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March 18, 2016

**MEMORANDUM TO:** Paul Piquado  
Assistant Secretary  
for Enforcement & Compliance

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

**SUBJECT:** Certain Frozen Fish Fillets from the Socialist Republic of Vietnam:  
Issues and Decision Memorandum for the Final Results of the  
Eleventh Antidumping Duty Administrative Review; 2013-2014

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## SUMMARY

The Department of Commerce (“the Department”) analyzed the comments submitted by Petitioners<sup>1</sup> and Respondents<sup>2</sup> in the eleventh administrative review of the antidumping duty order on certain frozen fish fillets (“fish fillets”) from the Socialist Republic of Vietnam (“Vietnam”). Following the *Preliminary Results*,<sup>3</sup> and the analysis of the comments received, we made changes to the margin calculations for the final results. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

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<sup>1</sup> The Catfish Farmers of America and individual U.S. catfish processors (collectively, “Petitioners”).

<sup>2</sup> Case and/or rebuttal briefs were filed by the following respondents: (1) HVG, Thuan An Production Trading and Services Co., Ltd. (“Tafishco”), Cafatex Corporation, C.P. Vietnam Corporation, Cuu Long Fish Joint Stock Company, GODACO Seafood Joint Stock Company, Green Farms Seafood Joint Stock Company, International Development and Investment Corporation, Seafood Joint Stock Company No. 4—Branch Dong Tam Fisheries Processing Company, and Viet Phu Foods and Fish Corporation; (2) Cantho Import-Export Joint Stock Company (“Caseamex”); and (3) NTACO Corporation and Nam Phuong Seafood Company Ltd. We note that the Hung Vuong Group, or “HVG,” includes An Giang Fisheries Import and Export Joint Stock Company (“Agifish”), Asia Pangasius Company Limited (“Asia Pangasius”), Europe Joint Stock Company (“Europe JS”), Hung Vuong Joint Stock Company (“Hung Vuong”), Hung Vuong Mascato Company Limited (“Hung Vuong Mascato”), Hung Vuong – Vinh Long Co., Ltd. (“Vinh Long”), and Hung Vuong – Sa Dec Co., Ltd. (“Hung Vuong Sa Dec”). See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Review; 2011–2012*, 79 FR 19053 (April 7, 2014) (“*Ninth AR Final*”) and accompanying Issues and Decision Memorandum at 3.

<sup>3</sup> See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review; 2013–2014*, 80 FR 55092 (September 14, 2015) (“*Preliminary Results*”) and *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Decision Memorandum for the Preliminary Results of the 2013–2014 Antidumping Duty Administrative Review* (August 31, 2015) (“*Preliminary Decision Memorandum*”).



## **CASE ISSUES**

- Comment I**      **Application of Facts Available to HVG and Tafishco**
- Comment II**    **Application of Facts Available to HVG’s Farming Factors**
- Comment III**   **Application of Adverse Facts Available to Certain Tafishco’s Tollers**
- Comment IV**    **Assignment of Vietnam-wide Rate to Asia Pangasius and HVG**
- Comment V**     **Assignment of Vietnam-wide Rate to QVD Food Company Ltd.**
- Comment VI**    **Assignment of Vietnam-wide Rate to Can Tho Import-Export Joint Stock Company**
- Comment VII**   **Rescission of Review with Respect to NTACO Corporation and Nam Phuong Seafood Company Ltd.**
- Comment VIII**   **Combination Rates**
- Comment IX**    **Surrogate Value for Fish Feed**
- Comment X**     **Surrogate Value for Fingerlings**
- Comment XI**    **Surrogate Value for Water**
- Comment XII**   **Application of Marine Insurance**
- Comment XIII**   **Packing**
  - A. Packing Type Should Not be a Physical Characteristic**
  - B. Tafishco’s Packing Materials Factors of Production Usage Rates**
  - C. Surrogate Value for Strap**
  - D. Surrogate Value for Tape**
- Comment XIV**   **By-Products**
  - A. Whether to Value Certain By-products**
  - B. Surrogate Value for Fish Waste**
- Comment XV**    **Customs Instructions**

## **BACKGROUND**

On September 30, 2014, the Department initiated the 11<sup>th</sup> administrative review of fish fillets from Vietnam.<sup>4</sup> On September 14, 2015, the Department published the *Preliminary Results* of this administrative review. The Department conducted a verification of Tafishco and its tollers between September 21, 2015, through October 6, 2015.<sup>5</sup> The Department also conducted a verification of HVG between November 10, 2015, through November 24, 2015.<sup>6</sup> On January 11,

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<sup>4</sup> See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 79 FR 58729 (September 30, 2014) (“*Initiation*”).

<sup>5</sup> See Memorandum to the File, from Jerry Huang, International Trade Analyst, Office V, and Javier Barrientos, International Trade Analyst, Office V, “Verification of the Sales and Factors of Production Responses of Thuan An Production Trading and Service Co., Ltd. in the 2013-2014 Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam,” dated February 2, 2016 (“Tafishco’s Verification Report”).

<sup>6</sup> See Memorandum to the File, from Javier Barrientos, International Trade Analyst, Office V, and Kenneth Hawkins, International Trade Analyst, Office V, “Verification of the Sales and Factors of Production Responses of Agifish and HVG in the 2013-2014 Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam,” dated February 5, 2016 (“HVG’s Verification Report”).

2016, the Department extended the deadline for the final results to March 14, 2016.<sup>7</sup> As explained in the memorandum from the Acting Assistant Secretary for Enforcement and Compliance, the Department has exercised its discretion to toll all administrative deadlines due to the recent closure of the Federal Government.<sup>8</sup> All deadlines in this segment of the proceeding have been extended by four business days. The revised deadline for the final results of this administrative review is now March 18, 2016. Between February 11 and February 22, 2016, interested parties submitted case and rebuttal briefs. On March 3, 2016, the Department held a closed hearing and a public hearing limited to issues raised in the case and rebuttal briefs.

### **SCOPE OF THE ORDER**

The product covered by the order is frozen fish fillets, including regular, shank, and strip fillets and portions thereof, whether or not breaded or marinated, of the species *Pangasius Bocourti*, *Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*) and *Pangasius Micronemus*.

Frozen fish fillets are lengthwise cuts of whole fish. The fillet products covered by the scope include boneless fillets with the belly flap intact (“regular” fillets), boneless fillets with the belly flap removed (“shank” fillets) and boneless shank fillets cut into strips (“fillet strips/finger”), which include fillets cut into strips, chunks, blocks, skewers, or any other shape.

Specifically excluded from the scope are frozen whole fish (whether or not dressed), frozen steaks, and frozen belly-flap nuggets. Frozen whole, dressed fish are deheaded, skinned, and eviscerated. Steaks are bone-in, cross-section cuts of dressed fish. Nuggets are the belly-flaps.

The subject merchandise will be hereinafter referred to as frozen “basa” and “tra” fillets, which are the Vietnamese common names for these species of fish. These products are classifiable under tariff article code 0304.62.0020 (Frozen Fish Fillets of the species *Pangasius*, including basa and tra), and may enter under tariff article codes 0305.59.0000, 1604.19.2100, 1604.19.3100, 1604.19.4100, 1604.19.5100, 1604.19.6100 and 1604.19.8100 of the Harmonized Tariff Schedule of the United States (“HTSUS”).<sup>9</sup>

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<sup>7</sup> See Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, through James C. Doyle, Director, Office V, Antidumping and Countervailing Duty Operations from Jerry Huang, International Trade Analyst, Office V, Antidumping and Countervailing Duty Operations, “Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Extension of Deadline for Final Results of Antidumping Duty Administrative Review,” dated January 11, 2016.

<sup>8</sup> See Memorandum to the Record from Ron Lorentzen, Acting A/S for Enforcement & Compliance, “Tolling of Administrative Deadlines As a Result of the Government Closure During Snowstorm Jonas,” dated January 27, 2016.

<sup>9</sup> Until June 30, 2004 these products were classifiable under HTSUS 0304.20.6030, 0304.20.6096, 0304.20.6043 and 0304.20.6057. From July 1, 2004 until December 31, 2006 these products were classifiable under HTSUS 0304.20.6033. From January 1, 2007 until December 31, 2011 these products were classifiable under HTSUS 0304.29.6033. On March 2, 2011 the Department added two HTSUS numbers at the request of U.S. Customs and Border Protection (“CBP”) that the subject merchandise may enter under: 1604.19.2000 and 1604.19.3000, which were changed to 1604.19.2100 and 1604.19.3100 on January 1, 2012. On January 1, 2012 the Department added the following HTSUS numbers at the request of CBP: 0304.62.0020, 0305.59.0000, 1604.19.4100, 1604.19.5100, 1604.19.6100 and 1604.19.8100.

The order covers all frozen fish fillets meeting the above specifications, regardless of tariff classification. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

## **SEPARATE RATES**

In the *Preliminary Results*, we determined that the following 15 companies, in addition to HVG and Tafishco, met the criteria for separate rate status: (1) Basa Joint Stock Company, (2) Cadovimex II Seafood Import-Export and Processing Joint Stock Company, (3) Cafatex Corporation, (4) C.P. Vietnam Corporation, (5) Cuu Long Fish Joint Stock Company, (6) East Sea Seafoods LLC, (7) GODACO Seafood Joint Stock Company, (8) Green Farms Seafood Joint Stock Company, (9) Hoang Long Seafood Processing Company Limited, (10) International Development and Investment Corporation, (11) Nam Viet Corporation, (12) NTSF Seafoods Joint Stock Company, (13) Seafood Joint Stock Company No. 4 - Branch Dong Tam Fisheries Processing Company, (14) Viet Phu Foods and Fish Corporation, and (15) Vinh Quang Fisheries Joint-Stock Company (collectively, the “Separate Rate Respondents”).<sup>10</sup>

The Department has reconsidered its separate rate determination with respect to International Development and Investment Corporation (“IDI”). With respect to the remaining Separate Rate Respondents, we have not received any information since the issuance of the *Preliminary Results* that provides a basis for reconsideration of these determinations. Therefore, the Department continues to find that Tafishco, HVG and the Separate Rate Respondents, with the exception of IDI, meet the criteria for a separate rate.

## **DISCUSSION OF THE ISSUES**

### **Comment I      Application of Facts Available to HVG and Tafishco**

#### ***Respondents’ Comments***

- The Department should not apply facts available (“FA”) to the two mandatory respondents, HVG and Tafishco, as they fully cooperated with the Department in this review.
- Starting with the original investigation, ten completed administrative reviews, and numerous new shipper reviews, not a single respondent has ever reported CONNUM-specific data. The Department’s application of FA in this situation is contrary to past practice in this very case. In the 8<sup>th</sup> AR Final the Department was similarly faced with the situation where the mandatory respondent had been requested by the Department to provide CONNUM-specific data, or explain why it could not, and the mandatory respondent provided a detailed explanation as to why it could not provide CONNUM-specific FOP data, stating that its production and accounting records do not distinguish the characteristics requested by the Department, and the Department verified the information as such.<sup>11</sup> In that case the Department found that respondent acted to the best of its ability in complying with the Department’s CONNUM-specificity requests, and did not apply FA.

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<sup>10</sup> See Preliminary Decision Memorandum at 7-8.

<sup>11</sup> See *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) (“8<sup>th</sup> AR Final”) and accompanying Issues and Decision Memorandum at Comment I.A.

- The Department’s demand for CONNUM-specific data in the middle of the review was unfair, and contrary to law. The Court only affords limited deference to a government agency action taken pursuant to a “non-statutory policy or practice.”<sup>12</sup> The Federal Circuit has held that if the Department changes a policy or practice and treats similar factual situations inconsistently, the agency action is lawful “only if Commerce reasonably explains the inconsistency and does not act arbitrarily.”<sup>13</sup>
- With respect to Product Form, the Department instructed Respondents to report the fillet forms as either shank fillet or regular fillet. This product characteristic has, however, never been considered commercially relevant within Vietnamese *pangasius* industry. The Vietnamese industry only distinguishes among frozen fillets as being either trimmed or untrimmed with trimmed fillets.
- With respect to Product Size, the size of a *pangasius* fillet does not impact the production cost or sales price of the fillet.
- The Department’s demand for CONNUM-specific data in the middle of an administrative review was fundamentally unfair because HVG and Tafishco do not keep/track CONNUM-specific information in their regular course of business. The Respondents could not, *post-facto*, report data they did not have.
- Both Respondents in this review progressed much further in their attempts to report CONNUM-specific FOP data, compared to the efforts taken by other mandatory respondents in all prior administrative and new shipper reviews. They reported a fish factor that is specific to fillet production by allocating the FOPs based on the production quantities of different products.
- In *Activated Carbon 3*, the Department had taken notice of the unfairness that would occur if it imposed a previously unenforced CONNUM-specificity requirement on the respondents during an administrative review.<sup>14</sup>
- While whole fish and fish steaks will have different FOP yields than fish fillets, their POR production quantities need to be taken into consideration. The inclusion of very small amounts of non-subject merchandise could not meaningfully distort the reported per-unit FOP amounts. It is wrong to claim that the Respondents submitted FOP databases that had distorted FOP usage rates due to the inclusion of non-subject merchandise in the denominator. The usage rates would be the same whether the non-subject merchandise was included or excluded from the denominator.
- Vietnamese frozen fish fillet companies have been soaking and tumbling their product for years to add weight gain. The Department’s rule has always been that FOPs and sales must be reported on the same weight basis. The Department’s logic suggests there would be a distortion if FOPs were reported on a gross weight basis and sales were reported on a net weight basis. However, while the Respondents soak/tumble much of their production (and this it is captured in the FOPs), the corresponding sales to the United States reflect a soaked/tumbled product, as well, thus sales and FOPs are on the same basis.

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<sup>12</sup> See Respondents’ case brief at 10, citing to *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944) (“*Skidmore*”).

<sup>13</sup> *Id.*, citing to *NSK Ltd. v. United States*, 309 F. 3d 1352 (1358 (Fed. Cir. 2004) (“*NSK*”) and *SKF USA Inc. v. United States*, 263 F.3d 1369, 1381-82 (Fed. Cir. 2001).

<sup>14</sup> See *Certain Activated Carbon from the People’s Republic of China: Preliminary Results of the Third Antidumping Duty Administrative Review, and Preliminary Rescission in Part*, 76 FR 23978, 23986-87 (April 29, 2011) (“*Activated Carbon 3*”) unchanged in final.

### *Petitioners' Comments*

- Respondents allege that the Department, in *Activated Carbon 3*, had taken notice of the unfairness that would occur if it imposed a previously unenforced CONNUM-specificity requirement on the respondents during an administrative review.<sup>15</sup> However, in that case the Department discovered during the course of the third review that respondents were unable to report four out of 15 CONNUM product characteristics based on their accounting books and records, and the Department excused respondents from having to report FOPs for these four CONNUMs because respondents did not have sufficient notice of the agency's reporting requirements.<sup>16</sup> The Department also explicitly stated that it would demand CONNUM-specific reporting in future reviews without exception.<sup>17</sup> In this regard, *Activated Carbon 3* fully supports the Department's *Preliminary Results*.
- While Respondents argue that, because they do not keep CONNUM specific information in their normal course of business, they could not, *post facto*, report data that they did not have, they also concede that they had the ability to compile CONNUM-specific FOPs, if given a reasonable transition period.<sup>18</sup>
- The plain fact that Respondents (1) weigh fish at intervals during the production process<sup>19</sup>, and (2) track sizes of whole live fish in order to produce specific sizes of fillets<sup>20</sup> underscores their ability to report very reliable estimates of CONNUM-specific data. To provide estimates of CONNUM-specific data Respondents could have established product-specific yields, much like the yield tests performed at verification, and then allocated FOPs to product-specific yields using the whole live fish consumption and inventory records.
- Although Respondents cite to a verification report from a prior review, where a respondent was excused from reporting CONNUM-specific information, the Respondents complain that "no respondents in this case have ever reported CONNUM-specific data" because they normally do not track such information.<sup>21</sup> However, the Department's longstanding practice is to treat every segment of every proceeding independently because each case segment is separate and unique, and the Department evaluates "the facts on the record of each segment in determining whether a respondent . . . provided an accurate, reasonable methodology for calculating its antidumping duty margin for that segment."<sup>22</sup>
- Respondents' references in their case brief to the Supreme Court's and CAFC's decisions in *Skidmore*, *Mead*, and *NSK*<sup>23</sup> are irrelevant to the issue at hand and provide no support for Respondents' argument that the Department deviated from agency practice in requiring

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<sup>15</sup> See Respondents' case brief at 15.

<sup>16</sup> See *Activated Carbon 3*, 76 FR at 23986-87.

<sup>17</sup> *Id.* See also *Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 72 FR 58642 (October 16, 2007) and accompanying Issues and Decision Memorandum at Comment 7 (where the Department stated that respondents should maintain their inventory and books and records in such a manner that FOPs may be reported on a CONNUM-specific basis).

<sup>18</sup> See Respondents' case brief at 16.

<sup>19</sup> See Tafishco's Verification Report at 17; HVG's Verification Report at 14.

<sup>20</sup> *Id.*

<sup>21</sup> See Respondents' case brief at 1, 7-8.

<sup>22</sup> See, e.g., *Certain Steel Threaded Rod from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review; 2013-2014*, 80 FR 26222 (May 7, 2015) at "Application of Facts Available and Use of Adverse Inference," unchanged in final.

<sup>23</sup> See Respondents' case brief at 10 (citing *Skidmore*, 323 U.S. 134, 139; *United States v. Mead Corp.* 533 U.S. 218, 228 (2001) ("*Mead*"), and *NSK*, 390 F.3d 1352, 1358).

CONNUM-specific reporting in the instant review. The Supreme Court’s decision in *Skidmore* concerned the unrelated issue of whether the waiting time spent by private employees, for which they are paid a fixed compensation by a packing plant, is within the provisions of the Fair Labor Standards Act.<sup>24</sup> The Supreme Court’s decision is *Mead* involved the U.S. Customs’ Service’s issuance of classification rulings, and the question of whether those rulings had the force of law.<sup>25</sup> While *NSK* did involve an antidumping duty administrative review, the specific issue before the CAFC related to whether the Department’s treatment of repacking expenses as a selling expense was appropriate when the agency treated warehousing expenses as a movement expense.<sup>26</sup>

- The Department’s antidumping duty questionnaire specifically includes Frozen Form, Product Form, Product Size and Net Weight in its CONNUM designation because these are important physical characteristics of subject merchandise that impact sales prices, production costs, and therefore normal values (“NV”). These characteristics have been a part of the CONNUM since the *Investigation*, and given the importance of these characteristics to the Department’s antidumping duty analysis, as noted below, the Department must find that HVG’s and TAFISHCO’s failure to report FOPs specific to Product Form, Product Size, Frozen Form and Net Weight rendered their FOP databases unreliable for the agency’s antidumping duty analysis.
- Frozen Form is a commercially meaningful characteristic of the final fillet product as this is one of the characteristics used by Respondents to market and sell frozen fillets.<sup>27</sup>
- Regarding Product Form, HVG and Tafishco sell fillets to U.S. customers according to the product form (*e.g.*, trimmed shank fillets, untrimmed regular fillets, *etc.*),<sup>28</sup> U.S. customers overwhelmingly require a certain type of fillet,<sup>29</sup> and the fact that Respondents advertise the type of fillets they produce on their website, confirms that Product Form is commercially significant to purchasers.
- Importantly, the record demonstrates that different Product Forms have different yields, *i.e.*, more fish are required, on a per-kg basis, to produce different Product Forms; the production of different Product Forms is more intensive and requires more variable costs on a per-unit basis (such as labor, electricity, *etc.*) than the production process for other forms.
- With regarding Product Size, HVG and Tafishco sold fillets of varying sizes to the United States.<sup>30</sup> According to the Department’s reporting instructions, Respondents should have reported FOPs associated with the production of various fillet sizes, but instead reported an aggregate of all FOPs associated with the production of fillets of a variety of sizes.<sup>31</sup> This is

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<sup>24</sup> See Petitioners’ case brief citing *Skidmore*, 323 U.S. at 136.

<sup>25</sup> See Petitioners’ case brief citing *Mead*, 533 U.S. at 228.

<sup>26</sup> See Petitioners’ case brief citing *NSK*, 390 F.3d at 1357.

<sup>27</sup> See Tafishco’s January 21, 2015 submission at Exhibit 7; HVG’s December 23, 2014 submission at Exhibit 7.

<sup>28</sup> See Tafishco’s May 14, 2015 submission at 8; HVG’s May 7, 2105 submission at 2. HVG emphasized in its own supplemental questionnaire response that “the fish factor associated with trimmed fillets is generally higher than that associated with untrimmed fillets. This is because . . . a portion of fish (called trimmings) is taken away from the trimmed fillets. The less trimmed the fillet, the better the yield.” See, *e.g.*, HVG’s May 14, 2015 submission at 7.

<sup>29</sup> The type of fillet is proprietary, *see, e.g.*, Tafishco’s August 19, 2015 submission at Exhibit 11; HVG’s August 14, 2015 submission at Exhibit 11.

<sup>30</sup> See HVG’s December 23, 2014 submission at 7; Tafishco’s January 21, 2105 submission at 7.

<sup>31</sup> See HVG’s January 7, 2015 submission at 1; HVG’s May 7, 2015 submission at 4; Tafishco’s January 21, 2015 submission at 1; Tafishco’s May 7, 2015 submission at 8.

distortive because certain production costs are lower for smaller fish and fillets, and certain other production costs are higher for smaller fish and fillets.<sup>32</sup>

- The Net Weight field requires respondents to report the weight of “ice, water, glazing, *etc.*” that has been included in the final product as sold. Respondents have narrowly interpreted this field by limiting it to ice glaze only. Respondents correctly note that sales and FOPs should be on the same basis to make an apples-to-apples comparison between U.S. price and NV.<sup>33</sup> However, Respondents erroneously argue that soaking is different from glazing and, as long as U.S. sales and FOPs are on a soaked basis, then there is no distortion in the dumping calculation.<sup>34</sup> Turning to record evidence, the Respondents have reported that the fillets they included in their FOP calculations, fillets sold to the United States and to other countries have added water weight gains.<sup>35</sup> Respondents also report that the water they add to fillets sold to the United States are much different than those sold to other countries, thus the sales and FOPs are not on an apples-to-apples basis.
- The data derived from the yield tests at verification undermine the reliability of those tests because they indicate that the weight of the fillets and all byproducts exceed the weight of the whole live fish input. Nevertheless, those yield tests indicate that Respondents’ fish FOPs are drastically understated.
- The record also shows that HVG and Tafishco have included the production of non-subject merchandise in the numerator and denominator of their FOPs. For example, the non-subject products the Respondents produced during the POR (whole fish and steaks) require lower FOPs, on a per-unit basis, than subject fillets.<sup>36</sup> This is because more of the body of the fish is incorporated into the final product.<sup>37</sup> Because these products require lower per-unit FOPs than subject fillets to produce, their exclusion from both the FOP denominator and numerator will result in higher per-unit FOPs, not the exact same FOPs as Respondents contend.
- While HVG and TAFISHCO claim that Department erred in rejecting their FOP data in the *Preliminary Results* because they track FOPs for live fish, direct labor and soaking chemicals separately according to various product forms, and claim to have reported CONNUM-specific FOPs for each of these inputs,<sup>38</sup> record evidence indicates that Respondents’ FOPs are understated due to the distortive allocation methodology they used to calculate their FOPs. In sum, Respondents’ allocation methodology allocates FOPs away from subject merchandise towards non-subject merchandise, which as noted above, lowers FOP usage ratios.

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<sup>32</sup> At the time of harvest, small fish have consumed, on a per-kilogram basis, lower quantities of fish feed and medicine than larger fish. Moreover, more time and labor is required to fillet smaller fish, on a per-kilogram basis, than larger fish. By the same token, more electricity is consumed to fillet smaller fish than larger fish. Further, smaller fish would also be expected to absorb more water through the use of additives due to the relationship between fillet weight and surface area. Also, larger quantities of packing materials are required to package smaller fish, on a per-kilogram basis, than larger ones. *See* Petitioners’ July 13, 2015 submission at 18; Petitioners’ July 20, 2015 submission at 18.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See* Tafishco’s August 19, 2015 submission at Exhibit 3; HVG’s August 14, 2015 submission at Exhibit 1.

<sup>36</sup> *See, e.g.*, Tafishco’s January 21, 2015 submission at Exhibit 4; HVG’s January 7, 2015 submission at Exhibits 4 – 6.

<sup>37</sup> *See* Petitioners’ Aug. 7, 2015 submission at Attachment 5. HVG’s website, which shows pictures of these tra products, confirms that they have significantly different yields. *See* Petitioners’ June 5, 2015 submission at Exhibit 1.

<sup>38</sup> *See* Respondents’ case brief at 16.

**Department’s Position:** For these final results, pursuant to sections 776(a)(2)(B), and (C) of the Act, the Department continues to find that the use of facts otherwise available is warranted with respect to HVG and Tafishco. During the course of this review, the Department continues to find that HVG and Tafishco failed to provide information in the manner requested by the Department for calculating accurate dumping margins. Specifically, HVG and Tafishco failed to provide accurate, reliable FOP databases. HVG and Tafishco included in their FOP denominators merchandise which is not produced on the same basis as merchandise destined for the United States, including non-subject merchandise. The inclusion of these products in HVG and Tafishco’s FOP usage rates distorts their FOP usage ratios, as explained further below.

Section 776(a)(1) and (2) of the Act provides that, if necessary information is missing from the record, or if an interested party (A) withholds information that has been requested by the Department, (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act, (C) significantly impedes a proceeding under the AD statute, or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Section 776(a)(1) and (2) of the Act provides that, if necessary information is missing from the record, or if an interested party (A) withholds information that has been requested by the Department, (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act, (C) significantly impedes a proceeding under the AD statute, or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party an opportunity to remedy or explain the deficiency. If the party fails to remedy or satisfactorily explain the deficiency within the applicable time limits, subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate.

In the *Preliminary Results*, we found that HVG and Tafishco did not provide the Department with accurate factors of production FOP information. Specifically, HVG and Tafishco failed to report FOPs on a CONNUM-specific basis that reflected their production of fillet types it sold to the United States during the POR.<sup>39</sup> HVG and Tafishco also failed to report FOPs that accurately accounted for the water soaking levels of the fillets they sold to the United States.<sup>40</sup> The commingling of FOP data for subject and non-subject products and the inclusion of excessive amounts of water weight gains in the FOP denominators led their FOPs to be understated and unreliable for the agency’s antidumping duty calculation.<sup>41</sup> For these reasons, in the *Preliminary Results*, the Department did not include HVG and Tafishco’s reported FOPs in

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<sup>39</sup> See *Preliminary Results* at “Use of Facts Available.”

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*; Tafishco’s August 19, 2015 submission at Exhibit 3.

their margin calculation but instead calculated their NVs using the weighted-average FOPs of certain tollers that produced subject merchandise as a FA substitute under 19 USC 1677e.<sup>42</sup> The Department found that the fillets produced by these tollers shared the same physical characteristics as the subject fillets HVG and Tafishco sold to the United States during the POR.<sup>43</sup>

In order to calculate NVs in antidumping proceedings involving NMEs, the Act states:

the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses.<sup>44</sup>

To construct the value of the product sold by Respondents in the United States, the Department determines the NV of the subject merchandise based on the FOPs utilized in producing such merchandise. The Department's instructions in the antidumping questionnaire specifically request:

If you are not reporting factors of production (FOPs) using actual quantities consumed to produce the merchandise under review on a CONNUM-specific basis, please provide a detailed explanation of all efforts undertaken to report the actual quantity of each FOP consumed to produce the merchandise under review on a CONNUM-specific basis. Additionally, please provide a detailed explanation of how you derived your estimated FOP consumption for merchandise under review on a CONNUM-specific basis and explain why the methodology you selected is the best way to accurately demonstrate an accurate consumption amount.

In order to compare NVs to U.S. prices on an apples-to-apples basis, the Act instructs the Department to determine the NV of the subject merchandise based on the FOPs utilized in producing the merchandise.<sup>45</sup> To achieve this end, the Department utilizes a CONNUM which defines the key physical characteristics of the subject merchandise as those that are commercially meaningful in the U.S. marketplace, and impact costs of production.<sup>46</sup> In NME proceedings in particular, the Department requires respondents to report FOPs that are specific to each

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<sup>42</sup> See Memo to the File, "11<sup>th</sup> Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results Analysis Memorandum for Thuan An Production Trading and Service Co., Ltd.," dated August 31, 2015 ("Tafishco's Prelim Analysis Memo") at 3; Memo to the File, "11th Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results Analysis Memorandum for An Giang Fisheries Import and Export Joint Stock Company and the Hung Vuong Group," dated August 31, 2015 ("HVG Prelim Analysis Memo") at 3.

<sup>43</sup> *Id.*

<sup>44</sup> See 19 USC 1677 b(c) of the Act.

<sup>45</sup> See 19 USC 1677b(a) and b(c) of the Act.

<sup>46</sup> See, e.g., *Large Residential Washers from the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation*, 81 FR 1398, 1399 (January 12, 2016) ("*Washers Initiation*") and *Stainless Steel Wire Rod from Sweden: Final Results of Antidumping Duty Administrative Review*, 73 FR 12950 (March 11, 2008) and accompanying Issues and Decision Memorandum at Comment 1 (where the Department stated that, consistent with Department practice, model-matching criteria were developed to account for the salient characteristics of the subject merchandise and not the specific experience of any one respondent).

CONNUM sold to the United States “to construct the value of the product sold by {the respondent} company in the United States.”<sup>47</sup>

Although the respondents participating in the original investigation were excused from reporting CONNUM-specific FOPs, the Department recognized the inaccuracies that could result in future administrative reviews if respondents did not report CONNUM-specific FOPs.<sup>48</sup> As a result, in the investigation, the Department placed respondents on notice that in future segments it would require CONNUM-specific FOPs.<sup>49</sup> In the 8<sup>th</sup> AR Final, the Department reminded respondents of their obligation to report CONNUM-specific FOPs, noting that the Department “may require Vinh Hoan and other respondents to report {their} FOPs on a CONNUM-specific basis...”<sup>50</sup> The Department noted that although the respondent argued that it was unable to report FOP data on a CONNUM-specific basis, based on its experience as a respondent in the investigation and numerous administrative reviews, it should now fully understand the Department’s documentation and data collection requirements for reporting CONNUM-specific FOPs.<sup>51</sup> Moreover, the Department has consistently requested CONNUM-specific FOP information in each questionnaire issued in every segment of this case since the investigation.<sup>52</sup> In fact, the agency’s requirement for CONNUM-specific FOPs is explicitly set forth in the Department’s standard NME questionnaire, which has been publicly available on the Department’s website for years.<sup>53</sup>

In HVG’s and Tafishco’s original questionnaire responses, the Respondents did not provide CONNUM-specific FOPs. In accordance with section 782(d) of the Act, the Department provided HVG and Tafishco with an opportunity to remedy this deficiency, twice.<sup>54</sup> It should not have come as a surprise to the Respondents that we requested they provide FOPs on a CONNUM-specific basis. Although we stated in the questionnaires that the Department recognizes that parties have not submitted FOPs on a CONNUM-specific in the past, we also stated that the supplemental questionnaires serve as notification that in this review and going forward, FOPs must be reported on a CONNUM-specific basis, or the respondent must then explain in detail why it is unable to do so and provide a reasonable allocation methodology.<sup>55</sup> Although they stated they were unable to provide CONNUM-specific data at first, in response to our supplemental questionnaires on this topic, we note that HVG and Tafishco formulated an allocation methodology which resulted in differentiated FOP reporting.<sup>56</sup> Nevertheless, HVG

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<sup>47</sup> See the Department’s original antidumping duty questionnaires at D-1.

<sup>48</sup> See *Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 FR 37116 (June 23, 2003) (“Investigation”) and accompanying Issues and Decision Memorandum at Comment 18.

<sup>49</sup> *Id.*

<sup>50</sup> See 8<sup>th</sup> AR Final at Comment XXII.

<sup>51</sup> *Id.*

<sup>52</sup> See *Preliminary Results* at “Use of Facts Available.”

<sup>53</sup> *Id.*

<sup>54</sup> See the Department’s April 9, 2015 supplemental questionnaire to HVG; the Department’s July 31, 2015 supplemental questionnaire to HVG; see also the Department’s April 9, 2015 supplemental questionnaire to Tafishco; the Department’s August 3, 2015 supplemental questionnaire to Tafishco.

<sup>55</sup> *Id.*

<sup>56</sup> See HVG’s August 11, 2015 submission at 5; Tafishco’s August 14, 2015 submission at 5.

and Tafishco's allocation methodology did not accurately reflect the FOPs consumed for the production of subject merchandise sold to the United States, as described below.<sup>57</sup>

While HVG and Tafishco claim that they have fully cooperated in this review, and that a novel and burdensome requirement was placed on them in the middle of a review, the Department disagrees. As an initial matter, the Department's requirement for CONNUM-specific FOP data is a standard requirement placed on every respondent in every proceeding. Where the request for information was clear and relates to some of the central issues in an antidumping duty case, such as accurate sales and FOP databases, the Court of International Trade ("CIT") has found that the respondent has "a statutory obligation to prepare an accurate and complete record in response to questions plainly asked by Commerce."<sup>58</sup> Further, the CIT has stated that the terms of sections 782(d) and (e) do not give rise to an obligation for the Department to permit a remedial response from the respondent where the respondent has not met all of the criteria of 782(e).<sup>59</sup> This review is not a case where the requests for information were not clear and HVG and Tafishco can claim that they were unaware of their obligation to submit the information, and thus, required further notification by the Department. Record evidence clearly shows that HVG and Tafishco were aware of their obligation to report accurate FOP data.<sup>60</sup> Therefore, the Department finds that HVG and Tafishco had ample notification of the centrality of this issue and the circumstances do not absolve HVG and Tafishco to at least revise their FOP data based on a reasonable allocation methodology.<sup>61</sup>

HVG and Tafishco also argue that no respondent in the history of this order have ever reported CONNUM-specific FOP data, and the Department has never applied FA to any of the other respondents for not reporting CONNUM-specific data. Contrary to what is suggested by HVG and Tafishco, the Department has not adopted a policy reversal in this case. The Department notes that its determination is a fact-based, investigative determination carried out pursuant to existing policies and regulations, which is made based on the facts on a case-by-case basis. We recognize that the Department in the past did not insist respondents submit CONNUM-specific data, such as in the eighth review of this order, because respondent had not kept such records in the production process.<sup>62</sup> However, each review proceeds *de novo* and determinations in that

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<sup>57</sup> See HVG's August 11, 2015 submission at 5; Tafishco's August 14, 2015 submission at 5.

<sup>58</sup> See *Tung Mung Dev. Co. v. United States*, 25 CIT 752, 758 (CIT 2001) ("*Tung Mung*"); *Reiner Brach GmbH & Co. KG v. United States*, 206 F. Supp. 2d 1323, 1332-3 (CIT 2002) (stating that, where the initial questionnaire was clear as to the information requested, and where the Department questioned the respondent regarding the information, the Department is in compliance with 782(d), and it is the respondent's obligation to create an accurate record and provide the Department with the information requested).

<sup>59</sup> See *Tung Mung*, 25 CIT at 789 (stating that the remedial provisions of 782(d) are not triggered unless the respondent meets all of the five enumerated criteria of 782(e)).

<sup>60</sup> In the Department's April 9, 2015 supplemental questionnaire to HVG, we requested that HVG ensure that the numerator of the FOP calculation should only include FOPs consumed for the production of that particular subject merchandise during the POR, and the denominator should only include the weight of that particular subject merchandise produced during the POR. See the Department's April 9, 2015 supplemental questionnaire to HVG at 5. In addition, we requested that HVG provide information on weight gains due to soaking the subject merchandise in preservatives and test results by market for these weight gains. *Id.* at 9. We asked these same questions of Tafishco. See the Department's April 9, 2015 supplemental questionnaire to Tafishco at 8 and 10.

<sup>61</sup> We note that HVG and Tafishco have provided varied FOP usage rates in response to the Department's supplemental questionnaires. See HVG's August 14, 2015 submission; Tafishco's August 19, 2015 submission.

<sup>62</sup> See *8th AR Final* at Comment VIII.C.

review are based upon the specific record developed during the course of that particular segment of the proceeding.<sup>63</sup> The Respondents were given adequate notice of this requirement in prior reviews, as noted above, and in this review in the original questionnaire and two supplemental questionnaires.<sup>64</sup> As discussed below, the Department has not acted arbitrarily, rather, the decision is based on facts and observations gathered in this review that require a new determination.

Regardless of whether HVG and Tafishco maintain CONNUM-specific information in their normal course of business, this does not absolve them of their obligation to implement measures to track this information, as requested by the Department. The CIT has explained that a respondent's statutory obligation to act to the best of its ability extends to creating an accurate and complete record, in accordance with the agency's instructions.<sup>65</sup> Additionally, the CAFC has confirmed that the standard of acting to the best of its ability means that the respondent must do the "maximum" it is able to do, this standard does not require perfection, and it "does not condone inattentiveness, carelessness, or inadequate record keeping."<sup>66</sup> The evaluation of whether a respondent has done the maximum it is able to do to comply with the Department's requests involves both "objective and subjective inquiries."<sup>67</sup> Under the objective inquiry, the record must demonstrate "that a reasonable and responsible {respondent} would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations."<sup>68</sup> Under the subjective inquiry, the record must demonstrate that a respondent's failure to promptly produce the requested information "is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records."<sup>69</sup> Both HVG and Tafishco have participated in past reviews of this order, and in fact one of the companies comprising HVG, Agifish, was a mandatory respondent in the *Investigation*.<sup>70</sup>

With respect to the accuracy of their FOP data, HVG and Tafishco first claim that they could have excluded the non-subject merchandise from their FOP denominator, but the net result would be the same per-unit FOP usages rates.<sup>71</sup> This is simply not correct. Immediately following this claim in their brief, HVG and Tafishco concede that whole fish and fish steaks

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<sup>63</sup> See, e.g., *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 FR 14499 (March 12, 2012) and accompanying Issues and Decision Memorandum at Comment 1; see also *Shandong Huarong Mach. Co. v. United States*, 29 CIT 484, 491 (2005) ("Each administrative review is a separate segment of proceedings with its own unique facts.").

<sup>64</sup> See the Department's November 7, 2014 initial questionnaire to HVG; the Department's April 9, 2015 supplemental questionnaire to HVG; the Department's July 31, 2015 supplemental questionnaire to HVG; see also the Department's December 1, 2014 initial questionnaire to Tafishco; the Department's April 9, 2015 supplemental questionnaire to Tafishco; the Department's August 3, 2015 supplemental questionnaire to Tafishco.

<sup>65</sup> See *Tung Mung*, 25 CIT 752, 788; *Sidenor Indus. SL v. United States*, 33 CIT 1660, 1669 (CIT 2009).

<sup>66</sup> See *Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1382-84 (Fed. Cir. 2003) ("*Nippon Steel*").

<sup>67</sup> See *Fujian Lianfu Forestry Co. v. United States*, 638 F. Supp. 2d 1325, 1337 (CIT 2009).

<sup>68</sup> *Id.* (quoting *Nippon Steel*, 337 F.3d 1373, 1382-83).

<sup>69</sup> *Id.* at 17-18 (quoting *Nippon Steel*, 337 F.3d at 1382-83).

<sup>70</sup> See, e.g., *Investigation*, 68 FR 37116; *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the New Shipper Review*, 77 FR 27435 (May 10, 2012).

<sup>71</sup> See Tafishco and HVG's case brief at 20-21.

have different FOP yields than fish fillets, and during the POR the quantity of non-subject merchandise included in the denominators was exceedingly small; thus HVG and Tafishco argue their inclusion could not meaningfully distort the reported per-unit amounts.<sup>72</sup> However, these different product forms, *i.e.* whole fish versus fish fillet, have vastly different yields that distort the FOP data when they are included in the FOP denominator as if they have the same yield.<sup>73</sup> HVG and Tafishco could, and should have, accounted for such differences in yield, and because they refused to apply a reasonable methodology for allocation when they have the data to do so, the Department is unable to precisely determine how much distortion they created. Nevertheless, during the verification of Tafishco, company officials conceded that these different products have significantly different yields, which company officials assert is common knowledge within the industry, and that Respondents do in fact take these different yields into consideration for its production planning purposes.<sup>74</sup> HVG and Tafishco could have applied some reasonable standard yields as weights to allocate and account for these different products in their allocation methodology, even if the companies do not maintain such records during their normal course of business. Rather, they chose not to do so and insisted that the Department accept a less accurate methodology that counts these products as having the same yield ratio.

Furthermore, HVG and Tafishco miscategorized the issue of soaking in the Department's dumping analysis. Vietnamese fish fillet producers soak their fillets in preservatives, and as a result, the fillets gain water weight. It stands to reason that if HVG and Tafishco soak/tumble their production, and the corresponding sales to the United States reflect that same soaked/tumbled product, then FOPs and U.S. sales are both on a soaked basis. However, during the course of this review, the Department learned that HVG and Tafishco apply very different soaking formulae based on the requirements of different markets.<sup>75</sup> Therefore, when HVG and Tafishco comingle U.S. frozen products that have lower soaking percentage with frozen products for other markets with a higher soaking percentages, the Department cannot make an apples-to-apples comparison between FOPs and sales. More specifically, by expanding the denominator to include products that were soaked to a greater degree, *i.e.*, by adding water to the denominator of all reported FOPs, HVG and Tafishco underreported all of their FOPs for subject merchandise sold to the United States.

While Respondents have provided arguments on glazing, with respect to the Net Weight Factor, the questionnaire is clear with regard to the reporting requirements, which states:

Report the percentage of weight as sold accounted for by ice, water, glazing, *etc.* Report this item as a two-digit numeric variable. For example, if the product is glazed and the glaze accounts for 23 percent of the weight of the merchandise as sold, report the numeric characters "23" in this field. If weight as sold does not include ice, water, glazing, *etc.*, report "00" in this field. In the narrative, please explain how you calculated this percentage.<sup>76</sup>

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<sup>72</sup> See Tafishco and HVG's case brief at 20-21.

<sup>73</sup> See Petitioners' August 7, 2015 submission, at 7-11, and 16-21.

<sup>74</sup> See Tafishco's Verification Report at 9 and 17. See also Petitioners' August 7, 2015 submission at Attachment 5 ("Slaughtering processes for farmed Pangasius in Vietnam"), Petitioners' July 20, 2015 submission at Appendix 2 ("Description of the Pangasius Value Chain in Vietnam").

<sup>75</sup> See Petitioners' August 7, 2015 submission at 21-27.

<sup>76</sup> See initial questionnaire.

Neither Tafishco, nor HVG, reported the water included in the weight of the product as sold. As explained above, the Department found at verification that HVG and Tafishco have the data with regard to the soaking percentages for different market and could adjust their allocation method accordingly, but they chose not to do so. For the foregoing reasons, the Department disagrees with HVG and Tafishco that they acted to the best of their ability and reported accurate FOP data.

We agree with Petitioners that the Department's determination here is consistent with the Department's prior determination in *Activated Carbon 3*. Unlike in *Activated Carbon 3*, the Department put respondents on notice about the requirement for CONNUM-specific reporting as of the investigation, such that requiring CONNUM-specific reporting here does not require respondents to create *post-hoc* records that did not exist. Where HVG and Tafishco were able to demonstrate that certain characteristics such as product size did not impact their cost accounting, the Department has not counted the lack of such information against them in this determination. However, for the reasons discussed above, where the record clearly shows that the Respondents have not applied a reasonable allocation method to accurately account for the FOPs consumed in the production of subject merchandise, the Department must rely on more accurate information available in this case.

We also agree with Petitioners that HVG and Tafishco's reliance on court cases such as *Skidmore*, *Mead*, and *NSK* are misplaced and not specific to the facts and practice in this case. As Petitioners highlight, neither *Skidmore* nor *Mead* are relevant to the Department's antidumping duty practice and its typical request for CONNUM-specific reporting from respondents.<sup>77</sup> Furthermore, in *NSK*, the Department's re-classification of repacking expenses as selling expenses was found to be contrary to its practice by the CAFC;<sup>78</sup> here, the Department's request for CONNUM-specific reporting is consistent with its practice.

In this particular case, despite the fact that HVG and Tafishco submitted flawed information, we note that the record contains FOP usage factors from companies which toll produced frozen fish fillets for Tafishco that are specific to the subject merchandise by HVG and Tafishco, that allow the Department to calculate more accurate dumping margins.<sup>79</sup> This tolling FOP data is free from the distortions noted above -- *e.g.*, the inclusion of non-subject merchandise in the denominator, the inclusion of fillets which have a greater weight gain due to soaking in preservatives in the denominator, and the mixing of product forms which have different yields. The FOP information the Department has relied on for these final results was based on production data of subject merchandise that the Department finds to be reliable and commercially reasonable. The Department verified this information and HVG and Tafishco have not argued that such data is distorted or unrepresentative of their production experience; thus application of FA is in no way punitive. HVG and Tafishco continue to insist on the inclusion of their own distorted FOP data, which are significantly lower from the FOPs data that were reported by the tollers, because for the above mentioned reasons HVG and Tafishco's FOP data are underreported and would benefit their margin calculation.

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<sup>77</sup> See *Skidmore*, 323 U.S. at 136; *Mead*, 533 U.S. at 228.

<sup>78</sup> See *NSK*, 390 F.3d at 1357

<sup>79</sup> See Preliminary Decision Memorandum at 21.

## Comment II Application of Facts Available to HVG's Farming Factors

### *Respondents' Comments*

- No adjustment to HVG's reported farming FOPs is necessary because it incorrectly assumes that the reported farming FOPs were only consumed to raise the so-called shank equivalent live fish. However, to the contrary, the reported farming FOPs were consumed to raise the total POR harvested fish.
- However, if an adjustment is made, the Department should, instead, inflate the reported farming FOPs, using the difference between the adjusted fish factor, used at the *Preliminary Results*, and the reported fish factor.

### *Petitioners' Comments*

- The record firmly establishes that HVG understated their farming FOPs by including non-subject merchandise in their calculations, and thus, adjustments to their farming FOPs are necessary and appropriate. The Department's adjustment to the reported farming FOP data was correct and cured the distortions associated with the HVG's original reporting, *e.g.*, that their FOP allocations included non-subject merchandise.
- The preliminary FA adjustment is mathematically sound and the most accurate way to correct for HVG's failure to report farming FOPs associated with the production of subject merchandise only.
- HVG's proposed alternative methodology, *i.e.*, using an all fish harvested denominator, ignores the fact that more farming FOPs are consumed, in the production of subject shank fillets than non-subject products, *i.e.*, whole fish.
- HVG's second alternative, *i.e.*, the differences in yields between the reported and tolled fish factors is distorted because it results in an FOP denominator that produces per-unit factors on a whole live fish basis, not a per unit of shank fillets.

**Department's Position:** We agree with Petitioners. In the *Preliminary Results*, the Department stated that:

As noted in the Preliminary Decision Memo, the Department has preliminarily determined that as facts available, we will use factor information that are specific to the subject *pangasius* products sold to the United States to correct the distortions in HVG's reported FOP usage ratios. For processing, we weight averaged the tolling FOPs for HVG and Agifish who produced subject *pangasius* products sold to the United States, *i.e.*, PRODFORM=2, as tollers. For farming, we first added the reported factors for HVG, Agifish, and Europe JSC, and then divided this by the shank equivalent of the total harvested fish. Finally, in order to avoid double counting of the whole fish and farming factors, we allocated these by the respective percentage of the whole fish input into production, *i.e.*, 32.64% from purchased fish, and 67.36% from farmed fish.<sup>80</sup>

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<sup>80</sup> See HVG Prelim Analysis Memo at 4, and Attachments 4 and 5.

As an initial matter we note that the denominator issue here is the same as discussed in Comment I, above, *i.e.*, the inclusion of non-subject merchandise in the denominator, the inclusion of fillets which have a greater weight gain due to soaking in preservatives in the denominator and the mixing of product forms which have different yields. As such, the Department continues to use, as FA, factor information that are specific to the subject *pangasius* products sold to the United States to correct the distortions in HVG's reported FOP usage ratios. To that end, we will not use HVG's proposed second alternative, as that methodology starts with the reported distorted factors, and proposes inflating these distorted factors.

With regard to HVG's argument that the denominator should be the quantity of harvested fish, we note that it is the Department's standard practice to require that all FOPs be allocated over the total quantity of finished product rather than inputs.<sup>81</sup> Thus, HVG is correct, in part, that the farming FOPs have to be divided by the amount of harvested fish. However, this is just the first step because the processing FOPs, and U.S. price, are on a subject merchandise/shank basis, while the farming FOPs are on a whole live harvested fish basis at this stage, *i.e.*, there is a mismatch in the denominators. Thus, to have the farming FOPs on the proper basis, we converted the "harvest basis" farming FOPs to a "shank fillet basis" by the shank equivalent conversion factor. This conversion factor is simply the whole live fish to subject merchandise (shank fillets) FOP that is used for the processing factors as FA. After this conversion the FOPs and the U.S. prices are on an apples-to-apples basis.<sup>82</sup>

### **Comment III Application of Adverse Facts Available to Certain Tafishco Tollers**

#### ***Petitioners' Comments***

- Tafishco entered into tolling agreements with certain companies during the POR to produce frozen *pangasius* fillets for sale to the United States. At verification, Tafishco admitted to the Department that its tollers chose to export their products through Tafishco in order to bypass antidumping duty rates.<sup>83</sup> Two of these companies (Toller A and Toller B) did not allow the Department to verify their FOP data, which prevented the Department from having the data necessary to accurately calculate Tafishco's final antidumping duty margin.<sup>84</sup>
- Toller A and Toller B are interested parties because they are foreign manufacturers of subject merchandise, and are obligated to cooperate with the Department's requests for information, including permitting verification of their data when requested.<sup>85</sup> The statute requires that interested parties cooperate to the best of their abilities to comply with the Department's

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<sup>81</sup> See, e.g., *Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China: Notice of Final Determination of Sales at Less Than Fair Value*, 69 FR 70997 (December 8, 2004) ("*China Shrimp Investigation*") and accompanying Issues and Decision Memorandum at Comment 8 (stating that FOPs must be allocated over the total volume of the finished product). See also the Department's November 7, 2014 initial antidumping duty questionnaire at D-7.

<sup>82</sup> We note that one more allocation (*i.e.*, 32.64% from purchased fish, and 67.36% from farmed fish) has to be done in order not to double count the farming fish factors. However, no party questioned this allocation methodology. See HVG's Prelim Analysis Memo at 4.

<sup>83</sup> See Tafishco's Verification Report at 7.

<sup>84</sup> The names of these companies are proprietary. See Tafishco's September 14, 2015 submission at 2.

<sup>85</sup> See Petitioners' case brief citing 19 USC 1677(9)(A).

request for information.<sup>86</sup> The Act provides that if the Department “finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information . . . {the Department} may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.”<sup>87</sup>

- In other proceedings, the Department has repeatedly confirmed that the failure to permit verification warrants a FA determination with an adverse inference, *i.e.*, adverse facts available (“AFA”).<sup>88</sup> As AFA, the Department should assign the highest individual FOP usage rates reported by Tafishco’s cooperative tollers in this review to Toller A and Toller B.
- In *Mexico Pipe*, where a respondent’s unaffiliated supplier refused to provide certain cost information, the Department addressed the respondent supplier’s non-cooperation through an adverse inference, and included in the respondent’s margin calculation a component aimed at deterring its supplier from refusing to cooperate in the future.<sup>89</sup> The Department found that even though the respondent itself had been fully cooperative in the administrative review, it would not be inappropriate for the respondent to suffer adverse collateral consequences as a result of its supplier’s failure to cooperate.<sup>90</sup>
- On appeal, the CIT upheld the reasonableness of the Department’s approach of filling the gap in the record, which stemmed from the respondent’s supplier’s refusal to provide cost information, using FA with a deterrent component.<sup>91</sup>
- Subsequently, the CAFC affirmed the Department’s reliance in *Mexico Pipe* on AFA to calculate a margin for a cooperative respondent that also addressed the noncooperation of its unaffiliated supplier.<sup>92</sup> In its analysis, the CAFC emphasized that the Department did not make an adverse inference directly against the respondent, but rather made an adverse inference directly against the respondent’s supplier.<sup>93</sup> The Court concluded “Commerce may rely on such policies as part of a margin determination for a cooperating party.”<sup>94</sup>
- In this case, the application of AFA to Toller A and Toller B is not intended to make an adverse inference directly against Tafishco or any of its cooperative tollers, but is aimed at Toller A and Toller B to induce their cooperation in the future. Here, as in *Mueller*, a respondent elected to do business with tollers and was in a position to induce non-cooperating suppliers to comply with the Department’s requests by refusing to do any future business with that supplier.
- In *KYD*, the Court upheld the Department’s application of an adverse rate against an uncooperative exporter even though the adverse rate negatively affected the interest of a

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<sup>86</sup> See Petitioners’ case brief citing 19 USC 1677e(b).

<sup>87</sup> See Petitioners’ case brief citing 19 USC 1677e(b); Statement of Administrative Action (“SAA”) accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, vol. 1, at 868, 870 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199.

<sup>88</sup> See, *e.g.*, Petitioners’ case brief citing *Honey from the People’s Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 70 FR 38873 (July 6, 2005) and accompanying Issues and Decision Memorandum at Comment 13.

<sup>89</sup> See Petitioners’ case brief citing *Certain Circular Welded Non-Alloy Steel Pipe from Mexico: Final Results of Antidumping Duty Administrative Review*, 76 FR 36086, (June 21, 2011) (“*Mexico Pipe*”) and accompanying Issues and Decision Memorandum at Comment 4.

<sup>90</sup> *Id.*

<sup>91</sup> See Petitioners’ case brief citing *Mueller Comercial De Mex. V. United States*, 887 F. Supp.2d 1360 (CIT 2012).

<sup>92</sup> See Petitioners’ case brief citing *Mueller Comercial De Mexico v. United States*, 753 F.3d 1227 (Fed. Cir. 2014) (“*Mueller*”).

<sup>93</sup> See Petitioners’ case brief citing *Mueller*, 753 F.3d at 1235-36.

<sup>94</sup> *Id.*

cooperative, unaffiliated U.S. importer.<sup>95</sup> The facts in this administrative review are analogous to *KYD* because Tafishco's unaffiliated tollers failed to cooperate with the Department by permitting verification and, consistent with *KYD*, the application of AFA to Tafishco's tollers is appropriate and lawful, even though Tafishco will bear some collateral consequences.

- As noted in *Solar Cells*, the Department normally applies FA, as opposed to AFA, when a toller's information is missing in instances where the respondent has a number of tollers it identified in a timely manner, has documented its unsuccessful attempts to obtain FOPs from its tollers, the non-reporting tollers account for only a small portion of FOPs, and, there is usable FOP information from other suppliers that could serve as a substitute for the missing FOPs.<sup>96</sup> In this case Toller A and Toller B do not account for a small portion of FOPs.

### ***Respondents' Comments***

- Tafishco is confident that the Department will apply some form of AFA to Toller A and Toller B for their failure to cooperate with the Department's verification requests, most likely resulting in the loss of their previously-assigned separate rate status. This would satisfy Petitioners' request for a deterrent component. Any rate assigned to Tafishco belongs to Tafishco and Tafishco alone, thus, nothing that the Department does to Tafishco will benefit or harm any of its tollers.
- Tafishco's tollers did not approach Tafishco to circumvent their existing cash deposit rates; rather Tafishco approached them with a business opportunity.<sup>97</sup>
- While Petitioners' brief goes into a long recitation of the law on AFA, and the fact that denying the Department an opportunity to verify is cause for an AFA decision, the fact is that the parties who did not cooperate were the two unaffiliated tollers – and not Tafishco. Under Department practice, there is no basis to apply AFA due to the non-cooperation of unaffiliated tollers, especially given the extraordinary lengths taken by Tafishco to secure their cooperation.
- Regarding *Mueller*, the CAFC ruled that in situations where the Department is faced with a cooperating respondent, it must be cautious if it decides to employ a deterrence rationale. Specifically, any margin calculation incorporating any “deterrent” element involving a fully cooperative respondent must be decided on a case-by-case basis (based on the facts of the particular case), and that at all times, the Department must have as its primary objective the calculation of an accurate rate.<sup>98</sup>
- Petitioners' reliance on *KYD* is misplaced. That case dealt with the impact that an AFA situation has on an importer.<sup>99</sup> However, that case is distinguishable from the current situation in that the entity that was to be assigned the dumping rate (the exporter) was the uncooperative party. However, in the present case, the exporter, the party to be assigned the dumping margin, was in fact cooperative. In addition, under U.S. law, the U.S. importers are

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<sup>95</sup> See Petitioners' case brief citing *KYD, Inc. v. United States*, 607 F.3d. 760, 768 (Fed. Cir. 2010).

<sup>96</sup> See Petitioners' case brief citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012-2013*, 80 FR 40998 (July 14, 2015) (“*Solar Cells*”) and accompanying Issues and Decision Memorandum at Comment 10.

<sup>97</sup> See Tafishco's Verification Report at 7.

<sup>98</sup> See Respondents' citing *Mueller* at 14 - 17.

<sup>99</sup> See Petitioners' February 11, 2016 submission at 31-33.

liable for the dumping duties – and there is no comparable provision under U.S. law for the present situation.

- For purposes of the final results, the Department has two options for reasonably, fairly, and accurately calculating Tafishco’s tolled FOPs in light of the non-cooperation of Toller A and Toller B: (a) replace the non-verified FOPs with the average of the FOPs of the four cooperating tollers; or (b) simply not use Toller A and Toller B’s FOPs in Tafishco’s margin calculation.

**Department’s Position:** For the final results, we have applied AFA to Toller A and Toller B. Section 776(a)(1) and (2) of the Act provides that, if necessary information is missing from the record, or if an interested party (A) withholds information that has been requested by the Department, (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act, (C) significantly impedes a proceeding under the AD statute, or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

The Department attempted to verify Toller A and Toller B’s Section D responses, in addition to the one company’s no shipments certification (Toller A) and the other company’s separate rate certification (Toller B). On September 14, 2015, Tafishco notified the Department that it was unable to secure the cooperation of Toller A for verification.<sup>100</sup> The other uncooperative Tafishco toller, Toller B, indicated to Department officials during verification in Vietnam that it would not participate with the verification.<sup>101</sup> Therefore, in accordance with sections 776(a)(2)(C) and (D) of the Act, the Department finds that applying FA is warranted for Toller A and Toller B, because these companies refused to allow verification of the information they submitted on the record, thereby significantly impeding this proceeding and rendering the information submitted unverifiable.<sup>102</sup>

Section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. In doing so, and under the recently-enacted TPEA,<sup>103</sup> the Department is not required to determine, or make any adjustments to, a weighted average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.<sup>104</sup> Section 776(b)(2) states that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other

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<sup>100</sup> See Tafishco’s September 14, 2015 submission.

<sup>101</sup> See Tafishco’s Verification Report at 2.

<sup>102</sup> See *Solar Cells* at Comment 10.

<sup>103</sup> On June 29, 2015, the President of the United States signed into law the TPEA, which made numerous amendments to the AD and countervailing duty law, including amendments to section 776(b) and 776(c) of the Act and the addition of section 776(d) of the Act. The amendments to the Act are applicable to all determinations made on or after August 6, 2015, and, therefore, apply to this final determination. See Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (2015) (“TPEA”); see also *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015) (“*Applicability Notice*”).

<sup>104</sup> See TPEA, Pub. L. No. 114-27, 129 Stat. 362 (2015); *Applicability Notice*, 80 FR 46793.

information placed on the record. Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.<sup>105</sup> Secondary information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.<sup>106</sup> Further, and under the TPEA, the Department is not required to corroborate any dumping margin applied in a separate segment of the same proceeding.<sup>107</sup> Finally, under the new section 776(d) of the Act, the Department may use any dumping margin from any segment of a proceeding under an antidumping order when applying an adverse inference, including the highest of such margins.<sup>108</sup> The TPEA also makes clear that when selecting an AFA margin, the Department is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated or to demonstrate that the dumping margin reflects an “alleged commercial reality” of the interested party.<sup>109</sup>

In addition, the SAA explains that the Department may employ an adverse inference “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”<sup>110</sup> Further, affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.

Toller A and Toller B failed to cooperate by not acting to the best of their abilities because they refused to participate in the verification. The Courts have upheld the use of AFA when a respondent refused to participate in verification.<sup>111</sup> Thus, pursuant to section 776(b) of the Act, for the final results, we will apply an adverse inference, in selecting from among the facts otherwise available, to Toller A and Toller B because they failed to cooperate to the best of their ability when they refused verification of their submitted information. As noted above, Toller A submitted a no shipments certification. Because Toller A refused to allow its no shipments certification to be verified, as AFA, we find that this company made shipments to the United States during the POR. Furthermore, because Toller A has not established that it is separate from the Vietnam-wide entity, we find that Toller A is a part of the Vietnam-wide entity. For Toller B, because we were unable to verify its separate rate certification, as AFA, we find that its separate rate information is unreliable. As such, Toller B has not provided information that it is separate from the Vietnam-wide entity, and for the final results we consider it to be a part of the entity.

The facts of this review also support the application of AFA to the unverifiable information from Tafishco’s tollers. Parties’ comments on this issue mainly revolve around a CAFC decision, *Mueller*. In *Mexico Pipe*, one of the mandatory respondents, Ternium Mexico, S.A. de C.V. (“Ternium”) also produced subject merchandise exported by another mandatory respondent,

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<sup>105</sup> See also 19 CFR 351.308(d).

<sup>106</sup> See SAA at 870.

<sup>107</sup> See section 776(c)(2) of the Act; TPEA, section 502(2).

<sup>108</sup> See section 776(d)(1)-(2) of the Act; TPEA, section 502(3).

<sup>109</sup> See section 776(d)(3) of the Act; TPEA, section 502(3).

<sup>110</sup> See SAA.

<sup>111</sup> See, e.g., *Crawfish Processors Alliance v. United States*, 343 F. Supp. 2d 1242 (CIT 2004).

Mueller Comercial de Mexico, S. de R.L. de C.V. and Southland Pipe Nipples Company, Inc., (collectively, “Mueller”).<sup>112</sup> The Department requested cost information from Ternium as an unaffiliated supplier to Mueller, in addition to the information requested of it as a mandatory respondent.<sup>113</sup> Because Ternium did not respond to the Department’s requests for information, for either questionnaire, the Department applied AFA to Ternium as a mandatory respondent, and applied AFA to Ternium for its refusal to provide necessary cost information as Mueller’s supplier.<sup>114</sup>

Had the Department not applied AFA to Ternium as Mueller’s supplier, Ternium could have avoided its own high cash deposit rate by simply selling through Mueller. The Department noted that it has a duty to both ensure that uncooperative parties do not benefit from their lack of cooperation and to encourage their future compliance.<sup>115</sup> Subsequently, the CIT upheld the Department’s final results in *Mexico Pipe*.<sup>116</sup>

On appeal, the CAFC stated that the Department may rely on adverse inferences for an unaffiliated party’s failure to cooperate and include that inference in the margin determination for a cooperating respondent, as long as the application of the inference is reasonable given the particular facts of the proceeding and the predominate interest in accuracy is properly taken into account.<sup>117</sup> To the extent that the adverse inference impacted Mueller’s margin calculation, the Court noted that this was entirely permissible because the supplier would not be sufficiently deterred if Mueller were unaffected by the supplier’s non-cooperation.”<sup>118</sup> The CAFC also considered the key question of whether the respondent, Mueller, acted to the best of its ability to compel its unaffiliated supplier to cooperate. The Court concluded that “Mueller had an existing relationship with its supplier” and, therefore, “could potentially have refused to do business with {its supplier} in the future as a tactic to force {its supplier} to cooperate.”<sup>119</sup> It added that, if Mueller was willing to terminate its relationship with its supplier “this would potentially induce {the supplier} to cooperate.”<sup>120</sup>

The Department finds that the facts here support a determination consistent with the court’s statements in *Mueller*. First, the application of neutral FA to Tafishco’s uncooperative tollers is not supported by the record of this review. In *Solar Cells* the Department listed several factors it considered relevant to using neutral FA for missing toller data, including: the respondent’s identification of its tollers, the documentation of its unsuccessful attempts to obtain FOPs from its tollers, whether the non-reporting tollers account for only a small portion of FOPs, and whether there is usable FOP information from other supplies that could serve as a substitute for the missing FOPs.<sup>121</sup> This case is distinguishable from *Solar Cells* on the basis that the uncooperative tollers here represent a much higher percentage of total production than in *Solar*

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<sup>112</sup> See *Mexico Pipe*, 76 FR 36086.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at Comment 4.

<sup>115</sup> *Id.*

<sup>116</sup> See *Mueller Comercial De Mex. V. United States*, 887 F. Supp.2d 1360 (CIT 2012) (“*Mueller CIT*”).

<sup>117</sup> See *Mueller*.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1235.

<sup>120</sup> *Id.* at 1235.

<sup>121</sup> See *Solar Cells* at Comment 10.

Cells.<sup>122</sup>

At the verification of Tafishco, the Department learned that during the POR, when the cash deposit rates for frozen fillet producers from Vietnam went up, many exporters could not export, but Tafishco, with a zero cash deposit rate, was in a good position with a low cash deposit rate to export frozen fish fillets.<sup>123</sup> Tafishco entered into contractual tolling agreements with companies who had higher cash deposit rates.<sup>124</sup> Accordingly, certain Tafishco tollers could continue to produce frozen fish fillets for the U.S. market and would benefit from Tafishco's lower cash deposit rates, as long as Tafishco remained cooperative with the Department.

Here, as discussed in *Mueller*, while Tafishco requested that its suppliers cooperate with the Department's verification, it did not make any attempt to induce its uncooperative tollers to participate by, for example, refusing to do business with Tollers A and B, who they had an ongoing business relationship with, unless they cooperated.<sup>125</sup> Moreover, as discussed in *Mueller*, the non-cooperative Tollers A and B were "interested parties" to this proceeding as defined in Section 771(9) of the Act. Finally, as noted above, there is evidence on the record of certain Tafishco tollers entering into tolling agreements with Tafishco solely to avoid higher cash deposit rates.<sup>126</sup> Accordingly, the Department finds that including an AFA component to Tafishco's margin will encourage Tafishco to induce its suppliers' cooperation in future reviews.<sup>127</sup> Therefore, for these final results, the Department has also applied AFA to Toller A and Toller B by including an AFA component to Tafishco's margin calculation.

Because Toller A and Toller B's FOP information is unverified, we have not relied on it in the final results, and have removed the data from Tafishco's margin calculation.<sup>128</sup> We agree with the Respondents that here, unlike in *KYD*, Tafishco has been cooperative under the Act. However, we also note that although Tafishco is a cooperating respondent, its tollers have been uncooperative and Toller A and Toller B will likely benefit from Tafishco's cooperation. Moreover, the uncooperative tollers are interested parties to this review. Because these interested parties failed to act to the best of their ability to provide the information requested by the Department, we find that an adverse inference with regard to the missing data is appropriate and would induce cooperation from Tafishco's tollers. Given the particular facts of this review, we assigned the Vietnam-wide rate (the rate applied to the tollers as exporters) as partial AFA to those products produced by Toller A and Toller B, which results in a small increase in Tafishco's

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<sup>122</sup> See Petitioners' February 11, 2016 submission at 11.

<sup>123</sup> See Tafishco's Verification Report at 7.

<sup>124</sup> *Id.*

<sup>125</sup> See *Mueller* at 1235. See also Tafishco's May 7, 2015 submission at Exhibit 18.

<sup>126</sup> See Tafishco Verification Report at 7.

<sup>127</sup> See *Narrow Woven Ribbons with Woven Selvedge from Taiwan; Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 19635 (April 13, 2015) and accompanying Issues and Decision Memorandum at Comment 7 (where the Department, citing *Mueller*, applied AFA to an uncooperative, unaffiliated supplier).

<sup>128</sup> See *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Lined Paper Products from Indonesia*, 71 FR 47171 (August 16, 2006) and accompanying Issues and Decision Memorandum at Comment 8 (where the Department stated that it is unable to rely on unverified information in a final determination).

margin.<sup>129</sup>

## Comment IV Assignment of Vietnam-wide Rate to Asia Pangasius and HVG

### *Petitioners' Comments*

- As stated in the *Initiation*, where an antidumping duty investigation involves an NME country, entities within that country are presumed to be subject to government control, and a company may request a separate rate by providing evidence of its independence from government control. Where an NME company successfully rebuts the NME presumption by providing evidence of its independence from state control, the Department may assign a separate rate unless the company does not: (1) rebut the NME presumption of state control, or (2) cooperate by failing to respond to the Department's questionnaire.<sup>130</sup>
- In the 9<sup>th</sup> *AR Final*, the Department determined that Asia Pangasius, and other members of HVG, met the criteria for treatment as a single entity, and consequently collapsed them.<sup>131</sup>
- In the *Preliminary Results*, the Department considered Asia Pangasius to be part of the collapsed, single entity HVG.<sup>132</sup> At the same time, the Department also determined that Asia Pangasius was a part of the Vietnam-wide entity and not eligible for separate rate status because it did not submit a completed separate rate application or certification.<sup>133</sup>
- Because Asia Pangasius is part of HVG, Asia Pangasius' failure to substantiate its entitlement to a separate rate should be imputed to all companies which are a part of HVG, which is consistent with the fundamental principle of collapsing, which is to treat the individual members of the collapsed group as a single entity.<sup>134</sup> For the final results, consistent with agency precedent, Asia Pangasius should receive the Vietnam-wide rate, *i.e.*, \$2.39/kg, and because Asia Pangasius is part of HVG, the Department should also find that the entire collapsed entity failed to demonstrate its entitlement to a separate rate and be assigned the \$2.39/kg rate.

### *Respondents' Comments*

- Since HVG was selected as a mandatory respondent, and HVG reported its FOP and U.S.

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<sup>129</sup> See Tafishco's Final Analysis Memo. We note that in *Mueller*, the CAFC remanded back to the Department the calculation of Mueller's rate, because the initial rate calculated by the Department resulted in a four-fold increase in the respondent's margin, and thus, was not accurate. See *Mueller*. In this review, unlike *Mueller*, the application of AFA to Toller A and Toller B increases Tafishco's margin by a fraction of the rate calculated at the *Preliminary Results*. See Tafishco's Final Analysis Memo.

<sup>130</sup> See Petitioners' case brief citing *Initiation; Transcom, Inc. v. United States*, 294 F.3d 1371, 1373 (Fed. Cir. 2002) (citing *Sigma*, 117 F.3d at 1405-06) ("Under the NME presumption, a company that fails to demonstrate independence from the NME entity is subject to the countrywide rate, while a company that demonstrates its independence is entitled to an individual rate as in a market economy.").

<sup>131</sup> See Petitioners' case brief citing *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2011-2012*, 79 FR 19053 (April 7, 2014) ("9<sup>th</sup> *AR Final*") and accompanying Issues and Decision Memorandum at Comment 3.

<sup>132</sup> See *Preliminary Results*, 80 FR 55093.

<sup>133</sup> *Id.*

<sup>134</sup> See *e.g.*, Petitioners' case brief citing *Aluminum Extrusions from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission, in Part, 2010/12*, 79 FR 96 (January 2, 2014) ("*Aluminum Extrusions*") and accompanying Issues and Decision Memorandum at Comment 6; *Bicycles from the People's Republic of China*, 61 FR 19026 (April 30, 1996) ("*Bicycles*") and accompanying Issues and Decision Memorandum at Comment 8.

sales as the collapsed entity – which includes Asia Pangasius - then Asia Pangasius was part of the review and was cooperative along with the rest of the companies collapsed HVG.

- The verification of HVG covered all of the companies that the Department identified as being part of HVG, including Asia Pangasius. The HVG Verification Report reported no discrepancies or problems with the separate rate status of any member of HVG, and as such, HVG, including Asia Pangasius should receive a separate rate for the final results.

**Department’s Position:** We agree with HVG. In the ninth review of this order, the Department found the following companies to be a single entity, HVG: Agifish, Asia Pangasius, Europe JS, Hung Vuong, Hung Vuong Mascato, Vinh Long, and Hung Vuong Sa Dec.<sup>135</sup> In this review HVG was selected as a mandatory respondent, and has provided the Department complete responses to our requests for information on its separate rate status.<sup>136</sup> While the Department inadvertently listed Asia Pangasius as a part of the Vietnam-wide entity in the *Preliminary Results*, we also calculated an individual rate for HVG and found that HVG was entitled to a separate rate.<sup>137</sup> After the *Preliminary Results*, in the HVG Verification Report, we noted that the separate rate information for HVG, which includes Asia Pangasius, was verified without issue.<sup>138</sup> Therefore, for the final results, we find that HVG, including Asia Pangasius, is eligible for a separate rate.

#### **Comment V Assignment of Vietnam-wide Rate to QVD Food Company Ltd.**

##### ***Petitioners’ Comments***

- In the tenth review, the Department explained that the rate assigned to QVD Food Company Ltd. is also applicable to Thuan Hung Co., Ltd. (“Thufico”) and QVD Dong Thap Food Co., Ltd. (“QVD Dong Thap”) because these three companies are a single entity.<sup>139</sup>
- In the *Preliminary Results*, the Department found that Thufico was not eligible for separate rate status because the company did not submit a completed separate rate application, or certification, and the Department deemed Thufico to be a part of the Vietnam-wide entity.<sup>140</sup>
- As detailed above, where one member of a single entity fails to establish its eligibility for a separate rate, the Department’s practice is to assign the Vietnam-wide entity rate to the entire collapsed entity.<sup>141</sup> Thus, for the final results, the Department should assign to QVD Food Company Ltd., QVD Dong Thap, and Thufico the Vietnam-rate of \$2.39/kg.

##### ***QVD’s Comments***

- QVD did not comment on this issue.

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<sup>135</sup> See 9<sup>th</sup> AR Final at Comment 3.

<sup>136</sup> See, e.g., HVG’s May 7, 2015 submission, responding to the Department’s supplemental questionnaire.

<sup>137</sup> *Id.* at “Vietnam-Wide Entity.”

<sup>138</sup> See HVG’s Verification Report at 6 – 7.

<sup>139</sup> See Petitioners’ case brief citing *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Antidumping Duty Administrative Review; 2012-2013*, 79 FR 40059, 40061 (July 11, 2014), unchanged in *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 2394 (January 16, 2015) (“10<sup>th</sup> AR Final”) and accompanying Issues and Decision Memorandum.

<sup>140</sup> See *Preliminary Results*, 80 FR 55093.

<sup>141</sup> See, e.g., Petitioners’ case brief citing *Aluminum Extrusions* at Comment 6; *Bicycles* at Comment 8.

**Department’s Position:** In the second review of this order, the Department found QVD Food Company Ltd., QVD Dong Thap and Thufico to be a single entity and, because there have been no changes to this determination since that administrative review, we continue to find these companies to be part of a single entity (hereafter referred to as “QVD”).<sup>142</sup> In this review QVD submitted a no shipments response.<sup>143</sup> In the *Preliminary Results*, the Department preliminarily found that QVD, among other companies, had no shipments during the POR.<sup>144</sup> Consistent with our practice, we continue to find that QVD, including Thufico and QVD Dong Thap, had no reviewable entries during the POR.<sup>145</sup> The Department inadvertently listed Thufico as a part of the Vietnam-wide entity in the *Preliminary Results*.<sup>146</sup> The Department will correct this inadvertent error in the final results.

## **Comment VI Assignment of Vietnam-wide Rate to Can Tho Import-Export Joint Stock Company**

### *Petitioners’ Comments*

- In the tenth administrative review, the Department explained that Can Tho Import-Export Joint Stock Company (“Caseamex”) did not “meet the criteria for a separate rate” because it did not demonstrate its autonomy from the Vietnamese government regarding business decisions such as the selection of management.”<sup>147</sup> In this, the eleventh administrative review, Caseamex submitted a separate rate application but stated that “no material changes in company structure, shareholdings or operations have occurred” since the tenth POR.
- Thus, in the *Preliminary Results*, the Department found that Caseamex was not eligible for a separate rate consistent with the Department’s determination in the *10<sup>th</sup> AR Final*.<sup>148</sup>
- However, the Department listed Caseamex as receiving a separate rate in the *Preliminary Results*, which should be corrected in the final results.

### *Caseamex’s Comments*

- The Court has ruled that the Department may not apply a NME country-wide rate where there is evidence that a town government had an ownership interest in the respondent, but there is no evidence that the government exercised *de facto* control over the respondent’s prices, export activities, or operations.<sup>149</sup> In past cases the Department has found that a government’s legal control of relevant day-to-day activities devolves to other parties when

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<sup>142</sup> See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 53387 (September 11, 2006).

<sup>143</sup> See QVD’s October 29, 2015 submission at Exhibit 4.

<sup>144</sup> See *Preliminary Results* at “Preliminary Determination of No Shipments.”

<sup>145</sup> See *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694 (October 24, 2011)

<sup>146</sup> See *Preliminary Results* at “Vietnam-wide Entity.”

<sup>147</sup> See Petitioners’ case brief citing *10<sup>th</sup> AR Final* at Comment XXI, citing to a Memorandum to James C. Doyle, Director, Office V, from Scot T. Fullerton, Program Manager, Office V, “Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results of the Tenth Administrative Review; Proprietary Analysis of Comment XXI: Caseamex – Separate Rate Status,” dated January 7, 2015 (“Caseamex Separate Rate Memo”).

<sup>148</sup> See *Preliminary Results*, 80 FR at 55092, Preliminary Decision Memo at 9.

<sup>149</sup> See Caseamex’s case brief citing *Qingdao Taifa Group Co. v. United States*, 33 CIT 1090, 1101-1102 (2009).

the government's ownership is distributed, as long as the government does not directly exercise its rights to vote on ownership boards.<sup>150</sup>

- In affidavits submitted before the Department in this case, a part of the Can Tho government (Shareholder A), noted that its ownership in Caseamex is purely for investment purposes, *i.e.*, it is a passive minority shareholder for investment purposes only.<sup>151</sup> Shareholder A effectively abdicated its shareholder rights by officially authorizing Caseamex's largest shareholder, Shareholder B, to act on its behalf. While Caseamex may inform Shareholder A of changes to management or directors, Shareholder A has no direct influence or control over these decisions as it has appointed a legal representative to undertake such decisions on its behalf.<sup>152</sup>
- The General Meeting is the highest competent authority of Caseamex, and approves the appointment, dismissal and replacement of members of the Board of Directors,<sup>153</sup> and approves of the appointment of the General Director by the Board of Directors. The General Meeting is presided over by the Chairman of the Board of Directors, and the appointment, dismissal, and replacement of members of the Board of Directors, can only be passed with 65% of the shareholders' votes.<sup>154</sup> The Board of Directors consists of five individuals, and is responsible for the business operations of the company and supervises the General Director and other management officers.<sup>155</sup> While single shareholders can nominate individuals for the Board of Directors, they must own enough shares to do so. Neither Shareholder A, nor Shareholder B, individually or together, have the ability to approve or appoint individuals to the Board of Directors.
- While the General Director recommends specific individuals for management positions, only the Board of Directors can approve them. While Shareholder A may have signed appointment letters, because he is the Chairman of the Board of Directors, and the company's legal representative, it is fully expected that he would sign appointment letters, it does not mean that he appointed these individuals.
- These facts distinguish this case from *Diamond Sawblades*, which pertained to the very unique factual circumstances of the SASAC's oversight of and control over the process of privatizing state owned enterprises in China, and particularly the interim requirements that the SASAC maintain authority to "hire and fire" management or other individuals in a company.<sup>156</sup> Moreover, these facts distinguish this case from *Tetra*, because in that case three shareholders controlled by the state-owned shareholder had the ability to appoint "all members of the seven-member Board."<sup>157</sup>

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<sup>150</sup> See Caseamex's case brief citing *Utility Scale Wind Towers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 75992 (December 26, 2012) ("*Wind Towers*") and accompanying Issues and Decision Memorandum at Comment 6.

<sup>151</sup> See Caseamex's December 1, 2014 submission at Exhibit 18.

<sup>152</sup> *Id.*

<sup>153</sup> The Board of Directors is synonymous with the Board of Management in the Article of Associations. It is likely that this was a translation error; however, the contents of the Articles of Association make clear these are not the separate entities.

<sup>154</sup> See Caseamex's December 1, 2014 submission at Exhibit 14.

<sup>155</sup> See Caseamex's December 1, 2014 submission at Art. 26

<sup>156</sup> *Final Results of Redetermination Pursuant to Remand Order for Diamond Sawblades and Parts Thereof from the People's Republic of China*, May 6, 2013 ("*Diamond Sawblades*").

<sup>157</sup> See Caseamex's case brief citing *1,1,1,2-Tetrafluoroethane from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 62597 (October 20, 2014) and accompanying Issues and Decision Memorandum, at 10-11 ("*Tetra*").

**Department's Position:** At the outset we note that the Department faced this identical issue in the last administrative review of this order.<sup>158</sup> In the last review the Department made the following finding with respect to Caseamex's separate rate status:

Thus, based on these facts, we determine that Caseamex does not have has autonomy from the Vietnamese government in making decisions regarding the selection of management. We find that Caseamex is part of the Vietnam-wide entity and does not qualify for a separate rate.<sup>159</sup>

In this review, Caseamex stated in its separate rate application that: "No material changes in company structure, shareholdings or operations have occurred since POR 9 or POR 10."<sup>160</sup> Because we found in the last review that Caseamex does not have has autonomy from the Vietnamese government, and Caseamex certified that there have been no changes in company structure, shareholdings or operations, for these final results we have continued to find that Caseamex is part of the Vietnam-wide entity and does not qualify for a separate rate.

In order to obtain a separate rate, a company must demonstrate an absence of *de jure* and *de facto* control over its export activities.<sup>161</sup> Regarding *de jure* control, the Department considers the following criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of the companies; and (3) other formal measures by the government decentralizing control.<sup>162</sup>

In determining *de facto* government control of an enterprise's export functions, the Department examines: (1) whether the export prices are set by, or are subject to the approval of, a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses.<sup>163</sup>

With respect to the issue of *de facto* control, we find that Caseamex is not eligible for a separate rate because it does not meet the *de facto* criteria for the separate rate test (*i.e.*, whether the respondent has autonomy from the government in making decisions regarding the selection of management).

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<sup>158</sup> See 10<sup>th</sup> AR Final at Comment XXI, citing to Caseamex Separate Rate Memo.

<sup>159</sup> See Caseamex Separate Rate Memo at 7.

<sup>160</sup> See Caseamex's December 1, 2104 submission at 2.

<sup>161</sup> See Enforcement & Compliance's Policy Bulletin 05.1, *Separate-Rates Practice and Application of Combination Rates in Antidumping Investigation involving Non-Market Economy Countries* (April 5, 2005) ("Policy Bulletin 05.1") at 7, available at <http://enforcement.trade.gov/policy/bull05-1.pdf>.

<sup>162</sup> See *Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991).

<sup>163</sup> See *Silicon Carbide from the People's Republic of China*, 59 FR 22586 - 89 (May 2, 1994); see also *Furfuryl Alcohol from the People's Republic of China*, 60 FR 22544 (May 8, 1995).

One of the two largest shareholders of Caseamex is a part of the administrative body of the central government in the Can Tho City area, Shareholder A, which (a) directly administers investment policy on behalf of the government, (b) advises the government on investment projects in the Can Tho City area, and (c) acts as the entity which represents the local government's equity interests in specific industries or companies.<sup>164</sup> Shareholder B holds the following positions in Caseamex - General Director and Chairman of the Board of Directors – and, as Chairman of the Board of Directors, presides over the general meeting. Shareholder B stated that the government appointed him “as their sole and exclusive representative in the company to make all decision {sic} on their behalf, including the appointment, replacement and removal of any directors and management.”<sup>165</sup> This shareholder has fulfilled these obligations at Caseamex.<sup>166</sup>

We disagree with Caseamex's assertions that Shareholder A and Shareholder B do not control the appointment of members to the Board of Directors. As noted above, Shareholder B was appointed by Shareholder A (the government) as its exclusive representative in the company. The Board of Directors then appointed Shareholder B to General Manager, including the appointment, replacement and removal of any directors and management.<sup>167</sup> According to the Articles of Association, a shareholder, or group of shareholders, must have at least a five percent voting share to nominate an individual to the Board of Directors, which must be approved by a 65% shareholder vote in the General Meeting.<sup>168</sup> Only the two largest shareholders, Shareholder A and Shareholder B, surpass the ownership threshold which provides them with the right to nominate the company's board members. While in theory the Articles of Association allow other shareholders to put forward a nomination, no other shareholder meets the threshold to do so, and as such, Shareholder B controls all nominations to the Board of Directors. In addition, while a 65% shareholder vote is required by the General Meeting to approve any nomination, due to the percentage of shares controlled by Shareholder B, no nomination would meet the threshold to pass without his approval. While Caseamex correctly notes that Shareholder A and Shareholder B cannot simply appoint any individual they want to the Board of Directors, because of the number of shares they own, these shareholders completely control the nomination and approval process. Therefore, the two largest shareholders, one of which is the government, and the other which is the “sole and exclusive representative” of the government and its respective shares, has the sole ability to nominate members of the company's board.

In *Tetra*, we found that government ownership is significant when the government's ownership surpasses the threshold required to nominate a board member, and when the board controls the day-to-day operations of a company.<sup>169</sup> Moreover, consistent with *Tetra*, one shareholder, controlled by the government, has the ability to control the appointment for all members of the

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<sup>164</sup> Because some of the details are proprietary, *see* Caseamex Separate Rate Memo at 5.

<sup>165</sup> Some of the details are proprietary. *Id.*

<sup>166</sup> Some of the details are proprietary. *Id.* We note that in the Caseamex Separate Rate Memo the Department inadvertently stated in the last administrative review that a branch of the government of Can Tho appointed Shareholder B as a member of the Board of Directors. *See* Caseamex Separate Rate Memo at 7. We note Shareholder B was not appointed by the government to the Board of Directors; Shareholder B was appointed as the representative of the government on the Board of Directors. *Id.* at 5.

<sup>167</sup> Some of the details are proprietary. *Id.*

<sup>168</sup> *See* Caseamex's December 1, 2014 submission at Exhibit 14.

<sup>169</sup> *See Tetra* at 10-11.

Board of Directors.<sup>170</sup> In this case, Shareholder A has surpassed the ownership threshold to nominate a board member.<sup>171</sup> Consistent with *Tetra*, Caseamex’s board controls the day-to-day operations of Caseamex, determines the disposition of Caseamex’s profits, and makes other company decisions.<sup>172</sup>

We disagree with CASEAMEX’s assertion that the *Diamond Sawblades Remand Redetermination* is not analogous to this case. Caseamex provided two appointment letters, one of which demonstrates that Shareholder A appointed Shareholder B as its sole representative in Caseamex.<sup>173</sup> The other appointment letter, by the Board of Directors, gives Shareholder B control over the appointment and removal of directors and management.<sup>174</sup> In the *Diamond Sawblades Remand Redetermination*, an organization which was owned by the PRC government exerted influence over the selection of the respondent’s management by placing officials on its board.<sup>175</sup> Therefore, the record in *Diamond Sawblades Remand Redetermination* demonstrated that the respondent, like CASEAMEX, did not choose its own management autonomously.<sup>176</sup>

## **Comment VII            Rescission of Review with Respect to NTACO Corporation and Nam Phuong Seafood Company Ltd.**

### ***NTACO Corporation’s and Nam Phuong Seafood Company Ltd.’s Comments***

- Both NTACO Corporation (“NTACO”) and Nam Phuong Seafood Company Ltd. (“Nam Phuong”) participated in the bi-annual new shipper review (“NSR”) covering the first six months of the POR, and made no other shipments of subject merchandise to the United States during the POR, other than those considered by the Department in the bi-annual new shipper review.
- In accordance with 19 CFR 351.214(j), NTACO and Nam Phuong timely filed requests with the Department to rescind the annual administrative review, and timely withdrew their review requests. However, in the *Preliminary Results*, the Department assigned NTACO and Nam Phuong the Vietnam wide entity rate, categorizing both companies as No Response Companies.

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<sup>170</sup> *Id.*

<sup>171</sup> See Caseamex’s December 1, 2014 submission at Exhibits 13A, 13B and 14.

<sup>172</sup> *Id.* at 21. We noted in *Vietnam Shrimp* that where a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter, the majority ownership holding in and of itself means that the government exercises, or has the potential to exercise, control over the company’s operations generally. See *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2013-2014*, 80 FR 55328 (September 15, 2015) (“*Vietnam Shrimp*”) and accompanying Issues and Decision Memorandum at Comment 11. This may include control over, for example, the selection of management, a key factor in determining whether a company has sufficient independence in its export activities to merit a separate rate. *Id.* Consistent with normal business practices, we would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company, including the selection of management and the profitability of the company. *Id.* While the combined holdings of Shareholder A and Shareholder B are not a majority of shares, it is enough shares that these shareholders control who is nominated and approved to the Board of Directors, as explained above.

<sup>173</sup> See Caseamex’s December 1, 2014 submission at Exhibit S2-2.

<sup>174</sup> *Id.* at Exhibit S3-8.

<sup>175</sup> See *Diamond Sawblades* at 8-9.

<sup>176</sup> *Id.*

- For the final results, the Department should rescind this review with respect to NTACO and Nam Phuong.

### ***Petitioners' Comments***

- The Department initiated this review of NTACO and Nam Phuong based upon requests from those respondents and Petitioners.
- 19 CFR 351.214(j) permits the Department to rescind a review when it is conducting multiple reviews covering the same entries. The Department began conducting a new shipper review of NTACO and Nam Phuong covering a portion of this POR, but that review was rescinded,<sup>177</sup> and therefore, there are not multiple reviews covering the same entries during the same period. The regulation does not require any action with respect to an annual administrative review, or any other specific type of review, rather it states that the Department may rescind “a review in progress.”

**Department's Position:** Based on review requests from Petitioners, NTACO, and Nam Phuong, on September 30, 2014 the Department initiated this administrative review with respect to these two companies, among others.<sup>178</sup> Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of the notice of initiation. While NTACO and Nam Phuong withdrew their review request,<sup>179</sup> Petitioners did not withdraw their review request. Therefore, the criteria for rescinding this review with respect to NTACO and Nam Phuong, under 19 CFR 351.213(d)(1), had not been met.

However, in this case, NTACO's and Nam Phuong's entries were covered by both a NSR and this administrative review.<sup>180</sup> We rescinded that review based on a finding that the sales at issue were not bona fide and thus we could not use them to determine a dumping margin for these exporters.<sup>181</sup> Therefore, in light of the Department's findings in the new shipper review, there are no other *bona fide* sales on which to conduct a review with respect to NTACO and Nam Phuong. Therefore, we are rescinding this review with respect to these companies.

## **Comment VIII Combination Rates**

### ***Petitioners' Comments***

- At verification, Tafishco admitted to the Department that its tollers chose to export their products through Tafishco in order to bypass antidumping duty rates.<sup>182</sup> To prevent the evasion of antidumping duties by Toller A and Toller B, the Department must assign “combination” rates to Tafishco as the exporter, and Toller A and Toller B as producers. That is, the Department must assign the NME-wide rate of \$2.39/kg to the Tafishco-Toller A combination and the Tafishco-Toller B combination. Without combination rates, Toller A

<sup>177</sup> See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Rescission of Antidumping Duty New Shipper Reviews; 2013-2014*, 80 FR 36970 (June 29, 2015) (“NTACO/Nam Phuong NSRs”).

<sup>178</sup> See Petitioners' September 2, 2014 submission; NTACO and Nam Phuong's September 2, 2014 submission; *Initiation*.

<sup>179</sup> See NTACO and Nam Phuong's November 25, 2014 submission.

<sup>180</sup> See *NTACO/Nam Phuong NSRs*, 80 FR 36970.

<sup>181</sup> *Id.*

<sup>182</sup> See Tafishco's Verification Report at 7.

and Toller B can evade antidumping duties by continuing to ship through Tafishco. The CAFC underscored in *Mueller* and *Xiping Opeck* that the Department must address the potential for duty evasion through any practical means available.<sup>183</sup>

- In NME investigations, the Department’s *Policy Bulletin 05.1* requires the application of a combination rate, “to prevent the avoidance of payment of antidumping duties by firms shifting exports through exporters with the lowest assigned cash-deposit rates.”<sup>184</sup> Petitioners are aware that the Department has, to date, not applied combination rates in NME administrative reviews.<sup>185</sup> Nevertheless, the Department has acknowledged that it has the legal authority to do so, noting in *Policy Bulletin 05.1* that it is “currently evaluating” the application of combination rates in NME administrative reviews.<sup>186</sup>
- The Department’s regulations provide that the agency may impose combination rates whenever appropriate to the foreign exporter and the producer/toller that supplied it with merchandise.<sup>187</sup> In adopting this regulation, the Department stated in the *Preamble* that the purpose of using combination rates is to prevent the manipulation of antidumping duty rates, such that “a producer with a relatively high deposit rate {could} avoid the application of its own rate by selling to the United States through an exporter with a low rate.”<sup>188</sup>
- The CIT has affirmed that the Department’s authority to use combination rates stems from its “duty to implement the basic purpose of the {antidumping} statute” and its “responsibility to prevent circumvention of the antidumping duty law.”<sup>189</sup> Indeed the use of combination rates comports with the antidumping statute’s characterization of dumping duties as a remedial instrument for eliminating unfair trade practices<sup>190</sup> and, according to the CIT, where the record reveals the possibility of circumvention/duty evasion, the Department may exercise its discretion to apply combination rates.<sup>191</sup>
- The Petitioners are not advocating for a policy decision to apply combination rates in all NME administrative reviews. Instead the Department should consider the facts in this review, in conjunction with its statutory responsibility of preventing duty evasion, because the assignment of adverse antidumping duty rates to Toller A and Toller B cannot be practically enforced at the border without the use of combination rates. The Department is

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<sup>183</sup> See Petitioners’ case brief citing *Mueller*, 753 F.3d at 1233; *Xiping Opeck*, 34 F.Supp.3d at 1351.

<sup>184</sup> See Petitioners’ case brief citing *Policy Bulletin 05.1* at 7.

<sup>185</sup> The Department has applied combination rates in market economy administrative reviews. For example, in *Pistachios from Iran*, the Department established a combination rate for sales of pistachios exported by a company with a high cash deposit rate, but exported by a company with a low cash deposit rate to circumvent the higher cash deposit rates. See Petitioners’ case brief citing *Certain In-Shell Raw Pistachios from Iran: Final Results of Antidumping Duty Administrative Review*, 70 FR 7470 (February 14, 2005) (“*Pistachios from Iran*”) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>186</sup> See Petitioners’ case brief citing *Policy Bulletin 05.1*.

<sup>187</sup> See Petitioners’ case brief citing 19 CFR 351.107(b)(1).

<sup>188</sup> See Petitioners’ case brief citing *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27303 (May 19, 1997) (“*Preamble*”).

<sup>189</sup> See Petitioners’ case brief citing *Shandong Huarang Gen. Group Corp. v. United States*, 27 CIT 1568, 1580 (2003); *Allegheny Ludlum Corp. v. United States*, 239 F. Supp. 2d 1381, 1383 (CIT 2002).

<sup>190</sup> See Petitioners’ case brief citing *C.J. Tower & Sons v. United States*, 21 C.C.P.A. 417, 427, 71 F.2d 438 (1934); *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1313 (Fed. Cir. 2001); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995).

<sup>191</sup> See Petitioners’ case brief citing *Lifestyle Enter. v. United States*, 768 F. Supp. 2d 1286, 1314 (CIT 2011).

permitted by its own regulations to make case-specific determinations to prevent duty evasion of this kind.<sup>192</sup>

### ***Respondents' Comments***

- Respondents did not comment on this issue.

**Department's Position:** While we agree with the Petitioners that the Department has the discretion to apply combination rates, the Department has not changed its general practice of not assigning combination rates in antidumping duty administrative reviews.<sup>193</sup> It is the Department's current practice to assign producer-exporter chain rates only in the course of an NME investigation or an NME new shipper review, not in an NME administrative review.<sup>194</sup> While in limited circumstances the Department has applied combination rates in market economy administrative reviews, we have only done so where the combination rate would combat evasion on the facts of that review.<sup>195</sup> In this review, however, we find that the facts do not support the use of combination rates.

As an initial matter, we note that we have addressed the non-cooperation of Toller A and Toller B by applying AFA, as noted above in Comment III. The preamble to the Department's regulations contemplates that when deciding whether combination rates are appropriate, the Department will consider the practicality of their assignment.<sup>196</sup> Here, we find the situation similar to that described in *Activated Carbon* and *Bedroom Furniture* where the Department found "the application of combination rates would be too large of an administrative burden to be practicable" because the Department would be required to list producer/exporter combinations for the individually reviewed respondents as well as the numerous separate rate companies that are reviewed in each segment.<sup>197</sup> Therefore, for the final results, the Department will continue to assign deposit and assessment rates by exporter rather than producer and exporter.

## **Comment IX Surrogate Value for Fish Feed**

### ***Petitioners' Comments***

- The Department places more weight on specificity than other criteria used to select surrogate values ("SVs"), particularly when the input is a major FOP which accounts for a significant

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<sup>192</sup> See Petitioners' case brief citing 19 CFR 351.107(b)(1); *Policy Bulletin 05.1* (where the Department acknowledged its authority to apply combination rates in administrative reviews).

<sup>193</sup> *Policy Bulletin 05.1* applies to investigations only.

<sup>194</sup> See *Aluminum Extrusions* at Comment 13.

<sup>195</sup> See, e.g., *Pistachios from Iran*.

<sup>196</sup> See *Preamble*, 62 FR at 27303 ("it may not be practicable to establish combination rates when there are a large number of producers . . .").

<sup>197</sup> See *Certain Activated Carbon from the People's Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review*, 75 FR 70208, (November 17, 2010) and accompanying Issues and Decision Memorandum at Comment 1; *Wooden Bedroom Furniture from the People's Republic of China: Final Results and Final Rescission in Part*, 76 FR 49729 (August 11, 2011) ("*Bedroom Furniture*") and accompanying Issues and Decision Memorandum at Comment 16.

portion of normal value.<sup>198</sup> The CAFC and the CIT have repeatedly upheld the importance of specificity in the agency's SV analysis.<sup>199</sup>

- During the POR, HVG consumed numerous farming FOPs to produce whole live *pangasius* fish, including certain type of *pangasius* feed.<sup>200</sup> In addition, HVG's website confirms that it consumed "high quality floating pellets."<sup>201</sup> The Department has previously acknowledged that the Vietnamese *pangasius* producers use floating pellets to feed their *pangasius* fish.<sup>202</sup>
- Because sinking feed commands lower prices in the marketplace than floating feed, the Department's use of sinking feed averaged with floating feed values has understated HVG's normal value. Thus, for the final results, the Department should rely on floating feed prices to value *pangasius* feed.
- Should the Department value all FOPs reported by Tafishco for the final results, the Department should value Tafishco's feed inputs using only the SVs for floating feed because the record establishes that Respondents primarily use floating feed to raise *pangasius* fish.<sup>203</sup>

### ***Respondents' Comments***

- While HVG's "usage guidance" may have stated that floating pellets are recommended, this does not demonstrate that HVG only consumed floating *pangasius* feed during the POR. In other words, what is recommended, and what is actually done, can be two very different things.
- The record does not support a finding that sinking vs. floating is an important factor in feed prices. Specifically, for most fish feed prices, the record is silent as to whether the feed sinks or floats. Moreover, for those prices which indicate sinking and floating, not all prices for sinking feed are lower than those for floating feed. As such, the record does not demonstrate that sinking feed always commands a lower price than floating feed.

**Department's Position:** Section 773(c)(1) of the Act instructs the Department to value the FOPs with the best available information from a market economy 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 inputs in question.<sup>204</sup> The Department's preference is to satisfy the breadth of the aforementioned selection criteria.<sup>205</sup> Moreover, it is the Department's practice to carefully consider the available evidence in light of the particular facts of each industry when

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<sup>198</sup> See, e.g., Petitioners' case brief citing *Wind Towers* at Comment 1.

<sup>199</sup> See, e.g., Petitioners' case brief citing *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014) (upholding the Department's conclusion that specificity is a more important factor than contemporaneity).

<sup>200</sup> See HVG's May 7, 2015 submission at Exhibit 11.

<sup>201</sup> See Petitioners' June 5, 2015 submission at Exhibit 8.

<sup>202</sup> See Petitioners' case brief citing 9<sup>th</sup> AR Final at Comment IV.

<sup>203</sup> See Petitioners' February 4, 2015 submission at Exhibit FS-10 (where respondents reported that they only used floating feed pellets during the POR).

<sup>204</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) ("*Lined Paper*") and accompanying Issues and Decision Memorandum at Comment 3.

<sup>205</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) ("*China Shrimp 5*") and accompanying Issues and Decision Memorandum at Comment 2.

undertaking its analysis of valuing FOPs.<sup>206</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>207</sup>

In the *Preliminary Results* we calculated protein specific values for the various types of *pangasius* feed consumed using contemporaneous Indonesian price quotes, and other pricing information from Indonesian feed companies, submitted by Petitioners and Respondents.<sup>208</sup> No party has argued that these values are not contemporaneous, publicly available, tax and duty exclusive, or unrepresentative of a broad market average; parties have only provided arguments concerning specificity. At the outset, we note that the Department is not concerned with what types of feed may have been consumed by Respondents in past reviews, as the record of each review stands on its own.<sup>209</sup> Nor are parties' arguments concerning the values of floating and sinking feed availing in determining which value is more specific, because the record of this review is silent with respect as to whether HVG consumed sinking feed. In this review we note that the record is silent with respect as to whether HVG consumed sinking feed. Record evidence indicates that HVG consumed floating feed, as noted in the "usage guidance" it submitted for its feed specification guidelines, its website, and confirmed in its case brief.<sup>210</sup> As a result, the Department has valued *pangasius* feed using floating feed prices, where available, to value HVG's *pangasius* feed FOP, because it is more specific to the input in question.

## **Comment X      Surrogate Value for Fingerlings**

### ***Respondents' Comments***

- The fingerling SV used in the *Preliminary Results*, an affidavit from Dr. Djumbuh Rukmono of the Directorate General of Aquaculture ("2012 Rukmono Affidavit"), which is a part of the Ministry of Marine Affairs and Fisheries of the Republic of Indonesia, is not contemporaneous with the POR, as the prices are from 2012.<sup>211</sup>
- For the final results, the Department should use the fingerling data from the 2013/2014 Rukmono Affidavit, which is contemporaneous with the POR.<sup>212</sup> These data meet the Department's SV criteria in that they are: from the primary surrogate country; publically

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<sup>206</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) ("*Crawfish*") and accompanying Issues and Decision Memorandum at Comment 2.

<sup>207</sup> See, e.g., *Mushrooms2006* at Comment 1.

<sup>208</sup> See Petitioners' May 22, 2015 submission at Exhibit I-10C; Respondents' May 22, 2015 submission at Exhibit 1.C.

<sup>209</sup> See, e.g., *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Final Results of the Countervailing Duty Administrative Review*, 77 FR 21744 (April 11, 2012) and accompanying Issues and Decision Memorandum at 29.

<sup>210</sup> See HVG's May 7, 2015 submission at Exhibit 11; Petitioners' June 5, 2015 submission at Exhibit 8; Respondents' February 22, 2016 submission at 3.

<sup>211</sup> See Respondents' case brief citing Petitioners' May 22, 2015 submission at Exhibit I-10B (2012 Rukmono Affidavit).

<sup>212</sup> See Respondents' July 17, 2015 submission at Exhibit 1 and Petitioners' July 20, 2015 submission at Exhibit I-2 (2013/2014 Rukmono Affidavit). Both Petitioner and respondents submitted the 2013/2014 Rukmono Affidavit.

available; contemporaneous with the POR; specific to the input being valued; a broad market average; and is otherwise reliable. Indeed, it is from the same Indonesian government source as used in the *Preliminary Results*, and the last few recent final decisions, and is accompanied by an affidavit explaining how it was obtained.<sup>213</sup>

### *Petitioners' Comments*

- Petitioners and Respondents are in agreement that the data contained in the 2012 Rukmono Affidavit and the 2013/2014 Rukmono Affidavit are reliable for surrogate valuation because they are from the primary surrogate country, represent a broad market average, are publicly available, and are, as the Respondents put it, “otherwise reliable.”<sup>214</sup>
- In the *Preliminary Results*, the Department valued fingerlings using the 2012 Rukmono Affidavit for four to five inch and five to six inch fingerlings.<sup>215</sup> The Department’s decision to use these sizes to value fingerlings in the *Preliminary Results* was reasonable because they are closer to the fingerling sizes reported by Respondents for the POR than the four inch size in the 2013/2014 Rukmono Affidavit. This is an appropriate course of action as HVG reported fingerling sizes are all greater than four inches in length.<sup>216</sup> For this reason, the Department should continue to use the 2012 Rukmono Affidavit for the final results.

**Department’s Position:** We agree with the Petitioners that the 2012 Rukmono Affidavit provides the best available information to value HVG’s *pangasius* fingerling input. Section 773(c)(1)(B) of the Act, instructs the Department to “use the best available information” on the record when selecting SVs with which to value FOPs. It is the Department’s practice to choose SVs that are specific to the input, representative of broad market averages, net of taxes and import duties, contemporaneous with the POR, publicly-available, and from a single surrogate ME country.<sup>217</sup>

The 2012 Rukmono Affidavit and 2013/2014 Rukmono Affidavit are responses to the Petitioners’ and Respondents’ letters to the Indonesian government, specifically the Directorate General of Aquaculture (“DGA”), which is a part of the Ministry of Marine Affairs and Fisheries of the Republic of Indonesia. This is the same department that publishes *Indonesian Aquaculture Statistics*. The Affidavits are signed and on Ministry of Marine Affairs and Fisheries letterhead.<sup>218</sup> Importantly, Petitioners and Respondents have provided all correspondence undertaken to gain this information, making the circumstances under which Dr. Rukmono was approached very clear. Thus, we find the prices in the 2012 Rukmono Affidavit

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<sup>213</sup> See 2013/2014 Rukmono Affidavit.

<sup>214</sup> See Petitioners’ case brief citing Respondents’ February 11, 2016 submission at 28-29.

<sup>215</sup> See Petitioners’ case brief citing HVG’s Prelim Analysis Memo at 4.

<sup>216</sup> See Petitioners’ case brief citing HVG’s August 11, 2015 submission at Exhibit 10; HVG’s May 14, 2015 submission at 16.

<sup>217</sup> See *Carbazole Violet Pigment 23 from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 75 FR 36630 (June 28, 2010) and accompanying Issues and Decision Memorandum at Comment 4; see also 19 CFR 351.408(c)(2).

<sup>218</sup> See 2012 Rukmono Affidavit; 2013/2014 Rukmono Affidavit.

and the 2013/2014 Rukmono Affidavit to be Indonesian government information, and to be reliable.<sup>219</sup>

According to the 2012 Rukmono Affidavit and the 2013/2014 Rukmono Affidavit, the *pangasius* fingerling prices they provide are publicly available and tax exclusive.<sup>220</sup> Moreover, the fingerling prices in the affidavits are from the largest three (of five) *pangasius* producing areas in Indonesia, Sumatera (Jambi), Java (Sukabumi), and Kalimantan (Mandiangan).<sup>221</sup> As such, we find that this data sufficiently represents a broad market average.

Where the affidavits diverge are on the criteria of contemporaneity and specificity. The 2012 Rukmono Affidavit is not contemporaneous with the POR, and the 2013/2014 Rukmono Affidavit is contemporaneous.<sup>222</sup> However, we note that the 2012 Rukmono Affidavit is specific to the input in question, *i.e.*, it covers the sizes of fingerlings consumed by HVG.<sup>223</sup> The 2013/2014 Rukmono Affidavit covers *pangasius* fingerlings, but of a smaller size than those consumed by HVG, thus, the Department must weigh the contemporaneity of one affidavit versus the specificity of the other affidavit.

The Department undertakes its analysis of valuing the FOPs on a case-by-case basis, carefully considering available record evidence regarding the particular facts of each industry.<sup>224</sup> There is no hierarchy for applying the SV selection criteria, as the Department weighs available information with respect to each input value and make a product specific and case specific decision as to what the “best” SV is for each input.<sup>225</sup> For this factor of production, record evidence indicates that the size of the fingerlings is an important factor in determining the price of fingerlings.<sup>226</sup> In past reviews of this order, we have not valued this FOP using data which are less specific, *i.e.*, the data had fewer size bands and did not cover the size of fingerlings consumed.<sup>227</sup> In this review we note that HVG reported purchasing fingerlings of specific sizes,<sup>228</sup> and the 2012 Rukmono Affidavit covers those sizes, while the 2013/2014 Rukmono Affidavit does not.<sup>229</sup>

As such, we have weighed the desire for contemporaneity against the superior specificity found in the 2012 Rukmono Affidavit, and find that the 2012 Rukmono Affidavit best meets the

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<sup>219</sup> See, *e.g.*, See, *e.g.*, *Fresh Garlic from the People’s Republic of China: Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews*, 72 FR 34438 (June 22, 2007) and accompanying Issues and Decision Memorandum at Comment 2.B (the Department typically finds that official government data to be a reliable, credible source of information).

<sup>220</sup> See 2012 Rukmono Affidavit; 2013/2014 Rukmono Affidavit.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> See *Glycine from the People’s Republic of China: Notice of Final Results of Antidumping Duty Administrative Review*, 70 FR 47176 (August 12, 2005) and accompanying Issues and Decision Memorandum at Comment 1.

<sup>225</sup> See, *e.g.*, *Polyethylene Terephthalate Film, Sheet, and Strip from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 55039 (September 24, 2008) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>226</sup> See 2012 Rukmono Affidavit; 2013/2014 Rukmono Affidavit.

<sup>227</sup> See 10<sup>th</sup> AR Final at Comment III.A.

<sup>228</sup> See HVG’s May 14, 2015 submission at 16.

<sup>229</sup> *Id.*

Department's SV criteria, and represents the best available information to value HVG's *pangasius* fingerling input.<sup>230</sup> Because this value is not contemporaneous, we inflated it per our normal practice. This decision aligns with a past Department determination in *Jinan Yipin*, where the Department selected a SV for garlic bulbs based on specificity to garlic size because size was "a strong determinant of the grade and price of garlic," just as size is a strong determinant in the price of *pangasius* fingerlings.<sup>231</sup>

## **Comment XI Surrogate Value for Water**

### ***Respondents' Comments***

- In the *Preliminary Results*, the Department valued water using data from Pam Jaya, an Indonesian water utility company, using a rate for tariff IV-B for food factories.
- The Department is aware that Vietnamese *pangasius* producers pump water for free from rivers, and that the only cost incurred in consuming river water is the labor, electricity and chemicals used to pump and treat the water.
- While the Department rejected this argument in prior reviews, the record now contains an affidavit from the Indonesian government which explains that, exactly like in Vietnam, *pangasius* processing companies in Indonesia do not purchase treated water from the utility; instead, they pump it from rivers and treat it.
- In view of these facts, the Department should not value the consumption of river water in the final results.

### ***Petitioners' Comments***

- The Department's practice is to value all inputs consumed in the production of the merchandise under consideration.
- As to the issue of whether to value river water, because this is an NME proceeding, it is irrelevant whether Respondents actually paid for river water in Vietnam. The fact that Vietnamese companies may consume river water free-of-charge may be the result of government intervention and market distortions that the NME methodology is intended to redress. Rather, the relevant question is whether river water is freely available in the surrogate country.
- Thus, the Department will not value river water only if the record establishes that producers in the surrogate country did not pay for such river water.
- While the Respondents state that the record in this review is different than in prior reviews because they provided an affidavit from an Indonesian government official stating that Indonesian *pangasius* producers do not purchase treated water, the affidavit does not state that Indonesian producers pump water from rivers; instead, it states that they "generally" obtain water from drilled wells.
- Furthermore, the Respondents cite no information from the surrogate financial statements of the Indonesian surrogate company, PT Dharma Samudera Fishing Industries Tbk ("DSFI"),

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<sup>230</sup> See, e.g., *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 26712 (May 9, 2014) and accompanying Issues and Decision Memorandum at Comment 9 (where the Department used non-contemporaneous data from a single month to value an FOP because that data was the most specific to the input in question).

<sup>231</sup> See, e.g., *Final Results of Redetermination Pursuant to Court Remand Order in Jinan Yipin Corp., Ltd., et al. v. United States*, Court No. 06-00189, Slip Op. 09-39 at 8 ("*Jinan Yipin*").

indicating that it did not purchase water, or that its depreciation contained the capital costs of drilling and maintaining drilled water wells.

- Accordingly, the Department should follow the methodology it has employed in prior reviews and value the Respondents' water input.

**Department's Position:** We agree with Petitioners that the Department's practice is to value all inputs consumed in the production of the merchandise under consideration.<sup>232</sup> Moreover, it is the Department's practice to value FOPs, even if a respondent obtains those FOPs at no cost.<sup>233</sup>

The Department has not valued river water used to farm *pangasius* fish. It is not the Department's practice to value water used in ponds in aquaculture farming because this type of cost would be captured as overhead in the surrogate financial ratios.<sup>234</sup> However, the water consumed in processing subject merchandise can be distinguished from the farming pond water, which is used to produce *inputs* to subject merchandise. Here, where the water is used as a FOP directly in the production of subject merchandise, we have continued to value Respondents' water input. Moreover, we agree with Petitioners that Respondents failed to establish that Indonesian producers pump water from rivers for free as the Respondents claim. Notably, there is no indication on the record that DSFI, or any other surrogate companies in Indonesia, pumped water from wells or from a nearby river for free.

We continue to find that the data from Pam Jaya is the best available information to value this input. The Pam Jaya data meets the Department's SV selection criteria and selecting that source would align with the Department's preference in 19 CFR 351.408(c)(2) of valuing FOPs within a single surrogate country.<sup>235</sup> Respondent have not challenged the specificity, accuracy, or reliability of the Pam Jaya data. Moreover, category "Group IV B" is specific to food factories and, thus, is specific to the water input water. Therefore, we continue to value water using the data from Pam Jaya.

## Comment XII Application of Marine Insurance

### *Petitioners' Comments*

- In the *Preliminary Results*, the Department valued marine insurance using an insurance rate for shipping merchandise to the Far East from a market-economy marine insurance provider,

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<sup>232</sup> See 19 USC 1677b(c)(1), (3).

<sup>233</sup> See, e.g., *Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review*, 70 FR 54361 (September 14, 2005) and accompanying Issues and Decision Memorandum at Comment 13; *Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China: Final Results of New Shipper Review*, 75 FR 81564 (December 28, 2010) and accompanying Issues and Decision Memorandum at Comment 1 (where the Department stated that it was required to value the quantities of all raw materials employed in producing subject merchandise, including inputs obtained free of charge, such as water).

<sup>234</sup> See *Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 46565 (September 10, 2009) and accompanying Issues and Decision Memorandum at Comment 2.B.

<sup>235</sup> See *Clearon Corp. v. United States*, No. 08-00364, 2013 WL 646390, at \*6 (CIT, Feb. 20, 2013) ("deriving the surrogate data from one surrogate country limits the amount of distortion introduced into {Commerce's} calculations").

RJG Consultants.<sup>236</sup> This rate is based on the value of the shipment, *i.e.*, on a USD/USD basis.<sup>237</sup> The manner in which the Department applied this rate, to derive marine insurance expenses for Tafishco, should be corrected for the final results.

### ***Respondents' Comments***

- Respondents did not comment on this issue.

**Department's Position:** The Department inadvertently misapplied the marine insurance expense in Tafishco's SAS program. We have corrected this error for the final results.

## **Comment XIII Packing**

### **A. Packing Type Should Not be a Physical Characteristic**

#### ***Petitioners' Comments***

- Although the Department's antidumping duty questionnaire did not include packing as a part of the CONNUM,<sup>238</sup> HVG and Tafishco included an additional "packing type" ("PACKTYPE") field in their Section C and D databases, which provided codes to describe the packing materials they used to ship subject merchandise to the United States.<sup>239</sup> In the *Preliminary Results*, the Department appended Respondents' PACKTYPE codes to their reported CONNUMs, in essence treating PACKTYPEs as physical characteristics of subject merchandise.<sup>240</sup>
- At the very outset of an antidumping investigation, the Department identifies the key physical characteristics of subject merchandise, which are the integral and commercially meaningful traits of the subject merchandise which most significantly impact the sale price as well as costs of production.<sup>241</sup> The Department does not treat packing as a physical characteristic because packing materials are not integral, and commercially meaningful, characteristics of subject merchandise, which the CAFC has affirmed.<sup>242</sup>
- Respondents' packing materials do not represent integral physical characteristics of subject fillets, and the record is devoid of any evidence to support the treatment of packing materials as physical characteristics of subject merchandise. The Department does not include packing in its CONNUM buildup. Although in a very limited number of cases, the Department has treated "packaging," which is distinct from packing, as a physical characteristic for its CONNUM product-comparison analysis.<sup>243</sup>

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<sup>236</sup> See Petitioners' case brief citing Preliminary Surrogate Value Memo at 9.

<sup>237</sup> *Id.* at Exhibit 1.

<sup>238</sup> See, e.g., Petitioners' case brief citing the Department's December 1, 2014 original antidumping duty questionnaire at C-5 – 7.

<sup>239</sup> See Petitioners' case brief citing the HVG's January 7, 2015 submission at 15; Tafishco's January 21, 2015 submission at 12-13.

<sup>240</sup> See Petitioners' case brief citing HVG Preliminary Analysis Memo at 1-2 and Attachment 2; Tafishco Preliminary Analysis Memo at 1-3 and Attachment 2.

<sup>241</sup> See, e.g., Petitioners' case brief citing *Washers Initiation*, 81 FR at 1399.

<sup>242</sup> See Petitioners' case brief citing *Pesquera Mares Australes, Ltda. v. United States*, 266 F.3d 1372, 1384 (Fed. Cir. 2001).

<sup>243</sup> See, e.g., Petitioners' case brief citing *See Certain Frozen and Canned Warmwater Shrimp from Ecuador: Notice of Final Determination of Sales at Less Than Fair Value*, 69 FR 76913 (December 23, 2004) ("*Shrimp from Ecuador*") and accompanying Issues and Decision Memorandum at Comment 5 (packaging are materials that

- As such, for the final results, the Department should not include PACKTYPE as a physical characteristic.
- If the Department determines to include Respondents' reported PACKTYPE in its CONNUM buildup, then the Department must, at a minimum, treat Respondents' packing material inputs as direct materials in its normal value calculation for the final results.

### ***Respondents' Comments***

- The Department did not treat PACKTYPE as a physical characteristic, and it was not incorporated into the CONNUM by either mandatory respondent. Instead, the Respondents simply included information regarding various packing configurations in their Section C and D databases, to allow the Department to calculate dumping margins as accurately as possible to capture and reflect various packing configurations. The Respondents in this case have done this for several years now, without problem or complaint, and there is no reason to change the calculation methodology.

**Department's Position:** The Respondents used a variety of PACKTYPEs to for each CONNUM, which they reported in their Sections C and D databases, and consumed different FOPs for each PACKTYPE.<sup>244</sup> By reporting different PACKTYPEs, the Respondents have provided more specific and accurate data than weighted-average packing usage rates per CONNUM. In this case, the use of weighted-average packing FOPs, as Petitioners suggest, would result in a less accurate margin calculation because they are less specific.<sup>245</sup>

We agree with Petitioners that the Department has treated packing and packaging differently in past cases.<sup>246</sup> In this case there is no record information which indicates that the packing reported by Respondents is, in fact, packaging. Nor have Respondents argued that their packing is packaging. For the final results the Department has continued to treat Respondents' reported packing as packing, and have not included these FOPs in direct materials. We also agree with Petitioners that PACKTYPE should not be a part of the CONNUM, as it is not integral to the subject merchandise.<sup>247</sup> The application of PACKTYPE in the respective SAS programs is not an indication that the Department has elevated PACKTYPE to be one of the product characteristics found in the CONNUM, it is used in the SAS program to calculate a more specific margin. Therefore, we have continued to use PACKTYPE in the margin calculation for the final results.

## **B. Tafishco's Packing Materials Factors of Production Usage Rates**

### ***Petitioners' Comments***

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become an integral part of the merchandise, rather than a packing associated with the shipment of the product to the customer).

<sup>244</sup> See, e.g., HVG's January 7, 2015 submission at 35-37.

<sup>245</sup> The Department's objective is to calculate dumping margins as accurately as possible. See *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

<sup>246</sup> See, e.g., *Chlorinated Isocyanurates from the People's Republic of China: Notice of Final Determination of Sales at Less Than Fair Value*, 70 FR 24502 (May 10, 2005) ("*Isos*") and accompanying Issues and Decision Memorandum at Comment 10 (where the Department treated materials it deemed to be packaging as direct materials, and treated materials used to ship the subject merchandise to the United States as packing).

<sup>247</sup> See, e.g., *Shrimp from Ecuador* at Comment 5; *Isos* at Comment 10.

- Tafishco reported packing FOPs for the materials that it used to pack subject merchandise for export to the United States.<sup>248</sup> However, all of Tafishco’s packing FOP denominators are distorted because it contains more than just the weight of subject fillets.<sup>249</sup> Tafishco used the Department’s standard methodology to report its other FOP usage rates, using the weight of the processed fish product in the denominator. Tafishco’s packing material FOP usage rates should be corrected for the final results.

***Respondents’ Comments***

- Respondents did not comment on this issue.

**Department’s Position:** We agree with the Petitioners. The Department’s practice is to allocate FOP usage rates over the weight of the subject merchandise, *i.e.*, the denominator should be the weight of the subject merchandise.<sup>250</sup> For packing FOPs, the questionnaire states that each packing material FOP allocated to “the quantity used to pack a unit of the merchandise under consideration for export to the United States.”<sup>251</sup> We have corrected this error for the final results.

**C. Surrogate Value for Strap**

***Petitioners’ Comments***

- HVG and Tafishco described this input only as “hard plastic strap.”<sup>252</sup> Although the Respondents claim, however, that they consumed packing strap “made of polymers of propylene” they did not provide this information until May 22, 2015.<sup>253</sup> The Department has recognized that SV submissions should be an equal opportunity for all parties to submit information needed to value inputs that have already been fully described in a respondent’s questionnaire responses.<sup>254</sup>
- The Respondents also argue that the Indonesian data for HTS 3920.30 should be benchmarked against both domestic price quotes and import data used in several Vietnamese shrimp cases. As the Department made clear in the previous administrative review, the appropriate benchmark for import data from one surrogate country is official import data from the other economically-comparable surrogate countries (not domestic price quotes), and that the party seeking to benchmark such data has the obligation to place such data on the

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<sup>248</sup> See Petitioners’ case brief citing Tafishco’s January 21, 2015 submission at 25-27, and Exhibit 15.

<sup>249</sup> See Petitioners’ case brief citing *Id.* at Exhibit 15. Because this information is proprietary, *see* Petitioners’ February 11, 2016 submission at 54.

<sup>250</sup> See, *e.g.*, *China Shrimp Investigation* at Comment 8 (stating that FOPs must be allocated over the total volume of the finished product).

<sup>251</sup> See the Department’s December 1, 2014 original antidumping duty questionnaire at D-10 (the Department instructed Tafishco to allocate each packing material to “the quantity used to pack a unit of the merchandise under consideration for export to the United States.”).

<sup>252</sup> See Petitioners’ case brief citing Tafishco’s January 21, 2015 submission at 26; HVG’s January 7, 2015 submission at 35.

<sup>253</sup> See Petitioners’ case brief citing Respondents’ May 22, 2015 submission at 13 (point 22).

<sup>254</sup> See Petitioners’ case brief citing *Grain-Oriented Electrical Steel from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 59226 (October 1, 2014) and accompanying Issues and Decision Memorandum at Comment 3 (the Department determined that a respondent’s clarification of the descriptions of two inputs filed two days prior to the SV deadline affected parties’ opportunity to research the accuracy of such information).

record.<sup>255</sup>

- For the final results, the Department should continue to value packing strap using HTS 3920.30. In the *Preliminary Results*, the Department included data from the People’s Republic of China in the SV calculation, which should be excluded in the final results.

### ***Respondents’ Comments***

- Respondents consumed packing strap made of polymers of propylene, thus, the correct HTS provision for packing strap is HTS 3920.20 – which covers plastic made of polymers of propylene.<sup>256</sup>
- Although Respondents provided benchmark data which indicate that indicate HTS 3920.20 is a closer match than HTS 3920.30,<sup>257</sup> the decision should rest on the specificity of the tariff classification.
- While Petitioners argue that the Department made a ministerial error in the SV calculation for HTS 3920.30, used in the *Preliminary Results*, this is not the correct HTS provision because it covers plastic made of polymers of styrene.

**Department’s Position:** As noted above, section 773(c)(1) of the Act instructs the Department to value the FOPs with the best available information from a market economy 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 inputs in question.<sup>258</sup> The Department’s preference is to satisfy the breadth of the aforementioned selection criteria.<sup>259</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 of valuing FOPs.<sup>260</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>261</sup>

Parties have argued for Indonesian Global Trade Atlas data (“GTA”) to value this input. The Department has previously found that data from GTA, such as that on the record for this input, is publicly available, represents a broad market average, and is tax- and duty- exclusive.<sup>262</sup> Additionally, the GTA data is contemporaneous with the POR. While Petitioners argue for HTS 3920.30, a styrene based plastic, record evidence indicates that the strap consumed by the Respondents is propylene.<sup>263</sup> Specificity is a key element of the test for the usability of a SV,

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<sup>255</sup> See 10<sup>th</sup> AR Final at Comment XI.

<sup>256</sup> See Respondents’ May 22, 2015 submission at Attachments 22-A and 22-B. In the Vietnamese shrimp case, the Department uses HTS 3921.19 to value packing strap for Vietnamese shrimp companies, and Respondents have provided the Indonesia data for this HTS on the record of this review. *Id.* at Attachment 22-C.

<sup>257</sup> *Id.* at Attachments 17-F, 22-F, and 22-G.

<sup>258</sup> See, e.g., *Lined Paper* at Comment 3.

<sup>259</sup> See, e.g., *China Shrimp 5* at Comment 2.

<sup>260</sup> See *Mushrooms* at Comment 1; see also *Crawfish* at Comment 2.

<sup>261</sup> See, e.g., *Mushrooms* at Comment 1.

<sup>262</sup> See, e.g., *Drawn Stainless Steel Sinks from the People’s Republic of China: Investigation, Final Determination*, 78 FR 13019 (February 26, 2013) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>263</sup> See Respondents’ May 22, 2015 submission at 13 (point 22).

because if the SV data does not cover the FOP in question, it cannot be used for SV purposes.<sup>264</sup> We find that Indonesian HTS 3920.20 is specific to the input in question, as the plain terms of the HTS description, “Plastics And Articles Thereof, Other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials, Of polymers of propylene,” cover propylene plastics. Therefore, because HTS 3920.30 does not cover the plastic strap consumed by Respondents, we value plastic strap using HTS 3920.20 for the final results.

Regarding parties’ arguments concerning benchmarks, no party has argued that HTS 3920.20 is aberrational or unsuitable with regard to the Department’s surrogate value criteria. As such, we do not find this value to be aberrational. In addition, because we have found that HTS 3920.20 is more specific to Respondents’ plastic strap, parties’ arguments concerning the calculation of HTS 3920.30 benchmarks are moot.

Regarding Petitioners’ argument concerning the timeliness of the information provided by Respondents, we find that it was submitted in a timely manner. Respondents indicated in their May 22, 2015 submission that they consumed propylene plastic strap. The *Preliminary Results* were not signed until August 31, 2015, and interested parties had until 30 days before this date to submit SV information.<sup>265</sup> We find that Petitioners had ample time to submit comments and information on HTS 3920.20.

#### **D. Surrogate Value for Tape**

##### ***Respondents’ Comments***

- In the *Preliminary Results*, the Department used Indonesian import data under HTS 3919.10 to value tape, which resulted in a value of IDR 175,107/kg.<sup>266</sup> The AUV’s range from a high of IDR 21,946,194/kg (Switzerland) to a low of IDR 32,738/kg (Malaysia). Common sense dictates that the price of packing tape does not vary by such wide differentials and products other than mere packing tape were being imported into Indonesia under this tariff provision during the POR.<sup>267</sup>
- For the final results the Department should value tape using Indonesian GTA data for HTS 3919, which results in a value of IDR 54,428/kg,<sup>268</sup> and has been used many times in the Vietnamese shrimp case.<sup>269</sup> Respondents also have placed benchmark data on the record, which have a value of IDR 6,500/kg.<sup>270</sup>

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<sup>264</sup> See *Jinan Yipin Corp. v. United States*, 800 F. Supp. 2d 1226, 1304 (CIT 2011) (“*Yipin*”) (where the Court noted that if a set of data is not sufficiently “product specific,” it is of no relevance whether or not the data satisfy the other criteria). See also *Tianjin Machinery Import & Export Corp. v. United States*, 806 F. Supp. 1008, 1017-1018 (CIT 1992) (“*Tianjin Machinery*”) (recognizing the fact that SVs must reflect the experience of the respondents’ industry).

<sup>265</sup> See 19 CFR 351.301 (c)(3)(i).

<sup>266</sup> See Respondents’ case brief citing Prelim Surrogate Value Memo at 5.

<sup>267</sup> However, please note that the courts have agreed that “Occasionally, even in the law, common sense must prevail.” See Respondents’ case brief citing *Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 99 (Fed. Cir. 2014).

<sup>268</sup> See Respondents’ May 22, 2015 submission at Exhibit 17-A.

<sup>269</sup> *Id.* at Attachment 17-C.

<sup>270</sup> *Id.* at Attachment 17-F.

- As an alternative, the Department could use price quotes from an Indonesian company Adib Food Suppliers.<sup>271</sup> Adib is known to be reputable, as even Petitioners have obtained SV information from them and placed it on the record under this Order, and the Department used data from this company in the *Preliminary Results* to value various by-products.

### *Petitioners' Comments*

- The Department should continue to value tape using HTS 3919.10 for the final results. An examination of the Indonesian tariff schedule shows that the Respondents' proposal to value packing tape using HTS 3919 makes no sense. First, HTS 3919 by definition includes the supposedly offensive data that the Respondents dispute - specifically HTS 3919.10. Second, only one other 6-digit subheading is included under heading 3919, the "other" category, and this subheading does not contain the packing tape input in question.<sup>272</sup>
- The HTS classification that the Department used in other, completely unrelated, cases, has no bearing on the tape consumed by Respondents in this case.
- While the Respondents focus on the high average unit value for HTS 3919.10 associated with imports from Switzerland,<sup>273</sup> they neglect to point out that imports from Switzerland account for less than one-tenth of one percent of the quantity of imports under HTS 3919.10, and that the unit prices for the remaining countries fall in a much tighter range.<sup>274</sup>
- Lastly, the Respondents argue that the Department could also use price quotes that they placed on the record to value packing tape.<sup>275</sup> The Department rejected this same argument in the last review.<sup>276</sup> In addition, one of the two price quotes is stated as price per roll, rather than per kilogram basis, and contains no information regarding the weight of the rolls in question. For these reasons, they are therefore unusable.<sup>277</sup>

**Department's Position:** For the final results, we have valued HVG's tape input using Indonesian GTA import data under HTS 3919.10, "Plates, Sheets, Film, Foil, Tape and Other Flat Shapes of Plastics, Self-adhesive, In Rolls Not Over 20 cm (8 In.) Wide." This HTS is specific to the input in question, and GTA data fulfills the Department's other SV selection criteria, *i.e.*, it is publicly-available, represents a broad market average, and is free of taxes and duties. HTS 3919 encompasses HTS 3919.10, but is less specific as it covers larger rolls of adhesive plastics, moreover, it contains the very data Respondents argue is aberrational. Therefore we have not used this HTS for value tape in the final results.

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<sup>271</sup> *Id.*

<sup>272</sup> The HTS subheading breakout shows that the "other" subheading (HTS 3919.90) contains self-adhesive tapes that are either: 1) in rolls larger than 20 cm (*i.e.*, 7.8 inches), or 2) not in rolls. Relevant sections of the HTS schedule are provided in the respondents' May 22<sup>nd</sup> Surrogate Value Submission at Exhibit 17 (Attachment B). In their surrogate value submission, the Vietnamese respondents provided pictures of the packing tape they used. These pictures portray standard packing tape – plastic adhesive tape *in rolls* that appear to be approximately 2 – 3 inches in width. Given this, such tape is not classified under HTS 3919.90 but instead falls squarely under HTS 3919.10.

<sup>273</sup> See Petitioners' rebuttal brief citing Respondents' case brief at 29.

<sup>274</sup> *Id.* at Attachment 2.

<sup>275</sup> *Id.* at 30-31.

<sup>276</sup> See Petitioners' rebuttal brief citing 10<sup>th</sup> AR Final at Comment XI.

<sup>277</sup> See Petitioners' rebuttal brief citing Respondents' May 22, 2015 submission at Exhibit 11 (Attachment D at B).

In order to demonstrate that a value is aberrational or unreliable because it significantly deviates from the norm, it is necessary to have multiple points of comparison.<sup>278</sup> In *Xanthan Gum*, the Department stated that “having only two values to compare could result in finding either the higher value aberrational in comparison to the lower value or the lower value aberrational in comparison to the higher value.”<sup>279</sup> HVG, *et al.* have not met this burden by placing POR data from other countries on the surrogate country list which demonstrate that HTS 3919.10 contains aberrational data.<sup>280</sup> A comparison of the countries’ data indicates that the Indonesian AUV for the current POR is twice that of other countries on the surrogate country list. However, the difference between the data from other countries on the surrogate country list and Indonesia for this HTS is not so large as to demonstrate an aberration with the current POR’s data for HTS 3919.10. With respect to the data parties have pointed to as aberrational, the Swiss data, listed in Indonesian GTA import data under HTS 3919.10, is significantly higher as compared to other countries’ data on the record, and have been removed for these final results.

While the Adib price quote fulfills some of our surrogate value criteria – it is specific to the input in question, is publicly-available, and is free of taxes and duties – it reflects the experience of single company and, thus, is not representative of a broad market average. In addition it is not contemporaneous with the POR. Because we have a value that thoroughly fulfills our criteria for this review, we are not using the Adib price quote for this value.

## **Comment XIV By-Products**

### **A. Whether to Value Certain By-products**

#### ***Respondents’ Comments***

- In the *Preliminary Results*, because of the FOP databases used, the Department did not value various by-products produced and sold by HVG and Tafishco during the POR. However, as argued above, if the Department uses the full FOP databases of each mandatory respondent for the final results, the Department should value all by-products.

#### ***Petitioners’ Comments***

- The Department’s preliminary facts available determination for determining Respondents’ normal values was appropriate, supported by substantial evidence and in accordance with the law. However, if the Department changes its facts available determination for the final results, the Department should value Respondents’ remaining by-products using the data contained in Petitioners’ May 22, 2015 and July 20, 2015 surrogate value submissions.

**Department’s Position:** The Department’s practice is to grant Respondents an offset to NV for by-products generated during the production of the merchandise under consideration if

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<sup>278</sup> See, e.g., *See 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) (“*Wood Flooring*”) and accompanying Issues and Decision Memorandum at Comment 14.

<sup>279</sup> See *Xanthan Gum from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013) (“*Xanthan Gum*”) and accompanying Issues and Decision Memorandum at Comment 16.A.

<sup>280</sup> See *Wood Flooring* at Comment 15.

evidence is provided that such by-product has commercial value.<sup>281</sup> As noted above, as facts available we used the tolling FOPs reported by Tafishco to calculate normal value for HVG and Tafishco. According to Tafishco's tolling contacts, Tafishco owns the whole live fish which enter the production process, as well as the fish waste generated from the tolling process.<sup>282</sup> Therefore, the only by-product Tafishco sells is fish waste to the unaffiliated tollers.<sup>283</sup> Consequently, for the final results, because we used the tolling FOPs reported by Tafishco, we have only granted a by-product offset for the fish waste Tafishco sold to its tollers.

Parties have provided comments on the valuation of fish stomach and fish bladder.<sup>284</sup> As noted above, for the final results, we have only valued fish waste, as that is the by-product sold by Tafishco to its unaffiliated tollers. We have not valued fish stomach and fish bladder, as those by-products were sold by the unaffiliated tollers, and not Tafishco. Therefore, we consider parties' comments about the surrogate valuation of fish stomach and fish bladder to be moot.

## B. Surrogate Value for Fish Waste

### *Respondents' Comments*

- Fish waste should be valued using Indonesian HTS 0511.91.0090.<sup>285</sup> This HTS was used to value fish waste in the 7<sup>th</sup> AR Final.<sup>286</sup> While in the past few reviews the Department's preference has been to reject import data in favor of domestic prices, respondents have provided record information which indicates that by-products are internationally traded.<sup>287</sup> Moreover, although HTS 0511.91.0090 is a fairly broad tariff provision, the data used by the Department in the *Preliminary Results* is also broad, as there was not a value specifically for "fish waste," but was instead a calculated value using the averages of various other by-products – none of which are identified as "fish waste."<sup>288</sup>
- The "price quotes" used in the *Preliminary Results*, Adib Food Supplies and CV Karunia Mitra Makmur (hereafter referred to as ("2013/14 Adib/Mitra Makmur")), are not price quotes at all, but historical pricing data from 2013 and 2014. This is important, because it means that these prices are not commercial offers to sell, and were provided in February 2015, after the POR.<sup>289</sup>

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<sup>281</sup> See *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 35245 (June 12, 2013) and accompanying Issues and Decision Memorandum at Comment 10.

<sup>282</sup> See Tafishco's May 7, 2015 submission at Exhibit 18.

<sup>283</sup> *Id.* ("Party A {Tafishco} agrees to sell the by-products generated from tolling to Party B {the toller}").

<sup>284</sup> See Petitioners' February 22, 2016 submission at 20-25; Respondents' February 11, 2016 submission at 38-41.

<sup>285</sup> See Respondents' May 22, 2015 submission at Attachment 11-A.

<sup>286</sup> See Respondents' rebuttal brief citing *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 1.

<sup>287</sup> *Id.* at Attachment 23 (sample invoices showing international shipment of various fish by-products such as fish fat, broken meat, fish heads & bones, fish stomach/maw and nuggets), Attachment 11-F (showing HTS 0511.91.0040 applies specifically to fish skin), and Attachment 11-H (HTS 0305.72.1000 applies specifically to fish maw); Respondents' June 17, 2015 submission at Attachment 6 (price quotes from two different Indonesian companies, offering to sell numerous types of *pangasius* products/by-products).

<sup>288</sup> See Respondents' rebuttal brief citing Prelim Surrogate Values Memo at "By-products" tab.

<sup>289</sup> In past reviews of this order, the Department has examined price quotes to determine if they "represent an actual business transaction." See Respondents' rebuttal brief citing *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76

- If the Department continues to refuse to use import data to value fish waste, and prefers to domestic pricing, it should seek data that is more specific to the input being valued.
- Product specificity must be the primary consideration in determining “best available information.” If a set of data is not sufficiently product specific, it is of no relevance whether or not the data satisfy the Department’s SV criteria.<sup>290</sup> As explained by the CIT, if surrogate value data is clearly inferior in terms of specificity, its higher ranking on any other consideration, such as contemporaneity, does not make it preferable over more specific data.<sup>291</sup>
- Luckily, there is data on the record that is perfectly specific to fish waste: a 2015 price from Adib Food Supplies for “fish waste,” a price quote from PT Alam Jaya specifically for “Fresh Patin Waste,” and a July 13, 2015, price quote from Adib Food Supplies specifically for “Fresh Patin Fish Waste” (hereafter referred to as (“2015 Adib/Alam Jaya”).<sup>292</sup>

### ***Petitioners’ Comments***

- Indonesian HTS 0511.91.0090 is a basket category and is not specific to *pangasius* fish waste.<sup>293</sup> Nothing on the administrative record indicates that the dead animals imported under this subheading include any types of by-products at all, nor are the import statistics even specific to *pangasius* fish.<sup>294</sup>
- Respondents’ argument that the use of import statistics is appropriate in this instance because by-products are sometimes sold internationally is misleading and discredited by the record.<sup>295</sup>
- This HTS is inaccurate and distorted because the AUV (9,908 Indonesian Rupiah (“IDR”)/kg<sup>296</sup>) is over half the value of whole live *pangasius* (15,237 IDR/kg).<sup>297</sup> There is no

FR 15941 (March 22, 2011) and accompanying Issues and Decision Memorandum at 31. It is difficult to say that a *post-facto* prepared price list represents an actual business transaction.

<sup>290</sup> See *Taian Ziyang Food Co. v. United States*, 783 F. Supp. 2d 1292, 1330 (CIT 2011), citing *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT 288, 300, 366 F. Supp. 2d 1264, 1273-74 (2005) (explaining that, where agency failed to demonstrate Indian import statistics were sufficiently “product specific,” it was irrelevant whether statistics satisfied other criteria, such as “contemporaneity”).

<sup>291</sup> See *Home Meridian International Inc. D/B/A Samuel Lawrence Furniture Co. and Import Services, Inc. v. United States*, No. 11-00325, slip op. 12-120 (CIT September 19, 2012).

<sup>292</sup> See Respondents’ May 22, 2015 submission at Attachment 11-D; Respondents’ June 17, 2015 submission at Exhibit 6.

<sup>293</sup> See Petitioners’ case brief citing Respondents’ May 22, 2015 submission at Exhibit 11 (Attachments A-C).

<sup>294</sup> The record makes clear that the overwhelming majority of the world’s *pangasius* fish are produced in Vietnam, with smaller quantities produced in Indonesia, the Philippines and several other Asian countries. See Petitioners’ case brief citing Petitioners’ May 22, 2015 submission at Exhibits I-2 and P-1A. However, the import data proposed by Respondents include data from the United States which has no known production of *pangasius* fish. See Respondents’ May 22, 2015 submission at Exhibit 11. As such, Respondents’ import category cannot possibly be specific to *pangasius* by-products.

<sup>295</sup> The first two international transactions of record for *pangasius* fish waste pertain to “frozen swai heads/frames” and “frozen swai” products sold in 2012 as fish “bait.” See Petitioners’ case brief citing Respondents’ May 22, 2015 submission at Exhibit 25. Fish bait is commonly processed for commercial sale by the addition of chemicals to enhance their longevity, improve their visual attractiveness to fish (*e.g.*, through color), and improve their taste. *Id.* The second two international transaction prices referenced by respondents occur after the POR and are “offers to sell,” and not actual transaction prices. See Respondents’ case brief at 35; Respondents’ May 22, 2015 submission at Exhibit 25.

<sup>296</sup> See Petitioners’ case brief citing Respondents’ May 22, 2015 submission at Exhibit 11.

evidence in the record to suggest that *pangasius* fish waste by-products would command a price this high. The CIT has previously confirmed that the distinguishing feature of a by-product is its relatively minor sales value in comparison to that of the major product or products produced.<sup>298</sup> Thus, it would be *prima facie* distortive to value Respondents' by-products with this HTS subheading.<sup>299</sup>

- Respondents' fish waste is comprised specifically of "head, bones, skin, trimmings and fin," and specifically excludes *pangasius* nuggets.<sup>300</sup> Consistent with Respondents' reporting, the Department's surrogate value for *pangasius* fish waste should involve those by-products. The 2013/14 Adib/Mitra Makmur price quotes are specific because they break out prices for individual *pangasius* by-products.<sup>301</sup> In an effort to ensure specificity, the Department excluded certain prices in its calculation, such as belly meat, trimmings bone, fin and nuggets, fish meal, skin, *etc.*<sup>302</sup> The Department correctly excluded any by-product category that may include nuggets or broken meat from the fish waste SV.<sup>303</sup>
- The 2013/14 Adib/Mitra Makmur price quotes are contemporaneous with the POR.<sup>304</sup> Respondents nevertheless attempt to override the contemporaneity of these quotes by alleging that these quotes represent "historical pricing data" and not commercial prices.<sup>305</sup> These price quotes bear numerous indicia attesting to their commercial validity and reliability. In particular, each company's price quote (1) identifies the commercial terms of sale associated with the listed prices, (2) specifies that the listed prices are stated on an ex-factory basis (pick-up prices), (3) specifies that payment terms are on a cash basis, (4) establishes that the listed prices are exclusive of taxes, (5) contains the signature of the company official providing the prices, and (6) are on company letterhead.<sup>306</sup>
- The 2015 Adib/Alam Jaya price quotes are not contemporaneous with the POR and not specific as they are for *pangasius* "fish waste," a single aggregated price for a mix of by-products.<sup>307</sup>
- Moreover, the 2015 Adib/Alam Jaya price quotes are also distorted because they represent prices quotes for international shipments of *pangasius* by-products, and thus, are not specific to the *pangasius* by-products sold by Respondents.<sup>308</sup> As noted above, the Department has

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<sup>297</sup> See Petitioners' case brief citing Preliminary Surrogate Value Memo at 4.

<sup>298</sup> See Petitioners' case brief citing *Catfish Farmers of Am. v. United States*, 2014 CIT LEXIS 146, at \*39-40 (CIT December 18, 2014) (citing *Certain Fresh Cut Flowers from Columbia: Final Results of Antidumping Duty Administrative Reviews*, 61 FR 42833 (August 19, 1996) and accompanying Issues and decision Memorandum at Comment 25).

<sup>299</sup> See Petitioners' case brief citing *Id.* (relying on "Charles Horngren, George Foster, *Cost Accounting: A Managerial Emphasis* (7<sup>th</sup> ed. 1991), p. 527 ("[a] by-product is a product that has a low sales value compared with the sales value of {the principal product}").

<sup>300</sup> See Tafishco's January 21, 2015 submission at Exhibits 5-11.

<sup>301</sup> See Petitioners' July 20, 2015 submission at Exhibits I-7 and I-8.

<sup>302</sup> See Petitioners' case brief citing *Id.*; Preliminary Surrogate Value Memo at 6 and Exhibit 1 ("By-Products" Worksheet).

<sup>303</sup> The Department's surrogate value calculation also excluded prices for *pangasius* skin, and included the prices for *pangasius* stomach. Respondents do not contest the Department's surrogate valuation in this regard.

<sup>304</sup> See Petitioners' July 20, 2015 submission at Exhibits I-7 and I-8.

<sup>305</sup> See Petitioners' rebuttal brief citing Respondents' case brief at 36.

<sup>306</sup> See Petitioners' case brief citing *Id.*

<sup>307</sup> See Petitioners' case brief citing Respondents' May 22, 2015 submission at Attachment 11.

<sup>308</sup> See Petitioners' case brief citing Tafishco's May 7, 2015 submission at Exhibit 18 (Tolling contracts).

previously rejected international *pangasius* by-product surrogate values because *pangasius* by-products are not normally traded internationally.<sup>309</sup>

**Department’s Position:** As noted above, section 773(c)(1) of the Act instructs the Department to value the FOPs with the best available information from a market economy 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 inputs in question.<sup>310</sup> The Department’s preference is to satisfy the breadth of the aforementioned selection criteria.<sup>311</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 of valuing FOPs.<sup>312</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>313</sup>

Regarding parties’ arguments over HTS 0511.91.0090, the Court has upheld the Department’s use of broad import categories when the category’s selection was supported by substantial evidence.<sup>314</sup> In addition, the Department previously found that GTA data, such as the data in question, is publicly-available, representative of broad market averages, and is free of duties and taxes.<sup>315</sup> However, Indonesian HTS 0511.91.0090 is a basket category which covers “Animal products not elsewhere specified or included; dead animals of Chapter 1 or 3, unfit for human Consumption; Products of fish or crustaceans, molluscs or other aquatic invertebrates; dead animals of Chapter 3; other.” Although Respondents are correct that this HTS was used in the 7<sup>th</sup> AR Final, on remand the Department stated the following concerning this HTS:

In revisiting the valuation of this by-product, we find that this HTS category lacks specificity to the actual fish waste produced by Respondents. After reviewing the information on the record, we find that fish waste products generally are not internationally traded commodities which would be reflected in import statistics. In other aquaculture cases, for example, in *Vietnam Shrimp 5<sup>th</sup> AR*, the Department consistently has valued the waste product using an Indonesian price quote. As a result, we find specificity to be the most important factor in valuing this by-product. Valuing fish waste using import statistics illogically results in a fish waste SV which is a significant

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<sup>309</sup> See Petitioners’ case brief citing 8<sup>th</sup> AR Final at Comment X (“Since fish waste products are generally not internationally traded commodities that would be reflected in import statistics, the import data that respondents are using as benchmarks cannot reliably measure *pangasius*-specific fish waste, a domestically traded commodity”).

<sup>310</sup> See, e.g., *Lined Paper* at Comment 3.

<sup>311</sup> See, e.g., *China Shrimp 5* at Comment 2.

<sup>312</sup> See *Mushrooms* at Comment 1; see also *Crawfish* at Comment 2.

<sup>313</sup> See, e.g., *Mushrooms* at Comment 1.

<sup>314</sup> See, e.g., *Writing Instrument Mfrs. Ass’n, Pencil Section v. Dep’t of Commerce*, 984 F. Supp. 629, 640 (CIT 1997); *Guangdong Chems. Imp. & Exp. Corp. v. United States*, 460 F. Supp. 2d 1370-71 (CIT 2006); *Peer Bearing Co. Changshan v. United States*, 752 F. Supp. 2d 1333, 1335 (CIT 2011); *Dorbest Ltd. v. United States*, 462 F. Supp. 2d 1289-90 (CIT 2006) (sustaining the Department’s use of a data set that included merchandise other than that being valued).

<sup>315</sup> See, e.g., *Frontseating Service Valves from the People’s Republic of China; Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 73825 (December 9, 2013) and accompanying Issues and Decision Memorandum at Comment 7.

percentage of the whole fish value. Consequently, the use of import statistics to value fish waste would distort the NV calculation.<sup>316</sup>

We continue to find the same here. Petitioners have placed evidence on the record which indicates that international sales of *pangasius* waste are uncommon due to low demand, the fact that it is unfit for human consumption, and transportation costs are high relative to the waste's value.<sup>317</sup> Importantly, Tafishco has not reported any packing materials used to sell its fish waste.<sup>318</sup> To prevent spoilage, fish waste must be refrigerated during the period of shipment, and the fish waste would need to be packed. The fish waste in question was not processed in any manner, packed or internationally traded, they were sold to Tafishco's unaffiliated tollers. As such we find this HTS is not specific to Respondents' fish waste. As the Court noted, specificity is a key element of the test for the usability of a SV, because if the SV data does not cover the FOP in question, it cannot be used for SV purposes.<sup>319</sup>

Turning to the 2013/14 Adib/Mitra Makmur price quotes and the 2015 Adib/Alam Jaya price quotes, the Department prefers to use SVs that are not company specific price quotes, because they do not represent a broad market average, where other more reliable data are available.<sup>320</sup> No party has contested the public availability or tax exclusivity of these price quotes. The 2013/14 Adib/Mitra Makmur are contemporaneous to the POR, whereas the 2015 Adib/Alam Jaya price quotes are not contemporaneous. All other things being equal, the Department prefers contemporaneous surrogate value information to non-contemporaneous surrogate value information.<sup>321</sup> We do not find that the 2015 Adib/Alam Jaya price quotes are specific to Respondents' fish waste by-product. For one, these have been further processed and packed for international trade, whereas Respondents' fish waste is not. 2015 Adib/Alam Jaya price quotes are not pick-up prices, whereas the 2013/14 Adib/Mitra Makmur price quotes are pick up prices, thus the terms of sale are more specific to Tafishco's sales of fish waste. In addition, Tafishco defined fish waste as: "The portion of fish extracted from filleting process, including head, bone, blood, skin."<sup>322</sup> Tafishco classified nuggets, stomach, bladder (maw), fish oil and fish meal separately.<sup>323</sup> The 2015 Adib/Alam Jaya price quotes are for fish bait and fish waste, and do not break out the individual components head, bone, blood, skin. Of these four items listed, the 2013/14 Adib/Mitra Makmur price quotes list prices for head, bones and skin.<sup>324</sup> However, the Mitra Makmur price quotes are for frozen products, and as Tafishco's fish wastes are not frozen,

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<sup>316</sup> See Final Results of Redetermination Pursuant to *Catfish Farmers of America et al. v. United States*, Consol. Court No. 12-00087, Slip Op. 14-146, (December 18, 2014) at 12 – 13 (citation omitted).

<sup>317</sup> See Petitioners' June 19, 2015 submission at Exhibit 2 (Affidavit of Dr. Nurilmala, *pangasius* expert).

<sup>318</sup> See Tafishco's May 7, 2015 submission at 27-29.

<sup>319</sup> See *Yipin*, 800 F. Supp. 2d 1226, 1304 (where the Court noted that if a set of data is not sufficiently "product specific," it is of no relevance whether or not the data satisfy the other criteria). See also *Tianjin Machinery*, 806 F. Supp. 1008, 1017-1018 (recognizing the fact that SVs must reflect the experience of the respondents' industry).

<sup>320</sup> See *Prestressed Concrete Steel Wire Strand from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 28560 (May 21, 2010) and accompanying Issues and Decision Memorandum at Comment I.B.

<sup>321</sup> See *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 36168 (June 17, 2013) and accompanying Issues and Decision Memorandum at Comment 6.

<sup>322</sup> See Tafishco's May 7, 2015 submission at 17.

<sup>323</sup> *Id.*

<sup>324</sup> See Petitioners' July 20, 2015 submission at Exhibits I-7 and I-8.

we have not used the Mitra Makmur price quotes for the final results. Therefore, for the final results, we find that the 2013/14 Adib price quotes meet the Department's SV criteria, are more specific than the 2015 Adib/Alam Jaya price quotes, or the 2013/14 Mitra Makmur price quotes, and represent the best available information to value Respondents' fish waste by-product.

## **Comment XV Customs Instructions**

### ***Respondents' Comments***

- Asia Pangasius Company Limited is not properly part of the Vietnam-wide entity and should not be included in the Vietnam-wide entity liquidation instruction.<sup>325</sup> In addition, Asia Pangasius had other circumstances that do not warrant it being part of the Vietnam-wide entity.<sup>326</sup>

### ***Petitioners' Comments***

- *Separate Rate Liquidation Instruction:* 1) Caseamex is not eligible for a separate rate and should instead be included in the Vietnam wide instruction; 2) the uncooperative tollers should instead be included in the Vietnam-wide liquidation instruction; 3) Vinh Quang should be included in the separate rate instruction.
- *Vietnam-wide Entity Liquidation Instruction:* 1) include case number A-552-801-000 for entries made by Nam Phuong and NTACO; 2) include the entire HVG group; 3) include Thufico along with the other QVD collapsed entities.
- *HVG Liquidation Instruction:* 1) if the Department subjects Asia Pangasius and the HVG Group to the Vietnam-wide rate, then it should include them in the Vietnam-wide entity instruction instead; 2) If the Department subjects Asia Pangasius to the Vietnam-wide rate, but not the other HVG companies, then the Department should assign a new case number to the HVG group and exclude Asia Pangasius.

**Department's Position:** With regard to Asia Pangasius, we will include them in the HVG liquidation instruction and not create a new CBP case number.<sup>327</sup> With regard to Caseamex, we will include the company in the Vietnam-wide entity liquidation instruction.<sup>328</sup> With regard to Tafishco's uncooperative tollers, Toller A and Toller B, we will include them in the Vietnam-wide entity liquidation instruction.<sup>329</sup> With regard to Vinh Quang, we will include them in the separate rate liquidation instruction. With regard to Nam Phuong and NTACO, we will include them in the Vietnam-wide entity liquidation instruction and include case number A-552-801-000 with regard to their entries.<sup>330</sup> With regard to Thufico and the QVD collapsed entity, we will include them in the separate rate liquidation instruction.<sup>331</sup>

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<sup>325</sup> See Respondents February 19, 2016, submission at section III.

<sup>326</sup> *Id.* at 11.

<sup>327</sup> See Comment IV herein.

<sup>328</sup> See Comment VI herein.

<sup>329</sup> See Comment I herein.

<sup>330</sup> See Comment VII herein.

<sup>331</sup> See Comment V herein.

## RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above 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 Enforcement & Compliance

18 MARCH 2016  
Date