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September 6, 2016

MEMORANDUM TO: Christian Marsh  
Acting Assistant Secretary  
for Enforcement and Compliance

FROM: Gary Taverman   
Associate Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Certain Frozen Warmwater Shrimp from the Socialist Republic of  
Vietnam: Issues and Decision Memorandum for the Final Results

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## I. SUMMARY

The Department of Commerce (“Department”) published the preliminary results of the administrative review of certain frozen warmwater shrimp (“shrimp”) from the Socialist Republic of Vietnam (“Vietnam”) on March 10, 2016.<sup>1</sup> The period of review (“POR”) is February 1, 2014, through January 31, 2015. We analyzed the case and rebuttal briefs that interested parties submitted on the record. As a result of our analysis, we made changes from the Preliminary Results. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

## II. BACKGROUND

In accordance with 19 CFR 351.309(c)(ii), the Department invited parties to comment on our Preliminary Results. On April 8, 2016, the Department extended the case and rebuttal brief schedule established in the Preliminary Results. On March 11, 2016, Viet Hai Seafood Co., Ltd. (“Fish One”) requested a public hearing and filed its case brief on April 1, 2016. VASEP<sup>2</sup> filed its case brief on April 25, 2016. On May 2, 2016, Petitioner<sup>3</sup> and ASPA<sup>4</sup> filed their rebuttal

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<sup>1</sup> See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Review; 2014–2015, 81 FR 12702 (March 10, 2016) (“Preliminary Results”).

<sup>2</sup> VASEP is the Vietnam Association of Seafood Exporters and Producers.

<sup>3</sup> Petitioner is the Ad Hoc Shrimp Trade Action Committee.

<sup>4</sup> ASPA is the American Shrimp Processors Association.



briefs. On June 17, 2015, we extended the final results deadline by 60 days.<sup>5</sup> On July 25 and 26, 2016, interested parties requested the Department to allow for additional briefing of a single issue.<sup>6</sup> On August 2, 2016, the Department held a public hearing. On August 11, 2016, we allowed interested parties to file additional briefing on the calculation of the separate rate. On August 16, 2016, VASEP,<sup>7</sup> Mazzetta Company LLC,<sup>8</sup> and two separate rate applicants<sup>9</sup> filed additional affirmative arguments regarding this issue. No parties filed rebuttal comments.

### III. PARTIAL RESCISSION OF ADMINISTRATIVE REVIEW

On July 6, 2016, VASEP, Petitioner, and ASPA withdrew their requests for review with respect to the Minh Phu Group and requested that the Department exercise its authority to extend the 90-day deadline to withdraw the requests for review and rescind the administrative review, in part, under extraordinary circumstances.<sup>10</sup> Section 351.213(d)(1) of the Department's regulations states that the Department will rescind an administrative review if a party requesting the review withdraws the request within 90 days of the publication of the notice of initiation. Further, 19 CFR 351.213(d)(1) allows the Department to extend the 90-day deadline if it considers it reasonable to do so.<sup>11</sup> We rescinded the review with respect to the Minh Phu Group on July 22, 2016.<sup>12</sup> Consequently, any issues raised in case and rebuttal briefs<sup>13</sup> with respect to the Minh Phu Group alone are considered moot for the final results, and not addressed below in the "Discussion of the Issues." As a result of rescinding the Minh Phu Group from the

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<sup>5</sup> See "Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, from James C. Doyle, Director, Office V, Antidumping and Countervailing Duty Operations, re; Extension of Deadline for Final Results of Antidumping Duty Administrative Review," dated June 17, 2016.

<sup>6</sup> See Letters from Mazzetta Company LLC and VASEP, dated July 25 and 26, 2016, respectively.

<sup>7</sup> See Letter from VASEP re; "Supplemental Case Brief," dated August 16, 2016 ("VASEP Supplemental Brief").

<sup>8</sup> Mazzetta Company LLC is a U.S. importer of subject merchandise. See Letter from Mazzetta Company LLC, re; "Additional Briefing," dated August 16, 2016 ("Mazzetta Brief").

<sup>9</sup> See Letter from Quoc Viet Seaproducts Processing Trading and Import-Export Co., Ltd. ("Quoc Viet") and Trong Nhan Seafood Company Limited ("Trong Nhan"), re; "Additional Briefing," dated August 16, 2016 ("SR Respondents Supplemental Brief").

<sup>10</sup> In particular, the parties explained their understanding that extraordinary circumstances exist because the withdrawals of review requests for the Minh Phu Group will assist the United States and Vietnam in reaching a mutually satisfactory resolution with respect to United States – Anti-dumping Measures of Certain Shrimp from Viet Nam (DS429) and United States Anti-dumping Measures of Certain Shrimp from Viet Nam (DS404).

<sup>11</sup> See Initiation of Antidumping and Countervailing Duty Administrative Reviews, 80 FR 18202 (April 3, 2015) ("AR10 Initiation Notice"). In the AR10 Initiation Notice, the Department stated that a party requesting an extension of the deadline must demonstrate that an "extraordinary circumstance" prevented it from submitting a timely withdrawal request, and that a determination to extend the deadline would be made on a case-by-case basis. Id., 80 FR at 18202. Although the parties' withdrawals of review request for the tenth administrative review were past the 90-day deadline, we determined that all parties that requested a review of the Minh Phu Group had withdrawn their requests and that the parties had demonstrated that extraordinary circumstances exist for this segment of the proceeding.

<sup>12</sup> See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Partial Rescission of Antidumping Duty Administrative Reviews (2014–2015; 2015–2016) and Compromise of Outstanding Claims, 81 FR 47758 (July 22, 2016).

<sup>13</sup> VASEP raised various issues in its case brief specific to the Minh Phu Group, such as the "double-counting of energy inputs" and "separate rate status for trade names." Because we have rescinded the Minh Phu Group from the review, we have not addressed any issues raised specific to the Minh Phu Group.

administrative review, Soc Trang Seafood Joint Stock Company (“Stapimex”) remains the sole mandatory respondent under active review.<sup>14</sup>

#### IV. SCOPE OF THE ORDER

The scope of the order includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,<sup>15</sup> deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

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

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, white-leg shrimp (*Penaeus vannamei*), banana prawn (*Penaeus merguensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

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

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

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<sup>14</sup> On July 25, 2016, and July 26, 2016, an importer interested party and VASEP, respectively, filed requests for the Department to open the administrative record and allow parties to comment on aspects of the final results, specific to separate rate respondents, following the rescission of Minh Phu Group from the administrative review.

<sup>15</sup> “Tails” in this context means the tail fan, which includes the telson and the uropods.

dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this order are currently classified under the following HTS subheadings: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and 1605.29.10.10. These HTS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.<sup>16</sup>

## V. DISCUSSION OF THE ISSUES

### General Issues

#### Comment 1: Differential Pricing

##### A. Whether the Department Interpretation of Section 777A(d)(1)(B) of the Act is Reasonable and Permissible

#### VASEP Case Brief:

- Although the statute is silent with how to address section 777A(d)(1)(B) of the Act for administrative reviews, in filling such a gap, the Department's interpretation must be permissible and reasonable in accordance with Chevron, and the Department's method is not reasonable.<sup>17</sup>

#### Petitioner's Rebuttal Brief:

- VASEP omits any reference to the CIT recently affirming the Department's determinations regarding its differential pricing methodology in the final results of the eighth administrative reviews of the antidumping duty order on certain frozen warmwater shrimp from both Vietnam and India.<sup>18</sup>
- VASEP's argument is not a legal argument; it is a complaint that the statute does not do enough to advantage the interests of a particular party. Accordingly, the Department need not adjust its use of Cohen's *d* thresholds for the final results.

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<sup>16</sup> On April 26, 2011, the Department amended the order to include dusted shrimp, pursuant to the U.S. Court of International Trade ("CIT") decision in Ad Hoc Shrimp Trade Action Committee v. United States, 703 F. Supp. 2d 1330 (CIT 2010) and the U.S. International Trade Commission ("ITC") determination, which found the domestic like product to include dusted shrimp. See Certain Frozen Warmwater Shrimp from Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Amended Antidumping Duty Orders in Accordance with Final Court Decision, 76 FR 23277 (April 26, 2011); see also Ad Hoc Shrimp Trade Action Committee v. United States, 703 F. Supp. 2d 1330 (CIT 2010) and Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam (Investigation Nos. 731-TA-1063, 1064, 1066-1068 (Review), USITC Publication 4221, March 2011).

<sup>17</sup> See VASEP Case Brief at 17-18 citing to Chevron, U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984) (Chevron).

<sup>18</sup> See Tri Union Frozen Products Inc. v. United States, 2016 CIT LEXIS 37 (April 6, 2016) ("Tri Union"); Apex Frozen Foods Private Ltd. v. United States, 144 F. Supp. 3d 1308 (CIT 2016) ("Apex").

## Department's Position:

The Department's differential pricing method is consistent with section 777A(d)(1)(B) of the Act and reasonable.

The purpose of section 777A(d)(1)(B) of the Act is to evaluate whether the Average-to-Average ("A-to-A") method is the appropriate tool to measure whether, and if so to what extent, a given respondent is dumping the subject merchandise at issue in the U.S. market

As an initial matter, it is worth pointing out that by its terms, section 777A(d)(1) of the Act applies directly only to less than fair value investigations. Nonetheless, it is the Department's practice to apply the same methodology it uses in investigations in administrative reviews as well to determine the appropriate comparison method for its calculations.

Notably, there is nothing in section 777A(d) of the Act that mandates how the Department measures whether there is a pattern of prices that differs significantly or explains why the A-to-A method or the Transaction-to-Transaction ("T-to-T") method cannot account for such differences. On the contrary, carrying out the purpose of the Act<sup>19</sup> is a gap filling exercise properly conducted by the Department.<sup>20</sup> As explained in the Preliminary Results, as well as in various other proceedings,<sup>21</sup> the Department's differential pricing analysis is reasonable, including the use of the Cohen's *d* test as a component in this analysis, and it is in no way contrary to the law.

With Congress' enactment of the Uruguay Round Agreements Act (URAA), section 777A(d) of the Act states:

(d) Determination of Less Than Fair Value.--

(1) Investigations.--

(A) In General. In an investigation under subtitle B, the administering authority shall determine whether the subject

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<sup>19</sup> See Koyo Seiko Co., Ltd. v. United States, 20 F.3d 1156, 1159 (Fed. Cir. 1994) ("The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value. Averaging U.S. prices defeats this purpose by allowing foreign manufacturers to offset sales made at less-than-fair value with higher priced sales. Commerce refers to this practice as 'masked dumping.' By using individual U.S. prices in calculating dumping margins, Commerce is able to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it. We cannot say that this is an unfair or unreasonable result." (internal citations omitted)).

<sup>20</sup> See Chevron, 467 U.S. 837, 842-43 (1984) (recognizing deference where a statute is ambiguous and an agency's interpretation is reasonable); see also Apex, 144 F. Supp. 3d at 1322-1331 (applying Chevron deference in the context of the Department's interpretation of section 777A(d)(1) of the Act).

<sup>21</sup> See, e.g., Welded Line Pipe From the Republic of Korea: Final Determination of Sales at Less Than Fair Value, 80 FR 61366 (October 13, 2015) (Lipe Pipe from Korea) and the accompanying Issues and Decision Memorandum at Comment 1; Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2012-2013, 80 FR 32937 (June 10, 2015) (CWP from Korea), and the accompanying Issues and Decision Memorandum at comments 1 and 2, and Welded ASTM A-312 Stainless Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014, 81 FR 46647 (July 18, 2016) at Comment 4.

merchandise is being sold in the United States at less than fair value--

- (i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or
- (ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

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

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

(2) Reviews.--In a review under section 751, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale.

The Statement of Administrative Action (SAA) expressly recognizes that:

New section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an A-to-A or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, i.e., where targeted dumping may be occurring.<sup>22</sup>

The SAA further discusses this new section of the statute and the Department's change in practice to using the A-to-A method:

In part the reluctance to use the A-to-A methodology had been based on a concern that such a methodology could conceal "targeted dumping." In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions."<sup>23</sup>

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<sup>22</sup> See Uruguay Round Agreement Act, Statement of Administrative Action (SAA), H.R. Doc. No. 103-316 at 843 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4161

<sup>23</sup> See SAA at 842.

With the enactment of the URAA, the Department’s standard comparison method in an LTFV investigation is normally the A-to-A method. This is reiterated in the Department’s regulations, which state that “the Secretary will use the {A-to-A} method unless the Secretary determines another method is appropriate in a particular case.”<sup>24</sup> As recognized in the SAA, the application by the Department of the A-to-A method to calculate a company’s weighted-average dumping margin has raised concerns that dumping may be masked or hidden. The SAA states that consideration of the average-to-transaction (A-to-T) method, as an alternative comparison method, may respond to such concerns where the A-to-A method, or the T-to-T method, “cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping *may* be occurring.”<sup>25</sup> Neither the Act nor the SAA state that “targeted dumping” only occurs where there is a pattern of prices that differ significantly. In other words, the U.S. sales which constitute a pattern are not necessarily the only sales where “targeted dumping” *may* be occurring or dumping *may* be masked. As stated in the Act, the requirements for considering whether to apply the A-to-T method are that there exist a pattern of prices that differ significantly and that the Department explains why either the A-to-A method or the T-to-T method cannot account for such differences.

Accordingly, the Department finds that the purpose of section 777A(d)(1)(B) of the Act is to evaluate whether the A-to-A method is the appropriate tool in investigations to measure whether, and if so to what extent, a given respondent is dumping the subject merchandise at issue in the U.S. market.<sup>26</sup> While “targeting” and “targeted dumping” may be used as a general expression to denote this provision of the statute,<sup>27</sup> these terms impose no additional requirements beyond those specified in the statute for the Department to otherwise determine that the A-to-A method is not appropriate based upon a finding that the two statutory requirements have been satisfied. Furthermore, “targeting” implies a purpose or intent on behalf of the exporter to focus on a subgroup of its U.S. sales. The court has already found that the purpose or intent behind an exporter’s pricing behavior in the U.S. market is not relevant to the Department’s analysis of the statutory provisions of section 777A(d)(1)(B) of the Act.<sup>28</sup> The Court of Appeals for the Federal Circuit (“CAFC”) has stated:

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<sup>24</sup> See 19 CFR 351.414(c)(1). This approach is also now followed by the Department in administrative and new shipper reviews. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101 (February 14, 2012) (Final Modification for Reviews) (where the Department explained that it would now “calculate weighted-average margins of dumping and antidumping duty assessment rates in a manner which provides offsets for non-dumped comparisons while using monthly average-to-average (“A–A”) comparisons in reviews, paralleling the WTO-consistent methodology that the Department applies in original investigations”).

<sup>25</sup> See SAA at 843 (emphasis added).

<sup>26</sup> See 19 CFR 351.414(c)(1).

<sup>27</sup> See, e.g., Samsung v. United States, 72 F. Supp. 3d 1359, 1363 (CIT 2015) (“Commerce may apply the A-to-T methodology ‘if (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or period of time, and (ii) the administering authority explains why such differences cannot be taken into account using’ the A-to-A or T-to-T methodologies. Id. § 1677f-1(d)(1)(B). Pricing that meets both conditions is known as ‘targeted dumping.’”).

<sup>28</sup> See JBF RAK LLC v. United States, 991 F. Supp. 2d 1343, 1355 (CIT 2014); *aff’d* JBF RAK LLC v. United States, 790 F.3d 1358 (Fed. Cir. 2015) (“JBF RAK”); see also Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States, 608 Fed. Appx. 948 (Fed. Cir. 2015) (“Borusan”).

Section 1677f-1(d)(1)(B) does not require Commerce to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods, nor does it mandate which comparison methods Commerce must use in administrative reviews. As a result, Commerce looks to its practices in antidumping duty investigations for guidance. Here, the {U.S. Court of International Trade (CIT)} did not err in finding there is no intent requirement in the statute, and we agree with the CIT that requiring Commerce to determine the intent of a targeted dumping respondent “would create a tremendous burden on Commerce that is not required or suggested by the statute.”<sup>29</sup>

The Department’s differential pricing method lawfully determines if there exists a pattern of prices that differ significantly under section 777A(d)(1)(B) of the Act.

As stated in section 777A(d)(1)(B) of the Act, the requirements for considering whether to apply the A-to-T method are that there exists a pattern of prices that differ significantly and that the Department explains why either the A-to-A method or the T-to-T method cannot account for such differences. The Department’s application of a differential pricing analysis in this review provides a complete and reasonable interpretation of the language of the statute, regulations and SAA to identify when pricing cannot be appropriately taken into account when using the standard A-to-A method, and it provides a remedy for masked dumping when the conditions exist.

As described in the Preliminary Results, the differential pricing analysis addresses each of these two statutory requirements for investigations. The first requirement, the “pattern requirement,” is addressed using the Cohen’s *d* test and the ratio test. The pattern requirement will establish whether conditions exist in the pricing behavior of the respondent in the U.S. market where dumping may be masked or hidden, where higher-priced U.S. sales offset lower-priced U.S. sales. Consistent with the pattern requirement, the Cohen’s *d* test, for comparable merchandise, compares the mean price of a given purchaser, region or time period to the mean price of all other purchasers, regions or time periods, respectively, to determine whether this difference is significant. The ratio test then aggregates the results of these individual comparisons from the Cohen’s *d* test to determine whether the extent of the identified differences in prices which are found to be significant is sufficient to find a pattern and satisfy the pattern requirement, *i.e.*, that conditions exist which may result in masked dumping.

As stated in the Preliminary Results, the purpose of the Cohen’s *d* test is to evaluate “the extent to which the net prices to a particular purchaser, region, or time period differ significantly from the net prices of all other sales of comparable merchandise.”<sup>30</sup> The Cohen’s *d* coefficient is a recognized measure which gauges the extent (or “effect size”) of the difference between the means of two groups. In the final determination for Xanthan Gum from the PRC, the Department stated “{e}ffect size is a simple way of quantifying the difference between two groups and has

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<sup>29</sup> See JBFR AK, 790 F.3d at 1368 (internal citations omitted).

<sup>30</sup> See Preliminary Decision Memo at 5.

many advantages over the use of tests of statistical significance alone.”<sup>31</sup> In addressing Deosen’s comment in Xanthan Gum from the PRC, the Department continued:

Effect size is the measurement that is derived from the Cohen’s *d* test. Although Deosen argues that effect size is a statistic that is “widely used in meta-analysis,” we note that the article also states that “{e}ffect size quantifies the size of the difference between two groups, and may therefore be said to be a true measure of the significance of the difference.” The article points out that the precise purpose for which the Department relies on the Cohen’s *d* test to satisfy the statutory language, to measure whether a difference is significant.<sup>32</sup>

The idea behind the Cohen’s *d* coefficient is that it indicates the degree by which the distribution of prices within the test and comparison groups overlaps or, conversely, how significant the difference is between the prices in the test and comparison groups. This measurement is based on the difference between the means of the test and the comparison groups relative to the variances of prices within the two groups, *i.e.*, the pooled standard deviation. When the difference in the weighted-average sale prices between the two groups is measured relative to the pooled standard deviation, then this value is expressed in standardized units (*i.e.*, the Cohen’s *d* coefficient) based on the dispersion of the prices within each group, and quantity of the overlap or, conversely, the significance of the differences, in the prices within the two groups. In other words, the “significance” of differences specifically to purchasers within a given group is addressed through the Cohen’s *d* test.

The Department thus relies on the Cohen’s *d* coefficient as a measure of effect size to determine whether the observed price differences are significant. In this application, the difference in the weighted-average (*i.e.*, mean) U.S. price to a particular purchaser, region or time period (*i.e.*, the test group) and the weighted-average U.S. price to all other purchasers, regions or time periods (*i.e.*, the comparison group) is measured relative to the variance of the U.S. prices within each of these groups (*i.e.*, all U.S. prices).

The CIT in Apex affirmed the Department’s use of the Cohen’s *d* test as lawful:

Here, Commerce has reasonably exercised its discretion and considered weighted-average export prices in the Cohen’s *d* test. Neither the statute nor Commerce’s practice require it to identify significant price differences through the use of individual export prices rather than weighted-average export prices. Commerce reasonably determines whether export prices differ significantly among purchasers, regions, or time periods by evaluating the relative difference between the weighted-averages of two subgroups of sales. As described above, the test group is comprised of sales to a particular purchaser, region, or time period, and

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<sup>31</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 from the PRC”) and the accompanying Issues and Decision Memorandum at Comment 3 (emphasis in the original, internal citations omitted); quoting from Coe, “It’s the Effect Size, Stupid: What effect size is and why it is important,” Paper presented at the Annual Conference of British Educational Research Association (Sept. 2002), <http://www.leeds.ac.uk/educol/documents/00002182.htm>.

<sup>32</sup> Id. (emphasis in original).

the comparison group is comprised of sales to the other purchasers, regions, or time periods outside of the test group. Commerce then calculates the weighted-average of the export prices that comprise each of these groups and if the difference between the weighted-averages reaches a certain level, Commerce finds that the price differences are significant. The court can discern from Commerce's explanation that export prices differ significantly among purchasers (or regions or time periods) where Commerce observes significant price differences between the weighted-average of sales to a particular purchaser (or region, or time period) and the weighted-average of sales to all other purchasers (or regions, or time periods). The court finds the use of weighted-average export prices reasonable in this case. Significant price differences between the weighted-averages of export prices reasonably indicate that export prices differ significantly because the analysis 'uses all of a respondent's reported U.S. sales of subject merchandise' and the weighted-averages are therefore representative of and account for all the export prices. Final I&D Memo at 34. Commerce's approach is thus able to effectuate the purpose of the analysis.<sup>33</sup>

Further, the CIT recently held in Tri Union that the Department's "reasons for choosing the Cohen's *d* test suffice to explain why the test is able to identify and discern significant price differences," and that the "use of the Cohen's *d* test here is reasonable because its use identifies significant price differences."<sup>34</sup>

The Department's differential pricing method lawfully determines if the A-to-A method can account for the significant prices differences

When the respondent's pricing behavior exhibits conditions in which masked dumping may be a problem – *i.e.*, where there exists a pattern of prices that differ significantly – then the Department considers whether the standard A-to-A method can account for "such differences" – *i.e.*, the conditions found pursuant to the pattern requirement. To examine this second statutory requirement, the "explanation requirement," the Department considers whether there is a meaningful difference between the weighted-average dumping margin calculated using the A-to-A method and that calculated using the appropriate alternative comparison method based on the A-to-T method. Comparison of these results summarize whether the differences in U.S. prices mask or hide dumping when NVs are compared with average U.S. prices (the A-to-A method) as opposed to when NVs are compared with sale-specific U.S. prices (the A-to-T method). When there is a meaningful difference in these results, the Department finds that the extent of masked dumping is meaningful to warrant the use of an alternative comparison method to quantify the amount of a respondent's dumping in the U.S. market, thus fulfilling the language and purpose of the statute and the SAA.

The simple comparison of the two calculated results belies all of the complexities in calculating and aggregating individual dumping margins (*i.e.*, individual results from comparing export

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<sup>33</sup> See Apex, 144 F. Supp. 3d at 1326.

<sup>34</sup> See Tri Union, CIT Slip Op. 16-33, at 78 (April 6, 2016); see also The Timken Company v. United States, Slip Op. 2016-47 (CIT May 10, 2016) at \*21 (finding that the Department's differential pricing methodology "lawfully identifies a pattern of export prices that differ significantly") ("Timken").

prices, or constructed export prices, with NVs). It is the interaction of these many comparisons of export prices or constructed export prices with NVs, and the aggregation of these comparison results, which determine whether there is a meaningful difference in these two calculated weighted-average dumping margins.

When using the A-to-A method, lower-priced U.S. sales (*i.e.*, sales which may be dumped) are offset by higher-priced U.S. sales. Congress was concerned about offsetting, and that concern is reflected in the SAA, which states that “targeted dumping” is a situation where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”<sup>35</sup> The comparison of a weighted-average dumping margin based on comparisons of weighted-average U.S. prices that also reflects offsets for non-dumped sales, with a weighted-average dumping margin based on comparisons of individual U.S. prices without such offsets (*i.e.*, with zeroing) precisely examines the impact on the amount of dumping which is hidden or masked by the A-to-A method. Both the weighted-average U.S. price and the individual U.S. prices are compared to a NV that is independent from the type of U.S. price used for comparison, and the basis for NV will be constant because the characteristics of the individual U.S. sales<sup>36</sup> remain constant whether weighted-average U.S. prices or individual U.S. prices are used in the analysis.

Consider the simple situation where there is a single, weighted-average U.S. price, and this average is made up of a number of individual U.S. sales which exhibit different prices, and the two comparison methods under consideration are the A-to-A method with offsets (*i.e.*, without zeroing) and the A-to-T method with zeroing.<sup>37</sup> The NV used to calculate a weighted-average dumping margin for these sales will fall into one of five scenarios with respect to the range of these different, individual U.S. sale prices:

- 1) the NV is less than all of the U.S. prices and there is no dumping;
- 2) the NV is greater than all of the U.S. prices and all sales are dumped;

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<sup>35</sup> See SAA at 842.

<sup>36</sup> These characteristics include may include such items as product, level-of-trade, time period, and whether the product is considered as prime- or second-quality merchandise.

<sup>37</sup> The calculated results using the A-to-A method with offsets (*i.e.*, no zeroing) and the calculated results using the A-to-T method with offsets (*i.e.*, no zeroing) will be identical. See Memorandum to the File, through Catherine Bertrand, Program Manager, Office V, from Irene Gorelik, Senior Analyst, Office V, re: “Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Analysis for the Final Results for Soc Trang Seafood Joint Stock Company,” dated September 6, 2016 (“Stapimex Final Analysis Memo”) at Attachment 2 (pages 168-170 of the SAS output), where the calculation results of the average-to-average method and each of the alternative comparison methods are summarized. The sum of the “Positive Comparison Results” and the “Negative Comparison Results” for each of the three comparison methods (*i.e.*, the A-to-A method, the “mixed” method, and the A-to-T method, are identical, *i.e.*, with offsets for all non-dumped sales (*i.e.*, negative comparison results), the amount of dumping is identical. As such, the difference between the calculated results of these comparison methods is whether negative comparison results are used as offsets or set to zero.

- 3) the NV is nominally greater than the lowest U.S. prices such that there is a minimal amount of dumping and a significant amount of offsets from non-dumped sales;<sup>38</sup>
- 4) the NV is nominally less than the highest U.S. prices such that there is a significant amount of dumping and a minimal amount of offsets generated from non-dumped sales;
- 5) the NV is in the middle of the range of individual U.S. prices such that there is both a significant amount dumping and a significant amount of offsets generated from non-dumped sales.

Under scenarios (1) and (2), either there is no dumping or all U.S. sales are dumped such that there is no difference between the weighted-average dumping margins calculated using offsets or zeroing and there is no meaningful difference in the calculated results and the A-to-A method will be used. Under scenario (3), there is a minimal (*i.e.*, de minimis) amount of dumping, such that the application of offsets will result in a zero or de minimis amount of dumping (*i.e.*, the A-to-A method with offsets and the A-to-T method with zeroing both results in a weighted-average dumping margin which is either zero or de minimis) and which also does not constitute a meaningful difference and the A-to-A method will be used. Under scenario (4), there is a significant (*i.e.*, non-de minimis) amount of dumping with only a minimal amount of non-dumped sales, such that the application of the offsets for non-dumped sales does not change the calculated results by more than 25 percent, and again there is not a meaningful difference in the weighted-average dumping margins calculated using offsets or zeroing and the A-to-A method will be used. Lastly, under scenario (5), there is a significant, non-de minimis amount of dumping and a significant amount of offsets generated from non-dumped sales such that there is a meaningful difference in the weighted-average dumping margins calculated using offsets and zeroing. Only under the fifth scenario can the Department consider the use of an alternative comparison method.

Only under scenarios (3), (4) and (5) are the granting or denial of offsets relevant to whether dumping is being masked, as there are both dumped and non-dumped sales. Under scenario (3), there is only a de minimis amount of dumping such that the extent of available offsets will only make this de minimis amount of dumping even smaller and have no impact on the outcome. Under scenario (4), there exists an above-de minimis amount of dumping, and the offsets are not sufficient to meaningfully change the results. Only with scenario (5) is there an above-de minimis amount of dumping with a sufficient amount of offsets such that the weighted-average dumping margin will be meaningfully different under the A-to-T method with zeroing as compared to the A-to-T / A-to-A method with offsets. This difference in the calculated results is meaningful in that a non-de minimis amount of dumping is now masked or hidden to the extent where the dumping is found to be zero or de minimis or to have decreased by 25 percent of the amount of the dumping with the applied offsets.

This example demonstrates that there must be a significant and meaningful difference in U.S. prices in order to resort to an alternative comparison method. These differences in U.S. prices

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<sup>38</sup> As discussed further below, please note that scenarios 3, 4 and 5 imply that there is a wide enough spread between the lowest and highest U.S. prices so that the differences between the U.S. prices and NV can result in a significant amount of dumping and/or offsets, both of which are measured relative to the U.S. prices.

must be large enough, relative to the absolute price level in the U.S. market, where not only is there a non-de minimis amount of dumping, but there also is a meaningful amount of offsets to impact the identified amount of dumping under the A-to-A method with offsets. Furthermore, the NV must fall within an even narrower range of values (i.e., narrower than the price differences exhibited in the U.S. market) such that these limiting circumstances are present (i.e., scenario (5) above). This required fact pattern, as represented in this simple situation, must then be repeated across multiple averaging groups in the calculation of a weighted-average dumping margin in order to result in an overall weighted-average dumping margin which changes to a meaningful extent.

Further, for each A-to-A comparison result which does not result in set of circumstances in scenario (5), the “meaningfulness” of the difference in the weighted-average dumping margins between the two comparison methods will be diluted. This is because for these A-to-A comparisons which do not exhibit a meaningful difference with the A-to-T comparisons, there will be little or no change in the amount of dumping (i.e., the numerator of the weighted-average dumping margin) but the U.S. sales value of these transactions will nonetheless be included in the total U.S. sales value (i.e., the denominator of the weighted-average dumping margin). The aggregation of these intermediate A-to-A comparison results where there is no “meaningful” difference will thus dilute the significance of other A-to-A comparison results where there is a “meaningful” difference, which the A-to-T method avoids.

Additionally, the extent of the amount of dumping and potential offsets for non-dumped sales is measured relative to the total export value (i.e., the denominator of the weighted-average dumping margin) of the subject merchandise. Thus, the “targeted dumping” analysis accounts for the difference in the U.S. prices relative to the absolute price level of the subject merchandise. Only under scenario (5) above will the Department find that the A-to-A method is not appropriate – where there is an identifiable above de minimis amount of dumping along with an amount of offsets generated from non-dumped sales such that the amount of dumping is changed by a meaningful amount when those offsets are applied. Both of these amounts are measured relative to the total export value (i.e., absolute price level) of the subject merchandise sold by the exporter in the U.S. market.

The CIT has affirmed the Department’s explanation of its “meaningful difference” test to determine whether A-to-A comparison results can account for significant price differences three times over the past year, holding that “such an explanation is reasonable and demonstrates why Commerce believes A-to-A, which allows for offsets and might mask significant price differences, cannot account for these price differences.”<sup>39</sup>

Accordingly, the Department has concluded that its interpretation of the purpose and intent of the statute, as implemented in its differential pricing analysis in this administrative review, is fully consistent with the requirements of the Act.

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<sup>39</sup>See Timken, Slip Op. 2016-47 at \*37. See also Apex, 144 F. Supp. 3d at 1331-1335; Tri Union 2016 LEXIS 37 at \*113-115.

## B. Cohen's *d* Coefficient Is a Measure of Whether Prices Differ "Significantly"

### VASEP Case Brief:

- Cohen's *d* is not an appropriate measure of whether prices differ significantly; rather it is a measure of effect size used primarily in the social sciences that is used to compare the magnitude of two different interventions on the same group or of the same intervention on two different groups.<sup>40</sup>
- The Department has provided no support for its automatic application of the Cohen's *d* thresholds in measuring whether there is a pattern of prices that differ significantly. Dr. Cohen's thresholds of "small," "medium" and "large" have no "real world sense" or "statistical significance." They are irrelevant "in the context of evaluating differences in prices and whether such differences are significant."<sup>41</sup>
- VASEP provides three hypothetical examples that demonstrate the fallacy of the application of the Cohen's *d* coefficient in this situation. Furthermore, VASEP argues that the use of a standardized measure (*i.e.*, relative to the variations in prices) is inappropriate in this situation and that the Department should rather compare price differences "in terms of normal price differences in the industry."<sup>42</sup> Therefore, it is unreasonable for the Department to examine significance relative "to standard deviations" rather than to "actual price{s}."<sup>43</sup>

### Petitioner's Rebuttal Brief:

- In section V.B of the CIT's decision in Tri Union, titled "VASEP Is Unable to Demonstrate that Commerce's Use of the Cohen's *d* Test to Identify Significant Price Differences in its Differential Pricing Analysis Is Unreasonable,"<sup>44</sup> the Court specifically stated that "Commerce has sufficiently explained why its differential pricing analysis, specifically its use of the Cohen's *d* test to identify significant price differences, is reasonable..."<sup>45</sup>
- The Court also stated that "for these reasons, Commerce stated that its "differential pricing analysis is reasonable, and the use of Cohen's *d* test as a component in this analysis is in no way contrary to the law."...Commerce's reasons for choosing the Cohen's *d* test suffice to explain why the test is able to identify and discern significant price differences. Commerce's use of the Cohen's *d* test here is reasonable because its use identifies significant price differences."<sup>46</sup>

### Department's Position:

The Department's reliance on the Cohen's *d* test is lawful and provides a reasonable approach to determine whether differences in U.S. prices among purchasers, regions or time periods are significant. VASEP puts forth several reasons unrelated to the language of the Act as to why

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<sup>40</sup> See VASEP Case Brief at 18.

<sup>41</sup> Id., at 18-19.

<sup>42</sup> Id., at 22.

<sup>43</sup> Id., at 19-23.

<sup>44</sup> See Petitioner Rebuttal Brief at 27, citing to Tri Union, 2016 CIT LEXIS 37, \*101 (April 6, 2016). This litigation is related to Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of Antidumping Administrative Review, 2012-2013, 79 FR 57047 (September 24, 2014) ("Vietnam Shrimp AR8 Final") and accompanying Issues and Decisions Memorandum at Comment 2c.

<sup>45</sup> Id.

<sup>46</sup> Id.

they believe the Department should modify its approach from the Preliminary Results. However, as VASEP acknowledges, there is nothing in the statute that mandates the means by which the Department is to measure whether there is a pattern of prices that differs significantly.<sup>47</sup> Further, VASEP recognizes that in carrying out the purpose of the statute the Department must exercise its discretion to fill a gap in the law.<sup>48</sup> As explained above and in the Preliminary Results, the Department's differential pricing analysis is reasonable and the use of Cohen's *d* test as a component in this analysis is in no way contrary to the law. In fact, as noted above, the CIT has agreed with the Department that our application of differential pricing methodology is lawful three times this year, in Apex, Tri-Union, and Timken.<sup>49</sup>

The Department disagrees with VASEP's assertion that "the Department's use of Cohen's *d* to determine whether prices differ significantly is neither reasonable nor consistent with the statutory requirement."<sup>50</sup> First, VASEP states that the Cohen's *d* coefficient is only used in the social sciences, without defining what "social science" encompasses. Social sciences include such faculties as psychology, anthropology, economics and politics. Economics is the science of examining the factors which determine the production, distribution and consumption of goods and services, such as shrimp from Vietnam. These factors will determine the economic goals, practices, and pricing behavior of producers, shippers, customers, and consumers of goods and services. Accordingly, according to VASEP's own explanation, a study which involves a Cohen's *d* analysis would be reasonable and appropriate.

VASEP provides two situations where a Cohen's *d* analysis would be used involving classroom performance and drug efficacy. The Department agrees that these may be two reasonable applications for a Cohen's *d* analysis (note that drug efficacy does not involve a social science but rather medical or natural science); however, these types of applications are not similar to that performed in the differential pricing analysis. Both of these situations involve predicting an unknown outcome from a given set of observed data (whether class size or the number of aides influences class performance; whether daily aspirin consumption reduces the chances for heart disease). This is not the type of application of a Cohen's *d* analysis as included in the differential pricing analysis. Predicting an unknown, future outcome implicitly requires that the data on which the analysis is based is a sample of a population because one is trying to predict another occurrence of that population. Such an analysis includes uncertainty, statistical inference, statistical error and confidence intervals. The Department's application of the Cohen's *d* test examines whether price differences are significant, and says nothing about the past or future pricing behavior of the exporter.

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<sup>47</sup> See VASEP Case Brief at 17-18.

<sup>48</sup> Id.

<sup>49</sup> See Apex, 144 F. Supp. 3d at 1331-1335; Tri Union, 2016 CIT LEXIS 37 at \*77-78 ("Commerce has sufficiently explained why its differential pricing analysis, specifically its use of the Cohen's *d* test to identify significant price differences, is reasonable" ... "VASEP's challenges to Commerce's use of the Cohen's *d* test in its differential pricing analysis fail."); and Timken, Slip Op. 2016-47 at \*37.

<sup>50</sup> See VASEP Case Brief at 23.

The Department disagrees with VASEP that it is not a reasonable approach to gauge the significance of price differences. In his introductory chapter to Statistical Power Analysis for the Behavioral Sciences,<sup>51</sup> Dr. Cohen describes “effect size” (“ES”) as follows:

{I}t can now readily be made clear that when the null hypothesis is false {i.e., there is some difference between the prices of the test and comparison groups}, it is false to some specific degree, i.e., the effect size (ES) is some specific nonzero value in the population. The larger this value, the greater the degree to which the phenomenon under study is manifested.

Thus, whether measured in one unit or another, whether expressed as a difference between two population parameters or the departure of a population parameter from a constant or in any other suitable way, the ES can itself be treated as a parameter which takes the value zero when the null hypothesis is true and some other specific nonzero value when the null hypothesis is false, and in this way the ES serves as an index of degree of departure from the null hypothesis.<sup>52</sup>

As quoted above from the initial situation where the Department used a differential pricing analysis:

Effect size is the measurement that is derived from the Cohen’s *d* test. Although Deosen argues that effect size is a statistic that is ‘widely used in meta-analysis,’ we note that the article also states that ‘{e}ffect size quantifies the size of the difference between two groups, and may therefore be said to be a true measure of the significance of the difference.’ The article points out that the precise purpose for which the Department relies on the Cohen’s *d* test to satisfy the statutory language, to measure whether a difference is significant.<sup>53</sup>

The Cohen’s *d* coefficient is one of many measures of “effect size.” Dr. Paul Ellis, in his publication The Essential Guide to Effect Sizes,<sup>54</sup> introduces effect size by asking a question: “So what? Why do this study? What does it mean for the man on the street?”<sup>55</sup> Dr. Ellis continues:

A statistically significant result is one that is unlikely to be the result of chance. But a practically significant result is meaningful in the real world. It is quite

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<sup>51</sup> See Cohen, Jacob, Statistical Power Analysis for the Behavioral Sciences, Second Edition, Lawrence Erlbaum Associates (1988) (“Cohen”), included in the submission from Curtis, Mallet-Prevost, Colt & Mosle LLP, Submission of Factual Information on Differential Pricing In the Tenth Review (September 25, 2015), Exhibit-07.

<sup>52</sup> See Cohen at 10.

<sup>53</sup> See Xanthan Gum from the PRC and the accompanying Issues and Decision Memorandum at Comment 3 (emphasis in the original, internal citations omitted); quoting from Coe, “It’s the Effect Size, Stupid: What effect size is and why it is important,” Paper presented at the Annual Conference of British Educational Research Association (Sept. 2002), <http://www.leeds.ac.uk/educol/documents/00002182.htm>.

<sup>54</sup> Ellis, Paul D., The Essential Guide to Effect Sizes; Cambridge University Press (2010) (Ellis); included in the submission from Curtis, Mallet-Prevost, Colt & Mosle LLP, “Submission of Factual Information on Differential Pricing In the Tenth Review” (September 25, 2015), Exhibit-04).

<sup>55</sup> Id., at 3.

possible, and unfortunately quite common, for a result to be statistically significant and trivial. It is also possible for a result to be statistically nonsignificant and important. Yet scholars, from PhD candidates to old professors, rarely distinguish between the statistical and the practical significance of their results.<sup>56</sup>

In order to evaluate whether such a practically significant result is meaningful, Dr. Ellis states that this “implies an estimation of one or more effect sizes.”<sup>57</sup>

An effect size refers to the magnitude of the result as it occurs, or would be found, in the population. Although effects can be observed in the artificial setting of a laboratory or sample, effect sizes exist in the real world.<sup>58</sup>

Accordingly, the Department has relied upon a measure of effect size, namely the Cohen’s *d* coefficient, as part of its differential pricing analysis in these final results of review to determine whether the observed price differences are significant. In this application, the difference in the weighted-average (i.e., mean) U.S. price of a particular purchaser, region or time period (i.e., the test group) and the weighted-average U.S. price of all other purchasers, regions or time periods (i.e., the comparison group) is measured relative to the variance of the U.S. prices within each of these groups (i.e., all U.S. prices).

As recognized by Dr. Ellis in the quotation above, the results of an analysis may have statistical and/or practical significance, and that these two distinct measures of significance are independent of one another. In its case brief, VASEP accedes to the distinction and meaning of “effect size” when it states “While application of the t test {a measure of statistical significance} in addition to Cohen’s *d* might at least provide the cover of statistical significance, it still would not ensure practical significance.”<sup>59</sup> The Department agrees with this statement -- statistical significance is not relevant to the Department’s examination of an exporter’s U.S. prices when examining whether such prices differ significantly. The Department’s differential pricing analysis, including the Cohen’s *d* test, includes all U.S. sales which are used to calculate a respondent’s weighted-average dumping margin; therefore, statistical significance, as discussed above, is inapposite. The question is whether there is a practical significance in the differences found to exist in the exporter’s U.S. prices among purchasers, regions or time periods. Such practical significance is quantified by the measure of “effect size.”

Dr. Ellis also states in his publication that the “best way to measure an effect is to conduct a census of an entire population but this is seldom feasible in practice.”<sup>60</sup> Dr. Ellis also recognizes that basing an analysis on a sample of the population data may even be desirable when the sample data is representative of the population as a whole.<sup>61</sup> When such sampling is the basis for

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<sup>56</sup> Id., at 3-4.

<sup>57</sup> Id., at 4.

<sup>58</sup> Id., at 4-5.

<sup>59</sup> See VASEP Case Brief at 22.

<sup>60</sup> See Ellis at 5.

<sup>61</sup> For example, even if it were even feasible to determine the efficacy of a new medicine on its ability to cure each individual diagnosed with a certain disease, it would likely be more desirable and management to use a sample of patients if they could adequately reflect such efficacy on the population as a whole.

an analysis, each of the measures used to calculate the effect size (e.g., means and variances) are estimates of the same measures for the population as a whole. Accordingly, the precision of these estimated values must be ascertained such that the statistical significance of these estimates is an intricate component of the results of the study. Thus, the results of an analysis based on a sample of data from the population as a whole may have both statistical significance and practical significance.

VASEP argues that Dr. Cohen's thresholds of "small," "medium" and "large" are arbitrary and meaningless in the context of examining whether prices differ significantly. As discussed above, the Cohen's *d* coefficient, and measures of effect size in general, are a logical and reasonable approach to determine whether price difference among purchasers, regions or time periods are significant. The Department's discussion of the relevance of Dr. Cohen's thresholds is included in the next section devoted exclusively to this issue.

VASEP's first example, consisting of five sets of three numbers each, is meaningless with regards to the Department Cohen's *d* test. For each of these sets of numbers, VASEP calculates an identical standard deviation of 1.<sup>62</sup> Accordingly, VASEP concludes that each of these groups of numbers is significantly (*i.e.*, "large") different apparently because the calculated standard deviation is equal to or greater than 0.8, and that the Department is "adopting a mechanical application of Cohen's *d* in effect is finding that all of these differences are 'significant.'"<sup>63</sup> VASEP's analysis and conclusions are irrelevant, as VASEP has conflated "standard deviation" (as calculated for each of these sets of numbers) with "pooled standard deviation," which is the basis of the Cohen's *d* test. Nonetheless, VASEP argues, as it does later in its case brief, that the Cohen's *d* coefficient is inadequate for determining "significance" because it only considers relative price differences and not absolute price difference, *i.e.*, the comparison of the differences in prices with the absolute price level. This distinction will be addressed below.

VASEP's continues its misplaced criticism of the Cohen's *d* test with its second example.<sup>64</sup> For dataset #1, VASEP also calculates a standard deviation of 1,<sup>65</sup> and concludes that these price differences are also significant. Furthermore, VASEP concludes that "{n}or could one conclude that there is hidden dumping given the symmetry of the pricing pattern in data set 1." Both conclusions are inapposite. First, values in dataset #1 are not being compared to any other dataset, such that one would examine whether the values in this dataset differ significantly from the values in a second dataset. Second, VASEP's conclusion regarding dumping is incomplete. There are no references to NV in this example, just as there is no inclusion of NV when considering there is a pattern of U.S. prices that differ significantly. As described by the Department above in Section (A), there are five general scenarios which describe the relationship between a range of prices for a group of U.S. sales and the NV for those sales. In three of those

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<sup>62</sup> The Department notes that if each set of numbers in this example represent a population, as in the Department's Cohen's *d* test, then the standard deviation for each of these number sets is 0.816497. If one considered these sets of numbers to be samples, rather than populations, then the standard deviation for each of these number sets is 1. The difference in the results is due to different degrees of freedom when calculating a standard deviation for a population vis-à-vis a sample.

<sup>63</sup> See VASEP Case Brief at 19 (emphasis in original).

<sup>64</sup> *Id.* at 19-20.

<sup>65</sup> The Department notes that, unlike in VASEP's first example, the standard deviation calculated for dataset #1 is based on the formula for a population and not a sample.

five scenarios, dumping will be “hidden” or masked, and in only one of those scenarios will dumping be masked to an extent that the A-to-A method will not account for such differences. Since VASEP’s example does not make any attempt to compare values between two groups of data, and makes no mention of NV or its relationship to the hypothesized prices, its conclusions of “significant differences” and “hidden dumping” are meaningless.

In this second example, VASEP also includes a second dataset with nine observations. For this data, the mean is 114.78 and the standard deviation is 4.76. VASEP’s one conclusion regarding this data is that when dataset #1 is “compared with data set 2 (the base set) this passes the 0.8 threshold for “large” used by the Department.” However, this is in error; the difference in the means is 2.22;<sup>66</sup> the pooled standard deviation is 3.44;<sup>67</sup> and the Cohen’s *d* coefficient is 0.65.<sup>68</sup> Therefore, VASEP’s conclusion, however it was formed, is incorrect; but even if it were correct, it would only demonstrate that the numbers in these two datasets have been found to differ significantly based on Dr. Cohen’s “large” threshold, the appropriateness of which will be discussed further below in Section (C).

VASEP’s third example designates dataset #1 from the second example as the test group, and defines comparison group which includes seven observations. VASEP calculates a mean and standard deviation for both groups, and a Cohen’s *d* coefficient of 0.871.<sup>69</sup> VASEP notes that (1) the test group overlaps the comparison group by 50%; (2) there is only a difference of 1 between the lowest price in the test group and the lowest price in the comparison group, which is less than 1% of the lowest value in either group. From these observations, VASEP concludes, in “common sense terms,” that it is absurd to find that these values in these two groups differ significantly. The Department disagrees. With regards to overlap between the two groups of data, this is not unexpected, and even expected that the U.S. prices for comparable merchandise between test and comparison groups overlap one another. Dr. Cohen himself addressed overlap where he quantified the proportion of non-overlap for the various values of the Cohen’s *d* coefficient.<sup>70</sup> However, Dr. Cohen’s quantification of non-overlap for various values of the Cohen’s *d* coefficient that are for two groups of data based random samples with assumed characteristics. As noted elsewhere, the Department’s analysis does not involve sampling of the U.S. sale prices in the differential pricing analysis; accordingly, it has not relied on this characteristic of Dr. Cohen’s work with measures of effect size, even though Dr. Cohen recognized that a measurement of non-overlap is “intuitively compelling and meaningful.”<sup>71</sup> VASEP’s second claimed shortfall of the Department’s approach, as raised elsewhere, is that the Cohen’s *d* coefficient is a relative measure and not a comparison of the price differences with the absolute prices being examined, and, thus, Dr. Cohen’s thresholds as used by the Department are arbitrary and without meaning. The Department disagrees and addresses this issue below.

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<sup>66</sup> The difference in the means = 117.0 – 114.78 = 2.22.

<sup>67</sup> The pooled standard deviation =  $\sqrt{\frac{(\sigma_1^2 + \sigma_2^2)}{2}} = \sqrt{\frac{(1.0^2 + 4.76^2)}{2}} = 3.44$

<sup>68</sup> The Cohen’s *d* coefficient =  $\frac{\text{difference in the means}}{\text{pooled standard deviation}} = \frac{2.22}{3.44} = 0.65$

<sup>69</sup> The Department notes that using the formulas which were used in these final results as well as for the preceding example, the Cohen’s *d* coefficient is 0.91.

<sup>70</sup> See Cohen at 21-23.

<sup>71</sup> Id., at 21.

Based on its (misplaced) conclusions from its three examples, VASEP concludes that “[g]iven the fact that Cohen’s *d* does not measure price differences relative to actual prices but only relative to standard deviations, it cannot be deemed to reasonably measure whether prices differ significantly.”<sup>72</sup> The Department’s application of the Cohen’s *d* test is flawed because Dr. Cohen’s thresholds of “small,” “medium” and “large” are arbitrary and only measure the magnitude of the differences in prices relative to their standard deviations (*i.e.*, a standardized metric) rather than using an actual metric, the difference relative to the price itself. Notwithstanding VASEP’s unreasoned conclusions, the Department disagrees with VASEP’s claims.

First, it is reasonable to examine the significance of the difference in prices of two groups of sales based on the variances in their prices. As stated in the SAA:

{T}he Administration intends that in determining whether a pattern of significant price differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant for on industry or one type of product, but not for another.<sup>73</sup>

The Cohen’s *d* coefficient does exactly this by gauging the difference in the mean prices of two groups based on the variance of prices within these two groups. When there is little variation in prices, then a small difference in the mean prices between the two groups may be significant where it would not be significant if the variation in prices were greater. Similarly, when there is greater variation in prices, then it will require a larger difference between the two mean prices for that difference to be significant. Accordingly, use of a measure such as the Cohen’s *d* coefficient exactly fits the intent behind this provision in the statute. Furthermore, as discussed below, Dr. Cohen’s thresholds are not arbitrary but have real life consequences as provided by Dr. Cohen.

Second, the Department disagrees that the differential pricing analysis does not also consider the observed price differences relative to the absolute price levels, as represented by both the U.S. price and also the NV. As discussed above, the meaningful difference test requires that the variation in the U.S. prices be large enough relative to their differences with NV to result in both non-*de minimis* amounts of dumping and meaningful amounts of offsets, and that both of these are measured relative to the U.S. price (*i.e.*, the denominator of the dumping margin). As explained above, only under scenario (5) will both of these conditions be met, whereas with scenarios (3) and (4), even though there is some degree of masked, or “targeted,” dumping, the differences in U.S. prices, even if significant from the Cohen’s *d* test, are not great enough to create differences between U.S. price and NV that are great enough relative to U.S. price to be meaningful.

For example, consider two of the five sets of numbers from VASEP’s first example above. The first group includes the “prices” 1, 2 and 3 and the fourth group includes the “prices” 1001, 1002

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<sup>72</sup> See VASEP Case Brief at 22-23.

<sup>73</sup> See SAA at 843.

and 1003.<sup>74</sup> The weighted-average price for these two groups is 2 and 1002, respectively. Assume that the NV for these two groups is also 2 and 1002, respectively. For A-to-A comparisons, the comparison result (i.e., “dumping margin”) for each of these groups of sales is zero because the difference between average U.S. price and NV is zero for both.<sup>75</sup> For A-to-T comparisons, the comparison results are 1, 0 and -1, respectively, for each sale in each group. The sum of these comparison results with offsets (i.e., no zeroing) is zero for both groups of sales and thus the “weighted-average dumping margin” is zero for both groups of sales. However, when aggregating the A-to-T comparison results with zeroing, the amount of dumping for each group of sales is 1; but the weighted-average dumping margin for each group of sales  $1/6 = 16.67\%$  and  $1/3006 = 0.03\%$ , respectively.

This extension of VASEP’s example clearly demonstrates that not only does variance in U.S. prices need to be significant, but that these differences must be meaningful in relation to both NV and U.S. price. The first group of sales represents scenario (5) above, where there is both a non-de minimis amount of dumping as well as a significant amount of offsets where there is a meaningful difference in the calculated weighted-average dumping margin where the A-to-A method results in a rate of zero and the A-to-T method results in non-de minimis rate of 16.67%. The other group of sales represents both scenario (3) and scenario (4) since there is neither a non-de minimis amount of dumping nor a significant amount of offsets because the range of the U.S. prices (1001, 1002 and 1003) is not great enough compared to the U.S. price level to generate sufficiently large comparison results. If the spread of the U.S. prices were greater, then the differences between U.S. price and NV would be larger such that either the amount of dumping or the amount of offsets could be significant relative to the absolute U.S. price. Thus, the variations in U.S. prices must be both significant and meaningful in order for both statutory requirements to be satisfied and permit the application of an alternative comparison method.

### **C. Most Experts Caution Against the Rote Application of Cohen’s Thresholds and Urge Users to Apply Threshold in the Context of What Is Being Measured**

#### **VASEP Case Brief:**

- The Cohen’s *d* test simply adopts the convention that “small” or “large” can be measured relative to the standard deviation of the population being studied. Thus, to say that the Cohen’s *d* test results in a “large” difference is simply to note that the difference between the two mean values is large relative to the spread of prices in each group.
- Cohen’s *d* compares outcomes across studies by using standard deviation as a common measure. When comparing the means of the groups being compared, Cohen’s *d* uses an arbitrary convention of “small,” “medium” and “large.” The Department adopted these conventions to measure whether prices differ significantly despite 1) an absence of evidence that that this type of comparison is appropriate and 2) overwhelming commentary stating that these conventions are arbitrary and not probative of the extent to which differences between groups actually are of importance.

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<sup>74</sup> Each “sale” involves a single unit, such that the weight for a weighted average is one. Thus, the amount of dumping or offsets will simply be the difference between U.S. price and NV, and the U.S. sales value is just a sum of the prices (6 for the first group and 3006 for the fourth group),

<sup>75</sup> The Department notes that this is also a very simplistic example of mathematical equivalence.

- Dr. Cohen recognized that the adopted Cohen’s *d* conventions of small, medium, and large are potentially arbitrary.<sup>76</sup> Further, other statistics scholars have found that Cohen’s *d* thresholds should be used as a last resort.<sup>77</sup>
- The Department must explain why Cohen’s *d* thresholds are valid in the context of the “targeted dumping” provision of the statute considering the concerns expressed by statistics experts regarding the automatic application of these thresholds. VASEP explains that a study conducted by statistics professors at George Washington University concluded that when seasonal as well as cyclical patterns in prices are not accounted for, *i.e.* appropriate adjustments to the data are not made before applying the Cohen’s *d* test, many companies that are not dumping and are obeying the law, will be erroneously identified as dumping.<sup>78</sup>
- The Department must explain why it does not need to make adjustments to its methodology necessary to adapt Cohen’s *d* from an appropriate test of behavioral statistics to an appropriate test of economic statistics.

### **Petitioner’s Rebuttal Brief:**

- VASEP’s claims are demonstrably false, as made evident by the Court’s ruling in Tri Union. The Court specifically stated that “VASEP’s argument assumes the mandatory respondents’ sales data reflects a normal distribution and are not differentially priced, but ‘Commerce has never claimed that the United States sales prices in this review exhibit a normal distribution’ and ‘has made no finding that United States prices tend to exhibit a normal distribution.’ . . . VASEP has not pointed to any record evidence that suggests that the sales data analyzed here reflects such a price distribution.”<sup>79</sup>
- VASEP does present record evidence in support of its contention that shrimp prices vary over time and that, as a result, the use of the Cohen’s *d* methodology does not identify differential pricing but, instead, finds that “the normal pattern of pricing for shrimp extending over a four year period to constitute targeted dumping.”<sup>80</sup> However, VASEP does no more than observe that commodity prices vary over time before immediately pivoting to the familiar complaint that the Department does not take their criticisms seriously enough.
- The “precise behavior” that antidumping law is intended to encourage is pricing at fair value – if this happens, it is immaterial as to whether the comparison methodology is A-to-T or A-to-A. VASEP seeks an end result that contravenes that basic purpose of the antidumping law and would prefer that the Department be stripped of the ability to address sales at less than fair value without offsets.

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<sup>76</sup> See VASEP Case Brief at 23-24, citing Cohen at 12.

<sup>77</sup> Id. at 24-25, citing Ellis at 41-42.

<sup>78</sup> See Gastwirth, Modares and Pan, “Some Statistical Aspects of the Department’s Use of Cohen’s *d* in measuring differential pricing in Anti-Dumping Cases That Should Be Considered Before it is Adopted,” included in the submission from Curtis, Mallet-Prevost, Colt & Mosle LLP, “Submission of Factual Information on Differential Pricing In the Tenth Review” (September 25, 2015) at Exhibit-20.

<sup>79</sup> See Petitioner Case Brief at 29, citing to Tri Union, 2016 CIT LEXIS 37, \*117-19.

<sup>80</sup> Id., citing to VASEP Case Brief at 33 (public version).

## Department's Position:

The Department disagrees with VASEP's claim that the Cohen's *d* test's thresholds of "small," "medium," and "large" are arbitrary, and that consequently the Department should use a higher threshold for the Cohen's *d* coefficient in order to find that the sales of the test group pass the Cohen's *d* test. Dr. Cohen himself describes these three cut-offs.<sup>81</sup> As an initial matter, the Court agreed with the Department with respect to this substantially identical argument in Tri Union.<sup>82</sup>

The effect size at the small threshold "is the order of magnitude of the difference in mean IQ between twins and non-twins, the latter being the larger. It is also approximately the size of the difference in mean height between 15- and 16-year-old girls."<sup>83</sup> For the medium threshold, the "effect size is conceived as one large enough to be visible to the naked eye. That is, in the course of normal experience, one would become aware of an average difference in IQ between clerical and semiskilled workers or between members of professional and managerial occupational groups" or "the magnitude of the difference in height between 14- and 18-year-old girls."<sup>84</sup> For the large threshold, the difference "is represented by the mean IQ difference estimated between holders of the Ph.D. degree and typical college freshmen, or between college graduates and persons with only a 50-50 chance of passing an academic high school curriculum. These seem like grossly perceptible and therefore large differences, as does the mean difference in height between 13- and 18-year-old girls..."<sup>85</sup>

Although these descriptions by Dr. Cohen are qualitative in nature, they are not arbitrary but represent real world observations. From Webster's dictionary,<sup>86</sup> "significant" has the following meanings:

1. having meaning;
2. a. having or likely to have influence or effect, of a noticeably or measurably large amount;  
b. probably caused by something other than mere chance.

Thus, the term "prices that differ significantly" connotes different prices where the difference has meaning, where it has or may have influence or effect, where it is noticeably or measurably large, and where it may be beyond something that occurs by chance. Certainly the examples for both Cohen's medium and large thresholds for effect size reasonably meet this level of difference. But as the Department noted in its Preliminary Decision Memo, the Department used the large threshold because "the large threshold provides the strongest indication that there is a significant difference between the means of the test and comparison groups..."<sup>87</sup> In other words, the significance required by the Department in its Cohen's *d* test affords the greatest meaning to

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<sup>81</sup> See Cohen at 24-27.

<sup>82</sup> See Tri Union, 2016 CIT LEXIS 37 at \*80-81.

<sup>83</sup> Id., at 25-26.

<sup>84</sup> Id., at 26 (citations omitted).

<sup>85</sup> Id., at 27 (citations omitted).

<sup>86</sup> See Webster's Ninth New Collegiate Dictionary (1986), p. 1096.

<sup>87</sup> See Preliminary Decision Memo at page 19.

the difference of the means of the prices among purchasers, regions and time periods. Furthermore, as originally stated in Xanthan Gum from the PRC:

In “Difference Between Two Means,” the author states that “there is no objective answer” to the question of what constitutes a large effect. Although Deosen focuses on this excerpt for the proposition that the “guidelines are somewhat arbitrary,” the author also notes that the guidelines suggested by Cohen as to what constitutes a small effect size, medium effect size, and large effect size “have been widely adopted.” The author further explains that Cohen's *d* is a “commonly used measure” to “consider the difference between means in standardized units.”<sup>88</sup>

Besides Dr. Cohen, VASEP also points to the concerns expressed by other scholars<sup>89</sup> as summarized by Paul Ellis<sup>90</sup> where the “advantages the interpretation of results using Cohen’s criteria remains a controversial practice.”<sup>91</sup> However, VASEP omits Dr. Ellis’ discussion of the advantages of Dr. Cohen’s thresholds, which has led to their wide acceptance. Dr. Ellis states:

The previous discussion reveals that the importance of an effect is influenced by when it occurs, where it occurs, and for whom it occurs. But in some cases these may not be easy assessments to make. A far simpler way to interpret an effect is to refer to conventions governing effect size. The best known of these are the thresholds proposed by Jacob Cohen. In his authoritative *Statistical Power Analysis for the Behavioral Sciences*, Cohen (1988) outlined a number of criteria for gauging small, medium, and large effect sizes estimated using different statistical procedures. ...

Cohen’s cut-offs provide a good basis for interpreting effect size and for resolving disputes about the importance of one's results. ...

Cohen's effect size classes have two selling points. First, they are easy to grasp. You just compare your numbers with his thresholds to get a ready-made interpretation of your result. Second, although they are arbitrary, they are sufficiently grounded in logic for Cohen to hope that his cut-offs “will be found to be reasonable by reasonable people”. In deciding the boundaries for the three size classes, Cohen began by defining a medium effect as one that is ‘visible to the naked eye of the careful observer’” To use his example, a medium effect is equivalent to the difference in height between fourteen- and eighteen-year-old girls, which is about one inch. He then defined a small effect as one that is less than a medium effect, but greater than a trivial effect. Small effects are equivalent to the height difference between fifteen- and sixteen-year-old girls, which is about half an inch. Finally, a large effect was defined as one that was as far above a

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<sup>88</sup> See Xanthan Gum from the PRC at Comment 3 (internal citations omitted); quoting from David Lane, et al., Chapter 19 “Effect Size,” Section 2 “Difference Between Two Means.”

<sup>89</sup> See VASEP Case Brief at 23-25.

<sup>90</sup> See Ellis at 41-42.

<sup>91</sup> Id., at 41.

medium effect as a small one was below it. In this case, a large effect is equivalent to the height difference between thirteen- and eighteen-year-old girls, which is just over an inch and a half.<sup>92</sup>

Thus, although there are critics of the use of Dr. Cohen's thresholds, Dr. Cohen, Dr. Ellis, and numerous other academic scholars find advantages to their use such that these thresholds "have been widely adopted." Therefore, the Department continues to find reasonable the application of the "large" threshold in its Cohen's *d* test when determining whether the differences in prices are significant in the U.S. market.

VASEP's reliance on the paper written by three professors from George Washington University<sup>93</sup> is also unavailing. The thrust of the paper is that the Department should adjust the pricing data for "seasonal as well as cyclical patterns, {because} when these are not accounted for, i.e., appropriate adjustments to the data are {not} made before applying the DOC methodology, many companies that are not dumping and are obeying the law, will be erroneously identified as dumping."<sup>94</sup> VASEP asserts that the numerous simulations conducted by the authors "indicated 'the importance of adjusting for normal price patterns' when using Cohen's *d* as a mechanism to uncover hidden dumping."<sup>95</sup> First, the purpose of the Cohen's *d* test is not to "uncover hidden dumping," but, as described above, is to determine whether the prices differences between purchasers, regions or time periods is significant. Second, the authors assume that the data which is being examined are random samples with normal distributions:

We assume sales prices are like a random sample from a normal distribution with the same mean \$4.08 and standard deviation (STD) \$0.48; the prices are truly independent of the region, quarter and purchaser. This scenario is consistent with *no dumping* as the distribution of sales prices is the same for any combination of region, quarter or season or purchaser.<sup>96</sup>

This is also not part of the Department's analysis. Furthermore, in calculating the weighted-average dumping margins, which may include unmasking dumping, the Department makes all of the adjustments required by the statute to the reported prices and its analysis, including for seasonal/cyclical patterns. Therefore, these considerations are accounted for in the Department analysis, and the assertions by the authors are misplaced.

VASEP argues that the Department must explain why it does not need to make adjustments to its methodology necessary to adapt Cohen's *d* from an appropriate test of behavioral statistics to an appropriate test of economic statistics. However, VASEP makes no attempt to identify what such adjustments might be. The statute, in general, provides all required adjustments to both

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<sup>92</sup> Id., at 40-41 (internal citations omitted).

<sup>93</sup> Gastwirth, Joseph L., Modarres, Reza and Pan, Qing, Some Statistical Aspects of the Department's Use of Cohen's *D* in Measuring Differential Pricing in Anti-Dumping Cases That Should Be Considered Before It Is Formally Adopted (Gastwirth, Modarres and Pan Paper), included in the submission from Curtis, Mallet-Prevost, Colt & Mosle LLP, "Submission of Factual Information on Differential Pricing in the Tenth Review" (September 25, 2015) at Exhibit 20.

<sup>94</sup> Id., at 4.

<sup>95</sup> See VASEP Case Brief at 26.

<sup>96</sup> See Gastwirth, Modarres and Pan Paper at 2-2 (emphasis in the original).

U.S. price and NV in order to make them comparable, including seasonality or rapidly changing production costs. In examining whether there exists a pattern of prices that differ significantly, the Department is analyzing a respondent's pricing behavior in the U.S. market, and has made similar adjustments, as with the comparison of U.S. price and NV, in order to minimize differences which will be accounted for in the margin calculations. However, to include factors in the differential pricing analysis which are not part of the margin calculations could result in not identifying significant prices differences which may mask dumping.

Furthermore, the CAFC has plainly stated that the Department is not required to consider why price differences exist.<sup>97</sup> If prices differ significantly, the question should not be whether there is an explanation to brush them aside, but rather can the A-to-A method account for these differences. Therefore, the Department continues to find that the framework of its differential pricing analysis, including the Cohen's *d* test, is a reasonable and logical reflection of, and consistent with, the language and purpose of the statute.

#### **D. Whether the Department's "One-Size-Fits-All" Approach to Determine If Prices Differ Significantly Reflects the Purpose of the Law or Is Consistent With the Legislative History**

##### **VASEP Case Brief:**

- VASEP presents several scenarios, each of which it claims demonstrates that the Department's "one-size-fits-all" approach, as exhibited in its Cohen's *d* test, is unreasonable. As VASEP states "significantly" is itself an ambiguous word that has different meanings in different contexts and at different times.<sup>98</sup>
- In VASEP's first scenario, it posits that the Department should measure the difference in U.S. prices based on the level of the U.S. prices. The example provided by VASEP is that a one-year difference in age is different when considering the age difference between a one and two year old, and the age difference between a 99 and 100 year old. Thus, the difference is "largely determine based on context."<sup>99</sup>
- Next, VASEP states that if "the pattern of prices normally differs by 30% because of seasonality or other factors, one might well conclude that prices do not differ significantly from year to year or period to period."<sup>100</sup> VASEP refers to the Gastwirth, Modarres and Pan Paper insisting that the Department make an adjustment to the reported prices for such factors.<sup>101</sup>
- VASEP's third scenario first recognizes the "domestic" (*i.e.*, comparison market) prices are used as a basis for comparisons, as NVs, with export prices. VASEP also recognizes that NVs may be based on either constructed value or factors of production:

Thus, for purposes of the calculation of the margins of dumping, differences in export prices must necessarily relate to differences in normal value. Changes in export prices that parallel changes in normal value over the same time period

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<sup>97</sup> See JBFRAK, 790 F.3d 1358, 1368; Borusan, 608 Fed. Appx. 948, 949.

<sup>98</sup> See VASEP Case Brief at 27-28.

<sup>99</sup> Id., at 27.

<sup>100</sup> Id., at 28.

<sup>101</sup> Id., at 26.

would have no effect on the margins of dumping. Similarly, changes in export prices that parallel changes in constructed value over the same time period, both in market and non-market economy inquiries, would have no effect on the margins of dumping.<sup>102</sup>

As a result, the Department should measure the differences in U.S. prices relative to the differences exhibited in NVs.

- VASEP asserts that this third scenario is supported by the SAA where it states:

In addition, the Administration intends that in determining whether a pattern of significant price differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant in one industry or type of product, but not for another.<sup>103</sup>

- To support its assertion in this third scenario, VASEP compares quarterly average U.S. prices for the Minh Phu Group by count size with shrimp prices as reported by the International Monetary Fund (“IMF”) over the period of review. VASEP provides an additional example based on CONNUM-specific Minh Phu Group’s price data, with the conclusion that its own analysis shows price stability, yet the Department determined that Minh Phu Group’s prices “differed significantly.”<sup>104</sup>
- VASEP also claims that its analysis in this third scenario, based on changes in prices over time, also applies equally to changes among purchasers and regions.

### **Department’s Position:**

First, as the Department rescinded the review with respect to the Minh Phu Group, no portions of Minh Phu Group’s responses or data are relevant for the final results; the Department is not calculating a final antidumping duty margin for the Minh Phu Group. Thus, we will not address VASEP’s issues raised as they pertain specifically to the Minh Phu Group or reference the Minh Phu Group’s data as a point of argument.

The Department disagrees with VASEP that its approach using the Cohen’s *d* test is unreasonable, and that the Department must adopt one of the alternative proposals by VASEP to evaluate whether prices differ significantly among purchasers, regions or time periods. As an initial matter, the term “significantly” as in “differ significantly” is not an amorphous word, the definition of which changes to meet one’s purpose. As noted above, Webster’s dictionary defines “significantly” as:

1. having meaning;
2. a. having or likely to have influence or effect, of a noticeably or measurably large amount;  
b. probably caused by something other than mere chance.

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<sup>102</sup> Id., at 28-29.

<sup>103</sup> See SAA at 843 (emphasis added by VASEP).

<sup>104</sup> Id., at 32-33.

Thus, the term “differ significantly” connotes differences that have meaning, where they have or may have influence or effect, where they are noticeably or measurably large, and where they may be beyond something that occurs by chance. As discussed above, the Department’s use of the Cohen’s *d* coefficient with the “large” threshold, as established and described by Dr. Cohen, reasonably fulfills this concept.

The Cohen’s *d* coefficient, itself, is one of a number of measures of effect size. For this measure, the difference in the means of two groups (e.g., the average U.S. prices of a test group and a comparison group), is gauged relative to the variance, or the spread, of U.S. prices in each group. When the variance of U.S. prices present in each of these groups is small (i.e., there is little variation in the prices), then the difference in the average U.S. prices need only be relatively small to be considered significant. However, if the variance of the U.S. prices is much greater, then the difference in the average U.S. prices must necessarily be larger in order to be found significant. The Department finds that this approach of gauging the size of the difference in prices relative to the range of prices present in the U.S. sales data to reasonable implement the language of the statute “prices ... that differ significantly.”

VASEP’s first scenario appears to recommend that the Department gauge the differences in the U.S. prices relative to the U.S. price rather than the variance of the U.S. prices for comparable merchandise. The Department does not find this approach to be more reasonable or preferable to that used in the Preliminary Results. Furthermore, this analysis is effectively included in the Department’s analysis when examining the “explanation” requirement. In the simplified situation of a single product, the difference in the margin calculations between the A-to-A method and the A-to-T method, where the NVs under both methods is the same, is a difference between the transaction-specific U.S. prices and the weighted-average U.S. price. These differences are measured relative to the U.S. price. As discussed above, when the NV falls in a range inside of the range of transaction-specific U.S. prices, then there will be a meaningful difference in the calculated results such that the A-to-A method would not be able to account for the price differences. Otherwise, under the four other situations described above, the A-to-A method would be able to account for the differences in U.S. prices such that an alternative comparison method would not be applied. Therefore, although VASEP’s first scenario may be reasonable, it does not make the Department’s approach with the Cohen’s *d* test unreasonable, and further this approach is already incorporated into the Department’s examination of the “explanation” requirement.

For VASEP’s second scenario, the Department disagrees with VASEP’s argument that it must adjust the U.S. prices or its analysis to account for some causal link for the price differences or for the intentions of the exporter in establishing its pricing behavior. The Act has no provision which requires the Department to consider any such factors when examining whether there exists a pattern of prices which differ significantly. The CAFC has already found that the purpose or intent behind an exporter’s pricing behavior in the U.S. market is not relevant to the Department’s analysis of the statutory provisions of section 777A(d)(1)(B) of the Act.<sup>105</sup> In JBF Rak, the CAFC stated:

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<sup>105</sup> See JBF RAK, 790 F.3d at 1368.

Section 1677f-1(d)(1)(B) does not require Commerce to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods, nor does it mandate which comparison methods Commerce must use in administrative reviews. As a result, Commerce looks to its practices in antidumping duty investigations for guidance. Here, the CIT did not err in finding there is no intent requirement in the statute, and we agree with the CIT that requiring Commerce to determine the intent of a targeted dumping respondent “would create a tremendous burden on Commerce that is not required or suggested by the statute.”<sup>106</sup>

The Department disagrees with VASEP’s third scenario which is an amalgamation of gauging the differences in U.S. prices relative to differences in NVs and/or comparison market sale prices (scenario one) with making adjustments to the U.S. price differences or the analysis to account for changes in NVs, production costs and/or world prices (scenario two). Besides the fact that these alternatives are different than the Department’s current approach, VASEP has failed to explain how these alternatives are reasonable or even supported by the language of the Act. Section 777A(d)(1)(B)(i) of the Act requires the existence of a pattern of U.S. prices that differ significantly. The Act makes no provision that the Department consider NVs, comparison market sale prices, production costs, or world prices. As such, the Department finds these proposals unreasonable.

Furthermore, VASEP’s proposals in scenario three are all based on price and other differences over time. VASEP also claims that “the same problems arising out of the Department’s methodology with respect to time period also apply to region and purchaser.”<sup>107</sup> The Department fails to understand how VASEP’s arguments related to time periods in scenario three can be transferred to an analysis based on regions or purchasers, and VASEP provides no further explanation. Although a respondent’s U.S. prices can be organized by U.S. purchaser and U.S. region, considering NVs, comparison market prices, production costs or world prices by U.S. purchaser or U.S. region is impossible. Therefore, VASEP’s assertion that its time-period-based proposals are equally valid for U.S. prices differences among regions or purchasers is nonsensical.

#### **E. The Methodology Used in Making Average-to-Transaction Comparison is Contrary to Law**

##### **VASEP Case Brief:**

- The Department’s methodology using a single NV based on surrogate values for inputs to compare with specific transaction prices over an entire POR is contrary to section 777A(d)(2) of the Act and the legislative history in the SAA.
- The Department must explain why it has compared the results of A-to-A comparison with the results of A-to-T comparison that uses a single NV for the POR and compares the individual export prices to this single NV rather than comparing the monthly NV to the corresponding monthly U.S. price.

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<sup>106</sup> Id. at 1355 (internal quotation marks and citation omitted).

<sup>107</sup> See VASEP Case Brief at 30.

- The dumping margins using the A-to-T method are not generated because any sales are differentially priced or “targeted dumped,” but because the Department is using a non-contemporaneous NV. The distortion created by this methodology is even more pronounced when, as is the case in the instant review, there are rapid changes in costs accompanied by rapid changes in export prices.
- The fact that the margins are higher in the A-to-T comparison is the result of nothing other than the use of an inappropriate NV and has nothing to do with differences, significant or otherwise, among export prices by purchaser, region, or time period.

**Petitioner’s Rebuttal Brief:**

- The Department has previously explained why prices differences cannot be accounted for using the A-to-A method.<sup>108</sup> Accordingly, the Department should continue to apply the A-to-T method when the Department finds there is a pattern of prices that differ significantly and the differences between the weighted-average dumping margins calculated using the A-to-A method and the A-T method is meaningful.
- VASEP leaves behind its criticism of the differential pricing methodology to challenge the A-to-T comparison methodology. The CIT disagreed with this challenge in Apex: “The fact that A-A was unable to calculate more than a negligible dumping margin while A-T was able to is reason enough to demonstrate that A-A could not account for the pattern of significant price differences here.”<sup>109</sup>

**Department’s Position:**

VASEP has completely distorted the application of the Act, and the Department finds its arguments inapposite to the instant administrative review. VASEP states:<sup>110</sup>

A further distortion of the Department’s methodology arises from the fact that it is using a single normal value based on annual costs (or surrogate values) for inputs to compare with specific transaction prices over the course of the entire period of review. This, of course, is contrary to the plain language of Section 777A(d)(2) which states:

In a review under section 751, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale.

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<sup>108</sup> Petitioner cites to Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers From the Republic of Korea, 77 FR 75988 (December 26, 2012) and accompanying Issues and Decision Memorandum at Comment 3b, and Seamless Refined Copper Pipe and Tube From Mexico: Final Results of Antidumping Duty Administrative Review; 2011-2012, 79 FR 36719 (June 30, 2014) and accompanying Issues and Decision Memorandum at Comment 4.

<sup>109</sup> See Petitioner Case Brief at 31, citing to Apex, 144 F. Supp. at 133 (citations omitted).

<sup>110</sup> See VASEP’s Case Brief at 35.

In this review, Vietnam has continued to be considered a non-market economy (“NME”).<sup>111</sup> As such, NV is based on section 773(c) of the Act, which provides for the calculation of POR-wide NV based on factors of production and surrogate values (“SVs”). There is no statutory or regulatory requirement for the Department to compile data to support the calculation of monthly or quarterly NVs for NME antidumping proceedings. Furthermore, neither the Act nor the Department regulations preclude the application of the A-to-T comparison methodology in NME proceedings even in the absence of monthly or quarterly NVs.<sup>112</sup> The Court agreed with the Department in this respect, stating that:

Plaintiffs alternatively argue that Commerce must use monthly weighted-average export prices instead of annual or quarterly weighted-average export prices....The court is unconvinced. Plaintiffs fail to show why the use of monthly averages is either required by the statute or regulation, or why the use of annual or quarterly averages is unreasonable. Commerce’s regulation instructs Commerce to apply A-A in reviews as follows:

(d) Application of the average-to-average method—  
... (3) Time period over which weighted average is calculated. . . .When applying the average-to-average method in a review, {Commerce} normally will calculate weighted averages on a monthly basis and compare the weighted-average monthly export price or constructed export price to the weighted-average normal value for the contemporaneous month. 19 C.F.R. § 351.414(d)(3). Plaintiffs’ argument misunderstands the function of the differential pricing analysis. The regulation cited by Plaintiffs is inapplicable in this context because it refers to Commerce’s use of averages in using the A-A comparison methodology to calculate dumping margins. The differential pricing analysis provides Commerce with a method to identify if a respondent's sales exhibit a pattern of significant price differences, not calculate dumping margins. The regulation in no way restricts the time period over which Commerce calculates the weighted-averages it uses for purposes of finding significant price differences.<sup>113</sup>

Accordingly, VASEP’s assertions are without merit.

#### **F. Whether the Department Should Disaggregate the Results of Cohen’s *d* and Make Separate Determinations Based on Customer, Region, and Period**

##### **VASEP Case Brief:**

- The Department must make a separate determination with respect to purchasers, regions or time periods. The statute permits the use of the alternative A-T method in situations in which

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<sup>111</sup> See Preliminary Decision Memo at page 6.

<sup>112</sup> Indeed, in Tri Union, VASEP challenged the Department’s use of a differential pricing method and the CIT affirmed the use of that method as lawful, at no point even suggesting that the nonmarket economy methodology for determining NV under section 773(c) of the Act was in any way inconsistent with the Department’s differential pricing method implemented consistent with a separate provision, section 777A(d)(1)(B) of the Act.

<sup>113</sup> See Apex, 144 F. Supp. 3d at 1327-1328.

it is demonstrated that prices differ significantly “among purchasers, regions, or time periods.” There is no statutory authority to bundle all three together.

- The Department should not aggregate the results of its application of the Cohen’s *d* test for all three categories into a single amount and then use this amount to determine whether the thresholds the Department has established for application of the A-to-T method are met. The differential pricing exercise being undertaken by the Department is intended to “unmask” hidden dumping. Ironically, in doing so the Department is masking the fact that sales are not differentially priced by region in most cases and not marginally differentially priced at all by customer.<sup>114</sup>

#### **Petitioner’s Rebuttal Brief:**

- The Department should continue to reject VASEP’s arguments on this issue because the Department has previously addressed this argument in Vietnam Shrimp AR8 Final, which VASEP has not challenged.<sup>115</sup>

#### **Department’s Position:**

We disagree with VASEP that the Department should consider the results of the Cohen’s *d* test by purchaser, by region, and by time period separately from one another. The Department considered all information on the record of this review in its analysis and drew reasonable inferences as to what that data show. Under the Cohen’s *d* test and ratio tests, the Department considers the pricing behavior of the producer or exporter in the U.S. market as a whole. The Department does not find the results of the Cohen’s *d* test by purchaser, region or time period to be analogous to an aggregation of “apples and oranges” but rather to be different aspects of a single pricing behavior of the producer or exporter. This analysis, based on the Cohen’s *d* and ratio tests, informs the Department as to whether there exists a pattern of prices that differ significantly for the producer or exporter as a whole. There is no provision in the Act requiring the Department to determine the existence of a pattern of prices that differ significantly by selecting only one of either purchaser, region or time period. Likewise, the results of the differential pricing analysis, including both criteria provided in the statute, will determine whether the A-to-A method is the appropriate comparison method with which the Department calculates a single weighted-average dumping margin for the producer or exporter as a whole.

As we stated in AR9 Final Results, VASEP is confusing the results of examining individual test groups within the Cohen’s *d* test with the aggregation of these individual results within the ratio test to determine whether there exists a pattern of prices that differ significantly.<sup>116</sup> As described in the Preliminary Results, the Cohen’s *d* test evaluates whether sales of comparable merchandise to a particular purchaser, region or time period exhibit prices that are significantly different from sales to all other purchasers, regions or time periods, respectively. These results are then aggregated for the producer or exporter as a whole to determine whether there exists a

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<sup>114</sup> See VASEP Case Brief at 38-39.

<sup>115</sup> Petitioner cites to Vietnam Shrimp AR8 Final at Comment 2c.

<sup>116</sup> 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), and accompanying Issues and Decision Memorandum (“AR 9 Final Results”) and accompanying Issues and Decision Memorandum at Comment 1F.

pattern of prices that differ significantly for that producer or exporter. If such a pattern is found to exist, then the Department will examine whether the standard A-to-A method can account for such differences. The purpose of this analysis is to determine whether the A-to-A method is an appropriate tool with which to measure the respondents' amount of dumping. The Department undertakes a similar process when measuring this amount of dumping. Specifically, the Department makes comparisons between NVs and EPs or CEPs for comparable merchandise, and then aggregates these comparison results to determine the amount of dumping for that respondent as a whole.

Furthermore, VASEP does not explain to what end the Department should consider the results of the Cohen's *d* test individually by purchaser, or by region, or by time period. If the Department finds, as in this review for Stapimex, that more than 33% of the sales pass the Cohen's *d* test based on prices differences among regions, should such a determination result in the Department applying the A-to-T method by region? What does it mean to calculate a respondent's weighted-average dumping margin by region (or by purchaser or by time period)? The Department concludes that such a parsing of the various types of comparative factors to be illogical, and the Act does not provide for such an approach to the calculation of dumping margins or weighted-average dumping margins by region (or by purchaser or by time period).<sup>117</sup> Alternatively, does VASEP argue that the Department must find that 33% of the sales by a respondent pass the Cohen's *d* test by time period, 33% of sales by purchaser, and 33% of sales by region? Again, the Act does not require such an analysis. As VASEP even notes in its case brief, section 777A(d)(1)(B)(i) of the Act says "among purchasers, regions **or** time periods" (emphasis added). Accordingly, such an interpretation of the meaning of the Act is not consistent with the text itself and is not reasonable.

Therefore, the Department continues to find that its use of the Cohen's *d* and ratio tests in the Preliminary Results is consistent with the Act and is a reasonable execution of its mandate to calculate the weighted-average dumping margin for Stapimex.

### **G. Whether the Department Correctly Includes Both Lower- and Higher-Priced U.S. Sales As Contributing To a Pattern of Prices That Differ Significantly**

#### **VASEP's Case Brief:**

- In applying Cohen's *d* test, the Department incorrectly considers the absolute value of the difference, and not just positive differences that may suggest targeting. "Taken to its extreme," according to VASEP, "it is possible that only high priced sales of a particular CONNUM would pass the Cohen's *d* test at 0.8 {resulting in} no hidden dumping because there are no low prices passing the test."<sup>118</sup>
- The Department should adjust the differential pricing methodology and use a one-tail or directional test in determining the potential existence of targeted dumping or differential pricing, and that test should include only those sales that are lower than the average U.S. price.

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<sup>117</sup> See section 771(35) of the Act.

<sup>118</sup> See VASEP Case Brief at 52-53

### **Petitioner’s Rebuttal Brief:**

- VASEP has failed to mention or address the Department’s prior response to these arguments,<sup>119</sup> and the Department should again reject these arguments for the final results.
- The Court has rejected this argument in Apex.

### **Department’s Position:**

First, as Petitioner points out, the CIT rejected this argument in Apex:

All sales are subject to the differential pricing analysis because its purpose is to determine to what extent a respondent’s U.S. sales are differentially priced, not to identify dumped sales. . . . Commerce is not restricted in what type of sales it may consider in assessing the existence of such a pattern so long as its methodological choice enables Commerce to reasonably determine whether application of A-T is appropriate.<sup>120</sup>

The statute does not require that the Department consider only lower priced sales in the differential pricing analysis. The Department has the discretion to consider sales information on the record in its analysis and to draw reasonable inferences as to what the data show. Contrary to VASEP’s claim, it is reasonable for the Department to consider both lower priced and higher priced sales in the Cohen’s *d* analysis because higher priced sales are equally capable as lower priced sales to create a pattern of prices that differ significantly.

VASEP states that the “hidden dumping is obviously not the result of high-priced sales, but rather the low-priced sales.”<sup>121</sup> VASEP continues “{a}lthough as a matter of mathematics, a positive or negative number could be considered ‘large,’ the mathematics must be grounded in some context of what is being measured. The context here is checking for evidence of possible targeted dumping...”<sup>122</sup> As noted above, the SAA defines “targeted dumping” as a situation where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”<sup>123</sup> VASEP either does not understand or chooses to ignore the SAA, that for “targeted” or masked dumping to occur, there must both be lower-priced U.S. sales which may be dumped, and higher-priced U.S. sales which may offset, or mask, other sales which are dumped. Therefore, VASEP’s arguments are clearly baseless.

The Act does not provide that the Department consider only higher priced sales or only lower-priced sales when conducting its analysis, nor does the Act specify whether the difference must be the result of certain sales being priced higher or lower than other sales. The Department has explained that higher-priced sales and lower-priced sales do not operate independently; all sales are relevant to the analysis.<sup>124</sup> Lower-or higher-priced sales could be dumped or could be

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<sup>119</sup> Petitioner cites to Vietnam Shrimp AR8 Final at Comment 2c.

<sup>120</sup> See Apex, 144 F. Supp. 3d at 1330 (citations omitted).

<sup>121</sup> See VASEP Case Brief at 41.

<sup>122</sup> Id., at 41-42.

<sup>123</sup> See SAA at 843.

<sup>124</sup> See Hardwood and Decorative Plywood From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 58273 (September 23, 2013) and accompanying Issues and Decision Memorandum at Comment 5.

masking other dumped sales—this is immaterial in the Cohen’s *d* test and in answering the question of whether there is a pattern of prices that differ significantly because this analysis includes no comparisons with NVs and section 777A(d)(1)(B)(i) of the Act contemplates no such comparisons. By considering all sales, higher-priced sales and lower-priced sales, the Department is able to analyze an exporter’s pricing practice and to identify whether there is a pattern of prices that differ significantly.

As the CIT held in Apex:

To discern whether the sales passing the Cohen’s *d* test constitute a pattern, Commerce has devised the ratio test to categorize a respondent’s pricing behavior. Commerce has chosen to consider all sales, regardless of whether they are higher or lower-priced sales, to evaluate the extent of the differentially priced sales. Commerce explained that all sales are relevant to its analysis because ‘{h}igher-priced sales and lower-priced sales do not operate independently . . . . Higher-or lower-priced sales could be dumped or could be masking other dumped sales . . . . By considering all sales, both higher-priced and lower-priced, the Department is able to analyze an exporter’s pricing behavior and to identify whether there is a pattern of prices that differ significantly.’ Final I&D Memo at 26. This practice is based upon a methodological approach that is reasonable and has been adequately explained.<sup>125</sup>

Moreover, finding such a pattern of prices that differ significantly among purchasers, regions, or periods of time signals that the exporter is discriminating between purchasers, regions, or periods of time within the U.S. market rather than following a more uniform pricing behavior. Where the evidence indicates that the exporter pricing behavior has created a condition in which dumping may be masked, and there is cause to continue with the analysis to determine whether the A-to-A method or the T-to-T method can account for such pricing behavior. Accordingly, both higher-and lower-priced sales are relevant to the Department’s analysis of the exporter’s pricing behavior.

Further, the Department finds that VASEP’s “extreme” example (*i.e.*, to demonstrate the inappropriateness of considering both lower- and higher-priced sales as contributing to a pattern of prices that differ significantly) actually demonstrates the need to consider that higher-priced sales can pass the Cohen’s *d* test. In this example, VASEP continues to erroneously cling to the argument that there must be lower-priced U.S. sales which must be found to be at significantly different prices (*i.e.*, pass the Cohen’s *d* test), and which are also below NV (*i.e.*, dumped) in order to find “targeted dumping.” The Department disagrees. VASEP claims that if, for comparable merchandise, sales to a single customer are markedly higher than the weighted-average price to all customers, and the prices to all other customers are slightly below this weighted-average price, then only the higher-priced sales to the one customer would pass the Cohen’s *d* test, which the Department should disallow. Assuming, *arguendo*, that the NV for this merchandise is equal to the weighted-average price to all U.S. sales, then for the A-to-A method there is no dumping. However, with the A-to-T method, comparisons with the lower-priced sales all result in dumping, whereas the comparisons with the higher-priced sales to the

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<sup>125</sup> See Apex, 144 F. Supp. 3d at 1329.

one customer result in potential offsets, perhaps enough to mask the entire amount of dumping found for the vast majority (lower-priced) of sales of this product. VASEP's "extreme" example illustrates a specific reason why higher-priced sales must be considered as potentially contributing to a pattern of prices that differ significantly, even if the lower-priced sales are not found to be at prices which differ significantly.

The Department disagrees with VASEP's repeated claim that the Department has failed to explain its interpretation of the Act. As discussed above, the Act sets no requirement as to the means by which the Department must identify prices that differ significantly. Accordingly, the Department has followed the guidance of the SAA with respect to "targeted dumping," which is one of the situations which may cause the A-to-A method to not be appropriate when evaluating the extent of a respondents dumping in the U.S. market. The SAA expressly describes "targeted dumping" as including both lower-priced and higher-priced U.S. sales, and this is the basis for the Department's approach in the Cohen's *d* test. Therefore, the Department's application of the Cohen's *d* test is reasonable and lawfully permissible.

#### **H. Exclusion of U.S. Sales in the Test Group From the U.S. Sales in the Comparison Group as Part of the Cohen's *d* Test**

##### **VASEP's Case Brief:**

- The Department should not exclude the test-group sales from the comparison-group sales used in calculating the Cohen's *d* coefficient, where, for example, where one customer (A) accounts for 90 percent of a product's sales and a second customer (B) accounts for the remaining 10 percent of the product's sales. If the sales to the test group are excluded from the comparison group, and customer A's sales are found to pass the Cohen's *d* test, then customer B's sales will also pass the Cohen's *d* test. This skews the results of the analysis as the Department should be using all sales in the comparison group, which VASEP implies would result in customer A's sales not passing the Cohen's *d* test if its sales, *i.e.*, 90 percent of all sales, are being compared to themselves.
- VASEP further explains that excluding the test group from the base group results in changing the threshold for what is considered a "normal" price. Using the example above, the base group for determining the mean for one customer is entirely different than the base group for determining the mean for the second customer.

##### **Petitioner's Rebuttal Brief:**

- VASEP has failed to mention or address the Department's prior response to these arguments,<sup>126</sup> and the Department should again reject these arguments for the final results.
- The Court has upheld the Department's practice as articulated in Vietnam Shrimp AR8 Final and AR9 Final Results.

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

First, as Petitioner points out, in Tri Union, the CIT affirmed the Department's explanation of its practice of excluding test-group sales, holding that:

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<sup>126</sup> Petitioner cites to Vietnam Shrimp AR8 Final at Comment 2c.

The court finds this explanation to be adequate and reasonable because it is arguably counterintuitive to include the potentially differentially priced sales in the base group for purposes of evaluating whether the target group sales prices differ significantly. VASEP might be able to make a different argument, but being able to do so does not make Commerce's decision and explanation unreasonable. VASEP, however, contends that comparing two subgroups of a CONNUM 'could yield the anomalous result that all prices within a given CONNUM differ significantly in that all could pass the Cohen's *d* test at above or below the 0.8 threshold.' . . . Commerce did not deny that such result may occur, but explained that such a result is logical and not anomalous as VASEP contends. Thus, the possibility that all sales within a given CONNUM differ significantly is not an unacceptable result. VASEP again has not pointed to record evidence to suggest that comparing two subgroups of sales of a particular CONNUM is unreasonable here.<sup>127</sup>

As Petitioner notes, on this record, VASEP has failed to identify record evidence suggesting that comparing two subgroups of sales of a particular CONNUM is unreasonable.

The Department disagrees with VASEP's assertion that the sales in each test group should also be included in the comparison group rather than have the test and comparison groups be independent (*i.e.*, mutually-exclusive) of each other. This would result in the sales prices of purchasers, regions or time periods being compared to themselves. Section 777A(d)(1)(B)(i) of the Act states that there must exist a pattern of prices for comparable merchandise that differ significantly "among purchasers, regions, or periods of time." It does not state there must exist a pattern between a purchaser, region and time period and all sales of the comparable merchandise. Thus, the Department has reasonably structured the Cohen's *d* test to compare the mean price to a given purchaser, region or time period with the mean price to all other purchasers, regions or time periods, respectively. As for the example provided by VASEP, the Department disagrees that the results of the Cohen's *d* test would be skewed. In this example, if the mean sale price to customer A differs significantly from the mean sale price to customer B, then the reverse should also be true, that is, that the mean sale price to customer B should also differ significantly from the mean sale price to customer A. To summarize, if A is different than B, then it is logical and reasonable the B is different from A.

To further expose the implications of VASEP's argument to include the test-group U.S. sales in the comparison group, consider VASEP's example of testing whether taking an aspirin every day lowers one's chance of having a heart attack. To follow VASEP's suggestion, this study would compare the incidences of heart attacks for the people taking a daily aspirin with the incidences of heart attacks for people who both take and do not take a daily aspirin. That is, the impact on the test group is partially measured based on that same impact on the test group. Such an approach would partially conceal, or mask, the effectiveness of taking a daily aspirin to reduce the incidences of heart attacks. However, to gauge the full effect of taking a daily aspirin, just as to fully gauge whether the average price to a test group differs significantly, this effect must be measured against an independent effect of not taking a daily aspirin. Analogous to the

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<sup>127</sup> See Petitioner Case Brief at 34, citing to Tri Union, 2016 CIT LEXIS 37, at \*123-24.

summation above, it is reasonable to state that if taking a daily aspirin significantly reduces the incidences of heart attacks, then the opposite is also true that not taking a daily aspirin will increase the incidences of heart attacks.

Therefore, the Department finds reasonable its approach to not include the test-group U.S. sales in the comparison group.

### **I. Whether the Department Incorrectly Determines Variance Based on Simple or Weighted Average**

#### **VASEP's Case Brief:**

- The Department incorrectly determines the pooled standard deviation based on a simple average, rather than a weighted average, of the standard deviations of the test and comparison groups, and thus biases the results of the Cohen's *d* test. VASEP provides formulas to demonstrate that if the pooled standard deviation is calculated using weights based on sale quantity that the results of the Cohen's *d* test change from passing to not passing.

#### **Petitioner's Rebuttal Brief:**

- VASEP has failed to mention or address the Department's prior response to these arguments,<sup>128</sup> and the Department should again reject these arguments for the final results.

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

VASEP argues that the Department should use a weighted-average rather than a simple average of the variances for the test and comparison groups when calculating the pooled standard deviation of the Cohen's *d* coefficient.<sup>129</sup> VASEP claims that the correct approach is a weighted-average, based on the volume of sales, to adjust for differences in sizes between the test and comparison groups, and that a simple average gives too much weight to the variance from the test groups.<sup>130</sup>

As explained above with respect to other issues, there is no statutory directive with respect to how the Department should determine whether a pattern of prices that differ significantly exists, let alone how to calculate the pooled standard deviation of the Cohen's *d* coefficient. The Department's intent is to rely on a reasonable approach that affords predictability. The Department determines that the best way to accomplish this goal is to use a simple average (i.e., giving equal weight to the test and comparison groups) when determining the pooled standard deviation. By using a simple average, the respondent's pricing practices to each group will be weighted equally, and the magnitude of the sales to one group does not skew the outcome.

VASEP provides an example that it claims demonstrates that the Department is "over weighing" the test group.<sup>131</sup> VASEP's example attempts to demonstrate that the simple average approach

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<sup>128</sup> Petitioner cites to Vietnam Shrimp AR8 Final at Comment 2c.

<sup>129</sup> See VASEP Case Brief, at 59-61.

<sup>130</sup> Id.

<sup>131</sup> Id.

leads to distorted results.<sup>132</sup> This example, however, actually provides further support for the Department's use of a simple average. If, in VASEP's hypothetical, the standard deviations are reversed between the test and comparison groups, the exact opposite result is derived. The Department is not persuaded that the results yielded by this example based on hypothetical data demonstrate that the Department's proposed approach is unreasonable generally or as applied in this administrative review. Therefore, we disagree with VASEP's claim that the proper approach is to account for differences in the size of each group. Rather, the Department finds it reasonable to use a simple average, in which the respondent's pricing practices to each group will be weighted equally, and the magnitude of the sales to one group does not skew the outcome.

In sum, VASEP presented a suggested alternative methodology for the Department to employ. VASEP's arguments, however, fall short of demonstrating that the Department's current methodology and use of the Cohen's *d* test does not comply with the statute, fails to address the requirements of section 777A(d)(1)(B)(i) of the Act, or is unreasonable.

#### **J. Whether the Department Has the Information Necessary to Make an Average-to-Transaction Comparison**

##### **VASEP's Case Brief:**

- The Department's application of the A-to-T methodology is unlawful because the Department has not sought or collected FOPs or SVs to determine NV on a monthly or quarterly basis. As a result, the Department does not have an appropriate basis for determining margins of dumping based on a comparison of average NVs and individual transaction prices. Section 777A(d)(2) of the Act and the SAA require a temporal relationship between the individual transactions being compared and weighted average NV to which those transactions are compared.
- The Department does not have and has not requested (or itself provided) surrogate values on a month-by-month or quarter-by-quarter basis. As a result, the Department does not have an appropriate basis for determining margins of dumping based on a comparison of average NVs and individual transaction prices. As a result, application of an average-to-transaction methodology in the instant case is not possible and would be unlawful.
- The Department is not entitled to, in effect, blame respondents for not providing information which is necessary for the Department to meet its statutory obligations when it has never requested such information.
- The Department cannot ignore the requirements of the law by simply stating that respondents did not provide information to permit it to make a determination consistent with the law. Rather, the Department must identify the information required to make a lawful determination and seek such information from respondents. If respondents do not provide the requested information, then Commerce may apply "facts available" or "adverse facts available."

##### **Petitioner's Rebuttal Brief:**

- Despite the wholesale failure to support their criticisms with record evidence, in the final subsection of the Case Brief regarding differential pricing (titled "The Department Does Not

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<sup>132</sup> Id.

Have and Has Not Sought the Information Necessary to Make An Average-to-Transaction Comparison”), VASEP asserts that it is the Department that has failed to obtain adequate record evidence to support the agency’s methodology.<sup>133</sup>

- VASEP has failed to provide an adequate record to support its contentions. The Department is under no obligation to solicit information to cure VASEP’s failure.
- For all of the foregoing reasons, the Department should reject the arguments presented by VASEP and make no adjustments to the application of the differential pricing methodology in the final results.

### **Department’s Position:**

We disagree with VASEP’s arguments regarding the lack of necessary information on the record to make determinations pursuant to section 773(c) of the Act. Indeed, VASEP’s arguments are nonsensical. The Department issued its NME questionnaire to respondents who, in turn, provided the requested information. The Department has not applied adverse findings to any respondents in this review, examined or not examined. As explained above, in the NME context, the statute and the Department’s A-to-T methodology do not require that NVs be determined on a monthly or quarterly basis, or that such comparisons be made to export prices.<sup>134</sup> Further, as we stated in AR9 Final Results, it is incumbent upon respondent for “creating an adequate record to assist Commerce’s determinations.”<sup>135</sup> Had the mandatory respondents considered the issue of calculating monthly or quarterly NVs to be an important factor for the mandatory respondents, they had to the opportunity to request such for the Department’s consideration at the appropriate time. However, here, we will continue to apply the either the A-to-A method or the A-to-T method where the weighted-average NV is based on period-wide factors of production and surrogate values consistent with section 773(c) of the Act.

### **Comment 2: Treatment of Frozen Shrimp Purchases**

#### **VASEP Case Brief:**

- In the original investigation and the eight subsequent administrative reviews, the Department recognized that there was an ultimately negligible effect on normal value between consuming fresh headless shrimp and semi-finished headless shrimp, and all respondents reported their factors of production (“FOPs”) on a headless basis anyway.
- The respondents do not separately track the actual consumption in their production records of shrimp per unique finished product separately for purchased frozen shrimp, self-produced (including tolled) frozen shrimp, and fresh shrimp. There is no record of which finished products are actually produced from these frozen materials or in what count sizes.
- There should be no distinction between the normal value based on purchased headless frozen shrimp (imported or domestic) and the normal value based on purchased fresh shrimp. The

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<sup>133</sup> See Petitioner’s Rebuttal Brief at 35-26, citing to VASEP Case Brief at 53 (public version).

<sup>134</sup> See 19 CFR 351.414.

<sup>135</sup> See AR9 Final Results and accompanying Issues and Decision Memorandum at Comment 1J. See also QVD Food v. United States, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (“{T}he burden of creating an adequate record lies with {interested parties} and not with Commerce.”); NSK Ltd. v. United States, 919 F. Supp. 442, 449 (CIT 1996) (quoting Nachi-Fujikoshi Corp. v. United States, 890 F. Supp. 1106, 1111 (CIT 1995), in turn citing Tiajin Machinery Import & Export Corp. v. United States, 806 F. Supp. 1008, 1015 (CIT 1992)).

total cost of fresh head-on shrimp is normally 99% of the cost of headless shrimp, as the only difference is the head being cut off. The only reason the respondents' data show a smaller percentage is because of the Department's inflated valuation of ice, which incorrectly increases the cost of headless in the Department's margin program.<sup>136</sup>

- Any value added from fresh head-on shrimp to frozen headless shrimp is miniscule, which makes questionable the utility of reporting purchased frozen headless shrimp separately from self-produced frozen headless shrimp. Doing so should not yield different results in the margin calculation, if the frozen shrimp surrogate value bore any resemblance to realistic values.
- Any additional selling, general and administrative (“SG&A”), overhead, or profit attributable to purchased shrimp are all accounted for fully by applying the financial ratios to the constructed headless shrimp price in the calculation of NV.
- The added burden of extracting these data and manually identifying the source of each line item, then artificially allocating consumption of these data across all products (irrespective of whether they actually received purchased frozen shrimp because that data is not present in the company's records), actually yields a less accurate result rather than a more accurate result.
- Because respondents purchase the vast majority of their imported frozen headless shrimp from a country believed to be receiving countervailable subsidies, the Department used a surrogate import value (“SV”) for frozen shrimp in the Preliminary Results.
  - However, the SV used is neither size- nor species-specific, making it an imprecise and non-specific SV.
  - It is a basket category that can include semi-finished headless shrimp that is consumed by the respondents, as well as finished goods – including cooked product – comparable to the merchandise sold by the respondents in the United States.
  - It is even more imprecise than the one used in the previous administrative review as it does not distinguish between coldwater and warmwater shrimp.
  - The SV value is not only less specific (lacking any size-specific information), but includes data from countries that do not produce the subject merchandise (41% of the volume is from cold-water producing countries). Accordingly, a frozen shrimp SV should not be used as it will necessarily lead to a less accurate result than using size-specific warmwater fresh shrimp SVs to value the respondents' consumption of comingled fresh and reprocessed frozen shrimp. Accordingly, there is no basis for applying a different SV for purchased fresh shrimp and purchased frozen shrimp. In contrast, the SV the Department relies on for fresh shrimp is size- and species-specific from a country producing warmwater shrimp.
- If the Department continues to apply a frozen shrimp SV to the frozen shrimp purchases, it should use the Indian GTA SV applied in the AR9 Final Results.<sup>137</sup>

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<sup>136</sup> See VASEP Case Brief at 2-3, citing to Memorandum from Irene Gorelik to the File, Administrative Review of Certain Frozen Warmwater Shrimp from Socialist Republic of Vietnam: Analysis for the Preliminary Results for Minh Phu Group (“MPG”), dated March 4, 2016, at Exhibit 2 (“MPG Prelim Analysis Memo”).

<sup>137</sup> See AR 9 Final Results and accompanying Issues and Decision Memorandum at Comment 2.

### **Petitioner’s Rebuttal Brief:**

- In AR9 Final Results, the Department found that it was appropriate to utilize a SV for respondents’ purchases of frozen shrimp. Although VASEP would prefer that the Department employ the same SV for their purchases of both fresh and frozen shrimp, it has failed to provide a basis upon which the agency might reverse its well-reasoned decision to utilize a separate SV for frozen shrimp purchases in this administrative review.
- The Department has a well-established practice, also reflected in the agency’s regulations, of strongly preferring to value all factors in a single surrogate country. The Department will resort to values from a secondary surrogate country, but will only do so if data from the primary surrogate country are unavailable or unreliable.
- VASEP asserts that the Department should use an SV obtained from India, rather than Bangladesh, for frozen shrimp, but declines to address the agency’s well-established practice. Instead, VASEP asserts that data from India would be “more accurate” than data from Bangladesh. This is not the legal standard. Accordingly, because Respondents have failed to present a basis upon which the Department might reverse its well-established practice of valuing factors in a single surrogate country when data are both available and reliable, the agency should make no adjustment to its frozen shrimp SV in the Final Results.

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

- The Department should make no changes with respect to the SV used in the Preliminary Results.

### **Department’s Position:**

#### A. Treatment of Frozen Shrimp Versus Fresh Shrimp

The Department disagrees with VASEP’s contention that there is no basis for applying different SVs for purchased fresh shrimp and purchased frozen shrimp. As in AR9 Final Results, VASEP made several arguments why the Department should consider purchased frozen shrimp as being identical to shrimp that are delivered fresh from local farms. The Department has already established the basis upon which it is necessary to distinguish different direct material inputs with appropriate SVs.<sup>138</sup> As the Department explained in AR9 Final Results, it is the Department’s practice to account for all materials used in the production of subject merchandise.<sup>139</sup> Fresh unprocessed shrimp is a different input from frozen semi-processed shrimp, which we consider to be an intermediate, processed input. Accordingly, these inputs must be reported separately and valued appropriately, which in this instance means applying different SVs to each.

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<sup>138</sup> See AR9 Final Results and accompanying Issues and Decision Memorandum at Comment 2.

<sup>139</sup> See, e.g., Xanthan Gum From the PRC at Comment 8 (“Our policy, consistent with section 773(c)(1)(B) of the Act, is to value the FOPs that a respondent uses to produce the subject merchandise. Accordingly, our standard NME questionnaire asks respondents to report the FOPs used in the various stages of production.”). See also Certain Activated Carbon from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review: 2011-2012, 78 FR 70533 (November 26, 2013) and accompanying Issues and Decision Memorandum at Comment 16.

As an initial matter, we disagree with VASEP's argument that reporting methodologies accepted in the segments prior to the ninth administrative review necessitates acceptance of those same methodologies in future segments. We have stated, in numerous cases, including AR9 Final Results, that "it is the Department's practice to treat each segment of an antidumping proceeding as independent proceedings with separate records which lead to independent determinations."<sup>140</sup> The administrative record (and arguments) may differ from one administrative segment to another administrative segment. For instance, if a respondent in this proceeding did not purchase frozen shrimp for re-processing into subject merchandise, there would be no issue of whether to separately value frozen shrimp inputs, and we would simply value the fresh shrimp with the appropriate SV. Here, however, Stapimex has reported purchases and subsequent withdrawals from inventory of frozen shrimp and was able to do so separately from fresh shrimp input. Thus, we have continued to value that purchased frozen shrimp using a frozen shrimp surrogate value.

In AR9 Final Results, we placed Vietnamese respondents on notice that, for all subsequent reviews, they would be required to separately track and report frozen shrimp consumption apart from fresh shrimp consumption.<sup>141</sup> The Department explained that, "for the future segments of this proceeding, we expect that respondent will track frozen and fresh shrimp inputs separately for FOP reporting purposes."<sup>142</sup> In response to this instruction, Stapimex reported purchases and subsequent withdrawals from inventory of frozen shrimp.<sup>143</sup> It was able to do so separately from fresh shrimp input and, thus, was able to distinguish fresh shrimp from frozen shrimp prior to commingling during production.<sup>144</sup> Although Stapimex did not report actual consumption, withdrawal from material inventory record-keeping is a close approximation of actual consumption, such that the Department is able to value the two different inputs separately for purposes of this administrative review.<sup>145</sup> For this reason, we are unpersuaded by VASEP's argument that the Department should not value frozen shrimp separately because "the respondents do not separately track the actual consumption in their production records of shrimp per unique finished product separately for purchased frozen shrimp, self-produced (including tolled) frozen shrimp, and fresh shrimp."<sup>146</sup> The Department addressed this in AR9 Final Results, where we determined that "the important fact that respondents have reported on the

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<sup>140</sup> See 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) and accompanying Issues and Decision Memorandum at Comment 1 ("Fish Fillets 2011-2012"). See also Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 74 FR 47551 (September 16, 2009) and accompanying Issues and Decision Memorandum at Comment 8.

<sup>141</sup> See AR9 Final Results and accompanying Issues and Decision Memorandum at Comment 2 ("the Department is hereby placing respondents on notice, that for future segments, frozen shrimp and fresh shrimp consumption should be tracked separately, for FOP reporting purposes.").

<sup>142</sup> Id.

<sup>143</sup> See Stapimex's Section D Questionnaire response, dated July 6, 2015, at page 7 ("Stapimex maintains material consumption records (withdrawal records) that track consumption of materials on a material code-specific basis month by month. We provide examples of such worksheets at Exhibit D-7 (for Fresh Shrimp Withdrawals), Exhibit D-8 for Frozen Shrimp Withdrawals...and Exhibit D-9 for the tying of such withdrawal records to production.").

<sup>144</sup> Id., at Exhibit D-9.

<sup>145</sup> See AR9 Final Results and accompanying Issues and Decision Memorandum at Comment 2 citing to 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 6 ("using its inventory records, Max Fortune could have reported ink and dye consumption...").

<sup>146</sup> See VASEP Case Brief at 2.

record is that they track frozen shrimp withdrawals from inventory.”<sup>147</sup> We reach that same determination here.

VASEP also argues, as it did in the prior review, that respondents having to manually isolate frozen shrimp from total shrimp consumption in reporting FOPs is burdensome and does not yield greater accuracy as a result. However, the record does not demonstrate that it was burdensome<sup>148</sup> to report frozen shrimp separately from fresh shrimp because Stapimex timely reported its Section D questionnaire response and corresponding FOP database, for which the Department provided ample time by granting deadline extensions based on its extension requests.<sup>149</sup>

We also disagree with VASEP’s argument that any value added from fresh head-on shrimp to frozen headless shrimp is miniscule, which makes questionable the utility of reporting purchased frozen headless shrimp separately from self-produced frozen headless shrimp. Doing so should not yield different results in the margin calculation, if the frozen shrimp surrogate value bore any resemblance to realistic values.<sup>150</sup> Stapimex, however, reported that it “receives purchased frozen product as a ‘finished good.’”<sup>151</sup> Thus, the record demonstrates that purchased frozen semi-processed shrimp contains added value that is not present in fresh shrimp input, because a ‘finished good’ is the result of expended materials, labor, and energy.<sup>152</sup> VASEP’s claim that this value is “miniscule” is speculation without any support in the record. As we stated in AR9 Final Results and continue to determine here, “fresh shrimp” in this context is shrimp that has been recently harvested and delivered to the plant for processing, while frozen processed shrimp is shrimp that has already undergone a significant transformation in processing shrimp: de-heading (approximately one-third of the fresh shrimp is the head).<sup>153</sup> In contrast to unprocessed fresh shrimp input, frozen processed shrimp input contains costs, such as labor, electricity, and water, as incurred by the frozen shrimp suppliers and built-in to the selling price, that are not incurred for fresh shrimp.

We also disagree with VASEP’s understanding of the additional cost of selling, general and administrative (“SG&A”) costs associated with the purchased frozen shrimp. VASEP posits that the SG&A applied to the NV for finished subject merchandise captures the SG&A for purchased frozen shrimp input, as “accounted for fully by applying the financial ratios to the constructed headless shrimp price in the calculation of NV.”<sup>154</sup> This is misguided. The calculated surrogate financial ratios attribute surrogate SG&A, overhead, and profit to the finished good that a respondent produces, rather than the input material that it purchases. Using a SV for frozen,

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<sup>147</sup> See AR9 Final Results and accompanying Issues and Decision Memorandum at Comment 2.

<sup>148</sup> See, e.g., Fujian Lianfu Forestry Co., Ltd. v. United States, 638 F. Supp. 2d 1325, 1341 (CIT 2009), where the Court noted that the respondent’s ability to eventually provide requested data did not demonstrate a burden.

<sup>149</sup> See, e.g., Letter from the Department, re: “Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Request for Extensions of Various Deadline for Stapimex and MPG,” dated June 16, 2015, wherein we granted Stapimex an extension of 28 days, in total, to submit its Section D questionnaire response and FOP data, originally due June 8, 2015.

<sup>150</sup> See VASEP Case Brief at 3.

<sup>151</sup> See Stapimex’s Supplemental Section C and D Questionnaire response, dated August 5, 2015, at 7.

<sup>152</sup> Id.

<sup>153</sup> See, e.g., Stapimex’s Second Supplemental Section C and D Questionnaire response, dated September 15, 2015, at Exhibit SSCD-3.

<sup>154</sup> See VASEP Case Brief at 3.

processed shrimp ensures that the Department uses an accurate value of the input. If a respondent purchases the processed, headless, frozen shrimp, it does not have to incur costs of such processing of the input when it produces the finished product. Accordingly, its SG&A, overhead and profit would not reflect such costs. These costs are captured within the SV. Using the unadjusted value of unprocessed fresh shrimp in place of the value of processed frozen shrimp input, which the respondent purchased and used in production, would understate the value of the input and, thus, distort the margin calculation.

We also disagree with VASEP's argument that the total cost of fresh head-on shrimp is normally 99% of the cost of headless shrimp...and that the only reason the respondents' data show a smaller percentage is because of the Department's inflated valuation of ice, which incorrectly represents of the cost of headless shrimp in the Department's margin program.<sup>155</sup> This argument is flawed because VASEP only discusses head-on shrimp versus headless shrimp as the main differences between frozen and fresh shrimp. VASEP does not acknowledge that purchased frozen shrimp has already been partially processed using labor, electricity, water, etc. VASEP has not provided any evidentiary support demonstrating that ice, as a percentage of NV, is distorting the results. In fact, a review of the SAS data output for Stapimex's margin calculation program, wherein we compared ice as a component of the highest and lowest calculated NVs, demonstrates that ice, as a percentage of total NV, is negligible compared to the other direct materials.<sup>156</sup> The data demonstrate that ice is not overstated as a result of the SV we selected, but instead is within the normal range of COM vis-à-vis other direct material inputs, such as water and electricity.

VASEP also argues generally that separating fresh from frozen shrimp input will not yield different results in the margin calculation. As an initial matter, we see no record evidence to support VASEP's apparent conclusion that differentiating frozen shrimp from fresh shrimp will not yield different results. In any event, however, we disagree with the premise that the Department should determine whether to value different inputs separately by first examining whether such a determination would affect the margin calculation. The purpose of valuing frozen shrimp using a different SV from fresh shrimp is because they are different raw materials and maintained separately in physical form prior to production as well as in the books and records, and doing so increases the accuracy of the calculation.<sup>157</sup>

Finally, VASEP argues that the Department should not separately value frozen shrimp because the frozen shrimp SV applied in the Preliminary Results, of which VASEP alleges various deficiencies,<sup>158</sup> will necessarily lead to a less accurate result than using the fresh shrimp SV. We disagree. With respect to count size, while we acknowledge that count-size is an important consideration and that the SV applied to the frozen shrimp input is not on a count-size basis, fresh unprocessed shrimp is a different input from frozen processed shrimp. Were we to apply the count size-specific fresh shrimp SV to the frozen shrimp input, we would certainly be

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<sup>155</sup> See VASEP Case Brief at 2-3.

<sup>156</sup> See Memorandum to the File, through Catherine Bertrand, Program Manager, Office V, from Irene Gorelik, Senior Analyst, Office V, re: "Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Analysis for the Final Results for Soc Trang Seafood Joint Stock Company," dated September 6, 2016 ("Stapimex Final Analysis Memo").

<sup>157</sup> See, e.g., Stapimex's Section D Questionnaire Response, dated July 6, 2016, at Exhibits D-5, D-7, and D-8.

<sup>158</sup> See VASEP Case Brief at 3-4.

undervaluing the frozen processed shrimp because the fresh shrimp SV does not contain the built-in added value of the single largest transformation of a whole fresh shrimp: de-heading. Thus, while the frozen shrimp SV is not on a count-size basis, the Department does not find that this consideration outweighs the undervaluation concern identified above. We find the same with respect to VASEP's concerns as to species. Regarding VASEP's claim that the frozen shrimp SV applied in the Preliminary Results includes cooked shrimp, we observe that VASEP supports this assertion by attributing the written description within the Indian GTA data to the Bangladeshi UN Comtrade data and determine that the description provided by the source itself (the Bangladeshi UN Comtrade data), "Shrimps & prawns, whether/not in shell, frozen," is the best indication of what the data contain.<sup>159</sup> This description provides no indication that these data include cooked shrimp. Finally, with respect to VASEP's claim that the UN Comtrade data is partially comprised of shrimp from coldwater shrimp producing countries, we note that VASEP bases this argument on the list of warmwater shrimp producing countries that it provided in its post-Preliminary Results SV comments.<sup>160</sup> However, VASEP fails to acknowledge that the UN Comtrade data for Bangladesh contains the majority of import data volume from the United States which is a producer and exporter of warmwater shrimp.<sup>161</sup>

## B. Frozen Shrimp Surrogate Value

We continue to value frozen shrimp using Bangladeshi UN Comtrade data, as it satisfies our surrogate value selection criteria and is from the primary surrogate country. The record contains two frozen shrimp SVs from two different sources: 1) UN Comtrade import data from the primary surrogate country, Bangladesh<sup>162</sup> and 2) GTA import data from India.<sup>163</sup> The statute requires that the Department use the "best available information" to assign values to a respondent's FOPs and financial ratios.<sup>164</sup> In the Preliminary Results, we stated that "the

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<sup>159</sup> See, e.g., Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014, 81 FR 46899 (July 19, 2016) and accompanying Issues and Decision Memorandum at Comment 2; Large Residential Washers From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances, in Part, and Postponement of Final Determination, 81 FR 48741 (July 26, 2016) and accompanying Preliminary Decision Memorandum. ("In instances where the parties disagree with respect to the particular Harmonized Tariff System (HTS) subheading under which a particular material input...should be valued, the Department used an HTS subheading selection method based on the best match between the reported physical description (e.g., material composition, shape, and form) and/or function (e.g., general purpose) of the input and the HTS subheading description."). Moreover, record evidence suggests that HTS sub-categories provide varying written descriptions depending on the source. For example, while the Indian GTA import statistics for frozen shrimp under 0306.17: "Shrimps And Prawns, Frozen, Other Than Cold-Water" specifically excludes coldwater shrimp, in documentation provided by Stapimex, coldwater shrimp are specifically covered by HTS sub-categories other than 0306.13 and 0306.17. See Domestic Processors' SV Comments at Exhibit 1; See Stapimex's SAQR at Exhibit A-7, .pdf page 200, identifying HTS sub-categories. Thus, we are relying on the written descriptions provided by the SV sources that are on the record of this review.

<sup>160</sup> See VASEP Post-Preliminary Results SV Comments and Domestic Processors' SV Comments at Exhibit 2.

<sup>161</sup> See Prelim SV Memo at Exhibit 3e, which shows Bangladeshi import data of frozen shrimp from the United States equal to 137,036 kilograms.

<sup>162</sup> Id.

<sup>163</sup> See, e.g., VASEP Post-Preliminary Results SV Comments and Domestic Processors' SV Comments at Exhibit 1. Both VASEP and ASPA submitted identical Indian Global Trade Atlas ("GTA") data for HTS 0306.17. The Indian GTA import values of frozen shrimp under 0306.17: "Shrimps And Prawns, Frozen, Other Than Cold-Water" contains import data from the United Kingdom, Pakistan, and South Africa.

<sup>164</sup> See section 773(c) of the Act.

Department's practice when selecting the best available information for valuing FOPs is to select, to the extent practicable, SVs which are product-specific, representative of a broad market average, publicly available, contemporaneous with the POR, and exclusive of taxes and duties.<sup>165</sup> As noted above, the Department selected Bangladesh as the surrogate country. Because our strong preference is to value all inputs from a single surrogate country, we valued frozen shrimp using the Bangladeshi UN Comtrade data and allowed interested parties to comment on that data.<sup>166</sup> From among these two frozen shrimp SVs on the record, the Department preliminarily determined to apply the frozen shrimp SV from UN Comtrade import statistics from Bangladesh, the primary surrogate country, reported under HTS "0306.13: Shrimps & prawns, whether/not in shell, frozen."<sup>167</sup> We specifically reasoned that "because both the Indian GTA data and the Bangladeshi UN Comtrade data for frozen shrimp are obtained using a basket category HS number, the Department, in this case, prefers the data from the primary surrogate country, Bangladesh."<sup>168</sup> Although the Indian GTA are contemporaneous, whereas Bangladeshi UN Comtrade data are not, this consideration does not outweigh our preference to remain within the primary surrogate country. VASEP has challenged the Department's reliance on the Bangladeshi UN Comtrade data on various grounds. We have discussed each of these arguments below.

As an initial matter, with respect to VASEP's arguments, the burden to build the record of a proceeding before the Department lies with the interested parties to that proceeding.<sup>169</sup> All interested parties had the opportunity to submit SV data prior to and after the Preliminary Results.<sup>170</sup> However, prior to the Preliminary Results, in arguing for the Department to select Bangladesh as the primary surrogate country, VASEP submitted fresh shrimp SV data for Bangladeshi from a study conducted by the Network of Aquaculture Centers in Asia-Pacific ("NACA"), an intergovernmental organization affiliated with the United Nation's ("UN") Food and Agricultural Organization ("FAO"), which provides prices for several fresh shrimp count-sizes.<sup>171</sup> VASEP did not submit a Bangladeshi frozen shrimp SV. ASPA placed GTA data for

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<sup>165</sup> See, e.g., Preliminary Decision Memo at page 23; see also Electrolytic Manganese Dioxide From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 48195 (August 18, 2008) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>166</sup> See VASEP Post-Preliminary Results SV Comments, dated March 11, 2016 ("VASEP Post-Prelim SV Comments"), which contains the identical Indian GTA data for frozen shrimp under HTS 0306.17 (VASEP's preferred sub-category) that Domestic Processors submitted prior to the Preliminary Results.

<sup>167</sup> See Prelim SV Memo.

<sup>168</sup> See Preliminary Decision Memo at page 25.

<sup>169</sup> See, e.g., Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of the Changed Circumstances Review, 81 FR 9427 (February 25, 2016) and accompanying Issues and Decision Memorandum at Comment 3, quoting QVD Food v. United States, 658 F.3d 1318, 1324 (Fed. Cir. 2011) ("{T}he burden of creating an adequate record lies with {interested parties} and not with Commerce.") ("QVD 2011").

<sup>170</sup> See Memorandum to Catherine Bertrand, Program Manager, Office V, from Irene Gorelik, Senior International Trade Analyst, Office V, re: "Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Surrogate Values for the Preliminary Results," dated March 3, 2016, at 1 ("Prelim SV Memo").

<sup>171</sup> See VASEP SV Comments at Exhibit 2.

frozen shrimp and shrimp scrap.<sup>172</sup> In rebuttal to ASPA's SV submission, VASEP only rebutted the shrimp scrap value.

VASEP's presumptions regarding the Bangladeshi UN Comtrade's HTS sub-categories' written descriptions and the nature of the underlying data of the countries included within the import statistics do not impact the Department's requirement to select the best available information on the record to value purchased semi-processed frozen shrimp with a frozen shrimp SV. The Department evaluated the Indian GTA data on the record prior the Preliminary Results. Because the Department selected Bangladesh as the surrogate country and determined that, in valuing the largest component of the NV with Bangladeshi NACA data for fresh shrimp, it was equally important to value purchased frozen shrimp with an appropriate SV from the primary surrogate country to avoid undue distortion of the largest input. Our determination here is distinguishable from AR9 Final Results, where we used the Indian GTA SV for frozen shrimp, simply because: 1) no parties submitted a frozen shrimp SV on that record and 2) there was no data from Bangladesh for that FOP. Finally, while parties had the opportunity to comment on the SVs used in the Preliminary Results and potentially provide alternative Bangladeshi SV data for frozen shrimp, VASEP instead simply submitted<sup>173</sup> the identical Indian GTA data that Domestic Processor's submitted prior to the Preliminary Results, which we had already evaluated and rejected in the Preliminary Results.

## **Surrogate Values**

### **Comment 3: Bangladeshi Inflator Data**

#### **VASEP Case Brief:**

- The Department incorrectly utilized a Bangladeshi inflator to inflate USD denominated SVs in its Preliminary Results. In using the 2011 and 2010 UN Comtrade data from Bangladesh to value the FOPs, the Department failed to take into account its past practice with respect to the use of USD-denominated SVs. Specifically, even though these data were denominated in USD, the Department used a Bangladeshi inflation rate to inflate these data to present value.
- The Department should have instead applied an inflation rate denominated in the same currency. In the absence of a U.S. dollar inflator, the Department should have converted the values to takas, and then applied the Bangladeshi inflator.
- Consistency between the currency and the inflator is a well-established practice followed by the Department, dating back more than 17 years. There is a significant body of precedent in Department proceedings that document that this is incorrect. The use of U.S. inflation rates

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<sup>172</sup> In the Preliminary Results of the ninth administrative review, we stated that "for three inputs, shrimp larvae, frozen shrimp, and byproduct scrap, the Department was unable to locate any SV within UN ComTrade for Bangladesh, nor within any other Bangladeshi source." See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty Administrative Review; 2013–2014, 80 FR 12441 (March 9, 2015) and accompanying Preliminary Decision Memorandum at page 25 ("AR9 Prelim") unchanged in AR9 Final Results. Domestic Processors submitted the same Indian GTA value for frozen shrimp that we used in AR9 Final Results. See Domestic Processors' SV Comments at Exhibit 1.

<sup>173</sup> See VASEP Post-Preliminary Results SV Comments at Exhibit 1 and Domestic Processors' SV Comments at Exhibit 1. VASEP also included Indian GTA data under HTS 0306.13. VASEP provided no narrative discussion explaining the data, making the purpose of the submission unclear.

when an SV is denominated in USD is a well-established practice followed by the Department<sup>174</sup> and should be modified for the final results.

- In the AR9 Final Results, the Department relied on Seamless Pipe from Romania<sup>175</sup> as setting forth its current practice. But the Department's use of the Bangladeshi inflator in this case still does not conform to the Department's practice as set forth in Seamless Pipe from Romania. In Seamless Pipe from Romania, the Department converted brokerage and handling rates quoted in U.S. dollars to Egyptian pounds, indexed for inflation using the Egyptian wholesale price index, and then converted back to U.S. dollars. In the Preliminary Results, the Department did not convert U.S. dollar-denominated UN Comtrade data to Bangladeshi taka prior to indexing for inflation using a Bangladeshi inflator. By directly applying the Bangladeshi Consumer Price Index ("CPI") to the UN Comtrade data, which is denominated in U.S. dollars, the Department acted inconsistently with its practice as set forth in Seamless Pipe from Romania.
- In the Final Results, the Department should apply an inflation rate denominated in the same currency, by converting the UN Contrade data to Bangladeshi taka before applying the Bangladeshi inflator.

#### **Petitioner's Rebuttal Brief:**

- The selection of a methodology for indexing an expense incurred in the surrogate country but denominated in U.S. dollars is left to the sound discretion of the Department. The law and the agency's practice do not prohibit the Department from adopting the VASEP's proposed methodology, but nor do they require that this methodology be adopted.
- The methodology adopted by the Department in the Preliminary Results is reasonable and is supported by the agency's general concern regarding distortions created in the margin calculation by the use of multiple exchange rates. Accordingly, the Department should continue to index U.S. dollar denominated UN Comtrade values through a Bangladeshi inflator in the Final Results.
- Because VASEP's argument that the Department should adjust this UN Comtrade data through a U.S. inflator has been rejected by the agency, VASEP now argues that the Department should apply an inflation rate denominated in the same currency, by converting the UN Comtrade data to Bangladeshi taka before applying the Bangladeshi inflator.
- VASEP asserts that the Department's practice is to convert a U.S. dollar denominated value into the currency of the surrogate country, inflate the converted value through a surrogate country inflator, and then convert the value back to U.S. dollars, with a cite to a single Department determination as establishing this practice.

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<sup>174</sup> See VASEP's Case Brief at 15-16, citing to Final Determination of Sales at Less than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China, 62 FR 61964, 61987 (November 20, 1997) ("CTL Plate"); Final Determination of Sales at Less than Fair Value: Creatine Monohydrate from the People's Republic of China, 64 FR 71104, 71110 (December 20, 1999) ("Creatine"); Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of 2002-2003, 69 FR 42041 (July 13, 2004) ("TRBs") and accompanying Issues and Decision Memorandum at Comment 3.

<sup>175</sup> See Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from Romania: Final Results of Antidumping Duty Administrative Review and Final Determination Not To Revoke Order in Part, 70 FR 7237 (February 11, 2005) ("Seamless Pipe from Romania") and accompanying Issues and Decision Memorandum at Comment 7.

- VASEP seeks to introduce the distortion of two currency conversions into the Department’s SV calculations utilizing UN Comtrade data – with an initial currency conversion using conversion rates corresponding to the time for which the UN Comtrade data are reported and a second currency conversion back to U.S. dollars.
- In Seamless Pipe from Romania, the Department rejected the domestic industry’s proposal “to avoid multiple unnecessary currency conversions” by indexing Egyptian brokerage and handling charges denominated in U.S. dollars through use of the U.S. producer price index (“PPI”). In response, the Department observed that the use of PPI to index an expense incurred in a country outside of the United States was inappropriate.

### **Department’s Position:**

The Department disagrees with VASEP regarding the inflator used in the Preliminary Results. In the Preliminary Results, we stated that “whenever possible, the Department used United Nations Comtrade Statistics (“UN Comtrade”), provided by the United Nations Department of Economic and Social Affairs’ Statistics Division, as its primary source of Bangladeshi surrogate value data.”<sup>176</sup> Because the UN Comtrade data is not contemporaneous with the POR, the Department applied its standard practice with respect to non-contemporaneous SVs and adjusted the SVs to reflect inflation or deflation, as appropriate, using publicly available price index data, such as the International Monetary Fund’s Producer Price Index or, in this case, the Bangladeshi CPI.<sup>177</sup>

VASEP’s arguments are inconsistent on this issue. Specifically, in its comments on the selection of SVs, VASEP itself provided Bangladeshi inflators identical to that the Department used in the Preliminary Results.<sup>178</sup> Now, however, VASEP is challenging the Department for using this data in Preliminary Results.

As we have done in numerous past administrative reviews, including AR9 Final Results, in the Preliminary Results we applied a Bangladeshi CPI inflator to the UN Comtrade import statistics, which are reported in Bangladeshi Taka (but expressed in USD on UN Comtrade’s website).<sup>179</sup> VASEP argues that because the data are expressed in USD, the Department should instead apply a USD inflator. In the alternative, VASEP argues that the Department should convert the UN Comtrade import statistics to Bangladeshi Taka, apply the Bangladeshi CPI inflator, and then convert the inflated value back to USD. VASEP argues that both of these options are consistent with Department practice in past cases.

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<sup>176</sup> See Prelim SV Memo, at page 2 and Exhibit 3a, which contains a printout of the UN Comtrade Import Statistics Explanatory Notes demonstrating that the data, while expressed in USD on the UN Comtrade website, are collected in Bangladeshi Taka, as the country reporting trade activity, and then converted to USD using a published currency conversion factor, which is the annual average for the reporting year.

<sup>177</sup> See, e.g., Seamless Refined Copper Pipe and Tube From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014, 81 FR 39893 (June 20, 2016) and accompanying Issues and Decision Memorandum at Comment 3.

<sup>178</sup> See VASEP SV Comments at Exhibit 1, pages 21-26. See also Prelim SV Memo at Exhibit 2, which show the identical UN Comtrade inflator from Bangladesh as those provided by VASEP.

<sup>179</sup> See Prelim SV Memo at Exhibit 3a.

We disagree with VASEP's arguments regarding the proper inflator to apply to the Bangladeshi import statistics. VASEP cites to past practice from 17 years ago, specifically the Department's decades-old determinations regarding inflators in CTL Plate, Creatine, and TRBs. This practice has been superseded by methodology applied in more recent determinations, including in past segments of this proceeding and Seamless Pipe from Romania,<sup>180</sup> where the Department did not apply a U.S. inflator to foreign data. More recently, in Glycine from the PRC, which VASEP does not acknowledge as the current practice, the Department applied the "Consumer Price Index rate for Indonesia"<sup>181</sup> to Indonesian import statistics from the GTA, which are reported in USD.<sup>182</sup> In Glycine from the PRC, we specifically stated that "it is the Department's practice to calculate price index adjustors to inflate or deflate, as appropriate, surrogate values that are not contemporaneous with the period of review using the wholesale price index for the subject country. But these data were not available for Indonesia. Therefore, where we could not obtain publicly available information contemporaneous with the period of review to value factors, we adjusted surrogate values by using the Consumer Price Index rate for Indonesia, as published in the International Monetary Fund's International Financial Statistics."<sup>183</sup>

Consequently, contrary to VASEP's argument, there is no basis in our current practice to apply a USD inflator index to import statistics reported by Bangladesh to UN Comtrade, especially since the data is collected and reported in Bangladeshi Taka. Because Bangladesh is the reporting country regarding its trade flow, any assumptions that that economic activity occurs anywhere but Bangladesh in currency other than Bangladeshi Taka is not supported by the record. The record demonstrates that the data are collected, and reported to UN Comtrade, in Bangladeshi Taka. For this reason, consistent with our well-established practice, we applied the Bangladeshi inflator.

The Department also disagrees with VASEP's alternative option to convert the UN Comtrade data to Bangladeshi Taka, apply the inflator, and then re-convert back to USD, as done in Seamless Pipe from Romania.<sup>184</sup> In Glycine from the PRC, the GTA data for Indonesia was reported in USD, but the Department applied the Indonesia CPI to the Indonesian GTA data and declined to convert the currency. Here, UN Comtrade already converted the currency to USD using the average exchange rate for the reporting year,<sup>185</sup> which already accounts for the currency conversion the Department would have had to perform if the UN Comtrade data were

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<sup>180</sup> See Seamless Pipe from Romania at Comment 7, "although surrogate values quoted in U.S. dollars have been inflated using the U.S. PPI in past cases, in recent cases we have reviewed our inflation methodology and find that U.S. dollar-denominated surrogate values should be inflated based on the country in which the expense was incurred, not the currency in which it was reported."

<sup>181</sup> See Glycine From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review, 77 FR 21738, 21742 (April 11, 2012) ("Glycine 2012 Prelim") unchanged in Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 77 FR 64100 (October 18, 2012) ("Glycine 2012") and accompanying Issues and Decision Memorandum at Comment 8.

<sup>182</sup> See Glycine 2012, at Comment 8, where "we found that the GTA obtains its Indonesian data from Statistics Indonesia, an Indonesian government organization, and that the data is reported to the GTA in U.S. dollars."

<sup>183</sup> See Glycine 2012 Prelim 77 FR at 21742.

<sup>184</sup> See Seamless Pipe from Romania at Comment 7, where the Department converted the "Egyptian brokerage and handling rate quoted in U.S. dollars to Egyptian pounds, indexing it for inflation using the Egyptian WPI, and converting it back to U.S. dollars."

<sup>185</sup> See Prelim SV Memo, at Exhibit 3a and Exhibit 5.

expressed in the reported currency, Bangladeshi Takas. Consistent with our current practice, we decline to apply VASEP's suggestion of adding an unnecessary second layer of currency conversion, "to avoid any unwarranted currency conversions and prevent data distortions."<sup>186</sup> To convert the currency, twice more, would introduce unnecessary manipulation of the import statistics.<sup>187</sup> Accordingly, we are making no changes from the Preliminary Results.

#### **Comment 4: Ice Surrogate Value**

##### **VASEP Case Brief:**

- The Department's use of Harmonized Tariff Schedule ("HTS") number 2201.90 to value ice is distortive. HTS 2201.90, representing "Ice & snow," is not specific to the input and does not adequately represent the type of ice used in frozen shrimp production because it specifically includes snow and fails to account for the quality and type of ice used by frozen shrimp producers.
- Instead, the Department should rely on the more specific and contemporaneous data submitted by VASEP, which is the 0.06 Takas/kg value incurred by Apex Foods Limited ("Apex") in 2013-14 to produce frozen shrimp in Bangladesh. Apex is a producer of frozen shrimp and engaged in the same type of business as the mandatory respondents in this case and therefore uses ice for the same purpose.
- The Department should prefer the Apex value not only because it is specific to the production at issue in this case, but also because it is more contemporaneous with the period of review: whereas the Department's value is from 2011, the value we propose is from Apex's 2013-14 financial statement.
- Although the Department relied on generic HTS data in the seventh and eight administrative reviews to value ice, in the sixth administrative review, the Department relied on Apex's financial statements to value ice.
- Choosing a surrogate value always involves choosing among imperfect sources of information, and therefore the weighing of various considerations ultimately aimed at using data that will derive the most accurate dumping margins, as required by law. Thus, utilizing a surrogate value for snow cannot possibly be accurate or specific to the input consumed by the respondents.
- The Department complains that a single company's financial statement does not contain a broad market average. However, this does not stop the Department from using a single financial statement to calculate financial ratios, as it does in many cases, including in multiple reviews of the order in this case.
- A broad market average for imported ice and snow (which, incidentally, is a very odd thing to import and cannot possibly be comparable to the block ice consumed by the respondents) is certainly no better – and probably far worse – than a company-specific value for ice, particularly when the company whose value is being used engages in the exact same business as the respondents being examined.

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<sup>186</sup> See Glycine 2012 at Comment 8.

<sup>187</sup> See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Canada, 67 FR 55782 (August 30, 2002) and accompanying Issues and Decision Memorandum at Comment 8 ("It is the Department's policy not to convert U.S. dollars to foreign currency on the home market date of sale and then convert these figures back to U.S. dollars using the exchange rate in effect on the U.S. date of sale, as the use of multiple exchange rates may cause distortions in the margin calculation." (emphasis added)).

- The value VASEP reported is from Note 19 of the financial statement, entitled “Sundry Creditors,” which identifies this value as purchased from suppliers.

**Petitioner’s Rebuttal Brief:**

- As noted by VASEP, in the last administrative review, the Department found that (1) VASEP had failed to demonstrate how ice values obtained through UN Comtrade reporting was not specific to ice “simply because the HS category also includes snow”; (2) that the ice value reported in a company’s financial statement was not a “broad market average of prices”; and (3) that the financial statement did “not indicate whether its ice consumption is from purchased ice or self-produced ice.”
- In addition to the same arguments presented in AR9 Final Results, VASEP claims that the ice value reported in the financial statement is “clearly a purchase value” because it was taken from a note entitled “Sundry Creditors” “in other words, suppliers from which Apex purchased various things.” VASEP also asserts that because the data from the financial statement is more contemporaneous with the POR and is more specific to the input valued, the Department is obligated in this review to use a financial statement for the ice SV.
- Having adopted this line of argumentation, VASEP ignores the second half of the Department’s explanation for utilizing UN Comtrade data in the last review.
- VASEP does not discuss the legal standard applied in Jinan Yipin Corp., wherein the CIT explained that the agency is afforded considerable discretion in determining how to treat a particular production input, nor does VASEP discuss that the Federal Circuit previously affirmed the use of broad market average data over data from a single financial statement for the single largest input in frozen warmwater shrimp production in a prior proceeding.<sup>188</sup>
- VASEP failed to identify a basis upon which the Department might alter its approach to establishing the ice SV in the final results.
- While VASEP complains about unfair and inconsistent treatment of SVs with regard to their argument on byproduct values, in the very next section of their brief, VASEP demands that the Department adopt unfair and inconsistent treatment of SVs such that a value from Apex’s financial statement is disregarded in favor of a broad market average value for raw shrimp inputs but the broad market average value is disregarded in favor of a value from Apex’s financial statement for ice inputs.

**Domestic Processors’ Rebuttal Brief:**

- The Department should make no changes with respect to the SV used in the Preliminary Results.

**Department’s Position:**

The Department disagrees with VASEP regarding the SV used for ice in the Preliminary Results. The Department’s practice when considering what constitutes the best available information is to consider 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>189</sup> In the

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<sup>188</sup> See Jinan Yipin Corporation, et al v. United States, 526 F.Supp. 2d 1347, 1373 (CIT 2007) (“Jinan Yipin”).

<sup>189</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) and accompanying Issues and Decision Memorandum at Comment 3.

Preliminary Results, we valued ice using Bangladeshi UN Comtrade data reported under HTS sub-category 2201.90: “Ice & Snow.”<sup>190</sup> VASEP argues that the Department should not use this SV but, instead, rely on the per-unit ice consumption reported within a single financial statement from a Bangladeshi shrimp processor: “[i]n Exhibit SV-4, we provide a calculation of the ice SV using the Apex Foods Limited (“Apex”) income statement.”<sup>191</sup> VASEP asserts that the Apex ice value is a purchase price, as it was reported in the “Sundry Creditors” note in the financial statements.

The Department relied on the Bangladeshi UN Comtrade data for ice because the data is publicly available, tax and duty exclusive, representative of a broad market average, and specific to the input in question. Notwithstanding the Bangladeshi UN Comtrade data being non-contemporaneous, this data is superior to the Apex value because the Apex value is not representative of a broad market average.<sup>192</sup> The Department prefers country-wide information, such as government import statistics, to information from a single source, as well as preferring industry-wide values to values of a single producer (because industry-wide values better represent prices of all producers in the surrogate country).<sup>193</sup> As the Federal Circuit explained in Ad Hoc, “Commerce has explained that it ‘prefers, whenever possible, to use countrywide data, and only resorts to company-specific (or regional) information when countrywide data are not available.’ . . . In accordance with its policy, Commerce chose the NACA Survey data over the Apex data, which is specific to one company.”<sup>194</sup> Incidentally, in Ad Hoc, we declined to rely on Apex for a fresh shrimp SV, preferring a country-wide source. The issue in Ad Hoc regarding the fresh shrimp SV is entirely analogous to the argument herein regarding ice. We decline to value a FOP using a single processor’s information as the SV.

VASEP’s reference to the Department’s reliance on financial statements from a single source to value overhead, SG&A, and profit in this proceeding and in other proceedings is both inaccurate and inapposite. First, in this review we relied on two financial statements, not one, to calculate average surrogate financial ratios to approximate respondent’s overhead, SG&A, and profit. Moreover, the Department’s practice regarding surrogate financial ratios differs slightly from our practice in selecting country-wide data for FOPs. When selecting financial statements for purposes of calculating surrogate financial ratios, the Department’s policy is to use data from one or more market economy surrogate companies based on the “specificity, contemporaneity, and

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<sup>190</sup> See Prelim SV Memo at Exhibit 3.

<sup>191</sup> See VASEP’s SV Comments, dated December 15, 2014, at page 6 and Exhibit SV-4.

<sup>192</sup> We prefer to value factors using prices that are broad market averages because “a single input price reported by a surrogate producer may be less representative of the cost of that input in the surrogate country.” See Honey from the People’s Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Order Administrative Review, 71 FR 34893 (June 16, 2016).

<sup>193</sup> See, e.g., Diamond Sawblades and Parts Thereof from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review: 2012-2013, 80 FR 32344 (June 8, 2015) and accompanying Issues and Decision Memorandum at Comment 13, citing to Certain Cased Pencils from the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 33406 (July 13, 2009) and the accompanying Issues and Decision Memorandum at Comment 4.

<sup>194</sup> See Ad Hoc Shrimp Trade Action Committee v. United States, 618 F.3d 1316, 1322 (2010) (“Ad Hoc”). The Federal Circuit affirmed our selection of country-wide data over a single processor’s data as a fresh shrimp SV. Incidentally, in this litigation, the same processor, Apex, was proffered as the single SV source to value fresh shrimp.

quality of the data.”<sup>195</sup> In accordance with 19 CFR 351.408(c)(4), the Department normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country to value manufacturing overhead, SG&A and profit.<sup>196</sup> Additionally, for purposes of selecting surrogate producers, the Department examines how similar a proposed surrogate producer’s production experience is to the NME producer’s production experience.<sup>197</sup> However, the Department is not required to “duplicate the exact production experience of” an NME producer, nor must it undertake “an item-by-item analysis in calculating factory overhead.”<sup>198</sup> Thus, while surrogate financial ratios must be based on producers of comparable or identical merchandise, the selection of FOPs must be based on a broad-market average, rather than rely upon a single producer’s information.<sup>199</sup>

VASEP has also argued that the written description of the HTS sub-category 2201.90: “Ice & Snow” contains snow and, as a result, is not specific to the input at issue, ice. However, VASEP disregards the fact that this category also contains ice and does not argue that the ice covered by this HTS category is somehow different from the ice used by respondents. The ice FOP that Stapimex reported simply notes that it is “block ice” without any further detail.<sup>200</sup> Likewise, neither Stapimex nor VASEP submitted an HTS number for the specific ice that Stapimex purchased. Rather, VASEP only offered a single financial statement upon which to rely for an ice SV.<sup>201</sup> Further, VASEP has not supported its contention that this HTS subcategory, which specifically includes ice, is not specific to Stapimex’s purchased ice. As in any case, the Department will consider evidence parties submit as to the specificity of inputs in the import statistics of the HTS subcategory, but in this case there was no such evidence on the record. However, the record shows that plain language of the HTS subcategory includes ice; thus, it is an appropriate HTS subcategory to value ice. As a result, the Department is not compelled to find that a single producer’s financial statement is a more reasonable SV source than the UN Comtrade data.

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<sup>195</sup> See, e.g., Diamond Sawblades and Parts Thereof from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances, 71 FR 29303 (May 22, 2006) and accompanying Issues and Decision Memorandum at Comment 1.

<sup>196</sup> See Certain Frozen Warmwater Shrimp from the People’s Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 52049 (September 12, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>197</sup> See Certain Oil Country Tubular Goods from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping, 75 FR 20335 (April 19, 2010) and accompanying Issues and Decision Memorandum at Comment 13.

<sup>198</sup> See Nation Ford Chem. Co. v. United States, 166 F.3d 1373, 1377 (Fed. Cir. 1999); see also Magnesium Corp. of Am. v. United States, 166 F.3d 1364, 1372 (Fed. Cir. 1999).

<sup>199</sup> See, e.g., 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) and accompanying Issues and Decision Memorandum at Comment I (“the contemporaneous Indonesian GTA import data for this SV represents country-wide data, whereas the Bangladeshi data is from a newspaper article which reflects a single company’s experience in 2008. As such, we find the country-wide Indonesian data to represent more contemporaneous broad market average, whereas the Bangladeshi data is neither a broad market average, nor contemporaneous.”).

<sup>200</sup> See Stapimex’s Section D Questionnaire response dated July 6, 2015, at page 19.

<sup>201</sup> See VASEP’s SV Comments, dated December 15, 2014, at page 6 and Exhibit SV-4.

## Comment 5: Byproduct Surrogate Value

### VASEP Case Brief:

- The Department erroneously relied on Indian import statistics to value the head/shell byproduct in the Preliminary Results. Rather than turn to Indian import statistics, the Department should have relied on the Bangladeshi SV data for byproducts, which the respondents placed on the record in their initial surrogate value submission.<sup>202</sup> This surrogate value, according to the 2011 UN Comtrade data, is 13.96 USD/kg.
- The Department has not justified why it rejected the Bangladeshi value rather than cap it. The Department's decision to use the 2011 UN Comtrade data from Bangladesh to value the vast majority of the other FOPs in the Preliminary Results recommends the use of the same source for byproducts, in light of the Department's preference to value all inputs from the primary surrogate country.
- The Bangladeshi UN Comtrade data corresponds to the same HTS code – 0508.00 – as the Indian GTA data relied upon by the Department in the Preliminary Results. Therefore, the Bangladeshi data and the Indian data the Department used in the Preliminary Results are equally specific to the FOP at issue because they are derived from the same HTS code.
- To overcome the issue of the Bangladeshi byproduct value exceeding the value of the main input, whole shrimp, the Department can reject the higher value (as it did here), or cap it. The Department also acknowledges that its practice does not favor rejecting over capping – or vice versa. However, the Department previously has recognized this preference in choosing to cap instead of applying surrogate values from third countries.<sup>203</sup>
- To avoid cherry-picking the SV data in a manner that rejects values that are more beneficial for respondents (as with head and shell byproducts) but utilize more detrimental values (as with frozen shrimp) utilizing contrary arguments, the Department should cap the Bangladeshi value because using one primary surrogate country helps promote accuracy in the calculation of dumping margins by helping to account for extraneous variables.
- If the Department insists on using Indian data to value these byproducts, it should rely on the same HTS item it used in AR9 Final Results using HTS 0508.00: “Coral and Similar Materials, Molluscs, Crustaceans, Echinoderms and Cuttlebone Shells, Unworked Or Simply Prepared, Not Cut To Shape, Powder And Waste.” The SV for imports under this HTS item was \$3.61/kg.<sup>204</sup>
- In the Preliminary Results, the Department switched to HTS 0508.00.50: “Shells Of Molluscs, Crustaceans/Echinoderms,” at a value of only \$0.44/kg, claiming that this HTS item is more specific. Given the huge difference between the Bangladeshi choice – even if capped – and the value the Department proposes to use in this review in deviation from the past review, the Department must reconsider its decision. An 89% reduction in the byproduct value used from one review to the next does not ensure greater accuracy in the dumping margin, and would therefore be contrary to law.

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<sup>202</sup> Id., at Exhibit 3.

<sup>203</sup> See VASEP Case Brief at 8, footnote 15.

<sup>204</sup> Id., at 8,

### **Petitioner's Rebuttal Brief:**

- The Department should maintain the use of values derived from the eight-digit HTS code 0508.00.50 for the purposes of establishing an SV for head and shell byproducts.
- Despite VASEP's contentions regarding the SV chosen for frozen shrimp in the UN Comtrade data, VASEP asserts that, with respect to these byproducts, the Bangladeshi value is superior to the India value as it is from the primary surrogate country for this review.
- The Department rejected VASEP's same arguments in AR9 Final Results and provided a detailed explanation for why the agency was relying on an SV from a secondary surrogate country. The Department repeated this rationale in the Preliminary Results, observing that, once again, the Bangladeshi byproduct value exceeded the value of the shrimp input on the record of this review.
- The Department fully explained that the record of this proceeding offered a value from a secondary surrogate country that was more specific to the actual shrimp waste generated. Because the SV from India was reliable (while a scrap value in Bangladesh that exceeded the input value was not), the Department appropriately determined to use the Indian value and should continue to do so. VASEP also provided no support that an alleged 89% reduction in the byproduct value used from one review to the next does not ensure greater accuracy in the dumping margin, and would therefore be contrary to law.
- Alternatively, VASEP asserts that the Department should use the same Indian SV from AR9 Final Results. In doing so, VASEP acknowledges that the Department explained the change by reporting that the eight-digit HTS code 0508.00.50 was more specific to shrimp byproduct than the six-digit HTS code employed in AR9 Final Results. VASEP does not argue that this claim is inaccurate or otherwise attempt to demonstrate that the six-digit HTS code is more specific to shrimp byproduct.
- A change – whether an increase or decrease – in an SV due to the identification of more specific data on the record in a current review proceeding compared to the record of prior review does not violate the law. To the contrary, declining to use a more specific SV because of any change would violate the Department's obligation to use the best available information. When the CIT reviews a Department determination as to what constitutes the "best available information" on a particular administrative record, it asks "whether a reasonable mind could conclude that Commerce chose the best available information." VASEP cannot establish that, faced with this choice, a reasonable mind would select a less specific SV over a more specific SV simply because of its impact on margin calculations.

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

- The Department should make no changes with respect to the byproduct SV used in the Preliminary Results.

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

The Department disagrees with VASEP regarding the appropriate SV for shrimp waste/scrap byproduct. As noted by Petitioner, the statute requires that the Department use the "best available information" to assign values to a respondent's FOPs and financial ratios. The Department has considered the quality and availability of the SV data from each available option on the record and again concluded that the Indian GTA data contains the best available information for valuing respondent's byproducts. Specifically, the Indian GTA data is publicly

available, tax and duty exclusive, representative of a broad market average, and specific to the input in question. As further explained below, the only alternative SV on the record is UN Comtrade data for HTS category 0508.00, and our practice does not favor this source.

Prior to the Preliminary Results, ASPA submitted a byproduct SV from Indian GTA using HTS 0508.00.50: “Shells of Molluscs, Crustaceans, Echinoderms.”<sup>205</sup> VASEP also submitted a byproduct SV from Bangladeshi UN Comtrade using HTS 0508.00, which did not include the UN Comtrade HTS written description.<sup>206</sup> The Bangladesh UN Comtrade value is at the six-digit HTS level, while the Indian GTA value is at the eight-digit HTS level.

As noted above, VASEP’s submission of this HTS from UN Comtrade was unaccompanied by the written description<sup>207</sup>, thus, the Department is unable to determine whether that SV is more or less appropriate than the SV we used in the Preliminary Results. Conversely, the Indian GTA HTS number on the record does contain a written description, and, at the eight-digit level, is, logically, more specific than an HTS number at the six-digit level.

Furthermore, although the Department’s preference is to select publicly available SVs from a single surrogate country,<sup>208</sup> the UN Comtrade byproduct SV of \$13.96/kg<sup>209</sup> is greater than the value of the shrimp input.<sup>210</sup> As we stated in AR9 Final Results, consistent with our practice, we find it unreasonable to assign a higher value to a waste product, such as heads and shells, than to its input product, a whole shrimp.<sup>211</sup> The Department has a long-standing practice of rejecting or capping the byproduct SV in instances where the byproduct SV exceeds the SV of the product from which it was derived.<sup>212</sup> Indeed, recent case precedent supports the practice of rejecting

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<sup>205</sup> See Domestic Processors’ SV Comments at page 2 and Exhibit 2.

<sup>206</sup> See VASEP SV Comments at Exhibit 3, which provides the printout of the values obtained from Bangladesh UN Comtrade, but not the written description of HTS 0508.00.

<sup>207</sup> Id.

<sup>208</sup> See, e.g., Clearon Corp. v. United States, No. 08-00364, 2013 WL 646390, at \*6 (CIT 2013) (“deriving the surrogate data from one surrogate country limits the amount of distortion introduced into {Commerce’s} calculations”) (“Clearon”).

<sup>209</sup> See VASEP’s “Rebuttal Comments Regarding the Department’s Surrogate Value Data,” dated March 10, 2015, at Exhibit 1.

<sup>210</sup> See, e.g., Minh Phu Group SAS Output, “Variables Converted to US Dollars.”

<sup>211</sup> See, e.g., AR9 Final Results at Comment 7.

<sup>212</sup> See Certain Steel Nails from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) and accompanying Issues and Decision Memorandum at Comment 12.

and/or capping a scrap SV when it is of a higher price than the SV for the input which created the scrap byproduct in question.<sup>213</sup>

We disagree with VASEP's assertion that the Department's practice indicates a preference of capping over rejecting byproduct SVs that are higher than the main input SV. In fact, in PRC Tires 2015, we stated that "our practice...{is} that the surrogate used to value a by-product offset will be capped at the value of the surrogate used to value the input from which that by-product offset was produced *if no more appropriate value can be found*."<sup>214</sup> Here, the record contains a publicly available, contemporaneous value from a reliable source that is specific to the byproduct produced, as opposed to the broader HTS sub-category from the primary surrogate country. We find that, here, the record contains a more appropriate value such that capping is neither preferred nor required.

We also disagree with VASEP's statement that "an 89% reduction in the byproduct value used from one review to the next does not ensure greater accuracy in the dumping margin, and would therefore be contrary to law."<sup>215</sup> The Department makes SV determinations based on the record information before it, and the record does not contain the shrimp scrap SV or underlying source data used in AR9 Final Results. Our SV determination here is not contrary to law but, instead, consistent with the statute and our practice to value FOPs using the best available information on the record.

Moreover, while VASEP also argues that the Department should, alternatively, use the Indian GTA value using HTS 0508.00.36, as applied in AR9 Final Results, no interested parties submitted the data for that HTS number on the record of this review. Rather, we have evaluated the byproducts SVs on the record of this review and determined that, consistent with section 773(c)(1)(B) of the Act, the Indian GTA value for HTS 0508.00.50 is the best available information with which to value byproducts over the Bangladeshi UN Comtrade data.

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<sup>213</sup> See, e.g., Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013, 80 FR 20197 (April 15, 2015) and accompanying Issues and Decision Memorandum at Comment 20 ("PRC Tires 2015"); Monosodium Glutamate From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and the Final Affirmative Determination of Critical Circumstances, 79 FR 58326 (September 29, 2014) at Comment 11 ("A by-product by definition is less valuable than the input from which it is derived. Where there is no evidence that the by-product is a value-added by-product, assigning a by-product a value that is higher than the value of the input from which it is derived is unreasonable. In this investigation, the quantity of the by-product reported exceeds the quantity of the primary input consumed in the production of that by-product. Thus the extended value of the by-product exceeds the extended value of the primary input. Therefore, in the instant investigation, the Department finds it appropriate and reasonable to cap the specific by-product quantity at the specific FOP input amount."); Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (Tuesday, October 18, 2011) at Comment 24; 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) at Comment II.B.3, where the Department capped broken fillet by-products at the value for whole live fish because broken fillets were not a value-added byproduct.

<sup>214</sup> See PRC Tires 2015 and accompanying Issues and Decision Memorandum at Comment 20 (emphasis added).

<sup>215</sup> See VASEP Case Brief at 8.

## **Comment 6: Electricity**

### **VASEP Case Brief:**

- In the Prelim SV Memo, the Department indicated that to value electricity, it used data from the Dhaka Electric Supply Company, “with an electricity tariff as of March 2014 onward, which we deflated to the POR. The deflated value is 9.13 Takas/kwh.” However, upon reviewing the Department’s exhibits and margin calculations, it appears the Department did not use the deflated value; rather, it used an unadjusted March 2014 value of 9.58 takas/kwh. The Department should fix this in the Final Results and use the 9.13 taka/kwh value the Department intended to use.

No other interested parties commented on this issue.

### **Department’s Position:**

The Department disagrees with VASEP regarding the SV applied for electricity consumption. The source for the electricity surrogate value is from March 14, 2014 onward,<sup>216</sup> which is contemporaneous with the POR and did not require inflation or deflation. Our statement regarding deflation of the electricity SV in the Prelim SV Memo narrative at page 6 was an unintentional narrative error. The electricity SV of 9.58 Taka per kilowatt hour used in the margin calculation is accurate and contemporaneous with the POR and, thus, does not require any adjustment or correction.

## **Company-Specific Issues**

### **Comment 7: Calculation of the Separate Rate Margin**

#### **VASEP Supplemental Brief:**

- Although the review has been rescinded for the Minh Phu Group, the Department should include the preliminary weighted-average dumping margin calculated for Minh Phu Group when calculating the “all-others” separate rate for the final results. Doing so is consistent with the statute, is administratively feasible, and promotes the goal of calculating an all-others rate that is representative of the margins of the non-examined companies.
- The statute supports including Minh Phu Group’s margin in the all-others rate calculation, because the statute contemplates that the all others rate will be based on margins calculated for more than a single company. The “general rule” in administrative reviews is that the Department shall determine the individual weighted-average dumping margin for each known exporter and producer of the subject merchandise, except when the Department limits its examination to a statistically valid sample or largest exporter by volume.<sup>217</sup>
- The CIT has explained that “{t}he plural term ‘reasonable number of exporters or producers’ read according to its plain meaning, does not encompass a quantity of one.”<sup>218</sup> The plural “export{er}s or producers” language is likewise used in sections 777A(c)(2) and

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<sup>216</sup> See Prelim SV Memo at Exhibits 1 and 7.

<sup>217</sup> See VASEP Supplemental Brief at 2, citing to section 777A(c)(1)-(2) of the Act.

<sup>218</sup> *Id.*, at 3, citing to *Schaeffler Italia S.r.l. v. United States*, 781 F. Supp. 2d 1358, 1362-63 (CIT 2011) (“Schaeffler”).

735(c)(5)(A) of the Act. The use of the plural in these two statutory provisions therefore reflects a Congressional understanding that the all-others rate would be based on margins for more than a single company.

- As a factual matter, Minh Phu Group was individually investigated. Minh Phu Group submitted numerous questionnaire responses, was verified, received a non-de minimis margin in the Preliminary Results, and all parties wishing to comment on the proper calculation of Minh Phu Group’s margin had a chance to do so. Thus, there is nothing in the statute that plainly requires that the “exporters and producers individually investigated” receive an individual assessment rate at the end of the review. The rescission of the review for Minh Phu Group does not prevent the Department from using a weighted-average margin calculated for Minh Phu Group in the all-others rate calculation – either as a practical or a legal matter.

### **Mazzetta Company, Quoc Viet, and Trong Nhan Supplemental Brief**

- The Department should either calculate a final margin for the Minh Phu Group for the purpose of inclusion in the calculation of the all-others rate or continue to use the all-others rate calculated in the Preliminary Results. Doing so would maintain fairness and ensure that the rate is not tainted by an appearance of irregularity.
- Were the Department to ignore the information submitted by Minh Phu Group, the Department in effect will have examined only a single respondent (Stapimex) and will have based the all-others rate on the margin calculated for a single producer. As the CIT explained in Schaeffler, this is contrary to the statutory scheme.
- Limiting the separate rate only to the rate calculated for Stapimex would result in an all-others rate based only on A-T method when record evidence demonstrates that not all Vietnamese exporters had the necessary percentage value of U.S. sales passing the Cohen’s *d* test to justify such an inference.
- There is no statutory exception that allows the Department to calculate an all-others rate based on the weighted-average margin of only a single respondent because of a last-minute rescission of a review for another mandatory respondent.<sup>219</sup> Relying on a single rate as an all-others rate would not be reasonably reflective of the separate rate respondents’ actual dumping.
- Relying on only Stapimex’s margin, which was based entirely on export price (“EP”) as the all-others rate, is not representative of the Vietnamese exporters that made sales based on EP and constructed export price (“CEP”), as the Minh Phu Group did.
- It is the Department’s stated position that “a rate that is culled from the history of two respondents...is broader in scope than a single rate.”<sup>220</sup>
- Even if the Department were to conclude that the statute normally does not allow a margin that is not actually applied to a respondent to be used in the all-others rate under section 735(c)(5)(A) of the Act, “Commerce may not rely on a literal interpretation of the statute at the expense of the reason of the law and producing absurd consequences.”<sup>221</sup>

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<sup>219</sup> Id., at 4, citing to FAG Italia S.p.A. v. United States, 291 F.3d 806, 817 (Fed.Cir. 2002).

<sup>220</sup> See both Mazzetta Brief and SR Respondents Supplemental Brief, at 4-5, citing to Foshan Shunde Yongjian & Hardware Co, Ltd. and Polder Inc. v. United States, Court No. 10-00059 Slip. Op. 16-35 (April 7, 2016) at 6 (“Foshan Shunde”).

<sup>221</sup> Id., at 4-5, citing to Xiamen Int’l Trade & Indus. Co. v. United States, 953 F. Supp. 2d 1307, 1326 (CIT 2013).

- The Congressional goal of representativeness would be undermined if the only data available for the Department to consider in calculating an appropriate all-others rate came from a single company. The Department should avoid this result by calculating a weighted-average margin using the information on the record for Minh Phu Group and including that margin in the calculation of the all-others rate.
- It would be inherently unfair if the agreement between the Department, domestic industry, and the Minh Phu Group has the consequence of increasing the dumping margin for the non-examined Vietnamese exporters who were not party to the agreement. Given the extraordinary circumstances that allowed the Department to rescind the Minh Phu Group from the review after the Preliminary Results, the Department should provide fairness and due process by including the Minh Phu Group in the calculation of the all-others rate.

**No other interested parties comments on this issue.**

**Department's Position:**

As a threshold matter, we note that counsel for VASEP (including numerous separate rate respondents) also represented the Minh Phu Group on the record of this review and as such is presumably familiar with the circumstances surrounding the Minh Phu Group's rescission and revocation from the order. VASEP filed no argument claiming prejudice on behalf of the separate rate respondents with respect to the Minh Phu Groups' argument that a "corrected" differential pricing analysis would result in a Minh Phu Group margin zero percent.<sup>222</sup> Had the Department agreed with VASEP in that regard (which we do not; see Comment 1), the resulting separate rate calculation would have presented an identical scenario: the exclusion of the Minh Phu Group's margin from the separate rate calculation.

However, that is tangential to the issue of the calculation of the all-others rate. In that regard, our practice is unambiguous. While the statute and the Department's regulations do not specifically address what rate to apply to respondents not selected for individual examination when the Department limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act, the Department's established long-standing practice is to look to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for non-selected respondents that are not

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<sup>222</sup> See, e.g., VASEP Case Brief at pages 17-55. See also MPG Prelim Analysis Memo at page 11.

examined individually in an administrative review.<sup>223</sup> Under section 735(c)(5)(A) of the Act, the all-others rate is an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely on the basis of facts available. Section 735(c)(5)(B) of the Act provides that, if the estimated weighted-average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined entirely under section 776 of the Act, the Department may “use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted-average dumping margins determined for the exporters and producers individually investigated.”<sup>224</sup> In this proceeding, however, the Department calculated an above-de minimis rate that is not based entirely on facts available for the single mandatory respondent remaining under active review; thus, it is unnecessary to rely upon an alternative reasonable method, defined under section 735(c)(5)(B) of the Act, or to otherwise depart from our long-standing practice. Our established practice in such circumstances is consistent among numerous proceedings<sup>225</sup> and Court-affirmed.<sup>226</sup>

The Department disagrees that we are creating an additional exception to the statutory mandate that the all-others rate reflects the margins of more than a single producer. VASEP is correct that the statute is silent with respect to the method used to calculate the all-others rate when a

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<sup>223</sup> See, e.g., Hydrofluorocarbon Blends and Components Thereof from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, 81 FR 42314, 42316 (June 29, 2016) (“Hydrofluorocarbons 2016”) (“Under section 735(c)(5)(A) of the Act, the rate for all other companies that have not been individually examined is normally an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely on the basis of facts available. In this final determination, the Department has calculated a rate for TTI that is not zero, de minimis, or based entirely on facts available. Therefore, the Department has assigned to the companies that have not been individually examined, but have demonstrated their eligibility for a separate rate, a margin of 101.82 percent, which is the rate for TTI.”); Certain Corrosion-Resistant Steel Products From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, and Final Affirmative Critical Circumstances Determination, in Part, 81 FR 35316, 35317 (June 2, 2016) (“In this final determination, we calculated a weighted-average dumping margin for Yieh Phui (the only cooperating mandatory respondent) which is not zero, de minimis, or based entirely on facts available. Accordingly, we determine to use Yieh Phui’s weighted-average dumping margin as the margin for the separate rate companies.”); Narrow Woven Ribbons with Woven Selvedge from Taiwan: Preliminary Results of Antidumping Duty Administrative Review; 2013-2014, 80 FR 60627, 60627 (October 7, 2015) unchanged in Narrow Woven Ribbons With Woven Selvedge From Taiwan: Final Results of Antidumping Duty Administrative Review; 2013-2014, 81 FR 22578 (April 18, 2016).

<sup>224</sup> See section 735(c)(5)(B).

<sup>225</sup> See, e.g., Hydrofluorocarbons 2016, 81 FR at 42316; Boltless Steel Shelving Units Prepackaged for Sale From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 80 FR 51779, 51780-81 (August 26, 2015) (“Boltless 2015”); Multilayered Wood Flooring From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and Final Results of New Shipper Review; 2012-2013, 80 FR 41476 (July 15, 2015) (“Wood Flooring 2015”) and accompanying Issues and Decision Memorandum at Comment 17; Certain Kitchen Appliance Shelving and Racks From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 36656, 36660 (July 24, 2009) (“KASR 2009”).

<sup>226</sup> See, e.g., Changzhou Wujin Fine Chemical Factory Co., Ltd., v. United States, 942 F. Supp. 2d 1333, 1339 (CIT 2013) (“Fine Chemical”); Longkou Haimeng Mach. Co. v. United States, 581 F. Supp. 2d 1344, 1357-60 (CIT 2008) (“Longkou Haimeng”) (affirming the Department’s determination to assign a 4.22 percent dumping margin to the separate rate respondents in a segment where the three mandatory respondents received dumping margins of 4.22 percent, 0.03 percent, and zero percent, respectively).

mandatory respondent is rescinded from review after a preliminary determination, leaving only a single mandatory respondent under active review. The statute and the Department's regulations also do not address the establishment of a rate to be applied to individual separate rate respondents not selected for examination when the Department limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. However, under section 735(c)(5) of the Act, the Department established a long-standing reasonable method to assign margins to non-examined respondents, as noted above. Moreover, “[p]ursuant to section 735(c)(5)(A) of the Act, when only one dumping margin for the individually investigated respondents is above de minimis and not based on AFA, the separate rate will be equal to that single above de minimis rate.”<sup>227</sup> Contrary to parties' arguments regarding the circumstances of Minh Phu Group's rescission from review under 19 CFR 351.302(c), there is no statutory provision under section 735(c)(5)(A) to extend “good cause” or “special circumstances” to the calculation of the separate rate margin. The Department already has a well-established and consistently-applied practice in place for the circumstances presented here. Thus, any departure from that Court-affirmed practice, as suggested by the parties, is unsupported by the statute and the facts of this case. Thus, consistent with our practice, the Department determines that the most appropriate method to calculate the all-others rate is to base that rate on the rate calculated for the remaining mandatory respondent under review, Stapimex.

The Department disagrees with VASEP's arguments with respect to the calculation of the separate rate margin and the notion that the Department should, or is required to calculate a rate for Minh Phu Group based upon data submitted by that company prior to its withdrawal from the review. The Department has rescinded the administrative review with respect to the Minh Phu Group; thus, we have not calculated a final AD margin for this company. Because the Minh Phu Group is no longer under review, the Department did not complete its examination of the Minh Phu Group, nor is the Department required to do so. The fact that we examined and verified its sales and examined the FOPs for the Preliminary Results does not compel a different result. We agree with VASEP that we limited our examination of exporters to the two largest by volume. However, all parties that requested review of the Minh Phu Group, including the Minh Phu Group, withdrew their respective requests for review. Whether this occurred before or after the Preliminary Results is of no consequence.

VASEP's reliance on Schaeffler is misplaced. As an initial matter, VASEP excludes the crucial point that the Court did not set aside the Department's determination in that case. Specifically, the Court declined to issue a remand order, finding that plaintiffs for reasons immaterial to the circumstances of this proceeding did not qualify for relief.<sup>228</sup> As noted above, in this case there was no feasible manner in which the Department could have selected another respondent to fully

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<sup>227</sup> See, e.g., Fine Chemical, 942 F. Supp. 2d 1333, 1339 (CIT 2013); Longkou Haimeng, 581 F. Supp. 2d 1344, 1357-60 (CIT 2008).

<sup>228</sup> See Schaeffler, 781 F. Supp. 2d 1358, 1362-63. Indeed, the central argument within Schaeffler focuses on section 777A(c)(2) of the Act regarding limiting examination of respondents.

examine and verify within the statutory deadline at this late stage of the administrative review.<sup>229</sup> In addition, whatever the merits of Schaeffler, VASEP disregards the many proceedings and cases assuming the permissibility of all-others raters calculated based upon a single mandatory respondent.<sup>230</sup> Mazzetta Company LLC's, Quoc Viet's and Trong Nhan's reliance on language from Foshan Shunde and several other cases is also misplaced.<sup>231</sup> While a separate rate based on the dumping margins of two exporters instead of one may be generally more representative, this consideration is not sufficient to compel the Department to calculate a dumping margin for a company not subject to the current review.

The Department also disagrees with Mazzetta Company LLC's, Quoc Viet's and Trong Nhan's argument that it is improper to apply Stapimex's weighted-average margin as the separate rate because it is based entirely on a margin calculated in accordance with the A-T comparison method and only using EP sales. Such an outcome could and often does come to pass absent the circumstances of this case, as could reasonably be expected.<sup>232</sup> The circumstances of this review do not compel the Department to read into the statute the rule implied in Mazzetta Company LLC's, Quoc Viet's and Trong Nhan's argument.

VASEP, Mazzetta Company LLC, Quoc Viet and Trong Nhan are suggesting that the Department depart from its practice to arbitrarily include the information of a company rescinded from review simply based upon the supposed impact it would have on their duty rate if the Department were to calculate a final margin for the withdrawn respondent. To be clear, withdrawal and rescission of a review of a mandatory can work both ways, increasing or decreasing the rate for non-examined respondents, depending on the facts and circumstances of the particular case. In either case, we decline to continue a review of a properly withdrawn respondent and include that margin in these calculations, notwithstanding the speculative impact.

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<sup>229</sup> See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Results of the First Antidumping Duty Administrative Review, 76 FR 9753 (February 22, 2011) and accompanying Issues and Decision Memorandum at Comment 10, where the Department declined to examine an additional respondent even before the preliminary results deadline, stating that "given the statutory time constraints of an AR, it is not feasible at this time to identify an additional respondent, provide that respondent with time to respond to our questionnaires, analyze the data and develop preliminary results of review, provide parties with an opportunity to comment upon the results, solicit rebuttal comments, and then develop final results of review."

<sup>230</sup> See, e.g., Boltless Steel Shelving Units Prepackaged for Sale From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 80 FR 51779, 51780-81 (August 26, 2015); Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Results of New Shipper Review; 2012-2013, 80 FR 41476 (July 15, 2015) and accompanying Issues and Decision Memorandum at Comment 17; Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 36656, 36660 (July 24, 2009).

<sup>231</sup> The circumstances within Foshan Shunde are not analogous to this case. In Foshan Shunde, the Court required the Department to corroborate a rate based entirely on AFA, assigned as a separate rate to Foshan Shunde, a non-examined company. See Foshan Shunde, Court No. 10-00059 Slip. Op. 16-35 (April 7, 2016) at 31-33.

<sup>232</sup> See, e.g., Multilayered Wood Flooring From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2013-2014, 81 FR 903, January 8, 2016 and accompanying Preliminary Decision Memorandum at page 15 ("For Fine Furniture, the Department finds that 53.20 percent of Fine Furniture's export sales confirm the existence of a pattern of CEPs for comparable merchandise that differs significantly among purchasers, regions, or time periods. unchanged in Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014, 81 FR 46899 (July 19, 2016) (the separate rate margin was based on the only above-de minimis, non-AFA margin calculated for mandatory respondent, Fine Furniture, which made CEP sales).

For the final results, the Department calculated a rate for the remaining mandatory respondent under review, Stapimex, that is not zero, *de minimis*, or based entirely on facts available. We have rescinded the administrative review with respect to the Minh Phu Group. Therefore, consistent with section 735(c)(5)(A) and our Court-affirmed practice, the Department has assigned to the non-individually examined companies a separate rate of 4.78 percent, which is the rate calculated for Stapimex.

## **Comment 8: Treatment of Packing Materials as Byproducts**

### **VASEP Case Brief:**

- In the Preliminary Results, the Department disregarded all byproducts that are not necessarily physically derivative of shrimp, *i.e.*, everything other than heads and shells, stating that they are not “generated” in the production of subject merchandise. This improperly inflated the normal value.
- The Department’s conclusion is inconsistent with the law. The Department’s calculation of byproduct offsets must comport with the overall purpose of the antidumping statute, which is to calculate actual margins as accurately as possible.
- The Department’s general practice is to grant an offset if the respondent demonstrates that: (1) the byproduct is generated during the production of subject merchandise; and (2) the byproduct was sold for commercial value.<sup>233</sup>
- To determine whether the byproduct is generated during the production of the subject merchandise, the appropriate test is whether the byproduct is generated during the same phase of production that results in the subject merchandise, and not in the production of a separate product sold for value.<sup>234</sup>
- The key inquiry is whether the byproduct is generated during the production of subject merchandise versus some other merchandise sold for value. It is clear that the heads, shells, and packing materials were all created during the production of one product – frozen shrimp. There is no legal justification to assert that a byproduct must be a physical derivative of the subject merchandise – indeed, that simply introduces needless inaccuracy into the calculation of normal value.
- The Department’s conclusion is factually inaccurate. The shrimp production process “generates” the boxes that are later resold. Further, the sale of packing materials is no different from the revenue created by the production and sale of the byproducts that were once attached to the shrimp input. There is no difference between the sale of an empty box that was the result of the production of subject merchandise, and the sale of an empty shell that was the result of the production of the subject merchandise. Because both products were generated during the production of subject merchandise, and later sold, determining the values of both byproducts is necessary for accurately calculating normal value.
- As an accounting matter, whether the byproduct is technically a physical derivative is irrelevant, and provides no basis for the Department’s decision. It is worth noting that in a ME case, the sale of the boxes would certainly be captured in the calculation of a

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<sup>233</sup> See VASEP’s Case Brief at 12 citing to Arch Chems. Inc. v. United States, No. 08-00040, 2011 WL 1449034, at \*2 (CIT 2011) (“Arch Chems”).

<sup>234</sup> Id., citing to Arch Chems.

respondent's costs, either as an offset to the company's cost of manufacturing or as other income in the calculation of G&A. For the Department to ignore this value because it does not meet a new and arbitrary standard for what comprises a "byproduct" in an NME case merely ensures that the dumping margin is inaccurate.

#### **Petitioner's Rebuttal Brief:**

- The Department has correctly explained that unlike shrimp shells and heads, packing materials are not produced directly as a result of the production process.
- Boxes/cartons are physically independent of and separable from whole shrimp (the main input) before the packaging is introduced into the production process of the subject merchandise; shrimp shells are not and only become separated as the result of the production process.
- Unlike shrimp shells, the independent commercial value for the boxes exists whether they are introduced to the production process or not and thus are not attributable to the production of the subject merchandise. Under this logic, the remaining value of the input packing materials was the same as, if not less than, what it was before the input packing materials were placed into the production process.
- Shrimp shells, on the other hand, had no value before the production process; and only derived their independent commercial value, if any, through the production of subject merchandise after they were removed from the whole shrimp.

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

The Department disagrees with VASEP's request to treat packing materials of the FOPs and subject merchandise as byproduct offsets. Stapimex stated that its "production of frozen shrimp results in by-products of the shrimp's shell, head, and tail, each of which the company sells as scrap material."<sup>235</sup> Stapimex then reported that it "sold to an unaffiliated party scrap cartons, PA bags, and PE Bags that were discarded in the production process. These were predominately either cartons/boxes..., defective boxes purchased and booked as COP but not consumed in the production process, or used and later discarded on temporary packed products."<sup>236</sup> The NME Questionnaire at Section D states that offsets are granted for merchandise that is "either sold or reintroduced into production during the POI/POR, up to the amount of that byproduct/co-product actually produced during the POI/POR."<sup>237</sup> However, none of these claimed byproducts are actually byproducts derived from producing subject merchandise. They are either packing materials from the raw materials used to produce subject merchandise or defective packing materials that were not used to pack subject merchandise.

As we stated in the Preliminary Results, and consistent with our established practice, packing for direct materials, which are discarded (or sold as scrap) prior to entering the production process for subject merchandise, do not qualify as "byproducts." The circumstances here, regarding boxes/cartons, exactly mirror those in Hangers from the PRC, where we stated that "because the Department's practice is to only grant offsets to byproducts generated in the production of subject merchandise, which generally does not include packing materials for a particular input,

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<sup>235</sup> See Stapimex's Section D Questionnaire Response, dated July 6, 2015, at 6.

<sup>236</sup> Id., at 27-28.

<sup>237</sup> See, e.g., NME Questionnaire issued to Stapimex at Section D, page D-9, dated April 30, 2015.

we continue to find that the scrap iron buckets are not generated during the production of subject merchandise, and thus, are not eligible as an offset to the NV.”<sup>238</sup> Our established practice plainly excludes input packing materials from byproduct offsets.<sup>239</sup> Cartons, for example, are not “generated” from producing subject merchandise from whole shrimp; it is the packing material in which the main input was purchased and stored until withdrawal for consumption, which does not qualify as a byproduct “produced directly as a result of the production process.”<sup>240</sup> This reasoning similarly extends to defective packing materials that were not used to pack subject merchandise, which are also not generated in the production of subject merchandise.

Further, VASEP’s reliance on Arch Chems is inapposite here. In Arch Chems, “the CIT concluded that the respondent was not entitled to the offset since the byproduct in question was ‘discharged at a production stage that resulted solely in the production of non-subject merchandise.’”<sup>241</sup> The issue in that case was whether the claimed byproduct was properly attributed to the production of subject merchandise or to the production of non-subject merchandise. That case does not stand for the proposition, as VASEP would appear to have it, that the Department must grant a byproduct offset for any claimed byproduct that was sold for commercial value and not generated in the production of non-subject merchandise. VASEP’s argument regarding the Department’s practice in ME proceedings is also inapposite. Vietnam is a NME, and, as such, the surrogate financial statements capture the NME respondents’ costs.<sup>242</sup> Thus, we decline to grant Stapimex a byproduct offset for packing materials in the final results.

## **Comment 9: Separate Rate Status for Fish One**

### **Fish One’s Case Brief:**

- The Department appears to have made a clerical error in denying Fish One a separate rate in the Preliminary Results.

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<sup>238</sup> See First Administrative Review of Steel Wire Garment Hangers From the People’s Republic of China: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 76 FR 27994 (May 13, 2011) and accompanying Issues and Decision Memorandum at Comment 6.

<sup>239</sup> See, e.g., 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 1C, where the respondent, Xinhua Metal, argued for an offset for scrap tie wire used to tie purchased wire rod together. However, the Department determined that, “{b}ecause the scrap tie wire is not generated during the production of PC strand, the Department is not granting Xinhua Metal a by-product offset for scrap tie wire.”

<sup>240</sup> See also Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From the People’s Republic of China, 62 FR 61964 (November 20, 1997) and accompanying Issues and Decision Memorandum at Comment 64, where we stated that “it is the Department’s general policy to only grant by-product credits for by-products actually produced directly as a result of the production process.”

<sup>241</sup> 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) and accompanying Issues and Decision Memorandum at Comment 23, citing Arch Chems, Slip Op. 11-41 at 9.

<sup>242</sup> Section 773(c)(1) of the Act also explains that the Department will add to this amount general expenses, profit, and the cost of containers, coverings, and other expenses. In calculating these amounts, our practice is to use non-proprietary financial statements of companies producing identical or comparable merchandise from the primary surrogate country. See also 19 CFR 351.408(c)(4).

- If the Department intentionally denied Fish One a separate rate in the Preliminary Results, then its decision was not based on substantial evidence on the record, was arbitrary and capricious, not reasonable, and other not in accordance with law.

**No other interested parties commented on this issue.**

### **Department’s Position:**

The Department agrees with Fish One regarding its separate rate status. In the Preliminary Results, we unintentionally listed Fish One under the list of companies considered to be part of the Vietnam-wide entity. We have reviewed Fish One’s timely-filed separate rate certification and determine that Fish One is eligible for, and should receive, a separate rate in the final results.

### **Comment 10: Separate Rate Status for MC Seafood**

#### **VASEP Case Brief:**

- In the Preliminary Results, the Department wrongly concluded that MC Seafood should be denied separate rate status.
- The documentation this company provided with its Separate Rate Application (“SRA”) was no different from the documentation provided in the prior review, in which the Department granted separate rate status.
- The Department made no attempt to inform the company that the documentation it provided in the prior review would not be sufficient for this review. Indeed, in a Supplemental Questionnaire issued to MC Seafood, the Department did not ask the company anything about the name issue raised in the Preliminary Results. This is in direct violation of the statute, which requires that the Department bring to the respondent’s attention any deficiency in the respondent’s submissions in order to allow the respondent to correct or explain such deficiency.<sup>243</sup>
- The statutory provision is directly applicable here, because a denial of separate rate status subjects a company to an adverse facts available country-wide rate. This cannot be done without following the procedures set forth under U.S. law.
- Furthermore, the Department’s finding in the Preliminary Results is not correct. MC Seafood reported as follows on page 5 of its Separate Rate Application: “The BRC’s English did not specify in the full name of the company the words “Joint Stock”, but these words appear in the Vietnamese name with the words “Co Phan.” These words – “Co Phan” – also appear in the Vietnamese title of the document “Giay Chung Nhan Dang Ky Doanh Nghiep Cong Ty Co Phan,” which in English is “Business Registration Certification Registration for Joint Stock Company.” In other words, there is no question that this company is registered and known as a joint stock company; the words are merely missing from the BRC’s English translation.
- As such, the Vietnamese BRC does, in fact, register the name that the company uses on its letterhead and invoices. The English translation on the BRC is simply lacking some of the words. This should not lead the Department to penalize the company and its importers with

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<sup>243</sup> See VASEP Case Brief, at 62, citing to 19 U.S.C. § 1677m(d). VASEP also argues that the purpose of this statutory provision is remedial to ensure the record is complete, citing to Agro Dutch Indus., Ltd. v. United States, 31 CIT 2047, 2055 (2007).

application of the country-wide rate – use of which is inconsistent with both U.S. law and, as discussed in the previous section, the WTO Antidumping Agreement.

### **Petitioner’s Rebuttal Brief:**

- The Department should continue to deny separate rate status to MC Seafood
- The fact that MC Seafood Joint Stock Co. was granted separate rate status in a prior proceeding is irrelevant to the Department’s analysis on the record of this review.
- The Department issued a supplemental questionnaire to MC Seafood seeking more information on the BRC initially submitted. In its response, MC Seafood explained that the BRC “serve{d} as a business license of a company,” that the BRC “informs the scope of business in which an enterprise is allowed to engage as well as {includes} information relating to the legal structure, ownership, capital and legal representative of that enterprise,” and that the BRC issued on January 20, 2014, “acts as a replacement for the last version filed with the issuing Authority.”<sup>244</sup>
- With regard to the BRC, MC Seafood Joint Stock Company is the exporter in record for the subject merchandise, not “Minh Cuong Seafood Import-Export Processing,” the company listed on the BRC.<sup>245</sup>
- Even if afforded the opportunity to provide supplemental documentation, the fact that the exporter on the U.S. sales documentation for the subject merchandise does not match the entity listed in the BRC could not be changed. Thus, here, the “deficiency” identified by the Department could not be remedied by MC Seafood Joint Stock Co. in light of the time limits established.
- Indeed, MC Seafood Joint Stock Company has made no attempt to remedy the “deficiency” by supplementing the record.

### **Department’s Position:**

The Department disagrees with VASEP regarding MC Seafood’s eligibility for a separate rate. As an initial matter, the Department has not made an adverse finding here, under section 776(a)-(b) of the Act. The act of applying for a separate rate is a voluntary process undertaken by exporter-respondents and not directly solicited by the Department. Thus, VASEP errs when it indicates that the Department’s decision to deny MC Seafood separate rate status is an adverse finding. MC Seafood voluntarily submitted a SRA and did not follow the instructions provided therein.

The burden to build the record of a proceeding before the Department lies with the interested parties to that proceeding.<sup>246</sup> In the Initiation Notice, the Department notified exporter-respondents of the deadline to submit SRAs and/or separate rate certifications (“SRC”).<sup>247</sup> We also stated that “the Separate Rate Status Application will be available on the Department’s Web

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<sup>244</sup> See Petitioner Case Brief at 44, citing to MC Seafood’s Supplemental Questionnaire response, dated June 26, 2015.

<sup>245</sup> Id., at 45.

<sup>246</sup> See, e.g., QVD 2011, 658 F.3d 1318, 1324 (“{T}he burden of creating an adequate record lies with {interested parties} and not with Commerce.”).

<sup>247</sup> See Initiation of Antidumping and Countervailing Duty Administrative Reviews, 80 FR 18202 (April 3, 2015) (“Initiation Notice”).

site at <http://enforcement.trade.gov/nme/nme-sep-rate.html> on the date of publication of this Federal Register notice. In responding to the Separate Rate Status Application, refer to the instructions contained in the application.”<sup>248</sup>

In the Preliminary Results, we determined that MC Seafood’s submitted SRA did not heed the instructions that are provided in the application.<sup>249</sup> The instructions in the SRA are not fluid guidelines and very clearly provide for the necessary documents and information for exporter-respondents to demonstrate their eligibility for separate rate consideration. Specifically, as we stated in the Preliminary Results, the instructions in the NME SRA require applicants to demonstrate, among other things, that:

The name that is provided to the Department in the application **must** be the name that appears on the exporter’s business license/registration documents. All shipments to the United States declared to U.S. Customs and Border Protection **must** identify the exporter by its legal business name, and **this name must match the name** that appears on the exporter’s business/registration documents.<sup>250</sup>

The Department reviewed MC Seafood’s SRA and noted the following:

1. The currently valid Vietnamese business registration certificate (“BRC”) identifies the exporter-respondent, in English, as “MINH CUONG SEAFOOD IMPORT-EXPORT PROCESSING,” with “MC SEAFOOD” identified as the abbreviated name.<sup>251</sup>
2. The export sales documentation in the SRA identifies the exporter-respondent as either “MINH CUONG SEAFOOD IMPORT EXPORT FROZEN PROCESSING JOINT STOCK COMPANY” or “MINH CUONG SEAFOOD IMPORT EXPORT FROZEN PROCESSING JOINT STOCK CO.”<sup>252</sup>

These names demonstrably do not match. While VASEP argues that the Department did not specifically request MC Seafood to clarify the discrepancy regarding the mismatched names in a supplemental questionnaire, we agree with Petitioner that, even if the Department had requested clarification of the mismatched legal names on the various documents, these are not correctible discrepancies. In other words, neither the BRC nor export sales documentation are capable of being validly corrected in this review period such that the names would match and “fix” the issue.

Moreover, MC Seafood understood that the names included within the qualifying documents did not match because it provided a chart in its SRA demonstrating that very fact.<sup>253</sup> VASEP even included this chart in its case brief, which clearly demonstrates that the name listed in the BRC

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<sup>248</sup> Id., 80 FR at 18203.

<sup>249</sup> See Preliminary Decision Memo at page 10.

<sup>250</sup> Id.; see also NME Separate Rate Application, at page 4, available at: <http://enforcement.trade.gov/nme/sep-rate-files/app-20150323/srv-sr-app-20150416.pdf> (emphasis added).

<sup>251</sup> See Minh Cuong Seafood’s Separate Rate Application dated April 28, 2015, at Exhibit 1.

<sup>252</sup> Id., at Exhibits 2 and 3.

<sup>253</sup> Id., at page 5.

does not match the name listed in the export sales documentation.<sup>254</sup> MC Seafood attempted an explanation for this in a one-paragraph narrative in the SRA,<sup>255</sup> stating that “these name variations reflect only slight differences in the transliteration from Vietnamese.”<sup>256</sup> However, this is not what our instructions require, and the Department is not persuaded by VASEP’s argument that the difference between the two names is the result of a transliteration error. The name in the government-issued Vietnamese BRC does not match the name identified in the export sales documents.<sup>257</sup> This is not a matter of translation because the Department reviewed the Vietnamese BRC (which identifies the company name in English) to determine whether the names match, not the English translation of the Vietnamese BRC. Thus, MC Seafood is suggesting that the Department should overlook its own established instructions and grant MC Seafood a separate rate despite this obvious discrepancy in the documentation upon which separate rate determinations are based, which we decline to do. However, the Department’s requirements in the instructions of the application/certification are not arbitrary or fluid. Rather this requirement unambiguously reflects our stated policy in Policy Bulletin 5.1, which requires that:

{a}ll shipments to the United States declared to U.S. Customs and Border Protection must identify the exporter by its legal business name. This name must match the name that appears on the exporter’s business license/registration documents, a copy of which shall be provided to the Department as part of the exporter’s request for separate rate status.<sup>258</sup>

Because the commercial documents are used for merchandise entry purposes and provided to another agency (CBP) which, among other responsibilities enforces our determinations, the Department in granting separate rate status must ensure that the names provided on commercial documents submitted to the other agency and the company’s legal BRC contain the same information. Here, despite whatever similarities the names share, they do not match. Moreover, our separate rate application requires that an applicant “must provide documentary evidence that the trade name or d.b.a. name was used during the relevant period.” Here, MC Seafood itself acknowledged that none of the name permutations were used in *both* the BRC and in commercial documents during the relevant period.<sup>259</sup> We also disagree with VASEP’s contention that the Department must grant MC Seafood a separate rate in this administrative review because the Department had done so in the prior administrative review, using the same information. The purpose of requiring a SRA or SRC is that separate rates are granted on a segment-by-segment basis and not in perpetuity for the life of the order, just as a denial of a separate rate in one segment does not bar a respondent from receiving a separate rate in the next segment based on the information provided on the record of that next segment. Thus, the Department makes separate rate determinations in each segment after reviewing and evaluating the documents submitted for that segment. While the Department granted MC Seafood a separate rate in a prior

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<sup>254</sup> See VASEP Case Brief at 62.

<sup>255</sup> See Minh Cuong Seafood’s Separate Rate Application, at page 5; VASEP Case Brief at 62.

<sup>256</sup> See Minh Cuong Seafood’s Separate Rate Application, at page 6.

<sup>257</sup> Id., at Exhibit 1 (Vietnamese BRC) at .pdf pages 52-54.

<sup>258</sup> See Policy Bulletin 5.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries, dated April 5, 2005, at page 5; available at: <http://enforcement.trade.gov/policy/bull05-1.pdf>.

<sup>259</sup> See Minh Cuong Seafood’s Separate Rate Application, at page 5.

segment, in this segment, the Department has identified that MC Seafood's documents do not meet the clearly-stated requirements in the SRA that the names in the BRC and export documents must match. Finally, it is clear the standard for filing a correction separate rate application or certification is not an impossible standard as 32 individual companies submitted the required information timely, in the proper form, and completely.

As such, because MC Seafood's SRA does not contain a BRC and export sales documents with matching company names, as required in the instructions, MC Seafood is ineligible for a separate rate in these final results.

### **Comment 11: Separate Rate Status for Seaprodex Danang**

#### **VASEP Case Brief:**

- In its Preliminary Results, the Department wrongly denied separate rate status to Danang Sea Products Import-Export Corporation ("Seaprodex Danang"). This company had been granted separate rate status in the original investigation and in each of the first eight reviews to which it was subject.
- The Department's decision was improper because (1) the decision is inconsistent with U.S. law and with WTO law, and (2) the Department ignored changes in the level of government involvement in Seaprodex Danang since the prior review. In all segments of this order prior to the ninth review to which this company was subject, the Department granted separate rate status to Seaprodex Danang. As the Department knows, the degree of this company's relationship with the Government has declined rather than increased over the life of the order.
- The Department has not explained how it reconciles the fact that it found this company to act independently of the Government for multiple prior segments of this proceeding – even when government ownership was greater – and then suddenly found that a reduced level of government involvement led to the opposite conclusion for purposes of the ninth review and this review. It is important to recognize that the Department has not altered its decision on whether Seaprodex Danang is de jure independent of the Government.
- The evidence provided by the 33 companies in their separate rate applications/certifications supports a preliminary finding of an absence of de jure government control based on the following: (1) there is an absence of restrictive stipulations associated with the individual exporter's business and export licenses; (2) there are applicable legislative enactments decentralizing control of the companies; and (3) there are formal measures by the government decentralizing control of the companies.
- Seaprodex Danang was among the 33 companies to which this finding applied in AR9. In other words, the Department accepts the notion that even state-owned enterprises are legally entitled to independent decision-making under Vietnamese law.
- Furthermore, the Department did not alter the analysis it traditionally applies to determining whether a company is de facto independent of the Government: (1) the respondent sets its own export prices independent of the government and without the approval of a government authority; (2) the respondent retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses; (3) the respondent has the authority to negotiate and sign contracts and other agreements; and (4) the respondent has autonomy from the government regarding the selection of management.

- The evidence placed on the record of this review in the separate rate applications/certifications for 31 of the applicants demonstrates an absence of de jure and de facto government control with respect the companies' exports of subject merchandise, in accordance with the criteria identified in Sparklers and Silicon Carbide.
- Rather, the Department decided to apply a new policy that, based solely on the Government's percentage ownership, merely assumes a lack of independence. This policy, which is aimed at reducing the number of state-owned enterprises that exist in non-market economy countries, is not a decision based on substantial evidence.
  - The Department's determination, based solely on the percentage of government ownership, cannot be reconciled with legal jurisprudence. The CIT has noted that "{i}t is now well established that 'government ownership is not dispositive' of government control. Firms that are wholly owned by the PRC government are not barred, per se, from a separate rate." Despite this clear CIT guidance in the Diamond Sawblades litigation, the Department, which ironically changed its NME policy regarding state-owned enterprises in response to this same Diamond Sawblades litigation, has determined that government ownership is dispositive of government control in the present review.
  - The Department's new policy violates concepts of fundamental fairness. The problem with the Department's application of this new policy is not merely that it is irreconcilable with court precedent and many years of past practice involving the exact same set of facts, but it also is irreconcilable with the goal of ensuring that companies can conduct their businesses based on a predictable set of rules. When rules like this are changed in the middle of the game, they make a mockery of U.S. law. This is particularly true here given the retrospective nature of the antidumping law. Exporters and importers should be able to engage in business and not be retrospectively penalized after following the same procedures they followed in all the prior reviews that consistently gained them separate rate status. It is understood that if a company (or, as here, the mandatory respondents) are found to be dumping at a greater rate than the prior review, then their rate may change, both retrospectively and prospectively.
  - For this company's importers to be assessed a countrywide AFA rate of 25.76 percent – after multiple years of receiving the average of the mandatory respondents' rates, while doing nothing different from prior reviews – is extreme, to say the least.
  - Retroactively assessing an AFA rate on POR10 entries for importers that purchased from Seaprodex Danang when nothing material had changed regarding the company's relationship with the government will do nothing to further the Department's goal of prospectively reducing the number of state-owned enterprises in Vietnam.
  - The Department's decision to impose a countrywide rate based on AFA is inconsistent with the World Trade Organization ("WTO"). In United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam, a WTO Panel determined that the Department's practice of applying a countrywide rate based on AFA, rather than assigning an all-others rate to the Vietnamese-wide entity, was a clear violation of Article 6.8 of the Antidumping Agreement ("ADA"), which governs when AFA can be applied. At issue in that case was the treatment of non-separate rate respondents. Here, the Department's decision to impose a 25.76 percent AFA rate on Seaprodex Danang is inconsistent with Article 6.8 of the ADA.

- Because U.S. law is generally to be construed consistently with international obligations (such as those imposed by the WTO), the Department should not apply a countrywide rate to Seaprodex Danang.
- In an attempt to respond to the Department’s erroneous new rules with regard to government ownership, Seaprodex Danang underwent several changes that it reported to the Department over the course of this tenth review. Those changes include the following:
  - Seaprodex Vietnam began equitizing in October 2014 and completed the process in January 2015. Prior to October 2014, Seaprodex Vietnam was 100% state owned. Seaprodex Vietnam is now only 63.38% state owned. Seaprodex Vietnam is now a minority shareholder of Seaprodex Danang, reducing its share on July 27, 2015. As a result, Seaprodex Danang no longer has greater than 50% ownership by a majority government-owned entity.
  - Upon Seaprodex Vietnam’s sale of Seaprodex Danang shares, Seaprodex Danang changed its abbreviated name to “SeaDanang” on December 5, 2015. Evidence of this change was provided to the Department in the Third Supplemental Separate Rate Certification filed on December 17, 2015.
  - On January 25, 2016, SeaDanang’s board of management approved the change of the company logo, to further distinguish itself from its previous majority shareholder, Seaprodex Vietnam. The record of this decision and logo guidelines were provided to the Department in a letter on January 28, 2016.
- The Department ignored these changes, in direct contravention of its supposed aim of rewarding companies in NME countries that are seeking to shed the possible influence of government.

**Petitioner’s Rebuttal Brief:**

- The Department should continue to find that Seaprodex Danang does not satisfy the criteria demonstrating an absence of de facto government control over export activities and, as such, is ineligible for a separate rate.
- It is the Department’s practice to treat each segment of an antidumping proceeding as independent proceedings with separate records which lead to independent eligibility in this review based on the facts on the record and in accordance with court rulings.
- Similar arguments were also raised in AR9 Final Results and have been rejected by the Department.
- The Department considers whether there is an absence of de jure and de facto governmental control over a respondent in light of the criticism levied by the Court.
- Respondents assert that Seaprodex Danang should have been found to be eligible for a separate rate on the record of this administrative review. However, Respondents premise their argument on a mischaracterization of Department practice and, further, fail to demonstrate that the agency should consider post-period of review developments in its separate rate analysis. Because Respondents’ argument lacks merit, the Department should continue to find Seaprodex Danang to be ineligible for a separate rate in the final results.
- Despite all the information regarding separate rate eligibility on the record, VASEP presents no argument as to why the Department should account for post-POR developments in a separate rate determination for this review.

**Department’s Position:**

The Department disagrees with VASEP's arguments regarding Seaprodex Danang's eligibility for a separate rate. As an initial matter, the Department has not made an adverse finding here, as defined under section 776(a)-(b) of the Act. The act of applying for a separate rate is a voluntary process undertaken by exporter-respondents and not directly solicited by the Department. Thus, VASEP's arguments regarding the Department's alleged adverse finding are misplaced. Seaprodex Danang voluntarily submitted a SRA which contained information therein that did not demonstrate the exporter-respondent's de facto independence from government ownership and control.

We continue to find that Seaprodex Danang has not demonstrated that it meets the criteria for a separate rate. In the Preliminary Results, we explained that Seaprodex Danang did not demonstrate an absence of de facto governmental control.<sup>260</sup> Specifically, we reached this determination because Seaprodex Vietnam, the majority shareholder of Seaprodex Danang, itself remained majority-owned by the Government of Vietnam's Ministry of Agriculture and Rural Development ("MARD") during the POR and that three out of five members of its board of directors, including the chairman of the board, were representatives of Seaprodex Vietnam.<sup>261</sup>

As we stated in the Preliminary Results, in proceedings involving NME countries, the Department begins with a rebuttable presumption that all companies within Vietnam are subject to government control and, thus, should be assessed a single antidumping duty rate.<sup>262</sup> It is the Department's policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (de jure) and in fact (de facto), with respect to exports. To establish whether a company is sufficiently independent to be entitled to a separate, company-specific rate, the Department analyzes each exporting entity in an NME country under the test established in Sparklers,<sup>263</sup> as further developed in Silicon Carbide.<sup>264</sup> In accordance with this separate rates test, the Department assigns separate rates to respondents in NME proceedings if respondents demonstrate the absence of both de jure and de facto government control over their export activities.<sup>265</sup>

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<sup>260</sup> See Preliminary Decision Memo at pages 8-9.

<sup>261</sup> Id., citing Seaprodex Danang's Separate Rate Application, dated May 4, 2015, at page 14, and Supplemental Questionnaire Responses, dated August 5, 2015, November 11, 2015, and December 17, 2015.

<sup>262</sup> Id.

<sup>263</sup> See Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China, 56 FR 20588 (May 6, 1991) ("Sparklers").

<sup>264</sup> See Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China, 59 FR 22585, 22586-89 (May 2, 1994) ("Silicon Carbide").

<sup>265</sup> See, e.g., Final Results of Antidumping Duty Administrative Review: Petroleum Wax Candles From the People's Republic of China, 72 FR 52355, 52356 (September 13, 2007); Brake Rotors From the People's Republic of China: Preliminary Results and Partial Rescission of the Fourth New Shipper Review and Rescission of the Third Antidumping Duty Administrative Review, 66 FR 1303, 1306 (January 8, 2001), unchanged in Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of Fourth New Shipper Review and Rescission of Third Antidumping Duty Administrative Review, 66 FR 27063 (May 16, 2001); Notice of Final Determination of Sales at Less Than Fair Value: Creatine Monohydrate From the People's Republic of China, 64 FR 71104 (December 20, 1999).

As we stated in AR9 Final Results, addressing the same arguments, the Department continues to develop its practice with regard to the separate rates analysis in light of the litigation following Diamond Sawblades, and the Department's determinations thereafter.<sup>266</sup> In particular, in litigation involving the Diamond Sawblades proceeding, the Court found the Department's existing separate rates analysis deficient in the specific circumstances of that case, in which a government-controlled entity had significant ownership in the respondent exporter.<sup>267</sup> Following the Court's reasoning, in recent proceedings, we have concluded 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.<sup>268</sup> 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. 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. Here, as in AR9 Final Results, Seaprodex Danang has not demonstrated an absence of de facto government control.<sup>269</sup>

We also disagree with VASEP's contention that the Department must grant Seaprodex Danang a separate rate in this administrative review because the Department had done so in the underlying investigation and thereafter until AR9 Final Results. As we stated above, the purpose of requiring a SRA or SRC is that separate rates are granted on a segment-by-segment basis and not in perpetuity for the life of the order, just as a denial of a separate rate in one segment does not bar a respondent from receiving a separate rate in the next segment based on the information

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<sup>266</sup> See 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") in Advanced Technology & Materials Co., Ltd. v. United States, 885 F. Supp. 2d 1343 (CIT 2012), ("Advanced Technology") sustained Advanced Technology & Materials Co., Ltd. v. United States, 938 F. Supp. 2d 1342 (CIT 2013), *aff'd* Case No. 2014-1154 (Fed. Cir. 2014). This remand redetermination is on the Enforcement and Compliance website at <http://enforcement.trade.gov/remands/12-147.pdf>. ("DSB Remand"). See also Diamond Sawblades and Parts Thereof from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 77098 (December 20, 2013) and accompanying Preliminary Decision Memo at 7, unchanged in Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012, 79 FR 35723 (June 24, 2014) and accompanying Issues and Decision Memorandum at Comment 1 ("DSB 2014").

<sup>267</sup> See, e.g., Advanced Technology, 885 F. Supp. 2d at 1349. ("The court remains concerned that Commerce has failed to consider important aspects of the problem and offered explanations that run counter to the evidence before it."); *id.*, at 1351 ("Further substantial evidence of record does not support the inference that SASAC's {State-owned Assets Supervision and Administration Commission} 'management' of its 'state-owned assets' is restricted to the kind of passive-investor de jure 'separation' that Commerce concludes.") (footnotes omitted); *id.* at 1355 ("The point here is that 'governmental control' in the context of the separate rate test appears to be a fuzzy concept, at least to this court, since a 'degree' of it can obviously be traced from the controlling shareholder, to the board, to the general manager, and so on along the chain to 'day-to-day decisions of export operations,' including terms, financing, and inputs into finished product for export."); *id.* at 1357 ("AT&M itself identifies its 'controlling shareholder' as CISRI {owned by SASAC} in its financial statements and the power to veto nomination does not equilibrate the power of control over nomination.") (footnotes omitted).

<sup>268</sup> See Carbon and Certain Alloy Steel Wire Rod From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances, in Part, 79 FR 53169 (September 8, 2014) and accompanying Preliminary Decision Memorandum at 5-9.

<sup>269</sup> See Advanced Technology, 885 F. Supp. 2d, at 1349. See also DSB 2014 at Comment 1.

provided on the record of that next segment. The Department makes separate rate determinations in each segment after reviewing and evaluating the documents submitted in that segment.<sup>270</sup> While the Department may have granted Seaprodex Danang a separate rate in a prior segment, in this segment, Seaprodex Danang has not, on this record, demonstrated that it is independent from government control.

We also disagree with VASEP's argument that Seaprodex Danang presented information on the record that alters the ownership percentages, name, and logo of the company, which now differentiates it from its previous status as wholly government owned. First, in the Preliminary Results, the Department addressed these changes.<sup>271</sup> The basis of our determination as to ownership was based on majority ownership, not whether Seaprodex Danang was wholly owned by a government entity. With respect to the issues of name and logo changes, these arguments are flawed in that the documents therein regarding the logo post-dated the current POR and are not relevant to the separate rate analysis for the current POR.<sup>272</sup>

With respect to VASEP's reference to the Department's obligations under *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam (DS429)*, on July 18, 2016, Vietnam and the United States notified the Dispute Settlement Body that they had reached a mutually agreed solution following which the Department was not obliged to change its NME methodology as suggested in VASEP's argument.

Furthermore, although VASEP makes arguments related to what it perceives as the absence of record evidence showing control, the standard for determining separate rate status is that an NME exporter is presumed to be under government control until such a presumption is sufficiently rebutted. As such, Seaprodex Danang's citation to the purported absence of evidence of control or other demonstrable action on behalf of the Vietnamese government does not rebut this presumption.<sup>273</sup>

Based on the foregoing, we conclude that Seaprodex Danang does not satisfy the criteria demonstrating an absence of de facto government control over export activities. As a result, the Department continues to find that Seaprodex Danang has not demonstrated that it is free from de facto government control and remains ineligible for a separate rate in these final results.

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<sup>270</sup> See Fish Fillets 2011-2012 and accompanying Issues and Decision Memorandum at Comment 1. See also Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 74 FR 47551 (September 16, 2009) and accompanying Issues and Decision Memorandum at Comment 8.

<sup>271</sup> See Preliminary Decision Memo at page 8. See also Seaprodex Danang's Separate Rate Application, dated May 4, 2015, at page 14, and Supplemental Questionnaire Responses, dated August 5, 2015, November 11, 2015, and December 17, 2015. Seaprodex Danang reported that its majority owner, Seaprodex Vietnam, was previously 100 percent owned by MARD, but has since equitized so that MARD's ownership in Seaprodex Vietnam is no longer at 100 percent. See Seaprodex Danang's Separate Rate Application, dated May 4, 2015, at page 16. However, this equitization was not completed until four days before the end of the POR.

<sup>272</sup> See Seaprodex Danang's Submission, dated January 28, 2016.

<sup>273</sup> See, e.g., Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013, 80 FR 20197 (April 15, 2015), and accompanying Issues and Decision Memorandum at Comment 1. See also Seaprodex Danang's Separate Rate Application, at page 15, where Seaprodex Danang provided ownership percentages of its majority owner, which, in turn, is majority owned by MARD; Seaprodex Danang's Submission, dated January 28, 2016.

## **Comment 12: Separate Rate Status for Additional Trade Names**

### **A. Thuan Phuoc Seafoods and Trading Corporation**

#### **VASEP Case Brief:**

- In the Preliminary Results, the Department granted separate rate status for Thuan Phuoc Seafoods and Trading Corporation. However, the abbreviated or factory names “Frozen Seafoods Factory No 32,” “Seafoods and Foodstuff Factory,” “My Son Seafoods Factory,” and “Frozen Seafoods Factory” were not included, despite being requested in Thuan Phuoc’s April 23, 2015, Separate Rate Certification.
- These names are the factory names of the company granted separate rate status as reflected in their separate branch BRCs. Given that the case number and manufacturer ID were the same for entries under this name and the names granted separate rate status and that the “Frozen Seafoods Factory No 32,” “Seafoods and Foodstuff Factory,” “My Son Seafoods Factory,” and “Frozen Seafoods Factory” were included in BRCs included with the separate rate certification, these are clear references to the same company.
- As such, we ask that the Department grant separate rate status in the Final Results to the names, “Frozen Seafoods Factory No 32,” “Seafoods and Foodstuff Factory,” “My Son Seafoods Factory,” and “Frozen Seafoods Factory”.

**No other interested parties commented on this issue.**

#### **Department’s Position:**

The Department disagrees with VASEP. In the Preliminary Results, we found that “Thuan Phuoc Seafood and Trading Company” and “Frozen Seafoods Factory” were variations of names that were not eligible for separate rate status, the reasons for which are business proprietary information.<sup>274</sup> In our Trade Name Memo, we stated that:

If a company’s trade name or dba is not included in: 1) the most current BRC valid during the POR and 2) on commercial documents (such as sales contracts, invoices, bills of lading, packing lists, certificates of origin) submitted to CBP for entry, showing use of this name for trade purposes, we are not granting separate rate status to that name, even if it had been granted separate rate status in the ninth administrative review (or any other prior administrative reviews).<sup>275</sup>

Thuan Phuoc’s currently valid BRC (November 7, 2011) does not include the above names requested for status.<sup>276</sup> Indeed, while the above-requested names appear on an older version of the BRC, those names are not on the currently valid BRC (i.e., the most recent iteration dated

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<sup>274</sup> See “Memorandum to the File, through Catherine Bertrand, Program Manager, Office V, from Irene Gorelik, Analyst, Office V, re: Names Not Granted Separate Rate Status at the Preliminary Results,” dated March 3, 2016 (“Trade Name Memo”).

<sup>275</sup> Id., at page 3, footnote 13.

<sup>276</sup> See Thuan Phuoc’s Separate Rate Certification, dated April 23, 2015, at 5-6.

November 7, 2011).<sup>277</sup> However, there is no commercial documentation on the record showing that the requested trade names above were commercially used for sales of subject merchandise during the POR. As shown in the Department’s SRCs and SRAs, a trade name identified solely on a BRC is not sufficient for gaining separate rate status for trade names—a company must also show evidence that the trade name was used during the POR.<sup>278</sup> Thuan Phuoc has not presented any documentation demonstrating that the additional trade names for which it is requesting separate rate status were used commercially during the POR. Further, if Thuan Phuoc included these names as trade names but these names are, in fact, separate companies or “branches,” they are equally ineligible for separate rate status. In the Trade Name Memo, the Department stated that:

We will not grant separate rate status to companies that have not filed their own separate rate application, but rather, request “dba” or “trade name” status through a claimed affiliate’s separate rate application/certification. The Department has stated this policy repeatedly for several review periods. See, e.g., Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2011–2012, 78 FR 56211 (September 12, 2013) and accompanying Issues and Decision Memorandum at Comment 11.<sup>279</sup>

Moreover, the Department has never conducted an affiliation or collapsing/single entity analysis for Thuan Phuoc and any of the above names, pursuant to section 771(33) of the Act and 19 CFR 351.403. Thus, despite any granting of a separate rate to these companies in a prior review period, whether it was proper or not, we continue to find that these “trade names” are not eligible for separate rate status in the instant review.

We also disagree with Thuan Phuoc’s argument that importer data entry error qualifies as reasons for granting separate rate status to these two requested name variations. It is not the Department’s responsibility to ensure that importers properly enter exporter names when completing CBP entry documentation. The Federal Register notices are searchable public documents such that any public person may immediately know what names are granted separate rate status. Furthermore, importers and customs brokers have access to the ACE system used by CBP and can readily identify which companies and trade names obtained separate rate status for the relevant POR. It is also not the Department’s responsibility to correct importers’ entry errors, whether typographical or as a result of translation. The Department is not required to grant separate rate status to trade names that are not eligible for it (i.e., without evidence of use in commercial documentation and inclusion in the BRC). Simply requesting separate rate status for a trade name in a separate rate certification, without the required evidence that 1) the name is

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<sup>277</sup> See AR9 Final Results and accompanying Issues and Decision Memorandum at Comment 13B, where the Department denied separate rate status to these identical names in that review as well (“In the Preliminary Results, we found that ‘Thuan Phuoc Seafood and Trading Company’ and ‘Frozen Seafoods Factory’ were variations of names that were not eligible for separate rate status, the reasons for which are business proprietary information. . . . Furthermore, the Department also conducted verification of this company and found that the above name variations were not listed on the company’s BRC or appeared on any commercial documentation.”).

<sup>278</sup> See, e.g., AR9 Final Results and accompanying Issues and Decision Memorandum at Comment 13.

<sup>279</sup> See Trade Name Memo, at page 5, footnote 16.

on a valid BRC and 2) appears on commercial documentation during the POR is insufficient for demonstrating eligibility for separate rate status.

As for ease of liquidating entries for specific company names, CBP may inquire with the Department regarding, for example, the punctuation of a company's name as confirmation that they are the same company without the Department having to grant separate rate status to a name that does not meet the requirements for such. The issue of properly liquidating entries is separate from a company receiving separate rate status for a name that does not merit such status. Thus, we continue to decline to grant separate rate status to the four "trade names" for which Thuan Phuoc has requested separate rate status.

## **B. Sao Ta Seafood Joint Stock Company**

### **VASEP Case Brief:**

- In the Preliminary Results, the Department granted separate rate status for Sao Ta Seafood Joint Stock Company, Fimex VN, and its factory Saota Seafood Factory. However, the slight variation of the name "Sao Ta Seafood Factory"—that is, "Sao Ta" with a space rather than Saota— was not granted separate rate status.
- Both variations of the name can be found in the Fimex's separate rate application.
- "Sao Ta Foods Joint Stock Company" is included in the BRC provided in the separate rate application and "Sao Ta Seafood Factory" is the same as "Saota Seafood Factory," but for a space between Sao and Ta, and should be given separate rate status particularly given that the case number and manufacturer ID were the same for entries under this name and the names granted separate rate status. The separate rate company should not be denied separate rate status simply a space is included or missing.
- As such, we ask that the Department not specifically deny separate rate status in the final results to the abbreviated name "Sao Ta Seafood Factory."

**No other interested parties commented on this issue.**

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

The Department disagrees with Sao Ta Seafood Joint Stock Company regarding what trade names qualify for separate rate status. In the Preliminary Results, we stated that "Sao Ta Seafood Factory" was a variation of a name that was not eligible for separate rate status, the reasons for which are business proprietary information.<sup>280</sup> In our Trade Name Memo, we stated that:

If a company's trade name or dba is not included in: 1) the most current BRC valid during the POR and 2) on commercial documents (such as sales contracts, invoices, bills of lading, packing lists, certificates of origin) submitted to CBP for entry, showing use of this name for trade purposes, we are not granting separate

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<sup>280</sup> See Trade Name Memo.

rate status to that name, even if it had been granted separate rate status in the ninth administrative review (or any other prior administrative reviews).<sup>281</sup>

We disagree with Sao Ta Seafood Joint Stock Company's argument that importer data entry error qualifies as reasons for granting separate rate status to the requested name variation. It is not the Department's responsibility to ensure that importers properly enter exporter names when completing CBP entry documentation. The Federal Register notices are searchable public documents such that any public person may immediately know what names are granted separate rate status. Furthermore, importers and customs brokers have access to the ACE system used by CBP and can readily identify which companies and trade names obtained separate rate status for the relevant POR. It is also not the Department's responsibility to correct importers' entry errors, whether typographical or translation. The Department is not required to grant separate rate status to trade names that are not eligible for it (*i.e.*, without evidence of use in commercial documentation and inclusion in the BRC). Simply requesting separate rate status for a trade name in a separate rate certification, without the required evidence that: 1) the name is on a valid BRC and 2) appears on commercial documentation during the POR, is insufficient for eligibility for separate rate status, especially if the name is a misspelling of a name that the company does not use commercially.

As for ease of liquidating entries for specific company names, CBP may inquire with the Department regarding, for example, spacing or punctuation of a company's name as confirmation that they are the same company without the Department having to grant separate rate status to a name that does not meet the requirements for such. The issue of properly liquidating entries is separate from a company receiving separate rate status for a trade name that does not merit such status. Thus, we continue to decline to grant separate rate status to claimed trade name "Sao Ta Seafood Factory."

### **C. Vietnam Clean Seafood Corporation**

#### **VASEP Case Brief:**

- In the Preliminary Results, the Department did not grant separate rate status to abbreviated name "Viet Nam Clean Seafood Corporation." This name was requested in Vina Cleanfood's April 28, 2015, SRC.
- This variation of the company name is a slight variation (due to different spacing when translating the country name) of the names granted separate rate status. "Viet Nam Clean Seafood Corporation" is a clear reference to Vietnam Clean Seafood Corporation, which was granted separate rate status.
- The Department should grant separate rate status to the abbreviated name, "Viet Nam Clean Seafood Corporation," particularly given that the case number and manufacturer ID were the same for entries under this name and the names granted separate rate status.

**No other interested parties commented on this issue.**

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<sup>281</sup> Id., at page 3, footnote 13.

## **Department's Position:**

The Department disagrees with Vietnam Clean Seafood Corporation regarding what trade names qualify for separate rate status. In the Preliminary Results, we stated that “Viet Nam Clean Seafood Corporation” was a variation of a name that was not eligible for separate rate status, the reasons for which are business proprietary information.<sup>282</sup> In our Trade Name Memo, we stated that:

If a company's trade name or dba is not included in: 1) the most current BRC valid during the POR and 2) on commercial documents (such as sales contracts, invoices, bills of lading, packing lists, certificates of origin) submitted to CBP for entry, showing use of this name for trade purposes, we are not granting separate rate status to that name, even if it had been granted separate rate status in the ninth administrative review (or any other prior administrative reviews).<sup>283</sup>

We disagree with Vietnam Clean Seafood Corporation's argument that slight variations in spelling or spacing of an official company name qualifies as reasons for granting separate rate status to the requested name variation. The Department is not required to grant separate rate status to trade names that are not eligible for it (i.e., without evidence of use in commercial documentation and inclusion in the BRC). Simply requesting separate rate status for a trade name in a separate rate certification, without the required evidence that: 1) the name is on a valid BRC and 2) appears on commercial documentation during the POR, is insufficient for eligibility for separate rate status, especially if the name is a misspelling of a name that the company does not use commercially.

As for ease of liquidating entries for specific company names, CBP may inquire with the Department regarding, for example, spacing or punctuation of a company's name as confirmation that they are the same company without the Department having to grant separate rate status to a name that does not meet the requirements for such. The issue of properly liquidating entries is separate from a company receiving separate rate status for a trade name that does not merit such status. Thus, we continue to decline to grant separate rate status to claimed trade name “Viet Nam Clean Seafood Corporation.”

### **D. C.P. Vietnam Corporation**

#### **VASEP Case Brief:**

- In the Preliminary Results, the Department granted separate rate status to C.P. Vietnam Corporation. However, the former company name “C.P. Vietnam Livestock Co., Ltd.” was not included.
- This name was requested in C.P. Vietnam's May 4, 2015, SRC and is included in the supporting documents. This variation of the company name has been granted separate rate status in previous reviews. Given that the case number and manufacturer ID were the same for entries under this name and the names granted separate rate status and that the name “C.P.

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<sup>282</sup> See Trade Name Memo.

<sup>283</sup> Id., at page 3, footnote 13.

Vietnam Livestock Co., Ltd.” was included in the SRC, this is a clear reference to the same company.

- As such, the Department should grant separate rate status in the final results to the name variation, “C.P. Vietnam Livestock Co., Ltd.”

**No other interested parties commented on this issue.**

**Department’s Position:**

The Department disagrees with C.P. Vietnam Corporation regarding what trade names qualify for separate rate status. In the Preliminary Results, we stated that “C.P. Vietnam Livestock Co., Ltd.” was a name variation ineligible for separate rate status, because we conducted a changed circumstances review (“CCR”)<sup>284</sup> for this company and the name was superseded by a different company name post-CCR.<sup>285</sup> Moreover, in the CCR, the Department clearly notified C.P. Vietnam Corporation that it will instruct CBP of the revised company name pursuant to the successorship determination. Thus, the Department is perplexed by C.P. Vietnam Corporation’s continued requests for separate rate status for a defunct company name that has been previously determined to no longer exist for purposes of exporting to the United States.

In our Trade Name Memo, we stated that “these names have been superseded by completed changed circumstances reviews resulting in Successor-in-Interest determinations, as conducted by the Department. These names no longer appear on the *current* BRC’s and, thus, are not the legally designated company names and ineligible for separate rate status as valid trade names.”<sup>286</sup> We also very clearly stated that we do not automatically grant separate rate status in an active segment simply because we had previously granted separate rate status to that name variation.<sup>287</sup> As we stated above, the purpose of requiring a SRA or SRC is that separate rates are granted on a segment-by-segment basis and not in perpetuity for the life of the order, just as a denial of a separate rate in one segment does not bar a respondent from receiving a separate rate in the next segment based on the information provided on the record of that next segment. The same standard applies to all name variations requested. The Department makes separate rate determinations in each segment after reviewing and evaluating the documents submitted for such.

The Department is not required to grant separate rate status to trade names that are not eligible for it (*i.e.*, without evidence of use in commercial documentation and inclusion in the BRC). Simply requesting separate rate status for a trade name in a separate rate certification, without the required evidence that: 1) the name is on a valid BRC and 2) appears on commercial documentation during the POR, is insufficient for eligibility for separate rate status.

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<sup>284</sup> See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Changed Circumstances Review, 77 FR 23222 (April 18, 2012) (“The Department will instruct U.S. Customs and Border Protection that the cash deposit determination from this changed circumstances review will apply to all shipments of the subject merchandise produced and exported by C. P. Vietnam Corporation entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this changed circumstances review. This deposit rate shall remain in effect until further notice.”).

<sup>285</sup> See Trade Name Memo, at page 5.

<sup>286</sup> *Id.*, at page 3, footnote 14.

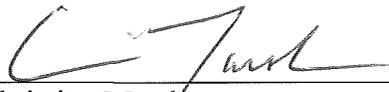
<sup>287</sup> *Id.*, at page 3, footnote 13.

Moreover, as noted above, the Department conducted a changed circumstances review for this company, which resulted in a successorship determination, but that does not qualify a former name that has been superseded by a new company name, for separate rate status. As for ease of liquidating entries for specific company names, CBP may inquire with the Department regarding, for example, spacing or punctuation or other slight variations of a company's name as confirmation that they are the same company without the Department having to grant separate rate status to a name that does not meet the requirements for such. In this case, the Department would refer CBP to the CCR, where we notified them of the change. The issue of properly liquidating entries is separate from a company receiving separate rate status for a trade name that does not merit such status. Thus, we continue to decline to grant separate rate status to the claimed trade name "C.P. Vietnam Livestock Co., Ltd."

**RECOMMENDATION**

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

AGREE  DISAGREE

  
\_\_\_\_\_  
Christian Marsh  
Acting Assistant Secretary  
for Enforcement and Compliance

9/16/16  
\_\_\_\_\_  
Date

## Appendix I—Separate Rate Respondents

1. Bac Lieu Fisheries Joint Stock Company
2. C.P. Vietnam Corporation
3. Cadovimex Seafood Import-Export and Processing Joint Stock Company
4. Camau Frozen Seafood Processing Import Export Corporation
5. Camau Seafood Processing and Service Joint Stock Corporation
6. Can Tho Import Export Fishery Limited Company
7. Cuulong Seaproducts Company
8. Gallant Dachan Seafood Co., Ltd.
9. Green Farms Seafood Joint Stock Company
10. Hai Viet Corporation
11. Investment Commerce Fisheries Corporation
12. Kim Anh Company Limited
13. Minh Hai Export Frozen Seafood Processing Joint-Stock Company
14. Minh Hai Joint-Stock Seafoods Processing Company
15. Ngoc Tri Seafood Joint Stock Company
16. Nha Trang Fisheries Joint Stock Company
17. Nha Trang Seaproduct Company
18. Phuong Nam Foodstuff Corp.
19. Quang Minh Seafood Co., Ltd.
20. Quoc Viet Seaproducts Processing Trading and Import-Export Co., Ltd.
21. Sao Ta Foods Joint Stock Company
22. Seaprimexco Vietnam
23. Stapimex
24. Taika Seafood Corporation
25. Thong Thuan Company Limited
26. Thuan Phuoc Seafoods and Trading Corporation
27. Trong Nhan Seafood Company Limited
28. UTXI Aquatic Products Processing Corporation
29. Viet Foods Co., Ltd.
30. Viet Hai Seafood Co., Ltd.
31. Viet I-Mei Frozen Foods Co., Ltd.
32. Vietnam Clean Seafood Corporation

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

1. Amanda Foods (Vietnam) Ltd. Ngoc Tri Seafood Company (Amanda’s affiliate)
2. Amanda Seafood Co., Ltd.
3. An Giang Coffee JSC
4. Anvifish Joint Stock Co.
5. Asia Food Stuffs Import Export Co., Ltd.
6. B.O.P. Limited Co.
7. Binh An Seafood Joint Stock Company
8. Can Tho Agricultural and Animal Product Import Export Company (“CATACO”)  
Can Tho Agricultural and Animal Products Imex Company  
Can Tho Agricultural and Animal Products Import Export Company (“CATACO”)  
Can Tho Agricultural Products  
Can Tho Agricultural Products
9. Can Tho Import Export Seafood Joint Stock Company (CASEAMEX)
10. Cau Tre Enterprise (C. T. E.)
11. Cautre Export Goods Processing Joint Stock Company
12. CL Fish Co., Ltd. (Cuu Long Fish Company)
13. Danang Seaproducts Import Export Corporation (“Seaprodex Danang”)  
Danang Seaproducts Import-Export Corporation (“Seaprodex Danang”) (and its affiliates)  
Danang Seaproducts Import-Export Corporation (and its affiliate, Tho Quang Seafood Processing and Export Company) (collectively “Seaprodex Danang”)  
Seaprodex Danang  
Tho Quang Co.  
Tho Quang Seafood Processing and Export Company  
Frozen Seafoods Factory No. 32 (Tho Quang Seafood Processing and Export Company)
14. D & N Foods Processing (Danang Company Ltd.)
15. Duy Dai Corporation
16. Gallant Ocean (Quang Ngai) Co., Ltd.
17. Gn Foods
18. Hai Thanh Food Company Ltd.
19. Hai Vuong Co., Ltd.
20. Han An Trading Service Co., Ltd.
21. Hoang Hai Company Ltd.
22. Hua Heong Food Industries Vietnam Co. Ltd.
23. Huynh Huong Seafood Processing (Huynh Houg Trading and Import Export Joint Stock Company)
24. Interfood Shareholding Co.
25. Khanh Loi Seafood Factory
26. Kien Long Seafoods Co. Ltd.
27. Luan Vo Fishery Co., Ltd.
28. Minh Chau Imp. Exp. Seafood Processing Co., Ltd.
29. Minh Cuong Seafood Import Export Frozen Processing Joint Stock Company (“Minh Cuong Seafood”)
30. Mp Consol Co., Ltd.

31. Ngoc Chau Co., Ltd. and/or Ngoc Chau Seafood Processing Company
32. Ngoc Sinh  
Ngoc Sinh Fisheries  
Ngoc Sinh Private Enterprises  
Ngoc Sinh Seafood Processing Company  
Ngoc Sinh Seafood Trading & Processing Enterprise  
Ngoc Sinh Seafoods
33. Phu Cuong Jostoco Corp.  
Phu Cuong Jostoco Seafood Corporation
34. Quang Ninh Export Aquatic Products Processing Factory
35. Quang Ninh Seaproducts Factory
36. Quoc Ai Seafood Processing Import Export Co., Ltd.
37. S.R.V. Freight Services Co., Ltd.
38. Sustainable Seafood
39. Tan Thanh Loi Frozen Food Co., Ltd.
40. Thanh Doan Seaproducts Import & Export Processing Joint-Stock Company  
(THADIMEXCO)
41. Thanh Hung Frozen Seafood Processing Import Export Co., Ltd.
42. Thanh Tri Seafood Processing Co. Ltd.
43. Thinh Hung Co., Ltd.
44. Tien Tien Garment Joint Stock Company
45. Tithi Co., Ltd.
46. Trang Khan Seafood Co., Ltd.
47. Viet Cuong Seafood Processing Import Export Joint-Stock Company
48. Vietnam Northern Viking Technologies Co. Ltd.
49. Vinatex Danang
50. Vinh Loi Import Export Company (“VIMEX”)  
Vinh Loi Import Export Company (“Vimexco”)