

Final Results of Redetermination Pursuant to *Catfish Farmers of America et al. v. United States*, Court No. 11-00252, Slip Op. 13-91, (July 22, 2013)

I. Summary

The U.S. Department of Commerce (“Department”) has prepared these results of redetermination pursuant to the remand order of the U.S. Court of International Trade (“CIT” or the “Court”) in *Catfish Farmers of America et al. v. United States*, Consol. Court No. 11-00252, Slip Op. 13-91, (July 22, 2013) (“*Catfish Farmers NSR*”). This remand addresses two issues in the new shipper reviews for IDI Corporation (“IDI”) and Thien Ma Seafood Company (“THIMACO”) (collectively, “Respondents”) of the antidumping duty order on certain frozen fish fillets from the Socialist Republic of Vietnam (“Vietnam”).¹ In accordance with the Court’s instructions, the Department reconsidered its selection of the primary surrogate country, as well as the selection of the surrogate values (“SVs”) for the fish waste and fish skin by-products²

As described further below, and after further evaluating the record evidence, the Department continues to determine that Bangladesh is the best option for the surrogate country. The Department has also determined to select different SVs for the fish waste and fish skin by-products. Lastly, the Department has accounted for all of the changes in the margin calculations pursuant to this remand redetermination. In doing so, the Department finds that, after accounting for all such changes and issues, the resulting antidumping margins are unchanged from the draft results of redetermination issued on November 15, 2003 (“Draft Results”) and remain *de minimis*.

¹ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty New Shipper Reviews*, 76 FR 35403 (June 17, 2011) (“*NSR Final*”).

² See *Catfish Farmers NSR* at 3-6. The Court’s opinion and remand order also presumed familiarity with *Catfish Farmers of America et al. v. United States*, Court No. 11-00109, Slip Op. 13-63 (May 23, 2013) (“*Catfish Farmers AR Opinion*”).

II. Analysis

A. Surrogate Country Selection

The CIT remanded the entire issue of surrogate country selection to the Department.³ We observe that parties' arguments and the Court's opinion regarding the surrogate country issues center around the evaluation of the data considerations between the Philippine Bureau of Aquaculture Statistics ("BAS") data and Bangladeshi Department of Agricultural Marketing ("DAM") data. Thus, our underlying determinations in the *NSR Final* with respect to whether the two countries at issue (Bangladesh and the Philippines) are economically comparable and are significant producers of comparable merchandise⁴ are not at issue in this proceeding.

Contribution of Different Factors of Production ("FOPs") to the Margin Calculation

As in the underlying administrative review, the SV for whole fish dominates the decision of which surrogate country to select, given its overwhelming contribution to the cost of manufacturing ("COM") and normal value ("NV").⁵ In addition, the Respondents overwhelmingly purchased whole live fish, as opposed to farming it themselves, thus making purchased fish more important relative to other FOPs.⁶ Of these other FOPs, the surrogate financial ratios are generally a more important component of the margin calculation. For the reasons explained in the *NSR Final* (and not in dispute here), the Department generally prefers to average multiple usable financial statements where available and to use statements from the primary surrogate country. Given that Bangladesh has two usable financial statements, and for

³ See *Catfish Farmers NSR*, at 6.

⁴ See *NSR Final*, and accompanying Issues and Decision Memorandum at Comments I.A. and I.B.

⁵ See the memorandum "Business Proprietary Information Referenced in the Draft Remand," dated concurrently with these draft remand results, for the precise percentages of COM and NV accounted for by the whole fish input.

⁶ We note that THIMACO had reported farming FOPs in the underlying review, but that given concerns about the reliability of its reported farming FOPs, we used the intermediate input methodology for THIMACO's margin calculation (*i.e.*, we began the NV buildup by valuing the whole fish input). Thus, the FOP data we used for THIMACO mirrors that of a company that purchases whole live fish.

the reasons stated herein remains the primary surrogate country, it is unnecessary to consider financial statements from another country. Thus, while the SV data for some secondary FOPs are more contemporaneous in the Philippines than the corresponding Bangladeshi data, we do not place significant weight on that fact when rendering our overall decision on the surrogate country, especially given the fact that we can inflate these values to make them current with the POR in order to mitigate against the fact that the certain data are not as contemporaneous. The surrogate financial ratios are a more important component of the margin calculation in this instance than a handful of secondary FOPs that contribute minimally to the overall NV.⁷

Turning our attention to the SV for the whole fish FOP, we continue to consider two sources of information for the whole fish SV issued by two governments, both representing official statements of those governments as to the price of whole live fish relevant to our surrogate country selection. In examining the two government sources, the Tariff Act of 1930, as amended, (“Act”) and the Department’s well-established SV practice provide guidance. Section 773(c)(1) of the Act directs the Department to use “the best available information” from the appropriate ME country to value FOPs. In selecting the most appropriate SVs, the Department considers several factors including whether the SV is: 1) publicly available, 2) contemporaneous with the POR, 3) represents a broad market average, 4) chosen from an approved surrogate country, 5) are tax and duty-exclusive, and 6) specific to the input.⁸ Moreover, it is the Department’s practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing the FOPs on a case-

⁷ See the memorandum “Business Proprietary Information Referenced in the Draft Remand,” (showing low percentage of COM and NV accounted for by all of the combined secondary FOPs.)

⁸ See, e.g., *First Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Final Results of the Antidumping Duty Administrative Review*, 75 FR 64695 (October 20, 2010), and accompanying Issues and Decision Memorandum at Comment 3.

by-case basis.⁹ As there is no hierarchy for applying the above-mentioned factors, the Department must weigh available information with respect to each input value and make a product-specific and case-specific decision as to what the “best” available SV is for each input.¹⁰

B. SV Selection Criteria Applied to the BAS and DAM Data

As an initial matter and for purposes of this remand, given the arguments espoused by the parties in litigation and the issues highlighted in the Court’s opinion, of the six SV selection criteria noted above, as in the *NSR Final*, the Department continues to find that both sources are publicly available, contemporaneous with the period of review (“POR”), from an approved surrogate country, and tax and duty exclusive. Thus, these four factors are not in dispute. Below, we elaborate on the application of the remaining selection criteria (broad market average and specificity) to the BAS and DAM data.

1. Broad Market Average

BAS Data

Considering whether the BAS data represent a broad market average, we first note that the BAS reports data for various seafood products covering a total of 81 provinces and cities.¹¹ In sampling from these 81, the BAS selects respondents from both top-producing provinces and less significant-producing provinces.¹² Out of 81 provinces, only four provinces reported any *Pangasius* production in 2008, and only eight of 81 provinces reported production in 2009.¹³ Additionally, the production figures reported in the published BAS data are extrapolated

⁹ See *Certain Preserved Mushrooms from the People’s Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review*, 71 FR 40477 (July 17, 2006), and accompanying Issues and Decision Memorandum at Comment 1 (“*Mushrooms from the PRC*”); see also *Freshwater Crawfish Tail Meat from the People’s Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 19546 (April 22, 2002), and accompanying Issues and Decision Memorandum at Comment 2.

¹⁰ See *Mushrooms from the PRC*.

¹¹ See Petitioners’ April 12, 2011, submission at Exhibit 1.

¹² See Petitioner’s September 10, 2010, submission at Exhibit 9-B.

¹³ See Petitioners’ April 12, 2011, submission at Exhibit 1.

estimates of total production by province, meaning that the quantities sampled were much less.¹⁴ The sum total of these provincial production estimates for *Pangasius* for the entire Philippines reported for 2008 was 12.80 metric tons (“MTs”), and for 2009 was 34.34 MTs.¹⁵ Thus, the BAS data for two full years represent a grand total of 47.14 MTs of *Pangasius* production, or 0.08 percent of the Bangladeshi production amount for a single year (*see* below). In addition, the Philippine *Pangasius* production represents less than 0.001 percent of total national aquaculture production (last in terms of production among all products).¹⁶ Furthermore, the Philippines Secretary of Agriculture¹⁷ described the Philippines *Pangasius* industry (one year and four months *after* the POR) as: (1) being provided extensive support; (2) one with high production costs; (3) having limited production and sales; and, (4) still merely in its incipient stage and considered an infant industry.¹⁸ Lastly, the BAS survey forms themselves suggest that the *Pangasius* industry is not well-established, as *Pangasius* is not one of the types of fish listed on the forms and must be written in separately.

We do not question the validity of the BAS sampling methodology as a whole. Rather, the question is whether this data source represents the best information available for SV purposes given all of the information on the record. As applied to the nascent *Pangasius* industry, there are several reasons why the sampling would not produce a reliable and valid result. In terms of methodology, the BAS national estimates rely on previous year’s data,¹⁹ of which there is none

¹⁴ *See* Petitioners’ December 13, 2010, submission from the AR6 record at Exhibit 8 (Chapter 2.2.1.3.C Aquaculture Production: Estimation and/or Compilation Procedure), which has been placed on the record of this remand redetermination.

¹⁵ *See* Petitioners’ April 12, 2011, submission at Exhibit 1.

¹⁶ *See* Petitioner’s April 12, 2011, submission at Exhibit 1 (Table 16).

¹⁷ The Fisheries Statistics Division is an agency under the BAS. The BAS is an agency under the Department of Agriculture.

¹⁸ *See* Respondents’ April 12, 2011, submission at Exhibit 14.

¹⁹ *See* Petitioners’ December 13, 2010, submission from the AR6 record at Exhibit 8 (Chapter 2.2.1.3.C Aquaculture Production: Estimation and/or Compilation Procedure), which has been placed on the record of this remand redetermination.

for *Pangasius* in the majority of the provinces in 2008. For example, the production figure in 2008 for the Isabela province was 3.51 MT.²⁰ However, according to the BAS methodology, this estimate was based on inflating the 2007 Isabela production estimate, which was zero. Moreover, none of the provinces reported *Pangasius* production in 2007, so the BAS could not have relied on another province's production as a proxy. Therefore, it is unclear exactly how the BAS inflated the 2007 "zero" production to produce 2008 estimated production for all the provinces. This same issue also applies to five of the eight provinces for the 2009 estimated production figures.²¹ The underlying problem is that there is no explanation on the record on how the BAS filled these gaps in the data. In other words, there are too many gaps in the BAS methodology that are not explained by record evidence. Thus, even though the underlying methodology may indeed be valid, using this methodology on an infant/nascent industry is problematic, given that there will be a very small response rate for *Pangasius* within the overall sample size, and there will be a number of respondents within the sample reporting nothing for *Pangasius* at all. Put another way, the methodology relies on sampling to produce its estimated totals, and if there are numerous gaps in responses from those who are sampled, it makes the final reported number less dependable. It is thus unclear to what degree the estimated total *Pangasius* production figures provided in the BAS data are a reliable indicator of the country's production in this instance. Therefore, a further reading and close examination of the information on the record, as expressed by the above analysis, demonstrates that the BAS data for *Pangasius* do not represent a broad market average suitable for surrogate valuation purposes.

²⁰ See BAS Data at page 358.

²¹ We also note that the BAS makes deductions to the prices it gathers to try to calculate a farm-gate price.

DAM Data

Several of the issues raised by the Court regarding the DAM data fall within the purview of whether the DAM data represent a broad market average. The remainder of the issues are addressed elsewhere in this remand redetermination. Specifically, the Court questioned several of our findings and required responses on the following items: (1) explain more fully our finding that the price data represent “a fuller set” than the Philippines data and are reliable because they were “collected using a scientific method;” (2) elaborate on past cases in which we had similar factual circumstances, where despite our preference for data containing volume and value information, we used data to value major inputs absent such information (such as the DAM data here); (3) clarify how the data would be representative of commercial quantities of whole fish sales; (4) address the affidavits submitted by Petitioners concerning DAM’s price data collection methodology; (5) address the size of the DAM data as a factor, as well as our statement that the Philippine sampling methodology does not provide statistically equivalent representation in comparison; and (6) address Petitioner’s contention that there is no record evidence that links the DAM Data and the *Fisheries Statistical Yearbook of Bangladesh* (which we relied upon to demonstrate the size of Bangladesh’s *Pangasius* production), or any other basis for assuming that the DAM 08/09 Data cover more sales or quantities than the Philippine national statistics. In addressing these points, we convey below how the DAM data satisfy the requirement that an SV source must represent a broad market average.

With regard to the DAM data being a “fuller set” than the BAS data, we based our finding on the following reasons: 1) the DAM data were collected using direct weekly price observations from each district covering the exact POR, whereas the BAS data are extrapolated estimates of total production; 2) *Pangasius* data were a category specifically collected by DAM,

whereas the BAS data relied on users to input “*Pangasius*” under a general “Other” category; and 3) the DAM data contain data points for 63 out of 68 districts (92.65 percent) in Bangladesh, covering a total of 1,076 weekly price reports during exactly the POR (six months), whereas the BAS data cover only a few regions (*see above*).²²

As to these reviews being similar to *Nails* and *Hangers*²³ (in relying on a price source with no underlying values or volumes), similar to the Indian JPC data for steel wire rod used in *Nails* and *Hangers*, we note that the DAM price data represent systematic, national-level price monitoring specific to the same *Pangasius* species at issue, and are collected by a government agency and maintained on a regular basis.

Regarding the DAM data representing commercial quantities, given the fact that whole live *Pangasius* fish are a highly perishable product, and given the scope, coverage, and frequency of collection of the DAM data, these factors demonstrate that the DAM data do not represent insignificant quantities. Moreover, other information on the record demonstrates that the *Pangasius* market was significant (59,474 MTs)²⁴ during this period (*see further below*). While there is no direct link between the DAM data and the *Fisheries Statistical Yearbook of Bangladesh* such that one data source flows into the other, we find that data do not have to be all from the exact same source to provide useful, reliable government-generated information. The lack of direct linkage is not surprising as the Government of Bangladesh collected them for different purposes – one to report on weekly market prices, and the other to report on overall annual country-wide production. Thus, our conclusion that the DAM data represent a fuller set

²² See Respondents’ April 12, 2011, submission at Exhibits 1 and 5.

²³ 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 10 (“*Nails*”); *see also Steel Wire Garment Hangers from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 47587 (August 14, 2008) and accompanying Issues and Decision Memorandum at Comment 4 (“*Hangers*”).

²⁴ See Respondents’ April 12, 2011, submission at Exhibit 8 (*Fisheries Statistical Yearbook of Bangladesh*)-Table 16.

of data, and thus a broad market average, unlike the BAS data, is supported by the record. The DAM data, taken together, represent national level governmental price monitoring and reporting, covering numerous commodities for the POR, one of which was specifically the *Pangasius* fish species at issue. Corresponding national production data from the same government, and for nearly the exact same period, show overall production of 59,474 MTs, more than enough to supply any Respondents' production requirements. Moreover, Bangladeshi *Pangasius* production represents 6.52 percent of total national aquaculture production (fifth largest overall among all products).²⁵ Lastly, information on the record indicates that the *Pangasius* industry has been well established in Bangladesh since at least 1998.²⁶

Concerning the three affidavits submitted by Petitioners discussing the DAM data, the primary one is from a Bangladeshi lawyer hired by Petitioners who spoke with DAM officials, and who in turn also obtained two affidavits from Bangladeshi farmers, all purporting to show that the prices in the DAM do not accurately reflect farm-gate prices.²⁷ However, the record also contains official statements from the Bangladeshi officials (who are in charge of the agency that published the DAM data) stating that the prices in the DAM data are wholesale prices of whole live *Pangas* sold into the marketplace throughout the country.²⁸ Even according weight to the affidavits submitted by Petitioners, we are left with conflicting evidence on the record. We determine that the letters from Bangladeshi officials, appearing on official letterhead and given as part of performing in their official capacity, are more reliable than affidavits that were procured for the specific purpose of being used in an antidumping duty proceeding. Given the

²⁵ *Id.*

²⁶ See Respondents' September 10, 2010, submission at Exhibit 3 (*FAO 505 Report* - pg. 35).

²⁷ See Petitioners' April 22, 2011, submission at Exhibits 5-7.

²⁸ See Respondents' April 12, 2011, submission at Exhibits 1 and 2.

totality of the above evidence, it is clear that DAM data satisfy the broad market average requirement to a significantly greater degree than the BAS data.

2. Specificity/Level of Trade

In the context of this remand redetermination, the specificity of the species of whole, live fish in both the BAS and DAM data is not at issue. Instead, specificity here involves the arguments espoused by Petitioners regarding the level of trade (farm-gate versus wholesale) of the reported prices.

Competing Affidavits Regarding the BAS Data

The Court disagreed with our finding that the Philippines BAS data “contain information which suggests that the prices are not solely farm-gate prices” as found in our interpretation of the two affidavits pertaining to the BAS data (Affidavit 1,²⁹ and Affidavit 2: Bureau of Fisheries and Aquatic Resources “BFAR” Official overseeing in Region 2).³⁰ The Court also stated that the plain reading of Affidavit 1 equates “first point of sale” to “farm-gate” prices and that this represents a single channel of distribution, not multiple ones. The Court was not convinced that the interpretation of the BFAR affidavit (Affidavit 2) demonstrates that the “cleaned/cut/otherwise not live” prices were actually included in the BAS data.

With regard to our finding that the BAS data contain information which suggests that the prices are not solely farm-gate prices, as stated in the *NSR Final*, even though Affidavit 2 indicates that 10-15 percent of the fish in Region 2 (which accounted for about 67-81 percent of total production, depending on the year)³¹ was sold cleaned, cut, or otherwise not live or in whole form, there is no indication that this further processed fish was actually included in the

²⁹ See Petitioners’ September 10, 2010, submission at Exhibit 9-B.

³⁰ See Respondents’ April 12, 2011, submission at Exhibit 4.

³¹ See Petitioners’ April 12, 2011, submission at Exhibit 1 (summing the totals for the provinces encompassed by Region 2 shows that they accounted for these percentages of total national production).

BAS data. Although we give weight to Affidavit 2, as it is from a government official who would have first-hand knowledge of the largest *Pangasius* producing region in the Philippines, Affidavit 1 (from the person responsible for compiling the BAS data) stated that the prices are for whole live *Pangasius* produced and sold in the Philippines.³² We have two conflicting pieces of information on the record, and do not conclude in this remand redetermination that one outweighs the other. However, we no longer believe it is necessary to rely, in part, on Affidavit 2 in rendering our evaluation of the available data for the whole fish SV and, thus, surrogate country selection. Given that there is an incongruity on the record with respect to a subset of the data for Region 2 (*i.e.*, whether the data contain prices for further-processed fish instead of only whole live fish), and further uncertainty as to whether the data may have been included in the BAS statistics, the focus of our analysis shifts instead to those points on which we can make a determination (*i.e.*, the discussion regarding the broad market average criterion discussed above, and the further discussion about specificity/level of trade below).

Farm-Gate vs. Wholesale Prices

Regarding the evaluation of the data quality of the BAS data and the DAM data, the Court noted that the BAS data are at the “farm-gate” level (*i.e.*, the price sold by the fish farmer), whereas the DAM data are at the wholesale level, and thus potentially contain markups and other expenses. The Court stated that given our preference for farm-gate prices (citing to the *AR5 Final*³³), and given the relative importance of the level of trade, we did not adequately explain why a distinction between farm-gate and wholesale prices became irrelevant in the *AR6 Final*.

³² See Petitioners’ September 10, 2010, submission at Exhibit 9-B.

³³ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 75 FR 12726 (March 17, 2010), and accompanying Issues and Decision Memorandum at Comment 2A.

As an initial matter, in the *AR5 Final*, the Department did not express a preference in its decision discussing the selection of the SV for the whole fish input regarding farm-gate prices. In that review, the Department evaluated the SV options for whole, live *Pangasius* fish based on the evidence and arguments presented therein and determined that the source containing the farm-gate prices was the best available information relative to the other options on the record. The Department did not establish a general preference for farm-gate prices *per se*.

In the *AR5 Final*, the Department was left with two main options for valuing the whole fish input, the *Pangas Thesis* and the *FAO Report*. In discussing the former, we stated:

With regard to being representative of a broad market average, we note that the *Pangas Thesis* entails data gathered from 100 fish farms. However, other information regarding this criterion is unclear. For example, the *Pangas Thesis* states that costs and returns of *Pangasius* fish farming were calculated by using “farm-gate price” {emphasis added}, while the *Pangas Thesis* also states that returns were calculated using “market prices” {emphasis added}. Thus, it is unclear whether the *Pangas Thesis*’ methodology relies on farm-gate prices or market prices, and if market prices, what movement or other expenses are included in those prices. In addition, while Respondents have reported a price of 35 takas per kilogram for *Pangas* fish, this price is never stated in the thesis, and rather, is derived from what appears to be the total value and production data in the thesis. While, Respondents claim that the price was derived using pricing information in a table, they do not explain how exactly they calculated this price from the underlying data. Moreover, performing a pricing analysis (using either a weighted or simple average of the data in the individual tiers) does not reconcile with the figure obtained from the using the total value and production figure, thus questioning the reliability of this data source. Therefore, we consider the *Pangas Thesis* to not be a superior source with regard to this surrogate value criterion.

With respect to whether the price derived from the *Pangas Thesis* is tax and duty exclusive, based on the above, the information is unclear (i.e., as noted previously, one cannot decipher if the prices are derived from farm-gate prices, and are therefore tax and duty exclusive, or from market prices). Thus, we consider the *Pangas Thesis* to not be dispositive with regard to this surrogate value criterion. {Footnotes omitted in quote }

In evaluating the *FAO Report* and stating our decision as to which source to select, we stated:

With respect to the FAO Report being publicly available, coming from an approved surrogate country, being specific to the input, and representing a broad

market average, we note that no party challenged our evaluation of these criteria in the Preliminary Results, and thus, we continue to consider that the FAO Report satisfies them. With regard to the whole live fish prices in the FAO Report being tax and duty exclusive, while Petitioners contend that this criterion is unclear, they have not provided evidence that the farm-gate prices in the FAO Report contain taxes, much less duties, or any indication that taxes or duties are common with regard to farm-gate prices. With regard to being contemporaneous with the POR, we note that the FAO Report is not contemporaneous and, thus, does not satisfy this surrogate value criterion as well as other fully contemporaneous sources.

While the FAO Report is not contemporaneous with the POR, when considered in light of the other surrogate value criteria, we find that it is the best available information on the record. It is specific to the input, is publicly available, is from the primary surrogate country (Bangladesh), represents of a broad market average and is the most superior source on record in its reliability. Furthermore, unlike the Pangas Thesis, the exact farm-gate price of *Pangasius* fish is directly stated in the FAO Report and, as noted above, is clearly tax and duty exclusive. For these reasons, we will continue to use the FAO Report to value the fish input in the margin calculation for these final results. {Footnotes omitted in quote}

Thus, we did not state that we had a preference for farm-gate prices; rather, we rejected one data source (the *Pangas Thesis*) because it had an unreliable price that mingled farm-gate and market prices *without demonstrating that the market prices were tax- and duty-free*. We, thus, selected another data source (*FAO Report*) because the record demonstrated that its data, which happened to be farm-gate, were tax- and duty-exclusive, among other reasons.³⁴ Thus, contrary to Petitioners' claims, the Department has not determined that it prefers farm-gate prices, only that as one of the factors considered for the SV, it seeks prices that are tax- and duty-exclusive. Accordingly, it is the extent to which any price, whether called "farm-gate" or "wholesale" includes taxes, duties or other expenses that the Department considers in comparing sources (if such a comparison is possible).

³⁴ *Id.*

Analysis of the Level of Trade of the BAS Data and DAM Data

With regard to the level of trade for the whole fish prices in these two sources, a further analysis of the record information yields additional insight. In footnote 8 of the *Catfish Farmers AR Opinion*, the Court found that:

BAS had also defined “traders” as “those who buy and sell goods or commodities” and “wholesalers” as “those who buy in bulk from farmers/raisers/fishermen and fellow traders.” The only reasonable interpretation of “aquafarm trader” in the affidavit is for obtaining his or her knowledge of “production of aquaculture in the locality” (including “price/value of the product per kilogram, volume of production, in metric ton and harvest area in terms of hectare”) and quotation of first-point-of-sale price, *i.e.*, the farm-gate price. Even construing, *arguendo*, “other respondent” in the affidavit to encompass a fellow-trader “wholesaler,” it is still plain that for purposes of FSD’s statistical information gathering any “prices quoted by” such wholesaler would still have to be first point-of-sale prices (*i.e.*, the farm-gate price) based upon such wholesaler’s knowledge of what he or she paid or would have paid to purchase product from an aquafarm farmer. That would be the only meaningful construction, because a price “quoted by” a wholesaler for a sale *from* that wholesaler, as defined by BAS, to another purchaser would not be a “first-point-of-sale” price, as defined by BAS.

Upon reexamination during remand of the BAS data on the record and the underlying documentation regarding its methodology, we find that the while the BAS data in final, published form appear to report a farm-gate price, the prices BAS gathers can initially come from other respondents besides aquafarmers, including, *inter alia*, traders (of which there are a few sub-types), distributors, and wholesalers.³⁵ In other words many of the price sources from which the BAS may gather data would have no access to the initial farm-gate price (*e.g.*, a trader or wholesaler who purchased from another distributor.) To underscore this point, we draw attention to the fact that the BAS makes deductions to the prices it gathers from these various

³⁵ See Petitioners’ December 13, 2010, submission from the AR6 record at Exhibit 8, specifically, Chapter 2 of the Philippines Department of Agriculture’s statistical framework titled “Major Domains and Selected Indicators of Agricultural Statistics,” 2.2.4 “Prices,” 2.2.4.1 “Concepts, Definitions, and Classifications,” wherein several types and sub-types of prices and sources for prices are described, which has been placed on the record of this remand redetermination.

types of respondents for “freight charges/total transport cost” to estimate a farm-gate price.³⁶

The questionnaire sent to respondents has no provision or mention for transportation expenses, or any expenses for that matter.³⁷ Furthermore, and similar to the issues noted on pages 5-6 above, the record does not demonstrate how the BAS arrives at the *calculated* farm-gate price, *i.e.*, how it made deductions for transport costs to the raw price data, and whether those deductions were estimates or not.

Additionally, in reexamining the definitions of terms within the BAS methodology, wholesale prices can be either wholesale buying prices or wholesale selling prices, with a wholesale buying price representing “the price that traders pay for commodities they buy in bulk from farmers/raisers/fishermen and fellow traders.”³⁸ Based upon the BAS definition, a wholesale price can thus be the same as a farm-gate price if it is a wholesale buying price paid to a farmer/raiser. Further, while the DAM’s definitions of a “wholesaler” or “wholesale market price” are not explicitly defined, the DAM collects its data from aquafarmers, wholesale traders, and by market enquiry, and states that its wholesale price is the price of whole live fish sold into the marketplace.³⁹ Thus, the DAM data would in large part consist of prices equivalent to the BAS farm-gate price/wholesale buying prices (*i.e.*, aquafarmers reporting prices at which they sold to wholesalers, and wholesalers reporting the prices at which they bought from aquafarmers).

³⁶ See Petitioners’ December 13, 2010, submission from the AR6 record at Exhibit 8 (2.2.4.3.A Estimation and/or Compilation Procedure: Provincial Farm Gate Price), where the equation for calculating a net provincial farm-gate price (*i.e.*, one which has freight charges and total transport costs subtracted out) is provided in the middle of the first page of this subsection, which has been placed on the record of this remand redetermination.

³⁷ See Petitioners’ April 22, 2011, submission at Exhibit 28.

³⁸ See Petitioners’ December 13, 2010, submission from the AR6 record at Exhibit 8, specifically, Chapter 2 of the Philippines Department of Agriculture’s statistical framework titled “Major Domains and Selected Indicators of Agricultural Statistics,” 2.2.4 “Prices,” 2.2.4.1 “Concepts, Definitions, and Classifications,” which has been placed on the record of this remand redetermination.

³⁹ See Respondents’ April 12, 2011, submission at Exhibits 1 and 2.

In sum, none of the above indicates a more accurate result would be achieved in this case by the use of prices identified as farm-gate (BAS data) versus wholesale (DAM data), much less that we have an automatic preference for farm-gate prices as opposed to wholesale prices. Even if we were to evaluate level of trade as an important consideration in determining the appropriate source of data, the record simply does not contain the level of detail necessary to discern if, as Petitioners contend, the DAM data include any wholesale prices at a more advanced level of trade (*i.e.*, equivalent to the BAS wholesale selling price). In any case, even if we were to assume that the DAM data are at a more advanced level of trade and already include some transport charges (and no record evidence indicates they do), the way to account for that in the margin calculation would be not to add surrogate freight charges to the total input cost for whole fish as we currently do. Not including such charges would only have the effect of lowering Respondents' NV.⁴⁰

3. Other Considerations

Another issue raised in addition to the broad market average and specificity/level of trade criteria is price volatility, which was observed in both the BAS and DAM data. In the DAM data, Petitioners point to prices in one region and compare them to prices in another (same time period, different place), while the BAS volatility is for the same region in different years (same place, different time period), thus leading to an apple-to-oranges comparison. The volatility in the BAS data is thus constant in that the anomalous figures are from the same region over different years. In contrast, the variability of prices in the DAM data is for different regions and at various times throughout the POR. Notwithstanding the other flaws with the BAS data noted

⁴⁰ The Department notes that such freight charges have an extremely minimal impact on the overall calculation. See the memorandum "Business Proprietary Information Referenced in the Draft Remand," dated concurrently with these draft remand results, for the precise percentages of COM accounted for by the freight cost assigned to the whole fish input.

above, the fact remains that given the huge degree of difference in the scope and coverage of the BAS data versus the DAM data, any inherent volatility in the BAS data will not be as normalized given its limited coverage (*i.e.*, the volatile data points will have a greater impact on the final number), in comparison with the DAM data, which comprise a much larger data set.

Lastly, in the course of re-evaluating the record evidence, we observed that the 2008 figures in the BAS publication itself do not reconcile to the total figures for that same year in the letter provided by the BAS official.⁴¹ Thus, there is a conflict on the record as to the accuracy of the figures provided, further casting additional doubt as to the BAS data's suitability for valuing the primary input.

4. Surrogate Country Conclusion

We have reconsidered our surrogate country determination, and in doing so have demonstrated that which country has the best source for valuing the whole fish input remains the determining factor. We have demonstrated based on clear record evidence that the DAM data represent a much broader market average based on both industry size in the respective countries, as well as the scope and coverage of the data sources themselves. We have also shown that a meaningful distinction regarding the level of trade cannot be made between the BAS data and the DAM data based on record evidence. The other remaining considerations also support choosing the DAM data over the BAS data. Even assuming for the sake of argument that the DAM data are at a more advanced level of trade than the BAS data, their superiority in terms of the broad market average criterion and the other considerations noted above would still outweigh any consideration made for the level of trade. Based on all of the above, the record supports

⁴¹ Compare Petitioners' September 9, 2010, submission at Exhibit 9-B, which shows a total quantity and value of 12.176 MTs and 1,371.680 (thousands of pesos), with Petitioners' April 12, 2011 submission at Exhibit 1, which shows a total quantity and value of 12.800 MTs and 1,433.380 (thousands of pesos).

selecting Bangladesh as the primary surrogate determination because its SV data for the whole fish input represent the best selection between the competing options.

C. SVs for Fish Waste and Fish Skin

In the underlying reviews, we selected Philippine Harmonized Tariff Schedule (“HTS”) category 0304.90 (other fish meat of marine fish) to value the fish waste and fish skin by-products and rejected the Philippine and Indian price quotes submitted by Petitioners (we note that neither NSR respondent reported broken meat as byproduct). We requested a voluntary remand regarding the SV for fish waste. The Court noted that the SV selection for fish skin would be intertwined with that of fish waste (given that Petitioners proffered the same alternative source for them), and remanded the selection of SVs for that by-product as well.⁴²

In endeavoring to find appropriate SVs for by-products, we attempt to find identical items to those produced by respondents. In this case, the closest import statistics in terms of HTS classification on the record are a basket category, containing many other things besides waste and fish skin. In contrast, the Vitarich Philippine price quote is for a variety of *Pangasius* fish waste products, including head and belly waste, fat and intestines, bone and tails waste, and skin and trimmings (thus encompassing the two by-products at issue here).⁴³ After reviewing the information on the record, and considering the approach we have adopted in recent determinations in this and other aquaculture cases, we find that seafood by-products are generally not internationally traded commodities which would be reflected in import statistics.⁴⁴

⁴² See *Catfish Farmers NSR* at 3-4.

⁴³ See Petitioners’ September 10, 2010, submission at Exhibit 16.

⁴⁴ See, e.g., *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, In Part, of the Fifth Administrative Review*, 76 FR 12054 (March 4, 2011), unchanged in *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 56158, 56165 (September 12, 2011), where the Department has consistently used an Indonesian price quote to value a by-product in that case.

Moreover, the HTS description in question indicates it is for fish *meat*, rather than *by-products*. We find specificity of the price quote to be an important factor in valuing these by-products.

Further, upon reconsideration, we find that valuing fish waste using import statistics results in a fish waste SV which is higher than that of the whole fish. Consequently, the use of import statistics to value fish waste would distort the NV calculation. The Vitarich price quote satisfies our criteria of whether the SV data is publicly available, includes terms of payment, and is tax and duty exclusive.⁴⁵ While a price quote from one company may not reflect a broad market average, this concern is outweighed by its far superior specificity and the fact that it meets the other SV selection criteria. Moreover, it is dated April 2010, which is not so far outside the POR as to be unusable,⁴⁶ and in any case we have deflated these SVs to make them contemporaneous with the POR.

Lastly, there is also an Indian price quote on the record, but it only pertains to one by-product (fish waste), and while it is dated closer to the POR, it is unclear if the price is tax/duty exclusive. Therefore, we have decided to use the Vitarich price quote to value these three by-products as it represents the best information on the record.

IV. Comments from Interested Parties

The Department released its Draft Results on November 15, 2013. Interested parties submitted comments on November 27, 2013. On December 11, 2013, the Department rejected certain untimely and unsolicited new factual information contained in Petitioners' comments. Petitioners refiled their comments on December 12, 2013.

⁴⁵ *Id.*

⁴⁶ See *Hebei Metals & Minerals Import & Export Corporation and Hebei Wuxin Metals & Minerals Trading Co., Ltd. v. United States*, 366 F.Supp.2d 1264,1275 (CIT March 10, 2005), where the Court held that contemporaneity is not a compelling factor where the alternative data is only a year-and-a-half distant from the POR.

A. The Department's Consideration of the BAS Data as Compared to the DAM Data

Petitioners' Comments

- The Department repeatedly drew favorable assumptions about the DAM data while drawing negative inferences about the BAS data.

IDI and THIMACO's Comments⁴⁷

- The Department conducted a careful review and analysis of the record evidence pursuant to the Court's remand order and demonstrated that the DAM data represent a superior selection for the SV of the whole live fish input.

Department's Position: We disagree with Petitioners' argument that we have unfairly evaluated the BAS data *vis-à-vis* the DAM data. Petitioners submitted the BAS data and the associated information regarding its methodology. Petitioners argue that we repeatedly drew negative inferences and conclusions regarding the detailed information they submitted regarding the BAS data, while at the same time treating the DAM data in a favorable light, despite the fact that the record did not contain a similar level of detailed background information about the DAM data. Petitioners have miscast the Department's approach. We recognize that the record contains a greater level of detail about the methodology surrounding the BAS data than it does the DAM data. That is not, however, an indicator in and of itself that the BAS data are a superior SV source. The fact that certain points within the background information undermine Petitioners' preferred SV source, while being inconvenient for Petitioners given that they submitted the information, is explained in a factual manner both on the preceding pages and below in our responses to parties' comments. Moreover, while less background information about the DAM data has been submitted on the record, the available record information about it

⁴⁷ We note that IDI and THIMACO did not provide further comments relating to the selection of surrogate country and the SV for the *Pangasius* fish input.

indicates it is an appropriate and superior SV source, and the Department evaluated the facts in response to the Court's remand order and parties' comments. In sum, our conclusion in the Draft Results that the BAS data are not the best information available to value the whole live fish input based upon our SV selection criteria, and that the DAM data represent a broad market average based upon a mature, established *Pangasius* industry, and are reliable in other aspects, was based upon a careful reevaluation of the record evidence.

B. Surrogate Country Selection Premise and Relative Importance of Different FOPs

Petitioners' Comments

- Regarding the importance of secondary FOPs, the Department compared non-fish FOPs to NV calculated after deducting byproducts and should, instead, aggregate the secondary FOPs and by-products.
- In addition, the Philippine ratio companies are more specific with a more similar production process than the less comparable Bangladeshi shrimp producers.

Department's Position: The largest percentage of NV, by far, is the value of the whole live fish. The second largest values by some distance from the whole live fish value are represented by the SV ratios from surrogate financial statements. The remaining non-fish FOPs represent a small percentage of NV. Because the DAM data are the best available information on the record to value the whole live fish, and we have three usable financial statements from Bangladesh, we continue to find that Bangladesh is the best choice for the primary surrogate country.

As explained above, the most important factor is the value of the whole live fish followed by the financial ratios. The record demonstrates that the secondary non-fish FOP values are a very small percentage of the NV. In the Draft Results we noted the preeminent importance of the whole fish input as it relates to the selection of the surrogate country, and have maintained

that stance for these final results (*see* page 3 above). Petitioners argue in making the comparison of the non-fish secondary FOPs with the NV to determine the percentage of these secondary FOPs of the NV, the Department should have added the value of the by-products to the secondary FOPs before making the comparison. Such an addition would artificially skew the percentage of the secondary FOPs upward, because the NV does not add the by-product values. The effect of the by-product adjustment is to reduce the constructed values (based on FOP usage rates and SVs) generated from the production of the subject merchandise by the value of the by-products, which are non-subject merchandise and for which the company received revenue. This is appropriate because the FOP calculations should only include the FOPs and values that are attributable to the subject merchandise, and not to non-subject by-products, as long as the record contains the information to make such an adjustment. So, in fact, contrary to Petitioners' argument, their proposed comparison would be incorrect. The calculated NV has already been reduced by the amount of the by-product offset, so adding the by-product value back into the final comparison would actually result in an inaccurate doubling of the amount of the by-product value in relation to other components of the calculation. Petitioners' suggested artificial inflation and double counting of the by-product value is thus inappropriate. Furthermore, in addition to comparing the contribution of the whole fish input and secondary materials to NV, we also compared them to COM.⁴⁸ In comparing these to COM, again we saw an overwhelming contribution by the fish input.⁴⁹ With regard to Petitioners' argument that the Philippine ratio companies are more similar to respondents than the Bangladeshi companies, as neither the Philippine nor Bangladeshi companies are predominantly producers of identical merchandise (*Pangasius* fish fillets), we find it more reasonable to find that all the companies are producers of

⁴⁸ *See* the Draft Results BPI Memo.

⁴⁹ Petitioners provided no comments regarding whole fish value as compared to COM.

comparable merchandise. While Petitioners attempt to draw contrasts between the production processes for fish fillets versus frozen shrimp, the production steps they list are in fact quite similar.⁵⁰ Lastly, there are still more Bangladeshi than Philippine companies (three versus two) that are suitable for surrogate valuation purposes.

C. SV Selection Criteria as Applied to the BAS Data and DAM Data

1. Public Availability

Petitioners' Comments

- Petitioners contend that the public availability criterion is extremely important and that the Department erred in determining that the DAM data were publicly available.

Department's Position: We agree with Petitioners that public availability is a key consideration in the SV selection process. We disagree, however, with the notion that the DAM data are not publicly available. As noted in the *AR6 Final*, the underlying record contains an official letter from a senior Bangladeshi government official attesting to their availability to the general public.⁵¹ Nothing on the record of the underlying review undermines their public availability; moreover, each segment of an antidumping duty case contains its own independent record and is considered a separate and distinct proceeding.⁵² Findings in subsequent reviews are based on different administrative records, arguments, and time periods, and absent the possibility of fraud, are not bases to reopen prior completed administrative reviews.⁵³ We therefore continue to find that the DAM data satisfy the public availability criterion.

⁵⁰ See Petitioners' comments on the Draft Results at 79.

⁵¹ See Respondents' April 12, 2011, submission at Exhibit 1.

⁵² See *Shandong Huarong Mach. Co. v. United States*, 29 CIT 484, 491 (2005).

⁵³ See *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277-78 (Fed. Cir. 2012).

2. Broad Market Average

Petitioners' Comments

- The Department improperly substituted a “fullness” test in lieu of its established broad market average criterion.
- Regarding reliance on data without quantity information, unlike in *Nails* and *Hangars*, there is no evidence that the DAM collects data in any “systematic” manner nor is it a “national-level” price monitoring like the JPC data. Moreover, an affidavit on the record states that a DAM official clarified that the DAM does not undertake any process to validate prices.
- The size of Bangladesh’s *Pangasius* industry says nothing about the coverage of the DAM data much less whether the DAM data is greater or more “full” than the BAS data. In addition, we still do not know if the DAM data represent sales of commercial quantities.
- As to the number of data points, in *Laizhou Auto*,⁵⁴ the Department rejected, and the Court upheld, the notion that a larger data set constitutes, *per se*, a more accurate SV source. Likewise, in *Jinan Yipin*⁵⁵ the Court rejected the Department’s selection of an SV because it contained more “price points” rather than more specific sources.
- Regarding BAS’s reported production as compared to Vinh Hoan’s, the Department does not explain how this is relevant to a broad market average analysis. In addition, Vietnam accounted for more than 90 percent of global *Pangasius* production, and any comparisons to any other countries is like comparing a pond to an ocean.
- Similarly, the Philippines is one of the largest aquaculture producers in the world and has commercial production of *Pangasius*. The size or newness of the Philippine *Pangasius*

⁵⁴ See *Laizhou Auto Brake Equip. Co. v. United States*, 32 Ct. Int'l Trade 711, 715-718. (“*Laizhou Auto*”)

⁵⁵ See *Jinan Yipin Com. Ltd. v. United States*, 80 F. Supp. 2d 1226, 1255-69 (Ct. Int'l Trade 2011) (“*Jinan Yipin*”).

industry relative to the Vietnamese industry does not affect the validity/reliability of the Philippine prices.

- Furthermore, the letter from the Philippine Secretary of Agriculture has no probative value as: (1) there is no evidence that the BAS *Pangasius* industry has received countervailable subsidies or provided support that distorts prices; (2) the comparison of costs/prices in the Philippines to those in Vietnam is not probative because Vietnam's costs/prices are deemed unreliable given its NME status; and (3) the Philippines has a well-established aquaculture industry and has the means and experience to produce fish products efficiently through aquaculture.
- Moreover, the Department has used (and found to be a broad market average) values associated with similar (and sometimes smaller) volumes and single districts or a single company.
- Concerning the BAS survey form, data collection is done through personal interviews using structured questionnaires by trained data collectors to ensure that the questionnaires cover all species and not a situation in which the farmers themselves are left to fill out the forms.
- Regarding the BAS sample size, whether "large" or "small" is irrelevant because a statistically valid methodology would rely on a statistically valid sample size, and there is no evidence that the BAS sample size used was not statistically valid.
- The Department incorrectly interpreted the BAS statistical methodology to infer that each year's production amounts were based on inflating the previous year's data.
- Moreover, the record contains no information about the methodology the DAM used and whether it was statistically valid.

Department's Position: We disagree with Petitioners and continue to find that the DAM data satisfy the broad market average criterion whereas the BAS data fail in this regard. At the outset, Petitioners are incorrect in arguing that we did not consider the broad market average criterion and instead substituted a so-called "fullness" test. Petitioners cite to a dictionary definition of the word "full" and attempt to differentiate it from "broad market average." As was abundantly clear in the Draft Results (which are re-stated herein on pages 2-25), we carefully evaluated both the BAS data and the DAM data within the context of a broad market average. Moreover, "full" and "broad" in fact overlap in meaning, especially within the context of this particular SV selection criterion.⁵⁶

With regard to reliance on data without quantity information, information on the record establishes that the DAM does collect information in a systematic manner. A letter from a DAM official states that:

The price data was collected using a scientific method by the District Marketing Officers (DMO) posted in all the districts. The DMO's collect the raw price data from each upzila (sub-districts) in the district using a structured questionnaire, by interacting with a network of all leading aqua farmers and wholesale traders as well as through direct market inquiry by visiting the mandi (marketplace). These data are being collected each week, and the monthly average price is based on such weekly data points. The enclosed price data is being maintained by the office of DAM and can be provided to any member of the public upon request, free of cost.⁵⁷

Also, the wholesale price of *Pangas* in this country-wide database is with reference to the price of whole live unprocessed *Pangas*, sold into the marketplace.⁵⁸

⁵⁶ According to the Encarta English Dictionary included with Microsoft Word, the first five definitions of "broad" are: 1) wide; 2) large and spacious; 3) measured across; 4) full and clear; and 5) covering wide range. Similarly, for "full," they are: 1) filled to capacity; 2) with much or many; 3) greatest in extent; 4) with nothing missing; and 5) completely developed (emphasis added).

⁵⁷ See Respondents' April 12, 2011, submission at Exhibit 1.

⁵⁸ *Id.*

Thus, these data are collected routinely and in a systematic manner contrary to Petitioner's assertions. Furthermore, these data, as has been pointed out, do encompass "national level" price monitoring as data are collected from each sub-district, within each district on a weekly basis by direct market inquiry for the subject species *Pangasius hypophthalmus*. Thus, *Pangasius* is an important and large⁵⁹ national level commodity because it is one of many specifically monitored by DAM. Moreover, given the record evidence above, the Department finds Petitioners' claims contradictory: Petitioners contend that the DAM data were not gathered systematically, while at the same time overlooking the fact that the BAS did not "systematically" gather *Pangasius* price information because *Pangasius* was not even an option on the BAS survey form.

In addition, and as with other broad-based price survey information, the nature of the DAM data gathering is such that the absence of volume information does not undermine the representativeness of the prices, as the market can sell 1,000 kilograms, 10,000 kilograms, 100,000 kilograms, *etc.* at that price. Furthermore, the DAM prices that are gathered for *Pangasius* are prices per quintal (100 kilograms),⁶⁰ establishing that the price data consist of bulk business-to-business lots/transactions prices, and the logical conclusion therefore being that the DAM data consist in their entirety of nothing but prices that are representative of a broad market average.

Concerning Petitioners' submitted affidavit claiming that the DAM does not validate prices, as we stated in the Draft Results, there are two competing documents (a letter from a DAM official on government letterhead, and an affidavit from Petitioners' Bangladeshi co-counsel) with each stating something slightly different. In any event, the statements from the

⁵⁹ *Pangasius* ranks fifth out of 20 products for total cultured production. See Respondents' April 12, 2011, submission at Exhibit 8 (*Fisheries Statistical Yearbook of Bangladesh*)-Table 16.

⁶⁰ See Respondents' April 12, 2011, submission at Exhibit 1.

DAM officials indicate that the prices are gathered directly from markets in each sub-district in each district without relying on sampling. It is not clear how Petitioners claim to have a statement that the DAM prices are not validated when the prices were directly gathered and, thus validated at the time of gathering. Furthermore, without knowing the direct question that was asked at the time to the DAM official by the Bangladeshi attorney retained by the Petitioners with regard to price checking, it is not possible to fully analyze Petitioners' claim, further undermining the weight attributed to this affidavit.

As to the number of data points being an issue, the key factor here is not merely about the total number of data points/price observations. Rather, it is about what each data point represents individually (*i.e.*, weekly commercial quantities from 63 of 68 districts of a species specific to the input). Further, these data points comprise a data set that is indisputably a broad market average from one of a select few other countries other than Vietnam that has a commercially large and economically significant *Pangasius* industry that would provide an overall price representative of a broad market average.

Key points differentiate this case from both *Laizhou Auto* and *Jinan Yipin*. The alternative data disputed in *Laizhou Auto* were from only four Indian companies and likely included non- arms-length transaction prices,⁶¹ whereas the DAM data here represent country-wide data collected by a government agency in the course of monitoring a variety of commodity prices. As to *Jinan Yipin*, in that decision the Court stated that the 198 price points “correlate only to offer prices. As such, the number of “points of data” whether 198 or even 199,888 — says nothing whatsoever about how many (if any) sales of “A”- and “S.A.”-grade garlic were actually made during the two-and-one-half month period, or the prices actually paid in any such

⁶¹ See *Laizhou Auto*, 32 Ct. Int'l Trade at 715-716.

sales.”⁶² In contrast, the DAM data consist of actual price data, gathered by a government agency as part of a country-wide survey, for whole, live *Pangasius* fish, and not merely price offers.⁶³

With regard to BAS’ total reported *Pangasius* production quantity as compared to Vietnam’s (or even Vinh Hoan’s individual usage amount of *Pangasius* fish), no one disputes that Vietnam is the global leader in *Pangasius* production. However, the comparison the Department is making is just how small a quantity is represented by the BAS data, belying how small the Philippine *Pangasius* industry is, as compared to even one respondent’s consumption of the fish input. Petitioners’ draw attention to just how small a quantity the BAS data encompass by arguing that any other country’s *Pangasius* industry would be small compared to Vietnam’s. This simply underscores the point that it is important to rely instead on data from one of the few other countries (Bangladesh) that: 1) has an established *Pangasius* industry; 2) that produces *Pangasius* in commercial quantities; and 3) for which commodity price data are specifically collected on a regular basis.

Furthermore, the fact that the Philippines is one of the largest aquaculture producers is not responsive to the issue of whether the Philippine *Pangasius* production in the BAS data are broad-based. As to the newness and size of the Philippines *Pangasius* industry (and the letter from the Philippines Secretary of Agriculture), we note that Petitioners agree that the industry is nascent. However, Petitioners do not address the issue of how a nascent *Pangasius* industry would have similar economies of scale within the *Pangasius* industry to that of other well established and mature Philippine aquaculture industries. Petitioners’ generalization does not take into consideration the differences in materials that may be used, the experience of the

⁶² See *Jinan Yipin* 80 F. Supp. 2d at 1251.

⁶³ See Respondents’ April 12, 2011, submission at Exhibit 1.

farmers/laborers in dealing with a new species, the idiosyncrasies of *Pangasius* farming, the large initial overhead associated with establishing any type of industry, and the experience salespeople have in trying to market and sell this comparatively new species. Thus, we need not even reach a comparison of the relative costs of producing *Pangasius* in the Philippines to Vietnam. Ultimately, the letter from the Philippines Secretary of Agriculture represents yet another indication that the BAS data for *Pangasius* are not reflective of a broad market average, because the underlying market they sampled was itself not broadly established.

With regard to the Department (in previous segments) using values associated with similar and, sometimes, smaller volumes, we do not dispute that observation. However, as noted above on page 23, every case segment is distinct, and the available SV sources on the record are similarly distinct, just as they are here. In those segments, the Department relied on the particular source that represented the best available information, taking into consideration the SV selection criteria. Moreover, and as stated above, the Department has relied on sources without associated volume data. Therefore, just because a source (the BAS data in this instance) has a volume with similar or greater volumes to ones used previously does not automatically render it a superior or similar source without comparing it to the other SV sources on the same case record utilizing the SV selection criteria.

Regarding the BAS survey form/data collection, initially, we agree with Petitioner that the fact that *Pangasius* is one of the less significant species produced in the Philippines, is the reason that the BAS's form does not list it separately. In addition, because it is not on the survey form, and unlike the DAM data, it is not a species for which data are specifically obtained. Furthermore, lacking a listed species on the questionnaire form questions the systematic nature

of the collection system, as there no assurances that *Pangasius* production information was specifically requested.

Regarding the BAS sample size, again, we are not claiming that the BAS' overall methodology is unsound, especially when applied to a mature, well-established industry. We do however note that there are gaps in the data that are not explained, especially given the methodology's reliance (in part) on the previous year's estimates, to calculate the current year's estimates. Furthermore, we are not confident that the estimated figures are reliable given these gaps, in addition to the very low response rate from the districts, even if the response rate were statistically valid. Additionally, nowhere did we state or imply that the BAS does not gather new data and simply inflates a previous year's. Rather, we highlighted that the Quarterly Aquaculture Survey ("QAS") methodology relied on the previous year's estimated total production amounts to inflate the new sample amounts it gathers each year in order to then arrive at the new total production amount.⁶⁴ Petitioners refer to the very first equation in the section cited in footnote 81, but it does not pertain to the QAS, but rather to a different survey form, the Aquaculture Production Survey, which has not been referenced or discussed with respect to the BAS data; only the QAS have been referenced as being the source of the *Pangasius* prices in the BAS data. Lastly, while the same level of background information about the DAM data is not available, the Department cannot simply draw a negative inference about that fact, given that Bangladeshi officials have attested to its completeness and reliability.

⁶⁴ See Petitioners' December 13, 2010, submission from the AR6 record at Exhibit 8 (Chapter 2.2.1.3.C Aquaculture Production: Estimation and/or Compilation Procedure), which has been placed on the record of this remand redetermination.

3. Specificity (Level of Trade)

Petitioners' Comments

- The Department cannot credibly claim that it does not prefer farm-gate prices given the farm-gate related language it used in previous determinations.
- The Department must rely on prices that are specific to respondents' inputs, and farm-gate prices are superior to any wholesale prices.
- The Department improperly dismissed affidavits that contained evidence the DAM data do not reflect farm-gate prices.
- The BAS reported *Pangasius* fish prices from aquafarmers at the farm level, and these were actual, not calculated farm-gate prices.
- The Department unreasonably disregarded evidence in Affidavit 1 that the BAS report includes farm-gate prices.
- The farm-gate prices in the Philippines BAS data are not the same as wholesale prices, and the DAM data contain prices at a different level of trade than the BAS data.

Department's Position: We disagree with Petitioners. As an initial matter, we highlight the fact that the process of constructing NV for a producer in an NME country using SVs is difficult and necessarily imprecise.⁶⁵ Moreover, while we strive to select the best SV possible, we must not necessarily duplicate the exact production experience of the NME producers at the expense of choosing an SV that most accurately represents the input in question.⁶⁶

As to Petitioners' points, respectfully, the Department is in the best position to know what it meant with regard to the language about farm-gate prices in prior reviews. Petitioners rely on the Department's use and placement of the conjunction "and" in the following sentence

⁶⁵ See *Nation Ford Chem. Co. v. United States*, 166 F.3d. 1373, 1377 (Fed. Cir. 1999).

⁶⁶ See *Nation Ford Chem. Co. v. United States*, 985 F. Supp. 133 (Ct. Int'l Trade 1997).

from the *AR5 Final*: “Furthermore, unlike the Pangas Thesis, the exact farm-gate price of *Pangasius* fish is directly stated in the FAO Report **and**, as noted above, is clearly tax and duty exclusive.” Petitioners interpret this to mean that both the fact that it was a farm-gate price, and tax and duty exclusive, informed our decision. Instead, we were pointing out that the *Pangasius* fish price in the FAO Report was directly stated, rather than having to be derived from various information contained therein, as was the case with the price from the Pangas Thesis. Petitioners also cite other general language where we have referenced fish farming and production.⁶⁷ Again, Petitioners have miscast the Department’s language to draw conclusions that are absent in the language itself. The Department made no statements about a preference for farm-gate prices (and again noted in the language quoted by Petitioners the importance of a price being exclusive of taxes and duties), and the references to *Pangasius* production and farming do not speak discuss farm-gate prices, but rather refer to the fact that such production and farming would be indications that the *Pangasius* industry in a particular area (be it a region or country) was economically significant, and could thus be a source of quality SV data for the *Pangasius* fish input.

Petitioners have also stated that wholesale prices would be downstream prices (at a more advanced level of trade) and perhaps include markups in addition to transportation charges, or could perhaps be at a lower price level if the fish are not as fresh (or dead). However, such inferences as to the degree of freshness and to any possible price differentials between a “farm-gate” versus a “wholesale” price are based mostly on speculation instead of record evidence. The only record evidence showing that farm-gate prices during the POR might ever be higher to any meaningful degree is in Petitioners’ first affidavit from a single Bangladeshi *Pangasius*

⁶⁷ See Petitioners’ comments on the Draft Results at 15-16.

farmer, and the price lists accompanying the affidavit are not supported by any documentation.⁶⁸ The prices within the POR in the second affidavit from another Bangladeshi *Pangasius* farmer in fact overlap to a great extent with those in the DAM data (which are purportedly at a meaningfully different level of trade).⁶⁹ Other record evidence indicates that Bangladeshi farm-gate prices are either comparable to, or lower than, the prices in the DAM data.⁷⁰

Additionally, our consideration of the affidavits submitted by Petitioners in the Draft Results was appropriate. The affidavits attempted to undermine the reliability of the DAM data for the purpose of surrogate valuation,⁷¹ and we instead opted to give greater weight to the statement on government letterhead from a Bangladeshi government official. Regardless, drawing a summary conclusion, as Petitioners do, that the price information from only two farmers demonstrates that the DAM data contain unreliable prices at a meaningfully different level of trade is spurious and not well supported by the totality of the record evidence.

Moreover, in relation to another issue discussed below on pages 42-43, Petitioners assert that a difference of about \$0.01 per kilogram in the SV for the primary material input would have no meaningful effect on our margin calculations. Keeping in mind this point, the Department in the Draft Results showed that in this instance, the purported difference in the level of trade also did not result in a meaningful difference. As a proxy for the actual Bangladeshi distance between farms and wholesale markets, we used the distance from Respondents' fish farms to their processing facilities along with the Bangladeshi freight SV to point out that the

⁶⁸ See Petitioners' April 22, 2011, submission at Exhibit 6.

⁶⁹ *Id.* at Exhibit 7.

⁷⁰ See Respondents' May 2, 2011, case brief at 65-67.

⁷¹ As a side note, we observe that while Petitioners submitted these affidavits in an attempt to undermine the DAM data, they also undermine the reliability of the BAS data for surrogate valuation purposes. If they were to be relied upon, the production quantities from a mere two Bangladeshi *Pangasius* farmers for one calendar year dwarf the total *Pangasius* production amount for two full years in the BAS data. This point further highlights the fact that the *Pangasius* industry in the Philippines is not economically significant enough to produce price data that represent a broad market average, even if such price data were collected by a government agency using a statistically sound methodology.

transportation charges associated were miniscule.⁷² A \$0.01 per kilogram difference⁷³ is in fact far greater than the miniscule amount of the transportation costs associated with the whole live fish input. In their comments, Petitioners aver that transportation charges are not the only difference between farm-gate and wholesale prices. While that may be true, they have failed to define or specify any others, and have also at the same time posited that farm-gate prices can be either higher or lower, so any other difference could be positive or negative, with transportation being the only constant difference. By dismissing a \$0.01 per kilogram difference as being immaterial, Petitioners are in fact also conceding that the potential difference in a price between the wholesale and farm-gate levels that can be approximated using record evidence is even more immaterial, as the available record evidence shows that it does not lead to any meaningful difference in the SV of the primary input, and by extension, the overall margin calculation.

Petitioners maintain that despite the evidence to the contrary outlined in the Draft Results, the BAS data include only original farm-gate prices because they use the QAS which is not part of the Farm Price Survey. Petitioners also claim that the various levels of price reporting noted by the Department can only pertain to other commodities, and not *Pangasius*. Petitioners are simply mistaken. The QAS falls within the purview of the Farm Price Survey,⁷⁴ whose methodology clearly includes a provision for netting out transportation costs, indicating that

⁷² See page 16 *supra* and the Draft Results BPI Memo.

⁷³ We note that SV for the *Pangasius* fish input is multiplied by each respondent's FOP usage rate, so the difference would be even greater than \$0.01 per kilogram.

⁷⁴ See Petitioners' December 13, 2010, submission from the AR6 record at Exhibit 8, specifically, Chapter 2 of the Philippines Department of Agriculture's statistical framework titled "Major Domains and Selected Indicators of Agricultural Statistics," 2.2.1 "Production," 2.2.1.2 "Coverage, Availability, Data Resources and Responsible Agencies," wherein the aquaculture production is identified as part of the farm prices survey (page 3 of 3, directly above the section titled "Macroeconomic Indicators"), which has been placed on the record of this remand redetermination.

other price levels besides farm-gate can be collected.⁷⁵ We do not dispute what is stated in Affidavit 1 “The prices quoted by the aquafarm farmers/operators (or other respondents, as the case may be) are also referred to as first-point-of-sale-price or farm-gate price.”⁷⁶ This statement is not incongruous with our observation that the prices in the BAS data likely contain price information from sources beyond the farm-gate. Rather, a reasonable conclusion would be that the prices in the BAS data can be referred to as farm-gate prices because any prices that were not originally at the farm-gate level have been adjusted (per BAS methodology) to render them at a level equivalent to farm-gate.

Contrary to Petitioners’ assertion (relayed on pages 54-57 of their comments), we have not disregarded the evidence in Affidavit 1. In fact, in the very language about which Petitioners object, we stated that the BAS data possibly contain some value-added *Pangasius* fish products (stemming from Affidavit 2) and stated that we would no longer rely on that as part of our analysis.

Lastly, Petitioners take issue with the Department’s plain reading of various price definitions contained within the description of the BAS methodology. Petitioners attempt to downplay record evidence that they themselves submitted, and which inconveniently runs contrary to their line of reasoning. Our explanation and reasoning on pages 15-16 above need not be repeated again here. Additionally, Petitioners make an assertion that the DAM data only consist of wholesale selling prices, supported only by an affidavit from their Bangladeshi co-

⁷⁵ See Petitioners’ December 13, 2010, submission at Exhibit 8 (2.2.4.3.A Estimation and/or Compilation Procedure: Provincial Farm Gate Price), where the equation for calculating a net provincial farm-gate price (*i.e.*, one which has freight charges and total transport costs subtracted out) is provided in the middle of the first page of this subsection, which has been placed on the record of this remand redetermination.

⁷⁶ See Petitioners’ September 10, 2010, submission at Exhibit 9-B.

counsel. In contrast, DAM officials have stated that its personnel interact with and obtain price information from both aquafarmers and wholesale traders.⁷⁷

D. Other Whole Fish SV Considerations

1. Volatility

Petitioners' Comments

- The Department overlooked evidence of significant price volatility in the DAM data.
- As a matter of course, the Department should not be concerned with “volatility,” as variations in price within an area over a year, or variations among areas, should not be surprising.
- The Department could opt to remove the alleged “volatile” data from the BAS data or simply use only the 2009 BAS data.

Department's Position: After further considering the issue subsequent to issuing the Draft Results and after reviewing parties' comments, we agree with Petitioners and find that volatility is not a revealing consideration with respect to the SV data on the record. Fluctuations in the prices within a given dataset, in and of themselves, are not something typically contemplated in NME antidumping duty cases.

2. Difference in Reported BAS Figures

Petitioners' Comments

- Regarding discrepancies between the BAS data and the Director's letter: 1) it is routine for a government to revise statistical data in official publications on continuing review; 2) the BAS data include *Pangasius* data for an additional province; and 3) the quantity and value difference is immaterial, as the average unit value differs by only 0.67 pesos per kilogram

⁷⁷ See Respondents' April 12, 2011, submission at Exhibit 1.

(about \$0.01 per kilogram) and would have no meaningful effect on the Department's calculations.

Department's Position: As part of the Draft Results, and consistent with the Court's remand order to revisit the issue of surrogate country selection, we carefully reviewed the available record information, and in the process, noted the aforementioned difference in the quantity and value totals in the BAS' 2008 data. In this instance a whole province, one of the very few reporting any *Pangasius* production data in 2008, was missing and not reported in the previous year's publication. Moreover, this was despite the fact that the BAS officials stated that the 2008 data were "complete and final," "the data contained in this schedule is final" and "these data sets are correct and official."⁷⁸ Nonetheless, Petitioners' explanation for the difference, that an additional province's data was added in the interim, and then included when the BAS data were published in official form later that same year, appears correct. Therefore, we no longer find the observed difference in the price between the data sources to be meaningful.

E. SVs for Fish Waste and Fish Skin

IDI and THIMACO's Comments⁷⁹

- Our determination in the draft remand that the Vitarich price quotes represent the best information available for SV purposes was incorrect and not based on substantial evidence. Neither the quote itself nor the accompanying affidavit shows that the prices therein reflect an actual transaction, are tax-exclusive, or otherwise reliable.

⁷⁸ See Petitioners' September 10, 2010, submission at Exhibit 9-B.

⁷⁹ We note that Respondents simply placed the same set of comments on the record for this remand redetermination that they did for the corresponding remand pertaining to AR6 and the aligned new shipper review. Thus, certain comments regarding the by-products are not relevant to this remand segment, as only fish waste and fish skin are in dispute in this litigation, and not broken meat. Similarly, IDI and THIMACO also refer to certain information in respondent Vinh Hoan Corporation's ("Vinh Hoan") questionnaire response from AR6, which is neither on the underlying record for this litigation, nor on the record for this remand redetermination. This submission can thus not be relied upon for evidentiary support.

- IDI and THIMACO question the supposedly superior specificity of the price quote, and also note that our conclusion that seafood by-products are not generally internationally trade is belied by the fact that in AR6 Vinh Hoan sold some its by-products for export during the POR.

Petitioners did not comment on this issue.

Department’s Position: As in the Draft Results, we continue to find that the Vitarich price quotes represent the best available information for valuing the three by-products at issue. Below we address the specific factual issues raised by IDI and THIMACO.

The affidavit accompanying the price quotes explains that the price quotes were obtained as publicly available information pertaining to the production and sales of *Pangasius* fish in the Philippines.⁸⁰ The affidavit also details the sales terms,⁸¹ the party offering the price, and the manner in which the price quote was obtained.⁸² The affidavit also states that the price quotes were requested on an ex-factory and tax-exclusive basis.⁸³ We dispute IDI and THIMACOs’ arguments that the Vitarich price quote is unreliable because it is neither signed nor shows the name of the individual or company official who issued the quote. After all, the price quotes were on Vitarich’s company letterhead, and were accompanied by the business card of Imee U. Chun, the Sales and Marketing Director of Vitarich. Vinh Hoan’s questions regarding the timing of obtaining the price quotes (*i.e.*, several days after they were requested) are merely speculative and do not undercut the reliability of the prices quoted therein. As to IDI and THIMACOs’ contentions regarding specificity, we note that the primary issue here is not to what species the

⁸⁰ See Petitioners’ September 10, 2010, submission at Exhibit 16.

⁸¹ IDI and THIMACO attempt to undermine the fact that the price quotes are on an ex-factory basis by noting that the term “pickup price” pertains to only those by-products identified as “waste.” However, the affidavit accompanying the quotes makes plain that all of the requested prices were on an ex-factory basis.

⁸² *Id.*

⁸³ *Id.*

by-product prices pertain to, but what by-products the prices actually represent. The alternative HTS category proffered by IDI and THIMACO for fish waste, as noted above on page 18, pertains to the fish meat of marine fish, which is a broad category that upon further review would appear not even to pertain to fish waste, and given the fact that the record contains a much more specific alternative, would be an inappropriate selection. Similarly, the fish skin price quote from Vitarich is a far better match for the fish skin by-product than the Bangladeshi HTS category used in the *AR6 Final*, which pertained to “Flours, Meals and Pellets, of Fish or of Crustaceans.”⁸⁴

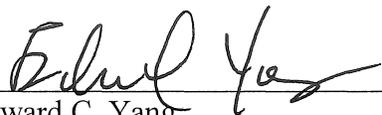
Lastly, IDI and THIMACO attempt to rebut the Department’s observation that seafood by-products are not generally internationally traded and thus not reflected in import statistics, by referring to a submission from AR6 respondent Vinh Hoan. This submission is not on the record and cannot be used for evidentiary support. Nonetheless, in our observation about seafood by-products not being internationally traded, we noted that that was generally the case, and this was due to the difficulty in locating appropriate HTS categories in the surrogate countries that closely match respondents’ by-products in this and other antidumping proceedings. This is especially true of non- value-added by-products that have not undergone some degree of additional processing (*e.g.*, fish waste). In any event, that observation is not central to our overall conclusion here, which is that the Vitarich price quotes, for the reasons stated immediately above and on pages 18-19 *supra*, are the best choice for valuing the by-products at issue in this remand.

V. CONCLUSION

Pursuant to the Court’s order, and based on the analysis of the two issues the Department was instructed to reconsider, the Department has maintained its selection of Bangladesh as the primary country, and has selected different SVs for the fish waste and fish skin by-products

⁸⁴ See the Department’s June 10, 2011, final SV memorandum at 3.

using information from the Vitarich price quote. Upon accounting for all calculation changes as a result of addressing the issues raised by the Court and the changes in the by-product SVs, the margins for all respondents are unchanged from the Draft Results and remain *de minimis*.



Edward C. Yang
Director, Office VII
Antidumping and Countervailing Duty Operations

1/17/2014

Date