August 20, 2019

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

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

I. SUMMARY

The Department of Commerce (Commerce) published the preliminary results of the administrative review of certain frozen warmwater shrimp from the Socialist Republic of Vietnam (Vietnam) on April 22, 2019.\(^1\) The period of review (POR) is February 1, 2017, through January 31, 2018. We analyzed the case and rebuttal briefs that interested parties submitted on the record. As a result of our analysis, we made two changes from the Preliminary Results, as discussed below in “Changes from the Preliminary Results” and Comment 1. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

II. BACKGROUND

On May 22, 2019, Quang Ming Seafood Co., Ltd (Quang Minh)\(^2\) and Fimex VN\(^3\) filed case briefs. On May 28, 2019, the petitioner\(^4\) filed its rebuttal brief.

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\(^2\) See Quang Minh Submission, “Case Brief,” dated May 22, 2019 (Quang Minh’s Case Brief).

\(^3\) See Fimex VN Submission, “Case Brief,” dated May 22, 2019 (Fimex VN’s Case Brief).

\(^4\) Ad Hoc Shrimp Trade Action Committee (the petitioner). See Petitioner Submission, “Rebuttal Brief,” dated May 28, 2019 (Rebuttal Brief).
III. 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,5 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 merguiensis), fleshy prawn (Penaeus chinensis), giant river prawn (Macrobrachium rosenbergii), giant tiger prawn (Penaeus monodon), redspotted shrimp (Penaeus brasiliensis), southern brown shrimp (Penaeus subtilis), southern pink shrimp (Penaeus notialis), southern rough shrimp (Trachypenaeus curvirostris), southern white shrimp (Penaeus schmitti), blue shrimp (Penaeus stylirostris), western white shrimp (Penaeus occidentalis), and Indian white prawn (Penaeus indicus).

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

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

The products covered by 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.

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5 “Tails” in this context means the tail fan, which includes the telson and the uropods.
IV. CHANGES FROM THE PRELIMINARY RESULTS

Affiliation/Single Entity Determination

Based on the information regarding corporate structure, sales and factors of production (FOP) provided by Fimex VN, a mandatory respondent in this segment of the proceeding, we determine that it is appropriate to find Fimex VN and Sao Ta Seafood Factory are affiliated companies and, further, should be treated as a single entity, pursuant to section 771(33)(E) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.401(f)(1) and (2).

Section 771(33) of the Act sets out several categories of persons who are considered to be “affiliated” or “affiliated persons” under the Act:

(A) Members of a family, including brothers and sisters (whether by whole or half blood), spouse, ancestors, and lineal descendants.
(B) Any officer or director of an organization and such organization.
(C) Partners.
(D) Employer and employee.
(E) Any person, directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the outstanding voting stock or shares of any organization and such organization.
(F) Two or more persons directly or indirectly controlling, controlled by, or under common control, with any person.
(G) Any person who controls any other person and such person.

The Act further states that “a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.”

Additionally, 19 CFR 351.401(f) outlines the criteria for treating affiliated producers as a single entity for purposes of antidumping proceedings –

(1) In general. In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.
(2) Significant potential for manipulation. In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:

(i) The level of common ownership;
(ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
(iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

Commerce will determine that exporters and/or producers are a single entity if the facts of the case support such a finding pursuant to section 771(33) of the Act. Further, Commerce will make such a determination in accordance with its practice regarding separate rates. In addition, Commerce’s determination that an exporter and/or producer are a single entity is made in accordance with sections 771(18) and 773(c) of the Act.9

We find that Fimex VN and Sao Ta Seafood Factory are affiliated under 771(33)(E) of the Act. Fimex VN reported Sao Ta Seafood Factory as one if its manufacturing facilities that produces and exports subject merchandise to the United States.11 Fimex VN reported that it operates Sao Ta Seafood Factory as an additional production facility under Fimex VN’s authority and control.12 Further, pursuant to 19 CFR 351.401(f), Commerce also finds that Fimex VN and Sao Ta Seafood Factory should be treated as a single entity. Both Fimex VN and Sao Ta Seafood Factory produce and export subject merchandise and Fimex VN provided combined sales and FOP data demonstrating sales13 and production14 of subject merchandise from both Fimex VN and Sao Ta Seafood Factory. Thus, we find that the first criterion in 19 CFR 351.401(f)(1) is met. Additionally, we find that the second criterion in 19 CFR 351.401(f)(2), a significant potential for manipulation of price or production, is also met. Specifically, Fimex VN and Sao Ta Seafood Factory share sales and production information, demonstrating intertwined

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11 See Fimex VN Section A Questionnaire Response, dated June 6, 2018, at 19.
12 See Fimex VN Supplemental Section A Questionnaire Response (SSAQR) dated July 2, 2018, at Exhibit SA-5.
13 See Fimex VN Section C Questionnaire Response, dated July 2, 2018, at C-37 (“sometimes the company sells using the name “FIMEX VN” and in some instances the name “Sao Ta Seafood Factory” is used.”) and Exhibit C-1a (printout of sales database).
14 See Fimex VN Section D Questionnaire Response, dated July 13, 2018, at D-2 (“During the POR Fimex VN processed frozen shrimp at two factories, one located at its headquarters in Soc Trang (‘Fimex Factory’) and the other a short distance away in the township of An Hiep (Sao Ta Seafood Factory or ‘STSF Factory’)”)) and D-28 (demonstrating evidence of shared cost of production).
operations\textsuperscript{15} through the combined accounting records, sales and FOP databases, and the transfer/remittance of Sao Ta Seafood Factory’s earnings to Fimex VN.\textsuperscript{16}

V. DISCUSSION OF THE ISSUES

Comment 1: Separate Rate Status for Sao Ta Seafood Factory

Fimex VN Case Brief:
- Commerce should grant separate rate (SR) status to Fimex VN’s trade name, “Sao Ta Seafood Factory” in the final results. In the Preliminary Results, Commerce denied SR status to “Sao Ta Seafood Factory,” finding that Fimex VN did not provide commercial documents demonstrating Fimex VN’s use of that name during the POR.
- Contrary to Commerce’s finding, Fimex VN provided commercial documents in its supplemental questionnaire response demonstrating commercial use of the trade name, “Sao Ta Seafood Factory.”\textsuperscript{17}

Petitioner’s Rebuttal Brief:
- Fimex VN reported that the trade name “Sao Ta Seafood Factory” had been commercially used but this only referred to “Production” as opposed to “Production and Sale” in its separate rate application (SRA).\textsuperscript{18} In the SRA, Fimex VN cited no evidentiary support demonstrating the name “Sao Ta Seafood Factory” was used during the POR.\textsuperscript{19}
- Fimex VN argues that it provided a commercial invoice and its Business Registration Certificate (BRC) in a supplemental questionnaire response showing a sale to the United States and that the name “Sao Ta Seafood Factory” identified “a branch of Fimex VN which produces and exports subject merchandise to the United States.”\textsuperscript{20} However, the commercial document related to a single sale to the United States and, contrary to Fimex VN’s assertion, no portion of that document was placed on the public record.\textsuperscript{21} Contrary to Fimex VN’s argument, this is not sufficient to demonstrate that SR status should be granted to the name “Sao Ta Seafood Factory” in the final results.
- Commerce has the discretion to determine whether the evidence provided by Fimex VN is sufficient to meet the requirements for granting SR status. Even if Commerce finds that Fimex VN has demonstrated that “Sao Ta Seafood Factory” appears on the BRC, if there is insufficient evidence establishing that the name was used on commercial documents, SR status should not be granted.\textsuperscript{22} The burden of proof in establishing eligibility for a separate rate lies with Fimex VN and not Commerce.\textsuperscript{23}

\textsuperscript{15} See 19 CFR 351.401(f)(2)(iii).
\textsuperscript{16} See SSAQR at 9 (“Sao Ta Seafood Factory” is a branch of Fimex VN which produces and exports subject merchantise to the United States. However, because it is only a branch of Fimex VN, the beneficiary of the sales is FIMEX VN.”) and Exhibit SA-4, demonstrating a sale invoiced by Sao Ta Seafood Factory, with payment rendered to Fimex VN.
\textsuperscript{17} See SSAQR at Exhibits SA-4, SA-5 and SA-7.
\textsuperscript{19} Id.
\textsuperscript{20} See Petitioner’s Rebuttal Brief at 8, citing Fimex VN’s Case Brief at 2; and SSAQR.
\textsuperscript{21} Id. at 9, citing Fimex VN’s Case Brief at 2; and SSAQR at Exhibit SA-4.
\textsuperscript{22} See Memorandum, “Names Not Granted Separate Rate Status at the Preliminary Results,” dated April 8, 2019.
\textsuperscript{23} See Petitioner’s Rebuttal Brief at 9, citing \textit{QVD Food v. United States}, 658 F. 3d 1318, 1324 (CAFC 2011) (\textit{QVD Food}); and \textit{NSK Ltd. v. United States}, 919 F. Supp. 442, 449 (CIT 1996) (\textit{NSK Ltd.}).
As Commerce previously noted, Commerce “has denied {separate rate} status to applicants’ claimed trade names since the second administrative review” of this antidumping duty order and prior grants of SR status for a particular name “have no bearing on the information relied upon in this segment.”

**Commerce’s Position:**

As discussed above, Commerce has determined that Fimex VN and Sao Ta Seafood Factory comprise a single entity, and are, thus, subject to a single cash deposit rate. Consequently, all arguments presented in Fimex VN’s case brief and the petitioner’s rebuttal brief are moot with regard to the issue of whether Sao Ta Seafood Factory is entitled to SR status as an additional trade name. As a separate manufacturing facility, Sao Ta Seafood Factory is not a “trade name,” but is an actual facility that produces and exports under its own name. Thus, reference to Sao Ta Seafood Factory as an alternate “trade name” of Fimex VN is a misnomer. As directed in Commerce’s separate rate application, Vietnamese exporters should adhere to Commerce’s definition of a trade name, and, in future segments, SR applicants/certifiers must not claim “product brand names or the names of any other entities in the applicant’s “group,” affiliated or otherwise,” as an alternative trade name of the applicant itself.

Commerce has reviewed the record and analyzed Fimex VN’s questionnaire responses, wherein Fimex VN has provided, as a mandatory respondent, all the relevant corporate structure, sales and cost information required to make an affiliation/single entity determination under section 771(33) of the Act and 19 CFR 351.401(f). As stated above, both Fimex VN and Sao Ta Seafood Factory are subject to a single cash deposit rate in these final results. Thus, both Fimex VN and Sao Ta Seafood Factory, as a single entity, appear in the list of rates in the accompanying Federal Register notice.

However, for the final results, Commerce will not include “Sao Ta Foods Joint Stock Company” in the list of rates. In the Preliminary Results, Commerce inadvertently granted SR status to Fimex VN’s claimed trade name “Sao Ta Foods Joint Stock Company.” However, Commerce overlooked information that Fimex VN reported that this name was not used commercially (i.e., the name does not appear on any commercial document, such as an invoice) during the POR. Thus, Commerce incorrectly granted SR status to the claimed trade name “Sao Ta Foods Joint Stock Company” in the Preliminary Results, which we have removed from the list of rates in these final results and revised in the cash deposit and company-specific liquidation instructions.

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25 Commerce clearly defines the term “trade name” in its separate rate application (“Trade names are other names under which the company does business. It does not include product brand names or the names of any other entities in the applicant’s “group,” affiliated or otherwise.”). See Separate Rate Application at question 2a and fn6, available at: https://enforcement.trade.gov/nme/sep-rate-files/app-20190221/srv-sr-app-022119.pdf.

26 See Preliminary Results, 84 FR at 16649.

27 See SSAQR at 8 (“‘Sao Ta Foods Joint Stock Company’ is the full name of FIMEX VN. However, there were not any commercial documents which used the name ‘Sao Ta Foods Joint Stock Company,’ except that the full name in Vietnamese is used in the Vietnamese Customs Clearance Form, while the shipper name on the other commercial documents is FIMEX VN.”).

28 See Preliminary Results, 84 FR at 16649.
Comment 2: Treatment of Quang Minh Seafood Co., Ltd.

Quang Minh Case Brief:

- Quang Minh submitted a no-shipment certification after the established deadline and Commerce rejected the certification. However, Commerce should treat the failure to submit the certification in a timely fashion as an extraordinary circumstance because a former employee falsely informed Quang Minh that the certification had been filed. This also caused the company’s counsel to overlook that the fact that no certification had been filed as it believed that a different firm was monitoring the administrative record.
- If the circumstances do not warrant extraordinary consideration, Commerce still retains the discretion to accept the certification because Commerce may extend any time limits or waive any requirements not required by statute. Not accepting the certification would amount to an abuse of discretion.
- The circumstances here are similar to Grobest & I-Mei Indus. (Vietnam) Co. v. United States (Grobest). In Grobest, the Court of International Trade (CIT) found that Commerce abused its discretion by not accepting a separate rate certification (SRC) submitted three months after its deadline and assigning the Vietnam-wide rate to the entity in question. The CIT explained that a case-by-case determination must be made regarding the acceptance of untimely submissions based on the burden it creates for Commerce. The CIT found that not assigning the separate rate was prejudicial because reviewing the submission would not have created a large burden, and, had the SRC been accepted, the entity would have likely received a separate rate.
- By not accepting the no-shipment certification, Commerce is abusing its discretion as it did in the administrative review subject to Grobest, and accepting the certification will allow Quang Minh to retain its current rate.
- If Commerce continues to not accept the no-shipment certification, the CBP data on the record shows that Quang Minh had no shipments during the POR. The substantial evidence standard requires Commerce to base determinations on the record as a whole, and the absence of shipments should be considered for the final results. Accordingly, Quang Minh’s existing cash deposit rate should not be subject to change.

Petitioner’s Rebuttal Brief:

- Commerce is not obligated to use its discretion to accept an untimely filed submission. Quang Minh cannot challenge Commerce’s discretion because Quang Minh is unable to demonstrate Commerce has abused its discretion based on facts presented on the record.
- Quang Minh’s circumstances in this segment differs from those presented in Grobest because in that case, the untimely SRC arrived significantly earlier in the review process and the entity in question was more diligent in its efforts to resolve the issue promptly upon

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30 See Quang Minh’s Case Brief at 3, citing 19 CFR 351.301(b); and NTN Bearing Corp. v. United States, 74 F. 3d 1204, 1207 (CAFC 1995).
32 Id. at 6, citing Gerald Metals, Inc. v. United States, 132 F. 3d 716, 720 (CAFC 1997).
discovery. Quang Minh only realized its failure to file a no-shipment certification after the Preliminary Results were released, which is not a demonstration of “acting diligently.”

- Quang Minh’s argument that Commerce should base its final results on the CBP data on record misrepresents Commerce’s practice. According to Commerce’s practice, the burden of proof lies with the interested party.\(^\text{33}\) Quang Minh must explain why the release of CBP data would allow it to retain its existing cash deposit rate as companies are still subject to review even if they file no-shipment certifications.

- Commerce acted appropriately in declining to treat Quang Minh as a separate entity in the Preliminary Results and should continue to do so in the final results.

**Commerce’s Position:**

Commerce disagrees with Quang Minh regarding the rejection of its untimely-filed no-shipment certification and Commerce’s treatment of Quang Minh in the Preliminary Results as part of the Vietnam-wide entity. We continue to find that Quang Minh is part of the Vietnam-wide entity for these final results. Quang Minh raised several arguments regarding the rejection of the untimely no-shipment certification. Generally, Quang Minh argues that Commerce’s regulations allow for it to accept untimely submissions, and even if Commerce does not accept an out-of-time submission, Commerce must allow Quang Minh to retain a cash deposit rate from a prior review because any other decision would be an abuse of its discretion.\(^\text{34}\) We address these arguments below.

As a threshold matter, the deadline to submit a certification of no shipments was 30 days after the publication of the Initiation Notice in the Federal Register (i.e., May 16, 2018).\(^\text{35}\) Publication of the Initiation Notice in the Federal Register constitutes public notification to interested parties. Further, because Quang Minh had participated in prior segments of the proceeding, with counsel, it is unreasonable to conclude that Quang Minh was unaware of the filing requirements for either a separate rate certification/application or a no-shipment certification, the deadlines for which were clearly established in the Initiation Notice. In addition, Commerce provides all interested parties with an opportunity to request an extension of time to file their submissions. Specifically, 19 CFR 351.302(c) states that:

> Before the applicable time limit established under this part expires, a party may request an extension pursuant to paragraph (b) of this section. An untimely filed extension request will not be considered unless the party demonstrates that an extraordinary circumstance exists. The request must be in writing, in a separate, stand-alone submission, filed consistent with § 351.303, and state the reasons for the request. An extension granted to a party must be approved in writing.

1. An extension request will be considered untimely if it is received after the applicable time limit expires or as otherwise specified by the Secretary.

2. An extraordinary circumstance is an unexpected event that:

   (i) Could not have been prevented if reasonable measures had been taken, and

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\(^{33}\) See Petitioner’s Rebuttal Brief at 6, citing QVD Food, 658 F. 3d at 1324; and NSK Ltd., 919 F. Supp. at 449.

\(^{34}\) See Quang Minh’s Case Brief at 3.

At no time prior to the May 16, 2018, no-shipment certification deadline did Quang Minh request an extension of time to file its no-shipment certification, as directed in the regulations. Rather, Quang Minh noted its status in the unpublished Preliminary Results (released to parties on April 9, 2019)\textsuperscript{36} and subsequently submitted, simultaneously, a letter requesting acceptance of the untimely submission and the now-rejected no-shipment certification on April 19, 2019, 338 days after the deadline.\textsuperscript{37} Within its April 19 Letter, Quang Minh requested “extraordinary circumstances” treatment, citing the “good cause” criterion under 19 CFR 351.302(b). However, the regulatory language regarding “extraordinary circumstances,” as cited above, refers to untimely-filed extension requests, not untimely-filed submissions. Regardless of that fact, Commerce has identified the types of circumstances qualifying for “extraordinary circumstances” treatment. For example, Commerce explained in Extension of Time Limits that “\{e\}xamples of extraordinary circumstances include a natural disaster, riot, war, force majeure, or medical emergency,” while “\{e\}xamples that are unlikely to be considered extraordinary circumstances include insufficient resources, inattentiveness, or the inability of a party’s representative to access the Internet on the day on which the submission was due.”\textsuperscript{38} We have applied this language in other cases where companies sought “extraordinary circumstances” treatment without demonstrating qualification for such.\textsuperscript{39}

In this case, Quang Minh did not provide an untimely extension request—it simply filed its April 19 Letter requesting consideration of the untimely submission along with the untimely no-shipment certification.\textsuperscript{40} The regulations provide that the agency “may, for good cause, extend any time limit established by this part.”\textsuperscript{41} However, Quang Minh has not established good cause for requesting consideration for an untimely no-shipment certification, absent any requests for extension prior to the May 16, 2018, deadline, particularly because its explanation for the untimely submission was, by its own admission, inattentiveness to the administrative record, portrayed as miscommunications within the company itself.\textsuperscript{42} Moreover, the “good cause” standard applies to consideration of out-of-time extension requests. There is no such request on this record. Nor did Quang Minh allow time for Commerce to respond to its April 19 Letter requesting consideration of an untimely submission—Quang Minh just submitted it without allowing Commerce to consider, much less authorize, such an egregiously late filing.

\textsuperscript{36} See Preliminary Results (signed, unpublished version), uploaded April 9, 2019, under ACCESS Barcode 3816855-01.

\textsuperscript{37} See April 19 Letter. The rejected No-Shipment Certification was filed simultaneously with the April 19 Letter, a “request to accept” the untimely no-shipment certification. The rejected document is identified in ACCESS under Barcode 3822551-01.

\textsuperscript{38} See Extension of Time Limits, 78 FR 57790, 57792-93 (September 20, 2013) (Extension of Time Limits).

\textsuperscript{39} See Honey from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013, 80 FR 27633 (May 14, 2015), and accompanying IDM at Comment 1 (“Kunshan Xinlong’s counsel’s inattentiveness to the information available on the record does not excuse the respondent from filing its responses by the established deadlines.”).

\textsuperscript{40} See April 19 Letter.

\textsuperscript{41} See 19 CFR 351.302(b). For untimely extension requests, parties must show that they meet the higher standard of “extraordinary circumstances” applicable in this administrative review rather than the “good cause” standard. See Extension of Time Limits, 78 FR at 57793.

\textsuperscript{42} See April 19 Letter at 2-3.
Quang Minh has argued that its former employee and various hired counsel miscommunicated the status of a no-shipment certification for this review period.\footnote{Id.} However, Quang Minh’s explanation of these miscommunications demonstrates inattentiveness rather than resemblance to any of the above-noted examples of what circumstances qualify as “extraordinary.” The Court of Appeals for the Federal Circuit’s (CAFC) has affirmed Commerce’s practice to find that “inattentiveness, or the inability of a party’s representative to access the Internet on the day on which the submission was due,” is not an extraordinary circumstance.\footnote{See Dongtai Peak v. United States, 777 F. 3d 1343, 1351 (CAFC 2015) (Dongtai Peak).}

Further, the CAFC affirmed that in the administrative review subject to \textit{Dongtai Peak}, Commerce “properly exercised its discretion in rejecting Dongtai Peak’s extension requests and Supplemental Responses because (1) the extension requests were submitted after the established deadline in violation of 19 C.F.R. \S 351.302(c), and (2) Appellant failed to show ‘good cause’ for an extension as required by \S 351.302(b).”\footnote{Id. at 1351-52.} The CAFC also found that under certain circumstances, Commerce is not required to justify its rejections of such untimely-filed extension requests or submissions:

\begin{quote}
Appellant misunderstands its obligation to submit a written extension request before the time limit specified by Commerce and to ‘state the reasons for the request.’ \textit{Id.} \S 351.302(c). That is, Commerce was not required to demonstrate good cause for rejecting Dongtai Peak’s untimely submissions. As the Government notes, ‘(i)t is not for Dongtai Peak to establish Commerce’s deadlines or to dictate to Commerce whether and when Commerce actually needs the requested information.’\footnote{Id. at 1352.}
\end{quote}

Thus, Commerce properly rejected Quang Minh’s untimely submission and removed it from the record, in accordance with the governing regulations under 19 CFR 351.302(d) and 351.104(a)(2)(iii).\footnote{See Rejection Letter; and Rejection Memo to the File.} Commerce establishes its deadlines and provides sufficient time and opportunity for interested parties to either file a response or request an extension of time prior to the deadline. Indeed, the \textit{Initiation Notice} explicitly provides notice of opportunity for extensions and addresses firmly when extensions are considered untimely.\footnote{See Initiation Notice, 83 FR at 16319 (“Parties may request an extension of time limits before a time limit established under Part 351 expires, or as otherwise specified by the Secretary. See 19 CFR 351.302. In general, an extension request will be considered untimely if it is filed after the time limit established under Part 351 expires.”).} Moreover, interested parties on this record made use of extension opportunities; for example, various companies requested an extension of the deadline to file separate-rate certifications (SRCs) or applications, which had the same 30-day deadline as the no-shipment certifications.\footnote{See VASEP Letter, “Request for Extension of Deadline for Separate Rate Certifications and Applications,” dated May 15, 2018.} Commerce addressed these timely-filed extension requests and granted the additional time requested.\footnote{See Memorandum, “Deadline for the Submission of Separate Rate Applications/Certifications,” dated May 15, 2018.} However, Quang Minh did not submit any such request for an extension. As discussed, Quang Minh filed a letter requesting consideration of an untimely document, 338 days after the
established deadline expired. For these situations, the regulations afford, and the courts have affirmed, Commerce’s ability to reject any such filings that are untimely.51

Commerce also disagrees with Quang Minh’s claim that the circumstances in this case mirror those in the administrative review subject to Grobest, as support for its untimely submission. In Grobest, the CIT held that rejecting an SRC that was three months late was an abuse of discretion because, inter alia, the SRC had been submitted early in the proceeding, the respondent was diligent in attempting to correct the error, and the burden on the agency to consider the certification would have been minimal.52 However, none of those circumstances exist here. Quang Minh’s untimely submission was not “early in the proceeding.” It was submitted approximately 11 months after the established deadline expired and after the Preliminary Results were issued.53 There is no evidence on the record that Quang Minh demonstrated any diligence in filing timely information; Quang Minh did not communicate with Commerce regarding any difficulties in submitting its no-shipment claim until after the Preliminary Results. Presenting untimely information after the issuance of the Preliminary Results, where Commerce first addresses no-shipment claims, as an administrative matter, is not an example of diligence, as referenced in Grobest.

In Grobest, the CIT found that the facts of that case suggested that the administrative burden of reviewing the SRC rejected by Commerce would not have been great because Commerce had granted the respondent company separate-rate status in the preceding three administrative reviews without needing to conduct a separate-rate analysis.54 Therefore, the Court found that but for the untimeliness of its submission, the respondent would likely have received a separate rate in the segment in question, with minimal administrative burden imposed upon Commerce, and, as a result of its rejected submission, was likely assigned an inaccurate and disproportionate margin.55

However, Commerce notes that no exporter is privileged with retaining a previously established cash deposit rate. Commerce issues cash deposit rates at the conclusion of a segment, based on the record. Thus, contrary to Quang Minh’s assumption that it is “entitled to keep its 0.71% separate rate,”56 such a determination is one made by Commerce, not the exporter. Contrary to Quang Minh’s claim, retention of a previously granted separate rate is not a privilege that exporters are granted in perpetuity.57 Quang Minh does not have an inherent right to keep its

51 See, e.g., Nippon Steel Corp. v. United States, 118 F. Supp. 2d 1366, 1377 (CIT 2000) (Nippon Steel); and Seattle Marine Fishing Supply, et al. v. United States, 679 F. Supp. 1119, 1128 (CIT 1998) (it was not unreasonable for Commerce to refuse to accept untimely filed responses, where “the record displays the ITA followed statutory procedure” and the respondent “was afforded its chance to respond to the questionnaires, which it failed to do.”).
52 See Grobest, 815 F. Supp. 2d at 1367.
53 See April 15 Letter; and {Rejected} Submission under ACCESS Barcode 3822551-01.
54 See Grobest, 815 F. Supp. 2d at 1367.
55 Id.
56 See Quang Minh’s Case Brief at 4 (“data already on the record shows no entries for Quang Minh during the POR, indicating that Quang Minh in fact is entitled to keep its 0.71% separate rate.”).
57 See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2014-2015, 81 FR 62717 (September 12, 2016), and accompanying IDM at Comment 10 (“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.”).
separate rate from a prior administrative review;\(^{58}\) it has to provide timely evidence, on a
segment-specific basis, that it either qualifies for a separate rate or timely demonstrate that it had
no shipments during the POR. Without one or the other, Commerce has no basis to continue
granting a separate rate to an exporter initiated for review. Thus, Quang Minh’s assertion that
“rejecting the no-shipment certification would lead to an inaccurate determination that severely
prejudices Quang Minh,” is incorrect. Commerce did not make an inaccurate determination.
Rather, Quang Minh failed to timely provide either a no-shipment certification or separate rate
documentation, in order to demonstrate its continued eligibility for the separate rate granted in a
prior administrative review.\(^{59}\)

Furthermore, notwithstanding the distinction between this case and \textit{Grobest}, the case law
regarding Commerce’s authority to reject untimely-filed submissions, has developed such that
the CIT’s ruling in \textit{Grobest} is superseded by the CAFC’s ruling in \textit{PSC VSMPO}.\(^{60}\) In \textit{PSC VSMPO}, the CAFC explained that the CIT “erred when, in spite of this determination \{that the
information was untimely submitted\}, it ordered Commerce to admit the affidavit into the record
because of circumstances the Court described as ‘not typical.’” The CAFC further stated that the
CIT’s decision to remand Commerce’s determination to reject an untimely-filed document was
an improper intrusion into Commerce’s power to apply its own procedures for the timely
resolution of antidumping reviews.\(^ {61}\) Thus, based on the distinction between this case and
\textit{Grobest}, as well as subsequent support from the CAFC in \textit{PSC VSMPO}, it was within
Commerce’s authority to reject Quang Minh’s untimely no-shipment certification in this review,
especially considering the lateness of Quang Minh’s untimely filing. Accordingly, we find that
the circumstances of this case are more comparable with those addressed in \textit{PSC VSMPO} and
\textit{Dongtai Peak}, rather than \textit{Grobest}.

Commerce establishes deadlines to ensure its ability to complete administrative proceedings
within statutorily mandated deadlines. The CIT has long recognized the need to establish and
enforce time limits for filings, the purpose of which is to aid Commerce in the administration of
the antidumping laws.\(^ {62}\) The purpose of requiring no-shipment certifications within 30 days of
the publication of initiations is to ensure that we have sufficient time to gather the information,
create and submit a no-shipment inquiry to CBP, receive the information from CBP, place it on
the record, and then address the no-shipments in the \textit{Preliminary Results}, not after the
\textit{Preliminary Results}. In this administrative review, we have done exactly that for the 18
companies that timely filed their no-shipment certifications.\(^ {63}\)

\(^{58}\) See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Court Decision Not in
Harmony With Final Results of Administrative Review, 84 FR 8077, 8079 (March 6, 2019).

\(^{59}\) See, e.g., 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 IDM at Comment 5 (“…in order to maintain its separate rate status, Linyi Bonn should have
submitted either a separate rate certification or a no shipment certification, as appropriate, no later than April 4,
2014. It timely submitted neither, nor did Linyi Bonn request an extension of time to submit anything in this review.
Therefore, when Linyi Bonn submitted a no shipments certification following the Preliminary Results, that
submission was rejected consistent with the \{Commerce’s\} practice and regulations.”).

\(^{60}\) See \textit{PSC VSMPO-Avisma Corp. v. United States}, 688 F. 3d 751, 761 (CAFC 2012) (\textit{PSC VSMPO}).

\(^{61}\) Id.

\(^{62}\) See \textit{Nippon Steel}, 118 F. Supp. 2d at 1377; see also \textit{Drawn Stainless Steel Sinks from the People’s Republic of
China: Final Results of the Antidumping Duty Administrative Review; 2012-2014}, 80 FR 69644 (November 10,
2015), and accompanying IDM at Comment 19.

\(^{63}\) See No Shipment Inquiry 1-CBP Message 8159303, dated June 8, 2018 (ACCESS Barcode 3716316-01); and No
Shipment Inquiry 2-CBP Message 8213312, dated August 1, 2018 (ACCESS Barcode 3737552-01) (Second No
Commerce also disagrees with Quang Minh’s suggestion that it should issue no-shipment inquiries to CBP after the Preliminary Results because “any potential additional inquiry into the accuracy of the certification would be minimal and could be completed in extremely short order.”

First, Quang Minh’s assertion is based on conjecture. There is no guarantee that CBP provides to Commerce on the timing of responses to our no-shipment inquiries. The record shows that response times can vary, and are dependent on factors unknown to Commerce. For example, while the first no-shipment inquiry response was a short time after we issued our first inquiry, the second inquiry we issued had a longer response time. Thus, Quang Minh’s suggestion that a rushed, post-preliminary no-shipment inquiry to CBP is appropriate because the effort is allegedly minimal, without reflection of how Quang Minh failed to provide timely information, mitigates the significant time and effort actually required of two separate agencies.

Second, the CIT explained in Grobest that Commerce has the discretion to “set and enforce deadlines.”

“Otherwise any party would be allowed to provide {Commerce} with information at the parties’ leisure and expect the agency to review the information and issue a binding determination.” The establishment of deadlines for submission of factual information in an antidumping duty review is not arbitrary. Commerce declines to entertain Quang Minh’s suggestion that it may ignore its regulations and court-affirmed practice to ease the claimed hardship of a company that filed a no-shipment certification 338 days late because the company was inattentive to the administrative record.

Commerce also disagrees with Quang Minh’s assertion that it may rely on the CBP data alone as sufficient evidence of Quang Minh’s untimely certification that it had no shipments during the POR. Commerce has explained that in reviewing no-shipment claims:

{Commerce} requires exporters who had no shipments during the POR to file no-shipment certifications, and does not simply rely on the absence of entries in the CBP data before determining whether that party has any entries subject to review. In this segment, Fengchi Imp. and Exp. Co., Ltd. of Haicheng City and Fengchi


64 See Quang Minh’s Case Brief at 5.

65 See Second No Ship Inquiry, which is dated August 1, 2018, and Second No Ship Inquiry Response, which is dated September 6, 2018, a difference of 36 days.

66 See Grobest, 815 F. Supp. 2d at 1365.


68 See Saha Thai Steel Pipe Co., Ltd. v. United States, 828 F. Supp. 57, 64 (CIT 1993) (Commerce “has honored one of the fundamental principles underlying the trade statute -- accuracy. It is this endeavor for accuracy, within the limits of strict deadlines, that lends respectability to U.S. trade statutes in the international community.”).

69 See Quang Minh’s Case Brief at 5.

70 See, e.g., Carbon and Alloy Steel Wire Rod from the Republic of South Africa: Affirmative Final Determination of Sales at Less Than Fair Value and Affirmative Finding of Critical Circumstances, 83 FR 2141 (January 16, 2018), and accompanying IDM at Comment 2 (“Although the CBP entry data on the record did not show any entries for Scaw, this does not end our inquiry nor excuse a party from complying with a request to respond to an AD questionnaire. Rather, Scaw was required to either respond to our AD questionnaire, or file a certification of no shipments...When examining a no shipments claim, Commerce’s practice is to 1) review the respondent’s no shipment claim; 2) examine CBP entry data to determine whether these data are consistent with the claim; and 3) send a ‘No Shipment Inquiry’ to CBP requesting that CBP notify Commerce if it has evidence of shipments from the company making the claim.”).
Refractories Co., of Haicheng City…submitted a timely filed certification that it had no shipments of subject merchandise to the United States during the POR. ⁷¹

As demonstrated on the record, and consistent with our practice, our examination of no-shipment certifications early in the review process requires the concurrent involvement and examination by CBP, which confirms/corroborates the no-shipment declarations from foreign exporters using CBP’s own examination and analysis methods of import data, well in advance of the issuance of our preliminary decisions.

Consistent with our decision in Garlic 2017, wherein we addressed the identical issue of rejecting an untimely no-shipment certification, while the CBP entry data may not list Quang Minh as an exporter, Commerce’s practice, early in the review, and certainly before the statutory deadline for the preliminary results, is to corroborate an exporter’s no shipment declaration with CBP directly. ⁷² Further, as we stated in Garlic 2017, while we consider the CBP data to be accurate and reliable for the purposes of ranking and selecting respondents for individual examination early in the review, because of the possibility that some suspended Type 3 entries could be omitted from the original import data listing, we require the company to file a certification accompanied by a subsequent separate inquiry to CBP to ensure that no such entries subject to the review were missed. ⁷³ Consistent with this established practice, early in the review, we submitted inquires to CBP to confirm that the timely-filed no shipment declarations from 18 companies were accurate. ⁷⁴ Nevertheless, Quang Minh filed an untimely no-shipment certification, and Commerce determined that it was untimely and rejected this submission in accordance with its regulations. ⁷⁵ Accordingly, we find that there is an insufficient basis to find that Quang Minh had no shipments during the POR. Thus, we find that Quang Minh has been appropriately assigned the Vietnam-wide entity rate in this review.

⁷² See Fresh Garlic from the People’s Republic of China: Final Results and Partial Rescission of the 21st Antidumping Duty Administrative Review; 2014-2015, 82 FR 27230 (June 14, 2017), and accompanying IDM at Comment 2 (Garlic 2017) (Commerce “continues to find that Hejia is part of the PRC-wide entity for these Final Results. {Commerce} notes that the deadline to submit a certification of no shipments was 30 days after the publication of the initiation notice in the Federal Register (i.e., February 6, 2006)...Hejia submitted its certification of no shipments on January 23, 2017, almost one full year after the deadline to submit the certification had passed. Hejia did not request an extension to file its certification of no shipments...Accordingly, the Department rejected it.”).
⁷³ Id.
⁷⁴ See Preliminary Results, 84 FR at 16648, and accompanying Preliminary Decision Memorandum at 5-6.
⁷⁵ See Rejection Letter; and Rejection Memo to the File.
VI. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results of the administrative review and the final dumping margins in the *Federal Register*.

☑ ☐

Agree  Disagree

8/20/2019

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance