

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND
Sao Ta Foods Joint Stock Company et al. v. United States
Consol. Court No. 18-00205, Slip Op. 20-135 (CIT September 15, 2020)

I. SUMMARY

The Department of Commerce (Commerce) has prepared these final results of redetermination pursuant to the remand order of the Court of International Trade (the Court) in *Sao Ta Foods Joint Stock Company et.al. v. United States*, Consol. Court No. 18-00205, Slip Op. 20-135 (September 15, 2020) (*Second Remand Opinion and Order*). These final remand results concern the following: *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2016– 2017*, 83 FR 46704 (September 14, 2018) (*AR12 Final Results*) and accompanying Issues and Decision Memorandum (IDM); and Commerce’s Remand Redetermination¹ (*Remand I*) pursuant to *Sao Ta Foods Joint Stock Company et.al. v. United States*, Consol. Court No. 18-00205, Slip Op. 20-7 (January 16, 2020) (*First Remand Opinion and Order*). In the *Second Remand Opinion and Order*, the Court remanded back to Commerce its further explanation and determination in *Remand I*. In the *Second Remand Opinion and Order*, the Court found that “Commerce’s denial of {separate rate (SR)} status to Thuan Phuoc’s² factory names on this record is unreasonable and its change in practice regarding trade names is arbitrary and capricious”³... and that “Commerce continues to unreasonably deny SR status to Thuan Phuoc’s factory names.”⁴

¹ *Remand I* is available at: <https://enforcement.trade.gov/remands/20-7.pdf>.

² Thuan Phuoc Seafoods and Trading Corporation.

³ See *Second Remand Opinion and Order* at 6.

⁴ *Id.* at 10.

Further, the Court directed that Commerce should: (1) provide a definition for the term “separate exporters” or point to both an authority and rationale to support the distinction, and to explain why its approach is reasonable and how it squares with its policy as well as the {Separate Rate Application (SRA)} and {Separate Rate Certification (SRC)} instructions;⁵ (2) explain how Commerce provided adequate explanation or notice of its new approach and rationale to interested parties; (3) explain how Commerce evaluates record evidence in light of its own policy and SRA/SRC instructions;⁶ (4) state and explain its practice as discussed but also clarify why, based on the record, inclusive of detracting evidence, it concludes the factories are not trade names of Thuan Phuoc;⁷ and (5) reconsider its determination to continue to deny Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory a SR.⁸

As explained below, pursuant to the Court’s *Second Remand Opinion and Order*, we have determined to reconsider, under respectful protest, our determination that Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory are ineligible for a SR. Consequently, Commerce has reconsidered its denial of SR status for Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory in the *AR12 Final Results*, and, in light of that reconsideration, we have determined to grant Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory SR status as trade names of Thuan Phuoc Seafoods and Trading Corporation, limited to the *AR12 Final Results*.

⁵ *Id.* at 12.

⁶ *Id.* at 15 (“Commerce’s policy, as well as the SRA and SRC instructions, requires each SR applicant to provide the name of the exporting entity, and any trade name(s) under which it may export, as identified in its BRC, and demonstrate that such entity name and/or trade name(s) match the name on documents for declared shipments to CBP.”)

⁷ *Id.* at 17.

⁸ *Id.* at 17-18.

II. BACKGROUND

A. Administrative Background

On April 10, 2017, Commerce initiated an administrative review of the antidumping duty order on certain warmwater shrimp from Vietnam for 127 producers and exporters of subject merchandise for the period February 1, 2016 through January 31, 2017.⁹ On May 23, 2017, Commerce determined to limit the number of respondents selected for individual examination to the two largest companies by U.S. import entry volume for which a review was requested.¹⁰ Commerce selected Fimex VN and Soc Trang Seafood Joint Stock Company for individual examination.¹¹ We issued the *Preliminary Results* of the administrative review on March 12, 2018.¹²

In the *Preliminary Results*, Commerce stated that it considers Vietnam to be a non-market economy (NME) country and that, in accordance with section 771(18)(C)(i) of the Tariff Act of 1930, as amended (the Act), any determination that a foreign country is an NME country shall remain in effect until revoked by Commerce.¹³ Commerce further stated that, pursuant to section 771(18)(C) of the Act, in proceedings involving NME countries, Commerce maintains a rebuttable presumption that all companies within the country are subject to government control

⁹ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 FR 17188 (April 10, 2017) (*Initiation Notice*). While there were 127 individual names upon which we initiated an administrative review, the number of *actual* companies for which a review was initiated is 78 when accounting for numerous duplicate names and minor name variations of the same companies requested by multiple interested parties and the groupings of companies that have been collapsed and/or have been previously found affiliated.

¹⁰ See Memorandum, “Selection of Respondents for Individual Examination,” dated May 23, 2017.

¹¹ Subsequent to our selection of Fimex VN and Soc Trang Seafood Joint Stock Company for individual examination, Soc Trang Seafood Joint Stock Company withdrew its request for administrative review on July 7, 2017. On July 7, 2017, the petitioner, the Ad Hoc Shrimp Trade Action Committee, and the American Shrimp Processors Association also withdrew their respective requests for an administrative review of Soc Trang Seafood Joint Stock Company. Thus, we rescinded the review of Soc Trang Seafood Joint Stock Company, leaving Fimex VN as the sole mandatory respondent.

¹² See *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2016–2017*, 83 FR 10673 (March 12, 2018) (*AR12 Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

¹³ See *AR12 Preliminary Results* PDM at 6.

and, therefore, should be assessed a single weighted-average dumping margin.¹⁴ Commerce's policy is to assign all exporters of subject merchandise that are in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a SR.¹⁵

Commerce analyzes whether each entity exporting the subject merchandise is sufficiently independent under a test established in *Sparklers*¹⁶ and further developed in *Silicon Carbide*.¹⁷ According to this SR test, Commerce will assign an SR in NME proceedings if a respondent can demonstrate the absence of both *de jure* and *de facto* government control over its export activities. However, if Commerce determines that a company is wholly foreign-owned or located in a market economy, then an SR analysis is not necessary to determine whether it is independent from government control.¹⁸ In this administrative review, 37 companies filed SRAs or SRCs. Further, based on timely withdrawals of review requests, we rescinded the review with respect to four companies;¹⁹ thus, the record contained SRAs or SRCs for 33 companies under active review, including the mandatory respondent, Fimex VN.

In the *Preliminary Results*, Commerce identified the companies that were eligible for an SR and, in a separate memorandum accompanying the *Preliminary Results*, also addressed whether or not any of these companies' claimed trade names also qualified for the same SR, as

¹⁴ See, e.g., *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 55039, 55040 (September 24, 2008).

¹⁵ See *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588, 20589 (May 6, 1991) (*Sparklers*).

¹⁶ *Id.*

¹⁷ See *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (*Silicon Carbide*).

¹⁸ See, e.g., *Final Results of Antidumping Duty Administrative Review: Petroleum Wax Candles from the People's Republic of China*, 72 FR 52355, 52356 (September 13, 2007).

¹⁹ See *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Partial Rescission of Antidumping Duty Administrative Review; 2016–2017*, 82 FR 37563 (August 11, 2017).

an “aka” name or trade name.²⁰ In the Trade Name Memo, Commerce determined that Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory were ineligible for a SR as “aka” names of Thuan Phuoc Seafoods and Trading Corporation because they were identified on sales documentation but not in Thuan Phuoc Seafoods and Trading Corporation’s Business Registration Certificate (BRC).²¹

Commerce published its *AR12 Final Results* on September 14, 2018. In the *AR12 Final Results*, we made no changes regarding Thuan Phuoc Seafoods and Trading Corporation’s two claimed trade names at issue: Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory.²² Thus, Commerce determined that Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory continued to be ineligible for an SR as trade names of Thuan Phuoc Seafoods and Trading Corporation based on the reasoning provided in the *Preliminary Results* and in response to VASEP’s²³ claims that Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory are divisions of Thuan Phuoc Seafoods and Trading Corporation, located on the same premises as Thuan Phuoc Seafoods and Trading Corporation, and managed by the same executives as Thuan Phuoc Seafoods and Trading Corporation, and are thus, allegedly the same company.²⁴

B. Litigation Background

In the *First Remand Opinion and Order*, the Court ordered Commerce to reconsider or further explain its denial of SR status for Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory in view of the information contained in Thuan Phuoc Seafoods and Trading

²⁰ See Memorandum, “Antidumping Duty Administrative of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Requested Trade Names Not Granted Separate Rate Status at the Preliminary Results,” dated March 5, 2018 (Trade Name Memo).

²¹ See Trade Name Memo at 4.

²² See IDM at Comment 3A.

²³ VASEP is the Vietnam Association of Seafood Exporters and Producers.

²⁴ See VASEP’s Letter, “VASEP Case Brief,” dated August 16, 2018 at 12-15.

Corporation's SRC which Commerce had not considered.²⁵ The Court noted that because Commerce did not appear to consider the information contained in Thuan Phuoc Seafoods and Trading Corporation's SRC or the supporting documentation, it unreasonably denied SR status to Thuan Phuoc Seafoods and Trading Corporation's factories.²⁶ In *Remand I*, Commerce provided further explanation of its determination, in consideration of Thuan Phuoc Seafoods and Trading Corporation's SRC, and is thus, the subject of the Court's *Second Remand Opinion and Order*.

In *Remand I*, Commerce first acknowledged that it had misapplied its SR evaluation of companies' claims of trade names in prior reviews.²⁷ Commerce also provided an explanation of the information on the record and how that information was insufficient to make an SR determination for Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory.²⁸ Commerce further discussed its practice with regard to SR applicants and certifiers that are affiliated or under common ownership.²⁹ Finally, Commerce discussed how it distinguished exporting entities from companies claiming trade names.³⁰ Commerce also addressed arguments from Vietnamese Respondents.³¹

Subsequently, as noted above, in the *Second Remand Opinion and Order*, the Court remanded this issue again to Commerce and directed the agency to provide further explanation or reconsider its determination that Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory are ineligible for SR status as trade names of Thuan Phuoc Seafoods and Trading Corporation.³²

²⁵ See Thuan Phuoc Seafoods and Trading Corporation's Letter, "Separate Rate Certification," dated May 15, 2017 (Thuan Phuoc Seafoods and Trading Corporation's SRC).

²⁶ See *First Remand Opinion and Order* at 25-26.

²⁷ See *Remand I* at 12-14.

²⁸ *Id.* at 5-12.

²⁹ *Id.* at 14-17.

³⁰ *Id.* at 17-21.

³¹ *Id.* at 21-38, most of which reiterated analysis provided in the draft version of *Remand I*.

³² See *Second Remand Opinion and Order* at 18.

In the “Analysis” section below, Commerce has addressed the Court’s requests in the *Second Remand Opinion and Order*.

III. ANALYSIS

A. Whether Commerce’s Evaluation of Record Evidence Was Consistent with Its Practice, Policy and SRC Instructions

The Court requested that Commerce explain its evaluation of certifications and applications for SR eligibility, particularly that of Thuan Phuoc Seafoods and Trading Corporation’s SRC compared to those of other applicants and certifiers.³³ Commerce notes that it had no issue with Thuan Phuoc Seafoods and Trading Corporation’s certification for itself. Thuan Phuoc Seafoods and Trading Corporation provided an SRC wherein it certified that it had no changes from the prior review wherein Commerce had granted it an SR.³⁴ Commerce’s evaluation methodology for SR determinations was described in the *AR12 Preliminary Results* and was applied to all certifying companies and applicants. In the *AR12 Preliminary Results*, Commerce stated that its

policy is to assign all exporters of subject merchandise that are in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate ... and that it “analyzes whether each entity exporting the subject merchandise is sufficiently independent under a test established in *Sparklers* and further developed in *Silicon Carbide*.”³⁵

Commerce also stated that it “will assign a separate rate in NME proceedings if a respondent can demonstrate the absence of both *de jure* and *de facto* government control over its export activities.”³⁶

With regard to the *de jure* criteria, Commerce evaluates whether the exporter demonstrated: (1) an absence of restrictive stipulations associated with an individual exporter’s

³³ *Id.* at 15-17.

³⁴ *See* Thuan Phuoc Seafoods and Trading Corporation’s SRC; *see also Remand I* at 5.

³⁵ *See AR12 Preliminary Results* PDM at 6 (internal citations omitted).

³⁶ *Id.* at 7.

business and export licenses; (2) legislative enactments decentralizing control over export activities of the companies; and (3) other formal measures by the government decentralizing control over export activities of companies.³⁷ With regard to the *de facto* criteria, Commerce evaluates whether the exporter demonstrated: (1) whether the export prices are set by, or are subject to the approval of, a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses.³⁸

Commerce does not dispute whether Thuan Phuoc Seafoods and Trading Corporation satisfied the required criteria; in fact, because Commerce granted Thuan Phuoc Seafoods and Trading Corporation an SR, we determined that it satisfied the criteria, because the full suite of information regarding the above criteria is not required in SRCs as it is in SRAs. As required in SRCs, Thuan Phuoc Seafoods and Trading Corporation certified, for the relevant period of review (POR), that its information had not changed since the last review period in which it was granted an SR.³⁹ However, because the two factories at issue did not have SR status from the prior review, regardless of the reason why SR status was denied in that review,⁴⁰ the two factories could have and should have filed an SRA so that Commerce could apply its methodology to evaluate whether the criteria stated above had been met by them. This

³⁷ *Id.* at 8 (citing *Sparklers*).

³⁸ *Id.* at 8 (citing *Silicon Carbide*).

³⁹ See Thuan Phuoc Seafoods and Trading Corporation's SRC.

⁴⁰ The Court noted that, with regard to *AR10 Final Results*, "Commerce merely declined to consider the factory names as trade names because Thuan Phuoc had not provided the required commercial documentation." See *Second Remand Opinion and Order* at 13, n.13 (citing to *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 80 (*AR10 Final Results*)). While the Court is correct that Commerce denied SR status to the two factories in *AR10 Final Results* for a different reason, the fact remains that the two exporting factories still did not have SR status that would permit them to submit a SRC in lieu of a SRA in AR12.

methodology is important and provides a legal framework for evaluating SR eligibility for Commerce that is applied consistently to all exporters with no existing, prior SR that are seeking a SR for that review period.

Commerce's practice as to NME exporters is to presume that all exporters are under the control of the central government until they demonstrate an absence of government control. This approach has been upheld by the courts.⁴¹ For exporters with no existing SR, Commerce must examine an SRA, for which there is no substitution provided or permitted:

All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification, as described below. For these administrative reviews, in order to demonstrate separate rate eligibility, {Commerce} requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate.⁴²

Based on this public notification to parties in Commerce's initiation notices, the instructions are clear: if an exporter for which a review has been initiated has an existing SR from the preceding review, a certification is required; otherwise an application is required. In this case, Thuan Phuoc Seafoods and Trading Corporation had an SR from the preceding review and, therefore, was required to submit an SRC; Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory did not and, therefore, were required to submit SRAs.

There is no statutory or regulatory requirement that Commerce must first evaluate whether exporters are subdivisions, affiliated, or otherwise connected, prior to applying its SR

⁴¹ See *Kaiyuan Group Corp. v. United States*, 343 F. Supp. 2d 1289, 1307 (CIT 2004) (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997)); see also *Coalition for the Pres. of Am. Brake Drum and Rotor Aftermkt. Mfrs. v. United States*, 44 F. Supp. 2d 229, 242 (CIT 1999) ("Those exporters who do not respond or fail to prove absence of *de jure/de facto* control are assigned the country-wide rate.")

⁴² See *Initiation Notice*, 82 FR at 17190.

evaluation criteria.⁴³ Indeed, Commerce has stated that it would be inappropriate to alter its SR policy to explicitly allow determinations under section 771(33) of the Act or 19 CFR 351.401(f) for SR companies.⁴⁴ Regardless of their alleged “common ownership” status with Thuan Phuoc Seafoods and Trading Corporation, a fact that is not part of the evaluation criteria for determining SR eligibility,⁴⁵ Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory did not provide a full application (SRA). The SRA would have allowed Commerce to conduct a full evaluation of an exporter with no existing SR, as stated in the *Initiation Notice*.

Moreover, the Vietnamese Laws of Enterprises on the record are for the purpose of satisfying the *de jure* criteria established in *Sparklers*, as discussed above and noted for applicants in the SRA. In addition, Commerce’s evaluation of SR eligibility does not provide an opportunity for SR applicants/certifiers to assert or entreat corporate structure findings; Commerce conducts separate segments for those types of determinations (*i.e.*, changed circumstances reviews).⁴⁶ Indeed, evaluating SR eligibility does not, on its face, include

⁴³ Both the SRC and SRA clearly state that “Each firm seeking separate rate status must submit a separate Certification {or Application} regardless of any common ownership or affiliation between firms and regardless of foreign ownership.” See SRC at <https://enforcement.trade.gov/nme/sep-rate-files/cert-20150323/srv-sr-cert-20150416.pdf> and SRA at <https://enforcement.trade.gov/nme/sep-rate-files/app-20190221/srv-sr-app-022119.pdf>.

⁴⁴ See, e.g., *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2013-2014*, 80 FR 55328 (September 15, 2015), and accompanying IDM at Comment 12, where Commerce declined VASEP’s request to extend the practice of making single entity/collapsing determinations for SR companies (*i.e.*, not mandatory respondents). While neither the statute nor the regulations differentiate between the parties subject to affiliation/collapsing determinations, the very nature of the record evidence required to make such determinations greatly exceeds the information provided in SRAs or SRCs.

⁴⁵ Unless the record demonstrates that affiliates are, or are a part of, the central, provincial, or local government.

⁴⁶ See, e.g., *Frozen Warmwater Shrimp from Vietnam: Notice of Preliminary Results of Antidumping Duty Changed Circumstances Reviews*, 74 FR 31698, 31700 (July 2, 2009), unchanged in *Frozen Warmwater Shrimp from Vietnam: Notice of Final Results of Antidumping Duty Changed Circumstances Reviews*, 74 FR 42050 (August 20, 2009) (“...in terms of management, production facilities, supplier relationships, and customer base, the documentation shows that CAFISH is materially dissimilar from CATACO’s shrimp factory. In addition, CAFISH continues to conduct its sales to the United States through CATACO, thus CATACO remains an active exporter of the subject merchandise...Thus we preliminarily find that CAFISH should not receive CATACO’s current separate rate and that the cash deposit rate for the subject merchandise exported and manufactured by CAFISH should continue to be the current Vietnam-wide rate.”) Commerce cites to this specific changed circumstance review determination because it demonstrates that a factory (CAFISH) attached to CATACO was not eligible for a separate rate because its sales were conducted through CATACO. In this case, Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory produce, sell, and export independently from Thuan Phuoc Seafoods and Trading

determinations as to whether a separate producing/exporting factory can or should be subsumed by another company; this analysis is beyond the scope of whether an exporter should receive an SR.⁴⁷

In addition, the statute, regulations, and our practice all do not require Commerce to seek or rely on the Vietnamese Enterprise Laws to establish the corporate status of a company and its various divisions/subdivisions/subsidiaries/*etc.* for any purpose other than to determine whether the applicant/certifier is *de jure* independent from government control. Moreover, is it not Commerce's practice to rely on foreign laws, such as the Vietnamese Enterprise Laws and definitions therein, for the purpose of defining the meaning of "exporter."⁴⁸ While both the Court and Thuan Phuoc Seafoods and Trading Corporation have argued that because Commerce has not defined "firm," "company," and "exporter," those terms are allegedly unclear, Commerce

Corporation; thus, had they filed SRAs, the SR evaluations would have been specific to Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory.

⁴⁷ See *Sparklers*; see also SRA (linked above) at Section III, page 15.

⁴⁸ See, e.g., *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963, 65969 (November 4, 2013):

"It is {Commerce}'s practice to assign this single rate to all *exporters* of merchandise in an NME country subject to an {antidumping duty} investigation or review unless an *exporter* can demonstrate that it is sufficiently independent in its *export* activities, on both a *de jure* and *de facto* basis, so as to be entitled to a 'separate rate'... {Commerce} analyzes *each entity exporting* the subject merchandise that applies for a separate rate under a test first articulated in *Sparklers*, and further developed in *Silicon Carbide*..." (emphasis added).

As the record demonstrates that the two factories are, in fact, producers and exporters, Commerce has no legal justification, for SR evaluation purposes, to consider, define, or determine that the "branch factories" are the same company as another exporter, doing business under a totally different name. Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory are exporters seeking a SR through a method of being "grandfathered-in" by another exporter claiming to be under common ownership with the two factories, regardless of Commerce's instructions in the SR applications that "Each applicant seeking separate rate status must submit a separate and complete individual application *regardless of any common ownership or affiliation between firms*... *Each firm must apply for a separate rate by submitting an individual application. Only one firm per application is permitted.*" See SRA 3-4 (emphasis added). Similarly, in the SR certification, the instructions state "each firm seeking separate rate status must submit a separate Certification regardless of any common ownership or affiliation between firms and regardless of foreign ownership." See SRC at 2. It is inappropriate and also outside the SR practice to claim SR status in one segment as a "trade name" simply because Commerce erroneously granted such in a prior segment. Each segment stands alone. Furthermore, both the SRA and SRC also state that completion of an application or certification do not guarantee SR status for the POR.

provides a host of information on its website, including a glossary of terms that pertain to antidumping/countervailing proceedings, wherein Commerce defines “exporter.”⁴⁹ The conservative approach for Thuan Phuoc Seafoods and Trading Corporation, if it had questions about Commerce’s SR application or practice, would have been to request proactively clarification from Commerce, especially after the language applied in *AR10 Final Results*.⁵⁰ Absent such a request, it was reasonable for Commerce to assume comprehension of Commerce’s SR application and interpretations.

B. Whether Commerce Failed to Apprise Interested Parties of Its Approach and Rationale

After having misapplied its practice in prior segments of the proceeding, Commerce began to apply its practice correctly with regard to the claimed trade names in *AR10 Final Results*. Nevertheless, even if interested parties overlooked the *AR10 Final Results* determinations with regard to separate exporting factories claimed as trade names, the *Initiation Notice* in this review was a public notice to exporters with no existing SR regarding instructions on how to acquire a SR.⁵¹ The two factories at issue had no existing SR; thus, the instructions in the *Initiation Notice* were directly applicable to the two factories. Because the two factories did not file SRAs on their own behalf, Commerce denied the two factories an SR in the *AR12 Final Results*. The *Initiation Notice*, in and of itself, provided adequate notice to the two factories that

⁴⁹ The term “exporter” is defined, and publicly available, in the glossary of terms within Appendix I of the Commerce Questionnaire, at: <https://enforcement.trade.gov/questionnaires/20170906/q-review-cvr-complete-quest-090617.pdf>

⁵⁰ See *AR10 Final Results* IDM at 80 (“if Thuan Phuoc included these names as trade names but these names are, in fact, separate companies or ‘branches,’ they are equally ineligible for separate rate status.”)

⁵¹ See, e.g., *Certain Carbon and Alloy Steel Cut-To-Length Plate from the People’s Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 82 FR 8510 (January 26, 2017), and accompanying IDM at Comment 1; see also *Suntec Industries Co., Ltd., v. United States*, 2016 WL 1621088, *6 (CIT 2016) (“...because it had constructive notice of the initiation and therefore cannot claim having suffered substantial prejudice as a result of lack of notice prior to the initiation.”); *Transcom, Inc. v. United States*, 294 F.3d 1371, 1380 (Fed. Cir. 2002) (“...we conclude that the notice of initiation was sufficient to give reasonable notice”).

an SRA would be required. However, these factories did not provide an SRA; therefore, they were ineligible for consideration of an SR.

Our denial of SR status in *AR10 Final Results* was the first time in this proceeding Commerce noted the distinction of factory names as impermissible trade names. Commerce does not find that its decision with regard to the two factories constituted an abrupt departure from well-established practice because, as explained in *Remand I*, Commerce had been misapplying the well-established practice in prior segments of this proceeding and simply corrected this error. We acknowledge that the denial of an SR to the two factories results in liquidation at the NME-wide rate of 25.76 percent. However, without an SRA on the record, the two factories did not fulfill the requirements as instructed in the *Initiation Notice*, and were, thus, subject to the NME-wide rate. This is not novel, but, rather ubiquitous in NME proceedings: exporters with no existing SR must file an SRA.

Nevertheless, despite the above responses to the Court's additional requests for information, given that: (1) prior to, and including AR12, the two factories never had their own SR,⁵² apart from their claimed and apparent connection to Thuan Phuoc Seafoods and Trading Corporation; (2) the two factories' expected to receive SR status because they had received such in prior reviews; and (3) the Court found that such an expectation was reasonable, Commerce has determined to reverse its denial of SR status, pertaining to *AR12 Final Results*, with respect to Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory, under respectful protest, as discussed below.

⁵² Meaning that, prior to AR13, Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory never had their own U.S. Customs and Border Protection Case Reference File (CRF) number, denoting SR status in their own right as exporters.

IV. INTERESTED PARTY COMMENTS ON DRAFT REMAND RESULTS

On November 12, 2020, Commerce released the draft remand results of redetermination to all interested parties.⁵³ We invited interested parties to comment on the Draft Remand Results by November 17, 2020, which we extended by one day until November 18, 2020.⁵⁴ On November 17, 2020, the petitioner filed timely comments opposing the draft remand results, as discussed in Issue 1 below.⁵⁵ On November 18, 2020, Thuan Phuoc Seafoods and Trading Corporation filed timely comments supporting the draft remand results, in part, as discussed in Issue 2 below.⁵⁶

Issue 1: Whether It Is Appropriate to Reconsider the Denial of Separate Rate Eligibility for Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory

Petitioner's Comments:

- Domestic Producers support Commerce's reasoning and explanation for the basis of its original determination, reached again on second remand, as to why it was (and remains) appropriate to decline to extend SR status to Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory. Accordingly, Domestic Producers oppose the determination, contradicting this reasoning and explanation, to grant SR status to Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory.
- Domestic Producers agree with Commerce's explanation regarding its evaluation of the SR eligibility of Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory. Domestic Producers agree that the agency's practice was appropriately and lawfully applied in this administrative review and that the *Initiation Notice*, in and of itself, afforded all parties more than adequate notice that a SRA would be required of any entity not benefitting from an existing SR at the time that the administrative review began.
- Because Commerce provided an exhaustive and comprehensive explanation for the basis of its determination for finding that Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory were not entitled to SR status in the *AR12 Final Results* or in *Remand I*, Domestic Producers object to the agency's determination to now reverse the *AR12 Final Results* and *Remand I* and grant SR status to Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory for entries of subject merchandise.
- The denial of SR status to Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff

⁵³ See Commerce's Letter, "Second Remand Redetermination in the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam," dated November 12, 2020 (Draft Remand Results).

⁵⁴ See Memorandum, "Extension of Draft Remand Comment Deadline," dated November 17, 2020.

⁵⁵ See Petitioner's Letter, "Comments on Draft Remand Redetermination," dated November 17, 2020 (Petitioner's Comments).

⁵⁶ See Thuan Phuoc Seafoods and Trading Corporation's Letter, "Comments on Draft Remand Redetermination," dated November 18, 2020 (Thuan Phuoc Seafoods and Trading Corporation's Comments).

Factory was appropriate, supported by substantial evidence, and consistent with law. While Thuan Phuoc Seafoods and Trading Corporation had an existing SR from *AR10 Final Results* and was granted SR status again in *AR12 Final Results*, this is not true for Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory, which did not have an existing SR from *AR10 Final Results* and were not granted SR status in *AR12 Final Results*.

- Thuan Phuoc Seafoods and Trading Corporation “certified that it had no changes from the prior review {AR10} wherein Commerce had granted it” a SR.⁵⁷ But that claim, while accurate with regard to Thuan Phuoc Seafoods and Trading Corporation, was demonstrably false with respect to Thuan Phuoc Seafoods and Trading Corporation’s attempts to expand the scope of the SR awarded to include entities that were expressly denied SR status in the most recently completed segment of this proceeding (*i.e.*, AR10).
- The fact that the two factories did not have existing SRs at the time that Thuan Phuoc Seafoods and Trading Corporation submitted its SRC is the fulcrum of this dispute because Commerce’s practice, repeatedly upheld by the U.S. Court of Appeals for the Federal Circuit,⁵⁸ is to presume that all exporters in a NME country are under the control of the central government until they demonstrate an absence of government control.
- A review of the record of this administrative proceeding establishes that virtually all of the salient facts are undisputed:
 - First, Thuan Phuoc Seafoods and Trading Corporation obtained a SR in the most recently completed administrative review preceding AR12.
 - Second, Thuan Phuoc Seafoods and Trading Corporation submitted a SRC to maintain its SR status.
 - Third, Frozen Seafoods Factory No. 32; Seafoods and Foodstuff Factory; My Son Seafoods Factory; and Frozen Seafoods Factory were each deemed ineligible for SR status in the most recently completed administrative review.
 - Fourth, none those four entities (Frozen Seafoods of Factory No. 32; Seafoods and Foodstuff Factory; My Son Seafoods Factory; and Frozen Seafoods Factory) submitted a SRA in the underlying administrative review.
 - Fifth, Thuan Phuoc Seafoods and Trading Corporation’s SRC requested that Commerce afford SR status to each of the four entities that had been denied SR status in the most recently completed administrative review.
 - Sixth, Thuan Phuoc Seafoods and Trading Corporation objects only to the denial of SR status for two of the four entities that were denied SR status, Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory.
- Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory voluntarily chose to export subject merchandise to the United States during the POR. To the extent that Thuan Phuoc Seafoods and Trading Corporation argues that these two entities are merely a part of the single entity of Thuan Phuoc Seafoods and Trading Corporation, that entity had the ability to structure its sales to the United States under the entity name that had qualified for and was in receipt of a SR. But Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory chose to ship subject merchandise with each listed as the producer/exporter, despite not being entitled to a SR.

⁵⁷ See Petitioner’s Comments at 5 (citing to Draft Remand Results at 7).

⁵⁸ *Id.* (citing to *Diamond Sawblades Mfrs. Coalition v. United States*, 866 F.3d 1304, 1310-1311 (Fed. Cir. 2017) (citing *Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006 (Fed. Cir. 2017); *Michaels Stores, Inc. v. United States*, 766 F.3d 1388 (Fed. Cir. 2014); *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367 (Fed. Cir. 2012); and *Sigma Corp. v. United States*, 117 F.3d 1401 (Fed. Cir. 1997).))

- If Thuan Phuoc Seafoods and Trading Corporation’s contentions regarding the structure of its operations are correct – a determination that would require an analysis under 19 U.S.C. § 1677(33) and 19 C.F.R. § 351.401(f) based on the limited factual record available from a SRC submission – the circumstances that have led to this dispute were created by its own volition. Throughout this litigation, no explanation has been provided and no argument has been made as to any legal basis for the contention that Commerce is obligated to accommodate Thuan Phuoc Seafoods and Trading Corporation’s desire to ship under different names by adjusting the agency’s well-established SR practice to fit the respondent’s marketing strategy.
- At best, Thuan Phuoc Seafoods and Trading Corporation can only assert that it was confused as to what would be required from Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory, entities that had been denied a SR in the most recently completed administrative review, to obtain a SR in this administrative review. However, Commerce addressed such confusion by stating that Thuan Phuoc Seafoods and Trading Corporation could have and should have sought clarification on the SR requirements for the two factories; but it did not do so.
- Domestic Producers appreciate that Commerce has a strong desire at this point to dedicate scarce resources elsewhere, but Thuan Phuoc Seafoods and Trading Corporation simply is without the authority to dictate the application of the agency’s well-established SR practice. Nothing about this administrative review has changed: Thuan Phuoc Seafoods and Trading Corporation falsely certified that the factories included in its SRC for AR12 had been previously granted SR status and “that the separate rate status is currently applicable, and the separate rate status has not been revoked.”⁵⁹ On this basis alone, Commerce’s determination not to grant SR status to all four entities/names was, and remains, appropriate.
- While Domestic Producers understand that Commerce “believe{s} the explanations provided above are unlikely to satisfy the concerns expressed by the Court in the *Second Remand Opinion and Order* regarding Commerce’s explanations in *Remand I*, Commerce should squarely present this rationale to the CIT for review.
- If the CIT believes that, under these circumstances, Commerce was obligated to accommodate Thuan Phuoc Seafoods and Trading Corporation’s (incorrect) interpretation of the law, regulations, and agency practice, the Court can identify the legal basis for this obligatory accommodation. At that point, Commerce will be able to explain the legal and evidentiary basis supporting the granting of SR status to Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory. In the absence of such an explanation, the draft remand results appear to be arbitrary, unsupported by law, agency practice, and substantial evidence on the record of this administrative review.

Commerce’s Position:

The petitioner has argued that Commerce properly denied SR status to the two factories because they did not have an existing SR from the prior review, and were thus, obliged to file a SRA in the AR12 pursuant to instructions provided in the *Initiation Notice* and the SRA/SRC.

⁵⁹ *Id.*, at 10 (citing to Thuan Phuoc Seafoods and Trading Corporation’s SRC).

Commerce agrees with the petitioner regarding the facts of the record. Commerce also acknowledges the petitioner's argument that Thuan Phuoc Seafoods and Trading Corporation, in the underlying review and in past reviews, routinely requested SR status for various claimed trade names, whether source documents supported such a claim or not.⁶⁰ However, Commerce was not ordered on remand to re-address all of the arguments already presented by Commerce and the Government to the Court. In the *Second Remand Opinion and Order*, the Court determined that "Commerce's denial of SR status to Thuan Phuoc's factory names on this record is unreasonable and its change in practice regarding trade names is arbitrary and capricious."⁶¹ We must therefore presume in light of the Court's conclusion that Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory are the same as Thuan Phuoc Seafoods and Trading Corporation, that those companies are eligible to share Thuan Phuoc Seafoods and Trading Corporation's SR status as granted in *ARI2 Final Results*. Therefore, Commerce's reconsideration of the denial of SR status to the two factories is a consequence of the Court's holding.

The Court concluded that "Commerce continues to unreasonably deny SR status to Thuan Phuoc's factory names."⁶² Thus, because the Court has determined that it is reasonable to apply Thuan Phuoc's SR status to Frozen Seafoods Factory No. 32 and to Seafoods and Foodstuff Factory on the record before it, under protest, we must comply with the Court's holding and on

⁶⁰ See, e.g., Petitioner's Comments at 4 (citing to Thuan Phuoc Seafoods and Trading Corporation's SRC at 1 ("Thuan Phuoc's separate rate certification was filed on its own behalf, and also was characterized as including four other entities/names: Frozen Seafoods Factory No. 32; Seafoods and Foodstuff Factory; My Son Seafoods Factory; and Frozen Seafood Factory."))

⁶¹ See *Second Remand Opinion and Order* at 6.

⁶² *Id.* at 10.

remand will reverse the denial of SR status regarding the two factories based on the factories' expectation of receiving the same SR status that they had received in prior reviews.⁶³

Issue 2: Whether Denial of SR Status Was Appropriate

Thuan Phuoc Seafoods and Trading Corporation's Comments:

- Although Thuan Phuoc Seafoods and Trading Corporation agrees with Commerce's ultimate conclusion and its reasoning that Thuan Phuoc's legitimate expectations warrant granting SR status to its factories, Thuan Phuoc Seafoods and Trading Corporation does not agree with those portions of the analysis that seek to explain why the original denial of SR status was correct.
- In Commerce's *Policy Bulletin 5.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries (Policy Bulletin)*, and the SRA instructions, Commerce refers to "firms" and "companies" as the requesters of SR status—not individual divisions of the same company or firm.
- Commerce still has not offered a rational explanation for how its previous denial of SR status to Thuan Phuoc Seafoods and Trading Corporation's factories would be consistent with its Policy Bulletin, its practice as actually applied, or the instructions in the SRA and SRC. The Court expressed doubt that Commerce could provide such an explanation, and Thuan Phuoc Seafoods and Trading Corporation does not believe that a decision denying SR status to its factories can be squared with the Policy Bulletin or the SRA/SRC instructions.
- The SRC instructions also allow a company to request SR status for trade names that were not granted SR status in a prior review, and Thuan Phuoc Seafoods and Trading Corporation acted in conformity with those instructions by requesting SR status for its factories as trade names because the factories are not separate companies or firms.
- The record and the law support Thuan Phuoc Seafoods and Trading Corporation's decision to request SR status for the factories as trade names, and any decision denying SR status to the factories would be unsupported by substantial evidence and otherwise not in accordance with law.

Commerce's Position:

Consistent with the Court's holding in the *Second Remand Opinion and Order*, Commerce has determined to reverse its denial of SR status for Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory under respectful protest. As stated above in response to the petitioner's comments, the factual record remains unchanged with regard to Thuan Phuoc

⁶³ *Id.*, at 14 ("Instead, as a result of Commerce granting the factories SR status as trade names of Thuan Phuoc in prior reviews, Thuan Phuoc relied upon Commerce's consistent application of that practice—even if, as Commerce asserts, it was consistently misapplied.")

Seafoods and Trading Corporation and the producing/exporting factories that the Court has determined to be the same as Thuan Phuoc Seafoods and Trading Corporation.⁶⁴

Further, contrary to Thuan Phuoc Seafoods and Trading Corporation's claims that Commerce could not provide a rational explanation to the Court for how its previous denial of SR status to Thuan Phuoc's factories would be consistent with its *Policy Bulletin*, its practice as actually applied, or the instructions in the SRA and SRC, the opposite is true. One need only read *Remand I* and the language in this remand to find ample reasoning for our practice, our correction to the erroneous prior application of that practice, the requirements and guidance in the *Policy Bulletin*, the instructions provided to SR applicants, and the instructions in the *Initiation Notice*. In Commerce's view, the SR determination in *ARI2 Final Results* was in full compliance with its practice, but the Court has ordered Commerce to take actions on remand which are inconsistent with that practice. As we have explained above, we have complied with the Court's *Remand Opinion and Order* and we understand that the resulting remand redetermination will bring Commerce's determination into compliance with the factories' expectation of receiving the same SR status that they had received in prior reviews.

V. FINAL RESULTS OF REDETERMINATION

Consistent with the Court's holding in the *Second Remand Opinion and Order*, we have issued a remand redetermination. While Commerce has complied with the Court's request for additional explanation, we believe the explanations provided above are unlikely to satisfy the concerns expressed by the Court in the *Second Remand Opinion and Order* regarding Commerce's explanations in *Remand I*. Therefore, under respectful protest, on remand

⁶⁴ Commerce did not determine in the underlying review, nor in *Remand I*, that the two factories are the same companies as Thuan Phuoc Seafoods and Trading Corporation and has not done so in this second remand redetermination, as such an analysis is not under the purview of Commerce's examination of SR eligibility, nor did the Court order Commerce to undertake an analysis regarding Thuan Phuoc Seafoods and Trading Corporation's corporate/legal structure and/or affiliations in the *Second Remand Opinion and Order*.

Commerce has reversed its *AR12 Final Results* determination denying SR status to Frozen Seafoods Factory No. 32 and to Seafoods and Foodstuff Factory, based on the Court's finding that: (1) prior to, and including AR12, the two factories never had their own SR,⁶⁵ apart from their claimed and apparent connection to Thuan Phuoc Seafoods and Trading Corporation; (2) the two factories expected to receive SR status because they had received such in prior reviews; and (3) this expectation was reasonable.

Based on the foregoing, we intend to liquidate suspended subject merchandise entries for Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory at the SR calculated in the *AR12 Final Results*, which is 4.58 percent.⁶⁶ This determination under protest is limited to the *AR12 Final Results*, as both Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory were granted their own SR (discrete from Thuan Phuoc Seafoods and Trading Corporation) in the subsequent administrative review.⁶⁷ Because the cash deposit rate applied to SR companies, including Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory, in the subsequent review, supersedes this rate of 4.58 percent, there is no revision of a cash deposit rate required or appropriate here. Based on the above redetermination, under protest, the final margin for Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory in this administrative review changes from 25.76 percent 4.58 percent, which is the SR assigned to the non-individually examined exporters in the *AR12 Final Results*.⁶⁸ We intend to issue instructions to U.S. Customs and Border Protection to liquidate suspended, enjoined entries of

⁶⁵ Meaning that, prior to AR13, Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory never had their own U.S. Customs and Border Protection Case Reference File (CRF) number, denoting SR status in their own right as exporters.

⁶⁶ See *AR12 Final Results*, 83 FR at 46705.

⁶⁷ See *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2017–2018*, 84 FR 44859, 44861-62 (August 27, 2019) (where both Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory were each granted a discrete SR.)

⁶⁸ See *AR12 Final Results*, 83 FR at 46705.

the subject merchandise exported by Frozen Seafoods Factory No. 32's and Seafoods and Foodstuff Factory's at the completion of this litigation.

12/4/2020

X 

Signed by: JEFFREY KESSLER
Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance