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FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND
Sao Ta Foods Joint Stock Company et al. v. United States
Court No. 18-00205, Slip Op. 20-7 (CIT January 16, 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. 20-7 (January 16, 2020) (*Remand Opinion and Order*). These final results of redetermination concern *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. In the *Remand Opinion and Order*, the Court ordered Commerce to further explain or reconsider the denial of separate rate status to the factory names "Frozen Seafoods Factory No. 32" and "Seafoods and Foodstuff Factory."[1]

As discussed below, pursuant to the Court's *Remand Opinion and Order*, Commerce has further explained its longstanding practice regarding the granting of separate rates and the qualifications required to obtain a separate rate.

II. BACKGROUND

On April 10, 2017, Commerce initiated an administrative review of certain warmwater shrimp from Vietnam for 127 producers and exporters of subject merchandise for the period

[1] *See Remand Opinion and Order* at 19.

February 1, 2016 through January 31, 2017.[2] 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.[3] Commerce selected Fimex VN and Soc Trang Seafood Joint Stock Company for individual examination.[4] We issued the *Preliminary Results* of the administrative review on March 12, 2018.[5]

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.[6] 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 and, therefore, should be assessed a single weighted-average dumping margin.[7] 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

[2] *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.
[3] *See* Memorandum, "Selection of Respondents for Individual Examination," dated May 23, 2017.
[4] 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 (Ad Hoc Shrimp Trade Action Committee) and the American Shrimp Processors Association (ASPA) 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.
[5] *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) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum.
[6] *See* Preliminary Decision Memorandum at 6.
[7] *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).

separate rate.[8]

Commerce analyzes whether each entity exporting the subject merchandise is sufficiently independent under a test established in *Sparklers*[9] and further developed in *Silicon Carbide*.[10] According to this separate rate test, Commerce 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. However, if Commerce determines that a company is wholly foreign-owned or located in a market economy, then a separate rate analysis is not necessary to determine whether it is independent from government control.[11] In this administrative review, 37 companies filed separate rate applications (SRAs) or certifications (SRCs). Further, based on timely withdrawals of review requests, we rescinded the review with respect to four companies;[12] 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 a separate rate and, in a separate memorandum accompanying the *Preliminary Results*, also addressed whether or not any of these companies' claimed trade names also qualified for that exporter's separate rate, as an "aka" name or trade name.[13] In the Trade Name Memo, Commerce determined that Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory

[8] *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*).
[9] *Id.*
[10] *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*).
[11] *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).
[12] *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).
[13] *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).

were ineligible for a separate rate as "aka" names of Thuan Phuoc Seafoods and Foodstuff Corporation because they were identified on sales documentation but not in Thuan Phuoc Seafoods and Foodstuff Corporation's Business Registration Certificate (BRC).[14]

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.[15] Thus, Commerce determined that Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory continued to be ineligible for a separate rate as trade names of Thuan Phuoc Seafoods and Foodstuff Corporation based on the reasoning provided in the *Preliminary Results* and in response to VASEP's[16] 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.[17]

III. REMAND OPINION AND ORDER

In the *Remand Opinion and Order*, the Court ordered Commerce to reconsider or further explain its denial of separate rate status for Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory in view of the information contained in Thuan Phuoc Seafoods and Trading Corporation's SRC which Commerce had not considered.[18] The Court noted that because

[14] *See* Trade Name Memo at 4.
[15] *See* Issues and Decision Memorandum at Comment 3A.
[16] VASEP is the Vietnam Association of Seafood Exporters and Producers.
[17] *See* VASEP's Letter, "VASEP Case Brief," dated August 16, 2018 (VASEP Case Brief) at 12-15.
[18] *See* Thuan Phuoc Seafoods and Trading Corporation Submission, "Separate Rate Certification," dated May 15, 2017 (Thuan Phuoc Seafoods and Trading Corporation's SRC).

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 separate rate status to Thuan Phuoc Seafoods and Trading Corporation's factories.[19] Commerce has provided further explanation of its determination below, in consideration of Thuan Phuoc Seafoods and Trading Corporation's SRC.

A. Thuan Phuoc Seafoods and Trading Corporation's SRC

Per the *Initiation Notice*, Commerce established a deadline for companies initiated for review to file SRAs, SRCs, or notices of no shipments within 30 days after the date of publication of the initiation.[20] Thuan Phuoc Seafoods and Trading Corporation filed a timely SRC containing its currently valid BRC and a sample invoice from the POR, thereby certifying that there were no changes to its corporate structure, ownership, or to the official company name[21] since the time of the most recently completed review in which it had been granted a separate rate (*i.e.*, *AR10 Final Results*[22]).

In order to demonstrate separate rate eligibility in an administrative review, Commerce requires entities for whom a review was requested, that were assigned a separate rate in the most recently completed segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate.[23] Commerce requires that companies

[19] *See Remand Opinion and Order* at 25-26.
[20] *See Initiation Notice*.
[21] *See* SRC at 2, available at https://enforcement.trade.gov/nme/sep-rate-files/cert-20150323/srv-sr-cert-20150416.pdf.
[22] *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review*, 2014–2015, 81 FR 62717, 62719 (September 12, 2016) (*AR10 Final Results*). Commerce notes that Thuan Phuoc Seafoods and Trading Corporation and "its separate factories" were rescinded from review in the eleventh administrative review. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Partial Rescission of Antidumping Duty Administrative Review; 2015–2016*, 81 FR 46047, 46048 (July 15, 2016).
[23] *See Initiation Notice*, 82 FR at 17190

file SRCs to certify their information only from the most recently completed review, not past reviews or even reviews immediately preceding the most recently completed review.[24] In this administrative review, Commerce did not issue a supplemental questionnaire to Thuan Phuoc Seafoods and Trading Corporation to request further information because Thuan Phuoc Seafoods and Trading Corporation had provided its currently valid BRC and supporting documentation for a commercial transaction demonstrating that the name "Thuan Phuoc Seafoods and Trading Corporation" was used during the POR.[25] Thus, Thuan Phuoc Seafoods and Trading Corporation's eligibility to maintain its separate rate from *AR10 Final Results* (as noted above, the eleventh review was rescinded with respect to it) was satisfied for the *Preliminary Results* and *AR12 Final Results*.

The Court has ordered Commerce in the *Remand Opinion and Order* to provide further explanation for the reasons that the two factories Seafoods and Foodstuff Factory and Frozen Seafoods Factory No. 32 were denied the separate rate status that Thuan Phuoc Seafoods and Trading Corporation received. Here, we provide additional explanation of the reasons for denying the two factories a separate rate.

In the Trade Name Memo, Commerce stated that the two factories were ineligible for separate-rate status because their names were identified on commercial documents but not on the currently valid BRC.[26] Specifically, the Trade Name Memo simply concluded the following:

[24] *Id.*
[25] *See* SRC at Exhibit 1 (.pdf page 17) and 2A. The Thuan Phuoc Seafoods and Trading Corporation BRC contains "branch factory" names but they do not match, as written, the names of the two factories at issue here.
[26] *See* Trade Name Memo at 4.

Names on Commercial Documents but Not on the Currently Valid BRC

1. Frozen Seafoods Factory No. 32
   Seafoods and Foodstuff Factory

2. Can Tho Import Export Fishery Limited Company (CAFISH)

3. Minh Hai Export Frozen Seafood Processing Joint-Stock Company ("Minh Hai Jostoco")[27]

Unfortunately, as the Court has pointed out in the *Remand Opinion and Order*, the explanation in the Trade Name Memo did not clearly state the reason for the denial of a separate rate to the two factories.[28] Further, in the *AR12 Final Results*, Commerce addressed the arguments from VASEP regarding the two factories in a general manner, but did not address the specific reasons for denying separate rate status to them.[29] In this remand, Commerce has addressed the issue more specifically for Thuan Phuoc Seafoods and Trading Corporation and the facts of the record which support Commerce's determination that denied the separate rate to the two factories at issue.

First, as noted above, Thuan Phuoc Seafoods and Trading Corporation filed its SRC, containing its own currently valid BRC. Thuan Phuoc Seafoods and Trading Corporation's own BRC contains "branch" factory names; however these names, as written, do not match the names of the two factories at issue here.[30] In addition to the currently valid BRC, Thuan Phuoc

[27] *Id.*
[28] *See* Trade Name Memo at 4, wherein Commerce denied a separate rate to the two factories under the incorrect category entitled "Names on Commercial Documents but Not on the Currently Valid BRC."
[29] *See AR12 Final Results* and accompanying Issues and Decision Memorandum at Comment 3A.
[30] *See* SRC at Exhibit 1 (.pdf page 18-19).

Seafoods and Trading Corporation also provided older, invalid[31] BRCs containing various names of "branches" -- the names of which also do not match, as written, the names of the two factories at issue here.[32]

In its SRC, Thuan Phuoc Seafoods and Trading Corporation further reported that it "maintains two factories and one branch, each of which have been previously granted separate rate status."[33] Thuan Phuoc Seafoods and Trading Corporation also provided the contact information for these entities as follows:

> **Factories:**
> FROZEN SEAFOODS FACTORY NO. 32
> Address: Tho Quang Seafood I.P.Z, Danang City, Vietnam.
> Telephone: 84-5113 - 920920
> Fax: 84-5113-923308
>
> SEAFOODS AND FOODSTUFF FACTORY
> Address: Tho Quang Seafood I.P.Z, Danang City, Vietnam
> Phone: 84.51 l. 3937166
>
> **Branch:**
> Tho Quang Seafood I.P.Z, Danang City, Vietnam
> 84.51 l. 3937166
> MY SON SEAFOODS FACTORY
> Address: Tho Quang Seafood I.P.Z, Son Tra District, Danang City, Viet Nam
> Telephone: 84-5113 - 920920
> Fax: 84-5113-923308[34]

[31] *See AR12 Final Results* and accompanying Issues and Decision Memorandum at page 19 ("We have noted that a number of applicants or certifiers provide photocopies of numerous amendments of the original BRCs that may identify claimed trade names. However, there are several problems with the submission of these superseded amendments to the BRCs. First, it is our understanding that if a company amends its BRC, it surrenders the original prior amendment before receiving the subsequent amendment. For example, the ninth amendment of a company's BRC must be surrendered to the issuing agency prior to receiving a new, original, tenth amendment to the BRC.)
[32] *See* SRC at Exhibit 1 (.pdf pages 24-25).
[33] *Id*. at 2.
[34] *Id*.

Finally, Thuan Phuoc Seafoods and Trading Corporation argued that "each of these names should also be granted separate rate status. The factories are not separate companies *but have their own business registration certificates* ('BRC'), each of which is provided at Exhibit 1."[35]

Thus, the record demonstrates that the two factories at issue produce and export subject merchandise under their own licenses, as reported by Thuan Phuoc Seafoods and Trading Corporation, but have not filed separate SRAs to obtain a separate rate for their own exports. Rather, their exports have been incorrectly using Thuan Phuoc Seafoods and Trading Corporation's U.S. Customs and Border Protection (CBP) case-reference-file (CRF) number.[36] As their licenses demonstrate, the two factories at issue here have the right to individually produce and export subject merchandise, which they exercised during the POR. With no separate rate in effect for these companies, these factories were subject to the Vietnam-wide entity cash deposit rate of 25.76 percent. The fact is that companies without a separate rate must have their merchandise entered under the Vietnam-wide entity rate of 25.76 percent, which is significantly higher than the single-digit cash deposit rate granted to separate rate companies in this proceeding.[37] While this is conjecture on Commerce's part, it is understandable that the two factories would have preferred to enter merchandise at a rate lower than the Vietnam-wide entity rate of 25.76 percent, the required cash deposit for companies without a separate rate, when their claimed affiliate (Thuan Phuoc Seafoods and Trading Corporation) had a much lower cash deposit rate in effect at the time of entry.

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[35] *Id*. (emphasis added).
[36] *See* Memorandum, "Customs Data of U.S. Imports of Certain Frozen Warmwater Shrimp for Respondent Selection," dated April 12, 2017, accompanied by U.S. Customs and Border Protection (CBP) business proprietary entry data, used to evaluate for respondent selection purposes the volume of exports from companies initiated for review; *see also* SRC at Exhibit 1 (.pdf pages 32 and 37).
[37] *See, e.g.*, *AR12 Final Results*.

Second, the factories' own BRCs also identify two different "heads of branch" responsible for each factory.[38] Commerce notes that these individuals, as heads of the two factories at issue, did not provide any company certification on the record of this review as required under 19 CFR 351.303.

In addition, Thuan Phuoc Seafoods and Trading Corporation also included commercial documents for both factories at issue.[39] These commercial invoices include information about each factory that differentiates them from Thuan Phuoc Seafoods and Trading Corporation. For example, the invoices show that each factory has discrete bank account numbers for sales receivables,[40] discrete Food and Drug Administration (FDA) Facility Registration numbers,[41] and discrete licenses allowing for the production and export of subject merchandise under their own names: Thuan Phuoc Seafoods and Trading Corporation, Seafoods and Foodstuff Factory, and Frozen Seafoods Factory No. 32.[42] This information demonstrates that these entities are three *separate* producers/exporters and none of these facts are evidence that Seafoods and Foodstuff Factory and Frozen Seafoods Factory No. 32 are "trade names" of Thuan Phuoc Seafoods and Trading Corporation, as defined by Commerce in its instructions to separate-rate applicants and certifiers:

> *Trade names are other names under which the firm does business. It does not include product brand names or the names of any other entities in the firm's "group," affiliated or otherwise*. Note that if {Commerce} determines that your firm is eligible for separate rate status, the separate rate will only apply to the firm as named in your business license/registration documents and not to any alternative or trade names that are not included in your business license/registration documents or not otherwise permitted, as explained in your response to this question.[43]

[38] *See* Thuan Phuoc Seafood and Trading Corporation SRC. The names of these individuals are business proprietary information.
[39] *Id*. at Exhibit 2B and 2C.
[40] *Id*. at Exhibits 2A, 2B, and 2C.
[41] *Id*.
[42] *Id*. at Exhibit 1.
[43] *See* SRC, at page 7, n.3 (emphasis added). The identical definition is also in the SRA, at page 13, n.12, available at https://enforcement.trade.gov/nme/sep-rate-files/app-20190221/srv-sr-app-022119.pdf.

In fact, the record demonstrates that these companies produce and export under their own names, and not based on their relationship with Thuan Phuoc Seafoods and Trading Corporation. Thus, based on the information provided in the Thuan Phuoc Seafoods and Trading Corporation SRC, it is likely that the two factories are affiliated with Thuan Phuoc Seafoods and Trading Corporation as *separate* factories, and are producers and exporters of subject merchandise, rather than mere "trade names." Commerce made a similar determination in *AR13 Final Results*, where it found that an affiliated factory of a respondent is not a trade name but a separate producing and exporting facility under the same ownership.[44]

Consequently, as these separate factories are not trade names for Thuan Phuoc Seafoods and Trading Corporation, they were each required to file their own separate rate documentation, apart from Thuan Phuoc Seafoods and Trading Corporation, as they did in the subsequent administrative review.[45] While it is possible that Thuan Phuoc Seafoods and Trading Corporation and the two factories were affiliated during the period of review (POR), Commerce always explicitly instructs separate rate applicants and certifiers that "each firm seeking separate rate status must submit a separate Certification regardless of any common ownership or

[44] *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2017–2018*, 84 FR 44859 (August 27, 2019) (*AR13 Final Results*) and accompanying Issues and Decision Memorandum at 3-4 and Comment 1 ("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…Fimex VN reported that it operates Sao Ta Seafood Factory as an additional production facility under Fimex VN's authority and control…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.").

[45] *See, e.g.*, *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018*, 84 FR 16648, 16649 (April 22, 2019) and accompanying Preliminary Decision Memorandum, unchanged in *AR13 Final Results*.

affiliation between firms and regardless of foreign ownership."[46] Neither of the two firms at issue complied with that Commerce SRA requirement.

B. Separate Rate Granted in Prior Reviews to Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory

As an initial matter, Commerce acknowledges that it had granted separate rate status to Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory in certain prior segments, as "aka" names of Thuan Phuoc Seafoods and Trading Corporation.[47] However, such an application was inconsistent with Commerce's practice, definition and understanding of the term "trade name." Regardless of the fact that SRCs are only evaluated based on the most recently completed review, as stated in the *Initiation Notice*, Commerce is now applying its trade name practice correctly under this antidumping order. Accordingly, Commerce's separate rate status determinations in the *AR12 Final Results* and in *AR10 Final Results*[48] were made in accordance with that correct practice, despite the prior erroneous determinations.

Thus, while Commerce may have granted Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory separate rate status in reviews prior to the *AR12 Final Results* and *AR10 Final Results*, Commerce has also consistently stated that separate rate eligibility is segment-specific and no exporter is guaranteed a separate rate in subsequent reviews simply because the exporter was granted one in a prior review.[49] Accordingly, regardless of separate rate status

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[46] *See* SRC at page 2. The identical definition is also in the SRA, at page 2. Further, the difference between separate rate determinations for separate-rate applicants and affiliation/collapsing determinations for mandatory respondents is discussed further below.

[47] *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, 55329 (September 15, 2015).

[48] *See AR10 Final Results* and accompanying Issues and Decision Memorandum at Comment 12A.

[49] *See SolarWorld Ams., Inc. v. United States*, 234 F. Supp. 3d 1286, 1298 (CIT 2017) (("'{A} party's separate rate status must be established in each segment of the proceeding in which the party is involved because a company's corporate structure, ownership, or relationship with the government can change from one segment of a proceeding to the next.'). Although Goal Zero claims that no such changes to ERA Solar's corporate structure actually occurred from the investigation to the second period of review…it is reasonably discernible that Commerce relies upon the record of each proceeding because it is not burdensome for a company, which is in the best position to produce such information, to provide such information in each segment.'").

granted in previous reviews, exporters do not receive the benefit of that status in perpetuity and must provide POR-specific information and company applications or certifications, as applicable, in every administrative review to which they are subject.

Additionally, Commerce notes that Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory did not receive a separate rate in *AR10 Final Results*, as a trade name or otherwise, and thus, based on only Thuan Phuoc Seafoods and Trading Corporation's SRC, were not eligible for a separate rate in the twelfth administrative review (AR12). That is, Thuan Phuoc Seafoods and Trading Corporation's filing of an SRC in AR12, on behalf of itself, but also including those factories that did not have a separate rate from *AR10 Final Results*, where the factories were under review, was inappropriate.

As Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory did not have a separate rate in *AR10 Final Results*, these "separate factories," as Thuan Phuoc Seafoods and Trading Corporation characterizes them,[50] should have separately filed SRAs, especially because these "separate factories" were also initiated for review and subject to examination separately from Thuan Phuoc Seafoods and Trading Corporation. Further, Commerce's initiation notices notify all interested parties of this requirement. Accordingly, the exporters that have an interest in obtaining a separate rate or re-certifying a separate rate from the most recently completed review have sufficient notice of what is required of them.

If Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory, as exporters of subject merchandise, wished to demonstrate eligibility for a separate rate, both should have

[50] VASEP requested review of "Thuan Phuoc Seafoods and Trading Corporation and its *separate factories* Frozen Seafoods Factory No. 32, Seafoods and Foodstuff Factory, and My Son Seafoods Factory (collectively 'Thuan Phuoc Corp.')." *See* VASEP's Letter, "Request for Administrative Review," dated February 27, 2017, at Attachment A, page 2 (emphasis added) (VASEP Review Request).

submitted SRAs, separately, as the burden of creating an adequate record lies with interested parties and not with Commerce.[51] Thus, because neither factory filed an SRA within the established deadline, neither was eligible for separate rate consideration. Additionally, because Thuan Phuoc Seafoods and Trading Corporation filed an SRC for itself and provided the required documentation for itself, Commerce had no reason to send Thuan Phuoc Seafoods and Trading Corporation a supplemental questionnaire with regard to the other two factories.

C. Affiliated Factories Pertaining to Mandatory Respondents vs. Separate Rate Applicants

With regard to AR12, Commerce published the notice of opportunity to request an administrative review on February 8, 2017.[52] In response to the *Opportunity Notice*, numerous interested parties requested administrative reviews of 127 companies, separately. As noted above, VASEP requested a review of "Thuan Phuoc Seafoods and Trading Corporation and its *separate factories* Frozen Seafoods Factory No. 32, Seafoods and Foodstuff Factory, and My Son Seafoods Factory (collectively 'Thuan Phuoc Corp.')"[53] As an initial matter, Thuan Phuoc Seafoods and Trading Corporation has, from the beginning of AR12 (and in other reviews), characterized itself and its "separate factories" as: (1) affiliates, and (2) a single entity, without Commerce ever having made such a determination consistent with the statutory and regulatory framework under section 771(33) of the Act and 19 CFR 351.401(f). However, both domestic interested parties (the petitioner and ASPA) requested reviews of Frozen Seafoods Factory No. 32, Seafoods and Foodstuff Factory, and Thuan Phuoc Seafoods and Trading Corporation,

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[51] *See, e.g.*, *QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (*QVD 2011*); *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 806 F. Supp. 1008, 1015 (CIT 1992); *NTN Bearing Corp. of Am. v. United States*, 997 F.2d 1453, 1458-59 (Fed. Cir. 1993).

[52] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 82 FR 9709 (February 8, 2017) (*Opportunity Notice*).

[53] *See* VASEP Review Request (emphasis added).

separately.[54] Thus, this single-entity characterization of these three exporters by Thuan Phuoc Seafoods and Trading Corporation is self-bestowed and not a determination made in any segment of the proceeding by Commerce, the proper authority for making such determinations. Moreover, the process of obtaining or certifying a separate rate is not an opportunity for affiliation or collapsing determinations.[55] It is for exporters to demonstrate an absence of *de facto* and *de jure* government control over their export activities. Commerce reserves affiliation and collapsing (single-entity) determinations for mandatory respondents selected for individual examination because the company-specific information required for affiliation and collapsing determinations exceeds the information necessary for separate rate determinations, especially within SRCs.

Thuan Phuoc Seafoods and Trading Corporation's self-characterized single-entity status with other companies under review (*i.e.*, Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory) is misleading because, as stated above, Commerce has never conducted such an analysis pursuant to section 771(33) of the Act or 19 CFR 351.401(f) for Thuan Phuoc Seafoods and Trading Corporation, Frozen Seafoods Factory No. 32, and Seafoods and Foodstuff Factory in this or a prior segment of the proceeding. Commerce never determined on

[54] *See* Petitioner's Letter, "Request for Administrative Reviews," dated February 24, 2017, at Appendix A, pages 2 and 4; *see also* ASPA's Letter, "Request for an Administrative Review, dated February 28, 2017, at Attachment A, pages 8-9. While the manner in which the petitioner and ASPA requested reviews of the two factories and Thuan Phuoc Seafoods and Trading Corporation is not dispositive of the issue at hand, the petitioner and ASPA presumably did so absent any prior collapsing determination by Commerce.

[55] *See, e.g.*, *Initiation Notice*, 82 FR at 17189, referring to collapsing analyses with respect to respondent selection, which occurs simultaneously with the submission of SRAs and SRCs; and *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2013-2014*, 80 FR 55328 (September 15, 2015) and accompanying Issues and Decision Memorandum at Comment 12 (declining VASEP's request to conduct collapsing determinations for non-individually examined separate rate companies, stating that "with respect to VASEP's request that {Commerce} alter its policy regarding whether companies not individually examined should be subject to affiliation or collapsing determinations, we find it is not appropriate to make changes to separate rate eligibility policies in the context of this review, especially where the circumstances of separate rate eligibility are clearly defined by Policy Bulletin 5.1 and the SRA.").

this or a prior administrative record that these companies comprise a single entity, subject to a single cash deposit rate. Other than the few exceptions where Commerce had made single- entity determinations for mandatory respondents in prior segments of this proceeding, the majority of the Vietnamese exporters, including Thuan Phuoc Seafoods and Trading Corporation, have requested reviews of themselves with all their claimed trade names combined as a single company, thus incorrectly conflating two discrete statutory and regulatory concepts: separate rate status (for trade names) and single-entity status (for affiliated companies).[56]

As stated in the background section above, the purpose of exporters filing SRAs or SRCs is to demonstrate an absence of both *de jure* and *de facto* government control over their export activities. Typically, Commerce considers four factors in evaluating whether a respondent is subject to *de facto* government control of its export functions: (1) whether the export prices (EP) 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.[57] Commerce has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of government control which would preclude Commerce from assigning separate rates. None of the above-described analysis includes any examination of affiliation information or production and sales data for the purpose of collapsing under 19 CFR 351.401(f).

[56] *See, e.g.*, VASEP Review Request.
[57] *See Silicon Carbide*, 59 FR at 22586-89; *Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995).

As the Court has stated, "given {that} the purpose of the collapsing regulation {is} to eliminate the potential for price and production manipulation,"[58] the steps and information involved in such analyses exceed the requirements for seeking a separate rate (*i.e.*, neither SRAs not SRCs request POR production or sales data for evaluation). Thus, there is no basis for Thuan Phuoc Seafoods and Trading Corporation to have considered itself a single entity with other producing and exporting entities within its self-claimed affiliated "group" of "separate factories," for the purpose of gaining a separate rate for these "separate factories" to export subject merchandise using the separate rate and CBP CRF number assigned to Thuan Phuoc Seafoods and Trading Corporation alone (*i.e.*, A-552-802-041).

Commerce evaluates separate rate eligibility for either a collapsed entity or for individual exporters. Claimed affiliates are not subject to "combined" separate rate eligibility or a single cash deposit rate unless and until Commerce has made an affiliation and collapsing (single-entity) determination with respect to them under section 771(33) of the Act and 19 CFR 351.401(f). Because neither the SRA nor SRC instructs separate-rate applicants/certifiers to provide any of the information required for collapsing under 19 CFR 351.401(f), there is no cause for one exporter to assume it is eligible for the separate rate of an affiliated exporter, under single-entity status, regardless of how a company chooses to self-identify (*i.e.*, as a "branch factory," a subsidiary, parent company, *etc.*).

D. Distinguishing Separate Exporting Entities from Trade Names

Thuan Phuoc Seafoods and Trading Corporation has argued that its separate factories and "branches" comprise one company under common ownership.[59] However, there is no

[58] *See Pakfood Pub. Co. v. United States*, 190 F. Supp. 3d 1156, 1159 (CIT 2016).
[59] *See* SRC at 2 ("The factories are not separate companies but have their own business registration certificates."). In its SRC, Thuan Phuoc Seafoods and Trading Corporation identified Frozen Seafoods and Foodstuff Factory No. 32 and Seafoods and Foodstuff Factory as "factories" and identified My Son Seafoods Factory as a "branch."

information on the record from any licensing authority, such as the central government or a regional/provincial government that supports that claim. In any case, even if that information was on the record, those definitions do not necessarily fall in line with the application of the AD duty laws. The statute does not define a "company" for purposes of the antidumping law.[60] Moreover, while Commerce has previously determined for certain mandatory respondents in this proceeding, that separate affiliated producing and exporting facilities comprise a single entity, no such determination has been made for Thuan Phuoc Seafoods and Trading Corporation and the two factories at issue.[61] Thus, while the nomenclature used by Thuan Phuoc Seafoods and Trading Company is its right to use, in administering the antidumping laws, Commerce must examine all exporters, and the two factories at issue are obviously exporters, regardless of their status in the NME, as a factory, branch, *etc*. The *Initiation Notice* provides instructions to all companies initiated for review for filing either a SRA, SRC, or a no-shipment certification.[62] With regard to separate rates, Commerce states that it "analyzes each entity exporting the subject merchandise."[63]

The use of the word "entity" in this regard does not distinguish between a company, a separate factory, a branch, a subsidiary, *etc.*, nor whether or not any of those "entities" are affiliated. Rather, if the "entity" is also an exporter and that exporter desires a separate rate, then separate-rate eligibility documentation is required if the "entity" had exports during the POR.

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[60] *See Queen's Flowers de Colom. v. United States*, 981 F. Supp. 617, 622 (CIT 1997).
[61] *See, e.g.*, *AR13 Final Results*; *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, In Part, of the Fifth Administrative Review*, 76 FR 12054, 12056 (March 4, 2011); unchanged in *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 56158 (September 12, 2011) (determining that three companies "self-collapsed" and Commerce later determined that mandatory respondent NT Seafoods Corporation comprises a single entity with its affiliates Nha Trang Seafoods – F.89 Joint Stock Company and NTSF Seafoods Joint Stock Company).
[62] *See Initiation Notice*, 82 FR at 17189-90.
[63] *Id.*, 82 FR at 17190.

Commerce further instructed in the *Initiation Notice* that "all firms listed below {which included, separately, Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory} 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."[64]

Thuan Phuoc Seafoods and Trading Corporation stated in the SRC that the factories are "separate" from itself, though they share common ownership and management.[65] The review request submitted by VASEP for Thuan Phuoc Seafoods and Trading Corporation even contains language identifying Thuan Phuoc Seafoods and Trading Corporation and its separate factories as a "collective."[66] Thus, based on the definition of "trade name" provided in the SRA and SRC, there should be no source of confusion in this case (other than Commerce's previous incorrect application of its trade name practice): a trade name does not refer to other entities in a group. The two factories at issue have separate licenses that allow them to produce and export subject merchandise under their own names. They are factories that produce and export identical merchandise and were initiated for review separately from Thuan Phuoc Seafoods and Trading Corporation. These "separate factories," whether or not they are affiliated with, are a part of, a subsidiary of, or a branch of…*etc*., Thuan Phuoc Seafoods and Trading Corporation, are producers and exporters of the subject merchandise in their own right, and are not trade names of Thuan Phuoc Seafoods and Trading Corporation. They may be owned or directed by the same individuals, but that does not result in the treatment of them as the same company as Thuan Phuoc Seafoods and Trading Corporation. They may also share managers, facilities, labor force,

[64] *Id.*
[65] *See* SRC at 2.
[66] *See* VASEP Review Request (wherein the request for review is for Thuan Phuoc Seafoods and Trading Corporation and its separate factories Frozen Seafoods Factory No. 32, Seafoods and Foodstuff Factory, and My Son Seafoods Factory (collectively "Thuan Phuoc Corp.")).

and sales and production information; however, all of this information falls under the statutory and regulatory framework for making affiliation and collapsing determinations, not for separate rate determinations.

The factories could have filed separate SRAs in this administrative review, as they did in the subsequent administrative review.[67] They did not do so. They are separate factories and not "trade names" for Thuan Phuoc Seafoods and Trading Corporation. Thus, consistent with Commerce's instructions,[68] Commerce correctly did not treat those factories as "trade names" of Thuan Phuoc Seafoods and Trading Corporation in the *AR12 Final Results*.

As a final point, it is important to note that there are numerous instances within this proceeding where Commerce correctly applied the term "trade name" in granting separate rates. For example, Seaprimexco Vietnam filed a SRC on the record of this review, and Commerce granted it a separate rate, accepting as a trade name, the abbreviated form of that name, Seaprimexco, which also appears on the BRC and on commercial documentation.[69] Seaprimexco and Seaprimexco Vietnam are not separate factories; one name is a version of the company name that was used as an additional trade name and both names were granted separate rate status based on the information provided. Another example is HAVICO, which is an abbreviation of Hai Viet Corporation, both of which were granted separate-rate status in the *AR12 Final Results* based on the information provided.[70] These examples are compliant with

[67] See *AR13 Final Results* where both factories were granted individual separate rates, because they, separately, demonstrated their eligibility via SRAs.
[68] *See* SRC, at page 7, n.3. The identical definition is also in the SRA, at page 13, footnote 12. ("Trade names are other names under which the firm does business. It does not include product brand names or the names of any other entities in the firm's group," affiliated or otherwise").
[69] *See* Seaprimexco Vietnam Submission, "Separate Rate Certification," dated May 8, 2017; *see also* Seaprimexco Vietnam Submission, "Supplemental Questionnaire Response," dated June 23, 2017, at 1 and Exhibit 1.
[70] *See AR12 Final Results*, 84 FR at 46705. *See also* Hai Viet Corporation Submission, "Separate Rate Certification," dated May 8, 2017; and "Separate Rate Supplemental Response, dated June 22, 2017, at Exhibit 1.

Commerce's instructions and are definitions of a "trade name." We provide these examples to show that Commerce's instructions on SRA and SRC filing requirements are not so ambiguous as to lead a company to deliberately file a single document covering multiple affiliates; other companies in this and other proceedings appear to follow these instructions without difficulty.[71]

Consistent with the *Remand Opinion and Order*, we have further explained our denial of separate rate status to Seafoods and Foodstuff Factory and Frozen Seafoods Factory No. 32, as claimed trade names of Thuan Phuoc Seafoods and Trading Corporation. In summary, they are separate factories, as reported by Thuan Phuoc Seafoods and Trading Corporation, and produce and export identical merchandise under their own names and licensing permissions. Moreover, the two factories did not have a separate rate in effect from the most recently completed review; thus, a SRC filed by a separate exporting entity (Thuan Phuoc Seafoods and Trading Corporation) was not the proper vehicle for obtaining a separate rate for them.

V. INTERESTED PARTY COMMENTS ON DRAFT REMAND RESULTS

On April 2, 2020, Commerce released the draft remand results of redetermination to all interested parties (Draft Remand).[72] On April 9, 2020, the petitioner[73] and Vietnamese

[71] *See, e.g.*, *Galvanized Steel Wire from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 76 FR 68407, 68414-15 (November 4, 2011) unchanged in *Galvanized Steel Wire from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 17430 (March 26, 2012) (Commerce "found that {mandatory respondent} Huayuan Group entities are {affiliated} based on familial relations, positions of directorship or management, and controlling ownership interest, pursuant to sections 771(33)(A), (B), (E), and (G) of the Act…We also noted above that TTM, THTM, and TMJH *have all filed separate rate applications on the record indicating their affiliation to one another, guided by the statutory definition of affiliation.* Further, we also determined that Tianjin Huayuan and its affiliates comprise a single entity pursuant to 19 CFR 351.401(f). Therefore, {Commerce} evaluated the separate rate eligibility of the entire collapsed Huayuan Group.") (emphasis added).

[72] *See* Commerce's Letter, "Remand Redetermination in the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam," dated April 2, 2020 (Draft Remand).

[73] *See* Ad Hoc Shrimp Trade Action Committee's (the petitioner's) Letter, "Comments on Draft Remand Redetermination," dated April 9, 2020 (Petitioner Comments).

Respondents,[74] filed timely comments, which we address below. In its comments, the petitioner states that Commerce has "addressed the deficiencies identified by the CIT in {Commerce's} explanation in the {*AR12 Final Results*} as to why Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory were deemed to be ineligible for a separate rate, despite their claimed affiliation with Thuan Phuoc {Seafoods and Trading Corporation}."[75] The petitioner further notes that the Draft Remand reaches a conclusion that is supported by substantial evidence and is otherwise in accordance with law.[76] As the petitioner agrees with the Draft Remand, and briefly paraphrased Commerce's multi-part explanations, Commerce will not summarize or address the petitioner's comments below, as there were no arguments presented contrary to the Draft Remand, and only contained supporting commentary for Commerce's conclusions.

Additionally, as a prefatory matter, we note that the Vietnamese Respondents repeated the same legal and factual arguments throughout their comments on the Draft Remand numerous times, merely using different words and phrases to make the same point. Below we discuss the three overarching issues raised by the Vietnamese Respondents..

Issue 1: Whether Frozen Seafoods Factory No.32 and Seafoods and Foodstuff Factory are Part of Thuan Phuoc Seafoods and Trading Corporation and Not Separate Companies

Respondent Comments:

- The evidence demonstrates that Thuan Phuoc's branch factories are divisions of Thuan Phuoc, and not separate entities. The BRC for Thuan Phuoc Seafoods and Trading Corporation and the branch certifications for Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory all list Thuan Phuoc Seafoods and Trading Corporation as the "enterprise" and list the factories as "branches" of that "enterprise." Therefore, Thuan

[74] *See* Letter from Vietnamese Respondents on behalf of Thuan Phuoc Seafoods and Trading Corporation, Frozen Seafoods Factory No. 32 and Seafoods and Foodstuffs Factory (Vietnamese Respondents), "Comments on Draft Remand Redetermination," dated April 9, 2020 (Respondent Comments). Arguments with citations to the record, legal citations, and citations to *Federal Register* notices are found at pages 2-23.
[75] *See* Petitioner Comments at 4.
[76] *Id.*

Phuoc's request for status for its factories was in accordance with the separate rate certification instructions and Commerce's past practice.

- Commerce claims that the names of the factories in Thuan Phuoc's BRC do not match the names of the factories. The discrepancy is merely a difference in translation of the underlying Vietnamese official documents. The branch certifications for the factories included in Exhibit 1 of Thuan Phuoc's SRC, include translations which match the names of the factories on the commercial invoices submitted in the SRC and the names for which Thuan Phuoc requested separate rate status. Thus, the discrepancy is an issue of how that portion of Thuan Phuoc's BRC was translated, not an actual discrepancy between the documents.
- The contact information for the branches indicates that a person cannot contact the branch factories without at the same time contacting Thuan Phuoc. Moreover, contrary to the Draft Remand that there is no information on the record from a licensing authority regarding the status of branches, such information is on the record, in the form of Fimex VN's Section A Response which contains the Vietnamese Enterprise Law.[77]
- It is not uncommon for a single company to have multiple bank accounts and this fact does not demonstrate that the branch factories are separate corporate entities from Thuan Phuoc. Even if factories use separate bank accounts, the contractual and legal obligations of the branch are ultimately those of the enterprise itself under Vietnam's Enterprise Law.
- The Draft Remand observes that Thuan Phuoc's factories have different FDA Facility Registration numbers. As the term "Facility Registration number" would suggest, each facility (as opposed to company) is required to have its own Facility Registration number. Thus, if a single company has multiple facilities, a Facility Registration number would be needed for each facility, despite the fact that the facilities are all owned by a single company. The fact that Thuan Phuoc's branch factories would have a Facility Registration number specific to each factory does not indicate that the branch factories have a separate corporate existence that is independent of Thuan Phuoc.

Commerce's Position:

A. Frozen Seafoods Factory No.32 and Seafoods and Foodstuff Factory Are Separate Exporters From Thuan Phuoc Seafoods and Trading Corporation

In accordance with section 777A(c)(1) of the Act, Commerce is generally charged with determining individual dumping margins for each known exporter. In proceedings involving NME countries, Commerce presumes that exporters are state-controlled, and assigns them a single state-wide dumping rate.[78] This presumption is rebuttable; an exporter that demonstrates

[77] *See* Respondent Comments at 5, citing to FIMEX VN Section A Questionnaire Response, dated June 12, 2017, at Exhibit A-2.
[78] *See* 19 CFR 351.107(d); *see also Albemarle Corp. v. United States*, 821 F.3d 1345, 1348 (Fed. Cir. 2016) (*Albemarle*).

sufficient independence from state control may apply to Commerce for a different rate. "A separate rate, sometimes referred to as the 'all-others' rate, is assigned to all non-individually examined exporters ('separate respondents') when Commerce limits its examination to fewer than all known exporters."[79]

Commerce's statutory obligations are not controlled by the Vietnamese Enterprise Law's definitions of what comprises a company, factory, enterprise, *etc*.[80] Rather, Commerce conducts antidumping proceedings that culminate in one result: assign a rate and issue instructions to CBP regarding producers or **exporters**.[81] As the Court acknowledged in its holding, "there is no dispute that the focus of the separate rates test here is the {respondents} export operations, that Commerce's test applies only to **exporters**…"[82] While Commerce indeed uses various words such as "companies," "entities," or "firms," interchangeably, the term of legal consequence for purpose of our analysis in this case is whether a company/entity/firm is an **exporter.** An exporter may be part of a larger group, a division of a company, a separate branch, or a separate facility, but that is immaterial to the fact that it is still an **exporter** that is under review, and by law, is required to be classified at the final results for CBP cash deposit and assessment purposes.

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[79] *See Albemarle*, 821 F.3d at 1348.

[80] "The existence of alternative dictionary definitions of {a word}, each making some sense under the statute, itself indicates that the statute is open to interpretation." *See Landis v. Marc Realty*, L.L.C., 235 Ill. 2d 1, 8, 919 N.E.2d 300, 335 Ill. Dec. 581 (2009) at 11 (quoting *National R.R. Passenger Corp. v. Boston & Maine Corp*., 503 U.S. 407, 418 (1992)).

[81] *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, 65964 (November 4, 2013) ((("when the number of producers/exporters ('companies') involved in an AD investigation or review is so large that {Commerce} finds it impracticable to examine each company individually, {Commerce} has the statutory authority to limit its examination to: (1) A sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or (2) exporters and producers accounting for the largest volume of subject merchandise from the exporting country that can reasonably be examined)) (citing sections 77A(c)(2)(A) and (B) of the Act).

[82] *See Advanced Tech. & Materials Co. v. United States*, 885 F. Supp. 2d 1343, 1349 (CIT 2012) (*Advanced Technology 2012*).

The Court acknowledged that:

> Commerce's practice as to nonmarket economy ("NME") *exporters* is to presume that all exporters are under the control of the central government until they demonstrate an absence of government control…'Those *exporters* who do not respond or fail to prove absence of de jure/de facto control are assigned the country-wide rate. Therefore, a NME *exporter* normally receives one of two rates: either the separate rate for which it qualified or a country-wide rate.'[83]

Frozen Seafoods Factory No.32 and Seafoods and Foodstuff Factory are separate known exporters and they were under separate review.[84] That Thuan Phuoc Seafoods and Trading Corporation defines itself as a single company with branch factories does not preclude Commerce from addressing the fact that the branch factories are separate **exporters**, not trade names, that are licensed to produce and export separately, regardless of whether or not Thuan Phuoc Seafoods and Trading Corporation exports the same or different merchandise itself. In other words, for the purposes of separate rate eligibility, it is the commercial export activity of exporters, not the intra-company legal structure of the exporters, that is evaluated. As such, an exporter's classification in an administrative review of a NME order must fit into one of three administrative categories that are required for issuance of instructions to CBP: a separate rate company, the country-wide entity (in this case Vietnam-wide), or an exporter that had no shipments.

Because the suspended entries were entered into the United States and identified upon import as exported by the names of the individual exporters, Commerce must direct CBP to treat those entries as exported by the same identified separate, non-individually examined exporters in the proceeding, regardless of affiliation. With respect to the alleged affiliation issue, Commerce

[83] *See Zhaoqing New Zhongya Aluminum Co. v. United States*, 70 F. Supp. 3d 1298, 1307-8 (CIT 2015) (internal citations omitted, emphasis added).
[84] *See* Thuan Phuoc Seafoods and Trading Corporation SRC at Exhibits 2B and 2C; *see also Initiation Notice*.

does not have the authority to order CBP to treat any of these companies/entities/firms as affiliates because Commerce never made any affiliation/collapsing determinations as to these exporters under section 771(33) of the Act and 19 CFR 351.401(f).[85] It appears that the Vietnamese Respondents are demanding Commerce conduct a much more detailed analysis of their imports and company structure on remand. However, the Court's *Remand Opinion and Order* did not direct Commerce to collect the larger amount of data it appears respondents are claiming Commerce should have reviewed, as Commerce normally does for mandatory respondents, such as Fimex VN,[86] nor did the Court order Commerce to conduct such a complex analysis on remand, again, which is normally reserved for mandatory respondents.

Accordingly, because the *Remand Opinion and Order* only directed Commerce to reconsider or further explain its denial of separate rate status for Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory in view of the information contained in Thuan Phuoc Seafoods and Trading Corporation's SRC,[87] Commerce followed the Court's instructions by further explaining the denial of a separate rate to the two factories. Commerce has not conducted a statutory affiliation analysis, much less a regulatory collapsing analysis of these three exporters, because we are under no obligation to do so and believe that to conduct such an analysis for the first time in this proceeding on remand is not appropriate.[88] To be clear, the three exporters are seeking Commerce to provide them a remedy on remand they would not

[85] As noted in the Draft Remand, Commerce has previously determined companies and separate factories as affiliates comprising a single entity, providing Fimex VN and its separate factory as an example, under factual circumstances not unlike those here, apart from the companies being mandatory respondents. *See AR13 Final Results* and accompanying Issues and Decision Memorandum at 2-3 and Comment 1.
[86] As we explained above, Commerce offered Fimex VN as an example of a mandatory respondent with a branch factory, for which, in AR13, we conducted a collapsing analysis and determined that Fimex VN and its branch factory comprise a single entity, thus subject to a single cash deposit rate. *See AR13 Final Results* and accompanying Issues and Decision Memorandum at 3-4 and Comment 1.
[87] *See Remand Opinion and Order* at 25-26*; see also* Thuan Phuoc Seafoods and Trading Corporation's SRC.
[88] *See Sigma Corp v. United States*, 117 F. 3d at 1404-05 (Fed. Cir. 1997) (*Sigma*).

receive in Commerce's normal administrative proceedings and which was not directed by the Court. As we have explained, we only conduct affiliation and collapsing analyses of mandatory respondents in administrative reviews and do not conduct such analyses of separate rate applicants and certifiers.

We believe it is worth pointing out that Commerce's treatment of the Vietnamese Respondents' arguments about "trade names" in this review is also similar to the agency's subsequent treatment of Fimex VN's arguments in AR13.[89] In that case, Fimex VN argued that Commerce should categorize its separate exporting factory as a trade name.[90] However, Commerce determined that "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…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."[91] Commerce's determination in AR13 with regard to Fimex VN reveals that Commerce's treatment of the three exporters in this review is fully consistent with both Commerce's practice in the *AR10 Final Results*, as explained above, in which Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory did not receive a separate rate, as a trade name or otherwise, as well as Commerce's finding in the *Final Results* at issue in this litigation, AR12, in which Commerce concluded that those companies were not eligible for a separate rate with regard to branch factories claimed as trade names and based solely on Thuan Phuoc Seafoods and Trading Corporation's overall certification in its SRC.[92]

B. *Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory Have Not Provided Separate SRAs and Are Ineligible For A Separate Rate*

[89] *See AR13 Final Results* and accompanying Issues and Decision Memorandum at 3-4 and Comment 1.
[90] *Id.*
[91] *Id.*
[92] *See AR10 Final Results* and accompanying Issues and Decision Memorandum at Comment 12A.

The Vietnamese Respondents do not deny that Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory are both **exporters** and provided evidence on the record that the two factories are exporting entities under their own licensing rights.[93] Because each of the two factories exported subject merchandise during the POR, based not only what was reported to CBP upon importation, but also on the invoices provided on the record, each one must be assigned a rate and its entries must be assessed at the conclusion of the administrative review. To be clear, Commerce does not make any assertions as to the status of these factories in Vietnam; rather, the record demonstrates that the factories are separate **exporters of subject merchandise to the United States**, which is the material evidence on the record that requires consideration. Thus, Commerce has explained that, having not provided separate SRAs, these two exporters are ineligible for a separate rate, regardless of their ownership or affiliation with Thuan Phuoc Seafoods and Trading Corporation.

On remand, we have examined "the relevant data and articulate{d} a satisfactory explanation for {our} action including a 'rational connection between the facts found and the choice made.'"[94] In essence, the two factories, having no existing separate rate from the most recently completed review, should have filed SRAs regardless of ownership or affiliation with any other exporter/applicant/certifier/company/firm, as directed. If there was any confusion, Thuan Phuoc Seafoods and Trading Corporation could have, and should have, contacted the Commerce officials identified in the *Initiation Notice*[95] for guidance; both the SRA and the SRC

[93] *See* Thuan Phuoc Seafoods and Trading Corporation SRC at Exhibit 1.
[94] *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).
[95] *See Initiation Notice*; *see also* SRC at footnote 2, page 6 ("If you cannot certify to each question in this section, please contact the official in charge.") and page 11 ("It is your responsibility to contact the official in charge if subsequent to your filing there are events that affect your response.")

instruct separate rate applicants and certifiers to do so, for any number of questions or issues pertaining to the submission of an SRA or SRC, as they are the parties burdened with establishing the record, not Commerce.

It is worth noting that Commerce also denied separate rate status to another entity in AR12, UTXI Aquatic Products Processing Corporation, which also requested that another entity it referred to as its "branch factory" be included in its request for a separate rate.[96] In *AR12 Final Results*, we did not grant status to that factory, stating that "Commerce disagrees with VASEP that Commerce erred in its treatment of 'branch factories' associated with UTXI Aquatic Products Processing Corporation…it is Commerce's practice to treat each segment of an antidumping proceeding independently with separate records which lead to independent determinations."[97] We further stated that "if the branch factory wishes to export under its own name, then it needs to file its own SRA, showing evidence of a suspended entry, and provide a BRC, as directed."[98]

In addition, it should be pointed out that Thuan Phuoc Seafoods and Trading Corporation claimed in its certification on the record that it and the two other exporting factories received a separate rate in the most recently completed review, but that is not factually correct.[99] As a factual matter, the two other exporting factories did not have a valid separate rate from the most recently completed review (*AR10 Final Results*).[100] Separate rates are not granted perpetually; they are re-examined in, and are reset as a result of, every administrative review.

The Vietnamese Respondents further argue that Commerce had granted a separate rate to

[96] *See* UTXI Aquatic Products Processing Corporation Submission, "Separate Rate Certification," dated May 8, 2017.
[97] *See AR12 Final Results* and accompanying Issues and Decision Memorandum at Comment 3H, page 33.
[98] *Id.*
[99] *See*, *e.g.*, Thuan Phuoc Seafoods and Trading Corporation SRC company certifications.
[100] *See AR10 Final Results* and accompanying Issues and Decision Memorandum at Comment 12A

Frozen Seafoods Factory No.32 and Seafoods and Foodstuff Factory in the *LTFV Amended Final*, and in *AR2 Final*, *AR3 Amended Final*, and *AR4 Final* through *AR9 Final*, thereby creating an expectation of a separate rate that was allegedly abruptly, and without notice, changed with the *AR12 Final Results*.[101] However, that argument is not accurate. As noted, Commerce did not grant a separate rate to the two factories in *AR10 Final Results* and in the subsequent *AR12 Final Results*, wherein Commerce again determined that branch factories are not trade names. The decision was not abruptly made in AR12, and the Vietnamese Respondents' argument overlooks Commerce's findings in the *AR10 Final Results*.[102] Thus, while the Vietnamese Respondents cite to the prior determinations in which Commerce granted a separate rate to Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory,[103] they ignore Commerce's correctly- and consistently-applied practice in subsequent reviews (first in *AR10 Final Results and then* in AR12 and AR13).

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[101] *See*, *e.g.*, *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 70 FR 5152 (February 1, 2005) (*LTFV Amended Final*); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 52273 (September 9, 2008) (*AR2 Final*); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Amended Final Results of Antidumping Duty Administrative Review*, 74 FR 53701 (October 20, 2009) (*AR3 Amended Final*); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 75 FR 47771 (August 9, 2010) (*AR4 Final*); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 56158 (September 12, 2011) (*AR5 Final*); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 77 FR 55800 (September 11, 2012) (*AR6 Final*); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2011–2012*, 78 FR 56211 (September 12, 2013) (*AR7 Final*); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Amended Final Results of Antidumping Duty Administrative Review, 2012–2013*, 79 FR 65377 (November 4, 2014) (*AR8 Final)*; *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 47191 (September 15, 2009) (*AR9 Final*).

[102] *See AR10 Final Results* and accompanying Issues and Decision Memorandum at Comment 12A ("Further, if Thuan Phuoc included these names as trade names but these names are, in fact, separate companies or "branches," they are equally ineligible for separate rate status…despite any granting of a separate rate to these companies in a prior review period, whether it was proper or not, we continue to find that these "trade names" are not eligible for separate rate status in the instant review.")

[103] *See* Respondents' Comments at 10-12, citing to prior Commerce determinations under this Order.

Issue 2: Commerce's SRA/SRC Instructions, Policy and Past Practice Regarding Separate Rates Granted to Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory

Respondent Comments:

- Commerce has long interpreted its Policy Bulletin {5.1} and separate rate instructions as allowing branch factories to be treated as "trade names" instead of separate entities that need to file their own SRA or SRC, and Thuan Phuoc acted consistently with that interpretation. Commerce even acknowledges this in the Draft Remand.
- Commerce continues to explain its policy by referring to "companies" or "firms," indicating that separate rate determinations are made for "companies" or "firms" and not divisions of firms.[104]
- Commerce notes in the Draft Remand that domestic interested parties made requests for review of Thuan Phuoc's factories that were separate from their request to review Thuan Phuoc and that status was denied for Thuan Phuoc's factories in AR10. Commerce suggests that these facts indicate that it was inappropriate for Thuan Phuoc to file a single SRC that included its branch factories. Commerce is mistaken.
- Commerce's reference to certain language in the *Initiation Notice* regarding its separate rate instructions also are taken out of context and do not support its reasoning in the Draft Remand Results. Although the *Initiation Notice includes* language regarding "entities for whom a review was requested," the *Initiation Notice* also contains language indicating that the separate rate requirements apply to "companies" or "firms," which informs how the word "entity" should be understood.
- Commerce's denial of status to Thuan Phuoc's branch factories in AR10 when there was no evidence that Thuan Phuoc used the branch factory names in commercial shipments during the AR10 POR did not preclude Thuan Phuoc from requesting SR status for the factory names in an SRC instead of submitting an SRA.
- The SRC instructions state that companies who had changes to corporate structure, ownership, or to the official company name may not file a SRC but must instead file a SRA. Between AR10 and AR12, there was no change in the corporate structure, ownership, or name of the company. Thus, Thuan Phuoc was not precluded by these instructions from including its factory names in its SRC.
- The SRC instructions also allow the applicant to request status for the same trade names as identified in the previous granting period, as well as new trade names. Thus, Thuan Phuoc was explicitly authorize{d} to include a request for status to trade names that were not granted status in the prior granting period, and Thuan Phuoc requested status for its branch factories in accordance with the instructions for requesting status for new trade names in the SRC. In short, nothing in the SRC instructions precluded Thuan Phuoc from requesting status for its branch factories through an SRC.
- Thuan Phuoc did not "self-bestow" its status as a single entity. The Draft Remand cast unwarranted aspersions at Thuan Phuoc, claiming that Thuan Phuoc's own description of its factories as part of a single entity as Thuan Phuoc was "self-bestowed."

[104] *Id.*, at 13, citing to Draft Remand at 2-3, 6, 11-12, and 20.

- Commerce claims that its previous determinations granting status to Thuan Phuoc's branch factories were inconsistent with its practice. To the contrary, these determinations reflect part of a decade-plus long practice of treating branch factories as "trade names" or "aka" names of the official company name.[105]
- The fact that Commerce acted in a manner that was "inconsistent" with its claimed practice over the course of ten determinations suggests that its *post hoc* characterization of the supposed practice was not in fact the actual practice during that time. Rather, the consistent practice as reflected in Commerce's actual determinations was to treat branch factories as trade names.
- Commerce has now made clear how it plans to treat branch factories going forward. But to fully articulate that policy for the first time in the *AR12 Final Results* and liquidate entries covered by AR12 at the NME-entity rate because companies did not anticipate Commerce's shift in its treatment of branch factories, and thus were not able to conform their submissions to the new requirement, was an abuse of discretion and violated principles of notice and fairness. The Court has held similar changes in practice that prejudice companies to be unlawful.[106]
- The first time that Commerce actually articulated this position was in AR12. Commerce took a different position regarding branch factories for over a decade and continued to accord branch factories SR status as "trade names" of the enterprise in AR10.
- It was unreasonable for Commerce to change its interpretation of the instructions, and create a new requirement for requesting status for branch factories, without clearly informing parties of its new interpretation and allowing parties to tailor their separate rate requests to the new requirements.

Commerce's Position:

Commerce Notified Thuan Phuoc Seafoods and Trading Corporation of Separate Rate Requirements For Branch Factories

With regard to the Vietnamese Respondents' interpretation of the Court's understanding of the record and subsequent remand for further explanation, Commerce notes again, as stated above, that the *AR12 Final Results* did not fully address the relevant reasons for denial of a separate rate to the two entities: namely, the fact that the two entities did not have an existing separate rate to certify in the first place. Further, the *AR12 Final Results* did not explain in detail that the two additional entities are exporters with suspended entries under their own names, and

[105] *Id.*, at 10-12.
[106] *Id.*, at 20, citing to *Huvis Corp. v. United States*, 525 F. Supp. 2d 1370, 1379 (CIT 2007).

therefore Commerce was required to treat them as non-individually examined exporters with no existing separate rate. Commerce has corrected this by providing the explanations above.

The Vietnamese Respondents further assert that Commerce's separate rate practice and/or policy have abruptly changed, without notice to parties. First, we disagree that there was a change in practice. Rather, it was the previous misapplication of our practice that was corrected in *AR10 Final Results*. Second, even if there was a change in practice, interested parties had public notice of that change with the publication of *AR10 Final Results*. The matter of public notice is demonstrated below, using a chronology of events between segments as evidence of: 1) public notice of our AR10 determination that "branch factories" are not trade names and 2) interested parties' eventual adjustments to filings following that determination.

The chronology of Commerce's determinations along with the timing of Thuan Phuoc Seafoods and Trading Corporation's eventual compliance with separate rate filing instructions demonstrate that Thuan Phuoc Seafoods and Trading Corporation was cognizant of Commerce's practice, even if it overlooked the *AR10 Final Results*, where we first addressed the issue of branch factories claimed as trade names:

- September 12, 2016: *AR10 Final Results* wherein Commerce denied separate rate status to Frozen Seafoods Factory No.32 and Seafoods and Foodstuff Factory and stated that that branch factories are not trade names of a company.[107]
- April 10, 2017: Initiation of AR12, wherein Commerce provided instructions to companies initiated for review regarding filing requirements for those that do not have a separate rate from the most recently completed review.[108]
- May 5, 2017: Thuan Phuoc Seafoods and Trading Corporation filed a SRC on behalf of itself and its branch factories, including Frozen Seafoods Factory No.32 and Seafoods

[107] *See AR10 Final Results* at Comment 12A ("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…despite any granting of a separate rate to these companies in a prior review period, whether it was proper or not, we continue to find that these "trade names" are not eligible for separate rate status in the instant review.")
[108] *See Initiation Notice*.

and Foodstuff Factory, certifying that Thuan Phuoc Seafoods and Foodstuff Corporation and its factories were granted a separate rate in the most recently completed review.[109]

- March 12, 2018: AR12 *Preliminary Results*, wherein Commerce preliminarily denied separate rate status to Frozen Seafoods Factory No.32 and Seafoods and Foodstuff Factory.

- April 16, 2018: Initiation of AR13, wherein Commerce set the deadline for the submission of SRAs/SRCs.[110]

- September 14, 2018: *AR12 Final Results* wherein Commerce denied separate rate status to Frozen Seafoods Factory No.32 and Seafoods and Foodstuff Factory.[111]

- August 27, 2019: *AR13 Final Results*, wherein Commerce, separately, granted separate rate status to Frozen Seafoods Factory No.32 and Seafoods and Foodstuff Factory, as they filed SRAs, as instructed.[112]

Based on the above chronology of events, the Vietnamese Respondents are incorrect to argue that Thuan Phuoc Seafoods and Trading Corporation had no notice of Commerce's "change in practice" with respect to branch factories claimed as trade names, and, accordingly, the requirements of filing a SRA where no separate rate was granted in the most recently completed review. Commerce's public notice of the correct application of our practice was stated in *AR10 Final Results*, well before the initiation of AR12. Indeed, Thuan Phuoc Seafoods and Trading Corporation was aware of our corrected practice when it filed SRAs for the two factories in AR13, shortly after the *AR12 Preliminary Results* were issued.

Because Commerce notified Thuan Phuoc Seafoods and Trading Corporation of separate rate requirements for branch factories in *AR10 Final Results*, there is no basis for Thuan Phuoc Seafood and Trading Corporation's claimed confusion of the requirements. Given the statement

[109] *See* Thuan Phuoc Seafoods and Trading Corporation SRC.
[110] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 FR 16298 (April 16, 2018). Commerce granted a separate rate to the two factories, separately, in *AR13 Final Results*, because the record contained SRAs for the two factories in that review.
[111] *See AR12 Final Results*.
[112] *See AR13 Final Results*.

in *AR10 Final Results*, that Commerce was no longer equating "branch factories" as trade names, Thuan Phuoc Seafoods and Trading Corporation knew, or should have known, Commerce's concern over this specific issue and that Commerce could potentially treat other entities within a company's corporate grouping, provided they were exporters, as requiring discrete separate rate documentation.

Issue 3: Commerce is Required to Provide An Opportunity to Remedy Its Mistake

Respondent Comments:

- Commerce should have informed Thuan Phuoc of the deficiency in the manner by which status was requested for the branch factories and provided Thuan Phuoc an opportunity to correct the deficiency by filing separate SRAs for its factories.
- Section 782(e) of the Act provides that Commerce shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, as long as the information submitted meets the five criteria listed in that statutory provision.
- Commerce's explanation for not issuing a supplemental questionnaire ignores that the SRC was clearly submitted on behalf of Thuan Phuoc Seafoods and Trading Corporation and the branch factories. Commerce cannot pretend that no request for status was made for the factories.
- The factories are entitled to separate rate status, deficiencies notwithstanding. Even if branch factories are supposed to file their own SRAs or SRCs, the evidence on the record indicates that Thuan Phuoc's branch factories are entitled to status as entities that operate independently of the Vietnamese government, and Commerce must consider that evidence. A request for status for the branch factories was clearly made in Thuan Phuoc's SRC.
- The information regarding Thuan Phuoc's factories meet all five criteria, and thus Commerce must consider it, even if the format in which the information was provided did not accord with the requirements established. Regardless of the proper interpretation of the SRC instructions, the information on the record demonstrates that Thuan Phuoc's branch factories are entitled to status, and they should be granted such status in the final remand.
- Commerce should act reasonably by treating Thuan Phuoc's request for status for its branch factories as proper in light of prior practice as it existed at the time the SRC was filed. By limiting such a determination to the unique facts of this case, Commerce can reach a result that is equitable, maintains flexibility going forward, and eliminates the need for Commerce, Thuan Phuoc, and the Court to devote even more resources to this particular dispute.

Commerce's Position:

The Vietnamese Respondents cite to section 782(d) of the Act, arguing that Commerce was required to address the supposed deficiency in Thuan Phuoc Seafoods and Trading

Corporation's SRC, pertaining to the two factories. However, as noted above, because there was no specific deficiency for Thuan Phuoc Seafoods and Trading Corporation's certification of its own existing separate rate, there was no need for a deficiency questionnaire.

Commerce does not actively solicit SRAs and SRCs from companies under review;[113] the submission of SRAs and SRCs by exporters is entirely voluntary. When exporters fail to file a SRA, SRC, or no-shipment certification, that failure may result in the exporters receiving the Vietnam-wide rate. The burden to prove eligibility for a separate rate is entirely on the exporter under review. The purpose of a supplemental questionnaire, on the other hand, to a reviewed exporter is not to solicit an entirely new and different submission; it provides a remedy to clarify or correct an existing submission.[114]

Thuan Phuoc Seafoods and Trading Corporation's SRC was adequate in that it provided sufficient explanation of why its export activities were free from government control. Commerce had all it needed from Thuan Phuoc Seafoods and Trading Corporation in that regard. Thus, no supplemental questionnaire was needed on that point. Had SRAs been filed by or for the two factories, Commerce would have been able to issue deficiency questionnaires, if necessary. Here, there were no SRAs filed; therefore, the requirements under section 782(e) of the Act were not met. Consequently, section 782(d) of Act does not apply. Section 782(e) of the Act provides that Commerce:

> {Commerce} shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by {Commerce} if the five conditions listed in section 782(e)(1)-

[113] *See Initiation Notice*, 82 FR at 17190 ("All firms listed below that *wish* to qualify for separate rate status…")
[114] *See* section 782(d) of the Act.

(5) are met - is inapplicable because {respondent} did not submit the information requested of it 'by the deadline established for its submission.'[115]

The CIT has held that the terms of sections 782(d) and (e) of the Act do not give rise to an obligation for Commerce to permit a remedial response from the respondent where the respondent has not met all of the criteria of 782(e) of the Act.[116] Furthermore, section 782(d) does not require Commerce to accept a response that belatedly seeks to remedy misreporting.[117] Here, the SRC filed with Commerce by one exporter, Thuan Phuoc Seafoods and Trading Corporation, was insufficient with respect to the two additional exporters, Frozen Seafoods Factory No.32 and Seafoods and Foodstuff Factory. Commerce requires specific information from a separate rate applicant with no existing separate rate from the most recently completed review, that is more complex than what is required in a SRC. For example, within a SRA, an applicant must provide evidence of price negotiations, as *de facto* evidence of independent price setting without government control or interference.[118] By contrast, within a SRC, a company certifying a separate rate granted in the most recently completed review must only certify that they set prices independently.[119] With its AR12 SRC, Thuan Phuoc Seafoods and Trading Corporation certified its *own* existing separate rate granted in the *AR10 Final Results*, including a certification that it continues to set its own prices free from government control.. With no existing separate rate and no SRA on the record containing evidence that the two exporting factories set their own prices, Commerce cannot make that determination for the two exporting factories. There was no lawful requirement for Commerce to issue a deficiency questionnaire to

[115] *See Jiangsu Jiasheng Photovoltaic Tech. Co., Ltd. v. United States*, 28 F. Supp. 3d 1317, 1332 (CIT 2014).
[116] *See Tung Mung Dev. Co. v. United States*, 25 CIT 752, 758, 789 (July 3, 2001) (Tung Mung) (stating that the remedial provisions of 782(d) are not triggered unless the respondent meets all the five enumerated criteria of 782(e)).
[117] *See Lightweight Thermal Paper From Germany: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 23220 (April 18, 2013) and accompanying Issues and Decision Memorandum at Comment 1.
[118] *See*, *generally*, SRA at 18, Section IVB.
[119] *See*, *generally*, SRC at 9.

those entities, because Thuan Phuoc Seafoods and Trading Corporation filed the wrong document with respect to Frozen Seafoods Factory No.32 and Seafoods and Foodstuff Factory.

As to the argument that the factories are entitled to a separate rate, deficiencies notwithstanding, we disagree. Commerce is not required to grant a separate rate where the eligibility has not been met. For example, in *Yantai 2017*, the Court found that "Commerce requires that exporters satisfy all four factors of the *de facto* control test in order to qualify for separate rate status."[120] The Court has further stated that, "{b}ecause {the respondent} failed to satisfy one *de facto* criterion, 'Commerce had no further obligation to continue with the analysis.'"[121] In keeping with the Court's findings, it is Commerce's practice that no exporter is "entitled" to a separate rate unless all the eligibility criteria are fulfilled. If an exporter demonstrates that it is independent of government control, it can receive a separate rate, provided the exporter can demonstrate that it fulfills all of the criteria required for separate rate status, for example, that it sets its own prices.

Finally, Commerce declines the Vietnamese Respondents' invitation to negotiate separate rate eligibility standards; that is, to allow the factories to be deemed as trade names in this litigation simply because the entries have been suspended for three years, and, in exchange, receive assurances that Thuan Phuoc Seafoods and Trading Corporation will comprehend the "new" practice going forward. In reality, this is not a new practice; it has been in place prior to, but correctly and consistently applied in, this proceeding since the *AR10 Final Results*, as discussed above.

[120] *See Yantai CMC Bearing Co. Ltd. v. United States*, 203 F. Supp. 3d 1317, 1326 (CIT 2017) (*Yantai 2017*), citing *Advanced Tech III*, 938 F. Supp. 2d at 1349.
[121] *See Yantai 2017*, 203 F. Supp. 3d at 1326.

VI. FINAL RESULTS OF REDETERMINATION

Consistent with the *Remand Opinion and Order*, we have provided further explanation for the reasons that exporters Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory are not eligible for a separate rate in AR12. Consequently, we have made no changes to the *AR12 Final Results*.

4/30/2020

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