

**Final Results of Redetermination Pursuant to
An Giang Fisheries Import and Export Joint Stock Company et al., v. United States,
Consol. Court No. 15-00044, Slip Op. 17-4 (January 23, 2017)**

I. SUMMARY

The U.S. Department of Commerce (the Department) has prepared these results of redetermination pursuant to the remand order of the U.S. Court of International Trade (CIT or the Court) in *An Giang Fisheries Import and Export Joint Stock Company et al., v. United States*, Consol. Court No. 15-00044, Slip Op. 17-4 (January 23, 2017) (*An Giang Fisheries* or the Court's Order). This remand addresses several issues in the tenth administrative review of the antidumping duty order on certain frozen fish fillets (fish fillets) from the Socialist Republic of Vietnam (Vietnam).¹

For this remand, in accordance with the Court's instructions, the Department reconsidered its decision not to grant a separate rate to Can Tho Import-Export Joint Stock Company (Caseamex) and the selection of the surrogate value (SV) for fish feed.² For these Final Results of Redetermination, the Department continues to find the record evidence demonstrates that Caseamex is not entitled to a separate rate. Additionally, the Department continues to find that the best available SV for fish feed is the Indonesian fish feed data in the Rukomono Affidavit.³ Because the Department is making no changes to its calculations in this

¹ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews; 2012-2013*, 80 FR 2394 (January 16, 2015) and accompanying Issues and Decision Memorandum (10th AR Final Results).

² See *An Giang Fisheries*, Slip Op. 17-4 at 65.

³ See Petitioners' May 12, 2014, submission at Exhibit 16.B.

remand redetermination, the margins for the mandatory respondents and separate rate respondents did not change.

II. ANALYSIS

A. Caseamex's Separate Rate

The CIT remanded the issue of Caseamex's separate rate to the Department.⁴ The Court determined that the Department's conclusion that Caseamex failed to demonstrate a lack of direct or indirect government influence over the actual selection of Caseamex's management is not supported by substantial evidence, and that the Department should explain what record evidence demonstrates the direct or indirect government involvement in Caseamex or reconsider its denial of a separate rate to Caseamex.⁵

Legal Framework

The Department considers Vietnam to be a non-market economy (NME) country under section 771(18) of the Tariff Act of 1930, as amended (the Act). In antidumping proceedings involving NME countries, such as Vietnam, the Department has a rebuttable presumption that the export activities of all firms within the country are subject to government control and influence.⁶ The Department analyzes whether each entity exporting the merchandise under consideration is sufficiently independent under a test established in *Sparklers*⁷ and further developed in *Silicon Carbide*.⁸ According to this separate rate test, the Department will assign a

⁴ See *An Giang Fisheries*, Slip Op. 16-55 at 33.

⁵ *Id.* at 57 – 61.

⁶ See, e.g., *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 20197 (April 15, 2015) (*OTR Tires*) and accompanying Issues and Decision Memorandum at Comment 1.

⁷ 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*).

⁸ 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*).

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. Companies which do not demonstrate an absence of both *de jure* and *de facto* government control are assigned a rate established for the NME-wide entity, which it applies to all imports from any exporter that has not established its eligibility for a separate rate.

The separate rate test has been subject to litigation in multiple cases before the CIT and the Court of Appeals for the Federal Circuit (CAFC), and the Department's current practice is in accordance with the holdings of those Court decisions. For example, in *Sigma*, the CAFC affirmed that it is within the Department's authority to employ a presumption for state control in an NME country and place the burden on the exporters to demonstrate an absence of central government control.⁹ The CAFC held that sections 771(18)(B)(iv)-(v) of the Act recognize a close correlation between an NME economy and government control of prices, output decisions, and allocation of resources, and therefore, the Department's presumption of government control is reasonable.¹⁰ Likewise, in *Jiangsu 2015*, the CIT ruled that the Department could "make reasonable inferences from the record evidence" when examining the totality of the circumstances in determining whether a respondent had demonstrated *de jure* and *de facto*

⁹ See *Sigma Corp v. United States*, 117 F.3d 1405-06 (Fed. Cir. 1997) (*Sigma*) ("We agree with the government that it was within Commerce's authority to employ a presumption of state control for exporters in a nonmarket economy, and to place the burden on the exporters to demonstrate an absence of central government control. The antidumping statute recognizes a close correlation between a nonmarket economy and government control of prices, output decisions, and the allocation of resources. Moreover, because exporters have the best access to information pertinent to the 'state control' issue, Commerce is justified in placing on them the burden of showing a lack of state control.") (internal citations omitted).

¹⁰ *Id.*; see also *Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers v. United States*, 44 F.Supp. 2d 229, 243 (CIT 1999) quoting *Sigma*, 117 F.3d at 1405 ("Under the broad authority delegated to it from Congress, Commerce has employed 'a presumption of state control for exporters in a non-market economy'... Under this presumption, all exporters receive one non-market economy country (NME) rate, or country-wide rate, unless an exporter can 'affirmatively demonstrate' its entitlement to a separate, company-specific margin by showing 'an absence of central government control, both in law and in fact, with respect to exports.'").

control of its export activities.¹¹ Furthermore, in *Advanced Technology*, the CIT ruled that majority ownership by a government entity, either directly or indirectly, rules out a respondent's ability to demonstrate an absence of *de facto* control.¹²

In *Wire Rod*, the Department explained why evidence of indirect or direct government ownership is a sufficient evidentiary basis on which to conclude that a NME government has the ability to exercise control over a company such that the company is ineligible for a separate rate:

...the majority ownership holding in and of itself means that the government exercises or has the potential to exercise control over the company's operations generally, which may include control over, for example, the selection of management, a key factor in determining whether a company has sufficient independence in its export activities to merit a separate rate. Consistent with normal business practices, we would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company, including the selection of management and the profitability of the company.¹³

Although in *Advanced Technology* the respondent was majority owned by a government

¹¹ See *Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, 121 F. Supp. 3d 1263, 1266 (CIT 2015) (*Jiangsu 2015*), citing to *Jiangsu Jiasheng Photovoltaic Tech. Co., Ltd. v. United States*, 28 F. Supp. 3d 1317, 1339 (CIT 2014) (*Jiangsu 2014*) ((quoting *Certain Cut-to-Length Carbon Steel Plate from Ukraine*, 62 FR 61754, 61759 (November 19, 1997) and *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997) (citation omitted), respectively; and citing *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (explaining that substantial evidence may include "reasonable inferences from the record") (quotation marks and citation omitted)).

¹² See *Jiangsu 2015*, 121 F. Supp. 3d at 1266 (citing to *Advanced Technology & Materials Co., Ltd., et al. v. United States*, 885 F. Supp. 2d 1343 (CIT 2012) (*Advanced Tech I*), remand *aff'd* in *Advanced Technology & Materials Co., Ltd., et al. v. United States*, 938 F. Supp. 2d 1342 (CIT 2013) (*Advanced Tech II*), *aff'd* in *Advanced Technology & Materials Co., Ltd. v. United States*, Case No. 2014-1154 (CAFC Fed. Cir. 2014) (*Advanced Tech III*) (collectively, *Advanced Tech*),) ("Specifically, as a result of litigation challenging Commerce's separate rate determinations in the diamond sawblades proceedings, Commerce has clarified its practice with regard to evaluating NME companies' *de facto* independence from government control. This revised practice, which was sustained by this Court and subsequently affirmed by the Court of Appeals, holds that 'where a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter {or producer},' such majority ownership holding 'in and of itself' precludes a finding of *de facto* autonomy").

¹³ See, e.g., *Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances, in Part*, 79 FR 53169 (September 8, 2014) and accompanying Preliminary Decision Memorandum at "Separate Rates," unchanged in *Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 79 FR 68860 (November 19, 2014) (hereafter, collectively referred to as "*Wire Rod*").

entity,¹⁴ in other cases, consistent with the facts in *Jiangsu 2015*, the Department has examined the totality of the circumstances where a respondent is not majority owned by a government entity, and made a reasonable inference that the respondent does not control its export activities, as is the case here. For example, in *Truck & Bus Tires*, we found that the top four shareholders of a respondent were PRC State-owned Assets Supervision and Administration Commission entities (SASAC), *i.e.*, state owned enterprises (SOE).¹⁵ These shareholders did not own the majority of shares, as they accounted for 49.06 percent of the respondent's ownership.¹⁶ However, the Department found that, despite minority ownership, record evidence indicated that the respondent was controlled by a SOE, and we denied the respondent a separate rate.¹⁷ In another example, *Containers*, we found that a respondent was indirectly controlled by a SOE, despite owning a minority of shares, and denied that company a separate rate.¹⁸ In that case, two minority shareholders owned a combined 48.2 percent of the respondent but, in turn, were 100-percent owned by a PRC SASAC.¹⁹ We examined the totality of the circumstances in *Containers* and made the reasonable inference that a PRC SASAC, though the minority shareholders it owned, had the ability to exercise control over important management organizations, such as board of directors, which has the authority to appoint managers that controlled the operations of the respondent.²⁰

¹⁴ See *Advanced Tech I*, 885 F. Supp. 2d 1343 (CIT 2012).

¹⁵ See *Truck and Bus Tires from the People's Republic of China: Final Affirmative Determinations of Sales at Less Than Fair Value and Critical Circumstances*, 82 FR 8599 (January 27, 2017) (*Truck & Bus Tires*) and accompanying Issues and Decision Memorandum at Comment 1. (*Truck & Bus Tires*).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See *53-Foot Domestic Dry Containers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value; Final Negative Determination of Critical Circumstances*, 80 FR 21203 (April 17, 2015) (*Containers*) and accompanying Issues and Decision memorandum at Comment 10. (*Containers*).

¹⁹ *Id.*

²⁰ *Id.*

In the Court’s Order, citing to the Diamond Sawblades Remand, the Court stated that the Department’s “practice does not require a respondent to rebut the potential for government control, but rather actual control by the government entity.”²¹ We respectfully disagree with this interpretation of our practice.²² As we explained in *Tetra*:

The Department continues to evaluate its practice with regard to the separate rates analysis in light of the Diamond Sawblades 2014 AD proceeding, and the Department’s determinations therein. In particular, we note that in litigation involving the Diamond Sawblades 2014 proceeding, the CIT found the Department’s existing separate rates analysis deficient in the specific circumstances of that case, in which a government-controlled entity had significant ownership in the respondent exporter. Following the Court’s reasoning, as affirmed by the Court of Appeals for the Federal Circuit (“CAFC”), in recent proceedings, we concluded that where a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter, the majority ownership holding in and of itself means that the government exercises, or has the potential to exercise, control over the company’s operations generally. This may include control over, for example, the selection of management, a key factor in determining whether a company has sufficient independence in its export activities to merit a separate rate. Consistent with normal business practices, we would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company, including the selection of management and the profitability of the company.²³

We do not disagree with the statement that it is the Department’s practice to determine that majority government ownership means that a government “exercises, or has the potential to

²¹ See *Advanced Tech II*, 938 F. Supp. 2d at 1342, (CIT 2013), citing *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People’s Republic of China*, 71 FR 29303 (May 22, 2006) and accompanying Issues and Decision Memorandum; “Final Results of Redetermination Pursuant to Remand Order for Diamond Sawblades and Parts Thereof from the People’s Republic of China,” dated May 6, 2013 (Diamond Sawblades Remand) at 7 and 14.

²² To that end, the Court states that “Defendant conceded at oral argument that Commerce must find actual control by the [] in order to determine that an exporter is under de facto government control.” *An Giang* at 59, n. 56. As explained in this remand, that statement is not representative of Commerce’s practice.

²³ See *1,1,1,2 Tetrafluoroethane (R-134a) from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part*, 82 FR 12192 (March 1, 2017) (*Tetra*) and accompanying Issues and Decision Memorandum at Comment 1. (*Tetra*).

exercise, control over the company's operations generally."²⁴ However, as noted above, it is also the Department's practice to examine whether the government might also be able to exercise, or have the potential to exercise, control of a company's general operations through minority government ownership under certain factual scenarios.²⁵ Under certain facts, whether government ownership is minor or major, those facts might still support a claim that the government has the potential to exercise control.

Inception of Caseamex

In the Court's Order, the Court takes note of the company history of Caseamex with regard to its separate rate, some of which occurred in 2006 at the founding of Caseamex. More specifically, the Court observes: (a) no record evidence supports the notion that [] (Caseamex's largest shareholder during the POR) had the authority to appoint directors or managers before 2012;²⁶ (b) the Department has not demonstrated that the [], a Vietnamese government entity, was ever directly involved in the appointment of management and directors, and if the Department inferred day-to-day control by the [] because it nominated a representative to nominate all the Board Members, this determination is not supported by substantial evidence, as the appointment letters pre-date the POR;²⁷ (c) [], voting with the shares of the [], can nominate four members of the board, but the board is comprised of at minimum five members; thus, he is not the only shareholder capable of nominating board members and it

²⁴ See, e.g., *Antidumping Duty Investigation of Stainless Steel Sheet and Strip from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 82 FR 9716, (February 8, 2017) (SSSS) and accompanying Issues and Decision Memorandum at Comment 1. (SSSS).

²⁵ See *Truck & Bus Tires* at Comment 1.

²⁶ See *An Giang* at 58-59.

²⁷ *Id.* at 60.

cannot be concluded that the [] exerts actual control over Caseamex’s selection of management in circumstances where it is neither the largest shareholder nor the only shareholder capable of nominating board members.²⁸ We examine the record, below, to address the Court’s concerns.

Can Tho Agriculture and Animal Products Import-Export Company (Cataco), was established as a SOE, fully owned by the [].²⁹ In [], the [] made the decision to divest its shares of Cataco, and form a joint stock company, Caseamex.³⁰ The [] Decision [

details the creation of Caseamex.³¹ The [] Decision indicated there was a []³², and while the [] has the responsibility for hiring a company to sell Cataco shares and run the operations of Cataco and Caseamex, [

].³³ The [] Decision [] also states:

²⁸ *Id.* at 61, footnote 57.

²⁹ See Caseamex’s June 6, 2014, submission at Exhibit S3-1; see also *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) (*Vietnam Shrimp*) and accompanying Issues and Decision Memorandum at Comment 7. (*Vietnam Shrimp*).

³⁰ *Id.*

³¹ See Caseamex’s June 6, 2014, submission at Exhibit S3-1, []. Each of the Decisions concerning the transformation of Cataco into Caseamex indicates that the manager of Caseamex is one of the people who has “the responsibility for implementing this Decision.” *Id.*

³² The [

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³³ We note that some of the documents produced by the [] refer to Caseamex as [].

“The Director of Cataco and of {Caseamex} has the responsibility of running and managing the company until transfer of all shares and labor to {Caseamex} and the responsibility of preparing the Income Statement of the Company under the current Law.”³⁴ This indicates that the Director of Cataco and Caseamex are the same individual, as the sentences do not reference the “directors” of these two companies, but the “director.”

Record evidence also indicates that [] Cataco employees purchasing shares of Caseamex stock remained employed by Caseamex after the sale, which, therefore, must include [].³⁵ Documents submitted by Caseamex indicate that [] was the director of Caseamex at its inception, and he has continued in this role through the POR.³⁶ In sum, we find it very reasonable to infer from the record evidence that [] was the General Director of Cataco, and continued in this role with Caseamex.

The [] Decision [], amends the [] Decision [], and determines the shareholder categories of Caseamex’s shares.³⁷ The [] Decision [] indicates that, at the outset of the creation of Caseamex, the [] retained [] percent of Caseamex’s shares, and was the [] shareholder.³⁸ It also indicates that [] percent of shares were to be sold to [], [] percent of shares to “[],” though the document does

³⁴ *Id.*

³⁵ *See* Caseamex’s June 6, 2013, submission at Exhibit S3-1. The total number of employees at the time of divestment of the [] were [], and the total number of employees transferring to Caseamex were [].

³⁶ *See, e.g.*, December 17, 2014, submission at Exhibit 13.A (where [] signed letters of appointment in 2006 as the Director of Caseamex).

³⁷ *Id.* at Decision [].

³⁸ *Id.*

not define this term, and [] percent of shares were to be [].³⁹

Record evidence makes clear that the Board of Directors was created before June 20, 2006, because the Board met on that date to determine who should be appointed as managers of Caseamex.⁴⁰ Caseamex did not provide the minutes of this meeting, or provide letters of appointment for any members of the Board of Directors.⁴¹ Record evidence makes clear that the [] played an important role in determining the managers of the company, because the appointment letters note that each appointment was based, in part, on the “[],” although Caseamex did not provide the minutes of this meeting, and the [] was the largest shareholder at that time.⁴² It is also clear that [] played a role in determining the managers of the company because the appointment letters note that each appointment was based, in part, on the “[],” and are signed by the General Director, [].⁴³ Moreover, these appointments all occurred before the Articles of Association were adopted in 2012,⁴⁴ and before the [] appointed [] to represent its shares in the company.⁴⁵

Record evidence indicates that on June 22, 2006, after the Board of Directors were selected and the managers of the company were selected, there was a change in the ownership of shares, and on that date [] owned [] percent of Caseamex’s public shares, making him

³⁹ *Id.*

⁴⁰ *See* Caseamex’s December 17, 2013 submission at Exhibit 13.A.

⁴¹ For that matter, Caseamex did not provide any of [] appointment letters- as Chairman of the Board of Directors, or as General Manager. It only provided a letter appointing Mr. Duc to the position of General Manger in 2014, after the POR. *See* Caseamex’s June 6, 2014 submission at Exhibit 8.

⁴² *See* Caseamex’s December 17, 2013, submission at Exhibit 13 (appointment letters indicating the Management Board selected managers on June 20, 2006); Caseamex’s June 6, 2014 submission at Exhibit S3-2 (which provides the “List of All Shareholders in 2006 After Divestiture,” dated June 22, 2006) and Exhibit S3-1 (which indicates the [] retained [] percent of the shares for itself, dated []).

⁴³ *See* Caseamex’s December 17, 2013, submission at Exhibit 13.

⁴⁴ *Id.* at Exhibit 10.

⁴⁵ *Id.* at 18.

the largest public shareholder, outside of the [] shares.⁴⁶

Analysis

Consistent with the facts in *Jiangsu 2015*, we have examined the totality of the circumstances and made the conclusion from record evidence that Caseamex was not autonomous from the government in the selection of its management.⁴⁷ As noted above, Caseamex was formed by the [] from a SOE it owned, Cataco.⁴⁸ Consistent with normal business practices, we would expect the sole owner of Cataco, the [], to have appointed [] as the General Director of that company. Moreover, because the Articles of Association granting minority shareholder rights had not yet been adopted, we have made the inference that the [], as it selected itself to be the largest shareholder, exercised its rights as the largest shareholder in selecting the Board of Directors and management of Caseamex. The [] exercised its rights in: (a) determining when Caseamex would be founded;⁴⁹ (b) creating the Divestment Board to sell certain of Cataco's shares, and run Cataco and Caseamex during the transition; (c) approving decisions made by the Divestment Board;⁵⁰ and (d) retaining [] in his position as General Director of Cataco to be General Director of Caseamex.⁵¹ We find it appropriate to determine that [] is beholden to the [] for his employment, first at Cataco and then at Caseamex. Based on the above, we find it is reasonable to infer that the [] exerted influence over the appointment of the Board of Directors and managers of

⁴⁶ See Caseamex's June 6, 2014, submission at Exhibit S3-2.

⁴⁷ See *Jiangsu 2015*, 121 F. Supp. 3d at 1266.

⁴⁸ See Caseamex's June 6, 2014, submission at Exhibit S3-1; see also *Vietnam Shrimp* at Comment 7.

⁴⁹ See Caseamex's June 6, 2014 submission at Exhibit S3-1, [].

⁵⁰ Some of the documents produced by the [] refer to Caseamex as [].

⁵¹ *Id.*

the company, whether it be directly or indirectly.

It is clear from the documents submitted by Caseamex that there were various meetings (Divestment Board, shareholder, Board of Directors) held to determine what individuals were selected to run the company (Board of Directors and General Director).⁵² It is important to note that in NME cases, it is the respondents who have the responsibility to demonstrate their independence from government control, whether it be direct or indirect, consistent with the facts in *Jiangsu 2015*, and whether the government exercises or has the potential to exercise control over the respondents' operations, consistent with the facts in *Wire Rod*.⁵³ As the CAFC affirmed in *Sigma*, the burden is on NME exporters to demonstrate an absence of government control, not on the Department to re-conclude in each proceeding the presumption of government control.⁵⁴ As the CAFC held, the burden is on exporters in NME countries to demonstrate an absence of government control because exporters have the best access to information pertinent to the issue.⁵⁵

Caseamex in 2012

By October 2011, Caseamex's top shareholders were: the [], [] percent, an asset management company, [] percent, [] percent and [] percent.⁵⁶ On August 1, 2012, the POR for the eighth review began. On September 12, 2012, the [] appointed [] to represent its shares in Caseamex.⁵⁷ In October 2012, Caseamex adopted its Articles of Association which provide for, among other things, how management will be selected for the company and other minority shareholder

⁵² See Caseamex's December 17, 2013 submission at Exhibit 13.A.

⁵³ See *Jiangsu 2015*, 121 F. Supp. 3d 1263, 1267; *Wire Rod*, respectively.

⁵⁴ See *Sigma*, 117 F.3d 1405-06 (Fed. Cir. 1997).

⁵⁵ *Id.*

⁵⁶ See Caseamex's June 6, 2014 submission at Exhibit S3-7.

⁵⁷ See Caseamex's April 2, 2104 submission at Exhibit S2-3.

rights.⁵⁸ On July 31, 2013, the POR for the eighth review ended. By November 2014, Caseamex's top shareholders were: [] percent, the [] percent, [] percent, and the next largest shareholder held [] percent.⁵⁹ Caseamex did not provide a complete list of shareholders during the POR, but indicated [], the [] and the largest [] shareholder's shares remained unchanged. Caseamex did not indicate there were any changes in the shares held by its [].

Analysis

In the underlying review, we did not deny Caseamex a separate rate because the [] exerted actual influence over the selection of managers during the POR. As no managers or Board members were appointed during the POR, the [] was precluded from exerting any actual influence. Instead, the Department denied Caseamex's separate rate because, consistent with the approach and facts in *Wire Rod*, *SSSS*, and *Tetra*, there existed the potential for government control of Caseamex's operations. Thus, regardless of whether the [] did, or did not, exert actual control over Caseamex during the POR, the *ability* to exert control existed, and Caseamex has not demonstrated that this potential for control did not exist, as *Sigma* requires it to do.⁶⁰

We find that, as General Director, Chairman of the Board of Directors and controller of the day-to-day operations of Caseamex, [] exercises control over his employees. In other words, because [] controls the pay of company employees and has the power to hire and

⁵⁸ See Caseamex's December 17, 2013, submission at Exhibit 10.

⁵⁹ See Caseamex's June 6, 2014, submission at Exhibit S3-7.

⁶⁰ See *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 Issues and Decision Memorandum at Comment 2.

fire them, they are beholden to him. The Court correctly pointed out that the Articles of Association (which were only adopted during the POR) indicate that shareholders could band together to nominate someone to the Board of Directors.⁶¹ First we note that, according to the Articles of Association, the Board of Directors consists of five individuals, those five positions had been filled by the [] at the inception of Caseamex, and remained filled during the POR.⁶² Thus, there existed no possibility that any member of the Board of Directors could have been replaced during the POR. Moreover, no managers of the company were replaced during the POR. Second, while smaller shareholders could band together to nominate board members over the objections of the [] and [], this seems an unlikely activity for those shareholders which are [], as they are beholden to []. The combined shares of [], the [] and [] is [] percent. Therefore, we find [] to be the controlling shareholder of Caseamex.

Moreover, [] was only appointed as the representative of the [] shares during the POR.⁶³ However, as we noted previously, we find that [] has been beholden to the [] for his employment, first at Cataco and then with Caseamex. As such, we find that, while the [] may have delegated its shares to [], it has not separated itself from the operations of Caseamex.

In *OTR Tires*, a respondent that was ultimately denied a separate rate argued that minority shareholder rights could have been exercised, which indicated that the SOE majority

⁶¹ See Caseamex's December 17, 2013, submission at Exhibit 10.

⁶² *Id.* at Exhibits 10 & 14.

⁶³ See Caseamex's June 6, 2014, submission at Exhibit S3-4.

shareholder did not control the respondent.⁶⁴ We find parallels to *OTR Tires* in this review. Although Caseamex shareholders (representing [] percent of shares) can nominate members to the Board of Directors, the absence of evidence of control, or other demonstrable action on behalf of a minority shareholder, does not rebut the presumption of government control, nor does the existence of certain minority shareholder rights (the ability to nominate board members) prove the absence of government control. As noted above, the standard for determining such a status is that an NME exporter is presumed to be under government control until such a presumption is sufficiently rebutted. Assuming, *arguendo*, that a nomination for the Board of Directors took place over the objections of the [] and [], the Articles of Association state that any nomination must have greater than 65 percent of the voting shares, which, during the POR, would be mathematically impossible, considering the [] and [] control approximately [] percent of the shares. Moreover, consistent with *Sigma*, the burden to rebut the presumption of government control is on the party seeking separate rate status. Like the respondent in *OTR Tires*, Caseamex provided limited information to rebut this presumption, despite the issuance of three supplemental questionnaires on its separate rate application. While no board members or managers were appointed during the POR, Caseamex has provided no pre-POR examples of minority shareholders exercising the rights which it claims rebut the presumption of government control. Further, Caseamex has not provided any information on which shareholders nominated which board members or managers, or how any shareholders voted on those nominations.

Summary

We find that the conclusion that Caseamex failed to rebut the presumption that the

⁶⁴ See *OTR Tires* at Comment 1.

[] exerted control over the selection of the Board of Directors and management of Caseamex, directly or indirectly, is a reasonable inference from the record evidence before us. Moreover, record evidence demonstrates that the individual who controls the day-to-day operations of the company, [], and controls approximately [] percent of the shares, is beholden to the [] for his employment at Cataco and then Caseamex, and it was only during the POR that the [] delegated its shares to []. As such, we find that the [] retained the potential to exert influence over the company's operations.⁶⁵

B. Fish Feed Surrogate Value

The CIT also remanded the issue of the fish feed SV to the Department.⁶⁶ The Court determined that the Department failed to address HVG *et al.*'s⁶⁷ argument that the fish feed prices in the Rukomono Affidavit are not representative of a broad-market average.⁶⁸ Specifically, the Court determined that the Department, in the immediately preceding review (9th administrative review (AR)), found that the same source, with identical regional and temporal coverage, was not representative of a broad-market average.⁶⁹ Thus, the Court instructed the Department to explain why the record evidence, which was the same as the immediately preceding review, justified the change in course for the selection of the best available SV for fish feed.⁷⁰

⁶⁵ See, e.g., generally *Wire Rod*; *SSSS* at Comment 1; *Tetra* at Comment 1.

⁶⁶ See *An Giang Fisheries*, Slip Op. 16-55 at 33.

⁶⁷ An Giang Fisheries Import and Export Joint Stock Company, Asia Commerce Fisheries Joint Stock Company, Cuu Long Fish Joint Stock Company, Hiep Thanh Seafood Joint Stock Company, International Development & Investment Corporation, NTSF Seafoods Joint Stock Company, QVD Food Company, Ltd., Southern Fisheries Industries Company Ltd., and TG Fishery Holdings Corporation (collectively, HVG *et al.*).

⁶⁸ *Id.* at 46-8.

⁶⁹ *Id.* at 48.

⁷⁰ *Id.* at 48-9.

Section 773(c)(1) of the Act instructs the Department to value the FOPs with the best available information from a market economy country, or countries, that the Department considers appropriate. When considering what constitutes the best available information, the Department considers several criteria, including whether the SV data are contemporaneous, publicly available, tax- and duty-exclusive, representative of a broad-market average, and specific to the inputs in question.⁷¹ The Department's preference is to satisfy the breadth of the aforementioned selection criteria.⁷² Moreover, it is the Department's practice to consider carefully the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing FOPs. The Department must weigh the available information with respect to each input value and make a product-specific and case-specific decision as to what constitutes the best available SV for each input.⁷³

As noted above, when considering what constitutes the best available information, the Department considers several criteria, including whether the SV data are representative of a broad-market average.⁷⁴ For example, the Department does not prefer regional data, or data representative of single company's experience. Moreover, we attempt to find the most

⁷¹ See *Qingdao Sea-Line Trading Co., Ltd. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014); see also *QVD Food Co., Ltd. v. United States*, 721 F. Supp. 2d 1311 (CICIT 2010) (describing the Department's preference for data that satisfies these five criteria).

⁷² See *Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Results, Partial Rescission of Sixth Antidumping Duty Administrative Review and Determination Not to Revoke in Part*, 77 FR 53856 (September 4, 2012) (*China Shrimp*) and accompanying Issues and Decision Memorandum at Comment 2. (*China Shrimp*).

⁷³ See *Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review*, 71 FR 40477 (July 17, 2006) and accompanying Issues and Decision Memorandum at Comment 1; see also *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 19546 (April 22, 2002) and accompanying Issues and Decision Memorandum at Comment 2.

⁷⁴ See *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People's Republic of China*, 71 FR 53079 (September 8, 2006) and accompanying Issues and Decision Memorandum at Comment 3.

representative and least distortive market-based value, because the more broad-based the value, the greater the likelihood that the value is representative. The Department does not consider the experience of a single company to represent a broad-market average when better information is available on the record.

In both this review (10th AR) and the immediately preceding review (9th AR), the Department selected Indonesia as the appropriate surrogate country, because Indonesia satisfies the statutory requirement that the surrogate country be at a comparable level of economic development to the NME country.⁷⁵ Further, data considerations weighed heavily in favor of Indonesia's selection over the other potential surrogate countries.⁷⁶ Specifically, beginning in the 8th AR *Final Results*, in response to an increase in fish farming among Vietnamese subject merchandise producers, we examined each factor of production's contribution to each respondent's normal value calculation, and determined that "factors other than the whole fish and surrogate ratios account for a significant portion of direct materials and normal value, and we have taken this into account in selecting the primary surrogate country."⁷⁷ Additionally, the increased vertical integration of producers and exporters in the Vietnamese industry caused the Department to consider the effect of other factors on normal value.⁷⁸ In both this AR and the immediately preceding 9th AR *Final Results*, we performed a similar examination of each factor of production's contribution to each respondent's normal value calculation, and came to the same

⁷⁵ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews; 2012-2013*, 80 FR 2394 (April 7, 2014) and accompanying Issues and Decision Memorandum (9th AR *Final Results*) at Comment 1.C; 10th AR *Final Results* at Comment 1.C.

⁷⁶ *Id.*

⁷⁷ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews; 2010-2011*, 78 FR 17350 (March 21, 2013) (8th AR *Final Results*) and accompanying Issues and Decision Memorandum at Comment 1.C. (8th AR *Final Results*).

⁷⁸ *Id.*

conclusion we did in the 8th AR *Final Results*; specifically, that FOPs other than whole, live *pangasius* accounted for significant portions of normal value.⁷⁹ Based on our analysis in this AR and the immediately preceding 9th AR *Final Results*, we found that the record evidence led us to find that Indonesia offered the best available information for SVs, including for the fish feed input that is subject of this remand.⁸⁰

In both this AR and the immediately preceding 9th AR, the respondents reported fish feed as a farming FOP.⁸¹ The record of each of these ARs contained the following sources from Indonesia as potential SVs for fish feed: 1) the fish feed prices in the Rukomono Affidavit⁸² that contains Indonesian government data from January 2014 and cover *pangasius* fish feed with a protein content of 26 to 28 percent (the Rukomono Affidavit fish feed data); and 2) the fish feed data in the *Trobos*⁸³ article (*Trobos* article fish feed data).⁸⁴ For this remand, as explained below, we note that there are material differences on the record for the 9th and 10th ARs regarding the level of specificity, contemporaneity, and the extent of a broad-market average for the Rukomono Affidavit data versus the *Trobos* article fish feed data. The differences in the records

⁷⁹ See *Ninth AR Final Results* at Comment 1.C; Memo to the File, from Steven Hampton, International Trade Compliance Analyst, Office V, “Tenth Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results Analysis Memorandum for the Hung Vuong Group,” dated July 2, 2014, at Attachment 1.

⁸⁰ *Id.* at Comment 1.C; and *Tenth AR Final Results* at Comment 1.C.

⁸¹ *Id.*

⁸² The Rukomono Affidavit is a response to Petitioners’ letter requesting information to the Indonesian government, specifically the DGA, which is a part of the Ministry of Marine Affairs and Fisheries of the Republic of Indonesia. The Rukomono Affidavit is signed and on Ministry of Marine Affairs and Fisheries letterhead. See *Ninth AR Final Results* at Comment IV; *Tenth AR Final Results* at Comment IV; and Petitioners’ May 12, 2014 submission at Exhibit 16.B.

⁸³ The *Trobos* article fish feed data appeared in the publicly available publication *Trobos Aqua*, which quotes the head of the Indonesian Feed Mills Association, and represents national Indonesian data for 2012. See *Ninth AR Final Results* at Comment IV; *Tenth AR Final Results* at Comment IV; and HVG’s May 12, 2014 submission at Exhibit 1.A.

⁸⁴ See *Ninth AR Final Results* at Comment IV; *Tenth AR Final Results* at Comment IV.

led us to choose the *Trobos* article fish feed data as the SV in the 9th AR, but then choose the Rukomono Affidavit data for the SV in the 10th AR.⁸⁵

In both this AR and the immediately preceding *9th AR Final Results*, the Department found that the Rukomono Affidavit fish feed data and the *Trobos* article fish feed data were publicly available and tax- and duty-exclusive.⁸⁶ Additionally, in the *9th AR Final Results*, the Department determined that the Rukomono Affidavit fish feed data that were dated from January 2014 with current listed prices were not contemporaneous with that AR (*i.e.*, POR covered August 1, 2011, through July 31, 2012).⁸⁷ Specifically, the Department made this finding based on the fact that the data were from a year and five months after the conclusion of the POR for the 9th AR.⁸⁸ In contrast, the Department found that the *Trobos* article fish feed data were contemporaneous with the POR for the 9th AR because these data covered 2012 (twelve months).⁸⁹

However, in this AR (*i.e.*, POR covered August 1, 2012, through July 31, 2013), the Department found that the Rukomono Affidavit fish feed data, which were dated from January 2014, were not contemporaneous with the POR.⁹⁰ Unlike in the *9th AR Final Results*, where the Rukomono Affidavit fish feed data were further outside the POR, here, in this AR, the Department found that the Rukomono Affidavit fish feed data fell only five months outside the POR.⁹¹ The Department also found that the *Trobos* article fish feed data were contemporaneous

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *9th AR Final Results* at Comment IV.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See *10th AR Final Results* at Comment IV.

⁹¹ *Id.*; *9th AR Final Results* at Comment V (where the Department discusses valuing rice husk with data that is a few months outside the POR).

with the POR for this AR, as the *Trobos* article fish feed data covered 2012 (twelve months).⁹²

As discussed above, the Department's practice, which has been upheld by the Court as in accordance with law, is to base its selection of the best available information for valuing an input on the totality of information, including broad-market average, specificity, and contemporaneity, and not on a single factor of the decision-making process.⁹³ Thus, the Department finds that, for these final results of redetermination, both the Rukomono Affidavit fish feed data and the *Trobos* article fish feed data should still be considered for valuing the fish feed input for this AR, as both sources either are contemporaneous or closely contemporaneous with the POR.

Next, in the 9th AR *Final Results*, the Department found that the Rukomono Affidavit fish feed data contained information from three of the five largest *pangasius* producing areas in Indonesia: Sumatera (Jambi), Java (Sukabumi), and Kalimantan (Mandiingin).⁹⁴ Unlike the *Trobos* article fish feed data, which the Department found represented national Indonesian data, in the 9th AR *Final Results*, the Department found that the Rukomono Affidavit fish feed data did not represent as much of a broad-market average, because it only represented data from three provinces from Indonesia, though these were three of the five largest *pangasius* producing provinces.⁹⁵ However, also in the 9th AR, when considering the best available information for a different input (fingerlings), the Department found that the Rukomono Affidavit contained data from three of the five largest *pangasius* producing provinces, and therefore, represented a broad-market average.⁹⁶

⁹² *Id.*

⁹³ *See Vinh Hoan Corporation vs. United States*, 49 F. Supp. 3d 1285, 1294 (CIT 2015).

⁹⁴ *See 9th AR Final Results* at Comment IV.

⁹⁵ *Id.*

⁹⁶ *Id.* at Comment III.

In this AR (10th AR), for the remand, the Department finds that the Rukomono Affidavit fish feed data continue to be data from three (Sumatera, Java, and Kalimantan) of the five largest *pangasius* provinces in Indonesia, whereas the *Trobos* article fish feed data are national data.⁹⁷ However, unlike in the 9th AR, record evidence from an Indonesian government publication, *Indonesian Aquaculture Statistics*, on the record for the 10th AR demonstrates that *pangasius* production in the three provinces covered in the Rukomono Affidavit fish feed data represented 99.8 percent of Indonesia’s total *pangasius* production in 2012.⁹⁸ While this record evidence pre-dates the Rukomono Affidavit fish feed data, the Department finds this demonstrates that the Rukomono Affidavit fish feed data, which are from these three provinces, represent the supermajority of fish feed data for Indonesia and, thus, provide as much broad-market average coverage as the *Trobos* article fish feed data that represent Indonesian national data.

Additionally, while the *Trobos* fish feed data article states that the fish feed prices are for all of Indonesia, in re-examining this source for the remand, the Department finds that the article does not specify the geographic area for where the prices were gathered and, thus, the Department cannot ascertain whether the *Trobos* article fish feed data include the provinces that produce the majority of *pangasius* production in Indonesia.⁹⁹ Thus, while the *Trobos* article fish feed data represent national data for Indonesia, the Department finds that the lack of geographic information for the key *pangasius* producing provinces demonstrates that the *Trobos* article fish feed data are not necessarily more representative of a broad-market average than the Rukomono Affidavit fish feed data. Accordingly, unlike in the 9th AR, for the remand of this AR (10th),

⁹⁷ See 10th AR Final Results at Comment IV.

⁹⁸ See Memorandum to the File, through Scot T. Fullerton, Program Manager, Office V, Enforcement & Compliance, from Paul Walker, Case Analyst, “Tenth Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Surrogate Values for the Preliminary Results,” dated July 2, 2014 at Exhibit 3 (Prelim SV Memo).

⁹⁹ See HVG’s May 12, 2014 submission at Exhibit 1.A.

Department finds that neither the Rukomono Affidavit fish feed data, nor the *Trobos* article fish feed data, are disqualified for consideration as a source for valuing the fish feed input due to not being a broad-market average.

Because in this remand redetermination, for the 10th AR, we continue to find that the Rukomono Affidavit fish feed data and the *Trobos* article fish feed data are contemporaneous or closely contemporaneous to the POR and both are representative of a broad-market average, we must now consider which of these data sources are most specific to the fish feed input. In the 9th AR, the Department found that the Rukomono Affidavit fish feed data contained *pangasius* fish feed data with the specific protein percentages, which correspond to the protein percentages consumed by the respondents in the production of the subject merchandise.¹⁰⁰ However, while the *Trobos* article fish feed data only listed that the data were for *pangasius* fish feed and did not list protein percentages, in the 9th AR, the Department found that this was sufficiently specific to the respondents' fish feed input, which was why we selected the *Trobos* article fish feed data as the best available SV for the 9th AR.¹⁰¹

In this AR, however, the record contained more detailed information regarding the specific type of fish feed input that the respondents consumed in the production of the subject merchandise. For this factor of production, record evidence indicates that the protein content of *pangasius* feed¹⁰² and the size of *pangasius* feed pellets¹⁰³ are important factors in determining the price of feed. In past cases where the Department has made determinations on aquatic feed,

¹⁰⁰ See 9th AR Final Results at Comment IV.

¹⁰¹ *Id.*

¹⁰² See Petitioners' May 12, 2014, submission at Exhibit 16-C (showing *pangasius* feed with protein contents ranging from 20-22 percent to 30-34 percent). See Petitioners' May 12, 2014 submission at Exhibit 16.C.

¹⁰³ See Petitioners' May 12, 2014, submission at Exhibit 16.B (feed pricing information for *pangasius* fingerling feed and adult *pangasius* fish feed).

we have found that protein content is an important factor in the feed price.¹⁰⁴ Specifically, the Rukomono Affidavit fish feed data are not only specific to the protein content percentages used by the respondents, including HVG, but the data are segregated by *pangasius* fingerling feed data versus *pangasius* adult fish feed data.¹⁰⁵ The Department finds that the record evidence demonstrates that the respondents, including HVG, consumed *pangasius* fingerling fish feed because HVG acknowledged on the record that it had farming operations where *pangasius* fingerlings are grown using fish feed into food-sized fish.¹⁰⁶ As such, we find that the Rukomono Affidavit fish feed data are superior to the *Trobos* article fish feed data because the *Trobos* article fish feed data, when more closely examined, do not specify the protein percentages of the *pangasius* fish feed, nor do they specify whether the data also contain fish feed for *pangasius* fingerlings and adult-sized fish, which the respondents consumed in the production of the subject merchandise for this AR (10th).¹⁰⁷ Accordingly, the Department finds that the Rukomono Affidavit fish feed data are more specific to the respondents' fish feed input than the *Trobos* article fish feed data, which is substantiated by the record evidence of this AR regarding the more specific types of fish feed (fingerling and adult-sized pellets) reported by the respondents, such as HVG, that was not on the record of the previous 9th AR. This decision aligns with a past Department determination in the remand in *Jinan Yipin*, where the Department selected a SV for garlic bulbs based on specificity to garlic size because size was "a strong determinant of the grade and price of garlic," just as protein content and type are strong

¹⁰⁴ See *China Shrimp* at Comment 10 ("Because shrimp produced in Thailand requires feed with lower protein content than feed for black tiger shrimp one would expect to see lower prices for feed where white shrimp is the primary species produced.")

¹⁰⁵ See *10th AR Final Results* at Comment IV; Petitioners' May 12, 2014, submission at Exhibit 16.B; and HVG's May 12, 2014, submission at Exhibit 1.A.

¹⁰⁶ See HVG's March 20, 2014 submission at 11. The record also shows that HVG consumes both small and larger pellet sizes, indicating that it consumes feed for both *pangasius* fingerlings and adult fish. See HVG's May 2, 2014, submission at Exhibit 1.

¹⁰⁷ See *10th AR Final Results* at Comment IV.

determinants in the price of *pangasius* feed.¹⁰⁸

Therefore, in sum for this remand redetermination, the Department continues to find for AR 10 that the Rukomono Affidavit fish feed data are the best available information for valuing the respondents' fish feed input. Specifically, because the Rukomono Affidavit fish data are the most specific to the fish feed input, represent a broad-market average, and are only five months outside of the POR, making them not significantly non-contemporaneous, we find this data source best meets the Department's SV criteria and, consequently, represents the best available information to value the respondents' *pangasius* feed input.

¹⁰⁸ See, *Fresh Garlic from the People's Republic of China: Final Results of the 2009-2010 Administrative Review of the Antidumping Duty Order*, 77 FR 34346 (June 11, 2102) and accompanying Issues and Decision Memorandum at Comment 5; *Final Results of Redetermination Pursuant to Court Remand Order in Jinan Yipin Corp., Ltd., et al. v. United States*, Court No. 06-00189, Slip Op. 09-39 (*Jinan Yipin*) at 8.

III. COMMENTS ON DRAFT RESULTS OF REDETERMINATION

The Department released the draft remand results on May 5, 2017. Interested parties submitted comments on May 19, 2017.¹⁰⁹

A. The Department's Separate Rate Test

Caseamex's Comments

- The Department's claim that only the potential for control under the *de facto* criteria is necessary to deny a company a separate rate is not an accurate description of the separate rate test, nor the Department's prior practice.¹¹⁰
- The *de facto* criteria of the separate rate test is the only part at issue here and it comprises four components: 1) whether 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.¹¹¹ It is notable that the absence of the term "potential" from the separate rate test is significant and intentional because a potential for control analysis is a much different and lower standard than an actual control analysis.¹¹²
- Specifically, the current separate rate test was originally developed in the 1990's when state ownership was determinative for whether a company qualified for a separate rate. However, this policy was expressly changed by the Department and companies with significant state

¹⁰⁹ See Petitioners,' Caseamex's, and HVG *et al.*'s Draft Remand Comments, dated May 19, 2017.

¹¹⁰ *Id.* at 2-3.

¹¹¹ *Id.* at 3.

¹¹² *Id.* at 4.

ownership since then have qualified for separate rate status.¹¹³ If the Department now concludes that majority state ownership always precludes a finding of *de facto* autonomy, that determination needs to be based on some degree of identifiable evidence for actual control.¹¹⁴

- The Department has not changed its policy of requiring actual control where there is only minority ownership or, where the government shareholder abdicated all rights under its shares to an individual. In this case, where the government had no ownership or shareholder rights during the POR, and there is no evidentiary support for any control during the POR, the Department cannot conclude there is actual, or even a potential for, government control over export activities.¹¹⁵
- The Department's focus on the potential to exert influence over a company's operations is misplaced and inconsistent with the Department's separate rate test. Moreover, none of the precedent that the Department relies on provides support for the conclusion that a company's separate rate status can be denied merely because minority ownership creates a potential for control.¹¹⁶

Petitioners' Comments

- The Department complied with the Court's order and fully explained its determination that Caseamex is not eligible for a separate rate.¹¹⁷

Department's Position: We disagree with Caseamex on what constitutes our separate rates practice. While Caseamex is correct that the Department's separate rate test was developed in

¹¹³ *Id.* at 4-5.

¹¹⁴ *Id.* at 6.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 9-12.

¹¹⁷ *See* Petitioners' Comments at 2.

the 1990s, specifically under a test established in *Sparklers*,¹¹⁸ and further developed in *Silicon Carbide*,¹¹⁹ Caseamex ignores the fact that the Department has continued to evaluate its practice in light of our determinations in the Diamond Sawblades proceedings.¹²⁰ Above, we extensively lay out the Department’s separate rate practice, and list several cases where a respondent was majority state owned,¹²¹ and even minority state owned,¹²² and, yet, was denied a separate rate, although Caseamex claims that companies with significant state ownership qualify for separate rate status.

Caseamex asserts that the Department’s practice to always deny a separate rate because of majority state ownership is tied to some degree of identifiable evidence that indicates actual control. We disagree. As the CIT held in *Advanced Technology*, majority ownership by a government entity, either directly or indirectly, rules out a respondent’s ability to demonstrate an absence of *de facto* control.¹²³ Accordingly, in recent proceedings, we have concluded that where a government entity holds a majority equity ownership, either directly or indirectly, in the respondent exporter, the record evidence reflects that the respondent is not eligible for a separate rate.¹²⁴

¹¹⁸ See *Sparklers*.

¹¹⁹ See *Silicon Carbide*.

¹²⁰ See, e.g., *Diamond Sawblades and Parts Thereof from the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 77098 (December 20, 2013) and accompanying Preliminary Decision Memo at 7, unchanged in *Diamond Sawblades and Parts Thereof from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 35723 (June 24, 2014) and accompanying Issues and Decision Memorandum at Comment 1.

¹²¹ See *Advanced Tech I*, 885 F. Supp. 2d 1343 (CIT 2012).

¹²² See *Truck & Bus Tires* at Comment 1; *Containers* at Comment 10.

¹²³ See *Jiangsu 2015*, 121 F. Supp. 3d at 1266 (citing to *Advanced Tech I*), aff’d in *Advanced Tech II*, aff’d in *Advanced Tech III* (“: “Specifically, as a result of litigation challenging Commerce’s separate rate determinations in the diamond sawblades proceedings, Commerce has clarified its practice with regard to evaluating NME companies’ *de facto* independence from government control. This revised practice, which was sustained by this Court and subsequently affirmed by the Court of Appeals, holds that ‘where a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter {or producer},’ such majority ownership holding ‘in and of itself’ precludes a finding of *de facto* autonomy”).”).

¹²⁴ See *Advanced Tech I* at 1343; *Truck & Bus Tires* at Comment 2 (where the Department found that a respondent was ineligible for a separate rate due to majority government ownership).

As we explained above, although in *Advanced Technology* the respondent was majority owned by a government entity, in other cases, consistent with the facts in *Jiangsu 2015*, the Department has examined the totality of the circumstances where a respondent is not majority owned by a government entity, and made a reasonable inference that the respondent does not control its export activities, as is the case here. For example, in *Truck & Bus Tires*, we found that the top four shareholders of a respondent were SASACs.¹²⁵ These shareholders did not own the majority of shares, as they accounted for 49.06 percent of the respondent's ownership.¹²⁶ However, the Department found that, despite minority ownership, record evidence indicated that the respondent was controlled by a SOE, and we denied the respondent a separate rate.¹²⁷

In another example, *Containers*, we found that a respondent was indirectly controlled by a SOE, despite owning a minority of shares, and denied that company a separate rate.¹²⁸ In that case, two minority shareholders owned a combined 48.2 percent of the respondent, but, in turn, were 100-percent owned by a PRC SASAC.¹²⁹ We examined the totality of the circumstances in *Containers* and made the reasonable inference that a PRC SASAC, through the minority shareholders it owned, had the ability to exercise control over important management organizations, such as the board of directors, which has the authority to appoint managers that controlled the operations of the respondent.¹³⁰ We find this case to be similar to *Containers* in that record evidence indicates that the [] appointed the Board of Directors, which controls Caseamex, and that the General Manager was an employee of the [] at Cataco, who was later appointed as General Manager of Caseamex.

¹²⁵ See *Truck & Bus Tires* at Comment 1.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See *Containers* at Comment 10.

¹²⁹ *Id.*

¹³⁰ *Id.*

In its comments on the draft remand results, Caseamex takes issue with the inclusion of the “potential” for government control in the separate rates test. As explained above, we respectfully disagree that the Department’s “practice does not require a respondent to rebut the potential for government control, but rather actual control by the government entity.”¹³¹ The concept of the potential for control was addressed by the CAFC in the separate rates analysis in *Advanced Tech*, where the Court held:

“{G}overnmental control” in the context of the separate rate test appears to be a fuzzy concept, at least to this court, since a “degree” of it can obviously be traced from the controlling shareholder, to the board, to the general manager, and so on along the chain to “day-to-day decisions of export operations,” including terms, financing, and inputs into finished product for export...AT&M itself identifies its “controlling shareholder” as CISRI {owned by a SASAC} in its financial statements and the power to veto nomination does not equilibrate the power of control over nomination (footnotes omitted).¹³²

As we explained in *Tetra*, “in recent proceedings, we concluded that where a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter, the majority ownership holding in and of itself means that the government exercises, or has the potential to exercise, control over the company’s operations generally.”¹³³ We also explained that “the potential to exercise government control may include control over, for example, the selection of management, a key factor in determining whether a company has sufficient independence in its export activities to merit a separate rate.”¹³⁴ Consistent with normal business practices, we would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company, including the selection

¹³¹ See *Advanced Tech II*, 938 F. Supp. 2d at 1342 (CIT 2013),, citing *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People’s Republic of China*, 71 FR 29303 (May 22, 2006) and accompanying Issues and Decision Memorandum; “Final Results of Redetermination Pursuant to Remand Order for Diamond Sawblades and Parts Thereof from the People’s Republic of China,” dated May 6, 2013 (Diamond Sawblades Remand) at 7 and 14.

¹³² See *Advanced Tech III*, Case No. 2014-1154 at 1351-1357.

¹³³ See *Tetra* at Comment 1.

¹³⁴ *Id.*

of management and the profitability of the company.¹³⁵ In addition, in other cases, after an examination of the facts of the case, we have examined whether the government may be able to exercise, or have the potential to exercise, control of a company's general operations through minority government ownership.¹³⁶ Thus, Caseamex's characterization of our practice is inaccurate.

B. Caseamex's Eligibility for a Separate Rate

Caseamex's Comments

- Contrary to the Department's findings, the record contains affirmative statements from the [] and [] that confirm the Vietnamese government separated itself from the operations of Caseamex.¹³⁷ The Department ignored this evidence and failed to discuss the affidavits provided by Caseamex that definitively establish that the [] had no control, nor the potential to control, Caseamex during the POR.¹³⁸
- The Department erroneously concludes that [] controlled [] percent of shares for Caseamex during the POR but, as explained on the record, [] and the [] held a combined total of [] percent for shares, which made them minority owners during the POR.¹³⁹ The POR-specific facts in this case demonstrate that Caseamex was not controlled by the government, because record evidence shows that [] was the largest shareholder and the [] assigned its shareholder rights to []. Thus, there is neither majority nor minority ownership of Caseamex by the Vietnamese government during the POR.¹⁴⁰

¹³⁵ *Id.*

¹³⁶ *See, e.g., Truck & Bus Tires* at Comment 1.

¹³⁷ *See* Caseamex's Comments at 8.

¹³⁸ *Id.* at 16.

¹³⁹ *Id.* at 8.

¹⁴⁰ *Id.* at 14-6.

- The Department’s newly proffered “beholden” theory, which focuses on events occurring six years prior to the POR, is irrelevant to the POR-specific separate rate test.¹⁴¹ The Department’s “beholden” theory is based entirely on speculation and unsupported by record evidence. Specifically, there is no record evidence that [] was the General Director of Cataco, or that the [] itself nominated [] to be the General Director of Caseamex. Indeed, it is unreasonable to conclude that, after the privatization of Cataco, the [] continued to attempt to wield control over this company.¹⁴² Additionally, it is unreasonable to conclude that [] is beholden to the [] simply because it may have helped him obtain a job with Caseamex, which is based solely on speculation.¹⁴³ Assuming *arguendo* that the [] selected [] to be the General Director at the inception of Caseamex in 2006, [] could only be “beholden” to the [] while the [] was a shareholder that actually retained its shareholder rights.¹⁴⁴
- The reason why the record is silent regarding the events surrounding the 2006 privatization of Cataco into Caseamex is because the separate rate application only focuses on events that occurred during the POR.¹⁴⁵ Despite providing extensive affirmative evidence that the Court already found sufficient to rebut the presumption of government control, the Department now says that this information is not sufficient and proffers a new theory on how Caseamex is controlled by the government through speculative appointments and actions that pre-dated

¹⁴¹ *Id.* at 12.

¹⁴² *Id.* at 13.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 19.

¹⁴⁵ *Id.* at 14.

the POR. However, Caseamex was never provided the opportunity to submit factual information regarding this new theory and events that predated the POR.¹⁴⁶

Petitioners' Comments

- The Department complied with the Court's order and fully explained its determination that Caseamex is not eligible for a separate rate.¹⁴⁷

Department's Position: We disagree with Caseamex that the affidavits it provided definitively establish that the [] had no control, nor the potential to control, Caseamex during the POR. Due to concerns the Department had with Caseamex's separate rate application, we issued three supplemental questionnaires to Caseamex, in order to allow it to complete the administrative record with respect to its eligibility for a separate rate.¹⁴⁸ As the Court has noted, the respondent bears the burden of creating a complete and accurate administrative record.¹⁴⁹ Moreover, as the CAFC affirmed in *Sigma*, the burden is on NME exporters to demonstrate an absence of government control with respect to eligibility for a separate rate.¹⁵⁰ In response to certain of the Department's questions, Caseamex submitted six affidavits.¹⁵¹ We find these affidavits to be unpersuasive with regard to Caseamex's assertion that they provide "substantial evidence that the [] played no role in the selection of management at Caseamex. We examine each of these affidavits below.

The first affidavit is from [], the [

].¹⁵² Although the translation is dated February 10, 2014, we note the

¹⁴⁶ *Id.* at 18.

¹⁴⁷ See Petitioners' Comments at 2.

¹⁴⁸ See the Department's letters dated, January 29, 2013, March 23, 2014, and May 27, 2014.

¹⁴⁹ See *Rhone Poulence, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

¹⁵⁰ See *Sigma*, 117 F.3d at 1405-06 (Fed. Cir. 1997)..

¹⁵¹ See Caseamex's February 19, 2014, submission at Exhibit S-1 (affidavit 1); Caseamex's April 2, 2014, submission at Exhibits S2-1, S2-2 & S2-3 (affidavits 2, 3 & 4); Caseamex's June 6, 2014, submission at Exhibits S3-4 & S3-9 (affidavits 5 & 6).

¹⁵² See Caseamex's February 19, 2014, submission at Exhibit S-1.

original document is not dated.¹⁵³ Furthermore, the document lists no effective dates, and the date of the translated version is outside the POR.¹⁵⁴ Moreover, it is unclear to the Department the relationship, if any, between this document and Caseamex. To be more specific, as noted above, Caseamex was founded by the [] from an SOE it owned, Cataco.¹⁵⁵ Caseamex submitted several documents from the [] in connection with its founding, and the letterhead of each indicates the documents were generated by the [] in the [].¹⁵⁶ This affidavit, Caseamex argues, is proof that the [] played no role in the selection of its management. However, it is from the [] which, according to its letterhead, is a part of the [].¹⁵⁷

As Vietnam is an NME, our presumption is that there is some relationship between the [] and the government. However, the record is unclear regarding the relationship between the [], which is the entity referred to as a shareholder in all source documents for Caseamex, and the [] that is referred to in this affidavit. The record indicates that these are two separate entities, because copies of the documents generated by the [] concerning the founding of Caseamex were sent to various entities, one of which was the [], and one of which was the [].¹⁵⁸ Moreover, as noted below, when discussing affidavit six, [] admits that these are two separate entities.¹⁵⁹

The second affidavit is from [], the []

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See Caseamex's June 6, 2014, submission at Exhibit S3-1; see also *Vietnam Shrimp* at Comment 7.

¹⁵⁶ See Caseamex's June 6, 2014, submission at Exhibit S3-1.

¹⁵⁷ See Caseamex's February 19, 2014, submission at Exhibit S-1

¹⁵⁸ See, e.g., Caseamex's June 6, 2014, submission at Exhibit S3-1 "[]."

¹⁵⁹ *Id.* at Exhibit S3-9.

].¹⁶⁰ This affidavit appears to be identical to the first affidavit, except that it is now dated, albeit after the POR, but contains no effective dates.¹⁶¹ Caseamex stated in its separate rate application: “One minority shareholder entity is a local government authority, [].” Again, the record is devoid of any information concerning the relationship between the local [] and the local government, nor does Caseamex explain why it would approach the local [] for such a document rather than the [], the entity which holds Caseamex shares.¹⁶² Although Caseamex argues the Department should only examine POR information in determining Caseamex’s eligibility for a separate rate, as stated in this remand, we have examined POR and pre-POR information to determine the role the [] played in the role of selecting Caseamex’s board of directors and management. The citation to this affidavit, and as discussed below most other affidavits submitted by Caseamex, is perplexing, as these affidavits post-date the POR and, therefore, do not cover the POR or any time before it. As such, the relevance of these types of affidavits to the discussion of Caseamex’s separate rate analysis is unclear.

This submission also contains the third affidavit, an affidavit from [].¹⁶³ This affidavit is dated April 1, 2014.¹⁶⁴ The affidavit states that the [] appointed [] as its []

¹⁶⁰ See Caseamex’s April 2, 2014, submission at Exhibit S2-1.

¹⁶¹ *Id.*

¹⁶² In its last submission, Caseamex explains that the [] is the representative office which directly administers investment policy on behalf of the [] and advises the [] on investment projects in the Can Tho City area, and acts as the entity which represents the local government’s equity interests in specific industries or companies. However, Caseamex offered no explanation as to the role of the local [] in Caseamex’s affairs. See Caseamex’s June 6, 2014 submission at 8.

¹⁶³ *Id.* at Exhibit S2-2.

¹⁶⁴ *Id.*

] and that the [

] ¹⁶⁵ This affidavit contains no effective dates, and is dated after the POR.

The same submission contains the fourth affidavit, an affidavit from [], the []. ¹⁶⁶ This is the only affidavit on the record concerning this issue which is dated during the POR. ¹⁶⁷ This affidavit was also produced by the local [] and references a source document, [

[]. It is unclear what this document is, or the entity which authored this document, as it is not on the record of this review, although it does predate the affidavit. ¹⁶⁸ The affidavit notes that [] was nominated to represent the government's shares in Caseamex. ¹⁶⁹ Again, the record is devoid of any information concerning the relationship between the local [] and the local government, and Caseamex does not explain why it would approach the local [] for such a document rather than the [], the entity which created Caseamex and holds its shares.

Moreover, this document does not discuss the [] role, if any, at Caseamex.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at Exhibit S2-3.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

The record contains a fifth affidavit, again from [], the [].¹⁷⁰ The document is dated June 5, 2014, which is again outside the POR, and lists no effective dates.¹⁷¹ This affidavit repeatedly claims throughout that the holder of Caseamex shares is the local [] and not the [].¹⁷² However, as noted above, the Caseamex inception documents indicate that the [] and local party are two separate entities.¹⁷³ Moreover, the Caseamex inception documents repeatedly discuss the shares being held by the government, *i.e.*, “[].”¹⁷⁴ Moreover, Caseamex stated in its separate rate application that one “minority shareholder entity is a local government authority, [],” it does not state that the minority shareholder entity is the local []. We find this affidavit contains information which directly contradicts other record information, *i.e.*, that the [] holds shares in Caseamex, not the local [], information Caseamex has asserted throughout this proceeding in its narrative response and well as source documents.

The last, and sixth, affidavit is from [] and is dated June 5, 2014, and although this post-dates the POR, the affidavit indicates that [] was not affiliated with the [] or local [] [], thus, making the statements contained in this affidavit effective during the POR.¹⁷⁵ This is only the second affidavit (the other being affidavit four) which appears to represent information covering at least a part of the POR, or pre-POR period. However, [] statement is directly contradicted by other record evidence

¹⁷⁰ See Caseamex’s June 6, 2014, submission at Exhibit S3-4.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See, *e.g.*, Caseamex’s June 6, 2014, submission at Exhibit S3-1 “[].”

¹⁷⁴ *Id.* at “[].”

¹⁷⁵ *Id.* at Exhibit S3-9.

indicating [] worked at Cataco, a SOE, and was, therefore, an employee of the [].¹⁷⁶ Because this affidavit contains conflicting information, we afford it little weight in our separate rate analysis.

In sum, with regard to the affidavits placed on the record by Caseamex, the record contains no affirmative statements from the [] that confirm the Vietnamese government separated itself from the operations of Caseamex because the record contains no affidavits from the [] whatsoever. Furthermore, in examining the record, including the three supplemental responses submitted by Caseamex regarding its claim to a separate rate, we find that Caseamex consistently referred to the founding entity to be the []. It is only now in response to our draft results of redetermination that Caseamex introduces into the discussion affidavits from a separate entity, the []. Again, we reiterate that it is incumbent upon the respondent to demonstrate its eligibility for a separate rate. The affidavits from the [] do nothing to evince this; if anything, they only muddle the record regarding Caseamex's claim to a separate rate when, after three supplemental responses, we cannot ascertain the relationship between these two separate entities. Lastly, the two affidavits from [] either do not cover the POR or pre-POR period where the [] selected Caseamex's managers, or contain conflicting information, making the affidavits unreliable. For these reasons, and the reasons stated above, we find Caseamex's arguments concerning these affidavits to be unpersuasive.

We disagree with Caseamex's contention that [] did not control [] percent of shares for Caseamex during the POR. As explained above, Caseamex did not provide a

¹⁷⁶ See Caseamex's June 6, 2014, submission at Exhibit S3-1.

complete list of shareholders during the POR, but indicated [], the [], and the largest [] shareholder's shares remained unchanged, and by November 2014 (shortly after the POR), Caseamex's top shareholders were: [] percent, the [] percent, and [] percent.¹⁷⁷ Also, as explained above, [] controls the day-to-day operations of the company, and thus, his employees are beholden to him for their employment. Therefore, when combining the shares of the [], [], and [] employees, he controls approximately [] percent of Caseamex's shares.

While Caseamex argues the Department has created a new "beholden theory" with regard to the separate test for this review, we note that, in fact, the CIT addressed this very issue in *Advanced Tech I*. In *Advanced Tech I*, the Court found that the managers of the company should be presumed "to be beholden to the board that controls their pay, in particular to the chairman of the board as the *de facto* company head."¹⁷⁸ [] is Chairman of the Board and, thus, we find the managers of Caseamex are beholden to him. [] is also the General Manager and controls the day-to-day operations of the company and, therefore, we find that the employees of Caseamex are beholden to him. It is for this reason, it is highly unlikely Caseamex employees owning shares in the company would vote against [] wishes, as he has the ability to hire and fire them and decide their pay. It is for this reason we evaluated the cumulative shares held by [], the [] and Caseamex employees for purposes the draft remand results.

Moreover, we have addressed to this issue in other cases with respect to the separate rate test. For example, in *SSSS*, we denied a company a separate rate because the owner of the

¹⁷⁷ See Caseamex's June 6, 2014, submission at Exhibit S3-7.

¹⁷⁸ See *Advanced Tech I*, 885 F.2d at 1359.

respondent was a SOE.¹⁷⁹ In that case, we found that the management was beholden to the Board, which was controlled by a SOE.¹⁸⁰ In another example, *Tetra*, we denied a company a separate rate because the owner of the respondent was in turn controlled by a SOE.¹⁸¹ In that case, we found that the management was beholden to a company controlled by a SOE.¹⁸² In *Tetra* there was a degree of separation between the SOE and the respondent, however, since the SOE controlled the Board of Directors of the company which owned the respondents.

We find that the evidence on this record of the potential control of the respondent's export activities is more persuasive than the evidence in *Tetra*, because unlike that case, here (a) the [] directly owns shares in the respondent, (b) the [] appointed the General Director as its agent, (c) the [] appointed the Board of Directors at the inception of the company, and (d) [] was an employee of the [].

We disagree with Caseamex's assertions that its export activities are not controlled by the government through speculative appointments and actions that pre-dated the POR, and that Caseamex was never provided the opportunity to submit factual information regarding events that predated the POR. In the draft remand results, which were provided to Casemex for comment, we provided an extensive analysis of documents submitted by Caseamex concerning the inception of the company.¹⁸³ It is factually incorrect for Caseamex to argue that it was not

¹⁷⁹ See SSSS at Comment 5 ("Similarly, we find that Taigang's management is beholden to its board, which is controlled by TISCO, which is wholly state-owned.")

¹⁸⁰ *Id.*

¹⁸¹ See *Tetra* at Comment 1 ("Similarly, we find that Quhua's and Lianzhou's management is beholden to Zhejiang Juhua, the sole owner of each company, whose board is controlled by Juhua Group, which is wholly state-owned." (internal citations omitted)).

¹⁸² *Id.*

¹⁸³ See Letter to All Interested Parties from Paul Walker, Program Manager, Office V, "Re: Draft Remand Determination in the 10th Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam," dated May 5, 2017.

able to provide factual information regarding events that predate the POR when the Department's analysis is based largely on the documents submitted by Caseamex surrounding events that predate the POR. Again, we note that the CAFC has held that it is the respondent, and not the Department, that bears the burden of creating a complete and accurate administrative record.¹⁸⁴ Furthermore, the CAFC has also held that with regard to separate rates, the burden is on NME exporters to demonstrate an absence of government control with respect to eligibility for a separate rate.¹⁸⁵ In this remand redetermination, we have assessed the administrative record Caseamex has completed, *i.e.*, the information it provided to demonstrate an absence of government control, and find that:

- Cataco was established as a SOE, fully owned by the [].¹⁸⁶
- In [], the [] made the decision to divest its shares of Cataco, and form a joint stock company, Caseamex.¹⁸⁷
- The [] approved all actions taken to create Caseamex.¹⁸⁸
- Cataco and Caseamex had/have the same director.¹⁸⁹ Further supporting the notion that [], at the very least, was an employee of Cataco and, hence, the [], is record evidence that [] Cataco employees purchasing shares of Caseamex stock remained employed by Caseamex after the sale.¹⁹⁰
- The [] determined the shareholder categories of Caseamex's stock¹⁹¹ and retained [] percent of Caseamex's shares for itself, making the [] the [] shareholder when the Board of Directors was created.¹⁹²
- The Board of Directors was created before June 20, 2006, because the Board met on that date to determine who should be appointed as managers of Caseamex.¹⁹³

¹⁸⁴ See *Rhone Poulence, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

¹⁸⁵ See *Sigma*, 117 F.3d at 1405-06 (Fed. Cir. 1997)..

¹⁸⁶ See Caseamex's June 6, 2014, submission at Exhibit S3-1; see also *Vietnam Shrimp* at Comment 7.

¹⁸⁷ *Id.*

¹⁸⁸ See Caseamex's June 6, 2014, submission at Exhibit S3-1.

¹⁸⁹ *Id.* The [] Decision [] states: "The Director of Cataco and of {Caseamex} has the responsibility of running and managing the company until transfer of all shares and labor to {Caseamex} and the responsibility of preparing the Income Statement of the Company under the current Law." This indicates that the Director of Cataco and Caseamex are the same individual, as the sentences do not reference the "directors" of these two companies, but the "director" and is not unfounded speculation as Casemex asserts.

¹⁹⁰ See Caseamex's June 6, 2013, submission at Exhibit S3-1. The total number of employees at the time of divestment of the [] were [], and the total number of employees transferring to Caseamex were [].

¹⁹¹ *Id.* at Decision [].

¹⁹² *Id.*

¹⁹³ See Caseamex's December 17, 2013, submission at Exhibit 13.A.

- Caseamex stated that the process of selling Cataco’s shares took several months to complete and “a list of all public shareholders as of the completion of the divestiture and conversion to a public joint stock company in 2006 is provided in Exhibit S3-2,” which we find is dated June 22, 2006, after the selection of the board.¹⁹⁴
- Record evidence makes clear that the [] played an important role in determining the managers of the company, because the appointment letters note that each appointment was based, in part, on the “[],”¹⁹⁵ and the [] was the largest shareholder at that time.¹⁹⁶

In sum, these facts lead us to conclude that the [] selected itself to be the largest shareholder, exercised its rights as the largest shareholder in selecting the Board of Directors and management of Caseamex, and that [] is beholden to the [

[] for his employment, first at Cataco, and then at Caseamex. Based on the above, we find it is reasonable to infer that the [] exerted influence over the appointment of the Board of Directors and managers of the company, whether it be directly or indirectly. Consistent with the facts in *Jiangsu 2015*, we have examined the totality of the circumstances for these remand results of redetermination and have concluded from record evidence that Caseamex was not autonomous from the government in the selection of its management.¹⁹⁷

Lastly, we disagree with Caseamex when it argues that the separate rate application focuses exclusively on events that occurred during the POR. While the separate rate application generally requests POI/POR information, certain information that pre-dates the POR is also requested.¹⁹⁸ Moreover, the Department issued a series of supplemental questionnaires because

¹⁹⁴ See Caseamex’s June 6, 2014, submission at 2 and Exhibit S3-2.

¹⁹⁵ We found in reviewing the record of the 10th AR that CASEAMEX did not provide the minutes of this [].

¹⁹⁶ See Caseamex’s December 17, 2013, submission at Exhibit 13 (appointment letters indicating the Management Board selected managers on June 20, 2006); Caseamex’s June 6, 2014 submission at Exhibit S3-2 (which provides the “List of All Shareholders in 2006 After Divestiture,” dated June 22, 2006) and Exhibit S3-1 (which indicates the [] retained [] percent of the shares for itself, dated []).

¹⁹⁷ See *Jiangsu 2015*, 121 F. Supp. 3d at 1266.

¹⁹⁸ For example, the separate rate application requests: the date on which the business license authority last renewed the business license/registration documents; the date on which the business license authority issued the export

there were deficiencies in Caseamex's separate rate application, and some of those deficiencies concerned the pre-POR information supplied by Caseamex.

A. Fish Feed Surrogate Value

HVG et al.'s Comments

- In the draft remand results, the Department found that the Rukomono Affidavit fish feed data and the *Trobos* article fish feed data were equal for SV selection because: 1) both were from the primary surrogate country; 2) publicly available; 3) tax- and duty-exclusive; 4) broad market average; and 5) specific to the input.¹⁹⁹
- While the Department found in the draft remand results that the Rukomono Affidavit fish feed data, in the end, were the best available information, due to better specificity to the fish feed input, the Department should provide further explanation for the final results of redetermination.²⁰⁰
- Specifically, the Department should address the following questions: 1) Why is the Rukomono affidavit equally contemporaneous with the POR when the Rukomono affidavit falls outside the POR and the *Trobos* article is inside the POR?; 2) In what other cases has the Department used the phrase "closely contemporaneous" to deem a SV source actually contemporaneous where there was other, actually contemporaneous data on the record?; 3) Please explain why, in the 9th AR, the IAS data that were also on the record, in the 10th AR, did not provide justification for the Department to find the Rukomono Affidavit to meet the

certificate; the export certificate; capital verification reports; articles of incorporation/articles of association; whether the top ten individual owners of the intermediate and ultimate shareholder entities held office at any level of the Vietnam government or agencies during the past three years; evidence of independence in the selection of management from the Vietnam government such as appointment letters, director meeting minutes and company-issued resolutions/notifications; the names of each manager and the position held for the three years prior to working at the respondent; whether any managers or board members worked for the government, at any level, or any government entities, in the past three years, *etc.* See, generally, Caseamex's December 17, 2103, submission.

¹⁹⁹ See HVG et al.'s Comments at 2.

²⁰⁰ *Id.* at 3.

broad-market average criteria.; and 4) What factual information on the record changed between the preliminary and final results of the 10th AR that justified the Department switching the SV source for fish feed from the *Trobos* article to the Rukomono Affidavit?²⁰¹

Petitioners' Comments

- The Department complied with the Court's order and explained why it concluded that the Rukomono Affidavit fish feed data represent the best available information for valuing fish feed.²⁰²

Department's Position: The Department disagrees with HVG *et al.* that the Rukomono Affidavit fish feed data are not the best available information for valuing the fish feed input that is subject to this remand. As discussed above, the two sources for fish feed that we examined for surrogate valuation purposes in this proceeding (*10th AR Final Results*) was the Rukomono Affidavit fish feed data and the *Trobos* Article fish feed data. No interested party presented arguments disputing that either the Rukomono Affidavit fish feed data or the *Trobos* Article fish feed data should not be considered, since both sources are from the primary surrogate country, Indonesia, which the Court sustained in its decision on this proceeding.²⁰³ Additionally, no interested parties presented arguments disputing that the Rukomono Affidavit fish feed data or the *Trobos* Article fish feed data are publicly available and tax- and duty-exclusive.²⁰⁴

However, HVG *et al.*'s raises arguments regarding our finding that both the Rukomono Affidavit fish feed data and the *Trobos* Article fish feed data were contemporaneous with the POR of the *10th AR Final Results*.²⁰⁵ Specifically, HVG *et al.* requests that we explain why the

²⁰¹ See HVG *et al.*'s Comments at 3.

²⁰² See Petitioners' Comments at 2.

²⁰³ See *An Giang Fisheries* at 4; *Petitioners' Comments*; and HVG *et al.*'s Comments.

²⁰⁴ See *10th AR Final Results* at Comment IV; *Petitioners' Comments*; and HVG *et al.*'s Comments.

²⁰⁵ See *10th AR Final Results* at Comment IV.

Rukomono Affidavit fish feed data are equally contemporaneous with the POR, as the *Trobos* Article fish feed data, whereas the Rukomono Affidavit fish feed data fall outside the POR.²⁰⁶ Additionally, HVG *et al.* also requests that we identify other cases where we found a surrogate value to be closely contemporaneous when there was another surrogate value on the record for consideration.²⁰⁷

As an initial matter, the Department finds that HVG *et al.* did not provide any support, either based on the administrative record or relevant legal precedent or Department practice, to support its argument that a surrogate value that falls outside the POR (*i.e.*, twelve months) by just five months should be disregarded solely based on this fact.²⁰⁸ As discussed above, the Department recognized that the Rukomono Affidavit fish feed data were not contemporaneous with the POR, but found that this was outweighed by their superior specificity in terms of protein content and fish feed size, given the variations in value between adult fish feed and fingerling fish feed demonstrated in the record evidence. Instead, HVG *et al.* only raised additional questions that it requested that the Department address in the context of its response to Court for why the Rukomono Affidavit fish feed data are the best available information for valuing fish feed in the 10th AR.²⁰⁹

As mentioned above, unlike in the 9th AR *Final Results*, where the Rukomono Affidavit fish feed data were a year and five months outside the POR (August 1, 2011, through July 31, 2012), in this proceeding (*10th AR Final Results*), the Rukomono Affidavit fish feed data fell only five months outside the POR (August 1, 2012, through July 31, 2013). Accordingly, it is clear the records of the 9th and 10th ARs are different for determining whether the Rukomono

²⁰⁶ See HVG *et al.*'s Comments at 3.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

Affidavit fish feed data are contemporaneous due to the difference in how far outside the POR the Rukomono Affidavit fish feed data fall, which are dated from January 2014.²¹⁰ So while it was appropriate to find the Rukomono Affidavit fish feed data were significantly outside the POR and, thus, it was not appropriate to find that specificity outweighed this fact in the 9th AR and select the *Trobos* Article fish feed data for that reason, this does not hold true for the 10th AR. Specifically, while the Rukomono Affidavit fish feed data are not contemporaneous with the POR, they only fall outside the POR by five months and, thus, this does not render them unusable. Moreover, as discussed further below, the Rukomono Affidavit fish feed data better satisfy the SV criterion, *i.e.*, specificity.²¹¹ Thus, the fact that they are non-contemporaneous by only five months does not outweigh the advantages they offer in terms of specificity (and any of the other factors). This follows CIT precedent, where the Court noted that it was not appropriate to disregard from consideration a possible source solely because that source falls slightly outside the period being examined.^{212, 213}

Such a conclusion is consistent with the CIT's holding in *Hebei Metals*, in which the Court held that it was not appropriate for the Department in another proceeding to disregard from consideration a possible source solely based on contemporaneity because that source fell a few months outside the period being examined.²¹⁴ Likewise, it is reasonable for the Department to conclude that, for the 10th AR, the *Trobos* Article fish feed data, which are contemporaneous

²¹⁰ See 10th AR Final Results at Comment IV; 9th AR Final Results at Comment IV.

²¹¹ *Id.*

²¹² See *Hebei Metals & Minerals Import & Export Corporation, et al. v. United States*, 366 F. Supp. 2d 1264, 1275 (CIT 2005) (where the Court noted "... three months of contemporaneity is not a compelling factor where the alternative data is only a year-and-a-half distant from the POI.") (*Hebei Metals*).

²¹³ *Id.* (where the Court stated "contemporaneity to be insufficient to explain why an import price is the best available information.").

²¹⁴ See *Hebei Metals & Minerals Import & Export Corporation, et al. v. United States*, 366 F. Supp. 2d 1264, 1275 (CIT 2005) (where the Court held "... three months of contemporaneity is not a compelling factor where the alternative data is only a year-and-a-half distant from the POI.") (*Hebei Metals*).

with the POR, and the Rukomono Affidavit fish feed data, which are closely contemporaneous with the POR, should both still be considered for surrogate valuation purposes. Such a conclusion is consistent with our practice of not disregarding a potential source based solely on contemporaneity.²¹⁵

Accordingly, as explained above, the next criterion that the Department considered for determining whether the Rukomono Affidavit fish feed data or the *Trobos* Article feed data were the best available information for surrogate valuation purposes is whether these sources are a broad-market average in the 10th AR for this remand. As discussed above, we continue to find that the Rukomono Affidavit fish feed data represent a broad-market average, because the Rukomono Affidavit fish feed data represent data from three (Sumatera, Java, and Kalimantan) of the five largest *pangasius* production provinces in Indonesia.²¹⁶ Moreover, there is record evidence from an Indonesian government publication, *Indonesian Aquaculture Statistics*, on the record for the 10th AR demonstrating that *pangasius* production in the three provinces covered in the Rukomono Affidavit fish feed data represented 99.8 percent of Indonesia's total *pangasius* production in 2012.²¹⁷

HVG *et al.* takes issue with this determination and question why the *Indonesian Aquaculture Statistics*, which were on the record of the 9th AR, did not justify the Department finding the Rukomono Affidavit fish feed data to be a broad-market average in the 9th AR *Final Results*.²¹⁸ As a preliminary matter, we note that the Department conducts each review based on

²¹⁵ *Id.* (where the Court held that “contemporaneity” alone is “insufficient to explain why an import price is the best available information.”).

²¹⁶ See 10th AR *Final Results* at Comment IV.

²¹⁷ See Memorandum to the File through Scot T. Fullerton, Program Manager, Office V, Enforcement & Compliance, from Paul Walker, Case Analyst, “Tenth Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Surrogate Values for the Preliminary Results,” dated July 2, 2014 at Exhibit 3 (Prelim SV Memo).

²¹⁸ See 9th AR *Final Results* at Comment IV.

the evidence and arguments before it. As a result, record evidence on similar issues in different proceedings can lead the Department to make dissimilar decisions based on the facts/record evidence presented to the Department on a case-by-case basis.²¹⁹ HVG *et al.* questions why the *Indonesian Aquaculture Statistics* publication did not lead the Department to finding the Rukomono Affidavit fish feed data to being a broad-market average in the 9th AR. The answer is simple -- the Department finds that the facts were different in the 9th AR *Final Results*.²²⁰ Specifically, the *Indonesian Aquaculture Statistics* publication was on the record of the 9th AR, but the Department's review of the 9th AR *Final Results* shows that there was no mention that the *Indonesian Aquaculture Statistics* publication indicated that the three provinces where the Rukomono Affidavit fish feed data represented 99.8 percent of Indonesia's total *pangasius* production.²²¹ Because this key fact was not on the record of the 9th AR *Final Results*, unlike in the 10th AR *Final Results*, the Department did not know that the Rukomono Affidavit fish feed data represented as much a broad-market average as the Trobos Article fish feed data, which were Indonesian national data, for the 9th AR *Final Results*.²²² Accordingly, the Department finds that the facts of the 9th AR *Final Results* and 10th AR *Final Results* are distinct, leading to separate conclusions.²²³ As such, the Department continues to find that the record evidence for this AR (10th AR) justifies finding both the Rukomono Affidavit fish feed data and the Trobos Article fish feed data to be a broad-market average for this remand.²²⁴

²¹⁹ *Id.*, at Comment IV; 10th AR *Final Results* at Comment IV; and *Fujian Mach. And Equip. Imp. & Exp. Corp. v. United States*, 178 F. Supp. 2d 1305, 1307 (2001); *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 75 FR 3201 (January 20, 2010) and accompanying Issues and Decision Memorandum at Comment 2.

²²⁰ *Id.* at Comments III and IV.

²²¹ *Id.*

²²² See 9th AR *Final Results* at Comment IV; 10th AR *Final Results* at Comment IV; and Prelim SV Memo at Exhibit 3.

²²³ *Id.*

²²⁴ While HVG *et al.* takes issue with the Department finding the Rukomono Affidavit fish feed data to be a broad-market average in this remand, the Department finds that HVG *et al.* fails to acknowledge that in re-examining all

As explained above, the last criterion that the Department examined for determining whether the Rukomono Affidavit fish feed data or the *Trobos* Article fish feed data represent the best available information was whether these data sources are most specific to the fish feed input for the 10th AR, which is the subject of this remand. For the reasons articulated, the record evidence for this AR (10th AR) clearly demonstrates that that the Rukomono Affidavit fish feed data are more specific to the fish feed input than the *Trobos* Article fish feed data.²²⁵ Specifically, the Rukomono Affidavit fish feed data are not only specific to the protein content percentages used by the respondents, including HVG, but the data are segregated by *pangasius* fingerling feed data versus *pangasius* adult fish feed data.²²⁶ The Department finds that the record evidence demonstrates that the respondents, including HVG, consumed *pangasius* fingerling fish feed because HVG acknowledged on the record that it had farming operations where *pangasius* fingerlings are grown using fish feed into food-sized fish.²²⁷ As such, we find that the Rukomono Affidavit fish feed data are superior to the *Trobos* article fish feed data because the *Trobos* article fish feed data, when more closely examined, do not specify the protein percentages of the *pangasius* fish feed, nor do they specify whether the data also contain fish feed for *pangasius* fingerlings and adult-sized fish, which the respondents consumed in the production of the subject merchandise for this AR (10th).²²⁸ Accordingly, the Department finds

record evidence the Department also found there are questions regarding the superiority of the *Trobos* Article fish feed data as a broad-market average. Specifically, the *Trobos* Article fish feed data only specifies that it is national data but it does not identify the geographic coverage of the data, and thus, the record is not clear as to whether this data encompasses the three provinces that represent the supermajority of *pangasius* production in Indonesia. See HVG's May 12, 2014 submission at Exhibit. 1.A.

²²⁵ See *10th AR Final Results* at Comment IV; Petitioners' May 12, 2014 submission at Exhibit 16.B; and HVG's May 12, 2014 submission at Exhibit. 1.A.

²²⁶ *Id.*

²²⁷ See HVG's March 20, 2014, submission at 11. The record also shows that HVG consumes both small and larger pellet sizes, indicating that it consumes feed for both *pangasius* fingerlings and adult fish. See HVG's May 2, 2014 submission at Exhibit 1.

²²⁸ See *10th AR Final Results* at Comment IV; Petitioners' May 12, 2014 submission at Exhibit 16.B; and HVG's May 12, 2014, submission at Exhibit. 1.A.

that the Rukomono Affidavit fish feed data are more specific to the respondents' fish feed input than the *Trobos* article fish feed data, which is further substantiated by the record evidence of this AR (10th AR) regarding the more specific types of fish feed (fingerling and adult-sized pellets) reported by the respondents, such as HVG, that was not on the record of the previous 9th AR.

HVG *et al.* also questions what factual information changed between the 10th AR *Preliminary Results* and the 10th AR *Final Results* leading the Department to switch from the *Trobos* Article fish feed data to the Rukomono Affidavit fish feed representing the best available information.²²⁹ The Department finds that no factual information changed between 10th AR *Preliminary Results* and the 10th AR *Final Results* for purposes of considering surrogate values because all submissions provided by interested parties were placed on the record prior to the 10th AR *Preliminary Results*.²³⁰ Specifically, as stated in the letter issued to interested parties when we requested information for selecting surrogate values, all factual information was due to the Department no more than 30 days prior to the 10th AR *Preliminary Results*, pursuant to 19 CFR 351.301(c).²³¹ However, contrary to the implication of HVG *et al.*'s question that only a change in facts could result in a change in analysis, the Department finds that it is not inconsistent with our practice to revisit our surrogate value selection for inputs, such as fish feed, after the issuance of the preliminary decision in a case, because we solicit comments from interested parties to consider along with the record evidence that we consider when making the final decision in a

²²⁹ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Antidumping Duty Administrative Review; 2012–2013*, 79 FR 40059 (July 11, 2014) (10th AR *Preliminary Results*) and *Frozen Fish Fillets from the Socialist Republic of Vietnam: Decision Memorandum for the Preliminary Results of the 2012-2013 Antidumping Duty Administrative Review* (July 2, 2014) (Preliminary Decision Memorandum); and 10th AR *Final Results* at Comment IV.

²³⁰ *Id.*

²³¹ See Letter from the Department to All Interested Parties, "Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Request for Surrogate Country and Surrogate Value Comments and Information," dated April 21, 2014, at 2.

case.²³² As is our practice, we received comments from interested parties and held a hearing where interested parties were allowed to present their arguments on the relevant issues, such as the fish feed input, to the Department and HVG *et al.* participated in this process.²³³ After consideration of all the arguments presented and re-examining the record evidence, which we discussed above in this remand, the Department found that the Rukomono Affidavit fish feed data, not the *Trobos* Article fish feed data, represented the best available information for valuing the fish feed input in the *10th AR Final Results*, which remains unchanged for this remand, as discussed above.

Therefore, in sum, for this remand, the Department continues to find for this AR (10th) that the Rukomono Affidavit fish feed data are the best available information for valuing the respondents' fish feed input. Specifically, because the Rukomono Affidavit fish data are the most specific to the fish feed input, represent a broad-market average, and are only five months outside of the POR, we find this data source best meets the Department's SV criteria and represents the best available information to value the respondents' *pangasius* feed input.

²³² See *10th AR Preliminary Results*, 79 FR at 40061 (where the Department requested comments from interested parties and requested that interested parties notify us if they wished to have a public hearing).

²³³ See *10th AR Final Results*.

IV. CONCLUSION

Pursuant to the Court's Order, and based on the analysis of the two issues the Department was instructed to reconsider, the Department has made no changes to its calculations for these Final Results of Redetermination. Specifically, the Department continues to find that the record evidence demonstrates that Caseamex is not entitled to a separate rate. Additionally, the Department continues to find that the best available SV for fish feed is the Indonesian fish feed data in the Rukomono Affidavit.²³⁴ Because the Department is making no changes in this remand redetermination to its calculations, the margins for the mandatory respondents and separate rate respondents remain unchanged.

6/21/2017

X 

Signed by: RONALD LORENTZEN

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

²³⁴ See Petitioners' May 12, 2014, submission at Exhibit 16.B.