

**Final Results of Redetermination Pursuant to *Vinh Hoan Corporation et al. v. United States*,
Consol. Court No. 13-00156, Slip Op. 17-00081 (July 10, 2017)**

I. SUMMARY

This is the third remand involving the eighth administrative review of the antidumping duty order on certain frozen fish fillets (fish fillets) from the Socialist Republic of Vietnam (Vietnam).¹

In the first remand, in accordance with the Court's instructions, the Department reconsidered its selection of the surrogate country, and the selection of certain surrogate values (SVs), *i.e.*, whole live *pangasius* fish, surrogate financial statements, various by-products and several other SVs, as they relate to the selection of the surrogate country.² Additionally, and in accordance with the Court's instructions, the Department made changes to Vinh Hoan Corporation's³ (Vinh Hoan) margin calculation, specifically, by adjusting the denominators for Vinh Hoan's factors of production (FOPs) to exclude water weight, and adjusting the consignment expense for certain sales. The Department made changes to the margin calculations of Vinh Hoan, Anvifish Joint Stock Company (Anvifish) and the separate rate respondents' margins to account for a small change in the live, whole fish SV. Also, at the Department's

¹ 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) (*Final Results*); changed in *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Amended Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 29323 (May 20, 2013) (*Amended Final Results*) and accompanying Ministerial Error Memorandum.

² See Final Results of Redetermination Pursuant to *Vinh Hoan Corporation et al. v. United States*, Consol. Court No. 13-00156, and Slip Op. 15-16, dated August 3, 2015 (First Remand Results).

³ Vinh Hoan was one of two mandatory respondents selected by the Department. Vinh Hoan includes Vinh Hoan Corporation and its affiliates Van Duc Food Export Joint Company and Van Duc Tien Giang (VDTG).

request, the Court granted the Department a voluntary remand to reconsider the calculation of the cap applied to Vinh Hoan's fish oil by-product SV.

In the second remand, in accordance with the Court's instructions, the Department reconsidered its selection of the sawdust and rice husk SVs, provided further explanation concerning the "cap" to the fish oil by-product, and discussed the use of the absolute value of by-products in the margin calculation.⁴ The Court upheld our findings on these issues, except one, the fish oil surrogate value.⁵

In this remand, the Court stated that, if the Department deviates from its practice of selecting the best surrogate value (SV) data source for a particular FOP, it must acknowledge it is doing so, and explain why it is reasonable to conclude that the fish oil SV the Department calculated is a better SV which yields more accurate margins than the other fish oil SV data on the record.⁶ The Department prepared these final results of redetermination and addressed one issue, which relates to the valuation of Vinh Hoan's fish oil by-product.

In accordance with the Court's instructions, the Department provides further explanation with respect to the calculated fish oil SV and its superiority with respect to the other fish oil SV on the record of this review, and addressed parties' comments on the draft remand. There were no changes to Vinh Hoan's margin calculation pursuant to this remand redetermination.

⁴ See Final Results of Redetermination Pursuant to *Vinh Hoan Corporation et al. v. United States*, Consol. Court No. 13-00156, Slip Op. 16-00053, dated May 26, 2016 (Second Remand Results).

⁵ See *Vinh Hoan Corporation et al. v. United States*, Consol. Court No. 13-00156, Slip Op. 17-00081 (July 10, 2017) (*Vinh Hoan*).

⁶ See *Vinh Hoan* at 18 - 23.

II. ANALYSIS

When selecting SVs with which to value FOPs, the Department is directed to use the “best available information” on the record, and is statutorily required to obtain accurate dumping margins.⁷ To select the most appropriate SVs, the Department considers several factors, including whether the SV is: (a) publicly available; (b) tax- and duty-exclusive; (c) represents a broad market average; (d) contemporaneous with the POR; and (e) specific to the input.⁸ Moreover, it is the Department’s practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing FOPs on a case-by-case basis.⁹ As there is no hierarchy for applying the above-mentioned factors, the Department must weigh available information with respect to each input value and make a product-specific and case-specific decision as to what the “best” available SV is for each input.¹⁰ It is the Department’s preference to satisfy the breadth of the aforementioned selection criteria.¹¹ Moreover, as the Court of Appeals for the Federal Circuit (CAFC) has explained, the Department has discretion in its selection of SVs as long as its selection is reasonable, based on record evidence, and based on the best available information.¹²

⁷ See Section 773(c)(1) of the Act; *Writing Instrument Mfrs. Ass’n, Pencil Section v. United States*, 984 F. Supp. 629, 637 (CIT 1997) (“The Court finds that the paramount objective of the statute is to obtain the most accurate determination of dumping margins utilizing the best information available within the broad outlines of the statute”).

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

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

¹⁰ See, e.g., *Mushrooms* at Comment 1.

¹¹ See, e.g., *Administrative Review of Certain Frozen Warmwater Shrimp from the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 51940 (August 19, 2011) and accompanying Issues and Decision Memorandum at Comment 2.

¹² See *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (*Nation Ford*).

In the *Final Results* and First Remand Results we examined the two Indonesian data sources for fish oil on the record of this administrative review, a price quote from an Indonesian company Yahdi,¹³ and Indonesian HTS 1504.20.9000.¹⁴ We review each of these below, as well as the fish oil SV calculated by the Department to determine which of these values represents the best available information to yield an accurate dumping margin.

Yahdi Price Quote

In the *Final Results*, we found that the Yahdi price quote was an unreliable source of SV data because: (a) it is from Agromaret, an online agricultural commodities search engine site, instead of an officially issued price quote directly from the company with a signed affidavit; (b) no record information indicates how this price is sourced, constructed or whether it reflects a market price; and, (c) it is not contemporaneous.¹⁵

In the First Remand Results, we further examined the Yahdi price quote and found that it: (a) is not a broad market average, as it is a single price offer from one company; (b) the record does not demonstrate that the quote is tax- and duty-exclusive; (c) we reiterated that it is not contemporaneous with the POR; (d) we reiterated our concerns that the price quote is not a reliable source of SV data because it is from Agromaret, which is an online commodities search engine and not an official company inquiry; (e) the payment terms are not included; (f) the price quote is not on official company letterhead, and there is no information on the record as to whether it was obtained directly from the company, or issued by an official of the company for sale in the ordinary course of business; and, (g) there are no terms of sale in this price so it is

¹³ See the petitioners' May 23, 2012, SV Submission at Exhibit 34-A.

¹⁴ See Memorandum to the File, from Paul Walker, Case Analyst "8th Administrative Review, and Aligned 9th New Shipper Reviews, of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Surrogate Values for the Preliminary Results," dated August 30, 2012, at 5-6.

¹⁵ *Id.*

unclear if it is being offered as a delivered duty paid price, CIF price, *etc.*, or how the fish oil is packaged.¹⁶ However, in the First Remand Results, we did find that the price quote is specific to fish oil and is publicly available.¹⁷

We have reexamined this price quote and have corrected two incorrect assertions in the *Final Results*. For one, the term *pangasius* does not appear in the price quote.¹⁸ Second, the price quote does not indicate whether the fish oil offered for sale is refined or unrefined.¹⁹ An examination of the exact language found in the Yahdi price quote is also determinative of its reliability as a SV. The Yahdi price quote states: “We would like to bid commodity. For livestock feed and vitamins. Our company sells fish oil and fish meal. Specifications as follows: 1. Fish oil for penggemikan beef, catfish, perkental quality rubber...” Grammatical issues aside, the meaning of the phrase “Fish oil for penggemikan beef, catfish, perkental quality rubber” is unclear. Moreover, the words penggemikan and perkental are not defined on the record. We do not know, for example, if this fish oil is refined, and while the phrase “Fish oil for penggemikan beef, catfish” appears to indicate this oil is used to either feed or cook animals, the phrase “perkental quality rubber” indicates this is perhaps some industrial quality oil. In sum, the price quote contains conflicting information about the type of fish oil purportedly for sale. Put another way, the record is devoid of the information required to determine whether this price quote is suitable to value Vinh Hoan’s by-product.

In sum, our analysis indicates that the Yahdi price quote only meets one of our SV selection criteria – it is publicly available. As stated above, it is our preference to satisfy the

¹⁶ See First Remand Results at 29 – 30.

¹⁷ *Id.*

¹⁸ See the petitioners’ May 23, 2012, SV Submission at Exhibit 34-A

¹⁹ *Id.*

breadth of the SV selection criteria, which this price quote does not.²⁰ In addition, for the reasons stated above, we do not find this fish oil quote to be reliable.

Indonesian GTA Data

The Department previously found that data from GTA, such as that on the record for HTS 1504.20.9000, is publicly available, represents a broad market average, and is tax and duty exclusive.²¹ In the *Final Results*, while we found the Indonesia HTS to be contemporaneous, we also found it to be not sufficiently similar to the fish oil by-product produced by Vinh Hoan.²² Record evidence, such as the Vinh Hoan verification report, indicates that Vinh Hoan's fish oil is a low value, unrefined fish oil.²³ In fact, its fish oil is not even packaged, but kept in a large vat, and dumped into its customer's containers with a spigot.²⁴ While HTS 1504.20.9000 covers unrefined fish oil, it covers unrefined fish oil that is packaged and containerized for international shipment, as well as high value refined fish oil containing Omega-3 fatty acids.²⁵ This makes Vinh Hoan's unrefined and low value fish oil dissimilar to much of the fish oil covered by HTS 1504.20.9000. Thus, we do not find that HTS 1504.20.900 is sufficiently representative of Vinh Hoan's fish oil. As such, although HTS 1504.20.9000 meets some of the Department's SV criteria, it is not specific to Vinh Hoan's fish oil.

²⁰ See, e.g., *Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 51940 (August 19, 2011) and accompanying Issues and Decision Memorandum at Comment 2.

²¹ See, e.g., *Certain Preserved Mushrooms from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 FR 55808 (September 11, 2012) and accompanying Issues and Decision Memorandum at Comment 3.

²² See *Final Results* at Comment VII.B.

²³ See Memorandum to the File, from Susan Pulongbarit, International Trade Compliance Analyst, "Verification of the Sales and Factors of Production Response of Vinh Hoan Corporation," dated December 14, 2010 (Vinh Hoan Verification Report).

²⁴ *Id.*

²⁵ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2011-2012*, 79 FR 19053 (April 7, 2014) and accompanying Issues and Decision Memorandum at Comment XXIII.

As noted above, there is no hierarchy for applying the Department’s SV selection criteria.²⁶ However, specificity is a key element of the test for the usability of a SV, because if the SV data does not cover the FOP in question, it cannot be used for SV purposes.²⁷ While HTS 1504.20.9000 covers unrefined fish oil, the type of fish oil by-product produced by Vinh Hoan, it also covers refined fish oil as well, and the value of this by-product is larger than the main input, whole live fish, and even the subject merchandise.²⁸ As such, as we explained fully in the second remand, valuing Vinh Hoan’s fish oil by-product with this HTS would lead to an unreasonable result given that there is more specific information on the record of the review from which to value unrefined fish oil.

Calculated Fish Oil SV

Although the Court stated that we deviated from our “practice of selecting the best SV data source for a particular FOP, {the Department} must acknowledge it is doing so and explain why it is reasonable to conclude that the constructed value for that FOP yields more accurate margins than the other SV data on the record for that FOP,” we respectfully disagree.²⁹ It is our

²⁶ See, e.g., *Mushrooms* at Comment 1.

²⁷ See *Jinan Yipin Corp. v. United States*, 800 F. Supp. 2d 1226, 1304 (CIT 2011) (*Yipin*) (where the Court noted that if a set of data is not sufficiently “product specific,” it is of no relevance whether or not the data satisfy the other criteria). See also *Tianjin Machinery Import & Export Corp. v. United States*, 806 F. Supp. 1008, 1017-1018 (CIT 1992) (*Tianjin Machinery*) (recognizing the fact that SVs must reflect the experience of the respondents’ industry).

²⁸ See, e.g., *Monosodium Glutamate from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and the Final Affirmative Determination of Critical Circumstances*, 79 FR 58326 (September 29, 2014) (*MSG*) and accompanying Issues and Decision Memorandum at Comment 11 (“A by-product by definition is less valuable than the input from which it is derived. Where there is no evidence that the by-product is a value-added by-product, assigning a by-product a value that is higher than the value of the input from which it is derived is unreasonable.”); *Multilayered Wood Flooring from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 FR 64318 (October 18, 2011) (*Wood Flooring*) and accompanying Issues and Decision Memorandum at Comment 24 (“...the Department has found in past cases that it may disregard a surrogate value when it is clear that the selection of that surrogate value would yield an unreasonable result.” In that case the Department also noted that the HTS value for scrap was higher than the SVs for the main inputs (log, veneer and core inputs). While all interested parties acknowledged that the plain terms of the HTS description made it specific to the by-product, the HTS description was not the only relevant factor for the Department to consider, as using the HTS “would produce an unreasonable result not explained by the record.”).

²⁹ See *Vinh Hoan* at 21.

practice to follow our statutory mandate to select SVs from the best available information, and we have done so here. The record of this review contained additional information beyond the sources proffered by the interested parties concerning fish oil, specifically, all FOPs consumed by Vinh Hoan to produce fish oil. Because this additional information was on the record, we could evaluate whether this information could credibly be used to value fish oil.³⁰ We reiterate that we have calculated SVs using record information in other cases where the record contains the requisite information to do so and the record information represents the best available information.³¹

Some of the subject merchandise produced by Vinh Hoan was produced using live fish from its own hatchery and/or farms, and some was produced with live fish purchased from unaffiliated suppliers.³² In other words, Vinh Hoan reported FOPs which reflect an integrated production process, and reported such FOPs as fingerlings, fish feed, medicines, environmental treatments, nutrition, lime, salt, labor and electricity, as well as live whole fish purchases.³³ The Department verified these farming FOPs, the live, whole fish FOP, and used this mix of integrated and non-integrated FOPs in Vinh Hoan's margin calculation. In other words, rather than begin Vinh Hoan's NV calculation with live, whole fish, we included farming FOPs which reflected Vinh Hoan's integrated production process to build up a value for whole, live fish.³⁴

³⁰ The Court found that the Department did not cap the fish oil surrogate value, but instead substituted a value the Department calculated to value fish oil. *See Vinh Hoan* at 20. Based on the Court's ruling, we will no longer refer to the SV used to value fish oil as a cap, but instead as a value the Department calculated to yield a more reasonable result.

³¹ *See, e.g., Drill Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances*, 76 FR 1966 (January 11, 2011) (*Drill Pipe*) and accompanying Issues and Decision Memorandum at Comment 6.

³² *See Vinh Hoan's* January 3, 2012 submission at 7. Vinh Hoan (and one of its affiliates, VDTG) even reported FOPs starting with the hatchery used to spawn fish, or "pre-farming" factors.

³³ *Id.*

³⁴ In fact, one of Vinh Hoan's affiliates did not farm during the POR and did not produce subject merchandise from whole live fish, so its FOPs were reported starting with purchased fresh and frozen fillets, as well as frozen whole fish. *See Vinh Hoan's* January 3, 2012 submission at 7.

Vinh Hoan has not contested this methodology or its accuracy.

Similar to the methodology in which Vinh Hoan's farming FOPs are used as a substitute for the live, whole fish FOP, we followed the integrated production process that Vinh Hoan employs to produce fish oil, to calculate a SV for this by-product. As we explained in the Second Remand Results:

...Vinh Hoan reported all of the FOPs it consumed in producing unrefined fish oil. The Department notes that Vinh Hoan reported these data in response to the Department's ordinary requests for information, and that we verified Vinh Hoan's FOPs. The verified FOPs consumed by Vinh Hoan to produce unrefined fish oil during the POR were applied to POR-specific SVs from the primary surrogate country, Indonesia, in the SAS program. Moreover, the SVs applied to the fish oil FOPs represent tax- and duty-exclusive broad market average values contemporaneous with the POR. Thus, we find the cap for fish oil to be contemporaneous. To account for the fact that Vinh Hoan's fish oil by-product was sold to unaffiliated parties, the Department added surrogate ratios for overhead, SG&A, and profit to the value, to approximate as closely as possible Vinh Hoan's experience. As such, we find the use of Vinh Hoan's own information in its production of fish oil is necessarily the most representative, and specific, value. The Department finds that the use of the contemporaneous, verified FOP data to produce unrefined fish oil provided by Vinh Hoan, provides a more accurate cap than the SV for live whole fish, improves the accuracy of the Department's dumping calculation, and represents the best available information.³⁵

Because we used verified information submitted from Vinh Hoan's own books and records, we find the calculated fish oil SV to be reliable.³⁶ As we found in the First Remand Results and Second Remand Results, we selected SVs in our calculation of the fish oil SV which meet our SV selection criteria, and are otherwise reliable. Therefore, we find that the calculated fish oil SV meets the SV selection criteria.

SV Comparison

Based on the SV submissions made by interested parties, the Department was left with

³⁵ See Second Remand Results at 24 – 25 (internal citations omitted).

³⁶ See, e.g., Vinh Hoan's January 3, 2012 Section D submission at 35 – 38; Memorandum to the File, through Scot T. Fullerton, Program Manager, Office 9, from Susan Pulongbarit, International Trade Analyst, Office 9, "Verification of the Sales and Factors of Production Response of Vinh Hoan Corporation in the 2010-2011 Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam," dated December 14, 2010 (Vinh Hoan Verification Report).

two exceptionally poor choices to value Vinh Hoan's by-product. Assuming, *arguendo*, the record was devoid of any other information with which to value fish oil, we would have selected the fish oil SV from among these two poor choices, but as noted above, the record contains more specific information with which to value this by-product. We find the Yahdi price quote to be unreliable and to meet only one of the SV selection criteria. We also find that, while Indonesian HTS 1504.20.9000 meets many of the SV criteria, it is overly broad and not specific to the low value, unrefined fish oil produced by Vinh Hoan, such that its use would lead to an unreasonable result.³⁷ Using a SV that leads to an unreasonable result cannot also lead to accurate margins. Therefore, we find that, unlike the Yahdi price quote and HTS 1504.20.9000, the calculated fish oil SV using Vinh Hoan's own information is the best available information on the record of the review with which to value unrefined fish oil.

III. COMMENTS FROM INTERESTED PARTIES

The Department released the draft remand results on August 28, 2017. Interested parties submitted comments on August 30, 2017.³⁸

Vinh Hoan's Comments

- Indonesian GTA data for HTS 1504.20.9000 covers "Fish Fats & Oils & Their Fractions Exc. Liver, Refined or Not, Not Chemically Mod." As this data is from a government agency, consistent with past cases, it is reliable, and as this data is sourced from GTA, it meets the Department's SV selection criteria (specific to the input in question, publicly available, broad market average, contemporaneous, and tax and duty exclusive). Also, the GTA data is from the primary surrogate country, Indonesia. As such, the decision to reject

³⁷ In the Final Remand for *Paslode Division of Illinois Tool Works, Inc. v. United States*, Ct. No. 9712-02161 (January 15, 1999), the Department found that valuing a by-product higher than the main input would produce an unreasonable result.

³⁸ See the petitioners' and Vinh Hoan's August 30, 2017 submissions.

HTS 1504.20.9000 is arbitrary and unreasonable. Moreover, the Department should point to where in the administrative record it is demonstrated that refined fish oil is different enough from unrefined fish oil such that HTS 1504.20.9000 can no longer be deemed specific.

- The Department stated that it will cap a by-product credit when the value of the by-product would lead to an unreasonable result, *i.e.*, when the by-product credit value is higher than the main input. In this case, the Department found that the value of HTS 1504.20.9000 (\$3.10/kg) is higher than that of the main input, whole, live fish (\$1.79/kg). Thus, the Department believes that valuing the fish oil by-product at \$3.10/kg would lead to an unreasonable result, and instead calculated a fish oil value.
- The Department has attempted to substantiate its actions by stating that Vinh Hoan's fish oil is a low value product. However, the record demonstrates that this is not just a waste product like fish heads and fish skin, but is a value-added by-product, and the Department's capping precedent should not apply to value-added by-products. Value-added by-products can be more valuable than the main input which is why companies produce them. In this case, fish oil has a significant value, which is why Vinh Hoan undertakes all the steps it does to produce it. Indeed, Vinh Hoan currently produces the by-product of collagen from *pangasius* fish skin, and sells it for a price many times greater than the cost of a whole fish – and even the subject merchandise.
- Even if the capping precedent applies to value-added by-products, the Department has deviated, without substantiation or reason, from its stated practice in the way it capped Vinh Hoan's fish oil. Indeed, in certain past cases, the Department has capped by-product SVs at the value of the main input.

- The Department’s calculated SV approach woefully undervalues Vinh Hoan's fish oil. For example, the Department added surrogate ratios for overhead, SG&A, and profit to the value, however, the Department does not explain or demonstrate how the overhead, SG&A and profit ratios of an Indonesian fish company approximates Vinh Hoan’s experience in producing fish oil.
- As this issue of fish oil valuation continues to be at issue in this litigation, Vinh Hoan believes that resolution of the issue would be enhanced if the Department were to re-open the record to allow additional information onto the record on the valuation of unrefined fish oil in Indonesia. As such, Vinh Hoan respectfully requests that the Department re-open the administrative record on this issue of fish oil valuation.

The petitioners’ Comments

- The Department’s calculation of the fish oil surrogate value is no different than the normal value buildup authorized by statute. Just as the Department constructs a normal value for frozen fish fillets (and other merchandise under consideration) pursuant to 19 USC 1677b(c), it has similarly done so here for fish oil – by valuing all FOPs consumed to produce and sell fish oil by the appropriate surrogate values. Therefore, the Department’s methodology is entirely consistent with the statute.
- Further, because the calculated fish oil byproduct surrogate value was derived using the respondent’s own FOP data (verified by the Department), it *necessarily* represents a reliable surrogate value.

Department’s Position: We addressed several of the issues raised by Vinh Hoan in the First Remand Results and Second Remand Results, and we reiterate those findings below. At the outset, we continue to agree with Vinh Hoan that GTA data are reliable, and generally meet the

Department's SV criteria. However, in this case, we disagree with Vinh Hoan that HTS 1504.20.9000 is specific to its fish oil by-product.

With regard to Vinh Hoan's contention that the Department must point to the record when determining that refined fish oil is different enough from unrefined fish oil such that HTS 1504.20.9000 can no longer be deemed specific, we note that we found in the First Remand Results that Indonesian HTS 1504.20.9000 is a basket category, which by the plain description of the HTS, includes both refined and unrefined oil.³⁹ Vinh Hoan's by-product is only unrefined oil that is minimally processed, stored in a vat, and sold unpackaged.⁴⁰ As stated in the *Final Results*, while the Indonesian HTS 1504.20.9000 is sufficiently specific, the HTS may contain refined fish oil which is not sufficiently similar to the fish oil by-product.⁴¹ We found in the First Remand Results that:

Upon further examination, we note that Indonesian HTS 1504.20.9000 values fish oil at \$3.10/kg, while the SV for the main input, whole fish, is \$1.79. For fish by-products, because the record contains information about the values of the main input (whole live fish) and output (frozen fish fillets) the Department is able to ascertain whether the value of a by-product makes commercial sense.⁴² It would be illogical to value an unrefined by-product like fish oil at a value greater than that of the main input, a value that also approaches that of the finished product, frozen fish fillets.⁴³ Given that the fish oil SV is greater than whole fish and that Vinh Hoan's fish oil is unrefined and minimally processed, as discussed above, the HTS 1504.20.9000 value is more closely priced to the value of refined fish oil.....

³⁹ See First Remand Results at 80.

⁴⁰ See Memorandum to the File, through Scot T. Fullerton, Program Manager, AD/CVD Operations, Office 9, from Susan Pulongbarit, International Trade Analyst, AD/CVD Operations Office 9, "Verification of the Sales and Factors of Production Response of Vinh Hoan Corporation in the 2010-2011 Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam," dated December 14, 2010 (Vinh Hoan Verification Report) at 33 and 39-40.

⁴¹ See *Final Results* at 28-39.

⁴² We do not have record evidence concerning, for example, the price of logs, finished lumber or FOPs used to press sawdust, which could enable us to determine whether the HTS for sawdust is appropriate.

⁴³ See *Blue Field (Sichuan) Food Industrial Co., Ltd. v. United States*, 949 F. Supp. 2d 1311, 1327, (CIT 2013) (in which the Court found that it is not reasonable for the Department to use a price for a rice by-product that is twice as high as the price of rice). See also *Zhengzhou Harmoni Spice Company Co., Ltd. v. United States*, 617 F. Supp. 2d 1281, 1297 (CIT 2009) ("The statutory objective of calculating dumping margins as accurately as possible can be achieved only when Commerce's choice as to what constitutes the best available information evidences a rational and reasonable relationship to the factor of production it represents.")

In fact, the fish oil SV suggested by Vinh Hoan is greater than that of the subject merchandise.⁴⁴

In the first remand results, we discussed the reasons why the use of HTS 1504.20.9000 would lead to an unreasonable result. We noted that in *MSG* the Department found that a “by-product by definition is less valuable than the input from which it is derived. Where there is no evidence that the by-product is a value-added by-product, assigning a by-product a value that is higher than the value of the input from which it is derived is unreasonable.”⁴⁵ Here, although Vinh Hoan argues that its fish oil is expensive, and therefore, must be a value-added by-product, we note there is no definition of “value-added” on the record. In fact, the record demonstrates that Vinh Hoan’s fish oil is further processed fish waste. The Court recognized, by the description of the production process,⁴⁶ that Vinh Hoan’s fish oil is a low value by-product.⁴⁷ Therefore, we find the situation in this case to be analogous to *MSG*.

Further, as we explained in *Wood Flooring*, “the Department has found in past cases that it may disregard a surrogate value when it is clear that the selection of that surrogate value would yield an unreasonable result.”⁴⁸ In that case, the Department also noted that the HTS value for

⁴⁴ The final analysis memo for the second remand contains Vinh Hoan’s prices and normal values for frozen fish fillets. See Memo to the File, from Susan Pulongbarit, Senior International Trade Compliance Analyst, “Eighth Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Remand Results Analysis Memorandum for Vinh Hoan Corporation,” dated January 27, 2016 at Attachment II.

⁴⁵ See *Monosodium Glutamate from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and the Final Affirmative Determination of Critical Circumstances*, 79 FR 58326 (September 29, 2014) (*MSG*) and accompanying Issues and Decision Memorandum at Comment 11.

⁴⁶ See Vinh Hoan Verification Report at 33, 39-40 (“We asked company officials to describe the production process for fish oil. Company officials noted that Vinh Hoan saves fish scrap during the production process. All of the scrap is transferred to Vinh Hoan Feed, where it is processed into fish oil and fish meal. There are machines at Vinh Hoan Feed that chop and grind the scrap, and then cook it. Then the scrap is pressed, and then a portion is then dried. Once it is dried, the dry part is used for fish meal, and the remaining liquid is further cooked to become fish oil. We asked what the fish oil is sold for. Company officials indicated that fish oil is sold mostly to animal food factories. We asked how it is packaged. Company officials indicated that the fish oil is not packaged, but rather it is pumped into containers belonging to the purchaser. Vinh Hoan’s fish oil is kept in a large vat and sold by turning a spigot which empties the oil into the customers’ buckets.”)

⁴⁷ See *Vinh Hoan Corporation et al. v. United States*, Consol. Court No. 13-00156, Slip Op. 16-53 (May 26, 2016) at 25.

⁴⁸ See *Wood Flooring* at Comment 24.

wood scrap was higher than the SVs for the main inputs.⁴⁹ While the plain terms of the HTS description for wood scrap made it specific to the by-product, as is the description of HTS 1504.20.9000 in this case, we found that the HTS description was not the only relevant factor to consider, since using the HTS “would produce an unreasonable result.”⁵⁰ We have a nearly identical situation to *Wood Flooring* in this case, because the plain terms of the HTS description encompass the by-product in question (as well as other high end products) and the use of HTS 1504.20.9000 thus leads to an unreasonable result.

In support of its assertion that its fish oil is a high value by-product, Vinh Hoan has made an unsubstantiated assertion, without any citation to record evidence, that it uses fish skin to produce high value collagen.⁵¹ The record is devoid of any information that Vinh Hoan produces collagen, let alone what the value of that collagen might be. Notably, Vinh Hoan did not report collagen as a by-product.⁵² As such, we find this argument to be unpersuasive.

Vinh Hoan is correct that in certain cases the Department has capped a by-product’s value at that of the main input. Although Vinh Hoan does not cite to any cases, in a prior fish fillets case, for example, we capped the value of broken fillets at the value of the live, whole fish.⁵³ A broken fillet is a piece of subject merchandise that has been broken, but is too small to be considered a fillet and is sold as a by-product, but may have undergone the same processing as a fillet. Although it is also a by-product, a broken fillet undergoes a much different production process than a low value by-product such as Vinh Hoan’s fish oil.⁵⁴ Because fish oil

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Vinh Hoan’s August 30, 2017 submission at 5.

⁵² See Vinh Hoan’s January 2, 2012 submission at 36, which lists the by-products it produces.

⁵³ See *Fish New Shipper* at Comment II.B.3 (where the Department capped broken fillet by-products at the value for whole live fish because broken fillets were not a value-added byproduct).

⁵⁴ Fillets, and therefore broken fillets, may be trimmed, washed several times, soaked in preservatives, sized, glazed, packaged for sale and frozen for some time, all under certain sanitary conditions. See Vinh Hoan’s January

is a low value by-product, it would not make sense to value it at a high value input like live, whole fish in the way it could make sense to value broken fillets. In this case, capping the by-product at the value of the main input would lead to an unreasonable result. Therefore, the Department calculated a fish oil surrogate value using all FOPs consumed to produce and sell fish oil by the appropriate surrogate values. Although we have referred to this value as a “cap” in the underlying review and subsequent remands, we agree with the Court that because this value is not tied to the HTS, it is not technically a cap, but a constructed surrogate value allowing for a more reasonable result than the values on the record.

Regarding Vinh Hoan’s assertion that the calculated SV for fish oil undervalues fish oil, due to the use of certain financial ratios, we disagree. We valued overhead, SG&A, and profit using the financial statements of an Indonesian fish producer, DSFI, because Vinh Hoan is a producer of fish. In the *Final Results*, we found that DSFI is a producer of comparable merchandise.⁵⁵ Based on the simple production process for fish oil, as compared to the more complicated production process for frozen fish fillets, the ratios could be over-stated. Vinh Hoan, however, has not indicated how specifically it believes the ratios are distorted or what adjustments should be made to them. In addition, the CAFC has ruled that the Department is not required to “duplicate the exact production experience of” an NME producer.⁵⁶

Finally, regarding Vinh Hoan’s suggestion to re-open the record with respect to fish oil, the Department determines that this step is unnecessary as the weight of the evidence on the

3, 2012 submission at Exhibit 6. Because they may undergo these production steps, for this reason broken fillets may be capped at the value of the main input. Although we describe the process in more detail in the Vinh Hoan Verification Report and Second Remand Results, fish oil is produced by chopping, cooking and pressing fish waste, not under sanitary conditions or even packaging the fish oil. *See* Second Remand Results at 35; Vinh Hoan Verification Report at 40.

⁵⁵ *See Final Results* at Comment II.

⁵⁶ *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999); *see also Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1372 (Fed. Cir. 1999).

record is sufficient for the Department to determine that the calculated SV for fish oil represents the best available information to value Vinh Hoan's fish oil by-product.

9/22/2017

X



Signed by: CAROLE SHOWERS

Carole Showers
Executive Director, Office of Policy
performing the duties of the Deputy Assistant Secretary
for Enforcement and Compliance