

**Final Results of Redetermination Pursuant to *An Giang Fisheries Import and Export Joint Stock Company et al.*, Consol. Court No. 14-00109, Slip Op. 17-00082 (July 10, 2017)**

**I. SUMMARY**

This is the second remand involving the ninth administrative review of the antidumping duty order on certain frozen fish fillets (fish fillets) from the Socialist Republic of Vietnam (Vietnam).<sup>1</sup> In the first remand, in accordance with the Court’s instructions, the U.S. Department of Commerce (the Department) reconsidered its selection of the surrogate value (SV) for rice husk and provided further explanation concerning the “cap” to the fish oil by-product in Vinh Hoan Corporation’s (Vinh Hoan)<sup>2</sup> margin calculation.<sup>3</sup> Additionally, and in accordance with the Court’s instructions, the Department made changes to Vinh Hoan’s margin calculation, specifically, by adjusting the denominators for Vinh Hoan’s factors of production (FOPs) to exclude water weight, and recalculating Vinh Hoan’s net U.S. price of sales for subject merchandise on a net weight basis exclusive of water weight.<sup>4</sup> The Court upheld our findings on these issues, except one, the fish oil surrogate value.<sup>5</sup>

In this remand, the Court stated that, if the Department deviates from its practice of selecting the best SV data source for a particular FOP, it must acknowledge it is doing so,

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<sup>1</sup> See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews; 2011-2012*, 79 FR 19053 (April 7, 2014) (*Final Results*); amended in *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Amended Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 37714 (July 2, 2014).

<sup>2</sup> 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).

<sup>3</sup> See *Final Results of Redetermination Pursuant to An Giang Fisheries Import and Export Joint Stock Company et al.*, Consol. Court No. 14-00109, and Slip Op. 16-55, dated February 9, 2017.

<sup>4</sup> *Id.*

<sup>5</sup> See *An Giang Fisheries Import and Export Joint Stock Company et al. v. United States*, Consol. Court No. 14-00109, Slip Op. 17-00082 (July 10, 2017) (*An Giang Fisheries*).

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.<sup>6</sup> The Department prepared these results of redetermination and addressed one issue, the valuation of Vinh Hoan's fish oil by-product.<sup>7</sup>

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 SVs on the record of this review.<sup>8</sup> There were no changes to Vinh Hoan's margin calculation pursuant to this remand redetermination.

## 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.<sup>9</sup> 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.<sup>10</sup> Moreover, it is the Department's practice to carefully consider the available evidence in light of

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<sup>6</sup> *Id.* at 11 - 17.

<sup>7</sup> 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); changed in *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Amended Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 37714 (July 2, 2014) (collectively, *Final Results*). This is the second remand stemming from the *Final Results*. The Department addressed several issues raised by the Court in the First Remand Results. See *Final Results of Redetermination Pursuant to An Giang Fisheries Import and Export Joint Stock Company et al.*, Consol. Court No. 14-00109, and Slip Op. 16-55, dated February 9, 2017 (First Remand Results).

<sup>8</sup> *Id.*

<sup>9</sup> 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").

<sup>10</sup> See, e.g., *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.

the particular facts of each industry when undertaking its analysis of valuing FOPs on a case-by-case basis.<sup>11</sup> As there is no hierarchy for applying the above-referenced factors, the Department must weigh available information with respect to each input value and make a product- and case-specific decision as to what the “best” available SV is for each input.<sup>12</sup> It is the Department’s preference to satisfy the breadth of the aforementioned selection criteria.<sup>13</sup> 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.<sup>14</sup>

In the *Final Results* and First Remand Results, we examined the six SVs for fish oil on the record of this administrative review- a price quote from an Indonesian company Yahdi,<sup>15</sup> prices from a pollution abatement study conducted in the Indonesian district of Muncar,<sup>16</sup> a price quote from an Indian company Arbee Biomarine Extracts Pvt Ltd. (Arbee),<sup>17</sup> a price quote from an Indian company Yashaswi Fish Meal & Oil Company (Yashaswi),<sup>18</sup> a price quote from a Bangladeshi company Asian Seafood Limited (Asian Seafood),<sup>19</sup> and Indonesian HTS 1504.20.9000.<sup>20</sup> We review each of these below, as well as the fish oil SV calculated by the

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<sup>11</sup> 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.

<sup>12</sup> See, e.g., *Mushrooms* at Comment 1.

<sup>13</sup> 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) (*Shrimp*) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>14</sup> See *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (*Nation Ford*).

<sup>15</sup> See the petitioners’ May 24, 2013 submission at Exhibit 21.B.

<sup>16</sup> *Id.* at Exhibit 21.C.

<sup>17</sup> See Vinh Hoan’s June 14, 2013 submission at Exhibit 37.B.

<sup>18</sup> *Id.*

<sup>19</sup> See the petitioners’ June 14, 2013 submission at Exhibit 58.

<sup>20</sup> See Memorandum to the File, from Paul Walker, Case Analyst “8<sup>th</sup> Administrative Review, and Aligned 9<sup>th</sup> 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.

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, which is an online agricultural commodities search engine site, instead of an officially issued price quote directly from the company with a signed affidavit. Thus, no record information indicates how this price is sourced, constructed or whether it reflects a market price; (b) it is not contemporaneous; (c) it is not a broad-market average; (d) the sales terms are unclear; and (e) and it is not tax- and duty-exclusive.<sup>21</sup> No record information indicates how this price is sourced, constructed or whether it reflects a market price.<sup>22</sup> We also found that the Yahdi price quote is publicly available and specific, because the price quote is for unrefined *pangasius* fish oil, which is the fish oil produced here.<sup>23</sup> In the First Remand Results, we reiterated these concerns.<sup>24</sup>

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.<sup>25</sup> Second, the price quote does not indicate whether the fish oil offered for sale is refined or unrefined, and Vinh Hoan's by-product is unrefined, or crude, fish oil.<sup>26</sup> Lastly, there are no terms of sale in this price, so it is unclear if it is being offered as a delivered duty paid price, CIF price, *etc.*, or how the fish oil is packaged.<sup>27</sup>

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<sup>21</sup> See *Final Results* at Comment VII.B.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See First Remand Results at 13 – 14.

<sup>25</sup> See the petitioners' May 24, 2013 submission at Exhibit 21.B.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

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....” 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 adequately specific to appropriately 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 breadth of the SV selection criteria, which this price quote does not.<sup>28</sup> In addition, for the reasons stated above, we do not find this fish oil quote to be reliable.

### *Muncar*

In the *Final Results*, we found that the Muncar fish oil prices represented ranges of fish oil prices provided in a study of small scale fish oil refinery enterprises in the Muncar district, Indonesia.<sup>29</sup> We found that these prices: (a) were not official commercial transactions because there is no information regarding the payment terms, the party offering the price, the manner in which the prices were obtained, and whether the prices were obtained in the ordinary course of business; (b) are not a broad-market average because the prices appear to only be prices for the

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<sup>28</sup> See, e.g., *Shrimp* at Comment 2.

<sup>29</sup> See *Final Results* at Comment VII.B.

Muncar district; (c) the prices are from 2010, and thus, not contemporaneous; (d) there is no record which indicates these prices are tax- and duty-exclusive; (e ) the prices are publicly available because they are from an Indonesian government website; and (f) one of the prices is for low quality, unrefined fish oil.<sup>30</sup> We reiterated these points in the First Remand Results.<sup>31</sup>

Upon further review, we find that Muncar fish oil prices appear to be, in fact, price estimates with regard to the quality of the fish oil, rather than transaction prices.<sup>32</sup> The Muncar study was conducted over three days in February 2010 and four days in July 2010, and examined just two units of equipment used to produce fish oil from polluted water. One unit of equipment, the study found, was not operational due to power issues and the lack of people trained to operate it, and while the other unit of equipment was operational, there were power issues and a lack of trained operators. Based on these statements in the study, it appears the fish oil “prices” are based on one piece of equipment, operating at a limited capacity over the course of several days during 2010 in one district in Indonesia, and is therefore not the type of broad market average which satisfies our SV criteria.

In sum, our analysis indicates that the Muncar estimated prices meet two of our SV selection criteria – public availability and specificity - however, as noted, the prices appear to be estimates. As stated previously, it is our preference is to satisfy the breadth of the SV selection criteria, which these prices do not.<sup>33</sup> In addition, for the reasons stated above, we do not find these prices to be reliable.

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<sup>30</sup> *Id.* See also the petitioners’ May 24, 2013 submission at Exhibit 21.C.

<sup>31</sup> See First Remand Results at 13 – 14.

<sup>32</sup> The study states that the “price of {fish} oil quality both reached” certain values, rather than stating that the fish oil was sold for certain prices.

<sup>33</sup> See, e.g., *Shrimp* at Comment 2.

*Arbee*

In the *Final Results*, we found that the Arbee price quote is not suitable for surrogate valuation purposes because it: (a) is a single transaction price and does not represent a broad-market average; (b) is unclear if the price is tax and duty-exclusive; (c) raises concerns as to the reliability of the quote as the accompanying affidavit does not detail the payment terms of the price offer and the price quote is not on official company letterhead with an official company business card.<sup>34</sup> We reiterated these points in the First Remand Results.<sup>35</sup>

After further examination, we find that the Arbee price quote is not a single transaction, it is a single offer of sale which is clearly part of a chain of emails, of which only one was provided, and therefore we continue to find that it is not representative of a broad market average.<sup>36</sup> We also find that the price quote is not contemporaneous.<sup>37</sup> On the other hand, we find that the price quote is publicly available and it is for “crude fish oil,” making it similar to Vinh Hoan’s by-product, and thus, specific.<sup>38</sup> Nonetheless, it is our preference to satisfy the breadth of the SV selection criteria, which this price quote does not, because it is not: a) a broad-market average; (b) contemporaneous; and (c) tax and duty exclusive.<sup>39</sup> In addition, as stated above, because we do not know the payment terms, and the price quote is not on official company letterhead accompanied by an official company business card or other such information provided in the normal course of business, we do not find this fish oil quote to be reliable.

*Yashaswi*

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<sup>34</sup> See *Final Results* at Comment XXIII.

<sup>35</sup> See First Remand Results at 13 – 14.

<sup>36</sup> See Vinh Hoan’s June 14, 2013 submission at Exhibit 37.B.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., *Shrimp* at Comment 2.

In the *Final Results*, we found that the Yashaswi price quote is not suitable for surrogate valuation purposes because it: (a) is a single transaction price and does not represent a broad-market average; (b) is unclear if the price is tax and duty exclusive; (c) is not a contemporaneous price; and (d) raises concerns as to the reliability of the quote as the accompanying affidavit does not detail the payment terms of the price offer, and the price quote is not on official company letterhead with an official company business card.<sup>40</sup> The Department found that the Yashaswi fish oil price quote is similar to Vinh Hoan’s “unrefined” fish oil because the price quote is for “crude” fish oil.<sup>41</sup> We reiterated these points in the First Remand Results.<sup>42</sup>

Upon further review, we find that this is not a single transaction, but instead is a single offer of sale which is clearly part of a chain of emails, although in contrast to the Arbee price quote, it appears that the entire chain of emails has been provided.<sup>43</sup> On the other hand, the price quote is publicly available. However, as stated above, it is our preference is to satisfy the breadth of the SV selection criteria, which this price quote does not because it is not: (a) a broad market average; (b) contemporaneous; and (c) tax and duty exclusive.<sup>44</sup> In addition, as stated above, because we do not know the payment terms, and the price quote is not on official company letterhead accompanied by an official company business card or other such information provided in the normal course of business, we do not find this fish oil quote to be reliable.

### *Asian Seafood*

In the *Final Results*, we found that the Asian Seafood price quote is not suitable for surrogate valuation purposes because it: (a) is a single transaction price and does not represent a

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<sup>40</sup> See *Final Results* at Comment XXIII.

<sup>41</sup> *Id.*

<sup>42</sup> See First Remand Results at 13 – 14.

<sup>43</sup> See Vinh Hoan’s June 14, 2013 submission at Exhibit 37.B.

<sup>44</sup> See, e.g., *Shrimp* at Comment 2.



broad-market average; (b) features an accompanying affidavit noting that Asian Seafood has limited *pangasius* operations and does not typically sell *pangasius* waste products; (c) is not on official company letterhead; (d) demonstrates indication whether the price quote is tax- and duty-exclusive; and (e) is not contemporaneous.<sup>45</sup> We found that it met two of the SV criteria in that it encompassed *pangasius* fish oil, and is publicly available.<sup>46</sup> We reiterated these points in the First Remand Results.<sup>47</sup> As noted above, it is our preference is to satisfy the breadth of the SV selection criteria, which this price quote does not.<sup>48</sup>

#### *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.<sup>49</sup> 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.<sup>50</sup> Record evidence, such as the verification report from the prior review, indicates Vinh Hoan's fish oil is a low value, unrefined fish oil.<sup>51</sup> 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.<sup>52</sup> While HTS 1504.20.9000 covers unrefined fish oil, that HTS number covers both unrefined fish oil that is packaged and containerized for international shipment, as well as high value refined fish oil containing Omega-

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<sup>45</sup> See *Final Results* at Comment XXIII.

<sup>46</sup> *Id.*

<sup>47</sup> See First Remand Results at 13 – 14.

<sup>48</sup> See, e.g., *Shrimp* at Comment 2.

<sup>49</sup> 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.

<sup>50</sup> See *Final Results* at Comment XXIII.

<sup>51</sup> See the petitioners' May 2, 2013, submission at Exhibit 7 (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)).

<sup>52</sup> *Id.*

3 fatty acids.<sup>53</sup> This makes Vinh Hoan's unrefined fish oil physically dissimilar to many products covered by HTS 1504.20.9000. In sum, HTS 1504.20.9000 meets the Department's SV criteria except one, specificity.

As noted above, there is no hierarchy for applying the Department's SV selection criteria.<sup>54</sup> 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.<sup>55</sup> 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. As a result of this diversity of product mix, if we were to use this HTS number as the surrogate for Vinh Hoan's unfinished fish oil, the value of this by-product would be larger than the value of the main input, whole live fish, and even larger than the value of the subject merchandise.<sup>56</sup> As such, as we explained in the first remand,<sup>57</sup> we compared the proposed fish oil SV which met the most SV criteria, Indonesian HTS 1504.20.9000, to the value of the main input to determine whether its use would lead to an unreasonable result. In determining this surrogate value, unlike, for example, a surrogate for fish

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<sup>53</sup> See *Final Results* at Comment XXIII.

<sup>54</sup> See, e.g., *Mushrooms* at Comment 1.

<sup>55</sup> 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).

<sup>56</sup> 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").

<sup>57</sup> See First Remand Results.

meal, the value of the fish oil using this HTS number exceeded the value of the main input, which we find would lead to an unreasonable result.

#### *Calculated Fish Oil SV*

Although the Court stated that if the Department “is going to deviate from its practice of selecting the best SV data source for a particular FOP, it 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 that the Department “deviated from its practice” on remand.<sup>58</sup> It is our 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 of the FOPs consumed by Vinh Hoan to produce fish oil. Because this additional information was on the record, we were able to evaluate whether this information could credibly be used to value fish oil.<sup>59</sup> 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 calculated SV information represented the best available information.<sup>60</sup>

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

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<sup>58</sup> See *An Giang Fisheries* at 15.

<sup>59</sup> 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 *An Giang Fisheries* at 14. 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.

<sup>60</sup> 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.

unaffiliated suppliers.<sup>61</sup> 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.<sup>62</sup> 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 calculate Vinh Hoan's NV initially using live, whole fish, we started our analysis with farming FOPs which reflected Vinh Hoan's integrated production process to build up a value for whole, live fish. 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 First Remand Results:

.... because the by-product in question is further processed, 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 the FOPs consumed in the production of fish oil in the immediately preceding segment. The FOPs used to produce 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 {calculated value} 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 (*i.e.*, selling, general, and administrative expenses), and profit to the value, to, as closely as possible, approximate 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, recently verified FOP data to produce unrefined fish oil provided by Vinh Hoan, provides a more accurate cap than the SV for live whole fish,

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<sup>61</sup> See Vinh Hoan's January 12, 2013 submission at 16 - 17. Vinh Hoan (and one of its affiliates, VDTG) even reported FOPs starting with the hatchery used to spawn fish, or "pre-farming" factors.

<sup>62</sup> *Id.*

improves the accuracy of the Department’s dumping calculation, and represents the best available information.<sup>63</sup>

Because we used verified information submitted from Vinh Hoan’s own books and records, we find the calculated fish oil SV to be reliable.<sup>64</sup> As we found in the First 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 several 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 choices, but as stated above, the record contains more specific information with which to value this by-product. We have summarized our findings with respect to the potential SVs on the record of review:

<b>Source</b>	<b>SV Criteria Met</b>	<b>Reliable</b>
Yahdi	1	No
Muncar	2	No
Arbee	2	No
Yashaswi	2	No
Asian Seafood	2	Yes
Indonesian GTA data	4	Yes
Calculated Fish Oil SV	5	Yes

We find that the price quotes do not meet many of the Department’s SVs criteria and do

<sup>63</sup> See First Remand Results at 16 – 17 (internal citations omitted).

<sup>64</sup> See the petitioners’ May 2, 2013 submission at Exhibit 7 (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)).

not represent the best information available when there are other choices on the record of this review. 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.<sup>65</sup> Using a SV that leads to an unreasonable result cannot also lead to accurate margins. Therefore, we find that 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 because it meets the Department's SV criteria.

### III. COMMENTS FROM INTERESTED PARTIES

The Department released the draft remand results on August 28, 2017. Interested parties submitted comments on August 30, 2017.<sup>66</sup>

#### *Vinh Hoan's Comments*

- The decision to reject HTS 1504.20.9000 is unreasonable, and not supported by substantial record evidence. 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 (\$1.73/kg) is higher than that of the main input, whole, live fish (\$1.63/kg). Thus, the Department believes that valuing the fish oil by-product at \$1.73/kg would lead to an unreasonable result, and instead calculated a fish oil value.
- Vinh Hoan's fish oil is not 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

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<sup>65</sup> In the Final Remand for *Paslode Division of Illinois Tool Works, Inc. v. United States*, Ct. No. 97-12-02161 (January 15, 1999), issued pursuant to litigation challenging the *Notice of Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails from the PRC*, 62 FR 51410 (Oct. 1, 1997), the Department found that valuing a by-product higher than the main input would produce an unreasonable result.

<sup>66</sup> See the petitioners' and Vinh Hoan's August 30, 2017 submissions.

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 issue raised by Vinh Hoan in the *Final Results* and First 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 decision to reject HTS 1504.20.9000 is unreasonable, and not supported by substantial record evidence, we disagree. In the *Final Results*, we found that:

- (a) An affidavit was submitted from the Secretary General of the Association of Indonesian Catfish Entrepreneurs, who has extensive experience in the Indonesian *pangasius* industry, indicates *pangasius* fish does not contain free fatty acid (FFA) and Omega-3 oil.<sup>67</sup>
- (b) Record information indicates that unrefined fish oil does not contain FFA and Omega-3.<sup>68, 69</sup>
- (c) Record information indicates that unrefined fish oil prices from India, Bangladesh, and Indonesia range from \$0.14 - 0.88/kg.<sup>70</sup>
- (d) Record information indicates that Indian refined fish oil prices range from \$1.58 –

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<sup>67</sup> See the petitioners’ Surrogate Value Rebuttal Data at Exhibit 4.

<sup>68</sup> *Id.* at Exhibit 10.

<sup>69</sup> See the petitioners’ Post-Preliminary Results Surrogate Value Submission at Exhibit 16.

<sup>70</sup> See the petitioners’ Case Brief at 182.



\$3.20/kg, indicating that the price for refined fish oil is much higher than the price for unrefined fish oil.<sup>71</sup>

- (e) Based on the description of Vinh Hoan's fish oil production process,<sup>72</sup> and the record information above, the Department found that HTS 1504.20.90.00 is reflective of refined fish oil prices.<sup>73</sup>

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.”<sup>74</sup> 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, or as we stated in the First Remand results, “the Department observed at verification that { Vinh Hoan's } fish oil appears to be drippings from pressed fish meal.”<sup>75</sup> The Court recognized, by the description of the production

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<sup>71</sup> See respondents' Post-Preliminary Results Surrogate Value Submission at Exhibit 6 (Tab G); Respondents' Rebuttal Surrogate Value Submission at Exhibit 37.B.

<sup>72</sup> See the petitioners' Submission of Rebuttal Factual Information, (May 2, 2013) at Exhibit 7 (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.”

<sup>73</sup> See *Final Results* at Comment XXIII.

<sup>74</sup> 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.

<sup>75</sup> See First Remand Results at 23.

process, that Vinh Hoan's fish oil is a low value by-product.<sup>76</sup> 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."<sup>77</sup> In that case the Department also noted that the HTS value for wood scrap was higher than the SVs for the main inputs.<sup>78</sup> 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."<sup>79</sup> 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 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.<sup>80</sup> The record is devoid of any information that Vinh Hoan produces collagen, let alone what the value of that collagen might be. In fact, Vinh Hoan did not report collagen as a by-product.<sup>81</sup> As such, we find this argument to be unpersuasive.

Vinh Hoan is correct, that in some 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

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<sup>76</sup> See *An Giang Fisheries* at 16.

<sup>77</sup> See *Wood Flooring* at Comment 24.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See Vinh Hoan's August 30, 2017 submission at 5.

<sup>81</sup> See Vinh Hoan's April 22, 2013 submission at 37 - 38, which lists the by-products it produces.

case, for example, we capped the value of broken fillets at the value of the live, whole fish.<sup>82</sup> 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.<sup>83</sup> Because fish oil 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 remand, 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

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<sup>82</sup> See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the New Shipper Review*, 77 FR 27435 (May 10, 2012) (*Fish New Shipper*) and accompanying Issues and Decision Memorandum 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).

<sup>83</sup> 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 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.

merchandise.<sup>84</sup> 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 in what way 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.<sup>85</sup>

Finally, regarding Vinh Hoan’s suggestion to re-open the record with respect to fish oil, the Department does not feel that step would be necessary as the weight of the evidence on the record is sufficient for us 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

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Signed by: CAROLE SHOWERS

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

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<sup>84</sup> See *Final Results* at Comment II.

<sup>85</sup> 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).