Amanda Foods (Vietnam) Ltd., et. al v. United States
Court No. 08-00301 Slip Op. 09-106 (CIT September 29, 2009)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

A. SUMMARY

The Department of Commerce ("Department") has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade ("CIT" or the "Court") in Amanda Foods (Vietnam) Ltd., et al., v. United States, Consol. Court No. 08-00301 (September 29, 2009) ("Remand Opinion and Order"). These final remand results concern 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) and accompanying Issues and Decision Memorandum ("Vietnam Shrimp AR2"). As set forth in detail below, in these final results, pursuant to the Court's Remand Opinion and Order, we have: 1) explained why, despite their differences in per capita GDP, the Department is justified in treating all the countries on the surrogate country list as equally comparable to Vietnam, as well as explained why the data considerations support relying upon Bangladesh as the surrogate country; and 2) explained why the rates applied to the separate rate companies in Vietnam Shrimp AR2 involved a reasonable method supported by substantial evidence on the record.

B. BACKGROUND

Selection of a Surrogate Country

In Vietnam Shrimp AR2, we selected Bangladesh as the primary surrogate country from among a list that also included India, Sri Lanka, Indonesia, and Pakistan. The Department stated that Bangladesh was the appropriate surrogate country for that administrative review period because: 1) Bangladesh is at a comparable level of economic development to Vietnam; and 2) Bangladesh is a significant producer of comparable merchandise. We also stated that the Bangladeshi data satisfy the Department's selection criteria, because such data are from publicly

available sources, contemporaneous with the period of review ("POR"), and, represent a broad-market average. See Vietnam Shrimp AR2 at Comment 1. The Department explained that, in accordance with section 773(c)(4) of the Tariff Act of 1930, as amended ("Act"), in valuing the factors of production ("FOP"), "the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more market economy countries that are: 1) at a level of economic development comparable to that of the NME country; and 2) significant producers of comparable merchandise."[1] The Court remanded the selection of Bangladesh as the surrogate country so that the Department may: "1) explain why it is justified in treating all the countries on the surrogate country list as equally comparable to Vietnam, despite their differences in per capita GDP, or 2) explain why the difference in comparability to Vietnam in per capita GDP between India and Bangladesh is small enough that it may be outweighed by superior quality of the Bangladeshi data, providing a reasoned basis for the determination of such superiority, or 3) otherwise reconsider its determination in accordance with this opinion." See Remand Opinion and Order at 17-18.

Separate Rate Calculation Methodology

The Department reviewed 63 companies in Vietnam Shrimp AR2. See Vietnam Shrimp AR 2 at 73 FR at 52275. Of those 63 companies, two companies were selected for individual examination, 26 cooperative, non-individually examined respondents demonstrated eligibility for, and received, a separate rate, and 35 companies were properly considered part of the Vietnam-Wide entity because they did not demonstrate eligibility for a separate rate. As part of the Vietnam-Wide entity, they were deemed uncooperative because they failed to respond to the

[1] See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Partial Rescission and Final Partial Rescission of the Second Administrative Review, 73 FR 12127 (March 6, 2008) ("Vietnam Shrimp AR2 Prelim"). The Department also cited to its memorandum accompanying the preliminary results which explained in greater detail the Department's policy in selecting a surrogate country. See "Memorandum to the File, through James C. Doyle, Office Director, Office 9, Import Administration, from Irene Gorelik, Senior Case Analyst, Subject: Second Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Selection of a Surrogate Country," dated February 28, 2008 ("Surrogate Country Memo").

Department's requests for quantity and value data. As a result, the Vietnam-wide entity was assigned a total adverse facts available ("AFA") rate of 25.76 percent. Id. at 52274.

In Vietnam Shrimp AR2 Prelim, the Department explained that the statute and the Department's regulations do not directly address the establishment of a rate to be applied to individual companies not selected for examination where the Department has limited its examination in an administrative review pursuant to section 777(A)(c)(2) of the Act. We further stated that the Department's practice in this regard, in cases involving limited selection based on exporters accounting for the largest volumes of trade, has been to weight-average the rates for the selected companies excluding zero and de minimis rates and rates based entirely on facts available. In this case, however, the Department calculated de minimis rates for both of the individually examined respondents and preliminarily assigned to the non-individually examined respondents a separate rate equal to the weighted-average margin of the two calculated de minimis rates, pursuant to section 735(c)(5)(B) of the Act.

After having invited interested parties to comment on the preliminary separate-rate calculation methodology, the Department determined that the methodology employed in the preliminary results was not consistent with our practice of excluding zero and de minimis rates and rates based entirely on facts available from the rate determined for non-examined companies. As a result, for Vietnam Shrimp AR2, the Department assigned a separate rate of 4.57 percent, which is the margin calculated for cooperative separate rate respondents in the underlying investigation, to the non-individually examined respondents in this administrative review with no history of a calculated margin, as a reasonable method which is reflective of the range of commercial behavior demonstrated by exporters of the subject merchandise during a very recent period in time. See Vietnam Shrimp AR2, 73 FR at 52275 and Comment 6. Additionally, for those non-individually examined respondents for whom we calculated a rate in a more recent or contemporaneous prior segment, we assigned that calculated rate as the company's separate rate

in this review. Specifically, for Viet Hai Seafoods Company Ltd. ("Vietnam Fish One") and Grobest & I-Mei Industrial (Vietnam) Co., Ltd. ("Grobest"), we assigned the rates most recently calculated for both companies (zero) as their separate rate in the instant review because these rates were more recent than the separate rate calculated in the underlying investigation and were based on the company's own data. Additionally, for Minh Hai Joint-Stock Seafoods Processing Company, we assigned as a separate rate, the most recent rate of 4.30 percent, which we calculated for it in the underlying investigation based on the company's own data. For all other non-individually examined respondents receiving a separate rate, we assigned 4.57 percent. See Vietnam Shrimp AR2 at Comment 6.

The Court remanded the separate rate assignment methodology to either assign to Plaintiffs the weighted-average rate of the mandatory respondents, or else provide justification, based on substantial evidence on the record, for using another rate. See Remand Opinion and Order at 30.

B. ANALYSIS

1. Selection of Surrogate Country

The Department continues to find that we properly selected Bangladesh as the primary surrogate country within the meaning of section 773(c)(4) of the Act.[2] Pursuant to the Court's remand instructions, we explain below why we are justified in treating all countries on the surrogate country list as equally comparable to Vietnam. We also explain why data considerations support our selection of Bangladesh as the surrogate country.

Our established practice, as described in the Policy Bulletin no. 04.1: Non-market Economy Surrogate Country Selection Process (March 1, 2004) ("Policy Bulletin")[3] and most

[2] In the Remand Opinion and Order, the Court deferred its consideration of the source of the raw shrimp surrogate value dependent upon whether a different surrogate country is selected. Because we have not changed our surrogate country selection, we have not revisited our analysis of the surrogate value for raw shrimp.

[3] Available at: http://ia.ita.doc.gov/policy/bull04-1.html.

recently sustained in Fujian Lianfu Forestry Co., Ltd., et al. v. United States, 638 F. Supp. 2d 1325 (CIT August 10, 2009) ("Fujian Lianfu Forestry"), is to: 1) compile a list of countries that are at a level of economic development comparable to the country being investigated; 2) ascertain which, if any, of those cited countries produce comparable merchandise; 3) determine from the resulting list of countries, which, if any, of the countries are significant producers of comparable merchandise; and 4) evaluate the quality, e.g., the reliability and availability, of the data from those countries.[4] Having completed the above four-prong analysis, the Department then selects the country most appropriate for use as a surrogate country. This process begins with a request for a memorandum from the Import Administration's Office of Policy ("Office of Policy") identifying potential surrogate countries that are at a comparable level of economic development to the NME country. See Policy Bulletin. We note that the Office of Policy memorandum "excludes non-market economy countries from the list of potential surrogate countries, and also excludes countries that technically are presumed to be market economies, but which in the Office of Policy's judgment are unsuitable sources for factor values (e.g., Cuba)." Economic comparability is determined on the basis of per capita gross national income ("GNI"), as reported in the most current annual issue of the World Development Report (The World Bank). See id. However, "while the Department's regulations at 19 CFR 351.408 instruct the Department to consider per capita income, when determining economic comparability, neither the statute nor the Department's regulations define the term 'economic comparability.'" See Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China, 72 FR 46957 (August 22, 2007) and accompanying Issues and Decision Memorandum at Comment 1a ("Furniture AR1"). The memorandum from the Office of Policy also states that the surrogate

[4] See Fujian Lianfu Forestry, 638 F. Supp. 2d 1325, 1347; see also Dorbest Ltd. v. United States, 462 F. Supp. 2d 1262, 1270-71 (2006) ("Dorbest").

countries on the list are not ranked and should be considered equivalent in terms of economic comparability.

In Vietnam Shrimp AR2, the Office of Policy provided a list of potential surrogate countries on July 31, 2007, which included Bangladesh, Pakistan, India, Sri Lanka, and Indonesia.[5] In the context of the World Development Report used for this review period, which contains approximately 132 countries and territories, the relative difference in GNI per capita between Bangladesh and Vietnam is minimal, which is supported by the fact that Indonesia, with a per capita GNI double that of Vietnam, was included as a potential surrogate country by the Office of Policy. The Department's analysis of the relative differences in GNI between the potential surrogate countries, in the chart below, shows that Bangladesh's per capita GNI in 2005 was USD470, which differs only by USD150 (or 24.19 %) from Vietnam's, while India's per capita GNI in 2005 was USD720, which differs by USD100 (or 16.13 %) from Vietnam's. Within the context of all countries and territories listed in the World Development Report, the relative differences in per capita GNI between the five potential countries is so minute that we have treated them as equal in terms of economic comparability.

Country	GNI (USD)[6]	USD difference from Vietnam	Percentage Difference from Vietnam
Bangladesh**[7]	470	150	24.19%
Zambia	490	130	20.97%
Benin	510	110	17.74%
Uzbekistan	510	110	17.74%
Kenya	530	90	14.52%

[5] The memorandum from the Office of Policy was included as part of a letter to interested parties inviting comment on the surrogate country selection process. See "Letter to Interested Parties; Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam (2/1/06—1/31/07)," dated August 3, 2007 at Attachment I.

[6] World Development Report GNI figures are available at Table 1, pages 288-289: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/09/13/000112742_20060913111024/Rendered/PDF/359990WDR0complete.pdf

[7] The asterisk denotes a country's inclusion in Surrogate Country List in Vietnam Shrimp AR2 compiled by the Office of Policy for consideration as a potential surrogate country for Vietnam.

Mauritania	560	60	9.68%
Nigeria	560	60	9.68%
Yemen, Rep.	600	20	3.23%
Vietnam	620	--	--
Sudan	640	20	3.23%
Papua New Guinea	660	40	6.45%
Mongolia	690	70	11.29%
Pakistan**	690	70	11.29%
Senegal	710	90	14.52%
India**	720	100	16.13%
Cote d'Ivoire	840	220	35.48%
Moldova	880	260	41.94%
Nicaragua	910	290	46.77%
Congo, Rep.	950	330	53.23%
Bolivia	1,010	390	62.90%
Cameroon	1,010	390	62.90%
West Bank and Gaza	1,120	500	80.65%
Sri Lanka**	1,160	540	87.10%
Honduras	1,190	570	91.94%
Azerbaijan	1,240	620	100.00%
Egypt, Arab Rep.	1,250	630	101.61%
Indonesia**	1,280	660	106.45%

We note that we conducted a similar analysis in Furniture AR1, albeit for different countries than in this case. Following the logic applied in Furniture AR1, we determined here that, while the difference between Vietnam's USD620 per capita GNI and Bangladesh's USD470 per capita GNI in 2005 seems large in nominal terms, viewed in the context of the spectrum of economic development across the world, the two countries are at a fairly similar stage of development. In Furniture AR1, the Court sustained the Department's selection of India as a surrogate country despite India's GNI of USD620 as compared to China's GNI of USD1270, a much larger gap (50%) between them than between Bangladesh and Vietnam (24.19%) here. See Fujian Lianfu Forestry, 638 F. Supp. 2d 1325, 1349; Furniture AR1 at Comment 1a.

Moreover, and consistent with the Court's second option upon remand, the minor differences in GNI between Bangladesh and Vietnam are outweighed by the data considerations.

As we stated in the Surrogate Country Memo, because we determined that India, Indonesia and Bangladesh were significant producers of comparable merchandise, as part of the surrogate country selection analysis, the Department, lastly, looked to data considerations to select the appropriate surrogate country from among India, Indonesia, and Bangladesh. See Surrogate Country Memo at 7-8. Interested parties placed surrogate value data on the record for India, Bangladesh, and Indonesia. In reviewing the data available on the record, the Department's practice in analyzing surrogate value data is to examine whether the data is: 1) contemporaneous; 2) a broad market average; 3) tax and duty exclusive; 4) publicly available; and 5) specific to the input.[8] Regarding the Indonesian data on the record, we determined that, "Indonesian shrimp data is limited and does not satisfy as many factors of the Department's data selection criteria (e.g., broad-market average)." See Surrogate Country Memo at 8. Further, with respect to Indian surrogate value data, we stated that "while the Indian data submitted by Petitioner is either ranged data obtained from one Indian producer of comparable merchandise or a price quote, the Bangladeshi shrimp values represent a broad-market average from a reliable source." See id.

Petitioner's argument regarding economic comparability would require the Department to select only the country with the closest GNI as the most economically comparable country from the surrogate country list provided by the Office of Policy. If the Department followed Petitioner's reasoning, any country with a GNI outside a mere 16% threshold (the percentage difference in GNI between India and Vietnam) of Vietnam's GNI of USD620 would not be economically comparable. Following this reasoning, Pakistan, with a GNI of USD690, and closest to Vietnam in terms of per capita GNI from the countries on the list provided by the Office of Policy, would be the surrogate country choice regardless of whether it was a significant

[8] See e.g., Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 47587 (August 14, 2008) and accompanying Issues and Decision Memorandum at Comment 4.

producer of comparable merchandise or whether surrogate value data was even available from Pakistan. Here, the Department conducted its four-prong analysis and determined that Bangladesh satisfied all the criteria set forth in the Policy Bulletin, especially the data considerations, while India did not. See Surrogate Country Memo at 8-9. Therefore, based on the foregoing explanation, we have not redetermined our selection of Bangladesh as the appropriate surrogate country in this administrative review.

COMMENTS FROM INTERESTED PARTIES[9]

Respondents agree with the Department's explanation regarding the selection of Bangladesh as the surrogate country.

Petitioner argues that the Department has not supported the selection of Bangladesh as the surrogate country. Petitioner contends that the statute requires the Department to evaluate the relative economic comparability of potential surrogate countries, which, Petitioner claims the Department avoided doing in the Draft Remand Results. Rather, Petitioner argues that the Department's determination that every country on the surrogate country list is economically comparable to the NME country is inconsistent with the statute. Petitioner also argues that, in selecting Bangladesh as the surrogate country, the Department did not even adhere to its own established practice as described in the Policy Bulletin and recently sustained in Fujian Lianfu Forestry. Specifically, Petitioner contends that, pursuant to its practice, the Department selects surrogate countries by: 1) compiling a list of countries that are at a level of comparable economic development to the NME country; 2) determine which of those countries are producers of comparable merchandise; 3) determine which of the producers of comparable merchandise produce significant quantities of that merchandise; and 4) evaluate the availability and reliability of the data from those countries. However, Petitioner argues that, here, the Department analyzed the first step and second step simultaneously. Petitioner also argues that if the Department

[9] The Department released its Draft Remand Redetermination ("Draft Remand Results") to parties on January 14, 2010, and parties filed comments on January 21, 2010.

followed its own practice and limited the countries in the first step, which is selecting countries with comparable GNI's to the NME country, to the ten countries closest in GNI to Vietnam, then the resulting list would not have even included Bangladesh, Sri Lanka, or Indonesia. Consequently, Petitioner asserts that the surrogate country listing might have, instead, included Sudan, Nigeria, Mauritania, Pakistan, and India, thus leaving India as the only appropriate surrogate country option.

DEPARTMENT'S POSITION

The Department employed the correct analytical framework in its draft remand redetermination, in determining that Bangladesh was the appropriate surrogate country selected to value the factors of production in Vietnam Shrimp AR2.

First, Petitioner has argued that the Department did not consider the economic comparability of the potential surrogate countries pursuant to 19 USC 1677b(c)(4)(A) because it considers all countries on the Office of Policy's list to be equal in terms of economic comparability. However, per the Court's remand instructions, we have explained why we are justified in treating all the countries on the Surrogate Country List as equally comparable to Vietnam.

Petitioner then argues that the Department has not followed its own established practice using the four-prong surrogate country analysis method to select potential surrogate countries. However, the Court's Remand Opinion and Order requested that the Department:

> 1) explain why it is justified in treating all the countries on the surrogate country list as equally comparable to Vietnam, despite their differences in per capita GDP, or 2) explain why the difference in comparability to Vietnam in per capita GDP between India and Bangladesh is small enough that it may be outweighed by superior quality of the Bangladeshi data, providing a reasoned basis for the determination of such superiority, or 3) otherwise reconsider its determination in accordance with this opinion.

See Remand Opinion and Order at 17-18.

In other words, the Court did not require the Department to explain or justify how the countries from World Development Report are selected and on what grounds those countries that are selected from the World Development Report are later included in the Surrogate Country List generated by the Office of Policy. In fact, the Court acknowledged in its Remand Opinion and Order that the Department "does not have a set range within which a country's GNI per capita could be considered economically comparable." See id., at 16. Nor did the Court require the Department to explain why the countries on the World Development Report with GNI's closest to the NME country were excluded from the Surrogate Country List. The Court required the Department to explain why the countries on the Surrogate Country List are all considered economically comparable or explain why the differences in GNI (or GDP) between India and Bangladesh were insignificant in light of the availability and reliability of the data for each country. Thus, in consideration of the Court's remand requirements, the Department has sufficiently explained and supported its surrogate country determination in the Draft Remand Results.

However, in the interest of further supporting our surrogate country determination, we also add that our primary reliance on GNI, and partial reliance on data availability, are reasonable and in accordance with law, as there is no statutory or regulatory requirement that mandates the Department rely exclusively on GNI when determining which countries to place on the list of potential surrogates.[10] The statute only directs Commerce to select factors of production from an economically comparable country "to the extent possible." See 19 U.S.C. § 1677b(c)(4).

It is reasonable for the Department to consider whether reliable data is available from a potential surrogate country because intrinsic to the potential surrogate country analysis, the

[10] See Technoimporexport v. United States, 766 F. Supp. 1169, 1175 (CIT 1991) ("the law does not require {Commerce} to chose the most comparable country, but rather a comparable country").

Department can and must consider whether a country on the World Development Report that has a reasonably comparable GNI to the NME country even reports any information or data regarding its industries before the Department selects it as a potential surrogate for the NME country. Moreover, the Court has acknowledged that the Department considers data an integral step in identifying and selecting countries from the World Development Report. Specifically, in Fujian Lianfu Forestry, the Court stated that:

> In selecting the list of potential surrogate countries, the Department does not consider NMEs and non-state territories such as "West Bank/Gaza." The Department also did not include on its list ten countries which the Department believes would not have as much available and reliable data as India (i.e., Syria, Angola, Ivory Coast).

See Fujian Lianfu Forestry at 1348.

The Court, then, sustained the Department surrogate country selection methodology by stating that:

> Dare Group's substantial evidence challenge might be compelling if the standard for economic comparability (either by statute, regulation, administrative policy, or practice) depended on some fixed range of nominal GNI data, but as noted, it apparently does not. Reviewed against the more flexible GNI standard actually applied by Commerce, Commerce's finding (and its accompanying explanation) that India is economically comparable to China is reasonable, and therefore supported by substantial evidence.

See id. at 1349.

Therefore, the Department's explanation in the Draft Remand Results adheres to the Court's requirement in the Remand Opinion and Order, and is similar to the determination sustained in Fujian Lianfu Forestry.

2. Separate Rate Determination

On remand, the Court ordered the Department to reconsider the methodology used in assigning separate rates to non-individually examined respondents in Vietnam Shrimp AR2. Per the Court's instruction, the Department has explained why the methodology from Vietnam Shrimp AR2 is reasonable and has supported, with substantial evidence, the rates assigned.

The Court stated that the Department must articulate a "rational connection between the facts found and the choice made," (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)), explaining why the rate chosen "is based on the best available information and establishes antidumping margins as accurately as possible" (quoting Shakeproof Assembly Components, Div. of Consol. Ct. No. 08-00301 Page 22 Ill. Tool Workers, Inc. v. United States, 268 F.3d 1376, 1382 (Fed. Cir. 2001)). See Remand Opinion and Order at 21. In remanding this issue, the Court stated that, "Commerce's decision to assign dumping margins to Plaintiffs based only on the rates they were assigned in prior proceedings does not meet this standard." See id. at 22. The Court further found that Commerce did not provide it with "sufficient evidence on the record which could justify ignoring the evidence in favor of assigning a de minimis rate to Plaintiffs and which would support as reasonable the alternate rate chosen. Nor has Commerce articulated a clear justification for choosing the dumping margin that it assigned." Id. at 26. Thus, the Court held that "Commerce must either assign to Plaintiffs the weighted average rate of the mandatory respondents, or else must provide justification, based on substantial evidence on the record, for using another rate." Id. at 30.

We continue to find that a reasonable method for determining the margins for the separate rate companies in this review is the methodology used in the final results (Vietnam Shrimp AR2): to assign the margin of 4.57 percent, the margin calculated for cooperative separate rate respondents in the underlying investigation, to the separate rate respondents in the instant review with no history of a calculated margin, and for those separate rate respondents that received a calculated rate in a prior segment, to assign that calculated rate as the company's separate rate in this review. The Department believes that it provided an adequate justification in Vietnam Shrimp AR2, in accordance with law and supported by substantial evidence, when selecting a reasonable method to assign a separate rate to the non-individually examined respondents. However, per the Court's instruction, under protest, we respectfully provide

additional justification supported by substantial evidence from the record of this review for the Department's separate rate determination.

The statute and the Department's regulations do not directly address the establishment of a rate to be applied to individual companies not selected for examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally we have looked to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents we did not examine individually in an administrative review. Section 735(c)(5)(A) of the Act instructs that we are to weight-average the rates for the companies that were individually investigated excluding zero and de minimis rates and rates based entirely on facts available. Section 735(c)(5)(B) of the Act also provides that, where all margins for companies individually investigated are zero, de minimis, or based entirely on facts available, we may use "any reasonable method" for assigning the rate to non-selected respondents. One method that section 735(c)(5)(B) of the Act contemplates as a possibility in this situation is "averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." As the Court acknowledged, Commerce is not required to use a particular method, even under the guidance of section 735(c)(5)(B) of the Act, but "as a legal matter, may choose to include or to exclude the mandatory respondents' zero or de minimis margins in calculating a separate rate." Remand Opinion and Order at 23.

In exercising this discretion to determine a non-examined rate, the Department considers relevant the fact that section 735(c)(5) of the Act: a) is explicitly applicable to the determination of an all others rate in an investigation; and b) articulates a preference that the Department avoid zero, de minimis rates or rates based entirely on facts available when it determines the all others rate. With respect to the second point, the Department consistently seeks to avoid the use of total facts available, zero and de minimis margins in determining non-selected rates in administrative

reviews, in order to implement this statutory preference. With respect to the first point, the statute's statement that averaging of zero/de minimis margins and margins based entirely on facts available may be a reasonable method, and the Statement of Administrative Action's ("SAA") indication that such averaging may be the expected method, should be read in the context of an investigation. See SAA accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 at 872 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4200. First, if there are only zero or de minimis margins determined in the investigation (and there is no other entity to which a facts available margin has been applied), the investigation would terminate and no order would be issued. Thus, the provision necessarily only applies to circumstances in which there are either both zero/de minimis and total facts available margins, or only total facts available margins. Second, when such rates are the only rates determined in an investigation, there is little information on which to rely to determine an appropriate all-others rate. In this context, therefore, the SAA's stated expected method is reasonable: the zero/de minimis and facts available margins may be the only or best data the Department has available to apply to non-selected companies.[11]

While the statute contemplates that we may use an average of the zero, de minimis and rates based entirely on facts available in an investigation, we have available in administrative reviews information that would not be available in an investigation. Specifically in this administrative review, we have rates from prior proceedings and evidence of dumped sales in the prior POR and instant POR. In the first administrative review, the Department calculated a zero

[11] For this reason, to the extent that the Court's statement that there is no basis in the statute for "penalizing cooperative uninvestigated respondents due solely to the presence of non-cooperative uninvestigated respondents who receive a margin based on AFA," indicates that application of an average of zero/de minimis rates and a rate based on AFA would be impermissible, the Department respectfully disagrees. Remand Opinion and Order at 27 (citing Yantai Oriental Juice Co v. United States, 27 CIT 477, 487 (2003)). The Department does not consider the use of an AFA rate in an average to be an application of an adverse inference. The statute explicitly permits such averaging. As the Court held in Laizhou Auto Brake Equipment Co. v. United States, 2008 Ct. Intl. Trade LEXIS 68, *29, Slip Op. 08-71 (2008) with respect to an average derived from a statistical sample, application of an average that includes an AFA rate to the group is not itself an application of AFA to the group.

margin for the only individually examined respondent, Vietnam Fish One. Concurrently, we also calculated a zero margin for Grobest in the aligned new shipper review. As the Court noted, we also determined to apply AFA to two mandatory respondents. See Remand Opinion and Order at 29. As these companies refused to provide the Department with necessary information, the Department was required to resort to facts available, and applied an adverse inference, determining their dumping margins to be 25.76 percent. We find that the existence of the 25.76 percent rate in the first administrative review is evidence that dumping has occurred since the investigation of the underlying order, in that two of the three exporters selected for individual review repeatedly did not respond to the Department's requests for information. The Department assumes that if an uncooperative respondent could have demonstrated a lower rate, it would have cooperated. See Rhone Poulenc, Inc. v. United States, 899 F2d 1185 (Fed. Cir. 1990).

Moreover, we also note that, in this review, there is evidence of dumping, despite the calculation of weighted-average de minimis margins for the mandatory respondents. At least one of the respondents individually investigated had transaction-specific margins that were higher than the 4.57 percent rate from the investigation. We find this fact relevant as it provides evidence showing that dumping, on a transaction-specific basis, occurred during the POR at rates higher than the 4.57 percent rate.[12] Further, the exporters to which we assigned an AFA rate, in this administrative review, were entirely unresponsive to our requests for information that was required in order for the Department to select respondents for individual review. Of the 63 exporters covered by the review, 35 exporters did not submit quantity and value questionnaire responses at the beginning stages of the proceeding, despite confirmed receipt of each attempt

[12] For all transaction-specific margin information, see "Memorandum to The File from Irene Gorelik, Senior Case Analyst, Office 9, through Catherine Bertrand, Program Manager, Office 9, Subject: Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Analysis for the Final Results of Camau Frozen Seafood Processing Import Export Corporation ("Camimex"), and accompanying SAS output at Attachment 2, dated September 2, 2008. See also "Memorandum to The File from Irene Gorelik, Senior Case Analyst, Office 9, through Catherine Bertrand, Program Manager, Office 9, Subject: Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Analysis for the Final Results of Minh Phu Group ("MPG")", and accompanying SAS output at Attachment 2, dated September 2, 2008.

made by the Department to solicit a quantity and value response. As a result, the Department lacked the necessary information to determine whether these 35 companies should have been selected as mandatory respondents. Accordingly, these companies were deemed to be part of the Vietnam-wide entity, and considered uncooperative. Consequently, the rate of the Vietnam-wide entity, of which these entities are a part, was adversely determined to be 25.76 percent. We do not consider the two companies selected for individual examination, as the Court stated, "to be representative of the respondents as a whole" because we did not select them pursuant to a statistical sampling methodology and because there is evidence on the record that several companies acted in a manner different from the mandatory respondents.[13] Indeed, by failing to allow the Department to determine the volume of their exports, precluding possible selection for individual examination, these companies, as part of the Vietnam-wide entity are reasonably presumed to have dumped at a rate at least equal to 25.76 percent during this POR. Consequently, the Department may infer that the existence of unresponsive exporters to which we assigned an AFA rate, as part of the Vietnam-wide entity, is evidence of continued dumping under the antidumping duty order.

Finally, we note that entry data obtained from U.S. Customs and Border Protection ("CBP") shows that exporters from the Vietnam-wide entity entered subject merchandise during the POR

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[13] The Court stated that:

> All parties agree that the mandatory respondents are presumed to be representative of the respondents as a whole; consequently, the average of the mandatory respondents' rates may be relevant to the determination of a reasonable rate for the separate rate respondents. More particularly, that the mandatory respondents in the current review were found not to be engaged in dumping was evidence indicating that the responding separate rate Plaintiffs may also no longer be engaged in dumping.

See Remand Opinion and Order at 23. The Department respectfully disagrees that an average rate applied to non-selected companies, when the selection methodology is based on the largest volume of exports is technically "representative" of other exporters' margins. While the sampling methodology attempts to reach "representativeness" by requiring a statistically valid sample, the option of selecting the respondents that have the largest volume, which is the methodology we used in selecting respondents in this case, does not include a representativeness evaluation. See section 777A(c)(2) of the Act; SAA at 872.

for which a cash deposit was paid at the rate of 25.76 percent. As reviews were not requested by some of these exporters, it is reasonable to presume that the cash deposit rate is reflective of the level of actual dumping by these exporters during the POR.

Accordingly, we find that, selecting rates from prior segments to apply to the nonselected companies in this review implements the statute's preference to avoid zero/de minimis and facts available margins and reasonably reflects the existence of dumping under the order, specifically accounting for: 1) the positive transaction-specific margins that exist on the record of this review; 2) the evidence of dumping in this review that may be inferred based on the lack of cooperation of the Vietnam-wide entity, which includes the companies that did not allow the Department to determine whether or not they should be selected for examination; 3) the evidence of dumping by certain mandatory respondents in the first review; and 4) ongoing entries made under the Vietnam-wide rate for which either reviews were not requested, or responses to Department questions not received.

In the Remand Opinion and Order, the Court cited to Brake Rotors and Honey from Argentina in which the Department assigned an average of de minimis margins to non-examined entities.[14] However, this case differs from Brake Rotors for the following reasons. In Brake Rotors, the Department found the industry to be homogenous[15], and we have made no similar determinations here. Also, we have not found the same longstanding history of calculated zero

[14] See Brake Rotors From the People's Republic of China: Final Results of 2006-2007 Administrative and New Shipper Reviews and Partial Rescission of 2006-2007 Administrative Review, 73 FR 32678 (June 10, 2008) ("Brake Rotors"). See also Honey from Argentina: Preliminary Results of Antidumping Duty Administrative Review and Intent Not to Revoke in Part, 72 FR 73763 (December 28, 2007) ("Honey from Argentina").

[15] In the eighth administrative review of Brake Rotors from the PRC, "the Department determined that the population {of exporters} was sufficiently homogeneous," with respect to the sampling methodology applied in selecting respondents." See Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review, 71 FR 66304 (November 14, 2006) and accompanying Issues and Decision Memorandum at Comment 1A. However, the Department has neither applied the sampling method to select respondents for individual examination in this proceeding, nor determined that the Vietnamese shrimp industry in this proceeding is homogeneous or heterogeneous.

and de minimis margins as was found in Brake Rotors. Finally, there was no inference of dumping from uncooperative respondents in Brake Rotors, as we have here. With respect to Honey from Argentina, similarly, we do not have the same consistent and longstanding history of zero/de minimis margins as was found in that review. Also, there was no inference of dumping from uncooperative respondents in Honey from Argentina, as we have here.[16]

Notwithstanding these differences, in proceedings since Honey from Argentina the Department has not applied a de minimis rate as the non-examined rate based on calculation of zero or de minimis rates for the only cooperative respondents. For example, in two other cases, all immediately post-dating Honey from Argentina, the Department explained in each case why it has selected a rate from a prior segment. See e.g., Notice of Final Results of Antidumping Duty Administrative Reviews and Rescission of Reviews In Part: Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom, 73 FR 52823 (September 11, 2008) and accompanying Issues and Decision Memorandum at Comment 6 ("Ball Bearings") and Notice of Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 74 FR 11349 (March 17, 2009) and accompanying Issues and Decision Memorandum at Comment 6 ("Fish Fillets AR4"). Accordingly, Honey from Argentina and Brake Rotors reflect both an older and distinguishable policy.

For the foregoing reasons we find that there is substantial evidence on the record to justify our non-examined rate determination in Vietnam Shrimp AR2 and that this methodology

[16] In another instance, the Department determined that the statute's preference for not averaging zero/de minimis and facts available margins was outweighed by the statute's authority to use a statistical sampling methodology to select mandatory respondents. In an earlier brake rotors determination, because the Department used a statistical sample to select respondents, it averaged the zero/de minimis, AFA and positive calculated rates to determine the average rate for all the non-selected companies. The Department determined to include the zero/de minimis and AFA margins because to exclude such rates would undermine the representative nature of a statistical sample. See Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review, 71 FR 66304 (November 14, 2006). The Department's decision to include AFA margins in the average was upheld by the Court. See Laizhou Auto Brake Equipment Co. v. United States, 2008 Ct. Intl. Trade LEXIS 68, Slip Op. 08-71 (2008).

is reasonable in assigning a non-examined rate exclusive of any weighted-average de minimis or zero margins or margins based entirely on facts available.

COMMENTS FROM INTERESTED PARTIES

Petitioner supports the Department's findings in the Draft Results regarding the explanation for the Department's separate rates determination for non-individually examined respondents.

Respondents contend that the Department has not provided any new evidence or other justification to support its separate rate assignment methodology. Further, Respondent states that the Department offered no justification to assign the cooperative non-individually examined respondents here an AFA rate assigned to non-cooperative respondents in the first administrative review. Respondents add that, although the Court acknowledged an inference of dumping in the first administrative review, such an inference does not exist in Vietnam Shrimp AR2.

Additionally, Respondents reiterate the Court's opinion that mandatory respondents are selected to be representative of the industry, whether or not the sampling method was utilized. Respondents further argue that this representativeness of the industry should be relegated to the cooperative non-examined respondents equally when the margins calculated for the individually examined mandatory respondents are de minimis or above de minimis. Respondents support the Court's opinion that because the mandatory respondents were not found to be dumping in Vietnam Shrimp AR2, there is evidence that the separate rate respondents must also not be dumping. Furthermore, Respondents cite to Brake Rotors and Honey from Argentina as cases where the Department assigned de minimis or zero separate rates based on the weighted-average zero or de minimis margins calculated for the individually examined mandatory respondents. Respondents argue that the Department's determination in Fish Fillets AR4 is distinguishable from the facts of this case and the Department determination in Ball Bearings was decided wrongly.

With respect to the quantitative data from the record used to provide substantial evidence to support the separate rate determination, Respondents first argue that the Department cannot exonerate the individually-examined mandatory respondents with de minimis rates in the Vietnam Shrimp AR2, while using the data of these same respondents as evidence of dumping. Respondents argue further that the fact that certain products were dumped is irrelevant compared against the entirety of the data that resulted in a de minimis margin. Citing to the underlying investigation, Respondents add that the data put forward here by the Department is analogous to the corroboration method used to justify the application of AFA, which is unreasonable since the respondents have fully cooperated with the Department. Second, Respondents contend that the Department's reference to CBP data showing subject entries at the Vietnam-wide rate during the POR proves nothing with respect to the behavior of cooperative non-selected respondents.

Lastly, Respondents argue that the Department cannot continue to attribute the behavior of the 35 non-cooperative exporters to the cooperative, non-selected respondents. Respondents contend that the Court has already stated that the behavior of these 35 exporters fails to justify the Department's selection of a separate rate margin for the cooperative, non-selected respondents. Respondents claim that, while it may have been proper for the Department to infer dumping exists by these 35 non-cooperative exporters, it is unreasonable for the Department to infer that dumping exists for the cooperative, non-selected respondents.

DEPARTMENT'S POSITION

The Department employed the correct analytical framework in its draft remand redetermination, in determining a reasonable method with which to assign a rate to non-individually examined respondents in Vietnam Shrimp AR2.

Respondents argued that the Department offered no new justification for attributing to cooperative non-mandatory respondents the AFA rates assigned to the uncooperative respondents in the first review. First, Respondents have misconstrued the Department's

determination with respect to the assignment of rates to the non-individually examined respondents. The Department did not attribute AFA rates to the non-individually examined respondents. The 4.57 percent rate about which most of the Plaintiffs in this case complain was the rate assigned in the first administrative review to the companies not individually examined and is based on the weighted-average calculated rates of the cooperative individually examined mandatory respondents in the underlying investigation. See Vietnam Shrimp AR2 at Comment 6. The other rate, 4.30 percent was the rate calculated for one of the individually examined companies in the investigation, and to whom we subsequently assigned that same calculated rate in Vietnam Shrimp AR2. This methodology does not, in any way, attribute or assign rates based on an adverse finding. Thus, we find that Respondents' allegation that the Department has attributed an adverse inference to the cooperative, non-individually examined respondents is baseless.

Second, Respondents incorrectly equate the calculation of positive margins for individually examined respondents with calculated de minimis or zero margins. Although both rates are "calculated" based on the respondents' submitted data, the statute clearly disfavors the use of de minimis or zero margins in the calculation of the "all-others" average rate in an investigation. Section 735(c)(5) of the Act. This provision disfavors the use of both de minimis/zero rates as well as margins determined entirely under section 776 of the Act in the calculation of the average. As we did not calculate positive margins for the individually examined respondents, but rather calculated only zero and de minimis rates for the individually examined respondents and determined AFA margins for the non-cooperative exporters, we considered the statutory preference to avoid the use of these rates in the average.[17] The Court

[17] Respondents' assertion in their comments dated January 21, 2010, that the 35 companies which received AFA "either stopped shipping to the United States or shipped very little" is not supported by record evidence. However, the record does show evidence of exporters notifying the Department that they had no shipments of subject merchandise during the POR, none of which are among the 35 companies that received AFA. See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Partial Rescission

has ruled that the different treatment between rates that are de minimis and rates that are above de minimis is an "inherent and accepted part" of the Department's respondent selection methodology. See Longkou Haimeng Mach. Co. v. United States, 581 F.Supp 2d 1344, 1360 (CIT 2008). Therefore, taking guidance from section 735(c)(5) of the Act addressing circumstances where the Department calculates zero or de minimis rates, or determines margins based entirely on facts available, rather than using these disfavored rates, we looked to another reasonable method to assign rates to non-individually examined respondents.

The Department disagrees with Respondents' assertion that we have not distinguished this case from Brake Rotors and Honey from Argentina. The Brake Rotors proceeding had a far longer history of calculated de minimis or zero rates, than certain frozen warmwater shrimp from Vietnam. At the time of this review, shrimp from Vietnam was only in the second administrative review, whereas Brake Rotors from China, at the time, was in its tenth administrative review.

Unlike Brake Rotors, this proceeding does not have as long a history of zero or de minimis calculated margins, but rather has assigned AFA margins (evidence of dumping) in both completed administrative reviews. In the first administrative review, we assigned AFA to two of the respondents selected for individual examination in addition to assigning AFA to nine other companies that also failed to cooperate. See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review, 72 FR 52052, 52054 (September 12, 2007). In the second administrative review, we assigned AFA to 35 companies that were not cooperative because they failed to respond to the Department's requests for quantity and value data,

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and Final Partial Rescission of the Second Administrative Review, 73 FR 12127 (March 6, 2008) ("Vietnam Shrimp AR2 Prelim"); "Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration from James Doyle, Director, Office 9, Import Administration; Recommendation Memorandum Regarding Quantity and Value Questionnaire Responses and Lack Thereof: 2006/2007 Administrative Review on Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam ("Unresponsive Companies Memo"), dated July 18, 2007."

necessary to determine whether they should have been selected for individual examination. See footnote 16. Nor did they establish that they were independent from, and thus entitled to a different rate than the Vietnam-wide entity. As such, in both the first administrative review and the second administrative review, the Department assigned to the Vietnam-wide entity, of which numerous exporters were deemed a part, an AFA rate of 25.76 percent, based on their failure to participate or to cooperate with the Department's requests for necessary data. The Department has referred to these rate determinations in this case to distinguish this case from Brake Rotors, as well as to provide the Court with substantial evidence that assigning a positive, cooperative, non-AFA margin to the non-individually examined companies is reasonable.

Further distinguishable in Honey from Argentina is the fact that there was only one instance where the Department assigned an AFA rate, which occurred in the investigation,[18] unlike in this case where we have assigned an AFA margin in the underlying investigation and both subsequent administrative reviews. Also, the proceeding was in its fourth administrative review when the Department assigned zero/de minimis rates to the non-examined companies. The relative comparison between cases here is highlighted only to show that the circumstances of antidumping proceedings can vary greatly between segments of the same order and even more so between different industries, such that the Department cannot automatically ascribe the behavior of companies in one industry, such as honey or brake rotors, to companies in an entirely different industry, such as the shrimp industry. The Department must address relevant differences and similarities on a case by case basis. Consequently, we determine that, as we stated above, because the facts of this case are sufficiently distinct from the unique circumstances presented in Brake Rotors or Honey from Argentina, another separate rate assignment methodology was more reasonable and appropriate here. Finally, while the Department was faced with novel and unique

[18] See Notice of Final Determination of Sales at Less Than Fair Value; Honey From Argentina, 66 FR 50611, (October 4, 2001).

circumstances in the cited honey and brake rotors proceedings, subsequently in Vietnam Shrimp AR2, the Department more broadly and thoroughly articulated its policy going forward. The methodology that the Department later articulated in Vietnam Shrimp AR2 is reasonable, based on the statute's disfavoring of the use of zero/de minimis margins or margins based entirely on facts available. This is particularly so under the circumstance presented in this case: relatively early in a proceeding, in which evidence of dumping persists.

Third, we disagree with Respondents' assertion that the transaction-specific sales of one mandatory respondent in this case cannot be used to prove evidence of dumping. Respondents stated that the Department "cannot exonerate the mandatory respondents by giving them de minimis margins in the Final Results while at the same time claiming that there is evidence of dumping by these same exporters." See Respondents' comments dated January 21, 2010 at 6. Contrary to Respondents' interpretation, we are not claiming that the mandatory respondents are dumping on an aggregate level. The weighted-average de minimis or zero rates calculated for these respondents have not changed, nor are the individually examined respondents the central issue at hand. For purposes of providing the Court with substantial evidence on the record to support the non-examined rate assignment methodology applied in this review, the Department simply cited to quantitative evidence on the record that dumping has occurred on a transaction-specific basis. In any case, the Department did not solely refer to the transaction-specific margins on the record as evidence of dumping under the order, but also acknowledged the existence of the subject entries at the Vietnam-wide entity rate for companies that did not request an administrative review as well as the existence of the AFA rate assigned to companies that did not cooperate with the Department in providing quantity and value data.

We also disagree with Respondents' assertion that import data provided by CBP for companies subject to the Vietnam-wide entity rate proves nothing about the behavior of the non-individually examined respondents. Again, the Department referred to the CBP data as support

for our argument that dumping continues to occur under this Order, because subject merchandise continued to enter the United States under the Vietnam-wide entity rate in this review, and the Department did not receive review requests from all companies under the Vietnam-wide rate. Indeed, the same argument could be used to suggest that the behavior of the selected companies (no dumping on average) proves nothing as to the non-selected companies' behavior. It is because of the statute's clear preference to avoid using de minimis/zero and AFA rates in the average that we have not used any of these rates in assigning a rate to the non-examined companies. The statute permits the Department to individually examine only a limited number of companies when it is impracticable to examine all of them because the number is large. See section 777A(c)(2) of the Act. The statute does not prescribe what rate to assign to those companies not examined, and when using the selection methodology employed here, choosing the largest export volume that can reasonably be examined, the Department does not "prove" – i.e., calculate – the actual rate of the non-examined companies. In assigning a margin to the non-examined companies, the Department did not impute the actions of any companies subject to an AFA rate, or the zero/de minimis rates, to the behavior of the non-individually examined companies, but because these were the only rates determined in the proceeding, consistent with the statute, the Department avoided the use of these rates and selected another reasonable method to assign rates to these companies.

Lastly, we disagree with Respondents' claim that the calculated margins are "representative" of the behavior of other non-individually examined respondents. As we stated above in the analysis portion of this final remand, the Department respectfully disagrees that a rate applied to non-selected companies, when the selection methodology is based on the largest volume of exports is technically "representative" of other exporters' margins. While the sampling methodology attempts to reach "representativeness" by requiring a statistically valid sample, the option of selecting the respondents that have the largest volume, which is the

methodology we used in selecting respondents in this case, does not include a representativeness evaluation. See section 777A(c)(2) of the Act; SAA at 872. In other words, the statute does not provide for the expectation of representativeness without a statistically valid sampling methodology applied in selecting respondents for individual examination.

C. FINAL REMAND CONCLUSION

In accordance with the Court's instructions, and based on the preceding analyses which takes into consideration the comments from Respondents and Petitioner, we have provided explanations regarding our surrogate country determination and non-examined rate determination based on substantial evidence on the record of this administrative review. Accordingly, it is unnecessary to recalculate any antidumping duty margins in this remand determination.

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Carole A. Showers
Acting Deputy Assistant Secretary
for Import Administration

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Date