

DEWEY BALLANTINE LLP

975 F STREET, N.W.
WASHINGTON, D.C. 20004-1405
TEL 202 862-1000 FAX 202 862-1093

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PUBLIC VERSION

DELIVERY BY HAND

The Honorable Carlos M. Gutierrez
Secretary of Commerce
Attn: Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, DC 20230

Attn: Sheila Forbes, Room 3065

Re: Second Antidumping Duty Administrative Review of Certain
Frozen Warmwater Shrimp from India (2006-2007): Respondent
Selection and Requests for Verification

Dear Secretary Gutierrez:

On behalf of the Domestic Producers¹ in the above-captioned administrative
review, we hereby submit comments to the U.S. Department of Commerce (the

¹ Ad Hoc Shrimp Trade Action Committee ("Domestic Producers"). The
Committee is a domestic interested party to this proceeding.

ORIGINAL

“Department”) regarding the selection of mandatory respondents in the second administrative reviews of the antidumping duty orders on certain warmwater shrimp from India. These comments are submitted in accordance with the Department’s June 6, 2007 memorandum to all interested parties providing a “final opportunity” to comment on the Department’s intended respondent methodology.² In addition, as explained *infra*, we hereby request that the Department verify the information submitted in this review.

I. THE DEPARTMENT HAS INAPPROPRIATELY RESTRICTED COMMENTS ON RESPONDENT SELECTION PRIOR TO THE RECEIPT OF ALL RELEVANT DATA

The Department’s June 6th Memorandum observes that interested parties “have had since the publication of the Initiation Notices to comment on the Department’s intention to select respondents by choosing the largest exporters and producers by volume”³ Domestic Producers submitted comments on respondent selection to the Department on May 22, 2007.⁴ As noted in that submission, the Department did not invite comment on respondent selection and instead announced, with prior comment provided only *ex parte* from a single U.S. importer, that the agency intended to select mandatory respondents in the administrative reviews by “the largest exporters/producers

² Letter from the U.S. Department of Commerce to Interested Parties, Case Nos. A-351-383, A-331-802, A-533-840, and A-549-822 at 1 (Jun. 6, 2007); Letter from the U.S. Department of Commerce to Interested Parties, Case Nos. A-570-893 and A-522-802 at 1 (Jun. 6, 2007) (“Department’s June 6 Memorandum”).

³ Id.

⁴ Letter from Dewey Ballantine LLP to the U.S. Department of Commerce, Case Nos. A-351-383, A-331-802, A-533-840, A-570-893, A-549-822, and A-552-802 at 1 (May 22, 2007) (“Domestic Producers’ Respondent Selection Comments”).

by U.S. sales/export volume.”⁵ Domestic Producers’ May 22 Respondent Selection Comments also noted that the announcement of an intention to use one alternative respondent selection methodology without considering the appropriateness of the other alternative methodology was unprecedented and a significant, inexplicable departure from past practice.⁶

In the memoranda issued by the Department in the first administrative review with respect to the selection of respondents in those proceedings, the agency observed that the decision to choose the largest respondents “does not preclude the Department from considering the selection of mandatory respondents in future reviews of this order using a sampling methodology.”⁷ And yet, in every action taken by the Department with respect to respondent selection taken thus far in this review, the agency appears to have sought to preclude consideration of a sampling methodology to choose mandatory respondents. After first declaring that the largest exporters would be chosen, the Department’s June 6th memorandum provides a “final opportunity” to comment on respondent selection -- while at the same time not disavowing its intention to examine the largest exporters and producers by volume -- well before the extended submission deadlines of over one hundred quantity and value questionnaire responses.

⁵ Id. at 2.

⁶ Id. at 2-3.

⁷ See, e.g., U.S. Department of Commerce Internal Memorandum from I. Tzafolias to S. Claeys, Case No. A-549-822 at 6 (Jul. 11, 2006) (Public Version) (“AR1 Thailand Respondent Selection Memorandum”); U.S. Department of Commerce Internal Memorandum from I. Tzafolias to S. Claeys, Case No. A-351-838 at 6 (Jul. 11, 2006) (Public Version) (“AR1 Brazil Respondent Selection Memorandum”).

Specifically, the Department has issued letters providing a number of Thai and Indian exporters subject to these administrative reviews the opportunity to respond to the quantity and value questionnaires between June 19th and June 21st, depending on the company.⁸ Just one of these letters was sent to 149 different Indian exporters.⁹ Thus, the Department's June 6th memorandum improperly requires "final" comments on respondent selection to be made well before all relevant data has been received in this proceeding. Accordingly, Domestic Producers again request that the Department (1) correct its initiation notice to rescind the unprecedented and indefensible action of announcing an intended respondent selection methodology prior to receipt of any relevant data; (2) allow interested parties to comment on an appropriate respondent selection methodology for each of the reviews once all relevant data has been received; and (3) fairly consider all comments submitted (and relevant data) prior to choosing a respondent selection methodology.

II. THE DEPARTMENT SHOULD USE SAMPLING TO SELECT RESPONDENTS IN THE SECOND ADMINISTRATIVE REVIEWS

A. SAMPLING IS BOTH AUTHORIZED AND CONTEMPLATED BY THE STATUTE

Where, as in these reviews, it is not practicable for the Department to calculate individual dumping margins for all of the potential respondents to the agency's administrative review proceeding, the Department is permitted to determine margins for a

⁸ Letter from the U.S. Department of Commerce to companies listed at unnumbered attachment 1, Case No. A-533-840 (May 4, 2007) ("Department Letter to Indian Exporters"); Letter from the U.S. Department of Commerce to companies listed at unnumbered attachment 1, Case No. A-549-822 (May 4, 2007).

⁹ Department Letter to Indian Exporters at unnumbered attachment 1.

“reasonable number” of exporters or producers by limiting its examination.¹⁰ The statute permits the Department to limit its review to:

- (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
- (B) exporters or producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.¹¹

There is no preference in the statute for one methodology over another.¹²

In both the original LTFV investigations and the first administrative reviews, the Department selected a limited number of mandatory respondents based on the largest volume of exports of subject merchandise. This decision, however, does not mean that the Department is obligated to use this methodology in future administrative reviews regarding the same subject merchandise. As the Department correctly noted in a Softwood Lumber administrative review, “the use of one methodology to select respondents in a given segment of a proceeding does not preclude the use of the other methodology in another segment of the same proceeding.”¹³ In that review, the Department switched from employing the “largest volume” respondent selection

¹⁰ 19 U.S.C. § 1677f-1(c)(2) (2005).

¹¹ Id.

¹² See U.S. Department of Commerce Internal Memorandum from D. Layton, D. Neubacher, and S. Subler through S. Kubach and C. Handley to S. Claeys, Case No. A-122-838 at 10 (Dec. 15, 2005) (Public Version) (“Lumber Respondent Selection Memorandum”).

¹³ Id.

methodology in the original LTFV investigation and first administrative review to using a sampling methodology to select respondents in later segments of the proceeding.¹⁴

Congress has provided express statutory authority for the Department to select respondents by sampling. A determination of whether this methodology should be employed in selecting respondents in any given proceeding should be based on the record presented in that proceeding. As described in detail below, the (incomplete) record in these proceedings demonstrates that a sampling methodology should be used to select respondents in this administrative review.

B. THE (INCOMPLETE) RECORD IN THESE ADMINISTRATIVE REVIEWS SUPPORTS THE USE OF SAMPLING TO SELECT RESPONDENTS IN THESE PROCEEDINGS

In the first administrative reviews, the Department determined that it was appropriate to use a “largest volume” methodology for selecting mandatory respondents. The Department explained that use of this methodology meant that the respondents selected represented over half of the total export volume under review and that the review would include companies that had not been examined by the agency in the original investigation.¹⁵ The Department has not explained the relevance of the percentage of reported shipment volume in the context of determining which statutorily-provided methodology to use in selecting mandatory respondents. First, the Department has previously employed a sampling methodology despite the fact that use of the “largest

¹⁴ Id.

¹⁵ See, e.g., AR1 Thailand Respondent Selection Memorandum at 6-7, AR1 Brazil Respondent Selection Memorandum at 6-7.

volume” methodology would result in coverage of over half of reported shipments.¹⁶ Second, if the Department is asserting that the reasons behind employing the “largest volume” methodology is that it allows the agency to cover the highest volume of exports, then the Department’s interpretation is clearly inconsistent with the statute. The perfectly circular reasoning that underlies this rationale would mean that in no circumstance would the Department ever use a sampling methodology to select respondents, as the coverage of reported shipments under a sampling methodology could never exceed the coverage of reported shipments under a “largest volume” methodology (and, indeed, would almost always be less).

Nevertheless, regardless of the reasoning behind the Department’s reference to these factors in its selection of respondents in the first administrative review, the application of these principles to the incomplete record in these administrative reviews demonstrates that selecting mandatory respondents based on a “largest volume” methodology is inappropriate in this administrative. For the administrative review of shrimp from India, the selection of the largest volume exporters would result in coverage of less than half of reported shipments and the agency would largely be reviewing companies that had been examined in previous segments. Moreover, a substantial number of Indian exporters would have no opportunity to be reviewed.

Specifically, the quantity and value questionnaire responses received by Domestic Producers indicate that choosing the three largest exporters would result in coverage of only [] of reported shipments during the POR, []

¹⁶ See Lumber Respondent Selection Memorandum at 10.

[]¹⁷ Moreover, []

[]. The quantity and value questionnaire responses received by Domestic Producers indicate that there were [] exporters who shipped at least [] of subject merchandise to the United States during the POR. The difference in volume between the third mandatory respondent exporter that would be chosen using the largest volume exporter selection methodology and the next largest exporter that would not be chosen is []. Thus, the difference between selecting a mandatory respondent [] and selecting the next largest respondent exporter, [], boils down to [] of the third largest exporter's total reported shipments.

C. A SAMPLING METHODOLOGY SHOULD BE EMPLOYED TO GIVE FULL REMEDIAL EFFECT TO THE ANTIDUMPING LAW

To give full remedial effect to the antidumping law, the Department should select respondents in these reviews by sampling.

First, consistently selecting respondents by the largest volume method allows producers and exporters to "game" the system. Continual review of the same respondents invites those respondents to manipulate their sales and cost data to achieve the lowest

¹⁷ Volumes calculated based on total reported by each quantity and value questionnaire respondent regarding (1) total volume produced and exported; (2) total volume produced and exported by another shipper; and (3) total volume exported but produced by another producer.

possible dumping margin while at the same time encouraging non-reviewed producers and exporters to dump their merchandise with impunity. Absent sampling, the margin of dumping of the continually unexamined companies is completely unknown. Thus, non-reviewed exporters and producers, confident that they will not be selected for review, have no incentive to avoid dumping. Worse, these non-reviewed exporters and producers actually have an incentive to increase their dumping, because they know they will never be held accountable for any dumping at a rate higher than the “all-others” rate. This threat is particularly relevant in these proceedings given the Department’s unprecedented action of precluding even the possibility of even considering the alternative sampling selection methodology in the initiation notices of these administrative reviews. By announcing at the very outset of these reviews that, absent any information regarding shipments made during the POR, the Department would choose respondents by the largest volume exporters, the Department has clearly signaled to exporters that smaller volume exporters may never be selected for review because the agency has chosen, for unarticulated reasons, to treat the shrimp cases differently from any other proceedings currently before it.

Second, selection of only the largest respondents precludes producers and exporters who are behaving legitimately and not dumping their merchandise from ever being examined. Thus, for smaller producers who are not dumping (or dumping at a rate below the “all others” average), the possibility of being selected for review (and thus obtaining a company-specific dumping margin) is foreclosed. Sampling provides these producers at least some opportunity of being assigned an individually calculated margin.

Third, by sampling, the Department will be able to include the pricing behavior of smaller exporters and producers in its margin analysis. If these producers behave differently, (i.e., price their products differently than the large exporters and producers), that differential will be captured in the Department's analysis. Conversely, if the size of the company has no effect on the margin (because all producers and exporters are price takers), then sampling will have no effect on the review-specific "all others" margin applied to the non-selected companies.¹⁸

Fourth, sampling furthers the remedial purposes of the antidumping law, because it assures that no company for whom a review has been initiated can assume it will never be selected. Sampling puts all companies, irrespective of their size, on notice that they are potential respondents. Without sampling, the exclusion of all but the largest companies from the reviews is a foregone conclusion. By maintaining a practice of continually selecting the same large exporters and producers as respondents, the same percentage of exports is reviewed. Sampling might result in the Department reviewing less total trade volume in these reviews than would be the case if it selected just the three or four largest exporters and producers in each country, as it did in the investigations. The Department addressed this issue in the recent Softwood Lumber review, and explained the benefits of sampling:

We acknowledge that by sampling with stratification the Department may review less total trade volume than it would have by selecting the largest eight exporters. However, the portion of exports that would not be reviewed if we selected the eight largest exporters, approximately 43 percent, is large. Sampling with stratification of the sample pool ensures that we will review some exports by exporters in the small

¹⁸ See Lumber Respondent Selection Memorandum at 11.

company pool. Moreover, small producers make up by far the great majority of Canadian exporters/producers. By drawing some of these smaller producers/exporters into our analysis, we believe that the results of our review will be more representative and, hence, improved.¹⁹

A similar conclusion is warranted here. Were the Department to again review only the two or three largest exporters and producers in each country, as was the case in the last administrative reviews, the vast majority of exporters and producers would be unreviewed. Moreover, the portion of exports from each country represented by these producers and exporters that would not be reviewed is large.

Finally, the use of sampling in these reviews is consistent with the Department's use of sampling in the recent Softwood Lumber and Brake Rotors reviews. The initiation in the Softwood Lumber review covered 496 companies. Citing the "high number" of potential respondents, the Department limited the number of respondents and selected them using a sampling methodology.²⁰ The Brake Rotors review covered only 16 companies. Nevertheless, the Department, citing the "significant number" of potential respondents, limited the number of respondents, and selected them by sampling.²¹ In the instant review, the number of respondents with respect to the administrative reviews of India is higher than the number of respondents in Brake Rotors.

D. THE DEPARTMENT CAN DEVISE A STATISTICALLY VALID SAMPLE IN THESE REVIEWS

It is practicable to devise a statistically valid sample in these reviews.

¹⁹ Id. (emphasis added).

²⁰ Id. at 1.

²¹ U.S. Department of Commerce Internal Memorandum from J. Doyle to S. Claeys, Case No. A-570-846 at 1-2 (Oct. 14, 2005).

The statute requires that the sample of exporters and producers be “statistically valid based on the information available to the administering authority at the time of selection”²² The requirement that a sample be “statistically valid” is not intended to impose an insurmountable standard. When the sampling provision of the antidumping statute was modified by the Uruguay Round Agreements Act to include a “statistically valid sample,” the Statement of Administrative Action (“SAA”) explained the meaning of this slight modification:

The phrase “statistically valid sample” is intended merely to conform the language of the statute with that of the Antidumping Agreement, and is not a substantive change from the current phrase “generally recognized sampling techniques.” Commerce will employ a sampling methodology designed to give representative results based on the facts known at the time the sampling method is designed. This important qualification recognizes that Commerce may not have the type of information needed to select the *most* representative sample at the early stages of an investigation or review when it must decide on a sampling technique.²³

Thus, both the statute and the SAA reject the notion that a “statistically valid” sample means a “statistically perfect” sample. Instead, where it is not practicable to make individual weighted average dumping margin determinations because of the large number of producers or exporters involved in the review, the Department is instructed to develop a sampling methodology “using the knowledge available at the beginning stage of the segment ‘to select the most representative sample,’ even if this knowledge may be incomplete.”²⁴ Thus, the Department in developing its sampling technique is only

²² 19 U.S.C. § 1677f-1(c)(2)(A) (2005).

²³ Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, at 872-73 (1994) (*italics in original; emphasis added*).

²⁴ See Lumber Respondent Selection Memorandum at 12 citing SAA at 873 (emphasis in original).

required to employ “generally recognized sampling techniques” that yield “representative results.”²⁵

The Department has in its possession sufficient information to develop a “statistically valid” sampling methodology for these reviews. First, the Department has a comprehensive list of Indian producers and exporters subject to this review. Moreover, the Department has extensive quantity and value data obtained from Indian producers and exporters from which to devise a statistically valid sample. Finally, the Department has gained substantial knowledge of the Indian shrimp industry. This knowledge has been gained through extensive examination of Indian producers and exporters during the original investigations and the first administrative review. The Department also conducted on-site verifications of the information provided by Indian respondents both during the LTFV investigation and the first administrative review. Thus, the Department knows the Indian shrimp industry well, and has both the knowledge and verified baselines with which to develop a statistically valid sampling methodology.

III. REQUESTS FOR VERIFICATION

On behalf of Domestic Producers and consistent with 19 C.F.R. § 351.307(b)(1)(v)(A) (2006) and (b)(2), we hereby submit a written request that the Department verify factual information submitted by respondents to the Department in the administrative review the agency is currently conducting with respect

²⁵ SAA at 872.

to imports of certain frozen warmwater shrimp from India.²⁶ Verification is necessary to ensure that the responses to the Department's questionnaires are true, fair, and accurate representations of the respondents' business activities in the United States and various third countries.

IV. CONCLUSION

For the reasons provided above, Domestic Producers again request that the Department (1) correct its initiation notice to rescind the unprecedented and indefensible action of announcing an intended respondent selection methodology prior to receipt of any relevant data; (2) allow interested parties to comment on an appropriate respondent selection methodology for each of the reviews once all relevant data has been received; and (3) fairly consider all comments submitted (and relevant data) prior to choosing a respondent selection methodology. If the Department determines not to grant this request, the agency should use a sampling methodology to choose mandatory respondents in the second administrative review of certain warmwater shrimp from India.

Finally, regardless of how mandatory respondents are selected, Domestic Producers request that the Department verify the responses of the Indian respondents.

* * * * *

Proprietary information released to Domestic Producers' counsel under administrative protective order ("APO") is contained within single brackets in this submission. The "Proprietary Version" of this submission is being served today as

²⁶ Frozen Warmwater Shrimp from Brazil, Ecuador, India and Thailand, 72 Fed. Reg. 17,100 (Apr. 6, 2007) (Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders).

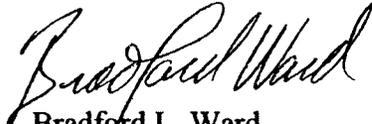
The Honorable Carlos M. Gutierrez

June 13, 2007

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indicated on the attached certificate of service. The "Public Version" will be served within one business day after the date of this submission. Please contact any of the undersigned should you require clarification of any aspect of this submission.

Respectfully submitted,



Bradford L. Ward
Nathaniel Maandig Rickard

Counsel to Domestic Producers