

DEWEY BALLANTINE LLP

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

STAMP & RETURN

JUN 22 2007

RECEIVED
JUN 22 2007
DEPT. OF COMMERCE
ITA
IMPORT ADMINISTRATION

Case Nos. A-331-802, A-533-840,
A-549-822 and A-552-802
Total Pages: 16
Administrative Review (§ 751)
02/01/06-01/31/07
AD/CVD Operations, Office 2
Second Administrative Review Period

PUBLIC DOCUMENT

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: James Maeder, Room 3713

Re: Second Antidumping Duty Administrative Review of Certain
Frozen Warmwater Shrimp from Ecuador, India, Thailand and
Vietnam (2006-2007): Respondent Selection

Dear Secretary Gutierrez:

On behalf of the Domestic Producers¹ in the above-captioned administrative reviews, we hereby supplement Domestic Producers' comments of June 13, 2007 to the U.S. Department of Commerce (the "Department") regarding the selection of mandatory

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

ORIGINAL

respondents in the second administrative reviews of the antidumping duty orders on certain warmwater shrimp from Ecuador, India, Thailand and Vietnam.² These supplemental comments are provided to insure that the Department has a complete record across the related second administrative review proceedings where the methodology to be employed in selecting mandatory respondents is at issue.³ These supplemental comments are necessitated because, however unintentionally, many of the comments submitted to the Department in support of its decision to select respondents based on the largest volume of exporters inadvertently emphasize why the Department should employ a sampling methodology to select Ecuadorian, Indian, Thai, and Vietnamese respondents in the second administrative reviews.

THE PURPOSE OF THE ANTIDUMPING LAWS IS TO PREVENT INJURY TO THE DOMESTIC INDUSTRY FROM DUMPED PRODUCTS

The comments submitted on behalf of Falcon Marine and the Liberty Group observe that the Court of Appeals for the Federal Circuit has explained:

the purpose underlying the antidumping laws is to prevent foreign manufacturers from injuring domestic industries by selling their products in the United States at less than 'fair value,' i.e., at prices below the prices the foreign manufacturers charge for the same products in their home markets.⁴

² Letter from Dewey Ballantine LLP to the U.S. Department of Commerce, Case No. A-331-802 (June 13, 2007); Letter from Dewey Ballantine LLP to the U.S. Department of Commerce, Case No. A-533-840 (June 13, 2007); Letter from Dewey Ballantine LLP to the U.S. Department of Commerce, Case No. A-549-822 (June 13, 2007); and Letter from Dewey Ballantine LLP to the U.S. Department of Commerce, Case No. A-552-802 (June 13, 2007) ("Domestic Producers Respondent Selection Comments").

³ See 19 C.F.R. § 351.301(c)(1) (2007).

⁴ Micron Technology, Inc. v. U.S., 243 F.3d 1301, 1303 (Fed. Cir. 2001) (emphasis added).

Citing this language, Falcon Marine and the Liberty Group bizarrely conclude that this means that the administrative review process should safeguard a foreign exporter's ability to demonstrate that it has ceased dumping in this market.⁵ Based on this erroneous understanding of the purpose of the antidumping laws, Falcon Marine and the Liberty Group assert that foreign exporters should control who is and is not reviewed by the Department -- that even where a respondent is not selected by the agency, it should be permitted to volunteer to be reviewed.⁶ This erroneous view has been echoed by others in these proceedings.⁷ In their comments, foreign exporters have emphasized the individual efforts that they have undertaken to address their unlawful dumping of shrimp into this market.⁸ Songa and Promarisco go so far as to argue that they should be allowed to participate as a matter of "fairness."⁹

⁵ Letter from Arent Fox to the U.S. Department of Commerce, Case No. A-533-840 at 4 (June 13, 2007) ("Liberty Group Respondent Selection comments").

⁶ Domestic Producers oppose the requests of exporters in these proceedings to be permitted to participate on a voluntary basis.

⁷ See Letter from Akin Gump Strauss Hauer & Feld LLP to the U.S. Department of Commerce, Case No. A-549-822 at 2 (June 13, 2007) ("Inter-Pacific Marine Respondent Selection comments") (asserting that Inter-Pacific Marine should be permitted to voluntarily participate in these reviews); and Letter from Akin Gump Strauss Hauer & Feld LLP to the U.S. Department of Commerce, Case No. A-331-802 at 26 (June 13, 2007) ("Ecuadorian Producers Respondent Selection comments") (asserting that Promarisco and Songa should be allowed to voluntarily participate in these reviews).

⁸ See Inter-Pacific Marine Respondent Selection comments; Letter from Steptoe & Johnson to the U.S. Department of Commerce, Case No. A-549-822 at 6-7 (June 13, 2007) ("Thai I-Mei Respondent Selection Comments"); and Ecuadorian Producers Respondent Selection comments at 23-26.

⁹ Ecuadorian Producers Respondent Selection comments at 23.

But these arguments, as noted by the Federal Circuit in Micron, have it exactly backwards. The purpose of the antidumping laws, as explicated by the Court in Micron, is not to safeguard or prevent injury to foreign exporters and their U.S. importer counterparts. This is no more the antidumping laws' purpose than giving counsel for foreign exporters a platform to make ridiculously inaccurate claims.¹⁰ Rather, the antidumping laws' purpose is to prevent injury to the domestic industry from the unfair trading practices of foreign exporters. The selection of respondents through a sampling methodology best effectuates that purpose, as it creates a realistic possibility that any exporter may be selected for review. Accordingly, each and every exporter must be concerned about their market behavior or risk the consequences in an individual review. In contrast, selection of respondents by reference only to the largest export volume means that most exporters will have no chance of being selected for review and, accordingly, have no incentive to address the dumping of subject merchandise in this market (and, indeed, can augment their unfair acts with impunity). The calculus is simple: where incentives exist for all exporters to address their unfair pricing practices into this country, exporters are prevented from injuring the domestic industry through the selling of subject merchandise at less than fair value in the U.S. market. Where only the largest exporters may have their pricing practices reviewed, only these exporters have any incentive to

¹⁰ See, e.g., Ecuadorian Producers Respondent Selection comments at 24 (attacking the Department's original injury determination as being determined "through the illegal procedure of 'zeroing' negative margins"). The United States Trade Representative has recently addressed the absurdity of referring to "zeroing" as "illegal": "A prohibition of zeroing, or a requirement to provide offsets for non-dumped transactions, *simply cannot be found* in the text of the AD Agreement." Communication of the United States to the Negotiating Group of Rules at 2, TN/RL/W/208 (Jun. 1, 2007) (emphasis added).

address dumping. All other exporters have no reason to do so and, in fact, may perversely increase their dumping even as the antidumping duties applied to them decrease if the few exporters that are reviewed actually decrease their dumping into this market (lowering the all others rate applied to non-reviewed exporters).

The submissions from foreign exporters in these proceedings underscore that the possibility of selection as a mandatory respondent is a strong motivating factor in getting exporters to address their pricing practices. Falcon Marine and the Liberty Group state that as a result of selection in the first administrative review, “Falcon and Liberty have invested heavily in learning how to properly monitor their pricing so as to eliminate dumping.”¹¹ Promarisco notes that after being part of the Department’s proceedings, “Promarisco has invested substantial resources to eliminate potential dumping”¹² Regardless of whether this is actually true, creating incentives for foreign exporters to be concerned about and, consequently, cease dumping in this market is consistent with the purpose of the antidumping laws. As such, choosing respondents based on the largest volume of shipments unnecessarily and pointlessly circumscribes the impact of the Department’s reviews. If exporters are only motivated to expend the effort to address their dumping because of the chance that their behavior is reviewed, then it makes no sense for the agency to decline to employ its statutorily-vested discretion to select respondents based on a sampling methodology.

The failure of respondent selection, through reference to largest volume, to effectively prevent injury to the domestic industry is even more pronounced in cases

¹¹ Liberty Group Respondent Selection comments at 4.

¹² Ecuadorian Producers Respondent Selection comments at 24.

where this methodology means that the majority of imports will not be reviewed. Where the majority of subject merchandise is unreviewed, elimination of the possibility of review for most exporters means that the incentives for exporters to address their market behavior apply only to a minority of exports, leaving those responsible for the most substantial portion of exports without any reason to address their pricing practices.

This is particularly problematic in these reviews as evidenced by an inaccurate empirical claim included in the submission made on behalf of Pakfood. In that submission, Pakfood asserts that the selection of respondents through reference to the largest shipment volume will result in a review that would be “representative of the majority of the volume of subject merchandise traded in the United States.”¹³ Leaving aside the fact that Pakfood immediately contradicts itself as to what constitutes “representative” four sentences later in its submission,¹⁴ Pakfood’s claim is false. Selection of two or three respondents each in Ecuador, India, Thailand and Vietnam based on the largest volume of shipments will not lead to results that are representative of the majority of volume of subject merchandise unless a significant number of additional mandatory respondents are selected in each proceeding. The respective records of these reviews show a significant number of exporters. Where, as here, selection of the two or three largest volume shippers as mandatory respondents means that a majority (and, in most cases, a significant majority) of export volume will not be reviewed,¹⁵ selection

¹³ Letter from Trade Pacific PLLC to the U.S. Department of Commerce, Case No. A-549-822 at 2 (June 13, 2007).

¹⁴ *Id.* at 2 (“But the concept of ‘representative results’ in this proceeding is unclear.”).

¹⁵ Domestic Producers Respondent Selection comments at 7.

based on the largest volume of shipments in these reviews will mean that the Department has absolutely no information on a significant majority of exports in each of the four countries. Accordingly, exclusive reliance on largest volumes to select mandatory respondents is not consistent with the purposes of the antidumping laws as articulated by the Federal Circuit in Micron. Rather than prevent injury to the domestic industry from unfairly traded imports, by refusing to exercise its discretion to select respondents through sampling, the Department gives the vast majority of exporters carte blanche to dump product with impunity as there is no chance that their pricing behavior will be reviewed.

Respondents themselves appear to concede the importance of the possibility of selection in the pricing behavior of exporters. Thai I-Mei, for example, notes:

Some argue that sampling puts all companies on notice that they are potential respondents, while selection of the largest exporters/producers permits smaller companies to engage in dumping without fear of being "caught." However, it is not the use of sampling in one particular review that arguably leads to these results; it is the possibility that sampling could be used in any future review.¹⁶

The logical conclusion of this statement, however, is that the Department should select respondents through a sampling process in these administrative reviews, as to do so makes clear that there is a realistic possibility that each individual exporter may have its pricing behavior in this market reviewed. Certainly, the Department's unprecedented action in these reviews of announcing a respondent selection methodology at initiation significantly diminished the perceived possibility that any exporter could be selected for review. Indeed, some of the respondents in these reviews base their arguments against

¹⁶ Thai I-Mei Respondent Selection comments at 5 (emphasis in original).

sampling on the premise that the selection of respondents through sampling is not a realistic possibility. The Vietnamese Respondents emphasize their belief that sampling “has not only been the exception -- it has been a rare exception.”¹⁷

Again, as foreign exporters concede, because the purpose of the antidumping law is to “prevent foreign manufacturers from injuring domestic industries by selling their

¹⁷ Letter from Vinson & Elkins to the U.S. Department of Commerce, Case No. A-552-802 at 6 (June 14, 2007) (emphasis in original). The Vietnamese Respondents nevertheless assert that the fact that Domestic Producers have raised the issue and that respondents have deigned to respond “demonstrates that no respondent can be confident that they can escape scrutiny in future reviews. In other words, the mere public discussion of sampling has remedied the perceived problem that supposedly justified the use of sampling in the *Lumber* and *Brake Rotor* cases.” *Id.* at 13.

These claims are unabashedly disingenuous. The Vietnamese Respondents, as with all other exporters who submitted comments, stridently argue that there is no basis to use sampling to select mandatory respondents in these proceedings and applaud the Department’s announcement of an intended selection methodology prior to receiving any record evidence in this review. The Department did not retract its original expression of its intent in soliciting comments on respondent selection, but instead sought to set out a “final” deadline for when it would entertain any comments on respondent selection. With a decision on the methodology to be employed on respondent selection preordained in an unprecedented manner in this proceeding, the Department has done the exact opposite of what the Vietnamese Respondents are suggesting. After explicitly stating that both statutorily-permitted respondent selection methodologies could be considered in future proceedings, the Department took a sampling methodology off the table in this proceeding at initiation. Undoubtedly, exporters have interpreted the Department’s decision exactly as any rational actor would: the Department will not sample in these proceedings. Accordingly, the message communicated is the reverse of what Vietnamese Respondents state: most respondents can be confident that they will escape scrutiny in future reviews.

On the other hand, there can be no argument that should the Department choose to select mandatory respondents through sampling in this review, the important message identified by the Vietnamese Respondents will, in fact, be transmitted: “no respondent can be confident that they can escape scrutiny in future reviews.”

products in the United States at less than ‘fair value’”¹⁸ this is best achieved through the utilization of a respondent selection methodology that presents the realistic possibility that the pricing behavior of any individual exporter will be reviewed. As such, Promarisco and Songa have it precisely backwards when they assert that selection of respondents by largest export volume “encourage{s} exporters to adjust their market behavior in order to eliminate dumping” while selection of respondents through sampling “frequently encourage{s} the opposite behavior since the odds of being picked in a lottery are so small.”¹⁹ This contention cannot be supported. Under the largest volume respondent selection methodology, the majority of exporters are assured that they will never be individually reviewed and, as such, have absolutely no reason to adjust their market behavior in order to eliminate dumping. In contrast, under a sampling respondent selection methodology, the possibility exists that any exporter may be reviewed and, accordingly, each exporter must adjust its market behavior or risk being held accountable through individual review by the Department.

In sum, the exporters’ comments, however inadvertently, convincingly demonstrate why the Department should choose mandatory respondents through sampling in these four reviews: it is the most powerful tool the agency has to get exporters to address their pricing behavior in this market to eliminate dumping and thereby prevent injury to the domestic industry. Exporters are simply wrong when they claim that “the reason the Domestic Producers want sampling is not because the results of the sample will be fairer, more accurate or improved, but rather because sampling will

¹⁸ Micron Technology, Inc. v. U.S., 243 F.3d 1301, 1303 (Fed. Cir. 2001).

¹⁹ Ecuadorian Producers Respondent Selection comments at 24.

almost certainly result in higher rates for virtually all Indian companies.”²⁰ As Indian respondents are well aware, the Department selected respondents by largest export volume in the first administrative review and this resulted, according to the Department’s preliminary results, in higher rates for virtually all Indian companies.²¹ The reason Domestic Producers want sampling is because the antidumping laws are supposed to prevent injury to the domestic industry from dumping and sampling best achieves that goal.

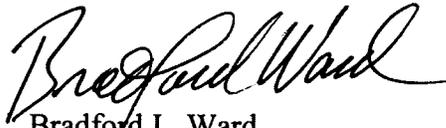
²⁰ Letter from Cameron & Hornbostel LLP to the U.S. Department of Commerce, Case No. A-533-840 (June 13, 2007) at 4. See also Thai I-Mei Respondent Selection comments at 4 (“Domestic producers often urge the use of a sampling methodology in order to increase the ‘all others’ dumping margin to be applied to unselected companies.”)

²¹ Certain Frozen Warmwater Shrimp from India, 72 Fed. Reg. 10,658 (Mar. 9, 2007).

* * * * *

This submission has been filed on interested parties as indicated on the attached certificate of service. Please contact any of the undersigned should you have any questions.

Respectfully submitted,



Bradford L. Ward
Nathaniel Maandig Rickard
Gregory I. Hume, *Economist*

Counsel to Domestic Producers

cc: Shawn Thompson, Room 3087B
Elizabeth Eastwood, Room 3083
Alex Villanueva, Room 4003
Katherine Johnson, Room 3083
Irina Itkin, Room 3083
Alice Gibbons, Room 3090
Jill Pollack, Room 3083
Matthew Renkey, Room 4003
Brianna Riker, Room 3090
Nichole Zink, Room 3088