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Via eRulemaking Portal

W. Ralph Basham
Commissioner
U.S. Customs and Border Protections
c/o Trade and Commercial Regulations Branch
Regulations and Ruling
Office of International Trade
U.S. Customs and Border Protection
1300 Pennsylvania Ave., N.W. (Mint Annex)
Washington, DC 20229

Re: USCBP-2007-0100: Uniform Rules of Origin for Imported Merchandise

Dear Commissioner Basham:

The Southern Shrimp Alliance ("SSA") submits the following comments in response to the U.S. Customs and Border Protection ("CBP") notice of proposed rulemaking regarding Uniform Rules of Origin for Imported Merchandise, as published in 73 Fed. Reg. 43,385 (July 25, 2008). Per CBP's notice published in 73 Fed. Reg. 51,962 (Sept. 8, 2008), these comments are timely filed.

The SSA, founded in 2002, is a non-profit alliance of the thousands of small businesses that comprise the U.S. warmwater shrimp industry. The SSA is the national voice for warmwater shrimp fishermen and processors in eight states: Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas. The SSA is committed to defending and advancing the interests of the domestic industry, which means ensuring that all shrimp being sold to U.S. consumers, domestic and foreign, meet the same level of integrity, quality and safety as those offered by SSA's members.

Although SSA's members are generally not part of the importing community, imports of shrimp have a substantial impact on our industry. Unfair trade practices and lax regulation of food safety standards have made the United States the market of both first and last resort for shrimp exporters, with devastating effects on SSA's members.

It is important to provide some background on the international shrimp trade to put these comments in proper context. A number of circumstances regarding the production of pond-raised shrimp result in various distortions and problems in the international shrimp market. Overproduction of foreign pond-raised shrimp is the result of several factors including national and international subsidies, and use of banned antibiotics. In particular, foreign producers of pond-raised shrimp have powerful economic incentives to use banned substances to increase production yields in crowded shrimp ponds and to reduce the risk of total crop failure. Use of these banned substances and various subsidies encourage overproduction and uneconomic pricing. In addition, the use of the banned substances raises serious concerns about the safety of imported shrimp, concerns that FDA to date has failed to take effective action to resolve. In contrast, strict food safety regimes in major importing markets such as the EU, Canada, and Japan mean that foreign shrimp that is or may be contaminated is diverted to the US market because of the relatively lax US testing of imports. For example, the massive surge of US imports from China in 2002 and 2003 was due in substantial part to the closure of the EU market to Chinese imports after detection of banned antibiotics.

The SSA's concerns regarding rules of origin are borne from the domestic shrimp industry's direct experience with the administration of trade relief and food safety laws by the federal government. In February of 2005, the U.S. Department of Commerce ("Commerce") imposed antidumping duties on certain frozen warmwater shrimp from Brazil, China, Ecuador, India, Thailand, and Vietnam after SSA demonstrated that the domestic industry had been injured by unfairly priced imports.¹ Simultaneously, unscrupulous foreign exporters and U.S. importers of shrimp from these countries began to engage in unlawful transshipment to mask the true origin of shrimp exported to the United States and thereby avoid antidumping duties. In the first year that trade relief was in place, CBP and Immigration and Customs Enforcement ("ICE") successfully discovered and took action against the unlawful transshipment of Chinese shrimp through Indonesia to avoid antidumping duties. While CBP and ICE achieved remarkable success with respect to this operation, other circumvention schemes have continued unabated. Since 2005, SSA has been forced not only to continuously defend antidumping

¹ Certain Frozen Warmwater Shrimp from Brazil, 70 Fed. Reg. 5143 (Feb. 1, 2005)(Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order); Certain Frozen Warmwater Shrimp from Thailand, 70 Fed. Reg. 5145 (Feb. 1, 2005)(Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order); Certain Frozen Warmwater Shrimp from India, 70 Fed. Reg. 5147 (Feb. 1, 2005)(Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order); Certain Frozen Warmwater Shrimp from China, 70 Fed. Reg. 5149 (Feb. 1, 2005)(Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order); Certain Frozen Warmwater Shrimp from Vietnam, 70 Fed. Reg. 5152 (Feb. 1, 2005)(Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order); Certain Frozen Warmwater Shrimp from Ecuador, 70 Fed. Reg. 5156 (Feb. 1, 2005)(Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order).

duties before Commerce, but also to root out efforts to illegally circumvent the antidumping orders.

Given this experience, it has not been the least bit surprising that the Import Alert implemented by the U.S. Food and Drug Administration ("FDA") last summer on imports of shrimp from China² has spurred even more brazen transshipment schemes seeking to mask the true origin of Chinese shrimp. In particular, commercial shipment data strongly suggests that exporters in Malaysia are acting as a conduit to supply U.S. importers with Chinese shrimp that is not subject to Commerce's antidumping duties and FDA's Import Alert. And while this transshipment appears to be open and obvious, the volume of purportedly "Malaysian" shrimp entering the United States continues to grow unchecked – import information for the first eight months of 2008 indicates that imports of shrimp from Malaysia have increased by over 40% in terms of volume versus the same period last year.

It is with these two issues in mind (unfair trade and food safety) that SSA notifies CBP of its strong objection to the agency's proposed rule changing the determination of the origin of an imported product to a uniform "tariff shift" rule. For the reasons provided below, SSA respectfully requests that CBP withdraw the proposed rulemaking and instead seek comments to identify and address problems with the substantial transformation rule as conceived and applied by the agency.

The *ad hoc* nature of CBP's country of origin determinations, pursuant to the "substantial transformation" rule, has unquestionably led to inconsistent and illogical results. CBP's holdings in HQ 562998 (May 21, 2004), HQ 563154 (February 3, 2005), and NY R04129 (June 15, 2006) provide good examples of problems that result from an *ad hoc* approach. Seeking to be consistent with a decision relating to the filleting of fish in Koru North America v. United States, 12 C.I.T. 1120, 701 F. Supp. 229 (CIT 1988), the agency, in HQ 562998 and HQ 563154, held that shrimp born in country A but grown out in ponds, harvested, and processed into a food product for export to the United States in country B would be considered a product of country A upon importation into the United States. Similarly, in NY R04129, CBP held that catfish fingerlings born in the United States and shipped to China to be grown in ponds, harvested and processed (gutted, skinned, frozen, and packaged into cartons holding 15 pounds of fish) would be considered a product of the United States upon importation. There is little to support the agency's logic in reaching these conclusions – there can be no question that shrimp and catfish would likely feel that they have been substantially transformed when converted from living beings to non-living commodities. CBP's resolution of the questions presented in these rulings are not simply of theological significance (does death constitute substantial transformation?), they have created opportunities for exporters to manipulate

² Food and Drug Administration Import Alert 16-131 (Detention Without Physical Examination Of Aquacultured Catfish, Basa (Pangasius Sp), Shrimp, Dace, And Eel Products From The People's Republic Of China Due To The Presence Of New Animal Drugs And/Or Unsafe Food Additives).

the country of origin attributed to aquacultured seafood products exported to the United States.

These rulings are particularly troubling from a food safety perspective. These rulings do not recognize or take account of the fact that where a creature is raised to commercial size is a far greater determinant of whether the resulting food product has a greater or lesser risk of food safety hazard than where an animal began its life. Seafood that is produced by aquaculture in the United States, for example, is subject to a comprehensive set of regulations that control the introduction or use of potentially harmful substances and the use of other potentially hazardous practices. As noted above, however, the economic incentives to use widely available (but banned) antibiotics and pesticides when producing seafood by aquaculture in a number of countries, such as China, are quite powerful, yet the rules and legal mechanisms of oversight are either extremely lax or nonexistent.

As such, SSA is acutely aware of the "problems derive{d} in large part from the inherently subjective nature of judgments made in case-by-case adjudications . . ." See 73 Fed. Reg. 43,386 (July 25, 2008). However, CBP's suggested response to these problems – the broad adoption of the tariff shift rule currently set forth at 19 C.F.R. § 102.20 (2008) – augments rather than ameliorates their negative consequences. Per § 102.20, a live shrimp transformed into a dead shrimp does not constitute a tariff shift (both are imported under the 0306 subheading of the Harmonized Tariff Schedule of the United States ("HTS")), nor does the conversion of a live farmed fish into a non-living product destined for human consumption (live fish are imported under subheading 0301 of the HTS while dead whole fish are imported under subheadings 0302 and 0303 of the HTS). The results of the tariff shift rule on living aquatic creatures converted to dead commodity products is therefore the same as the results of the agency's substantial transformation rule. Both are consistent, but illogical. The tariff shift rule, however, also codifies rules that are both illogical and inconsistent. For example, if a fish is filleted in another country beyond where it was eviscerated the country of origin changes to the place of filleting based on the tariff shift rule (as the product shifts from the 0301-0303 HTS subheadings to the 0304 subheading). However, if beef, pork, poultry, and other edible meats are filleted in another country beyond where these animals were eviscerated, then the country of origin does not change as the product, despite the additional processing, remains in the 0201-0209 HTS subheadings. There is no rational basis for such a distinction.

Under the *ad hoc* substantial transformation rules currently in place, while CBP has the discretion to make illogical and inconsistent country of origin determinations, it is vital to note that CBP also has the discretion to correct and revise improper determinations when they are brought to the agency's attention. However, should the tariff shift rule be adopted, the opportunity and discretion to correct bizarre and indefensible constructions would be lost. With respect to aquacultured seafood imports, this would be a particularly unfortunate result. For shrimp exporters, the tariff shift rule would create yet one more opportunity – above and beyond those already in existence

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because of CBP's construction of substantial transformation – for shrimp exporters to lawfully mask the true origin of the products they ship to the United States. Under the tariff shift rule, shrimp that is imported into the United States under HTS numbers 1605.20.10.10 and 1605.20.10.30 would have its country of origin determined by where it was cooked rather than where it was farmed (or, if born in another country, where its egg was laid).

This method of masking the origin of a product, along with the others presented by a tariff shift rule, are open invitations for seafood importers to circumvent trade relief and food safety controls. The implications of this change in regime cannot be overstated. The FDA's import alert on shrimp and other seafood was imposed because these aquacultured products were tainted with banned, dangerous antibiotics and fungicides introduced in grow-out ponds in China. CBP's country of origin rules largely abrogate any utility of the FDA import alert, because such products could, in the case of fish, simply be shipped to another country for filleting and, without legitimate justification, the country of origin would change and the product would no longer be subject to the FDA's strictures. With the new tariff shift rule, shrimp raised in Chinese ponds could be exported to another country and cooked and, again, without legitimate justification, the shrimp would cease to be a product of China. Under either scenario, the product has not been made safe and CBP's proposed rules would only serve to prevent consumers from being able to distinguish between seafood that does not pose risks and those which the FDA has determined merit an import alert.

For these reasons, CBP should withdraw its proposed rulemaking and, instead, seek to address problems with the substantial transformation method of determining country of origin by use of the discretion afforded to the agency under law. SSA believes that an evolving substantial transformation rule should take account of the practical realities of trade in that product. For farmed seafood, for example, the key attributes of importance in determining the country of origin is where the product was raised, harvested, and processed; in contrast, the country of the aquatic creature's birth should be considered irrelevant.

Please contact me should you require clarification of any aspect of this submission.

Respectfully submitted,

A handwritten signature in black ink that reads "John Williams". The signature is written in a cursive, flowing style.

John Williams
Executive Director
Southern Shrimp Alliance