



## Southern Shrimp Alliance

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January 31, 2011

Docket No. ITA-2010-0009

### **VIA FEDERAL E-RULEMAKING PORTAL**

The Honorable Gary F. Locke  
Secretary of Commerce  
Attn: Albert Hsu, Senior Economist, Office of Policy  
Room 1870, Import Administration  
U.S. Department of Commerce  
14th Street and Constitution Avenue, N.W.  
Washington, D.C. 20230

**Re: Comments on Proposed Methodology for Respondents in Antidumping Proceedings**

Dear Secretary Locke:

On behalf of the Southern Shrimp Alliance (“SSA”), we hereby submit the following comments as requested by the U.S. Department of Commerce (the “Department”) on its Proposed Methodology for Respondent Selection in Antidumping Proceedings.<sup>1</sup>

SSA fully supports the use of sampling to select mandatory respondents in administrative reviews of antidumping duty orders. Because the use of sampling facilitates the calculation of accurate dumping margins and enhances the remedial effect of the antidumping duty laws, the

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<sup>1</sup> Proposed Methodology for Respondent Selection in Antidumping Proceedings; Request for Comment, 75 Fed. Reg. 78,678 (Dec. 16, 2010).

Department should begin to select mandatory respondents through a sampling methodology as a matter of course as soon as possible. Further, the Department should not permit the exceptions to employing sampling to swallow the general rule. The Department should also recognize and take steps to address the limitations inherent in data regarding “type 3” imports obtained from U.S. Customs and Border Protection (“CBP”).

SSA concurs with the proposals set forth in the submission of the Committee to Support U.S. Trade Laws in support of the use of sampling to select mandatory respondents. Our comments below address issues of particular importance to the domestic shrimp industry and reflect the industry’s experience observed during the conduct of five administrative reviews of the various antidumping duty orders on certain frozen warmwater shrimp.

**I. SAMPLING IMPROVES THE ACCURACY OF DUMPING MARGINS CALCULATED IN ADMINISTRATIVE REVIEWS AND ENHANCES THE REMEDIAL EFFECT OF THE ANTIDUMPING LAWS**

Selecting mandatory respondents through sampling improves the accuracy of the calculation of dumping margins in administrative reviews<sup>2</sup> and enhances the remedial effect of the antidumping laws.

Because sampling improves the accuracy of dumping margins calculated in administrative reviews, the use of this respondent selection methodology advances what the Federal Circuit has described as the “overriding purpose of Commerce’s administration of the antidumping laws . . . to calculate dumping margins as accurately as possible.”<sup>3</sup> The agency’s

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<sup>2</sup> Sampling would not appear to be appropriate in investigations. The significantly shorter statutory time period for investigations does not lend itself to sampling. Compare 19 U.S.C. § 1675(a)(3) with 19 U.S.C. § 1673b(b), (c). Moreover, at the investigation stage the Department generally will have only limited experience with the subject industry.

<sup>3</sup> Parkdale Int’l v. United States, 475 F. 3d 1375, 1380 (Fed. Cir. 2007).

historic reliance on selecting respondents based on largest volumes of exports sacrificed the accuracy of the margins calculated for parties subject to administrative reviews in favor of administrative efficiency. Sampling, on the other hand, permits the Department to include the pricing behavior of smaller exporters and producers in its margin analysis. If these producers behave different, that differential will be captured in the Department's results following an administrative review. Conversely, if the size of the company has no effect on the margin, then sampling will have no effect on the review-specific margin applied to the non-selected companies.

In many cases – including virtually all of the administrative reviews conducted of the antidumping duty orders on imported shrimp – the existence of a large number of exporters means that the volume of sales reviewed has represented less than half of the total sales involved in the review period. Addressing concerns that sampling would result in smaller volumes of sales being reviewed, the Department has previously emphasized that the dumping margins calculated would, in fact, be more representative:

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 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.<sup>4</sup>

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<sup>4</sup> Memorandum from David Layton, et al., to Stephen J. Claeys, U.S. Department of Commerce, Case No. A-122-838, Re: Selection of Respondents (Dec. 15 2005) ("Lumber Resp. Selection Memo."), at 11.

Similarly, for most of the antidumping duty orders on shrimp imports, the exporting industries involved are characterized by a large number of exporting companies, where the volume of sales left unreviewed is quite large. Accordingly, the use of sampling in the administrative reviews of the shrimp antidumping duty orders would lead to results that are more representative and, hence, improved.

The use of sampling also enhances the remedial effect of the antidumping duty laws. Consistently selecting respondents by the largest volume option of 19 U.S.C. § 1677f-1(c)(2)(B) allows producers and exporters to game the system. Continual review of the same respondents invites respondents to manipulate their sales and cost data to achieve the lowest possible dumping margin. Exporters, as just one example, may develop previously non-existent home markets that involve sales that meet the Department's bare minimum requirements for viability in order to manage their dumping margins against a manipulated normal value.

At the same time, selection of the same respondents over and over again creates incentives for non-reviewed producers and exporters to increase dumping in the marketplace. Absent sampling, the margin of dumping of the continually unexamined companies is unknown. Non-reviewed exporters and producers, confident that they will not be selected for review, have no incentive to avoid dumping. Worse, because these companies are aware that they will not be held accountable for any dumping at a rate higher than the "all-others" rate, they are, at best, discouraged from correcting sales practices that result in dumped sales and, at worst, perversely encouraged to increase dumping as such behavior will go undetected.

The Department is currently conducting its fifth administrative reviews of the antidumping duty orders on certain frozen warmwater shrimp. The respondents selected in these reviews have been, by and large, repetitive. The vast majority of exporters of subject

merchandise have not been selected as mandatory respondents and, worse, have never been at risk of being selected as mandatory respondents in the agency's administrative reviews. As such, with respect to the antidumping duty orders on imported shrimp, the selection of mandatory respondents through a sampling methodology is long overdue and the Department should take steps to ensure that the mandatory respondents selected in any administrative reviews conducted for the review period starting February 1, 2010 and ending January 31, 2011 are chosen through a sampling methodology.

## **II. EXCEPTIONS TO THE GENERAL PRACTICE OF EMPLOYING SAMPLING SHOULD NOT BE PERMITTED TO SWALLOW THE RULE**

The Department is proposing to employ sampling in the selection of mandatory respondents only where resources are available "to examine at least three companies."<sup>5</sup> SSA strongly opposes the proposed automatic disregard of sampling in the event that only two mandatory respondents can be examined. This qualification carries the potential of eviscerating the proposal.

In the current ongoing administrative reviews of certain frozen warmwater shrimp from India and Thailand, the Department determined to select only two mandatory respondents.<sup>6</sup> As in prior reviews, the petitioner requested that the Department select mandatory respondents

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<sup>5</sup> Proposed Methodology, 75 Fed. Reg. at 78,678.

<sup>6</sup> See Memorandum from Elizabeth Eastwood, to James Maeder, U.S. Department of Commerce, Case No. A-533-840, Re: 2009-2010 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India ("India Resp. Selection Memo."); Memorandum from Elizabeth Eastwood, to James Maeder, U.S. Department of Commerce, Case No. A-549-822, Re: 2009-2010 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand ("Thailand Resp. Selection Memo.").

through sampling.<sup>7</sup> The Department selected by largest volume as it had in the prior reviews, but only after setting the number of companies it could examine as follows:

{W}e believe it is not practicable to investigate individually all companies involved in this review. Consequently, we recommend limiting our examination to two companies. . . Given that resources allow individual examination of only two companies in this review, the Department has determined that sampling would not be the preferred approach in this case.<sup>8</sup>

The Department provided no explanation as to why it had selected only two respondents as opposed to between two and four in the prior reviews.<sup>9</sup> As such, the signal sent to the domestic industry and all other parties involved in these administrative reviews was clear. The Department had precluded consideration of sampling in these administrative reviews by declining to select more than two respondents. The decision on the number of mandatory respondents selected in a review should be driven by the resources available to Commerce and not by a desire to avoid selecting respondents through sampling in certain proceedings.

As currently proposed, however, precluding sampling in circumstances where less than three respondents are selected encourages the Department to find that it only has resources to select two mandatory respondents in order to avoid sampling. There is, however, no compelling reason for employing sampling only where agency resources allow for the selection of three or more respondents. Because the selection of two mandatory respondents through sampling can generate sufficient data from which to assign representative rates for non-selected companies,

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<sup>7</sup> See India Resp. Selection Memo. at 5-7; Thailand Resp. Selection Memo. at 4-9.

<sup>8</sup> India Resp. Selection Memo. at 3, 7; Thailand Resp. Selection Memo. at 3, 9.

<sup>9</sup> See India Resp. Selection Memo. at 2-3; Thailand Resp. Selection Memo. at 2-3.

SSA proposes that the Department sample where it has the resources to sample at least two respondents.

The Department need not examine at least three respondents for the sample to be “statistically valid.”<sup>10</sup> In declining to sample in the recent administrative reviews of certain warmwater shrimp from India and Thailand, the Department expressed concern over “potential issues arising with respect to the statistical validity of the sample.”<sup>11</sup> The statutory requirement for a “statistically valid sample” mandates that the methodology be designed to achieve a representative result, not that the sample itself be representative.<sup>12</sup> Although the Department may examine more respondents to improve the representativeness of the sample, there is no basis in the statute for sampling to necessarily involve more than two mandatory respondents.

SSA welcomes the Department’s efforts to reconsider the use of sampling to select mandatory respondents and fully supports a change in practice because, as described above, selection of respondents through sampling improves the results of administrative reviews and enhances the remedial effect of the antidumping duty orders. However, a change in practice is meaningless unless it actually results in the Department employing sampling to select mandatory respondents on a regular and routine basis in administrative reviews. It would be inappropriate –

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<sup>10</sup> 19 U.S.C. § 1677f-1(c)(2)(A) (2000); H.R. Doc. No. 103-316, at 872-73 (1994) (“SAA”) at 872-73.

<sup>11</sup> India Resp. Selection Memo. at 6; Thailand Resp. Selection Memo. at 10.

<sup>12</sup> See SAA at 872-73.

and renders this entire exercise futile – if an exception were provided to the general rule that permitted wholesale avoidance of the rule in practice.<sup>13</sup>

### **III. THE DEPARTMENT SHOULD RETAIN FLEXIBILITY IN ANY SAMPLING METHODOLOGY EMPLOYED**

The Department’s proposal to select mandatory respondents through random sampling with stratification by import volume using probability proportional to size (“PPS”) samples is well within its discretion under the statute. The statute requires “a sample of exporters, producers, or types of producers that is statistically valid based on information available . . . at the time of selection.”<sup>14</sup> Although the term “statistically valid” is not defined, the Uruguay Round Agreements Act Statement of Administrative Action (“SAA”) explains as follows:

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

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<sup>13</sup> With regard to the other limitations on the use of sampling set out in the Department’s request for comments, SSA does not oppose the qualification to avoid sampling “when characteristics of the underlying population make it highly likely that results obtained . . . would be unreasonable to represent the population.” Proposed Methodology, 75 Fed. Reg. at 78,678. This bypass seems to acknowledge that continued sampling may not be appropriate based on the sampling undertaken in prior reviews, as it creates an expedited procedure to consider comments that “take into account sampled company margins from previous segments of the proceeding.” Id. However, SSA requests that the Department clarify that this exception only be considered after sampling has occurred in order to provide feedback on the previous sampling experience, not as a basis to avoid sampling in the first instance. As the Department increases its use of sampling, the Department should solicit feedback concerning whether to sample in subsequent reviews or to change the sampling methodology.

<sup>14</sup> 19 U.S.C. § 1677f-1(c)(2)(A) (2000).



early stages of an investigation or review when it must decide on a sampling technique.<sup>15</sup>

The Department correctly concluded in the third administrative review of Softwood Lumber From Canada that the statute does not require a specific number of mandatory respondents or otherwise preclude the use of sampling as a viable alternative to selection by largest volume.<sup>16</sup>

The CIT has upheld the Department's selection of mandatory respondents through sampling with stratification and PPS.<sup>17</sup> This methodology positively makes all subject exporters and producers eligible for selection regardless of size, ensures that those selected represent the spectrum of import volume, and correlates the chances of being selected with share of imports. In rejecting an argument that this sampling approach required a large number of mandatory respondents, the Department in Softwood Lumber explained that "neither the statute, the regulations, nor the legislative history specifies that a minimum confidence level attaches to the results to make the sample 'statistically valid.'"<sup>18</sup> SSA agrees with the Department's Softwood Lumber determination that sampling with stratification and PPS complies with the statute.

The sampling experience from Softwood Lumber supports this approach being repeated. In explaining its sampling methodology, the Department stated that use of stratification and PPS yields more accurate results because it "can ensure that some small companies are chosen,

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<sup>15</sup> SAA at 872-73 (emphasis in original).

<sup>16</sup> See Lumber Resp. Selection Memo. at 11-12; Certain Softwood Lumber Products From Canada, 71 Fed. Reg. 33,964 (June 12, 2006).

<sup>17</sup> See Laizhou Auto. Brake Equip. Co. v. United States, 2008 Ct. Int'l Trade LEXIS 68 (June 26, 2008); Brake Rotors From the People's Republic of China, 71 Fed. Reg. 66,304 (Nov. 14, 2006).

<sup>18</sup> Lumber Resp. Selection Memo. at 11.

thereby achieving a greater degree of cross-sectional representation.”<sup>19</sup> The Department further based its decision to sample using stratification by import volume by pointing to record evidence that “could mean that the dumping margins of small companies differ systematically from the dumping margins of large companies. If not, then stratification does no harm.”<sup>20</sup> Tellingly, the smaller Canadian companies selected for the first time through sampling received individually-calculated rates that were significantly higher than those for the larger companies that had been previously reviewed.<sup>21</sup>

Softwood Lumber demonstrates that including smaller companies as mandatory respondents through sampling positively enhances the accuracy of margins. Moreover, the fact that companies not expecting to be selected had higher margins than their larger counterparts supports the theory that sampling creates an incentive for all firms to stop dumping. Sampling therefore both facilitates compliance with the antidumping laws and advances the “overriding purpose of Commerce’s administration of the antidumping laws”<sup>22</sup> by calculating dumping margins more accurately. SSA welcomes the Department’s proposal to ordinarily employ sampling to select mandatory respondents in administrative reviews, although stratification by

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<sup>19</sup> Id. at 13.

<sup>20</sup> Id.

<sup>21</sup> Compare Softwood Lumber, 71 Fed. Reg. at 33,980-81 with Certain Softwood Lumber Products From Canada, 69 Fed. Reg. 75,921, 75,924 (Dec. 20, 2004) (weighted average margins for companies selected through largest volume in the second administrative review—Tembec, Tolko, West Fraser, and Weyerhouser—were significantly lower in third administrative review as compared with the other four companies selected for the first time through sampling).

<sup>22</sup> Parkdale Int’l, 475 F. 3d at 1380.

import volume with PPS and strata equal to the number of respondents selected represents only one of numerous legally-sound methodologies.

SSA recommends that the Department not restrict itself to any particular sampling methodology. The Department should treat the proposed random sampling with stratification and PPS as a default methodology that need not be used in every administrative review. Likewise, the Department's proposal to divide strata by volume and equate the number of strata with the number of mandatory respondents to be selected need not be absolute. There may be reviews where it is appropriate to select strata based on other criteria or select a different number of mandatory respondents per strata.<sup>23</sup> There also may be reviews where sampling need not involve stratification; the CIT has upheld sampling without stratification.<sup>24</sup> Given its wide statutory discretion, SSA suggests that the Department retain flexibility in its sampling methodology.

#### **IV. CONCERNS OVER THE DEPARTMENT'S PROPOSED USE OF CBP DATA**

SSA is concerned about the Department's proposal to further cement its reliance on "type 3" CBP data. Although the Department currently uses this data in selecting mandatory respondents by largest volume, it proposes to rely more extensively on this data in sampling "to both define the population, and, if the company is selected, establish a dumping margin for the

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<sup>23</sup> In neither Brake Rotors nor Softwood Lumber did the Department have strata equal to the number of mandatory respondents. See Softwood Lumber, 71 Fed. Reg. 33,964; Brake Rotors, 71 Fed. Reg. 66,304.

<sup>24</sup> See Asociación Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1114 (CIT 1989), aff'd, 901 F.2d 1089 (Fed. Cir. 1990). The CIT found "no requirement that a stratified sample be used" and that, although with "hindsight" stratification would have been preferable, "the sampling methodology was legally adequate and the results of the sampling have not been shown to be unrepresentative." Id. at 1122.

company.”<sup>25</sup> As the domestic industry has argued repeatedly in the recent administrative reviews of the antidumping duty orders on shrimp, “type 3” data released by the Department suffers from reliability defects. For example, the CIT has explained that “because CBP entry data do not contain information with respect to company affiliations, when the Department relies exclusively on such data, it is forced to use affiliation related information obtained in the course of prior proceedings. Such affiliation-related data may or may not remain accurate . . . .”<sup>26</sup>

However, the problems associated with CBP data far exceed the lack of affiliation information identified by the CIT. In recently upholding the Department’s use of CBP data, the CIT explained that it is the petitioner’s burden to provide record-specific evidence that CBP data is unreliable.<sup>27</sup> There are a number of reasons to believe that the petitioner will be able to meet such a burden in future administrative reviews. For example, the petitioner has already detailed the inaccuracy of CBP data in a recent administrative review of certain warmwater shrimp from China.<sup>28</sup> In that “review, the Department confirmed that the agency had discovered, through verification of a selected respondent, that U.S. importers had misclassified subject merchandise as nonsubject merchandise and that the ‘entered value of subject merchandise had been under reported by certain importers to CBP . . . .’”<sup>29</sup>

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<sup>25</sup> Proposed Methodology, 75 Fed. Reg. at 78,678.

<sup>26</sup> Pakfood, 2010 Ct. Intl. Trade LEXIS 105, \*16 (footnote omitted).

<sup>27</sup> See Pakfood Public Co. v. United States, Consol. Court No. 09-430, Slip Op. 11-6 (CIT Jan. 18, 2011), at 23.

<sup>28</sup> See Case Brief on Behalf of the Ad Hoc Shrimp Trade Action Committee, U.S. Department of Commerce Case No. A-570-893 (April 12, 2010), at 3-11.

<sup>29</sup> Id. at 4-5 (quoting Issues and Decision Memorandum, cmt. 7, appended to Third Administrative Review of Frozen Warmwater Shrimp from the People’s Republic of China, 74 Fed. Reg. 46,565 (Sept. 10, 2009)).

Moreover, merchandise subject to that antidumping order had widely evaded the order under a variety of schemes that rendered CBP data unreliable.<sup>30</sup> The U.S. Government Accountability Office “found that an importer did not pay approximately \$2.2 million in antidumping duties on imported Chinese shrimp that was transshipped through Indonesia” and explained that a federal “investigation found that foreign manufacturers and importers were . . . attempting to circumvent antidumping duties by sending Chinese shrimp to the United States through Malaysia.”<sup>31</sup>

A report from CBP to Congress elaborated on another circumvention scheme as follows:

Based on an allegation from the domestic shrimp industry, CBP conducted a special operation centered on cargo examination and lab analysis to determine whether imports of shrimp from China were being misdescribed . . . so that shipments would fall outside the scope of the AD order. CBP’s operations confirmed the allegation. CBP determined that fourteen importers evaded the AD order, resulting in \$5 million in lost revenue.<sup>32</sup>

These problems identified by federal agencies and the CIT must be addressed by the Department because it proposes to increase reliance on CBP data in selecting mandatory respondents through sampling. SSA encourages the Department to explore alternatives to exclusive reliance on “type 3” CBP data, as well as safeguards that can be put in place to ensure reliability if this data is used to select mandatory respondents.

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<sup>30</sup> See id. at 6-7.

<sup>31</sup> Id. at 6-7 (quoting U.S. Government Accountability Office, Seafood Fraud: FDA Program Changes and Better Collaboration among Key Federal Agencies Could Improve Detection and Prevention, GAO-09-258 (Feb. 2009), at 16).

<sup>32</sup> Id. at 7 (quoting U.S. Customs and Border Protection, Report to Congress on (1) U.S. Customs and Border Protection’s Plans to Increase AD/CVD Collections and (2) AD/CVD Enforcement Actions and Compliance Initiatives, at 11).

As an initial step, the Department should expand the CBP information released to parties under protective order in administrative reviews. The Department has provided no justification for limiting the release of such data only to the volume of shipments identified by U.S. importers as “type 3” entries. At a bare minimum, value data related to those entries should be released for review along with the volume data.

Moreover, in circumstances where, as with shrimp, the relevant Harmonized Tariff Schedule numbers line up with the scope of the orders, the Department should also make data relating to “type 1” entries available under protective order to the parties to review. By correlating data relating to purported “type 1” entries with data relating to “type 3” entries, interested parties could evaluate whether the “type 3” CBP data is under-representative as a result of misidentification of merchandise by importers.

Where problems with CBP data exist, the Department should issue quality and value questionnaires to all respondents. This would not represent a change in practice, as the Department routinely uses these questionnaires in selecting mandatory respondents – both in conjunction with, and instead of, reliance on “type 3” CBP data.<sup>33</sup> These questionnaires can obtain information necessary to ensure the reliability of CBP data, such as the affiliation matching problem identified by the CIT.<sup>34</sup> The Department could efficiently assess the reliability of “type 3” CBP data in a particular proceeding by comparing it to the questionnaire responses. Significant discrepancies in quantity or value would alert the Department that importers had mislabeled or undervalued entries, thereby rendering the CBP data unreliable.

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<sup>33</sup> See Pakfood, 2010 Ct. Intl. Trade LEXIS 105, at \*12-13 & nn.12, 13.

<sup>34</sup> See id. at \*16.

SSA requests that these types of safeguards be used when the Department relies on “type 3” CBP data in selecting mandatory respondents. That the Department regularly employs this data does not justify exclusive reliance given the evident defects such as those resulting from circumvention. SSA encourages the Department to refine its proposal for sampling to become the preferred approach without having to rely exclusively on problematic “type 3” CBP data.

**V. CONCLUSION**

The selection of mandatory respondents through sampling in administrative reviews advances the overriding statutory purpose of accuracy in the antidumping margins and enhances the remedial effect of antidumping duty orders. A change in the Department’s approach to selecting mandatory respondents in administrative reviews is both appropriate and long overdue. We are grateful for the opportunity to provide our comments on this proposed methodology and look forward to Commerce’s additional efforts to improve the efficacy of our antidumping laws.

Sincerely,

A handwritten signature in black ink, appearing to read "John Williams", written in a cursive style.

John Williams  
Executive Director