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Submitted via Regulations.gov

The Honorable Gina Raimondo
Secretary of Commerce
Attn: Enforcement and Compliance
APO/Dockets Unit, Room 18022
U.S. Department of Commerce
14th Street and Constitution Avenue, NW
Washington, DC 20230

**Re: Docket No. ITA-2023-0003: Comments on Proposed Rule – Regulations
Improving and Strengthening the Enforcement of Trade Remedies Through the
Administration of the Antidumping and Countervailing Duty Laws**

Dear Secretary Raimondo:

The Southern Shrimp Alliance respectfully submits the following comments on the proposed rule from the U.S. Department of Commerce (“Department”) published on May 9, 2023 in the *Federal Register* (“*Proposed Regulations*”).¹ These comments are timely as they are filed on the July 10, 2023 deadline for submissions.²

The U.S. shrimp industry has benefited from the antidumping duty (AD) laws since the submission of petitions for trade relief were filed on behalf of the industry in December 2003.³ Following the formal imposition of AD orders on imports of certain frozen warmwater shrimp in

¹ *Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws*, 88 Fed. Reg. 29,850 (Dep’t Commerce May 9, 2023).

² *Id.* at 29,850 (“[W]ritten comments must be received no later than July 10, 2023.”).

³ *See Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People’s Republic of China and the Socialist Republic of Vietnam*, 69 Fed. Reg. 3,876, 3,877 (Dep’t Commerce Jan. 27, 2004) (notice of initiation of antidumping duty investigations).

February 2005,⁴ representatives of the domestic industry have consistently appeared before the Department to defend the trade relief. Based, in part, on the continuing participation of the domestic industry, the Department recently published notice of the continuation of the AD orders on shrimp from China, India, Thailand, and Vietnam following the third sunset review of these duties.⁵ For these reasons, the domestic shrimp industry supports any efforts undertaken by the Department to “enhance, improve and strengthen its enforcement of trade remedies through the administration of” AD and countervailing duty (CVD) laws.

Nevertheless, the Southern Shrimp Alliance writes to express disappointment that the Department’s proposed rule, as a general matter, prioritizes complex modifications to the agency’s regulations as the means through which to enhance, improve, and strengthen enforcement. The Southern Shrimp Alliance continues to believe that the Department has ample existing discretionary authority through which to augment the effectiveness of trade remedies, but these options are unaddressed in the proposed rule and continue to be ignored by the agency.

According to the most recent data available from U.S. Customs and Border Protection (CBP), the AD orders on certain frozen warmwater shrimp cover the third, fourth, and seventh largest amounts of imports, by value, of all the AD and CVD orders administered by the Department.⁶ Yet,

⁴ See *Certain Frozen Warmwater Shrimp from the People’s Republic of China*, 70 Fed. Reg. 5,149 (Dep’t Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order); *Certain Frozen Warmwater Shrimp from India*, 70 Fed. Reg. 5,147 (Dep’t Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order); *Certain Frozen Warmwater Shrimp from Thailand*, 70 Fed. Reg. 5,145 (Dep’t Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order); and *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 70 Fed. Reg. 5,152 (Dep’t Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order).

⁵ *Certain Frozen Warmwater Shrimp from the People’s Republic of China, India, Thailand, and Vietnam*, 88 Fed. Reg. 42,914 (Dep’t Commerce July 5, 2023) (continuation of antidumping duty orders).

⁶ The AD order on softwood lumber from Canada (A-122-857) covers the largest value of imports (\$5 billion), followed by the CVD order on softwood lumber from Canada (C-122-858) (\$4.9 billion), then the AD order on Indian shrimp (A-533-840) (\$2.2 billion), then the AD order on Vietnamese shrimp (A-552-802) (\$505 million), then the AD order on solar cells from China (A-570-979) (\$389 million), then the CVD order on solar cells from China (C-570-980) (\$382 million), and then the AD order on Thai shrimp (A-549-822) (\$272 million). See U.S. Customs and Border Protection, *Antidumping and Countervailing Duty Enforcement Actions and Compliance Initiatives: FY 2020, Fiscal Year 2021 Report to Congress* (Public Version) (Aug. 11, 2021) (https://www.dhs.gov/sites/default/files/2021-12/antidumping_and_countervailing_duty_enforcement.pdf) at Appendix A.

Information on AD and CVD order specific duty deposits and collections has not been published by CBP since fiscal year 2020. The Department routinely identifies the number of

despite the size and scope of the trade relief covering imports of shrimp into this country, the Department's proposed amendments to the regulations decline to address the principal issues limiting the effectiveness of these AD orders, namely (1) the agency's continuing refusal to select companies for individual examination through a sampling methodology, consistent with the authority granted to the Department by Congress in section 777A(c)(2)(A) of the Tariff Act of 1930 (19 U.S.C. § 1677f-1(c)(2)(A)) and (2) the Department's insistence that the phrase "United States import duties" in section 772(c)(2)(A) (19 U.S.C. § 1677a(c)(2)(A)) does not encompass antidumping duties in circumstances where an exporter sells merchandise on a delivered, duty-paid basis.

Rather than address these foundational issues regarding the agency's approach to enforcement of AD and CVD orders, the Department has proposed a series of detailed additions to the agency's regulations that appear to further complicate the administration of these laws. The Southern Shrimp Alliance understands that these proposals are, with some significant exceptions discussed below, generally intended to improve the enforcement of trade relief. Indeed, the Southern Shrimp Alliance appreciates that the Department is now proposing to amend 19 C.F.R. § 351.408(d) to expressly permit the agency to "disregard a proposed surrogate value if that value is derived from a facility, party, industry, intra-country region or a country with weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, or environmental protections" after the domestic shrimp industry spent years challenging the Department's reliance on labor wage rates derived from supply chains characterized by forced labor practices as surrogate values.⁷ Having finally obtained a reversal of this practice through appeals to the federal courts,⁸ the Southern Shrimp Alliance supports the agency's proposal to specifically and explicitly recognize the distortions caused by non-enforcement of government rules in its regulations.

And, yet, as the Department has made clear in its undue limitation of the enforcement authority granted to the agency by Congress pursuant to 19 U.S.C. §§ 1677a(c)(2)(A) and 1677f-1(c)(2)(A), the relevant issue is not the Department's *authority* to enforce AD and CVD orders in an effective manner. Rather, the most pressing concern for the domestic shrimp industry is whether the agency intends to utilize any such authority in a manner that would make trade relief effective.

Because these issues of substantial importance to the domestic shrimp industry have not been addressed by the agency in its proposed amendments to the regulations, should the Department continue to ignore these concerns, one of the few avenues available to the industry to correct these

orders administered by the agency in budget justifications. However, the Department does not report, nor does it appear to track or maintain, information demonstrating the amount of ADs and/or CVDs collected under these orders, data that is fundamental to evaluating the effectiveness of the agency's enforcement of these trade laws.

⁷ See, e.g., *Ad Hoc Shrimp Trade Action Committee v. United States*, 219 F. Supp. 3d 1286 (Ct. Int'l Tr. 2017) and *Tri Union Frozen Products, Inc. v. United States*, 227 F. Supp. 3d 1387 (Ct. Int'l Tr. 2017).

⁸ See *Ad Hoc Shrimp Trade Action Committee v. United States*, 234 F. Supp. 3d 1315 (Ct. Int'l Tr. 2017).

practices is litigation.⁹ Moreover, if adopted, the Department's determinations made under the proposed rule are likely to be challenged before the federal courts. With that in mind, the Southern Shrimp Alliance also writes in opposition to the Department's proposal to revise 19 C.F.R. § 351.104. In substance, the agency's proposed amendment clarifies that materials referred to in citations using hyperlinks, URLs, or by reference do not become part of the official record simply by virtue of the citation and that this information must be submitted in a substantive form to be considered. The Department's proposed amendment provides for exceptions to this rule, specifically authorizing parties to cite to U.S. statutes and regulations, published legislative history, U.S. court decisions and orders, certain international agreements, and certain notices and publications from the Department and from the U.S. International Trade Commission that have been published in the *Federal Register* along with "decision memoranda and reports adopted by those notices."¹⁰

The Department further explains that there are exceptions to these exceptions and that certain agency decisional documents such as "remand redeterminations, section 129 determinations, and scope rulings must each be submitted on the official record of another segment or proceeding for Commerce to consider the contents and analysis of those determinations in that segment or proceeding."¹¹ In other words, under the new rule, the Department would permit a party in its briefing to discuss rationales expressed in preliminary decision memoranda ("PDMs") and issues and decision memoranda ("IDMs") explaining an agency action, but would not permit a party to reference an agency rationale if it was contained in a remand redetermination. However, there is no rational or logical reason for permitting parties to rely on unpublished PDMs and IDMs when they are associated with a *Federal Register* notice while proscribing parties from relying on other unpublished decisional

⁹ See, e.g., *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 63 F.4th 25, 36 (Fed. Cir. 2023) ("We also do not decide whether our *Wheatland* conclusion about ambiguity at *Chevron's* step one is subject to question based on intervening developments about, at least, the fullness of the statutory analysis required at that step.") and *Shantou Red Garden Food Processing Co. v. United States*, No. 20-03947, Slip Op. 23-72 (Ct. Int'l Trade May 12, 2023) at 3 n.2 (quoting *Carpenter Tech. Corp. v. United States*, 33 CIT 1721, 662 F. Supp. 2d 1337 (2009) ("Commerce's practice has devolved to the point where it regularly chooses only two (and sometimes one) mandatory respondents to be 'representative' of unexamined respondents for the purpose of calculating the {separate} rate in a review, a {practice} that this Court has regarded with some skepticism.") and *Xiping Opeck Food Co. v. United States*, 551 F. Supp. 3d 1339 (Ct. Int'l Trade 2021) ("There can be little question that, if Commerce were to change its method and name more than two mandatory respondents, separate rate companies would receive more accurate rates, and a great deal of litigation would be avoided.")).

¹⁰ The Department's proposed amendment does not include dictionary definitions within the exception. As such, if adopted, the regulation would appear to prohibit parties from relying upon dictionary definitions of terms in case and rebuttal briefs submitted to the agency. Accordingly, in addition to expanding the exception to include all agency-produced documents, the Department should also include dictionary definitions within the exception.

¹¹ *Proposed Regulations*, 88 Fed. Reg. at 29,852 n.6.

documents when they cannot be directly tied to a *Federal Register* notice.¹² Moreover, it would seem obvious that an express prohibition on parties' case briefs relying on the Department's own explanation as to how the agency addressed a legal deficiency identified by the U.S. Court of International Trade or the U.S. Court of Appeals for the Federal Circuit in another segment or proceeding is likely to be met with disfavor by these courts.

Further, setting aside the treatment of remand redeterminations, the Southern Shrimp Alliance believes that the proposed revisions will substantially undermine the ability of the Department to adopt and maintain consistent policies and practices across proceedings. For example, as the domestic shrimp industry recently discovered, over the last several years, the Department has adopted an inconsistent practice of weight-averaging dumping margins of individually-reviewed companies by reference to the volume or value of those companies' U.S. sales without identifying any rational basis as to why volume or value is preferred in that proceeding.¹³ In a typical administrative review,

¹² The Department routinely publishes notices of scope rulings and circumvention determinations in the *Federal Register*. See, e.g., *Notice of Scope Rulings*, 88 Fed. Reg. 32,731 (Dep't Commerce May 22, 2023) and *Notice of Scope Rulings*, 88 Fed. Reg. 7,402 (Dep't Commerce Feb. 3, 2023). It is not obvious why unpublished scope rulings and circumvention determinations included within these notices are not "adopted" by these notices or might otherwise be distinguished from PDMs and IDMs.

¹³ In some proceedings, the Department weight-averages margins by utilizing relative sales values. See, e.g., Memorandum from F. Baker to The File, "Antidumping Duty Order on Finished Carbon Steel Flanges from India; Administrative Review; 2020-2021: Calculation of Margin for Respondents Not Selected for Individual Examination," Case No. A-533-871 (Mar. 7, 2023) (PV); Memorandum from J. Rivera to The File, "Final Results of the Antidumping Administrative Review of Steel Concrete Reinforcing Bar from the Republic of Turkey; Calculation of the Cash Deposit Rate for Non-Selected Companies," Case No. A-489-829 (Feb. 1, 2023); Memorandum from M. Cryor to The File, "Preliminary Results of the Antidumping Duty Administrative Review of Certain Softwood Lumber Products from Canada: Calculation of the Rate for Non-Examined Companies," Case No. A-122-857 (Jan. 23, 2023); Memorandum from B. Ballesteros to The File, "Less-Than-Fair Value Investigation of Raw Honey from India: Calculation of All-Others Rate," Case No. A-533-903 (Apr. 7, 2022) (PV); Memorandum from G. Coen to The File, "Less-Than-Fair Value Investigation of Raw Honey from Brazil: Calculation of All-Others Rate," Case No. A-351-857 (Nov. 17, 2021) (PV); Memorandum from P.A. Ordaz to The File, "Final Determination in Less-Than-Fair Value Investigation of Raw Honey from the Socialist Republic of Vietnam: Calculation of the Dumping Margin for Respondents Not Selected for Individual Examination," Case No. A-552-833 (Apr. 7, 2022) (PV); Memorandum from K. Hill to The File, "Preliminary Determination Calculation for the All-Others," Case No. A-821-831 (Jan. 26, 2022) (PV); Memorandum from J. Hill to The File, "Antidumping Administrative Review of Steel Racks and Parts Thereof from the People's Republic of China: Calculation of Dumping Margin for Respondents Not Selected for Individual Review," Case No. A-570-088 (Sept. 30, 2021) (PV); Memorandum from J. Pedersen to The File, "2019-2020 Administrative Review of the Antidumping Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People's Republic of China:

the Department identifies, for the first time, the methodology the agency is utilizing in the preliminary results. Parties with views as to how the Department should establish the dumping margin applied to companies subject to the proceeding that were not individually-selected for review should be able to reference agency-produced documents explaining the Department's practice on this issue. A regulation barring parties from doing so because these memoranda were not on the administrative record prior to the issuance of the preliminary results prevents the agency from resolving inconsistencies and presenting a coherent description and explanation of agency practice to reviewing bodies.

Accordingly, the Southern Shrimp Alliance believes that the Department should amend its proposed revisions to specify that the limited exceptions encompass all agency-produced documents available on ACCESS. This is because Department-authored documents are not the kind of new factual information contemplated by 19 C.F.R. §§ 351.102(b)(21) and 351.301 since, like PDMs and IDMs, these documents are the basis of the agency's practice and policies. The Department is a decision-making administrative agency and its practices and policies develop through documents explaining and describing its actions. Because of its workload and the operation of statutory deadlines, the Department may unintentionally develop inconsistent practices or adopt a policy in a preliminary determination that undermines or contradicts the rationale for a policy followed in another segment or proceeding. In these circumstances, adopting a wholesale rule that prohibits parties from demonstrating in a case or rebuttal brief that the Department has taken a position in a preliminary determination that is inconsistent with the agency's position in another segment or

Calculation of the Dumping Margin for Respondents Not Selected for Individual Examination," Case No. A-570-979 (June 21, 2022). In other proceedings, the Department weight-averages margins by utilizing relative sales volumes. *See, e.g.*, Memorandum from J. Conniff to The File, "Final Results of the Antidumping Duty Administrative Review of Light-Walled Rectangular Pipe and Tube from Mexico: Calculation of the Rate for Non-Selected Respondents," Case No. A-201-836 (Mar. 7, 2023) (PV); Memorandum from A. Simons to The File, "2020-2021 Antidumping Duty Administrative Review of Welded Line Pipe from the Republic of Korea; Calculation of the Review-Specific Average Rate for the Preliminary Results," Case No. A-580-876 (Dec. 22, 2022) (PV); Memorandum from D. Crespo to The File, "Preliminary Results of the Antidumping Administrative Review of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico; Calculation of the Cash Deposit Rate for Non-Reviewed Companies," Case No. A-201-847 (Nov. 6, 2019) (PV); Memorandum from L. LaCivita to The File, "Certain Steel Nails from Thailand: Calculation of All-Others' Rate in the Final Determination," Case No. A-549-844 (Dec. 19, 2022) (PV); Memorandum from G. McMahon *et al.* to The File, "Less-Than-Fair-Value Investigation of Oil Country Tubular {Goods} from the Russian Federation; Preliminary Determination Calculation for All-Others," Case No. A-821-833 (May 4, 2022) (PV); and Memorandum from A. Wood to The File, "Final Results of the 2019-2020 Antidumping Administrative Review of Certain Carbon and Alloy Steel Cut-to-Length Plate from Belgium; Calculation of the Cash Deposit Rate for Non-Reviewed Companies," Case No. A-423-812 (Feb. 2, 2022) (PV). Regardless of whether the Department uses relative sales values or relative sales volumes, the agency has not explained how it determines whether to select one over the other.

proceeding harms the agency by eroding the deference that should otherwise be afforded to the agency in its administration of the AD and CVD laws.

Beyond improving the agency's ability to develop and maintain consistent policies and practices, revising the proposed amendment to 19 C.F.R. § 351.104 to encompass all Department-authored documents available on ACCESS within the exception would additionally eliminate the need and rationale for the proposed amendment to 19 C.F.R. § 351.301 that would add a new subsection (c)(4)(ii) contemplating the formal inclusion of agency memoranda from other segments or proceedings on the administrative record. Should the Department determine, after the submission of case briefs, that agency documents are of relevance to the proceeding, the agency could issue a memorandum to that effect, with the memorandum identifying the document, where it is located on ACCESS (*i.e.*, barcode number), and providing parties with an opportunity to comment. As currently contemplated, the Department would place such documents on the administrative record and permit the parties to comment, but would expressly prohibit parties from referencing any similar documents in other segments or proceedings that might contradict the information believed by the agency to be relevant. This position is impossible to justify and threatens to further erode the deference that otherwise should be afforded to the agency's expertise developed through "40 years of case precedent."

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Thank you in advance for your consideration of these comments on the *Proposed Regulations*. The members of the Southern Shrimp Alliance, comprised of hundreds of small, family-run businesses across a wide area of the country, depend on the Department's commitment to the strong enforcement of the U.S. trade remedy laws. While our industry has greatly benefitted from the agency's administration of the AD orders on shrimp imports, we nevertheless believe that the effectiveness of the trade remedies has been inappropriately limited by the Department's determinations to not exercise authority granted to it by Congress. In issuing final regulations, we ask that the Department address these concerns.

Respectfully submitted,



John Williams, Executive Director