Southern Shrimp Alliance
P.O. Box 1577 Tarpon Springs, FL 34688
955 E. MLK Dr. Suite D Tarpon Springs, FL 34689
727-934-5090 Fax 727-934-5362

February 18, 2011

Docket No. ITA-2010-00011
Regulation Identifier No. 0625-AA87

VIA FEDERAL E-RULEMAKING PORTAL

The Honorable Gary F. Locke
Secretary of Commerce
Attn: Ronald K. Lorentzen
Deputy Assistant Secretary for Import Administration
Room 1870
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Comments on Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings

Dear Secretary Locke:

On behalf of the Southern Shrimp Alliance ("SSA"), we hereby submit these comments in response to the request by the Department of Commerce (the "Department"), made pursuant to Section 123(g)(1) of the Uruguay Round Agreements Act (19 U.S.C. § 3533(g)(1)), for public comment on revisions to the Department's

practice and regulations governing the calculation of the weighted-average dumping margin in certain reviews of antidumping duty orders.[1]

In December 2003, the domestic shrimp industry, through the Ad Hoc Shrimp Trade Action Committee, petitioned for relief from unfairly traded imports of frozen and canned warmwater shrimp from Brazil, China, Ecuador, India, Thailand and Vietnam. Following extensive litigation before the Department and the U.S. International Trade Commission, antidumping duty orders were issued on frozen warmwater shrimp from these countries in February of 2005.

The antidumping duty order on frozen warmwater shrimp from Ecuador was revoked effective August 15, 2007.[2] Two years later, the antidumping duty order on frozen warmwater shrimp from Thailand was revoked with respect to two large Thai exporters of shrimp on January 16, 2009.[3] The revocation of trade relief on both occasions, ostensibly, resulted from decisions to comply with legal interpretations

---

1 Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 Fed. Reg. 81,533 (Dep't Commerce Dec. 28, 2010) ("Proposal").

2 Implementation of the Findings of the WTO Panel in United States Antidumping Measure on Shrimp from Ecuador: Notice of Determination Under section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Ecuador, 72 Fed. Reg. 48,257 (Aug. 23, 2007).

3 Implementation of the Findings of the WTO Panel in United States--Antidumping Measure on Shrimp From Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp From Thailand, 74 Fed. Reg. 5,638 (Jan. 30, 2009).

announced by the Appellate Body of the World Trade Organization expanding the obligations of members under the Anti-Dumping Agreement.

The loss of a significant portion of the trade relief granted to the domestic industry was without justification. The U.S. Government has repeatedly and consistently observed that the decisions made on "zeroing" by the Appellate Body constituted the creation of new obligations under the Anti-Dumping Agreement that had neither been negotiated nor agreed to by the parties. The United States has additionally objected to further expansions of the obligations of members under other WTO Agreements, including the Dispute Settlement Understanding, by the Appellate Body in proceedings related to the "zeroing" determinations.

The submission of the Committee to Support U.S. Trade Laws ("CSUSTL") provides a comprehensive summary of the United States' repeated and consistent objections. CSUSTL's submission appropriately frames the question presented here as whether there is anything to be meaningfully gained by acquiescing to the overreach of an unaccountable body that is unwilling to recognize the express limitations of its authority. The comments already filed with the Department on this issue by foreign exporters, governments, and U.S. importers are replete with declarations purporting to establish a near limitless scope of the reach of the Appellate Body's determinations and threats of further appeals to an Appellate Body that is expected to oversee and veto the exercise of rights carefully negotiated by the members of the World Trade Organization.

There is no argument that the exporters relieved of the discipline of the antidumping duty orders sold their merchandise at fair value in the U.S. market (if there

were no sales at less than fair value, offsets would be irrelevant). The record in the investigations of subject merchandise from Ecuador and Thailand demonstrated that sales were made at less than fair value. The issue in both cases regarded how these dumped sales would be accounted for. Respondents in both cases argued for the application of offsets in a manner that led to findings of dumping margins below *de minimis* levels, while the Ad Hoc Shrimp Trade Action Committee presented arguments and evidentiary support that the utilization of other calculation methodologies – fully permitted under the Anti-Dumping Agreement – would result in findings of dumping margins above *de minimis* levels. The Department declined to evaluate or apply those methodologies based on procedural concerns.

In announcing a calculation of *de minimis* dumping margins for the Ecuadorian respondent Promarisco S.A. (1.75%), the Department held that although the agency had discretion to consider alternative methodologies, it would not do so because appropriate procedural steps had not been taken in the original investigation:

> In the investigation subject to this proceeding, there was ample time for domestic parties to make a targeted dumping allegation. At this late stage, the Department does not have sufficient time to make a preliminary finding regarding targeted dumping, and allow time for verification and comment. Accordingly, the Department does not find that there is "good cause" to extend the deadline and consider the targeted dumping allegation made in this proceeding.[4]

---

[4] Issues and Decision Memorandum (cmt. 3) accompanying Implementation of the Findings of the WTO Panel in United States Antidumping Measure on Shrimp from Ecuador: Notice of Determination Under section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Ecuador, 72 Fed. Reg. 48,257 (Aug. 23, 2007).

Two years later, the Department employed the same rationale when announcing *de minimis* dumping margins for Thai respondents The Rubicon Group (1.94%) and Thai I-Mei Frozen Foods Co., Ltd. (1.81%):

> In the investigation stage of this proceeding, there was ample time for domestic parties to make a targeted dumping allegation. At this late stage, the Department does not have sufficient time to make a preliminary finding regarding targeted dumping, and to allow time for verification and comment. Accordingly, the Department does not find that there is "good cause" to extend the deadline and consider the targeted dumping allegation made in this proceeding.[5]

In result, following Appellate Body determinations that the United States uniformly disagrees with, the domestic shrimp industry lost trade relief because the Department decided, as a matter of procedure, that parties should have anticipated the Appellate Body's overreach and requested that alternative dumping margin calculations be evaluated and employed.[6]

The upshot for the domestic shrimp industry is that after investing substantial resources in the prosecution of trade remedy cases that resulted in trade relief granted

---

[5] Issues and Decision Memorandum (cmt. 3) accompanying Implementation of the Findings of the WTO Panel in United States--Antidumping Measure on Shrimp From Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp From Thailand, 74 Fed. Reg. 5,638 (Jan. 30, 2009).

[6] We recognize that the Department's exercise of discretion to decline to entertain targeted dumping allegations after the deadline imposed in an original investigation has been upheld by the Court of International Trade. See U.S. Steel Corp. v. United States, 637 F. Supp. 2d 1,199, 1,216-1218 (Ct. Int'l Tr. 2009) aff'd on other grounds 621 F.3d 1,351 (Fed. Cir. 2010). Nevertheless, the decision as to whether to waive or impose the deadline requirement is one afforded to the discretion of the agency and, on this issue, the Department has repeatedly exercised its discretion to the benefit of respondents and against domestic industries.

under U.S. law *that has not changed*, the industry now competes for sales in the U.S. market with record levels of unfairly-traded imports that are not subject to antidumping duties. In 2010, 556.6 million pounds of scope merchandise entered the United States from Ecuador and Thailand. This amount represents the single highest volume of frozen warmwater shrimp imports from these two countries in any year; a feat made possible by the Department's decision to define the scope of its responsibilities narrowly and withdraw trade relief that was appropriately granted to the domestic industry. In return, the Department's administration of the dumping laws has been subjected to even greater scrutiny by the Appellate Body and, emboldened by outcomes that have resulted in the elimination of trade relief, has encouraged parties to bring even more challenges at the World Trade Organization.

For these reasons, we write to register our concerns regarding the Department's proposal to modify 19 C.F.R. § 351.414(c) ("Preferences") to eliminate clause (2) stating that "In a review, the Secretary normally will use the average-to-transaction method."[7] The newly proposed section (c) ("Choice of Method") instead includes a proposed clause (1) that would read: "In an investigation or review, the Secretary will use the average-to-average method unless the Secretary determines another method is appropriate in a particular case."[8] The proposed language implies that an average-to-average comparison is to be the default method applied in reviews as well as investigations. Dubbing the average-to-average comparison methodology as the default methodology in

---

[7] Compare 19 C.F.R. § 351.414(c) (2010) with Proposal, 75 Fed. Reg. at 81,535.

[8] Proposal, 75 Fed. Reg. at 81,535.

reviews would appear to be inconsistent with the intentions of Congress in enacting the dumping laws.

The Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA") states, unequivocally, that:

> The {Anti-Dumping} Agreement reflects the express intent of the negotiators that the preference for the use of an average-to-average or transaction-to-transaction comparison be limited to the "investigation phase" of an antidumping proceeding. Therefore, as permitted by Article 2.4.2, *the preferred methodology in reviews will be to compare average* {normal values} *to individual export prices*.[9]

The SAA observed that the preference for an average-to-transaction comparison over that of an average-to-average comparison in reviews was "based on a concern" that the average-to-average methodology "could conceal 'targeted dumping.'"[10]

Accordingly, at the very least, the proposed rule should not implement a preference for an average-to-average comparison methodology over an average-to-transaction comparison methodology in reviews. The following language would make the regulation consistent with the instructions provided in the SAA:

> (c) *Choice of Method*. (1) In an investigation, the Secretary will use the average-to-average method unless the Secretary determines another method is appropriate in a particular case.
>
> (2) In a review, the Secretary will use either the average-to-average method or the average-to-transaction method as appropriate in a particular case.
>
> (3) The Secretary will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.

---

[9] SAA, H.R. Doc. No. 103-316 (1994) at 842 (emphasis added).

[10] Id.

The Department should not adopt regulations that would call for the default use of a comparison method that would conceal targeted dumping.

Finally, some parties have argued that the Department should expedite its proposed timetable for implementation of any new rule, asserting that additional litigation will ensue should the agency proceed under the proposed dates.[11] We note that the Court of International Trade recently dismissed a "zeroing" challenge, observing:

> The Federal Circuit's decision in SKF constitutes controlling authority, and while Dongbu is not binding on the court, it is legally sound and consistent with Federal Circuit precedent. SKF and Dongbu make clear that Commerce's practice of "zeroing" in administrative reviews remains a reasonable application of the antidumping statute under the second step of Chevron.[12]

Although parties may seek to bring further actions on the same basis at the Court of International Trade, there is no reason to believe that similar actions will survive motions to dismiss.

Insofar as the Department should be concerned with litigation arising from issues related to offsets in dumping calculations, we note that the agency's acquiescence to Appellate Body determinations that have been deemed as having no basis in the obligations of members under the Anti-Dumping Agreement has resulted in more, not less, litigation. By weakening the trade laws and trade law enforcement, the Department has encouraged parties engaging in unfair trade to bring additional litigation through their

---

11 See, e.g., Letter from Lafave Associates to the U.S. Department of Commerce, RIN No. 0625-AA87 at 3-5 (Jan. 26, 2011).

12 See MCC Eurochem v. United States, Ct. No. 10-260, Slip. Op. 11-13 (Ct. Int'l Tr. Feb. 4, 2011), at *4.

home governments challenging trade remedies. The Department's discretion – granted by Congress through the dumping laws – will be further circumscribed if the agency continues to take actions that effectively weaken our trade laws.

We are grateful for the opportunity to provide our comments on the Department's proposed rule.

.

Sincerely,

John Williams
Executive Director