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MEMORANDUM TO: Faryar Shirzad
Assistant Secretary
for Import Administration

FROM: Joseph A. Spetrini
Deputy Assistant Secretary
Import Administration Group III

SUBJECT: Issues and Decision Memorandum for the Final Rescission of the New Shipper Review of Freshwater Crawfish Tail Meat from the People's Republic of China for North Supreme Seafood and for the Final Results of the New Shipper Review of Freshwater Crawfish Tail Meat from the People's Republic of China for Shouzhou Huaxiang

Summary

We have analyzed the arguments of interested parties in the new shipper reviews of North Supreme Seafood (Zhejiang) Co., Ltd. (North Supreme) and Shouzhou Huaxiang Foodstuffs Co., Ltd (Shouzhou Huaxiang) under the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China (PRC). As a result of our analysis, we have made changes in the margin calculation for Shouzhou Huaxiang and have determined that the new shipper review for North Supreme should be rescinded. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this new shipper review for which we received comments and rebuttals by parties:

1. The *Bona Fides* of North Supreme's and Shouzhou Huaxiang's Sales
2. Surrogate Value for Whole, Live Crawfish
3. Shouzhou Huaxiang's Scrap Credit
4. Application of Chain Rates

Discussion of Comments

Comment 1: The *Bona Fides* of North Supreme's and Shouzhou Huaxiang's Sales

Petitioners argue that in order to sustain a new shipper review, the exporter or producer must show that there was a *bona fide* first sale to the United States in accordance with 19 CFR 351.214(b)(2)(iv)(C). Accordingly, petitioners argue that the Department should rescind the new shipper reviews for Shouzhou and North Supreme due to a lack of a *bona fide* sale based on the information provided by these companies.

Petitioners note that the Department has the discretion to disregard U.S. sales that are not *bona fide* if evidence demonstrates that a respondent has “artificially orchestrated an export scheme involving artificially set prices.” See Chang Tieh Industry Co. Ltd. v. United States, 840 F. Supp. 141, 146 (December 9, 1993). Furthermore, petitioners state that the CIT has ruled that the Department has a wide discretion to employ a methodology in determining whether sales are “unrepresentative or distortive, that is, non-*bona fide* ones.” See Windmill v. United States, 193 F. Supp. 2d 1301, 1313 (February 21, 2002) (Windmill).

According to petitioners, the integrity of a new shipper review depends on the *bona fides* of a new shipper's commercial transactions. Petitioners contend that if it were otherwise, a new shipper could unfairly benefit from the ability of its importers to post a bond in lieu of a cash deposit during the course of the new shipper review, to the detriment of both domestic and foreign competitors who trade according to actual *bona fide* commercial transactions.

Petitioners state that the Department examines a number of factors surrounding an alleged sale to determine whether the sale in question is *bona fide*. According to petitioners, these include the timing of the sale relative to the petition, the sales prices compared to the world market price for the commodity, and the prices observed in the United States at the time of the sale. See Notice of Final Determination of Sales at Less Than Fair Value: Manganese Metal from the People's Republic of China, 60 FR 56045 (November 6, 1995).

Petitioners note that in Windmill, the court found the Department's analysis in Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Rescission of Antidumping Duty Administrative Review, 63 FR 47232 (September 4, 1998), to be reasonable. According to petitioners, the CIT disagreed with respondent's claims that the Department could only measure the *bona fides* of a sale in light of evidence of fraud, and commented that the Department may review the *bona fides* of any sale in which it believes the sale may be “clearly atypical” and that the use of that sale in its methodology “would undermine the fairness of the comparison of foreign and U.S. sales.” Windmill, 193 F. Supp. 2d at 1312.

Petitioners cite a recent new shipper review that was rescinded by the Department based on an atypically high unit price for the sale in question. See Fresh Garlic from the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review (Garlic Final), 67 FR 11283, 11284 (March 13, 2002), and the accompanying Issues and Decision Memo: New Shipper Review of Clipper Manufacturing Ltd. (Clipper Decision Memo) dated March 6, 2002. In this determination, the Department “could not reconcile the significantly higher price that Clipper received for its U.S. sale with evidence of significantly lower prices of other Chinese garlic imports.” See Clipper Decision Memo at 8.

North Supreme argues that its sale was *bona fide*. North Supreme cites Silicon Metal from Brazil: Notice of Final Results of Antidumping Duty Administrative Review; LIASA, 64 FR 6305, 6317 (February 9, 1999) (Silicon Metal), which states that “the Department only disregards U.S. sales in exceptional circumstances where the sale is commercially unreasonable and other facts and circumstances indicate an attempt to manipulate the dumping margin.” See also FAG U.K., Ltd. v. United States, 945 F. Supp. 260, 265 (Ct. Int'l Trade 1996), wherein the CIT noted that, “Commerce can only exclude sales from U.S. price in an administrative review in exceptional circumstances when those sales are unrepresentative and extremely distortive.” Respondents argue that in the Garlic Final, the respondent was unable to substantiate its claim that the unique variety of garlic and the very nature of its out-of-season sale commanded a very high price. Respondents also contend that North Supreme makes no such claims regarding its subject sales price agreed upon by the company and its customer. Respondents conclude that petitioners have not offered any record evidence to refute the *bona fide* nature of North Supreme's sale because they have not offered record evidence regarding a “world market price” nor a U.S. price for crawfish tail meat “at the time of the sale” in question to contradict the commercially viable sales price reported by North Supreme.

North Supreme argues that it can sell its crawfish at higher prices, which are very close to U.S. domestic prices as high as \$7.00 a pound, because it has the most modern seafood processing factory in China. North Supreme further argues that it has the most comprehensive quality management program available in the seafood industry in China, thereby enabling it to produce a high quality product. North Supreme claims that it had invested in a three-tier quality assurance plan which includes training and testing in the following areas: 1) in pre-harvest by performing testing to control levels of illegal and unwanted residues in both soil and water; (2) upon arrival by performing random testing on crawfish to check the quality of the products, specifically aimed at avoiding unwanted residues (included in this process is North Supreme's use of ELISA kits to test for Chloramphenicol, which are designed to detect CAP levels in excess of 0.2 PPB; this exceeds all standards for such testing in all markets worldwide); and (3) in processing, North Supreme performs on-site laboratory checking of products as well as processes (like ensuring the best time-temperature profile during processing). The control includes testing of finished products at an independent laboratory.

In its argument that its production facility allows it to produce a premium product, North Supreme states that it has obtained certifications that prove it is the only high quality seafood processing plant in China. These certifications include the HACCP by the FDA; a certification for quality by the EU; the BRC, a higher level of British Retail Certification; the ISO 9000; and the ISO 14000 .

Shouzhou Huaxiang argues that its crawfish tail meat is sold to the low-end market in the United States because of its lower quality. Shouzhou Huaxiang argues that its customers understand that Shouzhou Huaxiang's crawfish tail meat is directed to the lower end of the U.S. market, thereby allowing Shouzhou Huaxiang to charge a lower price. Unlike the customers targeted by companies like North Supreme, its buyers do not expect high-end level of quality. According to Shouzhou Huaxiang, while it maintains certifications for U.S. FDA ("HACCP") and ISO 9000, its crawfish tail meat is not certified by the British Retail Consortium ("BRC"), European Union, or ISO 1400, like North Supreme.

Finally, Shouzhou Huaxiang argues that its business strategy of selling lower quality crawfish tail meat is quite different from companies like North Supreme. These companies, according to Shouzhou Huaxiang, target a different market that allow them to charge higher prices because their crawfish tail meat is of a higher, premium quality as compared with tail meat from other factories in China.

Petitioners argue that respondents failed to substantiate their assertions that the product quality is associated with various certifications and that quality is responsible for the atypical prices. Specifically, petitioners state that the differences in Shouzhou Huaxiang's and North Supreme's certification standards are not relevant to product quality and prices, but are actually standards of process management. Petitioners cite to information from the International Standards Organization ("ISO") that states:

{A}mong the misleading practices that ISO wants to put an end to {is...} {g}iving the false impression that ISO 9000 is a product quality label, or that ISO 1400 is a label {...} ISO 9000 and ISO 14000 are what are known as "generic management system standards. {...} The objective is to give the organization's management and its customers confidence that the organization is in control of the way it does things. While this confidence logically extends to the things it makes, neither ISO 9000 nor ISO 14000 contains requirements for specific products. See Publicizing Your Certification, at <http://www.iso.ch/iso/en/iso9000-14000/tour/publiciz.html>.

Petitioners note that ISO 14000 is a standard relating to environmental protection and not product quality. Likewise, petitioners add that the Food and Drug Administration's (FDA's) Hazard Analysis Critical Control Point ("*HACCP*") is a "preventive system of hazard control that can be used by processors to ensure the safety of their products to consumers." See Procedures for the Safe and Sanitary Processing and Importing of Fish and Fishery Products; Final Rule, 60 FR 65095 (FDA, December 18, 1995). In addition, petitioners note that the British Retail Consortium Standard (BRC)

appears to be another process standard largely duplicative of the HACCP. Petitioners conclude that none of these standards provide a means of drawing distinctions, based on product quality, between different sources of saleable crawfish tail meat from China.

Petitioners note that respondents have failed to identify any physical attributes in the crawfish tail meat that would affect a customers' appeal for a product. Petitioners argue that, based on the USITC's finding in the original order on this product, perceptions of product quality are tied to such physical characteristics as freshness, cleanliness, taste, texture, appearance, shelf life, size, and fat content. Petitioners further argue that there is no basis for a conclusion that Shouzhou Huaxiang's products are inferior to North Supreme's and of a low quality simply because it argued that its production facilities are not as new as North Supreme's or because its production processes are not "certified" to the same standards as North Supreme. Petitioners also argue that photos of Shouzhou Huaxiang's facility do not establish inferior product quality affecting U.S. price. Petitioners conclude their arguments regarding Shouzhou Huaxiang by providing that, regardless of the production facilities, there is no evidence that better equipment produces differences in product quality in the crawfish industry of sufficient magnitude to have an appreciable effect on the price. As such, petitioners contend that Shouzhou Huaxiang failed to substantiate its claims relating to product quality, and the Department should not rely on these claims in its analysis of whether the Shouzhou Huaxiang sale at issue was a *bona fide* sale.

Petitioners argue that North Supreme also failed to substantiate its claim that its atypical price resulted from unusually high product quality. Petitioners argue, as they did for Shouzhou Huaxiang, that perceptions of product quality are tied to such physical characteristics as shelf life, size, texture, and fat content. Petitioners note that North Supreme provided information about the nature of its production facility and certifications relating to its manufacturing process. However, petitioners argue that these factors identified by North Supreme do not establish the existence of quality differences affecting U.S. price. In addition, petitioners also argue that North Supreme failed to show how its quality control system has resulted in actual differences in the quality of its crawfish tail meat sold to the United States and that photographs of North Supreme's facility do not establish superior product quality that would affect its U.S. price. Petitioners also argue that modern equipment is not indicative of safer food.

Finally, concerning North Supreme's certifications, petitioners argue that the BRC and EU standards mean nothing to U.S. purchasers because they are foreign standards and they have nothing to do with product quality. Petitioners also argue that the ISO 9000 and ISO 14000 standards relate solely to environmental protection and not to product quality.

North Supreme argues that high-end crawfish tail meat has been selling in the United States market for prices between \$5.75 to \$7.00 per pound. Therefore, North Supreme is merely selling at the higher end of the range of prices established by U.S. producers for high-quality crawfish tail meat. North Supreme commands prices more in line with U.S. produced crawfish tail meat because it is recognized as higher quality by consumers of its products. To support this argument, North Supreme provided

documentation of four additional sales of crawfish tail meat to the United States that were made after this period of review at even higher prices than the initial sale giving rise to this new shipper review.

Alternatively, Shouzhou Huaxiang argues that because of its lower quality, Shouzhou Huaxiang's crawfish are offered at the lower end of the U.S. market. Shouzhou Huaxiang argues that when the new shipper sale was made, the prices in the United States were consistent with the price charged by Shouzhou Huaxiang, based on information from the Department. See Freshwater Crawfish Tail Meat From the People's Republic of China: Collection of Cash Deposits and Assessment of Duties, Memorandum to the File From Mark Hoadley, dated August 27, 2001.

Petitioners argue that the Department should give no credence to Shouzhou Huaxiang's claim that U.S. market prices for Chinese crawfish tail meat were dramatically higher during the POR than thereafter. Petitioners argue that while prices may have been higher during the POR than thereafter, the difference is not as dramatic as Shouzhou Huaxiang claims, and it is insufficient to explain its atypical prices. Petitioners argue that the price for the sale made by Shouzhou Huaxiang during the POR was much higher than the prices for all its subsequent sales, and thus was clearly atypical and unrepresentative of the company's normal sale prices in the United States.

Petitioners argue that North Supreme's comparison of its prices being similar to the prices of the domestic like product are inaccurate because the comparison should be made with subject merchandise, or imported tail meat. Petitioners also argue that Shouzhou Huaxiang states misleadingly that "crawfish tail meat prices in Louisiana ranged from a low of \$2.00 a pound to a high of \$7.00 per pound in 2002." Petitioners state that the claim is misleading because it fails to focus solely on U.S. prices for imports from China. Petitioners argue that the figure of \$7.00 per pound, taken from the newspaper article, is for domestic crawfish tail meat. Petitioners state that domestic crawfish tail meat has always sold at a significant premium over imported meat; therefore, prices for the domestic like product do not provide a proper basis for comparison in determining whether either company's sale was *bona fide*. Petitioners also argue that North Supreme has failed to provide evidence that even a single purchaser in the United States shares the opinion that North Supreme's product is of a higher quality.

On December 13, 2002, North Supreme submitted comments to rebut petitioners' December 10 submission. North Supreme again argued that petitioners are incorrect in claiming that North Supreme cannot justify its position that its high quality crawfish commands a higher price. North Supreme argues that the various certifications, customer acknowledgments of product superiority and plant and other photographic evidence establish the high quality of North Supreme's products. Further, North Supreme notes that petitioners have ignored the strongest evidence on the record for finding North Supreme's new shipper sale: North Supreme's four additional sales were made at a higher price than the sales subject to review; the terms of these sales were finalized before the *bona fide* sale issue came

to the attention of North Supreme; and three of these additional shipments were released by the U.S. Customs Service after passing FDA inspection.

Department's Position:

We have fully analyzed the totality of the circumstances surrounding both North Supreme's and Shouzhou Huaxiang's new shipper sales under review in this proceeding. Consistent with Windmill, we examined whether the transactions were negotiated at arm's length and were not artificially set; whether the transactions were commercially reasonable; and whether the transactions were consistent with each company's normal business practice. We also examined whether the transactions were consistent with normal business practices in the Chinese crawfish industry. As discussed in more detail below, after examining the totality of the circumstances of the sales at issue, the Department determines that North Supreme's new shipper sale was not *bona fide* and Shouzhou Huaxiang's new shipper sale was *bona fide*.

With regard to North Supreme, much of the information relied upon in our analysis of whether its new shipper sale was *bona fide* is business proprietary. As such, the full analysis is set forth in Memorandum to Joseph A. Spetrini through Barbara E. Tillman: Freshwater Crawfish Tail Meat from The People's Republic of China: Whether the Sales in the New Shipper Review of North Supreme Are Bona Fide, dated January 2, 2003 (North Supreme Memo). Provided below is a summary of that analysis. First, with regard to whether North Supreme's sale reflected arm's length negotiations, we found that some aspects of the price negotiations between North Supreme and its importer indicated that the transaction was not reflective of normal arm's length negotiations. In particular, the fact that, as stated by company officials at verification, neither company was concerned with "making a profit on the sale," was evidence that these negotiations did not appear to be true price negotiations, in which the buyer seeks the lowest possible price and the seller seeks the highest possible price. See New Shipper Review of Freshwater Crawfish Tail Meat from the People's Republic of China: Sales and Factors Verification Report for North Supreme Seafood (Zhejiang) Co., Ltd., Memorandum from Thomas Gilgunn, Christian Hughes, Holly Hawkins, and Scott Lindsay, Through Dana S. Mermelstein, Program Manager, Office of AD/CVD Enforcement VII, To the File, dated July 23, 2002 at 11 (North Supreme Verification Report). See also North Supreme Memo at 4. The additional fact that these companies agreed to a high price in order to avoid antidumping duties does not inform our analysis of whether the sales was conducted on an arm's length basis. We recognize that it is in the buyer's and seller's interests to achieve a low antidumping duty cash deposit rate, and that it makes good business sense for the importer to pay a relatively higher price on the initial sales in order to ensure lower-priced future sales. While limiting the cash deposits to be posted is a rational business objective, it is inappropriate to allow a company to establish a distorted dumping margin based on sales that are artificially constructed for this purpose.

With respect to whether North Supreme's sale was commercially reasonable, we examined the prices charged by North Supreme for its new shipper sale. The record shows that North Supreme's price was nearly double the average unit value at which crawfish tail meat was being imported from China during the POR. See Memorandum to the File Through Dana Mermelstein from Scott Lindsay: Freshwater Crawfish Tail Meat from The People's Republic of China – Inclusion of Customs Data Query for Import Data on the Record of the New Shipper Reviews, dated January 2, 2003 (CDQ Memo), at Attachment 1. While North Supreme did argue that its high quality crawfish tail meat commanded a higher price in the U.S. market, the information it provided to substantiate this claim was either inapposite (as petitioners correctly noted, a modern plant and international certifications of manufacturing processes do not demonstrate that the goods produced are premium) or inadequate (testimonials from European customers attesting to their satisfaction do not constitute documentary evidence of a product's high quality; furthermore, proprietary information on the record regarding the prices European customers paid at the same time that North Supreme's new shipper sales were made contradicts North Supreme's premium quality crawfish assertions). See North Supreme Memo at 5-6.

In analyzing the quantity of the new shipper sale made by North Supreme, we compared it with other shipments of Chinese crawfish tail meat to the United States. We found that the company's shipment was for a very small quantity, a quantity which is less than ten percent of what we have seen as typical of crawfish shipments to the United States over the history of this antidumping order. See North Supreme Memo at 8; see also CDQ Memo at Attachment 2. We note that Department practice provides that the size of a transaction is not sufficient, in and of itself, to warrant a finding that the transaction is not *bona fide*. The Department has stated that "single sales, even those involving small quantities, are not inherently commercially unreasonable and do not necessarily involve selling practices atypical of the parties' normal selling practices." See Certain Cut-to-Length Carbon Steel from Romania: Notice of Rescission of Antidumping Duty Administrative Review, 63 FR 47234 (September 4, 1998). Moreover, the Department has found small quantity sales (*e.g.*, test sales) to be *bona fide* in previous new shipper reviews. See American Silicon Tech v. U.S., 110 F Supp. 2d. 992, 996 (Ct. Int'l Trade 2000) (*American Silicon Tech*). The extremely small quantity of North Supreme's U.S. sale is a concern, which does not, by itself, render the sale not *bona fide*. However, when analyzed together with the totality of the circumstances surrounding the sale, the small quantity informs our decision of whether the sale was *bona fide*. North Supreme's sale to the United States reflects a sale that was negotiated at an artificially high price, and limited to an unusually small quantity, with the purpose of establishing a distorted cash deposit rate. See Windmill, 193 F. Supp.2d at 1313.

We also examined the *bona fides* of North Supreme as a company as well as the *bona fides* of its importer. As discussed at verification, North Supreme was formed by a foreign direct investment by a Norwegian company for the purpose of processing seafood for export. See Verification Report at 2. There is no record information which indicates that North Supreme is not a *bona fide* commercial enterprise. There is little information in the record regarding the importer, and there is no information

about who the final customer was and the terms of sale to that customer. The record does show that North Supreme's importer for the new shipper sales is an unaffiliated import-export company which supplies seafood products to restaurant chains and cruise ships. Id. at 11. Information provided by North Supreme indicates that North Supreme used a different importer for its more recent shipments, and that its importer for the new shipper sales is currently experiencing financial difficulties. See North Supreme's Third Supplemental Questionnaire Response, November 18, 2002, at p. 2. As such, we can draw no conclusions concerning the *bona fides* of the importer.

In examining the totality of the circumstances surrounding North Supreme's new shipper sale, we conclude that the sale was not *bona fide*. Therefore, it does not provide a reasonable or reliable basis for calculating a dumping margin. See North Supreme Memo at 9. Accordingly, we are rescinding the new shipper review with respect to North Supreme.

With respect to the question of whether Shouzhou Huaxiang's new shipper sale under review constitutes a *bona fide* sale which is reviewable under the new shipper provisions of the Department's regulations, we have also conducted an analysis consistent with the CIT decision in Windmill. We have examined Shouzhou Huaxiang's new shipper transaction to determine whether it reflects normal arm's-length negotiations; whether it was commercially reasonable; and whether it was consistent with company business practice. We found no evidence that Shouzhou Huaxiang's sale was negotiated on any other basis than an arm's-length basis. See New Shipper Review of Freshwater Crawfish Tail Meat from the People's Republic of China: Sales and Factors Verification Report for Shouzhou Huaxiang Foodstuffs Co., Ltd., Memorandum from Thomas Gilgunn, Christian Hughes, Holly Hawkins, and Scott Lindsay, Through Dana S. Mermelstein, Program Manager, Office of AD/CVD Enforcement VII, To the File, dated July 23, 2002 at 7-8 (Shouzhou Huaxiang Verification Report).

In examining whether Shouzhou Huaxiang's sale was commercially reasonable, we considered that Shouzhou Huaxiang was shipping to the United States for the first time. The quantity of Shouzhou Huaxiang's sale was somewhat smaller than what is typical for crawfish tail meat shipments from the PRC. However, as discussed above, small quantity alone would not render a sale not *bona fide*. Furthermore, the quantity of Shouzhou Huaxiang's sale, while smaller than typical quantities, was significant. It was almost eight times greater than the quantity of North Supreme's U.S. sale. While Shouzhou Huaxiang's price was also higher than the average price at which crawfish tail meat was imported during the same month, it was not nearly as high as North Supreme's price and there is no indication on the record that it was an artificially -set high price. Thus, with respect to both the price and quantity, there is no basis to find that Shouzhou Huaxiang's sale was not commercially reasonable.

Although Shouzhou Huaxiang did begin selling more recently in larger quantities and at lower prices, we do not find that fact alone to be sufficient to find Shouzhou Huaxiang's new shipper sale was not *bona fide*. The price at which Shouzhou Huaxiang made its new shipper sale

was not so high nor the quantity so small in comparison with its more recent sale or to other entered values and quantities for imports of crawfish tail meat from China that the new shipper sale could be considered outside the possible range of good business practice.

In examining the *bona fides* of Shouzhou Huaxiang and its importer, the record provides no basis for determining that either Shouzhou Huaxiang or its importer is not an established commercial enterprise. Furthermore, Shouzhou Huaxiang continued to use the same importer for its more recent shipments of crawfish tail meat to the United States.

Therefore, based on the totality of the circumstances of the Shouzhou Huaxiang sale under review, we find no basis to conclude that the sale was not *bona fide* and we have used Shouzhou Huaxiang's sale to calculate a dumping margin for Shouzhou Huaxiang.

Comment 2: Surrogate Value for Whole, Live Crawfish

Petitioners argue that the Department should not use Spanish import statistics issued by the Agencia Estatal de Administracion Tributaria (Agencia Tributaria), the Spanish government agency responsible for trade statistics, for the valuation of whole live freshwater crawfish exported to the United States from the PRC. Petitioners argue that, because the import data for January 2001 and beyond are still provisional, these data cannot provide a reliable basis upon which the Department can base its determination for the final results of these new shipper reviews. Referring to the 1998-1999 administrative review, where the record demonstrated a significant change in import volume from the Agencia Tributaria's publication of its provisional data to final data, petitioners argue that provisional Spanish import data is unreliable because it can change drastically. See Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, and Final Partial Rescission of Antidumping Duty Administrative Review 66 FR 20634 (April 24, 2001) (Final Results AR & NSR 98-99) and accompanying "Issues and Decision Memorandum" at 11, 13-14. According to petitioner, the Department used revised final Spanish import data in the 1998-1999 review "only because the Department was satisfied that the revision represented final data." (emphasis in petitioner's brief).

Petitioners contend that, since the Spanish import data for 2001 and 2002 are provisional and could change drastically with the publication of the final data, it is too early to conclude that the volume of imports of whole, live, freshwater crawfish has recovered considerably from the period of the September 1, 1999 - March 31, 2000, new shipper review, in which the Department rejected Spanish import data because it deemed imports insignificant. See Freshwater Crawfish Tail Meat From the People's Republic of China; Notice of Final Results of Antidumping Duty New Shipper Reviews, 66 FR 45002, 45003 (August 27, 2001) (Final Results NSR Sept. 99 - March 00). Petitioners also argue that the Department should not use unreliable provisional data for September 2001 through April 2002 to conclude that the Spanish import recovery is not likely to be an aberration, particularly since

the provisional quantities reported by the Agencia Tributaria in the statistics at issue here remain relatively small despite the apparent increase from previous periods in which the Department declined to use Agencia Tributaria data. Petitioners further argue that a change in the provisional data could demonstrate that Spanish imports have not recovered.

Petitioners contend that, in the absence of proper justification for reliance on Spanish import statistics, the Department should rely instead on statistics published by the Australian Bureau of Agricultural and Resource Economics (ABARE) as the most appropriate data to value whole, live, freshwater crawfish on the record of these new shipper reviews. Petitioners argue that the ABARE statistics should be adjusted downward to eliminate depot charges. Petitioners also argue that, if the Department uses the price list of Mulataga Pty. Ltd. (Mulataga), an Australian crawfish processor, for the surrogate valuation of whole live freshwater crawfish, the Department should use an average of all prices for crawfish with a live weight of 70 grams or less, regardless of grade. According to petitioner, the grades used by Mulataga reflect the presence or absence of aesthetic blemishes. Because there is no evidence that Chinese processors use only blemished crawfish in the production of tail meat, petitioners argue, the surrogate value used should include both blemished and unblemished crawfish.

Finally, petitioners contend that, if the Department decides to use Spanish import data, it should use only final data from the Agencia Tributaria. Petitioners suggest that the Department should use data for January through December 2000 imports, which it says is the most recent twelve-month period for which final figures are available.

Respondents argue that the Department properly relied on Spanish import data in its surrogate valuation of whole live freshwater crawfish, and should continue to use Spanish, rather than Australian, data for the final results. Respondents raise several arguments in support of this position. First, respondents contend, the economy of the PRC is more comparable to that of Spain than to that of Australia, since the *per capita* gross domestic product (GDP) of the PRC is closer to that of Spain; therefore, the Department should continue to favor the use of Spanish data. Second, the crawfish imported by Spain from Portugal is the same species as Chinese crawfish, while the Australian crawfish is a different species. Respondents argue that the Department has repeatedly expressed a preference for the use of identical merchandise in surrogate valuation. See Notice of Final Determination of Sales at Less than Fair Value: Pure Magnesium in Granular Form From the People's Republic of China, 66 FR 49345 (September 27, 2001) and accompanying "Issues and Decision Memorandum" at Comment 3; and Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 64 FR 69494 (December 13, 1999). Furthermore, according to respondents, Spanish import data is publicly available, published, and regularly maintained by the Spanish government. Finally, respondents claim that Spain has long been favored by the Department as the best source of surrogate valuation for whole live freshwater crawfish. See, e.g., Final Determination of Sales at less than Fair Value: Freshwater Crawfish Tail Meat from the People's Republic of China, 62 FR 41347, 41354 (August 1, 1997) (LTFV Final Determination).

Department's Position:

For the final results of these new shipper reviews, pursuant to section 773(c) of the Act, we are valuing whole, live, freshwater crawfish by using the POR average Spanish import price for whole, live, freshwater crawfish from Portugal, as issued on October 7, 2002, in final form, by the Agencia Tributaria. The Department is using the Spanish import data for these final results because it is the best data available on the record. See Memorandum to Barbara E. Tillman, Director, Office of AD/CVD Enforcement VII, through Maureen Flannery, Program Manager, Office of AD/CVD Enforcement VII, from Matthew Renkey and Scot Fullerton, Analysts: Selection of Surrogate for the Valuation of Whole, Live Freshwater Crawfish in the 2000-2001 Administrative and New Shipper Reviews for Freshwater Crawfish Tail Meat from the People's Republic of China (August 5, 2002) (Crawfish Valuation Memo).

Petitioners object to the use of Spanish import data because at the time of the preliminary results the data was provisional, and therefore, in its view, subject to change. We note that since the publication of the preliminary results, the data for the POR has been finalized by the Agencia Tributaria and has been posted on the agency's website. See www.aeat.es; see also Memorandum to the File: Final Data for the Surrogate Valuation of Whole Live Freshwater Crawfish, from Adina Teodorescu, Case Analyst, Office of AD/CVD Enforcement VII, Through Maureen Flannery, Program Manager, Office of AD/CVD Enforcement VII, dated November 19, 2002. We also note that there have been no changes in quantity from the provisional data used in the preliminary results. The values, although stated in dollars in the provisional data used in the preliminary results and in Euros in the final data, also show no changes from the provisional data used in the preliminary results. See id. The import statistics show that the quantity of freshwater crawfish imported from Portugal has increased 168 percent since the period of review for which we decided not to use the Spanish import data. Since the data show a recovery in the imports of whole live freshwater crawfish into Spain from Portugal, we find, for purposes of these reviews, that the use of the Spanish import data is more appropriate than the use of data from Australia.

In determining the proper surrogate to value factors of production, the Department considers several aspects of the available data. First, section 773(c)(4) of the Act states that, in valuing factors of production, the Department shall utilize, to the extent possible, prices or costs of factors of production in one or more market economy countries that are (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise. However, as stated in the Crawfish Valuation Memo, there is no reliable or usable publicly available information to value whole, live, freshwater crawfish for the surrogate countries identified by the Department. Although respondents have argued that Spain's *per capita* GDP is closer to that of the PRC than is Australia's, neither can be considered "comparable" to the PRC. As such, the Department searched for other sources of information to value the whole, live, freshwater

crawfish input. In the original investigation of sales at less than fair value and in subsequent reviews of this order, we used Spanish import statistics for live, freshwater crawfish from Portugal to value the crawfish input. We chose Spain because it was a significant producer of comparable merchandise and it published official government statistics on imports. However, when the trade declined precipitously, the Department could no longer rely on these import statistics to reflect an appropriate value for the input. As a result, we searched for other publicly available information, and found it in Australia. However, with the recovery of trade during the POR in whole, live, freshwater crawfish between Portugal and Spain, we find that these import statistics are the most appropriate data on record for use in the surrogate valuation of the crawfish input.

The Spanish import data for the POR of these new shipper reviews show that imports of crawfish tail meat from Portugal have recovered significantly since the September 1999 - March 2000 new shipper reviews, in which the Department decided to stop using Spanish import data because of the decline in the crawfish trade between Portugal and Spain. See Crawfish Valuation Memo. Because the trade has recovered we find that the import statistics serve as an appropriate basis for the calculation of the whole live crawfish input. We also note that the crawfish imported into Spain from Portugal is of the same species as the crawfish used in the PRC for the production of tail meat. See Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review, 67 FR 19546 (April 22, 2002) (Final Results AR 99-00) and accompanying "Issues and Decision Memorandum" at Comment 1.

In addition, the Department prefers to use publicly available information for valuing factors of production. See Final Results AR 99-00 and accompanying "Issues and Decision Memorandum" at Comment 2; Final Results AR & NSR 98-99 and accompanying "Decision Memorandum" at Comment 2; and Final Determination of Sales at Less than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China 62 FR 61964, 61987 (November 20, 1997). The Spanish data at issue here are publicly available, published, and regularly maintained by the Spanish government.

Although the comparability of economies, the comparability of the merchandise, and the public availability of data are factors we consider when selecting a source for surrogate valuation, none is dispositive by itself, and there is no hierarchy for these factors. In each case the Department must weigh all of the relevant characteristics of the data in order to select the best available information in accordance with section 773(c)(1) of the Act. See Final Results AR 99-00 and accompanying "Issues and Decision Memorandum" at Comment 2. On balance, given the facts on the record of these reviews, we determine that Spanish import data is the best available information for valuing the whole live freshwater crawfish input for these reviews.

Comment 3: Shouzhou Huaxiang's Scrap Credit

Petitioners argue that the Department's selection of partial adverse facts available for calculating Shouzhou Huaxiang's adjustment for the crawfish scrap by-product credit is not adverse because the approach taken in the preliminary results rewards Shouzhou Huaxiang for its lack of cooperation by providing, in essence, a credit based on neutral facts available. Citing section 351.401(c) of the Department's regulations, petitioners argue that the scrap factor is an adjustment that provides the respondent with a credit against normal value, and that the burden of substantiating the credit falls entirely on Shouzhou Huaxiang. Further, petitioners argue that Shouzhou Huaxiang has failed to meet its burden of substantiating its adjustment to normal value, and as adverse facts available Shouzhou Huaxiang should receive no scrap credit in the final results.

Shouzhou Huaxiang argues that the Department's selection of partial adverse facts available in this instance is adverse to Shouzhou Huaxiang for the simple fact that it is not Shouzhou Huaxiang's reported scrap factor. Respondent argues that it is important to note that although Shouzhou Huaxiang's reported scrap factor was not verified by the Department, there was no effort on the part of the company to mislead or deceive the Department. Respondent further argues that in instances where the Department determines that a respondent party has failed to provide sufficiently detailed information upon which to base a normal value calculation, the Department has been given the latitude to determine what constitutes best information otherwise available. See Shandong Huarong General Corp. v. United States, 23 I.T.R.D. 1846, 1850 (Ct. Int'l Trade 2001). Shouzhou Huaxiang argues that the Department verified that Shouzhou Huaxiang produces significant volumes of crawfish scrap as a byproduct of its manufacture of crawfish tail meat. See New Shipper Review of Freshwater Crawfish Tail Meat from the People's Republic of China: Sales and Factors Verification Report for Shouzhou Huaxiang Foodstuffs Co., Ltd., Memorandum from Thomas Gilgunn, Christian Hughes, Holly Hawkins, and Scott Lindsay, Through Dana S. Mermelstein, Program Manager, Office of AD/CVD Enforcement VII, To the File, dated July 23, 2002 at 14 (Shouzhou Huaxiang Verification Report). Respondent also argues that the proper course of action regarding Shouzhou Huaxiang's crawfish scrap factor is not to deny the adjustment. See Manifattura Emmepi S.p.A. v. United States, 799 F. Supp. 110, 115 (Ct. Int'l Trade 1992). Thus, respondents claim that Shouzhou Huaxiang should receive a scrap credit in the final results.

Department's Position:

We have reconsidered Shouzhou Huaxiang's scrap offset in light of the parties' arguments. In this case, Shouzhou Huaxiang reported that the scrap which results from its production of crawfish is sold. Normally, the Department uses information regarding the sale of by-products resulting from the production of subject merchandise to calculate an offset to normal value. See e.g., Certain Hot Rolled Steel Products from China; Final Determination of Sales at Less Than Fair Value, 66 FR 49632

(September 28, 2001) and accompanying “Issues and Decision Memorandum” at Comment 3. However, at verification, we learned that the company did not report the actual volume or value of scrap which was produced and sold during the POR, but rather that it used a formula to estimate the volume of scrap produced from the volume of whole crawfish processed during the POR. According to company officials, the formula was based on the company’s production experience. When the company was given an opportunity at verification to substantiate the formula it used to calculate the crawfish scrap derived from its production of crawfish tail meat, company officials were unable to provide production records to document that the crawfish scrap formula was based on their actual production experience. Furthermore, at verification we noted that the company’s whole crawfish to tail meat production yield formula could not allow for the volume of scrap production reported. See Shouzhou Verification Report at 14.

Because Shouzhou Huaxiang’s scrap production could not be verified, we find that Shouzhou Huaxiang did not cooperate to the best of its ability within the meaning of section 776(b) of the Act. In its initial antidumping questionnaire of November 9, 2001, the Department notified Shouzhou Huaxiang that all information submitted to the Department would be subject to verification and that the Department may resort to the use of adverse facts available when a “party provides information that cannot be verified.” See Department’s Antidumping Questionnaire at I-3. In its response to the initial questionnaire, dated, December 31, 2001, Shouzhou Huaxiang reported the volume of scrap resulting from the processing of a volume of live crawfish. No additional information was requested from, or provided by, Shouzhou Huaxiang regarding scrap production.

In the verification outline, which the Department issued on May 3, 2002, Shouzhou Huaxiang was notified of the opportunity to present to the Department at the outset of verification any minor corrections to its questionnaire responses identified during the process of preparing for verification. While Shouzhou Huaxiang did present a correction for the direct labor factor of production, no correction was presented for scrap production. Therefore, Shouzhou Huaxiang provided information to the Department which was ultimately unverifiable.

Shouzhou Huaxiang’s failure to provide verifiable information constitutes a “failure to cooperate by not acting to the best of {their} ability to comply with a request for information.” See Section 776(b) of the Act. Under such circumstances, section 776(b) of the Act further permits the Department to use an inference which is adverse to the party. See Statement of Administrative Action (SAA), H.R. Doc. 103-316 at 870 (1994). To examine whether the respondent “cooperated” by “acting to the best of its ability” under section 776(b) of the Act, the Department considers, *inter alia*, the accuracy and completeness of submitted information and whether the respondent has hindered the calculation of accurate dumping margins. See, e.g., Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review, 62 FR 53808, 53819-53820 (October 16, 1997).

As discussed above, the Department finds that Shouzhou Huaxiang failed to act to the best of its ability since Shouzhou Huaxiang reported a crawfish scrap production formula which it was unable to substantiate with documentation or records. Therefore, the information was neither complete nor accurate and therefore could not be used by the Department. Neither could the Department accurately calculate the scrap offset or use the information provided by Shouzhou Huaxiang to calculate the scrap offset since to be accurate, the offset must reflect the company's own experience. This information is within the sole possession of the respondent; it could not be obtained unless Shouzhou Huaxiang provided this information to the Department since Shouzhou Huaxiang has the best information regarding its scrap production. Moreover, the scrap production formula would be used to calculate an offset to normal value, the granting of which would work to the benefit of Shouzhou Huaxiang since it would lower normal value when compared to EP or CEP and thus lower the ultimate dumping margin the Department would calculate for Shouzhou Huaxiang. Shouzhou Huaxiang should not benefit by failing to respond to the Department's requests and the Department could neither use the information submitted by Shouzhou Huaxiang nor accurately calculate a scrap offset to normal value for Shouzhou Huaxiang.

Shouzhou Huaxiang could easily have provided verifiable information, but nevertheless decided not to comply with the Department's requests for information. In light of the foregoing, we determine that the application of adverse facts available is warranted. As adverse facts available, we are denying a scrap offset to normal value, as Shouzhou Huaxiang failed to provide complete and accurate information, the information was within its sole possession, and it had the burden of providing this information since it was an offset to normal value. As such, we are not including in our calculation of normal value an offset for Shouzhou Huaxiang's reported scrap production.

Comment 4: Application of Chain Rates

Petitioners support the Department's decision in the preliminary results to calculate margins and assign rates to specific producer-exporter combinations rather than to exporters alone. Petitioners state that the assignment of a rate to an exporter alone, without reference to the suppliers and producers on whose factors the margin is based, allows exporters to become conduits for shipments from all over China after these exporters obtain a low rate in a new shipper review. Petitioners argue that once these exporters receive a low rate, other producers ship subject merchandise to the U.S. through these exporters, thereby circumventing and undermining the effectiveness of the antidumping duty order.

Respondents argue that the Department's general practice in non-market economy ("NME") cases is to examine and assign margins to exporters located in the NME country, rather than the NME producers. See Notice of Final Determination of Sales at Less than Fair Value: Pure Magnesium in Granular Form From the People's Republic of China (Pure Magnesium from China, 66 FR 49345 (September 27, 2001), and accompanying Issues and Decision Memorandum at Comment 2.

Respondents claim that the Department has improperly limited application of any rate calculated in these new shipper reviews to merchandise that is both produced and exported by Shouzhou Huaxiang. Respondents state that petitioners cite no authority in arguing that the Department correctly limited the application of any rate calculated in these new shipper reviews to merchandise that is both produced and exported by Shouzhou Huaxiang. Respondents also argue that petitioner's allegations that Shouzhou Huaxiang and other PRC producers would exploit Shouzhou Huaxiang's lower margins to circumvent and undermine the effectiveness of the antidumping duty order is unfounded, speculative, and contradicts Department policy.

Department's Position:

The Department has determined that in new shipper reviews it is appropriate to assign rates to producer-exporter combinations rather than to exporters alone. Section 351.107(b)(1) of the Department's regulations states that, "[i]n the case of subject merchandise that is exported to the United States by a company that is not the producer of the merchandise, the Secretary may establish a "combination" cash deposit rate for each combination of the exporter and its supplying producer(s)."

The Department agrees with petitioners that in new shipper reviews, it is appropriate for the Department to calculate margins and assign rates to specific producer-exporter combinations rather than to exporters alone in order to prevent circumvention of antidumping duties that normally would be applied to producers and exporters under the PRC-wide rate. As a result, the Department will apply a combination chain rate to Shouzhou Huaxiang and will instruct Customs to apply the calculated cash deposit rate only when the entry documentation establishes that the merchandise is produced and exported by Shouzhou Huaxiang.

Recommendation

Based on our analysis of the comments received, we recommend rescinding this new shipper review for North Supreme Seafood and adopting all of the above positions. If these recommendations are accepted, we will publish the final results, of these new shipper reviews, including the final rescission for North Supreme and the final weighted-average dumping margin for Shouzhou Huaxiang, in the Federal Register.

Agree

Disagree

Faryar Shirzad
Assistant Secretary
for Import Administration

Date