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Investigation
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AD/CVD I/2:KJ

MEMORANDUM TO: Louis Apple
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THROUGH: Irene Darzenta Tzafolias
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FROM: Katherine Johnson
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DATE: January 24, 2005

RE: Ministerial Error Allegations in the Final Determination of the Antidumping Duty Investigation of Certain Frozen Warmwater Shrimp from Brazil

I. Summary

On December 23, 2004, we received an allegation from the petitioners (i.e., the Ad Hoc Shrimp Trade Action Committee, Versaggi Shrimp Corporation, and Indian Ridge Shrimp Company) that the Department of Commerce (the Department) made a ministerial error with respect to its exclusion of “dusted” shrimp from the scope of this investigation. On December 28, 2004, Eastern fish Company, Inc. and Long John Silver’s Inc., interested parties in this investigation, submitted a response to the petitioners’ December 23, 2004, ministerial error allegations. In addition, on December 30, 2004, we received allegations from the two participating respondents (i.e., Central de Industrialização e Distribuição de Alimentos Ltda (CIDA) and Empresa de Armazenagem Frigorífica Ltda. (EMPAF)) that the Department made ministerial errors in the final margin calculations. We received rebuttal comments from the petitioners on January 5 and 10, 2005, with respect to the ministerial error allegations made by EMPAF and CIDA, respectively.

II. Definition of Ministerial Error

A “ministerial error” is defined under 19 CFR 351.224(f) as:

an error in addition, subtraction, or other arithmetical function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial.

See also section 735(e) of the Tariff Act of 1930, as amended.

III. General Allegation

1. Exclusion of Dusted Shrimp from the Scope of Investigation

The petitioners contend that the Department made a ministerial error in the exclusion of dusted shrimp from the scope of this investigation. The petitioners note that the Department excluded dusted shrimp from the scope of this investigation in spite of the petitioners’ opposition. The petitioners point to the fact that the Department cited significantly to the declarations of Dr. Otwell and Mr. Thompson submitted by Eastern Fish Company, Inc. (Eastern Fish) and Long John Silver’s, Inc. (LJS) in support of excluding dusted shrimp. The petitioners contend that the Department based much of its decision to exclude dusted shrimp from the scope of this investigation on these affidavits. The petitioners specifically note that the Department referenced both declarations eight times regarding an adequate definition to separate dusted shrimp from subject merchandise and at least four times regarding the fact that the benefits of removing the dusting layer from the shrimp did not outweigh the costs.

The petitioners contend that they provided a declaration that directly rebutted many of the claims by Eastern Fish and LJS. According to the petitioners, their declaration stated that frozen dusted shrimp can have its dusting layer removed. Additionally, the practice of thawing and rinsing undusted frozen shrimp is common industry practice, thus the same can be done for dusted shrimp. Furthermore, the barriers to removing the dusting layer are economic, not physical. The declaration provided by the petitioners further noted that the cost of removing the dusting layer could be more economically sensible than paying the dumping duty. The declaration also notes that the technology to remove the dusting layer is available. See petitioners’ December 7, 2004, scope submission at page 11.

According to the petitioners, the Department did not address these statements, which directly contested Eastern Fish’s and LJS’ claims, in its decision. See Memorandum from Edward C. Yang, Vietnam/NME Unit Coordinator, Import Administration to Barbara E. Tillman, Acting Deputy Assistant Secretary for Import Administration, Antidumping Investigation on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the Socialist

Republic of Vietnam and the Socialist Republic of Vietnam: Scope Clarification on Dusted Shrimp and Battered Shrimp (Dusted/Battered Scope Memo), dated November 29, 2004. Furthermore, the petitioners assert that the Department did not acknowledge that the petitioners' declaration even existed. The petitioners therefore conclude that the Department completely overlooked the petitioners' declaration, and thus made an unintentional error that must be corrected by including dusted shrimp in the scope of this investigation.

Eastern Fish and LJS respond to these allegations by stating that, in excluding certain dusted shrimp from the scope of these investigations, the Department thoroughly identified and analyzed all of the evidence and arguments submitted by all parties. Eastern Fish and LJS also state that, to be a ministerial error, in accordance with 19 CFR 351.224(c)(1), the alleged error must pertain to calculations used by the Department to determine antidumping duty margins. As such, the Department's alleged error of failing to consider a declaration does not in any manner relate or pertain to any exporter's disclosed dumping margin calculation. Lastly, Eastern Fish and LJS point out that, to qualify as a correctable ministerial error, an alleged error must meet at least one of three definitions listed in 19 CFR 351.225(f). Eastern Fish and LJS argue that the petitioners do not identify which of the three definitions fits the alleged error. Furthermore, Eastern Fish and LJS state that the alleged error does not fit any of the three definitions because it was deliberate and cannot be considered ministerial in any way.

Analysis and Recommendation

We disagree with the petitioners that the Department made a ministerial error within the meaning of 19 CFR 351.224(f) in its decision to exclude dusted shrimp from the scope of this investigation. The Department notes that it did not reference the petitioners' affiant by name, but did reference the provided affidavit and statements made by the affiant. See Dusted/Battered Scope Memo at pages 15 and 16. The Department carefully reviewed and considered all evidence submitted by all parties prior to making its determination to exclude dusted shrimp from the scope of this investigation, as well as the concurrent warmwater shrimp investigations. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China (69 FR 70997, December 8, 2004). The Department's decision to exclude dusted shrimp from the scope of this investigation was an intentional decision, not a ministerial error.

Agree ____

Disagree ____

Let's Discuss _____

IV. Company-Specific Allegations

CIDA

1. Calculation of Difference-in-Merchandise (DIFMER) Adjustment and the 20 Percent DIFMER Test Percentage (COSTDIF)

CIDA claims that in the margin program, the Department made a ministerial error by converting cost data from kilograms to pounds before calculating the DIFMER adjustment. This error resulted in an erroneous DIFMER test using third country variable costs of manufacturing (VCOMs) denominated in reais per kilogram while using U.S. VCOMs and total costs of manufacturing (TCOMs) denominated in reais per pound. Later in the program, according to CIDA, the Department divides its already distorted DIFMERs by 2.2046. CIDA claims that this conversion would have been appropriate only if all third country and U.S. VCOMs and TCOMs were in reais per kilogram.

Analysis and Recommendation

We agree with CIDA that we made an inadvertent error by converting U.S. variable costs to pounds before calculating the DIFMER adjustment, resulting in a DIFMER test based on mixed units of measure. We recommend correcting this error because it is a ministerial error within the meaning of 19 CFR 351.224(f).

Agree ____ Disagree ____ Let's Discuss ____

2. Failure to Convert Third Country Net Prices to a Per-Pound Basis

CIDA alleges that the Department's incorrect programming to convert normal values to the same unit of measure as the U.S. price resulted in an incomplete conversion of normal value. Specifically, CIDA claims that the Department failed to convert third country net prices from U.S. dollars per kilogram to U.S. dollars per pound. According to CIDA, by comparing net prices of mixed units, the program overstates CIDA's margin.

Analysis and Recommendation

We agree with CIDA. The incorrect placement of parentheses in the line in which normal values were converted from kilograms to pounds excluded third country prices from the conversion calculation. We recommend correcting this error because it is a ministerial error within the meaning of 19 CFR 351.224(f).

Agree ____ Disagree ____ Let's Discuss ____

3. Failure to Take the Change in Inventory into Account in Determining Costs

CIDA alleges that the Department made a ministerial error by not taking into account the increase in shrimp inventory during the period of investigation (POI) when calculating the cost of production (COP) and constructed value (CV) of the subject merchandise. CIDA claims that regardless of whether the increase in inventory was related to raw or finished shrimp inventory, the increase should be used to reduce the reported raw shrimp costs.

The petitioners point out that the inventory increase was fully addressed in the case briefs, rebuttal briefs, and the Department's final decision memorandum; therefore, the Department's decision not to grant an offset to costs for the inventory increase was clearly intentional, and not a ministerial error. The petitioners add that the Department was correct in its decision to reject the offset in the final determination because CIDA could substantiate neither the accuracy nor the composition of the inventory increase.

Analysis and Recommendation

As we discussed in Comment 10 of the Issues and Decision Memorandum accompanying the Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil, 69 FR 76910 (December 23, 2004) (Final Decision Memorandum), we intentionally disregarded the increase in shrimp inventory when calculating CIDA's COP and CV because CIDA was unable to substantiate either the accuracy of the inventory change, or the products to which it may have related. As our actions with respect to CIDA's inventory increase were not unintentional, we find no basis to conclude that we made a ministerial error as defined by 19 CFR 351.422(f).

Agree ____ Disagree ____ Let's Discuss _____

EMPAF

1. Programming Error in Margin Program

EMPAF alleges that line 134 of the margin program refers to a CEP profit dataset (CEPTOT) that is not created by the comparison market program. EMPAF claims that in order to ensure that the margin program uses and references the correct and updated dataset, the program should generate a new CEP profit dataset each time the program is run. In this way, the margin program will correctly incorporate the total revenue, cost, selling and freight expenses for home market sales.

Analysis and Recommendation

We agree with EMPAF that we made an inadvertent error by not using a current dataset in the final margin program. Consequently, we recommend correcting this error because it was unintentional, within the meaning of 19 CFR 351.224(f).

Agree _____ Disagree _____ Let's Discuss _____

2. Revisions to Fresh Shrimp Costs in 2003

- A. EMPAF asserts that the Department made a ministerial error in calculating an adjustment to EMPAF's fresh shrimp costs for 2003 by allocating the entire amount of the unreconciled difference between the financial statements and the submitted cost to the cost of fresh shrimp. See Cost of Shrimp Adjustment Worksheet in Attachment 1 to the Cost of Production and Constructed Value Calculation Adjustments for the Final Determination from Michael P. Harrison to Neal Halper dated December 17, 2004. EMPAF claims that since the purchase and processing of fresh shrimp are only a part of EMPAF's food distribution business, this difference in the accounts is related to the purchase accounts for fresh shrimp as well as non-shrimp products. EMPAF claims that the unreconciled difference must be allocated over total purchases of all products, as derived by the Department in its Cost of Shrimp Adjustment Worksheet.

The petitioners claim that the Department took several steps at verification to insure that its reconciliation exercise related to raw shrimp costs only and that there is no support for EMPAF's claim that the difference in the accounts is related to the purchase accounts for fresh shrimp as well as non-shrimp products. Furthermore, according to the petitioners, even if the Department accepted EMPAF's claim on its face, the alleged error cannot be considered ministerial because the Department's decision to adjust EMPAF's shrimp costs was intentional.

Analysis and Recommendation

We agree with EMPAF that we made an inadvertent error by allocating the entire amount of the unreconciled difference discussed above to only the cost of fresh shrimp. The cost reconciliation was done on a company-wide basis. In the calculation of the unreconciled difference, we subtracted inventory balances, purchases and adjustments that related to all of EMPAF's production (*i.e.*, shrimp, lobster and fish) and then allocated the remaining difference to the cost of the fresh shrimp. Because the unreconciled difference was calculated from data that related to lobster and fish, as well as shrimp, the unreconciled error should have been allocated to all three areas of production. Consequently, we recommend correcting this error because it was unintentional, within the meaning of 19 CFR 351.224(f). Correction of this error changes the increase to shrimp cost from [] % to [] %. For the revised calculation, see Attachment 1.

Agree _____ Disagree _____ Let's Discuss _____

- B. EMPAF alleges that the value of the “beginning inventories with third parties” account (carried over from 2002 and reversed only in 2003) should be allocated over the purchases of all products and not merely fresh shrimp purchases. EMPAF claims that a comparison of the balance of this account at the beginning of 2003 to total fresh shrimp purchases in 2003 confirms this ministerial error in allocation, as this account could not possibly represent the value of fresh shrimp awaiting to be processed at the beginning of 2003. To remedy this error, EMPAF believes that the Department should either exclude the cost altogether or allocate the net change in opening and closing inventories with third parties over purchases of all products, not just fresh shrimp purchases.

The petitioners argue that contrary to EMPAF’s current allegations, based on the characterization of this inventory adjustment by EMPAF company officials, the only conclusion that the Department could draw from the record in this investigation was that this amount related to the respondent’s fresh shrimp purchases. The petitioners add that even though the Department rejected EMPAF’s arguments in the final determination and included the adjustment to EMPAF’s beginning inventory in the reported costs, EMPAF is now attempting to present a separate line of argument to convince the Department to exclude the cost altogether. However, based on the record and EMPAF’s own representations that the amount at issue related exclusively to fresh shrimp which was to be processed into scope merchandise, the petitioners maintain that no error was committed by the Department in adjusting EMPAF’s raw shrimp costs to include the change in inventory. Finally, the petitioners claim that the alleged error identified by EMPAF was not unintentional and therefore is not a ministerial error.

Analysis and Recommendation

Our treatment of the adjustment to the inventory with third parties did not constitute a ministerial error as defined by 19 CFR 351.224(f). The Department stated in the Final Decision Memorandum at Comment 17 that there is no evidence on the record to support EMPAF’s claim that the error related to an incorrect balance in a year-end 2002 work-in-process inventory account. As our actions with respect to this adjustment were not unintentional, we cannot conclude that we made a ministerial error.

Agree _____ Disagree _____ Let's Discuss _____

V. Amended Margins

If the team recommendations are accepted, the final margins become:

Manufacturer/Exporter	margin	Final Determination Weighted-average margin	Amended Weighted-average
Empresa de Armazenagem Frigorifica Ltda./ Maricultura Netuno S.A. (EMPAF)		10.70	7.94
Central de Industrialização e Distribuição de Alimentos Ltda. (CIDA)/Cia. Exportadora de Produtos do Mar (Produmar)		9.69	4.97
Norte Pesca, S.A.		67.80	not amended
All Others		10.40	7.05

VI. Recommendation

We recommend correcting the ministerial errors noted above and calculating revised dumping margins for CIDA and EMPAF. In addition, we recommend recalculating the “all others” rate, given that this rate is based on the dumping margins found for the two participating respondents.

Agree _____

Disagree _____

Let's Discuss _____

Louis Apple
Director
AD/CVD Operations, Office 2

(Date)