FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT REMAND
MARINE HARVEST (CHILE) S.A. V. UNITED STATES,
Court No. 01-00808

SUMMARY

The Department of Commerce (the Department) has prepared these results of redetermination pursuant to the remand order of the U.S. Court of International Trade (the Court) in *Marine Harvest (Chile) S.A. v. United States*, Slip Op. 02-134 (October 31, 2002). Specifically, the Court held that the imposition of a cash deposit simultaneously with publication of the initiation and preliminary results in a changed circumstances review, without prior notice, was not in accordance with law, and ordered the Department to refund in a timely manner any cash deposits held (*see Notice of Initiation and Preliminary Results of Changed Circumstances Antidumping Duty Review: Fresh Atlantic Salmon From Chile,* 65 Fed. Reg. 52,065 (Aug. 28, 2000) *(Changed Circumstances Preliminary*). In addition, the Court held that the Department's determination that Marine Harvest (Chile) S.A. (Marine Harvest) is a new entity was not supported by substantial evidence or otherwise in accordance with law, and ordered that, on remand, the Department should reassess its successor-in-interest analysis (*see id.,* and *Notice of Final Results of Changed Circumstances Antidumping Duty Review: Fresh Atlantic Salmon From Chile,* 66 Fed Reg. 42506 (Aug. 13, 2001) *(Changed Circumstances Final*).

Therefore, pursuant to the Court's analysis, we will refund any cash deposits of Marine Harvest paid between the *Changed Circumstances Preliminary* and implementation of the instructions to the U.S. Customs Service (Customs) issued after the *Changed Circumstances Final*. In addition, we have determined that the post-merger Marine Harvest was the successor-in-interest to both the pre-merger Marine Harvest and the former Pesquera Mares Australes, Ltda. (Mares Australes). As a result, we continue to find that, because Mares Australes was subject to the antidumping duty order, the post-merger Marine Harvest is also subject to the order.

BACKGROUND

In the *Changed Circumstances Preliminary*, the Department conducted a successor-in-interest analysis and concluded that the post-merger Marine Harvest was a new entity. At the same time that it published notice of the initiation and preliminary results of the review, the Department required the post-merger Marine Harvest to post a cash deposit. The rate selected was 2.23 percent, which was the cash deposit rate of Mares Australes. In the *Changed Circumstances Final*, the Department continued to find that the post-merger Marine Harvest was a new entity. It assigned Marine Harvest a zero cash deposit rate, which was the rate calculated for the combined entity of the pre-merger Marine Harvest and the former Mares Australes in the second administrative review. *See Notice of Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review: Fresh Atlantic Salmon From Chile,* 66 Fed. Reg. 42,505 (Aug. 13, 2001) *(Salmon II).*

In its order of October 31, 2002, the Court identified two issues for the Department to address:

Issue 1: Imposition of a cash deposit rate without notice after the Changed Circumstances Preliminary

The Court found that the imposition on Marine Harvest of the cash deposit rate of the former Mares Australes in a preliminary changed circumstances review, without notice, is not in accordance with law and those deposits must be timely refunded.

Issue 2: Successor-in-interest analysis

The Court instructed the Department to reassess Marine Harvest's status as a successor, *i.e.*, whether the post-merger Marine Harvest is a successor to Marine Harvest or Mares Australes or both.

The Department completed a draft redetermination on January 3, 2003. Marine Harvest provided comments regarding the draft redetermination on January 10, 2003. Those comments are discussed below.

ANALYSIS

Issue 1: Imposition of a cash deposit rate without notice after the Changed Circumstances Preliminary

The Court held that, based on a review of the entire statutory and regulatory scheme, Commerce did not have the authority to impose a cash deposit requirement without prior notice of an ongoing review in the *Changed Circumstances Preliminary*. The Court ordered that any cash deposits held by the government must be timely refunded. Therefore, upon final judgment of the Court, we will instruct Customs to refund all cash deposits posted with respect to entries of subject merchandise produced or exported by Marine Harvest prior to the time Customs implemented the instructions sent pursuant to the *Changed Circumstances Final*.

Issue 2: Successor-in-interest analysis

In making successor-in-interest determinations, the Department examines several factors including, but not limited to, changes in: (1) management; (2) production facilities; (3) supplier relationships; and (4) customer base. *See, e.g., Brass Sheet and Strip from Canada; Final Results of Antidumping Duty Administrative Review,* 57 FR 20460-61 (May 13, 1992). While no single factor, or combination of factors, will necessarily prove dispositive, the Department will generally consider the new company to be the successor to its predecessor company if the resulting operations are essentially the same as those of the predecessor company. *See, e.g., id. and Industrial Phosphoric Acid from Israel: Final*

Results of Changed Circumstances Review, 59 FR 6944, 6945 (February 14, 1994). Thus, if the evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as its predecessor, the Department will assign the new company the cash deposit rate of its predecessor.

In this case, the post-merger Marine Harvest incorporates important components of both the pre-merger Marine Harvest and the company with which it merged, Mares Australes. With regard to management, Marine Harvest became answerable to the parent company of the former Mares Australes. In addition, the president of the merged company was a former official for the pre-merger Marine Harvest, as was the manager in charge of the finance and accounting staff. The management structure of the combined entity also consisted of a number of former Mares Australes officials, including the operations manager. *See Changed Circumstances Final and the accompanying Issues and Decision Memorandum*, at comment 1.

The combined production facilities of both companies resulted in a more vertically-integrated business, with Marine Harvest providing the processing facilities and Mares Australes providing a large number of hatcheries, freshwater sites, and ocean sites. *Id.* Therefore, the production facilities of the post-merger Marine Harvest were almost entirely provided by both of the pre-merger entities.

Supplier relationships changed in that Marine Harvest began to source its major input, feed, from a Mares Australes affiliate and also acquired a feed mill which had been owned by one of its own affiliates. The customer base of the company also changed, in that it included the distributor clients of Mares Australes, which were fundamentally different from the retail chain clients of the pre-merger Marine Harvest. *Id.*

We have determined that the post-merger Marine Harvest is a successor-in-interest to both companies, because the evidence on the record demonstrates that the post-merger Marine Harvest contains significant elements of both the pre-merger Marine Harvest and the former Mares Australes. In addition, we continue to find that, because Mares Australes was subject to the antidumping duty order, the post-merger Marine Harvest is also subject to the order, and that the appropriate cash deposit rate is zero percent, which is the rate calculated for the combined sales of the pre-merger Marine Harvest and Mares Australes during the second administrative review.

Finally, we believe that the Court's concerns regarding the impact of this redetermination on the third administrative review of the order on Fresh Atlantic Salmon from Chile should be addressed in the final results of the third review, which will be issued on February 3, 2003. Specifically, this redetermination, issued pursuant to the Court's remand of the Department's determination in a changed circumstances review, and the third administrative review are separate proceedings. If the Court should issue a final judgment in this changed circumstances review prior to February 3, 2003, then we would consider said judgment in completing the third review.

COMMENTS

Comment 1: Return of Cash Deposits

Marine Harvest argues that, because of a delay in the issuance of Customs instructions, it continued to pay a cash deposit for several weeks after the publication of the *Changed Circumstances Final*. Therefore, it contends that the Department should instruct Customs to refund, with interest, all cash deposits made by Marine Harvest from the date of suspension of liquidation until the date that the Customs instructions resulting from the *Changed Circumstances Final* were put into effect.

Department's position: We agree with Marine Harvest. It is our intent to refund to Marine Harvest any amount it deposited before the results of the *Changed Circumstances Final* were put into effect. Pursuant to section 778 of the Act, Customs is required to pay interest on overpayments of the required amounts deposited as estimated antidumping duties. We will issue Customs instructions accordingly.

Comment 2: Successorship Determination and Coverage by Order

Marine Harvest agrees with the Department's conclusion that the post-merger Marine Harvest is the successor-in-interest to both the pre-merger Marine Harvest and the former Mares Australes. Nevertheless, Marine Harvest argues the Department has no authority to terminate or revoke exclusions, and because Marine Harvest is the successor, in part, to the pre-merger Marine Harvest, that it must retain its exclusion. According to Marine Harvest, in its original changed circumstances review, the Department relied exclusively on its successorship analysis to determine whether or not the post-merger Marine Harvest retained the exclusion granted to the pre-merger Marine Harvest, ruling that the post-merger Marine Harvest was covered by the dumping order because it was not the successor-in-interest to the excluded Marine Harvest. *See Changed Circumstances Preliminary* at 52066.

Although the post-merger Marine Harvest is also the successor-in-interest to Mares Australes, a company covered by the order, Marine Harvest contends that the pre-merger Marine Harvest was the dominant producer and exporter of subject merchandise to the United States at the time of the merger. If the Department is going to continue to base its decision regarding exclusion solely based on successorship, Marine Harvest argues that the Department must conclude that the post-merger Marine Harvest, as a successor-in-interest to the pre-merger Marine Harvest, succeeds to its exclusion.

According to Marine Harvest, U.S. antidumping statute and the Department's regulations all provide for permanent and unconditional exclusion of merchandise produced and exported by companies found not to be dumping in initial investigations. In addition, Marine Harvest notes that the preamble to the Department's regulations states that "'inclusion' of an excluded company would be inconsistent with Article 5.8 of the AD Agreement.... which require{s} termination of the order where the amount of dumping or subsidization is *de minimis*." *See 19 CFR Parts 351, 353, and 355 Antidumping Duties;*

Countervailing Duties, 62 FR 27296, 27311(May 19, 1997) (*Preamble*). Marine Harvest distinguishes its situation from that of an excluded non-producing exporter, which could be investigated by the Department should it serve as a conduit for merchandise produced by other subject producers, by pointing out that it is exporting its own production. Further, Marine Harvest notes that the ITC, in conducting its injury analysis did not take into account merchandise produced by Marine Harvest, because it had been found to have a *de minimis* margin. Therefore, Marine Harvest maintains that the statutory requirement that no antidumping duty or cash deposits can be imposed on merchandise for which there has been no affirmative finding of dumping or no affirmative ITC injury finding, means that the Department cannot impose an antidumping duty on Marine Harvest, hence it must remain an excluded company.

Marine Harvest argues, in the alternative, that the Department should abandon successorship analysis in addressing the exclusion issue. Marine Harvest argues that the statute only permits the Department to review "affirmative determinations" made in original investigations due to changed circumstances. *See* Section 751 of the Act. Therefore, Marine Harvest contends that the question of whether the post-merger Marine Harvest is excluded or not can only be answered, under the statue, by determining whether or not its dumping margin is below two percent. If the Department had averaged the investigation margins or Mares Australes and the pre-merger Marine Harvest, it would have found a margin under the two percent threshold, and would have concluded that the combined entity should be excluded. Alternately, according the Marine Harvest, the Department could have used the results of the second administrative review which included both entities and showed no dumping, to conclude that Marine Harvest was entitled to its exclusion. Either way, Marine Harvest argues that the Department has never found that Marine Harvest, either pre-merger or post-merger was dumping. Therefore, Marine Harvest concludes, it is still entitled to its exclusion.

Department's position: We disagree with Marine Harvest. A successorship analysis which results in the post-merger Marine Harvest being declared the successor-in-interest to both companies does not lead to the conclusion that the post-merger company should retain the exclusion of one of the pre-merger companies. In its opinion, the Court stated that, "[b]y the evidence that Commerce itself cites, Marine Harvest has to be a successor to both companies or at least to one of them." Slip Op. 02-134, at 30. As stated above, we determined that the post-merger Marine Harvest was a successor-in-interest to both companies because it contained key elements of both the pre-merger Marine Harvest and the former Mares Australes, and is substantially different in form and substance from either pre-merger company. The evidence on the record does not support the contention that Marine Harvest was the dominant company, or that the combined entity was more similar to the pre-merger Marine Harvest than to Mares Australes. On the contrary, the *Changed Circumstances Preliminary,* at 52066, states " The production facilities of Marine Harvest have changed substantially, by the addition of the large number of hatcheries, freshwater sites, and ocean sites previously owned by Mares Australes (until the merger, the largest exporter of subject merchandise to the United States)." This statement was not contested in the *Changed Circumstances Final*, nor is it contested here. Further, it was the parent company of Mares Australes that purchased Marine Harvest. Therefore, the

Department determines that post-merger Marine Harvest should not inherit the excluded status of the pre-merger Marine Harvest, rather than that of Mares Australes, a company which, in the investigation, was found to be dumping.

In addition, the Department is not revoking pre-merger Marine Harvest's exclusion from the order. In the preamble to the final regulations, the Department states that it "has never reviewed sales of excluded companies, with the exception of situations in which non-excluded companies have attempted to funnel their 'non-excluded' merchandise through an excluded company." *See* 62 FR at 27311. The Department's right to look at excluded companies which may be selling merchandise produced by non-excluded companies in the context of a changed circumstances review has been upheld by the Court.[1] It was to determine whether salmon produced by the entity known as Marine Harvest, comprised of the recently-merged operations of the former Marine Harvest and Mares Australes, was covered by the antidumping duty order, that the changed circumstances review was initiated. Because of the buy-out of Marine Harvest by Mares Australes' parent company, the post-merger Marine Harvest was exporting salmon produced, in part, with the assets of the former Mares Australes, whose merchandise was covered under the order. As stated in the *Changed Circumstances Final* at comment 1, "[t]he owners and directors of Mares Australes determined to formally fold the productive assets of Mares Australes into Marine Harvest as of the first day of the period of the anticipated third review (July 1, 2000, through June 30, 2001), and began to export merchandise produced by the joint facilities of Marine Harvest and Mares Australes under the name of Marine Harvest also as of that day."

We note that in *Jia Farn*, 817 F. Supp. at 975, the Court stated that, "[n]either the antidumping duty statutes nor regulations provide a specific mechanism designed to investigate an exporter which allegedly exports the merchandise produced by other manufacturers when it is excluded from the antidumping duty order based on the negative {less than fair value} determination. Nevertheless in light of the existing affirmative determination on the sweaters from Taiwan, it was reasonable for Commerce to conduct a changed circumstances review..." Thus, the existence of an affirmative determination on the merchandise subject to the order provides sufficient grounds to conduct a changed circumstances review, with regard to any producer, not just those producers subject to the order, should the circumstances warrant it. The merger of an excluded entity with an non-excluded entity is just such a circumstance.

Within the context of a changed circumstances review, it is only when the excluded company continues to operate as a successor-in-interest that an exclusion can be passed to that company's successor-in-interest. In *Certain Welded Stainless Steel Pipe From Taiwan; Preliminary Results of Changed Circumstances Antidumping Duty Administrative Review*, 63 FR 16982 (April 7, 1998) the

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[1]*See Jia Farn Manufacturing v. United States*, 17 CIT 187, 817 F. Supp 969, Slip.Op. 93-42, (1993) (*Jia Farn*) where the Court upheld the Department's decision to conduct a changed circumstances review of an excluded manufacturer to determine if that manufacturer was, in fact, acting as an exporter of subject merchandise manufactured by covered companies.

Department stated that one company was the successor-in-interest to another, and was thus entitled to retain its exclusion "since it essentially operates as the same entity as the former company, maintaining the same management, production facilities, and supplier relationships as did {it} prior to its merger."[2] As discussed above, and in the *Changed Circumstances Final*, none of these things are true of the post-merger Marine Harvest. Management, production facilities and supplier relationships all changed as a result of the merger with Mares Australes. As a result of the merger, there is no distinction between the companies and it is impossible to separate covered merchandise produced by Mares Australes from merchandise produced by Marine Harvest. Because the post-merger Marine Harvest is not the same entity as the pre-merger Marine Harvest, it is not entitled to retain its exclusion from the antidumping duty order.

Marine Harvest's argument to the effect that the Department must exclude Marine Harvest because it is conducting a review of a determination is premised on a misinterpretation of the statute. While it is true that a changed circumstances review may review "a final affirmative determination that resulted in an antidumping duty order," a changed circumstances review, or any review for that matter, is not then an opportunity to essentially re-open the investigation. Rather, it allows the Department to consider circumstances that arise after the publication of an order that had not been considered in the original investigation because they did not yet exist and could not be foreseen. Among the circumstances considered by the Department in this context is the question of successor-in-interest.

In that regard, it does not matter whether the Department averages the investigation margins or uses the results of the second administrate review to determine the margin for the post-merger Marine Harvest. The concern is that one of the entities to which it was a successor-in-interest was found to be dumping during the investigation and is subject to the order. Marine Harvest even points out that the statute allows the Department to apply zero deposit rates without exclusions in reviews. Therefore, the post-merger Marine Harvest is not entitled to an exclusion.

FINAL RESULTS OF REDETERMINATION

In accordance with the Court's order, we have determined that the post-merger Marine Harvest is the successor-in-interest to both the pre-merger Marine Harvest and to the former Mares Australes. If the Court approves these final results, we will issue instructions to Customs to refund any deposits paid by Marine Harvest between the *Changed Circumstances Preliminary* and implementation of the Customs instructions issued after the *Changed Circumstances Final*. Entries of subject merchandise produced and exported by Marine Harvest will continue to be subject to the suspension of liquidation, with a zero-rate cash deposit required, consistent with this determination.

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[2]This decision was upheld in the final results. *See Certain Welded Stainless Steel Pipe From Taiwan; Final Results of Changed Circumstances Antidumping Duty Administrative Review*, 63 FR 34147 (June 23, 1998).

These final results of redetermination are pursuant to the remand order of the Court of International Trade in *Marine Harvest (Chile) S.A. v. United States*, Slip Op. 02-134 (October 31, 2002).

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Faryar Shirzad
Assistant Secretary
for Import Administration

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Date