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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results of New Shipper Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from Ecuador

DATE: September 13, 2006

Summary

We have analyzed the case brief of the respondent in the new shipper review of the antidumping duty order on certain frozen warmwater shrimp from Ecuador. As a result of our analysis, we have made changes in the margin calculations for the final results. 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 investigation for which we received a brief from the respondent:

Comments:

Comment 1: Whether a Particular Market Situation Exists In the Home Market
Comment 2: Application of Facts Otherwise Available for Inland Freight Expenses
Comment 3: Period for Calculating G&A Expenses

Background

On June 16, 2006, the Department of Commerce (the Department) published the preliminary results for the new shipper review of the antidumping duty order on certain frozen warmwater shrimp from Ecuador for the period of review (POR) August 4, 2004, through July 31, 2005. See Notice of Preliminary Results of New Shipper Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from Ecuador, 71 FR 34888 (June 16, 2006) (Preliminary Results). The respondent in this review, Studmark, S.A. (Studmark), requested a hearing, which was held at the Department on August 16, 2006.

We invited parties to comment on the preliminary results. We received a brief from Studmark on July 31, 2006. Based on our analysis of the comments contained in Studmark's brief, we have changed the margin for Studmark's sale from the margin calculated in the preliminary results.

Margin Calculation

We calculated export price (EP) and normal value (NV) using the same methodology described in the preliminary results, except as follows below:

- We made no adjustment to EP for the foreign inland freight expense instead of making such an adjustment based on the facts otherwise available (FA), as we did in the preliminary results. See Comment 2 below.

Discussion of the Issues

Comment 1: *Whether a Particular Market Situation Exists In the Home Market*

In the underlying less-than-fair-value (LTFV) investigation, the Department determined that a "particular market situation" existed which rendered the Ecuadorian market inappropriate for purposes of determining NV for the three respondents. In the preliminary results of this review, the Department found that Studmark's home market sales were incidental to its export sale and that Studmark's home market sales situation did not differ markedly from that of the LTFV respondents where we found that a "particular market situation" existed. As a result, the Department found that a particular market situation existed with respect to Studmark's home market sales and, thus, could not rely on its home market sales for NV. In the absence of any third-country sales, we based Studmark's NV on constructed value (CV).

Studmark argues that the Department erred in its finding that a "particular market situation" exists in the home market and disputes basing NV on CV instead of on Studmark's home market sales. Studmark points out that its aggregate volume of sales of export quality shrimp in the home market is greater than five percent of its aggregate volume of U.S. sales for the subject merchandise. Thus, the home market sales meet the five-percent threshold test and should be used as a basis for NV. Furthermore, Studmark states that its situation does not match that of the particular market situation found for the three respondents in the LTFV investigation because none of those respondents met the five-percent statutory threshold for sales of export quality shrimp in the home market. Therefore, Studmark argues that, because it has met the five-percent threshold and it does not have a home market situation similar to that of the LTFV respondents, the Department should use Studmark's home market sales as the basis for NV in the final results.

Department's Position

We disagree with Studmark. First, Studmark misinterprets the LTFV "particular market situation" finding in that it confuses home market viability tests with a "particular market situation" analysis. In the LTFV investigation, all three respondents had viable home markets based on sales of the foreign like product. See Attachment II to the Department's December 8, 2005, supplemental questionnaire, which consists of a Memorandum from the LTFV investigation dated June 7, 2004, entitled "Home Market as Appropriate Comparison Market" (Market Memo). We agree with Studmark that it has a viable home market because its aggregate volume of export quality shrimp sales to the home market is greater than five-percent of its aggregate volume of U.S. sales of the subject merchandise. However, the Department's particular market situation determination is not based on whether or not a foreign market is viable, but rather on other factors in the market in question. Even if the five percent market viability test is met, the Department may decline to use home market or third country sales as a basis for calculating NV where the Department finds a "particular market situation" in the exporting country that would preclude a proper comparison with the EP under section 773(a)(1) of the Tariff Act of 1930, as amended (the Act). See Section 773(a)(1)(B)(ii)(III) and (C)(iii) of the Act; 19 CFR 351.404 (c)(2)(i); see also Chemetals, Inc. v. U.S., 138 F. Supp. 2d 1338, 1350 (CIT 2001). The Department's finding of a particular market situation indicates that, even though the respondent's sales in that foreign market have met the viability threshold, those sales do not form the basis of a proper comparison.

For example, in Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon From Chile, 63 FR 31412, 31418 (June 9, 1998), at Comment 4, the Department did not dispute the respondent's contention that the home market "unquestionably passes the statutorily mandated viability test, and that the merchandise sold in that market is within the scope of the investigation." The Department's determination that a "particular market situation" existed in the home market was based on its finding that the home market was incidental to the export-oriented Chilean salmon industry, comprised mostly of substandard quality product sold locally for reduced prices compared to export merchandise. The Department noted that "[t]he perfunctory marketing and distribution of salmon in the home market is consistent with the incidental nature of those sales."

Studmark argues that its sales of shrimp in the home market not only met the five-percent threshold but also were of export quality, unlike the home market sales of the LTFV respondents. The quality of the shrimp sold by Studmark in the home market, however, is only one of several factors considered by the Department in its particular market situation analysis. Furthermore, no one factor is dispositive. Based on the totality of the record evidence, we continue to find that a particular market situation exists for Studmark's home market sales during the POR. As discussed in the Preliminary Results, although Studmark's home market was viable and its home market sales were of export-quality shrimp, in all other respects, Studmark's home market sales situation is similar to that of the LTFV respondents. Studmark's home market sales were of products left over from the U.S. sale transaction, and sold on sight at the plant. These home market sales were incidental to Studmark's principal business during the POR of selling to the U.S. market. As Studmark made no other foreign market sales, we continue to base NV on CV.

<u>Comment 2</u>: *Application of Facts Otherwise Available for Inland Freight Expenses*

In its questionnaire responses, Studmark reported that it made its U.S. sale on an FOB Ecuador-port basis, but that the foreign inland freight expense was paid for by the importer. However, at verification Studmark could not support its claim that it did not incur this expense. Therefore, the Department applied an FA inland freight expense to EP based on Studmark's freight expense incurred for transporting unprocessed shrimp farms to the processing plant. In addition, the Department reallocated Studmark's inland insurance expenses, which Studmark had applied solely to the transport of raw materials in its questionnaire response. Because Studmark's transport insurance policy reviewed at verification indicates that risk is covered for both the transport of shrimp from the farm to the processing plant, and from the processing plant to the port, the Department reallocated the inland insurance expense to apply it equally between transport of shrimp from the farms to the processing plant, and transport of the processed shrimp from the plant to the port.

Studmark asserts that the Department erred in using FA to calculate a foreign inland freight expense because Studmark did not incur any such expense. Studmark contends that no evidence exists on the record to indicate that Studmark incurred such an expense. It argues that the absence of any factory-to-port freight expense recorded in Studmark's business records and financial statements, which the Department examined in detail, should provide sufficient proof that Studmark did not incur the expense. According to Studmark, it cannot go further to prove a negative, <u>i.e.</u>, that it did not incur a foreign inland freight expense.

Studmark also argues that the foreign inland freight and foreign inland insurance expense amounts used by the Department to adjust EP were wholly disproportional to the transport in question. Studmark notes that the Department based its adjustments on transportation costs from the farms to the processing plant, which are much farther from the plant than the port and involve riskier travel. Instead, Studmark argues that the Department could have obtained freight expense information from local independent sources, or requested Studmark to obtain such information.

<u>Department's Position</u>:

With respect to the foreign inland freight expense, we have reconsidered our preliminary results position and accepted Studmark's claim that it did not incur the expense. Although we noted in the <u>Preliminary Results</u> that Studmark provided contradictory information in its questionnaire responses concerning the terms of sale, as Studmark correctly notes, we found no record of any foreign inland freight expense in Studmark's financial records. As we have relied on Studmark's financial records to support Studmark's sales, cost, and expense reporting, it is reasonable to rely on these records to support Studmark's contention that it did not incur foreign inland freight expenses. Accordingly, we have revised the calculation of EP by making no adjustment for the foreign inland freight expenses, rather than making such an adjustment using an amount based on FA as we did in the preliminary results.

We disagree with Studmark with respect to the foreign inland freight insurance expense. Although Studmark did not report any foreign inland insurance expenses associated with its U.S. sale, as discussed in the Preliminary Results, we found at verification that Studmark's transport insurance policy provided such coverage. Studmark has not disputed this fact; its complaint is on the allocation of the expense. However, Studmark has not offered any other allocation methodology for this expense. Dividing the transport insurance premium expense equally between raw material transport from farm to plant, and finished goods transport from plant to port, is consistent with the allocation applied in the same circumstances to a respondent in the LTFV investigation. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Ecuador, 69 FR 76913 (December 23, 2004), and accompanying Issues and Decision Memorandum at page 5.

Comment 3: *Period for Calculating G&A Expenses*

In the preliminary results, the Department calculated the general and administrative expense (G&A) ratio for use in the CV calculation based on the data in Studmark's fiscal year (FY) 2005 trial balance. See Preliminary Results at 34891.

Studmark argues that, for the final results, the Department should calculate the G&A expense ratio based on the POR instead of FY 2005. According to Studmark, the statute directs the Department to calculate selling expenses, G&A expenses, and profit for CV using only those sales of the foreign like product that were made in the ordinary course of trade. According to Studmark's interpretation of the statute, because Studmark did not engage in any selling activities outside the POR, calculating its expense ratio over the FY rather than the POR distorts its true G&A ratio. Therefore, Studmark asserts that the G&A expenses for the CV calculation should be based on POR expenses, rather than FY 2005 expenses.

Department's Position:

We disagree with Studmark. The Department's longstanding practice is to calculate the G&A expense ratio based on the annual financial statements that most closely correspond to the POR, in order to account for seasonal fluctuations and year-end adjustments. See, e.g., Light-Walled Rectangular Pipe and Tube From Mexico: Notice of Final Determination of Sales at Less Than Fair Value, 69 FR 53677 (September 2, 2004), and accompanying Issues and Decision Memorandum at Comment 24. Our calculation of Studmark's G&A expense ratio using its FY 2005 financial statement is consistent with this practice and Studmark offers no credible basis for us to depart from this methodology.

Studmark states that it did not engage in further selling activities after the POR. Nevertheless, as the record shows, Studmark continued to remain in business for the remainder of FY 2005, and continued to incur expenses such as office rent and administrative wages. The Department normally considers such expenses as part of G&A expenses, which relate to the general operations of the company as a whole, rather than to the production process. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances: Metal Calendar Slides from Japan, 71 FR 36063 (June 23, 2006), and accompanying Issues and Decision Memorandum at Comment 10. Period expense categories such as G&A capture all related expenses incurred during a company's standard reporting period, i.e., its fiscal year. See Notice of Final Determination of Sales at Not Less Than Fair Value: Stainless Steel Bar from Taiwan, 67 FR 3152 (January 23, 2002), and accompanying Issues and Decision Memorandum at Comment 4. Therefore, in accordance with our normal practice, for the final results we continue to rely on the FY 2005 data to calculate Studmark's G&A expense ratio.

Recommendation

Based on our analysis of the comments contained in the brief received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of review and the final weighted-average dumping margin for the reviewed firm in the Federal Register.

Agree ___ Disagree ____

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David M. Spooner
Assistant Secretary
for Import Administration

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(Date)