



A-552-802
Remand: 02/01/2008-01/31/2009
Re-conducted Grobest 4th AR
E&C/ V: SSP

March 13, 2014

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: Christian Marsh 
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Re-Conducted Administrative Review of Grobest & I-Mei Industrial (Vietnam) Co., Ltd.

SUMMARY

The Department of Commerce (“the Department”) analyzed the comments submitted by Grobest & I-Mei Industrial (Vietnam) Co., Ltd. (“Grobest”) and Domestic Producers¹ in the re-conducted administrative review of the antidumping duty order on certain frozen warmwater shrimp (“shrimp”) from the Socialist Republic of Vietnam for the period of review February 1, 2008, through January 31, 2009. Following the *Preliminary Results*² and the analysis of the comments received, we have not made any changes to our decision that Grobest failed to cooperate to the best of its ability and continue to apply adverse facts available to Grobest. We further continue to find that Grobest does not satisfy the requirements of revocation under 19 CFR 351.222(b)(2) as we determine a positive dumping margin for Grobest in this review period. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

Scope

The scope of this order includes certain warmwater shrimp and prawns, whether frozen, wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on

¹ Domestic Producers are the Ad Hoc Shrimp Trade Action Committee whose members are: Nancy Edens: Papa Rod, Inc.; Carolina Seafoods; Bosarge Boats, Inc.; Knight’s Seafood Inc.; Big Grapes, Inc.; Versaggi Shrimp Co.; and Craig Wallis.

² See *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results of Re-conducted Administrative Review of Grobest & I-Mei Industrial (Vietnam) Co., Ltd. and Intent Not to Revoke; 2008-2009*, 78 FR 57532 (September 18, 2013) (“*Preliminary Results*”).



or peeled, tail-on or tail-off, “Tails” in this context means the tail fan, which includes the telson and the uropods, deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this investigation, regardless of definitions in the Harmonized Tariff Schedule of the United States (“HTS”), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannamei*), banana prawn (*Penaeus merguensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this investigation. In addition, food preparations, which are not “prepared meals,” that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this investigation.

Excluded from the scope are: 1) breaded shrimp and prawns (HTS subheading 1605.20.1020); 2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; 3) fresh shrimp and prawns whether shell-on or peeled (HTS subheadings 0306.23.0020 and 0306.23.0040); 4) shrimp and prawns in prepared meals (HTS subheading 1605.20.0510); 5) dried shrimp and prawns; 6) canned warmwater shrimp and prawns (HTS subheading 1605.20.1040); 7) certain dusted shrimp; and 8) certain battered shrimp. Dusted shrimp is a shrimp-based product: 1) that is produced from fresh (or thawed-from-frozen) and peeled shrimp; 2) to which a “dusting” layer of rice or wheat flour of at least 95 percent purity has been applied; 3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; 4) with the non-shrimp content of the end product constituting between four and 10 percent of the product’s total weight after being dusted, but prior to being frozen; and 5) that is subjected to individually quick frozen (“IQF”) freezing immediately after application of the dusting layer. Battered shrimp is a shrimp-based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this investigation are currently classified under the following HTS subheadings: 0306.13.0003, 0306.13.0006, 0306.13.0009, 0306.13.0012, 0306.13.0015, 0306.13.0018, 0306.13.0021, 0306.13.0024, 0306.13.0027, 0306.13.0040, 1605.20.1010, and 1605.20.1030. These HTS subheadings are provided for convenience and for customs purposes

only and are not dispositive, but rather the written description of the scope of this investigation is dispositive.³

Background

On October 17, 2012, consistent with *Grobest II*⁴ and the *Final Judgment*,⁵ the Department published a notice of re-conduct of the 2008-2009 administrative review on Grobest pursuant to the Court's final judgment, stating that the Department will re-conduct the 2008-2009 administrative review beginning September 13, 2012.⁶ The Department published the *Preliminary Results* on September 18, 2013. In accordance with 19 CFR 351.309(c)(1)(ii), we invited parties to comment on our *Preliminary Results*. On November 4, 2013, we received a case brief from Grobest.⁷ On November 12, 2013, we received a rebuttal brief from Domestic Producers.⁸

Discussion of the Issues

COMMENT 1: RESCISSION OF REVIEW FOR GROBEST

Grobest's Arguments

- The Department has the authority to rescind the review of Grobest as a voluntary respondent pursuant to 19 CFR 351.213(d)(1), stating that the Department “will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review.”⁹

³ The scope of this review does not contain the amendment to the scope made pursuant to court decision, as this amendment was not effective for fourth review entries. On April 26, 2011, the Department amended the antidumping duty order to include dusted shrimp, pursuant to the CIT decision in *Ad Hoc Shrimp Trade Action Committee v. United States*, 703 F. Supp. 2d 1330 (CIT 2010) and the U.S. International Trade Commission (“ITC”) determination, which found the domestic like product to include dusted shrimp. See *Certain Frozen Warmwater Shrimp from Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Amended Antidumping Duty Orders in Accordance with Final Court Decision*, 76 FR 23277 (April 26, 2011); see also *Ad Hoc Shrimp Trade Action Committee v. United States*, 703 F. Supp. 2d 1330 (CIT 2010) and *Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam* (Investigation Nos. 731-TA-1063, 1064, 1066-1068 (Review)), USITC Publication 4221, March 2011.

⁴ See *Grobest & I-Mei Industrial (Vietnam) Co. v. United States*, 853 F. Supp. 2d 1352, 1365 (CIT 2012) (“*Grobest II*”).

⁵ See *Grobest & I-Mei Industrial (Vietnam) Co., Ltd. et al., v. United States*, Consol. Court No. 10-00238 (CIT September 13, 2012). (“*Final Judgment*”).

⁶ See *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Notice of Court Decision Not in Harmony With Final Results of Administrative Review, Notice of Re-conduct of Administrative Review of Grobest & I-Mei Industrial (Vietnam) Co., Ltd., and Notice of Amended Final Results of Administrative Review*, 77 FR 63786 (October 17, 2012).

⁷ See Letter from Grobest, to Commerce, regarding “Certain Frozen Warmwater Shrimp from Vietnam: Case Brief on behalf of Viet I-Mei Frozen Foods Co, Ltd.,” dated November 4, 2013 (“Grobest Case Brief”).

⁸ See Letter from Domestic Producers, to Commerce, regarding “Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam (2008-2009) for Grobest & I-Mei Industrial (Vietnam) Co., Ltd.: Rebuttal Brief,” dated November 12, 2013 (“Domestic Producers’ Rebuttal”).

⁹ See Grobest Case Brief at 6.

- Grobest will not gain any undue or unfair advantage if the Department allows a withdrawal of its voluntary respondent request.¹⁰

Domestic Producers' Arguments

- Pursuant to *Grobest II* and subsequent *Final Judgment*, the Department is legally required to re-conduct the 2008 – 2009 administrative review of shrimp from Vietnam with respect to Grobest.¹¹
- The statute does not give the Department the authority to rescind voluntary administrative reviews once they are initiated.¹²
- Grobest's requested rescission violates the Department's regulations since the 90-day deadline occurred during the original administrative review.¹³
- The Department cannot rescind the review because Domestic Producers have not withdrawn their request for initiation of this review.¹⁴

Department's Position: We continue to reject Grobest's request to rescind the individual examination of Grobest as a voluntary respondent for these final results. As stated in the *Preliminary Results*, "the Department will not ignore the Court's order in *Grobest II* or its *Final Judgment*."¹⁵ In *Grobest II*, the Court specified that "this case is remanded to Commerce to individually review Grobest as a voluntary respondent and, if appropriate in light of the review, to consider Grobest's request for revocation."¹⁶ Subsequently, in its *Final Judgment*, the CIT stated that the Department "shall re-conduct its administrative review of {Grobest} for the fourth administrative review of the antidumping duty order concerning certain frozen warmwater shrimp from Vietnam by individual examining Grobest as a voluntary respondent."¹⁷ Accordingly, because the CIT specifically ordered the Department to conduct an individual examination of Grobest, rescission would be in conflict with the CIT's order and judgment.

With respect to Grobest's argument that the Department should rescind the individual review pursuant to 19 CFR 351.213(d)(1), we disagree. Even if Grobest properly withdrew its request for review within 90 days of the date of initiation of the review (which it did not), the regulation does not provide for authority to rescind the review, because Petitioners requested that the Department review Grobest and did not withdraw their request for review.¹⁸ Moreover, to the extent that the 90-day deadline is relevant, it has long since expired. 19 CFR 351.213(d)(1) states that the Department "will rescind an administrative review ... if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation."

¹⁰ See *id.*

¹¹ See Domestic Producers' Rebuttal, at 7.

¹² See *id.*, at 8 citing section 782(a) of the Tariff Act of 1930, as amended (the Act).

¹³ See *id.*, at 8-9.

¹⁴ See *id.*

¹⁵ See *Preliminary Results*.

¹⁶ See *Grobest II*, 853 F. Supp. 2d at 1365.

¹⁷ See *Final Judgment*.

¹⁸ See Letter from American Shrimp Processors Association and Louisiana Shrimp Association's Request For An Administrative Review, to Commerce, regarding "Administrative Review of the Antidumping Duty Order Covering Certain Frozen Warmwater Shrimp from Vietnam (2/1/08-1/31/09); American Shrimp Processors Association and Louisiana Shrimp Association's Request for an Administrative Review," dated February 27, 2009.

The notice of initiation for this administrative review was published on March 26, 2009.¹⁹ As a result, the deadline to submit a withdrawal request was June 24, 2009. Grobest did not withdraw its request for review within 90 days of the date of publication of the notice of initiation, *i.e.*, by June 24, 2009. To the contrary, both throughout the review and litigation, Grobest argued that it should be individually examined. Now, after the Court ruled in Grobest’s favor and ordered the Department to individually examine it, Grobest argues that September 13, 2012, the date of the entry of final judgment is the date from which deadlines listed in section 751(a)(3) of the Act and 19 CFR 351.213(d)(1) should be calculated. However, the plain language of the regulation refers to the date of initiation of the administrative review rather than the date of a court judgment.

With respect to Grobest’s contention that the Department should rescind this re-conducted administrative review because the Department has the discretion when trying “to avoid waste of resources,”²⁰ we disagree. Given the unique circumstances surrounding this review, including the *Final Judgment* and the request for review by Petitioners, the Department must conduct the individual examination of Grobest as ordered by the Court.

With regards to Domestic Producers’ claim that the Department does not have the authority to rescind the review of a voluntary respondent once it initiates, we disagree and note that the Department previously rescinded the review of voluntary respondents.²¹ However, the Department does not find it necessary to address the argument regarding the lack of authority to rescind reviews of voluntary respondents here, because the Department determined not to rescind the review.

COMMENT 2: APPLICATION OF AFA

Grobest’s Arguments

- The Department’s application of adverse facts available (“AFA”) is punitive and impermissible because Grobest requested a withdrawal of its voluntary review pursuant to 19 CFR 351.213(d)(1).²²

Domestic Producers’ Arguments

- The Department properly applied AFA because Grobest failed to cooperate to the best of its ability when it refused to answer the Department’s supplemental questionnaire.²³

¹⁹ See *Notice of Initiation of Administrative Reviews and Requests for Revocation in Pat of the Antidumping Duty Orders on Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam and the People’s Republic of China*, 74 FR 13178 (March 26, 2009).

²⁰ See Grobest Case Brief at 6 citing *Lincoln General Insurance Co., v. United States*, 412 F. Supp. 2d 1320, 1324 (CIT 2005).

²¹ See, e.g., *Sixth Administrative Review of Honey From the People’s Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 66221 (November 7, 2008), unchanged at *Honey From the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 76 (January 8, 2009).

²² See Grobest Case Brief at 6.

²³ See Domestic Producers’ Rebuttal at 9-11.

- Grobest’s non-cooperation should be understood in the context of the Department’s findings regarding Ocean Duke Corp. (“Ocean Duke”). Specifically, in proceedings for shrimp from the People’s Republic of China (“PRC”), the respondent Hilltop International (“Hilltop”), a company that also shares affiliation with Grobest’s U.S. importer Ocean Duke, was found to have hidden its affiliation with the Cambodian company Ocean King (Cambodia) Co., Ltd. (“Ocean King”). The Department also found that Ocean King and another undisclosed affiliate in Vietnam were likely used as a vehicle for transshipment to evade the antidumping orders on shrimp from the PRC and Vietnam. As a result, the Department applied AFA to Hilltop as part of the PRC-wide entity. Hilltop and Ocean Duke challenged the application of AFA before the Court of International Trade and stated that the evidence employed by the Department “(at best) supports an allegation of transshipment or circumvention in 2004 and 2005 of shrimp from Vietnam rather than China.... Moreover, the only other country ever referenced in these emails is Vietnam. Commerce has failed to cite any correspondence that even references China.”²⁴

Department’s Position: The Department agrees with Domestic Producers that AFA is appropriate to apply given Grobest’s refusal to cooperate. According to 19 CFR 351.301, the Department has the authority to request any party to submit factual information at any time during a proceeding. The Department requested that Grobest respond to a supplemental questionnaire, seeking further information necessary to complete the individual review of Grobest. Grobest did not submit responses to these questions withholding information from the Department.

Additionally, Grobest impeded the Department’s effort to develop the record as necessary to conduct this administrative review when it refused to provide among other inquiries, responses regarding its affiliations. Grobest’s failure to respond to the Department’s supplemental questionnaire prevented the Department from having complete and accurate information regarding affiliation that is critical to the Department’s analysis. As a result, we find that Grobest withheld requested information, and significantly impeded this proceeding. Accordingly, the Department’s preliminary finding that the use of facts available for Grobest is appropriate remains consistent with sections 776(a)(2)(A) and (C) of the Act.²⁵

In light of the discussion above, the Department determines that it will rely on facts otherwise available pursuant to sections 776(a)(2)(A), (B), and (C) of the Act in order to determine a weighted-average dumping margin for Grobest. Additionally, Grobest’s refusal to provide information constitutes circumstances under which the Department can conclude that Grobest

²⁴ See *id.*, at 11-14.

²⁵ Section 776(a) of the Act provides that the Department will apply “facts otherwise available” if, *inter alia*, necessary information is not available on the record or an interested party: (1) withholds information that has been requested by the Department; (2) fails to provide such information within the deadlines established, or in the form or manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (3) significantly impedes a proceeding; or (4) provides such information, but the information cannot be verified.

has not cooperated to the best of its ability.²⁶ Therefore, when selecting from among the facts otherwise available, the Department determines that an adverse inference is warranted with respect to Grobest under section 776(b) of the Act.

In selecting Grobest's AFA rate, the Department chose the margin, which is the rate also assigned as AFA to the Vietnam-wide entity in the original investigation,²⁷ and is also the highest dumping margin on the record of any segment of this proceeding.²⁸ Further, the 25.76 percent margin is not punitive because it has been corroborated²⁹ and continues to have probative value.

With regard to Grobest's argument that the application of AFA is impermissible, we disagree. The antidumping statute and the Department's regulations provide that the Department may apply AFA to a respondent that refuses to cooperate after receiving an antidumping duty questionnaire. We note that Petitioners have not withdrawn their request for review of Grobest and the Court expressly ordered the Department to conduct an individual examination of Grobest.

With respect to Domestic Producers' allegation that Grobest's lack of cooperation should be viewed in light of the scheme to evade antidumping duties by shipping Vietnamese shrimp through Cambodia and declaring it to be the product of Cambodia, Domestic Producers referenced the information that is on the record of another proceeding, but did not place it on the record of this review. Therefore, we do not find that this re-conducted administrative review is the correct venue to address this allegation. However, we take this allegation seriously and intend to consider whether it would be appropriate to otherwise address it in the context of this antidumping duty order.

²⁶ See *Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 FR 8909, 8911 (February 23, 1998); see also *Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review*, 70 FR 69937, 69939 (November 18, 2005), and *Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103-316, vol. 1, at 870 (1994) ("SAA").

²⁷ See *LTFV Determination*, and accompanying Issues and Decision Memorandum at Comment 6 stating that "the Vietnam-wide rate from this proceeding of 25.76 percent ... is derived from the *Petition*."

²⁸ See *LTFV Determination*.

²⁹ See Memo to the File, from Susan Pulongbarit, regarding "Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Re-conduct of 2008-2009 Administrative Review for Grobest & I-Mei Industrial (Vietnam) Co., Ltd, subject "Corroboration Memo of Adverse Facts Available for Grobest – Nha Trang Seaproduct Company Margins," dated September 12, 2013; see also Memo to the File, from Susan Pulongbarit, regarding "Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Re-conduct of 2008-2009 Administrative Review for Grobest & I-Mei Industrial (Vietnam) Co., Ltd, subject "Corroboration Memo of Adverse Facts Available for Grobest – Minh Phu Seafood Corporation (and its affiliates Minh Qui Seafood Co., Ltd. and Minh Phat Seafood Co., Ltd. (collectively "Minh Phu Group"))," dated September 12, 2013.

COMMENT 3: APPLICATION OF JUDICIAL ESTOPPEL

Grobest's Arguments

- Domestic Producers should be judicially estopped from arguing their previous position that the Department should not be forced to review Grobest as a voluntary respondent.³⁰
- Domestic Producers are not prejudiced by Grobest's request to withdraw from individual examination. Specifically, a granted withdrawal request would result in the same position Domestic Producers argued for before the CIT.³¹

Domestic Producers' Arguments

- The preclusion of arguments cannot be applied by the Department because estoppel can only be invoked by a court.³²
- None of the three requirements for judicial estoppel are satisfied because: (1) Domestic Producers' argument for applying AFA to Grobest was not previously argued; (2) Domestic Producers did not succeed in persuading the court to accept its earlier position; and (3) Given Grobest's role as an affiliate to Ocean Duke, Grobest will derive an unfair advantage and impose an unfair detriment on the Department and Domestic Producers if it is able to avoid answering the affiliation questions included in the Department's supplemental questionnaire.³³

Department's Position: We find that judicial estoppel does not apply under these circumstances. We are re-conducting the review of Grobest because the Court issued final judgment ordering the Department to individually review Grobest. Judicial estoppel is "an equitable doctrine invoked by a court at its discretion"³⁴ that "concerns the integrity of the judicial system independent of the interests of the parties."³⁵ The positions of the parties prior to the court's order are no longer relevant (and notably, even Grobest's own position has changed) following the entry of the final judgment by the Court. Further, neither the Department nor Domestic Producers prevailed in litigation and the Court ordered the Department to conduct an individual examination of Grobest.

³⁰ See Grobest Case Brief at 7-8.

³¹ See *id.*

³² See Domestic Producers' Rebuttal at 14.

³³ See *id.*, at 14-15.

³⁴ See *Thai Plastic Bags Co. v. United States*, 752 F. Supp. 2d 1316, 1326 (CIT 2010) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)).

³⁵ See *id.*, quoting *In re Airadigm Communications, Inc. v. Airadigm Communications Inc., and Telephone and Data Systems Inc.*, 616 F.3d 642, 661.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of review and the final dumping margin in the *Federal Register*.

AGREE DISAGREE



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

13 MARCH 2014
Date