

TO: Stephen Claeys
Deputy Assistant Secretary
for Import Administration

FROM: Abdelali Elouaradia
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Import Administration

SUBJECT: Scope Ruling: Antidumping Duty Order on Freshwater Crawfish Tail Meat from the People's Republic of China

Background

On November 8, 2006, the Department of Commerce (the "Department") received an application from Maritime Products International ("Maritime") for a scope ruling on whether breaded crawfish tail meat is covered by the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China ("PRC") (the "Application").¹ On November 30, 2006, the Department received comments on the Application from the Crawfish Processors Alliance (the "CPA"), together with a request that the Department conduct a circumvention inquiry concerning breaded crawfish tail meat under the "minor alterations of merchandise" and the "later-developed merchandise" criteria of 19 CFR § 351.225(i) and (j).

On December 18, 2006, the Department informed all parties on its comprehensive scope service list that it was initiating a scope inquiry pursuant to 19 CFR § 351.225(e). Also on December 18, 2006, the Department informed the CPA and Maritime that it was not initiating a circumvention inquiry concerning breaded crawfish tail meat. On January 16, 2007, the Department received Maritime's response to a questionnaire, issued on December 21, 2006, seeking additional information relevant to the Application. The CPA submitted comments regarding the Department's scope inquiry on January 26, 2007, and Maritime submitted rebuttal comments on February 5, 2007.

Scope of the Order

The product covered by this antidumping duty order is freshwater crawfish tail meat, in all its forms (whether washed or with fat on, whether purged or unpurged), grades, and sizes; whether

¹ See Notice of Amendment to Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Freshwater Crawfish Tail Meat from the People's Republic of China, 62 FR 48218 (Sept. 15, 1997) ("Crawfish Antidumping Duty Order").

frozen, fresh, or chilled; and regardless of how it is packed, preserved, or prepared. Excluded from the scope of the order are live crawfish and other whole crawfish, whether boiled, frozen, fresh, or chilled. Also excluded are saltwater crawfish of any type, and parts thereof. Freshwater crawfish tail meat is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers 1605.40.10.10 and 1605.40.10.90, which are the HTSUS numbers for prepared foodstuffs, indicating peeled crawfish tail meat and other, as introduced by U.S. Customs and Border Protection (“CBP”) in 2000, and HTSUS numbers 0306.19.00.10 and 0306.29.00.00, which are reserved for fish and crustaceans in general. The HTSUS subheadings are provided for convenience and customs purposes only. The written description of the scope of this order is dispositive.²

Maritime’s Request

In its Application, as supplemented by its questionnaire response, Maritime argues that the Department should find breaded crawfish tail meat to be outside of the scope of the antidumping duty order on freshwater crawfish tail meat from the PRC. Maritime’s arguments are summarized below.

As an initial matter, Maritime states that the petitioner in this proceeding never identified breaded crawfish tail meat as one of the forms of the subject merchandise³ and the tariff schedule number (HTSUS number) applicable to U.S. imports of breaded crawfish tail meat is not found in the antidumping duty order on freshwater crawfish tail meat from the PRC.

In addition, Maritime claims that prior determinations of the Department and the International Trade Commission (“ITC”) support its position. Specifically, Maritime notes that the ITC described subject merchandise as freshwater crawfish tail meat that has been blanched, extracted from the shell, and bagged for shipment (suggesting that subject merchandise was limited to tail meat produced in this fashion without additional processing (e.g. breading)).⁴ Moreover,

² See Freshwater Crawfish Tail Meat from the People’s Republic of China: Notice of Final Results and Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 19174 (April 17, 2007).

³ See petitioner’s letter to the Department, dated October 7, 1996, at Exhibit 1 of Maritime’s Application (explaining that crawfish tail meat is produced and sold either fresh or frozen, washed or fat on, purged or unpurged, or some combination of these forms).

⁴ See, e.g., Crawfish Tail Meat from China, Commission Final Determination, USITC Inv. No. 731-TA-752 (“ITC Sunset Determination”), Pub. No. 3614 (July 2003) at 8 (“[T]o produce crawfish tail meat, whole live crawfish are boiled, then cooled, picked, and cleaned. The resulting tail meat may be sold either chilled or frozen.”).

Maritime states that the ITC referred to breaded crawfish tail meat as a downstream product.⁵ Further, Maritime claims that the ITC recognized that subject merchandise is most often used as an ingredient in prepared dishes, something, according to Maritime, that cannot be done with breaded crawfish tail meat.⁶

Additionally, Maritime claims that the Department's finding that crawfish etouffee is outside of the scope of the instant order supports the position that breaded crawfish tail meat is also not covered by the order. Maritime notes that in defending its crawfish etouffee scope ruling before the United States Court of International Trade ("CIT"), the Department stated the following:

{T}here is no indication from the investigation, the ITC proceedings, any subsequent administrative proceedings, or the plain language of the scope that reflects an intent that any prepared food item, or other product which contains tail meat as an ingredient, would be covered by the order on freshwater crawfish tail meat.

See Crawfish Processors Alliance v. United States, 431 F. Supp 2d. 1342, 1348 (CIT 2006) (the Department's etouffee scope ruling was upheld by the CIT).

Maritime claims that the Department's statement before the CIT virtually compels the Department to determine that breaded crawfish tail meat is outside of the scope of the instant order.

Lastly, Maritime notes that the Department expressly excluded breaded shrimp from the scope of the order on frozen warmwater shrimp from the PRC. Maritime claims that warmwater shrimp is virtually identical to crawfish tail meat.

Even though Maritime contends that the record cited above is dispositive with respect to the requested scope ruling, in its Application, Maritime addressed the Diversified Products criteria which are often used by the Department in scope rulings.⁷ Maritime's analysis under the Diversified Products criteria is summarized in the "Analysis" section below.

⁵ See id. at II-7.

⁶ See Crawfish Tail Meat from China, Commission Preliminary Determination, USITC Inv. No. 731-TA-752, Pub. No. 3002 (November 1996) ("ITC Preliminary Determination") at 4 (stating that "{c}rawfish tail meat, whether fresh or frozen, is most commonly used in prepared dishes such as bisques and etouffees").

⁷ See Diversified Products Corp. v. United States, 572 F. Supp. 883 (CIT 1983) ("Diversified Products").

The CPA's Comments

The CPA disagrees with Maritime. According to the CPA, breaded crawfish tail meat is a form of crawfish tail meat and thus, it is covered by the order at issue (the scope of the order covers “freshwater crawfish tail meat, in *all its forms* ... regardless of how its is packed, preserved or prepared” (emphasis added)). The CPA contends it is not plausible to believe that the addition of relatively minor and inexpensive ingredients during the breading process could transform the product into something other than crawfish tail meat for antidumping purposes. The CPA notes that in other proceedings, the Department found products with additional features, far more significant than the breading at issue here, to be subject to antidumping duty orders (e.g., TV-VCR units were found to be subject to the antidumping duty order on televisions despite integration of the video cassette recorder into the television; personal word processors with many features not found in portable typewriters were subject to the antidumping duty order on typewriters).⁸

Furthermore, contrary to Maritime's assertion, the CPA states that the description of the scope of the order on crawfish tail meat from the PRC does list the HTSUS number applicable to breaded crawfish tail meat.

Moreover, the CPA contends that the determinations of the ITC and the Department, which Maritime relied upon in its Application, do not support Maritime's position. First, the CPA states that it is not surprising that breading operations were omitted from the ITC's description of how crawfish tail meat is produced since no one was producing or marketing mass-produced breaded crawfish tail meat at the time of the antidumping duty investigation in this proceeding. Because mass-produced breaded crawfish tail meat was not commercially available at the time of the investigation, the CPA asserts that any mention of breaded crawfish tail meat by the ITC in the investigation simply referred to one way purchasers of crawfish tail meat used the product. Thus, the CPA states that there is no basis for concluding that the ITC found breaded crawfish tail meat to be a downstream product different from subject merchandise. Also, consistent with the Department's determination in Softwood Lumber from Canada, the CPA urges the Department to reject Maritime's claim that the narrower use of breaded crawfish tail meat renders it outside of the scope of the order.⁹ Finally, the CPA claims that the scope of the antidumping duty orders on frozen and shrimp are not instructive since the Department excluded breaded shrimp from those orders simply because the domestic industry had chosen not to pursue relief against imports of breaded shrimp. Thus, the CPA maintains that nothing on the record of this proceeding indicates that either the ITC or the Department has formulated a position as to

⁸ See Funai Electric Co. v. United States, 713 F. Supp 420 (CIT 1989) and Matsushita Elect. Ind. Co. v. United States, 787 F. Supp. 1461 (CIT 1992).

⁹ See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539 (April 2, 2002) (“Softwood Lumber From Canada”).

whether breaded crawfish tail meat is outside of the scope of the antidumping duty order on crawfish tail meat from the PRC.

Accordingly, the CPA contends that the Department can, and should, find Maritime's breaded crawfish tail meat to be covered merchandise based solely on the Application, and the descriptions of subject merchandise contained in the petition, the investigation, and the determinations of the ITC and the Department. Nevertheless, if the Department makes its determination in this scope inquiry using the Diversified Products criteria, the CPA states that the Department must address the fact that mass-produced breaded crawfish tail meat is a later-developed product. The CPA claims that the Department has erroneously concluded in this scope inquiry that the CPA has not done enough to invoke the statutory provisions concerning "later-developed merchandise." According to the CPA, the "later-developed merchandise" provision in the statute simply codified long-standing Departmental practice in scope proceedings involving merchandise that was not commercially produced at the time of the underlying investigation. Further, the CPA notes that the Diversified Products criteria came from a case that involved a later-developed product. Hence, the CPA urges the Department to address the fact that mass-produced breaded crawfish tail meat is a later-developed product.

Lastly, the CPA contends that Maritime failed to provide fundamental information required by the Department in a Diversified Products analysis (e.g., the exact weight and value added to the tail meat by breading) or provide precise answers to the questionnaire issued by the Department in this inquiry. Consequently, the CPA argues that the Department must presume that if Maritime had supplied the missing information, it would not have supported its position. Thus, the CPA submits that any Diversified Products analysis in this scope inquiry must be based on adverse facts available.

Maritime's Rebuttal

Maritime contends that the CPA's assertions are unsupported and its arguments are irrelevant and flawed. First, Maritime argues that there is no evidence on the record supporting the CPA's claims that, at the time of the investigation, breaded crawfish tail meat was a new product that was not mass produced or marketed, and therefore not discussed by the ITC during the investigation. Rather, Maritime asserts, the ITC did not mention breading operations in discussing the production process for crawfish tail meat because breaded crawfish tail meat was outside of the scope of the investigation.

Second, Maritime dismisses the CPA's claim that any product containing crawfish tail meat should be viewed as a form of tail meat and thus, be subject to the instant order. According to Maritime, at the time of the investigation, the CPA itself limited the "forms" of covered tail meat to only fresh or frozen, washed or fat on, purged or unpurged, or some combination of these

forms.¹⁰ With respect to these forms of crawfish tail meat, Maritime notes that the CPA made the following comment:

Because these *forms of tail meat* are easy to produce and would allow circumvention of the antidumping order, petitioner included *all forms* of frozen tail meat in the scope of its petition (emphasis added).¹¹

Thus, Maritime contends that including breaded crawfish tail meat in the scope of the antidumping duty order, as the CPA urges, would constitute an unlawful expansion of the order.

Moreover, adds Maritime, accepting the CPA's interpretation of the phrase "in all its forms" would contradict the Department's finding that crawfish etouffee is outside of the scope of the instant order, a finding upheld by the CIT. Specifically, Maritime notes that in its etouffee scope ruling, the Department stated that neither the record of the proceeding nor the scope language indicated "an intent that any prepared food item, or other product which contains tail meat as an ingredient, would be covered by the order on freshwater crawfish tail meat."

Third, Maritime claims that the cases cited by the CPA, which involved products with added features and narrowed end-uses, do not support the CPA's arguments in the instant inquiry. Maritime adds that the decision in Softwood Lumber from Canada, the case the CPA used to show that products whose end-uses have been limited can still be covered by an order, is irrelevant. Maritime notes that in Softwood Lumber from Canada the issues were more complex than the issue of narrowed end-use and the cited decision came in a separate class or kind determination in the investigation, and not in a scope inquiry. In contrast, Maritime contends that the scope ruling on crawfish etouffee is clear precedent for finding that narrowing the end-uses of crawfish tail meat renders it outside the scope of the instant order.

Lastly, Maritime contends that it has provided more than enough information in its Application and questionnaire response for the Department to conduct its Diversified Products analysis. While it was unable to obtain cost data allowing it to identify the value added to the product by breading, Maritime maintains that it provided sufficient evidence to reasonably conclude that the breading process adds substantial value to crawfish tail meat. Moreover, given the overwhelming amount of record evidence showing that breaded crawfish tail meat is not subject to the instant order, and the fact that no criterion in the Diversified Products analysis is determinative, Maritime contends that information regarding the value added to the product should not determine the outcome of this inquiry. Further, Maritime asserts that it has responded to the Department's requests to the best of its ability. According to Maritime, the law clearly indicates that adverse facts available may not be applied to a respondent when the respondent is

¹⁰ See petitioner's letter to the Department, dated October 7, 1996, at Exhibit 1 of Maritime's Application.

¹¹ See *id.*

unable to provide information that it cannot access. Therefore, Maritime contends that the use of adverse facts available is unwarranted.

Applicable Regulations

The regulations governing scope determinations can be found at 19 CFR § 351.225. These regulations instruct the Department to issue a final scope ruling if it can determine whether the product is within the scope of an order based solely upon the information provided in the application for a ruling and the descriptions of the product contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the ITC. See 19 CFR § 351.225(d) and 351.225(k)(1). Conversely, when the descriptions of the merchandise are not dispositive, the Department will consider the additional criteria set forth at 19 CFR § 351.225(k)(2). These criteria are: i) the physical characteristics of the product; ii) the expectations of the ultimate purchasers; iii) the ultimate use of the product; iv) the channels of trade in which the product is sold; and v) the manner in which the product is advertised and displayed. These factors are commonly known as the Diversified Products¹² criteria. The determination as to which analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis after consideration of all the record evidence before the Department.

Scope Descriptions from the Petition and Prior Proceedings

The petition described subject merchandise as follows:

The imported product subject to this petition is freshwater crawfish tail meat from China in all its forms, grades, sizes, whether frozen, fresh, chilled, and regardless of how it is preserved, or prepared. The tail meat currently imported from China is frozen. Frozen freshwater crawfish of all types are provided for in subheading 0306.19.0010 of the Harmonized Tariff Schedule of the United States (“HTS”) and are free of duty. Freshwater crawfish of all types that are not frozen are provided for in subheading 0306.29.0000 of the HTS and are also free of duty.

Tail meat is a peeled crawfish product, which is usually blanched prior to peeling. Whole crawfish, including live and whole boiled crawfish, whether frozen, fresh, or chilled, are not included within the scope of this petition. Salt water crawfish of any type are similarly not within the scope of this petition.¹³

In initiating the investigation, the Department described subject merchandise as follows:

¹² See Diversified Products, 572 F. Supp. 883.

¹³ See Antidumping Petition: Freshwater Crawfish Tail Meat, September 26, 1996 (Crawfish Petition) at 3-4.

The product covered by this investigation is freshwater crawfish tail meat, in all its forms (whether washed or with fat on, whether purged or unpurged), grades, and sizes; whether frozen, fresh, or chilled; and regardless of how it is packed, preserved, or prepared. Excluded from the scope of the investigation are live crawfish and other whole crawfish, whether boiled, frozen, fresh, or chilled. Also excluded are saltwater crawfish of any type and parts thereof. Freshwater crawfish tail meat is currently classifiable in the Harmonized Tariff Schedule of the United States (HTS) under item numbers 0306.19.00.10 and 0306.29.00.00. The HTS subheadings are provided for convenience and customs purposes. Although the HTS numbers are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.¹⁴

In the final determination the Department found that partial shell-on crawfish tails are subject merchandise despite the fact that this form of tail meat was not identified in the scope.¹⁵ In that decision, the Department stated that it “adopted the phrase ‘in all its forms’ in order to make the scope appropriately comprehensive and inclusive.” The Department went on to note that “‘shell-on’ crawfish tails are simply another form of crawfish tail meat . . .”

The Department made no material changes to the above description in the Crawfish Antidumping Duty Order.¹⁶

In a recently completed segment of the proceeding, the scope of the order reads as follows:

The product covered by this antidumping duty order is freshwater crawfish tail meat, in all its forms (whether washed or with fat on, whether purged or unpurged), grades, and sizes; whether frozen, fresh, or chilled; and regardless of how it is packed, preserved, or prepared. Excluded from the scope of the order are live crawfish and other whole crawfish, whether boiled, frozen, fresh, or chilled. Also excluded are saltwater crawfish of any type, and parts thereof. Freshwater crawfish tail meat is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers 1605.40.10.10 and 1605.40.10.90, which are the HTSUS numbers for prepared foodstuffs, indicating peeled crawfish tail meat and other, as introduced by U.S. Customs and Border Protection (“CBP”) in 2000, and HTSUS numbers 0306.19.00.10 and 0306.29.00.00, which are reserved for fish and crustaceans in general. The HTSUS

¹⁴ See Freshwater Crawfish Tail Meat from the People’s Republic of China: Initiation of Antidumping Investigation, 61 FR 54154 (October 17, 1996).

¹⁵ See Notice of Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat From the People’s Republic of China, 62 FR 41347 (August 1, 1997) (Final Determination).

¹⁶ See Crawfish Antidumping Duty Order, 62 FR 48218, 48219.

subheadings are provided for convenience and customs purposes only. The written description of the scope of this order is dispositive.¹⁷

Apart from changes related to amendments of the HTSUS numbers for crawfish, the pertinent language of the scope remains unchanged.

On December 28, 2004, the Department issued a scope ruling on etouffee stating that etouffee was not covered by the order on freshwater crawfish tail meat from the PRC. The Department noted that crawfish tail meat which has been combined with various ingredients and cooked to produce etouffee has undergone a “substantial transformation into a new and different product.” See Scope Ruling in the Antidumping Duty Order on Freshwater Crawfish Tail Meat from the People’s Republic of China; Coastal Foods, LLC at 11 (December 17, 2004).

In the etouffee scope ruling, the Department noted that the history of this proceeding gives no indication that a prepared food item which contains crawfish tail meat as an ingredient would be covered by the instant order. See Scope Ruling in the Antidumping Duty Order on Freshwater Crawfish Tail Meat from the People’s Republic of China; Coastal Foods, LLC at 10 (December 17, 2004). As noted above, Maritime argues that this statement compels the Department to find breaded crawfish tail meat to be outside of the scope of the instant order. We disagree. We have determined that the Department’s prior scope ruling on etouffee does not provide a basis for issuing a final scope ruling without a Diversified Products analysis. The Department must compare the physical characteristics of breaded and unbreaded crawfish tail meat in order to determine whether breaded crawfish tail meat is a new product with tail meat simply as one of its ingredients. Such a comparison is part of a Diversified Products analysis.

Thus, the petition, the scope from the investigation and previous administrative and new shipper reviews, and the etouffee scope ruling do not address whether breaded crawfish tail meat is covered merchandise.

ITC Determinations

The record for the ITC injury investigation does not discuss the production of breaded crawfish tail meat by crawfish processors. In the ITC’s five-year sunset review, completed in July 2003, no arguments were raised regarding the description of freshwater crawfish tail meat, and the ITC found the domestic-like product to consist of crawfish tail meat, “coextensive with Commerce’s scope.”¹⁸ The ITC report relied on U.S. import statistics, but excluded imports under HTSUS item 1605.40.1090, as it is a “basket” category consisting of products other than tail meat, such

¹⁷ See Freshwater Crawfish Tail Meat from the People’s Republic of China: Notice of Final Results and Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 19174 (April 17, 2007).

¹⁸ See ITC Sunset Determination at 5.

as whole-cooked crawfish.¹⁹ Although the report mentioned breaded crawfish tail meat as an example of a “downstream product,” it did so in the context of analyzing demand for the merchandise in the United States.²⁰ The ITC did not rule on whether or not breaded crawfish tail meat is within the scope of the order, nor did it address whether breaded crawfish tail meat is something other than simply a variety of crawfish tail meat. The ITC record therefore, is not dispositive as to whether breaded crawfish tail meat is covered by the order on freshwater crawfish tail meat.

Hence, the Department has concluded that it cannot determine, based solely on Maritime’s request and the descriptions of the merchandise contained in the petition, the initial investigation, the determinations of the Department (including the etouffee scope ruling) and the ITC, whether breaded crawfish tail meat is included in the scope of the order.²¹ Therefore, pursuant to 19 CFR § 351.225(k)(2), the Department has examined the issue at hand using the Diversified Products criteria.

Analysis

The Physical Characteristics of the Product²²

Breaded crawfish tail meat starts with tail meat that is subject to the order. The meat is then dusted with flour, coated with batter, breaded, fried in oil for less than one minute (to set, but not fully cook, the batter and breading) and individually quick frozen. Sugar, yeast, salt, and dry spices may be added to the flour used to dust the meat. The batter may consist of either all eggs, or eggs with milk, water, or oil. Other ingredients can be added to flavor the batter such as mustard, Worcestershire sauce, tabasco and soy sauce. The breading typically consists of two-thirds bread crumbs, and may include corn meal and cracker meal, and often includes additional seasonings such as salt, pepper, and spices (e.g., powdered thyme, sage, paprika, cayenne pepper, coriander, granulated garlic, granulated onions).²³ Breading accounts for between 35 percent and

¹⁹ See *id.* at 70.

²⁰ See *id.* at 50.

²¹ See the Department’s December 18, 2006 letter to all interested parties announcing that it was initiating a scope inquiry in this proceeding.

²² The description of breaded crawfish tail meat in this section of the memorandum is based on information reported by Maritime in its Application and January 16, 2007 questionnaire response.

²³ See Attachment 1 of Maritime’s January 16, 2007 questionnaire response which contains a sample list of 25 ingredients contained in the breading applied to the tail meat that is the subject of the instant scope inquiry.

55 percent of the weight of the breaded tail meat. Breaded crawfish tail meat may also contain tripolyphosphate (a preservative). Breading prevents moisture from escaping, rendering breaded crawfish tail meat juicier than unbreaded subject crawfish tail meat.

Interested Party Comments

Maritime contends that the physical characteristics of breaded crawfish tail meat are dramatically different from those of subject crawfish tail meat. Specifically, Maritime claims that breaded crawfish tail meat: 1) is not readily identifiable as crawfish tail meat (the breading disguises the contour of the meat); 2) has a different texture than subject crawfish tail meat (breaded crawfish tail meat is crispy and the meat is juicier than subject tail meat), and; 3) contains ingredients not found in subject crawfish tail meat (e.g., seasonings, flour, starches, spices, colorants, sugar, milk, leavening, eggs, salt) that substantially alter the taste of the meat and result in a different carbohydrate, fat, caloric, and vitamin content. Maritime also states that it is not unusual to find breaded crawfish tail meat that is 40 to 50 percent meat, 40 percent batter/breading, and 10 percent phosphate/added water, by weight.

Furthermore, Maritime notes that CBP found that breading resulted in a significant change to subject crawfish tail meat. Specifically, Maritime states that CBP made the following comments regarding breaded crawfish tail meat:

The combined seasoning and breading operations performed upon the subject crawfish are not a mere surface application, but permanently alter one of the fundamental characteristics of the underlying crawfish meat – its taste. Thus, as a result of seasoning and breading, the imported crawfish undergoes a change in character.

See CBP's ruling HQ 560931 at 5 in Exhibit 3 of the Application.

Also, similar to crawfish etouffee, which the Department found to be outside of the scope of the instant order, Maritime argues that the breading process imparts the tail meat with flavors which cannot be extracted from, and which permanently alter the taste of, the tail meat. Maritime points out that the Department, in its scope ruling on crawfish etouffee, stated the following:

Once the tail meat is prepared in the etouffee, the tail meat included in the stew is permanently altered. The flavors contained in the etouffee, which penetrate the tail meat, cannot be extracted from the tail meat. The crawfish tail meat's fundamental characteristics have been altered.

See the Department's December 17, 2004 scope ruling on crawfish etouffee at 11 in Exhibit 5 of the Application.

The CPA considers the ingredients added to crawfish tail meat during the breading process to be minor, inexpensive ingredients which do not transform the product into something other than

crawfish tail meat.

Moreover, the CPA argues that Maritime's reliance on the above-referenced CBP ruling, which identifies the country of origin for certain U.S. imports of breaded crawfish tail meat, is misplaced. The CPA claims that the courts have repeatedly recognized that the results of CBP's "substantial transformation" test for determining country of origin are not controlling or even relevant with respect to the Department's scope rulings.²⁴ Also, the CPA notes that in the above-referenced ruling, CBP stated the following:

{I}t is important to note that the country of origin determinations made in this ruling are for Customs duty purposes only. The applicability of antidumping duties to imported merchandise is solely within the jurisdiction of the Department of Commerce.

In rebuttal, Maritime acknowledges that customs rulings are not binding with respect to Departmental decisions. However, argues Maritime, the cited customs ruling is relevant evidence. Therefore, Maritime asks the Department to rely upon Customs Ruling HQ 560931 in the manner that it did in finding crawfish etouffee to be outside of the scope of the instant order.

Department's Position

The question before the Department is whether the addition of breading, with its seasonings and associated ingredients, alters the physical characteristics of the crawfish tail meat to such an extent that breaded crawfish tail meat can no longer be considered a form of crawfish tail meat.²⁵ To answer this question, we compared the following characteristics of breaded crawfish tail meat and unbreaded subject crawfish tail meat: appearance/form, composition, flavor, and texture.

Appearance/Form

The breaded crawfish tail meat subject to this scope inquiry is sold as bite-size, individual pieces of curved or "J" shaped meat with all of the shell removed.²⁶ Breaded crawfish tail meat is off-

²⁴ See Diversified Products, 572 F. Supp 883, 887 (noting that "the ITA is in no wise obligated to follow nor is it bound by the classification determinations of Customs when it does clarify the scope of a dumping finding").

²⁵ See Crawfish Processors Alliance, Louisiana Department of Agriculture & Forestry, and Bob Odom, Commissioner v. United States, 483 F. 3d 1358, 1363 (CAFC 2007) (stating "the proper inquiry is whether the product etouffee is still properly considered freshwater crawfish tail meat or whether the tail meat had been transformed into a different product, such that it can no longer be considered crawfish tail meat").

²⁶ See Maritime's January 16, 2007 questionnaire response at Attachments 6A, 6B, and 6D (copies of which are in Attachment I to this memorandum).

white in color and has a coarser appearance than unbreaded subject merchandise.²⁷

Unbreaded subject merchandise is sold as approximately bite-size, individual pieces of curved or “J” shaped meat with all of the shell removed.²⁸ Tail meat is white or pink in color.²⁹ Subject crawfish tail meat may also be sold as partial shell-on tail meat.³⁰ Partial shell-on tail meat refers to bite-size, individual pieces of curved or “J” shaped meat still attached to the tail fins and the shell on the dorsal (top) side of the crawfish.³¹

Despite the fact that there is some variation in the contour of crawfish tail meat (including the presence of tail fins on the partial shell-on form of subject merchandise), the record shows that, typically, the form (i.e., shape and size) of breaded and unbreaded crawfish tail meat is similar.³² However, breaded crawfish tail meat and unbreaded subject merchandise differ in color and surface appearance.

Composition

Breaded crawfish tail meat consists of tail meat and a breading agent which typically contains flour, batter, breading, seasonings and possibly preservatives.³³ Maritime stated that breading formulations will vary to satisfy individual flavor requirements.³⁴ Further, Maritime reported that the additional ingredients used in the breading agent will change the carbohydrate, fat, caloric, and vitamin content from that of subject merchandise.³⁵ With respect to the tail meat, Maritime indicated that there is no difference between the tail meat subject to the instant order and the tail

²⁷ See Attachment I to this memorandum and Maritime’s January 16, 2007 questionnaire response at Attachment 6B.

²⁸ See Attachment I and II to this memorandum.

²⁹ See Crawfish Petition at 7 (a copy of which is in Attachment III to this memorandum).

³⁰ See Final Determination, 62 FR 41347, 41357.

³¹ See Crawfish Tail Meat from China, Commission Final Determination, USITC Inv. No. 731-TA-752 (Investigation), Pub. No. 3057 (August 1997) (“ITC Final Determination”).

³² See Attachment I and II to this memorandum.

³³ See Maritime’s January 16, 2007 questionnaire response at 3-4 and 8.

³⁴ See id. at 1.

³⁵ See Maritime’s Application at 12.

meat that is used to produce breaded crawfish tail meat.³⁶

Unbreaded subject merchandise consists of tail meat and, at times, added ingredients. Maritime's own supplier sells unbreaded crawfish tail meat containing sugar, dill, and salt (see Attachment II to this memorandum). Thus, both breaded and unbreaded crawfish tail meat may start with identical tail meat and include added seasonings. Breaded crawfish tail meat is not defined by a particular combination of seasonings, nor is it distinguished from unbreaded subject merchandise by the presence of seasonings. The distinction in composition between breaded and unbreaded crawfish tail meat is the presence of flour, batter, and breading and the nutritional and caloric effect they have on the crawfish tail meat.

Flavor

Maritime stated that the "taste of the subject tail meat changes to reflect the taste of the breading."³⁷ As noted above, Maritime reported that breading formulations will vary to satisfy individual flavor requirements. Maritime noted that the following items may be added to various components of the breading agent to flavor the product: (1) sugar, yeast, salt and dry spices may be added to the flour used to dust the tail meat; (2) mustard, Worcestershire sauce, tabasco sauce, and soy sauce can be added to the batter applied to the tail meat; and, (3) seasonings such as salt, pepper, powdered thyme, sage, paprika, cayenne pepper, and coriander are often added to the breading mix used to coat the tail meat.³⁸

Crawfish tail meat without added ingredients has a mild, slightly sweet flavor that has been compared to the flavor of shrimp and lobster.³⁹ The flavor of the meat varies depending on its fat content ("less fat results in less sweetness in the taste of the crawfish tail meat").⁴⁰ However, as noted above, unbreaded subject crawfish tail meat may be seasoned with added ingredients (e.g., sugar, dill, and salt). Thus, the flavor of unbreaded subject crawfish tail meat may vary depending upon the ingredients added to the products and both breaded and unbreaded crawfish tail meat may differ from the taste of unflavored crawfish tail meat.

Texture

Maritime reported that the breading used on crawfish tail meat adds a crispy texture to the

³⁶ See Maritime's January 16, 2007 questionnaire response at 11 (question 11).

³⁷ See id. at 3.

³⁸ See id. at 3-4.

³⁹ See Attachment IV to this memorandum.

⁴⁰ See ITC Final Determination.

product and creates a barrier which prevents moisture from escaping, thereby rendering the meat juicier than unbreaded subject merchandise.⁴¹ In addition, Maritime stated that a phosphate/salt wash is used to tenderize the meat.⁴²

Unbreaded crawfish tail meat has a firm texture⁴³ and can be somewhat rubbery.⁴⁴ Unlike breaded crawfish tail meat, unbreaded subject merchandise is not crispy.

In summary, breaded and unbreaded crawfish tail meat may start with identical tail meat, have a similar form, and include added ingredients which alter their content and taste from the content and taste of natural crawfish tail meat (*i.e.*, tail meat without added ingredients). On the other hand, breaded and unbreaded crawfish tail meat differ in color, texture, appearance, the presence of flour, batter and breading, and taste.

Notwithstanding the fact that there are differences between the physical characteristics of breaded and unbreaded crawfish tail meat, we have concluded that the changes in overall physical characteristics brought about by breading do not make the product something more than simply another form of tail meat. The breading agent that is responsible for these physical differences is meant to be a supporting ingredient that contributes additional features to the crawfish tail meat so as to enhance the meat for some consumers – not create something other than a variety of tail meat. Breaded crawfish tail meat cannot be viewed as a blend of ingredients comprising a new product where crawfish tail meat simply is one of the ingredients. The core of breaded crawfish tail meat is the tail meat.

Maritime argues that the CPA itself limited the “forms” of covered tail meat to only fresh or frozen, washed or fat on, purged or unpurged, or some combination of these forms. Although the scope of the order lists only certain forms of crawfish tail meat – “freshwater crawfish tail meat, *in all its forms* (whether washed or with fat on, whether purged or unpurged), . . .” (emphasis added), this parenthetical language has not been interpreted by the Department as limiting the scope. Partial shell-on crawfish tail meat, which is not listed in the scope description, was included in the scope of the instant order by the Department in its Final Determination.⁴⁵

⁴¹ See Maritime’s January 16, 2007 questionnaire response at 3.

⁴² See *id.* at 8.

⁴³ See Attachment IV to this memorandum.

⁴⁴ See ITC Sunset Determination at 51 (stating that Chinese tail meat producers have used a method of processing that “left Chinese tail meat with a rubbery texture However, . . . Chinese tail meat quality has improved since the original investigation”).

⁴⁵ See Final Determination at Comment 5.

Furthermore, we disagree with Maritime’s argument that the Department’s scope ruling on etouffee compels the finding that breaded crawfish tail meat is outside the scope of the order. In the etouffee scope ruling, the Department found that the overall physical characteristics of the tail meat (including fundamental characteristics such as flavor) underwent material changes which caused the tail meat to lose its identity and become a different product. Although breading changes some of the characteristics of crawfish tail meat, the changes are not as complete, nor as significant, as those found in the etouffee ruling. Unlike etouffee, which is a stew, breaded crawfish tail meat is still a piece of crawfish tail meat. Also, the flavors added through breading serve to season and enhance the meat, rather than integrate and blend it with other ingredients, as is the case with etouffee. Thus, the flavoring added by breading highlights the essence of the product, tail meat, rather than transforming the product into something other than tail meat. Moreover, since the flavor of crawfish tail meat can vary (see the advertisement for dill flavor unbreaded crawfish tail meat in Attachment II to this memorandum), simply flavoring tail meat through breading is not enough for us to redefine the product as something other than crawfish tail meat.

While CBP found that breading substantially transformed crawfish tail meat largely because it changed the flavor of the meat, changes from the natural crawfish tail meat taste also occur in other forms of subject merchandise (e.g. dill-flavored unbreaded crawfish tail meat). Thus, the flavor change noted by CBP does not necessarily distinguish breaded crawfish tail meat from unbreaded crawfish tail meat. Rather, when ingredients are added to a product, their overall affect on the physical characteristics of the product, and their relationship to the product,⁴⁶ must be examined to determine whether they create a new product. In ruling that crawfish tail meat underwent a substantial transformation when included in etouffee stew, the Department likened its ruling to CBP’s ruling on breaded crawfish, but based its ruling on changes to the overall physical characteristics of tail meat – not just the change in flavor.

We have concluded that the changes in overall physical characteristics brought about by breading do not make the product something more than simply another form of tail meat.

The Expectations of the Ultimate Purchasers

Interested Party Comments

Maritime maintains that most purchasers of subject merchandise plan to use it as an ingredient in dishes while purchasers of breaded crawfish tail meat plan to use it as the centerpiece of a meal in the form in which it was purchased. Maritime contends that the following comments by the Department in the crawfish etouffee scope ruling equally apply with respect to breaded crawfish tail meat:

⁴⁶ For example, added ingredients could simply be supporting ingredients that provide additional features to the original product or they could be blended with the original product in such a way that the original product becomes another ingredient in a new product.

The Department finds that the expectations of the ultimate users of etouffee differ from the ultimate users of crawfish tail meat. While the ultimate users of freshwater crawfish tail meat could include the tail meat as an ingredient in any variety of meals, etouffee is suitable only for heating and serving, and the tail meat included in the etouffee stew, as noted above, cannot then be used for any other purpose once it is included in the etouffee stew.

See the Department's December 17, 2004 scope ruling on crawfish etouffee at 12 in Exhibit 5 of the Application.

Maritime claims that purchasers prepare breaded crawfish tail meat for consumption by simply heating and serving it, while subject merchandise requires further cooking. According to Maritime, purchasers do not consider breaded crawfish tail meat to be interchangeable with subject merchandise. Thus, Maritime maintains that the expectations of the purchasers of breaded crawfish tail meat are dramatically different from those of purchasers of subject merchandise.

The CPA did not comment on the expectations of the ultimate purchasers of breaded crawfish tail meat and subject merchandise.

Department's Position

Although we agree with Maritime that consumers use unbreaded subject merchandise in a number of dishes that are not made with breaded crawfish tail meat (e.g., etouffees and bisques),⁴⁷ consumers' expectations do overlap for these products. Some consumers purchase unbreaded subject merchandise for breading and frying.⁴⁸ Some of the recipes listed in Exhibit 2 of the Application call for the crawfish tail meat to be breaded and fried (see Attachment VI to this memorandum). Also, contrary to Maritime's assertion, both breaded and unbreaded crawfish tail meat can be used as an ingredient in dishes and other prepared items. Attachment VII to this memorandum contains restaurant menus and a restaurant review identifying pasta dishes, salads, and sandwiches that contain breaded crawfish. Finally, contrary to Maritime's assertion, both breaded crawfish tail meat and unbreaded subject merchandise must be cooked before eating.⁴⁹

⁴⁷ See Attachment V to this memorandum.

⁴⁸ See ITC Preliminary Determination at 32 (noting that crawfish tail meat may be used in various dishes or served fried).

⁴⁹ See Maritime's January 16, 2007 questionnaire response at 11 acknowledging that "{b}readed tail meat must be cooked, by oven baking or frying in hot oil, before it can be eaten by the consumer."

The Ultimate Use of the Product

Interested Party Comments

Maritime characterizes subject merchandise as a multi-use product since it is used in a wide variety of prepared dishes whereas it notes that CBP characterized breaded crawfish tail meat as a single use product, essentially only suitable for deep frying.⁵⁰ According to Maritime, breaded crawfish tail meat cannot be used as a meal ingredient. Thus, Maritime argues that the ultimate use of breaded crawfish tail meat is entirely different from the ultimate use of subject merchandise.

The CPA finds Maritime's argument regarding limited end-uses for breaded crawfish tail meat to be unpersuasive. The CPA states that the Department rejected similar arguments involving extremely narrow end-uses in Softwood Lumber From Canada. Moreover, the CPA continues to maintain that Maritime's reliance on CBP rulings is misplaced.

As noted above, Maritime argues that the Department's decision in Softwood Lumber from Canada is irrelevant because the issues in that case were more complex than the issues here, and the decision was made in a separate class or kind analysis, not in a scope inquiry. On the other hand, Maritime contends that the scope ruling on crawfish etouffee is clear precedent for finding that narrowing the end-uses of crawfish tail meat renders it outside of the scope of the instant order.

Department's Position

While there is some narrowing in the use of crawfish tail meat when it is breaded, it is not accurate to consider breaded crawfish tail meat as a single use product that cannot be used as a meal ingredient. As noted above, breaded crawfish tail meat can be used as an ingredient in dishes and other prepared items (including some of the same dishes, such as crawfish pasta, in which unbreaded subject merchandise is used, see Attachments VI and VII to this memorandum). Further, both products can be served as an hors d'oeuvre or as an entree.⁵¹ Thus, there are similarities in the uses of breaded crawfish tail meat and unbreaded subject merchandise.

Additionally, limitations in end-use do not necessarily result in a product being outside the scope

⁵⁰ See CBP's ruling HQ 560931 at 5 in Exhibit 3 of the Application (noting that "prior to seasoning and breading operations the imported crawfish tails have a large variety of uses. ... Upon completion of the breading and seasoning operations, however, the processed crawfish are essentially suitable only for deep frying. The processing of the crawfish . . . results in a product suitable for preparation by a single method (deep frying), a limitation of such magnitude that it constitutes a change in the end-use of the product").

⁵¹ See Attachment VIII to this memorandum.

of the instant order. Partial shell-on crawfish tail meat, which is subject to the instant order, “is meant to be served alone, with tail fins splayed so that it looks like finger lobster.”⁵² Even though partial shell-on crawfish tail meat could be used in etouffees and bisques, the presence of a shell most certainly limits the range of dishes in which it is used compared to the range of dishes in which other forms of crawfish tail meat are used. Nonetheless, partial shell-on crawfish tail meat was included in the scope of the instant order by the Department in its Final Determination, because “shell-on crawfish tails are simply another form of crawfish tail meat, which are therefore included within the scope of the investigation.”⁵³

Further, we note that the Department did not rest its crawfish etouffee scope decision solely on the narrow end-use of etouffee. While applying the Diversified Products criteria in its etouffee scope inquiry, the Department stated that the crawfish tail meat in etouffee had also undergone a substantial transformation.

The Channels of Trade in Which the Product is Sold

Interested Party Comments

Maritime acknowledges that there may be some channels of trade used to sell both breaded crawfish tail meat and subject merchandise. Despite this commonality, Maritime argues that the differences between the physical characteristics, expected use, and ultimate use of breaded crawfish tail meat and subject merchandise should be viewed as controlling factors in this scope inquiry.

The CPA did not comment on the channels of trade used to sell breaded crawfish tail meat and subject merchandise.

Department’s Position

In testimony before the ITC, Mr. Jimmy Johnson, an employee of Sea Safari (a seafood processor located in North Carolina), stated that Sea Safari sold products, such as breaded crawfish tail meat, “to grocery chains, to restaurant chains, and to wholesale distributors.”⁵⁴

In the United States, the majority of unbreaded subject merchandise is sold to grocery stores,

⁵² See ITC Sunset Determination.

⁵³ See Final Determination at Comment 5.

⁵⁴ See Exhibit 1 of the CPA’s January 26, 2007 submission at 153-154 of the hearing transcript.

restaurants, and distributors.⁵⁵

Therefore, the record indicates that breaded crawfish tail meat and unbreaded subject merchandise are sold through the same channels of trade.

The Manner in Which the Product is Advertised and Displayed

Interested Party Comments

Maritime notes that breaded crawfish tail meat is not advertised or presented as unbreaded crawfish tail meat and unbreaded crawfish tail meat is not advertised or presented as breaded crawfish tail meat. Maritime states that breaded crawfish tail meat is advertised to the ultimate consumer in grocery store “specials of the week.” With respect to display, Maritime states that unbreaded crawfish tail meat is displayed in bags in the chilled seafood section of a grocery store whereas breaded crawfish tail meat is sold in boxes and displayed in the section of a grocery store where boxed prepared meals are displayed.

The CPA did not comment on the manner in which breaded crawfish tail meat and subject merchandise are advertised and displayed.

Department’s Position

Despite the fact that breaded crawfish tail meat and unbreaded crawfish tail meat are set apart by the use of the word breaded, we find it significant that both items are advertised as crawfish tail meat.⁵⁶ Also, contrary to Maritime’s claim, breaded and unbreaded crawfish tail meat are not always packaged in different containers (i.e., bags for unbreaded and boxes for breaded). Attachment IX to this memorandum contains a picture of breaded crawfish tail meat in a bag, not a box, as claimed by Maritime.

Use of Adverse Facts Available

As noted above, the CPA argues that any Diversified Products analysis must be based on adverse facts available (“AFA”) because Maritime failed to provide information required by the Department to appropriately conduct such an analysis. Specifically, the CPA states that Maritime: (1) failed to state whether the merchandise at issue was mechanically or hand breaded; (2) did not explain how much value is added to the tail meat by breading; and, (3) only provided estimates in response to the Department’s request to provide details (e.g., processing time, number of employees used) regarding the breading process.

⁵⁵ See ITC Preliminary Determination.

⁵⁶ See Attachment II to this memorandum.

We have not based our analysis on AFA. Section 776(a) of the Tariff Act of 1930, as amended (the Act), provides that if necessary information is not on the record or an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination. In using facts otherwise available, section 776(b) of the Act provides that if an interested party has failed to cooperate by not acting to the best of its ability, the Department may use an inference that is adverse to the interests of that party. We have the necessary information on the record to make the instant scope ruling. Additionally, Maritime provided timely responses to all of the Department's requests for information and has not significantly impeded the proceeding.⁵⁷ Therefore, there is no basis for resorting to facts available.

Conclusion

As the scope of the order does not clearly include or exclude breaded crawfish tail meat, the Department has considered breaded crawfish tail meat under the Diversified Products criteria set forth at 19 CFR § 351.225(k)(2), taking into account the difference in the overall physical characteristics, the expectations of the ultimate users, the ultimate end-use, the channels of trade, and the advertising and display of both breaded crawfish tail meat and unbreaded subject merchandise. While no single element of the Diversified Products criteria is dispositive, based on our comparative analysis of breaded crawfish tail meat and unbreaded subject merchandise under these criteria, as well as analysis of comments received, we have determined that breaded crawfish tail meat is covered by the order on freshwater crawfish tail meat from the PRC. If accepted, we will send the letter in Attachment X to this memorandum to interested parties, and will notify CBP of our determination.

⁵⁷ In describing the production process (and providing estimates regarding the time and number of workers required to produce breaded crawfish tail meat), Maritime noted that it is an importer, not a producer of breaded crawfish tail meat. Thus, Maritime stated that it was responding to the Department's request based on information available to it and its general knowledge of seafood processing.

Recommendation

Based on the analysis above, we recommend finding that breaded crawfish tail meat is covered by the order on freshwater crawfish tail meat from the PRC. We will send this memorandum to the parties to this proceeding, and will notify CBP of our determination.

Agree _____ Disagree _____

Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

Date