

MEMORANDUM

TO: David M. Spooner
Assistant Secretary
for Import Administration

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

RE: Preliminary Results Under Section 129 of the Uruguay Round Agreements Act:
Antidumping Measures on Frozen Warmwater Shrimp from Ecuador

SUBJECT: Calculation of the Weighted-Average Dumping Margins

Summary

Consistent with section 129 of the Uruguay Round Agreements Act (URAA), which provides for determinations by the Department of Commerce (the Department) to implement the findings of World Trade Organization (WTO) dispute settlement reports, the Department has calculated new rates with respect to the antidumping duty investigation on frozen warmwater shrimp (shrimp) from Ecuador in order to implement the WTO panel's report in *United States – Antidumping Measure on Shrimp from Ecuador* (WT/DS/335) (Panel Report). If the U.S. Trade Representative, after consulting with the Department and Congress, directs the Department to implement, in whole or in part, this determination, the antidumping duty order on shrimp from Ecuador will be revoked with respect to entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date on which the U.S. Trade Representative so directs.

Background

On December 23, 2004, the Department published a final determination of sales at less than fair value in the antidumping duty investigation on certain frozen warmwater shrimp from Ecuador. See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Ecuador*, 69 FR 79613 (December 23, 2004) (Final Determination), and accompanying Issues and Decision Memorandum. Following an affirmative injury determination issued by the United States International Trade Commission, the Department published an amended final determination and antidumping duty order on this product on

February 1, 2005. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Ecuador*, 70 FR 5156 (February 1, 2005) (Amended Final Determination and Order).

Subsequently, the Government of Ecuador requested the establishment of a WTO dispute settlement panel (the Panel) to consider various aspects of the Department's final determination in this case. The Panel circulated its report on January 30, 2007. The Panel found that the Department acted inconsistently with Article 2.4.2, first sentence, of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement). On February 20, 2007, the WTO Dispute Settlement Body (DSB) adopted the Panel Report. On March 20, 2007, the United States informed the DSB that it would implement the Panel Report.

Section 129 of the URAA¹ provides for determinations issued by the Department to implement the findings of WTO dispute settlement panels or the Appellate Body. Specifically, section 129(b)(2) provides that "notwithstanding any provision of the Tariff Act of 1930 . . .," (the Act), within 180 days of a written request from the U.S. Trade Representative, the Department shall issue a determination that would render its actions not inconsistent with an adverse finding of a WTO panel or the Appellate Body. See 19 USC 3538(b)(2). The Statement of Administrative Action, URAA, H. Doc. 316, Vol. 1, 103d Cong. (1994) (SAA) variously refers to such a determination by the Department as a "new," "second," and "different" determination. See SAA at 1025, 1027. This determination is subject to judicial review separate and apart from judicial review of the Department's original determination. See 19 USC 1516a(a)(2)(B)(vii).

In addition, section 129(c)(1)(B) of the URAA expressly provides that a determination under section 129 applies only with respect to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the U.S. Trade Representative directs the Department to implement that determination. In other words, as the SAA clearly provides, "such determinations have prospective effect only." See SAA at 1026. Thus, "relief available under subsection 129(c)(1) is distinguishable from relief in an action brought before a court or a NAFTA binational panel, where . . . retroactive relief may be available." See id.

Panel Findings and Conclusions

Article 2.4.2 of the Antidumping Agreement provides three means of calculating a dumping margin "during the investigation phase." Specifically, Article 2.4.2 states that, "normally," a margin "will be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" or that it will be established "by a comparison of normal value and export prices on a transaction-to-transaction

¹ Citation to "section 129" refers to section 129 of the URAA, codified at 19 USC 3538.

basis.” The third means of comparison, a comparison of “a normal value on a weighted average basis with individual export transactions,” is provided for when certain criteria exist.

For purposes of the Final Determination and the Amended Final Determination and Order, the Department calculated dumping margins for the investigated respondents using weighted-average-to-weighted-average comparisons. Specifically, the Department compared weighted-average export prices (EPs) to weighted-average normal values (NVs). When the EP was greater than the NV, the comparison showed no dumping. In these circumstances, the Department did not offset or reduce the amount of dumping found on other comparisons based on the amount by which the EP exceeded the NV for distinct comparisons. When the EP was less than the NV, the comparison was considered to have revealed dumping. In order to calculate the weighted-average dumping margin, the Department aggregated the amount of dumping found through these comparisons and divided it by the aggregate value of all U.S. sales (regardless of whether they were dumped) to ensure that the results took account of all comparisons and, thus, all U.S. sales, dumped and non-dumped.

In making its findings, the Panel considered the reasoning of the Appellate Body in *United States – Final Dumping Determination on Softwood Lumber from Canada* (WT/DS/264/AB/R), adopted August 31, 2004. The Appellate Body found that, when an investigating authority utilizes the average-to-average comparison methodology during the investigation phase and engages in multiple comparisons of EP and NV, the margin of dumping for the product in question must reflect the results of all comparisons, including comparisons where the EP is greater than the NV for individual models. Accordingly, the Appellate Body found that the Department acted inconsistently with Article 2.4.2 of the Antidumping Agreement in the less-than-fair-value investigation of softwood lumber from Canada. The Panel found the Appellate Body’s reasoning persuasive and adopted it as its own. See Panel Report, para. 7.41.

Implementation

We have preliminarily determined to implement the Panel’s findings by recalculating the weighted-average dumping margins at issue in the antidumping duty investigation and applying the calculation methodology described in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification* (Final Modification); see 71 FR 77722 (December 27, 2006) (stating that the Department will normally calculate weighted-average dumping margins in investigations using average-to-average comparisons, and in doing so the Department will provide offsets for non-dumped comparisons.) As a result of the changes to the calculations, we have determined that the following antidumping margins exist for the two companies found to have above *de minimis* margins in the Amended Final Determination and Antidumping Order:

<u>Manufacturer/Exporter</u>	<u>Weighted-Average Margin</u>
Exporklore S.A. (Exporklore)	0.00%
Promarisco S.A. (Promarisco)	1.75% (<i>de minimis</i>)

In the Amended Final Determination and Antidumping Order, the Department found the margin for the third respondent, Exportadora de Alimentos S.A. (Expalsa), to be *de minimis*. Accordingly, as a result of the changes to the calculations, the “All Others” rate is also *de minimis*. Therefore, if these margins remain at zero or *de minimis* for purposes of the final results, this order will be revoked.

Interested Party Comments

Interested parties may submit case briefs and/or written comments no later than June 15, 2007. Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than June 22, 2007. Parties who submit arguments are requested to submit with the argument (1) a statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities. Further, the parties submitting written comments should provide the Department with an additional copy of the public version of any such comments on computer media. Interested parties may request a hearing on the issues raised in the case and rebuttal briefs no later than June 20, 2007.

Revocation

In accordance with sections 129(b)(4) and 129(c)(1)(B) of the URAA, if the U.S. Trade Representative, after consulting with the Department and Congress, directs the Department to implement, in whole or in part, this determination, we will instruct U.S. Customs and Border Protection (CBP) to terminate the suspension of liquidation for all shipments of subject merchandise, entered or withdrawn from warehouse, for consumption on or after the date upon which the U.S. Trade Representative directs the Department to implement its final results (the effective date). Further, the Department will instruct CBP to liquidate without regard to antidumping duties (release all bonds and refund all cash deposits) entries of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date.

RECOMMENDATION

In light of the Panel's report, we recommend preliminarily determining to implement the recommendations and rulings of the DSB by applying the methodology in the Final Modification, and adopting the above-referenced recalculated weighted-average dumping margins.

Agree _____ Disagree _____

David M. Spooner
Assistant Secretary
for Import Administration

(Date)