

MEMORANDUM TO: Louis Apple  
Director, Office 2  
AD/CVD Operations

THROUGH: Shawn Thompson  
Program Manager, Office 2  
AD/CVD Operations

FROM: Irina Itkin  
Elizabeth Eastwood  
Alice Gibbons  
AD/CVD Operations, Office 2

RE: Ministerial Error Allegations in the Final Determination of the Antidumping Duty Investigation on Certain Frozen Warmwater Shrimp from Thailand

I. Summary

On December 30, 2004, we received an allegation from the petitioners (*i.e.*, the Ad Hoc Shrimp Trade Action Committee, Versaggi Shrimp Corporation, and Indian Ridge Shrimp Company) that the Department of Commerce (the Department) made a ministerial error with respect to its exclusion of “dusted” shrimp from the scope of this investigation. On December 28, 2004, Eastern Fish Company, Inc. (Eastern Fish) and Long John Silver’s Inc. (LJS), interested parties in this investigation, submitted a response to the petitioners’ December 23, 2004, ministerial error allegations. In addition, on December 30, 2004, we received allegations from the petitioners and the respondents (*i.e.*, Andaman Seafood Co., Ltd., Chanthaburi Seafoods Co., Ltd., and Thailand Fishery Cold Storage Public Co., Ltd. (collectively, the Rubicon Group); Thai I-Mei Frozen Foods Co., Ltd. (Thai I-Mei); and the Union Frozen Products Co., Ltd. (UFP)) that the Department also made ministerial errors in the final margin calculations. On January 6, 2004, we received submissions containing rebuttal comments from the petitioners, the Rubicon Group, and UFP.

## II. Definition of Ministerial Error

A “ministerial error” is defined under 19 CFR 351.224(f) as:

an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial.

See also section 735(e) of the Tariff Act of 1930, as amended.

## III. General Allegation

### 1. Exclusion of Dusted Shrimp from the Scope of Investigation

The petitioners contend that the Department made a ministerial error in the exclusion of dusted shrimp from the scope of this investigation. Petitioners note that the Department excluded dusted shrimp from the scope of this investigation in spite of the petitioners’ opposition. The petitioners point to the fact that the Department cited significantly the declarations of Dr. Otwell and Mr. Thompson submitted by Eastern Fish and LJS in support of excluding dusted shrimp. The petitioners contend that the Department based much of its decision to exclude dusted shrimp from the scope of this investigation on these affidavits. The petitioners specifically note that the Department referenced both declarations eight times regarding an adequate definition to separate dusted shrimp from subject merchandise and at least four times regarding the fact that the benefits of removing the dusting layer from the shrimp did not outweigh the costs.

The petitioners contend that they provided a declaration that directly rebutted many of the claims by Eastern Fish and LJS. According to the petitioners, their declaration stated that frozen dusted shrimp can have its dusting layer removed. Additionally, the practice of thawing and rinsing undusted frozen shrimp is common industry practice, thus the same can be done for dusted shrimp. Furthermore, the barriers to removing the dusting layer are economic, not physical. The declaration provided by the petitioners further noted that the cost of removing the dusting layer could be more economically sensible than paying the dumping duty. The declaration also notes that the technology to remove the dusting layer is available. See the petitioners’ December 7, 2004, scope submission at page 11.

According to the petitioners, the Department did not address these statements, which directly contested Eastern Fish’s and LJS’ claims, in its decision. See the November 29, 2004, memorandum to Barbara E. Tillman, Acting Deputy Assistant Secretary for Import Administration, from Edward C. Yang, Vietnam/NME Unit Coordinator, Import Administration Re: Antidumping Investigation on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the Socialist Republic of Vietnam and the People’s Republic of China

entitled, “Scope Clarification on Dusted Shrimp and Battered Shrimp” (Dusted/Battered Scope Memo). Furthermore, the petitioners assert that the Department did not acknowledge that the petitioners’ declaration even existed. The petitioners therefore conclude that the Department completely overlooked the petitioners’ declaration, and thus made an unintentional error that must be corrected by including dusted shrimp in the scope of this investigation.

Eastern Fish and LJS respond to these allegations by stating that, in excluding certain dusted shrimp from the scope of these investigations, the Department thoroughly identified and analyzed all of the evidence and arguments submitted by all parties. Eastern Fish and LJS also state that, to be a ministerial error, in accordance with 19 CFR 351.224(c)(1), the alleged error must pertain to calculations used by the Department to determine antidumping duty margins. As such, the alleged error of failing to consider a declaration does not in any manner relate or pertain to any exporter’s disclosed dumping margin calculation. Lastly, Eastern Fish and LJS point out that, to qualify as a correctable ministerial error, an alleged error must meet at least one of three definitions listed in 19 CFR 351.225(f). Eastern Fish and LJS argue that the petitioners do not identify which of the three definitions fits the alleged error. Furthermore, Eastern Fish and LJS state that the alleged error does not fit any of the three definitions because it was deliberate and cannot be considered ministerial in any way.

#### Analysis and Recommendation

We disagree with the petitioners that the Department made a ministerial error within the meaning of 19 CFR 351.224(f) in its decision to exclude dusted shrimp from the scope of this investigation. The Department notes that it did not reference the petitioners’ affiant by name, but did reference the provided affidavit and statements made by the affiant. See Dusted/Battered Scope Memo at pages 15 and 16. The Department carefully reviewed and considered all evidence submitted by all parties prior to making its determination to exclude dusted shrimp from the scope of this investigation as well as the concurrent warmwater shrimp investigations. See Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam, 69 FR 71005 (Dec. 8, 2004). The Department’s decision to exclude dusted shrimp from the scope of this investigation was an intentional decision, not a ministerial error.

Agree \_\_\_\_

Disagree \_\_\_\_

Let’s Discuss \_\_\_\_\_

#### IV. Company-Specific Allegations

##### 1. Calculation of a Single Weighted-Average Cost for Each Control Number for the Rubicon Group

The petitioners allege that the Department made a ministerial error in the final determination because it calculated more than one cost for the same control number for the Rubicon Group. According to the petitioners, this error occurred in several instances where the Department re-coded the Rubicon Group's reported "as-sold" count sizes and then applied costs using market-specific product information. Consequently, the petitioners assert that the Department should revise its calculations for the Rubicon Group to calculate one weighted-average cost for each unique control number, regardless of the market in which the product was sold. In their submission, the petitioners suggested computer programming language to correct the problem.

In response, the Rubicon Group contends that this issue is not a ministerial error, but rather reflects an intentional methodological decision made by the Department earlier in the proceeding. Specifically, the Rubicon Group notes that, at the preliminary determination, the Department made a methodological decision to: 1) re-code sales of the reported actual count sizes for all respondents based on the midpoint of the count size ranges designated by the Department in the original questionnaire;<sup>1</sup> and 2) average together the costs associated with the re-coded merchandise for each market. According to the Rubicon Group, because the Group is comprised of several different manufacturers with their own costs, some of which do not sell identical products in both the comparison and U.S. markets, the Department correctly relied on control numbers which contained the average costs for more than one count size. In any event, the Rubicon Group states the Department should not use the petitioners' proposed computer programming language because it would double-count certain costs by including the costs for various count sizes in more than one control number.

In a separate argument, the Rubicon Group asserts that the Department should re-code the "as-sold" count sizes for the Rubicon Group to be consistent with the count size coding employed for Thai I-Mei for the final determination (i.e., at the high point of the reported range based on the actual production experience of the company). See Notice of Final Determination of Sales

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<sup>1</sup> See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Certain Frozen and Canned Warmwater Shrimp from Thailand, 69 FR 47100, 47103 (Aug. 4, 2004); and the July 28, 2004, memo from Irina Itkin to the file, entitled "Calculations Performed for Andaman Seafood Co., Ltd., Chanthaburi Seafoods Co., Ltd. and Thailand Fishery Cold Storage Public Co., Ltd. (collectively "the Rubicon Group") for the Preliminary Determination Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from Thailand" at item 2.

at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand, 69 FR 76918 (Dec. 23, 2004) (Final Determination) and accompanying issues and decision memorandum at Comment 11. If the Department decides that a revision to the count size methodology used in the preliminary determination is warranted, the Rubicon Group argues that the Department should use the control numbers reported by the Rubicon Group in its sales and cost databases.<sup>2</sup>

#### Analysis and Recommendation

We agree with the petitioners that we made a ministerial error by unintentionally calculating more than one cost for the same control number for the Rubicon Group for the final determination. Further, we disagree with the Rubicon Group that this issue is methodological in nature because it is the Department's long-standing policy to calculate a single cost for each control number. Contrary to the Rubicon Group's claim, the Department did not intend to calculate more than one cost for the same control number. In fact, this issue was raised as a ministerial error at the preliminary determination of the companion Indian investigation. At that time, the Department acknowledged that this error was ministerial in nature. See the August 20, 2004, memorandum to Louis Apple, Director Office 2, from the Team entitled, "Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from India: Respondent's Allegations of Ministerial Errors in the Preliminary Determination" at page 3.

Regarding the Rubicon Group's argument that the Department should re-code the "as-sold" count sizes for the Rubicon Group to be consistent with the count size coding employed for Thai I-Mei for the final determination, we disagree that it would be appropriate to do so. As stated in the Final Determination at Comment 11, we determined that it was appropriate to use Thai I-Mei's "as-sold" count sizes based on our findings at verification that they correspond to Thai I-Mei's actual production experience. Regarding the other respondents, we intended to apply a standard product comparison in the preliminary determination by fitting the "as-sold" count sizes into the count size ranges specified in the questionnaire given the variety and overlap of the "as-sold" count size ranges reported by the respondents in this case. See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Certain Frozen and Canned Warmwater Shrimp from Thailand, 69 FR 47100, 47103 (Aug. 4, 2004). In contrast to the situation with Thai I-Mei, we did not make similar verification findings with respect to the Rubicon Group. Thus, given that we intended to follow the coding methodology outlined in the preliminary determination, we find that this issue is methodological in nature and it would be

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<sup>2</sup> These control numbers are based on the "as-sold" count sizes reported by the Rubicon Group rather than the count sizes reclassified to the midpoint of the Urner Barry range, as performed by the Department for the preliminary determination.

inappropriate to address it in the context of the ministerial error provision. Consequently, we recommend revising our calculations for the amended final determination for the Rubicon Group to calculate a single weighted-average cost for each unique control number.

Agree \_\_\_\_ Disagree \_\_\_\_ Let's Discuss \_\_\_\_\_

2. Calculation of U.S. Inventory Carrying Cost for the Rubicon Group

According to the Rubicon Group, the Department incorrectly adjusted the U.S. inventory carrying cost for its U.S. affiliate, Rubicon Resources, for the time between shipment date and invoice date for the final determination. Specifically, the Rubicon Group contends that the Department's adjustment was not warranted because the revised inventory carrying cost submitted by the Rubicon Group to the Department on October 22, 2004: 1) reflected the most up-to-date shipment dates (submitted to the Department on July 28, 2004); and 2) appropriately excluded the time between shipment date and sale date.<sup>3</sup> The Rubicon Group argues that the adjustment made by the Department for the final determination double-counts the time period between shipment date and invoice date. Therefore, the Rubicon Group argues that the Department should recalculate U.S. inventory carrying cost for its U.S. affiliate to exclude the adjustment made for the final determination.

The petitioners did not comment on this issue.

Analysis and Recommendation

We disagree that the Department made the ministerial error described above. The item described by the petitioners is methodological in nature and does not fit the definition of a ministerial error under 19 CFR 351.224(f). The Department's decision to adjust the Rubicon Group's U.S. sales was intentional and not a ministerial error. Specifically, in the calculations performed for the Rubicon Group for the final determination, we stated that we revised the calculation of inventory carrying costs for constructed export price sales in order to account for the revised dates of shipment submitted on July 28, 2004. See the December 17, 2004, memorandum from Brianne Riker through Irina Itkin to the file entitled "Calculations Performed for Andaman Seafood Co., Ltd., Chanthaburi Seafoods Co., Ltd., and Thailand Fishery Cold

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<sup>3</sup> The Rubicon Group notes that, in its October 22 response, it also decreased its reported credit expenses to exclude the time between shipment date and sale date.

Storage Public Co., Ltd. for the Final Determination in the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from Thailand,” at item 3. Thus, we recommend not amending the Rubicon Group’s calculations to revise inventory carrying costs.

Agree \_\_\_\_ Disagree \_\_\_\_ Let’s Discuss \_\_\_\_\_

3. Calculation of Commission Offset for Thai I-Mei

According to Thai I-Mei, the Department made a ministerial error in calculating the commission offset used in its margin calculations for the final determination. Specifically, Thai I-Mei alleges that the Department should have converted commission expenses<sup>4</sup> from Thai baht to U.S. dollars because these expenses are used in the calculation of the commission offset, which is denominated in U.S. dollars.

The petitioners did not comment on this issue.

Analysis and Recommendation

We agree that we made a ministerial error in the calculation of the commission offset for Thai I-Mei. Specifically, we note that we inadvertently compared Thai baht-denominated commission expenses to commission expenses incurred in U.S. dollars in the calculation of the commission offset, rather than converting the third-country commission expenses to U.S. dollars. Consequently, we recommend correcting this error because it was unintentional, within the meaning of 19 CFR 351.224(f).

Agree \_\_\_\_ Disagree \_\_\_\_ Let’s Discuss \_\_\_\_\_

4. Production Costs for Thai I-Mei

Thai I-Mei alleges that the Department made a ministerial error by inadvertently recalculating the costs for certain control numbers. Specifically, Thai I-Mei asserts that when the Department re-coded the species of certain of Thai I-Mei’s sales from black tiger shrimp (i.e., a SPECIESU code of “4”) to white shrimp (i.e., a SPECIESU code of “3”), it incorrectly calculated a total cost of manufacture for this merchandise by weight-averaging the reported costs for both black tiger and white shrimp whenever there were other sales reported with the same control number. According to Thai I-Mei, the resulting total costs of manufacture for these control numbers are different from the verified costs, and therefore the Department should amend its calculations to assign the verified costs for the re-coded merchandise.

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<sup>4</sup> These expenses were calculated using the weighted-average of the Rubicon Group’s and UFP’s third-country commission expenses.

The petitioners argue that this issue is methodological in nature, and that Thai I-Mei's allegation should therefore be rejected. The petitioners contend that the Department's recalculation of costs for the re-coded sales is warranted because Thai I-Mei did not report costs for certain re-coded control numbers, and therefore the Department had to determine an appropriate methodology to assign such costs. In addition, the petitioners contend that the Department used the same methodology to assign costs to the re-coded sales for the preliminary determination, and Thai I-Mei did not contest such methodology in its case brief for the final determination.

#### Analysis and Recommendation

Certain of Thai I-Mei's sales of white shrimp were incorrectly invoiced as black tiger shrimp. Consequently, for the final determination we re-coded these sales to reflect the actual species of shrimp produced (i.e., white). See item 5 of the December 17, 2004, memorandum from Alice Gibbons to the File, entitled "Calculations Performed for Thai I-Mei Frozen Foods Co., Ltd. for the Final Determination in the Investigation of Certain Frozen and Canned Warmwater Shrimp from Thailand."

We agree with Thai I-Mei that we incorrectly applied weighted-average costs to the re-coded merchandise, rather than using the actual verified costs for these sales. Specifically, when we re-coded the species for certain sales from black tiger to white shrimp and renamed the control number variable in the sales database (to be CONNUM2), we incorrectly sorted (and averaged) the data using the variable CONNUM2U. As a result, the total costs of manufacturing for all re-coded merchandise were incorrectly calculated using a weighted average of the costs for the black tiger and white merchandise. We disagree with the petitioners that this issue is methodological in nature because our intent was to treat the sales in question as white shrimp for sales and cost purposes. Therefore, we recommend correcting this error and recalculating the costs for the merchandise for which we re-coded the species.

In correcting the error noted above, we found that cost information for eight of Thai I-Mei's re-coded control numbers is missing from the record. Therefore, we based the cost for these products on facts available. As facts available, because species is a component that is low in the hierarchy of characteristics comprising the control number, we recommend using the average total cost of manufacturing of all control numbers reported in Thai I-Mei's cost database. This average is a reasonable approximation of the missing cost data. We recommend finding that the use of adverse facts available is not appropriate here, given that: 1)

Thai I-Mei has fully cooperated in this investigation; and 2) we were unaware that the information in question was missing from the record and thus we did not provide Thai I-Mei an opportunity to supply it during verification.<sup>5</sup>

Agree \_\_\_\_\_ Disagree \_\_\_\_\_ Let's Discuss \_\_\_\_\_

5. Treatment of Billing Adjustments Related to UFP's Marketing Agreement

The petitioners assert that the Department incorrectly subtracted billing adjustments related to UFP's marketing agreement (i.e., reported in the field BILLADJ2TA) from the gross unit price in its calculation of third-country net price and in its recalculation of third-country credit expenses for the final determination. Specifically, the petitioners assert that, in UFP's June 3, 2004, submission, UFP confirmed that the negative amounts shown in the field BILLADJ2TA reflected an overpayment of the amount invoiced and should be added to, not deducted from, the gross unit price.

UFP disagrees with the petitioners' allegation that the Department made a ministerial error in its treatment of UFP's billing adjustments reported in the field BILLADJ2TA. UFP maintains that the Department correctly subtracted the verified amounts reported in the field BILLADJ2TA from the gross unit price. According to UFP, subtracting the negative BILLADJ2TA amounts from the gross unit price correctly adds the additional revenue received to the gross unit price, while the subtraction of positive BILLADJ2TA amounts correctly accounts for sales that were made at a lower price than originally invoiced. Consequently, UFP contends that the Department's calculations correctly accounted for the amounts reported in the field BILLADJ2TA; thus, it argues that the Department should reject the petitioners' ministerial error allegation.

Analysis and Recommendation

We disagree that the Department made a ministerial error in its treatment of billing adjustments related to billing errors (i.e., reported in the field BILLADJ2TA). We note that, as explained by UFP, above, subtracting a negative amount reported in the field BILLADJ2TA in effect adds the amount of the billing adjustment to gross unit price. Therefore, we recommend finding that the Department's treatment of these billing adjustments in the final determination is correct and not modifying our calculations for UFP.

Agree \_\_\_\_\_ Disagree \_\_\_\_\_ Let's Discuss \_\_\_\_\_

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<sup>5</sup> Thai I-Mei submitted cost data for each of its reported control numbers. The need for the missing information arose solely because of the re-coding issue identified at verification.

6. Excluding Packing Expenses from the Calculations of General and Administrative Expenses (G&A) and Interest Expenses (INTEX) for UFP

UFP states that the Department made a ministerial error by including packing expenses (reported in the field PACK) in its calculations of G&A and INTEX for UFP for the final determination. UFP argues that the denominators of the G&A and INTEX rates reported by UFP and used in the calculations for the final determination are net of packing expenses. Therefore, according to UFP, the Department erred by applying G&A and INTEX rates that excluded packing expenses to values that included packing expenses. Consequently, UFP argues that the Department should amend its calculations to exclude packing expenses from G&A and INTEX.

The petitioners did not comment on this issue.

Analysis and Recommendation

We agree that the Department made a ministerial error by including the field PACK in the calculation of G&A and INTEX for UFP because the cost of goods sold figure was reported net of packaging costs. Thus, it is appropriate for the Department to base its calculation of INTEX and G&A expenses on total cost of production excluding these packaging costs. Consequently, we recommend revising the calculation of G&A and INTEX accordingly.

Agree \_\_\_\_                      Disagree \_\_\_\_                      Let's Discuss \_\_\_\_\_

7. Deducting Packing Expenses from the Calculation of the Net Comparison-Market Sales Price (NPRICOP) for UFP

UFP alleges that the Department inadvertently deducted home market packing expenses from the calculation of NPRICOP, while including such expenses in the calculation of total cost of production. UFP states that, according to Policy Bulletin 94.6, the Department has recognized that in performing the sales-below-cost test under 19 U.S.C. 1677b(b), "both the net cost of production and the net home-market prices should be on the same basis, (e.g., packed, ex-factory, net of selling expenses); otherwise, the comparison would be distorted." According to UFP, this error resulted in an unreasonable application of the sales-below-cost test. UFP contends that the Department should correct this error by not deducting packing expenses from NPRICOP in the comparison market program.

The petitioners did not comment on this issue.

### Analysis and Recommendation

We disagree that the Department made the ministerial error described above. As noted in item 7, the amounts included in the field PACK in the cost of production database are inner packaging costs, not packing expenses. The Department did appropriately include these inner packaging costs in the calculation of total cost of production. Further, the Department ensured it was making an apples-to-apples comparison when it deducted packing expenses from NPRICOP before comparing it with total cost of production in the sales-below-cost test because total cost of production does not include packing expenses. Thus, we recommend finding that the Department's deduction of packing expenses from NPRICOP is correct and not modifying our calculations for UFP.

Agree \_\_\_\_                      Disagree \_\_\_\_                      Let's Discuss \_\_\_\_

### V. Amended Margins

If the team recommendations are accepted, the final margins become:

Manufacturer/Exporter	Final Determination Weighted-average margin (in percent)	Amended Weighted-average margin (in percent)
Andaman Seafood Co., Ltd.	5.79	5.91
Chanthaburi Seafoods Co., Ltd.	5.79	5.91
Chanthaburi Frozen Food Co., Ltd.	5.79	5.91
Phattana Seafood Co., Ltd.	5.79	5.91
S.C.C. Frozen Seafood Co., Ltd.	5.79	5.91
Thai I-Mei Frozen Foods Co., Ltd.	6.20	5.29
Thailand Fishery Cold Storage Public Co., Ltd.	5.79	5.91
Thai International Seafood Co., Ltd.	5.79	5.91
The Union Frozen Products Co., Ltd.	6.82	6.82
Wales & Company Universe, Ltd.	5.79	5.91
Y2K Frozen Food Co., Ltd.	5.79	5.91
All Others	6.03	5.95

### VI. Recommendation

We recommend correcting each of the errors noted above and calculating revised dumping margins for each of the three respondents. In addition, we recommend recalculating: 1) the weighted-average selling expenses and CV profit rate for Thai I-Mei using the revised figures for the Rubicon Group and

UFP using the calculation in Attachment I; and 2) the “all others” rate, given that this rate is based on the dumping margins found for the three participating respondents.

Agree \_\_\_\_                      Disagree \_\_\_\_                      Let’s Discuss \_\_\_\_\_

\_\_\_\_\_  
Louis Apple  
Director, Office 2  
AD/CVD Operations

\_\_\_\_\_  
(Date)

Attachment