

January 12, 2009

MEMORANDUM TO: Ronald K. Lorentzen  
Acting Assistant Secretary  
for Import Administration

FROM: Gary Taverman  
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

RE: Final Results of Proceeding Under Section 129 of the Uruguay  
Round Agreements Act (URAA): Antidumping Measures on  
Frozen Warmwater Shrimp from Thailand

SUBJECT: Issues and Decision Memorandum for the Final Results

Summary

This memorandum addresses issues raised by the parties participating in the above-referenced proceeding. Below is a complete list of the issues in this proceeding for which we have received comments from the parties:

- Comment 1: Whether the Department of Commerce (the Department) Has the Authority to Implement a Determination Pursuant to Section 129 of the URAA
- Comment 2: Whether the Preliminary Results are Consistent with U.S. Law
- Comment 3: Alternative Calculation Methodologies
- Comment 4: Effective Date of Implementation
- Comment 5: The Rubicon Group Companies Subject to this Proceeding

Background

The Department issued its preliminary results in this proceeding on November 21, 2008. See Memorandum from Stephen J. Claeys to David M. Spooner entitled “Calculation of the Weighted-Average Dumping Margins” (Preliminary Results). Since we issued the Preliminary Results, we have received case briefs and rebuttal briefs, respectively, from the Ad Hoc Shrimp Trade Action Committee (the petitioner) and two respondents: the Rubicon Group (i.e.,

Andaman Seafood Co., Ltd. (Andaman), Chanthaburi Frozen Food Co., Ltd. (Chanthaburi Frozen), Chanthaburi Seafoods Co., Ltd. (Chanthaburi Seafoods), Intersia Foods Co. Ltd. (Intersia)<sup>1</sup>, Phatthana Seafood Co., Ltd. (Phatthana Seafood)<sup>2</sup>, S.C.C. Frozen Seafood Co., Ltd. (S.C.C.), Thailand Fishery Cold Storage Public Co. (Thailand Fishery), Thai International Seafoods Co., Ltd. (Thai International), and Wales & Co. Universe Limited (Wales))<sup>3</sup>, and Thai I-Mei Frozen Foods Co., Ltd. (Thai I-Mei). Pursuant to a request by the petitioner, we held a public hearing on December 17, 2008.

### Discussion of Issues

#### Comment 1: Whether the Department Has the Authority to Implement a Determination Pursuant to Section 129 of the URAA

The petitioner contends that the Department has no authority to implement the findings of a World Trade Organization (WTO) dispute settlement panel (the Panel) that are legally erroneous and contrary to the terms of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement). The petitioner argues that there are myriad problems with the various WTO dispute settlement reports emanating from the WTO Appellate Body and dispute settlement panels on the issue of “zeroing.” The petitioner contends that the Department should not implement the Panel’s findings at issue in this proceeding because they are contrary to the positions taken by the United States in the course of other WTO disputes and in WTO negotiations. The petitioner notes the criticisms made by the United States against the Appellate Body’s recent findings on the issue of “zeroing” and the United States’ defense of “zeroing” in calculating margins in recent WTO disputes, as well as in a communication presented to the Negotiating Group on Rules on June 1, 2007, proposing that the issue of “zeroing” be addressed in the context of the WTO Rules negotiations.<sup>4</sup>

Alternatively, the petitioner argues the Department should suspend implementation of the Panel’s findings until the issue of “zeroing” is expressly resolved through multilateral

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<sup>1</sup> The Department made a formal finding that Intersia is the successor-in-interest to Y2K Frozen Food Co, Ltd (Y2K), in the 2006-2007 administrative review. See Certain Frozen Warmwater Shrimp From Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 FR 50933, 50935 (Aug. 29, 2008) (06-07 Final Results).

<sup>2</sup> In the less-than-fair-value (LTFV) investigation the Department spelled the name of this company as “Phattana Seafoods;” however the correct spelling of this company’s name is “Phatthana Seafoods.”

<sup>3</sup> The Rubicon Group filed its case and rebuttal briefs on behalf of two additional companies, Phatthana Frozen Food Co., Ltd. (Phatthana Frozen), and Sea Wealth Frozen Food Co., Ltd. (Sea Wealth), which were not part of the group during the LTFV investigation. These companies were treated as part of the Rubicon Group (under the names “Phattana Frozen Food Co., Ltd.” and “Seawealth Frozen Food Co., Ltd.”) in the most recently completed segment of this proceeding. See 06-07 Final Results, 73 FR at 50937.

<sup>4</sup> See Offsets for Non-Dumped Comparisons, Communication from the United States, TN/RL/W/208 (June 1, 2007).

negotiations. The petitioner states that such a suspension would permit the Department to calculate the final results with the benefit of the results of the negotiations, whereas if it proceeded to the final results based on the methodology employed in the Preliminary Results, two major Thai shrimp exporters would be permanently revoked from the antidumping duty order on shrimp from Thailand.

The respondents maintain that the Department does have authority to issue this determination pursuant to section 129 of the URAA, and is not permitted to suspend implementation. The Rubicon Group contends it is the Department's practice to comply with WTO decisions finding that zeroing in antidumping investigations is inconsistent with the AD Agreement. To support this position the Rubicon Group cites Implementation of the Findings of the WTO Panel in United States Antidumping Measure on Shrimp from Ecuador: Notice of Determination Under section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Ecuador, 72 FR 48257 (Aug. 23, 2007) and accompanying Issues and Decision Memorandum at Comment 1 (Shrimp from Ecuador 129), and Implementation of the Findings of the WTO Panel in US – Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 FR 25261 (May 4, 2007) and accompanying Issues and Decision Memorandum at Comment 1 (EC Zeroing 129). The Rubicon Group also points out that the Department does not have discretion to suspend implementation or otherwise delay its determination in section 129 proceedings, asserting that under section 129 of the URAA, the U.S. Trade Representative (USTR) directs the Department whether and when to implement its determination.

Thai I-Mei argues that the WTO panel decision is consistent with WTO law, and that this section 129 proceeding is not the appropriate venue to challenge the legitimacy of a WTO panel decision. Thai I-Mei cites United States – Measures Relating to Shrimp from Thailand, WT/DS343/11 (May 5, 2008), noting that the United States did not even contest the “zeroing” issue in the WTO dispute settlement proceeding. Further, Thai I-Mei points out that the United States has indicated it plans on implementing the WTO ruling; thus, Thai I-Mei argues that the United States must believe the WTO ruling is suitable for implementation. Consequently, Thai I-Mei maintains that the Department must continue with the process of making its determination and follow the USTR's direction in implementing the determination. Thai I-Mei also notes that the Department is obligated to implement this section 129 proceeding under U.S. law currently in effect, and to delay implementation pending further multilateral negotiations is inappropriate.

#### Department's Position:

Section 129(b)(2) of the URAA provides that the Department “shall ... issue a determination ... that would render {the Department's action (i.e., the LTFV determination)} not inconsistent with the findings of the panel.” The authority granted by this provision may be invoked based on a report by a dispute settlement panel or the Appellate Body of the WTO finding that the Department's action was not in conformity with the obligations of the United States under the AD Agreement. We have such a panel report relating to the Department's LTFV determination

in this case. The statute provides that the Department's determination shall be made within 180 days of the receipt of a written request from the USTR to do so. See section 129(b)(2) of the URAA; 19 U.S.C. section 3538. In this case, the Department received such a written request from the USTR on November 4, 2008. Therefore, the Department has the authority, pursuant to section 129(b)(2) of the URAA, to issue a determination that would bring the Department's LTFV determination into conformity with the findings of the WTO Panel.

Nothing in the statute requires the United States to agree with the Panel's findings to have authority to issue such a determination, or at the appropriate time under the statutory scheme, to implement it. Moreover, the positions that the United States takes in other WTO dispute settlement proceedings and in negotiations have no bearing on whether the Department has the authority under section 129 of the URAA to issue a determination that, if implemented, would bring its LTFV determination into conformity with the findings in the WTO Panel report adopted by the Dispute Settlement Body (DSB).

With respect to the petitioner's argument that the Department should "suspend implementation" of the Panel's findings, we note that section 129(b)(2) of the URAA provides only that, upon request from USTR, the Department shall issue a determination within 180 days (emphasis added). The matter before the Department presently is the issuance of that determination. The subsequent implementation of that determination is a matter that is not presently before the Department. In order for the Department to implement such a determination, the statute first requires that the USTR consult with the Department and the relevant congressional committees with respect to the determination. After such consultations, the USTR may then instruct the Department to implement the determination, in whole or in part. See sections 129(b)(3) and (4) of the URAA.

Comment 2: Whether the Preliminary Results are Consistent with U.S. Law

The petitioner asserts that, under section 102(a)(1) of the URAA (19 USC 3512(a)(1)), U.S. law must prevail in any conflict with a WTO panel or Appellate Body report. According to the petitioner, this principle is emphasized at page 1023 of the Statement of Administrative Action (SAA) accompanying the URAA, H.R. Doc. No. 103-316, which states that USTR has the authority to instruct the Department to take action not inconsistent with a WTO panel report only if such action is in accord with U.S. law. In this instance, the petitioner argues, the Department used for purposes of the Preliminary Results a methodology that is not permitted by U.S. law. In particular, the petitioner contends that U.S. law precludes the Department from permitting "putative 'negative margins' of dumping" (where the average export price exceeded the average normal value) to offset positive margins of dumping (where the average normal value exceeded the average export price) because this methodology prevents the Department from accurately measuring dumping, whereas the petitioner asserts that the Department is obligated to calculate dumping margins "as accurately as possible." In support of the proposition that the Department must calculate margins of dumping as accurately as possible, the petitioner cites Krupp Thyssen v. United States, 25 CIT. 793, 808 (CIT 2001), SKF USA Inc. v. United States, 391 F.Supp. 2d 1327, 1334 (CIT 2005), Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir.

1990), and Shakeproof Assembly Components v. United States, 59 F. Supp. 2d 1354, 1358 (CIT 1999). The petitioner also refers to the Department's longstanding practice of denying offsets for comparisons in which the average export price exceeds the average normal value as a methodology that is necessary to calculate accurate dumping margins.

The respondents dispute the petitioner's contention that the Department is precluded under U.S. law from offsetting positive margins with negative ones. Citing to numerous court cases,<sup>5</sup> the respondents note that "zeroing" is not required under U.S. law, and therefore, the Department's Preliminary Results are consistent with U.S. law. Arguing that the Department has recognized that "zeroing" is not mandatory, the respondents cite to Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (Dec. 27, 2006) (Final Modification) and the following section 129 proceedings to support this assertion: Shrimp from Ecuador 129, 72 FR 48257; EC Zeroing 129, 72 FR 25261; Final Results of Proceeding Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Cut-to-Length Carbon-Quality Steel Plate Products from Japan: Issues and Decision Memorandum, at comment 2, dated December 27, 2007; and Final Results for the Section 129 Determination: Certain Stainless Steel Sheet and Strip in Coils from Italy, at comment 2, dated August 20, 2007. Thus, the respondents maintain that the Preliminary Results are consistent with U.S. law.

#### Department's Position:

The Department responded to this issue previously with respect to proceedings under section 129 of the URAA in Shrimp from Ecuador 129 and EC Zeroing 129. As we explained in EC Zeroing 129:

While the Department, through these section 129 proceedings, is taking actions to bring these investigations into conformity with an adopted WTO panel report, the Department must apply U.S. law. See SAA at 1023 (USTR may request that the Department issue a new determination in response to a WTO report only if the action required to render the agency determination not inconsistent with the panel report is in accord with U.S. law). The {Court of Appeals for the Federal Circuit} CAFC, in construing U.S. law, held that the denial of offsets when calculating the weighted-average dumping margin is not required by statute, but is instead a reasonable interpretation of the statute. See Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed.

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<sup>5</sup> The respondents cite the following cases in support of their assertion that "zeroing" is not required by law: Dorbest Ltd. v. United States, 462 F. Supp. 2d 1262 (CIT 2006); Corus Stall BV v. United States, CIT Slip Op. 2006-112 (July 25, 2006); Corus Stall BV v. Dep't of Commerce, 395 F.3d 1343 (Fed. Cir. 2005); Corus Stall BV v. United States, 387 F. Supp. 2d (CIT 2005); Corus Stall BV v. Dep't of Commerce, 259 F. Supp. 2d 1261 (CIT 2003); Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir. 2004) (Timken); NSK Ltd. v. United States, 416 F. Supp. 2d 1334 (Fed. Cir. 2007); NSK Ltd. v. United States, 346 F. Supp. 2d 1312 (CIT 2004); Paul Muller Industrie GmbH v. United States, 435 F. Supp. 2d (CIT 2006); SNR Roulements v. United States, F. Supp. 2d 1334; and Slater Steels Corp. v. United States, 297 F. Supp. 2d 1351 (CIT 2003).

Cir. 2005), cert. denied, 126 S. Ct. 1023 (2006); Timken Co. v. United States, 354 F.3d 1334, 1341-42 (Fed. Cir.), cert. denied sub nom., Koyo Seiko Co. v. United States, 543 U.S. 976 (2004). While many parties have expressed disagreement with these CAFC decisions, they are binding legal precedent. See Paul Muller Industrie GmbH v. United States, 435 F. Supp. 2d 1241, 1245 (CIT 2006) (stating new argument alone does not defeat binding precedent).

Section 771(35)(A) of the {Tariff Act of 1930, as amended (the Act)} Act defines “dumping margin” as “the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” The “weighted average dumping margin” is defined as “the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.” Section 771(35)(B) of the Act. Some parties argue that the use of the word “exceeds” in section 771(35)(A) of the Act demonstrates that only positive dumping margins should be aggregated when calculating the weighted-average dumping margin. This position, however, has been rejected by the CAFC in Timken.

In interpreting section 771(35)(A) of the Act, the CAFC examined closely the use of the word “exceeds.” Although dictionary definitions cited to the CAFC defined the word “exceeds” in terms of being greater than or going beyond something else, the court found that these dictionary definitions were not so clear so as to compel the denial of offsets. Timken, 435 F.3d at 1341. Rather, in a mathematical context, the court held that the word “exceeds” does not unambiguously preclude the calculation of a negative dumping margin.” See EC Zeroing 129, 72 FR 25261 at Comment 1.

The Department reiterated this reasoning in Shrimp from Ecuador 129.

In this proceeding, the Department has aggregated all of the comparison results for a particular exporter or producer, regardless of whether the specific comparisons yielded a positive or negative result. As the CAFC held in Timken, the use of the word “exceeds” in section 771(35)(A) of the Act does not require the exclusion of those comparisons that yielded a negative result.

No new situation or circumstance has been presented to warrant any change in the Department’s position, as expressed above, for purposes of this final determination. Accordingly, we continue to find that the Department’s calculations of the weighted-average dumping margins for the Rubicon Group, Thai I-Mei, and The Union Frozen Products Co., Ltd. in this proceeding are consistent with U.S. law.

Regarding the petitioner’s argument that permitting negative comparisons to offset positive comparisons in calculating the overall weighted-average margin of dumping may lead to a

dumping margin that is not “accurate,” we disagree. As explained above, the CAFC has held that the definition of dumping margin set forth in sections 771(35)(A) and (B) of the Act does not require exclusion of negative comparisons from the calculation of the weighted-average dumping margin. In this instance the petitioner has failed to demonstrate that this methodology is not an accurate means of calculating a dumping margin, as sanctioned by the CAFC.

Finally, we recognize that there are alternative methodologies for computing a weighted-average dumping margin which are permissible under U.S. law. However, the Department uses these methodologies only in unusual circumstances (e.g., when there is evidence of targeted dumping, in cases involving custom merchandise, etc.), which are not present here. For a discussion of these methodologies, see Comment 3, below. Moreover, while the petitioner has requested that we employ one or more of these methodologies in our final results, we disagree that the petitioner has established that their use would yield a dumping margin which is “more accurate.” In summary, absent evidence to the contrary, we find that the Department’s calculations resulting from the inclusion of negative comparisons are an accurate measure of the antidumping duty margin in accordance with one interpretation of dumping, that is in accordance with the statute, and thus we have continued to follow this methodology for purposes of these final results.

### Comment 3: Alternative Calculation Methodologies

The petitioner contends that, in implementing the Panel’s findings, the Department must examine alternative calculation methodologies that would be consistent with U.S. law and the AD Agreement. According to the petitioner, the Panel did not prescribe a particular methodology to apply in implementing its findings but, rather, instructed the Department to bring its margin calculations into conformity with the AD Agreement. The petitioner argues that the methodology applied in the Preliminary Results is unlawful because allowing offsets for non-dumped comparisons prevents the Department from carrying out its statutory obligation to calculate dumping margins “as accurately as possible” (see discussion in Comment 2, above). Therefore, the petitioner suggests that the Department employ “lawful” alternatives in its calculations for the final results.

Specifically, the petitioner believes that, by applying the same methodology as in the underlying LTFV investigation (i.e., the weighted-average to weighted-average comparison methodology), but permitting the offset of dumped comparisons with non-dumped comparisons, the ultimate results mask dumping by the Thai respondents. As alternatives, the petitioner suggests using either the transaction-to-transaction comparison methodology permitted under section 777A(d)(1)(A)(ii) of the Act, the targeted dumping analysis outlined under the Department’s Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment, 73 FR 26371 (May 9, 2008) (Proposed Targeting Dumping Methodology), or both of these methodologies together.

Using the transaction-to-transaction methodology, the petitioner urges the Department to compare the normal values of individual transactions to the export prices of individual

transactions for comparable merchandise, using the process outlined in Antidumping Measures on Certain Softwood Lumber from Canada, 70 FR 22636, 22640 (May 5, 2005) (Lumber from Canada). The petitioner recognizes that, according to the Department's regulations at 19 CFR 351.414(c)(1), the Department will only use this methodology in "unusual situations"; however, the petitioner argues that a section 129 proceeding is such an unusual situation. Further, the petitioner argues that Lumber from Canada demonstrates that the Department is permitted to diverge from the methodology used in a LTFV investigation in a section 129 proceeding.

The petitioner alleges that both the Rubicon Group and Thai I-Mei engaged in targeted dumping in specific months of the period of investigation (POI). While the petitioner acknowledges that most, if not all, of the Department's targeted dumping findings to date have dealt with targeted dumping with respect to specific customers, the petitioner argues that the Proposed Targeted Dumping Methodology and section 777A(d)(1)(B) of the Act allow for this targeted dumping methodology to be used with respect to specific time periods if there is a pattern of export prices that differ across time periods. Using this targeted dumping methodology, the petitioner requests the Department allow for "zeroing" during the time periods specified in its brief for both the Rubicon Group and Thai I-Mei.

The petitioner concedes that the Department has previously rejected targeted dumping allegations in section 129 proceedings as untimely. However, the petitioner argues that this is unfair and unreasonable because at the time of the LTFV investigation "zeroing" in LTFV investigations was well settled and accepted Department practice. Further, the petitioner argues that the Department's regulations at 19 CFR 351.414(f)(3) do not mandate a timely allegation, and therefore it argues the Department has the authority to conduct a targeted dumping analysis in the context of this proceeding if it chooses to do so.

As noted above in Comment 2, the respondents assert that the average-to-average methodology used by the Department in the Preliminary Results is consistent with U.S. law. Additionally, the respondents argue that the alternative methodologies proposed by the petitioner are inappropriate and inferior to the methodology used in the Preliminary Results. Regarding the proposed transaction-to-transaction methodology, the respondents maintain that the Department's regulations and the SAA show that this methodology should only be used in limited situations and that the average-to-average methodology used by the Department in the Preliminary Results is the preferred methodology. The respondents note that, under the Department's regulations, transaction-to-transaction methodology is only intended to be used in situations where: 1) there are very few sales of subject merchandise; and 2) the merchandise sold in both markets is nearly identical. According to the respondents, the fact pattern in this case does not meet these qualifications. The respondents also note that the Department addressed this issue for the same product (i.e., shrimp) in Shrimp from Ecuador 129, where the Department rejected using transaction-to-transaction matching.

Further, the respondents distinguish this case from Lumber from Canada, arguing that in that case the Department made specific findings as to why a transaction-to-transaction matching methodology was appropriate, which has not been done in this case. The respondents also note



that the transaction-to-transaction methodology proposed by the petitioner has been specifically rejected by the WTO, citing United States – Final Dumping Determination on Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada, Appellate Body Report, WT/DS264/AB/RW (Aug. 15, 2006) and United States – Measures Relating to Zeroing and Sunset Reviews, Appellate Body Report, WT/DS322/AB/R (Jan. 9, 2007). In any event, Thai I-Mei asserts that applying the transaction-to-transaction methodology to it would be impossible because it had no viable comparison market during the POI.

In addition, the respondents argue that the petitioner’s targeted dumping allegation should be dismissed as untimely. The respondents note that under the Department’s regulations, the Department can only conduct a targeted dumping analysis if a targeted dumping allegation is filed thirty days prior to the preliminary determination. The respondents point out that, in both Shrimp from Ecuador 129 and EC Zeroing 129, the Department rejected targeted dumping allegations as untimely. Further, the respondents note that the Department has rejected untimely targeted dumping allegations in LTFV investigations, citing Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People’s Republic of China, 72 FR 9508 (Mar. 2, 2007), and accompanying Issues and Decision Memorandum at Comment 4, and Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People’s Republic of China, 72 FR 19690 (Apr. 10, 2007), and accompanying Issues and Decision Memorandum at Comment 1.

Finally, the respondents contend that the petitioner’s targeted dumping allegation is insufficient because it provides no explanation as to how it selected the alleged “targeted” time periods, or explanation of why the average-to-average methodology would not be appropriate, as required by section 777A(d)(1)(B) of the Act. Additionally, the respondents note that the Department’s targeted dumping methodology is still largely unsettled, particularly with respect to its application to targeted dumping in specific time periods, and they argue that this section 129 proceeding is not an appropriate forum for the Department to formulate its methodology and practice.

#### Department’s Position:

As discussed above in Comment 2, the application of the Preliminary Results methodology is fully consistent with U.S. law and the AD Agreement. Moreover, it is fully consistent with the Department’s intentions as articulated in the Final Modification, and applied in the recent determinations made pursuant to section 129 of the URAA. See EC Zeroing 129, 72 FR 25261. Accordingly, this methodology is an acceptable and appropriate response to the WTO Panel report. In addition, as discussed below, we find this methodology to be superior in this instance to the alternatives suggested by the petitioner.

The respondents correctly point out that the transaction-to-transaction methodology is normally considered only for comparisons in unusual situations, particularly ones involving a small number of sales. Following the logic outlined in Shrimp from Ecuador 129, we do not find that the number of sales at issue in this case is unusually small, nor do we find that the merchandise

is of a type for which a transaction-to-transaction comparison would be more appropriate (e.g., custom-made merchandise). Although the Department applied this methodology in Lumber from Canada, the Department found that highly volatile prices in the U.S. and home markets favored transaction-to-transaction comparisons that would maximize contemporaneity. Those same concerns are not present here.

The petitioner's arguments for considering the weighted-average-to-individual-transaction, or "targeted dumping" methodology, were addressed in EC Zeroing 129 at Comment 2 and Shrimp from Ecuador 129 at Comment 3. In both of those cases, the Department noted that the Department's regulations provide for examination of a targeted dumping allegation that is filed no later than 30 days before the scheduled date of the preliminary determination in an LTFV investigation. See 19 CFR 351.414(f)(3) and 351.301(d)(5). The Department also noted that, in the preamble to the regulations, it declined to adopt suggestions to extend or eliminate this deadline, reasoning, among other things, that the regulation gave domestic interested parties sufficient time to analyze the relevant data and allow the Department to consider the allegation before issuing the preliminary determination. See Antidumping Duties; Countervailing Duties; Final rule 62 FR 27295, 27338, 27375 (May 19, 1997).

In the investigation stage of this proceeding, there was ample time for domestic parties to make a targeted dumping allegation. At this late stage, the Department does not have sufficient time to make a preliminary finding regarding targeted dumping, and to allow time for verification and comment. Accordingly, the Department does not find that there is "good cause" to extend the deadline and consider the targeted dumping allegation made in this proceeding.

Furthermore, as noted in Shrimp from Ecuador 129 and EC Zeroing 129, the targeted dumping methodology "is an independent provision of the antidumping law, unrelated to the Department's modification of its methodology of calculating weighted-average dumping margins in {this investigation}" and that if the petitioner believed that targeted dumping was occurring, "{it} had the opportunity to make {its} targeted dumping allegations in a timely manner" in the context of the LTFV investigation. Consequently, we find that the petitioner's targeted dumping allegation in this case is untimely, and there is no basis to waive the deadline. See Shrimp from Ecuador 129, 72 FR 48257 at Comment 3; and EC Zeroing 129, 72 FR 25261 at Comment 2.

#### Comment 4: Effective Date of Implementation

The Rubicon Group argues that, if it is revoked from the order as a result of this proceeding, then all of its remaining unliquidated entries of subject merchandise should be liquidated without regard to the assessment of antidumping duties. The Rubicon Group concedes that determinations under section 129 of the URAA afford only "prospective" relief. However, it argues that granting relief from future antidumping duty assessment on entries that remain unliquidated is, in fact, "prospective" in nature. Indeed, the Rubicon Group contends that the United States government itself has argued that the Department has discretion to liquidate any remaining unliquidated entries without regard to antidumping duties under a section 129 proceeding. In support of this statement, the Rubicon Group cites United States – Section

129(c)(1) of the Uruguay Round Agreements Act, WT/DS221/R (July 15, 2002) (Adopted Aug. 30, 2002) (U.S. – Section 129), and it argues that the position taken by the United States before the WTO in that case was that section 129(c)(1) of the URAA does not mandate any particular treatment of prior unliquidated sales. Therefore, the Rubicon Group urges the Department to exercise its discretion to liquidate all remaining unliquidated entries as of the date of implementation of this determination without any regard to the assessment of antidumping duties.

Further, the Rubicon Group points out that this issue is currently before a WTO compliance panel concerning the Department's implementation of United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”), WT/DS294/R (U.S. – Zeroing (EC)), and that it is supposed to circulate its report in December 2008. The Rubicon Group argues that the effective date of revocation in this case should be consistent with the compliance panel's decision in U.S. – Zeroing (EC).

Thai I-Mei requests that the Department implement the final determination of this section 129 proceeding by January 31, 2009. Thai I-Mei points out that if the implementation does result in the revocation Thai I-Mei from the antidumping duty order on shrimp from Thailand, but the Department fails to implement its final determination by January 31, 2009, then entries after that date will be subject to the 2009 – 2010 administrative review. Thai I-Mei contends this would subject it to the undue burden of additional delay in liquidating those entries while the Department conducts the 2009 – 2010 administrative review. If the Department is unable to implement its determination by January 31, 2009, Thai I-Mei requests the Department implement its findings by April 1, 2009.

The petitioner disagrees with the Rubicon Group's claim that its revocation should result in the liquidation of any remaining unliquidated entries without regard to antidumping duties. With reference to section 129(c)(1) of the URAA and the SAA, the petitioner maintains that any resulting revocation should only apply to imports made on or after the date of implementation, and should have no effect on any unliquidated entries entered prior to that date. The petitioner also disagrees with the Rubicon Group's assertion that the United States has taken a conflicting position before the WTO, pointing to the United States' statements in U.S. – Zeroing (EC). According to the petitioner, those statements indicate that the Department is under no obligation to liquidate entries made prior to implementation without regard to antidumping duties.

With respect to Thai I-Mei's claim that the Department should implement its determination by January 31, 2009, the petitioner contends that the Department must take the time necessary to analyze any changes to its margin calculation methodology, and it should not rush to judgment in this proceeding. Accordingly, the petitioner argues that the Department should not be constrained to implement its findings by January 31, 2009, if further time is necessary.

Department's Position:

Section 129(c)(1) of the URAA states that determinations “that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise ... that are entered, or withdrawn from warehouse for consumption on or after ... the date on which the Trade Representative directs the administering authority ... to implement that determination.” Thus, any implementation of this determination only applies to entries made on or after the date of implementation, and will have no bearing on entries made before that date. The SAA further states that “any entries made prior to the date of Trade Representative’s direction would remain subject to potential duty liability.” See SAA at 1026. This treatment is also consistent with the Department’s practice in past section 129 proceedings. See Shrimp from Ecuador 129 and EC Zeroing 129. Accordingly, once implemented, this determination will apply only to entries made on or after the date of implementation.

Regarding the Rubicon Group’s claim that the United States has taken an inconsistent view on this point before the WTO in U.S. – Section 129, we note that the United States’ statements in that case were based on the facts of that case, and merely indicated that the Department may have discretion in how it treats unliquidated entries. In that proceeding the United States argued “that it is not clear which of a number of options the Department of Commerce would pursue, as the Department has not faced such a situation to date. The United States submits, however, that section 129(c)(1) would not mandate any particular treatment of “prior unliquidated entries” in such situations.” U.S. – Section 129 at para. 6.63. Thus, at best, the Department has discretion in how to treat prior unliquidated entries. As mentioned in the U.S. – Section 129 panel report, at the time of the report, the Department had not yet faced such a situation. *Id.* In the intervening time, however, the Department has settled this question, and it has uniformly followed the plain language of section 129(c)(1) of the URAA and found that implementation only applies to entries made on or after the date of implementation, and has no impact on already entered, yet unliquidated, entries. See, e.g., Shrimp from Ecuador 129, 72 FR at 48257.

Finally, regarding the Rubicon Group’s argument that the effective date should be consistent with the compliance panel’s findings in U.S.-Zeroing (EC), we note that the panel issued its report on December 17, 2008.<sup>6</sup> However, this report has not yet been adopted by the DSB and both parties have a right to appeal the panel’s finding. Therefore, it would be inappropriate for the Department to rely on the compliance panel’s findings for guidance concerning this issue in the instant proceeding.

Regarding the parties’ request that the Department either implement this determination by January 31, 2009, or not commit itself to such time restraints, we note that such time considerations are not within the Department’s discretion. Under section 129(b)(4) of the URAA, the Department will implement this determination at the direction of the USTR, and we will follow the USTR’s direction as to the timing of implementation.

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<sup>6</sup> See United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”), Recourse to Article 21.5 of the DSU by the European Communities, WT/DS294/RW (December 17, 2008).

Comment 5: The Rubicon Group Companies Subject to this Proceeding

During the LTFV investigation, the Rubicon Group informed the Department that it consisted of the following member-companies which produced and/or exported frozen warmwater shrimp in Thailand: Andaman, Chanthaburi Frozen, Chanthaburi Seafoods, Phatthana Seafood, S.C.C., Thailand Fishery, Thai International, Wales, and Y2K. During that segment of the proceeding, the Department treated these nine companies as a single entity and assigned them the same antidumping duty rate. See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand, 70 FR 5145 (Feb. 1, 2005) (Thai Shrimp Order). In a subsequent administrative review, the Department made a formal successor-in-interest determination with respect to Y2K, finding that this company is now operating as Intersia Foods Co., Ltd. (Intersia). See 06-07 Final Results, 73 FR at 50935.

In our November 21, 2008, preliminary results, we recalculated the antidumping duty margin for the Rubicon Group, which we defined as the nine companies noted above (including Intersia). The Rubicon Group contends that the Department should expand its definition of the Group to include two additional companies, Phatthana Frozen and Sea Wealth, for purposes of this section 129 determination and any resulting revocation. The Rubicon Group notes that the Department included these companies as part of the Rubicon Group in the 2006-2007 administrative review. See 2006-2007 Thai Shrimp, 73 FR at 50934.

The Rubicon Group maintains that there is no logic to the Department's exclusion of Phatthana Frozen and Sea Wealth from the Group, given that it included S.C.C. (a company which it claims was treated as part of the Group only in administrative reviews). Accordingly, the Rubicon Group urges the Department to afford all three of these companies similar treatment.

While the Rubicon Group recognizes that the underlying *de minimis* rate for the Group does not include data from Phatthana Frozen or Sea Wealth, it contends that this fact should not preclude the Department from treating these companies as eligible for revocation. According to the Rubicon Group, the Department has an established practice of treating "new" members, which were not included in the margin calculations supporting revocation, as part of the same entity and applying any revocation finding to them. In support of this proposition, the Rubicon Group cites Certain Fresh Cut Flowers From Colombia; Preliminary Results of Antidumping Duty Changed Circumstances Review, 63 FR 25447 (May 8, 1998), unchanged in Certain Fresh Cut Flowers From Colombia; Final Results of Antidumping Duty Changed Circumstances Review, 63 FR 34634 (June 25, 1998) (Colombian Flowers), where the Department conducted a changed circumstances review to include a new company in a consolidated producer/exporter group that had already been revoked from the underlying antidumping duty order.

The petitioner argues that any potential revocation should be limited strictly to the companies included in the Rubicon Group during the LTFV POI. The petitioner contends that neither Phatthana Frozen, Sea Wealth, nor S.C.C. was included in the Rubicon Group in the LTFV

investigation; therefore, the petitioner contends that these companies should not be included as part of the Rubicon Group in this proceeding. The petitioner argues that any recalculation of the margin from the LTFV investigation should only apply to entities included in the Rubicon Group at the time of the investigation, as all sales made by Phatthana Frozen, Sea Wealth, or any other entity not then considered a part of the Rubicon Group were not included in the Department's margin calculations in the LTFV investigation. Further, the petitioner maintains that, because these companies were not included in the Department's original analysis, there is no evidence that these companies had *de minimis* dumping margins during the POI.

The petitioner argues that the situation in Colombian Flowers is distinguishable from the facts in this proceeding, in that the entity at issue in that case did not exist during the relevant period of investigation or the subsequent administrative reviews leading to revocation for the revoked producer/exporter group. The petitioner contends there is nothing on the record of the LTFV investigation or this proceeding to show that these companies did not exist during the POI.

Department's Position:

Contrary to the assertions of both the Rubicon Group and the petitioner, the Department treated S.C.C. as part of the Rubicon Group in the LTFV investigation, and we applied the final margin calculated for the Rubicon Group to that company. See Thai Shrimp Order, 70 FR at 5146. Thus, we find that it is appropriate to treat S.C.C. as part of the Rubicon Group for purposes of this section 129 proceeding, as well as for any resulting revocation.

In contrast, neither Phatthana Frozen nor Sea Wealth was part of the Rubicon Group during the POI, and as a result, neither was assigned the single rate applied to all members of the Rubicon Group.<sup>7</sup> Therefore, we disagree that excluding these companies from the Group is either inappropriate or inconsistent with our treatment of S.C.C., given that the facts surrounding these companies are different.

Section 129 of the URAA is the applicable provision governing the nature and effect of determinations issued by the Department to implement findings by WTO panels and the Appellate Body. Specifically, section 129(b)(2) provides, "the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body." 19 USC 3538(b)(2).

The Department has previously determined that considering any factor or argument regarding the underlying LTFV investigation that was not part of the WTO determination or the USTR's directive is outside the limited scope of bringing the LTFV determination into conformity with findings of the WTO. See Implementation of the Findings of the WTO Panel in US-Zeroing

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<sup>7</sup> The record shows that Phatthana Frozen was not yet in existence during the POI, while Sea Wealth was in existence, but not yet operational. See the transcript of the public hearing held on December 17, 2008 at page 73.

(EC); Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils From Italy 72 FR 54640 (Sept. 26, 2007) and accompanying Issues and Decision Memorandum at Comment 1 (“the limited purpose of a section 129 proceeding is to reopen for revision those aspects of the Department’s original determination found to be inconsistent with the WTO Agreements”). In this proceeding the only issue open to revision is the “zeroing” methodology used in the calculation of the dumping margins found during the LTFV investigation. Therefore, our redetermination, and any resulting revocation, only applies to the Rubicon Group companies considered as part of the Rubicon Group during the LTFV investigation, which do not include Phatthana Frozen or Sea Wealth. Redefining the companies which comprise this group is beyond the purview of our authority in this proceeding.

Finally, we disagree with the Rubicon Group that the Department’s determination in Colombian Flowers is on point because the determination in that case was not conducted under section 129 of the URAA.

#### Final Antidumping Margins

The recalculated margins, unchanged from the Preliminary Results, are as follows:

<u>Manufacturer/Exporter</u>	<u>Final Determination</u> <sup>8</sup>	<u>Re-calculated Margins</u>
The Rubicon Group (Andaman Seafood Co., Ltd., Chanthaburi Frozen Food Co., Ltd., Chanthaburi Seafoods Co., Ltd., Intersia Foods Co., Ltd., Phatthana Seafood Co., Ltd., S.C.C. Frozen Seafood Co., Ltd., Thailand Fishery Cold Storage Public Co., Ltd., Thai International Seafoods Co., Ltd., and Wales & Co. Universe Limited)	5.91%	1.94% ( <i>de minimis</i> )
Thai I-Mei Frozen Foods Co., Ltd.	5.29%	1.81% ( <i>de minimis</i> )
The Union Frozen Products Co., Ltd.	6.82%	5.34%
All Others	5.95%	5.34%

#### Partial Revocation

In accordance with sections 129(b)(4) and 129(c)(1)(B) of the URAA, if the USTR, 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 shrimp produced and exported by

<sup>8</sup> See Thai Shrimp Order, 70 FR at 5146.

one or more of the members of the Rubicon Group, as identified above, as well as shipments of shrimp produced and exported by Thai I-Mei, entered or withdrawn from warehouse, for consumption on or after the date upon which the USTR directs the Department to implement its final determination (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 shrimp produced and exported by these entities, entered, or withdrawn from warehouse, for consumption on or after the effective date of this determination.

Recommendation

In light of the Panel's findings, we recommend this determination which, if implemented, would render our original determination not inconsistent with 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 \_\_\_\_\_

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Ronald K. Lorentzen  
Acting Assistant Secretary  
for Import Administration