

**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 Thailand

**SUBJECT:** Calculation of the Weighted-Average Dumping Margins

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**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 Thailand in order to implement the WTO panel's report in United States – Measures Relating to Shrimp from Thailand (WT/DS343/R) (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 Thailand will be revoked, in part. Specifically, this partial revocation will apply to entries of shrimp produced and exported by the Rubicon Group<sup>1</sup>, as well as entries of shrimp produced and exported by Thai I-Mei Frozen Foods Co., Ltd., that are entered, or withdrawn from warehouse, for consumption on or after the date on which the U.S. Trade Representative so directs.

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<sup>1</sup> The Rubicon Group consists of the following companies: 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, Ltd.

## 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 Thailand. See Notice of Final Determination of Sales 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). 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 Thailand, 70 FR 5145 (Feb. 1, 2005) (Amended Final Determination and Order).

Subsequently, the Government of Thailand 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 February 29, 2008. The Panel found that the Department acted inconsistently with Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement). See Panel Report, para. 7.36. On August 1, 2008, the WTO Dispute Settlement Body (DSB) adopted the Panel Report. On October 31, 2008, the United States informed the DSB that it would implement the Panel Report.

Section 129 of the URAA<sup>2</sup> 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 . . .,” 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. Thus, such determinations have prospective effect only. See section 129(c)(1).

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<sup>2</sup> Citation to “section 129” refers to section 129 of the URAA, codified at 19 USC 3538.

## 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 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) or constructed export prices (CEPs) to weighted-average normal values (NVs). When the EP or CEP 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 or CEP 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 Panel in United States – Antidumping Measure on Shrimp from Ecuador (WT/DS/335/R), adopted Feb. 20, 2007 (Shrimp from Ecuador), and of the Appellate Body in United States – Final Dumping Determination on Softwood Lumber from Canada (WT/DS/264/AB/R), adopted Aug. 31, 2004 (Softwood Lumber from Canada). In Softwood Lumber from Canada 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. Id., para. 101. 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. Id., para. 117. The Panel in Shrimp from Ecuador found the Appellate Body’s reasoning persuasive and adopted it as its own. See Shrimp from Ecuador, para. 7.41. The Panel found the issues present in this case to be identical to the issues in Softwood Lumber from Canada and Shrimp from Ecuador, and therefore found that the Department acted inconsistently with the United States’ obligations under Article 2.4.2 of the Antidumping Agreement. See Panel Report, para. 7.36.

## 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 (Dec. 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 companies for which a company specific weighted-average antidumping margin was calculated in the Amended Final Determination and Order:

<u>Manufacturer/Exporter</u>	<u>Final Results</u> <sup>3</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., <sup>4</sup> 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%

<sup>3</sup> See Amended Final Determination and Order, 70 FR at 5146.

<sup>4</sup> This company was included in the less-than-fair-value investigation under the name of its predecessor, Y2K Frozen Foods, Co., Ltd. The Department made a formal successor-in-interest finding with respect to these companies 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).

### **Interested Party Comments**

Interested parties may submit case briefs and/or written comments no later than December 5, 2008. Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than December 10, 2008. Parties who submit arguments are requested to submit with the argument: (1) a statement of the issue; and (2) a brief summary of the argument. Interested parties may request a hearing on the issues raised in the case and rebuttal briefs no later than December 8, 2008.

### **Partial 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 shrimp produced and exported by one or more of the members of the Rubicon Group as well as shipments of shrimp produced and exported by Thai I-Mei Frozen Foods Co., Ltd., 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 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 report, we preliminarily recommend implementing 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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David M. Spooner  
Assistant Secretary  
for Import Administration

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(Date)