




A-570-893
Section 129 Proceedings
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DATE: March 4, 2013

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh 
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Final Results of the Proceeding under Section 129 of the Uruguay
Round Agreements Act: Antidumping Measures on Certain
Frozen and Canned Warmwater Shrimp from the People's
Republic of China

Summary

This memorandum addresses issues briefed in the proceeding under section 129 of the Uruguay Round Agreements Act (“URAA”), with respect to the antidumping duty investigation on certain frozen warmwater shrimp from the People’s Republic of China (“PRC”), in response to the World Trade Organization (“WTO”) panel report in United States - Anti-Dumping Measures on Certain Shrimp and Diamond Saw Blades from China (DS422) (“Panel Report”), dated June 8, 2012. In the “Discussion of the Issues” section below, the Department of Commerce (“Department”) has addressed the issues in this proceeding for which we received comments from interested parties.

Background

On December 8, 2004, the Department issued a final determination of sales at less than fair value in the antidumping investigation on certain frozen and canned warmwater shrimp from the PRC.¹ Following an affirmative injury determination for certain frozen warmwater shrimp issued by the United States International Trade Commission (“ITC”), the Department issued an amended final

¹ See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People’s Republic of China, 69 FR 70997 (December 8, 2004) (“Final Determination”).



determination and antidumping duty order on certain frozen warmwater shrimp from the PRC on February 1, 2005.²

Section 129 Determination

On October 13, 2011, the PRC government requested the establishment of a WTO dispute settlement panel (“the Panel”) to consider the issue of zeroing in the Department’s Final Determination. The Panel circulated its report on June 8, 2012. The Panel found that the Department acted inconsistently with the first sentence of Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“Antidumping Agreement”) by using zeroing in its calculation of certain margins of dumping in two investigations involving PRC products, including the investigation of certain frozen and canned warmwater shrimp.³ On July 23, 2012, the Panel adopted the Panel Report.

Section 129 of the URAA allows the Department to amend, rescind, or modify a determination found by a WTO dispute settlement panel or the Appellate Body to be inconsistent with U.S. obligations under the Antidumping Agreement. Specifically, section 129(b)(2) provides that, “notwithstanding any provision of the Tariff Act of 1930 . . .,” within 180 days after receipt of a written request from the United States Trade Representative (“USTR”), 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. The Statement of Administrative Action, URAA, H. Doc. 316, Vol. 1, 103d Cong. (1994) (“SAA”) refers variously to such a determination by the Department as a “new,” “second,” and “different” determination. This determination may be subject to judicial review separate and apart from judicial review of the Department’s original determination. In addition, section 129(c)(1)(B) of the URAA provides expressly 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 USTR directs the Department to implement that determination. Thus, such determinations have prospective effect only.

The Department issued its preliminary results in this proceeding on December 7, 2012.⁴ Since the issuance of the Preliminary 129 Results, the Department received case briefs from Petitioner⁵

² See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People’s Republic of China, 70 FR 5149 (February 1, 2005) (“Order”). On January 21, 2005, the ITC notified the Department of its final determination that two domestic like products exist for the merchandise covered by the Department’s investigation: (i) Certain non-canned warmwater shrimp and prawns, and (ii) canned warmwater shrimp and prawns. The ITC determined that there is no injury regarding imports of canned warmwater shrimp and prawns from the PRC. Therefore, canned warmwater shrimp and prawns are not covered by the Order.

³ See Panel Report, at para. 8.1.

⁴ See “Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Import Administration, re; Preliminary Results Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Frozen and Canned Warmwater Shrimp from the People’s Republic of China,” dated September 23, 2011 (“Preliminary 129 Results”).

⁵ Petitioner is the Ad Hoc Shrimp Trade Action Committee.

and Shantou Red Garden Foodstuff Co., Ltd. (“Red Garden”) on December 17, 2012. Petitioner and Hilltop International⁶ (“Hilltop”) filed rebuttal briefs on December 21, 2012.

Discussion of Issues

Comment 1: Whether the Order Should Be Revoked With Respect to Yelin and Hilltop

Petitioner:

- Although the Preliminary 129 Results state that if USTR directs the Department to implement this determination, the Order will not be revoked, the Department does not specify whether, and to what extent, the Order might be partially revoked as the result of the recalculations.
- Implementation of a 129 determination applies to unliquidated entries of the subject merchandise. Thus, because the basis of the 129 determination rests upon liquidation of subject entries attributed to Yelin and Yelin is no longer in existence, revocation with respect to Yelin is meaningless to the non-existent entity and that entity’s importers.
- While the Department preliminarily found that Yelin should be released from the Order, Hilltop cannot benefit from that determination while the successorship status remains unresolved. Unless and until Hilltop is determined to be Yelin’s successor-in-interest, Hilltop should be treated as part of the PRC-wide entity.
- Revocation of the Order, in its entirety or on a company-specific basis, would exacerbate circumvention and fraud.

Hilltop:

- Petitioner does not explain how a company excluded from the Order poses a risk of circumvention. Petitioner’s speculation that Yelin would act as a conduit for circumvention and fraud is baseless and should be rejected.
- Despite Petitioner’s claim, the Department’s November 29, 2012, letter explains that it declined to reconsider the first and second administrative reviews “because these proceedings are closed and liquidation instructions have been issued,” with no references regarding Yelin being “nonexistent.”
- Until the Department publishes the final results of a CCR reaching a different successorship conclusion, the Department must follow its preliminary finding in the Preliminary 129 Results of this proceeding. Regardless of any re-determination of successorship status, revocation is still appropriate for Yelin.

⁶ In 2007, the Department conducted a changed circumstances review (“CCR”) for Yelin Enterprise Co., Hong Kong (“Yelin”), where we determined that Hilltop is the successor-in-interest to Yelin. See Certain Frozen Warmwater Shrimp from the People’s Republic of China: Notice of Final Results of Changed Circumstances Review, 72 FR 33447 (June 18, 2007) (“Hilltop CCR”). On December 5, 2012, the Department determined to reconsider the original CCR determination that Hilltop was the successor-in-interest to Yelin. See Preliminary 129 Results, at Attachment I.

Department's Position:

Section 129 of the URAA provides that:

{n}otwithstanding any provision of the Tariff Act of 1930..., 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...not inconsistent with the findings of the panel or the Appellate Body.⁷

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 terms of the Antidumping Agreement. The Panel found that the Department acted inconsistently with the first sentence of Article 2.4.2 of the Antidumping Agreement by using zeroing in its calculation of certain margins of dumping in two investigations involving PRC products, including the investigation of certain frozen and canned warmwater shrimp.⁸ Subsequently, USTR requested, pursuant to section 129 of the URAA, that the Department issue determinations as necessary to render the determinations in these investigations not inconsistent with the Dispute Settlement Body ("DSB") recommendations and rulings.⁹ 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 investigation determinations into conformity with the findings of the WTO Panel. Accordingly, in its Preliminary 129 Results, the Department recalculated the weighted-average dumping margins at issue by applying the calculation methodology described in Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) ("Final Modification for Investigations").

The Preliminary 129 Results contained the preliminary re-calculations as required in the Panel Report. Specifically, USTR directed the Department to "issue determinations as necessary to render the original investigation determinations not inconsistent with the DSB recommendations and rulings in this dispute."¹⁰ While the Department agrees with Petitioner that we did not make any preliminary declarations of company-specific revocation in the Preliminary 129 Results, the Department made the changes, as requested by USTR, to the company-specific margin calculation programs. The Department's past practice, cited in the Preliminary 129 Results, has been to revoke or partially revoke an order where recalculations pursuant to section 129 of the

⁷ See section 129(b)(2) of the URAA.

⁸ See Panel Report, at para. 8.1.

⁹ See Letter from USTR, dated September 5, 2012.

¹⁰ See id.

URAA have resulted in zero or de minimis margins.¹¹ As in prior cases, here the Department is addressing company-specific revocations in this final results memorandum.

We disagree with Petitioner's argument that the Department should not partially revoke the Order with respect to Yelin. The Department has re-calculated Yelin's weighted-average dumping margin from the investigation, without the use of zeroing, resulting in a de minimis margin. Section 735(a)(4) of the Act provides that, in making a determination in an investigation, the Department "shall disregard any weighted average dumping margin that is de minimis as defined in section 1673b(b)(3)," or less than two percent. Consequently, the Department has no statutory authority with which to maintain Yelin (or Allied and Red Garden) as subject to the Order, notwithstanding Petitioner's belief that Yelin is "non-existent". Because the re-calculated dumping margins for the period of investigation are now de minimis for Allied, Yelin, and Red Garden, there is no basis to sustain these companies under the Order, should USTR direct the Department to implement its finding. Moreover, partial revocation has been consistent with the Department's practice in previous section 129 determinations that involved revised investigation weighted-average dumping margins of zero or de minimis.¹² Ordinarily, a company that receives a zero or de minimis weighted-average dumping margin in the context of an antidumping investigation is excluded from any antidumping duty order that may otherwise be issued as a result of the investigation. Accordingly, Petitioner's concerns about evasion and circumvention of the Order are misplaced in the context of this section 129 proceeding in connection with the underlying antidumping investigation.

With respect to whether Yelin's revocation from the Order should extend to Hilltop, the Department is currently reviewing Hilltop's status as successor-in-interest to Yelin in a separate, ongoing proceeding.¹³ Accordingly, whether the revocation for Yelin applies to Hilltop will be determined based on the final results of that proceeding.

¹¹ See, e.g., Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Stainless Steel Plate in Coils From the Republic of Korea; and Partial Revocation of the Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils From the Republic of Korea, 76 FR 74771, 74772 (December 1, 2011) ("2011 Korea 129 Proceedings") available at: <http://ia.ita.doc.gov/frn/summary/korea-south/2011-30951.txt>; see also 2011 Korea 129 Proceedings, and accompanying Issues and Decision Memorandum dated November 4, 2011, at page 9 ("Korea 129 Memo") available at: <http://ia.ita.doc.gov/frn/summary/korea-south/2011-30951-1.pdf>; Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Polyethylene Retail Carrier Bags From Thailand, 75 FR 48940 (August 12, 2010) ("Bags from Thailand 129") available at <http://ia.ita.doc.gov/frn/2010/1008frn/2010-19943.txt>, and accompanying Issues and Decision Memorandum ("Thailand Bags Memo") at page 8 available at: <http://ia.ita.doc.gov/download/section129/thailand-prcb-129-final-decision-memo-06-29-2010.pdf>

¹² See, e.g., 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 (August 23, 2007); Bags from Thailand 129, 75 FR 48940.

¹³ See Certain Frozen Warmwater Shrimp from the People's Republic of China: Notice of Preliminary Reconsideration of Changed Circumstances Review, 78 FR 13324 (February 27, 2013) and accompanying Decision Memorandum ("Preliminary CCR Reversal"). The Department has preliminarily reversed its 2007 finding that Hilltop was the successor-in-interest to Yelin because the record on which that determination was based is now known to contain material misrepresentations, and incomplete and unverifiable information. See Preliminary CCR Reversal for the scheduled deadline of the final results.

Comment 2: Revocation of the Order With Respect to Red Garden

Red Garden:

- By obtaining a zero percent rate in this proceeding, Red Garden now has an amended negative final determination and, thus, qualifies for rescission/revocation of the Order against it.
- The Department's policy is to revoke the Order for any respondent whose new rate in a section 129 proceeding covering an investigation is de minimis. Thus, Red Garden requests that the Department rescind/revoke the Order as applicable to Red Garden in the final results.

Petitioner:

- Red Garden fails to establish how revocation of the Order with respect to any single company is "necessary to render the Department's Final Determination and Order not inconsistent with the findings in the Panel Report."
- No WTO obligation has been identified that would require the Department to partially or wholly revoke an order in these circumstances. Granting an individual revocation/rescission improperly extends beyond the limited bounds of section 129 authority, regardless of the Department's practice on the issue.
- The circumstances in the AR4 remand and the AR6 final results show that the maintenance of this Order is appropriate here given the documented history of rampant circumvention and evasion. Duty evasion concerns will be exacerbated if the Department goes beyond its WTO obligations by granting company-specific revocation.

Department's Position:

The Department agrees with Red Garden regarding the appropriateness of revoking Red Garden from the existing Order. In its Preliminary 129 Results, the Department re-calculated Red Garden's weighted-average dumping margin, without the use of zeroing, as directed by USTR. This re-calculation resulted in a de minimis weighted-average margin. Section 735(a)(4) of the Act provides that, in making a determination in an investigation, the Department "shall disregard any weighted average dumping margin that is de minimis as defined in section 1673b(b)(3)," or less than two percent. The investigation dumping margin for Red Garden is now de minimis. Accordingly, because Red Garden's revised weighted-average dumping margin continues to be de minimis at these final results, it is appropriate to revoke the Order for Red Garden (and Allied and Yelin) upon implementation. Thus, because there is no affirmative finding of dumping for Red Garden, Allied or Yelin, if USTR directs the Department to implement this determination, then it will revoke the Order with respect to Red Garden, Allied and Yelin. This is consistent with the Department's previous section 129 proceedings¹⁴, notwithstanding Petitioner's argument that the Panel Report does not require the Department to revoke an order, in whole or in part. The Department's compliance with the Panel Report does not release the Department from adhering to its statutory obligations, which, in this case, are to "disregard any weighted average dumping margin that is de minimis as defined in section 1673b(b)(3)."

¹⁴ See 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) ("2007 Section 129 Determinations").

We disagree with Petitioner’s argument that previous administrative reviews of this Order indicate that circumvention and duty evasion is relevant to this 129 proceeding. USTR has only directed the Department to recalculate the weighted-average dumping margins from the underlying investigation, without the use of zeroing, which resulted in de minimis margins. Accordingly, the Department determines that the scope of this 129 proceeding is appropriately limited to the recalculation of these rates without zeroing, and does not include addressing any circumvention concerns raised by Petitioners. Consequently, as the revised investigation margins for the remaining three mandatory respondents continue to be de minimis, these companies would no longer be subject to the Order, after USTR directs us to implement the section 129 determination.

Final Antidumping Margins

Manufacturer/Exporter	Remands 1, 2	Section 129 Results
Allied Pacific Group	5.07 %	0 %
Yelin Enterprise Co. Hong Kong	8.45 %	0 %
Shantou Red Garden Foodstuff Co., Ltd	7.20 %	0 %
Separate Rate Companies (39 companies)	n/a	22.58 %

The PRC-wide Entity and Adverse Facts Available

As we stated in the Preliminary 129 Results, at the Final Determination, the Department assigned a dumping margin based on section 776 of the Act in the LTFV investigation to the PRC-wide entity.¹⁵ The Department has not recalculated or revised this dumping margin because it is not affected by the implementation of the Panel Report. This dumping margin was based on information contained in the petition and “zeroing” was not used to calculate the dumping margins in the petition.¹⁶

Separate Rate Margin

The Department originally calculated above-de minimis dumping margins for the three mandatory respondents listed above in the Final Determination and adopted in the Order.¹⁷ As stated in the Preliminary 129 Results, in the underlying investigation the Department calculated a de minimis weighted average dumping margin for Zhanjiang Guolian Aquatic Products Co., Ltd. (“ZG”). Consequently, pursuant to section 735(a)(4) of the Act, ZG was excluded from the Order. Because the Panel noted that the PRC “does not challenge the de minimis rate calculated for ZG or the PRC-wide rate,”¹⁸ there is no change from the Final Determination with respect to

¹⁵ See Final Determination, 69 FR at 71003.

¹⁶ See id.; see also Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People’s Republic of China and the Socialist Republic of Vietnam, 69 FR 3876, 3880-3881 (January 27, 2004) (where the Department stated that “based on comparisons of export price to normal value, calculated in accordance with section 773(c) of the Act, the estimated recalculated dumping margins for certain frozen and canned warmwater shrimp from the PRC range from 112.81 percent to 263.68 percent”).

¹⁷ See Order, 70 FR at 5151.

¹⁸ See Panel Report, fn18.

ZG and it continues to be excluded from the Order. Further, in the Final Determination, consistent with the methodology outlined in section 735(c)(5)(A) of the Act, which governs the calculation of the “All Others” rate, the Department calculated a margin for entities which qualified for a rate separate from the PRC-wide entity, but which were not individually examined. This rate was equal to the weighted average of the estimated weighted-average dumping margins established for producers and exporters individually investigated, excluding any zero or de minimis dumping margins and any dumping margins determined entirely under section 776 of the Act. However, the changes to the dumping margin calculations without the use of zeroing result in de minimis dumping margins for Allied, Yelin, and Red Garden. Consequently, the Department must determine an appropriate dumping margin for non-individually examined entities pursuant to section 735(c)(5) of the Act.

While section 735(c)(5)(A) of the Act provides that the All-Others dumping margin in an investigation is to be calculated excluding any dumping margins that are zero, de minimis or based entirely on facts available, section 735(c)(5)(B) provides that, where the dumping margins are all zero, de minimis, or based entirely on facts available, the Department may use “any reasonable method” (including a simple average of the dumping margins that are zero, de minimis, or based entirely on facts available) to determine the All-Others dumping margin. Consistent with our past practice¹⁹ a simple average of the adverse facts available dumping margin and the calculated de minimis dumping margins is a reasonable method, in this case, to assign a dumping margin to those producers or exporters qualifying for a separate rate but not individually examined because there are no other calculated dumping margins from which to assign a rate. Therefore, we have calculated the rate for separate entities not individually examined in the underlying investigation as a simple average of the de minimis dumping margins that now exist for all four of the investigation’s mandatory respondents, and the adverse facts available dumping margin of 112.81 percent assigned to the PRC-wide entity, resulting in a margin of 22.58 percent.

Revocation

The Department has re-calculated the dumping margins for Allied, Yelin, and Red Garden, absent the zeroing methodology, resulting in de minimis margins for these companies. These recalculations have not changed since the Preliminary 129 Results. Therefore, if directed to implement this section 129 determination, the Department will revoke the Order, in part, with respect to Allied, Yelin, and Red Garden effective for entries made on or after the date upon which USTR directs the Department to implement these final 129 results. Whether the revocation for Yelin applies to Hilltop will be determined based on the final results of a separate ongoing proceeding. Accordingly, if USTR directs us to implement this section 129 determination, the Department will instruct U.S. Customs and Border Protection (“CBP”) to liquidate without regard to antidumping duties, Allied’s, Yelin’s, and Red Garden’s entries of subject merchandise which were entered, or withdrawn from warehouse, for consumption on or after that date and to discontinue the collection of cash deposits for estimated antidumping duties

¹⁹ See 2011 Korea 129 Proceedings, 76 FR at 74772; see also 2007 Section 129 Determinations, 72 FR at 25262-63 where the Department calculated a simple average of existing adverse facts available margins with above-de minimis/zero margins as an All-Others rate following section 129 recalculations for the mandatory respondents that resulted in zero or de minimis rates.

from these companies. The Department continues to find that because the dumping margin for the separate rate companies and the PRC-wide entity margin remain above de minimis, revocation of this order is not necessary to render the Department's Final Determination and Order not inconsistent with the findings in the Panel Report. Accordingly, if USTR directs us to implement this section 129 determination, the Department determines that the Order, as a whole, will not be revoked as a result of implementation.


Cash Deposit for Separate Rate Companies and the PRC-wide entity

Upon implementation of this section 129 determination, CBP will continue to collect cash deposits for estimated antidumping duties from the separate rate companies and from the PRC-wide entity, as the Order, in whole, will not be revoked. Further, if any separate rate companies are subject to the LTFV separate rate cash deposit at the time of implementation (i.e., if a separate rate company from the LTFV has not had the LTFV separate rate cash deposit superseded by a subsequent review rate) we will instruct CBP to collect cash deposits at the new rate of 22.58 percent for subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which USTR directs the Department to implement this 129 determination. As noted above, the PRC-wide entity rate has not changed from the Final Determination, and continues to be 112.81 percent.

Recommendation

In light of the Panel's findings, we recommend issuing this determination which, if implemented, would render our original determination not inconsistent with the recommendations and rulings of the Dispute Settlement Body by applying the methodology in Final Modification for Investigations, and adopting the recalculated weighted-average dumping margins as outlined above.

Agree Disagree



Paul Piquado
Assistant Secretary
for Import Administration

4 March 2013
Date