

MEMORANDUM TO: Paul Piquado  
Acting Deputy Assistant Secretary  
for Import Administration

FROM: John M. Andersen  
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the  
Proceeding Under Section 129 of the Uruguay Round Agreements  
Act: Antidumping Measures on Polyethylene Retail Carrier Bags  
from Thailand

### 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 polyethylene retail carrier bags from Thailand in response to the World Trade Organization (WTO) panel report in *United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand* (WT/DS383/R). Below is a complete list of the issues in this proceeding for which we have received comments from the parties:

1. Targeted Dumping
2. All-Others Rate
3. Effective Date

### Background

The Department issued its preliminary results in this proceeding on April 27, 2010. See Memorandum from Edward C. Yang to Ronald K. Lorentzen entitled “Preliminary Results Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Polyethylene Retail Carrier Bags from Thailand” (Preliminary Results). Since the issuance of the Preliminary Results, we received case briefs and rebuttal briefs from the petitioners in the proceeding, the Polyethylene Retail Carrier Bag Committee and its individual members, Hilex Poly Co., LLC, and Superbag Corporation (collectively, the petitioners), and from Thai Plastic Bags Industries Co., Ltd., Apec Film Ltd., and Winner’s Pack Co., Ltd. (collectively, TPBI). We also received a rebuttal brief from the Government of Thailand. A hearing was held on June 8, 2010, at the request of the petitioners and TPBI.

## Discussion of Issues

### **1. Targeted Dumping**

Comment: The petitioners argue that the Department should recalculate the margins for Advance Polybag Inc., Alpine Plastics Inc., API Enterprises Inc., and Universal Polybag Co., Ltd. (collectively, Universal), and TPBI using the average-to-transaction comparison methodology. Citing *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada*, 70 FR 22636 (May 2, 2005) (*Softwood Lumber*), the petitioners contend that the Department may bring determinations into conformity with WTO obligations by changing the comparison methodology.

Citing section 777A(d)(1)(B) of the Tariff Act of 1930, as amended (the Act), the petitioners assert that the Department may use an average-to-transaction methodology where there is a pattern of export prices or constructed export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time. The petitioners claim that there is a pattern of export prices for comparable merchandise that differ significantly among periods of time with respect to TPBI and that there is a pattern of constructed export prices for comparable merchandise that differ significantly among purchasers with respect to Universal. The petitioners support these claims using the analysis the Department used in *Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value*, 75 FR 14569 (March 26, 2010). Accordingly, the petitioners assert, the statutory requirement for finding targeted dumping by both respondents is satisfied.

The petitioners also contend that the Statement of Administrative Action (SAA) expresses a reluctance to use an average-to-average methodology where patterns of significant price differences conceal dumping. The petitioners assert that their calculations demonstrate that the average-to-average methodology conceals dumping margins with respect to both TPBI and Universal and that these changes are not immaterial. Accordingly, the petitioners argue, the Department must conclude that application of the average-to-average methodology masks dumping and cannot take into account the patterns of price differences that exist for both TPBI and Universal.

The petitioners argue further that, although the Department declined to exercise its authority to consider targeted dumping as a means to bring determinations into compliance with similar WTO rulings in previous Section 129 proceedings, the Department's decisions in those cases were premised upon regulations which the Department has withdrawn since those earlier proceedings. According to the petitioners, the Department is required to apply its existing regulations to this proceeding because a Section 129 proceeding does not involve a redetermination of the original final determination and is not an administrative proceeding following the antidumping duty investigation as described in section 751 of the Act. Citing *Softwood Lumber*, the petitioners assert that Congress intended for a Section 129 determination to be a new, different determination separate and apart from the original antidumping duty

investigation and subsequent administrative reviews. Thus, the petitioners contend, there is no regulatory impediment to the Department considering whether a pattern of export prices or constructed export prices exists which supports the use of the average-to-transaction methodology. The petitioners also assert that, even if the former regulations remained in effect, they provide discretion to consider targeted dumping even without an allegation or to extend the deadline for filing an allegation. The petitioners claim that, to the extent that the withdrawn regulations remain effective, there are compelling reasons for the Department to exercise its discretion to consider targeted dumping in this case that did not exist in previous Section 129 cases.

The petitioners also argue that the recent decision in *Thyssenkrupp Acciai Speciali Terni S.p.A., et. al., v. United States*, 603 F.3d 928 (Fed. Cir. 2010) (*Thyssenkrupp*), is inapposite because, in this case, the Department must render the final determination consistent with the Panel Report. The petitioners assert that switching to an average-to-transaction methodology is the more appropriate means to accomplish that goal than the one used in the Preliminary Results. According to the petitioners, nothing in *Thyssenkrupp* limits the Department's ability to consider alternative means to render its determinations WTO compliant.

Finally, the petitioners assert that the precedents in *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*) and *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), and accompanying Issues and Decision Memorandum at Comment 3 (*Ecuador Shrimp*) should not be found to be controlling here. Citing *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930 (December 10, 2008) (*Withdrawal*), the petitioners assert that, after *EC Zeroing* and *Ecuador Shrimp*, the Department recognized that the former regulations were impractical and fundamentally unfair and that they had the effect of denying relief intended by Congress. Furthermore, the petitioners claim, the reason why the Department declined to find good cause to examine targeted dumping in *EC Zeroing* and *Ecuador Shrimp* was because it had not yet developed a methodology for identifying targeted dumping. According to the petitioners, this is no longer the case.

TPBI argues that the petitioners' targeted-dumping allegations must be rejected as time-barred under the law governing the proceeding. Citing 19 CFR 351.301(d)(5) and 351.414(f)(3), TPBI contends that a targeted-dumping allegation must be made no later than 30 days before the preliminary determination in an original investigation. TPBI argues that, because this Section 129 determination is a redetermination of the original investigation and not a new proceeding, these regulations govern this proceeding because they were in effect at the time of the investigation. Citing *Withdrawal*, TPBI asserts that the Department's withdrawal of this time limitation applies expressly only to investigations initiated on or after December 10, 2008.

Citing *EC Zeroing* and *Ecuador Shrimp*, TPBI alleges that the Department has rejected targeted-dumping allegations as untimely in similar circumstances as here. Furthermore, TPBI argues, the Department faced an analogous situation when it revised the regulations for industry support for a petition and the Department rejected an attempt to apply the revised regulation to an investigation that was initiated prior to the revision.

TPBI contends that the WTO Appellate Body ruled that the Department's use of zeroing under the transaction-to-transaction methodology in *Softwood Lumber* was inconsistent with the Antidumping Agreement but that the case was subsequently settled by mutual agreement of the parties before the courts could rule on it. Accordingly, TPBI argues, the legality of the Department's approach in *Softwood Lumber* is untested under U.S. law.

Furthermore, TPBI argues, since *Softwood Lumber*, the Department has taken the approach of strictly curtailing Section 129 determinations to address only those issues actually decided by the panel. Citing *Thyssenkrupp*, TPBI asserts that the Court of Appeals for the Federal Circuit upheld the Department's approach by affirming the Department's decision not to correct clerical errors raised for the first time in Section 129 determinations. Citing *Ecuador Shrimp*, TPBI states its belief that the Department has found that the targeted-dumping methodology is an independent provision of the antidumping law which is unrelated to its modification of its methodology of calculating weighted-average dumping margins to remove zeroing. TPBI alleges that zeroing is the only issue subject to the implementation agreement between the United States and Thailand and all that was addressed by the panel. According to TPBI, accepting the petitioners' targeted-dumping allegation here would render the agreement between the United States and Thailand a bait-and-switch tactic by the United States.

TPBI also argues that the petitioners' targeted-dumping allegations violate 19 CFR 351.414(f)(2), which requires that the transaction-to-average methodology only apply to targeted sales. TPBI asserts that, when the petitioners' calculations are made to comport with the governing regulation so that the transaction-to-average methodology, and hence zeroing, applies only to the alleged targeted sales, TPBI's margin would remain below zero.

Finally, TPBI argues that it would be a serious strategic blunder to accept the petitioners' allegations. TPBI contends that the WTO Appellate Body has not ruled on whether zeroing may be applied when a targeted-dumping methodology is employed. TPBI asserts that it is uncertain that zeroing will be countenanced by the WTO Appellate Body when the question is reviewed, given the WTO Appellate Body's broad condemnation of zeroing under other comparison methodologies. TPBI argues that adopting the petitioners' allegation would maximize the odds for ultimate failure by those that advocate for zeroing with targeted dumping.

The Government of Thailand argues that the Department should reject the petitioners' allegations because it would be inconsistent with the agreement between the United States and Thailand. The Government of Thailand contends that its WTO claim only concerned the application of zeroing and that the Department's use of the normal average-to-average comparison methodology was not at issue. The Government of Thailand suggests that the

Department resolve the dispute in the same manner as it did in the antidumping duty investigation concerning frozen shrimp from Thailand, which was done by removing zeroing. The Government of Thailand asserts that, if adopted, the petitioners' methodology would represent a complete undermining of the agreement between the United States and Thailand and, therefore, should be rejected.

Department Position: We have not acted on the petitioners' targeted-dumping allegations because they are untimely. The withdrawal of the regulations "is effective for all antidumping duty investigations initiated on or after December 10, 2008." *Withdrawal*, 73 FR at 74930. This Section 129 determination does not change the fact that the investigation at issue was initiated prior to December 10, 2008. The investigation at issue was initiated on July 10, 2003. Thailand challenged the results of that investigation at the WTO and this Section 129 determination is a response to the results of that challenge. Thus, the regulations in effect at the time of the less-than-fair-value (LTFV) investigation remain applicable to the determination the Department is rendering not inconsistent with WTO obligations by issuing this Section 129 determination.

Section 351.301(d)(5) (2003) of the Department's regulations governing the investigation provide that, "[i]n an antidumping investigation, an allegation of targeted dumping made by the petitioner or other domestic interested party under § 351.414(f)(3) is due no later than 30 days before the scheduled date of the preliminary determination." The petitioners' targeted-dumping allegations were filed on May 17, 2010, well after the date we published the preliminary determination (January 26, 2004). Accordingly, we find that the petitioners' allegations are untimely.

Furthermore, the regulations which apply to the investigation here are the same as applied in *EC Zeroing* and *Ecuador Shrimp*. In *Ecuador Shrimp*, we said,

"The petitioner's arguments for considering the weighted-average-to-individual-transaction, or 'targeted dumping,' methodology were addressed in the EC Final Results Memo at Comment 2. In the EC Final Results Memo, 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 the 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, 62 FR 27295, 27338, 27375 (May 19, 1997) (final rule)."

*Ecuador Shrimp*, 72 FR 48257, at Issues and Decision Memorandum, Comment 3.

The fact that the Department's analysis of targeted-dumping allegations today differs from the analysis employed at the time of the investigation at issue here or at the time of the investigations and Section 129 proceedings for *EC Zeroing* and *Ecuador Shrimp* does not lead the Department to conclude that domestic interested parties did not have sufficient time to make an allegation of targeted dumping at the time of the investigation at issue here.

Accordingly, consistent with *EC Zeroing* and *Ecuador Shrimp*, we have not examined whether there was targeted dumping as alleged by the petitioners.

## **2. All-Others Rate**

Comment: The petitioners argue that the Department should calculate the all-others rate based on the simple average of the recalculated (after applying the average-to-transaction methodology) margins for TPBI and Universal. Citing *Polyethylene Retail Carrier Bags from Indonesia: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 74 FR 56807 (November 3, 2009), the petitioners contend that the Department's practice is to use a simple average of the margins where there are only two calculated rates in order to avoid the disclosure of proprietary information.

No other parties commented on this issue.

Department Position: We have found that, upon recalculation, TPBI had no antidumping duty margin concerning its sales during the period of investigation. All of the other respondents, except for Universal, have antidumping duty margins based entirely on adverse facts available. Therefore, because the margin we calculated for Universal is the only margin which is neither *de minimis* nor based entirely upon adverse facts available, consistent with our long-standing practice, we have based the all-others rate on the margin we calculated for Universal. See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Italy*, 64 FR 30750, 30755 (June 8, 1999) (*SSSS in Coils from Italy*), and *Coated Free Sheet Paper from Indonesia: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 72 FR 30753, 30757 (June 4, 2007) (unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from Indonesia*, 72 FR 60636 (October 25, 2007)) (*Coated Free Sheet Paper from Indonesia*). This rate is 4.69 percent.

## **3. Effective Date**

Comment: TBPI argues that the effective date of the final determination should be no later than July 31, 2010. TBPI argues that, although the United States and Thailand have agreed that U.S. implementation would occur by August 18, 2010, the final determination should be implemented earlier because the annual review of the order runs from August through July. Because implementation of the Section 129 proceeding is prospective, if the implementation occurs after July 31, 2010, then TPBI could be subject to an administrative review for the 2010-2011 review

period which would cause both TPBI and the Department to bear the administrative burdens and costs for an administrative review for TPBI. TPBI argues that, given the minimal amount of time involved (up to 18 days) and the administrative costs to be avoided, the Section 129 final determination should be implemented with an effective date on or before July 31, 2010. Citing *Implementation of the Findings of the WTO Panel in United States--Antidumping Measure on Shrimp From Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp From Thailand*, 74 FR 5638 (January 30, 2009), TPBI contends that this would be in keeping with the practice employed previously in similar situations.

No other parties commented on this issue.

Department Position: Section 129(b)(4) of the URAA states that, after consulting with the Department and relevant Congressional committees, the U.S. Trade Representative (USTR) will direct the Department to implement a Section 129 determination. Section 129(c)(1) governs the date upon which that implementation becomes effective. Therefore, the date of implementation is not within our discretion and we cannot determine, at this time, whether the implementation will occur on or before July 31, 2010.

### **Final Antidumping Margins**

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

<u>Manufacturer/Exporter</u>	<u>Final Determination Margins</u> <sup>1</sup>	<u>Re-calculated Margins</u> <sup>2</sup>
Thai Plastic Bags Industries Co., Ltd., Winner's Pack Co., Ltd., and APEC Film Ltd.	2.26%	0.00%
Advance Polybag Inc., Alpine Plastics Inc., API Enterprises Inc., and Universal Polybag Co., Ltd. (Universal)	5.35%	4.69%
Champion Paper Polybags Ltd.	122.88% <sup>3</sup>	122.88%

<sup>1</sup> See *Antidumping Duty Order: Polyethylene Retail Carrier Bags From Thailand*, 69 FR 48204, 48205 (August 9, 2004).

<sup>2</sup> See Memorandum to the File entitled "Preliminary Recalculation of the Weighted-Average Margin for Thai Plastic Bags Industries Group pursuant to the Preliminary Section 129 Determination in the Implementation of Findings of the WTO Panel" dated April 27, 2010, and Memorandum to the File entitled "Preliminary Recalculation of the Weighted-Average Margin for Universal Polybag pursuant to the Preliminary Section 129 Determination in the Implementation of Findings of the WTO Panel" dated April 27, 2010.

<sup>3</sup> The margins for Champion Paper Polybags Ltd., TRC Polypack, and Zip-Pac Co., Ltd., were based on the highest margin based on petition information as adverse facts available. See *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Thailand*, 69 FR 34122, 34123 (June 18, 2004). Thus, we have determined that it is not necessary to change the final margins with respect to these companies because no zeroing was used to calculate these margins and, therefore, these margins are not inconsistent with the Panel's findings.

TRC Polypack	122.88% <sup>3</sup>	122.88%
Zip-Pac Co., Ltd.	122.88% <sup>3</sup>	122.88%

**All-Others Rate**

As discussed in response to Comment 2, above, section 735(c)(5)(A) of the Act provides that the estimated all-others rate shall be an amount 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* margins and any margins determined entirely under section 776 of the Act. Universal is the only respondent in this investigation for which we have calculated a company-specific rate that was not zero, *de minimis*, or determined entirely under section 776 of the Act. Therefore, for purposes of determining the all-others rate and pursuant to section 735(c)(5)(A) of the Act, we are using the weighted-average dumping margin calculated for Universal which is 4.69 percent. See, e.g., *SSSS in Coils from Italy*, and *Coated Free Sheet Paper from Indonesia*.

**Implementation of Partial Revocation and Recalculated Margins**

Upon recalculation, TPBI does not have a dumping margin. Therefore, if directed to implement this Section 129 determination, the Department will revoke the order with respect to TPBI effective on the date upon which USTR directs the Department to implement its final results. Accordingly, we would instruct U.S. Customs and Border Protection (CBP) to liquidate without regard to antidumping duties entries of the subject merchandise manufactured and exported by TPBI 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 for merchandise manufactured and exported by TPBI. In addition, we would instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all other exporters or producers. We would instruct CBP to continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension-of-liquidation instructions would remain in effect until further notice. The all-others rate established in this Section 129 determination would be the new cash-deposit rate on or after the effective date for all exporters of subject merchandise for which the Department has not calculated an individual rate.



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 Dispute Settlement Body by applying the methodology in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27, 2006), and adopting the recalculated weighted-average dumping margins as outlined above.

Agree \_\_\_\_\_ Disagree \_\_\_\_\_

\_\_\_\_\_  
Paul Piquado  
Acting Deputy Assistant Secretary  
for Import Administration

\_\_\_\_\_  
Date