

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

A. SUMMARY

The Department of Commerce (“Department”) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (“CIT” or the “Court”) in *Ad Hoc Shrimp Trade Action Committee, Versaggi Shrimp Corporation, and Indian Ridge Shrimp Company v. United States*, Consol. Court No. 05-00192 (July 1, 2009) (“*Remand Opinion and Order*”). The Court remanded the issue of the Department’s decision to exclude dusted shrimp from the scope of the antidumping duty investigations on certain frozen and canned warmwater shrimp. *See Remand Opinion and Order* at 27. The Department excluded dusted shrimp from the scope of the final determinations,¹ as well as the amended final determinations and antidumping duty orders.²

¹ *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Brazil*, 69 FR 76910 (December 23, 2004) (“*Brazil Final Determination*”); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Ecuador*, 69 FR 76913 (December 23, 2004) (“*Ecuador Final Determination*”); *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 India*, 69 FR 76916 (December 23, 2004) (“*India Final Determination*”); *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) (“*China Final Determination*”); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Thailand*, 69 FR 76918 (December 23, 2004) (“*Thailand Final Determination*”); *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam*, 69 FR 71005 (December 8, 2004) (“*Vietnam Final Determination*”); collectively the “*Shrimp AD Final Determinations*.”

² *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Brazil*, 70 FR 5143 (February 1, 2005) (“*Brazil Amended Final Determination & Order*”); *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Ecuador*, 70 FR 5156 (February 1, 2005) (“*Ecuador Amended Final Determination & Order*”); *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from India*, 70 FR 5147 (February 1, 2005) (“*India Amended Final Determination & Order*”); *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) (“*China Amended Final Determination & Order*”); *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp*

Following the publication of the *Shrimp AD Final Determinations* and the *Shrimp AD Amended Finals and Orders*, Petitioner appealed the Department's determination to exclude dusted shrimp from the scope of these antidumping duty orders. On July 1, 2009, the Court remanded to the Department its amended final determinations of sales at less than fair value in the investigations of certain frozen warmwater shrimp. *See Shrimp AD Amended Finals and Orders*. Specifically, the Court remanded to the Department its decision to exclude dusted shrimp from the scope of the investigations, stating that the Department's decision was unsupported by adequate reasoning and therefore contrary to law. *See Remand Opinion and Order* at 27.

In accordance with the Court's instructions, and as discussed further below, we have reconsidered the Department's dusted shrimp scope determination and now determine that dusted shrimp should be included within the scope of the *Shrimp AD Final Determinations* and *Shrimp AD Amended Finals and Orders*.³

B. ANALYSIS

Reconsideration of the Department's Exclusion of Dusted Shrimp from the Scope of the Investigations

In the underlying investigation and in accordance with its usual practice, the Department set aside time to allow parties to comment on the scope of the investigation. During this time, the Department received comments requesting the exclusion of dusted and battered shrimp from

from Thailand, 70 FR 5145 (February 1, 2005) ("*Thailand Amended Final Determination & Order*"); *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 70 FR 5152 (February 1, 2005) ("*Vietnam Amended Final Determination & Order*"); collectively, the "*Shrimp AD Amended Finals and Orders*."

³ As is often the case, the amended final determinations and antidumping duty orders were written and published as one document. Thus, although the amended final determinations and orders may be referenced together as the *Shrimp AD Amended Finals and Orders*, only the scope of the *Shrimp AD Final Determinations* and subsequent amended final determinations are at issue in this remand determination.

the scope of the investigations. The Department continued to examine these products throughout the investigations, evaluating and analyzing numerous comments from the parties.⁴

For the preliminary determinations, the Department found that dusted shrimp was included in the scope of the investigations, inviting further comment on the issue of developing a definition of dusted shrimp such that an exclusion could be administered. In the Prelim Dusted Shrimp Scope Memo, the Department stated:

The Department preliminarily finds that while substantial evidence exists to consider battered shrimp to fall within the meaning of the breaded shrimp exclusion identified in the scope of these proceedings, there is insufficient evidence to consider that shrimp that has been dusted falls within the meaning of ‘breaded’ shrimp. . . shrimp which has been dusted with flour, spices, or a combination thereof, is preliminarily within the scope of these proceedings until such time as an adequate description which precludes evasion can be established.

See Prelim Dusted Shrimp Scope Memo at 18-19. The Department further explained:

{T}he Department also finds that although the definition of breaded includes battered, the record is less clear regarding dusted shrimp. Accordingly, given the inadequate record information for defining dusted shrimp, which also presents concerns regarding the administrability of any orders, the Department hereby invites comment on this issue. . .

Id. at 25. After receiving further comments from parties, the Department found that dusted shrimp should be excluded from the scope of the investigations, reasoning that an adequate definition of dusted shrimp had been reached (*see* Dusted Shrimp Scope Memo⁵ at 25-28), that

⁴ The initial request to exclude, *inter alia*, dusted shrimp was filed with the Department on February 17, 2004. Between February 27, 2004, and June 7, 2004, various parties submitted comments regarding this exclusion. The Department issued a preliminary scope ruling on dusted shrimp on July 2, 2004. *See* Memorandum from Edward Yang, Senior Enforcement Coordinator, China/NME Unit, to Jeffrey A. May, Deputy Assistant Secretary for Import Administration: Antidumping Investigations on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the Socialist Republic of Vietnam, and the People’s Republic of China: Scope Clarification on Dusted Shrimp and Battered Shrimp, dated July 2, 2004 (“Prelim Dusted Shrimp Scope Memo”). The Department solicited comments from the interested parties on the Prelim Dusted Shrimp Scope Memo, and parties submitted their comments and rebuttal comments on August 2 and August 12, 2004, respectively. Additionally, parties commented on the dusted shrimp exclusion in their case and rebuttal briefs, which were filed between October 20, 2004, and October 27, 2004.

⁵ *See* Memorandum from Edward Yang, Senior Enforcement Coordinator, China/NME Unit, to Barbara E. Tillman, Acting Deputy Assistant Secretary for Import Administration: Antidumping Investigations on Certain Frozen and

there was no economic incentive for the removal of the dusting layer (*Id.* at 28), and that the dusted shrimp exclusion would be administrable within an antidumping duty order (*Id.* at 28-29).

On Remand, the Court ordered the Department to reconsider its exclusion of dusted shrimp from the scope of the investigations. Pursuant to the *Remand Opinion and Order*, the Department has reconsidered the scope of the investigations with respect to the inclusion of dusted shrimp. Moreover, in light of the Court's opinion, the Department has determined that dusted shrimp should properly be considered within the scope of the investigations, and has provided an explanation for its decision in accordance with the Court's order.

The Court found that the reasoning in the Department's Dusted Shrimp Scope Memo was inadequate. Specifically, the Court held:

The Scope Clarification Memorandum does not contain an analysis of the question of whether dusted shrimp fall within the scope of the proposed investigation as set forth in the Petitions. For instance, Commerce does not conclude therein that dusted shrimp are *other* than frozen shrimp that have been 'processed.' Nor does the memorandum conclude that the dusting layer on the product is other than a "minor addition" or that dusted shrimp is not a food preparation containing more than twenty percent by weight of shrimp.

See Remand Opinion and Order at 19. Additionally, the Court rejected the three reasons the Department used as the basis for excluding dusted shrimp, namely: 1) that there is a clear and administrable definition of dusted shrimp; 2) that the addition of dusting material physically alters the shrimp such that it differs from subject merchandise, and that with respect to several of the *Diversified Products*⁶ criteria, Commerce found that dusted shrimp is an intermediate product used for the purpose of making breaded and battered shrimp; and 3) regarding

Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam: Scope Clarification: Dusted Shrimp and Battered Shrimp, dated November 29, 2004 ("Dusted Shrimp Scope Memo").

⁶ *See Diversified Products Corp. v. United States*, 6 CIT 155, 572 F.Supp. 883 (1983).

circumvention concerns, the Department concluded that circumvention accomplished by removing the dusting flour from the product would be unlikely to occur. *Id.* at 20.

Additionally, the Court found that the three decisions by the Court of Appeals the Department relied upon were inapplicable to the instant issue. The Court stated that *Mitsubishi Electric Corp.*⁷ did not involve an issue analogous to the issue presented by this case and instead involved the Department's broad formulation of scope to encompass certain subassemblies in an antidumping duty investigation on cellular mobile telephones, and that the case did not address the extent of the Department's authority to narrow the scope from that which a petitioner claims to have proposed, and the holding therein does not signify that the Department may exercise that authority unreasonably. *See Remand Opinion and Order* at 24-25. The Court noted that *Duferco*⁸ also does not address the issue presented by the instant case, but instead stands for the principle that Commerce, in making a scope ruling *after* the issuance of an antidumping duty order, lacks the authority to construe scope language in the order to cover certain merchandise if there is no language in the order that includes or can reasonably be interpreted to include that merchandise. *Id.* at 25. Finally, the Court stated that although *Tak Fat Trading Co.*⁹ involved an antidumping duty order that contained scope language different from that which had been proposed in the petition, the Department's authority to adopt scope language different from that proposed in the petition was not at issue in this case. *Id.* at 25-26.

In sum, the Department originally found that dusted shrimp, while not meeting the definition of breaded shrimp, should be excluded from the scope of the order as they possessed physical characteristics that differentiated them from the subject merchandise (indeed, that they

⁷ *See Mitsubishi Electric Corp. v. United States*, 898 F.2d 1577, 1583 (Fed. Cir. 1990).

⁸ *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087 (Fed. Cir. 2002).

⁹ *See Tak Fat Trading Co. v. United States*, 396 F.3d 1378 (Fed. Cir. 2005).

were a type of “intermediate product” of the two excluded products, breaded or battered shrimp), and that evidence on the record indicated that such an exclusion would be administrable. The Court held, however, that a decision on whether to include or exclude dusted shrimp from the scope of the investigations hinges on the matter of whether dusted shrimp were included in the proposed scope of the investigations as stated in the original petitions, and whether the scope could be administered adequately without the exclusion of dusted shrimp. *Id.* at 24.

First, the Department, on remand, determines that the analytical process that led to the exclusion of dusted shrimp during the course of the instant investigations was incorrectly sequenced. The appropriate analysis should have referred to the scope language of the investigations to determine first whether dusted shrimp constituted subject merchandise, and if so, then considered whether it fell into an excluded product’s definition. In this context, the relevant scope language states:

In addition, food preparations, which are not ‘prepared meals,’ that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this investigation.

See, e.g., Thailand Final Determination at 76919; Petitions for the Imposition of Antidumping Duties: Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People’s Republic of China, and the Socialist Republic of Vietnam (December 31, 2003) (“Petitions”) at Ex. I-2. Thus, at issue is whether this language regarding food preparations makes clear that shrimp, otherwise meeting the description of scope merchandise, but that is dusted according to the definition of dusting contained in the scope language, is included in the scope of the investigations. In response to the requests for exclusion of dusted shrimp, the Department sought comments regarding, and ultimately articulated, a definition of dusted shrimp. As defined by the Department in the final determinations, dusted shrimp must contain

90-96 percent shrimp by weight. Accordingly, dusted shrimp necessarily satisfies the “more than 20 percent by weight” threshold.

The Court referenced the original petitions, particularly the language that includes food preparations, as well as the following “All products that meet the physical description are within the scope of this investigation unless explicitly excluded.” *See Petitions* at Ex. I-2; *Remand Opinion and Order* at 15. Chapter 16 of the Harmonized Tariff Schedule of the United States (“HTSUS”) defines food preparations as:

food preparations fall in this chapter provided that they contain more than 20 percent by weight of sausage, meat, meat offal, blood, fish or crustaceans, mollusks, or other aquatic invertebrates, or any combination thereof.

Given the language in the petitions and the above definition of food preparations (which was accepted by the Department and incorporated in the scope language, which states that food preparations that contain more than 20 percent by weight of shrimp or prawn fall within the scope), the Department determines that dusted shrimp constitutes subject merchandise within the scope of the *Shrimp AD Final Determinations* and *Shrimp AD Amended Finals and Orders*.

Second, regarding the matter of whether dusted shrimp would fall under the exclusion for breaded shrimp, the Court stated:

An ambiguity conceivably could arise from the proposed scope language in the Petitions over whether dusted shrimp are a form of ‘breaded shrimp,’ a product that the Petitions proposed for exclusion from the scope. . . . This is a doubtful proposition, however, because shrimp coated with flour would seem, as a matter of plain meaning, to be physically distinct from shrimp coated with breading. Regardless, Commerce resolved any potential ambiguity that may have arisen when, during the administrative proceeding, it decided not to include dusted shrimp within the meaning it assigned to the term “breaded shrimp.” *Thailand Prelim. Determination*, 69 Fed. Reg. at 47,102-03.

See Remand Opinion and Order at 16. More explicitly stated, the Department decided in the investigations that the specific exclusion for breaded or battered shrimp did not cover dusted shrimp:

Although Respondents argue strenuously that the Department should find the breaded shrimp exclusion includes dusted shrimp for a variety of reasons, they have not argued that dusted and breaded shrimp are considered the same product, or essentially the same product, by the industry or any authorities, as a definitional matter. In fact, they repeatedly argue the opposite - that dusted shrimp is an input, albeit a necessary one in their description, to breaded or battered shrimp without presenting evidence to substantiate their assertions. In so doing, they cannot logically treat these products as definitionally one and the same. Accordingly, with respect to this consideration, the Department finds that the record evidence, and lack thereof, weighs against finding dusted shrimp to be included within the meaning of breaded shrimp.

See Prelim Dusted Scope Memo at 20. Dusted shrimp is an input into the production of breaded and battered shrimp, rather than breaded or battered shrimp itself. Shrimp coated with flour is physically different from shrimp coated with breading or batter. Moreover, another factor in considering whether dusted shrimp fall within the exclusion for breaded shrimp is the fact that Petitioner has continually objected to the exclusion of dusted shrimp (whether as part of the breaded shrimp exclusion, or a separately crafted one). For all the foregoing reasons, we find that dusted shrimp does not fall within the breaded or battered shrimp exclusions.

C. COMMENTS FROM INTERESTED PARTIES¹⁰

Petitioner asserts that the Department followed the correct analytical process in first seeking to determine whether dusted shrimp was included in the scope of the petitions, and

¹⁰ The Department released its Draft Remand Redetermination to parties on September 22, 2009, and parties filed comments on October 2, 2009. On October 5, the Department sent a letter to Petitioner (Ad Hoc Shrimp Trade Action Committee (“Domestic Producers”) and its members: Carolina Seafoods, Papa Rod, Inc., Versaggi Shrimp Co., Big Grapes, Inc., Knight’s Seafood Inc., Kenny Lewis, Montha Sok and Craig Wallis), instructing it to remove untimely new factual information it had submitted in its comments. Petitioner refilled its comments on October 6, 2009. On October 9, 2009, Eastern Fish Company, Inc. and Long John Silver’s, Inc. (collectively, “Eastern Fish/LJS”) filed a letter stating that Petitioner’s re-filed comments still included untimely new factual information. On October 16, 2009, the Department issued a second letter to Petitioner instructing it again to redact the untimely new factual information. Petitioner submitted a second redacted version of its comments on October 19, 2009.

correctly determined that dusted shrimp would be considered a food preparation, which is covered by the scope language. Petitioner explains that, as dusted shrimp are an input used to produce breaded shrimp, they cannot fall within the specific exclusion for breaded shrimp. Petitioner states that it repeatedly and consistently expressed strong concerns that an exclusion for dusted shrimp would create a vehicle for significant circumvention.

Despite these concerns, Petitioner notes that an exclusion was granted as defined by the importers of the product, with no *actual* demonstration that the definition was administratively feasible or workable. Petitioner contends that the grant of an exclusion over the objection of the petitioning industry is poor policy and threatens the integrity of the trade relief available to domestic industries injured by unfair import competition. In sum, Petitioner concludes that the Department's Draft Remand Redetermination now correctly applies the law and correctly concludes that dusted shrimp is within the scope of the antidumping duty orders.

First, Eastern Fish/LJS argue that the CIT has limited the Department to addressing in its redetermination only the issue of whether the scope of the final determinations should include dusted shrimp, and not the scope of the orders, as the Department has done in its draft redetermination.

Second, Eastern Fish/LJS state that the draft remand incorrectly suggests that dusting imparts only a minor addition to the shrimp. Eastern Fish/LJS note that the Department's analysis concludes that dusted shrimp are subject merchandise, as they fall within the purview of scope's food preparation language, but that it is not clear if the Department is also basing its determination to include dusted shrimp because the dusting process only constitutes a "minor addition." Eastern Fish/LSJ elaborate that if the Department states in the final remand determination that dusted shrimp is covered by the scope of the final determinations, the

Department should clarify that its determination is *not* based on a finding that the application of a dusting layer constitutes merely a “minor addition” to shrimp, as such a finding would be contradicted by record evidence.

Third, Eastern Fish/LJS contend that each of the three reasons¹¹ cited for not including dusted shrimp in the breaded shrimp exclusion is flawed. Eastern Fish/LJS note that both the CIT and the Department incorrectly reference a separate exclusion for battered shrimp, when in fact battered shrimp fall under the aegis of the breaded shrimp exclusion. Eastern Fish/LJS state that after the preliminary determinations, the Department increasingly treated battered shrimp as being an excluded product in its own right, as opposed to being derivatively excluded through the express exclusion for breaded shrimp. For example, Eastern Fish/LJS note that in the final scope memo, the Department stated that it had “determine{d} that battered shrimp is excluded from the scope of these investigations” without mentioning breaded shrimp. *See Dusted Shrimp Scope Memo at 27.*

Eastern Fish/LJS further contend that under the Department’s criteria from the draft redetermination, battered shrimp would not be included within the breaded shrimp because it is also an input for breaded shrimp and is physically different from breaded shrimp. Eastern Fish/LJS argue that this would be an absurd result that demonstrates the inappropriateness of applying such an analysis to dusted shrimp.

Eastern Fish/LJS argue that the nature of Petitioner’s opposition to the exclusion of dusted shrimp does not warrant any deference from the Department. Eastern Fish/LJS state that the degree of deference owed by the Department to Petitioner on the question of whether dusted shrimp is included in the breaded shrimp exclusion depends on the nature of the “intent” behind

¹¹ 1) dusted shrimp is an input into the production of breaded and battered shrimp, rather than breaded or battered shrimp itself; 2) shrimp coated with flour is physically different from shrimp coated with breading or batter; and 3) petitioners have continually objected to the exclusion of dusted shrimp.

that exclusion that the Department can discern from the *petitions* in this case – not from Petitioner’s repeated post-initiation objections to the exclusion of dusted shrimp under any analysis. Thus, Eastern Fish/LJS contend that the Department’s showing of deference to Petitioner would reward them for their failure to supply any definition for breaded shrimp either in the petitions or during the investigations.

Eastern Fish/LJS argue that dusted shrimp is within the breaded shrimp exclusion because it constitutes highly-advanced, semi-finished breaded shrimp that need only minor additional processing to become completed breaded shrimp. Eastern Fish/LJS posit that the flaw with the Department’s analysis- that an input to an excluded product cannot be included in that exclusion, and that a product cannot be included in another product’s exclusion if the former is at all “physically different” from the excluded product- is that it is far too broad to be useful in finding the appropriate, reasonable range of an exclusion for a product such as breaded shrimp in the circumstances of this case. Eastern Fish/LJS state that both dusted shrimp and battered shrimp are much more than ingredient-related inputs into breaded shrimp such as flour, eggs and breading material, and that each is, in essence, the breaded shrimp itself in a highly-advanced, semi-finished form, and is just one or two stages short of completion.

Fourth, Eastern Fish/LJS note that, as the Department found in the original investigations, dusted shrimp is wholly dedicated to becoming either breaded or battered shrimp, in that 1) it cannot be consumed as food in its unfinished state; 2) it cannot be further processed into any other finished product beside breaded or battered shrimp; and 3) it cannot be reconverted to the fresh or thawed peeled shrimp that is the original major material input into dusted, battered and breaded shrimp, and used to produce a processed shrimp product other than breaded or battered shrimp. Eastern Fish/LJS note that if Petitioner excluded breaded shrimp from the scope because

such imports were not injuring them and could not injure them, the same reasoning should apply for imports of dusted shrimp, which are highly-advanced, semi-finished forms of breaded shrimp that need only minor additional processing to be completed. Eastern Fish/LJS thus request that the Department find dusted shrimp to be within the breaded shrimp exclusion on this basis.

Lastly, Eastern Fish/LJS assert that because dusted shrimp constitutes a separate class or kind of merchandise from all other subject merchandise, the Department must ensure that all of the initiation requirements have been met for dusted shrimp for each country, and must conduct an LTFV investigation for dusted shrimp from each country. Eastern Fish/LJS contend that if the Department continues to find in the remand redetermination it files with the CIT that dusted shrimp is subject merchandise and is not included in the breaded shrimp exclusion, the Department must also recognize in that redetermination that dusted shrimp constitutes a separate class of kind of merchandise from all other covered merchandise. Eastern Fish/LJS note that in the original final determinations, the Department based its finding that dusted shrimp was not subject merchandise in part on its finding that dusted shrimp constituted a separate class or kind of merchandise from all covered merchandise. *See Dusted Shrimp Scope Memo at 24-25.* The Department based this finding on the results of its class or kind analysis under the *Diversified Products* criteria. Eastern Fish/LJS argue that the Department would thus have to view each petition as requesting a separate investigation of dusted shrimp imports from the relevant country. *See Torrington Co. v. United States*, 745 F. Supp. 718 (CIT 1990), *aff'd*, 938 F.2d 1276 (Fed. Cir. 1991). This would require the Department to determine whether plaintiffs met all of the initiation requirements with regard to dusted shrimp imports from each of the six countries, including the AD law's two general standing requirements. The Department would also have to determine whether there were, in fact, imports of dusted shrimp from each country during the

period of investigation, and whether dusted shrimp imports from each country were dumped during the POI.

D. DEPARTMENT'S POSITION

The Department employed the correct analytical framework in its draft remand redetermination in determining that dusted shrimp would be considered food preparations (which are included in the plain language of the scope), and that dusted shrimp would not fall under the breaded shrimp exclusion listed in the scope language. Below, we address each of the points Eastern Fish/LJS's submitted in opposition to the Draft Remand Redetermination.

First, however, we agree with Eastern Fish/LJS that the CIT instructed the Department to address in its redetermination only the issue of whether the scope of the final and amended final determinations should include dusted shrimp, and not the scope of the orders. *See Remand Opinion and Order* at 27. The Department's references to amending the scope of the orders in its Draft Remand Redetermination were in error. This redetermination only addresses the scope of the investigations, and we have included revised scope language in Appendix 1, removing any references to the scope of the orders.¹²

Second, while Eastern Fish/LJS argue that the draft remand incorrectly suggests that dusting imparts only a minor addition to the shrimp, the Department, in the Draft Remand Redetermination, did not make a determination with respect to whether dusting would be considered a minor addition or not. Whether dusting constitutes a minor addition is not relevant to the Department's analysis here. Although it is true that minor additions to frozen warmwater shrimp are not sufficient to remove a product from the scope of the investigations, regardless of

¹² We note that the original shrimp investigations also included canned warmwater shrimp. However, given that the U.S. International Trade Commission ("ITC") failed to find injury with respect to canned warmwater shrimp and that the subsequent *Shrimp AD Amended Finals and Orders* did not consider canned warmwater shrimp, we are similarly not including any reference to canned warmwater shrimp in the revised scope language in Appendix 1.

what type of addition dusting constitutes, a product that otherwise meets the definition of the scope must fall under one of the express exclusions in order to be excluded. As noted above, the central issue is whether dusted shrimp is covered by the explicit language of the scope, and if so, whether dusted shrimp falls into any of the specific exclusions. *Id.* at 14. Given that the Department found that dusted shrimp is included within the scope by virtue of the language pertaining to food preparations, and that it does not fall within the breaded shrimp exclusion,¹³ no determination is necessary regarding whether the dusting process conveys only a minor addition.

Third, we also disagree with Eastern Fish/LJS's contention that the three reasons cited in the Draft Remand Redetermination for not including dusted shrimp in the breaded shrimp exclusion were flawed. In the Prelim Dusted Shrimp Scope Memo, the Department indicated that battered shrimp fell within the meaning of the breaded shrimp exclusion. During the investigations, the Department sought to develop an administrable definition for battered shrimp to include in the scope language. *See* Prelim Dusted Shrimp Scope Memo at 18-19; Dusted Shrimp Scope Memo at 29-30. While Eastern Fish/LJS contend that under the criteria used for the Draft Remand Redetermination, battered shrimp would, like dusted shrimp, not be included within the breaded shrimp exclusion because they are an input into breaded shrimp, this argument is flawed. No party has challenged the exclusion of battered shrimp, nor the analysis by which the Department found it to be excluded. Only the exclusion for dusted shrimp is in dispute. Pursuant to the *Remand Opinion and Order*, the Department has analyzed the dusted shrimp exclusion independently and in accordance with the Court's opinion.

Nevertheless, record evidence demonstrates that breaded and battered shrimp are considered one product:

¹³ No party has argued that dusted shrimp falls under any of the other exclusions.

Respondents provided the ‘United States Standards for Grades of Raw Frozen Breaded Shrimp,’ NOAA Seafood Inspection Program. (NOAA Standards) Section 265.151, Product Description, states ‘Frozen raw breaded shrimp are whole, clean, wholesome, headless, peeled shrimp which have been deveined where applicable of the regular commercial species, coated with a wholesome, suitable batter and/or breading.’ Thus, in these Standards, the Department of Commerce has previously found ‘batter’ or ‘breading’ both to be termed properly ‘breaded’ shrimp. Clearly, such a designation by the Department’s own subject matter experts at NOAA will carry great weight.

See Prelim Dusted Shrimp Scope Memo at 20; respondent Ocean Duke’s April 16, 2004, scope comments at Attachment 3.¹⁴ In contrast, dusted shrimp is conspicuously absent from this definition. Furthermore, battered shrimp is not always further processed and can be a finished product, like breaded shrimp, whereas dusted shrimp always require further processing. See, e.g., Eastern Fish/LJS’ June 7, 2004, scope comments at 2-3. Accordingly, the Department’s distinct treatment of and conclusion regarding dusted shrimp is supported by the record.

Contrary to Eastern Fish/LJS’s argument that the Department does not owe Petitioner deference given its failure to resolve the ambiguous nature of the breaded shrimp exclusion, the Court has held that the Department owes deference to the intent of the proposed scope of an antidumping investigation as expressed in an antidumping petition:

Under the statutory scheme, Commerce owes deference to the intent of the proposed scope of an antidumping investigation as expressed in an antidumping petition. See 19 U.S.C. §§ 1673, 1673a(b); *NTN Bearing Corp. of Am. v. United States*, 14 CIT 623, 626, 747 F. Supp. 726, 730 (1990) (“If the petition is deemed sufficient, the ITA is statutorily obliged to insure that the proceedings are maintained in a form which corresponds to the petitioner’s clearly evinced intent and purpose” citing *Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 700 F. Supp. 538 (1988), *aff’d*, 898 F.2d 1577, 1579 (Fed. Cir. 1990)).

See *Remand Opinion and Order* at 13-14. Despite Eastern Fish/LJS’s claims of ambiguity, “breaded shrimp” is a commonly used term, and in fact appears in the Harmonized Tariff

¹⁴ No party has challenged this NOAA standard or its appropriateness in being used to render our decision regarding battered shrimp.

Schedule of the United States with a specific number, without any further elaboration or detail.

The Court also properly recognized that:

Commerce retains authority to define the scope of the investigation and may depart from the scope as proposed by a petition if it determines that petition to be “overly broad, or insufficiently specific to allow proper investigation, or in any other way defective.” *NTN Bearing Corp.*, 14 CIT at 627, 747 F. Supp. at 731 (citing *Torrington Co. v. United States*, 14 CIT 507, 745 F. Supp. 718 (1990), *aff’d*, 938 F.2d 1276, 1278 (Fed. Cir. 1991)).

Id. As noted by the Court above, the Department has authority to define the scope. In this case, however, the Department has not found the scope language to be overly broad or otherwise not administrable, thus the Department believes that it must consider Petitioner’s intent as expressed in the clear language of the petitions and during the investigations. The scope language stating that food preparations would be within the scope (unless otherwise specifically excluded) appeared in the original petitions. *See Petitions* at Ex. I-2 (cited specifically on page 6 above). Thus, we can conclude that dusted shrimp, as defined during the course of the investigations, meet the definition of a food preparation as described in the scope language. We have not changed our determination in this regard, finding both in the original investigations and in this Remand Redetermination, that dusted shrimp are not the same as breaded shrimp. *See pages 7-8, above.* We note that the Court indicated that considering dusted shrimp to be a form of breaded shrimp would be a doubtful proposition. *See Remand Opinion and Order* at 16.

Lastly, because we find that the proper analysis leads to the conclusion that dusted shrimp constitutes a food preparation within the meaning of the scope of the original investigations, we do not need to conduct new investigations for dusted shrimp, as Eastern Fish/LJS assert. Although the Department’s previous analysis examined the *Diversified Products* criteria, the Court has rejected that analysis in this case. *See Remand Opinion and*

Order at 20-23. The Court found that the rationale offered in the Dusted Shrimp Scope Memo is unconvincing:

The memorandum states that “dusted shrimp is a separate class or kind of merchandise more similar to battered and breaded shrimp, which are outside the scope of these investigations, than the subject merchandise” and that “the addition of dusting material to shrimp physically changes the product significantly enough that it differs from otherwise-subject merchandise.” *Nov. Scope Clarification Mem.* 24. In concluding that dusting creates a physical characteristic separating dusted shrimp from “subject merchandise,” the memorandum assumes, without justification and contrary to general scope language that appears to include dusted shrimp, that dusted shrimp is *not* subject merchandise. Again, according to the general scope language, “subject merchandise” appeared to include not only all forms of “processed” frozen warmwater shrimp that were not specifically excluded, but also food preparations containing more than twenty percent by weight of warmwater shrimp, so long as the finished product was not a prepared meal. *See, e.g., Thailand Final Determination*, 69 Fed. Reg. at 76,919. The scope was not limited to frozen shrimp that lacked any form of a coating, seasoning, marinade or sauce. *See, e.g., id.* Commerce specifically decided, for example, that the scope included frozen shrimp scampi. *See, e.g., id.* Battered and breaded shrimp also appear to fall within the general scope language—because they would appear to be forms of processed shrimp, if not food preparations—and are placed outside the scope *only* as a result of a specific exclusion. Therefore, the finding that dusted shrimp is a separate class or kind of merchandise from the “subject merchandise” is illogical and unsupported by the record.

We no longer employ the irrelevant analysis that the Court rejected. As stated above, in this remand determination, the Department concluded that the language concerning food preparations is dispositive on the issue of whether dusted shrimp is included in the scope of the investigations, a fact which has not been rebutted by Eastern Fish/LJS. Given that the Department now finds dusted shrimp to be covered by the plain language of the scope and is thus subject merchandise, we are no longer examining whether it is a separate class or kind of merchandise for purposes of determining whether it should be covered or excluded.

E. FINAL REMAND CONCLUSION

In accordance with the Court’s instructions, and based on the preceding analysis which takes into consideration the comments from Eastern Fish/LJS and Petitioner, we have reconsidered the exclusion of dusted shrimp from the scope of the investigations and now determine that such merchandise is included within the scope based on the above analysis. Moreover, across the investigations for all countries, we have analyzed the impact of finding dusted shrimp to be within the scope on our antidumping duty calculations. Out of all investigations, only one respondent, the Allied Pacific Group in the investigation covering the People’s Republic of China, reported sales of dusted shrimp during the period of the investigation, and these sales comprised a very small percentage of its total sales. The Department reviewed the administrative record in the *China Final Determination* and *China Amended Final Determination & Order*, and discovered that the Allied Pacific Group’s sales of dusted shrimp were inadvertently included in its antidumping duty margin calculation, and that no party noted this fact. Accordingly, it is unnecessary to recalculate any antidumping duty margins in this remand determination concerning the scope of these investigations. The Department has also drafted proposed scope language that removes the exclusion for dusted shrimp.¹⁵ See Appendix 1.

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

Date

¹⁵ While the Department finds that dusted shrimp are no longer excluded from the scope of the investigations, it has retained the five-step definition of the dusting process, as dusting is a necessary precursor for producing battered shrimp, which remain outside the scope.

Appendix 1

Final Scope Language on Remand

The scope of this investigation includes certain warmwater shrimp and prawns, whether frozen, wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,¹⁶ deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this investigation, regardless of definitions in the Harmonized Tariff Schedule of the United States (“HTS”), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannamei*), banana prawn (*Penaeus merguensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this investigation. In addition, food preparations, which are not “prepared meals,”

¹⁶ “Tails” in this context means the tail fan, which includes the telson and the uropods.

that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this investigation.

Excluded from the scope are: 1) breaded shrimp and prawns (HTS subheading 1605.20.10.20); 2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; 3) fresh shrimp and prawns whether shell-on or peeled (HTS subheadings 0306.23.00.20 and 0306.23.00.40); 4) shrimp and prawns in prepared meals (HTS subheading 1605.20.05.10); 5) dried shrimp and prawns; 6) Lee Kum Kee's shrimp sauce; 7) canned warmwater shrimp and prawns (HTS subheading 1605.20.10.40); and 8) certain battered shrimp. Battered shrimp is a shrimp-based product: 1) that is produced from fresh (or thawed-from-frozen) and peeled shrimp; 2) to which a "dusting" layer of rice or wheat flour of at least 95 percent purity has been applied; 3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; 4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and 5) that is subjected to individually quick frozen ("IQF") freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this investigation are currently classified under the following HTS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this investigation is dispositive.