***UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN FROZEN WARMWATER SHRIMP FROM VIET NAM***

**(DS429)**

**RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND PANEL MEETING**

**April 15, 2014**

# TABLE OF EXHIBITS

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| US-87 | *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Partial Rescission and Final Partial Rescission of the Second Administrative Review*, 73 Fed. Reg. 12,127, 12,128 (March 6, 2008) |
| US-88 | *Tembec, Inc. v. United States*, 461 F. Supp. 2d 1355, 1364 (Ct. Int'l Trade 2006) |
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| *EC – Fasteners (China) (AB)* | Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China,* WT/DS397/AB/R, adopted 28 July 2011 |
| *US – Anti-Dumping Measures on Oil Country Tubular Goods (Panel)* | Panel Report, *Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/R, adopted 28 November 2005, as modified by the Appellate Body Report, WT/DS282/AB/R |
| *US – COOL (Article 21.3(c))* | Award of the Arbitrator, *United States – Certain Country of Origin Labelling (COOL) Requirements*, *Arbitration under Article 21.3(c) of the DSU*, WT/DS384/24, WT/DS386/23, 4 December 2012 |
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| *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* | Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by the Appellate Body Report WT/DS268/AB/RW |
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| *US – Shrimp (Viet Nam) (Panel)* | Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404/R, adopted 2 September 2011 |

## I. CLAIMS CONCERNING ZEROING

**Question 53. [to the United States] Does the Final Modification of 14 February 2012 apply to all entries which remained unliquidated as of the date of its entry into force, i.e., on 16 April 2012?**

1. The *Federal Register* notice of February 14, 2012 (Final Modification), which implemented the DSB's recommendations and rulings with respect to the so-called "zeroing" methodology, defines its scope of application by proceedings, not entries. The Final Modification provides that the methodology set out in the notice:

- "will be effective and applicable to all reviews pending before the Department for which the preliminary results are issued after April 16, 2012";

- "will be used in implementing the findings of the WTO panels in *US – Zeroing (EC)*, *US – Zeroing (Japan)*, *US – Stainless Steel (Mexico)*, and *US – Continued Zeroing (EC)*, with respect to any antidumping duty proceedings conducted pursuant to section 129";

- "will also be applicable to any reviews currently discontinued by the Department if such reviews are continued after April 16, 2012 by reason of a final and conclusive judgment of a U.S. Court."[1]

2. Accordingly, whether or not the Final Modification applies to a particular prior entry of merchandise will turn on the specific facts and circumstances with regard to that particular entry and its associated administrative review.

3. The United States would also emphasize, as explained in prior submissions, that the "zeroing" methodology does not exist today (nor at the time of the Panel's establishment) as a measure of general and prospective application, and thus cannot be subject to the type of challenge – often called "as such" – that applies measures irrespective of their application. Vietnam otherwise has not established a measure existed as of the time this matter was referred to the DSB, nor that it was inconsistent irrespective of its application in a particular proceeding. Finally, numerous determinations demonstrate that Commerce now offsets dumping margins on dumped sales with amounts by which normal value is less than export price on non-dumped sales in various contexts,[2] confirming that the measure subject to the DSB's recommendations and

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[1] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8101, 8113 (Feb. 14, 2012) (Exhibit US-39).

[2] *See, e.g.,* U.S. First Written Submission, para. 208, nn.273-275 (referencing investigations, administrative reviews and sunset review in which Commerce now offsets dumping margins on dumped sales with amounts by which normal value is less than export price on non-dumped sales). *See also Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty Administrative Review*, 78 Fed. Reg. 15699 (March 12, 2013) (stating that "the Department applied the assessment rate calculation method adopted in Final Modification for Reviews . . . <u>with offsets being provided for non-dumped comparisons</u>.") (emphasis added) (Exhibit US-29), unchanged in the final results by *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 78 Fed. Reg. 56211 (Sept. 13, 2013) (final results of administrative review) (Exhibit US-30).

rulings no longer exists. Therefore, as Vietnam has not demonstrated that the United States maintains a so-called "zeroing" methodology as a measure of general and prospective application, the United States cannot be considered in breach of a covered agreement.

**Question 54. [to the United States] Please explain whether and how the USDOC's calculation of dumping margins in administrative reviews has been consistent with the 14 February 2012 Final Modification announcing in particular that the USDOC would "provide offsets for non-dumped comparisons when using monthly A–A comparisons in reviews". (Exhibit US-39, p. 8102).**

4. The *Federal Register* notice of February 14, 2012, provides that as a result of the modification to the so-called "zeroing" methodology, "the new, normal comparison methodology to be used [by Commerce] in reviews will be the A-A comparison methodology (on a monthly basis) and offsets will be provided when the results of those comparisons are aggregated for purposes of determining the weighted-average dumping margin. This new methodology will parallel the WTO-consistent methodology the Department currently uses in original investigations."[3] As noted above and in the U.S. first written submission, numerous determinations illustrate that Commerce now uses this new, normal comparison methodology in administrative reviews[4] and offsets dumping margins on dumped sales with amounts by which normal value is less than export price on non-dumped sales in various contexts. These recent determinations thus confirm that Commerce's calculations of dumping margins in administrative reviews has been consistent with the modification announced in the *Federal Register* notice of February 14, 2012.

## II. CLAIMS WITH RESPECT TO THE "NON-MARKET ECONOMY-WIDE ENTITY" RATE

**Question 55. [to the United States] Can the United States explain whether and, if so, how and why the composition of the Viet Nam-wide entity changed from one administrative review to another?**

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[3] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8101, 8106 (Feb. 14, 2012) (Exhibit US-39).

[4] *See, e.g.*, *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty Administrative Review*, 78 Fed. Reg. 15,699 (March 12, 2013) (stating that "the Department applied the assessment rate calculation method adopted in Final Modification for Reviews . . . with offsets being provided for non-dumped comparisons.") (emphasis added) (Exhibit US-29), unchanged in the final results by *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 78 Fed. Reg. 56,211 (Sept. 13, 2013) (final results of administrative review) (Exhibit US-30); *Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review*, 78 Fed. Reg. 34,337 (June 7, 2013) (Exhibit US-40); *Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews*; 2010-2011, 77 Fed. Reg. 73,415 (December 10, 2012) (Exhibit US-41).

5. In each administrative review of the antidumping duty order on shrimp from Vietnam, Commerce determines based on the record in the review whether entities are sufficiently independent from the Government of Vietnam to qualify for an antidumping duty rate separate from any rate that may be assigned to the Vietnam-government entity during the applicable review. Under Commerce procedures explained to all exporters, a company that had been previously treated as part of the Vietnam-government entity may request to receive in a review a rate separate from the entity and may submit evidence during the review to demonstrate its eligibility for this separate rate. Likewise, a company that previously had received a separate rate may be considered part of the Vietnam-government entity in a review if the evidence indicates that its status has changed. For this reason, the composition of the Vietnam-government entity may change from one administrative review to the next.

**Question 56. [to the United States] The United States argues that "[a]lthough the entity rate of 25.76 percent originally was based on an adverse facts available determination from the initial investigation, it is the rate Commerce continued to apply to the entity in subsequent reviews". (United States' first written submission, para. 185).**

> **a. The Panel notes that in paragraph 49 of its opening oral statement at the second meeting, the United States submits that: "Commerce also again found that the Vietnam government entity failed to cooperate in the second review and applied a rate of 25.76 per cent as facts available. Commerce continued to apply this rate, or the rate in effect, for the Vietnam Government entity in the third and fourth administrative reviews". Is there a discrepancy between this statement and the statement in paragraph 185 above, in terms of (i) when the USDOC determined the rate applicable to the Viet Nam wide entity, (ii) when the USDOC determined to use facts available in establishing this rate, and (iii) which rate (the one determined in the original investigation or the one determined in the second administrative review), the USDOC "continued" to apply in the third, fourth, fifth, and sixth administrative reviews?**

6. The statements referenced by the Panel are consistent, and the United States appreciates the opportunity to clarify any possible misunderstanding.

7. First, the rate applied to the Vietnam-government entity in the original investigation was based on the facts available with an adverse inference.[5] As adverse facts available, Commerce assigned to the Vietnam-government entity a 25.76 percent rate, the lowest rate alleged in the petition. It was thus during the investigation that Commerce originally assigned the 25.76 rate to the Vietnam-government entity.

8. During the first and second administrative reviews, Commerce sent questionnaires to potential respondents to request information about the quantity and value of their imports to the

[5] *See* U.S. First Written Submission, paras. 21-26.

United States during the relevant time period ("Q&V questionnaires").[6] Commerce sent the Q&V questionnaires to respondents because it intended to limit respondent selection given the number of companies subject to review and needed to determine which companies to select as mandatory respondents based on their respective import volumes.[7] A number of companies failed to respond to the Q&V questionnaire. Because they failed to provide Commerce with necessary information that it requested, Commerce determined that these companies had failed to cooperate. These companies also submitted no information to show that they were separate from the Vietnam-government entity. As a result, Commerce considered these companies to be a part of the Vietnam-government entity. Additionally, two of the three mandatory respondents in the first administrative review failed to cooperate by not responding to Commerce's additional requests for information and did not demonstrate that they were separate from the Vietnam-government entity. Because constituent parts of the Vietnam-government entity failed to cooperate by not providing requested necessary information, Commerce found the entity had failed to cooperate and assigned a rate based on adverse facts available.[8] The rate assigned continued to be the rate established in the investigation, 25.76 percent.

9. In the third, fourth, fifth and sixth administrative reviews, Commerce based its selection of mandatory respondents on U.S. customs data and then requested information only from the companies selected as mandatory respondents.[9] All the companies that Commerce selected as mandatory respondents participated and submitted the requested information during the third, fourth, fifth and sixth review. Thus unlike the first and second reviews, Commerce made no finding during these later reviews that any constituent part of the Vietnam-government entity had

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[6] *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of the First Administrative Review and New Shipper Review*, 72 Fed. Reg. 10689, 10690 (March 9, 2007) (Exhibit US-83); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Partial Rescission and Final Partial Rescission of the Second Administrative Review*, 73 Fed. Reg. 12127, 12128 (March 6, 2008) (Exhibit US-87).

[7] In other instances, Commerce has relied on import volume data provided by the U.S. Customs and Border Protection to select mandatory respondents. However, Commerce found that data to be unreliable for purposes of the first and second administrative reviews.

[8] *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of the First Administrative Review,* 72 Fed. Reg. 52052 (Sept. 12, 2007) (Exhibit VN-62); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty,* 72 Fed. Reg. 52273 (Sept. 9, 2008) (Exhibit VN-63).

[9] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, In Part, of the Third Administrative Review,* 74 Fed. Reg. 10009, 10009 (March 9, 2009) (Exhibit VN-61); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, In Part, of the Fourth Administrative Review*, 75 Fed. Reg. 12206, 12207 (March 15, 2010) (Exhibit VN-09); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, In Part, of the Fifth Administrative Review*, 76 Fed. Reg. 12054, 12055 (March 4, 2011) (Exhibit VN-15); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results for Sixth Administrative Review*, 77 Fed. Reg. 13547, 13547 (March 7, 2012) (Exhibit VN-19).

failed to provide requested and necessary information such that the application of facts available was warranted. At the same time, however, neither the Vietnam-government entity nor any of its constituent parts requested a review of the rate applicable to the Vietnam-government entity during the third, fourth, fifth or sixth administrative reviews. Therefore, since Commerce did not otherwise select the Vietnam-government entity as a mandatory respondent, Commerce based the final assessment for entries by the Vietnam-government entity during the review period on the reasonable rate used to collect security against liability or the "rate in effect," *i.e.*, the previously assigned 25.76 percent rate.

10. Thus as noted in paragraph 185 of the U.S. first written submission, the first time that Commerce applied a rate of 25.76 percent to the Vietnam-government entity was in the initial investigation. As noted in paragraph 49 of the U.S. opening oral statement at the second meeting, Commerce also found that the Vietnam-government entity failed to cooperate in the second review and applied a rate of 25.76 percent based on facts available with an adverse inference. As is evident, the rates Commerce applied to the Vietnam-government entity in the covered reviews are the same as the rate applied in the initial investigation and the second review. However, as the Panel noted during the second meeting, the "rate in effect" for the covered reviews was based on the rate applied by Commerce to the Vietnam-government entity in the second review.

11. The U.S. response to Question 57 below further explains the use of the rate in effect with respect to the Vietnam-government entity.

> **b. The Panel understands that, according to the United States, the Viet Nam-wide entity rate applied in the three administrative reviews at issue in the present dispute is the same measure which was under consideration in the panel on US – Shrimp (Viet Nam) and which was found to be inconsistent with Articles 9.4 and 6.8 by the panel in that dispute. Can the United States confirm the Panel's understanding in this respect?**

12. Vietnam has failed to demonstrate in this dispute that there is a measure and that such a measure is inconsistent "as such."[10] The United States thus does not agree with the question's premise, which implies that Vietnam has made out an "as such" challenge to a measure in this dispute when it has not.

13. Further, in *US – Shrimp (Viet Nam) (Panel)*, Vietnam did not even assert "as such" claims with respect to the NME-entity rate,[11] and the panel concluded that Vietnam's "continued use" claims with respect to the NME-entity rate did not fall within its terms of reference.[12] The

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[10] U.S. First Written Submission, paras. 140-145; U.S. Second Written Submission, paras. 63-68.

[11] *See US – Shrimp (Viet Nam) (Panel)*, para. 7.70 (Vietnam made "as such" claims only with respect to the so-called zeroing methodology).

[12] *Ibid*.

panel's terms of reference in *US – Shrimp (Viet Nam) (Panel)* thus did not cover any "as such" claims with respect to an NME-entity rate, nor did its terms of reference include the fourth, fifth, or sixth administrative reviews. Therefore, the United States does not agree that the measure found to be inconsistent with Articles 9.4 and 6.8 by the panel in *US – Shrimp (Viet Nam) (Panel)* is the same measure that the Panel is considering here.

**c. In addition, can the United States please explain why the USDOC proceeded differently in the first and second administrative reviews, on the one hand, and the third, fourth, fifth, and sixth administrative reviews, on the other hand? In the former, the USDOC made a determination that the Viet Nam-wide entity failed to cooperate and on that basis applied a rate determined on the basis of facts available. In the latter, the United States submits that the USDOC merely continued to apply to the entity the rate that already applied to that entity.**

14. Please see the response of the United States to question 56.a. above for an explanation of the differences in Commerce's actions during the referenced administrative reviews.

**Question 57. [to both parties] In its response to Panel question No. 16(a), the United States submits that, inter alia, it "does not believe that the AD Agreement requires that a particular label be assigned to th[e NME-wide entity] rate; it is sufficient that the rate applied is not inconsistent with the obligations contained in the AD Agreement" (United States' response to Panel question No. 16(a), para. 52 (emphasis added)). Assuming arguendo that it is not necessary to assign a label to the NME-wide rate, how should the Panel assess the consistency of this "unlabeled" rate with the provisions of the Anti-Dumping Agreement? What provisions discipline this rate?**

15. The issue raised in this question must be considered in light of the way antidumping duties are assessed on a retrospective basis. Under a retrospective system, a company may be examined in a review in order to assess antidumping duties on the entries covered by the time period under review. The company may then need to post an antidumping duty deposit on future entries to secure liability that may arise with respect to those entries. That security could be based on the antidumping margin calculated for the past entries examined during the review. That the company should post a deposit for potential liability on future entries based on the antidumping margin calculated for past entries is reasonable and consistent with the Ad Note to Article VI, which confirms that "a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping . . . duty pending final determination of the facts in any case of suspect dumping . . ."[13] The AD Agreement then disciplines the final rate assessed on the future entries because it requires an administering authority to allow an exporter to request a review if the exporter believes that its actual rate should be lower than the rate on

[13] General Agreement on Tariffs and Trade 1994 (*GATT 1994)*, Ad Article VI: paras 2 and 3.

which the security is based. And in such a requested review, all of the disciplines in the AD Agreement relating to the calculation of dumping margins will apply.

16. In this matter, the rate used to collect security against the Vietnam-government entity's liability for the covered reviews was based on the rate applied by Commerce to the entity in the second review. Neither the Vietnam-government entity nor any of its constituent parts requested a review of this rate during the fourth, fifth or sixth administrative reviews. As a result, the amount of antidumping duty to be assessed during these reviews could not be based on information about the entries made by the Vietnam-government entity during the time period covered by the reviews, or based on a failure to submit such information. Where a rate has previously been assigned for an exporter's past entries, and where a Member collects security (in this case, a cash deposit) for the payment of antidumping duties pending final determination based on that rate, the AD Agreement does not require a Member to assess a duty at a different rate absent a request by the exporter to do so. Therefore, Commerce's decision to assess duties based on the security that had been collected and to apply the "rate in effect" to entries made during those reviews was not inconsistent with Articles 6.8 and 9.4 of the AD Agreement because:

(a) neither the Vietnam-government entity nor any of its constituent parts requested a review of the rate applicable to the Vietnam-government entity during the covered reviews; and

(b) Commerce did not otherwise calculate a rate for the Vietnam-government entity during the covered reviews based on the entries made during the relevant time period, or the failure to submit such information.[14]

**Question 58. [to the United States] In response to Panel question No. 17, the United States explains that, during the original investigation, the USDOC determined that Kim Anh, which had been initially selected as one of the mandatory respondents, "… was part of the Vietnam-government entity". The United States adds that "[b]ecause a part of the NME-government entity was selected for individual examination, the NME-government entity as a whole was under individual examination".**

**a. Is the United States arguing that the rate applied to Kim Anh (which was based on facts available) determined the rate for the Viet Nam-wide entity?**

17. No, the United States is not arguing that the rate applied to Kim Anh determined the rate for the Vietnam-government entity.

[14] The United States further notes that Commerce's decision to collect the security, *i.e.*, an amount based on the previously assigned 25.76 percent rate, is consistent with how assessment works under systems that assess antidumping duties on a prospective basis.

**b. If so, why does the USDOC's notice indicate the rates for, respectively, Kim Anh Company Ltd and the "Vietnam-wide margin" under two different entries (see Exhibit VN-72, p. 71009)?**

18. Commerce listed the rate for Kim Anh in its final determination for the original investigation separate from the rate for the Vietnam-government entity as an indication of the change in Kim Anh's status – from a separate-rate respondent to a constituent part of the Vietnam-government entity – following Commerce's preliminary determination.

19. Specifically, the preliminary determination for the original investigation indicates that Kim Anh, as a mandatory respondent, initially qualified for a rate separate from the Vietnam-government entity.[15] Thus as shown in Commerce's notice for the preliminary determination, Kim Anh as a mandatory respondent had its rate listed separately from the Vietnam-government entity.

20. Subsequent to this preliminary determination, Kim Anh refused to allow Commerce to verify its questionnaire responses.[16] As a result, Commerce determined that Kim Anh had failed to cooperate in its investigation and considered it part of the Vietnam-government entity.[17] However, given Commerce had listed Kim Anh in the notice for its preliminary determination apart from the Vietnam-government entity, Commerce continued to do so in the notice for its final determination as an indication of the change in Kim Anh's status, especially since the notice otherwise makes eminently clear that Kim Anh is part of the Vietnam-government entity.

21. For example, the *Federal Register* notice for the final determination definitively states that "Kim Anh does not qualify for a separate rate" – both in the text and in a footnote.[18] Further, in comment 6 of the memorandum accompanying this final determination, Commerce states Kim Anh is not entitled to a rate separate from the rate assigned to the Vietnam-government entity.[19] Thus given that Commerce in its preliminary determination had initially found that Kim Anh had qualified for a rate separate from the Vietnam-government entity, it made sense for Commerce in its final determination to discuss Kim Anh's subsequent actions in isolation so that its reasoning for finding Kim Anh to be part of the Vietnam-government entity would be readily apparent. Similarly, it also made sense for Commerce in its final determination

[15] *Notice of Preliminary Determination of Sales at Less Than Fair Value, Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, 69 Fed. Reg. 42672, 42686 (July 16, 2004) (Exhibit US-07).

[16] *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam*, 69 Fed. Reg. 71005, 71008 (Dec. 8, 2004), and accompanying issues and decision memorandum, pp. 19-22 (Exhibit VN-04).

[17] *Ibid.*

[18] *Ibid*, pp. 71,008-71,009.

[19] *Ibid*, accompanying issues and decision memorandum, pp. 19-22.

to list Kim Anh apart from the Vietnam-government entity in the *Federal Register* notice, while all the time underscoring that it was part of the Vietnam-government entity, so as to demonstrate the change in Kim Anh's status following the publication of Commerce's preliminary determination.

**c. During the original investigation, on the basis of which facts did the USDOC determine that Kim Anh belonged to the Viet Nam-wide entity? Please point to the relevant text in the USDOC determination in the original investigation.**

22. Comment 6 of the memorandum accompanying Commerce's final determination contains the relevant text explaining Commerce's basis for determining that Kim Anh was part of the Vietnam-government entity.[20] That comment explains the history of Kim Anh's actions during the investigation. That comment also explains why Commerce appropriately determined that Kim Anh was part of the Vietnam-government entity during the original investigation following Kim Anh's refusal to allow Commerce to verify its questionnaire response.[21]

**d. If Kim Anh's facts available rate somehow was used to calculate or determine the Viet Nam-wide rate, can the United States explain why the Viet Nam-wide entity rate remained unchanged when Kim Anh received a separate rate of 4.57% during the second administrative review? (see Final Results, Second Administrative Review, Exhibit VN-72, p. 52276)**

23. In Commerce's final determination for the original investigation, Kim Anh was considered part of the Vietnam-government entity. Commerce thus in that final determination did not assign Kim Anh a rate separate from the rate it assigned the Vietnam-government entity. Thus the question's introductory premise, which suggests that Commerce had assigned Kim Anh a rate in the original investigation, is not correct.

24. Further, there is no link between the rate assigned to the Vietnam-government entity during the second review and the rate assigned to Kim Anh. As explained in response to Question 56.a, certain companies failed to respond to the Q&V questionnaire. These companies also submitted no information to demonstrate that they were separate from the Vietnam-government entity. As a result, Commerce considered these companies to be a part of the Vietnam-government entity and assigned a rate to the entity based on a finding of a failure to cooperate.[22]

[20] *Ibid.*

[21] *Ibid*, p. 21.

[22] *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed. Reg. 52273, 52275 (Sept. 9, 2008) (Exhibit VN-63).

25. In contrast, Kim Anh participated in the second review and demonstrated that, unlike the original investigation, it should be assigned a rate separate from the Vietnam-government entity for entries it made during the time period covered by that review. As a result, Commerce considered Kim Anh separate from the Vietnam-government entity because it had met the criteria for the application of a separate rate and assigned it a rate different from the Vietnam-government entity.[23]

**Question 59. [to the United States] Also in its response to Panel question No. 17(a), the United States explains that Kim Anh, which was initially selected as one of the four mandatory respondents in the original investigation, was later determined to be part of the Viet Nam-wide entity because it refused to allow the USDOC to verify information. The United States then concludes that "[b]ecause a part of the NME-government entity was selected for individual examination, the NME-government entity as a whole was under individual examination" (United States' response to Panel question No. 17(a), para. 56).**

**a. With reference to the last sentence of paragraph 56, is the United States asserting that the Viet Nam-wide entity was under individual examination in the original investigation of the Shrimp order?**

26. Yes, the Vietnam-government entity was under individual examination during the original investigation.

27. The last sentence of paragraph 56, however, needs to be read in context with the entire response of the United States to Question 17, specifically the responses to Question 17.d.ii, which explain that the Vietnam-government entity was under individual examination in the original investigation for a number of reasons of which Kim Anh's refusal to allow Commerce to verify information was just a part. Please see the response of the United States to question 59.c below for further clarification.

**b. Does the United States equate the concept of "individual examination" with an entity, producer or exporter being a "mandatory respondent"? Put another way, can non-mandatory respondents be "individually examined"? If so, please explain.**

28. The terms "individual examination" and "mandatory respondent" are not interchangeable. A mandatory respondent is always under individual examination; however, a company under individual examination is not necessarily a mandatory respondent.

29. For example, during the initial investigation, the Vietnam-government entity was under individual examination but not as a mandatory respondent (or, that is, until Commerce appropriately relied on facts available to determine that Kim Anh was part of the Vietnam-government entity following its refusal to allow Commerce to verify the information it had

[23] *Ibid*, pp. 52274-75.

submitted). Another example is a company that is a voluntary respondent during a proceeding. Commerce will individually examine the voluntary respondent and, if it qualifies, assign it an individual rate, but the voluntary respondent is not a mandatory respondent.

**c. Please explain how the statement in paragraph 56 is to be reconciled with the statement, in the United States' response to Panel question 22, para. 86, in which the United States affirms that the USDOC "requested information from and individually examined the Vietnam-government entity during the original investigation" because it requested information from all respondents and issued the questionnaire to the Government of Viet Nam.**

30. The United States appreciates the opportunity to clarify any possible misunderstanding concerning the statement in paragraph 56 of our responses to the questions following the first Panel meeting. As discussed below, this statement was just part of the U.S. response and must be read in the context of the overall response of the United States to Question 17, paragraphs 56-66.

31. First, as explained in the response to Question 17, it is impossible for an investigating authority to know at the start of any investigation the relationships that might exist among foreign companies involved in the production or exportation of the product under investigation during the period of investigation.

32. As to the matter in dispute, Commerce had previously determined that Vietnam is an NME country. Thus at the very start of the investigation of shrimp from Vietnam, Commerce through a questionnaire provided all foreign companies involved in the production and exportation of this product the opportunity to demonstrate they were sufficiently free from governmental control or material influence with respect to their pricing and output of shrimp from Vietnam. The record in this regard confirms then that, with respect to the Vietnam-government entity, Commerce effectively requested information from the entity itself, as well as constituent parts of that entity, on February 25, 2004, when it issued Section A of its questionnaire to all respondents; again on March 1, 2004, when it issued the remaining sections of its questionnaire to the mandatory respondents; and again on March 11, 2004, when it issued its entire questionnaire to the Government of Vietnam.[24]

33. As the antidumping investigation on shrimp from Vietnam progressed, it became apparent that the Vietnam-government entity generally as well as constituent parts of that entity were failing to provide information about exports of shrimp from Vietnam to the United States that could be verified. For example,

[24] See U.S. Responses to the Panel's Questions Following the First Panel Meeting, paras. 61-63, and *Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam*, 69 Fed. Reg. 42672, 42673-75 (July 16, 2004) (Exhibit US-07).

- the Government of Vietnam had received a request to respond to Commerce's antidumping questionnaire but "did not provide a response"[25];

- the mandatory respondent Kim Anh had submitted a questionnaire response but then failed to permit Commerce to verify its responses, leading Commerce to conclude that Kim Anh was not entitled to a separate rate from the Vietnam-government entity[26]; and

- three Vietnamese exporters who responded to Commerce's January 29, 2004, request for quantity and value data did not submit responses to Section A of the questionnaire (including information about government control and the ability to qualify for a separate rate), and several other companies that did submit responses to Section A failed to demonstrate that they were sufficiently free from governmental control or material influence over the pricing and output of shrimp from Vietnam.[27]

Commerce thus concluded that the Vietnam-government entity, including constituent parts of that entity, did not provide the information that it had requested for its investigation of shrimp from Vietnam. In these circumstances, Commerce appropriately relied on facts available drawing an adverse inference in order to determine a margin for the Vietnam-government entity.

34. In this context, paragraph 86 of the U.S. response to Question 22 accurately summarizes the circumstances under which the Vietnam-government entity was under individual examination: "Commerce . . . requested information from and individually examined the Vietnam-government entity during the original investigation and then assigned the Vietnam-government entity its own rate based on facts available with adverse inferences <u>because the Government of Vietnam, Kim Anh and several other companies</u> failed to provide Commerce necessary verifiable information."[28] (Emphasis added.)

35. Paragraph 56 of the U.S. response to Question 17, on the other hand, was directed more to answering the Panel's specific question about whether the Vietnam-government entity had been selected as a mandatory respondent.[29] As that response indicates, it not until much later in the investigation – at the final determination – that Commerce determined that Kim Anh, one of

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[25] *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, Issues and Decision Memo, p. 35 (Exhibit VN-04).

[26] *Ibid*, pp. 20-22.

[27] *Ibid*, p. 35.

[28] U.S. Responses to the Panel's Questions Following the First Panel Meeting, para. 86.

[29] *Ibid*, para. 56.

the selected mandatory respondents, was actually part of the Vietnam-government entity. Therefore, the situation involving Kim Anh provided an additional basis on which to conclude that the Vietnam-government entity as a whole was under individual examination because Kim Anh had been selected for individual examination as a mandatory respondent and Commerce had ultimately determined that Kim Anh was part of the Vietnam-government entity,

> **d. Footnote 57, attached to the last sentence of para. 56, refers to two different anti-dumping proceedings involving China (Exhibits US-61 and US-62). Can the United States please clarify how and why this evidence is relevant to the question posed by the Panel? In other words, how and why does this evidence indicate that the Government of Viet Nam or the Viet Nam-wide entity was selected as a mandatory respondent in the original investigation of the Shrimp order?**

36. The United States cited to *Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China*[30] and *Honey from the People's Republic of China*[31] to provide the Panel with two examples, albeit with respect to cases involving China, of situations in which the government entity received an adverse facts available rate based on a mandatory respondent's failure to cooperate. These references are not intended to explain treatment of the Vietnam-government entity in the investigation of shrimp from Vietnam. They are intended merely to provide examples of other instances in which similar facts were present and, as a result, the government entity also received an adverse facts available rate.

**Question 60. In paragraph 175 of its first written submission, the United States argues that "the presumption in *EC – Fasteners (China)* that Articles 6.10 and 9.2 require Members to first recognize each entity as an individual exporter or producer … was based on an improper interpretation because the Appellate Body created obligations that are not grounded in the text of these articles". Hence, according to the United States, the Appellate Body's interpretative approach in that dispute was flawed. Could the United States explain in detail why the interpretative approach of the Appellate Body was flawed and what alternative interpretative approach would be appropriate?**

37. The *chapeau* to paragraph 255 of the Working Party Report accompanying Vietnam's Accession Protocol stipulates that the AD Agreement, and thus Articles 6.10 and 9.2, "shall" be applied in proceedings involving exports from Vietnam "consistent with" paragraph 255. Therefore, to the extent that the Appellate Body report in *EC – Fasteners (AB) (China)* interprets Articles 6.10 and 9.2 of the AD Agreement in a manner that would be, if considered in the context of this dispute, inconsistent with this *chapeau*, the Panel should consider the interpretative approach of that report flawed.

[30] Exhibit US-61.

[31] Exhibit US-62.

38. The United States will explain below why the correct approach is to read Articles 6.10 and 9.2 in a manner consistent with paragraph 255 and the exception provided therein when NME conditions prevail. In doing so, the United States will first address points that are not in dispute. The United States will then demonstrate why the U.S. approach is not inconsistent with Articles 6.10 and 9.2 of the AD Agreement.

**Points Not in Dispute**

39. First, this dispute does not involve a challenge to Commerce's finding that the exports at issue originate from an NME country. Unlike the complainant in *EC – Fasteners*, Vietnam does not contest in this dispute Commerce's treatment of Vietnam as an NME country. Even if it did so, the claim would not be supportable because Commerce in 2002 made a factual finding that Vietnam is an NME country.[32] Thus, unlike *EC – Fasteners*, where the Appellate Body agreed with China that its protocol did not, by itself, provide a basis for the EC to presume that China is an NME, the Panel's consideration of Vietnam's NME-entity claims must regard Vietnam as an NME. And given that Vietnam is an NME, it follows that the determination of the United States to apply the provisions of paragraph 255 of Vietnam's Working Party during the antidumping investigation of shrimp from Vietnam must also be considered not inconsistent with the AD Agreement.[33]

40. Second, this dispute does not involve a challenge to Commerce's finding that market economy conditions prevail in the industry producing the like product, *i.e.*, shrimp. Paragraph 255(a) places the burden on the producers under investigation to "clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product" before an importing WTO Member is required to use Vietnamese prices or costs for the industry under investigation.[34] The producers of shrimp from Vietnam during the antidumping proceeding, including the covered reviews, did not show that market economy conditions prevail in Vietnam with respect to the industry that manufactures, produces, and sells the like product. Vietnam also does not contest in this dispute Commerce's finding that NME conditions prevail in this industry. Thus the Panel's consideration of Vietnam's NME-entity claims must regard the industry that manufactures, produces and sells shrimp in Vietnam as operating under NME conditions.

[32] Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002) (Exhibit US-25) (finding that Vietnam is a NME where the government maintains significant control over the Vietnamese economy).

[33] *See* Working Party Report, para. 255(d) (Exhibit US-23) (The NME provisions of paragraph 255(a) apply until Vietnam has established that it is a market economy under the national law of the importing WTO Member).

[34] *See EC – Fasteners (China) (AB)*, para. 366 ("It is true that paragraph 15(a) of China's Accession Protocol places the burden on Chinese exporters to 'clearly show' that market economy conditions prevail in order for the importing WTO Members to be obliged to use Chinese domestic prices and costs in determining price comparability").

41. Finally, this dispute does not involve a challenge to the NME methodology that Commerce uses to calculate normal value for the industry producing the like product in Vietnam. Paragraph 255(a)(ii) indicates that when "producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product," "the importing WTO Member [in determining price comparability] may use a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam." Vietnam does not contest in this dispute the NME methodology that Commerce uses to calculate the normal value aspect of price comparability in the antidumping proceeding covering shrimp from Vietnam, including Vietnam's ability to exercise restraint or direction over firms located in Vietnam and to materially influence those firms decisions about the price or costs of products destined for consumption in Vietnam. Thus the Panel's consideration of Vietnam's NME-entity claims must regard Commerce's NME normal value methodology as based on the legal authority accorded to importing WTO Members under paragraph 255 of the Working Party Report and interpret the AD Agreement, including Articles 6.10 and 9.2, consistent with that methodology.

42. In sum, in this matter, as distinguished from the circumstances considered by the Appellate Body in *EC – Fasteners*, Vietnam's status as an NME is undisputed; the prevalence of NME conditions with regard to the manufacture, production and sale of the like product is undisputed; and the NME methodology used by the United States to calculate the normal value for purposes of price comparability is undisputed. Given the circumstances present here, as shown in the next section, the U.S. approach in this matter for deciding what sets of exports from an NME are considered to be from one exporter or from separate exporters is not inconsistent with the AD Agreement and Article VI of the GATT 1994.

**U.S. Approach is Not Inconsistent with AD Agreement**

43. "Price comparability" is a central tenet of every dumping analysis. Under Article 2.1 of the AD Agreement, a product is to be considered as being dumping only "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Article 2.6 defines the "like product" referenced in Article 2.1 and throughout the Agreement "to mean a product which is identical, *i.e.* alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." Thus under the AD Agreement, when WTO members compare the export price of the product to the normal value of an identical, or nearly similar, product at the ex-factory level, both products are presumed to have originated from the same "factory" and moved into commerce through the same "factory door."

44. In this matter, Commerce's use of an NME methodology to calculate normal value for purposes of price comparability is, as discussed previously, consistent with the legal basis set forth in paragraph 255(a) of the Working Party Report. This NME methodology determines

normal value using "factors of production,"[35] reflecting Vietnam's ability to exercise restraint or direction over firms located in Vietnam and to materially influence those firms decisions about the price or costs of products destined for consumption in Vietnam. The factors are based on actual inputs consumed by firms to manufacture the product or model types sold to the U.S. market.[36] If a firm manufactures these product or model types at more than one facility, Commerce's NME methodology requires the firm to report the factor use and output for each product or model type at each facility.[37] And if Commerce cannot ascertain the actual inputs consumed by a firm to manufacture the like product before it exits the factory, it cannot correctly determine normal value for purposes of price comparability.

45. Thus Commerce's presumption that firms in Vietnam, even if legally separate, are part of an NME-government entity with respect to the calculation of normal value is legally consistent with paragraph 255 of the Working Party Report because Vietnam is in a position to exercise restraint or direction over all firms producing and selling the like product in Vietnam given:

- Vietnam's undisputed NME status;
- the undisputed prevalence of NME conditions with respect to the manufacture, production and sale of the like product; and
- the undisputed requirement that each firm report as part of Commerce's NME normal value methodology the inputs consumed for each product or model types at every facility.

46. As a result, the parallel U.S. approach that presumes that the same firms are part of this NME-government entity with respect to their export activities correctly applies the AD Agreement consistent with paragraph 255 of the Working Party Report because the AD Agreement instructs importing WTO Members for purposes of price comparability to compare normal value and export price of identical or similar products at the ex-factory level.

47. Or put another way, the product exported from Vietnam to the United States moves into commerce through the same factory door as the like product destined for consumption in Vietnam. The firm that manufactures, produces and sells shrimp to the United States thus must be, for purposes of price comparability, identical to the firm that manufactures, produces and sells shrimp in Vietnam. Therefore, the U.S. approach that presumes exports from an NME are to be considered (pending contrary evidence) from one exporter, *i.e.*, the NME-government entity that is legally or operationally in a position to exercise restraint or direction over all firms in Vietnam, correctly reads Articles 6.10 and 9.2 in a manner consistent with paragraph 255

[35] Commerce NME Questionnaire (Administrative Reviews), p. D-1 (Exhibit US-76).

[36] *Ibid*, D-1-2 and D-7-9 (Exhibit US-76).

[37] *Ibid*, D-2 (Exhibit US-76).

when it assigns this exporter an individual margin of dumping and an individual antidumping duty.[38]

48. In contrast, the Appellate Body's finding in *EC – Fasteners* that Articles 6.10 and 9.2 require that an investigating authority first presume that all firms operate independently until evidence appears to the contrary[39] does not result in a reading of Articles 6.10 and 9.2 that is "consistent with" paragraph 255. Indeed, where NME conditions prevail and the resulting NME methodology defines an NME-government entity for purposes of normal value, it is considerably less reasonable to think of firms operating independently from the NME-government entity as the starting point for a margin of dumping analysis than it is to think of them as operating subject to the control of this entity until otherwise demonstrated.

49. In sum, paragraph 255 of Vietnam's Working Party Report provides a legal basis for importing WTO Members to treat Vietnam differently in antidumping proceedings with respect to the determination of a NME-government entity margin "[i]n determining the price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement." And in reading Articles 6.10 and 9.2 in a manner that is consistent with paragraph 255, it is not inconsistent with the AD Agreement for the United States to take the approach that the NME conditions in Vietnam result in government control of all firms until otherwise demonstrated.

**Question 61. [to the United States] Please react to Viet Nam's factual assertions in paragraph 16 of its opening oral statement at the second meeting, that requests for review were made by constituent companies, for instance Agrimex.**

50. Agrimex did not request that Commerce conduct a review of the company's exports during the fourth administrative review. The request to do so was made by domestic producers. As of the date Commerce initiated the fourth review (March 26, 2009),[40] Commerce had not yet completed its third review (September 15, 2009).[41] Therefore, contrary to Vietnam's opening oral statement at the second meeting, Agrimex had not been considered part of the Vietnam-government entity during the third review before Commerce initiated its fourth review.

[38] Although the Appellate Body in *EC – Fasteners* found that the EU's presumption under Article 9(5) of the Basic AD Regulation was inconsistent with Articles 6.10 and 9.2 of the AD Agreement, it also found that the "Articles 6.10 and 9.2 of the Anti-Dumping Agreement do not preclude an investigating authority from determining a single dumping margin and a single anti-dumping duty for a number of exporters if it establishes that they constitute a single exporter for purposes of Articles 6.10 and 9.2 of the Anti-Dumping Agreement." *EC – Fasteners (China) (AB)*, para. 376; *see ibid*, para. 382.

[39] *See EC – Fasteners (China) (AB)*, para. 364.

[40] *Notice of Initiation of Administrative Reviews*, 74 Fed. Reg. 13,178 (March 26, 2009) (Exhibit VN-06).

[41] *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 Fed. Reg. 47,191 (Sept. 15, 2009) (Exhibit VN-72).

51. Further, although domestic producers did sometimes request that certain constituent parts of the Vietnam-government entity be reviewed during the fourth, fifth or sixth review, neither the Vietnam-government entity nor any of its constituent parts requested a review of the rate applicable to the Vietnam-government entity during the covered reviews. Therefore, as previously explained, Commerce continued during the covered reviews to apply the "rate in effect" to the Vietnam-government entity for final assessment purposes.

**Question 63. [to the United States] Were the Vietnamese producers/exporters who were deemed to be part of the Viet Nam-wide entity covered by the fourth, fifth and sixth administrative reviews? If so, did the fact that they were covered by the reviews mean that the USDOC had to determine a new rate for them in each of these reviews?**

52. As previously noted, neither the Vietnam-government entity nor any of its constituent parts requested a review of the rate applicable to the Vietnam-government entity during the fourth, fifth or sixth administrative review. The Vietnam-government entity was not further required to submit information regarding the entries it made during the time periods covered by the fourth, fifth or sixth reviews because no mandatory respondents were considered part of the Vietnam-government entity during these reviews. As a result, the amount of antidumping duty to be assessed with respect to the entity's entries during the fourth, fifth or sixth reviews could not be based on information about the entity's specific entries, or a failure by the entity to submit such information.

53. Commerce otherwise did consider the Vietnam-government entity under "conditional" review during the covered reviews given that the information collected during a review might lead it to find that one or more of the mandatory respondents were part of the entity. This condition, however, was not triggered during the fourth, fifth or sixth reviews. As a result, Commerce did not have to determine a new rate for the Vietnam-government entity as the "conditional" review lapsed as soon as Commerce published its final determination.

54. In other words, as explained in response to Question 57, the AD Agreement does not require Members to change the rate on which a reasonable security (cash deposit) for the payment of antidumping duties pending final determination is based[42] and assess a duty at a different rate absent a request for a review of the rate to be assessed on past entries. Therefore, since neither the Vietnam-government entity nor any of its constituent parts requested a review of the rate applicable to the entity during the covered reviews, and since neither the Vietnam-government entity nor any of its constituent parts submitted, or failed to submit, information about any of the applicable review entries for purposes of Commerce's final determination in the fourth, fifth, or sixth reviews, Commerce did not need to determine a new rate for the Vietnam-government entity in fourth, fifth or sixth reviews.

[42] General Agreement on Tariffs and Trade 1994 *(GATT 1994)*, Ad Article VI: paras 2 and 3.

**Question 64. [to both parties] In administrative reviews, does Article 9.4 impose a requirement that there be a new determination of an "all others" rate?**

55. No, Article 9.4 does not impose a requirement that there be a new determination of an "all others" rate in administrative reviews.

**Question 65. [to the United States] Please react to Viet Nam's assertion in para. 14 of its opening statement at the second meeting that the United States has not identified a single instance in which the USDOC applied an Article 9.4-consistent rate to a producer that was presumed to be part of the NME-wide entity.**

56. Although the burden is on Vietnam to demonstrate that the United States acted inconsistently with Article 9.4 of the AD Agreement, Vietnam continues to seek to shift its burden to the United States by making wide-ranging assertions that the United States should be required to provide examples that do not conflict with Vietnam's interpretation of Article 9.4.

57. As for any claim, it is Vietnam's burden to set forth the facts that it believes would establish a claim under Article 9.4. Vietnam has not done so. Notwithstanding multiple written submissions and two oral presentations, Vietnam has yet to demonstrate the existence of a rule or norm of general and prospective application that is "as such" inconsistent with Article 9.4 of the AD Agreement and thus has failed to meet its burden.

58. In contrast, the United States in response to Question 15 has already provided several examples in which the United States did not apply adverse facts available to an NME-government entity.[43] The United States has also explained in response to Question 15[44] that the NME-government entity is like any other entity subject to an antidumping proceeding: if the entity responds in full to Commerce's antidumping questionnaire and Commerce is able to verify the response, Commerce will rely on the factual information contained in the response to make a final determination in an investigation or in a review.[45] Accordingly, Vietnam's assertion in paragraph 14 of its opening statement that "as a practice" Commerce always applies to a government entity a rate based on adverse facts available is factually inaccurate and incorrect. The rates from several determinations, which the United States referenced, are consistent with Article 9.4 even under Vietnam's own interpretation of that provision and thus are fatal to Vietnam's "as such" claim.

[43] U.S. Answers to Panel Questions, para. 47.

[44] *Ibid*, para. 48.

[45] Chapter 15, Verifications, Department of Commerce 2009 Antidumping Manual, pp. 2-3 (Exhibit US-78).

## III. CLAIMS CONCERNING SECTION 129(C)(1) OF THE URAA

**Question 66. [to the United States] In practice, what has been the interrelationship and overlap between the application of Section 123 and of Section 129 in implementing DSB recommendations and rulings?**

59. As an initial matter, Section 123 of the Uruguay Round Agreements Act ("URAA") is a mechanism by which Commerce can make changes in agency regulations or practices to render them consistent with DSB recommendations and rulings.[46] Section 129 provides for the implementation by Commerce of a new, WTO-consistent determination in connection with a particular segment of a proceeding effective as of the date that USTR directs implementation.[47] The concurrent application of these provisions can and does occur.

60. In particular, concurrent application occurs when the United States determines that it will (1) modify a regulation or practice *and* (2) modify proceeding-specific determinations to comply with DSB recommendations and rulings. The United States demonstrated in its first written submission how Sections 123 and 129 work in concert.[48] For example, in February 2012, Commerce implemented DSB recommendations and rulings and changed its zeroing methodology in administrative reviews pursuant to its authority in Section 123.[49] Four months later, Commerce implemented new, WTO-consistent determinations under particular antidumping orders pursuant to Section 129 in response to DSB recommendations and rulings.[50] Meanwhile, Commerce conducted administrative reviews of "prior unliquidated entries" subject to three of these very same antidumping duty orders, applying the WTO-consistent methodology developed pursuant to Section 123.[51] These examples demonstrate that Sections 123 and 129

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[46] *See* Section 123 of the URAA, 19 U.S.C. § 3533 (Exhibit US-10).

[47] *See* Section 129 of the URAA, 19 U.S.C. § 3538 (Exhibit VN-31).

[48] *See* U.S. First Written Submission, paras. 118-120 & nn.150-53.

[49] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification*, 77 Fed. Reg. 8101 (Feb. 14, 2012) (Exhibit VN-55). Commerce developed this methodology pursuant to Section 123 of the URAA. *See ibid*, p. 8102.

[50] *See Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act: Stainless Steel Plate in Coils From Belgium, Steel Concrete Reinforcing Bars From Latvia, Purified Carboxymethylcellulose From Finland, Certain Pasta From Italy, Purified Carboxymethylcellulose From the Netherlands, Stainless Steel Wire Rod From Spain, Granular Polytetrafluoroethylene Resin From Italy, Stainless Steel Sheet and Strip in Coils From Japan*, 77 Fed. Reg. 36257 (June 18, 2012) ("*Section 129 Notice*") (Exhibit VN-42, Determination 19-1).

[51] *See, e.g.*, *Purified Carboxymethylcellulose from the Netherlands: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Intent to Rescind*, 77 Fed. Reg. 46024 (Aug. 2, 2012) (in which Commerce applied new methodology for calculating weighted-average dumping margins and assessment rates for entries entered or withdrawn from warehouse, for consumption, between July 1, 2010, and June 30, 2011) (Exhibit US-18); *Certain Pasta from Italy: Notice of Preliminary Results of Antidumping Duty Administrative Review, Preliminary*

have been employed concurrently to implement DSB recommendations and rulings. These examples (along with the panel's findings in *US – Section 129(c)(1)*) rebut Vietnam's assertion that Section 129(c)(1) of the URAA serves as an absolute legal bar to the liquidation of "prior unliquidated entries" in a WTO-consistent manner.

61. Finally, the United States observes that Section 123 and Section 129 both have been applied to implement DSB recommendations and rulings with respect to "as applied" claims,[52] a point that Vietnam finally (and correctly) conceded in its second written submission.[53]

**Question 68. [to the United States] Please explain how decisions of US courts in anti-dumping and countervailing duty cases, and decisions of NAFTA Chapter 19 panels, affect prior unliquidated entries (in terms of liquidation and in terms of relevant dates).**

62. Treatment of entries that have not been liquidated under U.S. judicial proceedings and disputes arising under Chapter 19 of the North American Free Trade Agreement ("NAFTA") is not of particular relevance to any issues under the WTO Agreement involving compliance with DSB recommendations and rulings. U.S. judicial proceedings and NAFTA Chapter 19 disputes are brought by private parties under statutory sources of jurisdiction. [54] Under domestic law, the focus of such private party proceedings may involve the treatment of particular entries of goods. If such entries are finally and conclusively liquidated, there may not be a basis for jurisdiction. In contrast, state-to-state dispute settlement, such as under the DSU or Chapter 20 of NAFTA, involves claims that particular measures are inconsistent with international obligations. Jurisdiction in state-to-state dispute settlement does not turn on subsequent treatment (including possible liquidation) of entries that have not been liquidated; instead, the matter examined under WTO dispute settlement is the measure as it existed at the time of panel establishment.

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*No Shipment Determination and Preliminary Intent to Revoke Order, in Part*, 77 Fed. Reg. 46377 (Aug. 3, 2012) (in which Commerce applied new methodology for calculating weighted-average dumping margins and assessment rates for entries entered or withdrawn from warehouse, for consumption, between July 1, 2010, and June 30, 2011) (Exhibit US-19), unchanged in 78 Fed. Reg. 9364 (Feb. 8, 2013) (Exhibit US-19); and *Purified Carboxymethylcellulose from Finland; Notice of Preliminary Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 47036 (Aug. 7, 2012) (in which Commerce applied new methodology for calculating weighted-average dumping margins and assessment rates for entries entered or withdrawn from warehouse, for consumption, between July 1, 2010, and June 30, 2011) (Exhibit US-20).

[52] *See*, *e.g.*, *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11189, 11189 (Mar. 6, 2006) (Exhibit US-52) (providing notice of initiation of Section 123 proceeding in response to DSB recommendations and rulings on "as such" and "as applied" challenges).

[53] *See* Vietnam's Second Written Submission, para. 79 & n.104.

[54] *See generally* Section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a (Exhibit US-17).

63. Turning to the specifics of the Panel's question, the answer depends upon whether the liquidation of "prior unliquidated entries" is suspended during the pendency of the judicial proceeding.[55]

64. In U.S. courts, the statute provides that interested parties may move the U.S. Court of International Trade to suspend liquidation of relevant entries.[56] If granted, the court will order the suspension of the unliquidated entries.[57] If the challenge to the underlying Commerce decision is sustained in whole or in part by the U.S. Court of International Trade, the U.S. Court of Appeals for the Federal Circuit, or the U.S. Supreme Court, the statute provides that the enjoined unliquidated entries "shall be liquidated in accordance with the final court decision in the action."[58] Otherwise, the entries shall be liquidated in accordance with Commerce's original determination.

65. The panel question also refers to NAFTA proceedings. As the question notes, NAFTA Chapter 19 includes a special private-party-to-state dispute mechanism applicable to antidumping and countervailing duty proceedings. Unlike domestic courts, NAFTA Chapter 19 panels do not have injunctive relief powers. Nevertheless, in such disputes, the statute provides that an interested party may request that Commerce order the continued suspension of unliquidated entries,[59] and that Commerce "shall order the continued suspension of liquidation of

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[55] In answering this question, the United States has used Vietnam's definition of the phrase "prior unliquidated entries." Vietnam defines "prior unliquidated entries" as "imports that entered the United States prior to the date on which USTR directs implementation {pursuant to Section 129(c)(1)} for which there has been no definitive assessment of liability for antidumping or countervailing duties." Vietnam's First Written Submission, para. 212.

In addition, the United States' answer to this question is limited to disputes arising under Chapter 19 of NAFTA. As the United States explained at the second Panel meeting, the relevant statute does not provide for the continued suspension of unliquidated entries in disputes arising under different chapters, such as Chapter 20 of NAFTA. *See* Section 516A(g)(5)(C) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(g)(5)(C) (Exhibit US-17).

Moreover, the United States' answer to this question is premised upon three additional built-in factual assumptions in the Panel's question. Specifically, the existence of "prior unliquidated entries" in this context assumes that within a given antidumping or countervailing proceeding (1) there is a Section 129 determination implemented by Commerce; (2) there remain unliquidated entries that entered prior to the date that the U.S. Trade Representative ("USTR") directed Commerce to implement that determination pursuant to Section 129(c)(1); *and* (3) there is a completed administrative segment that examined those entries that is now subject to litigation before a U.S. court or a NAFTA Chapter 19 panel.

[56] *See* Section 516A(c)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(c)(2) (Exhibit US-17).

[57] *Ibid.*

[58] *See* Section 516A(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(e) (Exhibit US-17).

[59] *See* Section 516A(g)(5)(C)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(g)(5)(C)(i) (Exhibit US-17). Notably, interested parties may request the continued suspension of unliquidated entries only if those entries were the subject of an administrative review or of a determination as to whether a particular product falls within the class or kind of merchandise subject to an antidumping or countervailing duty order. *See* Section 516A(a)(2)(B)(iii),

those entries of merchandise covered by the determination that are involved in the review pending the final disposition of the review."[60] The U.S. Court of International Trade has interpreted these provisions to mean that Commerce should order the liquidation of the unliquidated entries in accordance with the final disposition of the NAFTA panel.[61]

**Question 69. [to both parties] Have there been any WTO disputes where a claim was made concerning the application of Section 129 in relation to the treatment of prior unliquidated entries?**

66. Based on exchanges with the Panel during the second Panel meeting, the United States understands that the Panel is inquiring whether there has ever been an "as applied" challenge to Section 129 of the URAA. The answer is no – there has never been an "as applied" challenge to Section 129 of the URAA, including a challenge to Section 129(c)(1).[62]

67. As the United States explained in its oral answer at the second Panel meeting, there have been challenges to Section 129 determinations in proceedings under Article 21.5 of the *Dispute Settlement Understanding* ("DSU").[63] However, there has not been a challenge to the application of the statute itself – *i.e.*, Section 129 of the URAA.

68. The absence of an "as applied" challenge further highlights the speculative nature of Vietnam's claim vis-à-vis Section 129. In particular, what matters from a compliance perspective is whether the United States complied with the relevant DSB recommendations and rulings, not the means of compliance.[64] For this reason as well, Vietnam's claim should be rejected.

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(vi), and (g)(5)(C)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii), (vi) and (g)(5)(C)(i) (Exhibit US-17). An interested party cannot seek the continued suspension of unliquidated entries if those entries were the subject of an investigation. *Ibid.*

[60] *See* Section 516A(g)(5)(C)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(g)(5)(C)(i) (Exhibit US-17).

[61] *See Tembec, Inc. v. United States*, 461 F. Supp. 2d 1355, 1364 (Ct. Int'l Trade 2006) (Exhibit US-88), *judgment vacated on other grounds by Tembec, Inc. v. United States*, 475 F. Supp. 2d 1393 (Ct. Int'l Trade 2007) (Exhibit US-89).

[62] As the Panel is aware, Canada's unsuccessful challenge to Section 129(c)(1) in *US – Section 129(c)(1)* was "as such."

[63] *See*, *e.g., US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 3.1.

[64] *See US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina),* para. 143 (noting that "to comply with the original panel's finding, as adopted by the DSB, the United States had to bring its determination of likelihood of dumping into conformity with Article 11.3 of the Anti-Dumping Agreement. How it chose to do so was, in principle, a matter for the United States to decide."); *US – COOL (Article 21.3)*, para. 98 (acknowledging

**Question 71. [to both parties] Please explain whether an Article 21.5 panel could find that the implementing Member acted inconsistently with Articles 9.2 and/or 9.3 of the Anti-Dumping Agreement if, in a "modification" case, that Member took no steps to implement the DSB recommendations and rulings with respect to prior unliquidated entries and liquidated such entries at rates that were found to be WTO-inconsistent in the original dispute.**

69. As the United States observed in its oral responses at the second Panel meeting, there could be factual scenarios under which the treatment of prior unliquidated entries could result in the breaches of substantive provisions of the AD Agreement. This result, however, is neither surprising nor particularly significant, given the terms of reference of an Article 21.5 panel to consider the consistency with a covered agreement of measures taken to comply with the DSB recommendations and rulings.

70. For this scenario to apply, there would need to be a number of particular findings by the panel, and actions by the responding Member. The panel convened under Article 21.5 of the DSU would have to find, as an initial matter, that the DSB recommendations and rulings applied to "prior unliquidated entries." To do so, the panel in question would have to make an "objective assessment of the matter before it" under Article 11 of the DSU to determine if application of the DSB recommendations and rulings in such a manner was warranted. The United States makes this observation to note (again) the speculative nature of Vietnam's claim as to Section 129(c)(1) of the URAA – *i.e.*, that Vietnam's claim assumes that DSB recommendations and ruling apply to "prior unliquidated entries."

71. Assuming, *arguendo*, that (1) the Article 21.5 panel found that the DSB recommendations and rulings applied to "prior unliquidated entries," and that (2) a Member took no steps to implement the DSB recommendations and rulings with respect to such entries and liquidated such entries at rates that were found to be WTO-inconsistent in the original dispute, such liquidation could constitute a continuing breach of provisions of the AD Agreement, such as Articles 9.2 and 9.3.[65]

72. The ability to postulate this hypothetical scenario does not establish Vietnam's "as such" challenge to Section 129 of the URAA. As the United States has explained, nothing in Section 129 dictates how the United States will treat prior unliquidated entries; rather, Section 129 is simply one tool that the U.S. Executive Branch may use for compliance. Furthermore, in this dispute, there has not been a compliance proceeding and, therefore, there are no "continuing" or "remaining" breaches of the AD Agreement. Vietnam's arguments would apply only in the context of a compliance proceeding. In such a proceeding, and as discussed in the U.S. response

that "the United States has a measure of discretion in selecting the means of implementation that it deems most appropriate.").

[65] In answering this question, the United States assumes that the term "modification" implies a case in which Commerce changes the dumping or countervailing duty margin in a particular case, but does not revoke the relevant order.

to Question 70, the issue presented would be whether the United States has brought the measures found to be in breach into compliance. And any finding of a breach of the AD Agreement in that proceeding would constitute either a continuing breach by the underlying measure already found to be in breach or a new breach by a measure taken to comply, such as a Section 129 determination. In other words, it would not be Section 129(c)(1) that would be in breach of the AD Agreement.

## IV. CLAIMS CONCERNING COMPANY-SPECIFIC REVOCATIONS

**Question 74. [to the United States] The preliminary determination in the fourth administrative review (Exhibit VN-9) lists Seaprodex Minh Hai as having made (and maintained) a request for revocation in the context of that administrative review. Footnote 86 to the Issues and Decision Memorandum to the final determination in the same administrative review (Exhibit VN-13) indicates that Seaprodex Minh Hai was erroneously listed as a "revocation company" and would not be included in the final determination as a "revocation company". However, the final determination in the fourth administrative review (Exhibit VN-12, p. 47774) does list Seaprodex Minh Hai as having an outstanding revocation request. Please confirm whether, in the fourth administrative review, Seaprodex Minh Hai: (i) was a mandatory respondent; and (ii) maintained a request for revocation.**

73. The United States clarifies that in the fourth administrative review, Seaprodex Minh Hai was not a mandatory respondent, was not selected for individual examination, and withdrew its request for company-specific revocation.[66]

**Question 75. [to both parties] The Panel understands that Grobest made requests for company-specific revocations in the fourth and fifth administrative reviews, and that it eventually withdrew its request in the context of the fourth administrative review. Is this understanding correct? Did Grobest also withdraw the request for revocation it made in the context of the fifth administrative review? Please provide any relevant supporting document.**

74. The Panel's understanding as to the fourth administrative review is correct. Grobest requested company-specific revocation in the fourth and fifth administrative reviews. Commerce did not examine Grobest's requests for revocation in either review because Grobest was not selected for individual examination.[67] Grobest pursued domestic litigation with regard to the

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[66] Letter from Counsel for Seaprodex Minh Hai to Secretary of Commerce, July 31, 1999 (Exhibit US-96).

[67] *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, in Part, of the Fourth Administrative Review*, 75 Fed. Reg. 12206, 12209, (March 15, 2010) (Exhibit VN-9); *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, in Part, of the Fifth Administrative Review*, 76 Fed Reg. 12054, 12057 (March 4, 2011) (Exhibit VN-16).

fourth administrative review, ultimately obtaining a court order requiring Commerce to conduct an individual examination of Grobest's data and consider its company-specific revocation request.[68] However, rather than participate in the re-conduct of the fourth administrative review and demonstrate possible entitlement to revocation under applicable Commerce regulations, Grobest refused to respond to Commerce's supplemental questionnaires and withdrew its fourth-review revocation request in the course of the court-ordered re-conduct proceeding.[69] Commerce recently completed the re-conducted fourth review and assigned Grobest a rate of 25.76%, which is not based on the so-called "zeroing" methodology.[70]

75. Grobest did not withdraw its request for revocation during the fifth review proceeding, which was conducted and completed prior to the above-referenced litigation.[71] The United States notes that even if Article 11.2 of the AD Agreement contains an obligation to conduct company-specific revocation reviews, Commerce was not obligated under Article 11.2 to review Grobest's request because Grobest was not selected for individual examination. Furthermore, in light of the rate that has since been individually applied to Grobest in the final results of the re-conduct of the fourth administrative review, Grobest would not meet the applicable regulatory requirements under which it sought revocation in the fifth review.

**Question 76. [to both parties] In its response to Panel question No. 46, the United States provided explanations concerning the manner in which company-specific requests for revocation were considered under US laws and regulations as they existed at the time of the determinations at issue. Please provide the corresponding information with respect to requests for order-wide revocations. In addition, please explain the links, in terms of procedure and criteria, between the two.**

76. At the time of the determinations at issue, order-wide revocation could occur under U.S. law pursuant to the same provisions of the statute as company-specific revocation, namely 19 U.S.C. § 1675(c), which refers to revocation as a result of either administrative reviews under 19 U.S.C. §1675(a) or changed circumstances reviews under 19 U.S.C. §1675(b).[72] Under

[68] Order, *Grobest & I Mei Industrial (Vietnam) Co. v. United States*, consol. Ct. No. 10-00238 (Exhibit US-11); *Grobest & I Mei Industrial (Vietnam) Co. v. United States*, 853 F.Supp.2d 1352, 1362-65 (CIT 2012) (Exhibit US-12).

[69] *Withdrawal of Request for Voluntary Respondent Review and Revocation of Antidumping Duty Order in Part* (Dec. 12, 2013) (Exhibit US-13).

[70] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam; Final Results of Re-Conducted Administrative Review of Grobest & I-Mei Industrial (Vietnam) Co., Ltd and Intent Not To Revoke; 2008-2009*, 79 Fed. Reg. 15309 (March 19, 2014) (Exhibit US-90).

[71] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 76 Fed. Reg. 56158, 56160-61 (Sept. 12, 2011) (Exhibit VN-18).

[72] 19 U.S.C. § 1675 (Exhibit VN-47). Order-wide revocation is also authorized under 19 U.S.C. § 1677m(h)(2) if producers accounting for substantially all of the production of the domestic like product express a lack of interest in the order (Exhibit US-95). Such revocation requests are examined in changed circumstances reviews.

Commerce's regulations, revocation in an administrative review based on, *inter alia*, an absence of dumping for three years was provided on both an order-wide and on a company-specific basis, under 19 CFR § 351.222(b).[73]

77. In an administrative review,[74] order-wide revocation based on an absence of dumping for three years was similar in substance and procedure to company-specific revocation. The main difference between the two regulations concerned whether all exporters or producers covered at the time of revocation could demonstrate, *inter alia*, an absence of dumping for three consecutive years (leading to order-wide revocation) or whether specific exporters or producers at issue could demonstrate, *inter alia*, an absence of dumping for three consecutive years (leading to company-specific revocation for such exporters or producers). In addition, when considering company-specific revocation requests, the exporter or producer in question, if found to have been dumping previously, must have agreed to immediate reinstatement under the order, should the order continue in place and the company is determined to have sold the subject merchandise at less than fair value.[75] This did not apply in the context of order-wide revocation.

**Question 77. [to both parties] Under US laws and regulations as they existed at the relevant time, did a request for revocation under Section 351.222(e) constitute a request that the USDOC consider revocation on both an individual company-specific basis and on an order-wide basis? Do the words "with regard to that person" in Section 351.222(e)(1) have the effect of limiting the request to Section 351.222(b)(2)(i) (i.e., a request to revoke an anti-dumping order in part)? If so, under what provision may an exporter request revocation on an order-wide basis?**

78. As noted in the U.S. responses to the Panel's questions following the first Panel meeting, all the requests for revocation made by individual Vietnamese producers/exporters were for company-specific revocation and were made in the context of administrative reviews.[76] Accordingly, Commerce treated these specific requests for what they were – *i.e.*, requests for company-specific, not order-wide, revocation.

79. Nevertheless, at the time of the measures at issue in this dispute, exporters or producers had the right to request revocation on an order-wide basis as discussed in the U.S. responses to

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[73] Vietnam provided a copy of the regulation, dated 2012, in Exhibit VN-49. The United States confirms that this is identical to the regulation in effect during the fourth, fifth and sixth administrative reviews.

[74] Company-specific and order-wide revocation in a changed circumstances review is discussed in the U.S. response to Question 80c.

[75] *Compare* 19 CFR § 351.222(b)(1) (order-wide revocation) with 19 CFR § 351.222(b)(2) (company-specific revocation); *see also* procedures relevant to both order-wide and company-specific revocations for each of the years at issue at 19 CFR § 351.222(e), (d)(1) and (f) (Exhibit VN-47).

[76] U.S. Responses to Panel's Questions Following the First Panel Meeting, para. 150.

Questions 76 (administrative reviews) and 80c (changed circumstances review). No such requests, however, were made by the Vietnamese respondents.

**Question 78. [to the United States] Please provide as exhibits: (i) the text of 19 C.F.R. § 351.216 (referred to by Viet Nam in its response to Panel question No. 42); and (ii) the text of 19 C.F.R. § 351.221 (referred to in Exhibit VN-49), as they existed at the time of the measures at issue.**

80. The exhibit provided by Vietnam for 19 § C.F.R. 351.222 (Exhibit VN-49) is identical to the regulation in effect during the fourth, fifth and sixth administrative reviews. With respect to the regulation, 19 C.F.R. § 351.216, the United States is providing a copy of the regulation in effect at the time of initiation of the fourth administrative review (Exhibit US-91). This regulation also remained unchanged during the subsequent fifth and sixth reviews.

**Question 79. [to both parties] In paragraph 50 of its opening oral statement at the second meeting, Viet Nam relies on the Appellate Body reasoning in US – Corrosion-Resistant Steel Sunset Review to argue that the use of the term "interested parties" is the basis of a distinction intended to impose obligations on authorities regarding individual producers/exporters under Article 11.2. What is the character, and scope, of these obligations under Article 11.2 as it concerns "interested parties"?**

81. The reference to "any interested party" in Article 11.2 is to an interested party, domestic or respondent, who may request a review by submitting positive information to substantiate the need for the review. The term "interested party" is plural, meaning many or multiple interested parties have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, or whether the injury would be likely to continue to recur if the duty were removed or varied, or both. Language concerning who can request that inquiry does not inform the interpretation of "the duty" in Article 11.2 or otherwise imply that company-specific revocation is an obligation under Article 11.2.[77]

82. The fact that the reference to "interested parties" in Article 11.2 of the AD Agreement is procedural is reflected in the section of the Appellate Body report in *US – Corrosion-Resistant Steel Sunset Review (AB)* relied on by Vietnam in its opening statement.[78] Specifically, in paragraph 149 of the Appellate Body report, the Appellate Body contrasts the "particular methodology[ies]" in a review under Articles 11.2 and 11.3 of the AD Agreement, with reviews under Article 11.2 being triggered by a request from "any interested party." That particular analysis did not factor in the interpretation of "the duty" in the subsequent paragraph – *i.e.*, paragraph 150 of the Appellate Body report.

[77] *See* U.S. Second Written Submission, paras. 12-13.

[78] Vietnam's Opening Statement at the Second Panel Meeting, para. 50.

83. The United States further observes that in the paragraph relied on by Vietnam (i.e., paragraph 149) the Appellate Body notes that "Article 11.3 does not contain the word 'margins,' which might implicitly refers to individual exporters or producers." Of note, Article 11.2 likewise does not contain the word "margins."

84. Accordingly, the reference to "interested parties" in Article 11.2 of the AD Agreement, and the Appellate Body's analysis of that reference in *US – Corrosion-Resistant Steel Sunset Review (AB)*, provide no support for Vietnam's assertion that Article 11.2 obligates company-specific revocation. In fact, paragraph 149 of the Appellate Body report further supports the fact that Article 11.2 does not require company-specific revocation.

**Question 80. With respect to Viet Nam's argument that the USDOC would apply the same criteria in assessing requests for company-specific revocations in a changed circumstances review as in an administrative review:**

> **a. [to the United States] Have there ever been requests for company-specific revocations in the context of changed circumstances reviews? If so, what criteria has the USDOC applied in such instances?**

85. Company-specific requests for revocation in the context of changed circumstances reviews have been made in numerous instances. In particular, in *Color Television Receivers form the Republic of Korea*, Commerce granted a request for company-specific revocation through a changed circumstances review based on the fact, *inter alia*, that the company in question had not been dumping.[79] In that changed circumstances review, Commerce looked at a number of factors as to whether the order should be revoked, including: trends in the U.S. and home markets, the impact of the Asian financial crisis on the respondent, currency movements, the respondent's ability to compete in the U.S. market absent dumping, trade restrictions in third countries, and the impact of new technologies.[80]

86. Another example – companies may change their names or corporate structures, and seek to have such changes evaluated by Commerce in order to determine whether or not the duty applicable to the former company should apply to the new company or not,[81] including whether or not non-application of the order to the former company should apply to the new company. For example, in the frozen warmwater shrimp from Thailand antidumping duty proceeding, a

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[79] *Color Television Receivers from the Republic of Korea; Final Results of Changes Circumstances Antidumping Duty Review*, 63 Fed. Reg. 46759 (Sept. 2, 1998) (Exhibit VN-88).

[80] *Ibid*, at 46761.

[81] *Stainless Steel Sheet and Strip in Coils From Japan: Final Results of Antidumping Duty Changed Circumstances Review*, 79 Fed. Reg. 10096 (Feb. 24, 2012) (Exhibit US-92); *Diamond Sawblades and Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review*, 78 Fed. Reg. 48414 (Aug. 8, 2013) (Exhibit US-93).

company that was excluded from the original order sought to have two additional companies recognized as part of the original excluded company, and thus entitled to exclusion from the order on a company-specific basis.[82] Following review, Commerce determined that the company as it currently existed was the successor to the excluded company, and thus entitled to exclusion from the order.[83]

**c. [to both parties] Please discuss the type of "changed circumstances" that an interested party may be required to demonstrate to obtain the initiation of a changed circumstances review.**

87. The U.S. law governing both whole and partial revocations in a changed circumstance review is written in broad terms, and the cases cited above provide only an illustrative example of what Commerce may consider in examining a request for a changed circumstance review. Any exhaustive list of the type of request that would be considered sufficient to warrant initiation would be speculative and, therefore, is not available. For instance, 19 U.S.C. § 1675(c)(1) states that "[t]he administering authority may revoke, in whole or in part, . . . an antidumping duty order or finding, . . . after review under subsection (a) ["periodic" or administrative review] or (b)[changed circumstances review] of this section. Similarly, Commerce's regulations concerning changed circumstances reviews state broadly that "the Secretary [of Commerce] may revoke an order, in whole or in part, . . . if the Secretary [of Commerce] . . . concludes that (ii) Other changed circumstances sufficient to warrant revocation . . . exist."[84]

88. These provisions of the law and corresponding regulations existed at the time of the determinations at issue. Commerce's regulations further provide that "[a]t any time, an interested party may request a changed circumstances review . . . ."[85] Normally, Commerce will not initiate such a review within two years of the imposition of an order, unless good cause is shown.[86] The regulations further provide that "[i]f the Secretary [of Commerce] decides that changed circumstances sufficient to warrant a review exist, the Secretary [of Commerce] will conduct a changed circumstances review . . . . ."[87]

89. The United States further observes that the panel in *US – Anti-Dumping Measures on Oil Country Tubular Goods* found that Commerce's decision not to revoke the antidumping duty

[82] *Certain Frozen Warmwater Shrimp from Thailand: Final Results of Antidumping Duty Changed Circumstances Review and Notice of Revocation in Part*, 74 Fed. Reg. 52452 (Oct. 13, 2009) (Exhibit US-94).

[83] *Ibid.*

[84] 19 CFR 351.222(g)(1)(ii) (Exhibit VN-49).

[85] 19 CFR 351.216(b) (Exhibit US-91).

[86] 19 CFR 351.216(c) (Exhibit US-91).

[87] 19 CFR 351.216(d) (Exhibit US-91).

order for two exporters was not WTO-inconsistent (notwithstanding the use of margins calculated based on the use of "zeroing") due, in part, to the ability of an interested party to seek a changed circumstances review in which the standard of three years of no dumping would not be used.[88] The panel in *US – DRAMs* reached a similar result as to another element of the same standard – *i.e.*, the use of a certification requirement.[89]

90. As noted to the Panel in its oral responses to Question 80c, there have been no material changes in U.S. law or regulations vis-à-vis changed circumstances reviews since the panel reports in *US – Anti-Dumping Measures on Oil Country Tubular Goods* and *US – DRAMs*. As discussed in previous submissions, this fact provides another reason to reject Vietnam's assertions that the United States breached Article 11.2 of the Ad Agreement.[90]

**Comments on Vietnam's Closing Statement at the Second Panel Meeting**

91. In the Panel's fax to the parties on March 31, 2014, the Panel invited the parties to comment on the parties' closing statements by April 15, 2014. The United States would like to make the following observations as to Vietnam's closing statement.

92. In its closing statement, Vietnam repeatedly asserted to the Panel that "Vietnamese shrimp exporters have played by the rules" in the proceedings at issue in this dispute.[91] The United States finds this statement troubling for a number of reasons. First, disputes under the DSU are disputes between WTO Members**,** and the Panel's terms of reference are to examine the consistency of the challenged measures with the covered agreements. In this dispute, the challenged measures are the determinations by the investigating authority. Second, to the extent that Vietnam asserts a position that vouches for the credibility of shrimp exporters located in Vietnam, it undermines Vietnam's objection to the NME-entity methodology. Simply put, unless Vietnam does in fact control Vietnamese exporters, the Government of Vietnam would be in no position to vouch for their conduct.

[88] *US – Anti-Dumping Measures on Oil Country Tubular Goods (Panel),* paras. 7.153, 7.166. Indeed, in *Color Television Receivers from the Republic of Korea; Final Results of Changes Circumstances Antidumping Duty Review*, Commerce noted, in a proceeding in which a respondent asked for company-specific revocation in a changed circumstances review based on a lack of dumping, that the standard for company-specific revocation in an administrative review would only provide "guidance." *Color Television Receivers from the Republic of Korea; Final Results of Changes Circumstances Antidumping Duty Review*, 63 Fed. Reg. 46759, 46760 (Sept. 2, 1998) (Exhibit VN-88). Commerce further noted that "[a] review based upon changed circumstances … is a separate and distinct procedure from that of a revocation review provided for [in an administrative review]." *Id.* at 46762.

[89] *US – DRAMs*, para. 6.53.

[90] *See, e.g.,* U.S. Second Written Submission, paras. 23-28.

[91] Vietnam's Closing Statement at the Second Panel Meeting, paras. 2-3.

93. Third, given that Vietnam has chosen to make an issue of the conduct of Vietnamese shrimp exporters (indeed, it was central to Vietnam's closing statement), the United States feels compelled to respond to Vietnam's inaccurate assertions, especially related to the conduct of Vietnamese shrimp exporters in the proceedings at issue.

94. As the Panel may be aware, Commerce has determined to re-open the record of the sunset review at issue in this dispute based on new information of fraud that was not available at the time of the original sunset proceeding. The information, which is public and was obtained from the record of a separate U.S. criminal proceeding,[92] indicates that at least one major participant in the Vietnamese shrimp trade engaged in a massive scheme to falsely label its seafood as a product of Cambodia to evade payment of antidumping duties by shipping significant volumes of shrimp through Cambodia during the first administrative review period.[93] In fact, according to the sentencing report in the criminal proceeding, the volume of shrimp shipped to the United States through Cambodia was many times greater than Cambodia's entire shrimp industry production.[94]

95. Because the record examined in the sunset review could have been tainted by such fraud, potentially affecting the completeness, accuracy, and reliability of the information, including import volumes and dumping margins, Commerce has determined to reopen the sunset review to address the information, consistent with Commerce's established procedure for addressing later-discovered evidence of potential fraud. Commerce published a notice on March 19, 2014, reopening the sunset review, which summarizes information from the criminal case and requests comments on the information.[95]

96. Accordingly, Vietnam's assertion that the "Vietnamese shrimp exporters have played by the rules" is both irrelevant and highly questionable in a dispute between Members and in light of the information from a criminal fraud case that Commerce is currently evaluating in the context of the reopened sunset review.

[92] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Reopening of the First Five-Year "Sunset" Review of the Antidumping Duty Order*, 79 Fed. Reg. 15310, fn. 6 (March 19, 2014) (Exhibit US-97).

[93] *Ibid*. The U.S. importer involved in the mislabeling ("Ocean Duke") had been found by Commerce to be an affiliate of Grobest & I-Mei Industrial (Vietnam) Co., Ltd.

[94] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Reopening of the First Five-Year "Sunset" Review of the Antidumping Duty Order*, 79 Fed. Reg. 15310, fn. 12 (March 19, 2014) (Exhibit US-97).

[95] *Ibid.*