UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN FROZEN WARMWATER SHRIMP FROM VIET NAM
(DS429)

COMMENTS OF THE UNITED STATES OF AMERICA ON VIETNAM'S RESPONSES TO THE PANEL'S QUESTIONS AFTER THE SECOND SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

April 29, 2014

TABLE OF EXHIBITS

EXHIBIT NUMBER	FULL CITATION
US-98	*Furfuryl Alcohol From the Republic of South Africa; Final Results of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order*, 64 Fed. Reg. 37500 (July 12, 1999)
US-99	*Certain Forged Steel Crankshafts from the United Kingdom; Final Results of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order*, 62 Fed. Reg. 16768 (April 8, 1997)

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Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005
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 Appellate Body Report, WT/DS282/AB/R
US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – DRAMS	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999
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 Appellate Body Report WT/DS268/AB/RW
US – Section 129(c)(1) URAA	Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002
US – Shrimp (Thailand) / US – Customs Bond Directive (AB)	Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008
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
US – Zeroing (Japan) (21.5) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009

I. CLAIMS CONCERNING ZEROING

Question 52. [to Viet Nam] Does Viet Nam agree that the USDOC did not use the zeroing methodology when calculating dumping margins in the seventh administrative review?

1. Vietnam agrees that the U.S. Department of Commerce ("Commerce") did not use the so-called "zeroing" methodology when calculating dumping margins in the seventh administrative review. This acknowledgement, together with Vietnam's failure to refute the evidence showing numerous determinations in which Commerce granted offsets,[1] confirm 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 to measures irrespective of their application.

2. The United States also notes that Vietnam's brief reference to the preliminary results of the eighth administrative review does not, as Vietnam argues, show the existence of an unwritten measure requiring the use of the so-called "zeroing" methodology. As an initial matter, Vietnam did not submit evidence to support the statements made in its response to Question 52. Vietnam also concedes that the Appellate Body findings on the so-called "zeroing" methodology do not apply to the methodology that Vietnam alleges is discussed in the preliminary results of the eight review.[2] Finally, the United States notes that the approach used in the preliminary results of the eighth review is not within the Panel's terms of reference.

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

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?

3. Vietnam's response to this question reveals a significant misunderstanding of how a retrospective duty assessment system works and how Commerce determined the appropriate assessment rate for antidumping duties on import entries made by the Vietnam-government entity during the time periods covered by the fourth, fifth, and sixth administrative reviews. As the United States explained in its response to Question 57,

[1] 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).

[2] Vietnam's Responses to the Panel's Questions Following the Second Panel Meeting, para. 2.

a. For retrospective systems under the AD Agreement, (i) in the event a review is conducted for an exporter, antidumping duties are assessed based on the determination of final liability made in the review for that exporter, or (ii) in the event a review is not conducted for an exporter, antidumping duties are assessed based on the cash deposit rate for that exporter applicable at the time of entry.[3] Prospective systems are directly comparable: if no review is conducted, the final liability is based on the amount collected on entry.

b. The Vietnam-government entity, constituent parts of that entity, and the domestic interested party did not request Commerce to change the rate in effect for the import entries made by the Vietnam-government entity during the time periods covered by the fourth, fifth, or sixth reviews.

c. Therefore, Commerce's decision to determine the assessment rate on the import entries made by the Vietnam-government entity during the time periods covered by the fourth, fifth, and sixth reviews to be the same rate as previously applicable (and the same as the existing cash deposit rate) is not inconsistent with any provision of the AD Agreement, and indeed, is contemplated by the AD Agreement.

4. In light of Vietnam's response to Question 62, it is useful to further elaborate on point 'b'. First, Vietnam's response fails to identify a single instance in which the Vietnam-government entity or a constituent part of that entity requested that Commerce change the rate in effect for the import entries made by the Vietnam-government entity during the time periods covered by the fourth, fifth, or sixth reviews. And although Vietnam alleges that the domestic interested party requested that Commerce conduct an administrative review of certain constituent companies of the entity,[4] Vietnam's response to Question 62 fails to demonstrate that the domestic interested party requested that Commerce change the amount of duty applicable to the Vietnam-government entity.[5]

5. Commerce's initiation notices for the fourth, fifth, and sixth administrative reviews further confirm that no interested party requested Commerce to change the rate in effect for the import entries made by the Vietnam-government entity during the applicable time periods. Commerce's initiation notice for the covered reviews individually named each producer or

[3] *See US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 222 (Under the U.S. retrospective duty assessment system, the factual determination of the amounts of antidumping duties payable by an importer "is not complete until an assessment review has been conducted" and occurs even if no interested party requests an assessment review as Commerce "will instruct United States Customs to assess anti-dumping duties and liquidate the import entries at the cash deposit rate required upon import entry").

[4] Vietnam's Responses to the Panel's Questions Following the Second Panel Meeting, para. 20.

[5] *See* Comments of the United States on Vietnam's Response to Question 62, *infra*.

exporter for which an administrative review had been made.[6] And while the notices reiterate the rebuttable presumption that Commerce considers all companies within Vietnam as being subject to government control, the notices do not distinguish companies previously considered part of the Vietnam-government entity from those previously considered separate from that entity.[7] Thus all companies subject to the fourth, fifth, or sixth reviews stood in the same position; *i.e.*, for each company Commerce would determine whether it was sufficiently independent so as not to be considered part of the Vietnam-government entity (including those companies that may have previously been considered part of that entity but for whom a review separate from that entity had been requested).

6. In sum, Commerce's decision to assess antidumping duties on the import entries made by the Vietnam-government entity during the time periods covered by the fourth, fifth, or sixth administrative reviews on the basis of the same rate previously assigned to the entity is not inconsistent with the AD Agreement. No interested party requested a change of the rate in effect for the entries made by the Vietnam-government entity during the time periods covered by these reviews. Under these circumstances, it was appropriate for Commerce to assess the amount of the final liability based on the prior rate determined for the entity and the cash deposit meant to protect against the risk of non-payment.

Question 62. [to Viet Nam] In paragraph 16 of its oral statement at the second substantive meeting with the Panel, Viet Nam states that "… requests were made for constituent companies" and "[r]eviews were requested for these companies…". Could Viet Nam please explain who requested these reviews and point to the relevant evidence?

7. Vietnam's response to this question acknowledges that no interested party requested a change to the rate in effect for the Vietnam-government entity during the fourth, fifth, or sixth administrative reviews.

8. First, Vietnam does not allege in its response to this question that an exporter, foreign producer, or importer of a product subject to review requested that Commerce change the rate in effect for any of the import entries made by the Vietnam-government entity during the time periods covered by the fourth, fifth, or sixth reviews. Vietnam also does not allege that the Government of Vietnam or the Vietnam-government entity requested that Commerce conduct an assessment review of any of the import entries made by the Vietnam-government entity during the time periods covered by the fourth, fifth, or sixth reviews.

9. Second, Vietnam's reliance on reviews requested by the domestic interested party with respect to certain companies that may have previously been considered part of the Vietnam-

[6] *See, e.g., Notice of Initiation of Administrative Reviews and Requests for Revocation In Part of the Antidumping Duty orders on Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China*, 74 Fed. Reg. 13178 (March 26, 2009) (Exhibit VN-06).

[7] *Ibid.*

government entity is misplaced. At the outset, the review requests filed by the domestic interested party do not assert, explicitly or implicitly, that any of the particular producers or exporters for which a request is made form part of the Vietnam-government entity.[8] Nor is there anything in these requests that implies that the domestic interested party is requesting that the rate in effect for the Vietnam-government entity during the applicable time periods should be changed; rather, the domestic interested party is asking Commerce to conduct a review of entries made by particular producers or exporters.[9] Thus Vietnam misrepresents the domestic interested party's review requests when it contends that the domestic interested party asked Commerce to conduct reviews of the Vietnam-government entity during the fourth, fifth, and sixth reviews (when it clearly did not).

10. Indeed, the lack of a request to review the rate in effect specifically for the Vietnam-government entity shows that the domestic interested party was not interested in having Commerce alter the rate of the Vietnam-government entity. In particular, the domestic interested party's review requests asked Commerce to review only "particular producers and exporters . . . because Domestic Producers believe these producers and exporters may be dumping subject merchandise at margins greater than the applicable cash deposit rate."[10] The requests thus imply that the domestic interested party considered the "particular producers and exporters" it identified as potentially apart from the Vietnam-government entity during the relevant time periods and as potentially able to qualify for rates separate from the entity based on the information available to the domestic interested party.

11. Therefore, contrary to Vietnam's response to Question 62, no interested party requested Commerce to change the rate in effect for the import entries made by the Vietnam-government entity during the time periods covered by the fourth, fifth, or sixth reviews.

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?

12. Vietnam's response to Question 64 fails to read Article 9.4 of the AD Agreement in context with the other paragraphs of Article 9. Paragraphs 9.3.1 and 9.3.2, which respectively address assessments in retrospective and prospective systems, are particularly relevant, and the context they provide helps show the flaws in Vietnam's proposed interpretation.

13. Paragraph 3.1 of Article 9, which applies to assessments under a retrospective duty assessment system, stipulates that "the determination of the final liability for payment of anti-dumping duties shall take place . . . after the date on which a request for a final assessment of the

[8] Review Requests, Fourth Administrative Review, Fifth Administrative Review, Sixth Administrative Review (Exhibit VN-81

[9] *Ibid.*

[10] *E.g. ibid*, Cover Letter p. 2 (Exhibit VN-81) (emphasis added).

amount of the anti-dumping duty has been made." The paragraph then goes on to link the provision of any refunds to this determination upon request. Paragraph 3.2 of Article 9 similarly stipulates that provision shall be made for a prompt refund under a prospective duty assessment system but only "upon request." This context shows that where reviews are involved, an assessment proceeding (unlike an investigation[11]) is limited to the exporters covered by a request for review, or for refund, and does not address the "all others" rate previously determined in the investigation.

14. Vietnam's Article 9.4 argument also is invalid because the exporter in question, *i.e.*, the Vietnam-government entity, received its own rate prior to the reviews covered in this dispute. Article 9.4 addresses a situation in which a company is not individually examined. Obligations under Article 9.4 thus are not implicated once an exporter has been individually examined (as is the case here with respect to the entity). Therefore, Vietnam's argument that the Panel should interpret Article 9.4 to require in administrative reviews a new determination of an "all others" rate that would include all exporters and producers, including those exporters that have already been individually examined and for which no change in rate was requested, is inconsistent with the plain language of Article 9, paragraphs 3.1, 3.2, and 4.

15. Finally, Vietnam's proposed interpretation is untenable because it would place Article 9.4 in conflict with the Ad Note to Article VI. The Appellate Body has recognized that the Ad Note read together with the AD Agreement permits a Member to assess a final liability for antidumping duties on the basis of the security collected as a protection against possible non-payment.[12] Vietnam's contention that Article 9.4 requires a Member to determine a new "all others" rate every time it conducts an assessment proceeding thus conflicts with this finding, which permits Members to assess final liability for antidumping duties on the basis of security collected with respect to exporters that did not request an assessment proceeding.[13]

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

Question 67. [to Viet Nam] In paragraph 87 of its response to Panel question No. 27, Viet Nam writes that:

[11] In investigations, unlike administrative reviews, a rate is normally individually calculated for all or, if appropriate, selected known exporters, and an "all others" rate is applied to known and unknown exporters that have not been individually examined under Article 9.4. *See e.g.*, AD Agreement, art. 5.2(ii) (requiring the application of domestic industry for investigation to include the identity of each known exporter or producer of the product under investigation), and art. 6.1.3 (requiring the authorities to provide the full text of application for investigation to the known exporters).

[12] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, paras. 220-227.

[13] An exporter may decide not to request a review (or a refund proceeding as the case may be) and rely instead on the already collected cash deposit as their final antidumping duty liability. If Vietnam's proposed interpretation was adopted, it would essentially forbid Members from allowing exporters the option of not requesting a review.

> **"… the fact [that] entries made before the RPT may remain unliquidated long after the RPT closes highlights another import consideration. The WTO-inconsistent conduct is not just about liquidation or revocation cases. Where the issue is the size of the margin, the limited legal effect of Section 129 means that the United States retains excessive, WTO inconsistent antidumping duty deposits established on a WTO-inconsistent basis well after the close of the RPT. The retention of such deposits is contrary to U.S. obligations under Articles 1, 9.2, 9.3, 11.1 and 18.1 of the WTO AD Agreement."**

Please clarify whether Viet Nam's argument pertains to the fact that the United States *temporarily* retains cash deposits during the period until liquidation, or whether it pertains to the fact that the United States *definitively* keeps the cash deposits.

16. In its response to Question 67, Vietnam states that its argument extends both to the temporary and "permanent" retention of cash deposits (that is, through a determination of final liability).[14]

17. An apparent expansion of the scope of Vietnam's arguments, however, does not fix the fundamental problem with Vietnam's challenge to Section 129(c)(1): namely, that Section 129 is just one tool that the United States may use for compliance with DSB recommendations and rulings, and the existence of this tool does not tie the hands of the United States nor dictate the level of cash deposits, the retention of cash deposits, nor the determination of final liability. The United States also notes its disagreement with Vietnam's legal positions regarding how cash deposits fit with AD Agreement obligations. The United States will turn to those matters at the end of this comment. But the first and foremost point here is that Vietnam's positions – perhaps pertinent (though ultimately without merit) in some hypothetical compliance proceeding – do not support Vietnam's "as such" challenge to Section 129(c)(1).

18. With regard to final assessments of prior entries, Vietnam asserts that "because Section 129 prohibits addressing prior unliquidated entries, it necessarily gives rise to retention of excessive cash deposits beyond [the reasonable period of time ("RPT")] in violation of Articles 1, 9.2, and 9.3, 11.1, and 18.1 of the AD Agreement."[15] This claim is just a repackaging of the flawed legal theory that Vietnam offered in its first written submission – namely, that Section 129(c)(1) is an "an absolute legal bar" to the WTO-consistent treatment of "prior unliquidated entries."[16] The United States previously has explained that this line of argument was made unsuccessfully by the complaining party in *US – Section 129(c)(1) URAA*.[17]

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[14] *See* Vietnam's Responses to the Panel's Questions Following the Second Panel Meeting, para. 29.

[15] *See ibid*, para. 30.

[16] *See* Vietnam's First Written Submission, paras. 213, 224.

[17] *See* U.S. First Written Submission, paras. 129-137; U.S. Second Written Submission, para. 36 & n.38.

19. Similarly, regarding cash deposits, the panel in *US – Section 129(c)(1) URAA* found that "it can *not* be inferred from the mere fact that a section 129 determination which establishes a new dumping margin or a new countervailable subsidy rate is inapplicable to 'prior unliquidated entries' that the Department of Commerce would be required to retain excessive cash deposits collected on such entries or would be precluded from refunding such cash deposits."[18] The panel also explained that Section 129(c)(1) "does not require or preclude any particular actions with respect to 'prior unliquidated entries' in a separate segment of the same proceeding."[19] The panel concluded that Section 129(c)(1), by itself, does not have the effect "of requiring the Department of Commerce to retain excessive cash deposits collected on 'prior unliquidated entries' or of precluding the Department of Commerce from returning such cash deposits, or of requiring the Department of Commerce to conduct administrative reviews for 'prior unliquidated entries'."[20]

20. These findings remain as true today as they were when the panel examined the U.S. system for implementing DSB recommendations and rulings in *US – Section 129(c)(1) URAA*. Section 129 remains the same and has not been amended. Consistent with its other submissions in this dispute, Vietnam does not meaningfully address the panel's findings in *US – Section 129(c)(1) URAA*, and its arguments do not provide any reason for this Panel to make different findings from those previously adopted by the DSB. Thus, Vietnam's arguments fail.

21. As noted above, although the legal positions put forth by Vietnam are not at issue in this dispute, the United States nonetheless will comment on Vietnam's statements regarding the application of the AD Agreement to cash deposits. In short, Vietnam's positions are not supportable.

22. A fundamental tenet of Vietnam's temporary retention argument (*i.e.*, that a Member must take action vis-à-vis cash deposits by the expiration of the RPT) is fatally flawed. Neither the DSU (which Vietnam does not cite) nor the AD Agreement (which it does) contains an obligation that requires Members to change the level of cash deposits by the close of the RPT. Put another way, no provision of the DSU or the AD Agreement prohibits Members from retaining cash deposits – which simply serve as security pending a final assessment – after the expiration of the RPT. To the contrary, Ad Article VI of the GATT 1994 explains that a Member "may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected

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[18] *US – Section 129(c)(1) URAA*, para. 6.69; *see also ibid.* at para. 6.84. As mentioned in the U.S. First Written Submission, Vietnam has raised nearly identical claims to those raised by Canada in *US – Section 129(c)(1) URAA*. U.S. First Written Submission, para. 129 & n.162.

[19] *US – Section 129(c)(1) URAA*, para. 6.80; *see also ibid*, para. 6.90.

[20] *Ibid*, para. 6.81; *see also ibid*, para. 6.87.

dumping or subsidization."[21] The plain text of Ad Article VI tethers the retention of cash deposits to the completion of a final assessment, not the expiration of a RPT.[22]

23. Vietnam's "permanent" retention argument (*i.e.*, that the United States must take action vis-à-vis cash deposits absent a request for an administrative review) is similarly flawed. Article 9.3.1 of the AD Agreement tethers refunds of cash deposits to a "request for final assessment," not the expiration of a RPT.[23]

24. Vietnam's argument is primarily based on the Appellate Body's findings in *US – Zeroing (Japan) (Article 21.5)*. However, Vietnam does not acknowledge that this prior dispute involved a different issue – namely liquidation obligations with respect to entries **subject to a review that was within the scope of a WTO dispute**. Thus, the statement upon which Vietnam relies – namely, that "there is no excuse for failing to provide prompt compliance with DSB rulings and recommendations in the context of excessive cash deposits"[24] – is referring to liquidation of the entries covered by the proceedings in the dispute. Moreover, the Appellate Body did not make recommendations and rulings on Member's obligations under the AD Agreement vis-à-vis cash deposits on entries not covered in the dispute.

25. In sum, Vietnam argues for additional obligations on Members that are not in the covered agreements, in contradiction to Article 3.2 of the DSU.

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).

26. In its response to Question 68, Vietnam asserts that "[t]he U.S. courts and/or NAFTA panels are only authorized to review the underlying determination based on U.S. law and cannot,

[21] GATT 1994, Ad Article VI, paras. 2 and 3 (emphasis added).

[22] Moreover, a cash deposit rate based on a dumping margin found to be WTO-inconsistent and held after the expiration of the RPT does not, *ipso facto*, render the deposit WTO-inconsistent. For example, a "reasonable security" (*i.e.*, the cash deposit) could exceed the WTO-inconsistent margin based on changed circumstances that occurred after the WTO-inconsistent margin was originally calculated.

[23] It should also be noted that, as a practical matter, if the entries are not subject to an administrative review, they will be liquidated well before any final WTO determination with respect to that review. Accordingly, it is difficult to envision any scenario in which compliance obligations would be at issue.

[24] Vietnam's Responses to the Panel's Questions Following the Second Panel Meeting, para. 30 (citing *US – Zeroing (Japan) (Article 21.5) (AB)*, para. 177). In the paragraph relied on by Vietnam, the Appellate Body rejected an argument by the United States concerning the effect of Footnote 20 to Article 9.3.1 of the AD Agreement on its liquidation obligations.

therefore, enjoin liquidation based on claims of the inconsistency of a particular measure with WTO obligations."[25] The United States offers two observations regarding Vietnam's statement.

27. First, Vietnam's assertion ignores the fact that the United States, through legislative action,[26] can enjoin liquidation based on claims of inconsistency of a particular measure with WTO obligations. Throughout the course of this dispute, Vietnam has not even attempted to rebut the fact that the United States can implement DSB recommendations and rulings vis-à-vis "prior unliquidated entries" through legislative action. This fact completely undermines Vietnam's "as such" claim.

28. Second, to the extent that U.S. courts and NAFTA Chapter 19 panels may not be able to enjoin liquidation based on inconsistencies with WTO obligations, that fact is not a function of Section 129(c)(1) of the URAA, which is the only measure challenged by Vietnam in this context. As noted by the panel in *US – Section 129(c)(1) URAA*:

> It might of course be the case that, because section 129(c)(1) limits the application of section 129 determinations to entries that take place on or after the implementation date, "prior unliquidated entries" would remain subject to other provisions of US antidumping or countervailing duty laws which might, for instance, require the Department of Commerce to assess definitive antidumping or countervailing duties with respect to "prior unliquidated entries" on the basis of the old, WTO-inconsistent methodology or might preclude the Department of Commerce from assessing such duties with respect to such entries on the basis of the new, WTO-consistent methodology. However, in such instances, it would not be because of section 129(c)(1) that the Department of Commerce would be required to take, or be precluded from taking, such action with respect to "prior unliquidated entries", but because of those other provisions of US law. Since the only measure before us is section 129(c)(1), we are not called on to make findings regarding whether any other provisions of US law would require the United States to take any of the actions which Canada has identified and considers contrary to WTO law.[27]

29. The panel's logic in *US – Section 129(c)(1) URAA* applies equally to the ability of U.S. Courts and NAFTA Chapter 19 panels to enjoin liquidation based on WTO inconsistencies. Simply put, such ability (or lack thereof) has nothing to do with Section 129(c)(1) of the URAA, and this Panel has not been called on to make findings regarding any other provisions of U.S. law. As noted by Vietnam in its latest submission, "Viet Nam reiterates that its claims relate to

[25] Vietnam's Responses to the Panel's Questions Following the Second Panel Meeting, para. 36.

[26] *See* U.S. First Written Submission, para. 120; *see also* U.S. Responses to Panel Questions, paras. 100-106; U.S. Second Written Submission, para. 39.

[27] *US – Section 129(c)(1) URAA*, fn. 122.

Section 129(c)(1). They do not involve any other mechanism that the United States might apply in implementing DSB rulings and recommendations."[28]

Question 70. [to Viet Nam] In paragraph 32 of its opening oral statement at the second meeting, Viet Nam writes that "What makes the measure WTO-inconsistent may only be determined by reference to the relevant agreements, including the Anti-Dumping Agreement". Please discuss how it is possible to know, in advance, what provisions of the covered agreements could be violated by a future measure taken to comply or by the absence of measures taken to comply.

30. In its response to Question 70, Vietnam again asserts that "the presence of discretion [*i.e.*, the ability of the USTR not to initiate or implement a Section 129 determination] or alternative measures [*e.g.*, legislative action or Section 123 of the URAA] does not exempt a measure [Section 129(c)(1)] from being challenged as such."[29] In support of its argument, Vietnam relies on the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review (AB)*.[30]

31. Vietnam's reliance on *US – Corrosion-Resistant Steel Sunset Review (AB)* is misplaced. As the panel noted in *Korea – Commercial Vessels*:

> In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body examined two issues. First, it considered whether certain types of measures could not, as such, be subject to dispute settlement proceedings. Second, the Appellate Body considered whether the measure at issue in that case could be inconsistent with the AD Agreement. The Appellate Body treated the first issue as a jurisdictional matter. Thus, having found that there was "no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such'", the Appellate Body stated that panels are not "obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory". However, this does not mean that the Appellate Body was excluding the application of the traditional mandatory/discretionary distinction, since it went on to acknowledge that the distinction might be relevant as part of the second issue, *i.e.*, the panel's assessment of whether the measure at issue was inconsistent with particular obligations.

32. The United States does not argue, as Vietnam suggests, that Section 129(c)(1) is not subject to dispute settlement proceedings or that the mere existence of USTR's discretion or other implementation mechanisms prevents inquiry into Section 129(c)(1). Indeed, Section 129(c)(1) was challenged and found to be consistent with U.S. obligations under the covered agreements. Instead, the United States offers an undisputed point related to the second step

[28] Vietnam's Responses to the Panel's Questions Following the Second Panel Meeting, para. 36.

[29] *Ibid*, para. 41.

[30] *Ibid.*

taken by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review (AB)*: that (i) USTR's discretion and (ii) the use of other mechanisms to implement DSB recommendations and rulings demonstrates that section 129(c)(1) does not require the United States to take any particular action with respect to "prior unliquidated entries." Vietnam omits this point, which is the critical focus of the Panel's inquiry in this "as such" challenge.

IV. CLAIMS CONCERNING COMPANY-SPECIFIC REVOCATIONS

Question 72 and 73. [to Viet Nam] The Panel understands that:

> **a. in the third administrative review, one Vietnamese producer/exporter (Fish One) made, and maintained, a request for review;**
>
> **b. in the fourth administrative review, 18 Vietnamese producers/exporters initially requested revocation but only five (Minh Phu Group, CAMIMEX, Grobest, Fish One and Seaprodex Minh Hai) maintained their requests (as of the time of the final determination);**
>
> **c. in the fifth administrative review, three Vietnamese producers/exporters (Camimex, Grobest and Phuong Nam) requested revocation of the order, and each had maintained their requests for revocation at the time of the final determination.**

Would Viet Nam:

> **a. Please confirm that these are the only companies who maintained requests for revocation in the proceedings at issue.**
>
> **b. For each of the requests for revocation (in each review), please: (i) confirm the basis under US anti-dumping procedures for the request, and (ii) provide the text of each of the request for revocation (in each review) submitted by each of these Vietnamese producers/exporters.**
>
> **c. Please confirm for which companies the USDOC determined not to revoke the order on the basis that they had a positive, non de minimis dumping margin.**
>
> **d. Please confirm for which companies the USDOC determined not to revoke the order on the basis that they had not been selected for individual examination in the relevant administrative review.**

33. As an initial matter, the United States notes that the third administrative review is not within this Panel's terms of reference.[31] Therefore, whether or not Fish One requested or

[31] *See infra*, rebuttal to Vietnam's Answer to Question 81; U.S. First Written Submission, fn. 102.

maintained a request for company-specific revocation in the third administrative review is not at issue in this dispute.

34. With respect to the fourth administrative review, Vietnam asserts that Grobest and Seaprodex Minh Hai requested and maintained requests for company-specific revocation.[32] Vietnam is incorrect. Both Grobest and Seaprodex Minh Hai withdrew their requests for revocation. The United States has provided the panel with documentation demonstrating their withdrawals of company-specific revocation requests.[33]

35. Accordingly, the requests for company-specific revocation provided by Vietnam at Exhibit VN-83 do not reflect the status of requests for revocation at the time of Commerce's final results in the fourth administrative review and the re-conduct of the fourth review for Grobest in which it withdrew its revocation request. Only Minh Phu, Camimex, and Fish One had outstanding requests for revocation in the fourth administrative review. In addition, having withdrawn its request for company-specific revocation, Seaprodex Minh Hai was not considered for revocation in the fourth administrative review.[34]

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.

36. In its response to Question 75, Vietnam asserts that Grobest maintained its requests for company-specific revocation in both the fourth and fifth administrative reviews.[35] This is inaccurate. As indicated in Exhibit US-13, Grobest withdrew its request for revocation for the fourth administrative 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

[32] Vietnam's Responses to the Panel's Questions Following the Second Panel Meeting, para. 44.

[33] Exhibit US-13 (Grobest) and Exhibit US-96 (Seaprodex Minh Hai).

[34] *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 75 Fed. Reg. 47774, (Aug. 9, 2010) and accompanying Issues and Decision Memorandum at Comment 4, fn.86 (Exhibit VN-13); *see also* Exhibit US-96.

[35] Vietnam's Answer to the Panel's Questions after the Second Panel Meeting, para. 53.

requests for order-wide revocations. In addition, please explain the links, in terms of procedure and criteria, between the two.

37. In its response, Vietnam states that it is "not aware of any order-wide revocations that have been conducted under USDOC Regulation 351.222."[36] The United States brings to the Panel's attention an order-wider revocation conducted under 19 C.F.R. § 351.222 – *Furfuryl Alcohol From the Republic of South Africa*.[37]

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?

38. In its response to Question 77, Vietnam asserts that Commerce could not have conducted a changed circumstances review vis-à-vis the respondents at issue in this dispute because there were no "changed circumstances."[38] Vietnam cites no support for its argument. Nor is the argument supportable: in fact, Vietnam's argument is directly contradicted by the panel reports in *US – DRAMS* and *US – Anti-Dumping Measures on Oil Country Tubular Goods*. The latter panel report found that Commerce's decision not to revoke the antidumping duty 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.[39]

39. In addition, Vietnam provides a tabulation of changed circumstances reviews conducted under 19 C.F.R. § 351.216 and individual revocations under 19 C.F.R. § 351.222(b)(2) in

[36] *Ibid*, para. 54.

[37] *Furfuryl Alcohol From the Republic of South Africa; Final Results of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order*, 64 Fed. Reg. 37500 (July 12, 1999) ("Based on a review of the relevant record evidence, including the facts pertaining to the shipments exported by the unrelated exporter, we have determined to revoke the order in full for the following reasons: (1) ISL has sold the subject merchandise at not less than normal value (NV) for three consecutive review periods, including this review; (2) there is no evidence to indicate that ISL or other persons are likely to sell the subject merchandise at less than NV in the future; and (3) the exports in question, which occurred over two years ago, represent isolated shipments of insignificant quantities of subject merchandise. We also note that there were no comments filed by any other party on this issue, with respect to either our preliminary results or ISL's case brief. {footnote omitted.} Accordingly, we determine that a full revocation of the order is warranted under 19 C.F.R. § 351.222(b)(1) and section 751(d)(1) of the Act.") (Exhibit US-98).

[38] Vietnam's Responses to the Panel's Questions Following the Second Panel Meeting, para. 57.

[39] *US – Anti-Dumping Measures on Oil Country Tubular Goods (Panel)*, paras. 7.153, 7.166.

Exhibits VN-85, VN-86 and VN-87. The United States offers the following observations regarding these lists of proceedings. First, Exhibits VN-85 and VN-86 highlight the diversity of circumstances that Commerce has addressed, and its broad authority to do so, under the changed circumstances law and regulation. Not only do these lists demonstrate, as Vietnam concedes, a company-specific revocation determination made under 19 C.F.R. § 351.216 (*Color Television Receivers from Korea*), but the lists also demonstrate examination of "no interest" claims made or supported by the domestic industry, examination of changes in corporate structure, market/nonmarket economy status changes, clarification of scope language, allegations of fraud (following revocation), examination of the possible resumption of dumping for companies that had been revoked, among other circumstances.

40. With respect to Exhibit VN-87, the United State would note that *Furfuryl Alcohol from South Africa*, as noted above in comments on Vietnam's answer to Question 76, involved an order-wide revocation. In addition, the revocation regarding *Certain Forged Steel Crankshafts from the United Kingdom* was also order-wide.[40]

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"?

41. In its response to Question 79, Vietnam asserts that the use of the term "interested parties" in Article 11.2 of the AD Agreement means that the term "the duty" in Article 11.2 should be interpreted differently (so as to provide for company-specific revocation) than "the duty" in Article 11.3, which the Appellate Body found in *US – Corrosion-Resistant Steel Sunset Review (AB)* did not refer to company-specific revocation.[41] As set forth in the U.S. responses to Panel questions following the second Panel meeting,[42] and in the U.S. second written submission,[43] the term "interested parties" in Article 11.2 does not support Vietnam's assertion that the term "the duty" should have a different meaning in Articles 11.2 and 11.3 of the AD Agreement.

[40] *Certain Forged Steel Crankshafts from the United Kingdom; Final Results of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order*, 62 Fed. Reg. 16768 (April 8, 1997) ("We are therefore revoking the order with respect to crankshafts from the United Kingdom, based on our determination that BSF is the only known producer of crankshafts" despite petitioner's objection that the company's facilities had been recently sold.") (Exhibit US-99).

[41] Vietnam's Responses to the Panel's Questions Following the Second Panel Meeting, para. 59.

[42] U.S. Responses to the Panel's Questions Following the Second Panel Meeting, paras. 81-84.

[43] U.S. Second Written Submission, paras. 12-13.

42. The United States further observes that if "the duty" were to have a different meaning in Articles 11.2 and 11.3 and if, consequently, company-specific revocation is a requirement under Article 11.2, then an absurd result occurs. In particular, if an investigating authority considers a request for company-specific revocation (that would cover both dumping and injury) in year four after the imposition of the duty, it would automatically extend the duration of the (product-wide) duty by an additional five years without any obligation to conduct a product-wide sunset review consistent with Article 11.3. If such company-specific reviews are requested by an interested party and conducted at least once every five years, Members would be under no obligation to terminate "the duty" or conduct a sunset review and "the duty" would continue indefinitely.[44]

43. For these reasons, Vietnam's attempt to proscribe a different meaning to "the duty" in Articles 11.2 and 11.3 of the AD Agreement is baseless.

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:

> **b. [to Viet Nam] Please respond to the United States' argument, in its second written submission, footnote 25, that with respect to the conduct of a changed circumstances review, the regulations governing revocations in administrative reviews are not more specific than the regulations governing changed circumstances reviews themselves.**

44. Vietnam's response to Question 80(b) appears to be largely non-responsive to the Panel's question and the U.S. argument that regulations governing revocations in administrative reviews are not more specific than the regulations governing changed circumstances reviews. In its response, Vietnam asserts that the "requirements for [company-specific] revocation" are found in 19 C.F.R. § 351.222, which was the Commerce regulation that provided for company-specific revocation in an administrative review based on, *inter alia*, an absence of dumping for three consecutive years.[45] While Vietnam's argument is somewhat unclear, Vietnam appears to assert (1) that requests for company-specific revocation are not allowed to be considered under the provisions in U.S. law for changed circumstances reviews (*e.g.*, 19 C.F.R. § 351.216) and (2) that even-if company-specific revocation were allowed to be considered pursuant to a changed circumstances review, such a review would have been based on the provisions applicable to revocation in an administrative review – *i.e.*, 19 C.F.R. § 351.222.

[44] Moreover, as both the European Union and the United States pointed out, the title of Article 11 and Article 11.5 confirm that Article 11 also applies to price undertakings under Article 8, *mutatis mutandis*. European Union's Answer to the Panel's Questions after the First Panel Meeting, para. 53; U.S. Second Written Submission, paras. 13 and n.7. When the raising of export prices under a price undertaking eliminates dumping (as set forth in Article 8.1), pursuant to Vietnam's interpretation of Article 11.2, this would lead to automatic termination of the duty. Thus, there would be no basis for review under Article 11.3 (after five years), which is again an absurd result.

[45] Vietnam's Responses to the Panel's Questions Following the Second Panel Meeting, para. 61.

45. By way of background, Vietnam's argument in this regard is an attempt to side-step the panel reports in both (i) *US – Anti-Dumping Measures on Oil Country Tubular Goods*, which found that Commerce's decision not to revoke the antidumping duty 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,[46] and (ii) *US – DRAMS*, which reached a similar result as to another element of the same standard.[47]

46. Vietnam's first argument (*i.e.*, that requests for company-specific revocation cannot be made under the changed circumstances review provisions) is belied by *Color Television Receivers from Korea*. In that proceeding, 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.[48]

47. Moreover, Vietnam has not proffered any language (because there is none) from the U.S. antidumping statute or Commerce's regulations that prohibits company-specific revocations through changed circumstances reviews. Indeed, Commerce's regulation, which governs changed circumstances reviews, expressly sets forth certain limitations that apply to Commerce's ability to conduct changed circumstances reviews (and even these limitations are subject to Commerce not finding good cause to set aside such limitations).[49] None of these limitations, discussed in 19 C.F.R. § 351.216(c), mentions company-specific revocations.

48. *Color Television Receivers from Korea* also demonstrates that Vietnam's second argument (*i.e.*, that 19 C.F.R. § 351.222 must be the standard for changed circumstance reviews) is incorrect. In that proceeding, Commerce found that the standard for company-specific revocation in an administrative review would only provide "guidance" for such an inquiry in a changed circumstances review.[50] 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]."[51] Once again, Vietnam has not proffered any statutory or regulatory language that requires Commerce to apply 19 C.F.R. § 351.222 standards when conducting a changed circumstances review under 19 C.F.R. § 351.216.

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[46] *US – Anti-Dumping Measures on Oil Country Tubular Goods (Panel)*, paras. 7.153, 7.166.

[47] *US – DRAMs*, para. 6.53.

[48] *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).

[49] 19 C.F.R. § 351.216(c) (Exhibit US-91).

[50] *Color Television Receivers from the Republic of Korea; Final Results of Changes Circumstances Antidumping Duty Review*, 63 Fed. Reg. 46760 (Sept. 2, 1998) (Exhibit VN-88).

[51] *Ibid.* at 46762.

49. In sum, Vietnam's assertion that requests for company-specific revocation cannot be made under U.S. provisions for changed circumstances reviews and that 19 C.F.R. § 351.222 would control such reviews is incorrect. And as a result, Vietnam has failed to show that the panel reports in *US – Anti-Dumping Measures on Oil Country Tubular Goods* and *US – DRAMS* were incorrect in their understandings of U.S. law.

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.

50. In its response to Question 80(c), Vietnam lists a number of circumstances in which Commerce has conducted a changed circumstances review, such as: company-specific revocation based on a lack of dumping; absence of interest by the petitioner; change in the status of the respondent; reunification of Germany; changes in non-market economy status; and the resumption of dumping by a company that had received company-specific revocation in an administrative review.[52]

51. These non-exhaustive examples show that Commerce has broad discretion to conduct a changed circumstances review,[53] and (as the United States discussed above in subpart (b) of this question) has conducted such reviews to determine if a company should be granted company-specific revocation based on, *inter alia*, an absence of dumping. Accordingly, these examples are in direct contradiction to Vietnam's assertion, discussed above, that Commerce cannot consider a request for company-specific revocation based on a lack of dumping under the provisions in U.S. law for a changed circumstances review.

Question 81. [to Viet Nam] Please react to the United States' argument, in paragraph 34 and footnote 32 of its second written submission, that Viet Nam did not request consultations on, nor file a panel request on, the third administrative review.

52. In its response to Question 81, Vietnam does not contest the fact that it did not request consultations on, nor file a panel request on, the third administrative review of the antidumping duty order on certain frozen warmwater shrimp from Vietnam.[54] Rather, Vietnam asserts that "[t]he consultations and subsequent panel proceedings in DS404 [*i.e.*, *US – Shrimp (Viet Nam) (Panel)*] fully addressed the issues relevant to the third administrative review which may bear on the panel's findings and conclusions in this proceeding."[55]

[52] Vietnam's Responses to the Panel's Questions Following the Second Panel Meeting, para. 62.

[53] *See also* U.S. Answer to the Panel's Questions after the Second Panel Meeting, para. 87.

[54] Vietnam's Answer to the Panel's Questions after the Second Panel Meeting, para. 63.

[55] *Ibid.*

53. Simply put, Vietnam's claim regarding Commerce's determination not to revoke the order on Fish One in the third administrative review is outside this Panel's terms of reference.[56] The panel's findings in *US – Shrimp (Viet Nam)* are simply irrelevant vis-à-vis the fact that the third administrative review is outside this particular Panel's terms of reference. The panel in *US – Shrimp (Viet Nam)* made no findings with respect to the third administrative review regarding any claimed obligation to conduct company-specific revocation under Article 11.2 of the AD Agreement.

[56] *Ibid*, para. 50.