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

(DS429)

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

January 10, 2014

TABLE OF EXHIBITS

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US-52	*Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (Mar. 6, 2006)
US-53	*Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 69,186 (Nov. 15, 2002)
US-54	*Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 Fed. Reg. 37,125 (June 23, 2003)
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US-59	Proclamation No. 7585, 67 Fed. Reg. 56,207 (Aug. 30, 2002)
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US-61	*Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China*, 74 Fed. Reg. 29,167 (June 19, 2009)
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US-67	*Notice of Final Determination of Sales at Less Than Fair Value: Urea Ammonium Nitrate Solutions from Belarus*, 68 Fed. Reg. 9,055 (Feb. 27, 2003)
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China – Auto Parts	Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R, WT/DS340/R, WT/DS342/R, adopted 12 January 2009, as modified by Appellate Body Reports WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R
China – Raw Materials (Panel)	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R
EC – Approval and Marketing of Biotech Products	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006
EC – Fasteners (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Duties on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Fasteners (Panel)	Panel Report, *European Communities – Definitive Anti-Dumping Duties on Certain Iron or Steel Fasteners from China*, WT/DS397/R, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R
EC – IT Products	Panel Report, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, adopted 21 September 2010
Guatemala – Cement I (AB)	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998
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 Reviews of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Export Restraints	Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001.
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5) (AB)	Appellate Body 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/AB/RW, adopted 11 May 2007
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 – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002
US – Zeroing (EC) (Article 21.5) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr. 1, adopted 11 June 2009
US – Zeroing (Japan) (Article 21.5) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009

I. GENERAL CONSIDERATIONS

Question 3 (to both parties): Can you please elaborate on the concept of "practice" (as opposed to other concepts such as "method", "methodology", "procedure" or "policy") as a measure which can be challenged in WTO dispute settlement?

1. To start, it is useful to recall that the covered agreements do not define the term "measure." There is no such definition because the content of the term may vary from case to case. For example, what constitutes a "measure" for purposes of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") may be different from what constitutes a measure for purposes of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* or the Dispute Settlement Understanding ("DSU"). Indeed, the Appellate Body has declined to make definitive statements in this area and, for example, has written that it "has *not*, to date, pronounced upon the issue of whether 'practice' may be challenged, as such, as a 'measure' in WTO dispute settlement."[1] Rather, the question of whether a matter should be considered a "measure" for purposes of the DSU must be made on a case-by-case basis, taking account of all relevant facts and circumstances.

2. The Appellate Body has made some findings that may be useful in the requisite case-by-case analysis. For example, the Appellate Body has found that "instruments of a Member containing rules or norms could constitute a 'measure', irrespective of how or whether those rules or norms are applied in a particular instance."[2] The Appellate Body in using the term "could constitute" clearly indicated that this is not intended to be a definition of "measure," but rather one starting point for analysis. Thus not all "instruments" are measures and not all measures are "instruments."[3]

3. Turning to the specific issue of an administrative practice, a practice – that is, a description of what a government entity has done – standing alone is not itself a measure for the purpose of the DSU, but it may be relevant evidence in a dispute settlement proceeding. For example, administrative practice may be useful evidence in construing the challenged law or regulation, or for establishing the existence of an unwritten measure. With regard to the latter point, the findings in *EC –Approval and Marketing of Biotech Products* are instructive. In that dispute, the United States challenged the EU's unwritten moratorium on granting approvals of products made with biotechnology. As part of the evidence used to show the existence of the unwritten measure, the United States demonstrated that the EU had not in fact granted any approvals during the period covered by the moratorium. But this practice was not itself the challenged measure. Rather, the panel agreed with the United States that the EU had adopted an unwritten moratorium on approvals, and the evidence of the EU practice of not granting

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[1] *US – Gambling (AB)*, para. 132 (emphasis in original).

[2] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 82.

[3] For example, a measure may not be an "instrument" but may be an "action" by a Member or in some cases could be viewed as "inaction" by a Member. "In the practice established under the GATT 1947, a 'measure' may be *any* act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government. A measure can also be an omission or a failure to act on the part of a Member. *Guatemala – Cement I (AB)*, para. 69 n.47 (internal citations omitted).

approvals was supportive of this finding. But the finding was not based on the practice alone. Rather, the panel relied on extensive evidence of an unwritten measure, including references by senior EU and member State officials to the moratorium, as well as reports of statements by member State and Commission officials that the decision-making process of the EU had been directly affected by the existence of the moratorium.[4]

4. Put another way, to conclude that a practice constitutes a measure that can be challenged in WTO dispute settlement because of its so-called "consistent application" would incorrectly presuppose the existence of an underlying "measure." Consistent application cannot, as a matter of logic, be the basis on which the "measure" is found to exist: there may be very good policy reasons why an authority, when confronted by a particular factual pattern, might want to respond to that pattern in the same manner when administering its laws and regulations – even without a separate measure requiring them to do so. As the panel in *US – Steel Plate* correctly noted:

> That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its past practice.[5]

5. Thus that there exist "consistent results" does not conclusively demonstrate that there exists a corresponding measure that is causing those results. Similarly, "that expectations are created on the part of foreign governments, exporters, consumers, and petitioners as a result of any particular practice that the [administering authority] 'normally' follows would not be sufficient to accord such a practice an independent operational existence."[6] There must be evidence establishing the existence of an unwritten measure that is independent of consistent application of a "practice."

6. In the WTO context, the policy values underlying why an authority, when confronted by a particular factual pattern, might want to respond to that pattern in the same manner when administering its laws and regulations – even without a separate measure requiring them to do so – find expression, among other places, in the terms of GATT 1994 Article X:3(a), which provides for administration "in a uniform, impartial and reasonable manner [of] all its laws, regulations, decisions and rulings," including the antidumping laws. In contrast, nothing in the covered agreements suggests that Members otherwise must adopt a measure that compels outcomes or arbitrary acts (*e.g.*, by reacting to identical fact-patterns differently when administering their laws). The context provided by GATT 1994 Article X:3(a) thus argues

[4] *See EC – Approval and Marketing of Biotech Products*, paras. 4.143-4.154.

[5] *US – Steel Plate*, para. 7.22.

[6] *US – Export Restraints*, para. 8.126.

strongly against inferring the existence of an unwritten "practice" as a measure simply because of consistent results in the administration of laws.

7. Finally, with respect to what constitutes a measure subject to dispute settlement, the Appellate Body has distinguished between challenges to acts as "applied only to a specific situation" and to "instruments of a Member containing rules or norms."[7] The latter may be challenged "irrespective of how or whether those rules or norms are applied in a particular instance."[8] In this context, it is clear that mere application of an individual act in repeated situations does not result in the creation of a measure susceptible of challenge "as such" because repetition of an individual act does not mean that there is now some additional measure generating the individual act. This is so even if repetition of an act is sufficient to lead to what might be called "practice."

8. With respect to a challenge to a measure "as such," an important consideration is whether that measure requires or necessarily results in a breach of a covered agreement. However, repetition of an act to the present does not require that the "act" occur in the future. Furthermore, even in those instances in which the repetition is sufficient that it might be called a "practice," this would not answer the question as to whether that practice requires that the Member act in a particular way. To the extent that a "practice" does not actually require a government entity to act in a way that is WTO-inconsistent, there is no basis for concluding that the practice requires WTO-inconsistent action and thus could not be considered inconsistent "as such."

II. CLAIMS CONCERNING ZEROING

Question 4 (to both parties): **Does the USDOC's zeroing methodology still exist as a measure which can be challenged "as such" in light of the fact that the USDOC modified its calculation methodology in administrative reviews in April 2012?**

9. Commerce's so-called "zeroing" methodology does not exist as a measure. Accordingly, it cannot be challenged "as such," in light of the fact that Commerce changed its approach for calculating dumping margins for investigations (effective early 2007)[9] and for administrative reviews (effective April 16, 2012)[10] in response to the DSB's recommendations and rulings on this matter. That is, the measure subject to those recommendations and rulings no longer exists.

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[7] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 82.

[8] *Ibid*.

[9] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dec. 27, 2006) (Exhibit US-38).

[10] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8,101 (Feb. 14, 2012) (Exhibit US-39).

Question 6 (to the United States): In its first written submission, the United States writes that "[e]ven if Vietnam's 'as applied' claims are considered within the Panel's terms of reference …" (p. 63, sub-heading F.1). Could the United States please explain whether it is objecting to certain of Viet Nam's "as applied" claims with respect to zeroing?

10. Vietnam contends that Commerce's use of zeroing in the fourth, fifth and sixth administrative reviews to calculate the dumping margins applied to individually examined respondents from Vietnam was inconsistent with the covered agreements.[11] The material quoted in the question is a reference to Vietnam's claims regarding the sixth administrative review. On July 31, 2013, the United States submitted a request for preliminary rulings in this matter in which the United States asked, in part, that the Panel find that the final results of the sixth administrative review, including Commerce's use of zeroing in that review, are not within the Panel's terms of reference. The Panel has addressed this issue and found "that the USDOC's final determination in the sixth administrative review in its anti-dumping investigation of certain Shrimp from Viet Nam, as well as the imposition of anti-dumping duties and cash deposit requirements pursuant to this determination, fall within our terms of reference."[12]

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

Question 8 (to the United States): The Panel notes that, in its first written submission, the United States refers to the "Viet Nam-government entity". However, this term does not appear in any of the various USDOC documents issued under the Shrimp order, which refer instead to the "Viet Nam-wide entity". Could the United States explain the difference, if any, between the "Viet Nam-government entity" and the "Viet Nam-wide entity"?

11. There is no difference between the terms "Vietnam-government entity" and "Vietnam-wide entity."[13]

Question 9 (to the United States): What difference is there, in the United States' view, between "deeming", a "presumption" and a "determination"?

> **a. Does the "rebuttable presumption that all companies within the NME country are essentially operating units of a single, government-wide entity …" amount to a "determination" based on "facts and evidence submitted or gathered in**

[11] *See* Vietnam's First Written Submission, para. 93.

[12] *US – Shrimp (Viet Nam) II*, Preliminary Ruling, para. 6.1.

[13] The term "NME government entity" has been previously used in Commerce's administrative determinations involving non-market economy countries. *See, e.g., Brake Rotors from the People's Republic of China*, 70 Fed. Reg. 69,937, Issues and Decision Memo, Comment 7 (Nov. 18, 2005) (Exhibit US-77).

the investigation" (see Appellate Body Report in EU – Fasteners (China), para. 364)?

12. The presumption in a particular proceeding that companies within Vietnam should initially be considered part of a Vietnam-government entity is based on the Working Party Report and Commerce's determination that NME conditions prevailed in Vietnam.[14] Subparagraphs 255(a) and 255(d) of the Working Party Report provide importing Members discretion under their domestic laws to determine whether and to what extent market economy conditions prevail in Vietnam. Commerce's finding that Vietnam is an NME is based, in part, on facts and evidence submitted or gathered during a 2002 inquiry of Vietnam's market economy status.[15] Following this inquiry, Commerce determined that Vietnam had not successfully made the transition to a market economy and is an NME because, in part, "the level of government intervention in the economy is still such that prices and costs are not a meaningful measure of value."[16] Thus based on the Working Party Report and Commerce's 2002 determination that NME conditions prevail in Vietnam, there exists a strong evidentiary basis that makes it reasonable for Commerce to presume (pending any contrary evidence) that Vietnam is legally or operationally in a position to exercise restraint or direction over entities located in Vietnam.

13. This presumption is not the same as, and is fundamentally different from, a determination. The presumption is an approach that Commerce uses during an NME proceeding as it progresses to a determination. Commerce will take on any evidence timely submitted by an interested party, and the approach does not rule out the consideration of contrary evidence, nor does it dictate the outcome of a proceeding. However, the use of a presumption means that Commerce takes its previous determination that Vietnam is a non-market economy as a given and does not approach this issue in each investigation as if no previous findings had been made and Vietnam's economy would be evaluated *de novo*.

14. Thus even though Commerce understood following the Working Party Report and its 2002 determination that Vietnam is an NME, in the proceedings at issue in this dispute it provided all foreign companies involved in the production and exportation of shrimp from Vietnam the opportunity to demonstrate that their export activities were sufficiently free from governmental control or material influence over the pricing and output of shrimp from Vietnam. Therefore, the approach that is described as a presumption never results in a determination that is lacking in evidentiary support, but rather describes how Commerce went about evaluating the factual record when a company that may be part of the Vietnam-government entity does not

[14] As an initial matter, we note that the above quote from *EC – Fasteners (AB)* concerns China's challenge to the EC's finding that China is an NME. Vietnam did not similarly challenge in this dispute Commerce's finding that Vietnam is an NME.

[15] 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).

[16] *Ibid*, p. 2 (Exhibit US-25).

provide evidence that it is sufficiently free from government influence with respect to its export activities.

b. What is the relationship between the USDOC's "determination" "that a Vietnam-government entity existed …" (see, e.g., United States' first written submission, para. 179) and the "presumption", applied in the administrative reviews at issue, that "all companies within a NME country are subject to government control" (see Exhibits VN-13, p. 47773; VN-18, p. 56160; and VN-19, p. 13550)?

15. Commerce's determination that a Vietnam-government entity existed speaks to the findings in the reviews that certain exporters, while legally separate, were in fact part of the Vietnam-government entity. Commerce's presumption that all companies are part of the Vietnam-government entity until a company provides evidence that it is sufficiently free from government control or material influence with respect to its export activities is based on the Working Party Report and Commerce's 2002 determination that NME conditions prevail in Vietnam.

c. In its first written submission, para. 23, the United States explains that the Viet Nam-wide entity encompasses all companies over which the Government is "deemed to exert control…" (emphasis added). What is the difference between, on the one hand, "deeming", and on the other hand, "determining", that certain companies are part of a government-controlled entity?

16. In the context of the second sentence of paragraph 23 of the U.S. First Written Submission, the word "deemed" should be read as a synonym for "presumed." Thus the sentence should be read as follows: "This entity encompasses all companies producing/exporting the subject merchandise over which the government is *presumed* to exert control with respect to business decisions regarding, *inter alia*, pricing, costs, and exports." The word "deemed" is not meant to convey in the context of this sentence a determination that certain companies are part of an NME-government entity.

Question 10 (to the United States): **In paragraph 182 of its first written submission, the United States submits that "Commerce may decide to treat the companies as a single entity for the purpose of setting export prices" (the footnote refers to 19 C.F.R 351.401 (f) (Exhibit US-26)). In addition, Section V of Chapter 10 of the Anti-Dumping Manual deals with the USDOC's "practice with respect to affiliation and the treatment of companies as a single entity in NME cases" (Exhibit VN-24, p. 8) and notes, inter alia, that "[t]he question of whether affiliated parties constitute a single entity can arise among various combinations of producers, exporters, and suppliers of inputs …" (p. 9).**

a. How does the "single entity determination" under 19 C.F.R 351.401 (f) and Section V of Chapter 10 of the Anti-Dumping Manual relate to, and distinguish itself from, the "separate rate test" in Section III?

17. The "single entity determination" described in 19 C.F.R. § 351.401(f) examines the evidence of record to determine whether it is appropriate to treat two or more companies as a single entity and assign a single margin and duty to that single entity. Meanwhile, Section V of Chapter 10 of the AD Manual describes the "separate rate test" by which a company in a non-market economy may demonstrate that it should receive a rate separate from the NME entity. They differ in focus in that Commerce's single entity determination examines possible relationships among private persons or enterprises while the separate rate test examines possible relationships between private persons or enterprises and the state (including public officials and persons who perform public functions). They also differ in that 19 C.F.R. § 351.401(f) is a regulation while the AD Manual is a non-binding guidance document.

18. For example, in the context of the Appellate Body's statements in *EC – Fasteners*, the "single entity determination" would involve the situation where the authority concerned treats two or more companies as a single private entity based on "the existence of corporate and structural links between the exporters, such as common control, shareholding and management."[17] In the context of Chapter 10 of the AD Manual, it would also involve the situation where one private entity is deemed to be related to another because "one of them directly or indirectly controls the other."[18] And in the context of 19 C.F.R. § 351.401(f), it would involve the situation where two or more affiliated private producers "have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary [of Commerce] concludes that there is a significant potential for the manipulation of price or production."[19]

19. In contrast, the "separate rate test" may involve the situation where the authority concerned would treat two or more companies as a single entity based on "the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management."[20] It also may include the situation where one entity is considered related to another because of "control or material influence by the State in respect of pricing and output." [21]

b. Has the United States made "single entity determinations" pursuant to 19 C.F.R 351.401 (f) and/or Section V of Chapter 10 of the Anti-Dumping Manual under the Shrimp order? If so, please give details.

[17] *EC – Fasteners (AB)*, para. 376.

[18] Article 4.1(i) of the AD Agreement, n.11; *see* 19 U.S.C. § 1677(33)(F) (Persons are considered "affiliated" where "[t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person").

[19] 19 C.F.R. § 351.401(f)(1).

[20] *EC – Fasteners (AB)*, para. 376.

[21] *Ibid*.

20. Commerce made a "single entity determination" under 19 C.F.R. § 351.401(f) in both the fifth and sixth administrative reviews.

21. In the fifth review, Nha Trang Seafoods treated itself and certain affiliates as a single entity based "on the fact that Nha Trang Seafoods is a significant shareholder of each of its affiliates and each of these companies produced subject merchandise and exported it to the United States through Nha Trang Seafoods."[22] After Commerce examined the information provided by Nha Trang Seafoods under the criteria set forth in 19 C.F.R. § 351.401(f), Commerce agreed with Nha Trang Seafoods that it and its affiliated companies should be treated as a single entity.

22. In the sixth review, the Minh Phu Group requested that Commerce treat its affiliated producer Hau Giang as part of Minh Phu based "primarily on the fact that the Minh Phu Group is a significant shareholder in Hau Giang and Hau Giang is controlled by the Minh Phu Group through shared management."[23] After Commerce examined the information provided by the Minh Phu Group under the criteria set forth in 19 C.F.R. § 351.401(f), Commerce agreed to treat Hau Giang and the Minh Phu Group as a single entity.[24]

Question 11 (to both parties): To what extent are the criteria used by the USDOC to determine the absence of government control, both *de jure* and *de facto*, with respect to export activities (see Exhibit VN-24, Chapter 10 of USDOC Anti-Dumping Manual, p. 4) similar or different from the criteria contained in Article 9(5) of the Basic AD Regulation under consideration in *EC – Fasteners (China)*?

23. Commerce's "separate rate test" differs significantly from Article 9(5) of the EU's Basic AD Regulation (as examined in *EC – Fasteners (AB)*) with respect to the context in which the "separate rate test" is applied as well as the criteria considered.

Differences in Context in which Test is Applied

24. First, unlike the EU's application of Article 9(5), Commerce made a factual finding based on an extensive evidentiary review that Vietnam operated as an NME. Commerce's inquiry

[22] *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. 12,054, p. 12,056 (March 4, 2011) (Exhibit VN-15).

[23] *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam; Preliminary Results of Administrative Review*, 77 Fed. Reg. 13,547, p. 13,549 (March 7, 2012) (Exhibit VN-19).

[24] *Ibid*, confirmed in *Certain Frozen Warmwater From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 77 Fed. Reg. 55,800, p. 55,802 (Sept. 11, 2012) (Exhibit VN-20).

focused on whether Vietnam should be considered an NME based on evidence about the following factors:[25]

> i. the extent to which the currency of the foreign country is convertible into the currency of other countries;[26]
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> ii. the extent to which wage rates in the foreign country are determined by free bargaining between labor and management;[27]
>
> iii. the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;[28]
>
> iv. the extent of government ownership or control of the means of production, including the extent and pace of privatization of enterprises and land and land use rights;[29]
>
> v. the extent of government control over the allocation of resources and over the price and output decisions of enterprises, including the extent of price liberalization, the status of commercial banking reform, and the degree to which individuals and businesses can engage in entrepreneurial activities;[30] and
>
> vi. other appropriate factors, including trade liberalization, the rule of law, and corruption.[31]

25. After Commerce considered the evidence collected regarding these factors, including facts and arguments presented by the Government of Vietnam as well as "the expert evaluations of . . . the World Bank, the International Monetary Fund, the European Bank for Reconstruction and Development, the Asian Development Bank, the Asian-Pacific Economic Cooperation and

[25] 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).

[26] *Ibid*, pp. 8-11, as based on 19 U.S.C. § 1677(18)(B)(i) (Exhibit US-6).

[27] *Ibid*, pp. 11-16, as based on 19 U.S.C. § 1677(18)(B)(ii) (Exhibit US-6).

[28] *Ibid*, pp. 16-22, as based on 19 U.S.C. § 1677(18)(B)(iii) (Exhibit US-6).

[29] *Ibid*, pp. 22-29, as based on 19 U.S.C. § 1677(18)(B)(iv) (Exhibit US-6).

[30] *Ibid*, pp. 30-39, as based on 19 U.S.C. § 1677(18)(B)(v) (Exhibit US-6).

[31] *Ibid*, pp. 40-42, as based on 19 U.S.C. § 1677(18)(B)(vii) (Exhibit US-6).

the Economist Intelligence Unit,"[32] it determined to "treat Vietnam as a NME country for purposes of antidumping and countervailing duty proceedings, effective July 1, 2001."[33]

26. The Government of Vietnam, or a foreign producer or exporter located in Vietnam, may request that Commerce reconsider its designation of Vietnam as an NME (and many parties have done so successfully with respect to other designated NME countries[34]), but no party involved in the antidumping duty order on shrimp from Vietnam has made such a request,[35] nor put forward evidence to demonstrate that the Vietnamese shrimp industry operates as a "market-oriented industry."[36] Indeed, as already noted in the U.S. First Written Submission, Vietnam has not challenged in this matter Commerce's determination that NME conditions prevail in Vietnam or Commerce's designation of Vietnam as an NME country.

27. Therefore, in addition to the Working Party Report, Commerce's decision to apply the "separate rate test" was, unlike the EU's application of Article 9(5), based on an evidentiary determination that found, in part, "that market forces in Vietnam are not yet sufficiently developed to permit the use of prices and costs in that country for purposes of the Department's dumping analysis."[37]

Differences in Criteria Used in the EU Test and U.S. Approach

28. In addition, unlike the criteria that compose Article 9(5) (as examined in *EC – Fasteners (AB)*), the criteria that compose the "separate rate test" are effectively waived (and a separate rate assigned) when the exporter under investigation or review is owned wholly by entities located in market-economy countries or has been previously assigned a separate rate. And when they do apply, they focus, unlike the criteria of Article 9(5), strictly on exporter-specific activities.

[32] *Ibid*, pp. 7-8.

[33] *Ibid*, p. 44.

[34] For example, Commerce revoked Russia's NME status effective April 1, 2002; Romania's NME status effective January 1, 2003; and Ukraine's NME status effective February 1, 2006.

[35] In the original investigation, respondents argued that Commerce should eliminate its "NME practice," but they did not argue then or in any subsequent administrative reviews that Vietnam was not an NME country. *See 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. 29 (Exhibit VN-04).

[36] *See* Chapter 10, Non-Market Economies (NME), Department of Commerce 2009 Antidumping Manual, p. 31-31 (Exhibit VN-24) (Commerce will use a market-economy methodology in an NME proceeding whenever an industry demonstrates that three market conditions are present in the industry).

[37] *Ibid*, p. 43.

29. Article 9(5) as considered in *EC – Fasteners (AB)* specified that exporters must substantiate the following five claims before the EU would assign the exporter an individual duty:

> (a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;
>
> (b) export prices and quantities, and conditions and terms of sale are freely determined;
>
> (c) the majority of the shares belong to private persons; state officials appearing on the board of directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;
>
> (d) exchange rate conversions are carried out at the market rate; and
>
> (e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.[38]

According to the panel in *EC – Fasteners*, an exporter will be unable to get an individual duty unless it satisfies all of the above criteria.[39]

30. In contrast, under Commerce's "separate rate test," an exporter located in an NME country that is owned wholly by entities located in market-economy countries is assigned a separate rate. It need not demonstrate an absence of *de jure* and *de facto* governmental control over its export activities. It only need to certify that the information contained in the separate rate application "is accurate and complete to the best of my knowledge"[40] and complete a few fields that "pertain to the firm's eligibility for separate rate consideration based on having sold subject merchandise to the United States during the period of investigation/review and support the firm's claim that it is in fact wholly owned by a market-economy entity."[41]

31. An exporter located in an NME country that has previously been assigned a separate rate also need not again demonstrate an absence of *de jure* and *de facto* governmental control over its export activities. It only needs to certify that its status has not changed.[42]

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[38] Article 9(5), Council Regulation (EC) No 1225/2009, L 343/63 (Exhibit US-72).

[39] *EC – Fasteners (Panel)*, para. 7.106.

[40] Separate Rate Application, pp. 7-8 (Exhibit VN-28).

[41] *Ibid*, p. 3 (Exhibit VN-28).

[42] Separate Rate Certification (Exhibit US-73).

32. Finally, an exporter located in an NME country that is not owned wholly by entities located in market-economy countries, or has not previously been assigned a separate rate, need only fill out a form confirming that its export activities are sufficiently free from the governmental control or material influence over pricing and output that Commerce found to exist when it determined that Vietnam should be treated as an NME. As the table below demonstrates, the evidence that Commerce asks this entity to provide regarding its export activities is fully consistent with those factors that the Appellate Body in *EC – Fasteners* suggests should be probed to ascertain situations "which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity"[43]:

EC – Fasteners (AB), para. 376	Separate Rate Application (VN-28), p. 2 Commerce Analysis of State Control
"[C]ontrol or material influence by the State in respect of pricing and output"	"whether each exporter sets its own export prices independent of the government and without the approval of a government authority" "whether each exporter retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses" "whether each exporter has the authority to negotiate and sign contracts and other agreements"
"[T]he existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management"	"whether each exporter has autonomy from government regarding the selection of management" "an absence of restrictive stipulations associated with an individual exporter's business and export licenses" "any legislative enactments decentralizing control of companies" "any other formal measures by the central and/or local government decentralizing control of companies"

[43] *EC – Fasteners (AB)*, para. 376.

33. All the criteria considered under Commerce's "separate rate test" then focuses on whether an entity's export activities are sufficiently free from the governmental control or material influence over pricing and output that Commerce found to exist when it determined that Vietnam should be treated as an NME, which is very different from the EU's Article 9(5) criteria as examined in *EC – Fasteners (AB)*.

34. For example, the Article 9(5) criteria apply just to entities majority owned by private persons (*i.e.*, Article 9(5)(c) indicates that "the majority of the [entity's] shares [must] belong to private persons" while Article 9(5)(a) applies to "wholly or partly foreign owned firms or joint ventures"). In contrast, any entity can qualify for separate-rate treatment under Commerce's "separate rate test," including entities whose corporate structure indicates ownership by the government (*i.e.*, they are "owned by all of the people" or "collective").[44] As long as the entity can demonstrate that its export activities are sufficiently free from the governmental control or material influence, it can qualify for a separate rate. And as previously mentioned, by definition, companies wholly owned by market economy firms qualify for a separate rate under Commerce's test.

35. The Article 9(5)(a) criterion further differs from the criteria set forth in Commerce's "separate rate test" in that it requires that the exporter demonstrate that all of its capital and profits can be repatriated. In contrast, Commerce's consideration of whether an exporter retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses is restricted to "export sales."[45]

36. Also, assuming the majority of an entity's shares belong to private persons, the Article 9(5)(c) criterion further requires that state officials listed on the board of directors or in key management positions hold a minority status unless the entity can demonstrate that it "is nonetheless sufficiently independent from State interference." In contrast, Commerce's criterion in this regard only considers whether the exporter has autonomy from government regarding the selection of management, nothing more.[46]

37. Finally, there is nothing in Commerce's "separate rate test" that is anything like the criteria found in Articles 9(5)(d) and 9(5)(e). Thus an exporter does not need to demonstrate under Commerce's test as it does under Article 9(5)(d) that "exchange rate conversions are carried out at the market rate," nor does it need to demonstrate as it does under Article 9(5)(e)

[44] Separate Rate Application, p. 14, question 2d (Exhibit VN-28).

[45] Separate Rate Application, p. 19, question 14 (Exhibit VN-28).

[46] Commerce does ask the entity to describe the government involvement of any board member or manager who has worked for the government in the past three years (Separate Rate Application, p. 19, question 12 (Exhibit VN-28)), but unlike Article 9(5)(c) it does not automatically disqualify an entity's request for a separate rate because of this possible government involvement.

that "State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty."

38. This leaves Article 9(5)(b) as the sole criterion under Article 9(5) that is similar in most respects to the criteria found under Commerce's "separate rate test." Article 9(5)(b) requires an entity to demonstrate that "export prices and quantities, and conditions and terms of sale are freely determined." As shown in the above table, an entity must make a similar demonstration under Commerce's test to qualify for separate-rate treatment. That said, as discussed earlier, the context in which an entity provides this evidence under the "separate rate test," where Commerce had made an evidentiary finding that there exists governmental control or material influence over pricing and output in Vietnam, differs significantly from the context in which an entity had to provide this evidence under Article 9(5), where the EU had presumed such control.

Question 12 (to the United States): In the Preliminary Results of the Fifth and Sixth Administrative Review, the USDOC notes that "… no party has submitted evidence of the proceeding to demonstrate that such government influence is no longer present or that our treatment of the NME entity is otherwise incorrect" (Exhibits VN-15, p. 12059 and VN-19, p. 13552). Can the United States explain whether and how a "party" could influence the treatment of the NME-entity as a whole in those reviews? In particular, who could be that "party" and what kind of evidence should it submit in order to "demonstrate that the treatment of the NME entity is otherwise incorrect"?

39. Producers and exporters located in Vietnam, assisted by the Government of Vietnam, could influence the treatment of the NME-government entity as a whole in the fifth and sixth administrative reviews by requesting Commerce to reconsider its designation of Vietnam as an NME and by submitting relevant information pertinent to the six factors previously considered by Commerce in its 2002 NME determination. The Government of Vietnam and producers and exporters located in Vietnam did participate in the initial inquiry that led to the 2002 NME determination. Thus, they were aware that they could have submitted evidence during the fifth and sixth reviews in an effort to demonstrate that Vietnam had made the transition to a market economy and that Vietnamese producers and exporters should be subject to the antidumping rules applicable to a market economy.

40. Parties located in other NME-designated countries have successfully demonstrated that such transitions have taken place. To assist the Panel in its efforts to understand what kind of evidence could be submitted to demonstrate that a NME country has transitioned to a market economy country, the United States has attached as Exhibit US-63 the 2002 Commerce inquiry into the continuing status of the Russian Federation as an NME. Based on the evidence submitted by two Russian producers during this inquiry, Commerce decided that the Russian Federation had made the transition to a market economy and that Russian producers and exporters would be subject to the antidumping rules applicable to market economies for transactions occurring after April 1, 2002.

Question 14 (to the United States): In paragraph 162 of its first written submission, the United States writes that "it is notable that Viet Nam does not challenge before the Panel Commerce's decision to calculate the normal value for the shrimp destined for consumption in Viet Nam based on a NME methodology, nor does Viet Nam challenge the NME methodology that Commerce selected for its calculation of this normal value".

> **a. Is the United States arguing that Viet Nam should have challenged the USDOC's decision to calculate the normal value based on a NME methodology as a prerequisite for challenging the application of the Viet Nam-wide rate? If so, please explain why the fact that Viet Nam did not challenge the USDOC's decision with respect to calculation of normal value justifies the application of the Viet Nam-wide rate. More generally, please explain the relationship between the two issues (NME status for purposes of calculating normal value, and NME status, leading to the application of the presumption), and between the criteria applied by the USDOC in respect to both.**

41. Vietnam's failure to challenge Commerce's determination is relevant for two reasons. First, this is one of several elements that distinguish this matter from *EC – Fasteners (AB)*, where China challenged the EC's NME determination.[47] Second, the fact that Commerce's NME-determination is unchallenged in this dispute is relevant for consideration of the Vietnam-government entity issue. As the United States has explained, the factual finding that Vietnam's economy is subject to such a high level of government control that it qualifies as an NME also supports the presumption that each exporter is likewise government-controlled.

42. Or put another way, it is undisputed that Commerce appropriately found that Vietnam is an NME. This overall determination entails findings that Vietnam is in a position to exercise restraint or direction over entities located in Vietnam and can materially influence those entities decisions about the price or costs of products destined for consumption in Vietnam.[48] Vietnam does not challenge this finding, nor does it challenge how this finding impacts Commerce's calculation of each entity's normal value. These findings likewise provide support for a finding of the existence of a Vietnam-government entity for the purpose of calculating margins of dumping on exports. That is, it was logical and consistent with its NME findings for Commerce to have also considered that Vietnam exercised restraint or direction over the same entities with respect to the price or costs of the same or similar products destined for export to the United States. Accordingly, Commerce had a sufficient factual basis to conclude, absent evidence to the contrary, that an entity that had not claimed or established that it was free from this control with respect to its export activities is part of a single government entity.

[47] *See EC – Fasteners (AB)*, para. 366.

[48] 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).

b. Could the United States point to the exact textual basis in Viet Nam's Protocol of Accession which, in addition to the language pertaining to the calculation of the normal value in para. 255(a) of the Working Party Report, would allow WTO Members to treat Viet Nam differently in anti-dumping proceedings, in particular with respect to the determination of export prices or country-wide margins and duties?

43. The burden is on Vietnam to prove that U.S. measures exist that are inconsistent with U.S. obligations under the relevant covered agreement. Also, a WTO adjudicative body is not permitted to presume that a Member will choose to breach a covered agreement. Thus, as an initial matter, the United States does not agree with the premise of Question 14.b that importing WTO Members must point to the "exact textual basis" in Vietnam's Protocol of Accession that allows an alleged "NME-wide entity rate practice," especially where there is no such "practice" measure.

44. That said, the introductory phrase to paragraph 255(a) of the Working Party Report – "[i]n determining the price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement" – and the associated language that permits importing Members to use a methodology for price comparability "not based on a strict comparison with domestic prices or costs in Viet Nam" together provide a textual basis for Members to treat Vietnam differently in antidumping proceedings with respect to the determination of a NME-government entity margin.

45. Vietnam confirmed upon accession to the WTO that certain NME provisions of the Working Party Report (*i.e.*, subparagraph 255(a)) would apply in antidumping proceedings involving exports from Vietnam to a WTO Member. These NME provisions permit a WTO Member to develop a "methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam." To the extent this methodology involves the calculation of a foreign entity's normal values, the WTO Member must ensure that an appropriate comparison is made between those normal values and the foreign entity's export price. This comparison can only be achieved if the parameters in which a WTO Member calculated the foreign entity's normal value coincide with the parameters of the foreign entity's export prices.

46. Therefore, given the Working Party Report's and Commerce's determination that NME conditions prevail in Vietnam, Commerce may presume for purposes of price comparability that entities located in Vietnam are part of a single Vietnam-government entity until it is otherwise demonstrated.

Question 15 (to the United States): Chapter 10 of the Anti-Dumping Manual states (pp. 7-8) that the NME-wide rate "may be based on adverse facts available if, for example, some exporters that are part of the NME-wide entity do not respond to the anti-dumping questionnaire" (emphasis added).

a. Have there been instances in which the NME-wide rate was not calculated on the basis of adverse facts available?

47. There have been several instances in which the United States did not apply adverse facts available to an NME-government entity. For example, in the antidumping duty proceeding involving imports of hangers from the People's Republic of China, Commerce assigned the government entity a rate based on the average of (a) the weighted average of the rates for the mandatory respondents and (b) an average of the rates from the petition that fell within a range of the mandatory respondents' U.S. prices and normal values.[49] Similarly, in the antidumping duty proceeding involving imports of certain carbon and steel alloy rod from the Ukraine, Commerce assigned the government entity a rate equal to the rate of the cooperative mandatory company, which was found to be the only exporter of subject merchandise during the period of investigation.[50] Commerce has made similar findings in other NME proceedings.[51]

b. Can the United States explain to the Panel when an NME-wide rate would <u>not</u> be based on facts available and, in such situations, how it would be calculated? Could the United States also indicate to the Panel where such a situation is envisaged in the USDOC Anti-Dumping Manual?

48. The NME-government entity is like any other entity subject to an antidumping proceeding. Accordingly, if the NME-government entity responds in full to Commerce's antidumping questionnaire, Commerce will calculate the antidumping margin for the NME-government entity based on the evidence in its questionnaire response using the methodology discussed in Section VI of Commerce's AD Manual.[52] As noted in Chapter 15 of Commerce's AD Manual, if Commerce is able to verify the questionnaire response to the NME-government entity, it will rely on the factual information contained in the questionnaire response to make a final determination in an investigation or in a review.[53]

Question 16 (to the United States): In paragraph 187 of its first written submission, the United States submits that "Commerce's determinations were … not based on the

[49] *Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 Fed. Reg. 47,587, p. 47,581 (Aug. 14, 2008) (Exhibit US-64); *Steel Wire Garment Hangers from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value*, 73 Fed. Reg. 53,188 (Sept. 15, 2008) (Exhibit US-65).

[50] *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Ukraine*, 67 Fed. Reg. 55785, p. 55787 (Aug. 30, 2002) (Exhibit US-66).

[51] *Notice of Final Determination of Sales at Less Than Fair Value: Urea Ammonium Nitrate Solutions from Belarus*, 68 Fed. Reg. 9,055, p. 9,056 (Feb. 27, 2003) (Exhibit US-67); *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from the Russian Federation*, 67 Fed. Reg. 35,490, p. 35,491 (May 20, 2002) (Exhibit US-68); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Romania*, 65 Fed. Reg. 39,125, pp. 39,126-67 (June 23, 2000) (Exhibit US-69).

[52] *See* Chapter 10, Non-Market Economies (NME), Department of Commerce 2009 Antidumping Manual, pp. 11-31 (Exhibit VN-24).

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

application of any facts available during these reviews, they were solely an application of the only rate the Vietnam-government entity ever received".

a. How would the United States characterize this rate under the Anti-Dumping Agreement? Is it: (i) an individual rate, (ii) an "all others" rate, (iii) a facts available rate, or (iv) some other rate?

49. The United States considers the rate assigned to the Vietnam-government entity during the covered reviews as the rate in effect at the time for the entity, which was first determined in the original investigation based on an individual examination and application of facts available drawing an adverse inference. In the context of the covered reviews, the rate in effect and applied to the Vietnam-government entity is not newly, individually determined. Rather, what Commerce determined in the covered reviews was that some companies were part of the Vietnam-government entity, and that the only rate ever determined for the entity (*i.e.*, the rate in effect) should continue to apply.

50. Further, the rate applied to the Vietnam-government entity in the covered reviews is not an "all others rate" governed by the terms of Article 9.4. As stated in the U.S. First Written Submission, Article 9.4 does not obligate Members to replace an existing WTO-consistent rate that was individually determined for the entity, which had failed to cooperate in the proceeding, with a different rate that is based on an average rate of independent exporters or producers that fully cooperated.[54]

51. Finally, the rate applied to the Vietnam-government entity in each of the covered reviews is not a "facts available rate" as defined under Article 6.8 because it is not based on the interested party's refusal to give access to, or otherwise provide, necessary information about the review period in question, nor is it based on the interested party's affirmative or negative acts to significantly impede the collection of information about the review period in question.

52. Instead, the rate applied to the Vietnam-government entity is a rate previously determined, the only rate ever determined for the entity, and a rate that the entity did not seek to change through a request for review as part of the yearly administrative review process. The United States does not believe that the AD Agreement requires that a particular label be assigned to this rate; it is sufficient that the rate applied is not inconsistent with the obligations contained in the AD Agreement.

b. Under what provisions of the Anti-Dumping Agreement does this rate fall?

53. In the context of the covered reviews, Commerce had an existing rate in effect for the Vietnam- government entity that had been determined prior to these reviews.

[54] U.S. First Written Submission, para. 193.

54. In the investigation, this rate was determined based on an individual examination of the entity as an "individual" exporter-specific rate within the meaning of Article 6.10 of the AD Agreement and application of facts available with adverse inference under Article 6.8 of the AD Agreement. Neither the Vietnam-government entity nor any of its constituent parts have requested that the existing entity rate be revised in the covered reviews (or any other review) and thus the rate remained in effect. In this regard it is worth noting that generally in a prospective system, whether or not a refund request is made under Article 9.3.2, the existing rate remains in place.

55. In the covered reviews, Commerce did not revise the Vietnam-government entity rate. Instead, certain named companies were determined to be ineligible for a rate separate from the Vietnam-government entity so the rate in effect for the Vietnam-government entity was applied without revision.

Question 17 (to the United States): In paragraph 192 of its first written submission, the United States describes certain facts which occurred during the original investigation. Could the United States clarify:

> **a. When did the selection of mandatory respondents take place? Was the Government of Viet Nam, or the Viet Nam-wide entity, selected as a mandatory respondent?**

56. In the original antidumping duty investigation of shrimp from Vietnam, Commerce selected the four largest producers/exporters as mandatory respondents on February 23, 2004, or less than one month after Commerce issued its notice of initiation for this investigation.[55] Later, Commerce determined that one of the selected mandatory respondents – Kim Anh Company Ltd. – was part of the Vietnam-government entity.[56] Because a part of the NME-government entity was selected for individual examination, the NME-government entity as a whole was under individual examination.[57]

[55] *Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam*, 69 Fed. Reg. 3,876 (Jan. 27, 2004) (Exhibit VN-03).

[56] Kim Anh initially claimed eligibility to a separate rate status, which Commerce preliminarily accepted. Kim Anh subsequently refused to allow Commerce to verify information that formed the basis of Kim Anh's separate rate claim, and thus its claim was ultimately rejected.

[57] *See, e.g., Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China*, 74 Fed. Reg. 29,167, pp. 29,169-70 (June 19, 2009) (Exhibit US-61) (entity receiving adverse facts available rate based on the failure of a mandatory respondent to cooperate); *Honey from the People's Republic of China*, 75 Fed. Reg. 24,880, pp. 24,881-82 (May 6, 2010) (Exhibit US-62).

b. When did the USDOC send a letter to the Government of Viet Nam? What precisely was asked of the Government of Viet Nam in that letter? What questionnaires were attached to that letter?

57. Less than two weeks after it selected mandatory respondents for the antidumping investigation on shrimp from Vietnam, on March 11, 2004, Commerce sent a letter to the Government of Vietnam.[58] A copy of the letter is attached as part of Exhibit US-71. Commerce attached its standard antidumping questionnaire to this letter (*i.e.*, the same questionnaire that it sent to all mandatory respondents).

58. In relevant part, the letter stated that "[a]ll parties are requested to respond"[59] to the questionnaire and that "questionnaire responses must be received by the Central Records Unit before 5 p.m. on the day of the applicable deadline." The letter also stated: "[i]f you have any questions about these or any other matters, please contact the officials in charge." Finally, the letter expressly instructed the Government of Vietnam that:

> [i]f *you* are unable to respond to any sections of the antidumping questionnaire within the specified time limits, *you* must formally request an extension of time in writing before the due date. *It is the responsibility of the Vietnamese Government* to distribute this deadline to all known producers/exporters of the subject merchandise. We will attempt to accommodate any difficulties that *you* encounter in answering this questionnaire. However, that accommodation cannot conflict with our obligation to conduct the investigation within the deadlines and informational requirements established by United States law.[60]

Therefore, "because the letter addressed to the Government of Vietnam provided instructions on how to respond to the letter after stating that this letter was following the NME analysis, the Department [of Commerce] determine[d] that the Government of Vietnam was asked to respond [to the questionnaire]."[61]

c. When were companies selected for individual examination given the opportunity to demonstrate that they were not subject to government control, and should thus receive an individual rate?

[58] Under U.S. law, by statute, the government of the exporting country is an "interested party" in antidumping proceedings before Commerce. *See* 19 U.S.C. § 1677(9)(B) (Exhibit US-70).

[59] Exhibit US-71.

[60] Exhibit US-71 (emphasis added).

[61] *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).

59. In the notice initiating the antidumping duty investigation of shrimp from Vietnam, Commerce stated that "all parties will have the opportunity to provide relevant information related to the issues of a country's NME status and the granting of separate rates to individual exporters."[62] Subsequently, Commerce sent questionnaires to the companies selected for individual examination. Section A of this questionnaire requested that these companies provide information about their organization, accounting practices, markets and merchandise, including information about government control and the ability to qualify for a separate rate.

d. The United States seems to differentiate three categories of entities: (i) mandatory respondents, (ii) the Viet Nam-wide entity, and (iii) the separate rate companies.

i. What kind of information did the USDOC request, and at what time did it request it, from these different entities? Similar or different information?

60. As an initial matter, of the three categories identified by the Panel, the Vietnam-government entity and non-Vietnam government entities (*i.e.*, separate rate companies) are mutually exclusive. A mandatory respondent, however, may be either the Vietnam-government entity (if, for example, a company that is part of the Vietnam government entity was selected for individual examination) or a company that is separate from that entity. Further, the selection of mandatory respondents usually takes place at a relatively early stage of an investigation when it may be unknown to the investigating authority whether a particular company selected for individual examination is under government control and thus part of the Vietnam-government entity. For example, if the investigating authority selects three mandatory respondents and two out of the three mandatory respondents demonstrate that they are not controlled by the government, these two mandatory respondents will be treated as separate rate companies. The third respondent, however, will be treated as part of the Vietnam-government entity. Under these circumstances, the Vietnam-government entity will be considered as having been individually examined as a single exporter and will receive its own rate.[63]

61. At the start of the investigation of shrimp from Vietnam, Commerce did not know which companies may be part of the Vietnam-government entity or not, or which entities might be selected as mandatory respondents. Accordingly, on January 29, 2004, soon after it started its investigation, it asked all known foreign producers and exporters to report their quantity and

[62] *See Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam*, 69 Fed. Reg. 3,876, p. 3,878 (Exhibit VN-03).

[63] *See e.g., Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China*, 74 Fed. Reg. 29167, pp. 29169-70 (June 19, 2009) (Exhibit US-61); *Honey from the People's Republic of China*, 75 Fed. Reg. 24880, pp. 24881-82 (May 6, 2010) (Exhibit US-62).

value of sales of subject merchandise to the United States during the period of investigation.[64] On the same date, it sent a letter to the Embassy of Vietnam "seeking their support in the transmittal of the quantity and value questionnaire."[65]

62. On February 23, 2004, Commerce selected mandatory respondents for the investigation of shrimp from Vietnam.[66] Two days later, on February 25, 2004, Commerce issued Section A of its questionnaire to all respondents, including the mandatory respondents, in which it requested that foreign producers and exporters provide information about their organization, accounting practices, markets and merchandise, including information about government control and the ability to qualify for a separate rate.[67]

63. On March 1, 2004, Commerce issued the remaining applicable portions of the antidumping duty questionnaire just to the selected mandatory respondents (including Kim Anh Company Ltd., which is part of the Vietnam-government entity) in which it asked these companies to provide information about sales to the United States (Section C), factors of production (Section D) and, if applicable, cost of further manufacture or assembly performed in the United States (Section E).[68] As explained in response to question 17.b above, Commerce issued the same standard antidumping duty questionnaire (Sections A and C-E plus appendices) to the Government of Vietnam on March 11, 2004. In contrast, Commerce did not issue Sections C-E of the antidumping duty questionnaire to the separate rate companies, which it did not individually examine.

ii. With respect to the Viet Nam-wide entity, was information requested from the "entity" itself or from the constituent parts of the entity? Please explain how the Viet Nam-wide entity was investigated during the original investigation and how its rate was calculated.

64. It is impossible for an investigating authority to know at the start of an 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. Thus even though Commerce understood following its 2002 determination that Vietnam is an NME, at the start of

[64] *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. 42,672, p 42,673 (July 16, 2004) (Exhibit US-07).

[65] *Ibid.*

[66] *Ibid.*

[67] *Ibid*, pp. 42,673 (*see* discussion about "Mandatory Respondents") and 42,674-75 (*see* discussion about "Section A Respondents")

[68] Section B of the antidumping duty questionnaire is not applicable in cases involving non-market economy countries.

its antidumping 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 that their export activities were sufficiently free from governmental control or material influence over the pricing and output of shrimp from Vietnam. Therefore, 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.[69] Commerce during the investigation of shrimp from Vietnam thus investigated and requested the same type of information from the Vietnam-government entity, including constituent parts of that entity, as requested from mandatory respondents.

65. 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, the Government of Vietnam had received a request to respond to Commerce's antidumping questionnaire but "did not provide a response."[70] 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.[71] Finally, 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.[72] Thus Commerce correctly 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, leaving Commerce no choice but to rely on facts available drawing an adverse inference in order to determine a margin for the Vietnam-government entity.

66. Following its investigation, Commerce based the margin it assigned the Vietnam-government entity on the lowest calculated rate from the petition, which the agency corroborated

[69] *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. 42,672, pp. 42,673-75 (July 16, 2004) (Exhibit US-07).

[70] *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).

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

[72] *Ibid*, p. 35.

using period of investigation data from an independent source.[73] The export prices used for this petition rate were based on the average unit values "of headless, shell-on, frozen warmwater shrimp for the POI from official U.S. import statistics . . . net of international freight, insurance and import charges . . . ."[74] The normal values used were based on Commerce's normal NME methodology, *i.e.*, factors of production valued according to public surrogate country data.[75] Based on a comparison of these calculated export values to the calculated normal values, the estimated petition dumping margins for shrimp from Vietnam ranged from 25.76 percent to 93.13 percent.[76] Commerce assigned the Vietnam-government entity the lowest petition rate of 25.76 percent because it corroborated this rate as reasonable based on information from an independent source on the record of the investigation.[77]

Question 18 (to the United States): According to the United States, the "Viet Nam-government entity" was not assigned a country-wide rate, but was individually examined and received its own rate (United States' first written submission, para. 190). Please explain how this producer/exporter was considered and/or treated in the respondent selection process which the USDOC conducted pursuant to Article 6.10.

67. Please see the response of the United States to Questions 17.a and 17.d.

Question 19 (to the United States): Concerning the fourth, fifth, and sixth administrative reviews:

> **a. When did the selection of mandatory respondents take place? Was the Government of Viet Nam, or the Viet Nam-wide entity, selected as a mandatory respondent?**

68. The selection of mandatory respondents took place at the beginning of each review. Respondent selection was based on a consideration of the companies for which a review was requested, either by the party itself or by the domestic industry. In each of the challenged reviews, Commerce selected the largest exporters for which a review was requested as mandatory respondents. Please see the United States response to Question 19.d below for

[73] *Ibid*, pp. 21-22 and 36-37.

[74] *Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam*, 69 Fed. Reg. 3,876, p. 3881 (Jan. 27, 2004) (Exhibit VN-03).

[75] *Ibid*, pp. 3,881-82.

[76] *Ibid*, p. 3,882. The United States notes that this calculation did not make use of the so-called "zeroing" methodology.

[77] *Ibid*, p. 37.

specific information on when the selection of mandatory respondents took place during the covered reviews.

69. The Vietnam-government entity was not selected as a mandatory respondent during any of the covered reviews. Notably, 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 reviews. Since Commerce did not select the Vietnam-government entity as a mandatory respondent, it based the final assessment for entries by the Vietnam-government entity during the review period on the "rate in effect."

b. Did the USDOC request any information from the Government of Viet Nam or send letter(s) to the Government of Viet Nam? If so, what was the information requested?

70. Since the Vietnam-government entity was not selected as a mandatory respondent, and selection of respondents was based on data obtained separately by Commerce, Commerce did not request information from, or send letters to, the Vietnam government entity (or the Government of Vietnam) during the covered reviews.

c. In paragraphs 30, 35 and 39 of its first written submission, the United States states that the USDOC provided all companies the opportunity to complete a separate rate application or certification. When and how were Vietnamese producers/exporters given this opportunity?

71. In its notice of initiation for each covered review involving exports of shrimp from Vietnam, Commerce notified all firms that requested a review, or for which a review had been requested, of the opportunity to "complete, as appropriate, either a separate rate application or certification . . . ."[78] Commerce informed these firms in the notice of initiation that both the Separate Rate Certification form and the Separate Rate Application were available on its web site and provided the specific web site link for both documents. Finally, Commerce informed these firms in the notice of initiation that either a completed application or a completed certification was due no later than 30 calendar days after publication of the notice in the Federal Register.

d. When and how were Vietnamese producers/exporters selected for individual examination given the opportunity to demonstrate that they were not subject to government control, and should thus receive an individual rate?

[78] *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. 13,178, p. 13,179 (March 26, 2009) (Exhibit VN-06); *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*, 75 Fed. Reg. 18,154, pp. 18,154-55179 (April 9, 2010) (Exhibit VN-10); *Initiation of Antidumping Duty Administrative Reviews, Requests for Revocation in Part, and Deferral of Administrative Reviews*, 76 Fed. Reg. 17,825, p. 17,826 (March 31, 2011) (Exhibit VN-16).

72. The companies selected for individual examination had the opportunity to demonstrate eligibility for a separate rate when responding to Section A of the standard questionnaire (which contained a section that requested information regarding government control and their separate rate eligibility). Commerce sent the standard questionnaire to the companies selected as mandatory respondents shortly after that selection had taken place.

73. For example, for the fourth administrative review, Commerce selected respondents for individual examination on June 11, 2009.[79] Commerce issued its questionnaire to the selected respondents on June 16, 2009. "From July 10, 2009, through February 26, 2010, the Department received responses from mandatory respondents from the non-market economy questionnaire and subsequent supplemental questionnaires."[80]

74. For the fifth administrative review, Commerce selected respondents for individual examination on July 30, 2010.[81] Commerce issued its questionnaire to the selected respondents on August 3, 2010. The selected respondents then submitted responses to Section A of this questionnaire (*i.e.*, the section of the questionnaire that asks for information about each respondent's organization, accounting practices, markets and merchandise, including information about government control and the ability of the respondent to qualify for a separate rate) on August 24, 2010. Commerce then issued supplemental questionnaires to the selected respondents "between September 2010 and January 2011 to which all companies responded."[82]

75. Finally, for the sixth administrative review, Commerce selected respondents for individual examination on June 17, 2011.[83] Commerce issued its questionnaire to the selected respondents on June 20, 2011. Responses were received in July and August 2011. "Commerce issued supplemental questionnaires in November, 2011 and responses were received in December, 2011."[84]

e. What kind of information did the USDOC request, and at what time did it request it, from the different entities described by the United States (mandatory

[79] *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. 12,206, p. 12,207 (March 15, 2010) (Exhibit VN-09).

[80] *Ibid.*

[81] *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. 12,054, pp. 12,055-56 (March 4, 2011) (Exhibit VN-15).

[82] *Ibid*, p. 12,056.

[83] *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam; Preliminary Results of Administrative Review*, 77 Fed. Reg. 13,547, p. 13,547 (March 7, 2012) (Exhibit VN-19).

[84] *Ibid*, p. 13,548.

respondents, Viet Nam-wide entity, separate rate companies)? Similar or different information?

76. Once Commerce conducts respondent selection and selects mandatory respondents at the beginning of an administrative review, it sends questionnaires to mandatory respondents. The responses to these questionnaires then form the basis on which Commerce calculates a margin for the mandatory respondent.

77. As explained in the response of the United States to Question 19.d above, Commerce sent its standard questionnaires to the mandatory respondents less than a week after it had selected them for a detailed examination. Commerce's questionnaire is divided into four sections: Section A – Organization, Accounting Practices, Markets and Merchandise; Section C – Sales to the United States; Section D – Factors of Production; and Section E – Costs of Further Manufacture or Assembly Performed in the United States.[85] Section A of the questionnaire asks about government control and the ability of the respondent to qualify for a separate rate. A copy of Commerce's generic NME questionnaire for an administrative review is attached as Exhibit US-76.

78. When Commerce limits respondent selection and selects mandatory respondents, it explains that it is unable to review all companies for which a review was requested. For that reason, Commerce does not send detailed questionnaires to companies not selected as mandatory respondents. However, a non-mandatory respondent may submit a separate rate application or certification to demonstrate that it is separate from the Vietnam-government entity. Commerce notified all firms in its notice of initiation for each covered review of the opportunity to "complete, as appropriate, either a separate rate application or certification . . . ."[86]

79. Finally, as explained above in the response of the United States to Question 19.b, the Vietnam-government entity was not selected as a mandatory respondent during the fourth, fifth or sixth administrative reviews. Commerce thus did not request information from, or send letters to, the Vietnam government entity (or the Government of Vietnam) during the covered reviews.

f. With respect to the Viet Nam-wide entity, was information requested from the "entity" itself or from the constituent parts of the entity during the three

[85] Section B of the antidumping duty questionnaire is not applicable in cases involving non-market economy countries.

[86] *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. 13,178, p. 13,179 (March 26, 2009) (Exhibit VN-06); *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*, 75 Fed. Reg. 18,154, pp. 18,154-55179 (April 9, 2010) (Exhibit VN-10); *Initiation of Antidumping Duty Administrative Reviews, Requests for Revocation in Part, and Deferral of Administrative Reviews*, 76 Fed. Reg. 17,825, p. 17,826 (March 31, 2011) (Exhibit VN-16).

administrative reviews? Please explain how the Viet Nam-wide entity was reviewed during the three administrative reviews and how the rate assigned to it was calculated.

80. As explained above, during the three covered reviews, Commerce did not request information from or send letters to the Vietnam-government entity. Because Commerce did not select the entity and there had been no request to determine a new rate, Commerce continued to apply the rate in effect for the entity.

g. Please react to paragraph 20 of Viet Nam's opening oral statement at the first substantive meeting, where Viet Nam asserts that the Viet Nam-wide entity was not selected for individual examination, and "questionnaires were never issued to the Viet-Nam wide entity such that an anti-dumping margin could be calculated".

81. The United States understands Vietnam's statement at paragraph 20 of its opening oral statement as relating to the issue of whether the Vietnam-government entity was selected for individual examination during the fourth, fifth or sixth administrative reviews.

82. The Vietnam-government entity was not selected by Commerce for individual examination during the covered reviews. The Vietnam-government entity did not request a change of final assessment of the amount of the antidumping duty during the challenged administrative reviews. Commerce otherwise did not select the Vietnam-government entity for individual examination during these reviews but instead based the final assessment of the entries of the Vietnam-government entity during the review period based on the rate in effect, the only rate ever determined for the entity.

Question 21 (to the United States): With respect to the NME-wide rate, Chapter 10 of the Anti-Dumping Manual (Exhibit VN-24, p. 8) indicates that:

Occasionally, the NME-wide rate may be changed through an administrative review. This happens when 1) the Department is reviewing the NME entity because the Department is reviewing an exporter that is part of the NME entity, and 2) one of the calculated margins for a respondent is higher than the current NME-wide rate. (footnote omitted)

With respect to the latter, does this mean that where the rate calculated for the respondent is lower than the rate for the NME-wide entity, the latter would not be changed? If so, why?

83. No, this is not the meaning of the above excerpt from the AD Manual. The above excerpt refers to a particular facts available situation and does not purport to address every conceivable scenario that may potentially arise during an investigation or an administrative review, including the possibility that a new rate could be determined for the NME-government entity if it is selected for individual examination and fully cooperates to the best of its ability.

84. Specifically, the language quoted above refers to a specific situation that arose in an administrative review on Crawfish from the People's Republic of China,[87] which is referenced in the footnote omitted from the quoted material. In that proceeding, Commerce reviewed the NME-government entity because it reviewed an exporter that was part of the NME entity. This exporter failed to cooperate with Commerce's investigation. Accordingly, Commerce used facts available to calculate the rate for the NME-government entity in a manner that ensured that a non-cooperating party did not obtain a more favorable result by failing to cooperate. Meanwhile, in the same review, another exporter fully cooperated with Commerce's investigation. The rate determined for that cooperating exporter was higher than the pre-existing rate of the NME-government entity and was one of the available facts considered by Commerce in that review.

Question 22 (to the United States): The United States argues (United States' first written submission, paras. 190-191) that "Commerce did not assign a 'country-wide' rate to the Vietnam-government entity" and that "the Vietnam-government entity received a rate based on facts available after being included in the examination in this anti-dumping duty proceeding and failing to cooperate". Is the United States arguing that, in the *Shrimp* proceeding, the USDOC did not apply an NME-wide rate pursuant to Section IV of Chapter 10? Or is the United States arguing that the NME-wide rate contemplated in Section IV of Chapter 10 of the Anti-Dumping Manual amounts to an individual rate, pursuant to Article 2 of the Anti-Dumping Agreement?

85. As Commerce's AD Manual itself notes, the manual "is for the internal training and guidance of Import Administration (IA) personnel only, and the practices set out herein are subject to change without notice."[88] The manual thus does not establish Commerce practice.[89] Commerce makes its determination based on the U.S. antidumping duty law and facts presented in each proceeding.

86. As has been discussed, Commerce in 2002 determined that Vietnam is an NME and thus considered at the start of the shrimp investigation that Vietnam controls or materially influences the economic behavior of firms. Soon thereafter, Commerce provided all foreign firms the opportunity during the shrimp investigation to demonstrate that their export activities were sufficiently free from governmental control or material influence over the pricing and output of shrimp from Vietnam. Commerce requested this information during the original investigation 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

[87] *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 Fed. Reg. 19,546, p. 19,549 (April 22, 2002) and accompanying Issues and Decision Memorandum.

[88] Chapter 1, Department of Commerce 2009 Antidumping Manual, p. 1 (emphasis added) (Exhibit US-27).

[89] *Ibid*.

respondents; and on March 11, 2004, when it issued its standard questionnaire to the Government of Vietnam.[90] Commerce thus 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 inference because the Government of Vietnam, Kim Anh and several other companies failed to provide Commerce necessary verifiable information.[91]

Question 23 (to both parties): Can an investigating authority apply facts available in case of failure to cooperate by the government of the exporting Member? If so, under what conditions?

87. Under Article 6.8 of the AD Agreement, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available by an investigating authority whenever "any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation." Article 6.11 of the AD Agreement defines "interested parties" as including, *inter alia*, "an exporter or foreign producer or the importer of a product subject to investigation" as well as "the government of the exporting Member." Therefore, if the government of an exporting Member is considered by the investigating authority to be an interested party in an investigation, either separately or in conjunction with a group of companies in the industry, the investigating authority may base its preliminary or final determinations on facts available whenever the government refuses access to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the investigation.

Question 24 (to both parties): The European Union argues that it is permissible to apply a rate determined on the basis of facts available to "unknown" producers/exporters provided that the investigating authority makes some additional effort to notify these producers/exporters of the information required and the consequences of not providing it (European Union's third-party submission, para. 23). Do you agree?

88. The statement of the European Union at paragraph 23 of its third party submission is limited to the use of facts available "in the calculation of an all others rate."[92] This dispute does not involve claims concerning the calculation of an all others rate. Therefore, the Panel does not need to reach this issue in this dispute.

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[90] *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. 42,672, pp. 42,673-75 (July 16, 2004) (Exhibit US-07).

[91] *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).

[92] EU's Third Party Written Submission, para. 23.

Question 25 (to both parties): Are there any limitations on the use of facts available to determine the dumping margin of a single "exporter" constituted of several distinct legal entities? Do the disciplines on the use of facts available under the Anti-Dumping Agreement with respect to such an exporter differ from those applicable to other individually-examined producers or exporters? If so, please explain.

89. Obligations regarding the use of facts available under the AD Agreement are established in Article 6.8 and Annex II. Nothing in the text of these provisions indicates that the guidelines applicable to the use of facts available in a proceeding for a single exporter or producer composed of multiple legal entities differ from those applicable to other interested parties.

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

Question 26: The United States argues that Viet Nam improperly assumes that implementation would necessarily be effectuated through Section 129, to the exclusion of other means of implementation, for instance Congress adopting new legislation, or action under Section 123.

a. (to both parties) What is the relevance of such additional avenues for implementation to the question of whether, where action is taken pursuant to Section 129, that action is WTO-consistent?

90. As an initial matter, the United States respectfully submits that this dispute does not involve a situation where action was taken pursuant to Section 129 of the URAA. Therefore, the dispute does not concern "the question of whether, where action is taken pursuant to Section 129, that action is WTO-consistent" as set out in the Panel's question. This observation shows the speculative and hypothetical nature of Vietnam's underlying claim.

91. As to the relevance of other avenues for implementation, Members may comply with DSB recommendations and rulings by means of multiple actions taken pursuant to various mechanisms in accordance with their own legislative, administrative, and other domestic procedures. Furthermore, the covered agreements do not contain an obligation that requires Members to implement DSB recommendations and rulings through a single measure. In fact, the provisions cited by Vietnam contain no obligation at all with respect to how a Member is to comply in the event of a finding of a breach.

92. Consequently, Vietnam has provided no basis under the covered agreements to find that Section 129 of the URAA is WTO-inconsistent by virtue of the fact that this mechanism is not designed to address every conceivable circumstance in which compliance action may be necessary, such that the mechanism may not always provide the full and sole means to take measures to comply. Actions taken pursuant to Section 129 bring measures into conformity with WTO obligations in relation to entries of merchandise made after a certain date. Where action is to be taken in relation to "prior unliquidated entries" that are not addressed by Section 129 of the URAA, other avenues are available for implementation.

93. Accordingly, the existence of other avenues under U.S. domestic law to implement DSB recommendations and rulings are relevant. Vietnam argues, incorrectly, that Section 129(c)(1) of the URAA is the "exclusive" mechanism for the United States to implement DSB recommendations and rulings. In its first written submission, the United States dispelled that claim as having no support in law or in fact.[93] In sum, the United States showed that the affirmative grant of authority to render actions on certain entries via Section 129 does not mean that Section 129 requires any particular treatment of other entries.

94. Ignoring these facts, Vietnam asserts that where the United States has implemented DSB recommendations and ruling as to "prior unliquidated entries," it is a "coincidence" that is not relevant to the Panel's analysis.[94] Taking this argument to its natural conclusion, Vietnam asserts that the United States would be required to address all possible entries subject to future, hypothetical DSB recommendations and rulings under one administrative mechanism – *i.e.*, Section 129 of the URAA – notwithstanding the fact that Vietnam concedes the United States has other mechanisms to implement *vis-à-vis* "prior unliquidated entries." This argument finds no support in the covered agreements.

95. Simply put, the covered agreements do not require Members to have a pre-existing administrative mechanism to implement DSB recommendations and rulings, still less a single and exclusive administrative mechanism that addresses all potential entries including "prior unliquidated entries." Vietnam's arguments to the contrary constitute an attempt to add obligations for the United States that are not in the covered agreements, in contradiction of Article 3.2 of the DSU. Accordingly, Vietnam's claim should be rejected.

b. (to the United States) Please react to Viet Nam and China's argument that the possibility that Congress may adopt new legislation cannot preclude other Members from establishing the WTO-inconsistency of the United States' existing law, practices, or a particular measure.

96. The United States submits that both Vietnam and China have fundamentally misunderstood the U.S. argument related to the ability of the U.S. Congress to adopt new legislation to bring the United States into compliance with DSB recommendations and rulings. The United States is <u>not</u> arguing that Section 129 of the URAA is WTO-consistent because Congress can change Section 129 itself with new legislation. Rather, the United States submits that where action is to be taken in relation to prior unliquidated entries that are not addressed by action taken pursuant to Section 129 (or Section 123), such action can be taken by means of legislation. The fact that multiple mechanisms may be employed by a Member to bring measures into conformity with DSB recommendations and rulings does not make any individual mechanism WTO-inconsistent.

[93] U.S. First Written Submission, paras. 109-114.

[94] Vietnam Opening Statement at the First Panel Meeting, para. 39.

97. Moreover, the fact that new legislation can (and has) brought the United States into compliance with DSB recommendations and rulings (*see* U.S. response to Question 29) is directly at odds with Vietnam's central assertion – *i.e.*, that Section 129 of the URAA is the sole mechanism by which the United States can come into compliance with DSB recommendations and rulings and, therefore, precludes the United States from bringing a measure into compliance with some potential future DSB recommendations and rulings *vis-à-vis* "prior unliquidated entries."

98. Rather, the ability of the United States to use legislation to implement DSB recommendations and rulings further shows that nothing in Section 129(c)(1) of the URAA prevents the United States from complying with DSB recommendations and rulings. As discussed in its first written submission, the United States has other administrative mechanisms for implementing DSB recommendations and rulings.[95] Consequently, Vietnam has failed to demonstrate that Section 129(c)(1) of the URAA is inconsistent, as such, with the AD Agreement.

Question 27 (to both parties): Please discuss whether Section 123 is relevant to the US authorities bringing a specific determination, as opposed to a regulation or practice, into conformity with the United States' obligations under the covered agreements.

99. Section 123(g) of the URAA addresses changes in agency regulations or practice to render them consistent with DSB recommendations and rulings.[96] The application of any new methodology developed pursuant to Section 123(g) can impact "prior unliquidated entries."[97] Specifically, the adoption of a methodological change pursuant to Section 123 could result in WTO-consistent determinations in administrative reviews covering "prior unliquidated entries." As explained in the U.S. First Written Submission, this very scenario has occurred.[98] Moreover, determinations in administrative reviews covering "prior unliquidated entries" have been found

[95] U.S. First Written Submission, paras. 109-111, 119-120.

[96] U.S. First Written Submission, para. 54.

[97] It should be noted that Section 123(g) of the URAA can be utilized to change a regulation or a practice where the DSB recommendations and rulings pertain either to "as such" or "as applied" findings. *See, e.g.*, *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189, 11,189 (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). Moreover, Commerce has found the statute to provide it with some discretion when determining the application of any new methodology developed pursuant to Section 123(g) of the URAA. *See, e.g.*, *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation; Final Modification*, 71 Fed. Reg. 77,722, 77,725 (Dec. 27, 2006) (explaining that "the statute does not specify whether the final modification must apply only to new segments of proceedings initiated after the effective date {established pursuant to Section 123(g) of the URAA}, or {whether it} may apply to any segments pending as of the effective date {established pursuant to Section 123(g)}") (Exhibit US-38).

[98] U.S. First Written Submission, para. 120.

by the Appellate Body to be measures taken to comply with recommendations and rulings of the DSB.[99]

Question 29 (to the United States): Apart from action under Section 129, please indicate how the United States has implemented DSB recommendations and rulings in trade remedy cases, also including countervailing duty and safeguard cases.

100. Apart from action under Section 129 of the URAA, the United States has implemented DSB recommendations and rulings in trade remedy cases through other administrative and legislative mechanisms.

101. Pursuant to Section 123 of the URAA, the United States has implemented DSB recommendations and rulings on various agency regulations or practices to render them WTO-consistent. For example, in the context of antidumping proceedings, Commerce changed its use of "zeroing" in investigations and administrative reviews,[100] as well as the methodology employed in determining whether certain sales made to affiliated parties are in the ordinary course of trade.[101]

102. In the latter example, Commerce explicitly found that Section 129(c)(1) of the URAA did not govern the effective date of implementation of determinations under Section 123.[102] As a result, in that case, the new "methodology [developed by Commerce pursuant to Section 123] would affect margins on imports which entered prior to the implementation date [established under Section 129(c)(1)]."[103]

[99] *US – Zeroing (EC) (Article 21.5) (AB)*, para. 256 ("We note in this respect that the Section 129 determinations apply to entries occurring after 23 April 2007; they do not cover entries occurring before that date. Therefore, administrative review determinations issued after the end of the reasonable period of time covering entries made prior to that date are relevant for assessing compliance with the DSB's recommendations and rulings, even though they do not concern those entries to which the Section 129 determinations will apply.").

[100] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dec. 27, 2006) (discussing use of zeroing in investigations) (Exhibit US-38); Vietnam's First Written Submission, Exhibit VN-55 (discussing the use of zeroing in administrative reviews).

[101] *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 69,186 (Nov. 15, 2002) (Exhibit US-53).

[102] *Ibid*, p. 69196 (internal quotations omitted).

[103] *Ibid.*

103. As to countervailing duty proceedings, Commerce modified its privatization methodology through Section 123.[104] And as to both antidumping and countervailing duty proceedings, Commerce relied upon Section 123 to change its regulations to apply new procedures in sunset reviews[105] and to utilize a WTO-consistent standard in determining whether to revoke an order in whole or in part.[106]

104. Pursuant to legislative action, the U.S. Congress has implemented DSB recommendations and rulings by passing new laws related to trade remedies. For example, in March 2012, Congress passed a law (the *GPX* legislation) partly in response to DSB recommendations and rulings on alleged double remedies in the context of countervailing duty proceedings.[107] Moreover, in October 2005, Congress passed a law to repeal the U.S. law affecting antidumping and countervailing duty proceedings commonly known as the "Continued Dumping and Subsidy Offset Act,"[108] which the DSB had found to be WTO-inconsistent.

105. Finally, with respect to safeguards, the United States has implemented DSB recommendations and rulings through Presidential proclamation on multiple occasions,[109] which is an administrative mechanism distinct from Section 129 and Section 123 of the URAA.

106. Therefore, as demonstrated above, the United States has implemented DSB recommendations and rulings through several mechanisms apart from Section 129 of the URAA.

Question 30 (to both parties): Please discuss the continued relevance, if any, of the "mandatory/discretionary" distinction for the Panel's resolution of Viet Nam's claims concerning Section 129(c)(1) of the URAA.

107. The United States believes that the mandatory/discretionary distinction is useful in examining Vietnam's claims concerning Section 129(c)(1) of the URAA. As discussed below, the mandatory/discretionary distinction is frequently used by panels and the Appellate Body to

[104] *See Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 Fed. Reg. 37,125 (June 23, 2003) (Exhibit US-54).

[105] *See Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders*, 70 Fed. Reg. 62,061 (Oct. 28, 2005) (Exhibit US-55).

[106] *See Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 64 Fed. Reg. 51,236 (Sept. 22, 1999) (Exhibit US-56).

[107] *See* Pub. L. No. 112-99, § 2, 126 Stat. 265, 265-66 (2012) (Exhibit US-57).

[108] *See* Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154 (2005) (Exhibit US-58).

[109] *See, e.g.*, Proclamation No. 7585, 67 Fed. Reg. 56,207 (Aug. 30, 2002) (Exhibit US-59); Proclamation No. 7502, 66 Fed. Reg. 57,837 (Nov. 14, 2001) (Exhibit US-60).

determine whether a measure is inconsistent "as such" with a Member's obligations because the measure in question either necessitates a breach of those obligations or precludes a Member from operating in a WTO-consistent manner. Not every report identifies clearly that it is applying the mandatory/discretionary analytical approach, but in reviewing whether a measure "requires" or "necessarily results in" WTO-inconsistent action, the same analysis and logic is being applied. Applying the analytical approach to the facts and measure at issue in this dispute, it is clear that nothing in Section 129(c)(1) of the URAA mandates a breach of the U.S. obligations under the covered agreements.

108. Articulated in various forms, the mandatory/discretionary distinction is often used by panels and the Appellate Body in determining if a measure is inconsistent "as such" with a Member's obligations.[110] Recently, in *China – Raw Materials*, the panel rejected an "as such" claim regarding Article X:3(a) of the GATT 1994 on the grounds that the measure in question did not "necessarily result in" a breach of China's obligations.[111] Similarly, in *EC – IT Products*, the panel (citing the panel in *China – Auto Parts)* examined whether the measure in question "necessarily" denied products duty-free treatment, in breach of the EC's WTO commitments.[112]

109. The distinction has also been used in disputes involving antidumping measures. For example, the Appellate Body applied the mandatory/discretionary distinction in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5)* to find that the United States did not breach the AD Agreement because the measure in question did not "preclude" Commerce from considering relevant evidence under Article 11.3 of the AD Agreement.[113]

110. Application of the analytical approach underlying the mandatory/discretionary distinction illustrates that Section 129(c)(1) of the URAA is not inconsistent "as such" with the AD Agreement because it does not require WTO-inconsistent action nor does it preclude WTO-consistent action by the United States of its obligations *vis-à-vis* "prior unliquidated entries." As discussed in the U.S. First Written Submission,[114] nothing in Section 129(c)(1) of the URAA requires the United States to treat "prior unliquidated entries" in any particular way nor does anything in Section 129(c)(1) prevent the United States from treating "prior unliquidated entries" in a manner that is consistent with DSB recommendations and rulings. Indeed, the United States, notwithstanding Vietnam's flawed interpretation of Section 129(c)(1) of the URAA, has assessed

[110] *Korea – Commercial Vessels*, para. 7.63 (noting that the Appellate Body continues to use the mandatory/discretionary distinction).

[111] *China – Raw Materials (Panel)*, paras. 7.776, 7.783, 7.786, 7.796.

[112] *EC – IT Products (Panel)*, paras. 7.113-7.115.

[113] *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5) (AB)*, para. 121.

[114] U.S. First Written Submission, paras. 93-138.

and liquidated such entries in a manner that is consistent with DSB recommendations and rulings by using other mechanisms available to it, such as Section 123 of the URAA.

111. In sum, nothing in Section 129(c)(1) of the URAA requires WTO-inconsistent action or precludes WTO-consistent action *vis-à-vis* "prior unliquidated entries." Prior unliquidated entries have been addressed in regards to implementation by Commerce (through Section 123 of the URAA) and by the U.S. Congress (in the case of the *GPX* legislation discussed above). These examples show that breaches of WTO obligations are not mandated by Section 129(c)(1) of the URAA and, therefore, that the measure is not inconsistent "as such" with United States' obligations under the AD Agreement. Vietnam's claims to the contrary should be rejected.

Question 31 (to both parties): What are the implications, if any, for Viet Nam's "as such" claims, of the Appellate Body statements indicating that the date of the assessment or liquidation of the duties, and not the date of importation, is the relevant date to determine compliance with the obligation to bring measures into conformity with DSB recommendations and rulings? (see Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 286-355, and *US – Zeroing (Japan) (Article 21.5 –* Japan*)*, paras. 153-197).

112. The Appellate Body's statements that the date of liquidation is the relevant date to bring an antidumping measure into conformity with DSB recommendations and rulings has no impact on Vietnam's "as such" claim regarding Section 129(c)(1) of the URAA. Specifically, the fact that the United States may, in certain disputes, have obligations *vis-à-vis* "prior unliquidated entries"[115] based on the Appellate Body's interpretation of the DSU in *US – Zeroing (EC) (Article 21.5)* and *US – Zeroing (Japan) (Article 21.5*) does not mean that Section 129(c)(1) is inconsistent with U.S. obligations under the AD Agreement because Section 129(c)(1) of the URAA is not the exclusive mechanism through which the United States may implement DSB recommendations and rulings. Consequently, it cannot be said that Section 129(c)(1) of the URAA precludes relief with respect to prior unliquidated entries.

113. As discussed in the U.S. First Written Submission,[116] Section 129 of the URAA can be used by the United States to implement DSB recommendations and rulings *vis-à-vis* entries that entered the United States, or are withdrawn from warehouse, on or after the date that USTR directs Commerce to implement a determination under Section 129.[117] Other mechanisms may be, and have been,[118] used by the United States to implement DSB recommendations and rulings

[115] 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.

[116] U.S. First Written Submission, paras. 93-138.

[117] 19 U.S.C. § 3538 (Exhibit VN-31).

[118] *See* U.S. Response to Question 29.

as to "prior unliquidated entries" should they exist based on the facts of a given dispute. For example, Commerce has conducted administrative reviews in a manner that affords WTO-consistent treatment to "prior unliquidated entries."[119] Accordingly, nothing in Section 129(c)(1) of the URAA prevents the United States from bringing the assessment of duties on "prior unliquidated entries" into conformity with DSB recommendations and rulings.

114. And even assuming, *arguendo*, that *US – Zeroing (EC) (Article 21.5)* and *US – Zeroing (Japan) (Article 21.5*) are somehow relevant to the Panel's analysis, those findings by the Appellate Body were based on an interpretation of Members' obligations under the DSU.[120] Such claims would be outside this Panel's terms of reference in this dispute, as Vietnam's claim regarding Section 129(c)(1) of the URAA is based on the AD Agreement, not the DSU. For this reason as well, Vietnam's claim that Section 129(c)(1) of the URAA is inconsistent with the United States' obligations under the covered agreements fails.

V. CLAIMS CONCERNING THE SUNSET REVIEW DETERMINATION

Question 32 (to both parties): Did Vietnamese respondents make specific attempts to demonstrate to the USDOC the relevance of "other factors" in the first sunset review of the *Shrimp* order? If so, please describe what kind of evidence was submitted.

115. Vietnamese respondents introduced certain points during the first sunset review but did not characterize their arguments as "other factors" or argue that Commerce should take into account "other factors." Specifically, Vietnamese respondents alleged during the sunset review proceeding that: (1) imports decreased only twice, *i.e.*, in 2006 (allegedly because of decreased raw material supply)[121] and 2009 (allegedly because of decreased consumer demand);[122] (2) growth in imports from Vietnam exceeded growth in total U.S. imports; and (3) Vietnam's U.S. import market share remained stable. Although Vietnamese respondents did not characterize these arguments as "other factors," Commerce addressed them as such and found that they did

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[119] U.S. First Written Submission, paras. 117-120 & n. 147-153.

[120] *US – Zeroing (EC) (Article 21.5) (AB)*, paras. 297, 299, 309; *US – Zeroing (Japan) (Article 21.5*) *(AB)*, paras. 154, 156, 157, 160, 169, 178.

[121] Without substantiating this claim, Vietnamese respondents merely referenced a website but did not provide any documentation from the website. *See* Vietnamese Respondents' February 12, 2010 Rebuttal Submission (Exhibit US-74, p. 8, n.9)) (public version); *see also* Case Brief for Vietnamese Respondents (Sept. 7, 2010) (Exhibit US-75, p. 6, n.15) (citing same website).

[122] Similarly, without substantiating this claim Vietnamese respondents merely referenced a website but did not provide any documentation from the website. *See* Vietnamese Respondents' February 12, 2010 Rebuttal Submission (Exhibit US-74, p. 8, n.10)) (public version); *see also* Case Brief for Vietnamese Respondents (Sept. 7, 2010) (Exhibit US-75, p. 6, n.16) (citing same website).

not "outweigh the likelihood analysis based on existence of margins and decline of imports."[123] Vietnamese respondents incorrectly focused their import volume argument on comparisons to 2004 as the base year (36 million kilograms), whereas the correct base year was 2003 (56.3 million kilograms), which demonstrated that imports had declined throughout the sunset period of review of 2005 through 2009 (42.1, 35.9, 37.9, 46.7, 40.1 million kilograms, respectively).

Question 34: The United States argues that the USDOC relied not only on dumping margins that Viet Nam alleges were WTO-inconsistent, but on "multiple factors".

a. (to the United States) Is it the United States' position that a sunset review will only be inconsistent with Article 11.3 when the investigating authority exclusively relied upon WTO-inconsistent margins of dumping?

116. It is not the position of the United States that a sunset review will only be inconsistent with Article 11.3 of the AD Agreement when the investigating authority exclusively relied on WTO-inconsistent margins of dumping. However, when the investigating authority's sunset review determination is based on multiple independent facts, a finding by a WTO adjudicative body that one or more of the investigating authority's factual findings are WTO-inconsistent does not invalidate the cogency of all the other facts on which the investigating authority relied. Put differently, for Vietnam to establish a breach it must establish that Commerce's determination of likelihood of continuation or recurrence is WTO-inconsistent, and where multiple bases support that determination, that one is alleged to be tainted is not enough. Therefore, even if the Panel in this dispute finds that Commerce relied on facts that the Panel considers WTO-inconsistent, if the remaining factual findings are WTO-consistent and support Commerce's sunset review determination, that determination should not be considered WTO-inconsistent.

b. (to both parties) Can a likelihood-of-dumping determination be found to be WTO-consistent in a case where part, but not all, of the investigating authority's analysis of relevant factors is found to be WTO-inconsistent?

117. As indicated in the United States response to Questions 34.a and 35, the likelihood-of-dumping determination can be found to be WTO-consistent even when some of the investigating authority's analysis of relevant factors is found to be WTO-inconsistent. That is, if there are independent bases supporting an authority's determination, that one base may not be relied upon does not establish that the determination is in breach because it was reached without sufficient foundation.

Question 35 (to the United States): The United States submits that "[t]he rate applied to [the two companies which did not cooperate during the first review] alone provides a

[123] *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Five-year "Sunset" Review of the Antidumping Duty Order*, Issues and Decision Memorandum, pp. 4-6 (Dec. 7, 2010) (Exhibit VN-14).

sufficient support for Commerce's conclusion that dumping continued during the sunset review period, and along with the declining import volumes […], sufficient evidence to support Commerce's likelihood determination" (United States' first written submission, para. 260). The Panel understands that the United States is arguing that the USDOC would have reached the same conclusion regarding the likelihood of dumping continuing or recurring by relying only on the two elements mentioned above (facts available rate applied to two uncooperative companies and declining import volumes). If the Panel's understanding is correct, could the United States please identify the relevant evidence and reasoning in the determination or underlying analysis that would support this view?

118. It is useful to recall that Commerce's likelihood determination as challenged by Vietnam relates only to the question of whether dumping, as opposed to injury, is likely to continue or recur if the antidumping duty order on shrimp from Vietnam is revoked. In the United States, the portion of the sunset review that concerns itself with the question whether revocation of an antidumping duty order will likely lead to the continuation or recurrence of the material injury associated with dumping is conducted by a separate investigating authority, the U.S. International Trade Commission. Vietnam has not challenged in this dispute the International Trade Commission's finding that revocation of the antidumping duty order on shrimp from Vietnam would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[124] As a result, as long as the factual elements listed in the Panel's question provide sufficient support for Commerce's determination that dumping is likely to continue or recur if the antidumping duty order on shrimp from Vietnam is revoked – and they do – then there is no basis for Vietnam's claim that Commerce's sunset determination was inconsistent with obligations under the AD Agreement.

119. In this regard, Commerce's sunset determination explained that "[t]he Department normally will determine that revocation of an antidumping duty order is likely to lead to a continuation or recurrence of dumping where . . . dumping continued at any level above de minimis after the issuance of the order . . . or . . . dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly."[125] Commerce then found that "while Vietnamese Respondents repeatedly claimed that dumping did not continue following the issuance of the order, Vietnamese Respondents also qualified that claim by stating that only the "vast majority" of the imports were not dumped. Therefore, by their own admission, Vietnamese respondents did not dispute there was some dumping that occurred."[126]

[124] Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam, Inv. Nos. 731-TA-163, 1064, 1055-1068 (Review), Pub. 4221 (March 2011), located at http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2010/shrimp/PDF/pub4221.pdf.

[125] *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Five-year "Sunset" Review of the Antidumping Duty Order*, Issues and Decision Memorandum, p. 4 (Dec. 7, 2010) (emphasis added) (Exhibit VN-14).

[126] *Ibid.*

Commerce also found that Vietnamese respondents failed to address the fact that two companies selected as mandatory respondents during the first administrative review failed to participate in that review and had received dumping margins of 25.76 percent as a result.[127] Finally, Commerce found that declining import volumes accompanied by the continued existence of dumping margins after the issuance of the order on shrimp indicated that, if the order was revoked, dumping would likely continue because exporters needed to dump to sell at pre-order volumes.[128]

120. Vietnam has not alleged, let alone demonstrated, that the factual elements identified in the Panel's question are insufficient to support Commerce's finding that dumping was likely to continue or recur if the antidumping duty order on shrimp from Vietnam was revoked. Moreover, as the United States noted in its first written submission, one of the respondents in the fourth review, following litigation in which it successfully sought to have its dumping margin individually calculated based on its own data, has since requested to maintain the dumping rate of 3.92 percent applied by Commerce in the fourth review, rather than provide its own data as a basis for an individual dumping margin calculation.[129] This exporter's position thus provides additional evidence in support of Commerce's determination that dumping continued "at any level above de minimis." Therefore, irrespective of Commerce's consideration of dumping margins that Vietnam alleges are WTO-inconsistent, the remaining evidence of record is sufficient to support Commerce's conclusion that revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping at a level above *de minimis*.

Question 36: In paragraph 262 of its first written submission, the United States submits that:

> **In addition to the margins of dumping examined, Commerce also considered public U.S. import data for the five-year sunset period, which was comparable to the data submitted by respondents, and found that import volumes fell from 56.3 million kilograms in the year preceding the investigation (2003) to 42.1, 35.9, 37.9, 46.7, and 40.1 million kilograms in 2005-2009, respectively.**

Did the USDOC consider whether declining imports could be due to factors other than the introduction of the *Shrimp* order? If not, why? If so, what "other factors" were considered?

121. Commerce did consider whether declining imports could be due to factors other than the introduction of the antidumping duty order on shrimp from Vietnam. Specifically, Commerce

[127] *Ibid.*

[128] *Ibid*, p. 5.

[129] *See* U.S. First Written Submission, para. 271, n. 358.

considered the arguments made by Vietnamese respondents that: (1) imports decreased only twice, *i.e.*, in 2006 (allegedly because of decreased raw material supply) and 2009 (allegedly because of decreased consumer demand); (2) growth in imports from Vietnam exceeded growth in total U.S. imports; and (3) Vietnam's U.S. import market share remained stable. However, Commerce explained that Vietnamese respondents had the burden of providing information to support their claims and found that "[i]n this case, Vietnamese Respondents have not demonstrated the relevance of the other factors they have cited, nor have they demonstrated why dumping margins and import volumes are not necessarily indicative of the likelihood of continued dumping."[130]

122. Commerce further expressed concern that Vietnamese respondents had not substantiated these claims or demonstrated the relevance of this information, stating in the final results that the "Vietnamese Respondents fail[ed] to provide any comments to address these concerns and merely repeat their previous assertions."[131] The information provided by Vietnamese respondents amounted only to speculation that "import volume could have been higher if not for the margins assigned to the separate rate companies or supply and demand issues."[132] Commerce found that, despite Commerce's invitation for Vietnam to further explain its purported "other factors" after the preliminary results, Vietnamese respondents "have not demonstrated how these factors could have affected import volumes." Thus Commerce found that respondents' "market share and other factor arguments do not outweigh the likelihood analysis based on the existence of margins and decline of imports."[133]

Question 37 (to the United States): Does the United States dispute, as a matter of fact, that dumping margins in the original investigation and in the first three administrative reviews were calculated with zeroing?

123. The United States does not dispute that a number of the dumping margins derived in the original investigation and in the first three administrative reviews were calculated using the so-called "zeroing" methodology. But not all dumping margins derived in the original investigation and first three administrative reviews were calculated using this methodology.

124. For example, in the original investigation, Commerce found that the Vietnam government entity, which included a company selected for individual examination, failed to cooperate in the investigation and Commerce accordingly determined a margin for the entity of 25.76 percent

[130] *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Five-year "Sunset" Review of the Antidumping Duty Order*, Issues and Decision Memorandum, p. 5 (Dec. 7, 2010) (Exhibit VN-14).

[131] *Ibid*, p. 6.

[132] *Ibid.*

[133] *Ibid.*

based on adverse facts available. Commerce based this finding on the lowest calculated rate from the petition,[134] a rate that did not involve the so-called "zeroing" methodology.[135]

125. Moreover, in the first administrative review, two companies selected for individual examination failed to respond to Commerce's request for information. Commerce subsequently assigned these two companies, as part of the Vietnam-government entity, the rate of 25.76 percent, which again did not involve any use of the so-called "zeroing" methodology. Commerce again found that the Vietnam government entity failed to cooperate in the second review and applied a rate of 25.76 percent as adverse facts available. Commerce continued to apply this rate, or the rate in effect for the Vietnam government entity in the third administrative review. The rate in effect did not involve use of the so-called "zeroing" methodology.

126. Finally, the application of an average of calculated rates to separate rate companies not selected for individual examination in the second and third administrative reviews does not involve the use of the so-called "zeroing" methodology.

VI. CLAIMS CONCERNING COMPANY-SPECIFIC REVOCATIONS

Question 38 (to both parties): Please guide the Panel through your interpretation – pursuant to the Vienna Convention (including, as relevant, any preparatory work) – of Article 11.2 as supporting your view that this provision does, or does not, provide for or require company-specific revocations.

127. Pursuant to the customary rules of treaty interpretation referenced in DSU Article 3.2, Article 11.2 of the AD Agreement is to be interpreted in accordance with its ordinary meaning in its context and in light of the object and purpose of the AD Agreement.[136] Article 11.2 provides for review by the administering authority of "the need for the continued imposition of the duty." As shown in the U.S. First Written Submission,[137] the ordinary meaning of "the duty" in Article 11.2 of the AD Agreement, when read in context, refers to the antidumping duty on a product, or in U.S. terminology, the antidumping duty order ("product-wide"). "The duty" is not a reference to a company-specific rate. And because "the duty" is that duty the authorities have determined to impose on a product from a particular source (country), there is no obligation in Article 11.2 of the AD Agreement to provide for company-specific revocation as Vietnam argues in this dispute.

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[134] *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. 37 (Exhibit VN-04).

[135] *See Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam*, 69 Fed. Reg. 3,876, p. 3881 (Jan. 27, 2004) (Exhibit VN-03).

[136] Vienna Convention on the Law of Treaties, Art. 31.

[137] U.S. First Written Submission, para. 78.

128. In particular, context provided by Articles 9 and 6 of the AD Agreement confirm that "the duty" in Article 11.2 is not company-specific. References to "the duty" in Article 11.2 contrast with references to "individual duties" in Article 9.4 and the reference to "an individual margin of dumping for each exporter or producer" in Article 6.10. "Individual duties" and "an individual margin of dumping for each exporter or producer" must have a different meaning than "the duty." To read "the duty" in the context of Article 11.2 as a company-specific reference would render these distinctions a nullity, which is not the preferred outcome under customary rules of treaty interpretation.

129. The context provided by, in particular, Article 9 of the AD Agreement formed the basis for the Appellate Body to find in *US – Corrosion-Resistant Steel Sunset Review* that "the duty" in Article 11.3 of the AD Agreement is not a company-specific reference.[138] Vietnam has provided no reason why "the duty" in Article 11.2 should have a different meaning from "the duty" in Article 11.3 of the AD Agreement. Indeed, no such reason exists.[139]

130. The United States further observes that the text of Article 11.2 of the AD Agreement makes no distinction between the likelihood of dumping determination and the likelihood of injury determination, both of which can provide the basis for termination of "the duty." The likelihood of continuation or recurrence of injury determination inherently relates to all of the imports subject to "the duty", that is, all imports from that source, and it therefore follows that the likelihood of dumping determination under Article 11.2 is also product-wide. In short, the two factors (*i.e.*, dumping and injury) that serve as the basis for termination of the order pursuant to Article 11.2 of the AD Agreement are product-wide.

131. The fact that "the duty" is not a company-specific reference is confirmed by the preparatory work of Article 11.2 of the AD Agreement. Specifically, the Nordic countries proposed that a company-specific reference be included in Article 11.2 – *i.e.*, that the authorities "review the margin of dumping and the material injury, or otherwise the need for the continued

[138] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 150 ("Article 11.3 does not require investigating authorities to make their likelihood determination on a company-specific basis.") and paras. 154-155 ("The provisions of Article 6.10 concerning the calculation of individual margins of dumping in investigations do not require that the determination of likelihood of continuation or recurrence of dumping under Article 11.3 be made on a company-specific basis.").

[139] Context provided by Article 11.3 informs the interpretation of Article 11.2. Article 11.3 and Article 11.2 provide for distinct but related actions: Article 11.3 provides for a review of the continuing need for (based on a determination of likelihood or recurrence of dumping), or termination, of "the duty" at a specific point in time. Article 11.2 also provides for review of the continued need for "the duty" but at any time after imposition of the duty, where warranted (and when a reasonable amount of time has passed). Thus, each paragraph serves to provide for a review of the continuing need for the duty, one automatic at a specified point in time (or termination of the duty if no review), the other at any time where warranted. However, both paragraphs refer to "the duty", which has been found by the Appellate Body to be a product-wide reference. The use of this same term in these paragraphs confirms that they should be given the same meaning.

imposition of the duty."[140] The Nordic countries' amendment was not accepted, and only the reference to "the duty" remained in the final version of Article 11.2 of the AD Agreement.

132. For these reasons, "the duty" in Article 11.2 of the AD Agreement is a product-wide reference and, as a result, Vietnam's assertion that the United States breached Article 11.2 by not providing for company-specific revocation fails.

Question 40 (to both parties): Please discuss how footnote 21 supports your position that Article 11.2 does, or does not, provide for or require company-specific revocations.

133. Footnote 21 to Article 11.2 of the AD Agreement provides no support for Vietnam's assertion that the reviews provided for in Article 11.2 are company-specific. In fact, as discussed below, Footnote 21 further demonstrates that the reviews provided for in Article 11.2 are product-wide.

134. Footnote 21 states that "[a] determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article." By its plain language, nothing in Footnote 21 implies that "a review" under Article 11.2 is company-specific. Rather, Footnote 21 contrasts reviews provided for in Article 11.2 with the company-specific assessment reviews provided for in Article 9.3 of the AD Agreement.

135. Specifically, Footnote 21 clarifies that the assessment reviews provided for in Article 9.3, such as administrative reviews in the U.S. system, do not, on their own, constitute the type of reviews provided for in Article 11.2 of the AD Agreement. In other words, company-specific assessment reviews, in which "[t]he amount of the anti-dumping duty is assessed" (a company-specific reference), are not the type of reviews provided for in Article 11.2 to determine the continuing need for "the duty."

136. Nevertheless, Footnote 21 (and, specifically, the "by itself" language) clearly implies that company-specific assessment reviews may play a role in product-wide reviews under Article 11.2. The role that company-specific assessments may play in the type of product-wide reviews provided for in Article 11 of the AD Agreement was discussed by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*. In that dispute, the Appellate Body observed that Members may take into account company-specific dumping margins from assessment reviews when conducting product-wide reviews under Article 11.3 of the AD Agreement.[141] This fact

[140] Drafting Proposals of the Nordic Countries Regarding Amendments of the Anti-Dumping Code, MTN.GNG/NG8/W/76, p. 4.

[141] *US – Corrosion-Resistant Steel Sunset Review (AB)*, paras. 150, 160, 176; *see also* n. 22 to Article 11.3 of the AD Agreement ("When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty").

does not mean, of course, that the reviews provided for in Articles 11.2 and 11.3 are company-specific.

137. In sum, Footnote 21 clarifies that company-specific assessment reviews cannot, by themselves, form the basis for product-wide termination of "the duty" under Article 11.2 of the AD Agreement. Accordingly, Footnote 21 further supports the U.S. argument that the reference to "the duty" in Article 11.2 is not company-specific.

Question 41 (to both parties): What is the meaning to be given to the term "dumping" in Article 11.2? Does it refer to dumping by an interested party, for example an individual producer/exporter seeking a review, or does it have a broader meaning?

138. As with the term "the duty" discussed above, the authorities' examination of "the continued imposition of the duty [as] necessary to offset dumping" in Article 11.2 of the AD Agreement is inherently an product-wide examination and, therefore, further shows that nothing in that Article provides for company-specific revocation of an antidumping duty order.

139. In particular, the use of the term "dumping" in Article 11.2 contrasts with, for example, reference to "an individual margin of dumping for each exporter or producer" in Article 6.10. "An individual margin of dumping for each exporter or producer" must have a different meaning than "dumping." To read "dumping" in the context of Article 11.2 as a company-specific reference would render this distinction a nullity, which is not the preferred outcome under customary rules of treaty interpretation.

140. More generally, the existence of "dumping," like "injury," is inherently a product-wide, not company-specific, examination. For example, under Article 3.5 of the AD Agreement, the "effects of dumping" (not individual margins) are examined to determine if they cause injury. The reference to dumping in Article 3.5 is product-wide because injury is determined on a product-wide basis. Similarly, the initiation of an investigation pursuant to Article 5.1 of the AD Agreement is done to determine "the existence, degree and effect of any alleged dumping," which is, again, a product-wide reference.[142]

141. For these reasons, the reference to "dumping" calls for a product-wide examination and, consequently, further shows that company-specific revocation is not provided for in Article 11.2 of the AD Agreement.

Question 44 (to both parties): In your view, to what extent do the detailed evidentiary and procedural requirements contained in Article 6 - including but not limited to the limited examination exception under the second sentence of Article 6.10 - apply in the context of Article 11.2 reviews?

[142] AD Agreement, Art. 5.1.

142. According to Article 11.4 of the AD Agreement, "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under [Articles 11.2 and 11.3]." Consequently, provisions related to, for example, notification and participation (Article 6.1) and confidential information (Article 6.5) apply to reviews to determine the likelihood of continuation or recurrence of dumping or injury provided for under Article 11.2.

143. In addition, assuming, *arguendo*, that Article 11.2 of the AD Agreement provides for company-specific revocation, the limited examination exception under the second sentence of Article 6.10 would be relevant and would apply. In other words, the permissible limitation of the number of exporters that the administering authority could individually examine under Article 6.10 cannot later provide a basis for a breach of Article 11.2 should that non-examined company seek a company-specific revocation. If an administering authority permissibly limits its examination of exporters under Article 6.10, a separate obligation arising from Article 11.2 to review all individual requests for revocation would override the administering authority's determination that it is impracticable to review each company individually. Such an argument, which is being made by Vietnam in this dispute,[143] would render Article 6.10 of the AD Agreement a nullity, which is not the preferred outcome under customary rules of treaty interpretation.

144. In fact, the panel in *US – Shrimp* (*Viet Nam*) rejected a similar argument from Vietnam relating to Article 11.3. In that case the panel concluded, "[s]ince neither the first sentence of Article 6.10, nor Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement, impose any additional restrictions on the use of limited examinations, there is no basis for us to find that the USDOC's legitimate (*i.e.* consistent with the second sentence of Article 6.10) use of limited examinations is inconsistent with those provisions."[144] Thus, the panel properly rejected Vietnam's claims under Articles 6.10, 9.3, 11.1 and 11.3 of the AD Agreement. The panel's reasoning in that case is equally applicable to the similar provision for termination of the duty under Article 11.2.

145. For these reasons, Vietnam's argument that the United States breached Article 11.2 of the AD Agreement by limiting its examination of respondents in the administrative reviews at issue is without merit.

Question 45 (to both parties): To what extent is the US mechanism providing for revocation in the context of administrative reviews governed by the disciplines of Article 11.2?

146. The U.S. mechanism for revocation in the context of the administrative reviews that are at issue in this dispute – *i.e.*, the standard of company-specific revocation based, in part, on three years of no dumping ("three and out") – is not governed by the disciplines of Article 11.2 of the

[143] Vietnam's First Written Submission, para. 351.

[144] *US – Shrimp* (*Viet Nam*), paras. 7.151-68.

AD Agreement for two reasons. First, as discussed above, Article 11.2 does not provide for company-specific revocation. For this reason alone, Article 11.2 of the AD Agreement does not apply to the particular mechanism under which certain Vietnamese exporters requested revocation.

147. Second, even assuming, *arguendo*, that Article 11.2 of the AD Agreement provides for company-specific revocation, which it does not, Vietnam's argument that the United States breached Article 11.2 still fails. Nothing in the text of Article 11.2 indicates that an administering authority must revoke an exporter from an order under such particularized and narrow circumstances, such as absence of dumping for a specified period of time. Commerce's standard of "three and out" applicable at the time of the administrative reviews at issue here was, as noted by the panel in *US – Anti-Dumping Measures on Oil Country Tubular Goods*, a "presumption" that "operates in favour of foreign producers and exporters."[145] As such, it goes "beyond what is required by Article 11.2" and, therefore, cannot serve as a basis for a breach of Article 11.2 of the AD Agreement by the United States.[146]

148. For this reason as well, Vietnam has failed to show that the United States breached Article 11.2 of the AD Agreement.

Question 46 (to both parties): What additional steps (other than those taken in every administrative review) does the USDOC take in an administrative review where a respondent asks for a company-specific revocation?

149. Pursuant to the regulations applicable during the fourth and fifth administrative reviews of the shrimp antidumping duty order (when certain Vietnam exporters requested company-specific revocation),[147] Commerce would consider (i) whether the exporter had not dumped for at least three consecutive years;[148] (ii) whether the exporter agreed in writing to immediate reinstatement into the antidumping duty order (if the order remained in place for any exporter) if Commerce concluded that subsequent to revocation the exporter was dumping;[149] (iii) whether continued application of the order was otherwise necessary to offset dumping;[150] and (iv) whether the company sold subject merchandise in commercial quantities during each of the three

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

[146] *US – Anti-Dumping Measures on Oil Country Tubular Goods (Panel)*, para. 7.174.

[147] 19 C.F.R. § 351.222(b)(2) (2012) (Exhibit VN-58).

[148] 19 C.F.R. § 351.222(b)(2)(i)(A) (Exhibit VN-58).

[149] 19 C.F.R. § 351.222(b)(2)(B) (Exhibit VN-58).

[150] 19 C.F.R. § 351.222(b)(2)(C) (Exhibit VN-58).

years.[151] In addition, the exporter must have undergone a successful verification of the information provided relevant to the revocation request.[152]

Question 51: In para. 79 of its first written submission, the United States indicates that no Vietnamese interested party has ever requested an order-wide revocation of the *Shrimp* order.

b. [to both parties] Please confirm whether all the requests for review made by individual Vietnamese producers/exporters were for company-specific revocations and were made in the context of administrative reviews.

150. Yes, 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.

c. [to both parties] Did any interested party request either an order-wide or a company-specific revocation in the context of a *changed circumstances review* under the *Shrimp* order, as it pertains to Viet Nam?

151. No interested party requested either product-wide or company-specific revocation in the context of a changed circumstances review under the antidumping duty order on shrimp from Vietnam.

[151] 19 C.F.R. § 351.222(d)(1) (Exhibit VN-58).

[152] 19 C.F.R. § 351.222(f)(2)(ii) (Exhibit VN-58).