

ANNEX G

REQUESTS FOR CONSULTATIONS AND THE ESTABLISHMENT OF A PANEL

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ANNEX G-1

REQUEST FOR CONSULTATIONS BY VIET NAM

WORLD TRADE ORGANIZATION

WT/DS404/1
G/L/915
G/ADP/D81/1
4 February 2010

(10-0594)

Original: English

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

Request for Consultations by Viet Nam

The following communication, dated 1 February 2010, from the delegation of Viet Nam to the delegation of the United States and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

Upon instructions from my authorities, I hereby request consultations with the Government of the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Articles 17.2 and 17.3 of the *Agreement on Implementation of Article VI of GATT 1994* ("Anti-Dumping Agreement"), with regard to the matters listed hereunder:

(1) The following determinations of the United States Department of Commerce (USDOC) concerning *Certain Frozen and Canned Warmwater Shrimp from Vietnam*, Case No. A-552-801:

- (a) Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative, 72 FR 52052 (12 September 2007) as well as any assessment instructions and cash deposit requirements issued pursuant to this determination, the "Decision Memorandum" in this review which discusses issues raised in this review and confirms that "zeroing" was applied by the USDOC in this review and specifically rejects the relevance of WTO Appellate Body precedents for administrative reviews conducted by the USDOC, and any records demonstrating the calculation of the margins of dumping applied zeroing;
- (b) *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,*

73 FR 52273 (9 September 2008) as well as any assessment instructions and cash deposit requirements issued pursuant to this determination, the "Decision Memorandum" in this review and any records demonstrating the calculation of the margins of dumping applied zeroing;

- (c) *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of the Second New Shipper Review*, 74 FR 24796 (26 May 2009) as well as any assessment instructions and cash deposit requirements issued pursuant to this determination, the "Decision Memorandum" in this review and any records demonstrating the calculation of the margins of dumping applied zeroing;
- (d) *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 47191 (15 September 2009) as well as any assessment instructions and cash deposit requirements issued pursuant to this determination, the "Decision Memorandum" in this review and any records demonstrating the calculation of the margins of dumping applied zeroing;
- (e) Preliminary and Final Results of any administrative reviews or other reviews of *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam* published in the Federal Register after the date of this request for consultations, including reviews under Section 751(c) of the Tariff Act of 1930, as well as any assessment instructions and cash deposit requirements issued pursuant to this determination, the "Decision Memorandum" in this review and any records demonstrating the calculation of the margins of dumping applied zeroing; and
- (f) Any changes in the final results of any administrative review of *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam* issued pursuant to a remand from the US Court of International Trade, as well as any opinion of the Court related to the remand results, any assessment instructions and cash deposit requirements issued pursuant to this remand determination, the "Decision Memorandum" in this remand determination, any arguments subsequently presented to the Court regarding the remand determination and any records related to the remand determination demonstrating the calculation of the margins of dumping applied zeroing.

(2) Any actions taken by United States Customs and Border Protection (USCBP) to collect definitive anti-dumping duties at duty assessment rates established in periodic reviews covered by the preceding paragraph, including through the issuance of USCBP liquidations instructions and notices.

(3) The following US laws, regulations, administrative procedures, practices and methodologies:

- the Tariff Act of 1930, as amended, (the "Act"), in particular sections 736, 751, 771(35)(A) and (B), and 777A(c) and (d);
- the US Statement of Administrative Action that accompanied the Uruguay Round Agreements Act, H.R. Doc. No.1 03-316, vol. I;
- the implementing regulations of USDOC, codified at Title 19 of the United States Code of Federal Regulations, 19 CFR Section 351, in particular sections 351.212(b), 351.414(c), and (e);

- the Import Administration Antidumping Manual (1997 edition), including the computer program(s) to which it refers;
- the general procedures and methodology employed by the United States to determine dumping margins in administrative reviews, whereby USDOC, in comparing weighted average normal value with transaction price of individual export transactions, treats as zero negative intermediate comparison results (i.e. situations in which the individual export price is greater than the weighted average normal value). Such methodology is commonly referred to as "simple zeroing" and/or the US "zeroing procedures".

2. Vietnam believes that the laws, regulations, administrative procedures, practices and methodologies described above are as such, and as applied in the determinations listed above, inconsistent with the obligations of the United States under the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement") and the Agreements annexed thereto. The provisions with which these measures appear to be inconsistent include, but are not limited to, the following:

- Articles I, II, VI: 1 and VI:2 of the GATT 1994;
- Articles 1,2.1,2.4,2.4.2,6.8,6.10,9.1,9.3,9.4,11.2, 11.3, 18.1 and 18.4 and Annex II of the Anti-Dumping Agreement;
- Article XVI:4 of the WTO Agreement.
- And Vietnam's Protocol of Accession to the WTO.

3. Vietnam believes that the United States has acted inconsistent with its WTO obligations specified in paragraph 2 above by applying so-called "zeroing" in the determination of the margins of dumping in the reviews cited in paragraph 1 above, by repeatedly and consistently, failing to provide most Vietnamese respondents seeking a review an opportunity to demonstrate the absence of dumping by being permitted to participate in a review, and by requiring companies to demonstrate their independence from government control and applying an adverse facts available rate to companies failing to do so in all reviews. Vietnam further believes that the US has an established practice with respect to each of these issues and will, therefore, continue to act inconsistent with its WTO obligations relating to these issues in ongoing and future reviews, including the five year review provided under Article 18.1 of the Antidumping Agreement.

4. Vietnam reserves the right to raise additional claims and legal matters during the course of the consultations. It looks forward to receiving the United States Government's response and to setting a mutually convenient date for consultations.

I look forward to receiving your reply to this request and, in accordance with Article 4.3 of the DSU, to selecting a mutually acceptable date for holding consultations. Vietnam welcomes suggestions that the United States may have concern the date and venue for the consultations.

ANNEX G-2

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY VIET NAM

WORLD TRADE ORGANIZATION

WT/DS404/5
9 April 2010

(10-1873)

Original: English

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

Request for the Establishment of a Panel by Viet Nam

The following communication, dated 7 April 2010, from the delegation of Viet Nam to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

Upon instruction from my authorities, I wish to convey the request of the Government of Viet Nam ("Viet Nam") to the Dispute Settlement Body (the "DSB") for the establishment of a panel pursuant to Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), Articles 4 and 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), and Article 17.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement") with respect to certain anti-dumping measures imposed by the United States on imports of certain shrimp from Viet Nam.

1. Consultations

Pursuant to Article 4 of the *Understanding on the Rules and Procedures Governing the Settlements of Disputes* (DSU) and Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* (GATT 1994), Viet Nam requested consultations with the United States (US) regarding certain anti-dumping measures imposed by the United States on imports of certain shrimp from Viet Nam. Viet Nam requested consultations with the United States on 1 February 2010, and the request was circulated on 4 February 2010 as document WT/DS404/1, G/L/915, G/ADP/D81/1. Thailand requested to join consultations with the United States on 15 February 2010 and the request was circulated on 16 February 2010 as document WT/DS404/4. The European Union (EU) requested to join consultations with the United States on 12 February 2010 and the request was circulated on 16 February 2010 as document WT/DS404/3. Japan requested to join consultations with the United

States on 12 February 2010 and the request was circulated on 16 February 2010 as document WT/DS404/2.

Viet Nam and the United States held consultations on 23 March 2010 in Geneva. Those consultations were held with the hope of reaching a mutually satisfactory solution. The parties at consultations gained a better understanding of the issues under consideration, but did not reach a resolution of the matter. Therefore, Viet Nam hereby requests that a Panel be established pursuant to Article 6 of the DSU and Article XXIII of the GATT 1994.

2. Summary of Facts and Legal Basis of Complaint

The specific measures at issue are the anti-dumping order and subsequent periodic reviews conducted by the United States Department of Commerce (USDOC) on certain frozen and canned warmwater shrimp from Viet Nam. The following determinations constitute the measures at issue:

1. *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, 69 Fed. Reg. 71005 (5 Dec. 2004)
2. *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review*, 72 Fed. Reg. 52052 (12 Sept. 2007)
3. *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed. Reg. 52273 (9 Sept. 2008)
4. *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 Fed. Reg. 47191 (15 Sept. 2009)
5. *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, in Part, of the Fourth Administrative Review*, 75 Fed. Reg. 12206 (15 March 2010), including denial of all requests for revocation.
6. *Initiation of Five-Year ("Sunset") Review*, 75 Fed. Reg. 103 (4 January 2010).

(a) Zeroing

(i) Summary of Facts

The USDOC engaged in model zeroing to calculate the dumping margin for all respondents during the original investigation. Specifically, the USDOC made an average-to-average comparison of export price and normal value within "subgroups" of the product under investigation. The USDOC aggregated the results of the subgroup, average-to-average comparisons to determine the weighted average margin of dumping, excluding any offsets where export price is greater than normal value. The USDOC acknowledged use of this zeroing methodology in the decision memorandum that accompanied the final results. As a result, the US calculated a margin and amount of dumping in excess of the actual dumping practised by the respondent companies.

In each of the administrative reviews at issue, the USDOC has made use of this zeroing methodology. Specifically, in making an average-to-average comparison of export price and normal

value, the USDOC does not allow non-dumped sales to offset the amount of dumping found with respect to other sales. As with the investigation, the USDOC has acknowledged in each review use of this zeroing methodology in the administrative determinations. Therefore, the dumping rate is in excess of the actual dumping performed by the respondent.

These calculations and methodologies are applied pursuant, in particular, to the following United States laws and regulations:

1. Tariff Act of 1930, as amended, Section 771(35)(A)
2. Implementing regulations of the USDOC, 19 C.F.R. § 351.408 and 351.414.

(ii) *Legal Basis of Complaint*

Viet Nam considers the above-mentioned laws and procedures by the USDOC to be, as such, inconsistent with several provisions of the Antidumping Agreement, GATT 1994, and the Marrakesh Agreement. In original investigations, periodic reviews, new shipper reviews, sunset reviews, and certain changed circumstances reviews, USDOC's use of zeroing is inconsistent with:

2. Article 2 of the *Anti-Dumping Agreement*, including paragraphs 2.1, 2.4, and 2.4.2, because the comparison made by the USDOC is inconsistent with the requirements of Article 2 and those paragraphs of Article 2;
3. Article 9 of the *Anti-Dumping Agreement*, including paragraphs 9.1 and 9.3, because the USDOC's use of the zeroing methodology results in the imposition of duties in excess of the amount of dumping as determined pursuant to Article 2;
4. Paragraph 9.4 of Article 9 of the *Anti-Dumping Agreement* because the USDOC's use of the zeroing methodology results in the imposition of duties for the all-other rate in excess of the amount of dumping as determined pursuant to Article 2;
5. Article 1 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 to the extent that the imposition and collection of the duties is inconsistent with the *Anti-Dumping Agreement*;
6. For original investigations only, Article 5.8 of the *Anti-Dumping Agreement* where de minimis dumping margins are unjustifiably found to be not de minimis; and
7. For sunset reviews only, Article 11 of the *Anti-Dumping Agreement*, including paragraphs 11.1, 11.2, 11.3 and 11.4 of the *Anti-Dumping Agreement* where likelihood of continued dumping determinations are made using the zeroing methodology inconsistent with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.
8. Part I:2 of the *Protocol of Accession of the Socialist Republic of Vietnam*, WT/L/662, 15 November 2006 and Paragraphs 254 and 255 of the *Report of the Working Party on Accession of Vietnam*, WT/ACC/VNM/48, 26 October, 2006.

Viet Nam also considers that USDOC's application of the above-mentioned laws and procedures in the original investigation and periodic reviews here at issue to be inconsistent with the following provisions of the *Anti-Dumping Agreement*, GATT 1994, and the Marrakesh Agreement for the same reasons set out above:

9. Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.3, 11.1, and 11.3 of the *Anti-Dumping Agreement*.

10. Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the Marrakesh Agreement.

11. Articles 1 and 2 of the GATT 1994.

(b) Country-Wide Rate Based on Adverse Facts Available

(i) *Summary of Facts*

The USDOC has applied a "country-wide rate" based on adverse facts available throughout the antidumping proceedings identified above. For countries identified as non-market economy countries, the USDOC requires that companies not selected as mandatory respondents apply for separate rates; those that fail to do so or do not meet the separate rate criteria are given the "country-wide rate" as established by USDOC. Even a company that timely and fully responds to the questions posed by USDOC will be assigned this country-wide rate if it does not rebut the presumption established by USDOC: specifically, the company must establish that it does not operate under the control of the government. If the company is successful, it will receive a "separate rate," which is the weighted average of the rates calculated for the individually investigated respondents.

Companies that do not receive a separate rate are assigned the country-wide rate. In the proceedings at issue, the USDOC assigned a company-wide rate based entirely on adverse facts available, even where companies responded timely and fully to the questionnaires issued by USDOC. The USDOC did so on the basis that certain separate rate applicants did not submit complete information and because the Vietnamese government did not submit a response on their behalf. The effect of this action is to assign highly prejudicial and unjustifiable rates to companies that do everything in their control to comply with USDOC requests. Companies granted a separate rate have received a margin of 4.57 per cent over the course of the measures at-issue; companies assigned a country-wide rate have in contrast received a margin of 25.76 per cent.

These calculations and methodologies are applied pursuant, in particular, to the following United States laws and measures:

12. Tariff Act of 1930, as amended, Sections 771(18)(C)(i), 776(a)(2), and 776(b);

13. Import Administration Antidumping Manual, Chapter 10, "Non-Market Economies."

(ii) *Legal Basis of Complaint*

In the antidumping proceedings at-issue, the United States applied the laws and methodologies described above with regard to calculation of a country-wide rate, which Viet Nam considers to be inconsistent with the obligations of the United States under the *Anti-Dumping Agreement*. Specifically, Viet Nam considers these measures to be inconsistent with Articles 6.8, 9.4, and Appendix II of the *Anti-Dumping Agreement*.

14. Articles 2 and 9 of the Anti-Dumping Agreement because these Articles determine the basis for calculation of antidumping margins and the collection of antidumping duties and do not refer to the circumstances contemplated by the application of a country-wide rate based on adverse facts available.

15. Article 6, including paragraphs 6.8, and Appendix II of the Anti-Dumping Agreement because USDOC relied on adverse facts available for the calculation of the country-wide rate for entities not granted a "separate rate." In so doing, the USDOC failed to adhere to the provisions of the Agreement governing the use of adverse facts

available, as the presence of "state control" is not a relevant criteria for determining margins of dumping or the application of adverse facts available.

16. Article 9, including paragraph 9.4, of the Anti-Dumping Agreement because the USDOC has created a category of producers not contemplated in the Agreement. The Agreement permits an authority to calculate a rate for individually investigated producers, a rate based on facts available for individually investigated producers that do not cooperate, and a separate, "all others" rate calculated based on the weighted average margin of the individually investigated producers. The "country-wide" rate applied by USDOC does not adhere to these limitations.
17. Part I.2 of the Protocol of Accession of the Socialist Republic of Vietnam, WT/L/662, 15 November 2006 and Paragraphs 527, 254 and 255 of the Report of the Working Party on Accession of Vietnam, WT/ACC/VNM/48, 27 October 2006 because the terms of Vietnam's accession to the WTO do not permit the application of such a country-wide rate unless otherwise provided for under the Anti-Dumping Agreement.

Viet Nam also considers that USDOC's application of the above-mentioned laws and procedures in the original investigation and periodic reviews here at issue to be inconsistent with the following provisions of the *Anti-Dumping Agreement*, *GATT 1994*, and the *Marrakesh Agreement* for the same reasons set out above:

18. Article 18, including paragraphs 18.1, 18.3 and 18.4, of the Anti-Dumping Agreement and Article XVI:4 of the Marrakesh Agreement.
 19. Articles 1 and 2 of the GATT 1994.
- (c) Limiting the Number of Respondents Selected for Full Investigation or Review
- (i) *Summary of Facts*

The United States antidumping law requires as a general rule examination of each known producer or exporter of subject merchandise. Beyond this general rule, the USDOC has the authority to limit the investigation to a selected number of producers where investigation of all known producers or exporters is not practicable.

The USDOC has only investigated or reviewed the few largest exporters, with the exception of new shipper reviews, throughout the proceeding at-issue, limiting to a substantial degree the number of producers individually investigated or reviewed. In the original investigation, the USDOC investigated only four respondents out of thirty-eight potential respondents. The USDOC published a memorandum in conjunction with this decision, citing the impracticability of investigating all producers because of staffing concerns or budgetary constraints to justify the limited number of producers individually investigated. The USDOC similarly limited the respondents reviewed to the largest exporters in each of the subsequent administrative reviews, selecting for individual investigation in each instance a fraction of the companies seeking individual review.

Companies not selected for individual investigation or review because of the US authorities methodology have not been assigned their own antidumping rate, but instead receive either the "separate rate" or the country-wide rate. The USDOC in the proceedings at-issue have declined to calculate an individual rate even where companies not individually investigated have voluntarily submitted information so that USDOC may do so. The result is that companies not presently engaging in dumping have not had and do not have the opportunity to receive a dumping rate of zero or de minimis, because they never have the opportunity to be individually investigated. Thus, companies

not individually investigated, caused by USDOC's review of only the largest exporters, are not eligible for revocation of the dumping order on an individual basis. The USDOC will revoke an antidumping order where the exporter or producer has not engaged in dumping for three consecutive years and there is a likelihood that they will not do so in the future. Companies not individually investigated in these proceedings have no opportunity to establish three consecutive years of de minimis dumping rates and will be forced to continue to pay dumping rates even if they have not engaged in sales at less than fair value for more than three consecutive years. In addition, any final duties related to imports from these companies are, have been, or will be assessed duties in excess of the margin of dumping.

These methodologies are applied pursuant, in particular, to the following United States laws and measures:

20. Tariff Act of 1930, as amended, Section 777A(c)(2)(B);
21. Implementing regulation of the USDOC, 19 C.F.R. § 351.204.

(ii) *Legal Basis of Complaint*

Because the United States has acted in the manner just described, Viet Nam considers the proceedings to be inconsistent with certain WTO obligations. Viet Nam considers these actions to be inconsistent with Articles 6.10 and 11 of the *Anti-Dumping Agreement*, and Article 31 of the *Vienna Convention on the Law of Treaties*:

22. Article 6, including paragraph 6.10, of the Anti-Dumping Agreement because the USDOC has failed to determine an individual margin of dumping for each known exporter or producer, without proper justification, at each stage of the proceedings.
23. Article 6, including paragraph 6.10.2 of the Anti-Dumping Agreement because the USDOC has, without proper justification, refused to investigate respondents on the basis of information voluntarily submitted and has refused voluntary responses.
24. Article 9, including paragraph 9.4, of the Anti-Dumping Agreement because the USDOC has refused to apply individual duties or normal values to respondents that provided the necessary information during the course of the investigation and has applied duties to non-investigated respondents without any evidence of dumping by those non-investigated respondents.
25. Article 11.1 of the Anti-Dumping Agreement because the USDOC's method of selecting respondents requires anti-dumping duties to be imposed even in instances where the producer or exporter is not dumping, where that producer has not been individually selected for investigation. Part I.2 of the Protocol of Accession of the Socialist Republic of Vietnam, WT/L/662, 15 November 2006 and Paragraphs 527, 254 and 255 of the Report of the Working Party on Accession of Vietnam, WT/ACC/VNM/48, 27 October 2006 because the terms of Vietnam's accession to the WTO do not permit the application of such a country-wide rate unless otherwise provided for under the Anti-Dumping Agreement.
26. Article 31 of the Vienna Convention on the Law of Treaties because the USDOC's practice does not comport with the overall purpose and intent of the Anti-Dumping Agreement, namely, the fair and effective imposition of antidumping duties so as to prevent the sale of goods for less than fair value.

Viet Nam also considers that USDOC's application of the above-mentioned laws and procedures in the original investigation and periodic reviews here at issue to be inconsistent with the following provisions of the *Anti-Dumping Agreement*, *GATT 1994*, and the *Marrakesh Agreement* for the same reasons set out above:

27. Article 18, including paragraphs 18.1, 18.3 and 18.4, of the *Anti-Dumping Agreement* and Article XVI:4 of the *Marrakesh Agreement*.
28. Articles 1 and 2 of the *GATT 1994*.

(d) Sunset Review

The USDOC initiated a sunset review for these antidumping proceedings on 4 January 2010. Based on statutory time limitations and an exceptional situation in which the USDOC tolled all deadlines for seven days, the preliminary determination for the sunset review is presently due on 3 May 2010. Because of the circumstances described above with regard to the original investigation and the subsequent reviews, including USDOC's use of zeroing, the use of a country-wide rate, and the respondent selection methodology which prevented certain producers and exporters from having the opportunity to receive individual rates, the ongoing sunset review is inconsistent with the *Anti-Dumping Agreement*. Each of these practices has a substantial and possibly determinative impact on the USDOC's sunset review determination because of the effect on the dumping margins calculated during the administrative reviews. Accordingly, Viet Nam considers as a consequence of the inconsistencies set forth in Sections a-c above that the USDOC sunset review is inconsistent with Articles 11.2 and 11.3 of the *Agreement*.

3. Request

Viet Nam hereby respectfully requests that a panel be established, with the standard terms of reference, by the Dispute Settlement Body pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the *GATT 1994*, and Article 17.4 of the *Anti-Dumping Agreement*. Viet Nam requests that this panel be placed on the agenda of the meeting of the Dispute Settlement Body on 20 April 2010.
