



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

ARB-2015-2/29

Arbitration
under Article 21.3(c) of the
Understanding on Rules and Procedures
Governing the Settlement of Disputes

Award of the 027e14atioon4 uie

TABLE OF CONTENTS

1 INTRODUCTION	6
2 ARGUMENTS OF THE PARTIES	7
3 REASONABLE PERIOD OF TIME	7
3.1 Mandate of the arbitrator under Article 21.3(c) of the DSU	7
3.2 Measures to be brought into conformity	9
3.3 Factors affecting the determination of the reasonable period of time	12
3.3.1 Overview of the chosen means of implementation	12
3.3.2 Analysis	14
4 AWARD	23
ANNEX A Executive summary of the United States' submission.....	24
ANNEX B Executive summary of Viet Nam's submission.....	25

ABBREVIATIONS USED IN THIS AWARD

Abb	Def
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Appellate Body Report	Appellate Body Report, United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam , WT/DS429/AB/R and Corr.1
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes

US – Shrimp II (Viet Nam)

Panel Report,

WORLD TRADE ORGANIZATION
AWARD OF THE ARBITRATOR

**US Anti-Dumping
Measures on Certain
Shrimp from Viet Nam**

Parties:

Viet Nam
United States

ARB-2015-2/29

Arbitrator:

Simon Farbenbloom

1 INTRODUCTION

1.1. On 22 April 2015, the Dispute Settlement Body (DSB) adopted the Appellate Body Report¹ and the Panel Report², as upheld by the Appellate Body Report, in *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*.³ This dispute concerns Viet Nam's challenge of certain anti-dumping measures imposed by the United States in the context of the US anti-dumping proceedings in *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*⁴ (Shrimp), and of certain US laws, methodologies, and practices with respect to the imposition of anti-dumping duties.⁵ The Panel found the measures at issue to be inconsistent with several provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), as well as with Article VI:2 of the General Agreement on Tariffs and Trade 1994 (GATT 1994).⁶ Most of the Panel's findings were not subject to appeal. Viet Nam's appeal was limited to the issue of whether the Panel acted inconsistently with Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in finding that Viet Nam had not esta1.224(ta1.224watero.3(n))Tt(tentl)-6.7(y)4(wi)l)-64Tw9Ds7A 28st ta1.9

1.3. The United States and Viet Nam filed their written submissions, together with the executive summaries thereof, on 15 and 22 October 2015, respectively.¹² A hearing was held on 10 November 2015.

2 ARGUMENTS OF THE PARTIES

2.1. Annexes A and B to this Award contain the executive summaries of the parties' submissions. Details of the parties' arguments are further described, as appropriate, in my analysis set out in this Award.

3 REASONABLE PERIOD OF TIME

3.1. This section begins by setting out the mandate of the arbitrator under Article 21.3(c) of the DSU, as defined in the text of the DSU and outlined in past awards under Article 21.3(c). It then addresses the measures to be brought into conformity with the recommendations and rulings of the DSB, before considering the parties' arguments on what constitutes a reasonable period of time for implementation in this dispute.

3.1 Mandate of the arbitrator under Article 21.3(c) of the DSU

3.2. Article 21.3 of the DSU provides, in relevant part:

If it is impracticable to comply immediately with the recommendations and rulings [of the DSB], the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

...

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances. (fns omitted)

3.3. The mandate of an arbitrator under Article 21.3(c) is therefore to determine the time period within which the implementing Member must comply with the recommendations and rulings of the DSB in the dispute at issue.¹³ In making this determination, the means of implementation chosen by the Member concerned is a relevant consideration. As noted in past awards, "when a Member must comply cannot be determined in isolation from the means used for implementation."¹⁴ Therefore, in order "to determine when a Member must comply, it may be necessary to consider how a Member proposes to do so."¹⁵ Consistent with previous awards of arbitrators under Article 21.3(c), the implementing Member has a measure of discretion in choosing the means of implementation that it deems most appropriate. This discretion, however, "is not an 'unfettered' right to choose any method of implementation".¹⁶ Rather, it is relevant to consider, in particular, "whether the implementing action falls within the range of permissible actions that can be taken in order to implement the DSB recommendations and rulings".

implementation must be capable of bringing the

3.2 ~~Methodology~~

3.8. The dispute underlying this arbitration concerns Viet Nam's challenge of certain US laws, methodologies, and practices with respect to the imposition of anti-dumping duties, and certain actions and determinations by the US Department of Commerce (USDOC) in the anti-dumping proceedings on Shrimp

- b. the practice or policy whereby, in NME proceedings, the USDOC presumes that all producers/exporters in the NME country belong to a single, NME-wide entity and assigns a single rate to these producers/exporters is inconsistent "as such" with the United States' obligations under Articles 6.10 and 9.2 of the Anti-Dumping Agreement³⁴;
- c. the United States acted inconsistently with its obligations under Articles 6.10 and 9.2 of the Anti-Dumping Agreement as a result of the application by the USDOC, in the fourth,

- c. Viet Nam had failed to establish that the rate applied to the Viet Nam-wide entity in the fourth, fifth, and sixth administrative reviews is inconsistent with Article 6.8 and Annex II to the Anti-Dumping Agreement⁴²; and
- d. Viet Nam had failed to establish that Section 129(c)(1) of the URAA precludes implementation, with respect to prior unliquidated entries, of DSB recommendations and rulings. Therefore, the Panel found that Viet Nam had not established that

c.

3.20. The United States submits that, in Phase I⁶⁴, the United States will employ Section 123(g) to address the Panel's finding that the presumption that all producers and exporters in Viet Nam belong to a single, Viet Nam-wide entity is inconsistent with the Anti-Dumping Agreement.⁶⁵ Phase II⁶⁶ and Phase III⁶⁷ will both be conducted in accordance with Section 129(b) of the URAA. In Phase II, the United States will address the Panel's "as applied" findings regarding the NME-wide entity practice in the fourth, fifth, and sixth administrative reviews and the use of the

findings in the fourth, fifth, and sixth administrative reviews, it is logical that the implementation of the Panel's "as such" finding on the practice will need to be completed first. Furthermore, because the results of the Section 129 determinations on the administrative reviews may be considered for purposes of making a sunset review determination, it also seems logical to complete the implementation of the finding concerning the first sunset review in the last phase.

3.28. In addition, I note that there will be a degree of overlap between Phase I and Phase II of the implementation process proposed by the United States. As the United States confirms, the work on the implementation of the findings concerning the application of the simple zeroing methodology and Minh Phu's revocation request may take place concurrently with the work on the implementation of the "as such" finding concerning the NME-wide entity practice. Viet Nam's argument as to the degree of overlap that can be achieved will be further addressed in my analysis below.⁸²

3.3.2.2 ~~Text~~ Section 123(g) of the URAA

3.29. In order to implement the Panel's "as such" finding regarding the NME-wide entity practice, the United States intends to utilize the process set out in Section 123(g) of the URAA. Section 123(g) of the URAA reads:

(g) REQUIREMENTS FOR AGENCY ACTION.—

(1) CHANGES IN AGENCY REGULATIONS OR PRACTICE.—In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until—

(A) the appropriate congressional committees have been consulted under subsection (f);

(B) the Trade Representative has sought advice regarding the modification from relevant private sector advisory committees established under section 135 of the Trade Act of 1974 (19 U.S.C. 2155);

practice, and, as a result, the overall time frame for completing the Section 123(g) process. The analysis below addresses each of these points of contention in turn.

3.31. At the outset, the United States emphasizes that this is the first time the USDOC's NME-wide entity practice was found to be inconsistent "as such" with the WTO covered agreements. As a result, implementation will involve considerations of "novel and multifaceted issues" about the relationship between an NME Member government and producers/exporters from that Member.⁸⁵ The United States submits that, as the first step in the Section 123(g) process, Sections 123(g)(1)(A) and (B) require the USTR to consult with appropriate congressional committees and seek advice from relevant private sector advisory committees regarding the implementation of the Panel's "as such" finding. According to the US Case Calendar, the consultations and pre-commencement analysis stage takes two to three months. Thereafter, the United States estimates that the preparation for the preliminary determination proposing any modification to the NME-wide entity practice will take 7-8 months, until January 2016.⁸⁶ In response to questioning at the hearing, the United States confirmed that the USTR had been engaged in consultations with the US Congress, and that the preparatory work with a view to implementing the Panel's "as such" finding was still under way.

3.32. Viet Nam contends that the United States has "prolonged" implementation by failing to "promptly commence compliance ... and continue concrete steps towards implementation".⁸⁷ In response to questioning at the hearing, Viet Nam noted that the United States would have been aware of its potential obligation to implement the Panel's findings when it decided not to appeal the Panel's findings in January 2015. Thus, it would be reasonable to expect that the consultations required under Section 123(g) would have been completed upon, or shortly after, the adoption of

receive "hundreds of pages of comments from the public and will have to prepare a lengthy final Section 123 determination addressing these comments".⁹² The United States estimates that it will take the USDOC around two months to solicit and analyse such comments.

3.35. Viet Nam takes issue with the alleged complexity of the implementation of the "as such"

Section 123(g) process.¹⁰⁰ Finally, I note that the findings in the EC – Fasteners (China) dispute concerned a different measure taken by another WTO Member, and the implementation of those findings was conducted in a different legal system. I therefore do not find the alleged implementation period in EC – Fasteners (China) to be relevant to my determination of the reasonable period of time in the present dispute.

3.3.2.3 ~~Section 129(b) of the~~ URAA

3.39. As noted above, the United States plans to utilize Section 129(b) of the URAA to conduct Phase II and Phase III of its implementation process. In Phase II, The United States intends to implement the Panel's findings regarding the fourth, fifth, and sixth administrative reviews, including: (i) the use of the simple zeroing methodology to calculate the dumping margins of mandatory respondents in these reviews¹⁰¹; (ii) the application of the NME-wide entity practice and the assignment of a duty rate exceeding the ceiling applicable under Article 9.4 of the Anti-Dumping Agreement in these reviews¹⁰²; and (iii) the treatment of Minh Phu's revocation request in the fourth administrative review.¹⁰³

3.41. In addition, the United States notes that, pursuant to Section 129(d) of the URAA, the USDOC is required to provide interested parties with an opportunity to submit written comments before issuing a final determination.¹⁰⁵

Section 129 determinations, and the USDOC will issue a Federal Register notice in which it officially implements the final Section 129 determinations.¹¹³

3.45. Viet Nam maintains that Section 129(b)(2) of the URAA requires that the determination by the USDOC to implement the Panel's findings be made "within 180 days" from the USTR's request to the USDOC to take implementing actions.¹¹⁴ At the hearing, Viet Nam acknowledged that there

program, and no additional information is required for this process.¹²² With regard to Minh Phu's revocation request, Viet Nam maintains that, according to the relevant practice, the USDOC should "automatically revoke" the anti-dumping duty because Minh Phu has demonstrated the absence of any margins of dumping in three consecutive reviews.¹²³ As regards the sunset review, Viet Nam argues that the need for any new information is also "minimal".¹²⁴

3.49. As noted above, both parties agree that the United States will implement the Panel's "as such" finding regarding the NME-wide entity practice before implementing the Panel's "as applied" findings regarding this practice. I recall that the NME-wide entity practice concerns the USDOC's approach in addressing the relationship between the NME Member government and producers/exporters from that Member. It cannot be excluded that, following implementation of the "as such" finding, the USDOC may need to gather more information regarding individual producers/exporters from Viet Nam in the administrative reviews. I also note the United States' argument at the hearing that, pursuant to the applicable regulation¹²⁵, the USDOC must evaluate two other criteria in examining Minh Phu's revocation request in addition to the existence or absence of dumping in three consecutive reviews, and the need for additional information cannot be excluded. At the same time, once relevant additional information is gathered, it appears that changing the computer program for recalculating dumping margins might not necessarily be time-consuming in itself. Finally, I recall that there must be a balance between the transparency and due process rights of interested parties, on the one hand, and the promptness required in implementing recommendations and rulings of the DSB, on the other hand.¹²⁶

3.50. Third, regarding the degree of overlap among certain steps, Viet Nam argued at the hearing

constitute an exercise of flexibility available to the USDOC, which it would be expected to utilize.¹³² Similarly, I therefore do not find the workload claimed by the United States to be relevant to my determination of the reasonable period of time in this dispute.

4 AWARD

4.1. In the light of the foregoing considerations, the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this dispute is 15 months, from 22 April 2015, that is, from the date on which the DSB adopted the Panel and Appellate Body Reports in this dispute. The reasonable period of time will expire on 22 July 2016.

Signed in the original at Geneva this 27th day of November 2015 by:

Simon Farbenbloom
Arbitrator

¹³² Award of the Arbitrator, US – Countervailing Measures (China) (Article 21.3(c)), para. 3.49.

ANNEX A

EXECUTIVE SUMMARY OF THE UNITED STATES' SUBMISSION

1. At its meeting on April 22, 2015, the DSB adopted its recommendations and rulings in *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam* (DS429). Pursuant to Article 21.3 of the DSU, the United States informed the DSB on May 20, 2015, that it intends to comply with the DSB's recommendations and rulings and that it would need a reasonable period of time (RPT) to do so. The United States engaged in discussions with Vietnam in an effort to agree on the RPT, but the parties were unable to reach agreement.
2. The amount of time a Member requires for implementation of DSB recommendations and rulings depends on the particular facts and circumst

ANNEX B

EXECUTIVE SUMMARY OF VIET NAM'S SUBMISSION

WTO JURISPRUDENCE

1. Under Article 21.1 and 21.3(c) of the DSU implementation must be prompt. WTO jurisprudence has established that "prompt" mean the shortest time possible.
2. Only circumstances resulting from the legal system of the implementing Member and the