Final Results of Redetermination Pursuant to
Hiep Thanh Seafood Joint Stock Co. v. United States,
Consol. Court No. 09-00270, Slip Op. 11-74, (June 23, 2011)

I. SUMMARY

The U.S. Department of Commerce ("Department") has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade ("CIT" or the "Court") in *Hiep Thanh Seafood Joint Stock Co. v. United States,* Consol. Court No. 10-00125, Slip Op. 11-74, (June 23, 2011) ("*Hiep Thanh 2*"). This remand addresses the issue of whether certain sales should be included in Hiep Thanh Seafood Joint Stock Co.'s ("Hiep Thanh") U.S. sales database in the third new shipper review of the antidumping duty order of certain frozen fish fillets from the Socialist Republic of Vietnam ("Vietnam").[1] The Court remanded the issue providing the Department with the opportunity to further explain its decision to include these sales in Hiep Thanh's U.S. sales database.[2]

The Department no longer examines these disputed sales within the framework of the knowledge test. Instead, as explained below, the Department has determined that the sales were properly included in Hiep Thanh's U.S. sales database and included in the margin calculation as the sales constitute merchandise "to an unaffiliated purchaser for exportation to the United States." 19 U.S.C. § 1677a(a). The terms of the sale were such that the merchandise was to be exported to the United States. The sales invoices list the United States as a destination,[3] the sales terms indicate Hiep Thanh's transfer of title in the United States,[4] and Hiep Thanh itself shipped

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[1] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Third New Shipper Reviews*, 74 FR 29473 (June 22, 2009) and *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Amended Final Results of New Shipper Review* 74 FR 37188 (July 28, 2009) ("*Final Results*").
[2] *See Hiep Thanh 2* at 15.
[3] *See* Memorandum to David M. Genovese from James C. Doyle, "Request for U.S. Entry Documents – Certain Frozen Fish Fillets from the Socialist Republic of Vietnam A-552-801," dated October 22, 2008.
[4] *See* Hiep Thanh's May 21, 2008, questionnaire response at page 11 and U.S. sales database dated December 19, 2008.

the goods to the United States.[5] Second, record evidence demonstrates that the merchandise entered the United States for consumption as Type 3 entries and thus was not simply transiting through the United States but rather entered the commerce of the United States.[6] The Department therefore finds that these disputed sales constitute goods "for exportation to the United States" within the meaning of 19 U.S.C. § 1677a(a). Thus, the sales are appropriately included in Hiep Thanh's margin calculation. As a result of this final redetermination, the Department has not revised the dumping margin calculation for Hiep Thanh and its margin remains $0.35 per kg, for sales of certain frozen fish fillets during the August 1, 2007, through January 31, 2008, period of review ("POR").

II. ANALYSIS

A. Background

In the *Final Results*, the Department included in its calculation of Hiep Thanh's antidumping duty margin sales that U.S. Customs and Border Protection ("CBP") documents identified as having been entered as Type 3 entries for U.S. consumption, but which Hiep Thanh had not initially reported to the Department. These sales were made to an unaffiliated customer, Company Z,[7] who, as part of the sale, requested certain specified delivery terms to the United States,[8] with further transport of the goods to Mexico. However, prior to going on to Mexico, these goods were entered into the United States customs territory for consumption, and therefore, subject to AD/CVD duties.

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[5] *See* Memorandum to David M. Genovese from James C. Doyle, "Request for U.S. Entry Documents – Certain Frozen Fish Fillets from the Socialist Republic of Vietnam A-552-801," dated October 22, 2008.

[6] When merchandise reaches its destination, it is entered with an appropriate entry type code. Entry code 3 indicates that the goods are being entered for consumption and subject to antidumping/countervailing duties ("AD/CVD").

[7] *See* Certain Frozen Fish Fillets from the Socialist Republic of Vietnam- Second Remand for the New Shipper Review of Hiep Thanh Seafood Joint Stock Company: BPI Referenced in the Draft Results of Redetermination," dated concurrently with this draft remand redetermination ("BPI Memo").

[8] *See* Hiep Thanh's May 21, 2008, questionnaire response at page 11 and U.S. sales database dated December 19, 2008.

Hiep Thanh challenged the Department's determination to include these sales in the company's U.S. sales database for margin calculation purposes. Upon review of Hiep Thanh's challenge, on November 5, 2010, the Court issued a remand order to the Department to explain further its decision to include the disputed sales in Hiep Thanh's U.S. sales database.[9] On February 2, 2011, the Department issued its first redetermination pursuant to *Hiep Thanh*.[10] After reviewing the *First Remand Results*, the Court remanded for further explanation the Department's decision to include these sales in Hiep Thanh's margin calculation. Specifically, the Court ordered "that this action is remanded to Commerce to further explain its decision to include the disputed sales within Hiep Thanh's U.S. sales database . . ."[11] For the reasons explained in the analysis below, we are continuing to include these sales in Hiep Thanh's margin calculation.

B. The Knowledge Test Is Inapplicable

In *Hiep Thanh 2*, the Court states that this is a simple case hinging on what "exportation to the United States" means, and whether the sales in question constitute "exportation" within the meaning of the statute.[12] Furthermore, the Court states that the knowledge test is a framework that the Department has used in the past but one that may not be appropriate in the present case. The Court states further that the Department need not apply the knowledge test nor explain its application should the Department instead demonstrate that Hiep Thanh's delivery of subject merchandise to a U.S. port constitutes "exportation to the United States."[13]

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[9] *See Hiep Thanh Seafood Joint Stock Co. v. United States,* Consol. Court No. 09-00270, Slip Op. 10-125, (November 5, 2010) ("*Hiep Thanh* ").
[10] *See* Final Results of Redetermination Pursuant to *Hiep Thanh Seafood Joint Stock Co. v. United States*, Consol. Court No. 09-00270, Slip Op. 10-125, (November 5, 2009), dated February 2, 2011 ("*First Remand Results*").
[11] *See Hiep Thanh 2* at 15.
[12] *See Hiep Thanh 2* at 5 and 19 U.S.C. § 1677a(a).
[13] *See Hiep Thanh 2* at 8.

Upon reconsideration on remand, we determine that while the knowledge test is a framework that is of use in identifying the first party in a transaction chain with knowledge of U.S. destination where there are multiple entities involved in such chains prior to importation, the framework is one that does not fit the fact pattern in this case. In this case, prior to importation, there were only two entities involved in the sale of the subject merchandise, Hiep Thanh and the unaffiliated purchaser. As such, the Department determines that the disputed sales are in fact U.S. sales that belong in Hiep Thanh's margin calculation because Hiep Thanh made the sales for exportation to the United States, and they fall squarely within the purview of 19 U.S.C. § 1677a(a). Application of the knowledge test is neither necessary nor appropriate in these circumstances.

C. Reexamination of Record Evidence

The Department has reexamined the record evidence relating to these sales. Using the CBP entry packages provided in Memorandum to David M. Genovese from James C. Doyle, "Request for U.S. Entry Documents – Certain Frozen Fish Fillets from the Socialist Republic of Vietnam A-552-801," dated October 22, 2008, the Department is able to trace the sales and shipment process for individual containers of subject merchandise. The first document in the packages is the CF 7501 form. The CF 7501 form lists the entry number, which corresponds to the entry number listed in the Department's entry documents request from CBP. The CF 7501 also lists the invoice number, the Type 3 entry code, the importer number, port of entry code, and the intermediate transport ("I.T.") number. The next document is the CF 7512 form, a document that is created when merchandise is exported from the United States, which lists the *pedimentos* number (a term used for Mexican customs purposes) associated with this sale, the I.T. number, the entry number on the CF 7501 form, a second entry number for the CF 7512 form (different

from the one the Department used in requesting the entry documents), the listed final destination, port of entry code, and shipment container number. The next document is the commercial invoice, which lists the invoice number, the location of entry in the United States, the listed final destination of Mexico, the volume and value of the sale, and the shipment container number. The next document is the bill of lading, which lists the I.T. number, the second entry number, and the shipment container number. Finally, the consumption entry slip lists the value and importer number.[14]

Having reexamined the documents, the Department can now trace each sale by the shipment container number first listed on the commercial invoice from the factory in Vietnam, to the port of export in Vietnam, to the port of entry in the United States, to the location where it was entered for consumption.

C. The Disputed Sales Constitute Merchandise for Exportation to the United States

The Court suggested that the Department reexamine the sales, U.S. entry, and shipment documents on the record, in order to provide a summary of the sales at issue and how they would meet the Department's definition of exportation to the United States.[15] With respect to the question of what the definition of "exportation to the United States" is, the statute provides:

> Export price- The term 'export price' means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c) of this section.[16]

It is the phrase "to an unaffiliated purchaser for exportation to the United States" that is relevant to this case as the Department did not consider the purchaser to be "in the United States." The Department first notes that the statute contains no explanation of what constitutes "exportation to

[14] For a complete explanation of the proprietary data contained in these documents, *see* BPI Memo.
[15] *See Hiep Thanh 2* at 13-14.
[16] *See* 19 U.S.C. § 1677a(a).

the United States." Accordingly, it is within the Department's discretion to provide a reasonable interpretation of this phrase in the statute.[17] Within the context of the facts of this case, the Department interprets "exportation to the United States" to mean any sale to an unaffiliated party in which merchandise is to be delivered to a U.S. destination, regardless of whether any underlying paperwork may indicate possible subsequent export to a third country. We believe that if a sale is made for delivery of merchandise to the United States (and record evidence clearly indicates that the disputed sales were made as such), there is a significant potential for it to enter the U.S. market for consumption (as discussed below, the sales in question did, in fact, enter the United States for consumption). If the Department were not to take this approach, it would place certain respondents in a position to exclude U.S. sales from reporting requirements by claiming them as sales to be shipped through the United States when, in reality, the merchandise is entered for consumption and thus enters the commerce of the United States subject to antidumping duties.

While Hiep Thanh may have anticipated that the disputed sales were ultimately to be delivered to Mexico, via the United States, Hiep Thanh stated that these sales were made according to sales terms "X,"[18] indicating that the merchandise was delivered to the unaffiliated purchaser, Customer Z, at a U.S. destination, at which point transfer of title took place.[19] Another unaffiliated company, Company Y, acted as the U.S. importer of record.[20] These facts in their totality demonstrate that the merchandise was "for exportation to the United States" as the Department reasonably interprets the phrase under section 1677a(a) of the statute.

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[17] *See Hiep Thanh 2* at 14.
[18] *See* Hiep Thanh's May 21, 2008, questionnaire response at page 11 and U.S. sales database dated December 19, 2008, *see* also BPI memo.
[19] *See* BPI Memo.
[20] *See id.*

D. The Disputed Sales Entered the U.S. Market for Consumption

Record evidence shows that the merchandise pertaining to these sales entered under the Type 3 entry code,[21] meaning that it entered the United States for consumption and was subject to antidumping duties, *i.e.*, the goods entered the commerce of the United States. Once such goods enter the commerce of the United States, they compete with U.S. goods and thus, an entry for consumption must be the end of our analysis, regardless of any subsequent resale either within or outside of the United States. We note that several sales made by Hiep Thanh to the same customer via the same importer of record did not enter the commerce of the United States, *i.e.*, were not entered as Type 3 entries[22] and were therefore not included in the margin calculation.

III. COMMENTS FROM INTERESTED PARTIES

On September 9, 2011, the Department provided interested parties a copy of the draft remand redetermination. Comments to the draft remand redetermination were due on September 16, 2011, and only Hiep Thanh submitted comments.

COMMENT 1: Whether Hiep Thanh's Disputed Sales Should Be Considered U.S. Sales

Hiep Thanh

- Instead of applying the "knowledge test" to determine if the sales in question are in fact U.S. sales, the Department chose to include the sales by providing a definition of "exportation to the United States" which is the same as the statutory definition of "export price," as opposed to "constructed export price."

[21] *See* Memorandum to David M. Genovese, Director of AD/CVD/Revenue & Programs, Office of International Trade, from James C. Doyle, "Request for U.S. Entry Documents – Certain Frozen Fish Fillets from the Socialist Republic of Vietnam A-552-801," dated October 22, 2008.

[22] *See* Hiep Thanh's October 29, 2008, questionnaire response at Exhibit 3 attachments A and C.

- In reexamining the sales and shipment documents, the Department focused on the CF 7501 and CF 7512 documents, documents that were not created by Hiep Thanh. Instead, the Department should have been focusing on what Hiep Thanh knew or should have known at the time of the sale, rather than the fact that the sales were entered for consumption.
- Hiep Thanh sold to an unaffiliated Mexican purchaser, not to the United States. The fact that the product was physically shipped to the United States does not *ipso facto* mean that this is a U.S. sale.
- The Department's policy statement suggests that these entries, or future shipments that have similar fact patterns, would escape the imposition of AD duties is not true. The disputed sales had AD duties applied to them at the Vietnam-wide deposit rate. U.S. Treasury and U.S. AD laws are better served by treating the disputed sales as subject to Vietnam-wide AD rates, not the rate of Hiep Thanh.

Department's Position:

We disagree with Hiep Thanh, and find that treating the disputed sales as "U.S. sales" and including them in its margin calculation best satisfies the CIT's remand order. For the reasons discussed herein, the Department is complying with the Court's order in *Hiep Thanh 2* by providing a further explanation of its decision to include the disputed sales within Hiep Thanh's U.S. sales database.

Hiep Thanh argues that the appropriate analysis focuses on what Hiep Thanh knew and when it knew it, suggesting the Department apply the knowledge test in this instance.[23] In accordance with the Court's order, application of the "knowledge test" to determine whether the

[23] *See* Hiep Thanh's comments at 2.

disputed sales are Hiep Thanh's U.S. sales is not appropriate, because the sales are made directly from the Vietnamese exporter to an unaffiliated purchaser for exportation to the United States. Given the facts of this case, knowledge is not the issue. As the Court stated, "[n]one of the numerous cases involving Commerce's application of the knowledge test, though, provide much guidance here."[24] When discussing the possible application of the "knowledge test" to the particular facts of this case, the Court stated, "[a]dditional insight and analysis of the sales, however, may not be relevant if Hiep Thanh's delivery of subject merchandise to a U.S. port . . . constitutes 'exportation to the United States.'"[25] Accordingly, we are applying a different framework from the "knowledge test" that does not depend on Hiep Thanh's knowledge of the "ultimate destination" of the merchandise.

Instead, the focus of our analysis is whether the sales in question can be considered U.S. sales within the plain meaning of the statutory language. On pages 5-6, *supra*, the Department has, within the context of this case, defined what "exportation to the United States" means, citing to the statutory definition of an export price transaction. As noted above, the disputed sales were for delivery to a U.S. destination, at which point transfer of title occurred. This constitutes "for exportation to the United States." The goods were subsequently entered as Type 3 entries for consumption—thereby entering the commerce of the United States and competing with U.S. origin merchandise. The totality of the facts thus demonstrates that the sales in question constitute U.S. sales made by Hiep Thanh to an unaffiliated purchaser for exportation to the United States, and that they were properly included in Hiep Thanh's U.S. sales database for the margin calculation.

[24] *See Hiep Thanh 2* at 14.
[25] *See Hiep Thanh 2* at 8.

We agree that the mere fact that a sale is shipped to the United States is not *ipso facto* the respondent's sale. The knowledge test may be relevant when multiple entities are involved prior to importation. For example, if a respondent sells to an unaffiliated party outside of the United States, the terms of sale do not indicate the merchandise is to be shipped to the United States, and the respondent does not otherwise know that the merchandise is destined for the United States, then it would not be the respondent's sale for exportation to the United States, even if the unaffiliated purchaser ultimately ships the merchandise to the United States. However, if under the same chain of distribution (respondent sells to an unaffiliated purchase outside the United States), and the terms of sale are for exportation to the United States, then pursuant to the statute, the sale would be a U.S. sale of the respondent.

With respect to Hiep Thanh's argument regarding the policy statement provided in *Hiep Thanh 1*, we disagree that the appropriate course of action would be to treat the disputed sales, and other future sales that follow a similar fact pattern, as subject to the Vietnam-wide rate rather than that of Hiep Thanh. What is at issue is not whether CBP can collect AD duties at the highest possible rate, but that the sales are attributed to the appropriate entity for purposes of calculating an accurate antidumping duty margin for such entries.

IV. FINAL REMAND CONCLUSION

The Court remanded to the Department to further explain its decision to include the disputed sales within Hiep Thanh's U.S. sales database. Pursuant to the Court's order and consideration of the comments received, we have chosen and supported, with substantial evidence, that the disputed sales are in fact Hiep Thanh's U.S. sales and are properly included in the margin calculation. Therefore, the Department has not removed the disputed sales from Hiep

Thanh's margin calculation and its AD rate remains unchanged $0.35 per kg, for sales of certain frozen fish fillets during the August 1, 2007, through January 31, 2008 POR.

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

September 30, 2011
Date