

**Final Results of Redetermination Pursuant to
East Sea Seafoods LLC (“ESS LLC”) v. United States and
Catfish Farmers of America (“CFA”),
Consol. Court No. 10-00102, Slip Op. 10-42 (April 19, 2010)**

I. SUMMARY

The U.S. Department of Commerce (the “Department” or “Commerce”) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (the “Court”) in *ESS LLC v. United States and CFA*, Consol. Court No. 10-00102, Slip Op. 10-42 (April 19, 2010) (“*ESS v. USA*”) (“*Remand Order*”). On remand, the Court directed the Department to: (1) “consider all evidence in the administrative record pertaining to ESS LLC’s *de jure* and *de facto* independence from the Vietnamese government, and make a finding as to whether ESS LLC has rebutted the presumption of government control; (2) if Commerce finds that ESS LLC is independent of the control of the Vietnamese government, it must assign to ESS LLC a cash deposit rate separate from the Vietnam-wide entity rate that is supported by substantial evidence and is otherwise in accordance with law; (3) if Commerce finds that ESS LLC is not independent of the control of the Vietnamese government based on the evidence on the record, it must explain why the presumption has not been rebutted, and it must explain why the evidence cited in the *Preliminary Results*¹ that was sufficient to establish ESS JVC’s independence from the Vietnamese government is insufficient to establish that ESS LLC is independent of the Vietnamese government; and (4) that Commerce must either provide a reasoned explanation, supported by evidence in the record, for why it should treat entries made by ESS JVC, after the effective date of the name change, as entries made by ESS LLC, or alternatively shall find that all entries made by ESS JVC are given the rate of \$0.02 per kilogram assigned to ESS JVC in the

¹ See *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results of the New Shipper Reviews and Fifth Antidumping Duty Administrative Review*, 74 FR 45805 (September 4, 2009) (“*Preliminary Results*”).

Final Results.” *See ESS v. USA*, at 47-48.

This remand addresses ESS LLC’s separate rates status in the fifth administrative review of the antidumping duty order on certain frozen fish fillets from the Socialist Republic of Vietnam. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final of Administrative Review and New Shipper Reviews*, 75 FR 12725 (March 17, 2010) (“*Final Results*”) and *accompanying Issues and Decision Memorandum* (“*Decision Memorandum*”).

In accordance with the Court’s instructions, and as explained in further detail below, we have determined that based on the evidence on the record, ESS LLC is not entitled to a separate rate. As this Court has found and the plaintiff has argued, ESS LLC has no entries during the fifth administrative review period. Therefore, the record contains no information on ESS LLC’s trading activity. As the Federal Circuit held in *Allegheny Ludlum Corp., et al. v. United States*, 346 F.3d 1368 (Fed. Cir. 2003)(“*Allegheny*”), Commerce is not required to review companies which have no entries during the period of review. “[W]e hold lawful, Commerce’s regulatory policy of rescinding annual reviews and hence not updating cash deposit rates where there are no entries during the period of review . . .” *See Allegheny* 346 F.3d at 1374. Specifically, because ESS LLC had no entries during the period of review, there is no ESS LLC export activity upon which to examine ESS LLC’s trading activity to support or make a determination that ESS LLC is *de facto* independent from the Vietnamese government. To do an analysis in the absence of entries would create a new procedure and party status under which the Department would have to issue advisory opinions on issues, such as separate rates, unsupported by any actual trading activity on the part of the requesting company.² As a result, the Department has not revised the

² An examination of the period of review (“POR”) U.S. Customs and Border Protection (“CBP”) data the Department placed on the record for respondent selection purposes shows that from June of 2008, when the name changed to ESS LLC, through the balance of the fifth POR, no entries of subject merchandise have entered under ESS LLC’s name. For entry data from the sixth POR, please *see* the administrative remand record – “Memorandum to the File from Alan

cash deposit rate for ESS LLC of \$2.11 per kilogram assigned to it in the *Final Results* for the August 1, 2007, through July 31, 2008, POR. However, after reconsidering the evidence on the record for ESS JVC, we have determined to assign the \$0.02 per kilogram rate to ESS JVC for the period of June 17, 2008 through July 31, 2008, the last 45 days of the POR, which we previously determined in the *Final Results* were subject to the \$2.11 per kilogram rate. Accordingly, the Department will issue revised instructions to CBP once this decision is final and conclusive and the preliminary injunction currently in place for the June 17, 2008, through July 31, 2008, period is lifted.

II. ANALYSIS

A. **ESS LLC HAD NO POR ENTRIES INTO THE UNITED STATES AND AS SUCH IS NOT ENTITLED TO A REVIEW ON ANY ISSUES, INCLUDING SEPARATE RATES.**

As ESS LLC has argued and this Court has found, all of the entries during the fifth administrative review were entries of ESS JVC. *See* Remand Order at 43-45. The impact of this determination on this proceeding is that because all entries during the review period were those of ESS JVC, ESS LLC had no entries. The Federal Circuit has held that Commerce is not required to conduct administrative reviews and change cash deposit rates for companies which have no entries during the period of review (“POR”). *See Allegheny* 346 F.3d at 1374. The Federal Circuit explained that Commerce’s policy of only conducting reviews of companies with entries is in accordance with law because the statute provides that for all administrative reviews, Commerce review “each entry.” *See* section 751(a)(2)(A)(i) and (ii) of the Tariff Act of 1930, as amended (“the Act”); *Allegheny* 346 F.3d at 1371.

Ray through Alex Villanueva, Program Manager, Regarding CBP Data Run From the sixth administrative review, April 27, 2010”.

Without an entry, there is no basis upon which to gauge a company's trading activity during the POR. To conduct such a review would be to issue advisory opinions on issues, including separate rates, without any evidence of the company's actual business practices during the POR. In essence, there would be no substantial record evidence to support any determination with regard to the way the company is run and its actual POR trading practices with the United State. Therefore, because ESS LLC has no entries during the POR, there is no factual basis upon which to make a determination whether, with regard to export activities to the United States, ESS LLC is not acting at the direction of the Vietnamese government.

Moreover, in addition to the lack of any evidence of trading activity, to require Commerce to resolve issues in a review for companies with no entries, would create an entirely new type of proceeding, a review without entries, and grant a new type of respondent status in a review, a company with no entries which is entitled to have a review. This simply is not contemplated by the antidumping duty statutory scheme or even the general principles of administrative law.

On page 39 of the Remand Order, the Court cites to a CAFC decision in *Transcom, Inc. and L&S Bearing Co. v. United States*, 182 F.3d 876 (Fed. Cir. 1999) ("*Transcom*"), for the general proposition that the Department must provide any interested party with the opportunity to rebut the presumption that they are not part of the non-market economy ("NME") government. *See Remand Order*, at 39. However, that case does not stand for that general proposition. *Transcom* stands for the proposition that if the Department reviews the NME entity in a review, the Department is required to give notice in the initiation notice to parties that the NME entity rate might change so that they have the opportunity to participate in the review including making separate rate claims. Since that case, the Department has included in all of its initiation notices concerning NME countries, including the initiation notice for the fifth review on certain frozen

fish fillets from Vietnam, that if the NME entity were reviewed, parties are on notice that the NME entity rate may change.³ In the review at issue, the Department gave the notice required by the Federal Circuit in *Transcom*. Moreover, in the review at issue, the Department did not review the NME entity. Therefore, the issue decided in *Transcom*, does not apply to this case.

Based on the foregoing, Commerce's redetermination on remand is that ESS LLC is not entitled to a separate rate because, as the Court has found and the plaintiff has claimed, that the new company, ESS LLC, had no entries during the POR and as such there is no substantial evidence on the record of ESS LLC's POR trading activities to the United States upon which to base a separate rate determination. However, as noted above the Court ordered the Department to "consider all evidence in the administrative record pertaining to ESS LLC's *de jure* and *de facto* independence from the Vietnamese government, and make a finding as to whether ESS LLC has rebutted the presumption of government control". See *ESS LLC v. USA*, at 47. Therefore, in order to comply with the Court's order, as explained below, Commerce analyzed the record evidence with regard to ESS LLC.

B. BECAUSE THERE IS NO SUBSTANTIAL EVIDENCE ON THE RECORD OF THE FIFTH POR CONCERNING ESS LLC'S BUSINESS AND TRADE PRACTICES WITH THE UNITED STATES. ESS LLC IS NOT ENTITLED TO A SEPARATE RATE IN THIS ADMINISTRATIVE REVIEW.

i. Legal Framework

In a NME antidumping duty proceeding, the Department presumes that all companies within the NME country, are subject to government control and should be assigned a single antidumping duty rate unless an exporter demonstrates the absence of both *de jure* and *de facto* governmental control over its export activities. See e.g., *Final Determination of Sales at Less*

³ See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 73 FR 56795 (September 30, 2008).

Than Fair Value: Bicycles from the People's Republic of China, 61 FR 19026, 19027 (April 30, 1996). In the less-than-fair-value antidumping duty investigation on certain frozen fish fillets, the Department designated the Socialist Republic of Vietnam an NME country and this determination remains in effect until revoked by the Department. See section 771(18)(C) of the Act. To establish whether a firm is sufficiently independent from government control in its export activities to be eligible for separate rate status, (e.g., a rate that is separate from the NME-wide entity rate), the Department analyzes each company using a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991), as modified in the *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585, 22587 (May 2, 1994). Using this test, the Department may assign a particular company a separate rate if the exporter can demonstrate the absence of both *de jure* and *de facto* government control over its export activities. See *Silicon Carbide and Final Determination of Sales at Less Than Fair Value: Furfural Alcohol from the People's Republic of China*, 60 FR 33655, 22545 (May 8, 1995).

Absence of *De Jure* Control: The Department considers the following *de jure* criteria in determining whether an individual company may qualify for a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies.

Absence of *De Facto* Control: The Department considers the following four factors in evaluating whether a company is subject to *de facto* government control of its export functions: (1) sets its own export prices independent of the government and other exporters; (2) retains the proceeds from its export sales and makes independent decisions regarding the disposition of

profits or financing of losses; (3) has the authority to negotiate and sign contracts and other agreements; and (4) has autonomy from the government regarding the selection of management.

In order to request and qualify for separate rate status a company must have exported the subject merchandise to the United States during the relevant proceeding.

ii. Information submitted by ESS LLC

On August 1, 2008, the Department published a notice of an opportunity to request an administrative review of the order. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity To Request Administrative Review*, 73 FR 44966 (August 1, 2008). On September 30, 2008, the Department initiated an antidumping duty administrative review on frozen fish fillets from the Socialist Republic of Vietnam covering 20 companies. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part (“Initiation Notice”)*, 73 FR 56795 (September 30, 2008). Included in the *Initiation Notice* was the initiation of the administrative review for ESS JVC, not ESS LLC. *Id.* Approximately two weeks later, ESS JVC requested to be a mandatory respondent, explaining that it was one of the largest exporters of the subject merchandise during the POR, but there was no request that ESS LLC be a mandatory respondent. On October 31, 2008, ESS LLC, which had not been accorded a prior separate rate, submitted a separate rates certification even though, the instructions on the certification form clearly stated in the very first line that “firms that do not currently hold a separate rate may not use this Certification and must instead submit an Application for separate rate”. *See* ESS LLC October 31, 2008, separate rate certification at 3.

On November 28, 2008, ESS LLC submitted a voluntary section A questionnaire response, claiming that it, ESS LLC, should be considered a “voluntary respondent.” Throughout this request, ESS LLC refers to itself as merely “East Sea,” except when explaining the reason for the

change in name from ESS JVC to ESS LLC. *See* ESS LLC’s November 24, 2008 Submission at 5-6. This request also states summarily that no additional changes resulted from the name change and does not acknowledge the differences between the company as it operated in the third review – the last time it received a separate rate – and as it operated during this review. *Id.* On March 23, 2009, East Sea LLC submitted a “clarification,” explaining that its separate rate certification was filed by a different company *on behalf of the previous company*. *See* ESS LLC’s March 23, 2009 Submission, at 1. Moreover, ESS LLC stated, “we are providing amended pages for that certification to clarify that the separate rates certification involved East Sea JVC, now known as East Sea LLC.” *Id.*

On September 4, 2009, Commerce issued the *Preliminary Results*, in which it granted ESS JVC a separate rate, noting that the separate rate certification was not valid due to the name change and instead relying upon ESS LLC’s section A questionnaire response. *See Preliminary Results*, at 45810. The Department relied on the voluntary Section A response for purposes of establishing the separate rate for ESS JVC, not ESS LLC.

The Court, on page 16 of its Remand Order, states that there is no evidence that Commerce rejected ESS LLC’s submission of the section A response submitted by ESS LLC on its own behalf and eventually ESS JVC’s behalf, as if Commerce had the option of rejecting it. However, at the time of the *Preliminary Results*, the Department had no basis upon which to reject any submissions by ESS LLC, because they were claiming they were the same company as ESS JVC. Commerce first had to do the complete analysis of the submitted data and requested additional data to determine for the *Final Results*, that ESS LLC was not the successor in interest to ESS JVC. It would have been premature for the Department to begin rejecting timely filed submissions without soliciting the proper information on the successorship issue and conducting the analysis.

iii. ESS LLC's De Jure and De Facto Evidence on the Record

First, we note that ESS LLC's voluntary Section A response contains the following items:

- A1: Quantity and Value of Sales from Piazza Seafood World LLC⁴ to U.S. Customers;
- A2: East Sea Seafoods Equity Transfer Documents
- A3: Investment Certificate for ESS Equity Holder;
- A4: Vietnam Commercial Law;
- A5: Enterprise Law of Vietnam;
- A6: Law on Investment of Vietnam;
- A7: Decree Providing Guidelines for Implementation of a Number of Articles of Law on Investment;
- A8: Chart of Joint Venture Enterprise Between PSF and a certain entity for ESS JVC;
- A9: Joint Venture Contract Between PSF and a certain entity for ESS JVC;
- A10: Permit to Operate ESS JVC;
- A11: Decree No 101/2006/ND-C – re-registration of foreign owned companies;
- A12: Investment Certificate – ESS JCV to ESS LLC (June 17, 2008)
- A13: Investment Certificate – ESS JCV to ESS LLC (August 26, 2008) Revision
- A14: Investment Certificate – ESS JCV to ESS LLC (September 25, 2008) Revision
- A15: ESS LLC Organization Chart
- A16: Sales Documents (Sales Contract, Invoice and Entry Documents for Sales Made by PSW to a certain entity)
- A17: PSW Price List
- A18: Application for Registration of Issuance of Investment License for ESS JVC
- A19: 2006 and 2007 U.S. Tax Returns for PSW
- A20: Fiscal Year 2007 ESS JVC Chart of Accounts and Financial Summary Sheets
- A21: PSW Sales Brochure

We have analyzed the above data using the *de jure* standards:

De Jure: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses, (2) any legislative enactments decentralizing control of companies, and (3) any other formal measures by the government decentralizing control of companies.

After reviewing the data submitted by ESS LLC in the voluntary Section A response, we find that there is sufficient evidence for ESS LLC to support a finding of *de jure* absence of government control over its export activities. The evidence submitted by ESS LLC includes government laws and regulations on corporate ownership, business registration certificates, and

⁴ Piazza Seafood World LLC ("PSW") is the affiliated U.S. importer and part owner of ESS JVC and the later, ESS LLC.

narrative information regarding its legal operations.

We have also analyzed the above data using the *de facto* standards:

De Facto: (1) sets its own export prices independent of the government and other exporters; (2) retains the proceeds from its export sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) has the authority to negotiate and sign contracts and other agreements; and (4) has autonomy from the government regarding the selection of management.

As noted above, in order to request and qualify for separate rate status a company must have exported the subject merchandise to the United States during the relevant antidumping proceeding. This is especially necessary when considering the *de facto* criteria because unlike *de jure*, which is more focused on the country-wide laws and regulations governing the establishment of companies, the *de facto* criteria require an examination of a company's exporting activities in relation to government control.

In this case, there is no evidence that ESS LLC exported merchandise to the United States during the POR. In ESS LLC's voluntary Section A response at exhibit A16, ESS LLC provided a number of sales documents⁵ which are consistent with the CBP data, which demonstrate that ESS LLC did not have any sales into the United States during the POR. In fact, the entry documentation, which is the only document identifying a Vietnamese entity, lists the ACS Module Suffix⁶ for ESS JVC. Therefore, without proper sales information (*e.g.*, sales negotiation documents, contracts, invoices, payment documentation, entry documents, etc.) regarding ESS LLC's export activities during the POR, there exists no record evidence of any ESS LLC's export

⁵ See Section A Questionnaire Response, dated November 25, 2008.

⁶ The ACS Module Suffix is a 10 figure identifier used by Import Administration and CBP that is assigned to companies with separate rate status which is used by both agencies when relaying information regarding antidumping duties. This is also used by importers of subject merchandise to identify the proper exporting entity and rate that is to be used in the U.S. import entry forms.

activities to analyze in order to determine the absence of *de facto* Vietnamese government control.

The Department's 2005 policy bulletin on separate rates practice available on the Import Administration website clearly states that an export is necessary for a company to request and qualify for a separate rate: "in order to qualify for separate rate status in an investigation, a company must have exported the subject merchandise to the United States during the period of investigation". See (<http://ia.ita.doc.gov/policy/bull05-1.pdf>); *Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China*, 69 FR 67313 (November 17, 2004) and *accompanying Issues and Decision Memorandum* at Comment 72 ("as a preliminary matter, we have determined that, because Shanghai Ideal did not ship merchandise to the United States during the POI, we have not granted it a Section A rate⁷"); *Preliminary Determination of Sales at Less Than Fair Value: Steel Wire Garment Hangers from the People's Republic of China*, 73 FR 15726 (March 25, 2008) (unchanged in final) ("Accordingly, non-exporting NME producers of the merchandise under consideration are not eligible for examination as respondents"); *Final Determination of Sales at Less Than Fair Value: Steel Wire Garment Hangers from the People's Republic of China*, 73 FR 47587 (August 14, 2008) and *accompanying Issues and Decision Memorandum*; *Preliminary Determination of Sales at Less Than Fair Value: Certain Steel Threaded Rod from the People's Republic of China*, 73 FR 58931 (October 8, 2008) ("Brother Fastener had no sales of subject merchandise to unaffiliated purchasers during the POI, we preliminary determine that Brother Fastener is not eligible for a separate rate").

Although the policy bulletin refers to the practice in an antidumping duty investigation, the Department has extended this practice to administrative reviews where it is unsatisfied that a sale

⁷ In the past, the Department referred to what we now call a separate rate as a Section A rate.

was made during the POR, which must include evidence of payment for the sale. *See Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 FR 29303 (May 22, 2006) and accompanying *Issues and Decision Memorandum* at Comment 12; *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 FR 11349 (March 17, 2009) and accompanying *Issues and Decision Memorandum* at Comment 7.

Moreover, the CBP import data during the POR placed on the record of this proceeding and provided to parties on October 7, 2008, confirms that the fillets that entered during the POR came from ESS JVC, not ESS LLC. As a result, the Department cannot properly examine the *de facto* criteria absent evidence of sales as it is impossible to determine whether the Vietnamese government controls ESS LLC's: (1) export activities; (2) distribution of profits; (3) ability to sign and negotiate contracts freely; and (4) select its own management. This is further underscored by the fact that, as explained above, the Federal Circuit has affirmed the Department's practice that a company cannot be under review without having an entry during the POR. *See Allegheny Ludlum Corp., et al., v. United States*, 346 F. 3d. 1368 (Fed Circ. 2003). Therefore, in order for the Department to properly consider assigning a separate rate to ESS LLC, the record must contain evidence that ESS LLC made an entry during the POR.⁸ Once ESS LLC has an entry, the standard procedure is that it can request a review and obtain a separate rate if the facts surrounding its sale support a separate rate determination. In fact, ESS LLC is currently participating in the 6th administrative review.

⁸ We also note that ESS LLC was not subject to this administrative review because neither ESS LLC, nor any other party requested an administrative review of ESS LLC by the appropriate deadline.

Finally, the Department will address the language on pages 42 and 43 of the Remand Order concerning the effect of the name change. As the Department explained in its briefs to the Court, changes in business structures usually do not take place all at one time. However, the Department has to make a determination as to what companies exist and in what form at a certain date in order to be able to effectively administer the antidumping duty order. The Department's general practice is to use the date of the name change unless parties argue persuasively that it should be a different date. Plaintiff has not challenged the Department's selection of the date of the name change and this Court has sustained the Department's determination that ESS LLC is not the successor-in-interest to ESS JVC. As a result, the Department properly treats activities before the date of the name change as activities of ESS JVC and would treat activities after that date to be ESS LLC, if ESS LLC in fact had any entries.⁹ It is unclear whether the Court is suggesting that the Department must use ESS JVC trading activity information as if it were ESS LLC's trading activity. Of course using ESS JVC's data would result in a separate rate for ESS LLC. However, it would be inappropriate to use ESS JVC's trading activity for ESS LLC as this Court has sustained the Department's finding that ESS LLC is not a successor-in-interest to ESS JVC and because ESS LLC has no entries during the POR it cannot be assigned a rate based on another company's trading activity.

Due to the lack of any trading activity by ESS LLC during the POR, there is no evidence upon which to make a determination that ESS LLC is in fact separate from the Vietnamese government. As a result, ESS LLC has not rebutted the presumption of government control and we continue to find ESS LLC to be properly part of the NME entity and thus must pay the NME

⁹ As we noted in footnote 2 above, POR CBP data shows that even after the date that ESS JVC was required to change its name two years ago entries continue to enter under only ESS JVC during the POR. Again, for the entry data during the sixth administrative review, please *see* the administrative record – “Memorandum to the File from Alan Ray through Alex Villanueva, Program Manager, Regarding CBP Data Run From the sixth administrative review”.

entity rate of \$2.11/kilogram.

III. RATE FOR ESS JVC DURING JUNE 17, 2008 THROUGH JULY 31, 2008

In the *Final Results*, the Department found that as of the effective date of the change in name from ESS JVC to ESS LLC, June 17, 2008, ESS JVC ceased to exist. *See Final Results* at Comment 7. As a result, we determined that any entries from ESS JVC would be liquidated at \$2.11 per kilogram as these entries could not have been made by ESS JVC. However, after reviewing the evidence on the record, it is clear that even after June 17, 2008, ESS JVC made the sales of subject merchandise as evidenced by the sales documents in exhibit A16 of ESS LLC's voluntary Section A response. Moreover, as noted above, the POR import data from CBP clearly show that all entries during these last 45 days of the POR were made by ESS JVC. Therefore, we now find that during June 17, 2008, through July 31, 2008, ESS JVC had entries to the United States during the POR and which will be assessed at \$0.02 per kilogram. The Department will issue revised instructions to CBP once this decision is final and conclusive and the preliminary injunction currently in place for the June 17, 2008 through July 31, 2008 period is lifted. As this Court has found in *Yancheng Boalong Biochemical Products Company LTD., v. United States*, 277 F.Supp. 2d 1349 (Ct. In'l Trade, 2003), which was affirmed by the Federal Circuit in *Yancheng Boalong Biochemical Products Company LTD., v. United States*, 406 F.3d 1377 (Fed. Cir. 2005), the CIT injunction lasts through all appeals until the case is final and conclusive. We note, however, that any subsequent entries during the current sixth administrative review are subject to the administrative process of that segment for which this Court currently has no jurisdiction.

IV. FINAL REMAND CONCLUSION

In accordance with the Court's instructions, and as explained in further detail below, we have determined that based on the evidence on the record, ESS LLC is not entitled to a separate

rate because it did not have any export activity into the United States or entries into the United States during the period of review. Moreover, the Court ordered analysis of the record data with regard to ESS LLC also supports a determination that while ESS LLC may have passed the *de jure* section of the separate rates test, due to ESS LLC's failure to provide any record evidence concerning any POR export activity into the United States, ESS LLC has not and indeed cannot demonstrate that it is separate from the Vietnamese government until it has trading activity of its own and entries for the Department to review. As a result, the Department has not revised the cash deposit rate for ESS LLC of \$2.11 per kilogram applicable to it as part of the Vietnam-wide entity in the Final Results for the August 1, 2007 through July 31, 2008, POR. However, after reconsidering the evidence on the record for ESS JVC, we have determined to assign the \$0.02 per kilogram rate to ESS JVC for the period of June 17, 2008 through July 31, 2008, the last 45 days of the POR, which we previously determined in the *Final Results* were subject to the \$2.11 per kilogram rate. Accordingly, the Department will issue revised instructions to CBP once this decision is final and conclusive and the preliminary injunction currently in place for the June 17, 2008 through July 31, 2008 period is lifted.

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date