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

Report of the Panel

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Canada – Dairy (Article 21.5 – New Zealand and US II)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, 213
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China – Audiovisual Products	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R
EC – Bananas III (Guatemala and Honduras)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 695
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R, circulated to WTO Members 3 December 2010 [adoption/appeal pending]
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
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Thailand – Cigarettes (Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, circulated to WTO Members 15 November 2010 [adoption/appeal pending]
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US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
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US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
US – Orange Juice (Brazil)	Panel Report, *United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/R, circulated on 25 March 2011 [adoption/appeal pending]
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007, DSR 2007:II, 425
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
US – Softwood Lumber V (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, 5087
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, 513
US – Stainless Steel (Mexico)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R, DSR 2008:II, 599
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417

Short Title	Full Case Title and Citation
US – Zeroing (EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, 521
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009
US – Zeroing (EC) (Article 21.5 – EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, 3
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R, DSR 2007:I, 97
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009

I. INTRODUCTION

A. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.1 On 1 February 2010, Viet Nam requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement") with regard to determinations in the U.S. anti-dumping proceedings on *Certain Frozen Warmwater Shrimp from Vietnam* (hereafter "*Shrimp*"), and certain related actions, laws, regulations, administrative procedures, practices and methodologies of the United States.[1]

1.2 On 7 April 2010, Viet Nam requested, pursuant to Article XXIII:1 of the GATT 1994, Articles 4 and 6 of the DSU, and Article 17.4 of the Anti-Dumping Agreement, that the Dispute Settlement Body ("DSB") establish a panel.[2]

1.3 At its meeting on 18 May 2010, the DSB established a panel in accordance with Article 6 of the DSU to examine the matter referred to the DSB by Viet Nam in document WT/DS404/5.

1.4 The Panel's terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Viet Nam in document WT/DS404/5 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 On 14 July 2010, Viet Nam requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.6 On 26 July 2010, the Director-General accordingly composed the Panel as follows[3]:

Chairman: Mr. Mohammad Saeed

Members: Ms Deborah Milstein
Mr. Iain Sandford

[1] WT/DS404/1. See Annex G-1.
[2] WT/DS404/5. See Annex G-2.
[3] WT/DS404/6.

1.7 China, the European Union, India, Japan, Korea, Mexico and Thailand reserved their rights to participate in the Panel proceedings as third parties.

B. PANEL PROCEEDINGS

1.8 Following consultation with the parties, the Panel adopted its working procedures (including additional procedures for the protection of business confidential information) and timetable on 20 August 2010.

1.9 On 13 September 2010, as part of its first written submission, the United States submitted requests for preliminary rulings. In its requests, the United States argued that certain of the measures challenged by Viet Nam are outside the terms of reference of this Panel, are not subject to the Anti-Dumping Agreement, and/or are not subject to WTO dispute settlement because they purport to include future measures. The Panel's rulings on these requests are set forth in its findings below.

1.10 The Panel met with the parties on 20, 21 October and on 14, 15 December 2010. It met with the third parties on 21 October 2010. The Panel issued its Interim Report to the parties on 7 April 2011. The Panel issued its Final Report to the parties on 19 May 2011.

II. FACTUAL ASPECTS

2.1 The present dispute concerns the imposition of anti-dumping ("AD") duties in the U.S. proceedings on *Shrimp*. The U.S. Department of Commerce ("USDOC") initiated the original investigation in January 2004, issued an anti-dumping duty order in February 2005, and has since undertaken periodic reviews and a sunset review.

2.2 Specifically, Viet Nam makes claims with respect to the USDOC's final determinations in the second and third administrative reviews under the *Shrimp* anti-dumping order, and with respect to the "continued use", by the USDOC, of certain practices in successive proceedings under the same order.[4] The "practices" challenged by Viet Nam are the following[5]:

(a) The USDOC's use of zeroing in the calculation of dumping margins;

(b) The application of a "country-wide rate" based on adverse facts available to certain Vietnamese exporters or producers that could not establish that they act independently from the Vietnamese Government in their commercial and sales operations;

(c) The USDOC's limitation of the number of exporters or producers selected for individual investigation or review.

2.3 In addition, Viet Nam makes claims with respect to the "all others" rate applied by the USDOC in the second and third administrative reviews.

2.4 Finally, Viet Nam also makes claims with respect to the USDOC's "zeroing methodology", as such.[6]

[4] Viet Nam's first written submission, para. 101; Viet Nam's second written submission, para. 1.
[5] Viet Nam's first written submission, paras. 1-15; Viet Nam's second written submission, para. 2.
[6] See *infra* section VII.B for a more detailed overview of the measures and claims at issue in this dispute.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. VIET NAM

3.1 Viet Nam requests the Panel to find that[7]:

(a) The application of zeroing to individually-investigated respondents in the second and third administrative reviews, and its continued application in the subsequent reviews, is inconsistent with Articles 9.3, 2.1, 2.4.2, and 2.4 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

(b) The USDOC's zeroing methodology is, as such, inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

(c) The use of margins of dumping determined using the zeroing methodology to calculate the "all others" rate in the second and third administrative reviews is, as applied, inconsistent with Articles 9.4, 9.3, 2.4.2 and 2.4 of the Anti-Dumping Agreement.

(d) Application of an "all others" rate that fails to consider the results of the individually-investigated respondents in the contemporaneous proceeding and produces an anti-dumping duty prejudicial to companies not selected for individual investigation is, as applied in the second and third administrative reviews, inconsistent with Articles 9.4, 17.6(i), and 2.4 of the Anti-Dumping Agreement.

(e) The application of an anti-dumping duty based on adverse facts available to the Vietnam-wide entity in the second and third administrative reviews, and its continued application in subsequent reviews, is inconsistent with Articles 6.8, 9.4, 17.6(i) and Annex II of the Anti-Dumping Agreement.

(f) The USDOC's determinations in the second and third administrative reviews, and on a continuing basis, to limit the number of individually-investigated respondents such that they restrict certain substantive rights under the Anti-Dumping Agreement is inconsistent with Articles 6.10, 6.10.2, 9.3, 11.1, and 11.3 of the Anti-Dumping Agreement.

3.2 Viet Nam requests that the Panel recommend that the United States immediately bring the relevant measures into conformity with its obligations under Article VI of the GATT 1994 and the Anti-Dumping Agreement.[8]

B. UNITED STATES

3.3 The United States requests that the Panel grant its requests for preliminary rulings and reject Viet Nam's claims that the United States has acted inconsistently with the covered agreements.[9]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel and their answers to questions. Executive summaries of the parties' written submissions, and

[7] Viet Nam's second written submission, para. 144.
[8] Viet Nam's second written submission, para. 146.
[9] United States' first written submission, para. 222; United States' second written submission, para. 167.

their oral statements, or executive summaries thereof, are attached to this Report as annexes (see List of Annexes, pages vi-vii).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties are set out in their written submissions and oral statements. Third parties' written submissions and oral statements, or executive summaries thereof, are attached to this Report as annexes (see List of Annexes, pages vi-vii).[10]

VI. INTERIM REVIEW

A. INTRODUCTION

6.1 On 7 April 2011, the Panel submitted its Interim Report to the parties. On 21 April 2011, the parties submitted written requests for review of precise aspects of the Interim Report. On 5 May 2011, Viet Nam submitted written comments on the United States' requests for interim review. The United States did not comment on Viet Nam's requests for review.

6.2 As explained below, the Panel has modified aspects of its findings in light of the parties' comments where it considered appropriate. Due to these changes, the numbering of certain paragraphs and footnotes in the Final Report has changed from the Interim Report.

B. VIET NAM'S REQUESTS FOR REVIEW OF PRECISE ASPECTS OF THE INTERIM REPORT

6.3 Viet Nam suggests that the Panel make a number of clerical changes to the Interim Report to correct typographical errors and to add a reference to an exhibit in a footnote. We have amended the Interim Report to address Viet Nam's suggestions.

C. UNITED STATES' REQUESTS FOR REVIEW OF PRECISE ASPECTS OF THE INTERIM REPORT

6.4 The United States takes issue with the statement in paragraph 7.14 of the Interim Report (unchanged in the Final Report) that when zeroing is applied, negative comparison results "are not taken into consideration in calculating the overall margin of dumping". The United States considers that negative comparison results are, in fact, taken into consideration when zeroing is applied. However, the United States argues, these negative comparison results are considered to be valued at zero. In addition, the United States submits that zeroing affects only the comparison results that are aggregated in the *numerator* of the dumping margin calculation. The United States notes that the value of all sales is aggregated in the *denominator* of the dumping margin calculation. The United States requests that the Panel amend paragraph 7.14 accordingly. For similar reasons, the United States requests that the Panel amend paragraph 7.93, paragraph 7.111 (subject to its other request in respect of this paragraph, discussed below), footnote 113 to paragraph 7.80 (footnote 114 in the Final Report), and footnote 168 to paragraph 7.114 (footnote 172 in the Final Report) to reflect the fact that zeroing sets the value of any negative comparison results to zero, rather than "disregard[ing]" or "discard[ing]" such results.

6.5 Viet Nam opposes these U.S. requests. Viet Nam considers that the Interim Report correctly describes the effects of the zeroing methodology. Furthermore, Viet Nam notes that the Interim Report does not comment on the use of *sales* in the denominator to calculate the final dumping margin, but rather on the failure to use the *negative comparison results* in calculating the numerator.

[10] China, India and Thailand did not submit third-party written submissions. Mexico and Thailand did not make third-party oral statements.

6.6 The Panel does not agree with the United States' suggestion that the Interim Report improperly describes the zeroing methodology. First, the Panel fails to see any distinction, from a mathematical point of view, between "disregard[ing]" a number in the aggregation of a series of numbers, and setting that number at zero. Second, the Panel considers that the changes suggested by the United States would not add to the factual accuracy of its description of the zeroing methodology applied by the United States. The evidence before the Panel – in particular Exhibit Viet Nam-33, the accuracy of which the United States does not contest – is to the effect that the programming instructions applied by the USDOC exclude negative comparison results from the calculation of the dumping margin, not that they set them zero. Incidentally, the Panel notes that the United States is not requesting any modification to paragraph 7.78 of the Interim Report (unchanged in the Final Report), which summarizes the relevant portions of this exhibit. For this reason, the Panel declines to amend paragraphs 7.14, 7.93, 7.111, footnote 113 (114 in the Final Report) to paragraph 7.80, and footnote 168 (172 in the Final Report) to paragraph 7.114 as requested by the United States.

6.7 In addition, we agree with Viet Nam that our description of the zeroing methodology focuses on whether all comparison results are taken into account in the numerator, and that it does not suggest that certain *sales* are disregarded in the denominator. Nevertheless, the Panel has added a new footnote (footnote 115) to make it clear that zeroing does not affect the denominator when the USDOC calculates the dumping margin as a percentage.

6.8 The United States requests that the Panel amend paragraph 7.75 of the Interim Report (unchanged in the Final Report). The United States submits that while it did not contest the accuracy of the evidence submitted by Viet Nam with respect to the USDOC's use of zeroing in the proceedings at issue, it argued that given the zero and *de minimis* margins of dumping calculated in the administrative reviews at issue, Viet Nam failed to demonstrate that the USDOC assessed any duties in excess of the margin of dumping. Viet Nam opposes the U.S. request. Viet Nam considers that the language that the United States proposes to add summarizes the United States' *legal* argument, and has no relevance to the *factual* question of whether the USDOC applied zeroing in the proceedings at issue, which is the question addressed in the paragraphs at issue. The Panel notes that the United States did not at any time during its proceedings challenge Viet Nam's allegation that the USDOC used zeroing in the proceedings at issue. For this reason, the Panel considers that paragraph 7.75 accurately reflects the United States' arguments in these proceedings. Furthermore, as Viet Nam notes, paragraph 7.75 concerns the question whether the USDOC used zeroing in the proceedings at issue (rather than whether or not duties were assessed). Finally, the language suggested by the United States is already included in paragraph 7.82 and footnote 114 of the Interim Report (footnote 116 of the Final Report). For this reason, we do not consider it necessary to amend paragraph 7.75 as requested by the United States. Nonetheless, to ensure greater clarity, we have inserted, in a new footnote, a reference to this paragraph and footnote.

6.9 The United States requests that we reflect, in paragraph 7.103 of the Interim Report (unchanged in the Final Report), its argument that Viet Nam for the first time made arguments with respect to its "as such" claim against the "zeroing methodology" in response to a written question of the Panel. Viet Nam opposes the change proposed by the United States. Viet Nam notes that the United States proposes adding language in the section summarizing the United States' legal arguments, but that the paragraph that the United States suggests adding does not explain or summarize any legal argument made by the United States. Rather, Viet Nam submits, the paragraph merely identifies the timing of events during the course of the Panel proceedings. We have added a new footnote to this paragraph to reflect the argument of the United States in respect of this issue.

6.10 The United States submits that paragraphs 7.111 and 7.122 of the Interim Report (unchanged in the Final Report) incorrectly state that the content of the alleged norm, and whether it is attributable to the United States, is not in dispute. Moreover, the United States argues that since these statements form an essential part of the basis for the Panel's conclusion in paragraph 7.122 with respect to

Viet Nam's "as such" claim against the "zeroing methodology", the Panel's conclusion in respect of that claim cannot be sustained and the relevant findings should be stricken from the Report. Viet Nam opposes this U.S. request on the ground that the sentences of concern to the United States are found in a section discussing the Panel's evaluation, not a section devoted a summary of U.S. arguments, and that the United States has not commented on any improper inclusion or omission in the section summarizing its arguments. In addition, Viet Nam submits that the Panel is correct that the United States did not offer any substantive argument on either the content of the alleged norm or attribution of the norm to the United States. The Panel has amended paragraphs 7.111 and 7.122 to ensure that they accurately reflect the United States' arguments on this issue. Specifically, the relevant paragraphs now reflect the United States' statement, in its second written submission, that Viet Nam has failed to provide evidence to establish the content of the alleged norm, and that it is attributable to the United States. We have amended paragraph 7.222 to reflect the Panel's view that Viet Nam has effectively established these two criteria. For this reason, the Panel has not modified its finding with respect to the existence of the "zeroing methodology" as a rule or norm of general and prospective application.

6.11 The United States submits that paragraph 7.113 of the Interim Report (unchanged in the Final Report) does not accurately reflect its position with respect to the evidence put forward by Viet Nam in support of its "as such" claim. The United States indicates that while it did not contest the accuracy of the evidence presented, it did contest that such evidence was sufficient to establish that the challenged measure is inconsistent with the provisions of the Agreement. The Panel has amended paragraph 7.113 as suggested by the United States.

6.12 The United States suggests that paragraphs 7.242 and 7.248 of the Interim Report be deleted. The United States submits that contrary to what these paragraphs suggest, it did not argue that the Working Party Report on Viet Nam's accession permits an investigating authority to apply a rate to a non-market economy entity that is not consistent with the requirements of Article 9.4 of the Anti-Dumping Agreement. Viet Nam opposes this U.S. request, as it considers that paragraph 7.242 accurately reflects the arguments made by the United States with respect to the rate applied to the Vietnam-wide entity. We have amended the Interim Report to address the United States' concerns.

6.13 The United States also suggests that the Panel make a number of clerical changes to the Interim Report to correct typographical errors. In some instances, the United States also suggests modifying the language used in the Report in order to enhance its clarity. In the absence of any objection by Viet Nam, we have amended the Interim Report to address these suggestions.

D. OTHER CHANGES FROM THE INTERIM REPORT

6.14 In addition to the typographical and other non-substantive errors identified by the parties, we have also made a number of changes to the Report to improve its readability or ensure its accuracy.

VII. FINDINGS

A. RELEVANT PRINCIPLES REGARDING TREATY INTERPRETATION, THE APPLICABLE STANDARD OF REVIEW, AND BURDEN OF PROOF

1. Standard of review

7.1 Article 11 of the DSU provides the standard of review applicable in WTO panel proceedings in general. This provision imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", both factual and legal. Article 11 of the DSU provides, in relevant part:

> "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

7.2 Further, Article 17.6 of the Anti-Dumping Agreement sets forth a special standard of review applicable to disputes under the Anti-Dumping Agreement. It provides:

> "(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

7.3 Taken together, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement establish the standard of review we will apply with respect to the factual and the legal aspects of the present dispute.

2. Rules of treaty interpretation

7.4 Article 3.2 of the DSU requires us to apply customary rules of public international law on the interpretation of treaties. It is generally accepted that these rules can be found in Articles 31-32 of the Vienna Convention on the Law of Treaties of 1969 ("Vienna Convention"). Article 31(1) of the Vienna Convention provides:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

7.5 Under the Anti-Dumping Agreement, the Panel is generally to follow the same rules of treaty interpretation as in any other dispute. However, under Article 17.6(ii) of the Anti-Dumping Agreement (cited above), where a relevant provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, a panel has to uphold a measure that rests upon one of those permissible interpretations. The Appellate Body has indicated that Article 17.6(ii) contemplates a sequential analysis. The Appellate Body explained that:

> "The first step requires a panel to apply the customary rules of interpretation to the treaty to see what is yielded by a conscientious application of such rules including those codified in the *Vienna Convention*. Only *after* engaging this exercise will a panel be able to determine whether the second sentence of Article 17.6(ii) applies."[11]

[11] Appellate Body Report, *US – Continued Zeroing*, para. 271. (emphasis original)

3. Burden of proof

7.6 The general principles regarding the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO agreement by another Member assert and prove its claim. In *US – Wool Shirts and Blouses* the Appellate Body stated that:

> "… we find it difficult … to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law, and, in fact, in most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".[12]

7.7 Furthermore, in *Canada – Dairy (Article 21.5 – New Zealand and US II)* the Appellate Body stated that:

> "… as a general matter, the burden of proof rests upon the complaining Member. That Member must make out a *prima facie* case by presenting sufficient evidence to raise a presumption in favour of its claim. If the complaining Member succeeds, the responding Member may then seek to rebut this presumption. Therefore, under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-*consistent*, until sufficient evidence is presented to prove the contrary."[13]

7.8 A *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.[14] Viet Nam, as the complaining party, must make a *prima facie* case of violation of the relevant provisions of the WTO agreements it invokes, which the United States must refute. We also note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof. In this respect, therefore, it is also for the United States to provide evidence supporting the facts which it asserts.

B. INTRODUCTION TO THE PANEL'S FINDINGS – FACTUAL BACKGROUND

7.9 Viet Nam requests the Panel to find that the United States acted inconsistently with its obligations under the GATT 1994 and the Anti-Dumping Agreement by reason of certain actions of the USDOC in its proceedings concerning imports of *Shrimp* from Viet Nam. As noted above, Viet Nam's claims pertain to:

(a) The USDOC's zeroing methodology, as such, and as applied in the proceedings at issue.

[12] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[13] Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66. (emphasis original)
[14] Appellate Body Report, *EC – Hormones*, para. 104.

(b) The USDOC's decisions, in the proceedings at issue, to limit the number of individually-examined companies.

(c) The "all others" rate imposed by the USDOC in the proceedings at issue.

(d) The rate assigned by the USDOC to the Vietnam-wide entity in the proceedings at issue.

7.10 Before we proceed to analyse Viet Nam's claims, we consider it useful to provide a brief overview of relevant USDOC practices. We therefore provide, in this introductory section, background information on: (i) the U.S. retrospective duty assessment system; (ii) zeroing; (iii) the USDOC's procedures for the selection of companies for individual examination; (iii) the USDOC's assignment of margins of dumping to respondents not individually examined. In addition, we also provide a brief summary of the USDOC's determinations in the *Shrimp* proceedings.

7.11 The summary of relevant facts in this section reflects our understanding of those facts before us which are not in dispute and is without prejudice to our legal findings in subsequent sections of this Report. To the extent that there is a disagreement between the parties with respect to a relevant fact before us, we address that controversy in the relevant section below.

1. Relevant USDOC practices in anti-dumping proceedings

(a) The U.S. retrospective anti-dumping system

7.12 The United States operates what is referred to as a "retrospective" duty assessment system. Under this system, an anti-dumping duty liability arises, and a security (in the form of a cash deposit) is collected at the time of importation, but duties are not assessed at that time. The U.S. authorities[15] determine the amount of dumping that actually took place, and the amount of duties actually due, at a later date, in the context of a periodic, or "administrative", review. Interested parties may request such a review once a year, during the anniversary month of the order, to determine the amount of duties – if any – owed on entries made during the previous year.[16] In an administrative review, the USDOC assesses the importer's liability for anti-dumping duties on a retrospective and transaction-specific basis. The USDOC calculates an importer-specific duty assessment rate, which is applied to the value of the importer's imports to determine the correct total amount of duties owed; if no review is requested, the duty is assessed at the rate established for the cash deposits. In addition, the USDOC also determines an exporter-specific margin of dumping, which is used to derive a new cash deposit rate applicable to imports from that exporter going forward.[17]

7.13 Five years after the publication of an anti-dumping duty order, the U.S. authorities conduct an expiry ("sunset") review to determine whether revocation of the order would be likely to lead to a continuation or recurrence of dumping and injury. Specifically, the USITC determines whether revocation of the order would be likely to lead to the continuation or recurrence of material injury whereas the USDOC determines whether revocation of the order would be likely to lead to a

[15] Three agencies of the U.S. Government are involved in anti-dumping proceedings: the U.S. Department of Commerce ("USDOC") determines the existence and level of dumping by foreign exporters/producers, while the U.S. International Trade Commission ("USITC") determines whether the U.S. domestic industry is materially injured or threatened with material injury by reason of the dumped imports. U.S. Customs and Border Protection ("USCBP") is responsible for the collection of duties.

[16] The period of time covered by the review is normally twelve months; however, in the case of the first administrative review, the period of time may extend to a period of up to 18 months in order to cover all entries that may have been subject to provisional measures.

[17] United States' first written submission, paras. 15-24; Viet Nam's first written submission, paras. 24-39.

continuation or recurrence of dumping. In making this "likelihood-of-dumping" determination, the USDOC takes into consideration the dumping margins established in the original investigation and administrative reviews, as well as the volume of imports for the periods before and after the issuance of the anti-dumping order.[18]

(b) "Zeroing" in the calculation of margins of dumping

7.14 Generally, the existence of dumping is determined by comparing prices of sales by the exporter to the importing country ("export price") to the price of sales of the same product in the exporter's domestic market ("normal value") during a reference period. Dumping exists if the export price is less than the normal value.[19] The issue of zeroing arises whenever multiple such comparisons between the export price and the normal value are performed and then need to be aggregated. In such cases, some comparisons may reflect export prices below normal value (i.e. dumping), while others may reflect the opposite (export prices above normal value). Zeroing is the practice, when performing the aggregation of multiple comparisons, of treating the results of comparisons where export prices are above normal value as "zero" (treating them as "undumped" rather than assigning them a negative value). Thus, when zeroing is applied, negative comparison results are not taken into consideration in calculating the overall margin of dumping and are not permitted to offset the results of comparisons where export prices are below normal value.

7.15 Viet Nam makes claims with respect to the alleged use by the USDOC of zeroing in the context of original investigations and of periodic reviews. Viet Nam alleges, first, that the USDOC applied "model zeroing" in calculating margins of dumping in the original investigation. Viet Nam describes the USDOC's "model zeroing" methodology as follows: In calculating the margins of dumping of individually-investigated exporters in the original investigation, the USDOC makes model-specific intermediate comparisons of the weighted average export price to the weighted average normal value ("weighted-average-to-weighted-average" comparisons). Where the intermediate comparison produces a negative dumping margin for a particular model, the USDOC refuses to allow the negative dumping margin for that model to offset positive dumping margins calculated for other models. Thus, Viet Nam submits, when aggregating the dumping margin for all models, the USDOC only includes those models that produced a positive dumping margin; the negative dumping margins are set to zero and have no impact on the overall dumping margin.[20]

7.16 Viet Nam also makes claims with respect to "simple zeroing" in the context of periodic reviews. Viet Nam submits that in periodic reviews, the USDOC compares the export price of individual transactions to a weighted average normal value for comparable merchandise ("weighted-

[18] USDOC Determinations in Recently Completed Sunset Reviews, Exhibit Viet Nam-64; Preliminary Determination and Issues and Decision Memorandum in the Sunset Review, Exhibit Viet Nam-25. Where not otherwise specified, all references to USDOC determinations in the "original investigation", an "administrative review" or the "sunset review" are to the relevant USDOC determinations in the *Shrimp* proceedings.

[19] In investigations involving products from countries which it categorizes as non-market economies, the USDOC calculates the normal value on the basis of surrogate values taken from countries which it considers to be "market economies" rather than on the basis of the prices or costs of production actually incurred by the investigated producer. Specifically, for each exporter/producer, the USDOC relies on the quantities of the factors of production used by the exporter/producer concerned (e.g., labour, raw materials, energy) based on its actual production experience. The USDOC values each such factor of production on the basis of prices prevailing in the "surrogate" "market economy". The USDOC then applies ratios for overhead, selling, general and administrative expenses, and profit to the calculation resulting from the multiplication of each respondent's factors of production by the surrogate price. In the *Shrimp* proceedings, the USDOC considered that Viet Nam is a non-market economy and selected Bangladesh as the relevant surrogate country. (Viet Nam's first written submission, para. 26 and USDOC 2009 Anti-Dumping Manual Chapter 10, Non-Market Economies, Exhibit Viet Nam-31, p. 7).

[20] Viet Nam's first written submission, paras. 29-32.

average-to-transaction" comparison). Viet Nam explains that the USDOC then aggregates the results of these comparisons to calculate the reviewed company's overall dumping margin. Viet Nam alleges that in doing so, the USDOC disregards, or "zeroes", all negative comparison results, where the export price is higher than the normal value.[21]

(c) USDOC procedures with respect to the selection of respondents

7.17 United States law sets forth a general requirement that the USDOC shall determine an individual margin of dumping for each known exporter or producer.[22] Similar to Article 6.10 of the Anti-Dumping Agreement, however, U.S. law provides an exception to this general rule: If it is "not practicable" to make individual dumping margin determinations because of the large number of exporters or producers involved in the investigation or review, the USDOC may determine individual margins of dumping "for a reasonable number of exporters or producers" by limiting its examination to: (i) a statistically-valid sample of exporters, producers, or types of products; or (ii) exporters and producers "accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined".[23] In the proceedings at issue, the USDOC limited its examination to the latter.[24]

7.18 The USDOC selects exporters/producers for individual examination in the context of an administrative review as follows: On the anniversary month of the publication of the anti-dumping order, the USDOC publishes a notice informing interested parties – whether U.S. domestic producers or importers or foreign exporters – of the possibility to request an administrative review of individual producers and exporters covered by the order. The USDOC next publishes a notice of initiation, in which it lists all companies for which a review has been requested. The USDOC then analyses importation data for these companies using either data collected by the USCBP or questionnaire responses submitted by the companies, providing the quantity and value of their exports of the product under consideration during the period under review. The USDOC subsequently issues a "Respondent Selection Memorandum" in which it determines (1) whether individual examination of all companies for which a review has been requested would be practicable and (2) if not, the companies selected for individual examination for the relevant review ("mandatory respondents"). U.S. law provides companies not selected for individual examination the opportunity to be "voluntary respondents", i.e. to come forward and submit to the USDOC the data necessary for the calculation of an individual dumping margin. While the USDOC has a general obligation to determine individual margins for such "voluntary respondents", it may also refuse to do so where this would be impracticable.[25]

[21] Viet Nam's first written submission, paras. 36-38.
[22] 19 U.S.C. § 1677f-1(c)(1), Exhibit Viet Nam-52.
[23] 19 U.S.C. § 1677f-1(c)(2), Exhibit Viet Nam-52.
[24] See *infra* section VII.E.
[25] 19 C.F.R. §351.204(d)(1) and (2) (Exhibit Viet Nam-53).

(d) The USDOC's assignment of dumping margins to exporters not individually examined[26]

7.19 The USDOC's practice for imposing anti-dumping duties on imports from companies not individually examined differs depending on whether the imports originate from a country which the USDOC considers to be a "market economy", or one which the USDOC treats as a "non-market economy". In the proceedings at issue, the USDOC considered that Viet Nam is a non-market economy.[27]

7.20 In proceedings involving imports from non-market economies, the USDOC applies a rebuttable presumption that all companies within the country are essentially operating units of a single government-wide entity and, thus, should receive a single anti-dumping duty rate.[28] Exporters wishing to rebut that presumption must file an application and demonstrate the absence of government control, both *de jure* and *de facto*, over their export activities, pursuant to a set of criteria established by the USDOC.[29] The "separate rate" respondents which satisfy these criteria are eligible to receive an individual margin. Where the investigating authority has limited its examination, they either receive an individual margin, if selected for individual examination, or an "all others" rate, if not selected for individual examination.

7.21 The "all others" rate[30] applied to non-selected respondents is generally based on the weighted average margins of dumping of the individually examined respondents, excluding rates that are zero, *de minimis* rates or rates entirely based on facts available. The all others rate is updated in each administrative review in order to reflect the individual dumping margins calculated in the review.[31]

7.22 The USDOC Anti-Dumping Manual does not explain how the NME-wide rate is to be calculated, other than to mention that the NME-wide rate determined in the original investigation may be based on adverse facts available, "if, for example, some exporters that are part of the NME-wide entity do not respond to the antidumping questionnaire", adding that "[i]n many cases, the Department concludes that some part of the NME-wide entity has not cooperated in the proceeding because those that have responded do not account for all imports of subject merchandise."[32] The Manual further indicates that "occasionally", the NME-wide rate "may be changed" through an administrative review. This happens when (i) the USDOC is reviewing the NME entity because the USDOC is reviewing an

[26] The USDOC uses the terms "exporter(s)", "company(ies)" and "respondent(s)" interchangeably. For this reason, we also use these terms interchangeably in discussing the entities in respect of which anti-dumping duties are assessed. Of relevance to this issue, the USDOC Anti-Dumping Manual, Chapter 10, Non-Market Economies indicates that the USDOC makes "separate rate" determinations (explained below) and assigns anti-dumping duties with respect to *exporters*. The Anti-Dumping Manual further indicates that the exporter-specific "separate rate" applied by the USDOC – whether individual margin or "all others" rate – is also specific to those producers that supplied the exporter during the period of investigation. The Anti-Dumping Manual refers to these as "combination rates" "because such rates apply to specific combinations of exporters and one or more producers" and explains that "[t]he cash-deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question and produced by a firm that supplied the exporter during the POI." (USDOC Anti-Dumping Manual, Chapter 10, Non-Market Economies, Exhibit Viet Nam-31, p. 5).

[27] We use the term "non-market economy" and the acronym "NME" to refer to the USDOC's own use of these term and acronym. In doing so, we express no opinion on the WTO-consistency of the USDOC's classification of certain countries, including Viet Nam, in such a category.

[28] USDOC Anti-Dumping Manual, Chapter 10, Non-Market Economies, Exhibit Viet Nam-31, p. 3.

[29] USDOC "Separate Rate" Application Used by the USDOC in Investigations Involving Imports from Viet Nam, Exhibit Viet Nam-50.

[30] The USDOC refers to the "all others" rate applied to such respondents as the "separate rate". To avoid confusion, in our findings, we usually prefer the term "all others" rate.

[31] See, *infra* section VII.F.

[32] USDOC Anti-Dumping Manual, Chapter 10, Non-Market Economies, Exhibit Viet Nam-31, pp. 7-8.

exporter that is part of that entity; and (ii) one of the calculated margins for a respondent is higher than the current NME-wide rate.[33]

2. USDOC determinations in the *Shrimp* proceedings

7.23 Below is a summary of the successive proceedings conducted by the USDOC under the *Shrimp* anti-dumping order. This summary is without prejudice to the Panel's analysis of whether any or all of these proceedings are within the Panel's terms of reference. We note, in this respect, that Viet Nam acceded to the WTO on 11 January 2007, meaning that certain of the USDOC proceedings mentioned here were initiated or completed prior to Viet Nam's accession. We further note that Viet Nam submitted its request for the establishment of a panel on 7 April 2010, i.e. before certain of the USDOC determinations listed below.[34]

(a) Original investigation

7.24 The USDOC initiated on 20 January 2004 an anti-dumping investigation on certain frozen and canned warmwater shrimp from, *inter alia*, Viet Nam.[35] On 8 December 2004, the USDOC published its final determination in the original investigation[36], and on 1 February 2005, the USDOC published the anti-dumping order.[37] In the investigation, the USDOC treated Viet Nam as a non-market economy. The USDOC determined that it was impracticable to individually examine all the Vietnamese exporters/producers of the product under consideration. The USDOC selected for individual examination the four respondents accounting for the largest volume of exports during the period of investigation. Three of these "mandatory respondents", Camimex, Minh Phu and Minh Hai, cooperated with the investigation. For each of them, the USDOC calculated an individual dumping margin ranging from 4.30 to 5.24 per cent. The USDOC applied to the separate rate respondents not selected for individual examination a rate equal to the weighted average of the three individual margins of dumping, 4.57 per cent. Finally, the USDOC applied to those exporters which it considered had not demonstrated entitlement to a separate rate a Vietnam-wide rate of 25.76 per cent. The USDOC determined this rate on the basis of adverse facts available.[38]

(b) First administrative review

7.25 The first administrative review covered imports of frozen warmwater shrimp from Viet Nam during the period 16 July 2004 to 31 January 2006. The USDOC issued its final determination in that review on 12 September 2007. The USDOC determined that it was impracticable to individually examine all Vietnamese companies covered by the review and selected three Vietnamese respondents

[33] USDOC Anti-Dumping Manual, Chapter 10, Non-Market Economies, Exhibit Viet Nam-31, pp. 7-8.

[34] Viet Nam indicates that the second and third administrative reviews were initiated and completed subsequent to Viet Nam's accession to the WTO on 11 January 2007 (Viet Nam's first written submission, para. 101). Indeed, these two administrative reviews are the only ones which were completed after Viet Nam's accession and before the submission by Viet Nam of its request for the establishment of a panel.

[35] Notice of Initiation of the Original Investigation, Exhibit Viet Nam-03.

[36] Final Determination and Issues and Decision Memorandum in the Original Investigation, Exhibit Viet Nam-06.

[37] Amended Final Determination in the Original Investigation and Anti-Dumping Duty Order, Exhibit Viet Nam-07; Preliminary Determination in the Original Investigation, Exhibit Viet Nam-05. While the USDOC initiated an investigation on certain *frozen and canned* warmwater shrimp, the anti-dumping order was imposed only in respect of *frozen* warmwater shrimp, reflecting the USITC's negative injury determination with respect to imports of *canned* warmwater shrimp from Viet Nam.

[38] Respondent Selection Memorandum in the Original Investigation, Exhibit Viet Nam-04; Final Determination and Issues and Decision Memorandum in the Original Investigation, Exhibit Viet Nam-06; Amended Final Determination in the Original Investigation and Anti-Dumping Duty Order, Exhibit Viet Nam-07.

for individual examination. Only one of these respondents, Fish One, cooperated. The USDOC calculated a margin of zero per cent for Fish One. The USDOC again applied a rate of 25.76 per cent to the Vietnam-wide entity. Since the rates for mandatory respondents included only Fish One's zero rate and the Vietnam-wide rate, which was entirely based on adverse facts available, the USDOC applied the same "all others" rate which it had applied in the original investigation, i.e. 4.57 per cent.[39]

(c) Second administrative review

7.26 The USDOC's final determination in the second administrative review, covering imports during the period 1 February 2006 to 31 January 2007, was issued on 9 September 2008. The USDOC again determined that it was impracticable to individually examine all Vietnamese exporters/producers. It selected two companies, Minh Phu and Camimex, for individual examination. The USDOC calculated a margin of zero per cent for Camimex and a margin of 0.01 per cent (*de minimis*) for Minh Phu. Since all individual margins were zero or *de minimis*, the USDOC applied to most "separate rate" respondents not individually examined the same 4.57 per cent "all others" rate which it had applied in the original investigation and the first administrative review. Where a more recent individual margin was on the record for a company, the USDOC applied that rate to the company concerned. The USDOC thus attributed zero rates to both Fish One and Grobest and a 4.30 per cent rate to Seaprodex. The USDOC also applied the same Vietnam-wide rate of 25.76 per cent that it had applied in the original investigation and first administrative review.[40]

(d) Third administrative review

7.27 The USDOC's final determination in the third administrative review, covering imports during the period 1 February 2007 to 31 January 2008, was issued on 19 September 2009. The USDOC again determined that it was impracticable to individually examine all Vietnamese exporters/producers. It selected three companies, Minh Phu, Camimex and Phuong Nam, for individual examination, and calculated a *de minimis* margin for each of these companies, ranging between 0.08 per cent and 0.43 per cent. The USDOC adopted the same approach with respect to the "all others" rate as in the second administrative review, applying an "all others" rate of 4.57 per cent, except where a more recent individual margin was on the record for a company. The USDOC also applied the same Vietnam-wide rate of 25.76 per cent rate it had applied in previous proceedings.[41]

(e) Fourth administrative review

7.28 The USDOC's final determination in the fourth administrative review, covering imports during the period 1 February 2008 to 31 January 2009, was issued on 9 August 2010. The USDOC selected two companies for individual examination, Minh Phu and Nha Trang. It calculated a dumping margin of 2.96 per cent for Minh Phu and a dumping margin of 5.58 per cent for Nha Trang.

[39] Notice of Initiation of the First Administrative Review and New Shipper Review, Exhibit Viet Nam-08; Respondent Selection Memorandum in the First Administrative Review, Exhibit Viet Nam-09; Preliminary Determination in the First Administrative Review, Exhibit Viet Nam-10; Final Determination and Issues and Decision Memorandum in the First Administrative Review and New Shipper Review, Exhibit Viet Nam-11. In addition, the USDOC applied a rate of zero to Grobest, a "new shipper" of the product under consideration.

[40] Notice of Initiation of the Second Administrative Review, Exhibit Viet Nam-12; Respondent Selection Memorandum in the Second Administrative Review, Exhibit Viet Nam-13; Preliminary Determination in the Second Administrative Review, Exhibit Viet Nam-14; Final Determination and Issues and Decision Memorandum in the Second Administrative Review, Exhibit Viet Nam-15.

[41] Notice of Initiation of the Third Administrative Review, Exhibit Viet Nam-16; Respondent Selection Memorandum in the Third Administrative Review, Exhibit Viet Nam-17; Preliminary Determination in the Third Administrative Review, Exhibit Viet Nam-18; Final Determination and Issues and Decision Memorandum in the Third Administrative Review, Exhibit Viet Nam-19.

The USDOC applied as "all others" rate the weighted average of these margins of dumping, i.e. 4.27 per cent. In addition, the USDOC applied to the Vietnam-wide entity the same 25.76 per cent rate as in previous proceedings.[42]

(f) Fifth administrative review

7.29 The USDOC's fifth administrative review, covering imports during the period 1 February 2009 to 31 January 2010, was initiated on 9 April 2010.[43] It was ongoing at the time of the Panel's proceedings. The USDOC selected three companies for individual examination, Minh Phu, Nha Trang and Camimex.[44]

(g) Sunset review

7.30 The USDOC on 4 January 2010 initiated a five-year "sunset" review of the *Shrimp* anti-dumping order. On 6 August 2010 the USDOC preliminarily determined that revocation of the order would be likely to lead to continuation or recurrence of dumping at margins of dumping ranging from 4.30 per cent to 25.76 per cent, corresponding to the margins of dumping calculated for various Vietnamese companies in the original investigation. On 7 December 2010, the USDOC issued its final likelihood-of-dumping determination, in which it confirmed these conclusions.[45]

C. TERMS OF REFERENCE

1. Introduction

7.31 Before addressing the substance of Viet Nam's claims, we first consider a number of issues pertaining to whether certain measures are properly before the Panel.

7.32 Viet Nam seeks "as applied" findings with respect to three measures: the USDOC's determination in the second administrative review, the USDOC's determination in the third administrative review, and the "continued use of challenged practices" in the successive *Shrimp* proceedings.[46] In addition, Viet Nam seeks findings with respect to the WTO-consistency, as such, of the U.S. "zeroing methodology".[47]

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[42] Notice of Initiation of the Fourth Administrative Review, Exhibit Viet Nam-20; Respondent Selection Memorandum in the Fourth Administrative Review, Exhibit Viet Nam-21; Preliminary Determination in the Fourth Administrative Review, Exhibit Viet Nam-22; Final Determination and Issues and Decision Memorandum in the Fourth Administrative Review, Exhibit Viet Nam-23. We note that at the time of Viet Nam's panel request, the USDOC had not yet issued its final determination in the fourth administrative review.

[43] Notice of Initiation of the Fifth Administrative Review, Exhibit Viet Nam-26. We note that at the time of Viet Nam's panel request, the USDOC had not yet initiated the fifth administrative review.

[44] Respondent Selection Memorandum in the Fifth Administrative Review, Exhibit Viet Nam-27.

[45] Notice of Initiation of the Sunset Review, Exhibit Viet Nam-24, and Preliminary Determination and Issues and Decision Memorandum in the Sunset Review, Exhibit Viet Nam-25. Viet Nam did not submit the USDOC's final likelihood-of-dumping determination as an exhibit but provided a reference to the Federal Register Notice of that determination (Viet Nam's opening oral statement at the second meeting of the Panel, footnote 46 to para. 52, citing to *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of the Five-Year "Sunset" Review of the Antidumping Duty Order*, 75 Fed. Reg. 75965, 7 December 2010, available at http://ia.ita.doc.gov/frn/summary/vietnam/2010-30664.txt). We note that the documents submitted by Viet Nam only pertain to the USDOC's likelihood-of-dumping determinations, and that at the time of Viet Nam's panel request, the USDOC had only initiated the sunset review.

[46] Viet Nam's first written submission, para. 101; Viet Nam's second written submission, para. 144.

[47] Viet Nam's second written submission, para. 144.

7.33 The United States made requests for preliminary rulings with respect to certain of the measures challenged by Viet Nam in the context of its "as applied" claims. Specifically, the United States requests that we find that the following measures are not within our terms of reference:

(a) the USDOC's final determination in the original investigation;

(b) the USDOC's final determination in the first administrative review; and

(c) the measure characterized by Viet Nam as the "continued use of challenged practices".[48]

7.34 We first address the United States' request pertaining to the USDOC determinations in the original investigation and first administrative review.

2. U.S. request for a preliminary ruling with respect to the USDOC determinations in the original investigation and first administrative review

7.35 The United States requests that we find that the USDOC's final determinations in the original investigation and in the first administrative review, which are both identified as "measures" at issue in Viet Nam's panel request, do not fall within our terms of reference. In support of its request, the United States argues that the original investigation was initiated and completed before Viet Nam's accession to the WTO, and that the first administrative review was initiated prior to Viet Nam's accession to the WTO. As a result, the United States argues, the Anti-Dumping Agreement does not apply to these determinations.[49] Moreover, the United States argues that the original investigation was not included in Viet Nam's request for consultations, which it considers to be a prerequisite for its inclusion in the panel request and, and therefore, our terms of reference.[50]

7.36 Viet Nam indicates that it does not consider the USDOC's determinations in the original investigation and the first administrative review to be "measures at issue" and does not request that we make any findings with respect to the WTO-consistency of these determinations.[51] This being the case, we see no need to address the U.S. request for preliminary rulings with respect to these two determinations.

7.37 We note, however, that Viet Nam considers that the USDOC's actions in the original investigation impact upon the WTO-consistency of the USDOC determinations in the subsequent proceedings conducted by the USDOC under the *Shrimp* anti-dumping order.[52] This, Viet Nam

[48] United States' first written submission, paras. 71-98.

[49] United States' first written submission, paras. 76-80 and 85-86; United States' opening oral statement at the first meeting of the Panel, paras. 6-12; United States' second written submission, para. 135. The United States relies, in this respect, on Article 18.3 of the Anti-Dumping Agreement, which provides as follows:

> "Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement."

[50] United States' first written submission, paras. 81-84; United States' second written submission, para. 136; United States' response to Panel question 8.

[51] Viet Nam's response to the United States' request for preliminary rulings, paras. 3, 5-10. In fact, the United States itself recognizes that Viet Nam requests no findings with respect to these two determinations. (United States' first written submission, footnote 65 to para. 84 and footnote 69 to para. 86; United States' response to Panel question 8).

[52] Viet Nam's response to the United States' request for preliminary rulings, para. 3. Viet Nam indicates that it considers that the USDOC's determinations in the original investigation and the first administrative review are not within our terms of reference "except to the extent that the results of these segments of the

argues, is because the USDOC in the second and third administrative reviews applied an "all others" rate based on dumping margins calculated with zeroing in the original investigation.[53] We address this argument of Viet Nam in section VII.F below, in our analysis of Viet Nam's claims with respect to the "all others" rate.

3. U.S. request for a preliminary ruling with respect to the "continued use of challenged practices" measure

(a) Introduction

7.38 As we have noted above, in its submissions to the Panel, Viet Nam identifies as one of the measures at issue in this dispute the "continued use of challenged practices" in successive "segments" of the *Shrimp* anti-dumping proceeding. Viet Nam explains that this measure concerns a *continued* and *ongoing* conduct on the part of the USDOC, encompassing the use of three of the challenged practices (zeroing, Vietnam-wide rate, limitation of the number of respondents individually examined) in successive proceedings under the *Shrimp* anti-dumping order.[54] This includes not only proceedings that have been completed, but also ongoing and future ones, and therefore includes a prospective element.[55] Viet Nam explains that the measure it challenges is similar to the one challenged by the European Communities in *US – Continued Zeroing*, which concerned an ongoing conduct with prospective effect.[56]

7.39 The United States requests that we preliminarily determine that this "continued use of challenged practices" measure does not fall within our terms of reference. The United States argues that this "continued use" measure is not a "measure" within the Panel's terms of reference as: (i) it was not "identified" as a "measure at issue" in Viet Nam's request for the establishment of a panel, pursuant to Article 6.2 of the DSU[57]; and (ii) it is not a measure that is cognizable in WTO dispute settlement because it purports to include future measures.[58] Viet Nam asks us to reject the U.S. request for a preliminary ruling and to proceed to consider the merits of its claims in respect of that measure.[59]

7.40 We examine each of the United States' arguments in turn, starting with the U.S. argument that Viet Nam's panel request failed to identify the "continued use of challenged practices" measure as a measure at issue in this dispute.

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proceeding bear on the results of those segments of the proceeding which occurred after Viet Nam's accession to the WTO".

[53] Viet Nam's response to the United States' request for preliminary rulings, paras. 6-10.

[54] Viet Nam's response to the United States' request for preliminary rulings, paras. 13-18; Viet Nam's second written submission, para. 2; Viet Nam's response to Panel question 1.

[55] Viet Nam's first written submission, para. 104. Viet Nam specifies that the "continued use" measure includes the fourth administrative review, the fifth administrative review, as well as the sunset review. The fifth administrative review was ongoing but not yet completed at the time of the drafting of this Report, whereas the USDOC issued a final likelihood-of-dumping determination in the context of the sunset review during the course of the Panel's proceedings. See *supra* section VII.B.2.

[56] Viet Nam's first written submission, paras. 98-99, 104-105 and 294-295; Viet Nam's response to the United States' request for preliminary rulings, paras. 13-18; Viet Nam's response to Panel question 1.

[57] United States' first written submission, paras. 88-95; United States' opening oral statement at the first meeting of the Panel, paras. 13-19.

[58] United States' first written submission, paras. 96-98; United States' opening oral statement at the first meeting of the Panel, paras. 20-22; United States' response to Panel question 12; United States' second written submission, paras. 157-159.

[59] Viet Nam's response to the United States' request for preliminary rulings, paras. 4, 30.

(b) Whether Viet Nam's panel request identifies the "continued use of challenged practices" as a "measure at issue" as required under Article 6.2 of the DSU

(i) Main arguments of the parties

United States

7.41 The United States asserts that Viet Nam's panel request identifies, as the measures at issue in this dispute, each proceeding under the *Shrimp* order that had already been initiated at the time of the panel request. Thus, the United States argues, Viet Nam's panel request limits the measures at issue to these determinations, and nowhere indicates that Viet Nam seeks to challenge a so-called "continued use" measure. The United States argues that Viet Nam would have the Panel infer from the identification of a selection of "as applied" measures that a "continuing measure" is also a subject of the dispute. The United States considers that such an inference is not permissible. The United States notes that by contrast, the European Communities' panel request in *US – Continued Zeroing* specifically and explicitly identified the "continued application" of the anti-dumping duties at issue as a measure at issue. In addition, the United States submits that not only is the "continued use" measure itself beyond the scope of Viet Nam's panel request, but the components that Viet Nam asserts are part of that "continued use" measure are themselves beyond the scope of the panel request. The United States submits in this respect that Viet Nam includes the fourth and fifth administrative reviews and the sunset review within the "continued use" measure whereas Viet Nam's panel request only includes the preliminary results of the fourth administrative review and the initiation of the sunset review and makes no mention of the fifth administrative review.[60]

7.42 In addition, the United States rejects Viet Nam's argument that the measures identified in the panel request are closely related to the "continued use" measure. The United States argues in this respect that Viet Nam's reliance on the reports of the *Japan – Film* and *Argentina – Footwear* panels, which both concerned measures not identified in the panel request, is inconsistent with its position that the "continued use" measure was identified in its panel request and is in any event inapposite.[61]

Viet Nam

7.43 Viet Nam considers that it properly and adequately identified the "continued use of challenged practices" measure in its panel request. Viet Nam asserts that its panel request identified its concern with the ongoing nature and the continued use of the challenged practices by identifying each segment of the proceeding that had been initiated at the time of its panel request. Viet Nam argues that it specifically included segments not yet finalized to ensure that the Panel and Members understood that it was concerned with the ongoing nature of the USDOC practices at issue.[62] Viet Nam argues that the findings of the Appellate Body in *US – Continued Zeroing* provide a useful framework for determining whether a complainant challenging a "continued use" measure has complied with Article 6.2. Viet Nam submits that consistent with the Appellate Body's findings in that dispute, its panel request included: (i) the identification of the anti-dumping order, which places the Panel and parties on notice for challenges to determinations that flow from imposition of the order; (ii) the most recently completed phases of the proceeding, which informs parties that the

[60] United States' first written submission, para. 88-94; United States' opening oral statement at the first meeting of the Panel, paras. 14-17; United States' response to Panel question 4; United States' second written submission, para. 137. The United States clarifies that it is not taking the position that Viet Nam was required to use, in its panel request, the same language used by the European Communities in *US – Continued Zeroing*. (United States' opening oral statement at the first meeting of the Panel, para. 18).

[61] United States' second written submission, paras. 146-153.

[62] Viet Nam's response to the United States' request for preliminary rulings, paras. 24, 27; Viet Nam's opening oral statement at the first meeting of the Panel, para. 28.

conduct is continuing and has not ceased; and (iii) that the claimed violations have occurred at multiple phases since imposition of the order.[63]

7.44 Viet Nam also argues that the requirement to identify the measures at issue under Article 6.2 must be informed by the context provided by other provisions of the DSU, namely Article 3.3 of the DSU, which calls for the "prompt settlement of disputes", and Article 9, which Viet Nam submits embodies "the DSU's philosophy of resolving all related issues together."[64] Moreover, Viet Nam contends that the reports of the panels in *Japan – Film* and *Argentina – Footwear* stand for the general proposition that the identification of a measure in the panel request suffices to place within a panel's terms of reference measures that are "subsidiary to", or "closely related" to that measure, or subsequent determinations made in connection with that measure. Viet Nam argues that its identification of the *Shrimp* anti-dumping order in its panel request placed parties on notice for subsequent determinations under that order.[65] Viet Nam also argues that the "continued use of challenged practices" measure does not expand upon the claims set forth in its panel request and that, as a result, denial of the United States' request would have a negligible substantive impact on the issues considered in this dispute.[66]

(ii) Main arguments of the third parties

7.45 Korea invites the Panel to review Viet Nam's panel request to see whether it can find in that request a description that is sufficient to indicate the nature of the "continued use of challenged practices", even though Viet Nam did not use these precise terms in its panel request. Moreover, Korea considers that the clear identification of the fourth administrative review and of the sunset review as measures at issue in Viet Nam's panel request should be taken into account, given that both measures are part of the "continued use of challenged practices".[67]

(iii) Evaluation by the Panel

7.46 Article 6.2 of the DSU provides, in relevant part:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, *identify the specific measures at issue* and provide a brief summary of the legal basis of the complaint *sufficient to present the problem clearly*." (emphasis added)

7.47 In *US – Continued Zeroing*, the Appellate Body summarized the jurisprudence with respect to Article 6.2 as follows:

> "There are two main requirements under Article 6.2 of the DSU, namely, the identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint. Together, these elements comprise the 'matter referred to the DSB', which forms the basis for a panel's terms of reference under

[63] Viet Nam's response to Panel question 4 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 166).

[64] Viet Nam's response to the United States' request for preliminary rulings, para. 22 (referring to Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.32).

[65] Viet Nam's response to the United States' request for preliminary rulings, paras. 23-24, 27 (referring to Panel Report, *Argentina – Footwear*, paras. 8.35-8.45); Viet Nam's response to Panel question 6 (referring to Panel Report, *Japan – Film*, para. 10.8).

[66] Viet Nam's response to the United States' request for preliminary rulings, para. 28.

[67] Korea's third-party written submission, paras. 6-7; Korea's third-party oral statement, para. 4.

> Article 7.1 of the DSU. These requirements are intended to ensure that the complainant 'present[s] the problem clearly' in the panel request."[68]

7.48 The Appellate Body, in the same decision, also observed that the requirements in Article 6.2 of the DSU serve a dual purpose:

> "First, as a panel's terms of reference are established by the claims raised in panel requests, the conditions of Article 6.2 serve to define the jurisdiction of a panel. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the due process objective of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response."[69]

7.49 The Appellate Body indicated in the same decision that to ensure that these purposes are fulfilled, "[s]uch compliance must be 'demonstrated on the face' of the panel request, read 'as a whole'".[70]

7.50 The United States' arguments pertain to the first requirement under Article 6.2, namely the identification of the specific measures at issue. We note, with respect to this requirement, that a measure may be identified either by its form (e.g. name, number, date and place of promulgation of a law or regulation, etc.) or by its substance (e.g. by providing a narrative description of the nature of the measure).[71] The Appellate Body has indicated in *US – Continued Zeroing* that "although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".[72] The Appellate Body further indicated that "so long as each measure is discernable in the panel request, the complaining party is not required to identify in its panel request each challenged measure independently from other measures in order to comply with the specificity requirement in Article 6.2 of the DSU".[73]

7.51 We agree with the abovementioned guidance from the Appellate Body and various panels. With this guidance in mind, we now consider whether Viet Nam's panel request[74] identifies the "continued use of challenged practices" as a measure at issue in this dispute. In doing so, we note that Viet Nam has referred extensively to the Appellate Body's findings in *US – Continued Zeroing* in explaining the nature and scope of the "continued use of challenged practices" measure. In fact, Viet Nam has defined its "continued use" measure primarily in relation to the measure at issue in *US – Continued Zeroing*.

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[68] Appellate Body Report, *US – Continued Zeroing*, para. 160. (footnotes omitted)

[69] Appellate Body Report, *US – Continued Zeroing*, para. 161.

[70] Appellate Body Report, *US – Continued Zeroing*, para. 161 (citing to Appellate Body Report, *US – Carbon Steel*, para. 127 and Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 169, in turn quoting Appellate Body Report, *US – Carbon Steel*, para. 127).

[71] Panel Report, *Canada – Wheat*, para. 6.10, subpara. 36; Panel Report, *China – Audiovisual Products*, para. 7.17; Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.60.

[72] Appellate Body Report, *US – Continued Zeroing*, para. 169. The Appellate Body made this comment when explaining the difference between the *identification* of the specific measure(s) at issue pursuant to Article 6.2 and a demonstration of the *existence* of these measure(s). The Appellate Body explained that an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement. For this reason, the Appellate Body "reject[ed] the proposition that an examination of the specificity requirement under Article 6.2 of the DSU must involve a substantive inquiry as to the existence and precise content of the measure." (*Idem*).

[73] Appellate Body Report, *US – Continued Zeroing*, para. 170.

[74] WT/DS404/5, Annex G-2.

7.52 In *US – Continued Zeroing*, the European Communities made claims in respect of an ongoing conduct, which the Appellate Body described as the USDOC's "use of the zeroing methodology in successive proceedings in each of the 18 cases [at issue] whereby anti-dumping duties are maintained."[75] The European Communities' panel request indicated that the measures at issue included, in addition to individual determinations:

> "The continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding at a level in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement (whether duties or cash deposit rates or other form of measure)."[76]

7.53 The Appellate Body found that the language of the European Communities' panel request was sufficient to identify a "continued use" measure, consistently with the requirements of Article 6.2 of the DSU. In particular, it found that through this language, the European Communities' panel request had properly identified the "continued application of the 18 duties" as a measure at issue.[77]

7.54 Viet Nam explains that similar to the measure at issue in *US – Continued Zeroing*, the "continued use" measure it challenges in the present dispute has both present and prospective components in the sense that it consists in the application of three of the four USDOC practices challenged by Viet Nam in both completed and future proceedings under the *Shrimp* anti-dumping order.[78]

7.55 The findings of the Appellate Body in *US – Continued Zeroing* clarify the Appellate Body's view that measures of the type of the "continued use" measure might properly be challenged in WTO dispute settlement proceedings.[79] However, the mere fact that a particular measure is *capable* of WTO challenge does not mean that it necessarily falls within a panel's terms of reference. Rather, as explained above, we must still establish whether or not Viet Nam's panel request actually identifies the "continued use of challenged practice" as a "measure at issue".

7.56 Having examined Viet Nam's panel request consistent with the guidance and principles set out above, we are bound to conclude that Viet Nam's panel request does not identify the "continued use of challenged practices" as a measure at issue. Viet Nam's panel request contains no indication that it sought to place any measure in the form of an ongoing conduct on the part of the USDOC, or any future USDOC determinations under the *Shrimp* anti-dumping order, before the Panel.

7.57 First, in this respect, we note that on its face, the only measures that Viet Nam's panel request identifies as "measures at issue" are those specifically referred to in the introductory paragraph to Section 2 of the panel request, namely the USDOC's final determinations in the original investigation and in the first, second and third administrative reviews, the USDOC's preliminary determination in

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[75] Appellate Body Report, *US – Continued Zeroing*, para. 171.

[76] Appellate Body Report, *US – Continued Zeroing*, para. 163.

[77] Appellate Body Report, *US – Continued Zeroing*, paras. 159-174.

[78] See *supra*, para. 7.38 and Viet Nam's first written submission, para. 104. Viet Nam explains that the USDOC's use of the practices at issue in successive proceedings under the *Shrimp* anti-dumping order "is conclusive evidence, per the Appellate Body's guidance in *US – Continued Zeroing*, that the USDOC will continue to engage in this conduct in the future." (Viet Nam's response to Panel question 55).

[79] We note that in *US – Continued Zeroing*, the European Communities challenged the USDOC's ongoing conduct in proceedings under several anti-dumping orders, whereas in the instant dispute, Viet Nam's claims pertain to the USDOC's actions in proceedings under a single order.

the fourth administrative review, and the USDOC's notice of initiation of the sunset review. The introductory paragraph to Section 2 of Viet Nam's panel request reads as follows:

> "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)."

7.58 The sentence that introduces the list of determinations, which reads "The following determinations constitute the measures at issue", in our view provides a strong indication that the panel request is limited to these determinations.

7.59 We recall that a measure at issue can be identified not only by its form, but also by a narrative description of the nature of the measure. With this in mind, we observe that, in addition to setting out the six segments of the *Shrimp* proceedings as constituting "the measures at issue", Viet Nam also describes the "zeroing methodology" as a measure in relation to which it makes "as such" claims.[80] However, beyond identifying the zeroing methodology as a measure subject to "as such" claims, Viet Nam's panel request contains no language that would indicate an intention to include future segments of the anti-dumping proceedings as measures at issue within the Panel's terms of reference or that would otherwise identify a "prospective component" of the alleged continued use measure. As can be seen from the list of measures contained in the introductory paragraph to Section 2 of the panel

[80] In this regard, we observe that later in its panel request, Viet Nam speaks of a "zeroing methodology" which it describes as having certain characteristics and certain bases. Although Viet Nam does not include this zeroing methodology in its list purporting to constitute the measures at issue in this proceeding, reading the panel request as a whole, we are comfortable that Viet Nam has identified the zeroing methodology as a measure at issue, consistent with the requirements of Article 6.2 of the DSU. In addition, the United States has not argued that this measure is not properly within our terms of reference.

request, Viet Nam's panel request only includes measures in existence or ongoing at the date of the request – as exemplified by the reference to the USDOC's *preliminary* determination in the fourth administrative review or the USDOC's *initiation* of a sunset review – without any reference to upcoming developments in respect of these proceedings.[81] Nothing in the panel request justifies inferring from the inclusion of partially-completed measures that Viet Nam sought to challenge a measure consisting of the USDOC's continuing and ongoing use of certain practices in the proceedings under the *Shrimp* anti-dumping order.[82]

7.60 For the foregoing reasons, we are unable to agree with Viet Nam that either the introductory paragraph to Section 2 of its panel request or the listing of USDOC determinations as of the date of the panel request identified the "continued use of challenged practices" measure consistent with the requirements of Article 6.2 of the DSU.[83] We also note Viet Nam's argument that language in the section of the panel request concerning the "Sunset Review" "established Viet Nam's concerns

[81] Consistent with this, in each of the sections of the panel request laying out its *legal claims* ("Zeroing", "Country-Wide Rate Based on Facts Available", "Limiting the Number of Respondents Selected for Full Investigation or Review" and "Sunset Review") Viet Nam refers to the "USDOC's application of the above-mentioned laws and procedures *in the original investigation and periodic reviews here at issue*" (emphasis added) or similar references to USDOC actions "[i]n the antidumping proceedings at-issue". (Viet Nam panel request, WT/DS404/5, p. 3, chapeau to paras. 9-11 (zeroing claims); p. 4, chapeau to paras. 14-17, and p. 5, chapeau to paras. 18-19 ("country-wide rate"); p. 6, chapeau to paras. 27-28 (limitation of the number of respondents)).

[82] We note the United States' argument that through the "continued use" measure, Viet Nam seeks to extend the scope of that list to include the final determinations in the sunset review and the fourth administrative review and the initiation of the fifth administrative review. We agree with the United States that there is no basis in the panel request – whether independent identification of these determinations or identification of a "continued use" measure comprising them – to consider that these determinations are properly before the Panel.

[83] The Panel asked Viet Nam the following question (Panel question 3):

> "(to Viet Nam) In paragraph 160 of its Report in *US – Continued Zeroing*, the Appellate Body stated that the requirements to identify the specific measures at issue and to provide a brief summary of the legal basis of the complaint under Article 6.2 of the DSU are "intended to ensure that the complainant 'present[s] the problem clearly.'" Further, in para. 161 of its Report in the same dispute, the Appellate Body, referring to its previous decisions, said that compliance with Article 6.2 of the DSU must be demonstrated "on the face" of the panel request, read "as a whole".
>
> Bearing in mind that we must read Viet Nam's panel request "as a whole", where, on the face of the panel request does Viet Nam identify the "continued use" measure in a manner that presents the problem clearly."

Viet Nam answered that it:

> "... presented the "continued use" measure in the opening line of Section 2 of the Panel Request, stating, "[t]he 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 sentence does not include the limitation of "completed" or "initiated" periodic reviews, plainly suggesting Viet Nam's concern with any future periodic review in which the USDOC continues to engaged in the challenged actions.
>
> The Panel Request next identified every segment of the proceeding that is a direct product, thus far, of the shrimp antidumping duty order to further clarify Viet Nam's concern with the ongoing nature of certain claims raised in the request. The determinations completed prior to Viet Nam's accession to the WTO and those segments not yet final were included for this purpose, illustrating that these violations continue to occur. Viet Nam's request made every effort to present as clearly as possible that the USDOC has continued to engage in the conduct throughout each segment of the antidumping proceeding stemming from imposition of the shrimp antidumping order."

regarding continued and ongoing practices".[84] The relevant paragraph of Viet Nam's panel request reads as follows:

> "The USDOC initiated a sunset review for these antidumping proceedings on 4 January 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."[85]

7.61 We read this paragraph as reflecting Viet Nam's intention to place the (then ongoing) sunset review within our terms of reference, and as expressing its concern with the cumulative effect of the challenged practices *on that sunset review*. In other words, the measure at issue in this paragraph appears to be the sunset review itself, not some continuing practice of the USDOC.[86]

7.62 Viet Nam has been unable to identify any other language in its panel request that would identify the "continued use" measure as a measure at issue. It was incumbent upon Viet Nam, if it wished to include a measure of the type which it has described in its submissions, to include in its panel request at least some indication that it was challenging not only USDOC determinations in completed proceedings under the *Shrimp* anti-dumping order, but also an ongoing conduct on the part of the USDOC, including USDOC actions in future proceedings under the order.

7.63 We recall that Viet Nam has referred extensively to the Appellate Body's findings in *US – Continued Zeroing*. We note that unlike Viet Nam's panel request, the European Communities' panel request in *US – Continued Zeroing* case referred not only to the definitive duties under each of the anti-dumping orders at issue, and to the most recent determinations under these orders, but also explicitly indicated the European Communities' intent to place before the panel a measure in the form of an ongoing conduct, which it defined as the "continued application" of the 18 duties at issue.[87] Viet Nam was not required to formulate its panel request by using terms identical or similar to those used by the European Communities in *US – Continued Zeroing*. However, the European Communities' formulation of the "continued application" measure in *US – Continued Zeroing* illustrates how a party *may* include a measure of this type in its panel request.[88] In contrast to that panel request, Viet Nam's panel request in the instant case does not signal – either directly, or even

[84] Viet Nam's response to the United States' request for preliminary rulings, para. 25.

[85] Viet Nam's panel request, p. 7 "(d) Sunset Review".

[86] We note, however, Viet Nam's indication in its response to Panel question 9 that it is not pursuing any claims in respect of the USDOC's determinations in the context of the sunset review.

[87] See *supra*, paras. 7.52-7.53.

[88] A recent illustration of a panel finding that a "continued use" measure was identified in a panel request in a manner meeting the requirements of Article 6.2 of the DSU is the report of the panel in *US – Orange Juice (Brazil)*. The panel in *US – Orange Juice (Brazil)* found that Brazil's panel request in that case was sufficiently precise to satisfy the requirements of Article 6.2 of the DSU. Brazil challenged a measure which it had described as follows in its panel request: "The continued use of the U.S. 'zeroing procedures' in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil." (Panel Report, *US – Orange Juice (Brazil)*, paras. 7.38-7.41). The report of the *US – Orange Juice (Brazil)* panel was issued shortly before the issuance of our Interim Report and had neither been appealed nor adopted at the time of the issuance of our Final Report to the parties.

indirectly, independently or in combination with other measures – any intention to place within the Panel's terms of reference a measure in the form of an ongoing conduct on the part of the USDOC, extending into the future. In sum, we reach the view that no "continued use" measure is discernable from Viet Nam's panel request.

7.64 In addition, we note that Viet Nam's request for *consultations* did identify a "continued use" measure, albeit in words that differ from those used by Viet Nam in its submissions to the Panel. Paragraph 3 of Viet Nam's request for consultations reads, in relevant part:

> "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."[89]

7.65 The fact that the reference to a measure of this type in the consultations request was omitted from the panel request, and not replaced with other similar textual references to a "continued use" measure, or other measure taking the form of an ongoing conduct, confirms the view that the "continued use" measure was excluded from the text of Viet Nam's panel request.[90]

7.66 Finally, Viet Nam also argues that measures not identified in a panel request may nonetheless fall within the panel's terms of reference where they are "subsidiary or closely related to" those measures explicitly identified in the panel request.[91] In support of this argument, Viet Nam cites to the findings of the panels in *Japan – Film* and *Argentina – Footwear*.

7.67 We do not consider that the findings of the *Japan – Film* and *Argentina – Footwear* panels assist Viet Nam in the present case. Viet Nam is not arguing that the "continued use" measure is an amendment to the specific measures explicitly included in the panel request, as was the case in *Argentina – Footwear*. Nor can Viet Nam argue that the relationship between the "continued use" measure and the specific determinations included in its panel request is similar to the relationship between a basic framework law and implementing measures provided for in that law, or between two documents of a same series, as was the case in *Japan – Film*.[92] More importantly, the key

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[89] Viet Nam's request for consultations, WT/DS404/1 (reproduced in Annex G-1), p. 3, para. 3. (emphasis added). Viet Nam confirmed during oral questioning and in its response to Panel question 2 that the closing sentence of this paragraph should be understood as a reference to a "continued use" measure.

[90] As a further contrast between the two requests, we note that the consultations request indicates Viet Nam's intention to launch consultations with respect not only to determinations already rendered by the USDOC (Viet Nam's request for consultations, p. 1, paras. 1(a)-(d)), but also with respect to what at that time were future measures, e.g. the preliminary and final results of "any administrative reviews or other reviews" under the *Shrimp* order published "after the date of this request for consultations" (request for consultations, p. 2, para. 1(e)) as well as any USDOC determination on remand from the US Court of International Trade (request for consultations, p. 2, para. 1(f)).

[91] We note the United States' argument that this line of argument is at odds with Viet Nam's position that its panel request does identify the "continued use" measure.

[92] The *Japan – Film* panel considered that where a basic framework law dealing with a narrow subject matter is specified in a panel request, implementing "measures" might be considered as effectively included in

rationale underlying the findings of the *Japan – Film* and *Argentina – Footwear* panels under Article 6.2 was their view that certain measures are so closely related to the measure identified explicitly in the panel request that identification of the latter provides sufficient notice that the complainant intends to challenge the former.[93] Accepting Viet Nam's arguments would effectively mean that a "continuing measure" is implicitly included in a panel's terms of reference whenever an individual determination is challenged. Yet we do not consider that the identification of specific instances of application of a given "practice" provides sufficient notice to the respondent and third parties that the complainant intends to make claims in respect of the responding Member's ongoing use of that same practice. Rather, as Viet Nam's own arguments demonstrate, measures in the form of an ongoing conduct are markedly different from individual manifestations of that conduct in specific instances.[94] For this reason, one would expect the complainant to identify such a measure explicitly in its panel request.[95]

7.68 In sum, after examining it as a whole, in light of the language used by Viet Nam therein, and taking as context Viet Nam's request for consultations, we conclude that Viet Nam's panel request fails to identify the "continued use of challenged practices" as a measure at issue. For this reason, we find that a measure consisting of the "continued use of challenged practices" is not within our terms of reference.

(c) Whether the "continued use of challenged practices" measure is amenable to WTO challenge

7.69 Given our conclusion that the "continued use" measure does not fall within our terms of reference because it is not identified as a "measure at issue" in Viet Nam's panel request, we do not need to examine the United States' request for a preliminary ruling that the "continued use" measure is a measure of a type that may not be challenged before a WTO dispute settlement panel. We recall, though, that the Appellate Body found in *US – Continued Zeroing* that the continued application of certain anti-dumping duties could be challenged in WTO dispute settlement proceedings.[96]

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the panel request, in particular where the basic framework law "specifies the form and circumscribes the possible content and scope of implementing 'measures'". Panel Report, *Japan – Film*, paras. 10.8, 10.13. In addition, the panel considered that a report which was part of the same series of reports as one which had been explicitly included among the measures listed in the panel request fell within its terms of reference. *Id.*, para. 10.14. At issue in *Argentina – Footwear* was whether subsequent modifications of the definitive safeguard measure identified as the measure at issue in the panel request also fell within the panel's terms of reference. The panel considered that it was the measures in their substance rather than the legal acts in their original or modified legal forms that were most relevant for its terms of reference. Panel Report, *Argentina – Footwear*, para. 8.40.

[93] See also Panel Report, *EC – Fasteners* (adoption/appeal pending), para. 7.38:

> "It is now well established that a measure which is not identified in the complainant's panel request may nonetheless fall within a panel's terms of reference if it is sufficiently closely related to the measures identified in the panel request, such that the respondent can be found to have had adequate notice of the nature of the claims that the complainant might raise during the panel proceedings". (footnote omitted)

[94] Viet Nam argues that "continuing measures" fall in the "cross-section" between the measures that are the subject of "as such" claims and those that are the subject of "as applied" claims, adding that measures in the form of an ongoing practice are narrower than the former, but broader than the latter. (Viet Nam's response to the United States' request for preliminary rulings, para. 13, referring to Appellate Body Report, *US – Continued Zeroing*, para. 180).

[95] We add that, were Viet Nam correct on this point, there would have been no need for the Appellate Body to examine the issue of the identification of the "continued application" measure in *US – Continued Zeroing*.

[96] See *supra*, para. 7.55.

4. Conclusion with respect to the measures at issue in this dispute

7.70 We recall that, with respect to its "as applied" claims, Viet Nam only seeks to place before the Panel the USDOC's determinations in the second and third administrative reviews and the "continued use" measure.[97] In response to a question from the Panel, Viet Nam confirmed that "[i]f the Panel determines that the 'continued use' measure does not fall within its terms of reference, then the second administrative review and third administrative review are the only measures to which Viet Nam's claims of violations apply."[98] We further recall that Viet Nam makes "as such" claims in respect of another measure, the U.S. "zeroing methodology".[99] We have concluded that the "continued use" measure does not fall within our terms of reference. In consequence, the measures at issue in the instant dispute are the USDOC's determinations in the second and third administrative reviews and the U.S. "zeroing methodology".

D. VIET NAM'S CLAIMS WITH RESPECT TO ZEROING

1. Introduction

7.71 Viet Nam requests that we find[100]:

(a) that simple zeroing, "as applied" in the second and third administrative reviews, is inconsistent with Articles 9.3, 2.1, 2.4.2, and 2.4 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994[101]; and

(b) that the USDOC's zeroing methodology is, as such, inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[102]

7.72 We examine each claim in turn, starting with Viet Nam's "as applied" claim.

2. Zeroing "as applied" in the administrative reviews at issue

(a) Introduction

7.73 Viet Nam requests that we find that the USDOC's use of simple zeroing to calculate the margins of dumping of individually-examined respondents in the second and third administrative reviews is inconsistent with Articles 9.3, 2.1, 2.4.2 and 2.4 of the Anti-Dumping Agreement and with Article VI:2 of the GATT 1994. We will first consider whether Viet Nam has demonstrated that the USDOC applied zeroing in these two administrative reviews. If we are satisfied that Viet Nam has met its burden of establishing its factual allegations in this respect, we will next consider whether, in doing so, the USDOC violated the provisions cited by Viet Nam.

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[97] See *supra*, para. 7.32.

[98] Viet Nam's response to Panel question 7. We understand Viet Nam's response as only addressing the measures before the Panel with respect to Viet Nam's "as applied" claims.

[99] In *supra*, footnote 80, we explain why, in our view, this measure falls within our terms of reference.

[100] We have already found that the "continued use of challenged practices" measure does not fall within our terms of reference and for this reason do not consider Viet Nam's claims in respect of that measure. We consider Viet Nam's claims and arguments with respect to the alleged use by the USDOC of margins calculated with zeroing to calculate the "all others" rates in section VII.F below.

[101] Viet Nam's second written submission, para. 144(1); Viet Nam's opening oral statement at the second meeting, para. 59(1).

[102] Viet Nam's second written submission, para. 144(2); Viet Nam's opening oral statement at the second meeting, para. 59(2).

(b) Whether the USDOC applied zeroing in the administrative reviews at issue

(i) Main arguments of the parties

Viet Nam

7.74 Viet Nam submits that consistent with its practice in administrative reviews[103], the USDOC engaged in "simple zeroing" in the calculation of the margins of dumping for individually-examined exporters in the administrative reviews at issue.[104]

United States

7.75 The United States does not contest Viet Nam's allegation that the USDOC used simple zeroing in the administrative reviews at issue.[105]

(ii) Evaluation by the Panel

7.76 We now proceed to determine on the basis of the evidence submitted by Viet Nam whether the USDOC used "simple zeroing" in the calculation of individual margins in the second and third administrative reviews.

7.77 First, Viet Nam provides the Panel with printouts of the USDOC's computer programme "logs" and "outputs" showing the application of zeroing for two Vietnamese respondents selected for individual review in each of the second and the third administrative reviews, i.e. Minh Phu and Camimex.[106] The "logs" provide the computer programming language to execute the desired operations on the data, and show how the programme processed the data. The "outputs" provide sample dumping calculations and sample prints of databases that are run through the programme.[107]

7.78 Viet Nam also submits an affidavit by a trade analyst, Mr. Michael Ferrier, explaining the USDOC's use of zeroing in the original investigation and administrative reviews.[108] The affidavit

[103] For a summary of Viet Nam's description of "simple zeroing", as allegedly used by the USDOC, see *supra* para. 7.16.

[104] Viet Nam's first written submission, paras. 47-51. Because of its claims in respect of the "continued use" measure, Viet Nam submits evidence with respect to the use of simple zeroing in each of the four administrative reviews under the *Shrimp* anti-dumping order. In this section of our findings, we only consider the evidence pertaining to the second and third administrative reviews.

[105] As we note *infra*, para. 7.82 and footnote 116, the United States' arguments focus on the fact that in the measures at issue, the USDOC calculated zero and *de minimis* margins of dumping, and as a result did not assess any duties in respect of imports from selected respondents.

[106] USDOC Computer Programme Log for Minh Phu in the Second Administrative Review, Exhibit Viet Nam-36; USDOC Computer Programme Log for Camimex in the Second Administrative Review, Exhibit Viet Nam-37; USDOC Computer Programme Log for Minh Phu in the Third Administrative Review, Exhibit Viet Nam-38; USDOC Computer Programme Log for Camimex in the Third Administrative Review, Exhibit Viet Nam-39; Computer Programme Output for Minh Phu in the Second Administrative Review, Exhibit Viet Nam-44; Computer Programme Output for Camimex in the Second Administrative Review, Exhibit Viet Nam-45; Computer Programme Output for Minh Phu in the Third Administrative Review, Exhibit Viet Nam-46; Computer Programme Output for Camimex in the Third Administrative Review, Exhibit Viet Nam-47.

[107] Affidavit by Michael Ferrier, Exhibit Viet Nam-33, para. 9.

[108] Affidavit by Michael Ferrier, Exhibit Viet Nam-33. The affidavit states that Mr. Ferrier is an international trade analyst with a law firm and formerly worked for the USDOC where, according to his affidavit, he analyzed computer responses of respondents, input the information from these responses into the USDOC's programme for determining anti-dumping duty margins, and calculated these margins. The affidavit also indicates that the "logs" and "outputs" were released by the USDOC to counsel for Minh Phu and

directs the Panel's attention to certain lines of computer code in the "logs" that implement the instruction to disregard negative comparison results in the calculation of the total anti-dumping duties of a reviewed exporter.[109] The affidavit further explains that corroboration for this removal by the computer programme of any comparison result of zero or below (i.e. comparisons for which the export price exceeds normal value) can be found in the "outputs" for Minh Phu and Camimex. These outputs record, for each of these two Vietnamese companies, the volume and value of sales that were below normal value, as well as the volume and value of each producer's total sales to the United States during the review period.[110] Finally, the affidavit also identifies the programming lines that exclude any comparison result below zero in the calculation of the importer-specific assessment rate.

7.79 Viet Nam also provides the Panel with the Issues and Decision Memoranda that accompany each of the USDOC's final determinations in the administrative reviews at issue. The memoranda confirm the USDOC's use of zeroing in these reviews. In the memorandum to the second administrative review, the USDOC states that it "has continued to deny offsets to dumping based on export transactions that exceed the normal value in this review".[111] In the memorandum to the third administrative review, the USDOC writes that "in the event that any of the export transactions examined in this review are found to exceed normal value, the amount by which the price exceeds normal value will not offset the dumping found in respect of other transactions."[112]

7.80 We recall that where a party adduces evidence sufficient to raise a presumption that what it claims is true, the burden shifts to the other party, who will fail unless it adduces evidence to rebut that presumption.[113] In the present instance, Viet Nam has put forward sufficient evidence to lead us to the view that, as Viet Nam alleges, the USDOC used simple zeroing in the calculation of the dumping margins of individually-examined exporters/producers. In the absence of any arguments or evidence on the part of the United States to rebut the presumption established by Viet Nam[114], we are satisfied that the USDOC used simple zeroing in its calculation of the margins of dumping of individually-examined producers in the second and third administrative reviews.[115]

Camimex. We note that in referring to Exhibit Viet Nam-33, we use the term "affidavit" which has been used in the exhibit and by the parties, without any comment on the status of the document as a matter of U.S. municipal law.

[109] Affidavit by Michael Ferrier, Exhibit Viet Nam-33, paras. 27-56; Viet Nam's first written submission, para. 48.

[110] According to the figures provided, in each of two administrative reviews, the vast majority of Minh Phu's and Camimex' U.S. sales (in terms of both value and volume) were excluded because the export price was equal to or above normal value.

[111] Issues and Decision Memorandum for the Final Determination in the Second Administrative Review, Exhibit Viet Nam-15, pp. 13-14.

[112] Issues and Decision Memorandum for the Final Determination in the Third Administrative Review, Exhibit Viet Nam-19, p. 13. See also, *infra* paras. 7.115-7.116 for a more detailed discussion of the content of the Issues and Decision Memoranda.

[113] See, *supra* paras. 7.6-7.8.

[114] In its response to Panel question 54, para. 6, the United States comments on the Ferrier affidavit (Exhibit Viet Nam-33). The United States indicates that "[t]he evidence contained in Exhibit Viet Nam-33 does not appear to be factually incorrect." The USDOC does not comment on other evidence submitted by Viet Nam in support of its allegation.

[115] We note that the USDOC places the amount resulting from the aggregation of the various comparison results in the numerator when calculating the margins of dumping as a percentage of the total value of export transactions. The issue before us relates to this inclusion of comparison results in the numerator. Zeroing does not affect the denominator: the USDOC includes the value of all export transactions in the denominator of the equation.

(c) Whether the USDOC's application of zeroing in the administrative reviews at issue is inconsistent with the provisions cited by Viet Nam

(i) Introduction

7.81 We now proceed to consider whether the USDOC's application of zeroing to calculate the margins of dumping of selected respondents in the two periodic reviews at issue was inconsistent with the United States' obligations under the covered agreements.

7.82 As we discuss below, this is not the first time U.S. practices in relation to zeroing have come before a WTO panel. The facts before us are unusual, however, in that all of the margins of dumping in the second and third administrative reviews were either zero or *de minimis*. This raises the question whether the use of zeroing is WTO-inconsistent, even though no duties are actually assessed with respect to the selected respondents.[116]

7.83 Viet Nam makes claims of violation under Articles 9.3, 2.1, 2.4.2, and 2.4 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[117] We examine each of Viet Nam's claims, starting with the alleged violation of Article 2.4 of the Anti-Dumping Agreement.[118]

(ii) Viet Nam's claim under Article 2.4 of the Anti-Dumping Agreement

Main arguments of the parties

Viet Nam

7.84 Viet Nam asserts that the "fair comparison" language in the first sentence of Article 2.4 creates an independent obligation for the investigating authority to make a "fair comparison" between export price and normal value.[119] Viet Nam argues that the use of a zeroing methodology in periodic reviews violates this obligation, particularly as it systematically eliminates certain transactions from the comparison. Viet Nam notes that the Appellate Body has found that zeroing is inconsistent with Article 2.4 because it distorts the prices of certain export transactions, since export transactions made at prices above normal value are not considered at their real value, and because it artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely.[120] Viet Nam argues that the violation of Article 2.4 resides in

[116] The United States argues that given the zero and *de minimis* dumping margins, Viet Nam has not demonstrated that the USDOC assessed any duties with respect to imports from the selected respondents (United States' first written submission, paras. 106-109 and United States' second written submission, para. 31). Viet Nam admits that under the U.S. procedures for the conduct of administrative reviews, if an exporter obtains a zero margin or a *de minimis* margin, it necessarily follows that as a result of that same review, no importer will be assessed any duties in respect of imports from that exporter (Viet Nam's response to Panel question 50). In light of these clarifications from the parties, we consider it an undisputed fact that no duties were assessed with respect to the selected respondents as a result of the two administrative reviews at issue.

[117] Viet Nam's second written submission, para. 144(1).

[118] We recall that a panel is entitled to structure its analysis in the manner most appropriate to facilitate the analysis of the issues presented to it. (Panel Report, *US – Zeroing (EC)*, para. 7.13; Panel Report, *US – Zeroing (Japan)*, para. 7.14 and footnote 641; see also Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 277).

[119] Viet Nam's response to Panel question 51 (citing to Appellate Body Report, *US – Zeroing (EC)*, para. 146).

[120] Viet Nam's second written submission, paras. 28-30; Viet Nam's response to Panel questions 17 and 51 (citing to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 138-140 and 142; and Appellate Body Report, *US – Zeroing (Japan)*, paras. 146-147); Viet Nam's closing oral statement at the second meeting of the Panel, para. 8.

this unfair comparison. Viet Nam therefore considers that the use of zeroing to calculate dumping margins in the periodic reviews at issue is inconsistent with Article 2.4 notwithstanding the fact that the calculations produced zero and *de minimis* margins.[121]

United States

7.85 The United States argues that Article 2.4 concerns the issue of the comparability of the export price and normal value, including the need for any adjustments, prior to the investigating authority conducting the comparison between the two. Thus, the United States argues, Article 2.4 does not speak to the issue of how the results of these comparisons are to be treated and does not require their aggregation. As a consequence, Article 2.4 does not prohibit zeroing.[122] The United States argues that the Appellate Body's statements, in prior disputes, that zeroing is inconsistent with Article 2.4 were either dependent on findings of violation under Article 2.4.2 or Article 9.3, or pertained to zeroing in different contexts.[123] In addition, the United States argues, where the margins of dumping calculated are zero or *de minimis*, they cannot be characterized as "artificially inflated" or "inherently unfair" and zeroing does not lead to the collection of duties in excess of the dumping margin under Article 9.3 of the Anti-Dumping Agreement.[124]

7.86 The United States argues that higher or lower dumping margins are not inherently fair or unfair, and therefore a methodology cannot be said to be unfair merely because it produces higher margins. The United States submits that the text of Article 2.4 does not resolve whether any particular assessment of anti-dumping duties exceeds the margin of dumping because Article 2.4 does not resolve whether "dumping" and "margins of dumping" are concepts that apply to individual transactions. Thus, the text of Article 2.4 does not resolve whether zeroing is "fair" or "unfair". The United States submits that a number of panels have rejected the expansive interpretation of the "fair comparison" requirement advocated by Viet Nam.[125]

Main arguments of the third parties

India

7.87 India urges the Panel follow the Appellate Body's prior decisions on the issue of zeroing. India notes that the Appellate Body has ruled in *US – Zeroing (Japan)* that zeroing in the context of periodic reviews is inconsistent with the "fair comparison" requirement in Article 2.4.[126]

[121] Viet Nam's response to Panel question 51; Viet Nam's comments on the United States' response to Panel question 49 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 137).

[122] United States' second written submission, paras. 21-29. United States' opening oral statement at the second meeting of the Panel, paras. 16-18; United States' comments on Viet Nam's response to Panel question 51.

[123] United States' second written submission, paras. 30-37 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 168, Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142; and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 135-138); United States' response to Panel question 49.

[124] United States' second written submission, paras. 31-32.

[125] United States' second written submission, paras. 34-37 and United States' opening oral statement at the second meeting of the Panel, paras. 19-23 (referring to Panel Report, *US – Zeroing (Japan)*, para. 7.155, 7.158; Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.74; Panel Report, *US – Zeroing (EC)*, para. 7.260).

[126] India's third-party oral statement, paras. 10, 12; India's response to Panel question 2 (referring to Appellate Body Report, *US – Zeroing (Japan)*, paras. 167-169).

Japan

7.88 Japan argues that the use of zeroing violates Article 2.4 of the Anti-Dumping Agreement irrespective of its impact, because by using zeroing, the investigating authority fails to carry out a fair comparison, irrespective of the outcome of that comparison.[127] Japan asserts that the Appellate Body has held that there is an inherent bias in a zeroing methodology and that as a way of calculating margins, the zeroing methodology "cannot be described as impartial, even-handed, or unbiased", because it necessarily excludes any negative comparisons results.[128]

Korea

7.89 Korea argues that it is now settled that zeroing makes an investigating authority methodically fail to take into account all export transactions for the product as a whole, and therefore inevitably leads to an "unfair comparison."[129]

Evaluation by the Panel

7.90 Viet Nam alleges that the USDOC's use of zeroing in the second and third administrative reviews violates the "fair comparison" requirement set forth in the first sentence of Article 2.4 of the Anti-Dumping Agreement. This sentence provides:

> "A fair comparison shall be made between the export price and the normal value."

7.91 The Appellate Body has previously indicated that the use of zeroing to calculate dumping margins is inherently inconsistent with this "fair comparison" requirement.[130] We refer in this regard to the findings of the Appellate Body in *US – Corrosion Resistant Steel Sunset Review*, *US – Softwood Lumber V (Article 21.5 – Canada)*, and *US – Zeroing (Japan)*. We note, in particular, the findings of the Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)* that:

> "First, the use of zeroing under the transaction-to-transaction comparison methodology when aggregating the transaction-specific comparisons for purposes of calculating the 'margins of dumping', distorts the prices of certain export transactions because export transactions made at prices above normal value are not considered at their real value. The prices of these export transactions are artificially reduced when zeroing is applied under the transaction-to-transaction comparison methodology. As the Appellate Body explained in the original dispute, '[z]eroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are.'
>
> Secondly, the use of zeroing in the transaction-to-transaction comparison methodology, as in the weighted average-to-weighted average methodology, tends to

[127] Japan's third-party written submission, para. 49; Japan's third-party oral statement, para. 2; Japan's response to Panel question 3.

[128] Japan's third-party written submission, paras. 30-31, 49; Japan's response to Panel question 3 (referring to, *inter alia*, to Appellate Body Report, *US – Zeroing (Japan)*, para. 146, in turn quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142; and to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135).

[129] Korea's response to Panel question 2.

[130] Regarding the U.S. argument concerning the scope of the first sentence of Article 2.4 (described, *supra* para 7.85), we note that the Appellate Body has already confirmed that the first sentence of Article 2.4 creates an independent obligation, the scope of which is not exhausted by the remainder of that provision (see, e.g. Appellate Body Report, *US – Zeroing (EC)*, para. 146, affirming, on this point, the interpretation of the panel in the same dispute, paras. 7.253-7.258; and Appellate Body Report, *EC – Bed Linen*, para. 59).

result in higher margins of dumping. As the Appellate Body underscored in *US – Corrosion-Resistant Steel Sunset Review*, the use of zeroing:

> ... will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. ... Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[131]

7.92 The Appellate Body concluded that:

> "... the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely. This way of calculating cannot be described as impartial, even-handed, or unbiased. For this reason, we do not consider that the calculation of 'margins of dumping', on the basis of a transaction-to-transaction comparison that uses zeroing, satisfies the 'fair comparison' requirement within the meaning of Article 2.4 of the *Anti-Dumping Agreement*."[132]

7.93 We agree with the above reasoning of the Appellate Body, and adopt it as our own. Even in cases where no anti-dumping duties are assessed, the application of zeroing distorts the prices of certain export transactions, because export transactions made at prices above normal value are not considered at their real value. Indeed, Viet Nam has demonstrated that, in the two administrative reviews at issue, the USDOC disregarded the results of the export price/normal value comparison for the vast majority of the selected respondents' export transactions.[133] In doing so, the USDOC, without any justification under the Anti-Dumping Agreement, effectively reduced the export prices for the relevant export transactions, treating these prices as equal to the normal value, even though in reality they were not.

7.94 Since it is an integral part of the price comparison undertaken by the USDOC, we consider that the USDOC's artificial reduction of the export price of transactions in the second and third administrative reviews is sufficient to render the price comparison inconsistent with the first sentence of Article 2.4, even though no anti-dumping duties are ultimately assessed.

7.95 Furthermore, as the Appellate Body underscored in *US – Corrosion-Resistant Steel Sunset Review*, there is an *inherent* bias in the zeroing methodology, because it *tends* to artificially inflate the dumping margins calculated.[134] The clear implication of the Appellate Body's approach is that zeroing is incompatible with the requirement of a "fair comparison" under Article 2.4 of the Anti-Dumping Agreement, irrespective of whether duties are actually assessed.

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[131] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 139-140 (citing to Appellate Body Report, *US – Softwood Lumber V*, para. 101 and *US – Corrosion-Resistant Steel Sunset Review*, para. 135). (emphasis original, footnotes omitted)

[132] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142. See also Appellate Body Report, *US – Zeroing (Japan)*, paras. 146 and 167-169.

[133] See *supra* footnote 110.

[134] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135, cited *supra* para. 7.91.

7.96 For these reasons, we reject the United States' argument that where the margins of dumping calculated are zero or *de minimis*, as they are here, there can be no violation of Article 2.4.[135]

7.97 On the basis of the foregoing, we conclude that the United States acted inconsistently with Article 2.4 of the Anti-Dumping Agreement as a result of the USDOC's use of zeroing to calculate the dumping margins of individually-examined exporters in the second and third administrative reviews.

(iii) Viet Nam's claims of violation under Articles 9.3, 2.1, and 2.4.2 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

7.98 In addition to its claim under Article 2.4, Viet Nam also considers that the USDOC's use of zeroing in the second and third administrative reviews violates Articles 9.3, 2.1, and 2.4.2 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994.

7.99 The United States asks us to reject Viet Nam's claims under these provisions. The United States argues, *inter alia*, that the prohibition of zeroing in periodic reviews under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, if there is one, is triggered by the imposition of duties *in excess* of the margin of dumping, such that there can be no violation when no duties are assessed[136]; that Article 2.1 of the Anti-Dumping Agreement is purely definitional and does not impose any independent obligation upon the investigating authority[137]; and that Article 2.4.2 of the Anti-Dumping Agreement applies only in the context of original investigations, and imposes no obligation with respect to periodic reviews.[138]

7.100 In *US – Shirts and Blouses*, the Appellate Body stated that "a panel need only address those claims which must be addressed in order to resolve the matter at issue".[139] The Appellate Body has also stated in *Australia – Salmon* that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings."[140]

7.101 We have already found that the USDOC's use of zeroing in the calculation of the margins of dumping of selected respondents in the second and third administrative reviews was inconsistent with Article 2.4 of the Anti-Dumping Agreement. Finding a violation of any of the other provisions invoked by Viet Nam would add nothing to the resolution of this dispute, nor would it aid in any potential implementation. Accordingly, we consider it appropriate to exercise judicial economy in respect of Viet Nam's claims under Articles 9.3, 2.1, and 2.4.2 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

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[135] United States' response to Panel question 49, para. 3. We note that shortly before we issued our interim report, another panel issued its Report in which it arrived at a similar conclusion. See Panel Report, *US – Orange Juice (Brazil)* (adoption/appeal pending), paras. 7.137-7.161.

[136] United States' first written submission, paras. 104, 106-109; United States' opening oral statement at the first meeting of the Panel, para. 26; United States' response to Panel questions 14 and 19; United States' second written submission, paras. 7-10; United States' opening oral statement at the second meeting of the Panel, paras. 7-8.

[137] United States' second written submission, paras. 21-37 and 49-54; United States' opening oral statement at the second meeting of the Panel, para. 11 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 140).

[138] United States' second written submission, paras. 38-48; United States' opening oral statement at the second meeting of the Panel, paras. 12-14; United States' comments on Viet Nam's response to Panel questions 52 and 53A.

[139] Appellate Body Report, *US – Shirts and Blouses*, p. 19.

[140] Appellate Body Report, *Australia – Salmon*, para. 223.

3. Zeroing "as such"

(a) Introduction

7.102 We now consider Viet Nam's claims with respect to the U.S. "zeroing methodology". Viet Nam argues that the zeroing methodology is a rule or norm of general and prospective application that may be subject to an "as such" claim, even though it is not set forth in any written document.[141] Viet Nam requests us to find that this rule or norm, insofar as it relates to the calculation of dumping margins in periodic reviews is, as such, inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[142]

7.103 The United States asks us to reject Viet Nam's claims. While the United States does not deny that unwritten rules or norms of general and prospective application may be challenged "as such", the United States submits that Viet Nam has failed to establish as a matter of fact, based on the evidence put forward in this proceeding, that the alleged zeroing methodology constitutes a norm of general and prospective application.[143]

7.104 Viet Nam's claims raise issues regarding the circumstances in which an unwritten rule or norm of general and prospective application may be challenged in WTO dispute settlement proceedings. While it is now established[144] that such measures are susceptible to challenge, the Appellate Body has indicated that their unwritten nature means that panels must exercise particular care in determining whether or not the complaining Member has properly established their existence. Accordingly, we will first examine whether or not Viet Nam has properly established the existence of the zeroing methodology as a rule or norm of general and prospective application. If we find Viet Nam has properly established the existence of such a measure as a matter of fact, we will then evaluate the parties' arguments concerning the WTO-consistency of that measure.

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[141] See, e.g. Viet Nam's second written submission, para. 20; Viet Nam's opening oral statement at the second meeting of the Panel, para. 10; Viet Nam's response to Panel question 54B; Viet Nam's comments on the United States' response to Panel question 50(ii). While Viet Nam requests findings in respect of the "zeroing methodology", in its arguments, Viet Nam interchangeably uses the terms "zeroing methodology" and "zeroing procedures". In our findings, we use the term "zeroing methodology" used by Viet Nam in its request for findings.

[142] Viet Nam's second written submission, para. 144(2). Viet Nam notes that the Appellate Body, in *US – Zeroing (Japan)*, para. 88, affirmed the finding of the panel in that case that "'zeroing procedures' under different comparison methodologies, and in different stages of the anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm". (Viet Nam's second written submission, para. 18). That said, we note that Viet Nam's requests for findings are limited to the application of that methodology in the context of U.S. administrative reviews and that Viet Nam's arguments focus on the precise context of the use of the weighted-average-to-transaction comparison methodology in such reviews.

[143] The United States notes that Viet Nam's first written submission made no reference to any "as such" claim and that during oral questioning in the first meeting of the Panel, Viet Nam indicated that it was not pursuing an "as such" claim in this dispute. The United States submits that Viet Nam for the first time articulated the bases of its "as such" claim against the zeroing methodology in response to a written question from the Panel (Panel question 11). (United States' second written submission, para. 11).

[144] See, e.g. Appellate Body Report, *US – Zeroing (EC)*, paras. 192-193.

(b) Whether Viet Nam has established the existence of the zeroing methodology as a rule or norm of general and prospective application

(i) Main arguments of the parties

Viet Nam

7.105 Viet Nam submits that prior panels and the Appellate Body have concluded that the U.S. zeroing methodology is an established norm or practice that may be subject to an as such claim.[145] Viet Nam asserts that the zeroing procedures, as described in the affidavit it submitted as Exhibit Viet Nam-33, are unchanged from the procedures that were found to constitute a general rule or norm in these past disputes.[146] Viet Nam argues that the Panel may take judicial notice of the facts underlying these findings by previous panels and the Appellate Body of the existence of the zeroing methodology as a rule or norm of general and prospective application. Viet Nam submits that doing so would be consistent with the objective of Article 3.2 of the DSU of achieving security and predictability in the mulilateral trading system. Further, Viet Nam argues that doing so would be consistent with the approach adopted by the *US – Shrimp (Ecuador)* and *US – Antidumping Measures on PET Bags* panels. Viet Nam argues that these panels relied on the facts as set forth in prior reports to establish the facts in the dispute before them. Thus, Viet Nam considers that citation to the report of a previous panel is sufficient to place the factual findings and the legal conclusions related to such factual findings on the record of this proceeding.[147]

7.106 In any event, Viet Nam considers that it has met its burden of proof with respect to the existence of the zeroing methodology. Viet Nam notes that it has provided, in the Ferrier affidavit (Exhibit Viet Nam-33), a detailed analysis of the zeroing methodology to calculate dumping margins generally and as used by the USDOC in the specific context of the *Shrimp* anti-dumping proceedings.[148] Viet Nam further cites to statements made by the USDOC in the four administrative reviews conducted by the USDOC in the *Shrimp* anti-dumping proceedings, in which the USDOC sought to justify its practice of zeroing with language that confirms its general and systematic application of this practice.[149] Thus, Viet Nam argues, all evidence on the record of this proceeding indicates the systematic application of zeroing in administrative reviews.[150]

7.107 Viet Nam further submits that the establishment of the relevant facts is not wholly the responsibility of the complaining party. Viet Nam considers that it has met its burden of establishing a *prima facie* case of the existence of the zeroing methodology as a general rule or norm. As a result, Viet Nam submits, the burden of proof has shifted to the United States. Viet Nam argues that the

[145] Viet Nam's second written submission, para. 18 and Viet Nam's comments on the United States' response to Panel question 50(ii) (referring to Panel and Appellate Body Reports, *US – Zeroing (Japan)* and Panel and Appellate Body Reports, *US – Stainless Steel (Mexico*); Viet Nam's comments on the United States' response to Panel question 50(ii).

[146] Viet Nam's opening oral statement at the second meeting of the Panel, para. 10.

[147] Viet Nam's response to Panel question 54A; Viet Nam's comments on the United States' response to Panel question 50A (referring to Panel Report, *US – Shrimp (Ecuador)*, para. 7.28; and Panel Report, *US – Anti-Dumping Measures on Polyethylene Carrier Bags from Thailand*, para. 7.7).

[148] Viet Nam's comments on the United States' response to Panel question 50(i).

[149] Viet Nam's comments on the United States' response to Panel question 50(iii) (referring to Issues and Decision Memorandum for the Final Determination in the First Administrative Review, Exhibit Viet Nam-11, pp. 15-16; Issues and Decision Memorandum for the Final Determination in the Second Administrative Review, Exhibit Viet Nam-15, pp. 13-14; Issues and Decision Memorandum for the Final Determination in the Third Administrative Review, Exhibit Viet Nam-19, pp. 12-13; Issues and Decision Memorandum for the Final Determination in the Fourth Administrative Review, Exhibit Viet Nam-23, pp. 33-34).

[150] Viet Nam's response to Panel question 50(iii).

United States fails to submit any evidence to rebut Viet Nam's case. Viet Nam asks the Panel to treat the United States' silence in this respect as an acknowledgment that no such evidence exists.[151]

United States

7.108 The United States argues that Viet Nam has not placed before the Panel sufficient evidence to support a finding as to the existence of the alleged zeroing methodology as a measure which may be challenged "as such" before a WTO panel consistent with the findings of the Appellate Body in *US – Zeroing (EC)*.[152] The United States notes that Viet Nam cites to prior panel and Appellate Body reports with respect to the "zeroing methodology". The United States asserts that argument regarding another dispute, or mere citation to the findings of another panel or the Appellate Body, is insufficient to place such facts before the Panel. The United States notes that in *US – Continued Zeroing*, the Appellate Body indicated that factual findings in prior disputes regarding the existence of the zeroing methodology as a rule or norm are not binding in subsequent disputes.[153] The United States argues that while in *US – Continued Zeroing* the Appellate Body indicated that evidence adduced in one proceeding and admissions made in respect of the same factual question about the operation of an aspect of municipal law may be submitted as evidence in another proceeding, it is necessary to actually adduce the evidence and point to any such admissions, which Viet Nam has not done with respect to the existence of the alleged zeroing methodology.[154]

7.109 The United States submits that the evidence presented by Viet Nam to the Panel falls short of the evidence described by the Appellate Body in previous disputes.[155] The United States argues that the present Panel has before it evidence of, at most, the alleged application of "zeroing" in four administrative reviews of one product, an "expert opinion" that does not even purport to demonstrate the existence of the "zeroing methodology" as a measure of general and prospective application attributable to the United States, and portions of the USDOC's Anti-Dumping Manual that are not relevant to the question of zeroing and do not include the "standard computer programs" used by the USDOC to calculate dumping margin. The United States argues that this evidence does not establish "systematic application" of zeroing in administrative reviews and that the absence of any evidence to that effect on the record before the Panel supports a conclusion that Viet Nam has failed to establish such a systematic application.[156]

(ii) Evaluation by the Panel

7.110 In *US – Zeroing (EC)*, the Appellate Body indicated that "a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document".[157] The Appellate Body reasoned that the

[151] Viet Nam's response to Panel questions 54A and 54B; Viet Nam's comments on the United States' response to Panel questions 49 (ii) and (iv).

[152] United States' second written submission para. 16; United States' opening oral statement at the second meeting of the Panel, para. 27; and United States' response to Panel question 54(iii) (all referring to Appellate Body Report, *US – Zeroing (EC)*, paras. 196-198).

[153] United States' second written submission para. 19; United States' opening oral statement at the second meeting of the Panel, para. 28; United States' response to Panel question 54A; United States' comments on Viet Nam's response to Panel question 54A (all referring to Appellate Body Report, *US – Continued Zeroing*, para. 190).

[154] United States' opening oral statement at the second meeting of the Panel, para. 28, comments on Viet Nam's response to Panel questions 54A and 54B; see also response to Panel question 54A.

[155] United States' response to Panel question 54(iii) (referring to the Appellate Body Reports on *US – Zeroing (EC)* and *US – Zeroing (Japan)*).

[156] United States' response to Panel question 54(iii).

[157] Appellate Body Report, *US – Zeroing (EC)*, para. 196.

existence and content of such a rule or norm may be more uncertain than where the rule or norm is expressed in the form of a written document.[158] The Appellate Body observed that:

> "... when bringing a challenge against such a 'rule or norm' that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged 'rule or norm' is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the 'rule or norm' may be challenged, as such. This evidence may include proof of the systematic application of the challenged 'rule or norm'. Particular rigour is required on the part of a panel to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported 'rule or norm' in order to conclude that such 'rule or norm' can be challenged, as such."[159]

7.111 The above reasoning was applied by the panels in *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)*.[160] Like those panels, we are guided by the above reasoning of the Appellate Body. In the present instance, the parties' disagreement focuses on whether the evidence before the Panel properly establishes that the zeroing methodology is a rule or norm of general and prospective application. We note that the United States argues that Viet Nam has pointed to no evidence and made no argument that would "clearly establish" that the alleged rule or norm is attributable to the United States, and the precise content of that norm.[161] We disagree. In our view, Viet Nam has presented evidence sufficient to establish both the content of the norm, and that it is attributable to the United States. First, we note that the United States has not contested the content of the alleged norm – i.e. that the USDOC, in calculating dumping margins in the context of periodic reviews, disregards any intermediate comparison result where the export price is equal to, or greater, than the normal value – as described by Viet Nam in its submissions and supporting exhibits. Second there can in our view be no question that if there is a norm, it is attributable to the United States. We recall that the USDOC forms part of the United States Government and that Viet Nam alleges that the norm at issue finds application in connection with the application by the United States of its anti-dumping law.[162]

7.112 With guidance from relevant case law[163], we consider that the zeroing methodology may be found to have general and prospective application if the USDOC is shown to have a deliberate policy of applying that methodology, going beyond the simple repetition of the application of that methodology in specific cases.[164] Given the unwritten nature of the alleged rule or norm at issue, our conclusions in this respect may rest on inferences drawn from evidence in the form, *inter alia*, of

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[158] Appellate Body Report, *US – Zeroing (EC)*, para. 197.

[159] Appellate Body Report, *US – Zeroing (EC)*, para. 198. (emphasis original, footnote omitted)

[160] Panel Report. *US – Zeroing (Japan)*, paras. 7.47-7.59; Panel Report, *US – Stainless Steel (Mexico)*, paras. 7.28-7.42 and 7.84-7.97. The findings of the *US – Zeroing (Japan)* panel with respect to the existence of a rule or norm of general and prospective application were upheld in Appellate Body Report, *US – Zeroing (Japan)*, para. 88. The findings of the *US – Stainless Steel (Mexico)* panel on the issue were not appealed.

[161] United States' second written submission, paras. 17-20.

[162] Viet Nam's response to Panel question 54B.

[163] We refer in this regard to the reports of the panels and the Appellate Body in *US – Zeroing (EC)* and *US – Zeroing (Japan)*, and the report of the panel in *US – Stainless Steel (Mexico)*. To be clear, we consider these findings relevant to determine the legal framework that we must apply in examining Viet Nam's factual assertions and claims; however, we do not consider that the factual findings of these prior panels and the Appellate Body alleviate Viet Nam's burden of establishing, before us, that the U.S. zeroing methodology is a norm of general and prospective application.

[164] Panel Reports, *US – Zeroing (Japan)*, para. 7.52; *US – Stainless Steel (Mexico)*, paras. 7.40, 7.95.

expert opinions, statements by the authorities concerned, or other evidence which indirectly supports the view that the application by the authorities of the methodology at issue reflects a "deliberate policy".[165]

7.113 We now turn to consider the evidence placed on our record by Viet Nam.[166] In this respect, we first note Viet Nam's reliance on the USDOC's use of zeroing in each of the anti-dumping proceedings undertaken pursuant to the *Shrimp* order. Evidence submitted by Viet Nam – the accuracy of which is not contested by the United States – demonstrates that the USDOC applied "simple zeroing" not only in the second and third administrative reviews, but also in each of the additional administrative reviews conducted under the *Shrimp* order.[167]

7.114 Viet Nam also submits to the Panel evidence to the effect that the USDOC applies zeroing in all anti-dumping proceedings where it is required to calculate a margin of dumping. In particular, the Ferrier affidavit submitted by Viet Nam includes a general overview of the standard programming used by the USDOC, which indicates that the USDOC uses a standard computer programme in calculating margins of dumping, and that the USDOC consistently includes instructions to disregard negative comparison results in this programme.[168] We note that the United States objects that the

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[165] Our evaluation of the evidence before us is guided by the Appellate Body's indication that panels should engage in a cumulative evaluation of the evidence. The Appellate Body stated that a panel has a duty, under Article 11, "to evaluate evidence in its totality, by which we mean the duty to weigh collectively all of the evidence and in relation to each other, even if no piece of evidence is by itself determinative of an asserted fact or claim". (Appellate Body Report, *US – Continued Zeroing*, para. 336).

[166] We note that Viet Nam invites us to take judicial notice of the findings of prior panels and of the Appellate Body as to the existence and WTO-inconsistency of the U.S. "zeroing methodology", in particular those in *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)*, in which the U.S. zeroing methodology, as it relates to the use of the weighted-average-to-transaction comparison method ("simple zeroing") in periodic reviews was found to be WTO-inconsistent. (Viet Nam's second written submission, para. 19; Viet Nam's response to Panel question 11). Viet Nam argues that we should apply an approach similar to that of the panels in *US – Shrimp (Ecuador)* and *US – Anti-Dumping Measures on PET Bags*. We note, though, that while the complainants in these disputes were allowed to rely on prior legal findings regarding the WTO-inconsistency of an identical measure in an earlier proceeding, the complainants were not dispensed from establishing, as a matter of fact, the existence of that measure. In addition, we note that the Appellate Body has cautioned, in *US – Continued Zeroing*, that findings of facts in one dispute are not binding in another dispute. (Appellate Body Report, *US – Continued Zeroing*, para. 190).

[167] Viet Nam refers us to the Issues and Decision Memoranda in each of the four administrative reviews completed under the *Shrimp* order. In each of these Memoranda, the USDOC states that it does not, in the review at issue, allow the amount by which the price exceeds normal value in certain transactions to offset the amount of dumping found in respect of other transactions. (Issues and Decision Memorandum for the Final Determination in the First Administrative Review, Exhibit Viet Nam-11, p. 15; Issues and Decision Memorandum for the Final Determination in the Second Administrative Review, Exhibit Viet Nam-15, p. 14; Issues and Decision Memorandum for the Final Determination in the Third Administrative Review, Exhibit Viet Nam-19, p. 13; Issues and Decision Memorandum for the Final Determination in the Fourth Administrative Review, Exhibit Viet Nam-23, p. 35; all are quoted in Viet Nam's first written submission, para. 47). In addition, Viet Nam also provides computer programme outputs and logs of the USDOC's dumping margin calculations for individually examined respondents in the administrative reviews at issue. In addition to the logs and outputs discussed above, paras. 7.77-7.78, pertaining to the USDOC's calculations in the second and third administrative reviews, Viet Nam also provides the logs and outputs for individual respondents in the fourth administrative review. (Viet Nam's first written submission, para. 48, referring to Computer Programme Log with respect Minh Phu in the Fourth Administrative Review, Exhibit Viet Nam-41; Computer Programme Output with respect to Minh Phu in the Fourth Administrative Review, Exhibit Viet Nam-49; Computer Programme Log with respect Nha Trang in the Fourth Administrative Review, Exhibit Viet Nam-69; Computer Programme Output with respect to Nha Trang in the Fourth Administrative Review, Exhibit Viet Nam-70).

[168] See Exhibit Viet Nam-33, paras. 6-7:

> "The structure and language of the computer programming the USDOC uses to derive the overall weighted-average dumping margin are basically the same in an original investigation

Ferrier affidavit "does not even purport to be an 'expert opinion' demonstrating the existence of the 'zeroing methodology' as a measure of general and prospective application attributable to the United States", but that, rather, "it is, as stated in paragraph 8 thereof, merely an analysis of 'the USDOC's computer programs used to determine the antidumping duty margins ... in the original investigation and the second, third, and fourth administrative reviews".[169] We are not persuaded by the United States' argument. In our view, the precise purpose for which the affidavit was prepared has no bearing on the probative value of Mr. Ferrier's evidence.[170] Thus, even though the Ferrier affidavit may have been prepared with a focus on the application of zeroing in the *Shrimp* proceedings, we have identified extracts from the affidavit that address the standard programme generally used by the USDOC, and therefore the use of zeroing in the calculation of margins of dumping more generally.[171] We note that the United States has not contested the accuracy of Mr. Ferrier's statement with respect to the standard programme generally used by the USDOC.[172]

7.115 Significant evidence of the general and prospective nature of the zeroing methodology is also found in a number of statements made by the USDOC in the Issues and Decision Memoranda accompanying the final determinations in the four completed administrative reviews of the *Shrimp* order. We consider that these statements demonstrate that the USDOC maintains a practice of zeroing in administrative reviews, going beyond the simple application of zeroing in individual instances, and that this practice reflects a deliberate policy. For instance, the Issues and Decision Memorandum accompanying the USDOC's final determination in the second administrative review states that, outside the context of weighted-average-to-weighted-average comparisons in original investigations, the USDOC interprets the definition of "dumping margin" in the U.S. anti-dumping statute to mean that:

> "a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales."[173]

> and administrative reviews, although minor differences in language occur. These differences do not, however, affect the language and procedures used to implement what is commonly referred to as 'zeroing'.
> The programming language addresses many aspects of the dumping margin calculation. The manner and order in which procedures and calculations are executed by the USDOC's programs are intrinsically linked to the U.S. antidumping laws and the USDOC's policies interpreting those laws. The USDOC cannot alter the structure of key components of the calculation procedures in the standard computer programs without risking violating its laws or changing its policies interpreting those laws."

[169] United States' response to Panel question 54(i), para. 6. The United States makes a similar argument in para. 17 of its second written submission.

[170] We note that the Appellate Body has indicated in the past that panels are entitled to examine all evidence placed on the record before them, including evidence submitted by the defending party, regardless of the purpose of the party introducing the evidence. See Appellate Body Report, *Korea – Dairy*, paras. 136-137. In *Korea – Dairy*, the Appellate Body rejected an argument of Korea that the panel in that dispute had impermissibly relied on evidence submitted by Korea, for a purpose other than that for which Korea had submitted the evidence, and used it to reach conclusions contrary to Korea's interests.

[171] Affidavit by Michael Ferrier, Exhibit Viet Nam-33, paras. 6-7, cited *supra* footnote 168.

[172] To be clear, we do not view any line of computer code as a practice or methodology in itself, but consider that the consistent presence of a line of computer code to discard negative comparison results can be regarded as manifestation of a zeroing practice maintained by the USDOC.

[173] Issues and Decision Memorandum for the Final Determination in the Second Administrative Review, Exhibit Viet Nam-15, p. 13.

7.116 The Memorandum adds that the U.S. Court of Appeals for the Federal Circuit "has held that this is a reasonable interpretation of the statute". The abovementioned Issues and Decision Memorandum further explains, in reaction to arguments by Vietnamese interested parties citing to WTO precedents finding that the zeroing methodology employed by the USDOC in periodic reviews is WTO-inconsistent, that WTO reports are without effect under U.S. law, unless and until they have been adopted pursuant to the specified U.S. statutory scheme. The Memorandum further provides that "[w]hile the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations, the Department has not adopted any other modifications concerning any other methodology or type of proceeding, such as administrative reviews." The USDOC then concludes that, consistent with its interpretation of the U.S. anti-dumping statute, the USDOC continued to "deny offsets" in its final determination in the periodic review at issue.[174] Similar statements appear in the Issues and Decision Memoranda accompanying the USDOC's final determinations in each of the other administrative reviews under the *Shrimp* order.[175]

7.117 In our view, the import of these statements extends beyond the administrative reviews of the *Shrimp* order. The general references to interpretation of the applicable statute, and the calculation of margins of dumping under that statute, indicate that whenever the USDOC calculates a margin of dumping in the context of administrative reviews, the USDOC will never allow non-dumped sales to offset the amount of dumping with respect to other sales. In other words, the USDOC will always apply zeroing.

7.118 We recall the Appellate Body's indication that a panel should not lightly assume the existence of a rule or norm constituting a measure of general and prospective application, particularly where the rule or norm at issue is not expressed in written form, and that a complaining party making a challenge against such a measure "must *clearly* establish" (our emphasis), *inter alia*, that the alleged "rule or norm" does have general and prospective application.[176] The Appellate Body itself has indicated that the complaining party bringing such a challenge faces a "high threshold".[177]

7.119 In our view, the evidence put forward by Viet Nam meets the "high threshold" referred to by the Appellate Body in *US – Zeroing (EC)*. This evidence in our view demonstrates that the USDOC's application of zeroing in administrative reviews extends well beyond the mere repetition of a practice in specific cases and rather substantiates Viet Nam's allegation that the USDOC maintains a deliberate policy to this effect.

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[174] Issues and Decision Memorandum for the Final Determination in the Second Administrative Review, Exhibit Viet Nam-15, pp. 13-14.

[175] See Issues and Decision Memorandum for the Final Determination in the First Administrative Review, Exhibit Viet Nam-11, p. 16, which states that "[b]ecause no change has yet been made with respect to the issue of 'zeroing' in administrative reviews, the Department has continued with its current approach to calculating and assessing antidumping duties in this administrative review"; Issues and Decision Memorandum for the Final Determination in the Third Administrative Review, Exhibit Viet Nam 19, pp. 12-13, cited in part in Viet Nam's first written submission, para. 49; Issues and Decision Memorandum for the Final Determination in the Fourth Administrative Review, Exhibit Viet Nam-23, pp. 33-35. See also Issues and Decision Memorandum for the Final Determination in the Original Investigation, Exhibit Viet Nam-06, p. 11, which primarily pertains to the USDOC zeroing "methodology" as it applies to original investigations, but in which the USDOC nevertheless mentions the application of that methodology in the context of administrative reviews ("... in the context of an administrative review, the Federal Circuit has affirmed the Department's statutory interpretation which underlies this methodology as reasonable."). Although only the second and third administrative reviews are "measures at issue" upon which we must pronounce, documents issued by the USDOC in other proceedings under the *Shrimp* order may serve as evidence of Viet Nam's factual assertions concerning the existence of the alleged "zeroing methodology".

[176] Appellate Body Report, *US – Zeroing (EC)*, para. 198, cited *supra* para. 7.110.

[177] Appellate Body Report, *US – Zeroing (EC)*, para. 198, cited *supra* para. 7.110.

7.120 Mindful of the rules governing the allocation of the burden of proof and of the Appellate Body's indication that panels should exercise particular care in examining the evidence supporting the existence of an unwritten norm, we nevertheless expressly sought the view of the United States on the evidence before us.[178] Although we provided the United States with an opportunity to identify any evidence that might rebut the evidence submitted by Viet Nam in support of its claim that the USDOC zeroing methodology is a rule or norm of general and prospective application, the United States declined to put forward any such evidence.[179] This being the case, we conclude that Viet Nam has established that the U.S. zeroing methodology is a norm which may be challenged "as such."

7.121 We emphasize that we reach this conclusion solely on the basis of the evidence placed before us. We note, however, that our conclusion as to the facts before us is consistent with that reached by panels and the Appellate Body in prior decisions in which they have found that the United States maintains a norm of general and prospective application by virtue of which it applies the zeroing methodology in performing dumping margins calculations, notably in the context of using the weighted-average-to-transaction methodology in periodic reviews.[180]

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[178] We are, in particular, guided by the Appellate Body's indication that "[p]articular rigour is required on the part of a panel to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document" and that, "[a] panel must carefully examine the concrete instrumentalities that evidence the existence of the purported 'rule or norm' in order to conclude that such 'rule or norm' can be challenged, as such". Appellate Body Report, *US – Zeroing (EC)*, para. 198. (emphasis original)

[179] We asked the United States "What evidence is there on the record that might support a conclusion that there is not a systematic application of zeroing in administrative reviews?" (Panel question 54(iii)). The United States answered that "Vietnam has the burden to offer evidence sufficient to substantiate its claim, and Vietnam has failed to put forward the requisite evidence to support an as such claim with respect to the so-called 'zeroing methodology.'" The United States also argued that it is insufficient for Viet Nam to rely on the facts, rationale, and findings in other disputes and that the evidence presented by Viet Nam "falls far short of the evidence as described by the Appellate Body in *US – Zeroing (EC)* and *US – Zeroing (Japan)*." The United States also argued that the evidence before the Panel does not establish a "systematic application of zeroing in administrative reviews."

We also asked the following question to the United States: "If the Panel were to find that Viet Nam has discharged its initial burden of establishing that the 'zeroing methodology' constitutes a rule or norm that may be challenged 'as such', the onus would shift to the United States to refute the existence of that measure. What evidence would the United States rely on to do so?" (Panel question 54 (iv)). The United States answered that:

> "The U.S. response would depend upon how Vietnam established that the 'zeroing methodology' constitutes a rule or norm that may be challenged 'as such.' Because Vietnam has not done so in this dispute, it is unclear how the United States would refute the existence of such a measure or norm, and we are not in a position to speculate on our response to evidence that Vietnam has not presented to the Panel.
>
> Hypothetically, if the Panel were to determine that Vietnam has discharged its initial burden of establishing that the 'zeroing methodology' constitutes a rule or norm that may be challenged 'as such,' the United States could respond, for example, by supplying evidence that calls into question whether Vietnam's evidence in fact supports that conclusion."

The rest of the United States' answer concerns the WTO-consistency of the zeroing methodology, in the event that the Panel found that Viet Nam has established the existence of that measure.

[180] Because we are of the view that the evidence discussed above suffices to meet the criteria set forth by the Appellate Body in *US – Zeroing (EC)*, we need not consider the other evidence cited by Viet Nam, in particular the USDOC's Anti-Dumping Manual. In any event, we agree with the United States that on their face, the chapters of the USDOC Anti-Dumping Manual submitted by Viet Nam relate only to the USDOC's NME methodology and to sunset reviews (United States' response to Panel question 54(iii)). For the same reason, we need not decide whether Exhibit Viet Nam-74, a recent Notice issued by the USDOC seeking comments from interested parties on a proposed rule change, is admissible evidence, given its late submission by Viet Nam (USDOC, "Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings" (28 December 2010), Exhibit Viet Nam-74).

7.122 In light of the foregoing, we uphold Viet Nam's arguments that the U.S. zeroing methodology has general and prospective application. Since, as indicated above, we are satisfied that Viet Nam has established the content of that rule or norm and that it may be attributed to the United States, we conclude that Viet Nam has properly established the existence of the zeroing methodology as a measure that may be challenged "as such." We now turn to Viet Nam's claim that the zeroing methodology measure is as such WTO-inconsistent.

(c) Whether the zeroing methodology is inconsistent, as such, with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

7.123 Viet Nam claims that the USDOC's zeroing methodology is, as such, inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT.[181]

7.124 The United States asks us to reject Viet Nam's claims.

(i) Main arguments of the parties

Viet Nam

7.125 Viet Nam argues that the Appellate Body has repeatedly found zeroing in administrative reviews to be inconsistent with the Anti-Dumping Agreement.[182] In particular, Viet Nam notes, the Appellate Body twice held that the precise zeroing methodology at issue in this dispute is inconsistent, as such, with Articles 9.3 of the Anti-Dumping Agreement and VI:2 of the GATT 1994.[183] Viet Nam considers that the findings of the Appellate Body in previous disputes are determinative in this dispute and that the Panel should follow these precedents.[184] Viet Nam submits that while recognizing the need to reach decisions on a dispute-specific basis, the Appellate Body has made clear that following its decisions in prior disputes "is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[185] Viet Nam further argues that Article 3.2 of the DSU requires security and predictability in the dispute settlement process and that refusing to recognize prior determinations involving identical factual situations would frustrate these goals.[186]

7.126 Relying on these precedents, Viet Nam argues that Articles VI of the GATT 1994 and 2.1 of the Anti-Dumping Agreement both define "dumping" and "margin of dumping" with regard to the product under investigation as a whole, and not in relation to models or categories that are subsets of the product. Viet Nam considers that the U.S. zeroing methodology does not produce a margin of dumping based on all intermediate comparisons and therefore fails to calculate a margin of dumping for the product as a whole. Viet Nam further argues that the arguments raised by the United States in this dispute – that dumping may be found at the individual, transaction level and that a margin of dumping need not be calculated for the product as a whole, have been repeatedly rejected by the

[181] Viet Nam's second written submission, paras. 17-21 and 144(2); Viet Nam's opening oral statement at the second meeting of the Panel, para. 59(2).

[182] Viet Nam's first written submission, paras. 115-120, 151-157 and Viet Nam's second written submission, para. 11 (referring to Appellate Body Reports in *US – Zeroing (EC)*, para. 133; *US – Zeroing (Japan)*, para. 176, *US – Stainless Steel (Mexico)*, para. 139; *US – Continued Zeroing*, para. 316; *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 195 and 197).

[183] Viet Nam's second written submission, paras. 11 and 19 (referring to Appellate Body Report, *US – Zeroing (Japan)*, paras. 166, 169; and Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 133-136).

[184] Viet Nam's second written submission, para. 20; Viet Nam response to Panel question 55.

[185] Viet Nam's first written submission, para. 119 (citing Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188).

[186] Viet Nam's opening oral statement at the second meeting of the Panel, paras. 11, 57.

Appellate Body.[187] Viet Nam recalls that Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 explicitly provide that margins of dumping may not be greater than the margin of dumping for the product as a whole. This, Viet Nam argues, means that where the administering authority makes use of multiple comparisons at an intermediate stage, it must aggregate the results of all intermediate comparisons, including negative comparison results, for purposes of calculating the margin of dumping. Viet Nam argues that by systematically disregarding negative comparison results, the USDOC's simple zeroing practice necessarily results in dumping margins that are greater than the margins for the product as a whole.[188]

United States

7.127 The United States argues that the text of the Anti-Dumping Agreement, interpreted in accordance with the customary rules of interpretation, does not support a general prohibition of zeroing that would apply in the context of assessment proceedings under Article of the 9.3 of the Anti-Dumping Agreement and that at a minimum, the USDOC's methodology to calculate anti-dumping duties in administrative reviews rests on a permissible interpretation of the Anti-Dumping Agreement under Article 17.6(ii) of the Agreement.[189]

7.128 Specifically, the United States argues that Viet Nam's claims depend on interpreting the terms "margins of dumping" and "dumping" as relating exclusively to the "product as a whole". The United States argues that there is no basis in Article VI of the GATT 1994 or in the Anti-Dumping Agreement for such a proposition. The United States argues that "dumping" as defined under Article 2.1 of the Anti-Dumping Agreement is a transaction-specific concept.[190] The United States further argues that the obligation set forth in Article 9.3 – to assess no more in anti-dumping duties than the margin of dumping – is similarly applicable at the level of individual transactions. The United States notes that in Viet Nam's view, a Member breaches Article 9.3 and Article VI:2 of the GATT by failing to provide offsets, because Members are required to calculate dumping margins on an exporter-specific basis for the "product as a whole" and, consequently, a Member is required to aggregate the results of all "intermediate comparison results". The United States argues that so long as the margin of dumping is understood to apply at the level of individual transactions there is no tension between the exporter-specific concept of dumping as a pricing behaviour and the importer-specific remedy of payment of anti-dumping duties. The United States adds that it is only when an obligation to aggregate transactions under Article 9.3 is improperly inferred that any perception of conflict arises.[191]

7.129 The United States invites the Panel to make an objective assessment of the matter before it, reach the same conclusion as the panels in *US – Zeroing (EC)*, *US – Zeroing (Japan)*, and *US –*

[187] Viet Nam's second written submission, paras. 40-47 (referring to Appellate Body Report, *US – Softwood Lumber V*, para. 93; Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 99, 106; Appellate Body Report, *US – Zeroing (Japan)*, para. 115; Appellate Body Report, *US – Zeroing (EC)*, paras. 127, 132; Appellate Body Report, *US – Continued Zeroing*, para. 283). While this is not totally clear from Viet Nam's submissions, we understand Viet Nam to make these arguments not only with respect to its "as applied" claims, but also with respect to "as such" claims. See also Viet Nam's first written submission, paras. 121-128.

[188] Viet Nam's first written submission, paras. 144-157 (referring to Appellate Body Reports on *US – Zeroing (EC)*, *US – Zeroing (Japan)*, *US – Stainless Steel (Mexico)*, *US – Continued Zeroing*, *US – Zeroing (Japan) (Article 21.5 - Japan)*).

[189] United States' first written submission, paras. 110-116; United States' second written submission, para. 13. In para. 13 of its second written submission, the United States incorporates by reference its arguments in paras. 110-138 of its first written submission, which it made in response to Viet Nam's "as applied" claim. We therefore reproduce these arguments here and take them into consideration in our analysis.

[190] United States' first written submission, paras. 117-123; United States' second written submission, paras. 51-53.

[191] United States' first written submission, paras. 117-138.

Stainless Steel (Mexico), which agreed with the interpretation it puts forward, and reject Viet Nam's claims.[192]

(ii) Main arguments of the third parties

7.130 Every one of the third parties that commented on Viet Nam's claims under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 – China, European Union, India, Japan, Korea, and Mexico – supports Viet Nam's arguments and invites the Panel to follow the reasoning of the Appellate Body in prior disputes in which it has found zeroing in periodic reviews to be inconsistent with these provisions.[193]

(iii) Evaluation by the Panel

7.131 Viet Nam's claim against the zeroing methodology, as such, is based on Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Article 9.3 of the Anti-Dumping Agreement reads:

> "The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."

7.132 Article VI:2 of the GATT 1994 provides:

> "In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1."

7.133 Although formulated differently, Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 impose similar obligations. Both provide that the amount of the anti-dumping duty shall not exceed the margin of dumping.

7.134 The parties' arguments regarding the WTO-consistency of the U.S. zeroing methodology raise a number of important issues of treaty interpretation, the most fundamental of which is whether the "margin of dumping" referred to under Articles 9.3 and VI:2 must be calculated for the "product as a whole", and in respect of an exporter (Viet Nam's position), or whether it may be calculated on a transaction-specific basis (the United States' position). These issues raised by Viet Nam's claims are, however, not novel. The Appellate Body has had the opportunity to consider these issues of interpretation in several prior WTO dispute settlement proceedings.

7.135 In these prior cases, the Appellate Body has consistently held that "dumping", as this term is defined under the Anti-Dumping Agreement and under Article VI:1 of the GATT 1994, necessarily relates to the product under consideration as a whole, and not to individual export transactions. Consequently, the Appellate Body has found that the "margin of dumping" must necessarily be determined on the basis of all export transactions of a given exporter. Thus, if the investigating authority conducts multiple comparisons for individual transactions or for groups of transactions, it must aggregate the results of all such intermediate comparisons, including those where the export

[192] United States' first written submission, paras. 115-116; United States' opening oral statement at the first meeting of the Panel, paras. 28-31.

[193] China's third-party oral statement, pp. 2-3 (this statement contains no paragraph numbering); European Union's third-party written submission, paras. 6-168; European Union's third-party oral statement, paras. 2-7; India's third-party oral statement, paras. 1-2 and 8-12; Japan's third-party written submission, paras. 8-50; Japan's third-party oral statement, para. 2; Korea's third-party written submission, paras. 9-16; Korea's third-party oral statement, paras. 5-9; Mexico's third-party written submission, paras. 4-29.

price exceeds the normal value".[194] Related to this, the Appellate Body has consistently held that dumping necessarily is an exporter-specific concept.[195] Thus, the Appellate Body has indicated that dumping can only be determined for the exporter, and in connection with the product under consideration as a whole, rather than on a transaction-specific basis.

7.136 The Appellate Body has found that these definitions of "dumping" and of the "margin of dumping" apply throughout the Agreement, including under Article 9.3, and under Article VI:2 of the GATT 1994. Therefore, the Appellate Body has reasoned, the "margin of dumping" calculated in accordance with Article 2 – in relation to the exporter, and in connection with the product under consideration as a whole – operates as a ceiling for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter. Thus, if the investigating authority chooses to undertake multiple comparisons at an intermediate stage, it is not allowed to take into account the results of only some of these comparisons, while disregarding others.[196]

7.137 On this basis, the Appellate Body has found that "simple zeroing" in periodic reviews – as it is applied by the USDOC – is inconsistent with Article 9.3 of the Anti-Dumping Agreement and with Article VI:2 of the GATT 1994. The Appellate Body has held that zeroing results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping. This, the Appellate Body has explained, is because when the USDOC applies simple zeroing in periodic reviews, the USDOC compares the prices of individual export transactions against monthly weighted average normal values, and disregards the amounts by which the export prices exceed the monthly weighted average normal values when aggregating the results of the comparisons to calculate the cash deposit rate for the exporter and the duty assessment rate for the importer concerned.[197] We note, however, that the Appellate Body has made it clear that its rulings with respect to zeroing in periodic reviews concern the amount of anti-dumping duty that can be levied in accordance with Article 9.3 of the Anti-Dumping Agreement, and not the issue of how this amount is to be collected from the importers. Specifically, the Appellate Body has clarified that the prohibition of simple zeroing in periodic reviews does not preclude Members from carrying out an importer-specific inquiry to determine the duty liability, as long as the duty collected does not exceed the exporter-specific margin of dumping established for the product under consideration as a whole.[198]

7.138 In the present dispute, the United States asserts that the Anti-Dumping Agreement and the GATT 1994 do not prohibit zeroing in the context of periodic reviews. In particular, the United States argues that it is possible to interpret the terms or concepts of "dumping" and "margin of dumping" as

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[194] Appellate Body Report, *US – Softwood Lumber V*, paras. 92-100; *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 122; Appellate Body Report, *US – Zeroing (Japan)*, paras. 108-110, 115, 151; Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 97-99; Appellate Body Report, *US – Continued Zeroing*, paras. 276-287.

[195] Appellate Body Report, *US – Zeroing (EC)*, paras. 128-129; Appellate Body Report, *US – Zeroing (Japan)*, paras. 111-112, 150; Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 83-95; Appellate Body Report, *US – Continued Zeroing*, paras. 282-283.

[196] Appellate Body Report, *US – Zeroing (EC)*, para. 130; Appellate Body Report, *US – Zeroing (Japan)*, paras. 155-156; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 96; Appellate Body Report, *US – Continued Zeroing*, paras. 286-287, 314.

[197] Appellate Body Report, *US – Zeroing (EC)*, paras. 132-135; Appellate Body Report, *US – Zeroing (Japan)*, paras. 155, 166; Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 133-139; Appellate Body Report, *US – Continued Zeroing*, paras. 315-316. The Appellate Body has also noted that if zeroing in periodic reviews were allowed under Article 9.3 of the Anti-Dumping Agreement, this would allow Members to circumvent the prohibition under Article 2.4.2 on zeroing in original investigations. (See, e.g. Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 109).

[198] Appellate Body Report, *US – Zeroing (EC)*, para. 131; Appellate Body Report, *US – Zeroing (Japan)*, para. 156; Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 111-114; Appellate Body Report, *US – Continued Zeroing*, para. 291.

referring not only to the product as a whole, but also to specific export transactions. The United States also rejects the notion that dumping is necessarily an exporter-specific concept, and argues that dumping may also be determined for individual importers. While we have carefully reviewed and considered these arguments of the United States, we note that the Appellate Body has considered, and rejected, these very same arguments in prior dispute settlement proceedings. Indeed, in two such prior cases – *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)* – the Appellate Body found that zeroing in the context of administrative reviews is, as such, inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[199]

7.139 In considering the merits of the parties' arguments, and performing our own objective assessment of the matter at hand, we are mindful of the Appellate Body's view that "[f]ollowing the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same" and that "[t]his is also in line with a key objective of the dispute settlement system to provide security and predictability to the multilateral trading system."[200]

7.140 We further recall that, in *US – Stainless Steel (Mexico)*, the Appellate Body considered that failure by the panel in that case to follow previously adopted Appellate Body reports addressing the same issues undermined the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.[201] We also note the concurring opinion expressed in the Appellate Body Report in *US – Continued Zeroing* that, on the question of zeroing, the Appellate Body has spoken definitively, the Appellate Body's decisions have been adopted by the DSB, and the membership of the WTO is entitled to rely upon these outcomes.[202]

7.141 We recall that the findings of the Appellate Body in *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)* discussed above[203] addressed the very same question which is now before us, i.e. the consistency with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 of the zeroing methodology, as such, in the context of administrative reviews. Following an objective assessment of the matter, and a thorough review of the abovementioned reasoning expressed by the Appellate Body, we agree with that reasoning and adopt it as our own.

7.142 Based on the foregoing considerations, we find that the U.S. zeroing methodology, as such, as it relates to the use of simple zeroing in periodic reviews, is inconsistent with the United States' obligations under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

E. VIET NAM'S CLAIMS CONCERNING THE LIMITATION OF THE NUMBER OF SELECTED RESPONDENTS

1. Introduction

7.143 Viet Nam makes a number of claims in relation to the limitation by the USDOC of the number of Vietnamese respondents for which it determined an individual dumping margin in the second and in the third administrative reviews. Viet Nam requests that we find that:

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[199] Appellate Body Report, *US – Zeroing (Japan)*, para. 166; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 134.

[200] Appellate Body Report, *US – Continued Zeroing*, para. 362.

[201] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.

[202] Appellate Body Report, *US – Continued Zeroing*, para. 312. We note, however, that the Appellate Body has not had to pronounce itself on the consistency with the Anti-Dumping Agreement and the GATT 1994 of zeroing as applied in the context of the use of the weighted average-to-transaction methodology to address "targeted dumping" pursuant to the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

[203] *Supra*, para. 7.138.

> "The USDOC's determinations in the second and third administrative reviews ... to limit the number of individually investigated respondents such that they restrict certain substantive rights under the Anti-Dumping Agreement is inconsistent with Articles 6.10, 6.10.2, 9.3, 11.1, and 11.3 of the Anti-Dumping Agreement"[204]

7.144 Viet Nam's claims concern the USDOC's application of Articles 6.10 and 6.10.2 of the Anti-Dumping Agreement. These Articles provide, in relevant part:

> "6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.
>
> ....
>
> 6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged."

7.145 Viet Nam also alleges a violation of Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement. Article 9.3 provides that:

> "The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."

7.146 Articles 11.1 and 11.3 provide that:

> "11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."
>
> "11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would

[204] Viet Nam's second written submission, para. 144(6); Viet Nam's first written submission, para. 235. Viet Nam makes similar claims in respect of the "continued use of challenged practices" measure. We have already determined that this measure is not within our terms of reference.

> be likely to lead to continuation or recurrence of dumping and injury.[205] The duty may remain in force pending the outcome of such a review."

7.147 In each of the proceedings it conducted under the *Shrimp* anti-dumping order, including in the second and third administrative reviews, the USDOC limited the number of Vietnamese respondents for which it determined an individual margin of dumping. In each instance, the USDOC determined that it was impracticable to examine all respondents for which an administrative review had been requested and determined to limit its examination to "...exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined". In the second administrative review, the USDOC determined that it could reasonably investigate two Vietnamese exporters, accounting for 34 per cent of the total exports of exporters seeking individual review.[206] In the third administrative review, the USDOC selected three respondents for individual review.[207] The USDOC explained its decision to limit the number of respondents with almost identical language in both administrative reviews. The USDOC considered that:

> "In selecting respondents for review, the Department carefully considers its resources including its current and anticipated workload and deadlines coinciding with the segment in question. After careful consideration of our resources, we believe [conclude][208] that it would not be practicable in this review to examine all producers/exporters of the subject merchandise for whom a review was requested [for which we have a request for review]. AD/CVD Operations Office 9, the office to which the administrative review is assigned, does not have the resources to examine all such exporters/producers. This office is conducting numerous concurrent antidumping proceedings which place a constraint on the number of analysts that can be assigned to this case. Not only do these other cases present a significant workload, but the deadlines for a number of the cases coincide and/or overlap with deadlines in this antidumping proceeding. In addition, because of the significant workload throughout Import Administration, we do not anticipate receiving any additional resources to devote to this antidumping proceeding.
>
> Therefore, after careful consideration of our resources, we believe that it would not be practicable in this administrative review to examine all producers/exporters of subject merchandise for whom a review has been requested. In light of our resource constraints, we believe it is practicable to examine two [three] of these companies."[209]

7.148 Of relevance to Viet Nam's claims, U.S. law provides an opportunity for individual exporters or producers to seek revocation of the anti-dumping order on an individual basis. The relevant U.S. regulations, 19 C.F.R. §351.222, provide that in making a determination whether to revoke an anti-

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[205] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty. (original footnote)

[206] Exhibit Viet Nam-13, Respondent Selection Memorandum in the Second Administrative Review.

[207] Exhibit Viet Nam-17, Respondent Selection Memorandum in the Third Administrative Review. The USDOC's Respondent Selection Memorandum in the Third Administrative Review does not indicate what percentage of Viet Nam's exports of shrimp to the United States, or of the exports of respondents seeking review, these three respondents accounted for.

[208] The underlined text is that of the Respondent Selection Memorandum in the Second Administrative Review; the text in square brackets is that of the Respondent Selection Memorandum in the Third Administrative Review.

[209] Respondent Selection Memo in the Second Administrative Review, Exhibit Viet Nam-13, pp. 3-4, quoted in Viet Nam's first written submission, para. 238; and Respondent Selection Memo in the Third Administrative Review, Exhibit Viet Nam-17, pp. 2-3.

dumping order in part, the USDOC is to take into account, *inter alia*, whether the exporter or producer concerned has sold the product under consideration at undumped prices for at least three consecutive years.[210] In the proceedings at issue, certain Vietnamese exporters sought company-specific revocations of the anti-dumping order. In their requests for revocation, certain of these companies requested that the USDOC assign them an individual margin of dumping. More details on these requests are provided below.

7.149 Also of relevance to Viet Nam's claims is the fact that the USDOC, when conducting its likelihood-of-dumping determination in the context of a sunset review, takes into consideration the margins of dumping established in the original investigation and in administrative reviews.[211]

7.150 Viet Nam challenges two aspects of the USDOC's actions in the determinations at issue: First, Viet Nam considers that the USDOC applied Article 6.10 in a manner that deprived Vietnamese respondents of substantive rights under Article 6.10 itself and under Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement. Second, Viet Nam argues that the USDOC acted inconsistently with Article 6.10.2 of the Anti-Dumping Agreement by discouraging Vietnamese exporters from submitting voluntary responses, and by refusing to consider such voluntary responses when they were made. We consider each in turn.

2. Viet Nam claims under Articles 6.10, 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement

(a) Introduction

7.151 We first consider Viet Nam's claims under Articles 6.10, 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement.

7.152 Viet Nam claims that the USDOC applied the limited examination exception provided for in Article 6.10 in a manner that deprived Vietnamese exporters and producers of substantive rights (that depend on the existence of individual margins) under Articles 6.10[212], 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement.[213]

7.153 The United States asks us to reject Viet Nam's claims.

(b) Main arguments of the parties

(i) Viet Nam

7.154 Viet Nam argues that the USDOC has effectively turned the general rule in the first sentence of Article 6.10 (i.e. that an individual margin should be determined for each exporter/producer) into an exception, and the exception under the same provision into a general rule.[214] According to Viet Nam, the USDOC's repeated use of limited examinations renders the individual margin rule provided for in the first sentence of Article 6.10, and additional requirements in Articles 9.3, 11.1

[210] 19 C.F.R. § 351.222, "Revocation of orders; termination of suspended investigations", Exhibit Viet Nam-56.

[211] See, *supra* para. 7.13.

[212] Viet Nam at times includes, and at other times, omits, Article 6.10 itself from the list of provisions, or rights or principles which the USDOC's application of the Article 6.10 exception infringes upon.

[213] Viet Nam's second written submission, para. 119.

[214] Viet Nam's first written submission, paras. 238, 255. Viet Nam argues that the USDOC applies the exception provided for under Article 6.10 as a rule, and *vice versa*, not only in the *Shrimp* proceeding, but in virtually every other recent investigation or review. Viet Nam's first written submission, para. 269 (referring to Exhibit Viet Nam-65, List of Ten Most Recently Completed USDOC Administrative Review Results (as of 12 August 2010)).

and 11.3 that are dependent on the existence of individual margins, meaningless. Viet Nam contends that an authority cannot use the exception provided in Article 6.10 to avoid that authority's obligations under other provisions of the Agreement.

7.155 With respect to Article 9.3, Viet Nam argues that the USDOC's refusal to individually examine certain respondents means that the USDOC fails to ensure that the amount of duties assessed on these respondents does not exceed their margin of dumping.[215] Viet Nam interprets Article 11.1 as providing a self-standing right for an individual exporter/producer to obtain a company-specific revocation of the order upon a showing that it has ceased dumping. Viet Nam argues that non-selected Vietnamese respondents are prevented from exercising their rights under this provision and under the U.S. regulation providing for company-specific revocations. This, Viet Nam argues, is because in the absence of individual margins of dumping, non-selected respondents are unable to demonstrate that they have ceased dumping.[216] Viet Nam argues that the USDOC is also required, under Article 11.3, to make company-specific likelihood-of-dumping determinations, using each respondent's individual margin of dumping, and that under U.S. law and practice, in order to obtain a termination of the order in the context of a sunset review, respondents must demonstrate that they have ceased dumping and that their exports to the United States have continued at levels comparable to those in the period preceding the order.[217] Viet Nam considers that the USDOC's refusal to determine an individual margin for each respondent means that these respondents are unable to demonstrate the absence of dumping, and are therefore unable to meet the relevant standard in the context of a sunset review.[218]

7.156 Viet Nam asserts that it is the responsibility of the authority to apply the exception in Article 6.10 in a manner which is consistent with the authority's obligations under other provisions of the Anti-Dumping Agreement. Viet Nam argues that, to do so, the authority may be required to deviate from standard practices applied in proceedings in which the authority does not limit its investigation. Viet Nam argues that the USDOC made no effort in the proceedings at issue to balance its right to conduct limited examinations with the interests and rights of Vietnamese respondents to have duties assessed based on individual margins and to obtain a company-specific review in order to demonstrate the absence of dumping. Viet Nam asserts that in these proceedings, the Vietnamese respondents suggested an alternative which would have allowed the USDOC to determine individual margins of dumping for those companies requesting them with limited additional effort given the small variations in normal value between companies in an NME context. According to Viet Nam, the same objective could have been achieved by applying to non-selected respondents the zero and *de minimis* margins calculated for the selected respondents.[219]

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[215] Viet Nam's opening oral statement at the first meeting of the Panel, para. 71; Viet Nam's second written submission, paras. 120, 132.

[216] Viet Nam's first written submission, paras. 260, 283; Viet Nam's opening oral statement at the first meeting of the Panel, para. 72; Viet Nam's second written submission, paras. 121, 130; Viet Nam's opening oral statement at the second meeting of the Panel, paras. 42-49; Viet Nam's response to Panel questions 45-48.

[217] Viet Nam's first written submission, para. 262 (citing to USDOC Anti-Dumping Manual, Chapter 25, Sunset Reviews, pp. 7-8, and Chapter 10, Non-Market Economies, Exhibit Viet Nam-31; and Five Most Recently Completed Sunset Review Determinations, Exhibit Viet Nam-64); Viet Nam's opening oral statement at the first meeting of the Panel, para. 73 (citing to Preliminary Results of Sunset Review and Issues and Decision Memorandum, Exhibit Viet Nam-25); Viet Nam's response to Panel question 45; Viet Nam's second written submission, paras. 121-122.

[218] Viet Nam's first written submission, para. 261-263, 284; Viet Nam's second written submission, paras. 122, 131.

[219] Viet Nam's first written submission, paras. 253-254; Viet Nam's second written submission, para. 137; Viet Nam's response to Panel question 65.

(ii) United States

7.157 The United States asserts that there is no limit to the number of times that an investigating authority may limit its examination. Rather, the United States submits, Article 6.10 permits the investigating authority to limit its examination whenever the conditions for doing so are met, i.e. where the number of exporters/producers makes determinations of individual margins for all exporters/producers "impracticable."[220] The United States notes that Viet Nam is not alleging that the USDOC violated Article 6.10 by failing to select the largest number of exporters/producers that "reasonably" could be examined, and that Viet Nam is also not arguing that the USDOC should have or could have investigated all respondents requesting reviews in each of the reviews. Thus, the United States argues, Viet Nam has provided no basis to support its claim that the United States acted inconsistently with any obligation under Article 6.10.[221]

7.158 The United States considers that Viet Nam's claims under provisions other than Article 6.10 are necessarily dependent on its claim under that provision. The United States submits that it cannot be found to have acted inconsistently with one provision of the Anti-Dumping Agreement due to the proper exercise of its rights under a separate provision of the same Agreement.[222] The United States also argues that the obligations under the other provisions cited by Viet Nam are unrelated to an investigating authority's determination to limit its examination and to the application of anti-dumping duties to companies not individually examined.[223]

7.159 The United States addresses each provision cited by Viet Nam as follows: Firstly, the United States argues that Viet Nam's interpretation of Article 9.3 reads the second sentence of Article 6.10, and all of Article 9.4, out of the Anti-Dumping Agreement. The United States argues that there could, in the proceedings at issue, be no connection between the anti-dumping duty assigned to non-selected respondents and these respondents' margin of dumping, given that no margin of dumping was determined for these respondents.[224]

7.160 Secondly, the United States argues that Article 11.1 does not impose any independent or additional obligation on Members, but merely informs Articles 11.2, which Viet Nam does not invoke, and 11.3. The United States further submits that the obligations in Article 11 apply to the anti-dumping order as a whole, and do not concern the particular anti-dumping duties applied to individual companies. The United States submits that, even assuming, *arguendo*, that there were an obligation under Article 11 to provide company-specific opportunities for revocation, under Article 11.4 of the Agreement, the provisions of Article 6.10, authorizing the authority to limit its examination, would also apply to such a review. The United States further notes that Viet Nam's arguments focus on the U.S. regulation permitting the revocation of an anti-dumping order with respect to an individual company. The United States argues that there is no obligation under the Anti-Dumping Agreement to revoke an order on a company-specific basis, let alone an obligation to do so where the exporter receives three successive zero margins, and that it cannot be found to have

[220] United States' first written submission, paras. 194-195; United States' opening oral statement at the first meeting of the Panel, para. 43.

[221] United States' first written submission, para. 193-19; United States' opening oral statement at the first meeting of the Panel, para. 42; United States' response to Panel questions 39-41; United States' second written submission, paras. 117-119; United States' opening oral statement at the second meeting of the Panel, paras. 82-84; United States' comments on Viet Nam's response to Panel question 64.

[222] United States' second written submission, para. 127; United States' opening oral statement at the second meeting of the Panel, paras. 95-95; United States' comments on Viet Nam's response to Panel question 64.

[223] United States' opening oral statement at the second meeting of the Panel, para. 92.

[224] United States' opening oral statement at the second meeting of the Panel, para. 94.

acted inconsistently with the Anti-Dumping Agreement for failing to take action that the Agreement does not require.[225]

7.161 Thirdly, the United States argues that the sunset review under the *Shrimp* anti-dumping order (i.e. the Article 11.3 review) is not within the Panel's terms of reference and that for this reason, Viet Nam's claim under Article 11.3 fails. In addition, the United States argues that the USDOC does not necessarily base its sunset review determinations solely upon the existence of dumping margins in administrative reviews, noting that interested parties are permitted to place any information they choose on the record.[226]

7.162 In addition, the United States rejects Viet Nam's suggestion that the USDOC could have employed alternative methodologies to assign individual margins to more exporters. The United States submits that the Anti-Dumping Agreement imposes no obligation in this respect. In any event, the United States submits, the methodologies suggested by Viet Nam would not have allowed the calculation of margins of dumping for non-selected exporters.[227]

(c) Evaluation by the Panel

7.163 Before proceeding with our evaluation, we recall that the first sentence of Article 6.10 of the Anti-Dumping Agreement provides that, "as a rule, the investigating authority shall determine an individual margin of dumping for each known exporter or producer". To do so, the investigating authority would have to individually examine each known exporter or producer. As a result of the difficulty of performing individual examinations of all known exporters and producers in certain cases, the second sentence of Article 6.10 provides for an exception to the rule set forth in the first sentence. In particular, the investigating authority may limit the scope of its examination "[i]n cases where the number of exporters, producers, importers or types of products involved is so large as to make such [individual] determination[s] impracticable." In such cases of limited examination, the authority must examine either "a reasonable number of interested parties or products by using samples", or "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated".

7.164 In examining Viet Nam's claims, we note that Viet Nam is not challenging the USDOC's decision to conduct limited examinations in the second and third administrative reviews.[228] In other words, Viet Nam is not challenging the USDOC's determination that it was "impracticable" to examine all known exporters and producers. Nor is Viet Nam challenging the number of exporters or producers which the USDOC included in its limited sample. Instead, Viet Nam is claiming that the USDOC's repeated use of limited examination in the second and third administrative reviews caused the USDOC to undermine the rights of exporters and producers provided for in other provisions of the Anti-Dumping Agreement that are dependent on each exporter or producer having individual margins of dumping.

7.165 Since Viet Nam is not claiming that the USDOC's use of limited examinations in the second and third administrative reviews was inconsistent with the second sentence of Article 6.10, we

[225] United States' first written submission, para. 199-203; United States' response to Panel questions 45 and 47; United States' second written submission, paras. 129-132; United States' opening oral statement at the second meeting of the Panel, para. 97.

[226] United States' first written submission, paras. 204-208.

[227] United States' second written submission, paras. 121-122; United States' response to Panel question 41; United States' opening oral statement at the second meeting of the Panel, para. 85; United States' comments on Viet Nam's response to Panel question 65.

[228] Viet Nam's response to Panel question 64; Viet Nam's opening oral statement at the first meeting of the Panel, para. 75; Viet Nam's second written submission, paras. 119 and 135; and Viet Nam's opening oral statement at the second meeting of the Panel, para. 50.

proceed on the basis that the USDOC's use of limited examinations in those reviews was consistent with the abovementioned criteria set forth in that provision. Accordingly, we understand Viet Nam's argument to be that, even though the USDOC undertook limited examinations in a manner consistent with the second sentence of Article 6.10, the USDOC violated other provisions of the Anti-Dumping Agreement because, in undertaking limited examinations, the USDOC failed to provide non-selected respondents with individual margins of dumping.

7.166 We are not persuaded by Viet Nam's claims. In our view, the use of limited examinations is governed exclusively by the second sentence of Article 6.10. Viet Nam has not identified any other provision in the Anti-Dumping Agreement governing the use of limited examinations. In particular, Viet Nam has not identified any text in either the first sentence of Article 6.10, or Articles 9.3, 11.1 and 11.3, concerning the use of limited examinations.

7.167 Viet Nam's claims are premised on the view that Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement require the determination of individual margins[229], notwithstanding the legitimate use of a limited examination. To interpret these other provisions of the Anti-Dumping Agreement in this way would render the second sentence of Article 6.10 meaningless. Indeed, Viet Nam would effectively have us interpret the first sentence of Article 6.10, and Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement, in isolation, as if the second sentence of Article 6.10 did not exist. There is no doubt that, generally, there is a preference for individual margins to be determined for each known exporter and producer. This is the very essence of the first sentence of Article 6.10. However, the exception provided for in the second sentence of Article 6.10 makes it clear that, despite the general preference for individual margins, investigating authorities need not determine individual margins for all known exporters and producers in all cases. Since neither the first sentence of Article 6.10, nor Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement, impose any additional restrictions on the use of limited examinations, there is no basis for us to find that the USDOC's legitimate (i.e. consistent with the second sentence of Article 6.10) use of limited examinations is inconsistent with those provisions.

7.168 For the foregoing reasons, we reject Viet Nam's claims of violation of Articles 6.10, 9.3, 11.1, and 11.3 of the Anti-Dumping Agreement.

3. Claims under Article 6.10.2 of the Anti-Dumping Agreement

(a) Introduction

7.169 Viet Nam claims that the USDOC in the second and third administrative reviews acted inconsistently with the U.S. obligations under Article 6.10.2 of the Anti-Dumping Agreement. Article 6.10.2 provides as follows:

> "In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual

[229] The parties disagree whether, irrespective of the use of limited examinations, some or all of these provisions require the determination of individual margins. We need not address this issue, since in any event the second sentence of Article 6.10 provides expressly that individual margins need not be determined in all cases.

examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged."[230]

7.170 Viet Nam's arguments in support of its claim(s) under Article 6.10.2 evolved during the course of the Panel's proceedings. At first, Viet Nam only argued that the USDOC failed to comply with the standard set out under the first sentence of Article 6.10.2 of the Anti-Dumping Agreement because voluntary responses made by non-selected parties were rejected by the USDOC.[231] In its subsequent submissions, Viet Nam also claimed that the USDOC had discouraged voluntary responses, contrary to the requirement in the second sentence of Article 6.10.2 that "[v]oluntary responses shall not be discouraged".

7.171 The United States opposes Viet Nam's claims under both the first and second sentences of Article 6.10.2.

(b) Main arguments of the parties

(i) Viet Nam

Arguments with respect to the first sentence of Article 6.10.2

7.172 Viet Nam argues that Article 6.10.2 imposes a different test, and requires a distinct determination, than the determination to limit the investigation under Article 6.10. Viet Nam argues that the relevant consideration under Article 6.10.2 is the number of voluntary responses, not the overall number of exporters and producers subject to the duty. Viet Nam argues that rejection of voluntary responses can only take place in exceptional circumstances.[232] In its first written submission, Viet Nam argued that the USDOC acted inconsistently with this requirement under Article 6.10.2 by repeatedly rejecting voluntary responses in the context of the USDOC's decision to limit the number of individually investigated or reviewed respondents and not on the basis of the number of voluntary respondents and the incremental workload entailed in reviewing the number of voluntary respondents involved.[233] Viet Nam later clarified that it considers that the USDOC acted in violation of Article 6.10.2 in refusing to consider a request for voluntary response treatment submitted by Fish One in the third administrative review. Viet Nam asserts that counsel for Fish One met with the USDOC to request inclusion of its client as a mandatory respondent following the selection of exporters and producers for individual examination and to inform the USDOC that it would provide all necessary documents to the USDOC with the intention of demonstrating the absence of dumping. Viet Nam indicates that Fish One renewed this request in a letter of 28 October 2008, again informing the USDOC that it would provide any necessary information to obtain an individually calculated margin of dumping.[234]

[230] We note, in addition that the last sentence of Article 9.4 reads: "The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6."

[231] Viet Nam's first written submission, para. 287.

[232] Viet Nam opening oral statement at the first meeting of the Panel, para. 74; Viet Nam's response to Panel questions 37-38; Viet Nam's second written submission, para. 123.

[233] Viet Nam's first written submission, paras. 285-288.

[234] Viet Nam's response to Panel question 42 and Viet Nam's second written submission, paras. 129 and 134, all referring to Fish One's "Request for the Department to Comply with its Regulations Regarding Revocation of Antidumping Duty Orders", Exhibit Viet Nam-62, p. 6.

Arguments with respect to the second sentence of Article 6.10.2

7.173 Viet Nam argues that the last sentence of Article 6.10.2 imposes an obligation – that the authority's actions not deter a company from submitting voluntary responses – that is distinct from the obligation in the first sentence of Article 6.10.2 that the authority consider voluntary responses. Viet Nam argues that this requirement in the final sentence of Article 6.10.2 addresses the conduct of the authority even prior to submission of a voluntary response or a formal request for treatment as a voluntary response. Viet Nam argues that discouraging behaviour in violation of this obligation may take the form of either action or inaction on the part of the authority. Viet Nam provides, as example of the latter, the hypothetical case of an authority that passively complied with a regulation prohibiting the acceptance of voluntary responses.[235]

7.174 Viet Nam argues that the standard applied by the USDOC under Article 6.10 forecloses the possibility of voluntary responses and thus "constructively" discourages such voluntary responses: Viet Nam argues that where the USDOC determines that it would be impracticable to individually investigate all exporters and producers, in virtually no instances could the USDOC later accept a voluntary respondent under the "undue burden" standard in the first sentence of Article 6.10.2. Viet Nam explains that the USDOC's Respondent Selection Memoranda in the second and third administrative reviews indicated that it did not have the resources to examine more than two or three companies. Viet Nam reasons that an authority's statement that it cannot and will not examine more than an identified number of companies will dissuade companies from seeking examination on a voluntary respondent basis as these companies will lack any reason to believe that the authority would consider examination of a submitted response.[236]

7.175 In addition, Viet Nam argues that the USDOC's actions in the treatment of certain requests by Vietnamese exporters/producers in the administrative reviews at issue "discouraged" voluntary responses. Viet Nam asserts that in the third administrative review, Fish One, one of the Vietnamese exporters, requested treatment as voluntary respondent and offered to provide the USDOC all necessary information to calculate an individual margin of dumping. Viet Nam argues that Fish One made repeated efforts, through formal meetings with the USDOC and formal submissions to the USDOC, to gain some assurances that data submitted to the USDOC would be accepted by the USDOC for purposes of the anti-dumping margin calculation. Viet Nam further asserts that the USDOC refused to directly address this request and to provide an answer to Fish One until forced to do so in the preliminary determination. Viet Nam submits that completing a full questionnaire response requires significant financial and time commitments and that under the circumstances that prevailed in the proceedings at issue, a rational business actor would be discouraged from completing a full anti-dumping questionnaire response.[237]

[235] Viet Nam's response to Panel question 67.

[236] Viet Nam's opening oral statement at the first meeting of the Panel, para. 74; Viet Nam's response to Panel question 43; Viet Nam's second written submission, paras. 123 and 133; Viet Nam's opening oral statement at the second meeting of the Panel, para. 40. In its first written submission, Viet Nam relied on a statement made by the United States in its first written submission, para. 214. Later, in its response to Panel question 67, Viet Nam cited to statements of the USDOC in the Respondent Selection Memoranda in the proceedings at issue (Respondent Selection Memorandum in the Second Administrative Review, Exhibit Viet Nam-13, p. 4; and Respondent Selection Memorandum in the Third Administrative Review, Exhibit Viet Nam-17, p. 3).

[237] Viet Nam's second written submission, para. 138; Viet Nam's opening oral statement at the second meeting of the Panel, para. 41; Viet Nam response to Panel question 68.

(ii) United States

Arguments with respect to the first sentence of Article 6.10.2

7.176 The United States argues that the USDOC could not have acted inconsistently with the requirements of the first sentence of Article 6.10.2 in the second and third administrative reviews, as no exporter or producer made the voluntary submission of "necessary information" that would have triggered the application of that provision. The United States explains that in the second administrative review, no company requested voluntary respondent status. The United States notes that in the third administrative review, one company requested voluntary respondent status, but subsequently did not submit any data.[238]

Arguments with respect to the second sentence of Article 6.10.2

7.177 The United States argues that there is no basis for Viet Nam's assertion that the USDOC acted inconsistently with the last sentence of Article 6.10.2. The United States argues that Viet Nam offers no evidence of so-called "discouraging behaviour" other than the USDOC's determinations that it was impracticable to examine all respondents, which the United States argues are consistent with the requirements of Article 6.10. The United States rejects as unfounded Viet Nam's assertion that the United States clarified that the USDOC will never consider voluntary respondents where it has already limited the number of respondents individually examined. The United States argues that no such clarification can be found in the record of the administrative reviews at issue. The United States further notes that the USDOC has, in the past, accepted and relied on voluntary submissions to determine dumping margins on numerous occasions. The USDOC did so, for example, when one of the exporters initially selected for individual examination withdrew its request, or the exporter ceased cooperating with the examination, in which case it became practicable to individually investigate another respondent. The United States argues that Viet Nam's interpretation of the phrase "shall not be discouraged" would deprive Members of the right to limit the examination under Article 6.10. In particular, the United States argues, under Viet Nam's proposed interpretation, an investigating authority, in order to act consistently with Article 6.10.2 and not impliedly "discourage" voluntary responses, would need to preserve its ability to accept and consider voluntary responses, and to do so would be required to act inconsistently with Article 6.10, by examining some percentage of the volume of exports that is less than the largest percentage that can reasonably be examined in order to reserve additional resources for possible voluntary responses. The United States argues that the USDOC cannot be found to have acted inconsistently with one provision of the Anti-Dumping Agreement by virtue of its proper application of another provision of the same Agreement.[239]

7.178 Furthermore, the United States argues that the obligation in the last sentence of Article 6.10.2 is framed as a prohibition on *action* on the part of the authorities. The United States argues that the USDOC took no action to discourage voluntary responses in the second and third administrative reviews. The United States notes that Viet Nam offers as evidence only one letter from the record of the third administrative review which, in the U.S. opinion, fails to show any action taken by the USDOC to discourage a voluntary response by Fish One or any other company. The United States argues that in that letter, Fish One is not asking to be treated as a voluntary respondent, but is asking for a revocation review, and, if required by the USDOC to obtain such a review, to be selected as a

[238] United States' first written submission, paras. 210-214; United States' opening oral statement at the first meeting of the Panel, paras. 44-45; United States' response to Panel questions 37-38 and 42; United States' second written submission, paras. 123-126; United States' opening oral statement at the second meeting of the Panel, para. 88; United States' response to Panel question 67.

[239] United States' opening oral statement at the second meeting of the Panel, para. 89; United States' response to Panel questions 43, 67; United States' comments on Viet Nam's response to Panel questions 67-68. The United States cites, as evidence, the Preliminary Determination in the Administrative Review on Certain Activated Carbon from the Peoples' Republic of China, Exhibit US-8.

mandatory respondent. The United States argues that this letter does not reference a possible voluntary submission of a full questionnaire. Furthermore, the United States argues that even if Fish One had sought some indication of the USDOC's intent early in the proceeding, the USDOC's inability to respond at that time with any commitment one way or the other cannot be viewed as discouraging.

(c) Main arguments of the third parties

(i) European Union

7.179 The European Union considers that both the overall number of exporters involved and the number of voluntary responses is relevant under Article 6.10.2. The European Union does not, however, take a position on whether the requirements of Article 6.10.2 were met in view of the specific facts before the Panel.[240]

(d) Evaluation by the Panel

7.180 We begin by addressing Viet Nam's claim under the first sentence of Article 6.10.2.

(i) Viet Nam's claim under the first sentence of Article 6.10.2

7.181 In cases where an investigating authority's examination is limited to certain selected exporters or producers, consistent with Article 6.10, the first sentence of Article 6.10.2 provides that the authority shall nevertheless also determine individual margins of dumping for non-selected exporters or producers that "submit[] the necessary information in time for that information to be considered during the course of the investigation", unless the authority determines that the number of exporters or producers is so large that individual examinations would be unduly burdensome and prevent timely completion of the investigation. Thus, the application of the first sentence of Article 6.10.2 is only triggered if non-selected exporters or producers make so-called voluntary responses. If no such voluntary response is submitted, there is no obligation on the investigating authority to take any action under the first sentence of Article 6.10.2.

7.182 At the first substantive meeting, the United States asserted that the application of the first sentence of Article 6.10.2 was never triggered in the second or third administrative reviews, since in neither of those reviews did any Vietnamese respondent make the requisite voluntary response.[241] During oral questioning by the Panel at the first substantive meeting, Viet Nam confirmed that no Vietnamese respondents had submitted voluntary responses pursuant to the first sentence of Article 6.10.2. Furthermore, in response to a written question from the Panel inviting Viet Nam to "provide any relevant information with respect to the submission of voluntary responses", Viet Nam failed to identify any instance in the second or third reviews where voluntary responses had been submitted by Vietnamese exporters or producers.[242]

7.183 In light of the absence of any evidence indicating that any voluntary response was ever submitted by non-selected exporters or producers in the second or third administrative reviews, we find that the obligations in the first sentence of Article 6.10.2 were never triggered in those reviews. Accordingly, we reject Viet Nam's claim that the USDOC acted inconsistent with the first sentence of Article 6.10.2.

[240] European Union's third-party written submission, paras. 187-188; European Union's response to Panel question 15.
[241] United States' opening oral statement at the first meeting of the Panel, para. 45.
[242] Viet Nam's response to Panel question 42.

(ii) Viet Nam's claim under the second sentence of Article 6.10.2

7.184 We recall that the second sentence of Article 6.10.2 provides that "[v]oluntary responses shall not be discouraged". While the parties disagree on the precise meaning of the term "discourage", and the issue of whether or not "discouragement" requires active conduct on the part of the investigating authority, we consider that the facts of the present case do not require us to explore this legal issue in any detail.

7.185 Viet Nam formulated its claim under the second sentence of Article 6.10.2 somewhat late in the Panel process.[243] In order to fully understand the factual basis for Viet Nam's claim, after the second substantive meeting, the Panel asked Viet Nam to "explain what evidence Viet Nam has placed on the record to substantiate a claim under the last sentence of Article 6.10.2".[244] In response, Viet Nam cited to:

> "the standard applied by the USDOC for the selection of mandatory respondents in support of the claim made under the last sentence of Article 6.10.2. The standard applied by the USDOC to limit the number of respondents selected for review violates Article 6.10.2 of the Anti-Dumping Agreement by foreclosing the possibility of voluntary respondent treatment and thus dissuading companies from attempting to participate as voluntary respondents. As noted, the USDOC's respondent selection memoranda in the second and third administrative reviews explained that it would not be 'practicable to examine' more than two or three companies, respectively. In other words, the USDOC determined and expressly stated that it did not have the resources to examine more than two or three companies. An authority's explicit statement that it cannot and will not examine more than the identified number of companies will of course dissuade companies from seeking examination on a voluntary respondent basis. The company lacks any reason to believe that the authority would consider examination of a submitted response where all evidence indicates the contrary."[245]

7.186 Thus, as evidence of the alleged discouragement of voluntary responses, Viet Nam cites to the fact that the USDOC determined that it would not be practicable to examine more than two or three exporters or producers in the second and third administrative reviews. Despite the very direct nature of the Panel's request, Viet Nam does not cite to any other evidence indicating that the USDOC discouraged voluntary responses.[246]

7.187 We recall that, in accordance with Article 6.10 of the Anti-Dumping Agreement, an authority may limit its examination in cases where the number of exporters, producers, importers or types of products involved is so large as to make [individual margin] determination[s] impracticable". The USDOC availed itself of this right in the second and third administrative reviews. The justification for doing so was provided for in the Respondent Selection Memoranda. In the memoranda, the USDOC discusses its resource constraints, and concludes "that it would not be practicable in this

[243] Viet Nam's second written submission, para. 133.
[244] Panel question 68.
[245] Viet Nam's response to Panel question 68, para. 82.
[246] We note that the Respondent Selection Memorandum in the Original Investigation (Exhibit Viet Nam-04) contains a section addressing whether the USDOC should investigate voluntary respondents, in the event that it were to receive voluntary responses. The USDOC indicates that it would not be in a position to individually examine companies other than the four mandatory respondents, unless some of these mandatory respondents decided not to cooperate in the investigation. We note that Viet Nam does not rely on this memorandum or any statement of the USDOC contained therein. In any event, Viet Nam makes no request for findings in respect of the original investigation, which it accepts is outside our terms of reference.

review" to individually examine all producers and exporters, and that, in light of resource constraints, "it is practicable to examine two [or three] of these companies".[247]

7.188 We recall that Viet Nam has not alleged that the USDOC failed to meet the substantive criteria of Article 6.10 in limiting its examination. In other words, Viet Nam has not challenged the USDOC's determination that it would not be practicable to examine all exporters and producers in the second and third administrative reviews. For this reason, there is no basis for the Panel to conclude that the USDOC limited its examination in a manner inconsistent with Article 6.10.

7.189 In our view, the USDOC's legitimate exercise of its right to limit its examination under Article 6.10 cannot suffice, in and of itself, to constitute evidence of a violation of the second sentence of Article 6.10.2. That is to say, the USDOC's determination that it would not be practicable to investigate all exporters and producers cannot constitute evidence that the USDOC discouraged voluntary responses.

7.190 We stress that Viet Nam has adduced no other evidence of alleged discouragement of voluntary responses by the USDOC. In its second written submission, Viet Nam asserted that the USDOC had initially refused to respond to a request for treatment as a voluntary respondent by Fish One, a non-selected exporter, in the third administrative review. Viet Nam appeared to allege that the USDOC's initial refusal to respond to Fish One's request could be construed as "discouragement" of voluntary responses. Fish One's alleged request for voluntary respondent treatment was submitted as Exhibit Viet Nam-62. In response to a question from the Panel regarding the evidence needed to make out a claim under the second sentence of Article 6.10.2, the United States asserted:

> "In the second and third administrative reviews, Commerce took no action to discourage voluntary responses. Indeed, we note that Vietnam does not cite to any record evidence from the second administrative review with regard to this claim. Vietnam offers as evidence only one letter from the record of the third administrative review, dated October 8, 2008. In that letter, the respondent party at issue, Fish One, is not asking to be treated as a voluntary respondent, but is asking for a specific revocation review, and, if required by Commerce to obtain such a review, to be selected as a mandatory respondent. This letter *does not reference* a possible *voluntary* submission of a full questionnaire, concluding as follows: "Fish One stands ready, even now, to fully participate in this review *as a mandatory respondent* and take the same time as the other mandatory respondents to answer the questionnaires." Fish One, to be treated as a voluntary respondent, needed to actually submit the necessary information by the applicable deadlines. Even if Fish One had sought some indication of Commerce's intent early in the proceeding, Commerce's inability to respond at that time with any commitment one way or the other cannot be viewed as discouraging. This evidence by Vietnam fails to show any action taken by Commerce to discourage a voluntary response by Fish One or any other company."[248]

7.191 In its Comments on the United States' Response, Viet Nam did not challenge the U.S. interpretation of Fish One's alleged request for voluntary respondent treatment. Upon examination of the relevant document, we see no reason to disagree with the United States' interpretation of Fish One's request. In particular, we see no reason to treat that request as evidence that Fish One sought

[247] Respondent Selection Memorandum in the Second Administrative Review, Exhibit Viet Nam-13, pp. 3-4, and Respondent Selection Memorandum in the Third Administrative Review, Exhibit Viet Nam-17, pp. 2-3, quoted *supra* para. 7.147.

[248] United States' response to Panel question 67, para. 63 (citing to Fish One's "Request for the Department to Comply with its Regulations Regarding Revocation of Antidumping Duty Orders", Exhibit Viet Nam-62, pp. 7-8). (emphasis original)

treatment as a voluntary respondent in the third administrative review. Instead, the relevant document details Fish One's attempts to be treated as a mandatory respondent. In these circumstances, we do not consider that the document submitted as Exhibit Viet Nam-62 supports Viet Nam's claim under the second sentence of Article 6.10.2.

7.192 For the above reasons, we reject Viet Nam's claim under the second sentence of Article 6.10.2 of the Anti-Dumping Agreement.

F. VIET NAM'S CLAIMS CONCERNING THE "ALL OTHERS" RATES APPLIED TO NON-SELECTED EXPORTERS

1. Introduction

7.193 We now turn our attention to Viet Nam's claims with respect to the "all others" rates applied by the USDOC in the second and third administrative reviews.[249]

7.194 Article 9.4 of the Anti-Dumping Agreement imposes disciplines with respect to the rate which an investigating authority may apply to non-selected exporters/producers, in a case in which it has limited its examination pursuant to the second sentence of Article 6.10 of the Agreement.[250] The rate so established is referred to as the "all others" rate. Article 9.4 provides, in relevant part:

> "When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
>
> ...
>
> provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6."

7.195 As can be seen from its text, Article 9.4 does not prescribe any specific method that WTO Members must use in establishing an "all others" rate that is applied to exporters or producers that are not individually examined. Rather, Article 9.4 simply provides that any "all others" anti-dumping duty *shall not exceed* a certain maximum or ceiling. In other words, Article 9.4 provides for the maximum allowable rate that may be applied. Sub-paragraph (i) of Article 9.4 states the general rule that this maximum allowable "all others" rate is equal to the weighted average of the margins of dumping established with respect to individually-examined exporters. However, the clause beginning with "provided that" qualifies this general rule. It mandates that, "for the purpose of this paragraph", investigating authorities shall disregard zero and *de minimis* margins of dumping, as well as "margins

[249] As previously noted, in the determinations at issue, the USDOC refers to the "all others" rate applied to such respondents as the "separate rate". In our findings, however, we use the terminology "all others" rate.

[250] Article 9.4 applies only "[w]hen the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6", i.e. with respect to duties imposed on imports from cooperating exporters that have made themselves known to the investigating authorities. Consequently, Article 9.4 does not govern the duties applied in respect of exporters that have not yet exported the product and exporters that have not come forward to the investigating authorities. See Panel Report, *EC – Salmon (Norway)*, para. 7.431; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.159; Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, footnote 916.

established under the circumstances referred to in paragraph 8 of Article 6", i.e. margins of dumping established on the basis of facts available.[251]

7.196 Article 9.4 of the Anti-Dumping Agreement does not explicitly address how the maximum allowable "all others" rate should be calculated when each of the margins of the selected exporters is zero, *de minimis*, or based on facts available. The Appellate Body has referred to this as a *lacuna* in Article 9.4. In *US – Hot Rolled Steel*, the Appellate Body explained that the *lacuna* arises because "while Article 9.4 *prohibits* the use of certain margins in the calculation of the ceiling for the 'all others' rate, it does not expressly address the issue of *how* that ceiling should be calculated in the event that *all* margins are to be *excluded* from the calculation, under [these] prohibitions".[252] The principal question raised by Viet Nam's claims is that of the disciplines, if any, that govern the imposition of the "all others" rate in such a situation. This question arises because, as we explain below, all respondents selected for individual examination in the second and third administrative reviews received a zero or a *de minimis* margin of dumping.

7.197 In its preliminary determination in the second administrative review, the USDOC noted that its practice in administrative reviews is to apply the provision of U.S. law concerning the calculation of the "all others" rate in original investigations. This provision instructs the USDOC to assign an "all others" rate equal to the weighted average of the rates of selected respondents, excluding zero and *de minimis* margins and margins based entirely on adverse facts available. The USDOC noted that it had preliminarily determined *de minimis* margins of dumping for both selected respondents, Minh Phu and Camimex. The USDOC decided to apply to the 27 "separate rate" companies not selected for individual examination an "all others" rate equal to the weighted average of these individual margins, i.e. a *de minimis* rate, but invited interested parties to comment on the methodology it should apply in its final determination.[253]

7.198 In its final determination, the USDOC noted that it had received comments from interested parties. The USDOC also indicated that U.S. law contemplated that it may use an average of the zero, *de minimis* and total facts available rates determined in an investigation and that in the review at issue, it had assigned margins based on adverse facts available to the 35 companies it considered to be part of the Vietnam-wide entity. The USDOC noted however that it had available information that would not be available in an original investigation, namely rates from prior administrative and new shipper reviews. The USDOC further noted that it had, in another case, assigned an "all others" rate based on the weighted average of zero and *de minimis* rates, but noted that in that case, there had been no rates based entirely on adverse facts available.[254] In view of these considerations and of the comments received from interested parties, and because the circumstances were unchanged from those in the first administrative review, the USDOC considered that a "reasonable method" was to assign the

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[251] The Appellate Body has found that this includes margins established in totality or in part on the basis of facts available. Appellate Body Report, *US – Hot Rolled Steel*, para. 122.

[252] Appellate Body Report, *US – Hot Rolled Steel*, para. 126. (emphasis original)

[253] Preliminary Determination in the Second Administrative Review, Exhibit Viet Nam-14, pp. 12133 and 12135-12136. The USDOC invited interested parties to address, in particular, the following factors:

> "(a) The Department has limited its examination of respondents ... (b) [U.S. law] provides that, with some exceptions, the all-others rate in an investigation is to be calculated excluding any margins that are zero, *de minimis* or based entirely on facts available, and (c) the [Statement of Administrative Action] states that with respect to the calculation of the all-others rate in such cases, 'the expected method will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available. However, if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods."

[254] Final Determination in the Second Administrative Review, pp. 52274-52275, and Issues and Decision Memo, pp. 18-20, Exhibit Viet Nam-15.

4.57 per cent "all others" rate applied in the original investigation and first administrative review. The USDOC considered that this constituted "a reasonable method which is reflective of the range of commercial behaviour demonstrated by exporters of the subject merchandise during a very recent period"[255] and that "there is no reason to find that it is not reasonably reflective of potential dumping margins for the non-selected companies".[256] However, where a separate rate respondent had received an individual margin in a prior proceeding (e.g. as a selected respondent in the original investigation or first administrative review), the USDOC applied that rate to the respondent. As a result, the USDOC assigned the following rates: (i) a rate of zero to both Grobest and to Fish One as the individual rate most recently calculated for each of these companies; (ii) a rate of 4.30 per cent to Seaprodex, as the individual rate most recently calculated for that company; and (iii) a general "all others" rate of 4.57 per cent to the other "separate rate" companies, which formed the vast majority of non-selected respondents.[257]

7.199 The USDOC calculated margins of dumping above *de minimis* for all three selected companies in its preliminary determination in the third administrative review. As a result, in that preliminary determination, the USDOC assigned to these companies an "all others" rate equal to the weighted average of these margins, 4.26 per cent.[258] However, the USDOC revised these individual margins in its final determination. As a result, all individual margins of dumping became *de minimis*. The USDOC indicated that it "must, again, look to other reasonable means to assign separate rate margins to non-reviewed companies eligible for a separate rate in this review" and determined, like in the second administrative review, that "a reasonable method" was to assign to non-selected companies the most recent rate calculated for them, i.e., the 4.57 per cent "all other" rate initially applied in the original investigation. As in the second administrative review, however, the USDOC also applied "individual" rates to companies for which it had previously determined an individual margin. As a result, it applied a rate of zero to both Grobest and Fish One, and a rate of 4.30 per cent to Seaprodex.[259]

7.200 Viet Nam's claims pertain to the 4.57 per cent "all others" rate applied by the USDOC to most non-selected respondents in both reviews. Viet Nam requests that we find that:

(a) The use of margins of dumping determined using the zeroing methodology to calculate the all others ("separate") rate in the second and third administrative reviews is, as applied, inconsistent with Articles 9.4, 9.3, 2.4.2 and 2.4 of the Anti-Dumping Agreement.[260]

(b) The application of an all others ("separate") rate that fails to consider the results of the individually-investigated respondents in the contemporaneous proceeding and produces an anti-dumping duty prejudicial to companies not selected for individual investigation is, as applied in the second and third administrative reviews, inconsistent with Articles 9.4, 17.6(i), and 2.4 of the Anti-Dumping Agreement.[261]

7.201 The United States asks us to reject Viet Nam's claims.

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[255] Final Determination in the Second Administrative Review, p. 52275, Exhibit Viet Nam-15; see also Issues and Decision Memo in the Second Administrative Review, p. 19, also Exhibit Viet Nam-15.

[256] Issues and Decision Memo in the Second Administrative Review, p. 19, Exhibit Viet Nam-15.

[257] See Final Determination in the Second Administrative Review, pp. 52274-52275, and Issues and Decision Memo, pp. 19-20. Exhibit Viet Nam-15.

[258] Preliminary Determination in the Third Administrative Review, Exhibit Viet Nam-18, pp. 10016-10017.

[259] See Final Determination in the Third Administrative Review, Exhibit Viet Nam-19, pp. 47195-47196.

[260] Viet Nam's second written submission, para. 144(3).

[261] Viet Nam's second written submission, para. 144(4).

7.202 Thus, Viet Nam challenges the "all others" rate applied in the second and third administrative reviews on two grounds – the USDOC's reliance on dumping margins calculated with zeroing and its reliance on dumping margins calculated in a prior proceeding, where all individual margins in the current proceeding are zero or *de minimis* – and under five distinct provisions of the Anti-Dumping Agreement, Articles 9.4, 9.3, 2.4.2, 2.4 and 17.6(i).

7.203 We first examine Viet Nam's claims under Article 9.4, before addressing Viet Nam's claims under the other provisions it cites. In addressing Viet Nam's claims under Article 9.4, we first focus on Viet Nam's argument that the USDOC impermissibly, under that provision, relied on dumping margins calculated with the use of zeroing.

2. Whether the USDOC's reliance on dumping margins calculated with zeroing in establishing the "all others" rate applied in the second and third administrative reviews is inconsistent with Article 9.4 of the Anti-Dumping Agreement

(a) Main arguments of the parties

(i) Viet Nam

7.204 Viet Nam asserts that the USDOC used "model zeroing" under the weighted-average-to-weighted-average comparison methodology to calculate the dumping margins of selected respondents in the original investigation.[262] Viet Nam argues that, as the Appellate Body has repeatedly found, and as the United States has conceded in other disputes, the USDOC's model zeroing methodology does not produce a dumping margin for the product as a whole and as a result is inconsistent with Article 2.4.2.[263] In its first written submission, Viet Nam argues that Article 9.4 requires that dumping margins calculated in a manner consistent with Article 2 serve as the basis for the administering authority's calculation of the "all others" rate.[264] In its second written submission, Viet Nam further argues that as a result of its use of the model zeroing methodology, the USDOC's original investigation produced margins of dumping for the selected respondents in excess of these respondents' margins of dumping, as properly calculated. Viet Nam argues that an "all others" rate based on zeroing necessarily overstates the margin of dumping as properly calculated under Article 2 and therefore by definition exceeds the (properly calculated) weighted average margin of dumping for mandatory respondents, and therefore violates the requirements of Article 9.4.[265]

7.205 Viet Nam responds to the argument of the United States that the Panel should not consider the actions of the USDOC in the original investigation because it was completed prior to Viet Nam's accession to the WTO. Viet Nam clarifies that it is not requesting the Panel to make findings in respect of the USDOC's determinations in the original investigation.[266] Viet Nam argues that the final results of the original investigation remain relevant only because of the actions taken by the USDOC in subsequent proceedings. Viet Nam also submits that under the reasoning advocated by the United States, the USDOC could continue to apply indefinitely WTO-inconsistent determinations, so long as the determinations remained unchanged since Viet Nam's accession to the WTO. Viet Nam also submits that the United States' citation to *US – DRAMS* is incongruent with the facts of the present dispute, where, in the second and third administrative reviews, the USDOC fully investigated the issue of the "all others" rate, and issued separate new determinations in this respect, distinct from those made in the original investigation. Viet Nam notes that by contrast, in *US – DRAMS*, the scope

[262] Viet Nam's first written submission, paras. 40-46, 141-143, 208-215.
[263] Viet Nam's first written submission, paras. 120, 129-139; Viet Nam's second written submission paras. 52-53.
[264] Viet Nam's first written submission, para. 209.
[265] Viet Nam's second written submission, paras. 50-54 and 60-62.
[266] Viet Nam's response to the United States' request for preliminary rulings, para. 3.

determination was never re-examined after the original investigation and was passively re-applied in subsequent stages of the proceeding.[267]

(ii) United States

7.206 The United States argues that the "all others" rates imposed by the USDOC in the second and third administrative reviews could not be found to be inconsistent with Article 9.4. This, the United States contends, is because Article 9.4 does not prescribe any methodology for assigning a *rate* to non-selected companies, and neither Article 9.4 nor any other provision of the Anti-Dumping Agreement specify the *maximum rate* in a situation where all the dumping margins calculated for selected companies fall into the three categories to be disregarded. The United States considers that the Appellate Body erred when, in *US – Zeroing (EC) (Article 21.5 – EC)*, it reversed the finding of the panel that Article 9.4 imposes no obligation regarding the maximum "all others" rate that may be applied in such a situation. The United States further notes that the Appellate Body in that dispute provided no indication as to what specific methodologies could be used or what legal standard would apply in assessing the consistency of an investigating authority's actions with Article 9.4 in a *lacuna* situation.[268]

7.207 The United States further argues that Article 9.4 of the Anti-Dumping Agreement does not prohibit zeroing and that even if the challenged measures were found to be inconsistent with other provisions of the Agreement, that would not mean that, as a consequence, they are also inconsistent with Article 9.4.[269] The United States adds that Viet Nam's claims of violation are dependent on the Panel finding that the "all others" rates applied in the second and third administrative reviews were inconsistent with the covered agreements when they were originally calculated. The United States notes, however, that the WTO Agreement did not apply between the United States and Viet Nam at the time of the original investigation, meaning that the "all others" rate calculated in the original investigation could not be WTO-inconsistent at the time it was calculated. Moreover, the United States argues that the Agreement does not apply to the "all others" rates determined in the second and third administrative reviews because in those reviews, the USDOC merely continued to apply the rate determined in the original investigation, prior to the entry into force of the Agreement for Viet Nam. The United States relies for this argument on the findings of the panel in *US – DRAMS*. The *US – DRAMS* panel found that pursuant to Article 18.3, the Anti-Dumping Agreement only applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. The United States asserts that the USDOC made no dumping margin calculations in the second and third administrative reviews in order to determine the "all others" rate, and did not recalculate or otherwise re-examine the "all others" rate applied in the original investigation. As a result, the United States argues, USDOC also did not use zeroing during these reviews and cannot be found to have acted inconsistently with the U.S. obligations under the Anti-Dumping Agreement.[270]

[267] Viet Nam's second written submission para. 62; Viet Nam's response to Panel question 18.

[268] United States' first written submission, paras. 176-184, 187; United States' opening oral statement at the first meeting of the Panel, paras. 49-51; United States' opening oral statement at the second meeting of the Panel, paras. 31-33; United States' response to Panel questions 20 and 21.

[269] United States' opening oral statement at the second meeting of the Panel, para. 32.

[270] United States' first written submission, paras. 99-103 and 168-175; United States' opening oral statement at the first meeting of the Panel, paras. 6-10, 54-58; United States' second written submission, paras. 21-48 and 63-76 and 83-89; United States' opening oral statement at the second meeting of the Panel, paras. 31-50, and 65-66. The United States cites to the Panel Report on *US – DRAMS*, paras. 6.14, 6.16.

(b) Main arguments of the third parties

(i) European Union

7.208 The European Union rejects the United States' suggestion that the reasoning of the panel in *US – DRAMS* applies in the present case. The European Union explains that the issue before the Panel in the present dispute concerns the use of the "all others" rate in actions taken by the United States after Viet Nam's accession, not whether those "all others" rates continue after Viet Nam's accession. The European Union argues that if the Panel concludes that the USDOC used zeroing when determining the dumping margins in the original investigation, the use of those dumping margins and the application of the "all others" rates from the original investigation in subsequent determinations amount to a new and separate measure which is subject to the present panel proceedings.[271]

(ii) India

7.209 India considers that the second and third administrative reviews are measures in their own right, distinct from the original investigation, and that the findings of the *US – DRAMS* panel can be distinguished from the facts and circumstances of the present dispute. India agrees with Viet Nam that an "all others" rate calculated by using WTO-inconsistent "model zeroing" in the original investigation violates Article 9.4 of the Anti-Dumping Agreement. For this reason, Viet Nam considers the "all others rate" applied in the second and third administrative reviews is inconsistent with Article 9.4.[272]

(iii) Japan

7.210 Japan submits that the "all others" rate must always – even in a *lacuna* situation – be based on WTO-consistent margins of dumping. Japan considers that this conclusion follows from the text of Article 9.4, and that the term "margins of dumping" in Article 9.4 refers to margins of dumping that are WTO-consistent at the time when they are used to calculate the "all others" rate. In Japan's view, it is the determination of the "all others" rate in the second and third administrative reviews that is rendered WTO-inconsistent, not the determinations of the dumping margins in the original investigation. For this reason, Japan rejects the U.S. argument that the "all others" rates applied in the second and third administrative reviews are shielded from review because they are based on margins that were calculated in the original investigation.[273]

(iv) Mexico

7.211 Mexico considers that the "all others" rates determined by the USDOC in the second and third administrative reviews are distinct determinations from the rates determined in the original investigation and are properly subject to review by the Panel. Mexico submits that the reasoning of the *US – DRAMS* panel does not apply in the present dispute. Mexico reasons that unlike the product scope in an anti-dumping proceeding, which is determined only once in the original investigation, the "all others" rate changes in each administrative review. Thus, Mexico submits that the "all others" rates applied in the two reviews at issue are subject to the disciplines of the Agreement, and the

[271] European Union's third-party written submission, paras. 179-180; European Union's response to Panel questions 5-6.

[272] India's third-party oral statement, paras. 9-10, 13-16; India's response to Panel question 6.

[273] Japan's third-party written submission, paras. 70-79; Japan's third-party oral statement, para. 3; Japan response to Panel question 7.

United States may not rely on dumping margins established in a WTO-inconsistent manner, irrespective of the fact that the margins were established in the original investigation.[274]

(c) Evaluation by the Panel

7.212 We first consider Viet Nam's argument that reliance by an investigating authority on margins of dumping calculated with zeroing in the determination of an "all others" rate is inconsistent with the disciplines of Article 9.4, irrespective of the fact that all the margins determined for selected exporters are zero, *de minimis*, or based on facts available.[275]

7.213 We find guidance in the WTO jurisprudence with respect to sunset reviews. In particular, we note the findings of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, in which the Appellate Body found that should investigating authorities choose to rely upon dumping margins in making a likelihood-of-dumping determination under Article 11.3 of the Anti-Dumping Agreement, the margins of dumping relied upon must be ones that were calculated consistently with Article 2 of the Agreement.[276] The Appellate Body added that "[w]e see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins".[277] We read these statements of the Appellate Body as standing for a more general proposition that any "margin of dumping" calculated or relied upon by an investigating authority in the context of the application of the disciplines of the Agreement must be calculated consistently with Article 2 and its various paragraphs. Of relevance to this question, we further note that the Appellate Body has repeatedly held that the definition of the phrase "margin of dumping" under Article 2.1 applies to the entire Agreement.[278] Accordingly, we consider that any individual margin of dumping which the investigating authority relies upon in determining the maximum allowable "all others" rate must of necessity have been calculated in conformity with the provisions of Article 2.[279, 280] This is true irrespective of whether or not all individual margins are zero, *de minimis* or based on facts available.

7.214 We observe that this conclusion is consistent with the statements of the Appellate Body in *US – Zeroing (EC) (Article 21.5 – EC)*, in which it commented on the disciplines that apply under Article 9.4 in a *lacuna* situation. The panel in that case had found that, in a *lacuna* situation,

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[274] Mexico's third-party written submission, paras. 39-42; Mexico's response to Panel question 6.

[275] We note that neither party questions the applicability of Article 9.4 of the Anti-Dumping Agreement in the context of periodic reviews. Accordingly, our findings below proceed on the assumption that Article 9.4 governs the imposition of "all others" rates in the context of U.S. administrative reviews.

[276] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127, cited with approval in Appellate Body Report, *US – Zeroing (Japan)*, para. 183, Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 390.

[277] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

[278] We refer to our summary of the Appellate Body's jurisprudence on this issue, *supra* para. 7.136.

[279] While authorities have the right to apply "all others" rates that are less than the maximum allowable amount, few authorities do so in practice (outside of the context of the lesser-duty rule). For this reason, investigating authorities generally do not make separate determinations of (i) the maximum allowable rate, and (ii) the rate that will actually be applied. Instead, authorities generally simply determine the "all others" rate to be applied. In our view, a determination of the maximum allowable "all others" rate is always implicit in such a determination, since the "all others" rate applied by the authority must necessarily be equal to or below the maximum allowable "all others" rate. In other words, an authority that determines an "all others" rate of x per cent implicitly determines that the maximum allowable "all others" rate is at least x per cent.

[280] We also see confirmation for our interpretation of Article 9.4 in the Appellate Body's interpretation of Article 9.3, of which Article 9.4 is an exception. The Appellate Body has found that the margin of dumping established for an exporter *in accordance with Article 2* operates as a ceiling for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter. See, e.g. Appellate Body Report, *US – Zeroing (EC)*, para. 130; Appellate Body Report, *US – Zeroing (Japan)*, paras. 155-156; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 96; Appellate Body Report, *US – Continued Zeroing*, paras. 286, 314 (discussed, *supra*, para. 7.137).

"Article 9.4 simply imposes no prohibition, as no *ceiling* can be calculated" and that, as a consequence, "there would be no legal basis for a panel to conclude that the 'all others' rate actually established is inconsistent with Article 9.4".[281] The Appellate Body disagreed. The Appellate Body indicated that, notwithstanding the *lacuna*, Article 9.4 nevertheless imposes certain residual disciplines. In particular, the Appellate Body found that:

> "[T]he fact that all margins of dumping for the investigated exporters fall within one of the categories that Article 9.4 directs investigating authorities to disregard, for purposes of that paragraph, does not imply that the investigating authorities' discretion to apply duties on non-investigated exporters is unbounded. The lacuna that the Appellate Body recognized to exist in Article 9.4 is one of a specific *method*. Thus, the absence of guidance in Article 9.4 on what particular methodology to follow does not imply an absence of any obligation with respect to the "all others" rate applicable to non-investigated exporters where all margins of dumping for the investigated exporters are either zero, *de minimis*, or based on facts available."[282]

7.215 Although the Appellate Body did not elaborate on the nature of the boundaries that might apply to the investigating authority's discretion in the *lacuna* situation[283], we note the Appellate Body's view that some form of boundary nevertheless applies. We interpret the Appellate Body's statement in *US – Zeroing (EC) (Article 21.5 – EC)* to mean that if an investigating authority limits its investigation and applies an "all others" rate to non-selected exporters, its discretion in doing so is not unlimited. In our view, one limitation under Article 9.4 is that the margins of dumping which are used to establish the maximum allowable "all others" rate must be ones which, at the time the "all others" rate is applied, conform to the disciplines of the Agreement.

7.216 In the present dispute, Viet Nam alleges that the USDOC relied upon margins of dumping calculated with the use of zeroing in determining the "all others" rate applied in each of the measures at issue. We recall that the Appellate Body has consistently found that the use of zeroing renders "margins of dumping" inconsistent with Article 2 of the Anti-Dumping Agreement. Specifically, the Appellate Body has found that "model zeroing", as it was applied by the USDOC, is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.[284] Significantly in our view, the United States has not taken issue with Viet Nam's argument that zeroing is inconsistent with that provision. We also recall our earlier findings that the application of simple zeroing in a periodic review renders the comparison inconsistent with the first sentence of Article 2.4.[285] For the same reasons, we are of the view that the use of "model zeroing" in the context of an original investigation would be inconsistent with that same provision.[286]

7.217 Based on the foregoing considerations, we consider that an investigating authority that determines the maximum allowable "all others" rate on the basis of dumping margins calculated with the use of zeroing acts inconsistently with Article 9.4. We now examine Viet Nam's factual allegation

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[281] Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 8.283. (emphasis original, footnote omitted)

[282] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 453. (emphasis original)

[283] In *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body considered that as the parties had not suggested specific alternative methodologies to calculate the maximum allowable "all others" rate, and that as the measures at issue were no longer in effect, it did not need to make findings concerning the European Communities' claim under Article 9.4.

[284] See, e.g. Appellate Body Report, *US – Softwood Lumber V*, para. 102.

[285] See *supra*, paras. 7.93-7.97.

[286] In addition, we note that the findings of the Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)*, on which we rely in our findings under Article 2.4, pertained to the use of zeroing under the transaction-to-transaction methodology in original investigations.

that the USDOC, in the administrative reviews at issue, imposed an "all others" rate determined on the basis of dumping margins calculated using "model zeroing".

7.218 Before doing so, however, we note the United States' argument that, as a result of Article 18.3 of the Anti-Dumping Agreement[287], the "all others" rates applied in the second and third administrative reviews are not subject to the disciplines of the Agreement because they were calculated in the original investigation, which was initiated and completed prior to Viet Nam's accession to the WTO. The United States contends that these "all others" rates do not become subject to the Anti-Dumping Agreement merely because they continued to be applied on or after the date of entry into force of the WTO Agreement for Viet Nam.

7.219 We note, first, that despite some ambiguity in the formulation of its claims and arguments, Viet Nam has clarified that it is not requesting us to make any findings in respect of the rates determined by the USDOC in the original investigation. Rather, Viet Nam explains that it is seeking findings only with respect to the USDOC's final determinations in the second and third administrative reviews.[288] It is not in dispute that the USDOC's determinations in these two administrative reviews are subject to the disciplines of the Anti-Dumping Agreement.

7.220 The United States argues that, because the "all others" rate was never recalculated, the USDOC never revisited its decision to apply that all others rate. According to the United States, the USDOC merely *continued to apply* the "all others" rate initially applied in the original investigation during the second and third administrative reviews. The United States relies, in particular, on the findings of the panel in *US – DRAMS*. That panel, applying Article 18.3 to the facts before it, considered that the scope of application of the Agreement was determined by the scope of post-WTO reviews, such that the Agreement only applied to those parts of a pre-WTO measure that were covered by a post-WTO review. According to the United States, because the USDOC merely continued to apply the "all others" rate from the original investigation, which pre-dated Viet Nam's accession to the WTO, in the period following Viet Nam's accession to the WTO, the "all others" rate is not subject to WTO review.

7.221 We are unable to accept the United States' argument which, in our view, is not supported by the findings of the panel in *US – DRAMS*. In *US – DRAMS*, the determination at issue – that of the product coverage of the Anti-Dumping measures at issue – was determined once, before the entry into force of the WTO Agreement, and never subsequently reconsidered. By contrast, the evidence before us shows that the USDOC made a new and distinct "all others" rate determination in each of the administrative reviews which are before us. We note in particular that, in its preliminary determination in the second administrative review, the USDOC initially applied a *de minimis* "all others" rate that reflected the weighted average of the selected respondents' dumping margins. The USDOC then invited interested parties to comment on the methodology that it should apply in its final determination and, on the basis of those comments, eventually decided to apply the "all others" rate calculated and applied in the original investigation.[289] These facts squarely contradict the suggestion by the United States that the USDOC merely continued to apply the "all others" rate from the original investigation in the two reviews at issue. On the contrary, they show that in the second administrative review the USDOC actively considered and analysed the question of which "all others" rate to apply and, on the basis of the specific margins calculated in that review, made a new

[287] Article 18.3 provides, in relevant part, that the provisions of the Anti-Dumping Agreement "shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement."

[288] See *supra*, section VII.C.

[289] Preliminary Determination in the Second Administrative Review, Exhibit Viet Nam-14; and Final Determination and Issues and Decision Memorandum in the Second Administrative Review, Exhibit Viet Nam-15, discussed *supra* paras. 7.197-7.198.

determination in which it decided to apply the same "all others" rate which it had applied in the original investigation. The mere fact that the "all others" rate ultimately applied was not recalculated does not change the extent of the analysis inherent in the USDOC's new determination to continue to apply that rate. In the third administrative review, the USDOC preliminary determined an "all others" rate of 4.26 per cent.[290] Only when the margins of examined exporters were revised in the final determination did a "*lacuna* situation" present itself, in response to which the USDOC decided to apply the "all others" rate from the original investigation. Again, this shows that in the third administrative review, the USDOC gave full and renewed consideration to the question of the "all others" rates to be applied.

7.222 In sum, the evidence before us shows that the "all others" rates applied in each of the administrative reviews at issue were subject to full consideration by the USDOC in each case. The "all others rate" applied by the USDOC in each instance was a direct result of the margins calculated by the USDOC in *that review*. It is only because the USDOC determined that all such margins could not relied upon that the USDOC *decided* to apply the same "all others" rate as had been applied in the original investigation. Accordingly, the United States' citation to the findings of the panel in *US – DRAMs* is inapposite.

7.223 For these reasons, we reject the United States' argument that the "all others" rates applied by the USDOC in the second and third administrative review are shielded from challenge under the Anti-Dumping Agreement by virtue of Article 18.3.

7.224 Turning to the substance of Viet Nam's claim, we recall that the "all others" rate of 4.57 per cent initially applied by the USDOC in the original investigation, and later applied again in the administrative reviews at issue, was the weighted average of the individual margins calculated for the three selected respondents in that investigation.[291] Viet Nam argues that the USDOC had, in the original investigation, applied "model zeroing" in calculating these margins of dumping.[292] Viet Nam supports this allegation with evidence similar to that which it provided in support of its claim that the USDOC applied "simple zeroing" in the calculation of individual margins in the second and third administrative reviews: Viet Nam provides the Panel with the USDOC's programming logs and computer programme outputs with respect to Minh Phu and Camimex, two Vietnamese respondents selected for individual examination in the investigation.[293] Viet Nam also again relies on the Ferrier affidavit, which describes how the computer programme used by the USDOC in the original investigation implemented the USDOC's model zeroing methodology.[294] The affidavit identifies certain lines of computer code in the "logs" that implement the instruction to disregard negative comparison results in the calculation of the total anti-dumping duties of the selected respondents. The affidavit also refers to the "outputs", which corroborate this removal by the computer programme of any comparison result of zero or below.

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[290] Preliminary Determination in the Third Administrative Review, Exhibit Viet Nam-18; and Final Determination in the Third Administrative Review, Exhibit Viet Nam-19, discussed *supra*, para. 7.199.

[291] Final Determination in the Original Investigation, p. 71009 and Issues and Decision Memorandum, pp. 28-29, Exhibit Viet Nam-06; Amended Final Determination in the Original Investigation, Exhibit Viet Nam-07, pp. 5153-5154.

[292] Viet Nam's first written submission, paras. 29-32; Viet Nam's second written submission, para. 58. See *supra*, para. 7.15 for Viet Nam's description of the U.S. "model zeroing" methodology.

[293] Viet Nam's first written submission, para. 45, referring to USDOC Computer Programme Log for Minh Phu in the Original Investigation, Exhibit Viet Nam-34; USDOC Computer Programme Log for Camimex in the Original Investigation, Exhibit Viet Nam-35; Computer Programme Output for Minh Phu in the Original Investigation, Exhibit Viet Nam-42; Computer Programme Output for Camimex in the Original Investigation, Exhibit Viet Nam-43.

[294] Ferrier affidavit, Exhibit Viet Nam-33, paras. 11-26. This is the same affidavit discussed *supra*,para. 7.78.

7.225 Finally, Viet Nam also refers us to the Issues and Decision Memorandum published with the final results of the original investigation, in which the USDOC indicates that, in calculating the margins of dumping of individually investigated exporters:

> "[W]e made model-specific comparisons of weighted average export prices with weighted-average normal values of comparable merchandise. ... We then combined the dumping margins found based upon these comparisons, without permitting non-dumped comparisons to reduce the dumping margins found on distinct models of subject merchandise, in order to calculate the weighted-average dumping margin".[295]

7.226 The United States neither seeks to rebut Viet Nam's assertion that the USDOC applied model zeroing in the original investigation, nor provides any evidence contradicting the evidence put forward by Viet Nam. In these circumstances, we are satisfied that the evidence submitted by Viet Nam establishes that the USDOC: (i) applied model zeroing when calculating the margins of dumping for selected respondents in the original investigation, and (ii) in the second and third administrative reviews, determined the maximum allowable "all others" rate on the basis of these margins of dumping, which had been calculated with zeroing in the original investigation. In doing so the USDOC implicitly determined that the maximum allowable "all others" rate could be based on dumping margins calculated with zeroing.

7.227 Since, in the second and third administrative reviews, the USDOC applied an "all others" rate (and therefore implicitly also a maximum allowable "all others" rate) on the basis of margins of dumping that had been calculated with zeroing in the original investigation, we find that the USDOC acted inconsistently with Article 9.4 of the Anti-Dumping Agreement in these reviews.[296]

3. Viet Nam's argument with respect to the USDOC's reliance on margins of dumping from a prior proceeding and Viet Nam's claims under Articles 2.4, 2.4.2, 9.3, 17.6(i) of the Anti-Dumping Agreement

7.228 We recall Viet Nam's second argument under Article 9.4, namely that the USDOC acted inconsistently with the United States' obligations under that provision because it imposed, in the second and third administrative reviews, an "all others" rate determined on the basis of margins of dumping that had been calculated in a prior proceeding, which "all others" rate was prejudicial to non-selected respondents. Moreover, we recall that in addition to its claims under Article 9.4, Viet Nam makes claims of violation under Articles 9.3, 2.4.2, 2.4 and 17.6(i) of the Anti-Dumping Agreement.[297]

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[295] Issues and Decision Memorandum in the Original Investigation, Exhibit Viet Nam-06, p. 12, cited by Viet Nam in its first written submission, para. 43 and in its second written submission, para. 57. We note that the evidence submitted by Viet Nam shows that subsequent to the original investigation in this proceeding, the USDOC altered its anti-dumping methodology in original investigations: The USDOC announced, in a notice published on 27 December 2006 that going forward, it would "no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons." (*Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 27 December 2006, Exhibit Viet Nam-66, cited in Viet Nam's first written submission, para. 34)

[296] Our findings concern the USDOC's *reliance* on dumping margins calculated not in accordance with Article 2 of the Anti-Dumping Agreement *to establish the "all others" rate applied in each of the administrative reviews here at issue*. We are not, however, making any findings with respect to the consistency, with the U.S. obligations under the Anti-Dumping Agreement, of the USDOC's actions and determinations in the original investigation. Nor should our findings be read as suggesting that those actions and determinations were subject to the disciplines of the Anti-Dumping Agreement.

[297] See, *supra* para. 7.200.

7.229 We are of the view that our findings above that the United States acted inconsistently with its obligations under Article 9.4 of the Anti-Dumping Agreement suffice to resolve the dispute between the parties with respect to the measures at issue. In our view, making additional findings under the same provision or making findings under other provisions of the Anti-Dumping Agreement would not contribute to the resolution of the dispute between the parties or assist in any potential implementation. For these reasons, we do not consider Viet Nam's argument that the United States acted inconsistently with Article 9.4 by virtue of the USDOC's application of an "all others" rate "that fails to consider the results of the individually-investigated respondents in the contemporaneous proceeding and produces an antidumping duty prejudicial to companies not selected for individual investigation", and we exercise judicial economy in respect of Viet Nam's claims under Articles 9.3, 2.4.2, and 2.4 of the Anti-Dumping Agreement.

7.230 With respect to Article 17.6(i), as the United States notes[298], Viet Nam's panel request makes no reference to this provision. For this reason, we consider that Viet Nam's claim of violation of Article 17.6(i) of the Anti-Dumping Agreement is not within our terms of reference.

G. VIET NAM'S CLAIMS CONCERNING THE RATE ASSIGNED TO THE VIETNAM-WIDE ENTITY

7.231 Viet Nam challenges the rate assigned to the Vietnam-wide entity in the second and third administrative reviews. Viet Nam's claims concern (i) the USDOC's failure to assign to the Vietnam-wide entity an "all others" rate, and (ii) the assignment instead to the Vietnam-wide entity of a rate based on facts available. Viet Nam's claims are based on Articles 6.8, 9.4, 17.6(i), and Annex II, of the Anti-Dumping Agreement.

7.232 The United States asks us to reject Viet Nam's claims.

1. Introduction

7.233 Before addressing Viet Nam's claims, we first set out the relevant facts in light of which the issues raised by Viet Nam's claims must be examined.

7.234 We recall that, in the two reviews at issue, the USDOC limited its examination in the manner provided for in the second sentence of Article 6.10 of the Anti-Dumping Agreement, because of the large number of firms involved.[299] The second sentence of Article 6.10 provides:

> "In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated."

7.235 Thus, while the second sentence of Article 6.10 allows authorities to limit the scope of their examination, that provision also ensures that, in cases where authorities do so, a minimum number of exporters or producers (or "respondents") are nevertheless examined individually.[300] Whereas the maximum anti-dumping rate to be applied to selected exporters is determined by their individual margins of dumping (in accordance with Article 9.3 of the Anti-Dumping Agreement), the question

[298] United States' second written submission, para. 75.
[299] See, *supra* para. 7.147.
[300] We refer to those respondents selected for individual examination as "selected" respondents. We refer to those respondents not selected for individual examination as "non-selected" respondents.

arises as to the maximum allowable amount of any "all others" rate assigned to non-selected exporters. This issue is addressed by the relevant part of Article 9.4 in the following terms:

> "When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers,
>
> …
>
> provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. …"

7.236 As noted above, the USDOC limited its examinations in the second and third administrative reviews in the manner envisaged by the second sentence of Article 6.10. Having done so, the USDOC was therefore required to select a minimum number of respondents for individual examination.

7.237 We recall that the USDOC treated Viet Nam as a non-market economy. As a result, the USDOC applied a rebuttable presumption that all shrimp exporting companies are controlled by the Government of Viet Nam, such that they may be treated as operating units of a single, government-controlled, Vietnam-wide entity, rather than individual exporters in their own right. Exporting companies that could establish their eligibility for a separate rate, on the basis of their independence from government control, were either selected for individual examination, or assigned the "all others" rate (we refer to these companies as "separate rate" companies). All remaining exporting companies (which we refer to as "non-separate rate" companies) were subject to the rate assigned to the Vietnam-wide entity. In other words, the "all others" rate was only assigned to separate rate respondents, excluding therefore the Vietnam-wide entity and its constituent parts. In this regard, the USDOC's notice of initiation of the second administrative review stated that "[o]nly those respondents with separate rate status will be included in the group receiving the weighted-average margin calculated from the selected respondents."[301]

7.238 In the second administrative review, the USDOC selected two separate rate companies for individual examination. The USDOC selected three separate rate companies for individual examination in the third administrative review. The USDOC did not select any non-separate rate companies for individual examination. The rates assigned to the selected (separate rate) respondents were based on their individual margins of dumping (all of which were zero or *de minimis*). Other separate rate respondents received an "all others" rate of 4.57 per cent. All non-separate rate respondents received the Vietnam-wide entity rate, set at 25.76 per cent on the basis of facts available (i.e. the highest rate calculated in the petition that could be corroborated).[302]

7.239 We begin by examining Viet Nam's claim under Article 9.4 of the Anti-Dumping Agreement, which concerns the USDOC's failure to assign an "all others" rate to the Vietnam-wide entity. After reviewing the text of that provision, we consider the possible impact of the Working Party Report of Viet Nam's Accession to the WTO. We also consider whether, because all the margins of dumping for individually examined respondents in the second and third administrative reviews were zero or *de minimis*, the USDOC could be considered to have violated any obligations under Article 9.4 in

[301] Notice of Initiation of the Second Administrative Review, Exhibit Viet Nam-12, p. 17100.
[302] United States' first written submission, para. 160.

those reviews. We subsequently examine whether the USDOC was entitled to assign a facts available rate to the Vietnam-wide entity, instead of an "all others" rate, because of non-cooperation by certain exporting companies treated as operating units of the Vietnam-wide entity.

7.240 We recall that the USDOC conducted limited examinations, as envisaged by the second sentence of Article 6.10. It is for this reason that the issue of whether or not the USDOC should have assigned an "all others" rate, i.e. a rate for non-selected respondents, to the Vietnam-wide entity arises. It is also for this reason that issues regarding alleged non-cooperation by respondents at the sample selection stage arise.

2. The USDOC's failure to assign the "all others" rate to the Vietnam-wide entity, viewed in light of Article 9.4 of the Anti-Dumping Agreement

(a) Main arguments of the parties

(i) Viet Nam

7.241 Viet Nam's basic argument is that Article 9.4 governs the rate that should be applied to all companies not selected for individual examination, whether or not they are eligible for a separate rate. Viet Nam's argument is based on the word "any" in the second line of Article 9.4. Viet Nam interprets the use of this word to mean that Article 9.4 governs the assessment of anti-dumping duties to "any" company not selected for individual examination, without exception.[303] Viet Nam contends that Article 9.4 is absolute, in the sense that, where an investigating authority has limited its examination, it must calculate an anti-dumping duty for all companies not individually investigated, irrespective of any question of their eligibility for a separate rate, that is no greater than the weighted average margin of dumping of the selected companies, excluding rates that are zero, *de minimis*, or based on facts available.

(ii) United States

7.242 In response, the United States notes that, in the second and third administrative reviews, the margins of dumping calculated for the two selected respondents were zero or *de minimis*. The United States asserts that Article 9.4 does not provide for any maximum allowable "all others" rate in such a *lacuna* situation.[304] According to the United States, therefore, the USDOC could not be found to have violated Article 9.4 in the second or third administrative reviews.

(b) Main arguments of the third parties

7.243 While some third parties expressed the view that the USDOC was entitled to treat separate legal entities as part of the Vietnam-wide entity, provided the structural and commercial relationship between the State and exporting companies was properly examined, only China addressed whether or not the USDOC was entitled not to have applied an "all others" rate to the Vietnam-wide entity. China argues that the rate applied to the Vietnam-wide entity is inconsistent with Article 9.4 because non-investigated exporters should necessarily receive the "all others" rate. China argues that the provisions of the Anti-Dumping Agreement never require non-selected companies to first demonstrate that they should be assigned an "all-others" rate.[305]

[303] Viet Nam's second written submission, para. 110; Viet Nam's response to Panel question 27, para. 74.

[304] The United States makes this argument, for example, at para. 78 of its opening oral statement at the second meeting of the Panel.

[305] China's third-party oral statement, pages 1-2.

(c) Evaluation by the Panel

7.244 As indicated above, we begin by considering the text of Article 9.4, which is set forth above.

(i) The text of Article 9.4

7.245 On its face, the text of Article 9.4 seems clear in requiring that, in the context of limited examinations envisaged by the second sentence of Article 6.10, any rate assigned to non-selected respondents should not exceed the maximum allowable amount provided for in that provision. This suggests that any exporter not selected for individual examination should be assigned an "all others" rate that does not exceed that maximum allowable amount. There is nothing in the text of Article 9.4 suggesting that authorities are entitled to render application of an "all others" rate conditional on the fulfilment of some additional requirement.[306]

(ii) Article 9.4 in light of Viet Nam's Protocol of Accession and the Working Party Report

7.246 In its first written submission, the United States asserts that:

> "During Vietnam's accession negotiations, Members expressed concern about the influence of the Government of Vietnam on its economy and how such influence could affect cost and price comparisons in antidumping duty proceedings. Paragraph 254 of the Working Party Report reflects the concern among Members that government influence may create special difficulties in determining cost and price comparability in the context of antidumping and countervailing duty investigations, and that a strict comparison with Vietnamese costs and prices might not always be appropriate. Indeed, the Working Party Report indicates that a dumping comparison using domestic costs and prices in Vietnam is not required for imports from Vietnam *unless and until* investigated producers demonstrate that market conditions exist in the industry producing the like product. In light of the Working Party Report and the commitments made therein, Members are free to determine that, absent a demonstration to the contrary by Vietnamese producers, government influence will prevent market principles from functioning in the Vietnamese industry manufacturing the product under investigation."[307]

7.247 Initially, we had understood the United States to argue that, because government influence over the Vietnam-wide entity prevented that entity from functioning on the basis of market principles, the USDOC was allowed by the provisions of the Working Party Report on the Accession of Viet Nam to the WTO ("Working Party Report") not to apply an "all others" rate to that entity. At the interim review, however, the United States clarified that, to the extent its argument relied on the Working Party Report, it was only as confirmation of the permissibility of treating the Vietnam-wide entity as a single exporter or producer. Accordingly, the United States does not rely on the Working Party Report to argue that the provisions thereof allowed the USDOC not to apply an "all others" rate to the Vietnam-wide entity. Nevertheless, as explained below, certain provisions of the Working Party Report address the application of the Anti-Dumping Agreement in the context of anti-dumping

[306] The additional requirement to which we refer concerns the separate rate criterion, whereby application of an "all others" rate was made dependent on eligibility for separate rate status ("Only those respondents with separate rate status will be included in the group receiving the weighted-average margin calculated from the selected respondents." (Notice of Initiation of the Second Administrative Review, Exhibit Viet Nam-12, p. 17100)). For present purposes, we do not consider it necessary to examine in greater detail the substantive basis for the distinction made by the USDOC between separate rate and non-separate rate respondents, including in particular the question of whether or not the USDOC was entitled to presume state control of shrimp exporting companies absent their showing of separate rate status.

[307] United States' first written submission, para. 146. (emphasis original)

proceedings involving imports from non-market economies. For this reason, it is appropriate for us to consider the interpretation of Article 9.4 in light of the Working Party Report.

7.248 Viet Nam submits that there is nothing in Viet Nam's Protocol of Accession, including the Working Party Report, that would provide for an alternative interpretation of Article 9.4 in the context of imports from NME countries. Viet Nam contends that neither the Protocol of Accession nor the Working Party Report provide any basis for differential treatment to a company because of government ownership.[308]

7.249 We note that, in negotiating Viet Nam's accession to the WTO, some Members did identify certain difficulties that might arise in anti-dumping proceedings involving imports from Viet Nam because that country had not yet transitioned to a full market economy. In this regard, we note that paragraph 254 of the Working Party Report provides:

> "Several Members noted that Viet Nam was continuing the process of transition towards a full market economy. Those Members noted that under those circumstances, in the case of imports of Vietnamese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those Members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in Viet Nam might not always be appropriate."[309]

7.250 Paragraph 255 of the Working Party Report explains that, in light of such difficulties:

> "The representative of Viet Nam confirmed that, upon accession, the following would apply − Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving exports from Viet Nam into a WTO Member consistent with the following:
>
> > (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Vietnamese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam based on the following rules:
> >
> > > (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Vietnamese prices or costs for the industry under investigation in determining price comparability;
> > >
> > > (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product

[308] Viet Nam's second written submission, para. 95.
[309] Working Party Report, WT/ACC/VNM/48, para. 254.

> with regard to manufacture, production and sale of that product."[310]

7.251 Thus, because of difficulties resulting from the fact that Viet Nam was still continuing the process of transition towards a full market economy, Members agreed that investigating authorities need not necessarily calculate normal value on the basis of domestic prices in Viet Nam, as would otherwise be required by Article 2 of the Anti-Dumping Agreement. However, we see nothing in paragraphs 254 and 255 of the Working Party Report, or any other provision thereof, indicating that the interpretation and/or application of any other provision of the Anti-Dumping Agreement, including Article 9.4, should be modified to accommodate any special difficulties that might arise in a proceeding involving imports from Viet Nam. In particular, there is nothing in the Working Party Report indicating that an investigating authority is entitled to render application of an "all others" rate subject to some additional requirement not provided for in Article 9.4. Furthermore, whereas sub-paragraphs (i) and (ii) of paragraph 255 allow an investigating authority to modify its investigation depending on whether "producers under investigation" can or cannot "clearly show that market economy conditions prevail" in the relevant industry, the investigating authority may only do so in respect of price comparability. Sub-paragraphs (i) and (ii) of paragraph 255 do not allow an investigating authority to assign "all others" rates to non-selected respondents on the basis of whether or not market conditions prevail. Accordingly, the Working Party Report has no bearing on our evaluation of Viet Nam's claim under Article 9.4 of the Anti-Dumping Agreement.

7.252 We next consider the United States' argument regarding the fact that a so-called *lacuna* situation arose in the second and third administrative reviews.

(iii) The application of Article 9.4 in a lacuna *situation*

7.253 With regard to the United States' argument that the USDOC could not be found to have violated Article 9.4 because that provision does not provide for any maximum allowable "all others" rate in cases where the margins of all selected exporters are either zero, *de minimis*, or based on facts available, the text of Article 9.4, interpreted in the light of Viet Nam's Protocol of Accession and the accompanying Working Party Report, provides no legal basis for the USDOC not to have applied an "all others" rate to the Vietnam-wide entity. Thus, in those factual circumstances in which a maximum allowable "all others" rate may be determined pursuant to Article 9.4(i), there is no question that an "all others" rate should have been applied to both selected and non-selected respondents. The Panel acknowledges that where all margins calculated for individually examined exporters/producers are zero or *de minimis*, or result from application of facts available, it is not possible to determine the ceiling which the "all others" rate shall not exceed. It does not follow, however, from this *lacuna* that a Member is entitled to differentiate, in terms of the application of an all others rate, between exporters/producers that qualify for separate rate treatment and exporters/producers that fail to qualify for such treatment and are treated as part of the Vietnam-wide entity. If such differentiation is not permissible in cases where Articles 9.4(i) permits the calculation of the maximum allowable "all others" rate, it is unclear why such differentiation would be permissible in *lacuna* situations.[311] The Panel recalls in this respect that the Appellate Body has

[310] Working Party Report, WT/ACC/VNM/48, extract from para. 255. We note that, according to para. 2 of Part I of the Protocol on the Accession of Viet Nam to the WTO (WT/L/662), the commitments set forth in para. 527 of the Working Party Report, which include para. 255 thereof, shall be an integral part of the WTO Agreement. It is appropriate, therefore, that we read Article 9.4 of the Anti-Dumping Agreement in conjunction with para. 255 of the Working Party Report.

[311] Furthermore, we observe that the USDOC stated in its notice of initiation of the second administrative review that "[o]nly those respondents with separate rate status will be included in the group receiving the weighted-average margin calculated from the selected respondents" (Notice of Initiation of the Second Administrative Review, Exhibit Viet Nam-12, p. 17100). Even outside of a *lacuna* situation, therefore, the USDOC still would not have applied an "all others" rate to the Vietnam-wide entity.

specifically rejected the argument that Article 9.4 imposes no obligations in *lacuna* situations. Specifically, as we have noted above, in *US – Zeroing (EC) (Article 21.5 – EC)* the Appellate Body found that:

> "[T]he fact that all margins of dumping for the investigated exporters fall within one of the categories that Article 9.4 directs investigating authorities to disregard, for purposes of that paragraph, does not imply that the investigating authorities' discretion to apply duties on non-investigated exporters is unbounded. The *lacuna* that the Appellate Body recognized to exist in Article 9.4 is one of a specific *method*. Thus, the absence of guidance in Article 9.4 on what particular methodology to follow does not imply an absence of any obligation with respect to the "all others" rate applicable to non-investigated exporters where all margins of dumping for the investigated exporters are either zero, *de minimis*, or based on facts available."[312]

7.254 We consider that our finding in response to the abovementioned U.S. argument is consistent with this finding by the Appellate Body. We note that the Appellate Body's finding does not concern the scope of respondents that should be assigned an "all others" rate. In other words, it does not suggest that the existence of the *lacuna* situation allows an investigating authority to not assign an "all others" rate to "non-investigated exporters" that would otherwise have been assigned such rate. The Appellate Body's finding merely concerns the maximum allowable rate that may be assigned to the non-selected respondents.

(iv) Summary

7.255 We have examined the text of Article 9.4, read in light of certain provisions of the Working Party Report. We have also considered the fact that, in the reviews at issue, the margins of selected respondents were zero or *de minimis*. Our analysis indicates that the USDOC's decision not to apply an "all others" rate to the Vietnam-wide entity is inconsistent with Article 9.4 of the Anti-Dumping Agreement.

7.256 We next consider the parties' arguments concerning Article 6.8 of the Anti-Dumping Agreement, and the potential relevance of that provision to our analysis under Article 9.4.

3. The USDOC's treatment of the Vietnam-wide entity viewed in light of Article 6.8 of the Anti-Dumping Agreement

(a) Main arguments of the parties

(i) Viet Nam

7.257 Viet Nam invokes Article 6.8 and Annex II as the basis for an affirmative claim against the USDOC's decision to assign a facts available rate to the Vietnam-wide entity. Viet Nam claims that the USDOC was not entitled to apply facts available in the second and third administrative reviews, because the USDOC failed to comply with the requirements of Article 6.8. In particular, Viet Nam submits that respondents did not fail to provide information that was "necessary" within the meaning of Article 6.8. In addition, Viet Nam submits that Article 6.8 only applies in respect of respondents selected for individual examination, and therefore has no application in respect of the rate applied to non-selected respondents.

7.258 Furthermore, Viet Nam submits that the USDOC's attempt to bring its actions within the ambit of Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement by reliance on the

[312] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 453. (emphasis original)

so-called quantity and value questionnaires is disingenuous. According to Viet Nam, the application of the Vietnam-wide rate had nothing to do with whether or not quantity and value information was provided by certain respondents. Rather it had to do with whether individual entities had demonstrated the absence of government control over their export activities.[313] Viet Nam therefore denies that Article 6.8 could justify the non-application of an "all others" rate to the Vietnam-wide entity. According to Viet Nam, the obligations in Article 9.4 are absolute, and therefore independent of the application of the Article 6.8 facts available mechanism in respect of non-cooperation at the sample selection stage.

(ii) United States

7.259 The United States denies that the USDOC failed to comply with the requirements of Article 6.8. The United States also argues that, in cases of non-cooperation by respondents at the time that the authority selects respondents for individual examination (in cases where the authority's examination is limited under Article 6.10), the authority is entitled to apply a facts available rate, rather than an "all others" rate, irrespective of the requirements of Article 9.4. The United States asserts that "[o]therwise, for example, if a company were aware that is was dumping at a high level and it was one of the largest exporters to the United States of subject merchandise, it would have no incentive to respond to the quantity and value questionnaire because it would receive a lower rate by not cooperating".[314]

(b) Evaluation by the Panel

7.260 We begin by addressing the parties' arguments regarding the interaction between Articles 6.8 and 9.4.

(i) Interaction between Articles 9.4 and 6.8

7.261 The USDOC found that 35 exporting companies had failed to respond to the USDOC's "quantity and value" ("Q&V") questionnaire. According to the USDOC, that data was necessary in order for the USDOC to determine which respondents to select for individual examination. The United States contends that, as a result of such non-cooperation, the USDOC was entitled to apply a facts available rate to the Vietnam-wide entity instead of an "all others" rate.

7.262 Article 6.8, which regulates the use of facts available, provides:

> "In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph."

7.263 Regarding Viet Nam's argument that the Article 6.8 facts available mechanism does not apply in respect of non-selected respondents, we note that the first sentence of Article 6.8 envisages the use of facts available in cases of non-cooperation by "any" interested party. The reference to non-cooperation by "any" interested party suggests that Article 6.8 is of broad application. There is nothing in the text of Article 6.8 to suggest that the facts available mechanism only applies in respect of non-cooperation by a limited category of interested parties. In particular, there is no indication in the text to suggest that, in cases of limited examination (under Article 6.10), Article 6.8 only allows

[313] Viet Nam's opening oral statement at the second meeting of the Panel, para. 34.
[314] United States' first written submission, para. 160.

the use of facts available in respect of those interested parties that were selected for individual examination, as alleged by Viet Nam.

7.264 We recall that the USDOC purported to find non-cooperation at the time it sought to select respondents for individual examination. In principle, if a respondent fails to provide information that the investigating authority needs to determine the composition of the sample in cases of limited examination, the authority is unable to establish whether that respondent should be selected for individual examination, or placed in the residual category of non-selected respondents and assigned the all-others rate. In other words, the investigating authority would not be able to determine whether or not the non-cooperating respondent should be selected or non-selected for the purpose of applying Article 9.4. In these factual circumstances, we acknowledge that it would not necessarily be unreasonable for an investigating authority to assign a facts available rate to those respondents that failed to cooperate at the sample selection stage, provided the requirements of Article 6.8 are fulfilled.

7.265 We need not reach a firm conclusion on this issue, though, since we are not persuaded that the reason the USDOC did not assign an "all others" rate to the Vietnam-wide entity was non-cooperation by constituent parts of the Vietnam-wide entity at the sample selection stage. In this regard, we are struck by the fact that, already in its notice of initiation of the second administrative review, the USDOC had stated that "[o]nly those respondents with separate rate status will be included in the group receiving the weighted-average margin calculated from the selected respondents."[315] This statement indicates that, even before any questionnaire had been issued, and before any issue of non-cooperation could have arisen, the USDOC had already resolved not to apply an "all others" rate to the Vietnam-wide entity. We conclude from this statement that, even if the exporting companies had cooperated fully with the USDOC, the Vietnam-wide entity still would not have been assigned an "all others" rate.[316] In these circumstances, we do not consider that there is any reasonable basis on which the USDOC could subsequently refer to non-cooperation by non-separate rate respondents as the reason for not having applied an "all others" rate to the Vietnam-wide entity.[317]

7.266 As a result, there is not strictly any need for us to examine whether or not the USDOC's application of the Article 6.8 facts available mechanism met the requirements of that provision. We shall address this issue, though, in case the Appellate Body might disagree with our conclusion on appeal.

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[315] Notice of Initiation of the Second Administrative Review, Exhibit Viet Nam-12, p. 17100.

[316] In our view, this is a reflection of the fact that, under the U.S. regime for anti-dumping proceedings involving non-market economies, the Vietnam-wide entity, as a non-separate rate respondent, will inevitably be assigned the Vietnam-wide entity rate, rather than an "all others" rate calculated on the basis of the margins of dumping of separate rate respondents selected for individual examination. We note that, as the USDOC explained in its Notice of Initiation of the Second Administrative Review (p. 17099), "[i]t is the Department's policy" to assign a single anti-dumping duty rate to non-separate respondents. This statement of USDOC policy is consistent with the USDOC's Anti-Dumping Manual, which also states that "[t]hose exporters that do not or cannot demonstrate that they are separate from the government-wide entity receive the NME-wide rate" (USDOC Anti-Dumping Manual, Chapter 10, Exhibit Viet Nam-31, Section III.A, page 3). The USDOC's Anti-Dumping Manual clearly distinguishes between the "NME-wide rate", addressed at Section IV of Chapter 10 of the Manual, and the "Separate Rates" (assigned to separate rate respondents), addressed at Section III of Chapter 10 of the Manual. See also our discussion of the USDOC's exclusion of non-separate rate respondents from selection for individual review, below at paras. 7.272-7.273. The USDOC effectively operates parallel systems for determining duties in anti-dumping dumping proceedings involving imports from non-market economies: one for separate rate respondents, and one for the remaining non-separate rate respondents.

[317] We agree in this regard with the finding by the panel in *Guatemala – Cement II* that: "Although there are certain consequences (under Article 6.8) for interested parties if they fail to cooperate with an investigating authority, in our view such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner." (Panel Report, *Guatemala – Cement II*, para. 8.251)

(ii) Whether the USDOC complied with the disciplines of Article 6.8 in applying a facts available rate to the Vietnam-wide entity

7.267 Viet Nam claims that the USDOC's use of facts available to determine the dumping rate applied to the Vietnam-wide entity in the second administrative review was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.[318] Viet Nam contends that the Q&V data requested by the USDOC was not "necessary", such that the failure of entities to provide that information could not justify the use of facts available. Viet Nam submits that information is only "necessary" if it is needed to determine a margin of dumping for a selected exporter or producer. Viet Nam also asserts that the fact that the Q&V data requested by the USDOC was not "necessary" in the second administrative review is demonstrated by the fact that the USDOC did not need to request that data in the third administrative review, but instead obtained that data from another U.S. Government agency.

7.268 The United States asks the Panel to reject Viet Nam's arguments. The United States contends that the information sought by the USDOC from the 35 exporting companies was "necessary", and that the USDOC complied with all the requirements of Article 6.8 in assigning a facts available rate to the Vietnam-wide entity.

7.269 As explained above, we are examining whether or not the USDOC fulfilled the criteria of Article 6.8 when assigning a facts available rate to the Vietnam-wide entity. As a result of differences in the factual circumstances of the second and third administrative reviews, we address each review separately, starting with the second.

Second administrative review

7.270 In the second administrative review, the USDOC applied a facts available rate to the Vietnam-wide entity on the basis of non-cooperation by both the Vietnam-wide entity, and the 35 exporting companies subject to the Vietnam-wide entity rate. (Neither the Vietnam-wide entity, nor any of the 35 exporting companies found to constitute that entity, had been selected for individual examination.) In its preliminary determination, the USDOC found that the 35 exporting companies had failed to respond to the USDOC's Q&V and separate rate questionnaires, or the follow-up letters sent by the Department.[319] In its final determination, the USDOC found that the 35 exporting companies had failed to respond only to the USDOC's Q&V questionnaire.[320]

7.271 We recall that the text of Article 6.8 is set forth at paragraph 7.262 above. In accordance with the first sentence of Article 6.8, determinations may be made on the basis of facts available "[i]n cases where any interested parts refuses access to, or otherwise does not provide, necessary information". We shall begin by examining whether or not the USDOC properly found that the 35 exporting

[318] We note that, in its request for the establishment of a panel, Viet Nam refers to the application of the facts available Vietnam-wide entity rate to companies that "responded timely and fully to the questionnaires issued by USDOC" (WT/DS404/5, Annex G-2, page 4). In its response to Panel question 27 (para. 72), Viet Nam also refers to the possibility of a (cooperative) company providing information to the USDOC indicating that the company is not independent of government control, and therefore receiving the facts available Vietnam-wide entity rate. However, Viet Nam has not produced any evidence indicating that any such cooperative company was assigned the Vietnam-wide entity rate based on facts available. Rather, the evidence on the record regarding the second administrative review indicates that all 35 exporting companies subject to the facts available Vietnam-wide entity rate were found not to have responded to the USDOC's request for Q&V data.

[319] Preliminary Determination in the Second Administrative Review, Exhibit Viet Nam-14, p. 12131. (footnotes omitted)

[320] Final Determination in the Second Administrative Review, Exhibit Viet Nam-15, p. 52275. (footnote omitted)

companies treated as constituent parts of the Vietnam-wide entity had failed to provide "necessary" information, in the form of Q&V data.

7.272 The USDOC alleged that Q&V data was "necessary" in order for the USDOC to select respondents for individual examination. As explained above, it would not necessarily be unreasonable for an investigating authority to assign a facts available rate to those respondents that failed to cooperate at the sample selection stage, provided the requirements of Article 6.8 are fulfilled. One consideration in this regard would be whether or not the investigating authority had properly designated information that allegedly non-cooperative respondents failed to provide as "necessary" within the meaning of Article 6.8. As to whether or not the Q&V data requested by the USDOC was properly designated by the USDOC as "necessary", we recall that the USDOC stated in its notice of initiation of the second administrative review that "[b]ecause the Department intends to select the mandatory respondents by selecting the exporters/producers accounting for the largest volume of subject merchandise exported to the United States during the period of review, the Department will require all potential respondents to demonstrate their eligibility for a separate rate."[321] We consider this statement in light of the USDOC's assertion in the notice of initiation of the first administrative review that it would "allow only those respondents with separate rate status to be included in the sampling pool."[322] We further recall the USDOC's assertion, earlier in its notice of initiation of the second administrative review, that "[i]t is the Department's policy" to assign all non-separate rate respondents the NME-wide rate.[323] Taken together, we consider that these various statements by the USDOC make it clear that non-separate rate respondents would not be selected for individual examination.

7.273 This observation is supported by the distinction drawn between separate rate respondents and non-separate rate respondents in Chapter 10 of the USDOC's Anti-Dumping Manual ("Manual")[324], which addresses USDOC procedures in respect of anti-dumping proceedings involving non-market economies. Section III of Chapter 10 of the Manual deals with "Separate Rates". Part G of Section III explains how the USDOC selects separate rate respondents for individual examination in cases where it will conduct a limited examination. Section IV of Chapter 10 of the Manual deals with "The NME-Wide Rate". There is no explanation in that Section of how the USDOC might select non-separate rate respondents for individual examination. Instead, Section IV states that the NME-wide rate "may be based on adverse facts available if, for example, some exporters that are part of the NME-wide entity do not respond to the antidumping questionnaire." Section IV further provides that "[i]n many cases, the Department concludes that some part of the NME-wide entity has not cooperated in the proceeding because those that have responded do not account for all imports of subject merchandise." Thus, while Section III (Part G) of the Manual explains how separate rate respondents might be selected for individual examination, Section IV merely explains that the (NME-wide entity) rate assigned to non-separate rate respondents is often based on facts available.[325]

[321] Notice of Initiation of the Second Administrative Review, Exhibit Viet Nam-12, p. 17100.

[322] Notice of Initiation of the First Administrative Review, Exhibit Viet Nam-08, p. 17818. Although the first administrative review is not one of the measures at issue, we consider it appropriate to consider this evidence as factual context for our review of the USDOC's treatment of non-selected respondents in the second and third administrative reviews.

[323] Notice of Initiation of the Second Administrative Review, Exhibit Viet Nam-12, p. 17099. This statement of USDOC policy is consistent with Chapter 10 of the USDOC's Anti-Dumping Manual ("Manual"), which also states that "[t]hose exporters that do not or cannot demonstrate that they are separate from the government-wide entity receive the NME-wide rate" (USDOC Anti-Dumping Manual, Exhibit Viet Nam-31, Section III.A, p. 3).

[324] We note that Viet Nam has not advanced any claims against the USDOC's Manual "as such". We do not consider that the absence of any claim "as such" should preclude our consideration of the Manual as evidence in the context of Viet Nam's "as applied" claims.

[325] The Panel asked the United States how the USDOC would calculate the rate applied to the Vietnam-wide entity if: (i) the USDOC applied sampling but the Vietnam-wide entity was not selected for

The absence of any discussion of the potential selection of non-separate rate respondents for individual examination in Section IV of the Manual is a reflection, we believe, of the fact that that such respondents would not be selected for individual examination.

7.274 In light of these factors, taken together, we consider that the USDOC had determined[326] that non-separate rate respondents would not be selected for individual examination in the second administrative review before any question of non-cooperation by non-selected respondents could have arisen.[327] In these circumstances, we do not consider that the USDOC could properly have designated Q&V data from non-separate rate respondents as "necessary" in the meaning of Article 6.8 of the Anti-Dumping Agreement. Thus, the USDOC's application of facts available as a result of exporting companies' failure to provide that data could not have justified the use of facts available under that provision. Accordingly, the USDOC's application of a facts available rate to the Vietnam-wide entity in the second administrative review was not consistent with Article 6.8 of the Anti-Dumping Agreement.[328] In view of this finding, it is not necessary for us to consider Viet Nam's claim under Annex II of the Anti-Dumping Agreement.

Third administrative review

7.275 The United States asserts that the USDOC did not apply a facts available rate to the Vietnam-wide entity in the third administrative review. Instead, the United States asserts that the USDOC "applied to the Vietnam-wide entity the same rate applied to it in the most recently completed proceeding, because this was 'the only rate ever determined for the Vietnam-wide entity in this proceeding.'"[329]

7.276 Viet Nam notes the USDOC's decision to "assign[] the entity's current rate and only rate ever determined for this entity in this proceeding"[330]. According to Viet Nam, left unsaid in the USDOC's decision is the fact that the only rate ever applied to the Vietnam-wide entity was based upon adverse

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individual examination; (ii) the use of facts available was not justified in respect of the Vietnam-wide entity; and (iii) a *lacuna* situation did not arise (Panel question 63C). The United States replied:

> "We would note that the factual situation described in the Panel's question was not present in either the second or third administrative review. In any event, Commerce determines the appropriate dumping rate to apply on a case-by-case basis, based on the particular facts and circumstances before it, and the arguments of the parties presented in proceeding. Accordingly, the United States is not in a position to speculate, in the absence of specific facts and arguments presented in the context of a particular case, on what determinations Commerce might make under such hypothetical circumstances."

[326] We asked the United States certain questions regarding the USDOC's treatment of non-separate rate respondents (questions 29, 61 and 63). The U.S. replies indicate that the USDOC is not precluded in U.S. law from selecting non-separate respondents for individual examination. Viet Nam's claim concerns the USDOC's application of U.S. law, rather than the U.S. law as such. Accordingly, our analysis need not consider the legal possibility that the USDOC might have selected non-separate rate respondents for individual examination. Instead, we focus on the fact that, in the second administrative review, the USDOC has determined not to do so.

[327] Viet Nam has not raised any claim under Article 6.10 of the Anti-Dumping Agreement regarding the USDOC's failure to consider non-separate rate respondents for individual review. However, the absence of any Article 6.10 claim does not preclude us from considering this issue when evaluating the USDOC's finding of non-cooperation by non-separate rate respondents.

[328] In view of this finding, we need not address Viet Nam's argument that the USDOC could not properly have found non-cooperation by the Vietnam-wide entity on the basis of non-cooperation by its constituent parts (for example, Viet Nam's response to Panel question 35, para. 88).

[329] United States' first written submission, para. 164. (footnote omitted)

[330] Viet Nam's opening statement at the second meeting of the Panel, para. 29 (citing to Preliminary Determination in the Third Administrative Review, Exhibit Viet Nam-18, pp. 10009, 10014 (unchanged in Final Determination)).

facts available. Viet Nam asserts that the fact that the USDOC had previously applied the rate to the Vietnam-wide entity does not alter the facts available nature of the rate.

7.277 The USDOC did not explicitly apply a facts available rate in the third administrative review. This is because, unlike in the second administrative review, the USDOC did not seek any Q&V data from any exporting entity in the third administrative review. Instead, the USDOC obtained the Q&V data it considered necessary for the purpose of selecting exporters for individual examination from the USCBP. If we were to take a formalistic approach regarding the third administrative review, we would conclude that the rate assigned to the Vietnam-wide entity in that review was not based on facts available. This is because there was no indication by the USDOC, at any time, that it was applying facts available. Under this approach, the question of the interaction between Articles 6.8 and 9.4 would not arise.

7.278 However, in performing our objective assessment of the matter, we consider it appropriate to take a less formalistic view of the USDOC's actions in the third administrative review. In this respect, we agree with Viet Nam's assertion[331] that there are essentially three types of rate that may be assigned under the Anti-Dumping Agreement: an individual rate consistent with Article 2, an "all others" rate consistent with Article 9.4, or a facts available rate consistent with Article 6.8. The United States has not characterised the rate assigned to the Vietnam-wide entity in the third administrative review as a rate determined under either Article 2 or 9.4 of the Anti-Dumping Agreement. Nor is there any evidence on the record to suggest that this was the case. Since the rate is not assigned under Articles 2 or 9.4, the only other basis under the Anti-Dumping Agreement for applying that rate would be Article 6.8 (which would result in a facts available rate).

7.279 Furthermore, although there was no formal application of facts available in the third administrative review, the rate ultimately assigned to the Vietnam-wide entity was exactly the same as the rates that had previously been assigned in the original investigation and preceding administrative reviews, and those rates had been determined on the basis of facts available. In these circumstances, we consider it appropriate to treat the 25.76 per cent rate assigned to the Vietnam-wide entity in the third administrative review as a facts available rate, founded on the same determination of non-cooperation made by the USDOC in the second administrative review. To fail to treat this rate as a facts available rate would elevate form over substance, and ignore the true factual circumstances surrounding the assignment of that rate.

7.280 Regarding the application of the criteria set forth in Article 6.8 to what we consider to have been in substance a facts available rate assigned in the third administrative review, we note that the USDOC did not request Q&V data from any exporting entity in that review.[332] In these circumstances, there is no basis for any valid finding of non-cooperation, and therefore no basis for any valid application of facts available in the sense of Article 6.8. For this reason, we find that the rate assigned to the Vietnam-wide entity in the third administrative review was not consistent with Article 6.8 of the Anti-Dumping Agreement.[333]

4. Conclusion

7.281 We recall our analysis under Article 9.4, which indicates that the USDOC's decision not to apply an "all others" rate to the Vietnam-wide entity is inconsistent with that provision. We have

[331] Viet Nam's first written submission, paras. 164-187. The United States has not contested Viet Nam's description of the three types of rate that may be applied under the Anti-Dumping Agreement.

[332] See USDOC Respondent Selection Memorandum in the Third Administrative Review, Exhibit Viet Nam-17.

[333] In view of this finding, it is not necessary for us to consider Viet Nam's claim under Annex II of the Anti-Dumping Agreement.

considered whether our analysis of Article 9.4 should be modified on the basis of the USDOC's application of an Article 6.8 facts available rate to the Vietnam-wide entity. In light of the fact that the USDOC had decided not to apply an "all others" rate to the Vietnam-wide entity before any question of non-cooperation could have arisen, and in light of our findings that the USDOC in any event failed to comply with the requirements of Article 6.8, we see no reason to do so. Accordingly, we conclude that the USDOC's failure to assign an "all others" rate to the Vietnam-wide entity in the second and third administrative reviews is inconsistent with Article 9.4 of the Anti-Dumping Agreement. In light of our analysis under Article 6.8, we also conclude that the USDOC's assignment of a facts available rate to the Vietnam-wide entity in the second administrative review and a rate that is in substance a facts available rate in the third administrative review is not consistent with Article 6.8 of the Anti-Dumping Agreement.

5. Viet Nam's claims under Article 17.6(i) of the Anti-Dumping Agreement

7.282 While a certain ambiguity remains in this respect, Viet Nam appears to seek findings of inconsistency under Article 17.6(i) of the Anti-Dumping Agreement in relation to the rate assigned to the Vietnam-wide entity.[334] As the United States notes[335], Viet Nam's request for the establishment of a panel[336] does not provide for any claim under this provision. For this reason, insofar as Viet Nam can be understood to be making a claim under Article 17.6(i) of the Anti-Dumping Agreement, we find that any such claim falls outside our terms of reference.

H. VIET NAM'S "CONSEQUENTIAL CLAIMS"

7.283 Viet Nam makes "consequential claims" of violation under Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement.[337] Under these "consequential claims", Viet Nam argues that the USDOC's actions with respect to the conduct challenged under its other claims – zeroing, "country-wide" rate, limitation of the number of selected respondents and "all others" rate – will have a consequential impact on the USDOC's sunset review, such that the USDOC could not reach a final sunset review determination consistent with the Anti-Dumping Agreement.[338, 339] The United States

[334] Viet Nam's second written submission, para. 144(5).

[335] United States' second written submission, para. 75.

[336] WT/DS404/5, Annex G-2.

[337] Viet Nam's first written submission, paras. 289-291; Viet Nam's second written submission, paras. 142-143. We note that Viet Nam did not include these claims in the list of requests for findings included in its second written submission.

[338] For instance, Viet Nam explained that:

> "Viet Nam's consequential claim asserts that the USDOC's conduct in the completed administrative reviews is such that the USDOC cannot reach a final determination in the five-year sunset review that is consistent with the requirements of the Anti-Dumping Agreement. Specifically, the USDOC's conduct with regard to zeroing, the limited selection of mandatory respondents, the all others rate calculation methodology, and the treatment of the Vietnam-wide entity renders it impossible for the USDOC to comply with the Anti-Dumping Agreement. As a consequence of the USDOC's actions with respect to these practices, the final determination of the five year sunset review will violate United States WTO obligations.
>
> The factual basis for the claim is the resulting impact of the USDOC's actions on the ongoing five-year sunset review, demonstrated by the rules and practices that govern a USDOC five-year sunset review determination." (Viet Nam's response to Panel question 13(ii), paras. 24-25)

[339] In its opening oral statement at the second meeting of the Panel, Viet Nam provides a reference to the Federal Register Notice of the USDOC's final likelihood-of-dumping determination, made in the context of the sunset review, in which the USDOC concludes that revocation of the anti-dumping order is likely to lead to continuation or recurrence of dumping (Viet Nam's opening oral statement at the second meeting of the Panel, footnote 46 to para. 52, citing to *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam:*

argues, commenting on Viet Nam's consequential claims, that the final determination in the sunset review is not a measure within our terms of reference.[340] We note that Viet Nam has not argued that the sunset review does fall within our terms of reference. Viet Nam has also confirmed that it is not pursuing any claims with respect to the sunset review other than as part of its claims on the "continued use" measure[341], which, we have determined, is not within our terms of reference.[342]

7.284 In light of the foregoing, we find that Viet Nam's "consequential" claims pertain to a measure not within our terms of reference. For this reason, we make no findings with respect to Viet Nam's "consequential" claims of violation under Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement.

VIII. CONCLUSIONS AND RECOMMENDATION

A. CONCLUSIONS

8.1 For the reasons set out in the foregoing sections of this Report, we conclude as follows:

(a) A measure consisting of the "continued use of challenged practices" is not within our terms of reference.

(b) The United States acted inconsistently with Article 2.4 of the Anti-Dumping Agreement as a result of the USDOC's application of the zeroing methodology to calculate the dumping margins of selected respondents in the second and third administrative reviews under the *Shrimp* anti-dumping order; we exercise judicial economy in respect of Viet Nam's claims that the United States acted inconsistently with Articles 9.3, 2.1, and 2.4.2 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

(c) The U.S. zeroing methodology, as such, as it relates to the use of simple zeroing in administrative reviews, is inconsistent with the United States' obligations under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

(d) Viet Nam has not established that the USDOC's decisions to limit its examinations in the second and third administrative reviews are inconsistent with Articles 6.10, 9.3, 11.1, and 11.3 of the Anti-Dumping Agreement.

(e) Viet Nam has not established that the United States acted inconsistently with its obligations under the first sentence of Article 6.10.2 of the Anti-Dumping Agreement in the second and third administrative reviews.

Final Results of the Five-Year "Sunset" Review of the Antidumping Duty Order, 75 Fed. Reg. 75965, 7 December 2010, available at http://ia.ita.doc.gov/frn/summary/vietnam/2010-30664.txt). In the same oral statement, Viet Nam argues that the challenged USDOC practices have, therefore, effectively resulted in a sunset review determination which is inconsistent with the United States' obligations under Article 11.3 of the Anti-Dumping Agreement.

[340] United States' comments on Viet Nam's response to Panel question 69.

[341] Viet Nam's response to Panel question 9, para. 15.

[342] Moreover, we note that while Viet Nam's "consequential claims" appear to be very closely related to the "continued use" measure, Viet Nam has indicated that it considers them to be distinct and that it maintains its "consequential claims" regardless of our determination with respect to whether the "continued use" measure falls within our terms of reference. Viet Nam's response to Panel questions 13(iii) and 69.

(f) Viet Nam has not established that the United States acted inconsistently with its obligations under the second sentence of Article 6.10.2 of the Anti-Dumping Agreement in the administrative reviews at issue.

(g) The United States acted inconsistently with its obligations under Article 9.4 of the Anti-Dumping Agreement as a result of the USDOC's imposition, in the second and third administrative reviews, of an "all others" rate determined on the basis of margins of dumping calculated with zeroing; we exercise judicial economy in respect of Viet Nam's claims under Articles 9.3, 2.4.2, and 2.4 of the Anti-Dumping Agreement.

(h) Viet Nam's claims of violation under Article 17.6(i) of the Anti-Dumping Agreement in relation to the "all others" rate are not within our terms of reference.

(i) The USDOC's failure to assign an "all others" rate to the Vietnam-wide entity in the second and third administrative reviews is inconsistent with Article 9.4 of the Anti-Dumping Agreement.

(j) The USDOC's assignment of a facts available rate to the Vietnam-wide entity in the second administrative review and a rate that is in substance a facts available rate in the third administrative review is not consistent with Article 6.8 of the Anti-Dumping Agreement.

(k) Viet Nam's claims of violation under Article 17.6(i) of the Anti-Dumping Agreement in relation to the rate assigned to the Vietnam-wide entity are not within our terms of reference.

(l) Viet Nam's "consequential" claims of violation under Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement relate to a measure that is not within our terms of reference and we make no findings in respect of these claims.

B. RECOMMENDATION

8.2 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the United States has acted inconsistently with certain provisions of the Anti-Dumping Agreement and of the GATT 1994, it has nullified or impaired benefits accruing to Viet Nam under these agreements.

8.3 Pursuant to Article 19.1 of the DSU, having found that the United States has acted inconsistently with provisions of the Anti-Dumping Agreement and of the GATT 1994 as set out above, we recommend that the United States bring its measures into conformity with its obligations under those Agreements.

ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF VIET NAM

I. INTRODUCTION

1. Viet Nam's First Written Submission in *US – Anti-Dumping Measures on Certain Shrimp from Viet Nam* provides the factual context and legal arguments challenging certain practices used by the United States Department of Commerce ("USDOC") in the ongoing antidumping proceedings involving certain shrimp products from Viet Nam. Each of these practices limits the ability of Vietnamese exporters and producers to prove the absence of dumping, resulting in the continuation of an antidumping order for companies that have in fact gone to great lengths to alter their conduct to eliminate dumping.

2. Specifically, the four claims set forth in the First Written Submission challenges practices that, as applied, are inconsistent with United States obligations under Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Agreement*"): (1) the use of zeroing to calculate antidumping margins, (2) the application of a country-wide rate to certain respondents not individually investigated or reviewed, (3) the all-others rate calculated and applied to certain other uninvestigated or unreviewed respondents, and (4) the repeated refusal by the USDOC to review individual respondents requesting such a review and thus determining margins for only a limited selection of respondents. The USDOC has relied on, and continues to rely on, the above-listed practices for each stage of the antidumping proceeding.

II. THE MEASURES AT ISSUE

3. The three measures at issue in this dispute relate to the imposition by the United States of antidumping duties under the USDOC's antidumping duty order involving certain frozen and canned warmwater shrimp from Viet Nam (case number A-552-802). The USDOC issued its final determination of sales at less than fair value for the original investigation on 8 December 2004, and subsequently published an amended determination and antidumping duty order on 1 February 2005. Since imposition of the antidumping duty order, USDOC has completed four periodic reviews, issued a preliminary determination in the fifth periodic review, and issued a preliminary determination in a Five-Year ("Sunset") review.

4. Viet Nam's date of accession to the World Trade Organization is 11 January 2007. Two of the above-referenced determinations in the shrimp proceedings have been initiated and completed subsequent to Viet Nam's accession and prior to the request for consultations in this dispute. Thus, the measures at issue are the second and third administrative reviews made pursuant to the antidumping duty order, and the continued use of the challenged practices in successive antidumping proceedings under this order. The second administrative review of antidumping duties covered entries during the period from 1 February 2006 through 31 January 2007, and the final results were published on 9 September 2008. The third administrative review covered entries from 1 February 2007 to 31 January 2008, and the final results were published on 15 September 2009.

5. The third measure is the continued use of the practices challenged in the above-referenced claims in successive segments of the proceeding under the shrimp antidumping order. This includes the fourth administrative review, the fifth administrative review, and the five-year (sunset) review.

Consistent with the Appellate Body's interpretation of the *Agreement* and the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, the USDOC's actions in connection with these practices constitute "ongoing conduct" that is subject to consideration by the reviewing panel. Judicial economy and fundamental fairness require inclusion of this measure because the USDOC has given no indication that it intends to alter these practices in any future segment of this proceeding.

6. The particular factual situation of this dispute also makes relevant the USDOC's determination in the original investigation and the final results of the first administrative review. Although not measures, these determinations are important for the Panel to review and understand because of their impact on the measures that are at issue in this dispute.

III. FACTS

7. The claims raised for the three measures at issue involve four practices adopted and used by the USDOC at each stage of the proceeding: (1) the use of zeroing; (2) application of a country-wide rate; (3) the chosen calculation method for the all-others rate; and (4) the limited selection of respondents subject to individual review.

A. THE USDOC'S ZEROING METHODOLOGY

8. The USDOC calculates the margin of dumping based on a comparison of normal value and United States export price or constructed export price. Normal value in proceedings involving a nonmarket economy country is based on the producer's factors of production, which include individual inputs for raw materials, labor, and energy based on the actual production experience of the individual respondent. The USDOC relies on surrogate values to determine the price at which the factors of production would be acquired in a market setting, relying on a specific surrogate country for this exercise. In the case of Viet Nam, this surrogate country has been Bangladesh. The USDOC then applies ratios for overhead, selling, general and administrative expenses, and profit to the calculation. The resulting normal value is compared to the export price or constructed export, which is the price at which the product is first sold to an unaffiliated purchaser.

9. The comparison of normal value and price is made between products of similar characteristics. That is, within the broad category of subject merchandise – certain frozen and canned warmwater shrimp – are many sub-categories with differing key characteristics, as determined by the USDOC. Each of these sub-categories, or "models" under USDOC terminology, is assigned a control number ("CONNUM") by the USDOC.

10. In original investigations, the USDOC utilizes "model zeroing," where each sales transaction is weight-averaged by CONNUM, and each weighted-average model is compared to the normal value for that CONNUM; the results of these intermediate calculations for each CONNUM are then aggregated to determine the overall margin of dumping. Positive dumping in the intermediate calculation occurs when the normal value exceeds the average export price of an individual CONNUM; negative dumping occurs when the average export price exceeds normal value. Zeroing arises in instances of negative dumping, where the USDOC eliminates the results of that specific CONNUM before calculating the overall weighted dumping margin for the exporter: any instances of negative dumping are set to zero, as opposed to allowing the negative dumping to offset the positive dumping.

11. The overall margin is calculated using only the CONNUMs that produce a positive dumping margin. The USDOC creates a fraction to calculate the overall dumping margin, using as the numerator the total amount of dumping by model, based only on margins that were positive at the intermediate, model-specific stage of comparison. For models with negative dumping, the USDOC ignores the results, thereby inflating the numerator by an amount equal to the excluded negative

comparison results. The denominator of the fraction is the total value of all export transactions for all models under investigation. Expressing this fraction as a percentage results in the "weighted average dumping margin" for the investigation, which for companies selected for individual investigation serves as the cash deposit rate for entries made after publication of the antidumping order. For companies not individually investigated that satisfy the USDOC's separate rate criteria (further discussion below), the USDOC will generally take the weight-average of the weighted-average margins of the firms individually investigated, excluding margins that are zero, *de minimis*, or based on adverse facts available. Thus, the model zeroing methodology similarly impacts the antidumping margin for these companies.

12. It cannot be reasonably argued that the USDOC did not use model zeroing in the investigation at issue in this dispute. Viet Nam provides substantial documentation demonstrating that the USDOC used a methodology identical to the methodology previously considered by the Appellate Body in *US – Softwood Lumber V*. The USDOC's Issues and Decision Memorandum, which accompanies publication of the final determination, states in explicit terms that intermediate model comparisons that produced negative dumping margins were not permitted to offset model comparisons that produced positive dumping margins, effectively ignoring these sales made by the respondents, regardless of the amount of volume involved. Further, Viet Nam provides the actual computer program outputs and logs for two of the mandatory respondents in the investigation, pinpointing the exact lines in the programming that execute the zeroing methodology.

13. In administrative reviews, the USDOC engages in simple zeroing, which differs with the above method for calculating antidumping margins only in the comparison that is made at the intermediate step. In administrative reviews, individual export transactions are compared with a contemporaneous weighted-average normal value; the amount by which normal value exceeds the export price is the dumping margin for that export transaction. As with model zeroing, these intermediate comparisons may produce either positive or negative dumping margins; once again, comparisons that produce a negative dumping margin are ignored for purposes of calculating the overall dumping margin. Instead of zeroing by model, as with model zeroing, the USDOC here zeroes by individual export transaction. The result is similar, in that the total amount of dumping reflected in the numerator is inflated by an amount equal to the excluded negative differences.

14. As stated above, it cannot reasonably be disputed that the USDOC engaged in simple zeroing in the administrative reviews considered in this dispute. In each completed administrative review, the USDOC has confirmed in its Issues and Decision Memorandum that it did not permit the intermediate negative dumping margins to offset the intermediate positive dumping margins when calculating the overall antidumping margin. The computer program logs and outputs provided by Viet Nam, which are in fact the logs and outputs released by the USDOC following completion of the administrative reviews, further substantiate this fact.

B. THE USDOC'S COUNTRY-WIDE RATE PRACTICE

15. The USDOC practice for determining antidumping margins for Vietnamese companies not individually reviewed differs substantially from the practice for market economy countries. In the shrimp proceedings, the USDOC creates two categories of companies not individually reviewed: those assigned an "all-others" rate (in USDOC terminology this is called a "separate rate"), consistent with the *Agreement*; and those assigned what is called a "Vietnam-wide" rate.

16. Companies wanting to receive the all-others rate must satisfy the USDOC's separate rate criteria. This requires that companies not individually reviewed submit to the USDOC a "separate rate application" or a "separate rate certification", to establish the absence of government control, both in law and in fact, with respect to exports. Companies must present evidence to satisfy the criteria established by the USDOC to prove the absence of government control. Companies that satisfy the

criteria will typically receive a rate based on the weighted average of the rates individually calculated for the mandatory respondents, excluding rates that are zero, *de minimis*, or based on facts available. Companies that do not satisfy the USDOC's criteria receive the Vietnam-wide rate, a punitive rate based on adverse facts available. The result of this practice is grossly inflated margins for companies that are unable to satisfy the unjustified criteria established by the USDOC.

17. In these antidumping proceedings, companies that do not satisfy the separate rate criteria have been assigned a Vietnam-wide rate of 25.76 percent for the first, second, third, and fourth administrative reviews. In contrast, the rate for companies that satisfied the separate rate criteria was 4.57 percent for the first, second, and third administrative review, and 4.27 percent for the fourth administrative review.

C. USDOC'S LIMITED SELECTION OF MANDATORY RESPONDENTS AND APPLICATION OF THE "ALL-OTHERS" RATE TO RESPONDENTS NOT INDIVIDUALLY REVIEWED

18. The United States antidumping law sets forth the general requirement that all exporters seeking individual investigation or review have the opportunity to do so. The law provides a limited exception to this general rule where doing so would be impracticable because of the large number of exporters or producers requesting investigation or review.

19. At each segment of this antidumping proceeding, the USDOC has severely limited the number of companies that it individually reviews. Following initiation of the investigation and administrative reviews, the USDOC issues a respondent selection memorandum in which two determinations are made: whether it would be practicable to individually examine all companies and, if not, the number and specific identity of those companies for which examination will take place. The USDOC has individually examined between two and four companies at each phase of this antidumping proceeding, despite requests for review that consistently exceed 30 companies. In each memorandum, the USDOC provides the identical rationale for limiting the number of companies examined: that the office conducting the review has a significant workload, that the office does not anticipate receiving additional resources to conduct the review, and therefore, it would be impracticable to review more than the stated number of companies.

20. The non-selection of a company for individual review can have significant ramifications for that company. In the second and third administrative reviews, all companies selected for individual examination received rates that there were either zero or *de minimis*. Because the USDOC typically excludes from the all-others rate calculation zero and *de minimis* rates, the USDOC in both instances relied on the results of the first administrative review, which in turn relied on calculations from the original investigation. The USDOC relied on a prior phase of the proceeding to assign a margin for companies not individually reviewed in a subsequent review. The fact that in both cases the companies selected as mandatory respondents received a zero or *de minimis* margin was ignored in determining the rate for the non-individually reviewed companies eligible to receive the all-others rate.

21. The limited selection of respondents also adversely impacts a company's ability to prove the absence of dumping and have an antidumping duty order revoked. A company not afforded the opportunity to participate in administrative reviews likewise does not have the opportunity to establish that it no longer engages in dumping. United States law, consistent with Article 11.1 of the *Agreement*, provides for revocation of an antidumping duty order where a company has been found to not dump for three consecutive years. Yet, by refusing to individually examine all companies seeking review, the USDOC severely limits the number of companies that qualify for revocation under this provision, making the law irrelevant for most companies seeking revocation.

IV. CLAIMS AND ARGUMENTS

A. CLAIMS OF INCONSISTENCY REGARDING ZEROING

22. The Appellate Body has stated repeatedly and resoundingly that the issue of zeroing in antidumping proceedings is a settled matter: the zeroing methodology is inconsistent with the *Agreement* in both investigations and administrative reviews. In the interest of judicial economy and fairness, the Panel should adhere to the guidance of the Appellate Body and find the zeroing used in this proceeding by the USDOC, identical in substance to the zeroing previously considered by the Appellate Body, to violate United States obligations under the *Agreement*.

1. The Use of Zeroing in the Original Investigation of this Proceeding Is Inconsistent with United States WTO Obligations

(a) Article VI of the GATT 1994 and Article 2.1 of the *Agreement* define "dumping" and "margin of dumping" with regard to the product as a whole

23. The GATT 1994 and the *Agreement* both define the concepts of "dumping" and "margin of dumping" with regard to the product under investigation as a whole, not models or categories that are subsets of the product. First, Article VI:1 of the GATT 1994 defines dumping as when "products of one country are introduced into the commerce of another country at less than the normal value of the products," referring to the product as a whole, not subsets.

24. Second, Article 2.1 of the *Agreement*, which based on the terms of the provision applies to the entire *Agreement*, defines "dumping" for purposes of the *Agreement* with clear reference to the "product" that is subject to the proceeding. The Appellate Body has repeatedly understood this definition to preclude a finding of dumping for any subcategory of the product under review. Additional articles of the *Agreement* and GATT 1994 provide contextual support for this interpretation: Article 9.2 discusses the imposition of an antidumping duty with respect to a "product"; Article 6.10 states that the investigating authority shall calculate an "individual margin of dumping for each exporter or producer concerned of the product under investigation"; and Article VI:2 of the GATT 1994 provides that "in order to offset or prevent dumping, a contracting party may levy on any dumped product an antidumping duty not greater in amount than the margin of dumping in respect of that product."

25. Thus, although an investigating authority may undertake multiple comparisons using averaging groups or models, the results of the multiple comparisons at the sub-level are not "margins of dumping." Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation.

(b) Zeroing is Prohibited Under Article 2.4.2 of the *Agreement*

26. The model zeroing methodology is inconsistent with Article 2.4.2 of the *Agreement* because it fails to consider the results of all export transaction comparisons for purposes of calculating a final dumping margin. The Article requires that where the administering authority makes a weighted average to weighted average comparison for purposes of calculating the margin of dumping, as it did in the shrimp original investigation, the weighted average normal value is to be compared to "a weighted average of prices of all comparable export transactions." As shown above, the "margin of dumping" for which Article 2.4.2 provides the method of calculation refers to the margin of dumping for the *product as a whole*, not a subset of the product. The requirement of Article 2.4.2 that "all comparable export transactions" be compared necessarily means that all transactions for that product be factored into the final calculation, and is not merely a reference to the intermediate, model-based calculations.

27. By disregarding or treating as zero the intermediate comparisons for product models where the net export prices exceed normal value, the USDOC's use of zeroing in investigations necessarily fails to account for "all comparable export transactions." The zeroing methodology systematically excludes export transactions that Article 2.4.2 requires be included in the final margin calculation. The Appellate Body and numerous panels have repeatedly found this action to violate Article 2.4.2 of the *Agreement*.

2. The Use of Zeroing in Periodic Reviews is Inconsistent with United States WTO Obligations

28. As the discussion above illustrates, Article IV:1 of the GATT 1994 and Article 2.1 of the *Agreement* define "dumping" and "margin of dumping" with regard to the subject product as a whole. As recognized by the Appellate Body, this definition is applicable to the entire *Agreement*, per the opening line of Article 2.1.

29. Article 9.3 of the *Agreement* governs the assessment of final antidumping duties and thus bears on the USDOC's use of simple zeroing in administrative reviews. The Article does not mandate use of a particular methodology for calculation of final assessment, but does require that the "amount of the antidumping duty shall not exceed the margin of dumping as established under Article 2." Thus, the margin of dumping, calculated pursuant to Article 2, serves as a ceiling to the amount of antidumping duties that may be collected in the assessment phase. Additionally, as is clear from the reference to Article 2, the "margin of dumping" in Article 9.3 must likewise be calculated on the basis of all transactions for the product as a whole, not merely a subset of the transactions for that product.

30. The USDOC's model zeroing methodology does not take into consideration all transactions for the product, treating as zero and disregarding those intermediate comparisons where export price of an individual transaction exceeds normal value. By doing so, the calculation necessarily results in dumping margins that are higher than would be true if all export transactions were taken into account, *i.e.*, higher than the dumping margins would be for the product as a whole.

31. The GATT 1994 and the *Agreement* require that where the administering authority makes multiple comparisons at an intermediate stage, *all* intermediate comparisons must be aggregated, including comparisons that produce both negative and positive dumping margins. As has been repeatedly construed by the Appellate Body and prior panels, this action violates Article VI:2 of the GATT 1994 and Article 9.3 of the *Agreement*.

B. CLAIMS OF INCONSISTENCY REGARDING THE COUNTRY-WIDE RATE

32. As discussed above, the USDOC's practice for calculating the antidumping margins for companies not individually investigated or reviewed differentiates between companies that satisfy the USDOC's separate rate criteria and those that do not. Yet, the USDOC has no authority under the *Agreement* or Viet Nam's Accession Protocol to the WTO to assign the highly punitive Vietnam-wide rate to companies in this proceeding.

33. The *Agreement* contemplates that an administering authority may apply only three types of antidumping margins. An administering authority may not go beyond the types of margins provided for in the *Agreement*, as identification of the three types of margins in the *Agreement* necessarily limits the practices and methodologies available to an authority. To allow an authority to deviate beyond the provided methods for calculation would render meaningless the parameters set for application of those margins. Specifically, the express terms of Articles 2, 6, and 9 of the *Agreement* limit the types of margins to be applied.

34. Article 2 defines dumping and provides the framework for how an administering authority may determine the existence and extent to which an individually investigated company may be engaged in dumping.

35. Article 6.8 provides that an administering authority may calculate rates for individually examined companies on the basis of facts available. The plain language of Article 6.8, as interpreted by the Appellate Body, makes clear that a margin that is based on facts available may only be applied to companies individually examined by the administering authority. Article 6.8 provides that facts available may only be used where an "interested party" does not provide "necessary information" to the authority. The Appellate Body has explicitly clarified that non-examined companies are not "interested parties" within the context of Article 6.8, precluding application of that Article to those entities.

36. Furthermore, an administering authority does not, by definition, request "necessary information" from companies not individually examined. Necessary information is that which is necessary to calculate an antidumping margin. Although an administering authority may request information beyond this, only the failure to provide necessary information triggers the application of Article 6.8. This fact renders this provision inapplicable to companies not individually examined.

37. Article 9.4 is the final type of antidumping margin contemplated by the *Agreement* and provides for calculation of a single all-others rate for companies not individually examined. Article 9.4 sets the parameters for margins to be applied where examination has been limited pursuant to Article 6.10 of the *Agreement*. The Article is clear that an administering authority may not apply to non-examined companies an antidumping margin that exceeds the weighted average margin of dumping for companies individually reviewed, excluding margins that are zero, *de minimis* or based on facts available. Application of a margin beyond this limit violates the basic and clear terms of Article 9.4.

38. Viet Nam's Protocol of Accession ("Protocol") confirms that the USDOC has no basis for applying this discriminatory rate to Vietnamese producers and exporters. The Protocol, through reference to the Report of the Working Party on the Accession of Viet Nam, identifies the entire universe of situations in which an administering authority may deviate from the terms of the *Agreement*. While the Protocol provides certain special rules applicable to Viet Nam during a transition period, it contains no exception for the calculation of the margins of dumping for companies not individually investigated or reviewed.

39. The USDOC has no authority to deviate from the *Agreement* and apply the Vietnam-wide rate to certain Vietnamese companies. The Vietnam-wide rate does not comply with the requirements of Articles 2, 6.8, or 9.4, and is not otherwise contemplated by the *Agreement* or Viet Nam's Protocol.

C. CLAIMS OF INCONSISTENCY REGARDING THE ALL-OTHERS RATE

40. As discussed above, the USDOC impermissibly applied both an all-others rate and a Vietnam-wide rate to companies not individually examined. For purposes of the all-others rate, the USDOC generally calculates the all-others rate based on the weight-average of the weighted-average margins of the firms individually examined, excluding those margins that are zero, *de minimis*, or based on facts available. Two actions taken by the USDOC with regard to calculation of the all-others rate in the second and third administrative reviews are inconsistent with United States WTO obligations.

41. First, the USDOC's use of weighted average margins for individually examined companies that were calculated using the zeroing methodology is inconsistent with Articles 2.4 and 9.4 of the *Agreement*. Article 9.4 requires that antidumping margins, calculated in a manner consistent with

Article 2, serve as the basis for determining the ceiling antidumping margin for the all-others margin. As set forth above in paragraph 20 above, the all-others rate applied in the second and third administrative reviews was in fact based on the final antidumping margins of the original investigation. As discussed in paragraph 12 above, the USDOC utilized model zeroing to calculate the rates for individually investigated companies in the original investigation; as discussed in paragraphs 26 and 27 above, use of this methodology is inconsistent with Article 2.4 of the *Agreement*. Accordingly, the all-others rate applied in the second and third administrative reviews is inconsistent with Article 9.4 of the *Agreement*.

42. Furthermore, the USDOC's determination to base the all-others rate on the results of a previous proceeding is inconsistent with Article 9.4 of the *Agreement*. While Article 9.4 states that an administering authority may not use rates that are zero, *de minimis*, or based on facts available when calculating the ceiling of the all-others rate, the Appellate Body has made clear that an administering authority does not operate with complete discretion where the individually reviewed companies all receive an antidumping duty of zero, *de minimis*, or based on facts available.

43. The Appellate Body's interpretation comports with the purpose of this provision of the *Agreement*: companies not individually examined should not be prejudiced by the actions of others. Companies that have been denied the opportunity for individual examination should not be subjected to a higher rate when the ability to participate has been removed through no fault of their own. The administering authority has an obligation to adopt a reasonable practice that does not subject the non-investigated companies to unfair prejudice. Viet Nam submits that the USDOC's practice in the second and third administrative reviews is prejudicial to these companies, as it relies on results that have no basis in the relevant review.

44. Article 9.4 does not prohibit the use of zero or *de minimis* rates for purposes of calculating the all-others rate; the prohibition only extends to calculating the ceiling of the all-others rate. Consistent with this understanding, the USDOC must adopt a reasonable approach that both complies the ordinary meaning of Article 9.4 and the purpose of that provision.

D. CLAIMS OF INCONSISTENCY REGARDING LIMITING THE NUMBER OF RESPONDENTS SELECTED FOR FULL INVESTIGATION OR REVIEW

45. Article 6.10 of the *Agreement* requires as a general rule that the administering authority shall determine an individual dumping margin for each known exporter or producer of the subject merchandise. The Article goes on to provide a limited exception to this requirement where doing so would be impracticable because of the large number of producers or exporters. The issue before the Panel is whether this exception should override other provisions of the *Agreement* and the object and purpose of the *Agreement*. In creating a rule out of the exception, the USDOC has denied Vietnamese companies their rights available under Articles 6.10, 9.3, 11.1, and 11.3.

46. It is difficult to conceive that in entering into the *Agreement* the parties intended to include an exception to a general rule which ultimately would become the rule. Even more probative of the proper interpretation of the Article 6.10 exception is that its repeated and continued application essentially nullifies other provisions and principles in the *Agreement*. This includes: (1) the protection of exporters and producers from paying an antidumping duty in excess of their margin of dumping pursuant to Article 9.3; (2) the ability of exporters and producers to obtain revocation of an order upon a demonstration that they are no longer dumping pursuant to Article 11.1; and (3) the ability of exporters and producers to benefit from termination of an order based on a demonstration of no likelihood of recurrence or continuation of the dumping pursuant to Article 11.3.

47. Viet Nam submits that the object and purpose of the *Agreement* further supports this interpretation. Because antidumping measures are a mechanism by which the tariff benefits of WTO

Members can be nullified, the application of these procedures is disciplined by detailed rules intended to avoid jeopardizing the tariff benefits without an adequate basis. Thus, the *Agreement* puts specific limits on the form (Article 18.1), duration (Articles 11.1 and 11.3) and amount (Article 9.3) of antidumping measures, and provides a mechanism to both review the need for continuation of the duties (Article 11.2) and the amount of the duties (Article 9). Read in the context of the WTO Agreement and the GATT 1994, the *Agreement* would thus appear to have two broad objects and purposes, one being the establishment of precise limits on the form, duration, and amount of any antidumping duties imposed. Indeed, the *Agreement* specifically contemplates the possibility that companies subject to the antidumping measures will cease dumping. Yet, in refusing to provide individual exporters and producers the opportunity for review, the USDOC has frustrated one of the basic objects and purposes of the *Agreement*. It cannot be that the exception to an Article can trump not only the general rule contained in the provision, but also frustrate the functions of other Articles and the overall purpose of the *Agreement*.

V. CONSEQUENTIAL VIOLATIONS OF WTO OBLIGATIONS

48. As a result of the aforementioned practices, the USDOC has committed consequential violations that strike at the very core principles of antidumping measures. Namely, that antidumping duties are company-specific and should not be levied in excess of the amount of the margin of dumping of a particular exporter or producer, and that the duties should be terminated upon demonstration that dumping is no longer occurring.

49. The claims made by Viet Nam in this dispute relate to practices that have had very significant and very real effects on the Vietnamese companies impacted by the antidumping proceeding. These companies and this industry in Viet Nam serve as a model for adjusting sales practices to ensure compliance with the antidumping law in the United States. For the reasons set forth above, the USDOC's practices impermissibly foreclose the ability of these companies to benefit from these changes.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. This is not merely another zeroing dispute. Zeroing, as a factual matter, had no impact on the margins of dumping determined for individually examined exporters or producers in the challenged proceedings, and it was not used during the proceedings in order to determine any other assessment rates applied. Beyond its unfounded zeroing claims, Vietnam seeks to undermine the ability of investigating authorities to conduct antidumping examinations when faced with incomplete information, uncooperative interested parties, and large numbers of respondent firms. Ultimately, Vietnam asks this Panel to read obligations into the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), notwithstanding the fact that there is no textual basis for such obligations. This Panel should make an objective assessment of the matter before it and refrain from adopting Vietnam's interpretations.

2. Vietnam also challenges a number of "measures" that are not properly before the Panel. The United States requests that the Panel grant the requests for preliminary rulings with respect to these "measures."

II. GENERAL PRINCIPLES

3. The complaining party bears the burden of proving that a measure is inconsistent with the obligations in a covered agreement. In a dispute involving the AD Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) of the AD Agreement, which confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation." Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.

4. Article 11 of the Dispute Settlement Understanding ("DSU") requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. The Appellate Body has explained that the matter includes both the facts of the case (and the specific measures at issue in particular) and the legal claims raised.

5. Articles 3.2 and 19.2 of the DSU mandate that the findings and recommendations of a panel or the Appellate Body, and the recommendations and rulings of the Dispute Settlement Body ("DSB"), cannot add to or diminish the rights and obligations provided in the covered agreements. While prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members, the Panel is not bound to follow the reasoning set forth in any Appellate Body report. The rights and obligations of the Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements.

III. REQUESTS FOR PRELIMINARY RULINGS

6. **The Investigation**: Pursuant to Article 18.3 of the AD Agreement, the original antidumping investigation of shrimp from Vietnam is not subject to the AD Agreement. The investigation was

initiated pursuant to an application made before 11 January 2007, the date on which the WTO Agreement entered into force for Vietnam. Consequently, determinations made by Commerce in the course of the investigation are not subject to the provisions of the AD Agreement and may not be reviewed by this Panel.

7. In addition, the investigation was not included in Vietnam's request for consultations. Article 4.4 of the DSU provides that a request for consultations must state the reasons for the request, "including identification of the measure at issue and an indication of the legal basis for the complaint." Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if "the consultations fail to settle a dispute." Article 17.4 of the AD Agreement states that a Member may only refer "the matter" to the DSB following a failure of consultations to achieve a mutually agreed solution, and final action by the administering authorities of the importing Member to levy definitive antidumping duties or to accept price undertakings. Because Vietnam failed to include the investigation in its consultations request, the shrimp antidumping investigation is outside the Panel's terms of reference.

8. **The First Administrative Review**: Like the investigation, the first administrative review was initiated prior to Vietnam's accession to the WTO. Per the terms of Article 18.3 of the AD Agreement, the application of the AD Agreement is strictly limited "to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement" (emphasis added). Accordingly, for the same reasons given with respect to the investigation, the AD Agreement does not apply to Commerce's determination in the first administrative review.

9. **The "Continued Use of Challenged Practices"**: The "continued use of challenged practices" is not a "measure" within the Panel's terms of reference. Article 6.2 of the DSU requires that a panel request "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Vietnam's panel request limits the measures at issue to the particular determinations identified therein and fails to identify the "continued use of challenged practices" as a measure at issue in this dispute. Vietnam's panel request here is distinguishable from the EC's request in *US – Continued Zeroing*; Vietnam's panel request fails to identify the "continued use of challenged practices" at all. Because the panel request defines the jurisdiction of a panel, the "continued use of challenged practices" is outside the Panel's jurisdiction. The component proceedings of the "continued use" measure are outside the Panel's terms of reference as well, because Vietnam is attempting to expand the scope of the proceedings it identified in its panel request.

10. Additionally, this purported "measure" is not subject to WTO dispute settlement because it appears to be composed of an indeterminate number of potential future measures. It is impossible for Members to consult on a measure that does not exist, and a non-existent measure cannot meet the requirement of Article 4.2 of the DSU that the measure be "affecting" the operation of a covered agreement. In *US – Upland Cotton*, the panel found that a measure that had not yet been adopted could not form part of its terms of reference, noting that such a "measure" could not have been impairing any benefits because it was not in existence at the time of the panel request. Furthermore, Article 17.4 of the AD Agreement provides that a Member may refer "the matter" to dispute settlement only if consultations have failed to resolve the dispute and "final action" has been taken by the administering authorities of the importing Member to levy definitive antidumping duties or to accept price undertakings. At the time of Vietnam's panel request, the alleged "continued use of the challenged practices" did not involve a final action to levy definitive antidumping duties or accept price undertakings.

IV. VIETNAM'S CLAIMS REGARDING ZEROING ARE WITHOUT MERIT

11. Vietnam argues that Commerce's "use of zeroing" in the original investigation is inconsistent with U.S. WTO obligations. The investigation is not within the Panel's terms of reference and was not subject to the AD Agreement, so Commerce's determination therein cannot be found inconsistent with Article 2.4.2 of the AD Agreement. To the extent that Commerce relied on dumping margins calculated during the investigation in later assessment reviews, the use of such margins in an assessment review cannot result in a finding that the determination in the investigation is inconsistent with Article 2.4.2 of the AD Agreement. Furthermore, the use of dumping margins from the original investigation in later assessment proceedings cannot itself be found inconsistent with Article 2.4.2 of the AD Agreement, since Article 2.4.2 is limited by its terms to the "investigation phase."

12. Vietnam contends that the use of zeroing in the second and third administrative reviews to calculate dumping margins applied to individually examined respondents was inconsistent with the WTO Agreements. Vietnam has not explained how the margins of dumping calculated for the individually examined firms were affected by "zeroing." Commerce calculated either a zero or *de minimis* margin of dumping for every company individually examined in the second and third administrative reviews. Given the zero and *de minimis* dumping margins, and that no antidumping duties were assessed based on "zeroing," it is not possible that antidumping duties were imposed that exceeded the margins of dumping, so there can be no violation of the obligations in Article VI:2 of the GATT 1994 or Article 9.3 of the AD Agreement.

13. In addition, the text and context of the relevant provisions of the AD Agreement, interpreted in accordance with customary rules of interpretation of public international law, do not support a general prohibition of zeroing that would apply in the context of assessment proceedings. The methodology used by Commerce to calculate antidumping duties in the assessment proceedings in question rests on a permissible interpretation of the AD Agreement and is WTO-consistent.

14. In *US – Softwood Lumber V (AB)*, the Appellate Body found that the exclusive textual basis for an obligation to account for such non-dumping in calculating margins of dumping appears in connection with the obligation in Article 2.4.2 that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a *weighted average normal value with a weighted average of prices of all comparable export transactions* ...." This particular text of Article 2.4.2 applies only within the limited context of determining whether dumping exists in the investigation phase when using the average-to-average comparison methodology in Article 2.4.2.

15. If Vietnam is correct that there is a general prohibition of zeroing that applies in all proceedings and under all comparison methodologies, the meaning ascribed to "all comparable export transactions" by the Appellate Body in *US – Softwood Lumber V* would be redundant of the general prohibition of zeroing. The Appellate Body recognized the need to avoid such redundancy in *US – Zeroing (Japan)*. There, the Appellate Body reinterpreted "all comparable export transactions" to relate solely to all transactions within a model, and not across models of the product under investigation. However, this is inconsistent with the reasoning in *US – Softwood Lumber V (AB)*.

16. Subsequent to *US – Softwood Lumber V (AB)*, several panels examined whether the obligation not to "zero" when making average-to-average comparisons in an investigation extended beyond that context. In making an objective assessment of the matter, these panels determined that the customary rules of interpretation of public international law do not support a reading of the AD Agreement that expands the zeroing prohibition beyond average-to-average comparisons in an investigation. This Panel should likewise find that, at a minimum, it is permissible to interpret the AD Agreement as not prohibiting zeroing outside the context where the interpretation of "all comparable export transactions" articulated in the Appellate Body report in *US – Softwood Lumber V* is applicable.

17. Vietnam's claims depend on interpreting "margins of dumping" and "dumping" as relating exclusively to the "product as a whole." The term "product as a whole" does not appear in the text of the AD Agreement. The panel in *US – Zeroing (Japan)* explained, "'[T]here is nothing inherent in the word 'product[]' (as used in Article VI:1 of the GATT 1994 and Article 2.1 of AD Agreement) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis ....'" The panel in *US – Softwood Lumber V (Article 21.5)* explained, "an analysis of the use of the words product and products throughout the *GATT 1994*, indicates that there is no basis to equate product with 'product as a whole'.... Thus, for example, when Article VII:3 of the GATT refers to 'the value for customs purposes of any imported product', this can only be interpreted to refer to the value of a product in a particular import transaction."

18. Vietnam also has not demonstrated any inconsistency with Article 9.3 of the AD Agreement nor Article VI:2 of the GATT 1994. Vietnam argues that the antidumping duty has exceeded the margin of dumping established under Article 2. This argument depends entirely on a conclusion that Vietnam's preferred interpretation of the "margin of dumping," which precludes any possibility of transaction-specific margins of dumping, is the only permissible interpretation of this term as used in Article 9.3 of the AD Agreement. However, antidumping duties are assessed on individual entries resulting from those individual transactions. The obligation set forth in Article 9.3 – to assess no more in antidumping duties than the margin of dumping – is similarly applicable at the level of individual transactions. All panels that have examined this issue – in *US – Zeroing (EC)*, *US – Zeroing (Japan)*, and *US – Stainless Steel (Mexico)* – have agreed with this interpretation. These panels' understanding of Article 9.3 of the AD Agreement is, at a minimum, a permissible interpretation of the provision.

V. VIETNAM'S CLAIMS REGARDING THE "COUNTRY-WIDE" RATE ARE WITHOUT MERIT

19. Vietnam argues that Commerce's assignment of a margin of dumping to the Vietnam-wide entity in the second and third administrative reviews was inconsistent with various obligations under the AD Agreement. Vietnam incorrectly refers to the assignment of an assessment rate to the Vietnam-wide entity as an assignment of a "country-wide" rate. The premise of Vietnam's argument is factually incorrect: Commerce did not assign a "country-wide" rate. The Vietnam-wide entity rate was assigned to those companies that had not established that they are free from government influence, particularly in their export activities, and thus are reasonably considered to be parts of one entity that Commerce has identified as an "exporter" or "producer" under Article 6.10 of the AD Agreement.

20. Article 6.10 requires an investigating authority to determine an individual margin of dumping for each known "exporter" or "producer" of the product under investigation, unless this is not practicable. Prior to assigning an individual dumping margin, however, the authority must identify whether an entity is an "exporter" or "producer." The AD Agreement does not define the terms "exporter" or "producer," nor does it establish criteria for an investigating authority to examine in order to determine whether a particular entity constitutes an "exporter" or "producer." Therefore, an authority is permitted to determine, based upon the facts on the record, whether a given entity constitutes an "exporter" or "producer" as a condition precedent to calculating an individual dumping margin for that entity. Depending on the facts of a given situation, an investigating authority may determine that legally distinct companies should be treated as a single "exporter" or "producer" based upon their activities and relationships. The reasoning of the panel in *Korea – Certain Paper* supports this interpretation of Article 6.10 of the AD Agreement.

21. An inquiry into the relationship between companies and the reality of their respective commercial activities is also relevant in the context of exporters from a non-market economy. As the term suggests, in a non-market economy, government influence on the economy interferes with the

full functioning of market principles. Due to this distortion, prices in a non-market economy cannot be used in antidumping calculations because they do not sufficiently reflect demand conditions or the relative scarcity of resources. In other words, there is an absence of the demand and supply elements that separately and collectively make a market-based price system work. During Vietnam's accession negotiations, Members expressed concern about the influence of the Government of Vietnam on its economy and how such influence could affect cost and price comparisons in antidumping duty proceedings.

22. Commerce's 2002 inquiry into the non-market nature of Vietnam's economy confirmed that the Government of Vietnam maintains significant control over the Vietnamese economy. During the antidumping duty investigation on frozen fish fillets from Vietnam, Commerce investigated and analyzed the extent of government influence on the Vietnamese economy for the purpose of determining whether Vietnam should be classified as a non-market economy in Commerce's antidumping proceedings. Commerce incorporated by reference and relied on the analysis in the fish fillets investigation when it determined that Vietnam continues to be a non-market economy for the purposes of the determinations challenged in this dispute. Thus, as one of the first steps in the administrative reviews at issue, Commerce determined whether the particular companies being examined were sufficiently free from government control so that, *inter alia*, their export prices were not being set by the government. In order to make this determination, Commerce required each company to submit information demonstrating the company's independence from government control regarding export activities. If Commerce had previously determined that a company was entitled to an individual rate, then that company needed only submit a certification that its status had not changed. However, if a company could not demonstrate that it was sufficiently free from government influence, Commerce considered that company ineligible for an individual (or "separate") rate. Instead, that company was identified as being part of the Vietnam-wide entity, *i.e.*, the entity that is presumed to control the export activities of the companies that compose it.

23. Contrary to Vietnam's claim, this is not a discriminatory practice. Commerce collects similar information in market economy cases to identify each company's affiliates, including information regarding percentage of ownership and ultimate decision making authority. If the data indicate that companies are affiliated and the relationships are sufficiently close so as to allow one company to influence another, Commerce treats the companies as a single entity.

24. The non-market economy entity is treated just like any other "exporter" or "producer" being examined under Article 9 of the AD Agreement. If the non-market economy entity does not provide information requested, the authority may rely upon the facts available pursuant to Article 6.8 and Annex II of the AD Agreement. In the second administrative review, numerous interested parties determined to be part of the Vietnam-wide entity failed to provide necessary information requested by Commerce. Thus, Commerce had to rely upon the facts available. Neither Article 6.8 nor Annex II requires investigating authorities to limit the application of facts available to "individually examined exporters/producers."

25. Vietnam further attempts to limit the ability of investigating authorities to rely on facts available by arguing that "necessary information" should be narrowly understood as only that information which is used to calculate dumping margins. There is no basis in the text of the AD Agreement for such a limitation. Vietnam's reliance on the panel report in *Argentina – Ceramic Tiles* is misplaced; that panel was not examining the definition of the term "necessary information" in Article 6.8. Vietnam also mischaracterizes the finding of the panel in *Egypt – Steel Rebar*. That panel found that "it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.) ...." Regardless, the information that Commerce requested was necessary in order to define the pool from which Commerce selected the largest exporters, and the information also

represented the data necessary for determining a company's export price, once selected for individual examination.

26. It is important to emphasize that, in the second administrative review, the Vietnam-wide entity received a rate based upon the facts available because of the non-cooperation of several of the parties that make up that entity. In fact, every party under review that was identified as being part of the Vietnam-wide entity failed to cooperate by not responding to a request for necessary information, *i.e.*, the quantity and value questionnaires. As a result, the rate assigned to each of the companies that were identified as being part of the Vietnam-wide entity would also have been based upon the facts available even if they each had been assigned an individual rate. That is, consistent with Article 6.8 and Annex II of the AD Agreement, each of these companies would have been assigned a rate based entirely upon the facts available because they failed to cooperate with the investigation by refusing to provide necessary information.

27. In the third administrative review, many of the companies under review did not provide information to demonstrate that their export activities were independent of government control. Accordingly, Commerce determined that they were part of the single Vietnam-wide entity and determined an appropriate rate to apply to entries from this entity. Commerce applied to the Vietnam-wide entity the same rate applied to it in the most recently completed proceeding, because this was "the only rate ever determined for the Vietnam-wide entity in this proceeding."

VI. VIETNAM'S CLAIMS REGARDING THE "ALL OTHERS RATE" ARE WITHOUT MERIT

28. Vietnam claims that the separate rates applied by Commerce to certain exporters or producers in the challenged determinations are inconsistent with Articles 2.4 and 9.4 of the AD Agreement because 1) the rate was calculated using the zeroing methodology, and 2) the rate was a weighted average of dumping margins calculated during the original investigation rather than a weighted average of dumping margins calculated during the particular administrative reviews.

29. Vietnam's argument is dependent upon its claim that Commerce acted inconsistently with the AD Agreement when it employed the zeroing methodology in the original investigation. Commerce's determination of the separate rate for non-examined exporters and producers in the investigation, which Vietnam refers to as the "all-others rate," was made prior to the entry into force of the WTO Agreement with respect to Vietnam. Thus, that determination was not subject to the AD Agreement and cannot have been inconsistent with Article 2.4 of the AD Agreement.

30. In addition, the separate rates determined in the original investigation do not become subject to the AD Agreement simply because they continued to be applied on or after the date of entry into force of the WTO Agreement for Vietnam. Article 18.3 of the AD Agreement provides that "the provisions of this Agreement shall apply to investigations, and assessment proceedings of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement." In *US – DRAMS*, the panel analyzed Article 18.3 of the AD Agreement, and reasoned that "[P]re-WTO measures do not become subject to the AD Agreement simply because they continue to be applied on or after the date of entry into force of the WTO Agreement for the Member concerned."

31. The calculations that Commerce performed in the investigation to determine the separate rates "were not subject to any re-examination" in the second and third assessment proceedings. Commerce made no new comparisons between the export price and the normal value. Commerce simply applied a previously calculated rate from the investigation, or a prior proceeding, to respondents that demonstrated sufficient independence from the government during the second and third administrative reviews. Therefore, as in *US – DRAMS*, the separate rates determined in the original investigation, and

applied in the second and third administrative reviews, did not become subject to the AD Agreement simply because they continued to be applied after the date of entry into force of the WTO Agreement for Vietnam.

32. In addition to its arguments related to zeroing, Vietnam asserts that the rate Commerce applied to companies that were not individually examined in the second and third administrative reviews "unfairly prejudiced" such companies, and for this reason was inconsistent with Article 9.4 of the AD Agreement. Vietnam misunderstands the requirements of Article 9.4 and has not substantiated its claim that Commerce acted inconsistently with that provision. The Appellate Body explained in *US – Hot-Rolled Steel* that, on its face, Article 9.4 expressly requires an investigating authority to disregard zero or *de minimis* margins, or margins based on facts available, when determining a dumping margin ceiling for non-examined exporters or producers based on the weighted average margin of dumping of the examined exporters or producers. Vietnam correctly notes the possibility that "[i]n certain situations, ... the individually examined exporters/producers may all receive an antidumping duty of zero, *de minimis*, or based on facts available, the three margins explicitly prohibited by Article 9.4 from calculation of the guiding ceiling." That is the case here. In the absence of rates that could be used to calculate a weighted average consistent with the requirements of Article 9.4, Commerce determined that it would be appropriate to rely on either a rate calculated during the original investigation, which was a weighted average of dumping margins calculated for exporters and producers individually examined in that proceeding, excluding any zero and *de minimis* margins and margins based on facts available, or a company-specific rate from a more recently completed proceeding where such a rate had been determined for a company.

33. In *US – Zeroing (EC) (21.5)*, while the Appellate Body recognized that Article 9.4 is silent regarding this situation, it nevertheless found that Article 9.4 includes some, notably undefined, obligation relating to the calculation of the rate for non-examined companies. Respectfully, the United States believes that the Appellate Body was incorrect. The Appellate Body did not opine on any "specific alternative methodologies to calculate the maximum allowable 'all others' rate in situations where all margins of dumping calculated for the examined exporters fall into the three categories to be disregarded ..." nor did it articulate a legal standard for assessing the consistency of an investigating authority's action with the "obligation" in Article 9.4 in such situations. Hence, the Appellate Body report in *US – Zeroing (EC) (21.5)* offers the Panel no guidance for its analysis of the consistency with Article 9.4 of the methodology applied by Commerce in the second and third administrative review.

34. In the absence of any legal standard or defined obligation, it is not clear how the separate rates Commerce applied to non-examined exporters and producers in the second and third administrative reviews could be deemed inconsistent with Article 9.4. Commerce applied a reasonable method of determining dumping margins that was reflective of the range of commercial behaviour demonstrated by exporters and producers of the subject merchandise during a very recent period and provided a reasonable security going forward for the payment of antidumping duties for those companies that were not individually examined.

35. Vietnam criticizes the "application of an antidumping margin that has no basis in the relevant period of review" and proposes that Commerce should be required to "recalculate the all-others rate using a weighted-average of the individually reviewed exporters/producers for the contemporaneous phase of the proceeding." Vietnam appears to be arguing that Commerce violated Article 9.4 of the AD Agreement by acting consistently with the explicit prohibition in Article 9.4 against using zero and *de minimis* margins to determine the ceiling for the dumping margin to be applied to non-examined exporters and producers. Vietnam's argument is internally incoherent and cannot be accepted.

VII. VIETNAM'S CLAIMS REGARDING LIMITING THE NUMBER OF RESPONDENTS SELECTED ARE WITHOUT MERIT

36. Vietnam argues that Commerce's determinations to limit its examination in each of the proceedings at issue are inconsistent with the AD Agreement. Vietnam misconstrues the AD Agreement obligations. Article 6.10 of the AD Agreement allows Members to determine individual margins of dumping for a *reasonable* number of exporters and producers, and does not require the determination of an individual margin of dumping for *all* exporters and producers, where a large number of exporters and producers is involved. The only condition for limiting an examination is that the number of exporters or producers must be so large as to make a determination of individual margins of dumping for all exporters or producers "impracticable."

37. Article 6.10 does not define the term "impracticable." The ordinary meaning of the term "impracticable" is "unable to be carried out or done; impossible in practice," or "incapable of being performed or accomplished by the means employed or at command." Vietnam incorrectly argues, contrary to the panel's findings in *EC – Salmon (Norway)*, that a determination to limit an examination must be based solely upon the number of companies involved in the proceeding, without regard to an investigating authority's resources. Article 6.10 permits the limiting of an examination when an authority does not have the resources to individually examine all parties involved in an investigation. Here, Commerce explained why it was necessary to limit the examination, noting the large number of companies involved, and providing an analysis of Commerce's available resources. Based upon this analysis, Commerce determined that it would be impracticable to individually examine all of the companies involved.

38. Vietnam further suggests that there is a limit to the number of times an authority may limit its examination, and that Commerce has surpassed that limit and turned the exception into the rule. Article 6.10 of the AD Agreement contains no such limitation. Any time the Article 6.10 conditions are satisfied, an authority may limit its examination.

39. Vietnam asserts that, by limiting its examination in the proceedings at issue, Commerce denied particular companies the opportunity, pursuant to a U.S. regulation, to have the antidumping order revoked with respect to their exports. Vietnam argues that this violated Article 11.1 of the AD Agreement. This claim is entirely dependent on Vietnam's claim under Article 6.10 of the AD Agreement, which, as explained above, is without merit. Additionally, Vietnam misunderstands the meaning of Article 11.1. As the Appellate Body has confirmed, Article 11.1 does not impose any independent or additional obligations on Members, so Commerce's determinations cannot violate Article 11.1. Furthermore, the obligations in Article 11 apply to the antidumping duty order as a whole, not as applied to individual companies. As the Appellate Body found in U.S. — *Corrosion-Resistant Steel Sunset Review*, "the duty" referenced in Article 11.3 is imposed on a product-specific (*i.e.*, order-wide) basis, not a company-specific basis. To the extent that Vietnam's claim rests on an alleged obligation to revoke the antidumping duty order on shrimp with respect to certain individual companies, that claim must fail.

40. Vietnam argues that Commerce violated Article 11.3 of the AD Agreement because, in declining to individually examine all companies requesting review in every proceeding at issue, Commerce has prevented these companies from demonstrating an absence of dumping, which Vietnam contends is the basis for determining whether to continue the order. The sunset review of the shrimp antidumping order, *i.e.*, the Article 11.3 review, is not within the Panel's terms of reference. The sunset review has not yet been completed and, consequently, there is no determination for the Panel to review. In any event, Article 11.3 provides that a definitive antidumping duty must be terminated after five years unless the authorities determine that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The focus of a sunset review is on future behaviour, *i.e.*, whether dumping and injury are likely to continue or recur in the event of

expiry of the duty, not whether or to what extent dumping or injury currently exists. Contrary to Vietnam's assertion, Commerce's sunset review determination is not based solely upon the existence of dumping margins in administrative reviews. Parties are permitted to place any information they choose on the administrative record of the sunset review. Vietnam's argument relies on a mischaracterization of the analysis Commerce performs in a sunset review.

41. Vietnam alleges that Commerce acted inconsistently with Article 6.10.2 of the AD Agreement by not determining individual dumping margins for companies that voluntarily submitted necessary information. Commerce could not have acted inconsistently with Article 6.10.2 because no company voluntarily provided the necessary information in the second and third administrative reviews such that any obligation under that provision was triggered.

42. In the fourth administrative review, which is not within the Panel's terms of reference, two companies requested voluntary respondent status and submitted what they purported was the necessary information. Commerce determined that it could only individually examine two companies. This determination was made based upon the large number of companies involved in the proceeding, as well as Commerce's resource constraints. Article 6.10 permits the limitation of an examination when the number of companies involved is so large as to make an individual determination for each company impracticable. Article 6.10.2, on the other hand, requires an authority to determine an individual margin of dumping for each company that voluntarily submits necessary information, unless the amount of companies involved is so large as to make an individual determination for each company that voluntarily submits information "unduly burdensome." Commerce explained that it could individually examine only two companies, and, more than being "unduly burdensome," it was impossible to examine any more. Thus, Commerce's decision not to determine individual dumping margins for these two companies was consistent with Article 6.10.2.

VIII. VIETNAM'S CLAIM WITH RESPECT TO THE CONTINUED USE OF CHALLENGED PRACTICES IS WITHOUT MERIT

43. Vietnam submits that "the USDOC has utilized the challenged practices in an original investigation, four consecutive administrative reviews, and in the preliminary results of the ongoing sunset review" and argues that this is inconsistent with various provisions of the AD Agreement and the GATT 1994. As explained above, the "continued use of the challenged practices" is not a measure within the Panel's terms of reference. In any event, Vietnam's argument is premised on its assertion that such "continued use" constitutes an "ongoing conduct." Even were this a cognizable claim, the facts belie a conclusion that any such "ongoing conduct" exists or is likely to continue.

44. The United States has serious concerns about the rationale articulated by the Appellate Body in the *US – Continued Zeroing* dispute. Vietnam incorrectly asserts that the facts of this case are "virtually identical" to the cases found to be inconsistent in that dispute. In *US – Continued Zeroing*, the Appellate Body found that the record supported findings of inconsistency in only four of the eighteen cases challenged, *i.e.*, where "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time." Each of the four cases where the Appellate Body concluded that there was "a sufficient basis for [the Appellate Body] to conclude that the zeroing methodology would likely continue to be applied in successive proceedings" included: (1) the use of the zeroing methodology in the initial less than fair value investigation; (2) the use of the zeroing methodology in four successive administrative reviews; and (3) reliance in a sunset review upon rates determined using the zeroing methodology.

45. The facts in this dispute do not support a conclusion that the challenged practices "would likely continue to be applied in successive proceedings." The original investigation, the first, fourth, and fifth administrative reviews, and the sunset review are not within the Panel's terms of reference and there can be no finding of inconsistency in connection with those proceedings. Additionally,

Vietnam has failed to establish that "zeroing" had any impact on the margins of dumping calculated in the second and third administrative reviews, and Vietnam has failed to establish as a factual matter that Commerce used the zeroing methodology in connection with the application of a dumping margin to separate rate respondents in those proceedings, or to the Vietnam-wide entity. Hence, with respect to Commerce's use of zeroing, Vietnam cannot establish "a string of determinations, made sequentially... over an extended period of time."

46. Vietnam seeks to expand the Appellate Body's reasoning in *US – Continued Zeroing* beyond zeroing to encompass the other "challenged practices." As demonstrated above, though, Vietnam's claims regarding the other "challenged practices" are without merit, and thus Vietnam cannot establish "a string of determinations, made sequentially... over an extended period of time" with respect to those "challenged practices" either.

IX. CONCLUSION

47. The United States respectfully requests that the Panel grant the U.S. requests for preliminary rulings and reject Vietnam's claims that the United States has acted inconsistently with the covered agreements.

ANNEX A-3

RESPONSE OF VIET NAM TO THE UNITED STATES' REQUEST FOR PRELIMINARY RULINGS

I. INTRODUCTION

1. With this submission, Viet Nam respectfully provides its response to the requests for preliminary rulings asserted in the United States' first written submission, received on 13 September 2010. Viet Nam does so consistent with the communication received from the Panel on 22 September 2010, requesting that a response be filed by Viet Nam no later than 4 October 2010.

2. Viet Nam limits its discussion in this submission to the arguments raised in Section V.A of the United States' first written submission. Specifically, Viet Nam addresses the following requests for preliminary rulings:

- The investigation is not subject to the AD Agreement, nor is it within the Panel's terms of reference[1];
- The first administrative review is not subject to the AD Agreement because it was initiated pursuant to an application made prior to the entry into force of the WTO Agreement for Viet Nam[2];
- The "continued use of challenged practices" is not within the Panel's terms of reference.[3]

3. As an initial matter, Viet Nam does not allege that the original investigation or first administrative review are within the Panel's terms of reference, except to the extent that the results of these segments of the proceeding bear on the results of those segments of the proceeding which occurred after Viet Nam's accession to the WTO.[4] The issue here is one of semantics not substance. Whether or not the measures imposed as a result of the initial investigation and first administrative review were consistent with U.S. WTO obligations at the time the measures were applied is irrelevant in that the U.S. had no obligation to Viet Nam at the time it applied these measures. However, the measures and their consistency with U.S. WTO obligations are relevant to the extent that they were the basis of measures applied by the U.S. after Viet Nam's accession to the WTO. As such, whether one characterizes these measures as being within the terms of reference of the panel or as simply being the factual predicate to support the claims related to the second and subsequent periodic reviews which clearly are within the panel's terms of reference is a matter of semantics not substance. The panel's inquiry into the second and subsequent reviews necessarily has to include what was done in the original investigation and first review because these actions bear directly on what was done in the second and subsequent administrative reviews.

4. Viet Nam does take strong exception, however, to the United States' claim that the "continued use of challenged practices" measure is not within the Panel's terms of reference. Viet Nam submits

[1] First Written Submission of the United States of America at p. 16 (hereafter, "United States FWS").
[2] *Id*. at p. 20.
[3] *Id*. at p. 21.
[4] First Written Submission of the Socialist Republic of Viet Nam at para. 101 (hereafter, "Viet Nam's First Written Submission").

that the request made for a preliminary ruling on this issue is little more than strategic gamesmanship on the part of the United States and an effort to distract the Panel from the important substantive issues that are of concern in this dispute. Accordingly, Viet Nam respectfully requests that the Panel deny the request made by the United States and permit for resolution the "continued use of challenged practices" measure.

II. VIET NAM ASSERTS THAT THE FINAL RESULTS OF THE INVESTIGATION AN THE FIRST ADMINISTRATIVE REVIEW ARE WITHIN THE PANEL'S TERMS OF REFERENCE ONLY INSOFAR AS THE RESULTS OF THESE SEGMENTS OF THE PROCEEDING BEAR ON SUBSEQUENT REVIEWS AFTER VIET NAM'S ACCESSION TO THE WTO

5. The United States claims in its first written submission that the final results of neither the investigation nor the first administrative review are within the Panel's terms of reference.[5] Viet Nam stated at paragraph 101 of the first written submission that "the measures at issue are the second and third administrative reviews made pursuant to the *Shrimp* order, and the continued use of the challenged practices in successive antidumping proceedings under this order."[6] Accordingly, Viet Nam does not consider the investigation or the first administrative review to be within the Panel's terms of reference, insofar as Viet Nam is not claiming that the panel can find these measures inconsistent with U.S. obligations at the time the measures were applied. However, to the extent that these measures served as the basis for measures applied after Viet Nam's accession to the WTO and are inconsistent with U.S. obligations under the *Agreement* at that time, the consistency of the measures in the investigation and first review with U.S. obligations after Viet Nam's accession are relevant to the panel's inquiry.

6. Although not within the Panel's jurisdiction, the United States Department of Commerce's (hereafter, "USDOC") actions in the investigation and first administrative review segments of the ongoing shrimp proceeding are critical to the Panel's understanding and analysis of the measures at issue. As explained in Viet Nam's first written submission, the factual circumstances of this antidumping proceeding are unique because the USDOC's actions in the investigation directly impacted the results of the second and third administrative reviews, the measures at issue. Thus, the investigation is relevant to the extent that it illustrates how the USDOC calculated the separate rates assessed in the second and third administrative reviews.

7. Viet Nam refers the Panel to paragraphs 76, 87, and 88 of Viet Nam's FWS. To make clear the relevance of the investigation and the first administrative review to the measures at issue, we provide a concise timeline that focuses exclusively on the USDOC's method for assigning the separate rate at each segment of the shrimp proceeding:

- 1 February 2005: Final Determination of Investigation and Antidumping Order:

  Separate rate respondents assigned a rate of 4.57 percent based on the weight-average of the weighted-average margins for the firms individually investigated. The USDOC calculated the margins of dumping for the individually investigated producers using the model zeroing methodology.[7]

[5] United States FWS at paras. 76-86.
[6] Viet Nam's First Written Submission at para. 101.
[7] Viet Nam's First Written Submission at paras. 40-46 and Exhibits cited therein.

- 12 September 2007: Final Results of First Administrative Review:

  Because the individually reviewed companies received assessment rates that were zero or *de minimis*, for the separate rate the USDOC assigned the separate rate from the investigation, 4.57 percent.[8] Again, this rate was derived using margins of dumping calculated with the USDOC's model zeroing methodology.

- 9 September 2008: Final Results of Second Administrative Review:

  Because the individually reviewed companies received assessment rates that were zero or *de minimis*, for the separate rate the USDOC assigned the separate rate from the investigation. Thus, the separate rate was 4.57 percent.[9] Again, this rate was derived using margins of dumping calculated with the USDOC's model zeroing methodology.

- 15 September 2009: Final Results of Third Administrative Review:

  Because the individually reviewed companies received assessment rates that were zero or *de minimis*, for the separate rate the USDOC assigned the separate rate from the investigation. Once again, the separate rate was 4.57 percent, which was derived using margins of dumping calculated with the USDOC's model zeroing methodology.[10]

8. The above timeline illustrates (1) why Viet Nam includes in its first written submission extensive background and discussion on the investigation segment of the proceeding, and (2) why the Panel must closely evaluate the USDOC's use of the zeroing methodology in the investigation. Viet Nam provided substantial documentation in the first written submission demonstrating that the USDOC relied on the model zeroing methodology to calculate the margin of dumping for the individually investigated companies.[11] These calculated margins of dumping were the only basis for the USDOC's calculation of the separate rate in the investigation. Thus, use of the zeroing methodology directly impacted the separate rate assigned in the investigation.

9. The same separate rate assigned in the investigation and first administrative review was also assigned in the second and third administrative reviews, the measures at issue in this proceeding. As such, because the methodology for determining the separate rates assigned in the second and third administrative reviews was derived from the original investigation, understanding the calculation of the separate rate in the initial investigation is essential to understanding the basis of the separate rate assigned in the second and third administrative reviews.

10. In sum: Viet Nam does not challenge here the final determination of the investigation. Rather, Viet Nam challenges the final results of the second and third administrative reviews, which rely on the investigation's determination. The final results of the second and third administrative reviews were both initiated subsequent to Viet Nam's date of Accession and completed prior to Viet Nam's request for consultations in this dispute.

[8] Exhibit Viet Nam-11.
[9] Exhibit Viet Nam-15.
[10] Exhibit Viet Nam-19.
[11] Viet Nam's First Written Submission at paras 40-46; Exhibits Viet Nam -33, -42, and -43.

III. THE "CONTINUED USE OF CHALLENGED PRACTICES" IS A MEASURE SUBJECT TO DISPUTE SETTLEMENT AND IS WITHIN THE PANEL'S TERMS OF REFERENCE

11. The Panel should deny the United States' request that the Panel make a preliminary ruling that the USDOC's continued use of the challenged practices does not constitute a measure in this dispute. The United States advances two arguments in support of this claim: that the measure purports to include future measures that are not subject to dispute settlement and that the measure was not identified in the Panel request. The United States' arguments should be dismissed.

A. THE APPELLATE BODY HAS RECENTLY CONSIDERED AND REJECTED THE UNITED STATES' ARGUMENT THAT A "CONTINUED USE OF CHALLENGED PRACTICES" MEASURE CANNOT BE CONSIDERED BY A PANEL

12. The United States contends that the "continued use of challenged practices" cannot be subject to dispute settlement. Citing a 2005 panel report, the United States claims that this measure encompasses future determinations and, as a result, these future determinations cannot be within the Panel's terms of reference under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereafter, "DSU").[12] The United States' interpretation of this exact issue was recently addressed and directly rejected by the Appellate Body.

13. As an initial matter, it has long been recognized that Article 3.3 of the DSU and Articles 17.3 and 17.4 of the *Agreement* allow for "not only measures consisting of acts that apply to particular situations, but also those consisting of acts setting forth rules or norms that have general and prospective application."[13] These measures are oftentimes referred to as "as such" claims. The Appellate Body's analysis in *US – Continued Zeroing* recognized the artificial distinction made between "as such" and "as applied" claims, refusing to accept the United States' interpretation that "as such" may be prospective in nature, while "as applied" may not.[14] The "as such" and "as applied" concepts are simply constructs of the dispute settlement system and have no basis in binding agreements. Thus, a measure may fall in the cross-section of these concepts, as is the case of practices that are ongoing and continuous through the course of one particular proceeding. Such a measure is certainly more broad than an "as applied" measure, but narrower than a generally applicable "as such" measure.[15] The continuing measure stems from a single antidumping duty order and encompasses the use of the challenged practice over a sustained period of time, across the imposition, assessment, and collection segments of the proceeding.[16] Although not of general application like an "as such" claim, a continuing measure ensures predictability and accountability with regard to the order at issue. The Appellate Body properly recognized that the inability to challenge the continued and ongoing use of a practice would lead to a multiplicity of litigation if authorities simply reverted to use of the WTO-inconsistent practices in segments of the proceeding occurring subsequent to resolution by the DSB.

14. The Appellate Body in *US – Continued Zeroing (EC)* concluded that "the continued use of the zeroing methodology in successive proceedings in which duties resulting from the 18 antidumping

[12] United States FWS at para. 96.

[13] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3 at para. 81.

[14] Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009 at para. 179.

[15] Appellate Body Report, *US – Continued Zeroing* at para. 180.

[16] *Id*. at para. 181.

duty orders are maintained, constitute 'measures' that can be challenged in WTO dispute settlement."[17] In considering the United States' arguments in that case with regard to Article 6.2 specifically, the Appellate Body discerned the following:

> The prospective nature of the remedy sought by the European Communities is congruent with the fact that the measures at issue are alleged to be ongoing, with prospective application and a life potentially stretching into the future. Moreover, it is not uncommon for remedies sought in WTO dispute settlement to have prospective effect, such as a finding against laws or regulations, as such, or a subsidy programme with regularly recurring payments.[18]

15. In reaching this conclusion, however, the Appellate Body placed important restrictions on the circumstances required to establish the "continued use" of a practice. The Appellate Body limited application of the "continued use" measure to only those proceedings "where the Panel ha[d] made clear findings of fact concerning the use of the zeroing methodology, *without interruption, in different types of proceedings over an extended period of time*."[19] The panel is to consider whether a "density of factual findings" exist to show that the practice has been used in successive proceedings under the same antidumping duty order.[20] Thus, continued use cannot be established where a practice is used in only a single segment of the proceeding; logically, this fails to establish that an authority has repeatedly and continuously relied on the practice throughout a particular proceeding.[21]

16. To exemplify this continued use, the Appellate Body identified a single antidumping proceeding in which (1) simple zeroing was used in four consecutive periodic reviews, and (2) the sunset review relied on the margin from the original investigation, which was calculated using zeroing. The Appellate Body concluded that "[t]his string of determinations demonstrates the continued use of the zeroing methodology in successive proceedings…"[22]

17. As was done in the *US – Continued Zeroing (EC)*, Viet Nam has shown a string of determinations demonstrating the continued use of the challenged practices in successive proceedings. Viet Nam has demonstrated the following:

- Zeroing: The USDOC utilized model zeroing in the investigation[23]; simple zeroing in the four completed periodic reviews[24]; and margins of dumping calculated using zeroing were used for purposes of the preliminary results of the ongoing sunset review.[25]

- Vietnam-wide rate: The USDOC assigned a rate to a "Vietnam-wide entity" in the investigation and in the four completed periodic reviews.[26]

- Limited Respondent selection: The USDOC impermissibly limited the section of individually examined respondents in the investigation and in the five periodic reviews for which mandatory respondents have been selected.[27]

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[17] *Id.* at para. 185.
[18] *Id*. at para. 171.
[19] *Id*. at para. 195 (emphasis added).
[20] *Id*. at para. 191.
[21] *Id*. at para. 193.
[22] *Id*. at para. 184.
[23] Viet Nam's First Written Submission at paras. 42-46 and exhibits cited therein.
[24] Viet Nam's First Written Submission at paras. 47-51 and exhibits cited therein.
[25] Exhibit Viet Nam-25.
[26] Viet Nam's First Written Submission at paras. 62-69 and exhibits cited therein.

18. Viet Nam acknowledges that the investigation and the first administrative review were completed prior to Viet Nam's accession. Viet Nam submits that this fact is irrelevant for purposes of this analysis. The concern in this instance is whether the USDOC has engaged in the above-discussed practices on an ongoing and continual basis across different segments of the proceeding. The USDOC continues to rely on these practices in all segments under the shrimp antidumping order and has shown zero inclination to alter course. To ensure predictability that future segments of the proceeding are conducted in a manner consistent with United States WTO obligations, Viet Nam respectfully requests that the Panel consider the "continued use of challenged practices" measure in this dispute.

B. VIET NAM IDENTIFIED THE "CONTINUED USE OF CHALLENGED PRACTICES" IN THE PANEL REQUEST

19. The United States claims that because Viet Nam did not include in the panel request the precise language employed by the European Communities in a panel request made in an entirely different proceeding, Viet Nam did not properly identify the "continued use of challenged practices" measure. Viet Nam submits that because the panel request identified the ongoing measure in a manner consistent with Article 6.2 of the DSU, the Panel should deny the United States' claims and accept the "continued use of challenged practices" as a measure in this dispute.

20. In relevant part, Article 6.2 of the DSU provides that "the request for establishment of a panel shall ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[28] Viet Nam understands the United States argument to be that Viet Nam's panel request did not identify the "continued use of challenged practices" measure, making no claim on the adequacy of the legal basis for the request.

21. The specificity requirement of Article 6.2 serves two purposes: it "forms the basis for the terms of reference of the panel" and "serves the due process objectives of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response."[29] Determining conformity with Article 6.2 and these general purposes must be based on the panel request "read as a whole."[30]

22. The general purposes of Article 6.2, and the lens through which they are considered, are necessarily informed by the context provided by related provisions of the DSU.[31] Article 3.3 of the DSU calls for the "prompt settlement" of disputes among Members, such that "the DSU must be interpreted so as to promote the prompt settlement of disputes, without adopting a reading of DSU provisions that would prolong disputes unnecessarily…"[32] Article 9 is also instructive, embodying "the DSU's philosophy of resolving all related issues together…." [33] It would contravene the clear intent of Articles 3 and 9 to require later resolution of an issue substantively identical to a matter presently before a panel.

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[27] Viet Nam's First Written Submission at paras. 78-86 and exhibits cited therein.

[28] Article 6.2, DSU.

[29] Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009 at para. 108.

[30] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257 at para. 169.

[31] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 695 at para. 7.32.

[32] Panel Report, *EC – Bananas III (Guatemala and Honduras)* at para. 7.32.

[33] Panel Report, *EC – Bananas III (Guatemala and Honduras)* at para. 7.32.

23. The Appellate Body and previous panels recognize these considerations when determining whether a panel request satisfies the due process objectives of Article 6.2. In *Argentina – Safeguard Measures on Imports of Footwear*, for example, the panel considered whether subsequent modifications of a definitive measure, which were not explicitly mentioned in the request, fall within the meaning of Article 6.2. Analyzing prior panel interpretations of Article 6.2, the panel agreed that "the requirements of Article 6.2 could be met in the case of a legal act that is subsidiary to or so closely related to a measure specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party."[34] The panel's reasoning, applied in a safeguard context, is of general application. The panel was cognizant of the danger in expanding a panel's terms of reference, but concluded that parties could reasonably assume that subsequent modifications of a definitive measure would necessarily be included within the panel's terms of reference given the logical connection.[35] This is particularly true where the substantive issues being considered remain the same in the subsequent actions.

24. Viet Nam's panel request provided the United States and third parties with clear notice that Viet Nam would challenge the USDOC's use of the defined practices in all proceedings related to the shrimp antidumping duty order. In the panel request, Viet Nam identified every segment of the proceeding that is a direct product of the shrimp antidumping duty order. Indeed, Viet Nam identified each segment of the shrimp proceeding that had at the time of the panel request been initiated – the investigation, each of the four periodic reviews, and the initiation of the five-year sunset review – to illustrate the continuous and ongoing nature of the challenged practices since imposition of the antidumping duty order. Inclusion of the determinations completed prior to Viet Nam's accession to the WTO (the investigation and the first administrative review) and those segments not yet final (the fourth administrative review and the five-year sunset review) provided clear notice that Viet Nam was concerned with the ongoing nature of these practices. Viet Nam specifically included the preliminary determination of the fourth administrative review and the initiation of the five-year sunset review to ensure that the Panel and Members understood Viet Nam's concerns with the continued use of the USDOC practices in those segments of the shrimp antidumping proceeding.[36]

25. If the balance of the *Request for the Establishment of a Panel by Viet Nam* provides insufficient notice of Viet Nam's concern about continued and ongoing practices by the USDOC, the portion of the request relating to the ongoing sunset review plainly establishes Viet Nam's concerns regarding continued and ongoing practices:

> 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

[34] Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515 at para. 8.35, *citing* Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179 at para. 10.10.

[35] Panel Report, *Argentina – Footwear (EC)* at para. 8.45 ("… the subsequent resolutions do not constitute entirely new safeguard measures in the sense that they were based on a different safeguard investigation, but are instead modifications of the legal form of the original definitive measure, which remains in force in substance and which is the subject of the complaint.").

[36] Viet Nam notes that the fifth administrative review, discussed in Viet Nam's First Written Submission, had not been initiated at the time of Viet Nam's panel request.

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.

26. Thus, Viet Nam has expressed its concerns clearly about the complained of practices in each segment of the proceeding and the cumulative effect of these practices on the sunset review and ongoing reviews in addition to the effects on completed reviews.

27. It is not clear how Viet Nam could have more plainly identified its concern with the ongoing nature of these practices (by listing each segment of the proceeding) and the continued use of these practices (by identifying the segments that have not yet reached a final determination). Viet Nam acknowledges that it did not use the precise language adopted by the European Communities in *US – Continued Zeroing*, as noted repeatedly by the United States. This fact is irrelevant. The issue is whether Viet Nam's panel request provided the parties with notice of its concern with the continued use of these practices. As the panel reasoned in *Argentina – Safeguard Measures on Imports of Footwear*, Viet Nam's clear identification of the definitive antidumping duty places parties on notice for subsequent determinations made in connection with the antidumping duty. Each of the segments listed in Viet Nam's panel request – the periodic reviews and the five-year sunset review – are intimately connected with one another and the antidumping order; but for the antidumping order, these segments would not occur.

28. Of added importance is that the United States makes no argument that it did not have notice of the substantive claims associated with the "continued use of challenged practices" measure. The claims set forth in Viet Nam's panel request pertain to zeroing, application of a Vietnam-wide rate, calculation of the all-others rate, and the respondent selection process. The "continued use of challenged practices" measure does not expand upon these claims. There is no meaningful distinction substantively between the arguments set forth by Viet Nam, the United States, or third parties on the specified claims, whether in relation to the second and third administrative review or the "continued use of challenged practices" measure. Denial of the United States' request has negligible substantive impact on the issues considered in this dispute.

IV. CONCLUSION

29. On the basis of the above, Viet Nam submits as follows:

- Viet Nam makes no claim that the investigation or first administrative review are within the Panel's terms of reference other than as the factual predicate for its claim that zeroing was applied in the second and third administrative reviews, thus the United States' requests with regard to those segments are moot;

- Viet Nam properly and adequately identified the "continued use of challenged practices" measure in the panel request of this dispute; and

- The Appellate Body has recognized that the "continued use of challenged practices" measure is susceptible to DSB resolution.

30. Accordingly, Viet Nam respectfully requests that the Panel deny the request made by the United States with respect to the "continued use of challenged practices" measure and proceed to consider the merits of the claims raised.

ANNEX B

EXECUTIVE SUMMARIES OF THIRD PARTIES' WRITTEN SUBMISSIONS

ANNEX B-1

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. PRELIMINARY ISSUES RAISED BY THE U.S.

1. The EU considers that the Panel should reject the U.S. request for preliminary rulings. First, the EU considers that to the extent that dumping margins from the original investigation and the first administrative review were used in subsequent reviews as the basis for calculating dumping margins or imposing/collecting anti-dumping duties, the Panel is due to examine, as part of the evidence and facts of this case, whether the U.S. applied zeroing in those measures. Second, the U.S. already tried the argument that that "continued used of zeroing" is not a measure which can be subject to WTO dispute settlement in *US – Continued Zeroing (EC)* and failed.

II. STANDARD OF REVIEW: THE ROLE OF THE PRECEDENT IN THIS DISPUTE

2. In *US – Stainless Steel from Mexico* the Appellate Body clarified the role of its previous reports and indicated how panels should act in cases where the same legal issues arise (paras 157-162). The EU fully agrees with these statements without reservation. WTO panels are obliged to correctly apply the law; in the context of this dispute this also means that the Panel should follow the rulings of the Appellate Body where the Appellate Body has previously interpreted the same legal questions. Otherwise, the security and predictability enshrined in Article 3.2 of the DSU would be put in serious danger.

III. OVERVIEW OF THE CORE PROBLEM

3. The term "zeroing" – which does not appear in the ADA, may be considered something of a misnomer, because it describes only part of the problem: that is, the downward adjustment of the relatively high export transactions; or, in other words, the setting to zero of the negative amounts. The heart of the matter, however, is the selection of the relatively low priced export transactions *per se*, as a sub-category, as the only or preponderant basis for the dumping margin calculation. This has nothing to do with "offsets" or "credits".

4. This is not a new problem. It is discussed at length in Jacob Viner's Memorandum, and was specifically addressed in the Uruguay Round negotiations, during which the Members were fully informed of the issue and knew exactly what they were talking about. After more than three years of public negotiations, the problem was nicely summarised by the WTO secretariat: it was generally considered that the practice of comparing a weighted average normal value with individual export transactions was obviously unfair to exporters – particularly from developing countries – and required amendment of the Tokyo Round AD Code; the U.S. explained that such a method was necessary to reveal targeted dumping – that is, successive attacks on different parts of an importing market; the consensus was that the Membership should try to find a solution to accommodate the legitimate concerns of both sides. That compromise was the text of Article 2.4.2 of the ADA, as it stands today.

5. Looking at the overall design and architecture of Article 2.4.2, and reading its provisions intelligently, in the light of the underlying economic realities that the legal rules are intended to address and respond to – that is, the real world, it is clear that there are only three sub-categories of clustered low priced export transactions that it is permissible to respond to: those clustered by

purchaser, region or time. These categories broadly correspond to typical market definition parameters: they make economic sense.

6. Thus, it is not permissible, and it is not fair, to pick up low priced export transactions clustered by model. The U.S. has acknowledged as much. This is clear from the term "all" in the first sentence of Article 2.4.2, and the definition of dumping in Article 2.1 of the ADA and Article VI:1 of the GATT 1994 in terms of the product; read together with the absence in the targeted dumping provisions of any reference to a sub-category by model. Thus, the relevant provisions, and particularly the normal rule and the exception, are read harmoniously, so as to give meaning – both legal and economic – to all the treaty terms.

7. In exactly the same way, it is not possible to pick up low priced export transactions *per se* as a sub-category. There is no reference to any such sub-category in the provisions on targeted dumping. To accept such a proposition would be to render the targeted dumping provisions useless; and to negate the compromise, negotiated and agreed by all the WTO Members (in return for other concessions), to which we have just referred. The proof of this is that for some 15 years the U.S. has simply ignored the targeted dumping requirements, content to continue doing exactly what it was doing before, based on its own unilateral interpretation of Article 2.4.2. The further proof of this is that, by its own assertion, the U.S. sought the insertion of the phrase "the existence of margins of dumping during the investigation phase" (the "Phrase") precisely with the intention of side-stepping the compromise and the obligations that we have just outlined. This is a highly significant point that bears repetition: the entire U.S. position is premised on the implied admission that the overall design and architecture of Article 2.4.2 is to be interpreted in the manner advocated by the EU in previous cases.

8. We turn, therefore, to the Phrase "the existence of margins of dumping during the investigation phase", added – behind closed doors – after some three and a half years of public negotiations. According to the U.S., this means that the obligations in Article 2.4.2 do not apply to the re-calculation of dumping margins in assessment proceedings. Rather, the U.S. is completely free to choose the methodology to be used for calculating a contemporaneous dumping margin and finally collecting duties. Since the results of the first retrospective assessment proceeding are applied with effect from the date on which duties were first imposed, this would negate entirely the compromise enshrined in Article 2.4.2.

9. In the view of the EU, assuming Members negotiate in full knowledge of the 1969 Vienna Convention on the Law of the Treaties (the "Vienna Convention"), it may reasonably be assumed that they negotiate in good faith, just as they agree that the terms of the ADA are to be interpreted in good faith. In such negotiations, the EU would neither expect nor accept that what is clearly given, after lengthy debate, with one hand (that is, agreement not to use asymmetry absent targeted dumping) would be surreptitiously entirely taken away with the other hand. The U.S. position reflects what might be termed the "last minute" "spanner in the works" theory of international negotiation – a tactic that, in the view of the EU, is hardly suited to a multilateral organisation with 153 Members, including many developing countries.

10. However, assuming for the sake of argument, that such negotiation tactics are permissible, the EU would like to draw the Panel's very close attention to what a Member forfeits when it adopts such an approach. First, most obviously, the Member chooses to leave no trace of its intended unilateral interpretation in the preparatory work. Second, and in similar vein, the Member chooses not to offer any explanation to its negotiating partners – many of whom are developing countries – as to what the object and purpose of such a provision might be. This is particularly problematic when the subsequent unilateral interpretation flies in the face of the overall design and architecture of the ADA. Especially when there is no object and purpose capable of explaining why, on the basis of identical data, the mere act of collection should inflate the dumping margin many times over – a proposition

that is "manifestly absurd or unreasonable" within the meaning of the Vienna Convention – both in legal terms and in economic terms. Third, and in similar vein, the Member chooses to forego any attempt to reconcile conflicting context with its intended unilateral interpretation. The Panel may thus note that of the various elements of the interpretive rule in the Vienna Convention, by the U.S.' own choice, there is only one that stands between the U.S. and failure: the supposed ordinary meaning of the Phrase.

11. We believe we have previously amply demonstrated – and we do so again below – that the ordinary meaning of the Phrase is not that advocated by the U.S.. We believe that, for the U.S., the term "investigation" was key in its intended unilateral interpretation. In fact, we have an express admission of this in the U.S. Statement of Administrative Action (SAA), which accompanied the adoption of the U.S. Uruguay Round Agreements Act, and which contains the words ("not reviews"). Obviously, the drafter of the SAA well appreciated that these words are not contained in Article 2.4.2 of the ADA, and do not result from a proper interpretation of that provision, which is precisely why they were inserted in the SAA in an attempt at ex post rationalisation – an attempt doomed to fail, as subsequent WTO litigation has demonstrated.

12. The discussion could stop here. But there are a multitude of other interpretative points against the U.S. First, the grammatical structure of the Phrase, in which the term "during … phase" is grammatically linked to a period of time in which margins exist (an investigation period) as opposed to one in which they are established (as the U.S. would have it). This both confirms the EU interpretation and precludes the U.S. interpretation. Second, the defined term "margin of dumping" has the same meaning throughout the ADA, and must inform the meaning of the Phrase – there being no support in the text for the view that the definition should change at the moment of final collection. Third, the overall design and architecture of Article 2.4.2, as outlined above. It is particularly significant in this respect that the EU position reads the normal rule referring to the investigation period in counterpoint to the exceptional rule permitting a response to time based targeted dumping. Thus, once again, the EU advances a harmonious reading of all the treaty terms, which makes legal and economic sense of all of them. Fourth, the numerous references in Article 2 to "investigations", which are considered, even in U.S. municipal law, to refer to all types of investigations, including assessment proceedings. Fifth, the rule in Article 9.3 that the amount assessed cannot exceed the dumping margin – with an express cross-reference to all of Article 2. Sixth, the absence of any object and purpose argument capable of supporting the U.S. position. Seventh, the preparatory work, as outlined above … And the list goes on.

13. Finally, the U.S. turns to some other general arguments, equally without merit. First, the so-called "mathematical equivalence" argument, which is obviously vitiated by a simple intellectual error: something can perfectly well be fair as a response to targeted dumping, but unfair absent targeted dumping. Second, the argument derived from Article 9(4)(ii) and the so-called "variable duty" or prospective normal value. This provision concerns sampling, and insofar as it implies the possibility that one of the measures that could be imposed pursuant to Article 9.2 ADA could be a variable duty, it equally implies that any such duty is ultimately subject to final assessment or refund under Article 9.3, with dumping margins re-calculated in accordance with all of the provisions of Article 2. This is completely logical. It plugs the gap that would otherwise arise in the refund system under Article 9.3.2, in which final liability cannot, by definition, increase. The only option for Members operating such systems who are fearful of targeted dumping is a variable duty, with refund in the event that the feared targeted dumping does not materialise. The proposition that Article 9(4)(ii) in any way contradicts any of the interpretative points that we have already outlined is thus without merit. Third, the proposition that because, in the U.S., assessment proceedings are importer driven, this should change the analysis. This practical assertion is without merit. The ADA responds to international price discrimination by exporters; and it is a matter of elementary accounting to calculate final liabilities for importers, whilst respecting the ceiling fixed by the amount of dumping practiced by an exporter.

14. If all of the interpretative elements in the Vienna Convention support the position of the EU and Vietnam, and disprove the position of the U.S., the U.S. interpretation cannot be said to be "permissible" within the meaning of Article 17.6 of the ADA.

IV. VIETNAM-WIDE RATE

15. The European Union considers that Article 6.10 of the ADA allows for the determination of a single margin of dumping per producer and thus permits to combine separate entities into a single supplier which is the actual source of the alleged price discrimination. The fact that Vietnam is a non-market economy country, and issue which clearly arises from its Protocol of Accession, is very relevant for the proper identification of the actual supplier in the present case. Indeed, in a non-market economy country, the State control over the means of production and State intervention in the economy, including international trade, imply that all the means of production and natural resources belong to one entity, the State. All imports from non-market economy countries are therefore considered to emanate from a single supplier, the State. The State (in this case, Vietnam) in this sense can be considered as one supplier whose dumping behaviour can be identified and addressed in accordance with the disciplines in the ADA. In view of the State's control over international trade, it would not be relevant to name exporting companies which do not act independently from the State separately since they collectively constituted one single supplier or exporting entity, *i.e.*, the State. The application of a single duty rate then also becomes necessary to avoid circumvention of the duties (*i.e.*, the channelling of exports through the supplier with the lowest duty rate). As also evidenced by the U.S., Vietnam as a non-market economy country, meets these concerns. Consequently, in the EU's view, Article 6.10 of the ADA allows investigating authorities to consider the State in cases of non-market economy countries as an "exporter" or "producer" and, thus, a single dumping margin for the State and its export branches can be calculated.

V. ALL OTHERS RATE

16. Whether the USDOC applied zeroing in the original investigation and/or any subsequent reviews is a factual matter that the Panel has to determine on the basis of the evidence provided by Vietnam. If the Panel concludes that the USDOC used zeroing when determining the dumping margins in the context of those anti-dumping proceedings, the use of those dumping margins and the application of those rates in subsequent determinations amount to a new and separate measure attributable to the U.S. which is subject to this Panel's proceedings.

17. Moreover, the European Union considers that, even assuming that Article 9.4 of the ADA contains a lacuna and, thus, does not provide any specific methodology for the calculation of a margin of dumping to be applied to non-investigated companies when the only margins calculated during the investigation are either zero or *de minimis* or calculated pursuant to Article 6.8, such a silence does not imply that no obligation is imposed on WTO Members when calculating "all others" rates in those circumstances. In this respect, the European Union invites the Panel to examine whether, looking at the ADA as a whole, the methodology used by the U.S. was reasonable in view of the specific circumstances of the case.

VI. LIMITATIONS IN THE NUMBER OF RESPONDENTS

18. The European Union considers that, since Article 6.10 is procedural in nature, it applies in the context of review proceedings. Moreover, the European Union considers that, in cases where investigating authorities have limited their examination in accordance with Article 6.10, second sentence, they are also required to consider requests for individual examination, "except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation". The exception is defined by reference to a large number of exporters or producers, as a condition for the application

of the exception. The exception is justified on the basis that individual examination would be unduly burdensome to the authorities and would prevent the timely completion of the investigation. In the EU's view, it is for the Panel to verify whether these elements were present in view of the specific facts of the case.

ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. Japan's written submission focuses on two of the issues raised by Viet Nam: (i) the use of the zeroing procedures by the United States Department of Commerce ("USDOC")[1]; and (ii) the USDOC's determination of "all others" rates.[2] In both respects, the United States appears to act inconsistently with its WTO obligations.[3]

II. THE USE OF ZEROING PROCEDURES IS INCONSISTENT WITH MEMBERS' OBLIGATIONS UNDER THE *AD AGREEMENT* AND THE GATT 1994

2. Viet Nam has challenged the USDOC's use of zeroing to determine margins of dumping for selected respondents in the second and third administrative reviews, as well as the USDOC's continued use[4] of the so-called "zeroing" procedures in successive segments of the ongoing proceeding pertaining to *Certain Frozen Warmwater Shrimp from Viet Nam* (including subsequent administrative reviews and the five-year sunset review).[5] Viet Nam has also asked the Panel to examine the USDOC's use of zeroing in the original investigation and first administrative review to the extent they are relevant to the challenged measures.[6] Japan agrees with Viet Nam that the use of zeroing in administrative reviews is inconsistent with Article 2.4 and Article 9.3 of the *AD Agreement*, and Article VI:2 of the GATT 1994.

3. The consequences of zeroing in the measures at issue are precisely the same as the consequences of zeroing addressed in many previous WTO disputes. *First*, by excluding all negative comparison results, the USDOC makes a "dumping" determination that disregards an entire category of the export transactions making up the "product" – namely, those low-priced export transactions that generate the negative comparison results. "Dumping" is, therefore, *not* determined for the "*product*" as defined by the investigating authority, but for a sub-part of it.

4. In *EC – Bed Linen*, *US – Softwood Lumber V*, *US – Zeroing (EC)*, *US – Softwood Lumber V (21.5)*, *US – Zeroing (Japan)*, *US – Stainless Steel (Mexico)*, and *US – Continued Zeroing (EC)*, the Appellate Body ruled that a partial determination of this type, taking account of just some comparison results, is inconsistent with the definition of "dumping" in Article 2.1 of the

[1] *See* Viet Nam's First Written Submission, Section VI.A.
[2] *See* Viet Nam's First Written Submission, Section VI.C.
[3] Viet Nam also raises two other issues: (i) calculation of the country-wide rate; and (ii) sampling. *See* Viet Nam's First Written Submission, Sections VI.B and VI.D. In this submission, Japan does not offer comments on these other two elements of the measures at issue.
[4] Japan does not further address this "continued use" measure in the present submission, but notes that the Appellate Body has considered the continued use of the zeroing methodology in successive proceedings to be susceptible to challenge in WTO dispute settlement. *See* Appellate Body Report, *US – Continued Zeroing (EC)*, paras. 175-185.
[5] *See* Viet Nam's First Written Submission, Section IV.
[6] *See* Viet Nam's First Written Submission, Section IV.

AD Agreement, and Article VI of the GATT 1994, because it is not made for the "'product' as a whole".[7]

5. *Second*, zeroing means that an affirmative "dumping" determination is much more likely to be made than not.[8] The reason is that the positive comparison results *included* in the determination relate to export transactions with prices that are *lower* than normal value; in sharp contrast, the *excluded* negative results relate to export transactions with prices *higher* than normal value. The export transactions selected for inclusion in the determination, therefore, relate to the sub-part of the product that is the most likely to generate an affirmative dumping determination.

6. As a result, zeroing can produce a "dumping" determination where, in fact, the product as a whole is not dumped.[9] The exclusion of negative comparison results also "inflates" the amount of any "dumping" determination that is made.[10]

7. Thus, zeroing systematically prejudices the interests of foreign producers and exporters because the negative comparison results that are favorable to them are purposefully set aside by the USDOC. As a result, the Appellate Body has held that the maintenance and use of zeroing procedures involve an "inherent bias" and "distortion" in the comparison of export price and normal value.[11] This is the very antithesis of the "fair comparison" required by Article 2.4 of the *AD Agreement*.

8. For these reasons, the United States' zeroing procedures, and anti-dumping measures adopted using these procedures, have been found to be incompatible with Articles 2.4 and 2.4.2, 9.3, 9.5 and 11.3 of the *AD Agreement* in a series of previous disputes.[12]

9. In the current dispute, the United States repeats the interpretive stance it has now taken in a string of previous *Zeroing* disputes. The arguments relied upon by the United States have been refuted by the complainants and third parties in previous disputes, and rejected by the Appellate Body. Japan urges the Panel to reject the United States' arguments that the use of zeroing is not inconsistent with the *AD Agreement* and the GATT 1994.

III. THE "ALL OTHERS" RATES APPLIED BY THE USDOC IN THE SECOND AND THIRD ADMINISTRATIVE REVIEWS ARE INCONSISTENT WITH THE UNITED STATES' OBLIGATIONS UNDER THE *AD AGREEMENT*

10. Viet Nam challenges the USDOC's determinations of the "all others" rate in the second and third administrative reviews as inconsistent with Article 9.4 of the *AD Agreement*.[13] Based on Viet Nam's and the United States' description of the facts, Japan understands that the USDOC did not calculate "all others" rates but applied the "all others" rate determined in the original investigation

[7] *See, e.g.*, Appellate Body Report, *EC – Bed Linen*, para. 53; Appellate Body Report, *US – Softwood Lumber V*, para. 99; Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Softwood Lumber V (21.5)*, paras. 87 and 89; Appellate Body Report, *US – Zeroing (Japan)*, para. 115.

[8] Appellate Body Report, *US – Softwood Lumber V (21.5)*, paras. 140-142; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[9] Appellate Body Report, *US – Softwood Lumber V (21.5)*, paras. 140-142; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[10] Appellate Body Report, *EC – Bed Linen*, para. 55; Appellate Body Report, *US – Softwood Lumber V*, para. 101; *and* Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[11] *See* Appellate Body Report, *US – Softwood Lumber V (21.5)*, paras. 140-142; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 134-135; *and* Appellate Body Report, *EC – Bed Linen*, para. 55.

[12] *See, e.g.*, Appellate Body Report, *US – Zeroing (Japan)*, para. 190; Appellate Body Report, *US – Zeroing (EC)*, para. 263; Appellate Body Report, *US – Softwood Lumber V*, para. 183.

[13] Viet Nam's First Written Submission, Section VI.C.

using "model zeroing" to non-investigated respondents in the second and third administrative reviews. Pursuant to U.S. law[14], the USDOC considered this to be a "reasonable" approach. Japan addresses three points.

A. AN INVESTIGATING AUTHORITY IS OBLIGATED TO UPDATE THE "ALL OTHERS" RATE IN AN ADMINISTRATIVE REVIEW BASED ON THE DUMPING MARGINS DETERMINED FOR RESPONDENTS SELECTED IN THAT REVIEW PURSUANT TO ARTICLE 9.4 OF THE *AD AGREEMENT*

11. With regard to this first question, in Japan's view, an investigating authority is obliged, pursuant to Article 9.4 of the *AD Agreement*, to update the "all others" rate to be applied to non-selected respondents based on the dumping margins determined for the selected respondents when it conducts an administrative review and selects respondents to be investigated in that review.

12. Article 9.4 *does* give rise to an obligation to update the "all others" rate when an investigating authority decides to conduct an administrative review because it establishes the general rule that an investigating authority must determine the ceiling for the "all others" rate based on "the weighted average margin of dumping established with respect to the *selected* exporters or producers".[15] If an investigating authority *mak*es a new selection of exporters and producers in an administrative review, and determines new margins for them, Article 9.4 requires that the "all others" rate be based on the updated margins for the selection made.

13. Under Article 9.4., Members are entitled to impose an "all others" rate on *non-examined* exporters, on the grounds that individually examined producers are engaged in dumping. Thus, if the examined producers are dumping and subject to anti-dumping duties, the non-examined producers are also deemed to be dumping and subject to such duties. However, if the individually examined producers are no longer dumping and no longer subject to anti-dumping duties, there is no rational basis to presume that non-examined exporters are dumping or to impose anti-dumping duties on them *alone*.

14. Further, if the "all others" rate were not updated to reflect the latest situation when individually determined rates in a given administrative review were all zero or *de minimis*, then the level of the "all others" rate would be greater than the level required to offset the level of dumping most recently determined, which would be contrary to Article 11.1 of the *AD Agreement* which establishes the principle that anti-dumping duties "shall remain in force *only as long as and to the extent* necessary to counteract dumping".[16]

B. AN INVESTIGATING AUTHORITY DOES NOT HAVE UNLIMITED DISCRETION IN DETERMINING AN "ALL OTHERS" RATE IF ALL SELECTED RESPONDENTS IN AN ADMINISTRATIVE REVIEW RECEIVE RATES THAT ARE EXPLICITLY TO BE EXCLUDED PURSUANT TO ARTICLE 9.4

15. Next, Japan turns to the second question, which considers what methodologies are available to an investigating authority for determining the "all others" rate, if all the individually investigated respondents in an administrative review receive rates that are explicitly to be excluded in determining the ceiling for the "all others" rate pursuant to Article 9.4. The Appellate Body has not stated the bounds of an investigating authority's obligations under Article 9.4 in determining an "all others" rate when the *lacuna* exists.

[14] *See* Viet Nam's First Written Submission, para. 230.
[15] Emphasis added.
[16] Emphasis added.

16. The case at hand appears to fall within the *lacuna* in Article 9.4 because, in the second and third administrative reviews, each of the rates determined by the USDOC for the selected respondents was zero or *de minimis*. Japan submits that the investigating authority's obligation under Article 9.4 requires it to apply an "all others" rate of zero in the second and third administrative reviews. In Japan's view, this would be the only reasonable outcome, because none of the individually examined exporters was found to be engaged in dumping. Thus, in Japan's view, the United States acted inconsistently with its obligations under Article 9.4 by applying the "all others" rate from the original investigation in the second and third administrative reviews, where the respondents selected for investigation all received zero or *de minimis* rates.

C. IF AN INVESTIGATING AUTHORITY IS ENTITLED TO RELY ON AN "ALL OTHERS" RATE DETERMINED IN AN EARLIER PROCEEDING PURSUANT TO ARTICLE 9.4, THAT RATE MUST BE BASED ON WTO-CONSISTENT MARGINS OF DUMPING

17. With regard to the third question, Japan submits that, if the Panel determines that an investigating authority may apply the "all others" rate determined in an original investigation to non-selected respondents in administrative reviews when the *lacuna* in Article 9.4 is triggered, such "all others" rate *must* be based on *WTO-consistent* margins of dumping. That is, if the "all others" rate from the original investigation was calculated based on WTO-inconsistent margins of dumping, the "all others" rate violates Article 9.4.

18. Yet, this is precisely what the United States has done in the second and third administrative reviews in this case. In Japan's view, this is neither "reasonable" nor consistent with the United States' obligations under the *AD Agreement* or the GATT 1994. Rather, the United States must re-calculate the "all others" rate from the original investigation without using "model zeroing" if it is to apply it in subsequent administrative reviews.

19. The United States contends that it is entitled to rely on margins of dumping established in the original investigation because the original investigation was initiated pursuant to an application made before Viet Nam's accession to the WTO.[17] This argument is without merit. The administrative reviews at issue, and the all others rate, are subject to the disciplines of the *AD Agreement*, a fact that the United States does not dispute. Therefore, in these administrative reviews, and in setting the revised all others rate, the United States may not rely on "margins of dumping" established in a WTO-inconsistent manner, irrespective of when these margins were *first* established.

[17] *See* U.S. First Written Submission, paras. 169-175.

ANNEX B-3

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE REPUBLIC OF KOREA

I. INTRODUCTION

1. This third party submission is presented by the Government of the Republic of Korea ("Korea") with respect to certain aspects of the First Written Submissions by Viet Nam dated 20 August 2010 and by the United States of America dated 13 September 2010.

II. ARGUMENTS

A. THE CLEAR IDENTIFICATION OF THE FOURTH ADMINISTRATIVE REVIEW AND THE SUNSET REVIEW MADE IN THE PANEL REQUEST SHOULD BE TAKEN INTO ACCOUNT IN PRELIMINARY RULING ON THE CONTINUED USE OF CHALLENGED PRACTICES.

2. In this dispute, Vietnam contests the "continued use of challenged practices" clearly and strongly in its first written submission, while the United States argues that the "continued use of challenged practices" was not identified in Vietnam's Panel Request, and it would appear to apply to an indeterminate number of potential future measures, and thus is not within the Panel's Terms of Reference.[1]

3. Although Vietnam did not use the term "continued use of challenged practices" in its Panel Request, Korea notes that the Panel should review carefully whether it could find a description in the Panel Request that is sufficient to indicate the nature of the "continued use of challenged practices". Especially, Korea would like to emphasize that the Fourth Administrative Review and the Sunset Review, which seem to be parts of the "continued use of challenged practices", are inarguably within Vietnam's Panel Request. Korea views that above-mentioned measures, as either components of the "continued use of challenged practices" or as independent measures at issue, are subject to this dispute.

B. THE PANEL SHOULD FIND THAT THE PRACTICE OF "ZEROING" IN ADMINISTRATIVE REVIEWS IS INCONSISTENT WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

4. Korea considers the United States' arguments on United States' practice of zeroing in administrative reviews unconvincing, and believes that the Panel should find that the United States' practice of zeroing is inconsistent with the *Anti-Dumping Agreement*.

5. Specifically, the United States argues in its first submission that the concept of "dumping" and "margin of dumping" have a meaning in relation to individual transaction, that is to say, dumping may occur in a single transaction and dumping which occurs with respect to one transaction does not need to be mitigated by the occurrence of another transaction made at a non-dumped price. However, the Appellate Body has explicitly rejected the United States' arguments that "dumping" and

[1] U.S. First Written Submission, para. 87.

"margin of dumping" can be found to exist at the level of individual transactions in ruling the USDOC's practice of zeroing in periodic administrative reviews.[2]

6. The Appellate Body, in analyzing the concept of "dumping" and "margin of dumping," has examined the context in other provisions of the *Anti-Dumping Agreement*, such as Articles 5.8, 6.10, 9.5 as well as the concept of injurious dumping, and concluded that the *Anti-Dumping Agreement* does not refer to "dumping" and "margin of dumping" as existing at the level of individual transactions. The argument by the United States is simply not compatible with the rulings and reasoning of the Appellate Body's decisions.

7. Furthermore, the United States also argues that the term "product" used in Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 does not refer exclusively to "product as a whole" and thus, the relevant provision does not require margins of dumping to be established on an aggregate basis for the "product as whole". This argument is contrary to the Appellate Body's reasoning in *United States – Final Dumping Determination on Softwood Lumber from Canada*[3], in which the Appellate Body held that "margin of dumping" could only be established for the product under investigation as a whole.[4]

8. Considering the Appellate Body's reasoning, Korea is unable to find that the USDOC's zeroing methodology in the assessment proceedings rests on a permissible interpretation of the *Anti-Dumping Agreement* and WTO-consistent.

III. CONCLUSION

9. For the reasons stated above, Korea respectfully requests that the Panel find the United States' practice of zeroing as used in the administrative reviews in anti-dumping proceedings concerning imports of certain shrimp from Vietnam to be inconsistent with the *Anti-Dumping Agreement.*

[2] See *US – Continued Existence and Application of Zeroing Methodology*, Appellate Body Report, WT/DS350/AB/R, 2 April 2009, para. 287.

[3] See *United States – Final Dumping Determination on Softwood Lumber from Canada*, Appellate Body Report, WT/DS264/AB/R, 11 August 2004, paras. 92 to 93.

[4] *Id*. para. 99.

ANNEX B-4

THIRD PARTY WRITTEN SUBMISSION OF MEXICO

I. INTRODUCTION

1. This third party submission is presented by the Government of Mexico ("Mexico") with respect to certain aspects of the *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam* (WT/DS404). The issues addressed in this submission are contained in the First Written Submission of the Socialist Republic of Viet Nam[1] and the First Written Submission of the United States of America.[2]

2. As a World Trade Organization ("WTO") member likewise seeking compliance by the United States with its WTO obligations in relation to the practice of "zeroing" in anti-dumping ("AD") duty "administrative reviews"[3] and related measures by the U.S. Department of Commerce ("USDOC"), Mexico has a systemic interest in the proper interpretation and application of the various provisions of *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"), the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and *the Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Mexico appreciates this opportunity to participate in this proceeding and present its views to the Panel.

3. Mexico will limit its response to issues of broader systemic concern. In particular, Mexico will address: (1) the proper and important role of established Appellate Body precedent in subsequent panel reviews dealing with identical issues; (2) the *Anti-Dumping Agreement's* clear preclusion of zeroing in administrative reviews, as confirmed repeatedly by the Appellate Body; (3) the appropriateness of Vietnam's challenge to the continued use of zeroing as ongoing conduct subject to WTO dispute settlement; (4) the appropriateness of Vietnam's challenge to zeroed rates incorporated in measures within this Panel's terms of reference; and (5) the role of panel requests, as opposed to consultations requests, in determining a panel's terms of reference.

II. THE PANEL SHOULD FOLLOW ESTABLISHED PRECEDENT OF THE APPELLATE BODY

4. The zeroing methodology presented for review in this dispute has been ruled WTO-inconsistent time and time again.[4] The First Written Submission of the United States raises no new substantive arguments in defense of the zeroing measure that have not been fully addressed in other proceedings. Instead, the United States requests this Panel ignore the long line of consistent Appellate Body rulings in this area and to chart a course of its own. This Panel should reject that invitation and should adhere to the established WTO jurisprudence – not only because the prior Appellate Body

[1] First Written Submission of the Socialist Republic of Viet Nam, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404, 20 August 2010 ("Viet Nam First Written Submission").

[2] First Written Submission of the United States of America, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404, 13 September 2010 ("U.S. First Written Submission").

[3] Period reviews, in the parlance of the *Anti-Dumping Agreement*, are referred to as "administrative reviews" under U.S. law. These terms are used interchangeably throughout this third party submission.

[4] *See* Appellate Body Report, *US – Zeroing (EC)*, para. 263; Appellate Body Report, *US – Zeroing (Japan)*, paras. 123-127, 190; Appellate Body Report, *US – Stainless Steel from Mexico*, para. 133; Appellate Body Report, *US – Continued Zeroing*, para. 316.

decisions were correctly decided, but because there are strong systemic reasons to adhere to this consistent body of law.

5. In an effort to distance itself from the long-line of contrary Appellate Body jurisprudence, the United States argues that "[w]hile prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members, the Panel in this dispute is not bound to follow the reasoning set forth in any Appellate Body Report."[5] The United States continues, "while the dispute settlement system serves to resolve a particular dispute, and to clarify agreement provisions in the context of doing so, neither panels nor the Appellate Body can adopt authoritative interpretations that are binding with respect to another dispute."[6] However, this "does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB,"[7] and the United States vastly underplays the important role of prior consistent rulings in future WTO disputes where the same issues have been addressed by the Appellate Body.

6. As recognized both by WTO panels and the Appellate Body, there are important systemic reasons for following the decisions of the Appellate Body in previous disputes when issues already decided are presented again to a new panel. The Appellate Body has expressed its deep concern about the implications of a panel ignoring prior Appellate Body reports on the same issues before it as follows:

> Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, ***absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case***.
>
> In the hierarchical structure contemplated in the DSU, panels and the Appellate Body have distinct roles to play. In order to strengthen dispute settlement in the multilateral trading system, the Uruguay Round established the Appellate Body as a standing body. Pursuant to Article 17.6 of the DSU, the Appellate Body is vested with the authority to review "issues of law covered in the panel report and legal interpretations developed by the panel". Accordingly, Article 17.13 provides that the Appellate Body may "uphold, modify or reverse" the legal findings and conclusions of panels. The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized

[5] U.S. First Written Submission, para. 68.
[6] *Id.*, para. 70.
[7] Appellate Body Report, *US – Stainless Steel from Mexico*, para. 158 (citations omitted).

> the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote "security and predictability" in the dispute settlement system, and to ensure the "prompt settlement" of disputes. ***The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU***. Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, ***the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case***.
>
> We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system, as explained above.[8]

7. In another dispute, the Appellate Body succinctly summarized the same point, stating that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."[9]

8. This understanding of the significance of prior Appellate Body rulings to subsequent disputes involving the same issues has also been emphasized specifically within the context of the U.S. zeroing methodology at issue in this dispute. In *US – Zeroing (EC)*, the Appellate Body observed that "[a]lthough previous Appellate Body decisions are not strictly speaking binding on panels, there clearly is an expectation that panels will follow such decisions in subsequent cases raising issues that the Appellate Body has expressly addressed. The Appellate Body has stated that adopted Appellate Body reports should be taken into account where they are relevant to any dispute."[10]

9. As explained in greater detail below, the substance of Vietnam's zeroing claims have been considered and affirmed in a long line of consistent prior Appellate Body decisions. The United States does not offer in its Written Submission any new substantive arguments not already rejected in previous proceedings. Accordingly, this Panel should adopt the reasoning from those prior decisions and hold (yet again) the United States' zeroing methodology, including as applied in administrative reviews and "sunset" reviews, in violation of the *Anti-Dumping Agreement* and the GATT 1994.

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[8] *Id.*, paras 160-162 (emphasis added).

[9] Appellate Body Report, *OCTG from Argentina*, para. 188; *see also* Appellate Body Report, *US – Certain Shrimp and Shrimp Products (Malaysia)(21.5)*, para. 109 ("[I]n taking into account the reasoning in an adopted Appellate Body Report – a Report, moreover, that was directly relevant to the Panel's disposition of the issues before it – the Panel did not err. The Panel was correct in using our findings as a tool for its own reasoning.").

[10] Panel Report, *US – Zeroing (EC)*, para. 7.30.

III. THE UNITED STATES' ZEROING METHODOLOGY IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

10. The United States' application of its zeroing methodology in administrative reviews has repeatedly been held by the Appellate Body to violate the *Anti-Dumping Agreement*. The United States asks this Panel to ignore established precedent on the exact issue presented in this dispute based on its erroneous theory that margins of dumping can be calculated at the transaction level. This repeatedly rejected theory, which the United States potentially plans to employ to avoid its WTO obligation not to zero, should be rejected yet again by this Panel. Moreover, the United States' application of zeroing is not somehow rendered consistent with the *Anti-Dumping Agreement* by virtue of USDOC calculating certain dumping margins as zero or *de minimis*. Prior to addressing these issues, however, Mexico will first highlight the irrelevance of Article 17.6(ii) on which the United States relies.

A. THE UNITED STATES' EMPHASIS ON ARTICLE 17.6(II) IS MISPLACED IN THIS DISPUTE

11. Article 17.6(ii) of the *Anti-Dumping Agreement* is not relevant to this dispute, despite claims by the United States to the contrary. Article 17.6(ii) provides:

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

12. The United States seizes on the second sentence to suggest that it somehow renders zeroing permissible under the *Anti-Dumping Agreement*. The United States is misguided about how Article 17.6(ii) operates.

13. According to the United States, "[t]he very premise underlying Article 17.6(ii) is that two distinct interpretations can be permissible simultaneously: one that would render the measure at issue consistent with the AD Agreement, and another that would render the measure at issue inconsistent with the AD Agreement."[11]

14. If an interpretation "would render the measure at issue inconsistent with the AD Agreement," nothing in Article 17.6(ii) makes that interpretation permissible. Article 17.6(ii) never renders an inconsistent measure permissible. Rather, Article 17.6(ii) merely clarifies that two interpretations may both be "permissible" and consistent with a Member's obligations under the Agreement. Accordingly, the second sentence only becomes relevant when application of the customary rules of interpretation of international law yield more than one permissible interpretation.

15. As discussed in greater detail in the following section, the interpretation of the *Anti-Dumping Agreement* advanced by the United States in this proceeding, in particular, is one that has repeatedly been held ***impermissible*** based on application of the rules of interpretation of international law, which are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("VCLT").[12] Because the U.S. interpretation of the *Anti-Dumping Agreement* as allowing zeroing has always been rejected for being ***impermissible*** under the language, context, and purpose of the treaty, the provision in Article 17.6(ii) is irrelevant to this dispute.

[11] U.S. First Written Submission, para. 66.
[12] *See* Appellate Body Report, *US – Hot-Rolled Steel from Japan*, para. 57.

B. ZEROING IS UNQUESTIONABLY PROHIBITED IN ADMINISTRATIVE REVIEWS AND "SUNSET" REVIEWS

16. Mexico would like to state very plainly that the United States raises no new issues that have not already been squarely addressed by the Appellate Body. In short – the *Anti-Dumping Agreement* prohibits the use of zeroing in any anti-dumping proceeding and under any comparison method, including those challenged here.[13] The Appellate Body has confirmed this fact no fewer than five times, rejecting each of the United States' arguments raised here in the process.

17. Mexico has already challenged the same methodology employed by the United States under the AD order on certain shrimp from Vietnam. In that dispute, the Appellate Body definitively ruled that simple zeroing is "as such, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement."[14] This ruling only confirmed the Appellate Body's ruling in *US – Zeroing (EC)* that the zeroing methodology used by USDOC in administrative reviews is inconsistent with the *Anti-Dumping Agreement*.[15] Furthermore, the Appellate Body in *US – Zeroing (Japan)* likewise found that zeroing in administrative reviews was "as such" and "as applied" inconsistent with Articles VI:1 and VI:2 of the GATT 1994, and Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*.[16] The Appellate Body reconfirmed this ruling twice more in 2009 in *US – Continued Zeroing* and *US – Zeroing (Japan)(21.5)*.[17] This issue has been adequately addressed and resolved by the Appellate Body.

18. In fact, one member of the Panel issued a separate concurring opinion in *US – Continued Zeroing* to express frustration with the United States' recalcitrance, stating:

> In matters of adjudication, there must be an end to every great debate. The Appellate Body exists to clarify the meaning of the covered agreements. On the question of zeroing it has spoken definitively. Its decisions have been adopted by the DSB. ... Whatever the difficulty of interpreting the meaning of "dumping", it cannot bear a meaning that is both export-specific and transaction-specific. ... One must prevail. The Appellate Body has decided the matter. At a point in every debate, there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past. With respect to zeroing, that time has come.[18]

19. As the member alluded to in the passage above, and as the United States admits[19], the crux of the argument on zeroing is whether "dumping" and "margins of dumping" are concepts that can have meaning at the transaction-specific level, as the United States suggests, or if they only have meaning with reference to the "product as a whole," as Vietnam contends.

20. The Appellate Body has explained in no uncertain terms that Vietnam's position is correct and that the United States' interpretation is not permissible within the context of the *Anti-Dumping Agreement*:

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[13] *See* Appellate Body Report, *US – Zeroing (Japan)*, paras. 123-127, 190.
[14] Appellate Body Report, *US – Stainless Steel from Mexico*, para. 133.
[15] Appellate Body Report, *US – Zeroing (EC)*, para. 263.
[16] *See* Appellate Body Report, *US – Zeroing (Japan)*, para. 190(c).
[17] *See* Appellate Body Report, *US – Continued Zeroing*, para. 316; Appellate Body Report, *US – Zeroing (Japan)(21.5)*, paras. 195, 197.
[18] Appellate Body Report, *US – Continued Zeroing*, para. 312.
[19] *See* U.S. First Written Submission, para. 117.

> A product under investigation may be defined by an investigating authority. But "dumping" and "margins of dumping" can be found to exist only in relation to that product as defined by that authority. They cannot be found to exist for only a type, model, or category of that product. ***Nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist at the level of an individual transaction***. Thus, when an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are not, in themselves, margins of dumping. Rather, they are merely "inputs that are [to be] aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer."[20]

21. The Appellate Body has also been equally clear in refuting the United States argument, raised again here, that the *Anti-Dumping Agreement*'s preclusion of zeroing is limited to original investigations.[21] Importantly, the Appellate Body has recognized that the definition of a product must remain consistent through all stages of an investigation, and furthermore, that the concepts of "dumping," "injury," and "margin of dumping" are interlinked and should be considered and interpreted in a coherent and consistent manner for all parts of the *Anti-Dumping Agreement*.[22] Based, in part, on these premises, the Appellate Body concluded as follows:

> We fail to see a textual or contextual basis in the GATT 1994 or the *Anti-Dumping Agreement* for treating transactions that occur above normal value as "dumped", for purposes of determining the existence and magnitude of dumping in the original investigation, and as "non-dumped", for purposes of assessing the final liability for payment of anti-dumping duties in a period review. If as a consequence of zeroing, the results of certain comparisons are disregarded only for purposes of assessing final liability for payment of anti-dumping duties in a periodic review, a mismatch is created between the product considered "dumped" in the original investigation and the product for which anti-dumping duties are collected. This is not consonant with the need for consistent treatment of a product at the various stages of anti-dumping duty proceedings.[23]

22. Even though the United States acknowledges that "[t]he Appellate Body has taken the view that the definition of 'dumping' may only be interpreted as applying at the 'level of the product under consideration,' not individual export transactions," the United States nevertheless requests that this Panel ignore the prior Appellate Body rulings and endorse the United States' transaction-specific interpretation.

23. To avoid still more futile rounds of dispute settlement at the WTO, this Panel should reconfirm not only that zeroing is absolutely prohibited in all antidumping proceedings, including administrative reviews and sunset reviews, but that "dumping" and "margins of dumping" are inherently aggregate concepts that apply exclusively to products as a whole under the *Anti-Dumping Agreement*.

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[20] Appellate Body Report, *US – Zeroing (Japan)*, para. 115 (emphasis added).

[21] *See* U.S. First Written Submission, para. 111.

[22] *See* Appellate Body Report, *US – Stainless Steel from Mexico*, para. 106; Appellate Body Report, *US – Continued Zeroing*, para. 284.

[23] Appellate Body Report, *US – Continued Zeroing*, para. 285.

24. In summary, the United States offers nothing more than rehashed arguments that have been roundly rejected by the Appellate Body.

C. THE UNITED STATES' CALCULATION OF ZERO OR *DE MINIMIS* RATES FOR INDIVIDUALLY EXAMINED RESPONDENTS IN ADMINISTRATIVE REVIEWS DOES NOT RENDER ITS ZEROING METHODOLOGY COMPLIANT WITH THE ANTI-DUMPING AGREEMENT

25. Despite its continued use of zeroing to calculate the margins of dumping for individually examined respondents in the second and third administrative reviews, the United States argues that it did not act inconsistently with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* because zero or *de minimis* margins were calculated for all such respondents.[24] Given that no antidumping duties were assessed, the United States reasons, it is not possible that antidumping duties in excess of the margins of dumping were imposed, as prohibited by Article 9.3. The United States ignores, however, the clear requirement in Article 9.3 that a margin be established consistent with Article 2 (*i.e.* without zeroing).

26. The United States is correct that, under Article 9.3 of the *Anti-Dumping Agreement*, a Member is prohibited from imposing an antidumping duty in excess of the margin of dumping as established in Article 2. Pursuant to Articles 9.3.1 and 9.3.2, a Member is required to refund any duties in excess of the actual margin of dumping determined under Article 2. A Member is, thus, required to first calculate the margin of dumping for the relevant exporter(s) during the period of review consistent with Article 2 (Step 1), and to then compare this amount to the total amount of duties actually collected (Step 2). To the extent the latter is greater than the former, the Member must provide refunds within the time allotted in Articles 9.3.1 and 9.3.2.

27. If the amount of duties actually collected on imports from a particular exporter or exporters is zero, it cannot exceed the actual margin of dumping.[25] Mexico therefore agrees that where no duties are collected from an importer, as is the case with respect to the imports from the individually examined respondents in the second and third administrative reviews here, no violation of Article 9.3.1 or 9.3.2 would exist. However, even where no duties are actually collected, the use of zeroing in the calculation of the margin of dumping would still violate Article 9.3.

28. Specifically, the use of zeroing would violate the obligation in the chapeau of Article 9.3 that requires a Member to calculate a margin of dumping "as established under Article 2" (Step 1 above). As the Appellate Body has repeatedly affirmed, zeroing cannot be used to calculate a margin of dumping under Article 2, including in periodic reviews.

29. Accordingly, a Member that used zeroing has failed to calculate a "margin of dumping as established under Article 2," regardless of whether any antidumping duties were actually collected on the basis of that margin calculation. Accordingly, USDOC's undisputed use of zeroing to calculate the margins of dumping for individually examined respondents in the second and third administrative reviews still violates the *Anti-Dumping Agreement*.

[24] U.S. First Written Submission, para. 109.

[25] Theoretically, zero duties collected would be greater than a negative margin of dumping, but a Member is not required to provide refunds for sales above normal value. *See* Appellate Body Report, *US – Stainless Steel from Mexico*, para. 113 n. 237; Appellate Body Report, *US – Zeroing (Japan)*, para. 155 n. 363; Appellate Body Report, *US – Zeroing (EC)*, para. 131 n. 234.

IV. THE CONTINUED USE OF THE ZEROING PROCEDURES BY THE UNITED STATES IS PROPERLY CHALLENGED AND SUBJECT TO PANEL REVIEW IN THIS DISPUTE

30. The United States is also misguided in its request for a preliminary ruling that Vietnam's challenge to the continued use of U.S. zeroing procedures fails because it purports to include "future measures." The United States argues that Vietnam appears to be challenging "an indeterminate number of potential future measures," and that "[m]easures that are not yet in existence are not within a panel's term [sic] of reference under the DSU."[26] As the Appellate Body has confirmed, the United States' position is flawed because it fails to recognize administrative reviews as segments of the same proceeding and because it erroneously assumes that all future conduct is beyond the reach of the WTO dispute settlement process.

31. The United States would like this tribunal to treat an AD order as series of autonomous and independent measures. For the United States, a definitive AD original determination would be an independent measure from the first subsequent administrative review, which would be itself independent from the second review, and so on with respect to the third, fourth, and even after the sunset review. Following the United States' suggestion would mean that an application of a practice in the original final determination that violates the *Anti-Dumping Agreement*, such as zeroing, would be independent from the application of the same practice in the first administrative review, and subsequent reviews. In the eyes of the United States, the AD order would be a series of one-year-hit-and-run measures outside the scope of WTO dispute settlement.

32. The United States' only support for its contention is the panel report in *United States – Upland Cotton*.[27] The United States' reliance on *Upland Cotton* is misplaced. In *Upland Cotton*, the Panel found that payments under the Agricultural Assistance Act of 2003 (the "Act") were not within the Panel's terms of reference because the Act was not enacted until after the panel request. As a result, consultations were not sought or held on the payments under the Act. The Panel also specifically "noted[d] that the cottonseed payments for each year were *ad hoc* appropriations, each with a separate legal basis, which did not follow a single model."[28] The Panel further found that the relevant section "did not amend or modify any existing or previous programme. Unlike Public Law 107-25, it did not provide for assistance under an earlier law, it did not define the recipients as those who had previously received assistance an it was not implemented by an existing regulation."[29] The Panel thus concluded that "[t]his evidence discloses the existence of separate and legally distinct cottonseed payment programmes for crops in different years rather than a single cottonseed payment programme."[30]

33. In contrast, in this dispute Vietnam challenges the continued application of zeroing in periodic reviews and "sunset" reviews conducted as stages of a continuous proceeding involving the imposition, assessment, and collection of duties under the same AD order. In fact, USDOC's own regulations regard administrative reviews as "segments" in one single proceeding beginning on the date the anti-dumping petition is filed and continuing until the AD order is revoked.[31] Therefore, Vietnam has every right to challenge in this dispute USDOC's continued use of zeroing in successive proceedings under a single AD order.

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[26] U.S. First Written Submission, para. 96.
[27] *Id.*
[28] Panel Report, *US – Upland Cotton*, para. 7.162 (citations omitted).
[29] *Id.*, para. 7.165 (citations omitted).
[30] *Id.*, para. 7.167.
[31] *See* 19 C.F.R. § 351.102(40),(47).

34. The Appellate Body endorsed just such a challenge in *US – Continued Zeroing*, where it concluded that "continued use of the zeroing methodology in successive proceedings in which duties resulting from the 18 anti-dumping duty orders are maintained, constitute 'measures' that can be challenged in WTO dispute settlement."[32] The Appellate Body noted that the complaining Member, "in seeking an effective resolution of its dispute with the United States, is entitled to frame the subject of its challenge in such a way as to bring the ongoing conduct, regarding the use of the zeroing methodology in [the case], under the scrutiny of WTO dispute settlement."[33]

35. In arriving at its conclusion, the Appellate Body reasoned as follows:

> As discussed, we are of the view that it can be discerned from the panel request, read as a whole, that the measures at issue consist of an ongoing conduct, that is, the use of the zeroing methodology in successive proceedings in each of the 18 cases whereby anti-dumping duties are maintained. The prospective nature of the remedy sought by the European Communities is congruent with the fact that the measures at issue are alleged to be ongoing, with prospective application and a life potentially stretching into the future. Moreover, it is not uncommon for remedies sought in WTO dispute settlement to have prospective effect, such as a finding against laws or regulations, as such, or a subsidy programme with regularly recurring payments.
>
> ...
>
> We see no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement. The successive determinations by which duties are maintained are connected stages in each of the 18 cases involving imposition, assessment, and collection of duties under the same anti-dumping duty order. The use of the zeroing methodology in a string of these stages is the allegedly unchanged component of each of the 18 measures at issue. It is with respect to this ongoing conduct that the European Communities brought its challenge, seeking its cessation.[34]

36. With respect to the AD order on certain shrimp from Vietnam, USDOC has applied zeroing at every stage and has given no indication that it will change its approach in future stages. The United States erroneously claims that Vietnam cannot establish a sequential string of determinations over a period of time sufficient to justify a finding that zeroing would likely continue to be applied in successive proceedings.[35] The United States reasons that this is so because: 1) the first, fourth, and fifth administrative reviews are not within the Panel's terms of reference; 2) zeroing did not impact the individually examined respondents in the second and third administrative reviews; and 3) zeroing arguably was not used to calculate the margins for respondents not individually examined (*i.e.* those subject to a separate rate or the country-wide rate) in the second and third administrative reviews.[36]

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[32] *See* Appellate Body Report, *US – Continued Zeroing*, para. 185.
[33] *Id.*, para 181.
[34] Appellate Body Report, *US – Continued Zeroing*, paras 171 and 181.
[35] *See* U.S. First Written Submission, para. 219.
[36] *See id.*

37. Even putting aside whether the United States' three premises are correct, an established and sequential pattern can be established on this record because, as a factual matter, USDOC applied zeroing in every one of those reviews. Even if Vietnam's accession date precludes a WTO panel from issuing legal rulings with respect to the first administrative review, this Panel is not required to pretend that, as a factual matter, that proceeding never occurred. Therefore, this Panel has every reason to believe, based on evidence of USDOC's consistent practice up to this point, that zeroing is likely to continue in successive proceedings under the AD order on certain shrimp from Vietnam.

38. It is the ongoing conduct of the United States in continuing to use zeroing in successive determinations by which anti-dumping duties are applied and maintained that Vietnam is challenging as "ongoing conduct" here. Vietnam is entitled to frame its challenge in way that subjects this ongoing conduct to the scrutiny of WTO dispute settlement. Accordingly, the United States' request for a preliminary ruling in this respect should be denied.

V. THE ZEROED "SEPARATE RATES" INCORPORATED BY THE UNITED STATES IN THE SECOND AND THIRD ADMINISTRATIVE REVIEWS ARE PROPERLY CHALLENGED AND SUBJECT TO PANEL REVIEW IN THIS DISPUTE

39. The United States argues that "to the extent that Commerce relied on dumping margins calculated during the investigation in later assessment reviews, the use of such margins in an assessment review cannot result in a finding that the determination ***in the investigation*** is inconsistent with Article 2.4.2 of the AD Agreement."[37] The United States relies on this reasoning to suggest that this Panel cannot review the "separate rates" determined in the second and third administrative reviews, which merely adopted a weighted-average margin of dumping calculated using zeroing in the original investigation. The United States misconstrues Vietnam's challenge in this regard.

40. As Mexico understands it, Vietnam is not seeking a finding that the determination in the investigation is inconsistent with the *Anti-Dumping Agreement*. Such a finding would, in theory, result in revocation of the AD order and would affect the assessment of duties on imports during the period of investigation.

41. Rather, Vietnam is challenging the "separate rate" (or "all-others rate") as determined in the second and third administrative reviews, and there is no question that these reviews are properly subject to review by this Panel.[38] The separate rates in these reviews are distinct determinations published in by USDOC in the *Federal Register* and bear no obvious (or usual) relationship to rates determined in the original investigation. It is the United States that chose to incorporate data from the original investigation to reach its determinations in these reviews and, regardless of whether that decision was reasonable and WTO-consistent, it certainly cannot shield the United States' determinations in the second and third administrative reviews from the scrutiny of this Panel.

42. Accordingly, this Panel should review Vietnam's challenge to the separate rates determined by USDOC in the second and third administrative reviews. And because these rates were unquestionably calculated through the use of zeroing, they should be rejected as unreasonable and inconsistent with the *Anti-Dumping Agreement*.

[37] *Id.*, para. 101 (emphasis in original).
[38] *See* Viet Nam First Written Submission, paras. 208, 210.

VI. THE ORIGINAL INVESTIGATION IS NOT EXCLUDED FROM THIS PANEL'S TERMS OF REFERENCE BY VIRTUE OF THE CONSULTATIONS BETWEEN VIETNAM AND THE UNITED STATES

43. The United States argues that the original investigation resulting in the AD Order on certain shrimp from Vietnam is not subject to this Panel's terms of reference. The United States relies, in part, on Vietnam's request for consultations.[39] The United States places undue emphasis on the request for consultations and ignores Vietnam's request for the establishment of a panel.

44. Previous panels and the Appellate Body have specifically highlighted that "a WTO panel's terms of reference are governed by the complaining Member's panel request, as opposed to it its consultations request."[40] Thus, the United States is incorrect in its suggestion that the consultations request sets the matter in stone, thereby limiting what can properly be raised before this Panel.[41] As the Appellate Body has noted, "the purpose of consultations is to clarify the facts of the situation and to arrive at a mutually agreed solution."[42] Neither "Articles 4 and 6 of the DSU, [n]or paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."[43]

45. The Panel in *United States – Continued Zeroing* made clear that that, "as long as the consultations request and the panel request concern the same matter, or dispute, claims raised in connection with measures identified in the complaining Member's panel request would fall within a panel's terms of reference even if those precise measures were not identified in the consultations request."[44] Vietnam clearly cited USDOC's original investigation determination in its panel request. The United States errs by failing to acknowledge or address this inclusion in the panel request, which determines this Panel's proper terms of reference.

VII. CONCLUSION

46. Mexico appreciates the opportunity to participate in these proceedings, and to present its views to the Panel.

47. For the foregoing reasons, Mexico respectfully urges the Panel to find, consistent with established Appellate Body precedent, that "dumping" and "margin of dumping" are inherently aggregate concepts that cannot exist on a transaction-specific basis, and thus, zeroing in administrative reviews and sunset reviews is precluded by the *Anti-Dumping Agreement* and the GATT 1994. Mexico requests that the Panel further find that the United States' continued use of zeroing in subsequent proceedings is properly subject to review by this Panel, as are zeroed rates incorporated in measures within this Panel's terms of reference.

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[39] *See* U.S. First Written Submission, paras. 81-84.
[40] Panel Report, *US – Continued Zeroing*, para. 7.23 (citing Appellate Body Report, *Brazil – Aircraft*).
[41] *See* U.S. First Written Submission, para. 82.
[42] Panel Report, *Brazil – Aircraft*, para. 131 (internal quotations omitted).
[43] *Id.*, para. 132 (emphasis in original).
[44] Panel Report, *US – Continued Zeroing*, para. 7.22.

ANNEX C

ORAL STATEMENTS OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL OR EXECUTIVE SUMMARIES THEREOF

ANNEX C-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF VIET NAM AT THE FIRST MEETING OF THE PANEL

I. OVERVIEW

1. This Panel proceeding is essentially about legal interpretations of various provisions of the Anti-Dumping Agreement.

2. First, it involves the question of whether the practice of zeroing as engaged in by the U.S. in determining the margins of dumping in repeated administrative reviews is consistent with U.S. obligations under Article VI:1 of the GATT 1994 and Articles 2.1, 2.4.2, and 9.3 of the Anti-Dumping Agreement. Second, it involves the question of whether a so-called "Vietnam-wide entity" rate based on adverse facts available is permitted under Articles 2, 6 and 9 of the Anti-Dumping Agreement. Third, it involves the question of whether an "all others" or "separate" rate applicable to non-reviewed respondents based on zeroing applied in a prior segment of an antidumping proceeding is consistent with Articles 2.4 and 9.4 of the Anti-Dumping Agreement. This question raises two related issues: one, is it reasonable to assume continued margins of dumping by non-reviewed respondents when the reviewed mandatory respondents have demonstrated the absence of dumping since imposition of the anti-dumping order. And two, if zeroing in periodic reviews is prohibited, then application of a rate based on zeroing for purposes of the "all others" or "separate rate" must also be prohibited. Fourth, this dispute involves the question of whether the exception provided in Article 6.10, which permits restricting the scope of an investigation or review to a sample of exporters/producers or those accounting for the largest volume of exports, allows authorities to continuously ignore other non-procedural obligations of the Anti-Dumping Agreement. Fifth, it involves the question of whether a five-year sunset review to determine whether dumping is continuing or likely to recur under Article 11.3 can be properly based on determinations in consecutive periodic reviews each of which is inconsistent with the Anti-Dumping Agreement in the multiple ways described above.

II. THE PANEL'S ANALYTIC FRAMEWORK MUST BE INFORMED BY APPELLATE BODY PRECEDENT, THE ACCEPTED RULES OF TREATY INTERPRETATION OF THE VIENNA CONVENTION, AND THE OBJECT AND PURPOSE OF SOVEREIGN ENTITIES IN ENTERING INTO AN INTERNATIONAL AGREEMENT OR TREATY

3. The WTO Agreements define a set of rights and obligations which the signatories have agreed to follow. The WTO Agreements define a rules based system of international trade with non-discrimination as the core principle. The dispute settlement system of the WTO "is a central element in providing security and predictability to the multilateral trading system" and "serves to preserve the rights and obligations of Members."

4. At paragraphs 67-70 of its First Written Submission, the United States suggests that the Panel in the instant proceeding is not bound by Appellate Body precedent and should conduct a *de novo* review of whether zeroing in periodic reviews is prohibited under the Anti-Dumping Agreement. The logical conclusion of the U.S. position is that identical factual scenarios raised under the same provision of an agreement can result in different treatment. Thus, zeroing can be applied to Viet Nam if this Panel disagrees with all Appellate Body precedent, but cannot be applied to another country

(or, indeed, in another dispute involving Viet Nam) if the Panel hearing that dispute agrees with Appellate Body precedent. This undermines both the non-discrimination principle of the WTO and the object and purpose of the Dispute Settlement Understanding to provide security and predictability.

III. THE "CONTINUED USE OF CHALLENGED PRACTICES" IS A MEASURE SUBJECT TO DISPUTE SETTLEMENT AND IS WITHIN THIS PANEL'S TERMS OF REFERENCE

A. NEITHER THE DSU NOR THE ANTI-DUMPING AGREEMENT PRECLUDE A MEMBER FROM CHALLENGING THE CONTINUED AND ONGOING USE OF A WTO-INCONSISTENT PRACTICE

5. With this measure, Viet Nam requests that the Panel consider the USDOC's use of certain practices at each segment of the shrimp antidumping proceeding since imposition of the antidumping duty order. Viet Nam's first written submission establishes a pattern of conduct by the USDOC that started with imposition of the antidumping duty order and continues to this moment. The USDOC has given no indication of its intentions to revise the conduct in future segments of this proceeding, necessitating inclusion of this measure.

6. The Appellate Body recently recognized a Panel's duty to consider measures that evaluate an authority's continued and ongoing use of certain practices in the context of a single antidumping duty order. Only through inclusion of this measure is the complaining Member able to ensure that the decision of the Panel will be respected for those determinations already completed and for future determinations. Failure to permit this measure would lead to a multiplicity of litigation where an authority, such as the USDOC, does not revise its practices in subsequent determinations to conform with a Panel's or the Appellate Body's findings.

B. VIET NAM PROPERLY PROVIDED NOTICE IN THE PANEL REQUEST OF THE "CONTINUED USE OF CHALLENGED PRACTICES" MEASURE

7. Viet Nam identified the "continued use of challenged practices" measure in its Panel request in a manner consistent with Article 6.2. Viet Nam included in the Panel request each segment of the proceeding that had at the time of the Panel request been initiated – the investigation, the four periodic reviews, and the initiation of the five-year sunset review – to illustrate the continuous and ongoing nature of the challenged practices since imposition of the antidumping duty order. Viet Nam provided in the list those determinations completed prior to Viet Nam's accession to the WTO and those segments not yet final to ensure that the Panel and Members understood Viet Nam's concerns with the continued use.

IV. THE USDOC'S RELIANCE ON MARGINS OF DUMPING CALCULATED USING THE ZEROING METHODOLOGY IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

8. We wish to provide for the Panel at the outset a clear description of the zeroing claims being made in this dispute. First, Viet Nam provided in its first written submission substantial factual documentation establishing that the USDOC utilized its zeroing methodology in the investigation and four completed periodic reviews. Viet Nam also advanced arguments based on the text of the Anti-Dumping Agreement – arguments that have been repeatedly adopted by the Appellate Body – establishing that the USDOC's model zeroing and simple zeroing methodologies are inconsistent with the Anti-Dumping Agreement.

9. Viet Nam also provided in its first written submission evidence that (1) the USDOC utilized the model zeroing methodology in the investigation to calculate margins of dumping for individually examined producers; (2) the USDOC relied on these margins of dumping for the purpose of

calculating the separate rate in the investigation; and (3) the USDOC relied on the separate rate calculated and applied in the investigation when assigning the separate rate in the second and third administrative reviews. Based on this series of indisputable facts, the USDOC's use of model zeroing in the investigation resulted in application of an impermissibly high separate rate in the second and third administrative reviews.

A. VIET NAM HAS SHOWN AS A MATTER OF FACT AND AS A MATTER OF LAW THAT THE USDOC'S CONTINUED AND ONGOING USE OF THE ZEROING METHODOLOGY IS INCONSISTENT WITH THE GATT 1994 AND THE ANTI-DUMPING AGREEMENT

1. As a Matter of Fact, the USDOC has Utilized the Zeroing Methodology at All Segments of the Shrimp Antidumping Proceeding

10. Viet Nam submits that the first written submission provided for the Panel overwhelming factual evidence on the USDOC's use of margins of dumping calculated using zeroing at each segment of the shrimp proceeding: the investigation, the four completed periodic reviews, and the preliminary results of the five-year sunset review.

2. As a Matter of Law, the USDOC's Continued and Ongoing Use of the Zeroing Methodology is Inconsistent with the United States' WTO Obligations

(a) The Use of Model Zeroing in Original Investigations is Inconsistent with the United States' WTO Obligations

11. The crux of the debate is the proper interpretation of the concepts of "dumping" and "margins of dumping." Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement define these concepts in relation to the product under examination as a whole. That is, "dumping" or a "margin of dumping" may only be found to exist for the product subject to investigation and not for a model, which is only a subset of the product under investigation. Although the USDOC may undertake multiple comparisons using averaging groups or models, the results of the multiple comparisons at the sub-product or intermediate level are not "margins of dumping." It is only on the basis of aggregating these "intermediate values" that an authority can establish margins of dumping for the product under investigation as a whole.

(b) The Use of Simple Zeroing in Periodic Reviews is Inconsistent with the United States' WTO Obligations

12. Viet Nam now turns to the legal arguments on the use of zeroing in periodic reviews – the assessment phase of an antidumping proceeding – which build upon the interpretations discussed above on the concepts of "dumping" and "margin of dumping." As in the case of model zeroing, Viet Nam is presenting to the Panel the exact legal reasoning that has been repeatedly adopted by the Appellate Body in multiple zeroing disputes. Article 9.3 of the Anti-Dumping Agreement governs the assessment of final antidumping duties in a retrospective system and mirrors the language of Article VI:2 of the GATT 1994. The article requires that "[t]he amount of the antidumping duty shall not exceed the margin of dumping as established under Article 2." Thus, the margin of dumping determined for an exporter or producer operates as a ceiling on the amount of antidumping duties that can be imposed on the entries of the subject merchandise. It is important to tie the term "margin of dumping" as used in Article 9.3 with the interpretation of this same phrase discussed above. As explained, Article 2.4.2 requires that the margin of dumping calculation take into consideration all transactions for the product as a whole, not merely a subset. It is only through aggregating all intermediate values that the authority can determine the margin of dumping for the product; systematically excluding transactions that produce negative dumping margins ignores this requirement. Viet Nam notes that the Appellate Body has recognized that this reasoning applies with

equal force in the context of simple zeroing, where comparisons are made at a transaction specific level (as opposed to a model specific level). Just as removing select models from the margin of dumping calculation produces a result that fails to account for all comparable export transactions, so too does removing particular transactions. Lastly, we observe that USDOC's assessment of zero or *de minimis* rates to the mandatory respondents in the second and third administrative reviews is irrelevant for purposes of the "continued use of challenged practices" claim.

13. Nevertheless, we believe that the United States' "no harm no foul" argument is simply wrong. An exporter/producer that wishes to avoid the payment of antidumping duties must price differently to obtain a zero margin if zeroing is applied. The application of zeroing puts a price constraint on respondents seeking to avoid or minimize antidumping duties.

B. VIET NAM HAS SHOWN AS A MATTER OF FACT AND AS A MATTER OF LAW THAT THE USDOC'S ASSESSMENT OF ALL-OTHERS RATES BASED ON MARGINS OF DUMPING CALCULATED USING ZEROING IN THE SECOND AND THIRD ADMINISTRATIVE REVIEWS IS INCONSISTENT WITH THE GATT 1994 AND THE ANTI-DUMPING AGREEMENT

14. As discussed in Viet Nam's first written submission, the USDOC's all-others assessment rate for the second and third administrative reviews are in actuality based on the final antidumping duty margins calculated in the original investigation, namely, the weighted average of the antidumping duty rates determined for investigated companies. Thus, as a matter of fact, the USDOC relied on margins of dumping calculated using zeroing to determine the all-others rate in the second and third administrative reviews. As a matter of law, for the reasons explained above, the zeroing methodology is inconsistent with the Anti-Dumping Agreement.

V. THE ALL-OTHERS RATES APPLIED IN THE SECOND AND THIRD ADMINISTRATIVE REVIEWS IMPERMISSIBLY RELY ON MARGINS OF DUMPING CALCULATED FROM A PREVIOUS SEGMENT OF THE PROCEEDING

15. Separate and apart from the claim described above, Viet Nam submits that the all-others rates used in the second and third administrative reviews impermissibly rely on rates calculated from a previous segment of the proceeding. Article 9.4, which guides authorities on the rate calculation for companies not individually examined, does not require use of a particular methodology. The Appellate Body has concluded, however, that the article does impose an obligation on authorities when calculating an all-others rate, even where all rates are zero, *de minimis*, or based on facts available. This obligation stems from the underlying purpose of the article, which demands that parties not individually examined not be prejudiced by the actions of other parties. Thus, when confronted with the situation that exists here, the USDOC has an obligation to adopt a reasonable practice that does not subject the non-examined companies to unfair prejudice. Viet Nam submits that the proper approach under Article 9.4 is reliance on the margins of dumping calculated in the contemporaneous proceeding. To rely on stale antidumping rates requires that the USDOC ignore all available evidence on the subject industry's response to the imposition of the antidumping order.

VI. THE USDOC'S CALCULATION OF A "VIETNAM-WIDE ENTITY" RATE HAS NO BASIS IN THE ANTI-DUMPING AGREEMENT OR VIET NAM'S PROTOCOL OF ACCESSION

A. THE USDOC HAS NO BASIS FOR APPLYING THE DISCRIMINATORY VIETNAM-WIDE ENTITY RATE TO CERTAIN VIETNAMESE PRODUCERS AND EXPORTERS

16. The USDOC's has assessed at each stage of this proceeding a highly punitive Vietnam-wide entity rate for producers or exporters that do not satisfy the USDOC's separate rate criteria. This rate

has no foundation in the Anti-Dumping Agreement or Viet Nam's Protocol of Accession. As an initial matter, Viet Nam does not dispute the general principle that an authority may assign a single antidumping rate to multiple entities. This issue is not before the Panel.

17. At the time of accession, Viet Nam understood that certain concessions would be necessary to assuage the concerns of market economy countries that Viet Nam's economy was not sufficiently market based to allow for application of the antidumping remedy. Accordingly, Viet Nam agreed to the specific instances in which an administering authority could treat Vietnamese entities differently than entities from other Member countries. These specific instances are detailed in paragraph 527 of the Working Party Report and in Viet Nam's Protocol of Accession. Neither document provides that an investigating authority may impose a rebuttable presumption that all exporters or producers operate under the control of the government. There is simply no basis by which the USDOC can impose additional commitments in the form of discriminatory and unjustified presumptions towards Vietnamese producers or exporters not likewise applied to the producers of other Member countries.

B. THE USDOC'S APPLICATION OF ADVERSE FACTS AVAILABLE TO THE VIETNAM-WIDE ENTITY RATE IS INCONSISTENT WITH ARTICLE 6.8 OF THE ANTI-DUMPING AGREEMENT

18. The USDOC has no basis for its reliance on a facts available rate pursuant to Article 6.8 for the Vietnam-wide entity in place of a properly calculated all-others rate pursuant to Article 9.4. Accordingly, the Vietnam-wide entity may only properly be assigned an all-others rate pursuant to Article 9.4.

19. We would like to note the important factual distinction between the second and third administrative reviews. In the second administrative review, the USDOC requested certain information from all exporters and producers on the quantity and value of U.S. exports of subject merchandise; the Vietnam-wide entity's failure to provide this information, which the United States identified as "necessary information," purportedly justified use of the punitive adverse facts available rate pursuant to Article 6.8. In the third administrative review, however, this information was never requested of any parties. Nevertheless, the USDOC continued to apply the punitive adverse facts available rate pursuant to Article 6.8, concluding that the companies (the Vietnam-wide entity) failed to establish their independence from government control. There is a disconnect and inconsistency with the USDOC's explanations on the basis for the application of adverse facts pursuant to Article 6.8, as the United States went to great lengths to explain that in the second administrative review, "Commerce did not punish parties for not meeting the criteria to receive an individual (or "separate") rate."[1] The results of the third administrative review directly contradict this claim, and raise questions about the United States' apparent post hoc rationalization for the application of adverse facts to the Vietnam-wide entity.

VII. THE USDOC'S LIMITED RESPONDENT SELECTION PRACTICE IS INCONSISTENT WITH ARTICLE 6.10 OF THE ANTI-DUMPING AGREEMENT

20. Finally, Viet Nam will briefly discuss the claims relating to the USDOC's practice of limiting the number of interested parties eligible for individual examination. Article 6.10 of the Anti-Dumping Agreement requires as a general rule that the administering authority shall determine the individual dumping margin for each known exporter or producer of the subject merchandise. The Article does, however, provide a limited exception where examining all known exporters or producers would be impracticable because of the large number of such parties. Viet Nam submits that the issue before the Panel is whether this exception can override and render superfluous other provisions of the Anti-Dumping Agreement. In creating a rule out of the exception, the USDOC has

[1] U.S. FWS at para. 162.

denied Vietnamese interested parties their rights under Articles 6.10, 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement.

21. The continued and ongoing limitations imposed by the USDOC on the number of respondents results in the nullification of other provisions and principles in the Anti-Dumping Agreement. This includes the protection of exporters and producers from paying an antidumping duty in excess of their margin of dumping pursuant to Article 9.3; the ability of exporters and producers to obtain revocation of an order upon demonstration that they are no longer dumping pursuant to Article 11.1; and the ability of exporters and producers to benefit from termination of an order based on a demonstration of no likelihood of recurrence or continuation of dumping pursuant to Article 11.3.

22. We would also like to comment on the USDOC's refusal in the shrimp antidumping proceeding to consider the submission of voluntary responses, contrary to the clear language of Article 6.10.2. That article requires that "[v]oluntary responses shall not be discouraged." The USDOC has acted in direct conflict with this clear statement, refusing to consider requests for voluntary respondent treatment and refusing to consider complete submissions made by parties hoping for voluntary treatment from the USDOC.

VIII. CONCLUSION

23. After years of being assessed duties in excess of the margins of dumping and being denied the opportunity to demonstrate the absence of dumping, the Vietnamese exporters and producers hope that this Panel will conclude that the U.S. has and continues to act in a manner inconsistent with its obligations under the Anti-Dumping Agreement and must bring its actions into consistency with those obligations.

24. Thank you for your patience and attention. I look forward to answering your questions.

ANNEX C-2

CLOSING STATEMENT OF VIET NAM AT THE FIRST MEETING OF THE PANEL

1. As we went through this first meeting with the Panel, I thought that the process worked very well and I think that we had a good dialogue, with the third parties adding to that dialogue this morning. What I want to come back to are just a few of the major points which I think are relevant.

2. First, we have been discussing the exception to the rule contained in Article 6.10. What I would like to make sure of is that we not miss the forest for the trees on this issue, because in these sessions we tend to get so deep into the tress. A couple of observations. First, the limitation on the number of respondents should not be looked at in isolation from the rest of the Anti-Dumping Agreement. There is an agreement, the agreement is affecting many foreign exporters, and the exception to the general rule has to be read in the context of the entire agreement, as well as the context of that rule. Our concern is whether the exception provided in article 6.10 can be implemented in a way that ignores other obligations in the agreement. We can talk about what are the constraints on the U.S. or whether they can take voluntary respondents. The relevant question, however, is who has responsibility at the end of the day to ensure there is compliance with the overall object and purpose of the agreement and the specific obligations of the Agreement outside of Article 6.10. The point we are trying to make is not that the U.S. is required to investigate every exporter or producer, but that if the U.S. chooses not to, it must determine how to do so while still fulfilling its other obligations under the agreement. The U.S. can not use this exception to justify actions which are otherwise inconsistent with the agreement.

3. The other issue to consider with regard to the exception to the general rule in Article 6.10 is the concern that if one reads the exception in isolation and do not put a burden on the authorities to meet its other obligations under the agreement, authorities could use the exception to essentially override other obligations, creating an enormous loophole for authorities to use to avoid the obligations of the agreement.

4. On the country-wide rate, the real issue is whether there is the authority in the agreement to apply an adverse facts available rate to companies simply because they are government controlled.

5. Going back to my earlier comment that justice delayed is justice denied, I want to give you a sense of what happens as a practical matter. The U.S., justifiably under the agreements, only applies panel reports or AB reports prospectively. When a review is completed, the U.S. immediately liquidates those entries; once those entries are liquidated, they are gone forever and cannot be retrieved, regardless of whether a WTO decision against the method of calculation of duties has been made. You can prevent liquidation only by appealing to the United States Court of International Trade (CIT). If you have an appeal pending, the CIT will enjoin liquidation of those entries pending resolution of the litigation, a process that generally takes one to three years, assuming an appeal from the CIT to the Court of Appeals for the Federal Circuit. There is no provision under U.S. law to enjoin the liquidation of entries pending a WTO appeal. So respondents have a one to three year window, if they are willing to go to U.S. courts and have a claim under U.S. law, to enforce a WTO report which disagrees with the action of the U.S. authorities. Our concern, which is why we look at the continued practices measure, is that often the WTO dispute settlement and implementation process is completed too late for foreign respondent to get their duties back. Thus, respondents have a

wonderful moral victory, but at the end of the day there is no actual benefit obtained from the WTO proceeding.

6. Finally, I want to mention Article 11 of the DSU. There must be some security and predictability in the system. When, as the EU expressed it, there is a practice embedded in a particular proceeding, producers and exporters have to make a decision: am I to assume that the practice will go on forever, or that somehow it will be changed. The issue is fundamental: how does a company know, if it wants to avoid payment of dumping duties, whether or not it is dumping. We need the provisions of the agreement interpreted so that all parties understand the rules of the game. This makes it extraordinarily important that when panels confront questions of interpretation, that the panels understand and articulate the interpretation in a manner which both the respondents and the authorities can understand and implement. I know that we have a number of complicated issues, such as the all others rate and the country-wide rate, and ask that the panel deal with each of these issues as thoroughly and completely as possible.

7. Viet Nam would like to again thank the panel and the Secretariat for its continuing work on the issues being presented to it.

ANNEX C-3

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

1. The U.S. First Written Submission provides a detailed response to the arguments raised in Vietnam's First Written Submission. Today we will highlight several important issues. At the outset, it is important to have a clear understanding of exactly what Vietnam is asking the Panel to do in this dispute. Rather than advance an argument based on the plain meaning of the rules agreed among the Members of the WTO, and accepted by Vietnam when it acceded to the WTO in 2007, Vietnam asks this Panel to accept interpretations of those rules that have little connection with how they are properly understood in light of their ordinary meaning, read in context, and in light of the object and purpose of the agreements at issue. In numerous instances in this dispute, Vietnam asks the Panel to rewrite or ignore provisions of the WTO agreements and disregard key facts. For example:

- Vietnam asks the Panel to ignore the requirements of Article 6.2 of the DSU, and the Panel's own terms of reference, to overcome the shortcomings of Vietnam's panel request, urging the Panel to make findings with respect to a so-called "measure" that Vietnam did not identify until its First Written Submission;

- Vietnam asks the Panel to find that the United States breached its WTO obligations by employing the zeroing methodology in review proceedings, despite the absence of any language in the covered agreements imposing such a general prohibition of zeroing in reviews. Moreover, Vietnam has failed to demonstrate how it has been affected by any application of the "zeroing" methodology when, in fact, all calculated margins of dumping in the review proceedings subject to this dispute were zero or *de minimis*;

- Vietnam asks the Panel to disregard the non-market nature of Vietnam's economy and impose on WTO Members an obligation to calculate a dumping margin for <u>any</u> company that requests one, regardless of the company's business affiliations or the government's influence over the company's export activities, when no such obligation exists in the AD Agreement;

- Vietnam invites the Panel to create a host of new obligations for WTO Members faced with large numbers of exporters or producers in antidumping proceedings, including a requirement to examine <u>all</u> companies without regard for the government's limited resources; a numerical cap on the frequency with which a WTO Member may exercise the right to limit the examination; an extremely narrow definition of what constitutes "necessary information"; and additional requirements for the calculation of a ceiling rate for non-examined companies that simply have no support whatsoever in the text of the AD Agreement;

- Vietnam argues that measures put into place prior to Vietnam's accession to the WTO – when, as Vietnam has recognized, the United States "had no obligation to Viet Nam" – should retroactively be found inconsistent with the WTO Agreement because they continue to be applied, despite the AD Agreement's express exemption of such measures from its application;

- And Vietnam asks the Panel to find, with respect to the so-called "continued use measure," that the United States has violated, or is violating, or perhaps in the future will violate its WTO obligations, but Vietnam has failed to demonstrate, for any proceeding within the Panel's terms of reference, that the United States has acted inconsistently with any WTO obligations, and Vietnam certainly cannot establish a "string" of violations over an "extended period of time."

2. In sum, Vietnam is asking the Panel to impose on the United States obligations found nowhere in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") or the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). If accepted, Vietnam's interpretations would seriously undermine the ability of investigating authorities to conduct antidumping examinations, particularly when they are faced with incomplete information, uncooperative interested parties, and large numbers of respondent firms. The United States thus respectfully urges the Panel to reject Vietnam's claims.

I. REQUESTS FOR PRELIMINARY RULINGS

3. **Investigation and First Administrative Review**: The United States appreciates the clarification in Vietnam's written response to the U.S. requests that Vietnam is not alleging that the original investigation or first administrative review are within the Panel's terms of reference. However, given the inconsistency between the panel request and Vietnam's First Written Submission with regard to the measures at issue, it is important to clarify the matter in dispute at the outset of these proceedings.

4. Vietnam's written response to the U.S. preliminary ruling requests suggests that, "to the extent that these measures [the investigation and first administrative review] served as the basis for measures applied after Vietnam's accession to the WTO and are inconsistent with U.S. obligations under the Agreement at that time, the consistency of the measures in the investigation and first review with U.S. obligations after Vietnam's accession are relevant to the panel's inquiry." Vietnam appears to formulate this issue incorrectly. As Vietnam concedes, the United States "had no obligation to Viet Nam at the time it applied these measures." Thus, "the consistency of the measures in the investigation and first review with U.S. obligations" is not relevant to the panel's inquiry, either "after Viet Nam's accession" or at any other time.

5. Article 18.3 of the AD Agreement strictly limits the application of the AD Agreement "to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement." As the panel in *US – DRAMS* explained, "pre-WTO measures do not become subject to the AD Agreement simply because they continue to be applied on or after the date of entry into force of the WTO Agreement for the Member concerned."[2]

6. The two measures subject to this dispute are the final determinations in the second and third administrative reviews. The Panel must assess whether those determinations – not the determinations made prior to Vietnam's WTO accession – are consistent with U.S. WTO obligations. This is more than a mere "semantic" disagreement. Thus, the United States respectfully reiterates its request that the Panel find that the AD Agreement does not apply to the determinations made in the investigation and the first administrative review.

7. In addition, the U.S. First Written Submission explained that the investigation is not within the Panel's terms of reference because it was not a subject of consultations. The United States notes that Vietnam did not respond to the U.S. argument in this regard in its written response to the U.S.

[2] *US – DRAMS*, para. 6.14.

preliminary ruling requests. The Panel should therefore find that the investigation is not within its terms of reference.

8. **The "Continued Use of Challenged Practices"**: There is an additional inconsistency between Vietnam's panel request and Vietnam's First Written Submission with regard to the measures at issue in this dispute. Vietnam's First Written Submission identifies as one of the "measures at issue" in this dispute what it describes as "the continued use of the challenged practices in successive antidumping proceedings under this order." However, as explained in the U.S. First Written Submission, this so-called "measure" was not identified in Vietnam's panel request, and thus it is not within the Panel's terms of reference.

9. Vietnam's arguments in its written response to the U.S. preliminary ruling requests are unavailing. First, Vietnam itself does not point to any identification of such a "measure" in its panel request, but rather appears to argue that it was implicit and the reader should infer such a measure from the identification of other, specific measures. Article 6.2 of the DSU requires a complaining party to "identify the specific measures at issue." Identifying certain specific measures does not mean that an additional, separate measure has also been identified.

10. Vietnam may describe the measures it seeks to challenge in the manner and using the words that Vietnam chooses. However, the description Vietnam presents in its panel request must "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

11. Vietnam's panel request individually identified each proceeding related to shrimp antidumping duties that had at the time of the panel request been initiated – the investigation, each of the four periodic reviews, and the five-year sunset review. Vietnam asserts that this list served "to illustrate the continuous and ongoing nature of the challenged practices since imposition of the antidumping duty order." Contrary to this assertion, however, the panel request expressly limits the measures at issue to the specific "determinations" identified in the list at the beginning of Section 2. Throughout the document, Vietnam's panel request limits itself to the application of laws and procedures in the determinations individually identified. There is no indication in the panel request that Vietnam seeks to challenge a so-called "continued use" measure.

12. Vietnam itself draws distinctions between the "as applied," "as such," and "continued use" concepts, asserting that a "[continued use] measure <u>is certainly more broad</u> than an 'as applied' measure, but narrower than a generally applicable 'as such' measure." To the extent that such a "continued use" measure can even be deemed to exist – and the United States strongly disagrees that it can – since it "may fall in the cross-section" of previously understood concepts, it is insufficient to identify a selection of "as applied" measures and expect that, through implication, a "continuing measure" will be understood to also be a subject of the dispute.

13. The only evidence to which Vietnam points in addition to the list of "as applied" measures is the discussion in the panel request of the legal basis for Vietnam's claim against the "initiation" of the sunset review. However, this simply serves to highlight the absence of any indication in the panel request that Vietnam intended to challenge a "continued use" measure.

14. The issue before the Panel is not whether Vietnam used the precise language adopted by the European Communities in *US – Continued Zeroing*. The issue is whether Vietnam's panel request met the requirements of Article 6.2 of the DSU. It did not. Consequently, the United States respectfully requests that the Panel find that the so-called "continued use" measure is outside its terms of reference.

15. On the separate question of whether "continued use" can constitute a measure, the United States recognizes that, in *US – Continued Zeroing*, "the Appellate Body held that the ongoing conduct constituted a measure with prospective effect." The United States has concerns with the Appellate Body's reasoning in that dispute, but believes that the reasoning of the panel in *Upland Cotton* is sound.[3]

16. We also explained in the U.S. First Written Submission that the "continued use of challenged practices" appears to be composed of an indeterminate number of potential future measures that did not exist at the time of Vietnam's panel request (and may never exist). Thus, such so-called "continued use" could not be impairing any benefits accruing to Vietnam, and therefore cannot be subject to WTO dispute settlement. Furthermore, to the extent that the "continued use" measure consists of proceedings that had not resulted in final action to levy definitive antidumping duties or accept price undertakings at the time of the consultations request, Article 17.4 of the AD Agreement precludes dispute settlement with respect to such a measure. These are additional reasons for the Panel to find that Vietnam's claims concerning the "continued use of challenged practices," including the fourth administrative review, the fifth administrative review, and the sunset review, are not within its terms of reference.

II. VIETNAM'S CLAIMS REGARDING "ZEROING" ARE WITHOUT MERIT

17. The U.S. First Written Submission begins by stating that "[t]his is not merely another zeroing dispute." It is not.

18. Unlike in other disputes, in the second and third administrative reviews, which are the only measures properly before this Panel, zeroing, as a factual matter, had no impact on the margins of dumping determined for individually examined exporters or producers, and the zeroing methodology was not used during the proceedings in order to determine the separate rates applied to companies not individually examined.

19. The prohibition of zeroing in administrative reviews, if one exists, is a prohibition against imposing antidumping duties in excess of the margin of dumping. That is the obligation in Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement. All the calculated dumping margins in the second and third administrative reviews were zero or *de minimis*. Thus, as a factual matter, Vietnam has failed to demonstrate that the United States has acted inconsistently with these provisions of the WTO Agreement.

20. It appears to the United States that the Panel can resolve this dispute based on these facts, and it is thus not necessary for the Panel to make any findings on the legal permissibility of zeroing generally.

21. On the question of the legal permissibility of zeroing, we have no doubt that all here are aware of the Appellate Body reports that have found zeroing in reviews inconsistent with the requirements of the covered agreements. The United States has serious concerns about these Appellate Body reports and believes that they are incorrect.

22. It is a fundamental principle of the customary rules of interpretation of public international law that any interpretation must address the text of the agreement and may not impute into the

[3] *See US – Upland Cotton (Panel)*, paras. 7.158-7.160; *see also US – Continued Zeroing (Panel)*, para. 7.61 (finding that "the European Communities failed to identify the specific measure at issue in connection with its claims regarding the continued application of the 18 anti-dumping duties at issue.") (*reversed on appeal*).

agreement words and obligations that are not there.[4] Relying upon these past Appellate Body reports, Vietnam asks the Panel to interpret the AD Agreement to include a general prohibition of zeroing that is based upon the concept of "product as a whole." That term cannot be found anywhere in the text of the AD Agreement or the GATT 1994. In contrast to the Appellate Body, all dispute settlement panels that have addressed this question have agreed with the United States that there is no prohibition of zeroing in proceedings beyond the original investigation.[5]

23. The rights and obligations of WTO Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements. Article 11 of the DSU plainly requires each panel to make its own objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. Further, in settling disputes among Members, pursuant to Articles 3.2 and 19.2 of the DSU, WTO dispute settlement panels and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements."

24. The United States will not repeat today all of our arguments concerning "zeroing," which we have explained in detail in the U.S. First Written Submission. Should the Panel reach the question of the legal permissibility of "zeroing," however, we reiterate our respectful request that this Panel make its own objective assessment of the matter before it and refrain from adopting Vietnam's incorrect interpretation of the covered agreements. We urge this Panel to remain faithful to the text of the AD Agreement and respectfully request that you find that the approach taken by the United States in the challenged proceedings rests upon a permissible interpretation in accordance with the customary rules of interpretation of public international law.

III. VIETNAM'S CLAIMS REGARDING THE "COUNTRY-WIDE" RATE ARE WITHOUT MERIT

25. Vietnam's claims concerning the assessment rates Commerce determined for the Vietnam-wide entity in the second and third administrative reviews are without merit. This is yet another instance of Vietnam asking the Panel to create new rules and obligations that have no basis in the covered agreements.

26. As explained in the U.S. First Written Submission, the terms "exporter" and "producer" are not defined in the AD Agreement, and the agreement does not establish any criteria for an investigating authority to examine in order to determine whether a particular entity constitutes an "exporter" or "producer." As a threshold question in an antidumping proceeding, investigating authorities must identify the exporters and producers subject to examination. This question must be addressed in all antidumping proceedings, both those involving market economies and those involving non-market economies.

27. As the panel in *Korea – Certain Paper* found, depending on the facts of a given situation, an investigating authority may determine, consistent with Article 6.10 of the AD Agreement, that legally distinct companies should be treated as a single "exporter" or "producer" based upon their activities and relationships. Thus, affiliated companies, such as a parent company and its subsidiaries, may be collapsed and treated as a single entity. Likewise, companies subject to government influence, in particular over their export activities, may be treated as a single entity and subject to a single antidumping rate.

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[4] *India – Patents (AB)*, para. 45.

[5] *US – Stainless Steel (Mexico) (Panel)*, paras. 7.61, 7.149; *US – Zeroing (Japan) (Panel)*, paras. 7.216, 7.219, 7.222, 7.259; *US – Softwood Lumber V (Article 21.5) (Panel)*, paras. 5.65, 5.66, 5.77; *US – Zeroing (EC) (Panel)*, paras. 7.223, 7.284; *see also US – Continued Zeroing (Panel)*, paras. 7.169 and n.131 (explaining that the panel generally "found the reasoning of the earlier panels on these issues to be persuasive").

28. In this case, the evidence on the record demonstrated that the nature of Vietnam's economy, in particular the control exercised by the Government of Vietnam over its economy, including decisions concerning pricing and exportation, justified Commerce's determination that Vietnamese companies, in the absence of evidence demonstrating independence from such government control, were part of an entity that constitutes a single exporter or producer subject to a single assessment rate. This determination was consistent with the meaning of the terms "exporter" and "producer," as they are used in Article 6.10 of the AD Agreement. It is also consistent with the recognition by WTO Members at the time of Vietnam's accession to the WTO that Vietnam is continuing the process of transition towards a full market economy, and that more reforms are needed for Vietnam's economy to operate fully on market principles.

29. After Commerce determined that the Vietnam-wide entity was an individual exporter or producer, Commerce treated that entity just like any other exporter or producer being examined under Article 9 of the AD Agreement. When the entity failed or refused to provide information requested, Commerce relied upon the facts available, consistent with Article 6.8 and Annex II of the AD Agreement. This is neither discriminatory treatment nor out of the ordinary, as Vietnam has suggested.

30. Vietnam asks the Panel to create a new rule barring investigating authorities from taking into account the relationships between companies and the influence of the government when identifying exporters or producers. There is simply no textual basis for such a rule in the AD Agreement. Of additional concern, such a rule would undermine the effectiveness of antidumping remedies because related companies and companies influenced by the government could circumvent antidumping measures by routing exports through companies with the lowest dumping margins to avoid paying antidumping duties and to avoid posting security to guarantee payment. Imposing such a new rule would seriously alter the balance of rights and obligations established in the AD Agreement, and that simply is not permitted by the DSU.

31. Vietnam further attempts to limit the ability of investigating authorities to rely on facts available by asking the Panel to narrowly define the term "necessary information" such that it encompasses only that information used to calculate dumping margins. Again, there is no support in the text of the AD Agreement for Vietnam's position. As the panel in *Egypt – Steel Rebar* correctly found, "it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.) ...." In this case, the information that Commerce requested was necessary in order to define the pool from which Commerce selected the largest exporters, and the information also represented the data necessary for determining a company's export price, once selected for individual examination. Where companies failed or refused to provide this information, Commerce necessarily relied upon the facts available to complete its analysis. There is no justification for tying the hands of investigating authorities and preventing them from doing their work, which is what Vietnam is asking this Panel to do.

IV. VIETNAM'S CLAIMS REGARDING LIMITING THE NUMBER OF RESPONDENTS SELECTED ARE WITHOUT MERIT

32. Vietnam advances a number of claims concerning Commerce's determinations to limit its examination under Article 6.10 of the AD Agreement. Vietnam's claims amount to a broad-based attack on the right of WTO Members' investigating authorities to limit their examinations consistent with the AD Agreement. Once again, Vietnam invites this Panel to create new obligations, restrict the rights of WTO Members, and alter the balance of rights and obligations established by the AD Agreement. The Panel should decline Vietnam's invitation.

33. Article 6.10 of the AD Agreement allows Members to determine individual margins of dumping for a *reasonable* number of exporters and producers, and does not require the determination of an individual margin of dumping for *all* exporters and producers, where a large number of exporters and producers is involved. The only condition for limiting an examination is that the number of exporters or producers must be so large as to make a determination of individual margins of dumping for all exporters or producers "impracticable."

34. Article 6.10 does not define the term "impracticable." The ordinary meaning of the term "impracticable" is "unable to be carried out or done; impossible in practice," or "incapable of being performed or accomplished by the means employed or at command." Vietnam incorrectly argues, contrary to the panel's findings in *EC – Salmon (Norway)*, that a determination to limit an examination must be based solely upon the number of companies involved in the proceeding, without regard to an investigating authority's resources. Article 6.10 permits an authority to limit its examination when it is impracticable to individually examine all parties involved in an investigation because the authority lacks the resources to do so.

35. Here, Commerce explained why it was necessary to limit the examination, noting the large number of companies involved, and providing an analysis of Commerce's available resources. Based upon this analysis, Commerce determined that it would be impracticable to individually examine all of the companies involved. There simply is no merit to Vietnam's claim that Commerce improperly limited its examination.

36. Vietnam also asks this Panel to add to the AD Agreement a new rule imposing a numerical limit on the right of WTO Members to limit the examination, and to find that Commerce has surpassed that numerical limit. Otherwise, in Vietnam's view, "the exception" would become "the rule." On its face, Article 6.10 of the AD Agreement contains no such numerical limitation. Any time the conditions in Article 6.10 are satisfied – that is, whenever the number of exporters, producers, importers or types of products involved is so large as to make individual dumping margin determinations for all companies "impracticable" – an authority may limit its examination. That is the rule to which the WTO Members, including Vietnam, agreed. The Panel should again decline Vietnam's invitation to establish a different rule.

37. Vietnam also alleges that Commerce acted inconsistently with Article 6.10.2 of the AD Agreement by not determining individual dumping margins for companies that voluntarily submitted necessary information. Article 6.10.2 requires an authority to determine an individual margin of dumping for such company only where the amount of companies involved is not so large as to make an individual determination for each company that voluntarily submits information "unduly burdensome." The investigating authority must determine, based on the number of companies involved and its own resources and capabilities, whether determining individual margins for voluntary respondents would be unduly burdensome or, in some instances, simply not possible.

38. Here again, though, as a factual matter, there cannot have been any violation. No company voluntarily provided the necessary information in the second and third administrative reviews. Thus, Commerce could not have acted inconsistently with Article 6.10.2.

39. Vietnam makes claims under a number of other provisions concerning Commerce's determinations to limit its examination. These are all addressed in detail in the U.S. First Written Submission. All of these other claims, though, are dependent on Vietnam's primary claim that the United States acted inconsistently with Article 6.10. As we have demonstrated, there is no merit to that claim.

V. VIETNAM'S CLAIMS REGARDING THE SEPARATE RATE APPLIED TO COMPANIES NOT INDIVIDUALLY EXAMINED ARE WITHOUT MERIT

40. When an investigating authority limits its examination pursuant to Article 6.10 of the AD Agreement, as Commerce properly did in the second and third administrative reviews, the question arises, what assessment rate is to be applied to the non-examined companies? On this question, Article 9.4 of the AD Agreement provides that the maximum antidumping duty that may be applied to non-examined companies is the weighted average margin of dumping determined for examined companies, excluding any zero and *de minimis* margins, and margins based on facts available.

41. Article 9.4 does not specify what the maximum antidumping duty is that may be applied to non-examined companies when all the rates determined for examined companies fall into one of the three categories that, by rule, must be disregarded in the calculation of the ceiling rate.

42. Faced with this situation in the second and third administrative reviews, Commerce relied on either a weighted average of dumping margins calculated for exporters and producers individually examined in the most recently completed proceeding, excluding any zero and *de minimis* margins and margins based on facts available, or a company-specific rate from a more recently completed proceeding where such a rate had been determined for a company. In the absence of any obligation, the separate rates Commerce applied to non-examined exporters and producers in the second and third administrative reviews cannot be deemed inconsistent with the Agreement.

43. Once again, however, Vietnam asks the Panel to create a new rule and require Commerce to "recalculate the all-others rate using a weighted-average of the individually reviewed exporters/producers for the contemporaneous phase of the proceeding." Nothing in the text of Article 9.4 supports any such requirement. In addition, Vietnam argues that the investigating authority should be required to exclude dumping margins based on facts available from the weighted average, but include zero or *de minimis* margins. The self-serving nature of Vietnam's proposal is obvious, and Vietnam's position simply is not credible.

44. Also not credible is Vietnam's assertion that, because the separate rates applied to non-examined companies had "no basis in the relevant period of review," Commerce's approach "unfairly prejudiced" the companies that were not individually examined. However, it is in the nature of an antidumping duty determined pursuant to Article 9.4 for companies that were not individually examined that the rate applied will not be based on the actual commercial behaviour of the non-examined companies. Certainly, where contemporaneous dumping margins are determined and those margins are not zero, *de minimis*, or based on facts available, such margins must be used to calculate a ceiling per the terms of Article 9.4. In the absence of such margins, Article 9.4 does not impose a ceiling.

45. Vietnam also argues that the separate rates Commerce applied to companies that were not individually examined were inconsistent with the covered agreements because the rates were calculated using the zeroing methodology. As a factual matter, the zeroing methodology was not employed during the second and third administrative reviews when Commerce applied the separate rates to companies that were not individually examined.

46. The calculations that Commerce performed in the investigation to determine the separate rates were not subject to any re-examination in the second and third administrative reviews. Commerce made no new comparisons between the export price and the normal value. Commerce simply applied a previously calculated rate to respondents that demonstrated sufficient independence from the government during the second and third administrative reviews.

47. Vietnam's argument is dependent upon its claim that Commerce acted inconsistently with the AD Agreement when it calculated margins of dumping based on the zeroing methodology in the original investigation. As explained, that determination was not subject to the AD Agreement and cannot have been inconsistent with the AD Agreement.

48. Here again, Vietnam asks the Panel to ignore the text of the AD Agreement, specifically the limitation of the application of the AD Agreement in Article 18.3. Because Commerce simply continued to apply rates determined prior to the entry into force of the WTO Agreement for Vietnam, and did not utilize the zeroing methodology during second and third administrative reviews in the application of those rates, the Panel should reject Vietnam's zeroing-related claims against the separate rates Commerce applied in the second and third administrative reviews.

VI. VIETNAM'S CLAIM WITH RESPECT TO THE CONTINUED USE OF CHALLENGED PRACTICES IS WITHOUT MERIT

49. Finally, Vietnam argues that Commerce "has utilized the challenged practices in an original investigation, four consecutive administrative reviews, and in the preliminary results of the ongoing sunset review," and this "continued use" is inconsistent with various provisions of the AD Agreement and the GATT 1994.

50. Vietnam did not identify the "continued use of the challenged practices" as a measure in its panel request, and thus no such measure is within the Panel's terms of reference. The United States also has serious concerns about the Appellate Body's finding in *US – Continued Zeroing* that "continued use" can constitute a measure subject to WTO dispute settlement. In any event, however, Vietnam's argument is premised on its assertion that such "continued use" constitutes an "ongoing conduct." Even were this a cognizable claim, once again the facts belie a conclusion that Vietnam has demonstrated the existence of such "ongoing conduct" in this dispute.

51. In *US – Continued Zeroing*, the Appellate Body found that the record supported findings of inconsistency in only four of the eighteen cases challenged. As a factual matter, in the fourteen other cases, the record did not reflect that "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time." In each of the four cases where the Appellate Body concluded that there was "a sufficient basis ... to conclude that the zeroing methodology would likely continue to be applied in successive proceedings," the panel had found the following: (1) the use of the zeroing methodology in the initial less than fair value investigation; (2) the use of the zeroing methodology in four successive administrative reviews; and (3) reliance in a sunset review upon rates determined using the zeroing methodology.

52. In this dispute, Vietnam cannot demonstrate a string of determinations over an extended period of time. The original investigation, the first, fourth, and fifth administrative reviews, and the sunset review are not properly before the Panel and there can be no finding of inconsistency in connection with those proceedings.

53. Additionally, Vietnam has failed to establish that "zeroing" had any impact on the margins of dumping calculated in the second and third administrative reviews, and Vietnam has failed to establish as a factual matter that Commerce used the zeroing methodology in connection with the application of a dumping margin to separate rate respondents in those proceedings, or to the Vietnam-wide entity. Hence, with respect to Commerce's use of zeroing, Vietnam cannot establish "a string of determinations, made sequentially ... over an extended period of time."

54. Vietnam also seeks to expand the Appellate Body's reasoning in *US – Continued Zeroing* beyond zeroing to encompass the other "challenged practices." Vietnam's claims regarding the other

"challenged practices" are without merit, and Vietnam cannot establish "a string of determinations, made sequentially... over an extended period of time."

VII. CONCLUSION

55. As we demonstrated in the U.S. First Written Submission and again this morning, Vietnam has pursued claims that are not within the Panel's terms of reference, advanced arguments that lack factual support, and invited the Panel to invent new obligations that have no basis in the covered agreements. Consequently, for the reasons we have given, the United States respectfully requests that the Panel grant the U.S. preliminary ruling requests and reject Vietnam's claims that the United States has acted inconsistently with the covered agreements.

ANNEX C-4

CLOSING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

1. The United States has only a few brief closing comments. This dispute, like all WTO disputes, is about the meaning of the covered agreements and the content of the obligations that WTO Members have accepted by joining the WTO. Vietnam seeks to alter the meaning of the covered agreements by departing from the accepted rules of treaty interpretation and by inventing obligations found nowhere in the text of any covered agreement. At the same time, Vietnam seeks to avoid its own obligations to identify the specific measures at issue in the panel request, to present factual evidence that supports its claims, and to have its exports subjected to the rules-based disciplines of the AD Agreement.

2. The Panel is charged with making an objective assessment of the matter before it and clarifying the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law. Correct application of the customary rules of interpretation ensures the security and predictability of the multilateral trading system.

3. At the beginning and at the end of this Panel's analysis is the text of the covered agreements. In its closing statement, Vietnam lamented that our discussion over the past two days got "bogged down by the text." Vietnam suggested that we "should not miss the forest for the trees." The "trees" here, though, is the text of the covered agreements. It is imperative that the Panel not miss these "trees."

4. The question before the Panel is: Does the text require what Vietnam contends the United States is obligated to do? For each claim Vietnam has made, the answer is no. Vietnam has failed to establish that the United States has acted inconsistently with any provision of any covered agreement. There simply is no support, either in fact or in the text of the covered agreements, for Vietnam's claims.

5. We would like to offer the Panel just two examples from this first meeting, which we believe shed light on what Vietnam is attempting to do in this dispute. First, Vietnam's discussion yesterday afternoon of the meaning of Article 9.4 of the AD Agreement is a clear example of its attempts to add to the AD Agreement new rules that are unsupported by the text and were never agreed by Members. Vietnam appears to agree with the United States that when all the margins of dumping determined for examined exporters or producers are zero, *de minimis*, or based on facts available, pursuant to the express terms of Article 9.4 it is not possible to calculate a maximum for the amount of duty that may be applied to non-examined entities. In such a case, however, Vietnam posits that Article 9.4 imposes the following specific obligations on Members:

- the antidumping duty applied must be based solely on *calculated* rates and may not be based upon or utilize the facts available;

- the antidumping duty applied must be a calculated rate *based on contemporaneous data* (though, Vietnam appeared later to have conceded that this was not required in all cases);

- if not contemporaneous, the rate applied must be *recalculated* and subject to scrutiny, even if at the time the prior rate was calculated, by rule it could not have been inconsistent with any obligation under the WTO agreements;

- the antidumping duty applied may only be applied to "individual," non-examined firms, and not groups of firms identified as a single exporter or producer; and

- the antidumping duty applied is subject to a reasonableness test, or an abuse of discretion test, or an "unbridled discretion" test, or possibly all of these tests simultaneously.

During the afternoon session yesterday, Vietnam, at one time or another, asserted that Article 9.4 of the AD Agreement requires all of these things. Not once, however, did Vietnam identify any text in Article 9.4 that establishes any of these requirements. The explanation for this is simple: there is no text in Article 9.4 that establishes any of these requirements. Indeed, Article 9.4 does not address the issue of how to calculate the rate to be applied. Article 9.4 simply provides for a ceiling on that rate.

6. Throughout Vietnam's First Written Submission, its opening statement at this hearing, and its responses to questions, Vietnam has presented arguments that simply are divorced from the text of the covered agreements. A second, striking example: at paragraph 74 of Vietnam's opening statement, Vietnam asserted, with respect to Article 6.10.2 of the AD Agreement, that "the 'undue burden' standard discussed by the United States has no basis in the Anti-Dumping Agreement." The best response we can offer to this is the text of Article 6.10.2 itself:

> In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be **unduly burdensome** to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged. (emphasis added)

The words "unduly burdensome" are right there in the text.

7. Throughout its claims and arguments, Vietnam is asking the Panel to read into the AD Agreement words that are not there, and read out of the AD Agreement words that are there. This is wholly inconsistent with the rules of treaty interpretation. The text of the covered agreements, which Vietnam seeks to alter or avoid, is determinative of the issues in this dispute. If that text is properly interpreted, Vietnam's arguments must be rejected.

8. The United States recognizes that the Panel is only at the beginning of its work. We hope that the U.S. First Written Submission and our presentation over these past two days have been helpful for you. We look forward to receiving the Panel's written questions. Once again, the United States thanks the Panel members for their time and careful attention to this matter.

ANNEX D

ORAL STATEMENTS OF THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

ANNEX D-1

THIRD PARTY ORAL STATEMENT OF CHINA

China appreciates this opportunity to provide its views on two matters arising in this dispute.

I. INCONSISTENCY REGARDING THE COUNTRY-WIDE RATE PRACTICE

China takes the view that the Country-Wide Rate practice, as a result of the "Separate Rate Application" practice adopted by the United States, is inconsistent with the AD Agreement.

When determining antidumping rates for companies in economies that are not treated as market economy by the United States, the USDOC requires that non-investigated companies first satisfy some established criteria, *i.e.*, Separate Rate Application, in order to receive a margin based on the weighted average of the rates for the individually investigated respondents, namely, by establishing "an absence of central government control, both in law and in fact, with respect to exports". Otherwise, what they receive would be a "country-wide rate" base on adverse facts available.

This is substantially differed from the USDOC's practice for determining antidumping rates for companies in market economies. In an antidumping proceeding involving a market economy country, companies not individually investigated are assigned an "all-others" rate, which is based on the weighted-average margins for the firms individually investigated.

By adopting the Separate Rate Application practice, the United States introduces additional requirement differentiating market economy and non-market economy, which is not provided in the AD Agreement.

According to the first sentence of Article 6.10 of the AD Agreement, it is clear that the investigating authorities must, "as a rule", calculate an individual dumping margin for each known exporter or producer of the product under investigation. The second sentence introduces an exception to the principle laid out in the first sentence, *i.e.*, where the number of exporting producers is so large as to make the determination of an individual dumping margin impracticable, investigating authorities may limit their examination "by using samples". The Wording of Article 6.10 suggests that sampling is the sole exception to the rule of individual margins.

According to Article 6.10, there should be only two categories of respondents before the investigating authorities, 1) those "samples" that are investigated and assigned individual rates, and 2) those not selected and assigned an "all-others" rate. The provisions of the AD Agreement never requires non-selected companies to first demonstrate that they should be assigned an "all-others" rate.

The United States argues that it is proper for the USDOC to consider that the Vietnam-Wide entity as an exporter or producer under investigation. There is no legal basis for this argument. Under the test applied by the panel in Korea-Certain Paper, the investigating authorities have to show that there is sufficiently close structural and commercial relationship between individual producers to justify treating them as a single entity. If this cannot be demonstrated, the authorities, pursuant to the first sentence of Article 6.10, must treat each legal entity as a separate producer/exporter, and calculate individual dumping margins for each of them.

In this case, China does not believe that the "sufficiently close structural and commercial relationship" exists.

II. ZEROING

It is well-settled by the Appellate Body and panels that the practice of zeroing employed by the United States, either in original investigations or in periodic reviews, is inconsistent with the WTO obligations of the United States. China requests that the Panel recommend that the United States bring its measures into conformity with its obligations under the relevant covered agreements of the WTO.

There are also some Chinese shrimp companies suffering from the related measures on shrimp from China by United States. China keeps on requesting the United States to recalculate the antidumping rates for the affected Chinese exporting producers of shrimp, but has no substantial result. China urges the United States to provide a package solution to this issue so as to fully bring its measures into conformity with its obligations under the relevant covered agreement of the WTO.

China thinks that it is not enough for the USDOC to modify its methodology in original antidumping investigations with respect to the calculation of the weighted-average dumping margin. According to the current practice of the USDOC, the relevant antidumping rates of the companies assigned any antidumping rates before January 2007 cannot be recalculated retrospectively.

China requests the United States to recalculate the antidumping rates also for such Chinese companies, including those exporting producers of shrimp in China.

For the stated reasons above, China requests that the Panel find that the U.S. measures at issue violate relevant provisions of the AD Agreement and that the Panel recommend to the Dispute Settlement Body to request that the U.S. bring its measures into conformity with its obligations under the AD Agreement and the GATT 1994.

Thank you for your attention.

ANNEX D-2

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN UNION

1. The European Union makes this third party oral statement because of its systemic interest in the correct and consistent interpretation and application of the *Anti-Dumping Agreement* and the *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)*. The European Union would like to briefly comment on the four main substantive issues in the current proceedings.

I. ZEROING

2. None of the issues in relation to the use of zeroing by the United States raised in this proceeding are new. Vietnam's claims appear to be supported by a consistent body of reasoning and findings, contained in all previous reports issued by panels and the Appellate Body, most recently in *EC – Continued Zeroing*. Further, the United States has not raised anything new in its argumentation to defend its zeroing methodologies and practices.

3. The European Union's oral statement on this matter will therefore be brief. In its written submission the European Union set out at length the reasons why in its view, this Panel should follow the findings and conclusions contained in previous panel and Appellate Body reports on zeroing. It is beyond dispute that the practice of zeroing in anti-dumping cases has been contested many times in WTO dispute settlement proceedings. The Appellate Body in particular has adjudicated on the issues raised in this case frequently, including in cases involving different variations of zeroing, both in original investigations and review investigations, in different factual circumstances and between different parties.

4. The United States does not contest this, but argues that this Panel should not follow these prior Appellate Body reports. Further, the United States explicitly invites this Panel to re-apply findings and follow the reasoning contained in panel reports that have been rejected and overturned – in many cases more than once – by the Appellate Body, in reports which have subsequently been adopted by the DSB. The European Union submits that the suggestion by the United States that, according to Article 11 of the *DSU* this Panel should be free to depart from adopted Appellate Body reports on issues of law and legal interpretations relating to the covered agreements, is misguided. It is rather the opposite. The Appellate Body itself has addressed this very question in several cases, notably in *US – Stainless Steel from Mexico*, and thus the U.S. proposition should be rejected.

5. On the substance, the European Union has set out its views in its written submission, and has only a few comments in this oral statement, on two specific aspects of the U.S. written submission.

6. First, zeroing has nothing to do with "offsets" or "credits". The key issue and the fundamental problem raised by the U.S. methodology is the selection of the relatively low priced export transactions *per se*, as a sub-category, as the only or preponderant basis for the dumping margin calculation, regardless of whether or not they are clustered by purchaser, region or time. This does not reflect the compromise set out in the text of Article 2.4.2 of the *Anti-Dumping Agreement.* It is clear that according to Article 2.4.2 of the *Anti-Dumping Agreement* there are only three sub-categories of clustered low priced export transactions that it is permissible to respond to: those clustered by purchaser, region or time. Thus, it is not permissible, and it is not fair, to pick up low-priced export transactions clustered by model or *per se*, as the U.S. zeroing methodology does. This is also clear from the term "all" in the first sentence of Article 2.4.2, and the definition of dumping in

Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the *GATT 1994* in terms of the product as a whole; read together with the absence in the targeted dumping provisions of any reference to a sub-category by model or low-priced transactions *per se*. Thus, the relevant provisions, and particularly the normal rule and the exception, are read harmoniously, so as to give meaning – both legal and economic – to all the treaty terms.

7. Second, the United States continues to rely on the legally erroneous proposition that the disciplines of Article 2.4.2 of the *Anti-Dumping Agreement* are excluded from retrospective assessment proceedings. In this respect, we believe that the Panel does not need to enter into this issue. Confronted with the same argument by the United States, the Appellate Body has repeatedly found that Article VI of the *GATT 1994* and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement* require that the dumping margin must be established on the basis of the product under investigation *as a whole.* In any event, should the Panel enter into this discussion, we invite the Panel to take into account the analysis set out in our written submission.

II. VIETNAM-WIDE RATE

8. Moving on to the Vietnam-wide rate issue, the European Union considers that the *Anti-Dumping Agreement* permits the calculation of dumping margins and the imposition of anti-dumping duties on a country-wide basis in cases of imports from non-market economy countries, such as Vietnam. Vietnam's references to the types of anti-dumping margins contemplated by Articles 2, 6 and 9 of the *Anti-Dumping Agreement* are unavailing. In fact, Vietnam does not seem to indicate the particular provision which the United States violates when calculating a Vietnam-wide duty rate. In the EU's view, several provisions in the *Anti-Dumping Agreement*, in particular Articles 6.10, 9.2 and 9.4, when read together, speak against Vietnam's claim.

9. First, Article 6.10, first sentence contains a general principle or preference for the calculation of dumping margins on an individual basis, rather than a strict obligation to do so in each and every case.

10. Second, Article 6.10, second sentence cannot be interpreted as meaning that sampling is the only exception to the alleged general rule. In practice, there are more situations where the calculation of dumping margins cannot be carried out on an individual basis: for example, when investigating authorities cannot identify the relevant producer and actual source of dumping; or where the information colleted and verified in the course of the investigation leads to identical dumping margin results for all suppliers.

11. Third, the WTO case law interpreting Article 6.10 as not requiring the determination of dumping margins for each legal entity in all cases further permits the determination of one dumping margin for related companies as a whole, as a single supplier and the actual source of the alleged price discrimination.

12. Fourth, Article 9.2 of the *Anti-Dumping Agreement* permits the imposition of anti-dumping duties on a country-wide basis also in the particular case of imports from non-market economy countries.[1] Indeed, absent market economy conditions, the State is considered the actual supplier and the "source" of the alleged price discrimination, and any "amounts" collected from the State or its

[1] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 150 ("Article 9.2 refers to the imposition of 'an anti-dumping duty ... in respect of any product', rather than the imposition of a duty in respect of individual exporters or producers. We agree that this reference in Article 9.2 informs the interpretation of Article 11.3. (…) Therefore, Article 9.2 confirms our initial view that Article 11.3 does not require investigating authorities to make their likelihood determination on a company-specific basis").

export branches (*i.e.*, companies which do not act *de jure* or *de facto* independently from the State) is "appropriate".

13. Fifth, in any event, the third sentence of Article 9.2 of the *Anti-Dumping Agreement* also permits the imposition of duties on a country-wide basis when there are several suppliers and it is "impracticable" to specify individual anti-dumping duties per supplier. The notion of "impracticable" implies "something which is not feasible in practice" or "something which cannot be done for practical reasons". In other words, suppliers cannot be specified by name and duties cannot be imposed on an individual basis because of "practical" reasons (*i.e.*, it would render those duties ineffective, not feasible or not suited for being used for a particular purpose, *i.e.*, offsetting or preventing dumping from the actual supplier, that being the State in non-market economy countries).

14. Sixth, Article 9.4 of the *Anti-Dumping Agreement* cannot be the only exception to the individual imposition of duties because, by definition, that would deprive the third sentence of Article 9.2 of the *Anti-Dumping Agreement* of any meaning. In fact, this interpretation would make that sentence (and particularly the term "impracticable") redundant and unnecessary, contrary to the principle of effectiveness in treaty interpretation[2], since the only exception would already be mentioned in Article 9.4.

15. Therefore, the European Union considers that, whilst not taking a position on the facts of this case and, in particular on the U.S. methodology to calculate dumping margins and impose anti-dumping duties on the Vietnam-wide entity, the *Anti-Dumping Agreement* permits the imposition of anti-dumping duties on a country-wide basis in cases of imports from non-market economy countries.

III. ALL OTHERS RATE

16. With respect to Vietnam's claims against the U.S. calculation of the "all others" rate, the European Union recalls that, as the Appellate Body has noted, the absence of guidance in Article 9.4 on what particular methodology to follow does not imply an absence of any obligation with respect to the "all others" rate applicable to non-investigated exporters where all margins of dumping for the investigated exporters are either zero, *de minimis*, or based on facts available.

17. The European Union has not encountered in its practical experience a case where all the dumping margins found for the companies within the sample were zero/*de minimis* or based on facts available. However, the European Union considers that, when all the results found for the sampled companies are zero/*de minimis*, the same result should be extrapolated to "all others" thus leading to the non imposition of measures. In contrast, if some dumping margins are zero/*de minimis* and some others are based on facts available, a reasonable method should be followed in order to impose duties on "all others" as well, for example, by taking into account the level of cooperation of exporting producers. In this respect, the European Union invites the Panel to examine whether the methodology used by the U.S. was reasonable in view of the specific circumstances of the case.

IV. LIMITATIONS IN THE NUMBER OF RESPONDENTS

18. Finally, as regards Vietnam's claims on the USDOC's limitations in the number of respondents examined in each of the anti-dumping proceedings at issue and the continued denials of requests by individual respondents to be individually examined, the European Union refers to the exception contained in Article 6.10, second sentence. If the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation, investigating authorities are not required to individually

[2] Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, at 21.

examine all known exporters or producers outside the sample. It is for the Panel to verify whether the facts of the case show that this was the case.

Mr. Chairman, Members of the Panel, the European Union stands ready to participate further in the discussion and answer any questions that this Panel may have. Thank you for your attention.

ANNEX D-3

THIRD PARTY ORAL STATEMENT OF INDIA

India would like to thank the panel for providing an opportunity to present its views as a third party in this dispute.

1. The issue of zeroing is of extreme systemic importance to the multilateral trading system. It is a matter of regret that the United States continues to apply the "zeroing" methodology for determining anti-dumping margins despite the well settled position of its denouncement by numerous reports of Panels and the Appellate Body that use of this zeroing methodology is inconsistent with Articles 2.4, 2.4.2, 9.3, 9.5 and 11.3 of the Anti-Dumping Agreement (ADA). The Appellate Body in *US – Zeroing (Japan)*, in *US – Zeroing (EC), US – Softwood Lumber V* has held that the United States zeroing procedures, and anti-dumping measures adopted using these procedures, are inconsistent with Articles 2.4 and 2.4.2, 9.3, 9.5 and 11.3 of the *ADA.*

2. Mr. Chairman, India believes that Members will eventually come to realize the futility of pursuing the use of "zeroing". India is deeply concerned at the impact of the prolonged use of this methodology on the credibility and predictability of the multilateral dispute settlement system. In view of the settled jurisprudence by the Appellate Body, India believes that the panel will reiterate that the practice of "zeroing" by any WTO Member in the original investigation, or during periodic or administrative reviews and sunset reviews is inconsistent with Members' WTO obligations under the ADA.

I. INTRODUCTION

3. Vietnam challenges three measures at issue and four practices adopted by the U.S. in this dispute that relate to the imposition by the United States of antidumping duties under the USDOC's antidumping duty order involving certain frozen and canned warm water shrimp from Viet Nam.

4. The U.S. practices under challenge are: (i) the use of zeroing to calculate antidumping margins, (ii) the application of a country-wide rate to certain respondents not individually investigated or reviewed, (iii) the all-others rate calculated and applied to certain other non-investigated or non-reviewed respondents, and (iv) the repeated refusal by the USDOC to review individual respondents requesting such a review and thus determining margins for only a limited selection of respondents.

Mr Chair we will confine our statement in respect of two of the challenged practices;

5. Vietnam has claimed that each of these practices limits the ability of Vietnamese exporters and producers to prove the absence of dumping, resulting in the continuation of an antidumping order for companies that have in fact gone to great lengths to alter their conduct to eliminate dumping.

6. India understands that Vietnam has challenged the USDOC's use of zeroing to determine margins of dumping for selected respondents in the second and third administrative reviews and the USDOC's continued use of the so called zeroing procedures in successive segments of the continuing proceedings of *certain frozen warm water shrimp from Viet Nam (*including subsequent administrative reviews and the five year sunset review).Vietnam also requests the Panel to examine the USDOC's use of zeroing in the original investigation and first administrative review to the extent they are relevant to the challenged measures.

7. Vietnam challenges the U.S. practices as inconsistent with United States obligations under Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Agreement*"). Vietnam alleges that the USDOC has relied on, and continues to rely on, the above-listed practices for each stage of the antidumping proceeding.

A. CLAIM OF USE OF ZEROING IN THESE PROCEEDINGS AS INCONSISTENT WITH UNITED STATES WTO OBLIGATIONS

8. Vietnam challenges the USDOC's zeroing, as applied, in two administrative reviews and its continued use in subsequent phases of this antidumping proceeding. Vietnam states that the USDOC's Final Determination in the original investigation stated in explicit terms that the USDOC utilized the model zeroing and acknowledged the use of the same zeroing methodology that was at issue in the *US – Softwood Lumber V* dispute. Vietnam states that as the USDOC stated plainly in the determinations, the zeroing methodology has been applied in each phase of this antidumping proceeding.

9. Vietnam, thus, challenges the USDOC's use of the zeroing methodology in the original investigation to determine the "all-others" rate in the subsequent administrative reviews. It alleges that the USDOC relied on the margin calculated in the original investigation for purposes of assigning rates in subsequent administrative reviews. Thus, the USDOC's use of the zeroing methodology has a direct relationship with the measures at-issue in this dispute. The USDOC's use of zeroing at the investigation phase produced a higher assessment and cash deposit rate for exports in the subsequent reviews than would have existed but for use of the WTO-inconsistent zeroing calculation.

10. India states that in the case the U.S. has used the zeroing methodology in the original investigation it would lead to an inflated dumping margin rate. This would be in conflict with the well settled WTO jurisprudence wherein zeroing has been held to be inconsistent with the provisions of the WTO Agreements. As per Vietnam's claim, the use of such zeroing methodology in the original investigation to determine the "all others" rate in subsequent administrative reviews would also lead to inflated rates and be inconsistent with the WTO Agreements. The Appellate Body in *US – Zeroing (Japan)*, has, ruled that the "maintenance" of zeroing procedures in original investigations and administrative reviews is inconsistent with Article 2.4 of the *ADA*. It states that "[I]n a review proceeding under Article 9.3.1, the authority is required to ensure that the total amount of anti-dumping duties collected from all the importers of that product does not exceed the total amount of dumping found in all sales made by the exporter or foreign producer, calculated according to the margin of dumping established for that exporter or foreign producer without zeroing. The AB held in *US – Zeroing (EC)* that the zeroing methodology, as applied by the USDOC in the administrative reviews at issue, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. The AB in *US – Stainless Steel (Mexico)* found that the use of zeroing by the USDOC in administrative reviews was inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

11. On a reading of the opening clause of Article 2.1 of the ADA, the Appellate Body has also ruled that the definition of "dumping" "applies to the entire ADA including the provisions governing administrative reviews such as in *US – Zeroing (Japan)*; *US – Softwood Lumber V*, and *US – Corrosion-Resistant Steel Sunset Review*.

12. India has consistently opposed the use of the zeroing method in calculating dumping margins from its initial dispute initiated against the EC as zeroing is inconsistent with Article 2.4.2 of the ADA.[1] India states that it is important that this Panel reiterates and reinforces the conclusion that

[1] DS141 (*EC – Bed Linen*)

practice of zeroing as stated above is "as such" inconsistent with the obligations under GATT, 1994, Anti-Dumping Agreement and the Agreement for Establishing the WTO as consistently held by the Panels and Appellate Body in several reports. Any other conclusion would result in the purported continuance of the zeroing practice, which not only inflates dumping margins, but also detracts from the obligation to undertake an objective examination of the impact of dumped imports and ascribes dumping even in cases where no dumping may exist. India urges that in the interest of judicial economy and fairness, the Panel should follow the judicial well settled position and find that the zeroing used in this proceeding by the USDOC, violates United States' obligations under the WTO Agreement.

B. CLAIMS OF INCONSISTENCY REGARDING THE ALL OTHERS RATE

13. Vietnam states that the USDOC generally calculates the all others rate based on the weight-average of the weighted average margins of the firms individually examined excluding those margins that are zero, de minimis or based on facts available. Vietnam states that the all others rate applied in the second and third administrative reviews was based on the "All others rate" in the original investigation. In turn, the "all others" rate from the original investigation was determined by taking the weighted average of margins of dumping determined for individually investigated respondents in the original investigation using "model zeroing".

14. Vietnam argues that Article 2.4.2 requires that a fair comparison shall be made between the export price and the normal value. Anti dumping margins that do not adhere to Article 2 are construed to be WTO inconsistent and must be recalculated.

15. Article 9.4 require that these anti dumping margins calculated in a manner consistent with Article 2 serve as a basis for the administrating authority's calculation of the All Others rate. Thus, the weighted average of dumping for those companies individually examined is the ceiling for the margin of dumping to be applied to the All Others Rate.

16. India would, thus, support the view that margins of dumping determined in original investigations using zeroing are inconsistent among others with Articles 2.4 and 2.4.2 of the ADA and that an "all others" rate calculated by using WTO inconsistent model zeroing in the original investigation violates Article 9.4 of the ADA. Therefore, the "all others rate" applied in the second and third administrative reviews is inconsistent with Article 9.4 of the ADA.

17. In Appellate Body Report, *US – Hot-Rolled Steel*, it has been held that Article 9.4 simply identifies a maximum limit, or ceiling, which investigating authorities '*shall not exceed*' in establishing an 'all others' rate". The AB has also held that, although Article 9.4 addresses the calculation of the ceiling for the "all others" rate, as opposed to the "all others" rate itself, it does not provide unlimited discretion to investigating authorities when no ceiling can be calculated due to the *lacuna* in Article 9.4.

We quote:

> "*[W]e do not agree with the Panel's statement that, in situations where all margins of dumping are either zero, de minimis, or based on facts available, Article 9.4 "simply imposes no prohibition, as no ceiling can be calculated." In our view, the fact that all margins of dumping for the investigated exporters fall within one of the categories that Article 9.4 directs investigating authorities to disregard, for purposes of that paragraph, does not imply that the investigating authorities' discretion to apply duties on non-investigated exporters is unbounded. The lacuna that the Appellate Body recognized to exist in Article 9.4 is one of a specific method. Thus, the absence of guidance in Article 9.4 on what particular methodology to follow does not imply an*

> *absence of any obligation with respect to the "all others" rate applicable to non-investigated exporters where all margins of dumping for the investigated exporters are either zero, de minimis, or based on facts available.*"

18. However, the Appellate Body has not stated the bounds of an investigating authority's obligations under Article 9.4 in determining an "all others" rate when the *lacuna* exists.

19. In India's view, a point for consideration is whether Article 9.4 of the ADA require a mandatory obligation on the Investigating Authority to make a fresh or updated determination in a review on the basis of respondents selected in the review. In the case that no such obligation exists then the investigating authority may apply the unchanged "All Others rate" calculated in the original investigations as the USDOC has done as claimed by Vietnam in the present case. India would like to submit to the Panel that the language used in Article 9.4 suggest that the All Others rate be based on the weighted average margin of dumping calculated for "selected" exporters or producers. In an administrative review, if the investigating authority has made a new selection of exporters and producers and calculates new margins for them, then a reading of Article 9.4 may suggest that the margin of dumping be based on the new "selected" exporters or producers.

20. It appears that the dispute at hand falls within the lacuna described above. Further, it has been held that in such matters, the discretion with the investigating authorities to apply duties on non investigated exporters is not unbounded and does not imply an absence of any obligation with respect to the all others rate applicable to non investigated exporters.[2]

21. A point for consideration for the Panel, maybe whether it is incongruous that if the individually examined producers are no longer dumping (as in the second and third administrative reviews in the present dispute) and not paying anti dumping duties on their imports, should there be a rationale (on the basis of rates calculated in the original investigation) to impose duties on non examined exporters during the same period. It has been held in *US – Hot-Rolled Steel* and *US – Zeroing (EC) (21.5)* that the purpose of Article 9.4 is to "prevent" exporters that were not selected for participation in the review from being "prejudiced".

22. In view of the lacuna in Article 9.4 as stated above, India would therefore, urge the Panel to examine the consistency of U.S. measures as regards determination of "all others rate" with its obligations under Article 9.4 of the ADA.

We would like to end our submission with thanking the panel again for providing us with is opportunity.

[2] *US – Zeroing (EC) (21.5)* (ABR).

ANNEX D-4

THIRD PARTY ORAL STATEMENT OF JAPAN

1. Japan appreciates the opportunity to present its views as a third party in this important dispute. The views expressed today and in our written submission are based on Japan's systemic interest in the sound interpretation of the legal obligation at issue. In this statement, Japan would like to briefly tough upon the following three points: (1) the issue of zeroing in administrative reviews; (2) whether the United States' application of the "all others" rates are inconsistent with members' obligations under the Anti-Dumping Agreement; and (3) Viet Nam's claims of inconsistency regarding the country-wide rate with the Anti-Dumping Agreement.

2. *First*, Japan will not reiterate its arguments set out in our third party submission here. Suffice it to say that all of the relevant legal issues involved over the WTO-inconsistency of the zeroing methodology in the context of administrative views have been thoroughly and fully examined and already resolved by the Appellate Body based on well-reasoned analyses in the previous zeroing disputes. Japan agrees with the Viet Nam that the use of zeroing in administrative reviews is inconsistent with Article 2.4 and Article 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994.

3. *Second*, as stated in Japan's written submission, Japan is of the view that the USDOC's determinations of "all others" rate in the second and third administrative reviews is inconsistent with its obligation under Article 9.4 of the Anti-Dumping Agreement. Japan considers that the USDOC is obliged to determine a contemporaneous "all others" rate in an administrative review based on the dumping margins determined for respondents selected in that review. If the USDOC finds that the each of the rates determined for the selected respondents was zero or *de minimis*, then the only reasonable outcome is to apply "all others" rate of zero, because none of the exporters individually examined for that period was found to be engaged in dumping. There is no basis to assume that during the same period, non-examined exporters should be subject to anti-dumping duties. Even if the panel determines that an investigating authority may apply the "all others" rate determined in an original investigation to non-selected exporters in administrative reviews, such all other rate must be based on WTO-consistent margins of dumping. The administrative reviews and the all others rate at issue are subject to the disciplines of the Anti-Dumping Agreement, and the term "margins of dumping" in Article 9.4 refers to margins of dumping that are WTO-consistent at the time when they are used to calculated the all other rate.

4. *Third*, Japan wishes to offer a few observations to Viet Nam's claims of inconsistency regarding the "country-wide" rate with the Anti-Dumping Agreement. The first sentence of Article 6.10 of the Anti-Dumping Agreement establishes a general obligation to determine an individual dumping margin for each known exporter or producer concerned. Viet Nam argues that the "country-wide" rate to exporters of subject merchandise that did not meet "separate rate criteria" was not permitted under the Viet Nam's Protocol of Accession or the Anti-Dumping Agreement.[1] The U.S., in contrast, argues that the rate was assigned to those companies that had not established that they are free from government influence, particularly in their export activities, and thus are reasonably considered to be parts of one entity that the USDOC has identified as an "exporter" or "producer".[2]

[1] *See* Viet Nam's First Written Submission, Section VI.B.
[2] *See* U.S. First Written Submission, Section V.C.

5. Japan considers that the Anti-Dumping Agreement allows investigating authorities to calculate a single dumping margin for "legally distinct entities" to the extent that they can be considered a single "exporter" or "producer" in the sense of the first sentence of Article 6.10, However, as explained by the panel in *Korea – Certain Paper*, the treatment of legally distinct entities as a single exporter or producer is allowed only in the case where "the structural and commercial relationship between the companies in questions is sufficiently close to be considered as a single exporter or producer."[3]

6. This question becomes particularly pertinent in a case like this where non-market economy involves because of a particular role the government plays in non-market economy. Therefore, Japan requests that the panel pay special attention to the role of the government of Viet Nam in its economy in examining whether the exporters or producers to which the "country-wide" rate is applied have structural and commercial relationship between themselves and the government.

7. This concludes Japan's oral statement. Japan thanks for this opportunity. Japan would welcome any questions you may have.

[3] *See* Panel Report, *Korea – Certain Paper*, para. 7.161 – 7.162.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF THE REPUBLIC OF KOREA

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views on key issues included in Korea's third party submission.

A. THE CLEAR IDENTIFICATION OF THE FOURTH ADMINISTRATIVE REVIEW AND THE SUNSET REVIEW MADE IN THE PANEL REQUEST SHOULD BE TAKEN INTO ACCOUNT IN PRELIMINARY RULING ON THE CONTINUED USE OF CHALLENGED PRACTICES.

2. First, in this dispute, Vietnam contests the "continued use of challenged practices" clearly and strongly in its first written submission, while the United States argues that the "continued use of challenged practices" was not identified in Vietnam's Panel Request, and it would appear to apply to an indeterminate number of potential future measures, and thus is not within the Panel's Terms of Reference.

3. Korea finds that "continued use of challenged practices" is not a mere potential future measure as alleged by the United States. Rather, that is an ongoing use of zeroing practice in successive proceedings of a certain anti-dumping case, which has some similarity with the measure in the *US – Continued Zeroing* case.

4. With respect to whether it was properly identified in Vietnam's Panel Request, Korea notes that the Panel should review carefully whether it could find a description in the Panel Request that is sufficient to indicate the nature of the "continued use of challenged practices". Especially, Korea would like to emphasize that the Fourth Administrative Review and the Sunset Review, which seem to be parts of the "continued use of challenged practices", are inarguably within Vietnam's Panel Request. Korea is of the view that above-mentioned measures, as either components of the "continued use of challenged practices" or as independent measures at issue, are subject to this dispute.

B. THE PANEL SHOULD FIND THAT THE PRACTICE OF "ZEROING" IN ADMINISTRATIVE REVIEWS IS INCONSISTENT WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

5. Regarding the United States' practice of zeroing in administrative reviews, Korea is of the view that the Panel should find that the United States' practice is inconsistent with the *Anti-Dumping Agreement*.

6. The United States argues the measures at issue rest on a permissible interpretation of *Anti-Dumping Agreement*, and thus, they are WTO-consistent. Specifically, the United States asserts that the concept of "dumping" and "margin of dumping" have a meaning in relation to individual transaction, that is to say, dumping may occur in a single transaction and dumping which occurs with respect to one transaction does not need to be mitigated by the occurrence of another transaction made at a non-dumped price. However, the Appellate Body has explicitly rejected the United States' arguments that "dumping" and "margin of dumping" can be found to exist at the level of individual transactions in a previous ruling regarding the USDOC's practice of zeroing in periodic administrative reviews.

7. Furthermore, the United States also argues that the term "product" used in Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 does not refer exclusively to "product as a whole" and thus, the relevant provision does not require margins of dumping to be established on an aggregate basis for the "product as whole". This argument is contrary to the Appellate Body's reasoning in *United States – Final Dumping Determination on Softwood Lumber from Canada*, in which the Appellate Body held that "margin of dumping" could only be established for the product under investigation as a whole.

8. Korea is of the view that the argument by the United States is simply not compatible with the rulings and reasoning of the aforementioned Appellate Body's decisions. Korea is unable to find any reason for the Panel to see the USDOC's zeroing methodology in the assessment proceedings rests on a permissible interpretation of the *Anti-Dumping Agreement*, although the Panel should make an objective assessment of the matter before it.

9. For the aforementioned reasons, Korea respectfully requests that the Panel find the United States' practice of zeroing as used in the administrative reviews in anti-dumping proceedings concerning imports of certain shrimp from Vietnam to be inconsistent with the *Anti-Dumping Agreement*.

ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX E-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF VIET NAM

I. INTRODUCTION

1. Viet Nam sets forth several claims in connection with the three measures at-issue in this dispute: the continued use of the challenged practices, the final determination of the second administrative review, and the final determination of the third administrative review.

II. STANDARDS APPLICABLE TO THE PANEL'S CONCLUSIONS AND RECOMMENDATIONS

2. The claims raised in this dispute involve the United States' interpretation of the facts on the evidentiary record and the United States' interpretation of the applicable WTO obligations. With respect to the Panel's assessment of the facts, Article 17.6(i) requires the Panel to determine whether the authority's establishment of the facts was "proper" and its evaluation of those facts was "unbiased and objective." The balance of the Panel's inquiry involves interpretation of various provisions of the Anti-Dumping Agreement. Article 17.6(ii) provides that such interpretations should be made in "accordance with customary rules of interpretation of public international law." The principles of treaty interpretations are set forth in Articles 31 and 32 of the Vienna Convention. Article 31 contains three core principles: that a treaty must be interpreted in "good faith," "in accordance with the ordinary meaning to be given to the terms of the treaty in their context" and in light of the treaty's "object and purpose." All three conditions must be followed. Article 32 of the Vienna Convention further informs the rules of treaty interpretation by permitting recourse to supplementary materials if an interpretation based on Article 31 either leaves the "meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable." Thus, we would note that the concept of whether an interpretation is "reasonable" is part of the customary rules of interpretation as provided for in the Vienna Convention.

3. Because this proceeding arises under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Viet Nam would further note that the object and purpose of the DSU is also relevant to the interpretation of the Anti-Dumping Agreement. In this regard, we would note that "security and predictability" cannot be achieved if different interpretations of the same rules are applied from proceeding to proceeding.

III. CLAIMS REGARDING THE USDOC'S USE OF THE ZEROING METHODOLOGY TO CALCULATE THE MARGINS OF DUMPING FOR INDIVIDUALLY INVESTIGATED RESPONDENTS

A. THE USE OF THE ZEROING METHODOLOGY TO CALCULATE THE MARGINS OF DUMPING FOR THE INDIVIDUALLY INVESTIGATED RESPONDENTS IS, AS SUCH, INCONSISTENT WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

4. The USDOC's use of zeroing to calculate the margins of dumping for the mandatory respondents in the second and third administrative reviews was, as such, inconsistent with United States obligations. Viet Nam has demonstrated as a factual matter in the first written submission that the USDOC engaged in the same simple zeroing procedure during the second and

third administrative reviews that has been repeatedly found by the Appellate Body to be as such inconsistent with the Anti-Dumping Agreement.

5. Viet Nam submits that the Appellate Body's findings on (1) the zeroing procedure as a norm subject to an "as such" claim[1] and (2) the inconsistency of the zeroing procedure with United States obligations[2], are determinative for this claim. An inconsistency found by the Appellate Body to be an as such violation relates to the authority's use of the practice itself and is not specific to the facts of any particular dispute. By their nature, as such claims are of general and prospective application, and the Appellate Body's finding concerns the authority's ongoing failure to bring the practice into conformity with clearly established obligations. Repeated determinations by the Appellate Body on the inconsistency of a practice create obligations that Members are entitled to rely upon. Indeed, Article 3.2 of the Dispute Settlement Understanding promotes the "security and predictability" of the dispute settlement process. The United States has an obligation, per the cited Appellate Body determinations, to cease the simple zeroing practice in the context of administrative reviews. The United States' failure to do so violates Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

B. THE USE OF THE ZEROING METHODOLOGY TO CALCULATE THE MARGINS OF DUMPING FOR THE INDIVIDUALLY INVESTIGATED RESPONDENTS (1) ON A CONTINUED AND ONGOING BASIS SINCE IMPOSITION OF THE ANTI-DUMPING DUTY ORDER AND (2) IN THE SECOND AND THIRD ADMINISTRATIVE REVIEWS IS, AS APPLIED, INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

6. Based on the factual record in this dispute, the Panel should conclude that the United States acted inconsistently with its obligations under Articles 2.1, 9.3 and 2.4 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. The factual record demonstrates that the USDOC engaged in zeroing – model zeroing in the original investigation and simple zeroing in the subsequent administrative reviews – since imposition of the shrimp antidumping duty order.[3] Article 9.3 requires that the margin of dumping "as established under Article 2" serve as the ceiling when determining the maximum antidumping duty to be applied to an exporter. Thus, prior to reaching the additional obligations regarding duty assessment contained in Article 9.3, the authority must calculate the margin of dumping in accordance with Article 2. The USDOC has failed to do so by systematically excluding certain transactions from the margin of dumping calculation: the USDOC did not calculate a dumping margin for the product. Article 2.1 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994 provide the definitions of "dumping" and "margin of dumping," clarifying the meaning of these terms in relation to the product as a whole. Contrary to the clear language of Article 9.3, the USDOC has for each of the measures at issue failed to determine a margin of dumping for the individually investigated respondents "as established under Article 2."

7. The United States' arguments to the contrary are unavailing. Two related points raised by the United States – that dumping may be found at the individual, transaction level and that a margin of dumping need not be calculated for the product as a whole – have been repeatedly rejected by the Appellate Body. The Appellate Body has interpreted the terms "dumping" and "margin of dumping" contrary to the United States' interpretation in a resounding fashion. To ensure predictability and security in the dispute settlement process, the Panel must recognize the now settled definitions of these concepts.

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[1] Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, 3; Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008.

[2] *Id*.

[3] Viet Nam's First Written Submission at paras. 46 to 48 and accompanying exhibits.

8. The United States' third argument concerns the phrase "during the investigation phase" found in Article 2.4.2. Viet Nam believes that the ordinary meaning of Article 2.4.2 makes clear its application to all investigations conducted by an authority during an antidumping proceeding.[4] Please see Viet Nam's Answers to Panel Questions at paras. 34 to 40 for a detailed discussion of the meaning of the phrase "during the investigative phase."

IV. CLAIMS REGARDING THE USDOC'S CALCULATION OF THE ALL OTHERS ("SEPARATE") RATE IN THE SECOND AND THIRD ADMINISTRATIVE REVIEWS

9. Viet Nam advances two independent claims regarding the all others ("separate") rate applied in the second and third administrative reviews: that (1) the USDOC's use of margins of dumping calculated using the zeroing methodology for the purpose of determining the ceiling rate and (2) the USDOC's failure to calculate an all others rate in the second and third administrative reviews that reflected the calculated dumping margins of the individually investigated respondents or was otherwise supported by the evidence, violate the United States' WTO obligations.

A. A CEILING ALL OTHERS RATE CALCULATED USING MARGINS OF DUMPING DETERMINED WITH THE ZEROING METHODOLOGY IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

10. The USDOC's use of margins of dumping calculated using the model zeroing methodology during the original investigation as the basis for determining the all others rate in the second and third administrative reviews violates Articles 9.3, 9.4, and 2 of the Anti-Dumping Agreement. Article 9.4 requires that the "margins of dumping" identified in the Article be used to determine the maximum amount of antidumping duties that can be applied to companies not selected for individual examination. The reliance on the "margins of dumping" determined for individually investigated companies necessarily requires that these margins of dumping be calculated in a manner consistent with Article 2 of the Anti-Dumping Agreement, as the definition of "dumping" in Article 2.1 explicitly governs all provisions of the Agreement.

11. As explained previously by Viet Nam, the phrase "margin of dumping" is defined by Article 2.1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. To be consistent with Article 9.4, the margins of dumping that serve as the basis for calculating the ceiling all others rate must be consistent with the definition and requirements on the calculation of dumping margins found in Article 2. Article 2.4.2 of the Anti-Dumping Agreement requires that the margin of dumping be calculated based on a comparison of "all comparable export transactions." Yet, as the Appellate Body has found repeatedly – and as the United States has apparently conceded in other disputes – the model zeroing methodology used in the original investigation does not produce a dumping margin for the product as a whole, which considers all transactions.[5] The USDOC's reliance on these margins of dumping first calculated in the original investigation for the purpose of calculating the ceiling all others rate applied in the second and third administrative reviews violates Articles 9.3 and 9.4 of the Agreement.

[4] For a more detailed discussion of the meaning of the phrase "during the investigative phase" please see Viet Nam's Answers to Panel Questions at paras. 34 to 40.

[5] The United States has declined to appeal these Panel determinations in the following disputes: *See* Panel Report, *US – Stainless Steel (Mexico)*, at para. 7.15. *See also* Panel Report, *United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WT/DS383/R, adopted 18 February 2010 at para. 3.3; Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007, DSR 2007:II, 425 at para. 3.2; Panel Report, *US – Continued Zeroing*, at para. 7.104; Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R, WT/DS345/AB/R at para. 7.16.

12. The United States' argument that the Panel should not consider the actions of the USDOC in the original investigation because it was completed prior to Viet Nam's accession to the WTO is unavailing, as the relevance of the original investigation to the second and third administrative reviews is a direct result of the USDOC's chosen actions.[6] Viet Nam does not request the Panel in this dispute to consider the final results of the original investigation. Instead, Viet Nam requests that the Panel evaluate the USDOC's final determinations in the second and third administrative review for the all others rate. Under the reasoning advocated by the United States, the USDOC could continue to apply indefinitely WTO-inconsistent determinations, so long as the determinations remained unchanged since accession to the WTO. Such a result is contrary to the benefits assumed upon accession to the WTO.

B. AN ALL OTHERS RATE ASSIGNED BASED ON A PRIOR SEGMENT OF THE ANTI-DUMPING PROCEEDING IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

13. The USDOC violated Article 9.4 of the Anti-Dumping Agreement when it assigned a rate to the separate rate respondents based on the margins of dumping of a prior segment of the proceeding in the second and third administrative reviews.[7] In the second administrative review, the USDOC calculated a margin of dumping for the mandatory respondents of 0.01 and 0.00 percent, but applied an all others rate well in excess of the margins calculated for the individually examined respondents of 4.57 percent. In the third administrative review, the USDOC applied the same reasoning in assigning a rate of 4.57 percent for the final determination, despite mandatory respondent dumping margins of zero or *de minimis*.

14. While recognizing that the Appellate Body has yet to define the exact nature of the obligation imposed on an authority where all individually examined respondents receive margins of dumping that are zero, *de minimis*, or based on facts available, as an initial matter, Article 9.4 prohibits companies not selected for individual examination from being prejudiced by the assigned antidumping duty.[8] It is thus incumbent upon the Panel to analyze whether the all others rate assigned in the second and third administrative reviews to the separate rate respondents prejudices those entities relative to the individually examined respondents. There can be little question that the USDOC's decision to assign a rate based on dumping behavior that is up to four years old prejudices separate rate companies. While the mandatory respondents have no requirement to make cash deposits for entries of subject merchandise, the non-examined companies must continue to pay a 4.57 percent cash deposit for imports to the United States.

15. Viet Nam also believes that the ordinary meaning of Article 9.4 and the relevant context make clear an authority's obligation to use contemporaneous sales information and calculated margins of dumping when calculating the all others rate. The first sentence of Article 9.4 clarifies that the Article applies only where the authority has limited the number of entities subject to individual investigation, cross-referencing Article 6.10. This reference to Article 6.10 establishes a link between the all others rate and the selection process for the contemporaneous segment of the proceeding. Subsection (i) reinforces this element of contemporaneity by identifying the "selected exporters or producers" as the calculated margins to be used in Article 9.4 calculations. The Article does not permit an authority to go back and select margins of dumping from a prior segment; doing so would fail to take into account the industry's response to imposition of the antidumping duty order. Articles 9.3 and 2.4 provide further support for this understanding of the all others rate. Article 9.3 establishes the contemporaneity requirement by linking (1) the margin of dumping calculated for a period of time

[6] Please refer to Viet Nam's Answers to Panel Questions at paras. 46 to 48 for further discussion.

[7] Viet Nam's First Written Submission at paras. 216 to 228; Opening Statement of Viet Nam at paras. 52 to 57; Viet Nam's Answers to Panel Questions at paras. 51 to 63.

[8] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697 at para. 123.

pursuant to Article 2 and (2) the amount of the antidumping duty imposed for that same period of time.[9] Further, Article 2.4 requires an authority to determine a dumping margin "in respect of sales made at as nearly as possible the same time." The Article recognizes the importance of contemporaneity when making an export price to normal value comparison, making explicit the understanding that market conditions and importer behavior are dynamic in nature and can change considerably with time. This concept cannot be limited to companies chosen for individual investigation: the principle applies with equal force to rates calculated pursuant to Article 9.4.

16. The USDOC's assigned all others rates in the second and third administrative reviews also violate Article 17.6(i) of the Anti-Dumping Agreement, which requires that authorities evaluate facts on the record in an "unbiased" and "objective" manner. The actions of the individually investigated exporters in the second and third administrative reviews, all of whom eliminated their dumping behavior, constitutes the entirety of the evidence available on the response of exporters to the antidumping duty order. The USDOC had no basis to conclude that the margin of dumping for all other producers equalled 4.57 percent.

17. The United States' arguments to the contrary are unavailing. Article 9.4 itself and in tandem with Article 2.4 require contemporeneity in the calculation of dumping margins, an obligation ignored in this instance through use of margins based on sales and cost information from up to four years prior. Further, the United States ignores the text of Article 17.6(i), which demands that authorities act in a reasonable and fair manner based on the facts presented: the United States can cite to no facts on the record of the second or third administrative review to support the USDOC's assessment of an all others rate of 4.57 percent.

V. THE USDOC'S APPLICATION OF ADVERSE FACTS AVAILABLE TO AN ENTITY NOT INDIVIDUALLY INVESTIGATED – THE VIETNAM-WIDE ENTITY – IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

18. Based on the factual record in this dispute, the Panel should conclude that the United States acted inconsistently with its obligations under Articles 9.4, 17.6(i), and 6.8 and Annex II of the Anti-Dumping Agreement. First, the USDOC determinations are inconsistent with Article 9.4 of the Anti-Dumping Agreement. Article 9.4 – exclusively – governs the antidumping duty applied to companies not selected for individual examination. In both the second and third administrative reviews, the USDOC limited examination to only two companies, prompting application of Article 9.4. Based on the ordinary meaning of Article 9.4, the Vietnam-wide entity should have received a rate no greater than the weighted average margin of dumping for the selected companies, excluding zero, *de minimis*, or facts available rates. Instead, the USDOC assigned the Vietnam-wide entity a rate of 25.76 percent based entirely on facts available. This exceeds the weighted margin of dumping for the selected companies and is therefore inconsistent with Article 9.4.

19. Second, Article 6.8 permits the application of facts available where an interested party "refuses access to, or otherwise does not provide, necessary information." Taken together, the phrase means that an administering authority may only apply facts available pursuant to Article 6.8 where it requested facts from an interested party and calculating a margin of dumping or otherwise conducting the investigation "cannot be ... done without" the requested information. With regard to the second administrative review, if the aggregate sales information requested from the parties constituted "necessary information" the USDOC could not have reached a final determination in the third administrative review, where the USDOC did not request this information from any interested parties. Yet, the USDOC did calculate margins of dumping for the mandatory respondents in the third administrative review and made no mention of any difficulty caused by the USDOC's decision to not request the quantity and value information from the interested parties. For the third administrative

[9] Please see Viet Nam's Answers to Panel Questions at para. 55 for further discussion.

review, the USDOC apparently does not dispute the claim that the USDOC did not request "necessary information" from the Vietnam-wide entity. Accordingly, the USDOC's application of a rate based on adverse facts available to the Vietnam-wide entity in the third administrative review violates Article 6.8 and Annex II of the Anti-Dumping Agreement.

20. The United States' arguments in opposition to these conclusions are unavailing. First, the United States contends that the nonmarket nature of Viet Nam's economy, as discussed in Viet Nam's Working Party Report, justifies differential treatment of the Vietnam-wide entity from other entities. Yet, this argument ignores the plain text of Articles 9.4 and 6.8 of the Anti-Dumping Agreement, neither of which provide for the distinctions the United States attempts to unilaterally add to the text of these provisions.

21. The United States next disagrees on whether the USDOC did in fact request quantity and value information from the "Vietnam-wide entity" in the second or third administrative reviews. The initiation notice for the second administrative review, found at Exhibit Viet Nam-12, lists all companies to which the USDOC sent the quantity and value questionnaire.[10] Note that a "Vietnam-wide entity" is not listed. This is because the USDOC did not know if this "Vietnam-wide entity" existed at the time it sent the questionnaire, let alone the sub-entities. The Vietnam-wide entity is only "created" by the USDOC once it determines later in the investigation that certain companies have failed to overcome the USDOC's presumption of government control. Thus, neither the "Vietnam-wide entity" nor any of its sub-entities were sent a quantity and value questionnaire; rather, it was only by subsequent operation of the USDOC's presumption of government control that certain entities were later classified as part of the Vietnam-wide entity.

22. Viet Nam believes that the USDOC's presumption results in a factual determination inconsistent with Article 17.6(i) of the Anti-Dumping Agreement. The USDOC does not gather any information or evidence from which it could determine the existence of affiliation among the non-investigated entities. The USDOC has no information to support the determination, and admittedly does so only on the basis of the impermissible presumption.

VI. THE USDOC'S LIMITED SELECTION OF MANDATORY RESPONDENTS DEPRIVES VIETNAMESE PRODUCERS OF SUBSTANTIVE RIGHTS GUARANTEED IN THE ANTI-DUMPING AGREEMENT AND IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

23. The Panel should conclude that the United States acted inconsistently with its obligations under Articles 6.10, 9.3, 11.1, and 11.3 of the Anti-Dumping Agreement. The USDOC's application of Article 6.10 in the imposition and collection of antidumping duties under Article 9.4 is inconsistent with the Anti-Dumping Agreement, as it deprives respondents of substantive rights provided by Articles 11.1, 11.3, and 9.3. Article 6.10 permits an authority to limit the number of entities individually examined where the individual investigation of all entities requesting examination would be impracticable. Viet Nam does not challenge the USDOC's authority to limit the number of companies examined. Viet Nam submits, however, that the USDOC must implement Article 6.10 to ensure that those producers are not denied rights contained in Articles 11.1, 11.3, or 9.3. The factual record demonstrates that the USDOC has limited the number of companies subject to individual examination in a manner inconsistent with the terms of the Anti-Dumping Agreement.[11] Further, the

[10] *Notice of Initiation*, 72 Fed. Reg. 17095, 17099 (6 April 2007). (Exhibit Viet Nam-12).

[11] Please see paragraph 71 of Viet Nam's First Written Submission for a chart detailing for each administrative review the number of companies for which the USDOC initiated a review, the number of companies eligible for individual investigation, and the number of companies selected for individual investigation.

USDOC repeatedly discouraged companies from participating as voluntary respondents in the administrative reviews.[12]

24. First, the USDOC has applied Article 6.10 in a manner that produces results inconsistent with Article 11.1 of the Anti-Dumping Agreement. Article 11.1 requires that an antidumping duty remain in place "only so long as and to the extent necessary to counteract dumping." Yet the USDOC's limited selection procedure makes impossible an entity's ability to demonstrate the extent to which the antidumping duty remains necessary because the USDOC has no evidence of the dumping behavior of companies not individually examined. In a related manner, the USDOC's application of Article 6.10 restricts the rights of respondent parties granted under Article 11.3. Certain companies denied the ability to participate in the administrative reviews have no ability to meet the "no likelihood of continued dumping" standard. Instead, the USDOC assumes a dumping margin for those companies equal to the separate rate or Vietnam-wide entity rate assigned in each of the administrative reviews.

25. The impact of the USDOC's improper application of Article 6.10 on rights guaranteed to respondent parties under Article 9.3 further illustrates the inconsistency in the USDOC's actions. Article 9.3 states that "[t]he amount of the antidumping duty shall not exceed the margin of dumping as established under Article 2." Despite the clear requirements contained in this sentence, throughout the course of the shrimp antidumping proceeding the USDOC has not established any relationship between the amount of the antidumping duties assessed on non-individually examined respondents and the margin of dumping for that respondent.

26. Lastly, the USDOC denied certain respondent companies of the opportunity to participate as voluntary respondents in violation of Article 6.10.2. The USDOC's actions with regard to voluntary responses fit squarely within the definition of discouraging behavior explicitly prohibited by the last sentence of Article 6.10.2. First, the standard applied by the USDOC discourages voluntary responses by interested parties. Second, the actions taken – or rather, not taken – by the USDOC are in violation of Article 6.10.2. In the third administrative review, an exporter of subject merchandise not selected for individual investigation requested treatment as a voluntary respondent in meetings with USDOC officials and through written submissions, yet the record does not indicate whether the USDOC ever responded directly to the company. In the fourth administrative review, where two companies actually submitted all of the information necessary to calculate a dumping margin, the USDOC again refused to treat the companies as voluntary respondents; instead treating the companies as separate rate respondents. These actions indicate a disregard for companies seeking treatment as voluntary respondents.

27. The United States argues that Articles 11.1 and 11.3 of the Anti-Dumping Agreement do not impose company-specific obligations on an authority. Viet Nam addressed this issue in greater detail in response to question 45 of the Panel's questions, and refers the Panel to that response. Viet Nam would like to simply impress upon the Panel that the words of Article 11.1 and 11.3 must be given meaning. The United States cannot unilaterally choose to ignore and label as ineffective provisions of the Anti-Dumping Agreement with which it disagrees. Members agreed to the terms of these Articles and they must be given effect.

28. Viet Nam would like to make the following additional observations. First, Article 31 of the Vienna Convention requires that the object and purpose of the entire treaty at issue be considered when interpreting the terms of any particular provision of the treaty. Thus, Articles 6.10 and 9.4 must

[12] *See* "Request for the Department to Comply with its Regulations Regarding Revocation of Antidumping Duty Orders," dated 8 October 2008 at 6. (Exhibit Viet Nam-62); *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, 12207 (15 March 2010). (Exhibit Viet Nam-22).

be interpreted in the context of the object and purpose of the Anti-Dumping Agreement. Interpreting Articles 6.10 and 9.4 to read out of the Agreement other obligations is not consistent with the requirements of Article 31 of the Vienna Convention.

29. Further, the USDOC has been aware of the insufficiency of its resources to permit individual investigation of all exporters and producers since 2003, yet has done nothing to address this insufficiency. Nor has it taken any steps to reconcile the use of the exception provided in Articles 6.10 and 9.4 with its obligations under Articles 9.3, 11.1, and 11.3. These dual failures have resulted in the loss of significant rights of the exporters and producers provided under the Anti-Dumping Agreement. To absolve the United States of any responsibility either to devote additional resources to the implementation of the Anti-Dumping Agreement or to reconcile its use of the exception in Articles 6.10 and 9.4 with its other obligations under the Agreement is to render meaningless the disciplines imposed by the Agreement.

VII. CONSEQUENTIAL CLAIM OF VIOLATIONS OF WTO OBLIGATIONS

30. As discussed above, the USDOC's actions with regard to the challenged conduct – the use of zeroing, the all others rate determination, the Vietnam-wide entity determination, and the limited investigation of respondents – will have a consequential impact on the USDOC's five-year sunset review determination, such that the USDOC cannot reach a final determination in the five-year sunset review that is consistent with the requirements of the Anti-Dumping Agreement.

VIII. CONCLUSION

31. For the reasons set forth above, we request that the Panel find:

1) That the application of zeroing to individually investigated respondents in the second and third administrative reviews, and its continued application in the subsequent reviews, is inconsistent with Articles 9.3, 2.1, 2.4.2, and 2.4 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

2) That the USDOC's zeroing methodology is, as such, inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

3) The use of margins of dumping determined using the zeroing methodology to calculate the all others ("separate") rate in the second and third administrative reviews is, as applied, inconsistent with Articles 9.4, 9.3, 2.4.2 and 2.4 of the Anti-Dumping Agreement.

4) Application of an all others ("separate") rate that fails to consider the results of the individually investigated respondents in the contemporaneous proceeding and produces an antidumping duty prejudicial to companies not selected for individual investigation is, as applied in the second and third administrative reviews, inconsistent with Articles 9.4, 17.6(i), and 2.4 of the Anti-Dumping Agreement.

5) The application of an antidumping duty based on adverse facts available to the Vietnam-wide entity in the second and third administrative reviews, and its continued application in subsequent reviews, is inconsistent with Articles 6.8, 9.4, 17.6(i) and Annex II of the Anti-Dumping Agreement.

6) The USDOC's determinations in the second and third administrative reviews, and on a continuing basis, to limit the number of individually investigated respondents such that they restrict certain substantive rights under the Anti-Dumping Agreement are inconsistent with Articles 6.10, 6.10.2, 9.3, 11.1, and 11.3 of the Anti-Dumping Agreement.

32. Accordingly, Viet Nam further requests that the Panel recommend that the United States immediately bring all such measures into conformity with its obligations under Article VI of the GATT 1994 and the Anti-Dumping Agreement.

ANNEX E-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. This dispute, like all WTO disputes, presents questions about the interpretation of the covered agreements, but Vietnam has largely failed to articulate what specific obligations contained in the covered agreements it believes the United States has violated. Vietnam has referenced multiple provisions of the AD Agreement and the GATT 1994, but has not provided a proper interpretive analysis of those provisions. Vietnam's arguments do not provide a basis on which the Panel could sustain Vietnam's allegations that the United States has acted inconsistently with any of its WTO obligations.

2. This submission will not repeat all of the arguments advanced in the U.S. First Written Submission, in oral statements during the first substantive panel meeting, and in the U.S. responses to the Panel's written questions, though we continue to rely on the arguments contained therein. For the reasons we have already given, together with those we provide in this submission, the United States respectfully submits that the only conclusion to be drawn is that Vietnam's claims are without merit and must be rejected.

II. VIETNAM'S CLAIMS OF INCONSISTENCY REGARDING "ZEROING" ARE WITHOUT MERIT

3. Vietnam has failed to demonstrate that any antidumping duties were applied in excess of the margins of dumping determined for individually examined exporters and producers in the second and third administrative reviews. Vietnam has not shown that zeroing had any impact on the calculated dumping margins for the individually examined exporters and producers in these reviews, all of which were determined to be zero or *de minimis*.

4. Vietnam continues to offer no relevant evidence in support of its claims against the margins of dumping calculated for individually examined exporters/producers in the second and third administrative reviews. Instead, Vietnam makes an unsubstantiated assertion about the impact of the use of "zeroing" on the behavior of exporters/producers. Even if Vietnam could provide evidence to support its assertion, there is no obligation in Article VI:2 of the GATT 1994 or Article 9.3 of the AD Agreement that addresses such an impact upon the behavior of exporters/producers.

5. Vietnam also argues that the Panel should find it "relevant" that the "zeroing" methodology was "embedded" in Commerce's determinations in the second and third administrative reviews. This appears to be no more than another attempt at a formulation that skirts the fact that the margins of dumping calculated for the individually examined companies were zero or *de minimis* and avoids the actual language of the provisions of the covered agreements that are at issue. To the extent that there is a prohibition on the use of a "zeroing" methodology in administrative reviews, such an obligation is found in Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. These provisions prohibit the imposition of antidumping duties in excess of the margin of dumping. The fact that the "zeroing" methodology is embedded in a proceeding is irrelevant unless it can be demonstrated that antidumping duties were applied in excess of the margin of dumping.

6. In response to the Panel's written questions, Vietnam, for the first time in this dispute, has advanced arguments in support of an "as such" challenge against the use of "zeroing" in administrative reviews. However, Vietnam has advanced no arguments and pointed to no evidence that would support a finding by the Panel that any "zeroing methodology" exists as a measure that can be challenged "as such." Vietnam merely cites repeatedly to prior panel and Appellate Body reports. Consequently, with respect to the so-called "zeroing methodology," Vietnam has not provided a sufficient evidentiary basis for the Panel to make any findings regarding the precise content of any rule or norm, its nature as a measure of general and prospective application, and its attribution to the United States.

7. Contrary to Vietnam's argument, the obligation to make a "fair comparison" under Article 2.4 does not create an obligation to provide for offsets. Article 2.4 establishes an obligation that a fair comparison be made between normal value and export price and provides detailed guidance as to how that fair comparison is to be made. Article 2.4 recognizes that the normal value and export transactions to be compared may occur, *inter alia*, (a) with respect to models with differing physical characteristics, (b) at distinct levels of trade, (c) pursuant to different terms and conditions, and (d) in varying quantities. The focus of Article 2.4 is on how the authorities are to select transactions for comparison and make appropriate adjustments for differences that affect price comparability. Vietnam's proposed interpretation of Article 2.4 – to encompass the *aggregation* of comparisons between export price and normal value – is inconsistent with prior panel and Appellate Body interpretations, and it is erroneous. Article 2.4 does not apply to the *aggregation* of comparisons. The open-ended approach inherent in Vietnam's interpretation of Article 2.4 of the AD Agreement would result in disputes that are virtually impossible to resolve in any principled, text-based way.

8. Vietnam also argues that the Panel should find that the prohibition on the use of "zeroing" during investigations that the Appellate Body has identified in Article 2.4.2 of the AD Agreement applies in the context of administrative reviews. The text of the AD Agreement, as well as prior panel and Appellate Body reports, does not support Vietnam's argument. The Appellate Body and prior panels have recognized distinctions between investigations and other proceedings under the AD Agreement, consistently finding that the provisions in the AD Agreement with express limitations to investigations are, in fact, limited to the investigation phase of a proceeding. The repeated recognition by panels and the Appellate Body of the distinctions between investigations and review proceedings is consistent with the distinct function of the investigation phase, which is to establish as a threshold matter whether the imposition of an antidumping duty is warranted. Other phases (such as Article 9 assessment proceedings or Article 11 sunset reviews) have different functions. Whereas the function of an investigation is to determine whether a remedy against dumping should be provided, the function of an assessment proceeding is to determine the precise amount of that remedy.

9. The limited applicability of Article 2.4.2 could not be plainer. Article 2.4.2, by its very terms, is limited to the "investigation phase." Analyzing the text of Article 2.4.2, the panel in *Argentina – Poultry Anti-Dumping Duties* recognized that the application of that provision is expressly limited to the investigation phase of an antidumping proceeding. The express limitation of the obligations in Article 2.4.2 to the investigation phase is consistent with the differences in the antidumping systems applied by Members for purposes of the assessment phase. The different methods used by Members include the use of prospective normal values, retrospective normal values, and prospective *ad valorem* duties. If the obligations regarding comparison methodologies found in Article 2.4.2 were applied to the assessment of antidumping duties, this divergence of assessment systems would not be possible. For example, it is not possible to reconcile the prospective normal value system used by some Members with a requirement to use either the average-to-average or transaction-to-transaction comparison methodology, because such systems compare weighted average normal values to individual export prices in order to assess antidumping duties on individual transactions. Thus, to retain the flexibility for Members to apply different assessment systems that is reflected in Article 9, it was necessary to limit the requirements of Article 2.4.2 to the investigation phase.

10. Contrary to Vietnam's argument, Article VI:1 of the GATT 1994 and Article 2.1 of the AD Agreement do not define the "concepts" of "dumping" and "margin of dumping" in relation to a "product as a whole". The term "product as a whole" is not found anywhere in the GATT 1994 or the AD Agreement, and Vietnam's purportedly "textual" argument is divorced from the actual text of the relevant provisions. Consistent with the customary rules of treaty interpretation, the precise meaning of the terms "dumping" and "margin of dumping" in a particular provision must be informed by the context in which the term is used. The terms "dumping" and "margin of dumping" are defined in relation to the term "product." The ordinary meaning of "product" may refer to a single transaction or multiple transactions. Article 2.1 defines "dumping" in relation to the terms "export price" and "normal value." These fundamental concepts have flexible meaning because "normal value" and "export price" could relate to either an individual transaction or multiple transactions depending upon the context. It would be illogical to conclude that the term "dumping," which is derived from these flexible terms, may not itself have a similarly flexible definition.

III. VIETNAM'S CLAIMS AGAINST THE RATES APPLIED TO COMPANIES NOT SELECTED FOR INDIVIDUAL EXAMINATION IN THE SECOND AND THIRD ADMINISTRATIVE REVIEWS ARE WITHOUT MERIT

11. Article 9.4 of the AD Agreement simply establishes the maximum antidumping duty that may be applied to companies not individually examined, in certain circumstances. Article 9.4 does not prescribe a methodology for assigning a rate to companies not individually examined in an assessment review, and Article 9.4 does not prescribe the *maximum* rate that may be applied to companies not individually examined in situations where the rates calculated for the individually examined companies are all zero, *de minimis*, or based on facts available. Contrary to Vietnam's argument, Article 9.4 does not require the application of zero or *de minimis* rates to companies not individually examined if all the rates determined for individually examined companies are also zero or *de minimis*. To invent further obligations under the circumstances presented here would be contrary to the DSU, which makes it clear that dispute settlement is not to add to or diminish Members' rights and obligations.

12. The text of Article 9.4 reflects the limited nature of the obligation related to the maximum antidumping duty that Members may apply, as well as the compromise that Members made in agreeing to this provision. Article 9.4 requires investigating authorities to disregard not only facts available margins (rates that would increase the maximum antidumping duty that may be applied), but also zero and *de minimis* margins as well (rates that would lower the ceiling). To interpret Article 9.4 as requiring Members to apply only zero or *de minimis* rates in instances in which only zero or *de minimis* rates have been calculated for individually examined companies would be inconsistent with the text and would upend the compromise evidenced by the text.

13. There is no basis in the AD Agreement for the contemporaneity requirement that Vietnam asks the Panel to read into Article 9.4. Article 2.4, which Vietnam suggests informs the interpretation of Article 9.4, addresses the determination of margins of dumping, specifically the comparison of export price and normal value and adjustments that must be made to ensure a "fair comparison." The obligation in Article 2.4 that the export price and normal value comparison be made "in respect of sales made at as nearly as possible the same time" relates to the calculation underlying the determination of dumping. It does not relate to the calculation of the maximum antidumping duty that may be applied to companies not individually examined pursuant to Article 9.4, nor to the actual antidumping duty applied to such companies when the duty is based on a previously determined dumping margin. The obligations in Article 2.4 are of no relevance to the Panel's examination of Commerce's determinations.

14. Nothing in the text of the AD Agreement supports the linkage that Vietnam attempts to establish between Articles 2.4 and 9.4. It is particularly noteworthy that there are no cross references

between these provisions. The Appellate Body has previously explained that the absence of cross references is of some consequence, as the drafters made "active use" of cross references in the covered agreements when they intended to apply obligations in different contexts. There are numerous cross references throughout the AD Agreement, but none that link Articles 2.4 and 9.4.

15. Vietnam also points to Article 9.3 of the AD Agreement as a basis for imputing a contemporaneity requirement into Article 9.4. Just as Article 9.4 does not cross reference Article 2.4, it makes no reference to Article 9.3. Additionally, while Article 9.3 establishes obligations with respect to the application of duties to individually examined companies, Article 9.4 establishes certain obligations with the respect to the maximum duty that may be applied to companies not individually examined in some situations. Unsurprisingly, the obligations are different. Article 9.4 does not impose any obligations on Members regarding the methodology to be used in determining what antidumping duty should be applied to companies not individually examined. Article 9.4 simply sets the maximum duty rate that may be applied in certain circumstances. When all the dumping margins calculated for individually examined companies, are zero, *de minimis*, or based on facts available, Article 9.4 does not specify a maximum duty.

16. Vietnam has also failed to demonstrate that Commere's determinations in the second and third administrative reviews are inconsistent with the "unbounded" discretion standard that the Appellate Body has said applies in a *lacuna* situation under Article 9.4. Commerce did not act with "unbounded" discretion. Rather, Commerce reasonably looked toward rates determined in recent proceedings as they would reflect the behavior of exporters of subject merchandise during a recent period of time.

17. Vietnam argues for the first time in response to the Panel's written questions that Commerce failed to make "an unbiased and objective evaluation of the facts" in assigning rates to companies not individually examined in the second and third administrative reviews. Vietnam did not raise any claims under Article 17.6(i) of the AD Agreement in its panel request, so no claims under this provision are within the panel's terms of reference. Furthermore, Article 17.6(i) establishes a general obligation in respect of a dispute settlement panel's assessment of the facts of the matter rather than imposing an obligation on *WTO Members*.

18. Additionally, Article 9.4 of the AD Agreement does not condition a Member's right to apply antidumping duties to companies that are not individually examined on a factual finding that other companies continued to dump during a particular period. Furthermore, Vietnam's assertion that the "evidence indicates an industry that has ceased dumping" is wrong. In the second administrative review, numerous companies avoided any possibility of being selected for individual examination by refusing to respond to Commerce's request for information concerning the quantity and value of their shipments to the United States, and Commerce determined the margin of dumping for these companies based on facts available using an adverse inference. In the first administrative review (not a measure at issue in this dispute), not only did companies not respond to quantity and value questionnaires, but several companies *selected for individual examination* failed to respond to Commerce's full sales and cost questionnaire. These adverse findings with respect to dumping cannot be considered evidence that dumping in the industry had ceased. Vietnam asks the Panel to ignore these facts.

19. Vietnam argues that *US – DRAMS* is "incongruent" with the facts of this dispute because Commerce "fully considered the issue" of what rate to apply to companies not individually examined in the second and third administrative reviews before ultimately determining to apply the separate rates determined in the original investigation. Of course, Commerce "fully considered" what rates to apply in the absence of rates that could be used to calculate an applicable ceiling rate consistent with the requirements of Article 9.4. Commerce determined that it would be appropriate to rely on either a weighted average of dumping margins calculated for exporters and producers individually examined

in the most recently completed proceeding, excluding any zero and *de minimis* margins and margins based on facts available, or a company-specific rate from a more recently completed proceeding where such a rate had been determined for a company. Commerce considered these rates to be reasonably reflective of commercial behavior during a recent period.

20. Vietnam has asked the Panel to find that the rates applied in the second and third administrative reviews to companies not individually examined are inconsistent with the covered agreements because they were inconsistent with the covered agreements when they were originally calculated. But the rates were not inconsistent with the covered agreements when they were originally calculated. The rates were not subject to the covered agreements when they were originally calculated – because the WTO Agreement did not apply between the United States and Vietnam at that time – and they cannot now be found to have been inconsistent with the covered agreements at the time they were originally calculated. Vietnam appears to be seeking to obtain the benefits of WTO Membership prior to its accession to the WTO.

21. The panel in *US – DRAMS* explained that "the AD Agreement only applies to those parts of a pre WTO measure that are included in the scope of a post WTO review. Any aspects of a pre WTO measure that are not covered by the scope of the post WTO review do not become subject to the AD Agreement by virtue of Article 18.3 of the AD Agreement." The relevant question, then, is whether the rates calculated in the original investigation were subject to post-WTO review? The answer to this question is, "no." Commerce did not recalculate the rates that were calculated in the original investigation and Commerce did not make any new comparisons of export price and normal value. That is, Commerce did not conduct a "post-WTO review" of the rates such that they became subject to the AD Agreement by virtue of such review. The separate rates in question were determined once and only once in the original pre-WTO investigation – before the entry into force of the WTO Agreement for Vietnam – and were then applied in the final results for the second and third administrative reviews. The factual situation in this dispute is thus closely analogous to that in *US – DRAMS*.

IV. VIETNAM'S CLAIMS OF INCONSISTENCY REGARDING THE RATE APPLIED TO THE VIETNAM-WIDE ENTITY ARE WITHOUT MERIT

22. Vietnam agrees with the United States that, as a general matter, an authority may, consistent with Article 6.10 of the AD Agreement, treat more than one company as a single entity based upon the relationship between those companies. However, Vietnam suggests that, in the challenged proceedings, Commerce relied on an "unjustified and impermissible presumption that all exporters are owned or controlled by the government" and Commerce "lacks the affirmative evidence necessary to conclude that the entities it believes constitute the Vietnam-wide entity are affiliated ...." Pursuant to Article 17.6(i) of the AD Agreement, the issue is whether Commerce properly established the facts and evaluated such facts in an unbiased and objective manner in finding a relationship between the Government of Vietnam and certain companies that is sufficiently close to warrant treating multiple companies as a single entity. This question must be answered in the affirmative. Commerce had before it ample evidence of the influence exerted by the Government of Vietnam over its economy, including over exportation.

23. Vietnam also argues that an investigating authority may only make a finding of affiliation with respect to "companies that are subject to individual examination." There is no such limitation in the text of the Agreement. Vietnam is also incorrect that an investigating authority would not have the necessary information to make an affiliation determination with respect to companies that are not individually examined. Commerce had ample evidence to support a determination that the Vietnam-wide entity should be treated as a single exporter/producer, including information about the non-market nature of Vietnam's economy and the influence exerted over it by the Government of

Vietnam, in particular with respect to exportation, as well as information provided by some companies regarding their independence from the government.

24. Contrary to Vietnam's argument, the opportunity Commerce provided to respondents in the second and third administrative reviews to demonstrate their independence from the government was not discriminatory. It was an information gathering exercise that permitted Commerce to determine whether particular companies should be considered individually or as part of another entity. Commerce collects similar information in market economy cases as well.

25. Vietnam asserts that the "assumption underlying the USDOC practice is that it can apply an adverse facts available rate to companies that do not demonstrate independence from government control." Vietnam is incorrect. Commerce did not apply a rate based upon the facts available to any interested party that cooperated in the proceedings. Vietnam mistakenly conflates Commerce's finding that the Vietnam-wide entity is a single exporter/producer and Commerce's separate determination in the second administrative review to apply to the Vietnam-wide entity an antidumping duty rate based upon facts available due to the failure of certain companies to provide requested information. Vietnam also mischaracterizes the basis for the antidumping duty rate applied to the Vietnam-wide entity in the third administrative review. In the third administrative review, Commerce did not apply to the Vietnam-wide entity a rate based upon facts available. Rather, Commerce applied to the Vietnam-wide entity the only rate that had ever been applied to it, which was similar to the methodology used for the other separate rate companies in the third administrative review.

26. The quantity and value data requested from all respondents under review in the second administrative review was "necessary information" within the meaning of Article 6.8 and Annex II of the AD Agreement. The fact that Commerce obtained information regarding the quantity and value of companies' imports in the third administrative review from U.S. Customs and Border Protection data, as opposed to sending questionnaires to companies, does not demonstrate that the information was not necessary. On the contrary, Commerce's collection of quantity and value information in both the second and third administrative reviews, albeit from different sources, confirms that this information was required in order for Commerce to conduct the proceedings. Additionally, regardless of whether Commerce calculates dumping margins based upon individual sales, a company's aggregate quantity and value is the starting point of any dumping analysis. That Commerce later requires companies that are individually investigated to report each sale does not mean that the total quantity and value of a company's sales is not necessary information.

27. Contrary to Vietnam's argument in this dispute, the scope of "necessary information" is not limited to the information used to calculate margins of dumping. As the *Egypt – Steel Rebar* panel explained, "it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.) ...." Vietnam's argument that an investigating authority cannot make an affiliation finding for a company not individually examined because, *inter alia*, "the authority does not have the information necessary to make such a determination" suggests that Vietnam agrees.

V. VIETNAM'S CLAIMS OF INCONSISTENCY REGARDING LIMITING THE NUMBER OF RESPONDENTS SELECTED ARE WITHOUT MERIT

28. Article 6.10 of the AD Agreement broadly provides that investigating authorities are not required to determine margins of dumping for every exporter or producer where the number of exporters or producers "is so large as to make such a determination impracticable." In the second and third administrative reviews, there were more than 100 exporters or producers under review. Vietnam has clarified that it is not arguing that Commerce "should have or could have investigated all the producers and exporters requesting reviews in each segment of the proceeding." Vietnam indicates that requiring Commerce to do so would not be "reasonable." Vietnam thus concedes that is was

"impracticable" for Commerce to determine individual dumping margins for all exporters and producers. Furthermore, Vietnam has not alleged that the Commerce acted inconsistently with Article 6.10 by failing to individually examine the largest number of exporters or producers that "reasonably" could be examined, explaining that, "[f]or purposes of this dispute, the Panel does not need to determine the precise percentage of producers or production that the USDOC could reasonably investigate under Article 6.10." Hence, the United States cannot be found to have acted inconsistently with any of the obligations in Article 6.10 of the AD Agreement.

29. Vietnam's argument that the United States violated Articles 6.10 and 9.4 of the AD Agreement because Commerce "made no effort to explore alternatives" to examine more exporters and producers when it limited its examination is without merit. Nothing in Article 6.10, or any other provision of the AD Agreement, requires Commerce to "explore alternatives" as proposed by Vietnam. This is another instance of Vietnam inventing an obligation that has no basis in the text of the AD Agreement.

30. By its terms, Article 6.10.2 of the AD Agreement requires that companies not initially selected who wish to have an individual margin of dumping calculated must "submit[] the necessary information in time for that information to be considered." The information Vietnam has put before the Panel demonstrates that the "necessary information" was never submitted in either the second or third administrative reviews and conclusively demonstrates that Commerce was under no obligation to determine individual dumping margins for "voluntary respondents" in those proceedings. For this reason, the United States cannot be found to have acted inconsistently with Article 6.10.2 of the AD Agreement.

31. In its responses to the Panel's written questions, Vietnam articulates its interpretation of Article 11 of the AD Agreement and ultimately concludes that Articles 11.1 and 11.3 "require that an authority permit revocation determinations on a company-specific basis." The Appellate Body, however, has confirmed that Article 11.1 does not impose any independent or additional obligations on Members. In addition, these claims are dependent on Vietnam's claims that Commerce's determinations to limit its examination are inconsistent with Article 6.10 of the AD Agreement. As we have shown, however, Commerce's determinations to limit its examination are not inconsistent with the AD Agreement. The United States cannot be found to have acted inconsistently with one provision of the AD Agreement due to the proper exercise of its rights under a separate provision of the AD Agreement.

32. Vietnam ignores the Appellate Body's unequivocal finding in *US – Corrosion-Resistant Steel Sunset Review* that "Article 11.3 does not require investigating authorities to make their likelihood determination on a company-specific basis." The Appellate Body also rejected the same arguments Vietnam makes now regarding Articles 6.10 and 11.4 of the AD Agreement, finding that "[t]he provisions of Article 6.10 concerning the calculation of individual margins of dumping in investigations do not require that the determination of likelihood of continuation or recurrence of dumping under Article 11.3 be made on a company specific basis." Additionally, contrary to Vietnam's suggestion, it is evident that the Appellate Body was aware of Article 11.1 when it was analyzing Article 11.3.

33. Finally, Vietnam asserts that a U.S. regulation that provides for company specific revocation of an antidumping duty order under certain circumstances is "the United States' chosen method for implementing Article 11.1. ..." The United States does not agree with this statement. The United States considers that the regulatory provision at issue goes beyond any obligation contained in Article 11 of the AD Agreement.

VI. VIETNAM'S CLAIM WITH RESPECT TO THE "CONTINUED USE OF THE CHALLENGED PRACTICES" IS WITHOUT MERIT

34. The United States has demonstrated that no so-called "continued use" measure is within the Panel's terms of reference because Vietnam failed to specifically identify any such measure in its panel request, contrary to the obligation in Article 6.2 of the DSU. Vietnam asks the Panel to infer from the description of other "as applied" measures that a "continued use" measure is also identified in the panel request. Such an inference is not permissible. Rather, the Panel must determine whether, "on the face" of the panel request, read "as a whole," a "continued use" measure was specifically identified consistently with the requirement in Article 6.2. In short, as the United States has shown and will explain further below, it was not.

35. Vietnam suggests that the opening line of Section 2 of the panel request specifically identified a "continued use" measure and "[t]he language of the Panel Request does not include limiting language that would restrict the measure's applicability to only those reviews already completed or initiated." Vietnam asks the Panel to ignore or erase the very next sentence of the panel request, which states that "[t]he following determinations constitute the measures at issue" and then lists six particular determinations that are specifically identified. Contrary to Vietnam's assertion, this sentence does indeed expressly "limit" the measures at issue in this dispute to the determinations identified. Other language in the panel request similarly limits the claims raised to the "as applied" measures identified in Section 2. Throughout the document, Vietnam's panel request limits itself to the application of the laws and procedures in the determinations individually identified. There is no indication in the panel request that Vietnam seeks to challenge a so-called "continued use" measure.

36. In the consultations request, Vietnam described its concern that the United States "will ... continue to act inconsistent with its WTO obligations." Vietnam has asserted that this is a reference to a "continued use" measure. In its First Written Submission, Vietnam described the measure as the "continued use of the challenged practices." The words used in the consultations request and Vietnam's First Written Submission are similar to each other, and the language in the First Written Submission is similar to that used in *US – Continued Zeroing* by the EC in its panel request and by the Appellate Body in its report. Vietnam has offered no explanation for why the words in the consultations request and Vietnam's First Written Submission are so dissimilar from the words in Vietnam's panel request in this dispute. While previous panels have recognized that the DSU does not require that a request for consultations mirror a panel request, the principal conclusion to be drawn from the dissimilarity is that the panel request does not specifically identify any "continued use" measure, and thus no such measure is within the Panel's terms of reference.

37. Nothing in the text of Section 2(d) of Vietnam's panel request can be read as specifically identifying a "continued use" measure. The words in Section 2(d) merely allege that the "sunset review is inconsistent with Articles 11.2 and 11.3 of the Agreement," which would be an "as applied" claim if not for the fact that Commerce had not yet made a final determination in the sunset review at the time Vietnam made its panel request.

38. Vietnam argues that "the measures identified in the panel request are closely related to the 'continued use' measure," mistakenly relying on the panel reports in *Japan – Film* and *Argentina – Footwear*. The "measure" that Vietnam failed to "explicitly describe" in the panel request is a so-called "continued use" measure. A "continued use" measure is not "subsidiary or closely related to" the second and third administrative reviews – the only measures properly described in the panel request. If anything, the second and third administrative reviews would be subsidiary to, *i.e.*, part of a "continued use" measure; not the reverse. Additionally, the "continued use" measure does not modify or implement the second and third administrative reviews. It is significant that, in *Japan – Film* and *Argentina – Footwear*, the complaining Members could not have "explicitly described" the

implementing measures in the panel request because the implementing measures were not put into place until after the panel request had been made. That is not the case in this dispute.

39. Article 6.2 of the DSU requires Vietnam to "identify the specific measures at issue" in its panel request. Vietnam would have the Panel look only at the "claims" and not the "measures" identified in its panel request. The logical conclusion of Vietnam's argument is that a complaining party could identify just one measure in its panel request, and bring before a panel as many additional measures as it wished as long as the claims with respect to each measure were the same. This is not what the DSU requires. Furthermore, the basic premise of Vietnam's assertion that there is no "meaningful distinction substantively between the arguments" to be made in relation to "as applied" and "continued use" measures is flawed. The facts and legal arguments relevant to "as applied" claims related to a particular determination are substantially different from those relevant to claims related to a so-called "continued use" measure.

40. The "continued use of challenged practices" appears to be a fictional measure supposedly composed of an indeterminate number of potential future measures that did not exist at the time of Vietnam's panel request (and may never exist). Such so-called "continued use" cannot be subject to dispute settlement because it could not be impairing any benefits accruing to Vietnam, and it consists of proceedings that had not resulted in "final action" at the time of the consultations request, as required by Article 17.4 of the AD Agreement.

41. In *US – Continued Zeroing*, the Appellate Body found that the record supported findings of inconsistency in only four of the eighteen cases challenged. As a factual matter, in the fourteen other cases, the record did not reflect that "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time." In each of the four cases where the Appellate Body concluded that there was "a sufficient basis ... to conclude that the zeroing methodology would likely continue to be applied in successive proceedings," the panel had found the following: (1) the use of the zeroing methodology in the initial less than fair value investigation; (2) the use of the zeroing methodology in four successive administrative reviews; and (3) reliance in a sunset review upon rates determined using the zeroing methodology. Where there was "a lack of evidence showing that zeroing was used in one periodic review listed in the panel request" or "the sunset review determination was excluded from the Panel's terms of reference," the Appellate Body found that "the Panel made no finding confirming the use of the zeroing methodology in successive stages over an extended period of time whereby the duties are maintained." Consequently, the Appellate Body was "unable to complete the analysis on whether the use of the zeroing methodology exists as an ongoing conduct in successive proceedings ...."

42. In this dispute, the original investigation, the first, fourth, and fifth administrative reviews, and the sunset review are not within the Panel's terms of reference and there can be no finding that Commerce acted inconsistently with the AD Agreement or the GATT 1994 in connection with the "challenged practices" in those proceedings. Additionally, Vietnam has failed to establish that "zeroing" had any impact on the margins of dumping calculated for the individually examined respondents in the second and third administrative reviews, and Vietnam has failed to establish as a factual matter that Commerce used the zeroing methodology in connection with the application of a dumping margin to separate rate respondents in those proceedings, or to the Vietnam-wide entity. Vietnam also seeks to expand the Appellate Body's reasoning in *US – Continued Zeroing* beyond zeroing to encompass the other "challenged practices", but Vietnam's claims regarding the other "challenged practices" are without merit. Vietnam cannot establish "a string of determinations, made sequentially ... over an extended period of time" with respect to any of the "challenged practices."

ANNEX F

ORAL STATEMENTS OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL OR EXECUTIVE SUMMARIES THEREOF

ANNEX F-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF VIET NAM AT THE SECOND MEETING OF THE PANEL

I. OVERVIEW

1. Viet Nam would like to again thank the Panel for the work done thus far in connection with this dispute. As an initial matter, Viet Nam would like to very briefly address a claim made repeatedly by the United States throughout this proceeding: that is, that Viet Nam is "inventing" obligations not present in the Anti-Dumping Agreement. The Anti-Dumping Agreement is not concerned solely with the obligations facing the administering authority. In addition to these obligations, the Anti-Dumping Agreement also grants certain rights to the exporters and producers subject to the antidumping proceeding. The Appellate Body, panels, and authorities therefore have a duty – an obligation – to ensure that these rights are safeguarded against the interests of the domestic parties.[1]

II. ARGUMENTS OF THE PARTIES PERTAINING TO THE USDOC'S ZEROING METHODOLOGY

2. We begin with the claims related to use of the zeroing methodology. The United States first argues that, "there can be no violation of the AD Agreement or the GATT 1994 when 'zeroing' has no impact on the margins of dumping calculated." The United States' argument ignores the plain language of Article 9.3 and should be dismissed. The first sentence of Article 9.3 imposes two independent obligations on the authority. The provision requires that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." The first obligation of the authority is to determine a "margin of dumping as established under Article 2." This requirement serves an important purpose: without guidelines for calculating the ceiling amount of duties that may be applied, the authority could adopt a methodology that produces an artificially inflated dumping margin, such as zeroing, rendering the ceiling of Article 9.3 meaningless. These words must be given effect.

3. The second argument of the United States is that Viet Nam has shown neither that the zeroing methodology may be challenged on an as such basis nor that zeroing is as such inconsistent with the Anti-Dumping Agreement. With these claims, the United States would have the Panel disregard clear Appellate Body findings that directly address these two arguments. First, the Appellate Body concluded on multiple occasions that the zeroing methodology can be susceptible to challenge on an as such basis; the zeroing procedures at issue then and the zeroing procedures at issue in this dispute are the same, and must be analyzed in the same manner. Second, the Appellate Body has repeatedly found the exact procedures at issue here to be inconsistent with the Anti-Dumping Agreement. Article 3.2 of the DSU requires security and predictability in the dispute settlement process. Refusing to recognize prior determinations involving identical factual situations frustrates these goals. It is absurd that countries must continue to waste their limited resources to contest a practice repeatedly found by the DSB to be inconsistent as such with the Anti-Dumping Agreement. It cannot be the case that in doing so, countries must also re-litigate in full these identical issues.

[1] Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613 at para. 81.

4. The third argument of the United States regards Viet Nam's interpretation of Article 2.4.2 and specifically interpretation of the word "investigation" in that provision. Viet Nam asks the Panel to consider the plain meaning of the word "investigation." While the United States would ignore this definition, it cites to no Appellate Body determinations that support disregarding the first step of treaty interpretation: that is, the plain meaning of the text. Viet Nam reminds the Panel that "investigation" is defined as a "systematic inquiry; a careful study of a particular subject." There can be no question that an antidumping assessment proceeding constitutes a "systematic inquiry" into the proper amount of duties to be assessed. Further, Viet Nam notes that the United States' contextual discussion omits Article 6, which governs the collection and evaluation of evidence. Article 6 refers repeatedly to the "investigation," but does not set forth separate rules for an assessment proceeding.

III. ARGUMENTS OF THE PARTIES PERTAINING TO THE ALL-OTHERS ("SEPARATE") RATE APPLIED IN THE SECOND AND THIRD ADMINISTRATIVE REVIEWS

5. We will now turn to issues concerning the all others – or separate – rate and whether the USDOC assigned a permissible separate rate to companies not selected for individual examination in the second and third administrative reviews. The United States' first argument is that Article 9.4 imposes no obligation on an authority under the present factual scenario. Viet Nam is asking the Panel to protect the rights of respondent parties that have literally zero recourse against an authority that – according to the United States – can operate with complete discretion in this scenario. It is these rights of respondent parties under the Anti-Dumping Agreement that the Appellate Body considered when it concluded that Article 9.4 prohibits actions prejudicial to non-investigated companies and that this Panel is asked to protect.

6. The United States' second argument, that an authority may use data from any segment of an antidumping proceeding when calculating the ceiling rate for companies not individually investigated, is illogical and contrary to the terms of the Anti-Dumping Agreement. We would note the significance of the cross-reference in Article 9.4 to the companies selected for individual review pursuant to Article 6.10. This makes a direct link between the companies selected for that investigation with the calculated all others rate. Moreover, the Appellate Body in *EC – Tube or Pipe Fittings* recognized this principle, stating that use of a period of investigation "assures the investigating authority and exporters of a consistent and reasonable methodology for determining present dumping, which anti-dumping duties are intended to offset." This right applies to all exporters of subject merchandise.

7. The United States' third argument that the factual records of the second and third administrative reviews support the "determination" that separate rate companies had dumping margins of 4.57 percent relies on a distorted reading of the facts. The United States begins by asserting that Viet Nam did not raise any claims under Article 17.6(i) in the Panel request. Article 17.6(i) provides the standard by which the Panel must evaluate the factual conclusion reached by the USDOC in calculating the Article 9.4-prescribed all others rate. This is the general obligation of the Panel in dispute resolution, and just as Viet Nam need not cite to Article 17.6(ii) in the panel request to state the standard of review for legal claims, any citation to Article 17.6(i) would be misplaced. Nonetheless, Article 17.6(i) requires that "the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective." Thus, the Panel must confirm that the authority met this obligation when confronted with an Article 9.4 lacuna situation.

8. The United States relies on a selection of largely irrelevant facts to justify the applied rate of 4.57 percent. The United States does not find relevant – and in fact appears to completely ignore – the data of individually examined companies that, like the separate rate companies, complied with all USDOC requests. The USDOC ignored all of the actual sales data on the record when determining the rate for the fully cooperating, non-investigated companies. Instead, the USDOC relied on the

non-cooperation of some companies to justify the rates applied to cooperating companies. Separate rate companies, which fully cooperated with the USDOC's investigation, are therefore penalized for the inaction of companies to which they have no relation. As a result, certain cooperating companies not selected for individual examination are being unfairly prejudiced relative to other cooperating companies; that is, those selected for individual examination. This is not an unbiased or objective result.

9. Viet Nam directs the Panel's attention to the USDOC's recent revised or "remand" determination for the second administrative review. The United States Court of International Trade agreed with the position taken by Viet Nam's in this dispute that the assessed duty of 4.57 percent bears no relationship to the separate rate companies' actual margin of dumping. To remedy this defect, the USDOC calculated dumping margins for the 23 separate rate companies based on a comparison of sales information they provided to the USDOC and the normal values of the individually investigated companies. These calculations produced evidence of no dumping for all 23 separate rate companies, further illustrating the absence of any evidence supporting the all others rate applied in the original determination of the second administrative review.

10. Finally, we would note that the margin of dumping assigned to the separate rate companies not only was not supported by any factual information on the record, but also was certainly in excess of "the margin of dumping" that would have been established under Article 2. Thus in reviewing the separate rate, the Panel should find that neither the factual determination nor the legal interpretation of the United States met the standards of Articles 17.6(i) or 17.6(ii) respectively.

IV. ARGUMENTS OF THE PARTIES PERTAINING TO THE RATE APPLIED TO THE VIETNAM-WIDE ENTITY

11. We next address the United States' arguments regarding application of a rate based on adverse facts available to what has been called the Vietnam-wide entity. The United States first argues that record evidence supported the USDOC's presumption that all companies are controlled by the government, basing the presumption of government ownership, and the existence of a Vietnam-wide entity, exclusively on the findings contained in a memo prepared by the USDOC. Two important facts not mentioned by the United States must be highlighted regarding this memo. First, the USDOC did not prepare the memo in connection with the shrimp antidumping proceeding at issue in this dispute and the memo provides no information on the ownership structure of the shrimp industry in Viet Nam. The USDOC can cite to no evidence in the memo to conclude broad state ownership of the shrimp industry; it can only cite to general conclusions on the economy as a whole, which may have little or no resemblance to the reality of the shrimp industry. The second important fact regarding this memo is the date: The USDOC published the memo on 8 November 2002, over eight years ago. Despite the rapid pace at which Viet Nam's economy continues to develop, the USDOC relies on the generalized conclusions drawn in a memo from over eight years ago to presume that all shrimp companies are currently owned by the government of Viet Nam. The United States has no basis under Articles 6.8 or 6.10 for concluding that the known and unknown sub-entities that allegedly comprise the Vietnam-wide entity may all be treated as a single entity.

12. The United States next relies on a misleading presentation of the facts to argue that its actions with regard to the collection of detailed ownership and sales process information from shrimp companies not individually examined is not discriminatory. The United States appears to imply that in market economy cases companies not selected for individual investigation must likewise as a matter of course submit extensive affiliation and sales process information. This insinuation is false. The USDOC only requests affiliation information as a matter of course from individually examined companies in market economy cases.

13. For the third administrative review, the United States next argues that the USDOC simply applied to the Vietnam-wide entity the only rate ever applied to the Vietnam-wide entity. On this fact,

the United States is correct; left unsaid in the United States' argument is that the only rate ever applied to the Vietnam-wide entity was based upon adverse facts available. That the USDOC had previously applied the rate to the Vietnam-wide entity does not alter the facts available nature of the rate. Despite lacking any basis for doing so, the USDOC applied a rate based entirely on adverse inferences to the Vietnam-wide entity.

14. Finally, we refer the Panel to the recent report of a Panel that found the European Communities' use of an identical, country-wide rate practice to be inconsistent with WTO obligations. The Panel in *EC – Fasteners* concluded that the EC's "individual treatment" test violates Articles 6.10 and 9.2 of the Anti-Dumping Agreement and Article I:1 of the GATT 1994. Under the individual treatment test, as with the USDOC's separate rate test, the EC "presumes that the State should be considered a 'parent company'" and requires companies to establish independence from the state. The Panel first concluded that reliance on this presumption violates Article 6.10 of the Anti-Dumping Agreement, finding that "sampling is the sole exception to the rule of individual margins" and that reliance on a presumption of state control could not override this general rule. Based on application of the presumption, the test violates Article 6.10 "in that it conditions the calculation of individual margins for producers on the fulfillment of the IT test." The Panel also found the EC's conduct to be discriminatory towards Chinese producers in violation of Article I:1 of GATT 1994. The Panel concluded that this requirement will "result in imports of the same product from different WTO Members being treated differently in anti-dumping investigations conducted by the European Union." As the Panel in *EC –Fasteners* recognized, there is not a single provision of the Anti-Dumping Agreement or any other WTO Agreement that allows for such treatment.

V. ARGUMENTS OF THE PARTIES PERTAINING TO THE LIMITED SELECTION OF INDIVIDUALLY INVESTIGATED RESPONDENTS

15. Finally, Viet Nam would like to address the United States' arguments regarding the limited selection of mandatory respondents. First, the United States addresses Viet Nam's claims under Article 6.10.2, concluding that the USDOC has no obligation to accept voluntary respondents for the measures at issue. We remind the Panel that the final sentence of Article 6.10.2 requires that "[v]oluntary responses shall not be discouraged." As fully explained in Viet Nam's second written submission, the voluntary respondent treatment standard applied by the USDOC would prohibit in all measures relevant to this dispute the addition of a voluntary respondent. Furthermore, the actions of the USDOC in the third administrative review illustrate this discouraging behavior, as the USDOC ignored repeated efforts by an entity to gain some assurance that it would be properly treated as a voluntary respondent.

16. The final United States argument concerns Viet Nam's interpretations of Articles 11.1 and 11.3 of the Anti-Dumping Agreement. Notably, the United States' discussion of Article 11.1 completely ignores the actual language of the Article, which is unambiguous and requires, in full, that "an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." These words must be given meaning. The Article provides respondent entities with important and clearly articulated rights, and the United States cannot be allowed to unilaterally eliminate these rights from the Agreement. The United States' argument regarding Article 11.1 rests exclusively upon citation to Appellate Body determinations, citations that are both misleading and incomplete. In the first instance, the United States claims, "[a]s an initial matter, as the Appellate Body has confirmed, Article 11.1 does not impose any independent or additional obligations on Members," citing to the Appellate Body's report in *EC – Tube or Pipe Fittings*. The Appellate Body did indeed uphold certain findings of the Panel and cited to the specific paragraphs of the Panel report being upheld, but none of which contain the stated proposition or even concern the alternative claims made under Article 11.1.[2] Moreover, paragraph 81 of that Appellate

[2] Appellate Body Report, *EC – Tube or Pipe Fittings* at para. 84.

Body report, cited by the United States, actually appears to contradict the proposition for which it was cited.

17. The United States also relies heavily on the Appellate Body's decision in *US – Corrosion-Resistant Steel Sunset Review* for the proposition that the words of Article 11.1 have no meaning. Again, however, the United States has selectively omitted important caveats in the Appellate Body's finding, in which the Appellate Body made clear that any purported finding with regard to Article 11.1 was contingent upon a company's ability to have the order revoked through review proceedings separate and apart from a sunset review. As previously explained, this option does not exist for company's not selected for individual examination. When viewed in full, the Appellate Body's determinations do not support the United States' interpretation.

18. Finally, we would again remind the Panel that it is not Viet Nam's position that the United States cannot invoke Article 6.10 in situations where it is not practicable to investigate all respondents either requesting a review or for which a review has been requested. Rather, it is Viet Nam's position that an authority must reconcile its actions under Article 6.10 with the rights of the respondents under other provisions of the Anti-Dumping Agreement.

VI. CONSEQUENTIAL VIOLATION OF UNITED STATES' OBLIGATIONS UNDER THE ANTI-DUMPING AGREEMENT

19. The cumulative effect of the challenged practices has resulted in the USDOC finding that dumping is likely to continue or recur if the antidumping duties are terminated pursuant to the recently concluded sunset review.[3] Thus, the continued use of these practices has resulted in a violation of the obligations imposed on authorities under Article 11.3 of the Anti-Dumping Agreement. Moreover, the continued use of zeroing by the USDOC in the fourth administrative review resulted in a finding of margins of dumping for the individually investigated respondents, a margin of dumping which would not exist but for the continued use of zeroing. Additionally, the continued use of all practices subject to this Panel proceeding has resulted in actions in the fourth administrative review which continue to be inconsistent with Articles 2, 2.4, 6.8, 6.10, 9.3, 9.4, 11.1, 11.3 and Annex II of the Anti-Dumping Agreement.

20. Similarly, the USDOC has continued to use the exception provided in Article 6.10 of the Anti-Dumping Agreement to limit the number of individually investigated companies in the fifth administrative review and, in light of the USDOC's prior conduct, we expect that the use of the challenged practices will continue in the fifth administrative review with a consequent violation of Articles 2, 2.4, 6.8, 6.10, 9.3, 11.1, 11.3 and Annex II of the Anti-Dumping Agreement.

VII. CONCLUSION

21. Based on the above, Viet Nam hereby requests that the Panel render the conclusions described in Viet Nam's Second Written Submission. In rendering such conclusions, the Panel should take into consideration that none of the complained of practices require a change in legislation or regulations. Under these circumstances, the Panel should recommend that the United States bring its practices into conformity with its obligations as specified in the Panel's report immediately.

[3] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of the Five-Year "Sunset" Review of the Antidumping Duty Order*, 75 Fed. Reg. 75965 (7 December 2010), available at http://ia.ita.doc.gov/frn/summary/vietnam/2010-30664.txt.

ANNEX F-2

CLOSING STATEMENT OF VIET NAM AT THE SECOND MEETING OF THE PANEL

1. I would like to begin Viet Nam's closing statement in this Panel proceeding by thanking the members of the Panel and the Secretariat for their patience throughout this proceeding. At this point, I believe every argument has been stated and restated many times. This, of course, makes it challenging to deliver a closing statement which does not repeat arguments that have already been made. I hope to avoid this as much as possible.

2. Unfortunately, at the outset I do want to reiterate a comment made in Viet Nam's opening statement yesterday; namely, that Viet Nam has neither invented obligations which do not exist under the Anti-Dumping Agreement nor engaged in interpretations which are inconsistent with the norms of treaty interpretation as set forth in the Vienna Convention. Rather, Viet Nam has, with respect to each claimed violation of U.S. obligations, relied on the language of the Anti-Dumping Agreement, prior and consistent Appellate Body Reports interpreting particular provisions of the Agreement, the object and purpose of specific provisions of the Anti-Dumping Agreement, as well as the broader object and purpose of the Agreement itself and of the Dispute Settlement Understanding, and the standards of review set forth in Article 17.6 of the Anti-Dumping Agreement.

3. Thus, with respect to the issue of zeroing, we have relied upon the consistent interpretation by the Appellate Body and its rationale in finding that the practice of zeroing in periodic reviews is contrary to various subparagraphs of Articles 2 and 9 of the Anti-Dumping Agreement. The Appellate Body has found zeroing to be inconsistent with these Articles both "as applied" and "as such." Viet Nam has similarly argued that the zeroing in the measures before this Panel is "as applied" and "as such" inconsistent with U.S. obligations. There is no invented obligation. Nor is there any invented inconsistency, as the United States applied zeroing in calculating both the margins of dumping for the individually examined companies and the all others "separate" rate in the second and third administrative review, and continues this practice as illustrated by the results of the fourth administrative review.

4. Our claim with respect to the all others rate is equally well grounded. We concede that Article 6.10 allows for sampling in periodic reviews. That is not the question before this Panel. Rather, there are two questions before this Panel related to the U.S. application of the exception provided in Article 6.10. First, does the lacuna in Article 6.10 and 9.4 allow for the application of an all others rate that cannot be considered objective or unbiased since there is a total absence of factual support for the rate applied by the United States. Here we rely on the factual standard of review set forth in Article 17.6(i) of the Anti-Dumping Agreement, not some invented standard. Second, does the exception of Article 6.10 and 9.4 permit a Member to ignore the most fundamental obligations regarding the amount of the anti-dumping duty to be assessed and the duration of the anti-dumping measures as provided in Articles 9.3, 11.1 and 11.3. These are not invented obligations; rather they are obligations that are clearly articulated in the Agreement and which relate to the most fundamental rights protecting respondents under the Agreement, namely the amount and duration of anti-dumping duties.

5. Similarly, Viet Nam's arguments regarding the rate applied to the so-called Vietnam-wide entity are grounded in the obligations of the Anti-Dumping Agreement as set forth in the text of that Agreement. First, Articles 6.10 and 9.4 clearly articulate the exclusive methodology for determining the anti-dumping duties to be applied to non-investigated companies. There is simply no support for

applying a rate other than the all others rate to the so-called Vietnam-wide entity. Furthermore, Article 6.8 and Annex II to the Anti-Dumping Agreement stipulate the necessary conditions for applying facts available and facts available with adverse inferences. The United States demonstrated in the third administrative review that the quantity and value information on which they sought to justify the application of facts available with adverse inferences was not "necessary" information and, thereby, undermined this justification for applying facts available with adverse inferences to the so-called Vietnam-wide entity. Nor has the United States provided any justification whatsoever for its so-called separate rate questionnaire or certification which would allow it to apply facts available with adverse inferences for failure by companies to submit such information even if such information were directly requested. Again, Viet Nam is not inventing obligations but is basing its position on the text of the Anti-Dumping Agreement. In this regard, we would again call the Panel's attention to the recent Panel Report in *EC – Fasteners* which finds that there is no basis for an authority to presume government control of non-investigated entities and no basis to apply a rate other than the all other rate to any non-investigated entities.

6. Finally, there is the question of continued use by the United States of practices which are inconsistent with its obligations under the Anti-Dumping Agreement. All of the practices subject to this Panel proceeding have been applied by the United States beginning with the original investigation and have carried through to the fourth administrative review. In addition, the margins of dumping determinations based on these WTO inconsistent practices served as the basis for the United States' analysis of whether dumping was likely to continue or recur if the anti-dumping measures were terminated pursuant to the sunset review. The continued application of these practices will result in (1) the continued assessment of duties in excess of the margins of dumping for all or some of the exporters and producers of shrimp from Viet Nam and (2) prevent the antidumping duty order from ever being terminated pursuant to the rights of the producers and exporters of shrimp from Viet Nam under Articles 11.1 and 11.3.

7. In contrast to Viet Nam's position on each of these issues, the positions of the United States on each of the issues subject to this proceeding are contrary to the precise language of the Anti-Dumping Agreement, involve interpretations inconsistent with the rules of treaty interpretation set forth in Articles 31 and 32 of the Vienna Convention, ignore the object and purpose of the Anti-Dumping Agreement and the specific provisions of that Agreement, ignore the object and purpose of the Dispute Settlement Understanding, and/or are contrary to consistent Appellate Body precedent.

8. In the case of zeroing, the United States relies on arguments which have been rejected by the Appellate Body time and time again. The Appellate Body's findings on zeroing are, in turn, based on a careful analysis of the language of Article 2 of the Anti-Dumping Agreement which requires a "fair comparison" and the calculation of antidumping duties based on the product as a whole. The practice of zeroing, which eliminates from the calculation of the margins of dumping those transactions in which export price is above normal value, is not a "fair comparison" and does not take into account whether the product as a whole has been dumped in the importing country market. The United States has not presented anything new in regards to zeroing which could or should motivate the Panel to overturn established and consistent Appellate Body precedent.

9. The United States has also tried to justify its position on zeroing by interpreting the phrase in Article 2.4.2 "investigation phase" to limit the application of Article 2.4.2 to initial investigations of dumping, excluding it application in investigations for purposes of duty assessment and collection. However, there is no basis for such a distinction if the rules of treaty interpretation are properly applied. First, the plain meaning of the word "investigation" is applicable to all segments of the proceeding during which the authority must make a "systematic inquiry" of normal value and export prices in order to determine the margins of dumping. The United States attempts to read the word "first" or "original" into this phrase, words that simply do not appear in the text of the Agreement. Second, the U.S. interpretation would lead to absurd results. Article 2.4.2. would not apply to duty

assessment and collection investigations, thereby leaving an enormous gap in the Anti-Dumping Agreement with respect to how the comparison of normal value and export price should be made when assessing and collecting duties. It is absurd to conclude that the negotiators of the Anti-Dumping Agreement did not intend to provide a comparison methodology to be applied for purposes of duty assessment and collection. Third, if the word "investigation" has a special meaning in Article 2.4.2, consistency demands that this same special meaning apply elsewhere in the Agreement. Article 6, for example, repeatedly uses the word "investigation." Article 6 provides the evidentiary rules governing antidumping proceedings. If the word "investigation" is interpreted as the United States suggests, not only would there be no guidance in the Agreement on how to make pricing comparisons for purposes of duty assessment and collection, there would be no evidentiary rules to guide authorities except in the original investigation. Again, it is absurd to conclude that the negotiators did not intend to provide evidentiary rules for purposes of duty assessment and collection.

10. As regards the all others or "separate" rate, the United States urges the Panel to adopt an interpretation of the exception of Article 6.10 and 9.4 that would allow authorities to ignore their obligations under Articles 9.3, 11.1 and 11.3 in any situation where it is impracticable to investigate all respondents individually. These provisions, which the United States urges the Panel to allow it to disregard, provide vital protections for respondents subject to anti-dumping measures. These include limiting the amount of anti-dumping duties to the margins of dumping, limiting the duration of anti-dumping duties for only so long and to the extent necessary to prevent injurious dumping, and providing for a mechanism to terminate the anti-dumping duties. There is nothing in Articles 6.10 or 9.4, much less elsewhere in the Anti-Dumping Agreement, which would allow the application of Article 6.10 or 9.4 in a manner which would allow authorities to nullify other obligations under the Agreement. Nor is the United States' interpretation consistent with the object and purpose of the Anti-Dumping Agreement. In short, the interpretation being urged on the Panel by the United States' leads to an absurd result.

11. Having used Article 6.10 and 9.4 to eliminate basic rights of Vietnamese exporters and producers under the Anti-Dumping Agreement, the United States proceeds to impose an anti-dumping duty on these same respondents unsupported by any facts and which is calculated using zeroing. In the face of having found zero or de minimis margins for every individually investigated company in periodic reviews since issuance of the anti-dumping duty order, the United States imposes a margin of dumping on the non-investigated respondents based on the pre-order margin of dumping found in the original investigation, a margin of dumping calculated using zeroing. A margin of dumping unsupported by any facts on the record of the relevant periodic review cannot be found by the Panel to be either objective or unbiased, as is required by Article 17.6(i). Furthermore, a margin of dumping which is calculated using zeroing has been found to be "as applied" and "as such" inconsistent with the obligations of the Anti-Dumping Agreement.

12. As noted in our opening statement, in its second remand determination in the U.S. Court of International Trade litigation *Amanda Foods v. United States*, the U.S. Department of Commerce, upon further investigation in connection with the second administrative review, remained unable to find any evidence that the separate rate companies were engaged in dumping during the period covered by the second administrative review. This finding reinforces Viet Nam's position that the margins of dumping assigned to the separate rate respondents was not based on an objective and unbiased evaluation of the facts.

13. Finally, the United States has invented a new category of respondent, the Vietnam-wide entity, which has no foundation in any provision of the Anti-Dumping Agreement. Article 6.10 and 9.4 address the treatment of non-investigated respondents in cases where an authority has deemed the individual investigation of all respondents to be impracticable. No other provision of the Anti-Dumping Agreement addresses the treatment of non-investigated respondents and no provision of Viet Nam's Protocol of Accession or the accompanying Working Party Report addresses the treatment of non-investigated respondents. Thus, Articles 6.10 and 9.4 provide the exclusive basis for

determining the margins of dumping for non-investigated respondents. Neither provision contemplates a presumption of government control, differential treatment between government controlled and non-government controlled non-investigated producers and exporters, or the need for non-investigated producers or exporters to overcome a presumption of government control by responding to a questionnaire from the authorities. The recently released Panel Report in *EC – Fasteners* supports the position of Viet Nam on these issues.

14. As a consequence of these practices and the continued use of these practices by the United States, Vietnamese producers and exporters have been assessed duties in excess of the margin of dumping, including at the unwarranted rates imposed on separate rate and Vietnam-wide rate respondents; they continue to be assessed duties in excess of the margin of dumping as illustrated by the results of the fourth administrative review; and they have been denied the opportunity to ever demonstrate the absence of dumping and thereby obtain a termination of the anti-dumping measures as contemplated by Articles 11.1 and 11.3 of the Anti-Dumping Agreement. We hope that the Panel Report will serve to reinstate the rights of Vietnamese respondents under the Anti-Dumping Agreement which have been denied to them and continue to be denied to them by the practices of the United States.

15. In closing, I and my colleagues appearing on behalf of Viet Nam in this proceeding would like to thank the Panelists and the Secretariat for the time, effort and energy that each of you have devoted to this proceeding. We look forward to receiving your report in this proceeding.

ANNEX F-3

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

1. Consistently, throughout this dispute, Vietnam's arguments have failed to meaningfully address the specific rights and obligations as established by the covered agreements. Instead of addressing actual obligations to which Members agreed, Vietnam departs from the accepted rules of treaty interpretation and invents obligations found nowhere in the text of the covered agreements. At the end of its second written submission, Vietnam makes six specific requests for findings. We will clarify what each request would entail and, importantly, why the Panel should not do what Vietnam asks.

2. In its first request for findings, Vietnam asks the Panel to find:

> ***That the application of zeroing to individually investigated respondents in the second and third administrative reviews, and its continued application in the subsequent reviews, is inconsistent with Articles 9.3, 2.1, 2.4.2, and 2.4 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.***

3. Vietnam's claims under Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 fail because Vietnam has not demonstrated that any antidumping duties were applied in excess of the margin of dumping with respect to the individually examined exporters/producers in the second and third administrative reviews. As we have explained, Article 9.3 and Article VI:2 provide that any antidumping duty applied shall not exceed the margin of dumping. Because Vietnam has not established that any antidumping duty was applied at all, Vietnam has not established that any antidumping duty was applied in excess of the margin of dumping.

4. Vietnam asks the Panel nevertheless to find that the United States acted inconsistently with Article 9.3 because that provision limits the antidumping duty to the margin of dumping "as established under Article 2." Vietnam suggests that, "prior to reaching the additional obligations regarding duty assessment contained in Article 9.3, the authority must calculate the margin of dumping in accordance with Article 2." Vietnam's interpretation of Article 9.3 is incorrect and would be redundant of the obligations in Article 2, which are found within the text of that provision. In any event, however, this aspect of Vietnam's claim under Article 9.3 is dependent upon Vietnam's separate claims under Articles 2.1, 2.4.2, and 2.4 of the AD Agreement, which are without merit.

5. Article 2.1 describes the situation wherein "a product is to be considered as being dumped." The Appellate Body has explained that Article 2.1 is a "definitional" provision, which, "read in isolation, [does] not impose independent obligations."[1] It is not clear how the challenged measures could be found inconsistent with a definition.

6. Vietnam also asks the Panel to find that the application of zeroing to individually investigated respondents in the second and third administrative reviews is inconsistent with Article 2.4.2 of the AD Agreement. For this claim to succeed, the Panel must find that Article 2.4.2 applies to administrative reviews. However, Article 2.4.2, by its terms, is limited to the "investigation phase." The Appellate Body and prior panels have recognized distinctions between investigations and other

[1] *US – Zeroing (Japan) (AB)*, para. 140.

proceedings under the AD Agreement, consistently finding that the provisions in the AD Agreement with express limitations to investigations are, in fact, limited to the investigation phase of a proceeding. The express limitation of the obligations in Article 2.4.2 to the investigation phase is consistent with the differences in the antidumping systems applied by Members for purposes of the assessment phase. If the obligations regarding comparison methodologies found in Article 2.4.2 were applied to the assessment of antidumping duties, this divergence of assessment systems would not be possible. Thus, to retain the flexibility for Members to apply different assessment systems, it was necessary to limit the requirements of Article 2.4.2 to the investigation phase.

7. Lastly, Article 2.4 of the AD Agreement requires investigating authorities to make a "fair comparison" between normal value and export price and then provides detailed guidance as to how that fair comparison is to be made. Article 2.4 recognizes that the normal value and export price transactions to be compared may occur, among other things, with respect to models with differing physical characteristics, at distinct levels of trade, pursuant to different terms and conditions, and in varying quantities. The focus of Article 2.4 is on how the authorities are to select transactions for comparison and make appropriate adjustments for differences that affect price comparability. This all occurs prior to making the comparisons between export price and normal value to ensure that the comparisons are "fair" comparisons. Vietnam proposes an interpretation of Article 2.4 that would encompass the aggregation of comparisons, which takes place, if at all, after the comparisons are made. Nothing in the text of Article 2.4 indicates that the scope of that provision reaches such post-comparison aggregation.

8. The open-ended approach inherent in Vietnam's interpretation of the "fair comparison" obligation in Article 2.4 would result in disputes that are virtually impossible to resolve in any principled, text-based way. Several prior panels have cautioned against such a broad, open-ended understanding of the "fair comparison" requirement.

9. In its second request for findings, Vietnam asks the Panel to find:

> ***That the USDOC's zeroing methodology is, as such, inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.***

10. Vietnam asserted very late in this proceeding, in response to a written question from the Panel after the first substantive meeting, that it is seeking an "as such" finding against "zeroing." However, Vietnam has advanced no arguments and pointed to no evidence that would support a finding that any "zeroing methodology" exists as a measure that can be challenged "as such." As the Appellate Body explained in *US – Zeroing (EC)*:

> [A] complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or norm" may be challenged, as such.[2]

In this dispute, Vietnam has pointed to no evidence and made no argument that would "clearly establish" that "the alleged 'rule or norm' is attributable to the [United States]; its precise content; and indeed, that it does have general and prospective application." Instead Vietnam merely cites repeatedly to prior panel and Appellate Body reports. While "[e]vidence adduced in one proceeding, and admissions made in respect of the same factual question about the operation of an aspect of municipal law, may be submitted as evidence in another proceeding,"[3] it is necessary to

[2] *US – Zeroing (EC) (AB)*, paras. 197-198 (citations omitted).
[3] *US – Continued Zeroing (AB)*, para. 190.

actually adduce the evidence and point to any such admissions. Vietnam has not done so with respect to the existence of any "zeroing methodology." The United States submits that the Panel lacks any evidentiary basis for finding that the "zeroing methodology" is a measure that is inconsistent, as such, with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.

11. In its third request for findings, Vietnam asks the Panel to find that:

> ***The use of margins of dumping determined using the zeroing methodology to calculate the all others ("separate") rate in the second and third administrative reviews is, as applied, inconsistent with Articles 9.4, 9.3, 2.4.2 and 2.4 of the Anti-Dumping Agreement.***

12. Article 9.4 of the AD Agreement, on the face of its text, establishes only a limited obligation related to the maximum antidumping duty that may be applied to companies not individually examined, in certain circumstances. Article 9.4 does not prescribe a methodology for assigning a rate to companies not individually examined in an assessment review. Article 9.4 does not prescribe the *maximum* rate that may be applied to companies not individually examined in situations where the rates calculated for the individually examined companies are all zero, *de minimis*, or based on facts available. And Article 9.4 certainly does not prohibit "zeroing."

13. To the extent that any prohibition of "zeroing" exists in the AD Agreement, it has been identified by panels and the Appellate Body in provisions other than Article 9.4. Even if the challenged measures were found to be inconsistent with those other provisions, that would not mean that, as a consequence, the measures are also inconsistent with the limited obligations in Article 9.4.

14. With respect to Article 9.3 of the AD Agreement, Vietnam's Second Written Submission asserts that "Article 9.3 prohibits the assessment of antidumping duties that exceed the margin of dumping properly calculated pursuant to Article 2. Thus, the margin of dumping for a respondent, individually examined or not, serves as the maximum for the amount of antidumping duties to be applied."[4] Even if Vietnam were correct that Article 9.3 establishes obligations with respect to the antidumping duty applied to companies not individually examined – and the United States believes that Vietnam's understanding is not correct – Vietnam's claim under Article 9.3 is nevertheless dependent on the Panel finding that the separate rates applied to companies not individually examined in the second and third administrative reviews were inconsistent with the covered agreements when they were originally calculated in the original investigation.[5] But those rates were not inconsistent with the covered agreements when they were originally calculated. The rates were not subject to the covered agreements when they were originally calculated – because the WTO Agreement did not apply between the United States and Vietnam at that time – and they cannot now be found to have been inconsistent with the covered agreements at the time they were originally calculated.

15. As we have noted, the panel in *US – DRAMS* explained that "the AD Agreement only applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. Any aspects of a pre-WTO measure that are not covered by the scope of the post-WTO review do not become subject to the AD Agreement by virtue of Article 18.3 of the AD Agreement."[6] In this dispute, Commerce did not recalculate the rates that were calculated in the original investigation and Commerce did not make any new comparisons of export price and normal value. The separate rates in question were determined once and only once in the original pre-WTO investigation – before the entry into force of the WTO Agreement for Vietnam – and were then applied in the final results for the second and third administrative reviews.

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[4] Vietnam Second Written Submission, para. 49 (emphasis added).
[5] *See* Vietnam First Written Submission, para. 214.
[6] *US – DRAMS*, para. 6.14.

16. Vietnam also claims that the separate rates applied to companies not individually examined in the second and third administrative reviews are inconsistent with Article 2.4.2 of the AD Agreement. Article 2.4.2 is limited to the "investigation phase" and does not apply to determinations in administrative reviews. Vietnam asks the Panel to ignore the limitation in the text of Article 2.4.2 in order to find that the determinations in the second and third administrative reviews are inconsistent with that provision. Furthermore, Commerce made no comparisons of normal value and export price during the second and third administrative reviews in order to determine the separate rates to apply to companies that were not individually examined. Commerce relied on rates calculated during the original investigation, but did not recalculate or otherwise reexamine those rates, and nothing in the AD Agreement required Commerce to do so. Thus, Commerce took no action during the second and third administrative reviews that was inconsistent with the obligations in Article 2.4.2 of the AD Agreement. For Vietnam's claim to succeed, the Panel would have to find that the pre-WTO dumping margin calculations performed during the investigation were inconsistent with Article 2.4.2 at the time they were calculated. But, as we have explained, that is not possible because the United States had no WTO obligations with respect to Vietnam at that time.

17. Vietnam also claims that the separate rates applied to companies not individually examined in the second and third administrative reviews are inconsistent with Article 2.4 of the AD Agreement. Article 2.4 establishes an obligation that a "fair comparison" be made between normal value and export price and then provides detailed guidance as to how that fair comparison is to be made. Commerce made no comparisons of normal value and export price during the second and third administrative reviews in order to determine the separate rates to apply to companies that were not individually examined. So, there can be no breach of the "fair comparison" requirement based on action taken by Commerce during the second and third administrative reviews.

18. To the extent that Vietnam's claim is dependent upon a finding that the dumping margins calculated during the investigation were inconsistent with Article 2.4 at the time that they were originally calculated, the claim must fail because such a finding is not possible. The dumping margin calculations made during the investigation were performed prior to Vietnam's accession to the WTO and the United States had no WTO obligations with respect to Vietnam at that time. Additionally, we would recall that Article 2.4 does not contain any obligations in respect of post-comparison aggregation, and it does not create an obligation to provide for offsets, or a prohibition of "zeroing."

19. In its fourth request for findings, Vietnam asks the Panel to find that the:

> ***Application of an all others ("separate") rate that fails to consider the results of the individually investigated respondents in the contemporaneous proceeding and produces an antidumping duty prejudicial to companies not selected for individual investigation is, as applied in the second and third administrative reviews, inconsistent with Articles 9.4, 17.6(i), and 2.4 of the Anti-Dumping Agreement.***

20. No provision of the AD Agreement establishes a contemporaneity requirement with respect to the antidumping duty rates applied to companies not selected for individual examination when all of the margins of dumping calculated for examined companies are zero or *de minimis* or based on facts available. Article 9.4 of the AD Agreement only establishes limited obligations relating to the maximum antidumping duty that may be applied to companies not individually examined. However, when all dumping margins calculated for individually examined companies are zero or *de minimis* or based on facts available, as was the case in the second and third administrative reviews, then Article 9.4 does not specify the maximum antidumping duty that may be applied. There is nothing in the text of Article 9.4 that establishes a contemporaneity requirement in such a situation.

21. Vietnam claims in its second written submission that "The actions of the individually investigated exporters, all of whom eliminated their dumping behavior, constitutes the entirety of the

evidence available on the response of exporters to the antidumping duty order."[7] Vietnam's claim is not relevant as a legal matter because nothing in the text of Article 9.4 conditions a Member's right to apply antidumping duties to companies that are not individually examined on a factual finding that other companies continued to dump during a particular period. Furthermore, Vietnam is incorrect as a matter of fact. In the first and second administrative reviews, numerous companies failed to respond to Commerce's questionnaires and Commerce accordingly determined the margin of dumping for these companies based on facts available using an adverse inference. These adverse findings with respect to dumping cannot be considered evidence that dumping in the industry had ceased, but Vietnam asks the Panel to ignore these facts.

22. With respect to Vietnam's claim under Article 17.6(i) of the AD Agreement, because Vietnam did not raise any claims under Article 17.6(i) in its panel request, no claims under this provision are within the Panel's terms of reference. Furthermore, Article 17.6(i) establishes a general obligation in respect of a dispute settlement panel's assessment of the facts of the matter. On its face, Article 17.6(i) does not impose any obligations on WTO Members. Thus, it is not clear how a Member may be found to have acted inconsistently with Article 17.6(i). In any event, Article 17.6(i) does not impose any additional obligations on Members in a situation in which Article 9.4 of the AD Agreement does not specify the maximum antidumping duty that may be applied to companies not individually examined. Rather, Article 17.6(i) provides a specific standard for the Panel's examination of Commerce's assessment of the facts.

23. Vietnam contends that Commerce failed to make "an unbiased and objective evaluation of the facts" in assigning rates to companies not individually examined in the second and third administrative reviews because "[t]he entire record before the USDOC evidenced an industry that did not dump subject merchandise above a *de minimis* amount" and thus, the rates assigned to companies not individually examined purportedly had "no basis in fact."[8] Nothing in the text of Article 9.4 conditions a Member's right to apply antidumping duties to companies that are not individually examined on a separate factual finding that other companies continued to dump during a particular period. Even if it did, though, Vietnam's claim would be undermined by the facts: a number of producers/exporters failed to cooperate in the first and second administrative reviews and Commerce therefore assigned to them antidumping duty rates determined on the basis of facts available. This is hardly evidence that dumping had stopped.

24. Vietnam asks the Panel to find that the challenged measures are inconsistent with Article 2.4 of the AD Agreement, this time because of the requirement in Article 2.4 that "the sales being compared be made 'at as nearly as possible the same time.'"[9] Vietnam asserts that this establishes a general contemporaneity requirement, including with respect to the application of antidumping duties to companies not individually examined. The obligation in Article 2.4 that the export price and normal value comparison be made "in respect of sales made at as nearly as possible the same time" relates to the calculation underlying the determination of dumping. This obligation does not relate to the calculation of the maximum antidumping duty that may be applied to companies not individually examined pursuant to Article 9.4, nor to the actual antidumping duty applied to such companies when the duty is based on a previously determined dumping margin. Nothing in the text of the AD Agreement supports the linkage that Vietnam attempts to establish between Articles 2.4 and 9.4.

25. Additionally, the margins of dumping calculated during the original investigation were not inconsistent with Article 2.4 at the time that they were calculated, both because the calculations were performed prior to Vietnam's accession to the WTO and because there is no evidence and Vietnam

[7] Vietnam Second Written Submission, para. 75.

[8] Vietnam Responses to Panel Questions, Question 22, paras. 60-61; *see also* Vietnam Responses to Panel Questions, Question 24, para. 65; *see also* Vietnam Second Written Submission, paras. 75-76, 80.

[9] Vietnam Responses to Panel Questions, Question 20, para. 52.

does not appear to suggest that the comparisons made during the original investigation were not made "in respect of sales made at as nearly as possible the same time."

26. In its fifth request for findings, Vietnam asks the Panel to find that:

> ***The application of an antidumping duty based on adverse facts available to the Vietnam-wide entity in the second and third administrative reviews, and its continued application in subsequent reviews, is inconsistent with Articles 6.8, 9.4, 17.6(i) and Annex II of the Anti-Dumping Agreement.***

27. As noted earlier, no claim under Article 17.6(i) of the AD Agreement is within the Panel's terms of reference, and, on its face, Article 17.6(i) does not impose any obligations on WTO Members. Vietnam appears to invoke Article 17.6(i) in relation to its argument that Commerce lacked sufficient evidence to justify treating the Vietnam-wide entity as a single exporter or producer comprised of companies that did not demonstrate their independence from the government. However, the United States and Vietnam agree that, as a general matter, an investigating authority may, consistent with Article 6.10 of the AD Agreement, treat more than one company as a single entity based upon the relationship between those companies.[10] In its second written submission, Vietnam confirms its view "that common control by the government of multiple entities may permit an authority to collapse this entity into a single entity and to apply a single rate to this single entity."[11]

28. The question is whether the facts of record in the second and third administrative reviews justified Commerce's determinations to treat the Vietnam-wide entity as a single exporter or producer. We have explained that the facts amply supported Commerce's determinations, and there is no basis for Vietnam's assertion that Commerce failed to make an "unbiased and objective" evaluation of the facts.

29. Article 6.8 and Annex II of the AD Agreement permit the use of the facts available in any case "in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation. ..." Rather than being limited in its application to individually examined companies, Article 6.8 refers to "*any* interested party." That includes companies not selected for individual examination and groups of companies treated as a single entity. Additionally, contrary to Vietnam's arguments, the quantity and value information requested was "necessary information" within the meaning of Article 6.8 and Annex II. The scope of "necessary information" is not limited only to that information used to calculate a dumping margin.

30. Because certain companies that were part of the Vietnam-wide entity refused to provide necessary information in the second administrative review, Commerce applied an antidumping duty rate to the Vietnam-wide entity that was based upon the facts available. Commerce's application of facts available to the Vietnam-wide entity in the second administrative review was not inconsistent with Article 6.8 and Annex II of the AD Agreement. In the third administrative review, Commerce did not apply to the Vietnam-wide entity a rate based upon facts available. Rather, Commerce applied to the Vietnam-wide entity the only rate that had ever been applied to it, relying on the same methodology used for the other separate rate companies in the third administrative review.

31. With respect to Vietnam's claim under Article 9.4 of the AD Agreement, as we have explained, Article 9.4 establishes a limited obligation with respect to the maximum antidumping duty that Members may apply to companies not individually examined. Where all the rates calculated for examined companies are zero or *de minimis*, as in the measures at issue in this case, then it is not possible to calculate a maximum antidumping duty according to the terms of Article 9.4, and

[10] *See, e.g.*, Vietnam Responses to Panel Questions, Question 35, para. 90.
[11] Vietnam Second Written Submission, para. 117.

Article 9.4 does not specify a maximum antidumping duty that may be applied to companies not individually examined.

32. In its last request for findings, Vietnam asks the Panel to find that:

> ***The USDOC's determinations in the second and third administrative reviews, and on a continuing basis, to limit the number of individually investigated respondents such that they restrict certain substantive rights under the Anti-Dumping Agreement is inconsistent with Articles 6.10, 6.10.2, 9.3, 11.1, and 11.3 of the Anti-Dumping Agreement.***

33. Article 6.10 of the AD Agreement does not require investigating authorities to determine margins of dumping for every exporter or producer where the number of exporters or producers "is so large as to make such a determination impracticable." Vietnam argues that Commerce's determinations were inconsistent with Article 6.10 because Commerce "made no effort to explore alternatives" to examine more exporters and producers when it limited its examination. Nothing in the text of Article 6.10, or any other provision of the AD Agreement, requires Commerce to "explore alternatives" as proposed by Vietnam.

34. With respect to Vietnam's claim under Article 6.10.2 of the AD Agreement, Vietnam itself has put before the Panel the evidence necessary to demonstrate that Commerce did not act inconsistently with the obligations in that provision. Article 6.10.2 requires that companies not initially selected who wish to have an individual margin of dumping calculated must "submit[] the necessary information in time for that information to be considered." The information provided by Vietnam in response to the Panel's written questions demonstrates that the "necessary information" was never submitted in either the second or third administrative reviews and this conclusively establishes that Commerce was under no obligation to determine individual margins of dumping for "voluntary respondents" in those proceedings.[12]

35. Vietnam now suggests that Commerce acted inconsistently with Article 6.10.2 by "discouraging" voluntary responses, contrary to the prohibition against doing so in the last sentence of that provision.[13] Vietnam offers no evidence of so-called "discouraging behavior" other than Commerce's determinations to limit its examination, which, as we have explained, are consistent with the requirements of Article 6.10. Commerce cannot be found to have acted inconsistently with one provision of the AD Agreement by virtue of its proper application of another provision.

36. Vietnam's assertion that Commerce acted inconsistently with Article 9.3 because it "failed throughout the shrimp antidumping proceeding to make any connection between the antidumping duty assigned to companies not selected for individual examination and their margin of dumping or any facts otherwise on the record" makes no sense.[14] Of course there is no connection between the antidumping duty applied to companies not individually examined and "their margin of dumping," because no margin of dumping was determined for them. If Vietnam's interpretation were accepted, Members would no longer have the right to limit the examination and would, in all cases, be required to determine individual margins of dumping for all companies. Vietnam's proposed interpretation reads the second sentence of Article 6.10, and all of Article 9.4, out of the AD Agreement.

37. Vietnam's claims under Articles 11.1 and 11.3 are likewise devoid of merit. Vietnam's claims under Articles 11.1 and 11.3 appear to be dependent on its claims that Commerce's determinations to limit its examination are inconsistent with Article 6.10 of the AD Agreement, but we have shown that they are not. A somewhat more disturbing implication of Vietnam's argument is that, regardless of whether Commerce's determinations are inconsistent with Article 6.10, the determinations to limit the

[12] *See* Vietnam Responses to Panel Questions, Question 42, para. 100.
[13] Vietnam Second Written Submission, para. 133.
[14] Vietnam Second Written Submission, para. 120.

examination nevertheless are inconsistent with Articles 11.1 and 11.3. But Commerce cannot be found to have acted inconsistently with one provision of the AD Agreement due to the proper exercise of U.S. rights under a separate provision of the AD Agreement.

38. Additionally, Vietnam's interpretation that Articles 11.1 and 11.3 "require that an authority permit revocation determinations on a company-specific basis" is incorrect and inconsistent with prior Appellate Body reports interpreting these provisions. The Appellate Body has confirmed that Article 11.1 does not impose any independent or additional obligations on Members[15] and that "Article 11.3 does not require investigating authorities to make their likelihood determination on a company-specific basis."[16] Vietnam's proposed interpretations have been considered before and rejected.

39. Finally, in its first, fifth, and sixth requests for findings, Vietnam asks the Panel to make findings related to the "continued application" of "zeroing," the "continued application" of "an antidumping duty based on adverse facts available to the Vietnam-wide entity," and Commerce's determinations "on a continuing basis" to limit its examination. No so-called "continued use" measure is within the Panel's terms of reference because Vietnam failed to specifically identify any such measure in its panel request, contrary to the obligation in Article 6.2 of the DSU.

40. Even if Vietnam had referenced a "continued use" measure in its panel request, such a measure appears to be a fictional construct supposedly composed of an indeterminate number of potential future measures that did not exist at the time of Vietnam's panel request (and may never exist). Such so-called "continued use" cannot be subject to dispute settlement because it could not be impairing any benefits accruing to Vietnam, and it consists of proceedings that had not resulted in "final action" at the time of the consultations request, as required by Article 17.4 of the AD Agreement.

41. Additionally, the facts in this dispute do not support a conclusion that the three challenged "practices" "would likely continue to be applied in successive proceedings."[17] In *US – Continued Zeroing*, where there was "a lack of evidence showing that zeroing was used in one periodic review listed in the panel request" or "the sunset review determination was excluded from the Panel's terms of reference," the Appellate Body found that "the Panel [had] made no finding confirming the use of the zeroing methodology in successive stages over an extended period of time whereby the duties are maintained."[18] In this dispute, the original investigation, the first, fourth, and fifth administrative reviews, and the sunset review are not within the Panel's terms of reference and hence no substantive findings that Commerce acted inconsistently with the AD Agreement or the GATT 1994 may be made with respect to those proceedings.[19]

42. Additionally, Vietnam has failed to establish that "zeroing" had any impact on the margins of dumping calculated for the individually examined respondents in the second and third administrative reviews, and Vietnam has failed to establish as a factual matter that Commerce used the zeroing methodology in connection with the application of a dumping margin to separate rate respondents in those proceedings, or to the Vietnam-wide entity.

[15] *EC – Tube or Pipe Fittings (AB)*, para. 81, 84 (Affirming the panel's finding. The panel explained that "Article 11.1 does not set out an independent or additional obligation for Members." *EC – Tube or Pipe Fittings (Panel)*, para. 7.113).

[16] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 150 (emphasis added).

[17] *US – Continued Zeroing (AB)*, para. 191.

[18] *US – Continued Zeroing (AB)*, para. 194.

[19] *See US – Continued Zeroing (AB)*, para. 194.

43. We also note that Vietnam asks the Panel to expand the Appellate Body's reasoning in *US – Continued Zeroing* beyond "zeroing" to encompass the other "challenged practices", but Vietnam's claims regarding the other "challenged practices" are without merit, as we have shown.

44. Therefore, Vietnam cannot establish "a string of determinations, made sequentially ... over an extended period of time" with respect to any of the "challenged practices," and so its claims must fail.

45. For all of the reasons we have given, the United States submits that each of Vietnam's claims is without merit and we thus respectfully request that the Panel reject Vietnam's claims.

ANNEX G

REQUESTS FOR CONSULTATIONS AND THE ESTABLISHMENT OF A PANEL

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-552-80l:

(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 zeromg;

(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 351.2l2(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-issues; 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.