

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

(WT/DS429)

**SECOND WRITTEN SUBMISSION OF
THE UNITED STATES OF AMERICA**

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US-79	Act of September 8, 1916, Ch. 463, § 801, 39 Stat. 756, 798-800 (partial document)
US-80	Miscellaneous Trade and Technical Corrections Act of 2004, Title II, § 2006(a), 118 Stat. 2434, 2597 (partial document)
US-81	VIETNAM CONSTITUTION, Chapt. II, Art. 15 (partial document)
US-82	Argentina, Notification of Laws and Regulations Under Articles 18.5 and 32 of the Agreements, G/ADP/N/1/ARG/1, G/SCM/N/1/ARG/1 (June 12, 1995) (partial document)
US-83	<i>Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of the First Administrative Review and New Shipper Review</i> , 72 Fed. Reg. 10,689 (March 9, 2007)
US-84	N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS (South-Western Centage Learning 2012) (partial document)
US-85	PAUL R. GREGORY & ROBERT C. STUART, COMPARING ECONOMIC SYSTEMS IN THE TWENTY-FIRST CENTURY (Houghton Mifflin Company 2004) (partial document)
US-86	Letter to Embassy of Vietnam (January 29, 2004)

TABLE OF REPORTS

SHORT TITLE	FULL CASE TITLE AND CITATION
<i>EC – Fasteners (AB)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Duties on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011
<i>EC – Tube or Pipe Fittings (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by the Appellate Body Report, WT/DS219/AB/R
<i>EC – Tube or Pipe Fittings (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>Japan-Alcoholic Beverages II (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
<i>Korea – Commercial Vessels</i>	Panel Report, <i>Korea – Measures Affecting Trade in Commercial Vessels</i> , WT/DS273/R, adopted 11 April 2005
<i>US – 1916 Act (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000
<i>US – Anti-Dumping Measures on Oil Country Tubular Goods</i>	Panel Report, <i>Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/R, adopted 28 November 2005, as modified by the Appellate Body Report, WT/DS282/AB/R
<i>US – Corrosion-Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004

<p><i>US – DRAMs</i></p>	<p>Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea</i>, WT/DS99/R, adopted 19 March 1999</p>
<p><i>US – Export Restraints</i></p>	<p>Panel Report, <i>United States – Measures Treating Export Restraints as Subsidies</i>, WT/DS194/R, adopted 23 August 2001</p>
<p><i>US – Oil Country Tubular Goods Sunset Reviews (AB)</i></p>	<p>Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i>, WT/DS268/AB/R, adopted 17 December 2004</p>
<p><i>US – Poultry (China)</i></p>	<p>Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i>, WT/DS392/R, adopted 25 October 2010</p>
<p><i>US – Section 129(c)(1)</i></p>	<p>Panel Report, <i>United States – Section 129(c)(1) of the Uruguay Round Agreements Act</i>, WT/DS221/R, adopted 30 August 2002</p>
<p><i>US – Shrimp (Malaysia) (21.5) (AB)</i></p>	<p>Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia</i>, WT/DS58/AB/RW, adopted 21 November 2001</p>
<p><i>US – Shrimp (Viet Nam) (Panel)</i></p>	<p>Panel Report, <i>United States – Anti-Dumping Measure on Certain Shrimp from Viet Nam</i>, WT/DS404/R, adopted 2 September 2011</p>
<p><i>US – Softwood Lumber Dumping (AB)</i></p>	<p>Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i>, WT/DS264/AB/R, adopted 31 August 2004</p>
<p><i>US – Zeroing (EC) (AB)</i></p>	<p>Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)</i>, WT/DS294/R, adopted 9 May 2006</p>
<p><i>US – Zeroing (Japan) (21.5) (AB)</i></p>	<p>Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to 21.5 of the DSU by Japan</i>, WT/DS322/AB/RW, adopted 31 August 2009</p>

I. INTRODUCTION

1. Throughout this dispute, Vietnam's arguments have consistently failed to meaningfully address the specific rights and obligations provided in the covered agreements and ignored relevant facts. The United States will not repeat all of its arguments related to these matters in this submission, but rather will focus on the flaws in arguments Vietnam made in its oral statements at the first substantive Panel meeting and in its answers to the Panel's questions following that meeting.

2. First, Vietnam's claim with respect to company-specific revocation based on the absence of dumping for three years fails because, as a threshold matter, there is no requirement for company-specific revocation in Article 11.2. Reference to "the duty" in Article 11 is an order-wide reference. This was the finding of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* and it is persuasive based on the references to injury in Article 11.2 as well as the contrast between "the duty" and references to "individual duties" elsewhere in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").

3. Next, Vietnam's claim with respect to section 129(c)(1) of the Uruguay Round Agreement Act ("URAA") also fails. When Members wanted to place implementation obligations in WTO agreements, they clearly did so, as with Article 4.7 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). No such obligations are contained in the AD Agreement, which is the covered agreement relied on by Vietnam to make its claim. In addition, Vietnam's central premise – that section 129(c)(1) is the exclusive mechanism by which the United States can implement DSB recommendations and rulings – is simply false. That is what the panel found in *US – Section 129(c)(1)* and, simply put, nothing has changed, and the Panel here should make the same finding.

4. Vietnam has also failed to demonstrate any of its claims with respect to Commerce's approach to the Vietnam-government entity rate. First, Vietnam still has failed to put forth sufficient evidence showing that this alleged practice exists as a measure and is invariably applied by Commerce. Second, Vietnam has failed to demonstrate that Commerce's decision to treat related companies in the covered reviews as a single exporter or producer for the purpose of determining a dumping margin is inconsistent with Articles 6.10 and 9.2 of the AD Agreement. Finally, Commerce's treatment of the Vietnam-government entity was fully consistent with Articles 6.8 and 9.4 of the AD Agreement. No party that is part of the Vietnam-government entity requested that Commerce review the entries of that entity during the covered reviews. Thus the companies subject to the Vietnam-government entity rate essentially expressed that the rate in effect was preferable to the rate that might be calculated if Commerce were to conduct a review.

5. Vietnam's "as such" claim with respect to Commerce's application of the so-called "zeroing" methodology is without merit because no such measure exists; the United States has already changed its approach for calculating dumping margins. Commerce has issued numerous determinations, including in the most recent administrative review of the antidumping duty order on shrimp from Vietnam, in which it has offset dumping margins on dumped sales by the amount equal to the amount by which normal value is less than export price on non-dumped sales.

Commerce changed its approach to calculating dumping margins pursuant to section 123(g) of the URAA after extensive consultations with appropriate congressional committees, relevant private sector advisory committees, and public comment. Thus Vietnam’s assertion that Commerce can easily re-impose an alleged U.S. zeroing measure is without merit.

6. Finally, on the issue of the Sunset Determination, Commerce had a sufficient evidentiary basis to conclude that revocation of the antidumping duty order on shrimp from Vietnam would likely lead to continuation or recurrence of dumping. The determination relied on multiple factors, including dumping margins that Vietnam does not dispute were calculated in a “WTO-consistent” way and declining import volumes. Thus the mere fact that this Panel may consider other dumping margins examined by Commerce as “WTO-inconsistent” does not undermine Commerce’s likelihood-of-dumping determination. That determination continues to stand on its own, substantiated by evidence and fully consistent with Article 11.3 of the AD Agreement.

II. ARGUMENT

A. The United States Did Not Act Inconsistently with Article 11.2 of the AD Agreement by Not Granting Company-Specific Revocation Based on the Absence of Company-Specific Dumping for Three Years

7. Vietnam argues that the ordinary meaning of Article 11.2 as well as context provided by other provisions of the AD Agreement support its interpretation that Article 11.2, in contrast to Article 11.3, mandates company-specific revocation.¹ For the reasons set forth in the U.S. First Written Submission,² Article 11.2 of the AD Agreement does not obligate Members to consider, much less provide, company-specific revocation of an antidumping duty order. But even aside from the fact that Article 11.2 does not provide for company-specific revocation, Article 11.2 does not contain a requirement that a Member revoke an order based on the absence of company-specific dumping for three years. Accordingly, for both of these reasons, Vietnam has no basis for its claim that the United States breached any obligation under Article 11.2 of the AD Agreement with respect to the denial of requests for company-specific revocation at issue in this dispute.

1. Article 11.2 of the AD Agreement Does Not Contain Obligations Vis-à-vis Company-Specific Revocation

8. The ordinary meaning of Article 11.2, as well as context provided by other provisions of the AD Agreement, makes clear that company-specific revocation is not an obligation. First, Article 11.2 requires a review of the continuing need for “the duty.” As the Appellate Body found in *US – Corrosion-Resistant Steel Sunset Review*, “the duty” referenced in Article 11.3 is imposed on a product-specific (*i.e.*, in U.S. terminology, “order-wide”) basis, not a company-specific basis.³ The term “duty” is most logically interpreted as having the same meaning in

¹ Vietnam’s Answers to Panel Questions, paras.120-133.

² U.S. First Written Submission, paras. 69-92.

³ See *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 150 (“Article 11.3 does not require investigating authorities to make their likelihood determination on a company-specific basis”).

Articles 11.2 and 11.3, especially given the fact that these two Articles provide the mechanisms to ensure that, per Article 11.1, an antidumping duty remains in place only as long as necessary to counteract injurious dumping.⁴

9. Vietnam’s argument that “the duty” should have a different meaning within Article 11 is undermined by the cross reference to Article 11.2 in the text of Article 11.3. Specifically, Article 11.3 provides that “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) . . .” (emphasis added). The reference to an Article 11.2 review as restarting the five-year clock for conducting a five-year sunset review consistent with Article 11.3 strongly suggests that both types of review contemplate examination of “the duty” on an order-wide basis.

10. When viewed in light of this language, Vietnam’s interpretation of Article 11.2 as imposing an obligation to conduct company-specific reviews and revocations yields an absurd result. In particular, if an investigating authority considers a request for company-specific revocation (that would cover both dumping and injury) in year four after the imposition of the duty, it would automatically extend the duration of the (product-specific) duty by an additional five years without any obligation to conduct a product-specific review consistent with Article 11.3. If such company-specific reviews are requested by an interested party and conducted at least once every five years, Members would be under no obligation to terminate “the duty” or conduct a sunset review and “the duty” would continue indefinitely.

11. In an effort to distinguish the Appellate Body’s finding in *US – Corrosion-Resistant Steel Sunset Review* from this dispute, Vietnam argues that the term “the duty” in Article 11.2 has a different meaning from the same term in Article 11.3 because (i) “any interested party” can request a review under Article 11.2, “while an Article 11.3 review is triggered by the obligations imposed on the authority or by a request from the domestic authority;”⁵ and (ii) “Article 11.2 requires the authority to consider the consequences of the duty being ‘removed or varied’ while Article 11.3 requires the authority only to consider the consequences of the ‘expiry’ of the duty.”⁶ As discussed below, neither of these arguments provide support for Vietnam’s assertion that the same language should have a different meaning between Articles 11.2 and 11.3 of the AD Agreement.

12. Regarding the fact that “any interested party” can request a review of “the duty” under Article 11.2, Vietnam’s argument provides no reasoning for why this language distinguishes “the duty” in Article 11.2 from “the duty” in Article 11.3. The fact that “any interested party” can trigger a review of “the duty” under Article 11.2, while the domestic industry can trigger a

⁴ Indeed, at one point in its answers to panel questions, Vietnam notes that it “does not disagree with the Appellate Body interpretation of the term ‘duty’ or ‘the duty’ as referring to the imposition of duties on a ‘product specific’ or ‘order-wide’ basis.” Vietnam’s Answers to Panel Questions, para. 134.

⁵ Vietnam’s Answers to Panel Questions, para. 125. See also China’s Answers to Panel Questions, para. 32; Japan’s Answers to Panel Questions, para. 15; EU’s Answers to Panel Questions, para. 49.

⁶ Vietnam’s Answers to Panel Questions, para. 126. See also Japan’s Answers to Panel Questions, para. 19.

review of “the duty” under Article 11.3, reflects the commercial reality of which actors are generally interested in the particular proceeding.

13. In the case of Article 11.2, interested parties (*e.g.*, exporters of the product subject to the duty) would have an interest in revocation of the order while, in the case of Article 11.3, it would be the domestic industry that would have an interest in the order remaining in effect and not expiring. Accordingly, in no way does the reference to “any interested party” in Article 11.2 warrant a different interpretation of the term “the duty” between Articles 11.2 and 11.3.⁷ Article 11.3 logically does not envision that exporters would request a review to prevent the anti-dumping duty from being terminated.

14. As to the “removed and varied” language found in Article 11.2, Vietnam’s argument is misplaced, as this language does not refer to the authority’s review of dumping, but rather to the authority’s review of injury, which is not at issue in this dispute. Specifically, Article 11.2 states that “[i]nterested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both.” (Emphasis added.) There are two distinct and separate considerations contemplated under Article 11.2: (i) the need for the duty to offset dumping, and (ii) whether removal or variation of the duty would likely lead to continuation or recurrence of injury. Vietnamese exporters did not ask the United States to review whether injury would be likely to continue or recur in their requests for revocation from the antidumping duty order. Thus, the examination of whether injury would continue or

⁷ In its answers to the Panel’s Questions, Japan asserts that “the duty” in Article 11.2 is distinct from Article 11.3 because Article 11.2 calls for an investigation of dumping or injury while Article 11.3 calls for an inquiry of dumping and injury. This distinction does not speak to the definition of “the duty” but rather the nature of reviews under Article 11.2 as compared to expiry or “sunset” reviews under Article 11.3. In the case of Article 11.2, whether the duty can be removed is based on an examination as to either dumping (whether continued imposition is necessary to offset dumping) or injury (whether injury would be likely to continue or recur), and the administering authority need not examine both to remove the duty. In the case of a review under Article 11.3, the order would expire unless the administering authority finds that both dumping and injury would be likely to continue or recur. For Article 11.3, the duty is removed unless there are affirmative findings by the authority related to both dumping and injury.

Japan also notes that price undertakings, which are agreements between “any exporter” and the investigating authority, are governed by the obligations under Article 11.2 and, as a result, Article 11.2 must call for company-specific revocation. Japan’s Answers to Panel Questions, para 18. Pursuant to Article 11.5 of the AD Agreement, Article 11.2 applies *mutatis mutandis* to price undertakings – i.e., Article 11.2 applies taking into account necessary changes to apply to price undertakings. Accordingly, the United States respectfully submits that the definition of “the duty” should not be changed as to how it is consistently interpreted in the AD Agreement as a product-specific reference because Article 11.2 obligations might be different when applied to price undertakings. Such an interpretation would turn the phrase “*mutatis mutandis*” on its head.

Moreover, we agree with the European Union’s argument that when the raising of export prices under a price undertaking eliminates dumping and, pursuant to Vietnam’s interpretation of Article 11.2, this would lead to automatic termination, there would be no basis for review under Article 11.3, which is an absurd result. EU’s Answers to Panel Questions, para. 53. Regardless, the interpretation of how price undertakings may be carried out under Article 8 is not an issue in this dispute, and the United States does not believe that the reference to “any exporter” has relevance for this issue.

recur if the duty is “removed” or “varied” has no bearing on the dumping examinations about which Vietnam complains.

15. Further, the fact that an authority may consider the consequence for injury to the domestic industry “if the duty were removed or varied” does not change the nature of the order-wide examination conducted either with respect to dumping or injury. A variation in the duty may be reflected in changes to individual margins of dumping, but the examination of injury to the domestic industry remains an inherently product-wide exercise. An injury determination relates to all of the imports subject to “the duty,” that is, all imports from that source. There is nothing in the language of Article 11.2 that indicates that an authority is required to examine the need for the duty based on injury, or dumping, occurring on a company-specific basis.

16. Even assuming, *arguendo*, that “varied” modifies “the duty” in Article 11.2 with respect to consideration of whether the duty is necessary to offset dumping, Vietnam has failed to explain why that leads to the conclusion that company-specific revocation based on a company-specific absence of dumping is an obligation. As noted by Vietnam, “the duty can be varied in a number of ways.”⁸ For example, the “duty” could be “varied” by decreasing the scope of products covered by an antidumping duty order, which would be product (not company) specific.

17. Vietnam also argues that the language in Article 11.1 that the duty shall remain only “to the extent necessary” points to a company-specific examination of dumping in Article 11.2. Article 11.1 of the AD Agreement states that “{a}n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.” The general rule in Article 11.1 informs the interpretation of both Articles 11.2 and 11.3.⁹ Notwithstanding the reference to “the extent” of the duty in Article 11.1, the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* still found that “the duty” in Article 11.3 was not a company-specific reference.

18. Finally, the United States observes that had Members agreed to an obligation to examine company-specific revocation requests of an antidumping duty order under Article 11.2, they would have included explicit language to that effect in the text of the provision. For example, the absence of such language as “including as to that interested party” following “whether the continued imposition of the duty is necessary to offset dumping” is telling. Vietnam attempts to add obligations where none exist.

19. In a tacit acknowledgment of its failure to adequately distinguish “the duty” in Article 11.3 from “the duty” in Article 11.2, Vietnam (while appearing to accept the Appellate Body’s reasoning at one point)¹⁰ criticizes the Appellate Body report in *US – Corrosion-Resistant Steel*

⁸ Vietnam’s Answers to Panel Questions, para. 126.

⁹*EC – Tube or Pipe Fittings (Panel)*, para. 7.113 (Panel stating that “Article 11.1 does not set out an independent or additional obligation for Members.”). The Appellate Body, like the panel, characterized Article 11.1 as a “general rule.” *EC – Tube or Pipe Fittings (AB)*, para. 81. See also Vietnam’s Answers to Panel Questions, para. 123 (“Articles 11.2 and 11.3 of the Anti-Dumping Agreement seek to provide the mechanism to ensure that the limitations on the application of anti-dumping duties provided for under Article 11.1 are followed.”).

¹⁰ Vietnam’s Answers to Panel Questions, para. 134.

Sunset Review as reading “the duty” out of context.¹¹ According to Vietnam, an interpretation of “the duty” in Article 11.3 that allows for company-specific revocation is consistent with Article 5.8 of the AD Agreement, which calls for the termination of an investigation and non-application of antidumping duties if an individual exporter is found not to be dumping,¹² and Article 6.10, which states that “[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation.”¹³

20. Vietnam’s argument fails, however, because both Article 5.8 and Article 6.10 of the AD Agreement show that when Members wanted to make company-specific references in the AD Agreement, they did so explicitly and did not use the term “the duty.” In particular, Articles 5.8 and 6.10 make references to the “margin of dumping” and “the individual margin of dumping,” respectively. These company-specific references to the “margin of dumping” and “the individual margin of dumping” must have a different meaning than “the duty.” To read “the duty” in the context of Article 11 as a company-specific reference would render these distinctions a nullity, which is not the preferred outcome under the customary rules of treaty interpretation.¹⁴

21. In addition, Vietnam asserts that Article 11.2 must be interpreted as obligating company-specific revocation because an opposite interpretation “would eliminate from the Anti-Dumping Agreement any possibility of individual exporters being excluded from antidumping duty liability by virtue of the demonstrated cessation of dumping.”¹⁵ This argument is without merit because it ignores the fact that exporters subject to “the duty” who have not engaged in dumping have no duties imposed pursuant to Article 9.3 of the AD Agreement.

22. Vietnam also asserts that the United States, as well as other Members, have engaged in a subsequent practice of allowing company-specific revocation and that this practice is relevant for assessing the legal obligations stemming from Article 11.2.¹⁶ However, nothing in the evidence provided by Vietnam shows that the Members, including the United States, provided for company-specific revocation because they thought it was an obligation under Article 11.2 of the AD Agreement. Accordingly, Vietnam has not established, under customary rules of interpretation of public international law as reflected in the Vienna Convention, the existence of

¹¹ Vietnam’s Answers to Panel Questions, para. 128.

¹² *Ibid.*

¹³ *Ibid.*, para. 130.

¹⁴ In its answers to Panel questions, China asserts that Article 9.5 of the AD Agreement establishes that the term “duties” is also a company-specific reference. China’s Answers to Panel Questions, para. 37. China’s argument is irrelevant on its face, as the term “duties” does not appear in Article 11.2 of the AD Agreement. Nevertheless, an examination of Article 9.5 shows, again, that when Members wanted to make company-specific references, they did so explicitly with language such as “individual margins of dumping.” Indeed, the first sentence of Article 9.5 reads: “[i]f a product is subject to anti-dumping duties [a product-specific reference], the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping [a company-specific reference].”

¹⁵ Vietnam’s Answers to Panel Questions, para. 129.

¹⁶ *Ibid.*, para. 133.

any subsequent practice in the application of the AD Agreement which establishes the agreement of the parties regarding its interpretation.¹⁷

2. Article 11.2 of the AD Agreement Does Not Require Revocation Based on the Absence of Dumping for Three Years

23. Even assuming, *arguendo*, that company-specific revocation is an obligation under Article 11.2 of the AD Agreement, there is nothing in Article 11.2 that obligates a Member to adopt a standard that revocation must occur based on the absence of dumping for three years. This was the panel’s observation in *US – Anti-Dumping Measures on Oil Country Tubular Goods* when it found that the standard of revocation based on three years of no dumping “operates in favour of foreign producers and exporters.”¹⁸ As such, it goes “beyond what is required by Article 11.2” and, therefore, cannot serve as a basis for a breach of Article 11.2 of the AD Agreement by the United States.¹⁹

24. Vietnam’s arguments as to why the Panel should not follow the panels in *US – Anti-Dumping Measures on Oil Country Tubular Goods* and *US – DRAMs*, which both found that elements of Commerce’s regulation providing for company-specific revocation, based, *inter alia*, on the absence of dumping for three years were not WTO-inconsistent, are unpersuasive and indeed, difficult to follow.²⁰ Nevertheless, the United States makes the following observations.

25. The panel in *US – Anti-Dumping Measures on Oil Country Tubular Goods* found that Commerce’s decision not to revoke the antidumping duty order for two exporters was not WTO-inconsistent (notwithstanding the use of margins calculated based on the use of “zeroing”) due, in part, to the ability of an interested party to seek a changed circumstances review (“CCR”) in which the standard of three years of no dumping would not be used.²¹ The panel in *US – DRAMs* reached a similar result as to another element of the same standard – *i.e.*, the use of a certification requirement.²²

26. In an attempt to avoid the findings in these two reports, Vietnam asserts that a request for revocation under the CCR provision “would [not] have been appropriate or legal”²³ and that the United States would have relied on the same (allegedly WTO-inconsistent) margins in a CCR.²⁴

¹⁷ See VCLT, art. 31(3)(b).

¹⁸ *US – Anti-Dumping Measures on Oil Country Tubular Goods (Panel)*, para. 7.166.

¹⁹ *Ibid*, para. 7.174.

²⁰ Vietnam’s Answers to Panel Questions, paras. 138-146.

²¹ *US – Anti-Dumping Measures on Oil Country Tubular Goods (Panel)*, paras. 7.153, 7.166.

²² *US – DRAMs*, para. 6.53.

²³ Vietnam’s Answers to Panel Questions, paras. 141, 144-146.

²⁴ *Ibid*, para. 143.

Vietnam has provided no valid support for such speculation and, accordingly, this argument should be rejected.²⁵

27. The speculative nature of Vietnam’s assertion is underscored by the haphazard way it has gone about challenging selected elements of how Vietnam believes that the United States would have applied its “three and out” administrative review regulation to a CCR. In particular, Vietnam notes that it is not “challenging the ‘not likely’ standard or the certification requirement [discussed above] because it has not been determined whether and how these will be applied if and when the USDOC considers revocation based on WTO-consistent margins of dumping.”²⁶ At the same time, Vietnam asserts that the United States would rely on WTO-inconsistent margins in a CCR. Vietnam has provided no evidence for such speculation or such distinctions.

28. In sum, Vietnam has no basis for arguing that the Panel should reach different conclusions from those reached by the panels in both *US – Anti-Dumping Measures on Oil Country Tubular Goods* and *US – DRAMs*; in particular, Vietnam’s arguments – based on a theory of what Commerce might have done in a proceeding (*i.e.*, a CCR) that did not happen and that the Vietnamese exporters never requested – is without merit and should be rejected.

3. The United States Did Not Act Inconsistently with Article 11.2 of the AD Agreement in Limiting the Number of Exporters for Individual Examination, Including Requests for Revocation

a. Vietnam Attempts to Create Ambiguity and Conflict in the AD Agreement Where None Exist

29. Even if Article 11.2 could be read to provide for company-specific revocations, Article 11.2 cannot be read as requiring administering authorities to initiate separate reviews of any company that makes a request for revocation. Vietnam’s argument in this regard is based on the premise that the AD Agreement has an ambiguity in, and apparent conflict between, the limited examination provisions of Article 6.10 and the review contemplated under Article 11.2.²⁷ However, Vietnam has no basis for the premise of its argument. A proper reading of the terms of these provisions, in light of their plain meaning, and in context and in light of the object and purpose of the AD Agreement, demonstrates that Members may limit the examination of requests made under Article 11.2. And indeed, it is Vietnam’s proposed interpretation that would create a conflict between Articles 6.10 and 11.2.

30. Article 6.10 provides that an authority may limit its examination whenever the number of exporters, producers, importers or types of products involved is so large as to make such a

²⁵ Vietnam asserts that the regulation on CCRs would be “governed” by the regulation for company-specific revocation in administrative reviews based on three years of no dumping because the latter is more specific. Vietnam’s Answers to Panel Questions, para. 146. Vietnam’s argument fails because, among other things, regulations governing revocations in administrative reviews are not more specific than a regulation governing CCRs as to the conduct of a CCR.

²⁶ Vietnam’s Answers to Panel Questions, para. 140 (emphasis added).

²⁷ *Ibid*, paras. 157, 161, 165-166.

determination impracticable. Commerce explained how the particular facts in each of the administrative reviews at issue justified its determination to limit the number of exporters it individually examined. Moreover, Vietnam does not dispute that the United States permissibly limited its examination in these reviews.

31. Article 11.4 states that “[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under [Articles 11.2 and 11.3].” Consequently, the limited examination provisions of Article 6.10 apply to any requests for individual revocations under Article 11.2. Vietnam concedes that it “does not dispute the plain language of Article 11.4.”²⁸ This should end the matter. There is no ambiguity and there is no conflict between these provisions.

32. Vietnam’s effort to create ambiguity and conflict rests on its claim that the interpretation provided by the United States yields an unreasonable and absurd result.²⁹ However, it is Vietnam’s strained interpretation that is erroneous. Under Vietnam’s proposed interpretation, an administering authority would have to examine each and every request for revocation that is presented, and in particular, examine each company’s dumping behavior. Accordingly, administering authorities would be required to conduct an unlimited number of dumping calculations upon request. This result cannot squared with the plain statement in Article 6.10 that authorities may limit their examination whenever the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable.

33. Vietnam’s response to this problem with its proposed interpretation is unpersuasive. In particular, Vietnam suggests ways in which such reviews might be simplified. However, there is no basis in the AD Agreement obligating any such action, nor any indication as to what kind of simplification would suffice under the covered agreements. In short, Vietnam’s proposed interpretation is not supportable with the plain text of Article 6.10.

b. Even if the AD Agreement Requires Members to Review All Requests for Revocation, Vietnam has Failed to Properly Establish Claims by Certain Exporters in this Dispute

34. The United States also notes that Vietnam lacks factual support for a number of its arguments regarding company-specific requests for revocation. In paragraph 154 of Vietnam’s answers to Panel questions, Vietnam lists several exporters that it claims requested revocation and which are asserted to be covered by Vietnam’s claims in this dispute. First, Nha Trang Seafoods, as conceded by Vietnam, withdrew its request for revocation.³⁰ Accordingly, there is no request for revocation for this company at issue in this dispute. Second, the company referred to as Grobest has also withdrawn its request for revocation.³¹ Accordingly, there is no request

²⁸ *Ibid*, para. 159.

²⁹ *Ibid*, para. 165.

³⁰ *Ibid*, para. 154.

³¹ *Withdrawal of Request for Voluntary Respondent Review and Revocation of Antidumping Duty Order in Part*, (Dec. 12, 2012) (Exhibit US-13).

for revocation for this company at issue in this dispute. Third, a request for revocation made by the company referred to as Fish One only involved the third administrative review, and that proceeding is not at issue in this dispute.³²

B. Vietnam Has Failed to Establish that Section 129(c)(1) of the URAA is Inconsistent, As Such, with the AD Agreement

35. As set forth in both the U.S. First Written Submission and the panel’s report in *US – Section 129(c)(1)*, section 129(c)(1) of the URAA does not mandate or preclude any particular treatment of “prior unliquidated” entries nor does it have “the effect” thereof.³³ Indeed, “only determinations made and implemented under section 129 are within the scope of section 129(c)(1)”³⁴ and “section 129(c)(1) only addresses the application of section 129 determinations. It does not require or preclude any particular actions with respect to {other entries} in a separate segment of the same proceeding.”³⁵ These DSB rulings remain as true today as they were when the panel examined the U.S. system for implementing DSB recommendations and rulings in *US – Section 129(c)(1)*. Section 129 remains the same and has not been amended. Vietnam’s arguments do not provide any reason for the Panel to make different findings from those previously adopted by the DSB.

36. In its first written submission, Vietnam asserted that section 129 is “the exclusive authority under U.S. law for the United States to comply with adverse DSB rulings.”³⁶ Vietnam further asserted that section 129(c)(1) “does not allow” any refund of any invalid duties applicable to entries made before the date that the U.S. Trade Representative (USTR) directs implementation pursuant to section 129(c)(1), thus constituting “an absolute legal bar” against such refunds.³⁷ These are the same arguments the complaining party unsuccessfully made in *US – Section 129(c)(1)*.³⁸

37. Unable to resolve the conflict between its interpretation of section 129(c)(1) and the fact that the United States has used other domestic mechanisms to implement DSB recommendations and rulings, Vietnam has rewritten its legal theory between its first written submission and its answers to Panel questions. Now, Vietnam asserts that “Section 129 of the URAA is the immediate point of inquiry under U.S. law”³⁹ and that the United States is obligated under the

³² In this dispute, Vietnam did not request consultations on, nor did it file a panel request on, the third administrative review. Vietnam’s First Written Submission, para. 325.

³³ *US – Section 129(c)(1)*, paras. 6.54-6.114.

³⁴ *See ibid*, para. 6.53.

³⁵ *Ibid*, para. 6.80.

³⁶ *See* Vietnam’s First Written Submission, para. 224.

³⁷ *See ibid*, para. 213.

³⁸ *See US – Section 129(c)(1)*, paras. 3.2-3.63.

³⁹ Vietnam’s Answers to Panel Questions, para. 69.

covered agreements to implement all DSB recommendations and rulings exclusively through section 129.⁴⁰

38. Consequently, Vietnam urges the Panel to examine section 129(c)(1) in a vacuum, divorced from the statutory scheme to which it belongs, as if other U.S. measures do not exist. In Vietnam’s view, these other measures are irrelevant to the Panel’s inquiry. Through this artificial exercise, Vietnam contends that the Panel can find section 129(c)(1) inconsistent “as such” with the covered agreements because it alone does not provide for refunds on “prior unliquidated entries.”

39. Vietnam’s new argument is as wrong as its old argument. Section 129 of the URAA is but one tool in a toolbox by which the United States can implement DSB recommendations and rulings, a point that Vietnam ultimately concedes in its answers to Panel questions.⁴¹ As the United States demonstrated in its First Written Submission and responses to Panel questions, it has used these other tools, including, for example, section 123 of the URAA and legislative action,⁴² a point that Vietnam has failed to rebut.⁴³ To insist, as Vietnam does, that the Panel must engage in a limited inquiry and ignore other relevant U.S. laws is a position that is inconsistent with the basic principles under which the DSB examines “as such” challenges to Members’ measures.⁴⁴

40. At bottom, Vietnam’s argument equates to a view that the AD Agreement requires Members to have a single administrative mechanism for implementing DSB recommendations and rulings and to use only that mechanism. The AD Agreement contains no such obligation and, consequently, the United States is not required to provide a single administrative mechanism that can address all DSB recommendations and rulings, regardless of their potential permutations and implications. Consequently, Vietnam’s argument fails.

⁴⁰ *Ibid*, para. 77 (“the mere fact that the United States might apply a different mechanism to implement adverse DSB rulings and recommendations in the future does not resolve the question of whether the mechanism set forth in Section 129 is or is not inconsistent [with WTO obligations.]”); *see also id.*, para. 69 (“While the United States points out that it is possible for Section 123 and Section 129 to operate in sequence where a regulation or practice is first amended under Section 123 before it is applied to correct a specific action under Section 129, that is a fact specific scenario that is neither automatic nor in any way diminishes Viet Nam’s claim regarding the legal effect given Section 129 determinations.”).

⁴¹ Vietnam’s Answers to Panel Questions, para. 69.

⁴² *See* U.S. First Written Submission, para. 120; *see also* U.S. Responses to Panel Questions, paras. 100-106.

⁴³ Vietnam’s Answers to Panel Questions, para. 92.

⁴⁴ *See, e.g., US – Section 129(c)(1)*, paras. 6.54-6.114 (comparing action taken pursuant to section 129(c)(1) with action taken pursuant to other U.S. measures to determine whether the former is WTO-consistent).

1. The AD Agreement Does Not Address Implementation of DSB Recommendations and Rulings

41. As an initial matter, and as discussed in the U.S. First Written Submission, the DSU is the only WTO agreement that addresses Members' obligations in regards to implementation in the antidumping context. Vietnam has not pursued any claims *vis-à-vis* section 129(c)(1) of the URAA under the DSU.⁴⁵ For this reason alone, Vietnam's claim as to section 129(c)(1) should be rejected.

42. In its answers to Panel questions, Vietnam asserts that it need not have relied on the DSU to bring its claim regarding section 129(c)(1) because "findings made by DSU Article 21.5 panels and the Appellate Body center on the substantive violations of measures to comply with covered agreements and not simply the DSU itself."⁴⁶ In support of this argument, Vietnam relies on *US – Zeroing (Japan) (21.5)*, in which the Appellate Body found that the United States acted inconsistently with the AD Agreement in the compliance proceedings.⁴⁷ This argument misconstrues the Appellate Body's report in that dispute.

43. As noted by the Appellate Body in *US – Zeroing (Japan) (21.5)*, that "appeal concern[ed] the obligation of WTO Members to comply with the DSB's recommendations and rulings. The DSU contains several provisions that specifically address this obligation."⁴⁸ The Appellate Body further observed that provisions in the AD Agreement do "not address a Member's compliance obligations after the DSB has adopted recommendations and rulings and the reasonable period of time for implementation has expired."⁴⁹

44. And while Vietnam is correct in that the Appellate Body in *US – Zeroing (Japan) (21.5)* found breaches of provisions in the AD Agreement in the compliance phase, "these findings relate rather to the continuing substantive inconsistency [of measures taken to comply], rather than to the temporal aspects of compliance."⁵⁰ This is clearly shown in the language used by the Appellate Body in describing the continuing breaches of the AD Agreement – *i.e.*, that the Member "remains in violation of Articles 2.4 and 9.3 of the [Anti-Dumping] Agreement, and Article VI:2 of the GATT 1994, in respect of those importer-specific assessment rates;"⁵¹ and that the Member "is in continued violation of its obligations under Articles 2.4 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994."⁵²

⁴⁵ See Vietnam's Panel Request, pp 11-12; *see also* Vietnam's First Written Submission, paras. 211-266.

⁴⁶ Vietnam's Answers to Panel Questions, para. 89.

⁴⁷ *Ibid*, para. 89.

⁴⁸ *US – Zeroing (Japan) (21.5) (AB)*, para. 153 (emphasis added).

⁴⁹ *Ibid*, para. 164.

⁵⁰ EU's Answer to Panel Questions, para. 37.

⁵¹ *US – Zeroing (Japan) (21.5) (AB)*, para. 189.

⁵² *Ibid*, para. 213.

45. In the context of this dispute, there has not been a compliance proceeding and, therefore, there are no “continuing” or “remaining” breaches of the AD Agreement. In fact, it is important to recognize the significance of the fact that Vietnam’s arguments would apply only in the context of a compliance proceeding. In such a proceeding, the question presented would be whether the United States has brought the measures found to be in breach into compliance. Also in that proceeding, any breach of the AD Agreement would be a continuing breach by the underlying measure already found to be in breach or a new breach by a measure taken to comply. It would not be section 129(c)(1) that would be in breach of the AD Agreement.

46. Accordingly, Vietnam’s argument fails because the AD Agreement simply does not address the implementation of DSB recommendations and rulings.

2. The United States Implements DSB Recommendations and Rulings Through a Number of Mechanisms

47. At various points in its answers to Panel questions, Vietnam asserts that while the United States may have a number of mechanisms besides section 129 to implement DSB recommendations and rulings, those mechanisms are “irrelevant” because implementation through other means is not “automatic.”⁵³ Vietnam thus asks the Panel to ignore the existence of other avenues, both administrative and legislative, by which the United States can implement DSB recommendations and rulings to treat “prior unliquidated entries” in a WTO consistent manner. In support of this argument, Vietnam cites the Appellate Body reports in *US – 1916* and *US – Corrosion-Resistant Steel Sunset Review*.⁵⁴

48. According to Vietnam, because these two reports imply a movement away from the “mandatory/discretionary” distinction, the United States must fully come into compliance with DSB recommendations and rulings through one “automatic,” administrative mechanism – *i.e.*, section 129.⁵⁵ As discussed below, these reports provide no support for Vietnam’s argument that the United States must implement all DSB recommendations and rulings in disputes involving antidumping duty measures exclusively through section 129.

49. As an initial matter, the Appellate Body in *US – 1916* did not move away from the mandatory/discretionary distinction, as Vietnam claims. To the contrary, the Appellate Body relied upon this distinction in assessing the provision at issue.⁵⁶ The Appellate Body only found

⁵³ Vietnam’s Answers to Panel Questions, paras. 68-81. The United States observes that Vietnam focuses exclusively on U.S. arguments that section 123 is another such mechanism through which the United States can accord WTO-consistent treatment to “prior unliquidated entries.” Importantly, Vietnam has not attempted to rebut the point that the United States can implement DSB recommendations and rulings, and accord WTO-consistent treatment to “prior unliquidated entries,” through congressional action.

⁵⁴ Vietnam’s Answers to Panel Questions, paras. 76-78.

⁵⁵ *Ibid.*, paras. 93-95. The United States observes that Vietnam itself acknowledges that, notwithstanding *US – 1916 (AB)* and *US – Corrosion-Resistant Steel Sunset Review (AB)*, the “mandatory/discretionary” distinction is an “analytic technique for evaluating claims that legislation is consistent as such.” *Ibid.*, para. 93.

⁵⁶ *US – 1916 (AB)*, paras. 87-91.

that it need not answer the question of whether the “mandatory/discretionary” distinction remained relevant to its analysis because the provision in dispute – section 801 of the Act of September 8, 1916 (“the 1916 Act”) “was clearly not discretionary legislation.”⁵⁷

50. The Appellate Body’s report in *US – 1916 (AB)* is inapposite for other reasons. Unlike section 129, the 1916 Act was a standalone provision that did not interact with other measures within a larger statutory scheme.⁵⁸ Thus, the question before the DSB was whether section 801 of the 1916 Act was inconsistent with the AD Agreement. In contrast, section 129(c)(1) is part of a scheme that permits DSB recommendations and rulings to be implemented through multiple mechanisms, both administrative and legislative.

51. Second, while the AD Agreement places limits on a Member’s discretion to assess antidumping duties (and the question before the Appellate Body in *US – 1916 (AB)* was whether the 1916 Act was inconsistent with those limits), the AD Agreement does not place any obligations on a Member with respect to the mechanisms to implement DSB recommendations and rulings, let alone place limits on a Member’s discretion to deploy multiple, distinct mechanisms to implement DSB recommendations and rulings.⁵⁹ As explained in the first written submission, the United States has a number of means at its disposal, whether administrative or legislative in nature, to bring the United States into compliance with DSB recommendations and rulings, even in situations where those recommendations and rulings might impact “prior unliquidated entries.” Therefore, the Appellate Body’s report in *US – 1916 (AB)* does not support Vietnam’s claim.

52. Vietnam’s reliance on *US – Corrosion-Resistant Steel Sunset Review (AB)* is similarly misplaced. As the panel noted in *Korea – Commercial Vessels*:

In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body examined two issues. First, it considered whether certain types of measures could not, as such, be subject to dispute settlement proceedings. Second, the Appellate Body considered whether the measure at issue in that case could be inconsistent with the AD Agreement. The Appellate Body treated the first issue as a jurisdictional matter. Thus, having found that there was “no reason for concluding that, in principle, non-mandatory measures cannot be challenged ‘as such’”, the Appellate Body stated that panels are not “obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory”. However, this does not mean that the Appellate Body was excluding the application of the traditional mandatory/discretionary distinction, since it went on to acknowledge that the distinction might be relevant as part of the second issue, *i.e.*, the

⁵⁷ *Ibid*, para. 99.

⁵⁸ See Act of September 8, 1916, Ch. 463, § 801, 39 Stat. 756, 798-800 (Exhibit US-79), *repealed by* Miscellaneous Trade and Technical Corrections Act of 2004, Title II, § 2006(a), 118 Stat. 2434, 2597 (Exhibit US-80). The United States observes that it came into compliance with DSB recommendations and rulings in *US – 1916 (AB)* through a legislative act.

⁵⁹ And although Vietnam has not made claims under the DSU, the United States would note that the DSU also does not contain obligations regarding the mechanisms a Member is to employ in implementing DSB recommendations and rulings or limit a Member’s discretion in this regard.

panel's assessment of whether the measure at issue was inconsistent with particular obligations.

53. The United States does not argue, as Vietnam suggests, that section 129(c)(1) is not subject to dispute settlement proceedings or that the mere existence of other implementation mechanisms prevents inquiry into section 129(c)(1).⁶⁰ As discussed above, section 129(c)(1) was challenged and found to be consistent with U.S. obligations under the covered agreements. Instead, the United States offers an undisputed point related to the second step taken by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*: that the use of other mechanisms to implement DSB recommendations and rulings demonstrates that section 129(c)(1) does not require the United States to take any particular action with respect to “prior unliquidated entries.” Vietnam omits this point, which is the critical focus of the Panel’s inquiry in this “as such” challenge.

54. Vietnam’s remaining arguments on the relevancy of section 123 are not persuasive. Vietnam contends that there are scenarios in which a section 129 determination has been issued in the absence of a section 123 determination;⁶¹ however, that does not mean that section 129(c)(1) would have required any particular treatment of “prior unliquidated entries” in those situations. Indeed, the panel in *US – Section 129(c)(1)* found that section 129(c)(1) did not require any particular treatment of prior unliquidated entries, concluding “that only determinations made and implemented under section 129 are within the scope of section 129(c)(1) and that such determinations are not applicable to ‘prior unliquidated entries’.”⁶² Vietnam also asserts that the United States “treats Section 123 and Section 129 proceedings as distinct and does not entertain arguments in one proceeding that focus on actions in another.”⁶³ This argument is of no moment; it does not undercut the fact that the United States has developed new methodologies in section 123 proceedings and later applied them in administrative reviews to afford WTO-consistent treatment to “prior unliquidated entries.”⁶⁴

55. Vietnam also attempts, without success, to undermine the significance of the fact that legislative action can afford WTO-consistent treatment to “prior unliquidated entries.” Vietnam asserts that such action does not prevent section 129(c)(1) from being found to be WTO-inconsistent because “[a]llowing the prospect of legislative change to serve as a viable defense to inconsistent measures would swallow the entire ‘as such’ inquiry.”⁶⁵

⁶⁰ Vietnam’s Answers to Panel Questions, para. 78.

⁶¹ *Ibid*, para. 81.

⁶² *US – Section 129(c)(1)*, para. 6.53 and 6.80.

⁶³ Vietnam’s Answers to Panel Questions, para. 81.

⁶⁴ U.S. First Written Submission, para. 120.

⁶⁵ Vietnam’s Answers to Panel Questions, paras. 79-80.

56. As discussed in our answers to Panel questions,⁶⁶ the United States does not argue that section 129(c)(1) is WTO-consistent because Congress can change section 129 itself so that it applies to “prior unliquidated entries.” Rather, the United States submits that where action is to be taken in relation to “prior unliquidated entries” that are not addressed by action taken pursuant to administrative mechanisms, such action can be taken by means of legislation. In other words, legislation represents another tool by which the United States can implement DSB recommendations and rulings, and has done so as in the *US – 1916* dispute.

57. In sum, section 123 and congressional action are two mechanisms within a larger domestic scheme by which the United States maintains the discretion to bring itself into compliance with DSB recommendations and rulings. Vietnam’s attempts to have the Panel analyze section 129(c)(1) in a vacuum that is isolated from the other parts of this domestic scheme should be rejected.

3. Vietnam Misconstrues the Statement of Administrative Action (SAA)

58. In an attempt to discredit the fact that the United States has used other administrative mechanisms (such as section 123) to accord WTO-consistent treatment to “prior unliquidated entries,” Vietnam asserts that such administrative mechanisms could only be used in “size of margin” cases but could not be used in “revocation” cases.⁶⁷ In support of this argument, Vietnam notes that the SAA states that section 129 determinations may not be necessary where the DSB recommendations and rulings “merely implicate[] the size of a dumping margin or countervailable subsidy rate [(“size of margin”)] (as opposed to whether a determination is affirmative or negative [(“revocation”)]).”⁶⁸

59. The fact that the SAA distinguishes “size of margin” and “revocation” situations does not mean that prior unliquidated entries cannot be accorded WTO-consistent treatment pursuant to other mechanisms. The passage of the SAA relied upon by Vietnam establishes only that the implementation of DSB recommendations and rulings under section 129(c)(1) does not affect duties assessed on “prior unliquidated entries.” To suggest that this passage, which pertains explicitly to section 129, dictates the application of other U.S. measures or the scope of potential congressional action is a conclusion unsupported by the text.

60. Vietnam’s reliance on U.S. statements in the Article 21.5 proceeding in *US – Softwood Lumber* is similarly unavailing.⁶⁹ Vietnam asserts that such statements imply that section 129 cannot be used in conjunction with other mechanisms – *i.e.*, “when Section 129 action is taken, this means the alternative action envisioned by the SAA language was not taken.”⁷⁰ Regardless of what Vietnam asserts is “envisioned” by the SAA, the simple fact is that the United States has

⁶⁶ U.S. Responses to Panel Questions, para. 96.

⁶⁷ Vietnam’s Answers to Panel Questions, para. 71.

⁶⁸ SAA, pp. 1025-26 (Exhibit VN-34).

⁶⁹ Vietnam’s Answers to Panel Questions, para. 71.

⁷⁰ *Ibid*, para. 74.

taken “alternative action” *vis-à-vis* “prior unliquidated entries,” even when action under section 129 has also been taken.⁷¹ The United States further observes that nothing in *US – Softwood Lumber* speaks to Congress’ ability to take action as to “prior unliquidated entries” in either “size of margin” or “revocation” cases.

61. Vietnam’s remaining claims as to the SAA are similarly unfounded. For example, the fact that Congress in the SAA explained that section 129 provides Commerce with authority to ensure compliance as to a particular set of entries does not mean that Congress sought to preclude WTO-consistent action with respect to “prior unliquidated entries.” Indeed, the panel recognized this point in *US – Section 129(c)(1)*.⁷² Moreover, the fact that the SAA does not speak to definitive duties at liquidation has no bearing on Vietnam’s claim. As explained above, the passage relied upon by Vietnam only pertains to section 129. It does not speak to the other mechanisms through which the U.S. could address “prior unliquidated entries.” Thus, the SAA text cited by Vietnam does not support its claim.

4. Vietnam’s Reliance on *Corus* is Misplaced

62. As in its first written submission, Vietnam continues to assert that the decision by the U.S. Court of International Trade (CIT) in *Corus* supports its claim.⁷³ As discussed in the U.S. First Written Submission,⁷⁴ Commerce did not argue in *Corus* that it had no discretion to change margins applicable to “prior unliquidated entries,” only that it was not required to do so under section 129(c)(1). This was the only issue that the CIT was required to resolve in order to reach a decision in *Corus* and the only issue that the CIT, in fact, decided. Moreover, neither the sequence of events under review in that case nor the CIT’s holding establishes that section 129(c)(1) prevented Commerce from revising the margins calculated in administrative reviews; rather, it demonstrates only that Commerce did not make such a revision in those particular instances. Thus, the CIT’s decision in *Corus* does not support Vietnam’s claim in this dispute.

C. The Treatment of Multiple Companies in Vietnam as a Single Vietnam-Government Exporter/Producer Was Not Inconsistent with the AD Agreement

1. Vietnam Still Has Failed to Demonstrate the Existence of a Measure that May be Challenged “As Such” as Inconsistent with the AD Agreement

63. Vietnam in its first written submission contended that it is challenging Commerce’s “NME-wide entity rate practice as set forth in the USDOC’s Anti-Dumping Manual, which confirms the practice is applied on a generalized and prospective basis.”⁷⁵ As discussed in the

⁷¹ See, e.g., U.S. First Written Submission, para. 120.

⁷² *US – Section 129(c)(1)*, para. 676.

⁷³ See, e.g., Vietnam’s Answers to Panel Questions, paras. 71, 74.

⁷⁴ U.S. First Written Submission, paras. 130-137.

⁷⁵ Vietnam’s First Written Submission, para. 94.

U.S. First Written Submission and below, Vietnam has not demonstrated the existence of a measure – based on an alleged “practice” – that may be challenged “as such” under the AD Agreement.

64. But before turning to this issue, the United States notes that subsequent submissions by Vietnam clarify what measure Vietnam purports to challenge. In a response to a question from the Panel, Vietnam stated that it “does not advance a claim in this dispute against the USDOC’s Anti-Dumping Manual or the policy bulletin.”⁷⁶ Thus the issue here is solely whether Vietnam has shown the existence of an unwritten measure – based on an alleged practice adopted by the United States – that may be challenged “as such.” And Vietnam has made clear that it is not alleging that either the AD Manual or Policy Bulletin Number 05.1 are themselves measures that Vietnam seeks to challenge “as such.”

65. The Appellate Body has identified several criteria in evaluating whether an unwritten measure exists that can be challenged as such: whether the rule or norm embodied in that measure is attributable to the responding Member; the precise content of the rule or norm; and whether the rule or norm has general and prospective application.⁷⁷ In addition, the Appellate Body has explained that “[p]articular rigor 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.”⁷⁸

66. Vietnam’s arguments as clarified still fail to establish the existence of a measure – which Vietnam calls a practice – that may be challenged “as such” in this dispute. Vietnam’s argument principally relies on the theory that the AD Manual and the policy bulletin provide evidence of a practice that may be challenged “as such” as a measure under WTO dispute settlement. Vietnam reliance, however, is misplaced. In particular, Vietnam fails to address the fact that the AD Manual stipulates that it “is for the internal training and guidance of Import Administration (IA) personnel only”; that approaches set out in the manual are “subject to change without notice”; and that the “manual cannot be cited to establish DOC practice.”⁷⁹ Indeed, other than Policy Bulletin Number 05.1, Vietnam has failed to submit any evidence since its first written submission to demonstrate the existence of an unwritten measure of general or prospective application.⁸⁰

⁷⁶ Vietnam’s Answers to Panel Questions, para. 19. The policy bulletin referenced in Vietnam’s response is Import Administration Policy Bulletin Number 05.1, which Vietnam attached as Exhibit VN-66.

⁷⁷ *US – Zeroing (EC) (AB)*, para. 198.

⁷⁸ *Ibid*, para. 198 (emphasis in original).

⁷⁹ Chapter 1, Department of Commerce 2009 Antidumping Manual, p. 1 (emphasis added) (Exhibit US-27).

⁸⁰ Vietnam acknowledges in its answers to the Panel’s question that it has provided only “three pieces of evidence” in support of its claim regarding the alleged “practice” measure. Vietnam’s Answers to Panel Questions, para. 27; *see ibid*, paras. 22-24.

67. As for Policy Bulletin Number 05.1, Vietnam argues that the bulletin provides evidence of the existence of a measure because it is a “formal policy . . . announced publicly in the Federal Register.”⁸¹ The approaches set forth in the bulletin, however, applied only with respect to “NME antidumping investigations initiated on or after the date of publication in the Federal Register of the notice announcing this policy. . . [and] only . . . to antidumping investigations.”⁸² The bulletin thus did not require Commerce to follow the approaches set forth therein during the covered reviews or generally during administrative reviews of products from NME countries.

68. Finally, the United States notes that Vietnam acknowledges that “[t]he USDOC retains broad discretion on the method for calculating the NME-wide entity rate.”⁸³ Thus even Vietnam does not argue that the alleged measure – relating to a supposed “practice involving NME-wide entity rates” – exists and is invariably applied by Commerce. Accordingly, Vietnam has not established a *prima facie* case for an “as such” inconsistency with the AD Agreement given that it has not brought forward evidence that what it describes as “practice” is a measure.

2. Commerce’s Approach with Respect to the Government of Vietnam’s Control over Multiple Companies is based on the Undisputed NME Conditions in Vietnam and is Not Inconsistent with Articles 6.10 and 9.2 of the AD Agreement

69. Vietnam states that it contests in this dispute “whether the covered agreements provide a legal – not a factual – basis for the presumption of government control that is central to the NME-wide entity policy.”⁸⁴ As an initial matter, the United States notes that the question presented is a **mixed question of fact and law**; namely, whether the U.S. approach for deciding what sets of exports from an NME are considered to be from one exporter or from separate exporters. The matter at issue – at least as Vietnam has presented it – does not involve a pure question of legal interpretation of any particular provision of the AD Agreement. Indeed, Vietnam cannot point to any provision of the AD Agreement that specifies exactly how an authority is to decide whether different sets of exports are considered to be from one exporter or multiple exporters. Rather, the question is whether Vietnam has demonstrated that the approach used by the United States to determine which exports from an NME are matched to particular exporters is inconsistent with the WTO Agreement.

70. That said, Vietnam’s Working Party Report provides legal (as well as factual) support for treating multiple companies in Vietnam as part of a Vietnam-government entity for the purpose of determining a dumping margin. Although there is no clear dividing line between what amounts to “factual” versus “legal” support, the United States will address both issues below, first with an emphasis on factual matters.

⁸¹ Vietnam’s Answers to Panel Questions, para. 23.

⁸² Import Administration Policy Bulletin Number 05.1, pp. 6, 7 (April 5, 2005) (Exhibit VN-66).

⁸³ Vietnam First Written Submission, para. 104.

⁸⁴ Vietnam’s Answers to Panel Questions, para. 34 (emphasis original).

a. Vietnam’s Working Party Report Provides the Basis for Commerce’s Presumption that Vietnam Controls Companies Involved in Exportation and Production of the Subject Merchandise until Demonstrated Otherwise

71. The Working Party Report reflects that Vietnam, in the course of its accession process, presented a range of reforms to the Working Party about prices, the banking sector, the role of state-owned enterprises (SOEs) and commercial activity and trade generally, all of which were aimed at establishing a multi-sector economy. At the same time, Vietnam also stated that its economy was still in the process of shifting from central planning to a market-based economy.⁸⁵ Despite this statement, which itself indicates that Vietnam considered its reforms incomplete, the description of Vietnam’s economy in the Working Party Report did not indicate a shift toward a true market-based economy. Rather, the description of Vietnam’s economy in the Working Party Report indicated that Vietnam planned to develop a “socialist-oriented market economy” in which the state preserves a predominant role for SOEs.⁸⁶

72. The Working Party Report contains many examples confirming that Vietnam had not yet shifted completely away from a centrally planned economy to a market-based economy. For the most part, Vietnam’s SOEs were not undergoing full privatization, *i.e.*, the outright sale of companies. Instead the government opted for a program of equitization whereby SOEs were converted into joint-stock or limited liability companies in which the State can hold any percentage of shares. Line ministries (which controlled SOEs during the central planning era) would hold the state’s stakes in these companies.⁸⁷ Vietnam envisioned that an indefinite number of SOEs, including large and important ones as well as the banks, would remain wholly or majority state-owned for an undefined time period; the open-ended list of such enterprises in the Working Party Report is extensive and encompasses industries and sectors far beyond those normally considered national security-related or natural monopolies.⁸⁸ Investment also was heavily regulated on a sector-specific basis and the Government of Vietnam maintained a long list of industries and sectors in which investment was prohibited, conditional, or restricted.⁸⁹

73. In the Working Party Report, Members expressed concern about the influence of the Government of Vietnam on its economy and how such influence could affect trade remedy proceedings, including cost and price comparisons in antidumping duty proceedings.⁹⁰ In particular, Members of the Working Party noted that special difficulties could arise because

⁸⁵ Working Party Report, para 52.

⁸⁶ VIETNAM CONST., Chapt. II, Art. 15 (Exhibit US-81).

⁸⁷ Working Party Report, paras. 56, 60 (Exhibit US-23).

⁸⁸ *Ibid*, Annex 2, Table 4, para. 83 (Exhibit US-23).

⁸⁹ *Ibid*, Annex 2, Tables 1 and 2 (Exhibit US-23).

⁹⁰ *See, e.g., ibid*, para. 254 (Exhibit US-23). For example, at least one Member expressed concerns regarding independence of enterprises even in those instances where government had less than majority shareholding. *Id.*, para. 57.

Vietnam had not yet transitioned to a full market economy.⁹¹ Paragraphs 254 and 255 of the Working Party Report specifically reflect 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.⁹² 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 economy conditions exist in the industry producing the like product.⁹³

74. Underlying the Working Party Report then is the presumption that NME conditions prevail in Vietnam until otherwise demonstrated. Because the Working Party Report as incorporated into the Accession Protocol is an integral part of the WTO agreements, this presumption is an integral part of the WTO agreements. This “NME presumption” is not inconsistent with the concerns expressed in GATT Article XVII, which addresses state-trading enterprises. In addition, the Ad note to GATT Article VI recognizes special difficulties may exist for price comparability with respect to an economy undergoing a shift away from central planning.⁹⁴ In accordance with the spirit of Working Party Report and Vietnam’s acknowledgement that its economy continues to transition, Commerce’s presumption of government control is rebuttable. In each proceeding, Commerce gives parties the opportunity to demonstrate that assignment of a separate rate is appropriate. However, also in accordance with the Working Party Report and the concerns expressed therein, it is fully supportable to place the burden of proof on the Vietnamese respondent to demonstrate the appropriateness of a separate rate.⁹⁵

75. As noted above, the phrase “market economy conditions” is not explicitly defined in the Working Party Report. However, its plain meaning and relevant context serve to establish its meaning. The plain meaning of “market economy conditions” refers to the conditions that underlie, attend to, or define a market economy. The hallmark of all market economies is a price system that allocates resources on the basis of the individual and collective supply and demand decisions of independent economic actors, and as reflected in prices that reflect true resource

⁹¹ See Working Party Report, para. 254 (Exhibit US-23).

⁹² *Ibid*, para. 254 (“[I]n 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”) (Exhibit US-23).

⁹³ *Ibid*, paras. 254-255 (Exhibit US-23).

⁹⁴ See General Agreement on Tariffs and Trade (GATT) 1994, *Ad Article VI*: para. 1 (“It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate”).

⁹⁵ The Appellate Body in *EC – Fasteners* stated that paragraph 15(a) of China’s Accession Protocol, which is similar to paragraph 255(a) of Vietnam’s Working Party Report, “places the burden on Chinese exporters to ‘clearly show’ that market economy conditions prevail in order for the importing WTO Members to be obliged to use Chinese domestic prices and costs in determining price comparability.” *EC – Fasteners (AB)*, para. 366.

scarcities.⁹⁶ Thus market economy conditions give rise to market-based prices for inputs and outputs. It stands to reason then that in the non-market-based price system associated with non-market economies, these underlying supply and demand decisions, and the attendant resource allocations, are made or fundamentally distorted by the government rather than by independent economic actors. Under such a scenario, the government effectively controls resource allocations.

76. When the government controls resource allocations, it controls resource allocators, *i.e.*, firms.⁹⁷ The presumption reflected by the concerns expressed in the Working Party Report is equivalent to the non-market-based prices for inputs and outputs on a system-wide basis, and thereby indicates government control over all firms on a system-wide basis.⁹⁸ In the face of such a presumption, it would make no sense to automatically assign individual dumping margins to different sets of exports that are all associated with Vietnamese companies under the government's control. On the contrary, a single government-entity rate is warranted unless and until the presumption is overcome for margin calculation and antidumping duty rate assignment purposes.⁹⁹

77. Finally, Vietnam does not challenge Commerce's use of an NME methodology for purposes of calculating normal value.¹⁰⁰ By not challenging Commerce's use of an NME methodology to calculate normal value, Vietnam does not challenge the underlying presumption provided in paragraph 255(a)(ii) that market economy conditions do not clearly prevail. The logical implication that results is that Vietnam agrees that NME conditions do, in fact, exist.

78. In sum, the concerns expressed in the Working Party Report regarding the nature of Vietnam's economy and the provisions on antidumping clearly indicate that Members were not convinced that market economy conditions prevailed in Vietnam. Members thus insisted on, and received from Vietnam, discretion in determining under their own national laws when market economy conditions prevailed in Vietnam, with implications that necessarily extended beyond the calculation of normal value. The Working Party Report memorializes the concerns with the Vietnam government's influence and provides the basis for Commerce's presumption that the government may control companies in various industries until otherwise demonstrated.

⁹⁶ See N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 10-11, 84 (South-Western Centage Learning 2012) (“In a market economy, the decisions of a central planner are replaced by the decisions of millions of firms and households. Firms decide whom to hire and what to make. Households decide which firms to work for and what to buy with their incomes. These firms and households interact in the marketplace, where prices and self-interest guide their decisions”) (Exhibit US-84).

⁹⁷ See PAUL R. GREGORY & ROBERT C. STUART, COMPARING ECONOMIC SYSTEMS IN THE TWENTY-FIRST CENTURY 24-25 (Houghton Mifflin Company 2004) (describing planned economies versus market economies and explaining that in a planned economy “resources are allocated in accordance with the instructions of planners”) (Exhibit US-85).

⁹⁸ *Ibid.* See also *ibid.*, pp. 29-30.

⁹⁹ See, e.g., Working Party Report, paras. 254-255 (Exhibit US-23).

¹⁰⁰ U.S. First Written Submission, paras. 160-162.

b. Given the Working Party Report Provides a Basis for doing so, Commerce’s Presumption that Companies in Vietnam are Part of a Vietnam-Government Entity Pending Contrary Evidence was Not Inconsistent with the AD Agreement

79. Paragraph 255(a) of the Working Party Report states that “an importing WTO Member shall use Vietnamese prices or costs for the industry under investigation in determining price comparability” where the producers “can clearly show that market economy conditions prevail.”¹⁰¹ But where the producers do not make this showing, “[t]he importing WTO Member [in determining price comparability] 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 with regard to manufacture, production and sale of that product.”¹⁰²

80. “Price comparability” is a central tenet of every dumping analysis. For example, Article 2.1 of the AD Agreement ensures that a dumping analysis is based on a comparison of prices for sales in the export market to prices for sales in the home market (or, under certain conditions, sales to an appropriate third country or a “constructed” normal value). The comparison being undertaken has a particular purpose: to determine if a transaction involves dumping. Article 2.4 further ensures that, when export price is compared to normal value, any differences should be based on an apples-to-apples comparison. Thus “price comparability,” by definition, concerns and shapes both sides of the dumping analysis under the AD Agreement and Article VI of the GATT 1994, not just the methodology used to derive normal value.

81. The methodology that Commerce uses for determining price comparability with respect to “domestic prices or costs in Vietnam”¹⁰³ routinely determines normal value using “factors of production.”¹⁰⁴ These factors are based on actual inputs consumed by a foreign entity to manufacture the exact product or model types sold to the U.S. market.¹⁰⁵ If a foreign entity manufactures these product or model types at more than one facility, it must report the factor use and output for each product or model type at each facility.¹⁰⁶ Therefore, if Commerce cannot determine the actual inputs consumed by a foreign entity in the manufacture of relevant product or model types, it cannot calculate normal value for purposes of price comparability.

82. Vietnam does not challenge the NME methodology used by Commerce to calculate normal value. Based on the Working Party Report and Commerce’s 2002 determination that

¹⁰¹ Working Party Report, para. 255(a)(i) (Exhibit US-23).

¹⁰² *Ibid*, para. 255(a)(ii) (Exhibit US-23).

¹⁰³ Working Party Report, para. 255(a)(ii) (Exhibit US-23).

¹⁰⁴ Commerce NME Questionnaire (Administrative Reviews), p. D-1 (Exhibit US-76).

¹⁰⁵ *Ibid*, D-1-2 and D-7-9 (Exhibit US-76).

¹⁰⁶ *Ibid*, D-2 (Exhibit US-76).

NME conditions prevail in Vietnam¹⁰⁷ (as well as Vietnam’s failure to challenge the circumstances that underlie paragraph 255(a)(ii) that market economy conditions do not prevail), there exists a strong evidentiary basis for Commerce to presume that Vietnam is legally or operationally in a position to exercise restraint or direction over all companies located in Vietnam. Commerce thus reasonably presumed for purposes of the antidumping proceedings involving shrimp from Vietnam that companies within Vietnam should initially be considered part of a Vietnam-government entity. Commerce’s NME methodology further in this regard reasonably required the Vietnam-government entity to report all inputs consumed by those companies with respect to the manufacture of each product or model type sold to the U.S. market. Therefore, in order to ensure price comparability, Commerce’s NME methodology correctly presumed, pending contrary evidence, that the product or model type sold to the U.S. market likewise originated from the Vietnam-government entity.

83. Commerce’s presumption that all companies are part of the Vietnam-government entity until a company provides evidence that it is sufficiently free from government control or material influence with respect to its export activities is consistent then with the legal basis set forth in paragraph 255(a) of the Working Party Report. The presumption is not the same as, and is fundamentally different from, a determination. It is an approach that Commerce uses during an NME proceeding as it progresses to a determination. Commerce will consider any evidence timely submitted by an interested party, and the approach does not rule out the consideration of contrary evidence, nor does it dictate the outcome of a proceeding. However, the use of a presumption means that Commerce takes its previous determination that Vietnam is an NME as a given and does not approach this issue in each investigation or review as if no previous findings had been made and Vietnam’s economy would be evaluated *de novo*.

84. Therefore, contrary to Vietnam’s argument, the introductory phrase to paragraph 255(a) of the Working Party Report – “[i]n determining the price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement” – and the associated language that permits importing Members to use a methodology for price comparability “not based on a strict comparison with domestic prices or costs in Viet Nam” together provide a legal basis for Members to treat Vietnam differently in antidumping proceedings with respect to the determination of a NME-government entity margin. Commerce’s determination in the covered reviews that a Vietnam-government entity existed and that certain companies, while legally separate, were in fact part of this entity for purposes of ensuring appropriate price comparability between the normal value and the export price thus were not inconsistent with the AD Agreement and Article VI of the GATT 1994.

¹⁰⁷ Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002) (Exhibit US-25). Following this inquiry, Commerce determined that Vietnam had not successfully made the transition to a market economy and is an NME because, in part, “the level of government intervention in the economy is still such that prices and costs are not a meaningful measure of value.” *Ibid*, p. 2 (Exhibit US-25).

c. Commerce’s Determination to Treat Related Companies in the Covered Reviews as a Single Exporter or Producer for the Purpose of Determining a Dumping Margin is Not Inconsistent with Articles 6.10 and 9.2 of the AD Agreement

85. As demonstrated in Section II.C.2.a., Commerce’s presumption that all companies in the antidumping proceedings involving shrimp from Vietnam are part of the Vietnam-government entity until a company provides evidence to the contrary regarding its export activities is based on the Working Party Report (and Commerce’s 2002 determination) that NME conditions prevail in Vietnam. As further demonstrated in Section II.C.2.b., Commerce’s presumption and eventual determination in the covered reviews that a Vietnam-government entity existed because certain companies, while legally separate, were in fact part of the Vietnam-government entity, was not inconsistent with the AD Agreement and Article VI of the GATT 1994.

86. Paragraph 255 of the Working Party Report states that the Agreements, including the AD Agreement, “shall apply in proceedings involving exports from Vietnam into a WTO Member consistent with the following” subparagraphs (a) through (d).¹⁰⁸ As explained, these subparagraphs provide importing Members the discretion to use an NME methodology when it is not clearly shown that market economy conditions prevail in Vietnam. The introductory language of paragraph 255 demonstrates that the AD Agreement, and thus Articles 6.10 and 9.2, must be read in a manner “consistent with” paragraph 255 and the exceptions provided therein when NME conditions prevail. Therefore, to the extent paragraph 255 of the Working Party Report modifies the obligations contained in the AD Agreement, the AD Agreement must be read in a manner “consistent with” that paragraph.

87. In reading Articles 6.10 and 9.2 in a manner that is consistent with paragraph 255, it is fully consistent with the AD Agreement for Commerce to take the approach that the NME conditions in Vietnam result in government control of all firms until otherwise demonstrated given the factual and legal bases discussed above. In contrast, the Appellate Body’s finding in *EC – Fasteners* that Article 6.10 requires that an investigating authority first presume that all legal entities operate independently until evidence appears to the contrary¹⁰⁹ does not result in a reading of Article 6.10 that is “consistent with” paragraph 255, especially when it is undisputed that NME conditions prevail. Indeed, where NME conditions do prevail, it is far less reasonable to think of entities operating independently from government control as the starting point for an antidumping analysis than it is to think of them as operating subject to government control until otherwise demonstrated.

88. Finally, Vietnam indicated in a written response to a question from the Panel that it “does not contest here the general question of whether, under the covered agreements, the State and exporters can be considered a single entity.”¹¹⁰ Therefore, given Vietnam’s position plus the fact that Commerce’s approach results in a reading of the AD Agreement that is consistent with

¹⁰⁸ Working Party Report, para. 255 (Exhibit US-23) (emphasis added).

¹⁰⁹ See *EC – Fasteners (AB)*, para. 364.

¹¹⁰ Vietnam’s Answers to Panel Questions, para. 34.

paragraph 255, Commerce’s conclusion in the covered reviews that multiple companies in Vietnam were part of the Vietnam-government entity and subsequent decision to assign that entity an individual margin of dumping and an individual antidumping duty were not inconsistent with Articles 6.10 and 9.2 of the AD Agreement.

3. The Rate Applied to the Vietnam-Government Entity is Not Inconsistent with Articles 6.8 and 9.4 of the AD Agreement

89. Commerce’s treatment of the Vietnam-government entity was fully consistent with Articles 6.8 and 9.4 of the AD Agreement. No party that is part of the Vietnam-government entity requested that Commerce review the entries of that entity during the covered reviews. The companies subject to the Vietnam-government entity rate thus essentially expressed that the rate in effect that Commerce had calculated for this entity was preferable to the rate that might be calculated if Commerce were to conduct a review. Thus Commerce’s decision to assign this last rate to the Vietnam-government entity during the covered reviews was not inconsistent with Articles 6.8 and 9.4 because this last rate was neither a “new” rate based on facts available nor an “all others” rate, but the “rate in effect” at the time.

a. Vietnam’s Argument that the Investigating Authority May Not Apply Facts Available if the Government of Vietnam Refuses to Cooperate Is Unfounded

90. Although Commerce did not assign the Vietnam-government entity a rate based on facts available in the covered reviews, Vietnam nonetheless argues that facts available cannot be applied to this entity because the government of the exporting country plays a different role in antidumping cases than it does in countervailing duty cases.¹¹¹ According to Vietnam, in antidumping cases, it “cannot foresee a situation in which an authority could apply facts available in case of a failure to cooperate by a government.”¹¹²

91. Vietnam’s argument lacks any support in the text of the AD Agreement. The issue is not how AD proceedings compare to countervailing duty proceedings, or what Vietnam can or cannot “foresee.” Rather, the issue is what the AD Agreement provides. And in the circumstances of this case, Commerce’s application of facts available following the government of Vietnam’s failure to cooperate is supported by the plain text of the AD Agreement. According to Article 6.8, preliminary and final determinations may be made on the basis of the facts available whenever “any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation” (emphasis added). Article 6.11 explicitly defines “interested parties” as including, *inter alia*, “the government of the exporting Member.” Articles 6.8 and 6.11 thus expressly contemplate that an antidumping determination may be based on facts available whenever the government of an exporting Member does not cooperate during an investigation.

¹¹¹ Vietnam’s Answers to Panel Questions, para. 57.

¹¹² *Ibid*, para. 58.

92. Vietnam’s response to this plain textual explanation is to present the supposition that the term “interested parties” under Article 6.8¹¹³ is limited to “a subset of all parties.” Vietnam, however, presents no basis for reading “interested party” as meaning a subset of interested parties. Vietnam also argues that the term “necessary information” must, *a priori*, exclude government information.¹¹⁴ Again, Vietnam has no support for its position. What information may or may not be “necessary” must be evaluated based on the facts of each particular situation. Here, as will be explained further below, information held by the Government of Vietnam was indeed necessary for the antidumping proceedings at issue. Accordingly, there is no basis in the text of the AD Agreement to exclude such information from the scope of “necessary information” under Article 6.8.

93. Further, the AD Agreement does not prohibit Members from sending questionnaires to the government of an exporting Member to seek “necessary information”¹¹⁵ or “relevant information.”¹¹⁶ In antidumping proceedings, such information may include, without limitation, pricing and cost data as well as data pertaining to other considerations, such as information regarding affiliations and control. Thus where the government of an exporting Member is considered by the investigating authority to be an interested party in an investigation, either separately or in conjunction with a group of companies in the industry, an investigating authority clearly may base its preliminary or final determinations on facts available whenever the government refuses access to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the investigation.

94. Finally, Vietnam’s statement that it “cannot envision a situation in which such information would be requested from the government” in antidumping cases (and thus the application of facts available)¹¹⁷ ignores the reality of the particular proceedings at issue. In particular, in these proceedings, the record established that the government plays an important role through its control of companies involved in production and exportation of the subject merchandise in NME countries (a reality that Vietnam has acknowledged exists with respect to the matter before the Panel). Therefore, because NME governments control information necessary to determine whether dumping exists, it is fully consistent with the AD Agreement for an administering authority to use facts available if an NME government does not cooperate by providing relevant information.¹¹⁸

¹¹³ Article 6.8 of the AD Agreement states “any interested party,” not “interested parties” as indicated by Vietnam.

¹¹⁴ Vietnam’s Answers to Panel Questions, paras. 60-61.

¹¹⁵ Art. 6.8 of the AD Agreement.

¹¹⁶ Annex II of the AD Agreement.

¹¹⁷ Vietnam’s Answers to Panel Questions, para. 62.

¹¹⁸ We note that another WTO member, Argentina, has a decree that expressly requires the application of facts available if the foreign government refuses to cooperate with an investigation. Specifically, Article 43 of Argentina’s Decree No. 2121/95, which is a general provision applicable to various proceedings (including antidumping investigations), mandates application of facts available if a foreign government fails to cooperate: “If a firm or government does not authorize verification or investigation or does not cooperate with the investigation, the competent implementing authority must use the best information available in order to complete investigation and

b. Commerce’s Application of the Rate in Effect during the Covered Reviews is Not Inconsistent with the AD Agreement

95. Although prior panel reports are not binding on panels considering other disputes,¹¹⁹ Vietnam further argues that the Panel should look to the *US – Shrimp (Viet Nam)* (DS404) panel report for guidance as it considers whether the rate that Commerce’s assigned to the Vietnam-government entity during the covered reviews was not inconsistent with the AD Agreement. This panel report treated the rate applied to the Vietnam-government entity in the third administrative review as a “facts available” rate.¹²⁰ As explained in the U.S. First Written Submission, however, it would be incorrect to apply the DS404 panel finding to the covered reviews because Commerce did not apply facts available (substantively or otherwise) to the Vietnam-government entity in those reviews.¹²¹ Again, the rate applied to the Vietnam-government entity in the covered reviews is not, and cannot be, a facts available rate because it is not based on the interested party’s refusal to give access to, or otherwise provide, necessary information during the covered reviews.¹²² Instead, it was based on the fact that the Vietnam-government entity, and those Vietnamese parties who would be subject to the Vietnam-government entity’s rate, did not seek a different rate but accepted the existing rate of the Vietnam-government entity. Accordingly, Commerce applied the existing rate of the Vietnam-government entity during the covered reviews and was under no obligation to change the existing rate for final assessment purposes.

96. Thus, contrary to the finding in DS404, Commerce has not elevated form over substance when it states that the rate it applied to the Vietnam-government entity in the covered reviews is the rate in effect, not a facts available rate. The rate as determined for the Vietnam-government entity in the original investigation was based on facts available with adverse inference because of the Vietnam-government entity’s failure to cooperate during the investigation. In contrast, the rate as applied in the covered reviews was not based on facts available but on the application of the existing rate to the entity. The AD Agreement does not require Members to change the existing rate of an exporter and assess a duty at a different rate absent a request by the exporter to

produce recommendations to the Minister for Economy and Public Works and Services.” Argentina, Notification of Laws and Regulations Under Articles 18.5 and 32 of the Agreements, G/ADP/N/1/ARG/1, G/SCM/N/1/ARG/1, p. 37 (June 12, 1995) (Exhibit US-82) (emphasis added).

¹¹⁹ See U.S. Second Written Submission, Annex, para. 1.

¹²⁰ *US – Shrimp (Viet Nam) (Panel)*, paras. 7.278-7.279.

¹²¹ U.S. First Written Submission, paras. 186-187.

¹²² *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 75 Fed. Reg. 47,771 (August 9, 2010) (Exhibit VN-13), as amended, 75 Fed. Reg. 61,122 (October 4, 2010) (Exhibit US-08); *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 76 Fed. Reg. 56,158 (September 12, 2011) (Exhibit VN-18), as amended, 76 Fed. Reg. 64,307 (October 18, 2011) (Exhibit US-09); *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 77 Fed. Reg. 55,800 (September 22, 2012) (Exhibit VN-20), as amended, 77 Fed. Reg. 64,102 (October 18, 2012) (Exhibit VN-22).

review or change its rate. Because neither the Vietnam-government entity nor any constituent parts of the entity requested a change of the existing rate of the Vietnam-government entity, Commerce applied that rate in the fourth, fifth, and sixth administrative reviews as the rate in effect for the Vietnam-government entity.

97. Nor is the rate in effect governed by the terms of Article 9.4 because it is not an “all others rate.” Article 9.4 does not obligate Members to replace an existing WTO-consistent rate that was individually determined for the entity, which had failed to cooperate in the proceeding, with a different rate that is based on an average rate of independent exporters or producers that fully cooperated.¹²³

98. Finally, as explained in our response to the Panel Question 16, the AD Agreement does not require that a particular label be assigned to the rate in effect for the Vietnam-government entity.¹²⁴ The United States has demonstrated that the rate applied to the Vietnam-government entity is not inconsistent with the obligations in the AD Agreement because it was the rate in effect, and neither the Vietnam-government entity nor any Vietnamese companies that were part of the entity requested that the rate be changed.

D. Vietnam’s Claim That the United States Maintains a Zeroing Measure That May Be Challenged “As Such” Under the AD Agreement is Without Merit

99. Commerce’s so-called “zeroing” methodology does not exist today as a measure of general and prospective application. Commerce changed its approach for calculating dumping margins for investigations (effective early 2007)¹²⁵ and for administrative reviews (effective early 2012)¹²⁶ in response to the DSB’s recommendations and rulings on this matter. The measure subject to the recommendations and rulings in prior disputes thus no longer exists.

100. Vietnam does not dispute that the United States has modified its calculation methodology and grants offsets for non-dumped comparisons (*i.e.*, does calculations without the ‘zeroing’ methodology) in various types of proceedings.¹²⁷ Nor has Vietnam refuted the evidence regarding U.S. current practice that was provided in the U.S. First Written Submission. Further, Vietnam has not identified any provision of U.S. law or regulation that requires Commerce to

¹²³ U.S. Responses to Panel Questions, para. 50; U.S. First Written Submission, para. 193.

¹²⁴ U.S. Responses to Panel Questions, paras. 49-55.

¹²⁵ *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dec. 27, 2006) (Exhibit US-38).

¹²⁶ *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8,101 (Feb. 14, 2012) (Exhibit US-39).

¹²⁷ See, e.g., *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty Administrative Review*, 78 Fed. Reg. 15,699 (March 12, 2013) (stating that “the Department applied the assessment rate calculation method adopted in Final Modification for Reviews . . . with offsets being provided for non-dumped comparisons.”) (emphasis added) (Exhibit US-29), unchanged in the final results by *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 78 Fed. Reg. 56,211 (Sept. 13, 2013) (final results of administrative review) (Exhibit US-30).

use a so-called “zeroing” methodology. The Appellate Body has explained that “[p]articuliar 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,”¹²⁸ yet Vietnam failed to provide any evidence that zeroing exists today as the rule or norm that has general and prospective application.

101. Rather, instead of satisfying its evidentiary burden, Vietnam argues that the Panel should still find that the so-called “zeroing” methodology exists as an “as such” measure because the United States does not concede that this methodology is WTO-inconsistent and because it “can be easily re-imposed.”¹²⁹ Vietnam’s argument that the alleged zeroing measure “can be easily re-imposed” constitutes a concession that the alleged measure is not being imposed today. This concession alone (that the alleged measure is not being currently imposed and requires re-imposition) is fatal to Vietnam’s argument.

102. In addition, it is wrong to conclude that Commerce can simply re-impose the so-called “zeroing” methodology that it changed in response to the DSB’s recommendations and rulings just because it “is not explicitly required or prohibited by [U.S.] law.”¹³⁰ Commerce changed its approach for calculating dumping margins in both investigations and administrative reviews in accordance with U.S. law and, in particular, under the procedures outlined in section 123(g) of the URAA.¹³¹ Commerce’s changes in methodology were made after extensive consultations with appropriate congressional committees, relevant private sector advisory committees, and public comment regarding its modifications. Vietnam has not provided a single example of the agency practice, which was found to be WTO inconsistent and changed pursuant to section 123(g), being subsequently “easily re-imposed.”

103. The situation before this Panel thus differs significantly from the situation in *US – Poultry (China)*, which Vietnam references.¹³² There the panel described the expired measure at issue – Section 727 – as a “moving target” because it “reiterated the language of a previous annual appropriations provision with identical wording.” The panel found the language of the replacement provision, while not the same, if not addressed “might be depriving China of any meaningful review of the consistency of the United States’ actions with its WTO obligations, while allowing the repetition of the potentially WTO-inconsistent conduct.”¹³³

104. In contrast to the annual appropriations provisions at issue in *US – Poultry (China)*, here there is no possibility of an annual repetition of potentially WTO-inconsistent conduct. Indeed, as pointed out in paragraph 208 of the U.S. First Written Submission, Commerce has issued

¹²⁸ *US – Zeroing (EC) (AB)*, para. 198 (emphasis in original).

¹²⁹ Vietnam’s Answers to Panel Questions, paras. 13-14.

¹³⁰ *Ibid*, para. 14.

¹³¹ Section 123 of the URAA, 19 U.S.C. § 3533 (Exhibit US-10).

¹³² *Ibid*, para. 11.

¹³³ *US – Poultry (China)*, para. 7.55.

numerous determinations in which it has offset dumping margins on dumped sales by the amount equal to the amount by which normal value is less than export price on non-dumped sales. Commerce even granted offsets for non-dumped transactions in the most recent administrative review of the antidumping duty order on shrimp from Vietnam. Finally, Vietnam has failed to provide a single example of Commerce re-imposing an alleged U.S. measure that was repealed via the section 123(g) process.

105. Therefore, Vietnam’s assertion that Commerce can easily re-impose an alleged U.S. zeroing measure is without merit and its claim that this alleged measure is “as such” inconsistent with the AD Agreement remains without any factual basis.

E. Commerce’s Sunset Review Determination is Not Inconsistent with Articles 11.3 of the AD Agreement

106. The AD Agreement does not prescribe specific methodologies that authorities must follow in determining whether to terminate definitive antidumping duties under Article 11.3. No other provisions of the AD Agreement set forth rules regarding the methodologies or analysis to be employed in making the determination of whether dumping and injury is likely to continue or recur.¹³⁴ Accordingly, attempts to read into Article 11.3 substantive obligations allegedly contained in other provisions of the AD Agreement have been soundly rejected.¹³⁵ Aside from the obligations contained in Article 11.3, the AD Agreement leaves the conduct of sunset reviews to the discretion of the Member concerned.

1. Notwithstanding its Statements to the Contrary, Vietnam Continues to Acknowledge that Commerce Relied on WTO-Consistent Margins of Dumping in the Sunset Review

107. In its Sunset Determination, Commerce conducted a thorough review of the history of the antidumping duty proceeding from the original investigation through the fourth review. In its likelihood determination, Commerce relied on positive antidumping duty margins applied to numerous companies during the four completed reviews.¹³⁶ Nonetheless, Vietnam in its arguments elects to mischaracterize the margins relied on by Commerce in making its likelihood determination. The Panel should reject Vietnam’s arguments for the reasons set forth below.

¹³⁴ *US – Corrosion Resistant Steel Sunset Review (AB)*, para. 158. For example, Article 11.4 explains that any review under Article 11 “shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review” and that the provisions of Article 6 regarding “evidence and procedure shall apply to any review carried out under this Article.” Article 12.3 states that the transparency and notice provisions of Article 12 apply “*mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11.”

¹³⁵ In *US – Carbon Steel*, at paragraph 112, the Appellate Body found that Article 22.1 of the SCM Agreement – the counterpart to Article 12.1 of the AD Agreement – did not create an evidentiary standard applicable to the initiation of sunset reviews.

¹³⁶ See *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of the First Five-year “Sunset” Review of the Antidumping Duty Order*, 75 Fed. Reg. 47,546 (Aug. 6, 2010) (Preliminary Sunset Determination) (Exhibit VN-12).

108. First, Vietnam contradicts itself by claiming that Commerce relied “exclusively” on WTO-inconsistent margins,¹³⁷ but claims elsewhere that “almost all” of the margins were WTO-inconsistent.¹³⁸ Vietnam’s statements highlight its continued acknowledgement that the margin applied to two of the companies considered in the sunset review was calculated in a WTO-consistent manner.

109. Second, Vietnam continues to minimize the indisputable existence of dumping by claiming that the two companies that failed to cooperate in the first administrative review were “small.”¹³⁹ To the contrary, Commerce’s initial respondent selection memorandum in the first administrative review¹⁴⁰ shows these companies listed as among the largest exporters of subject merchandise under review.¹⁴¹ The memorandum thus confirms that, because the United States selected the companies accounting for the largest volume of exports for individual examination, the three companies that were ultimately selected for individual examination (two of which are the companies that failed to cooperate) constituted the exporters with the highest volume of shipments to the United States under review at the time.¹⁴² Thus there is no basis for Vietnam’s assertion that these companies were “small,” and Vietnam has not provided any evidence in support of its claim.¹⁴³

110. Further, Vietnam erroneously argues that Commerce ignored the results of “every single individually investigated respondent during the course of the four reviews,” despite the fact that the two companies that failed to cooperate were individually investigated as they were selected for individual examination and chose not to cooperate.¹⁴⁴ Their rate, as part of the Vietnam-government entity, is properly determined to be 25.76 percent, the lowest calculated rate from

¹³⁷ Vietnam’s Answers to Panel Questions, para. 101.

¹³⁸ *Ibid*, para. 98. Vietnam further acknowledges these WTO-consistent margins at paragraph 114 of its answers. *Ibid* (“Assuming this Panel agrees with the Panel in DS404 that all margins of dumping other than those of the two non-cooperating respondents were WTO inconsistent,” “the Panel would have to conclude that USDOC’s finding of margins of two small non-cooperating respondents in the first review indicate continuation of dumping.”).

¹³⁹ Vietnam’s Answers to Panel Questions, para. 114.

¹⁴⁰ *Ibid*, para. 6.

¹⁴¹ See *ibid*, para. 114; see also *Memorandum from James C. Doyle to Stephen J. Claeys, Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Selection of Respondents* (June 16, 2006) (Exhibit VN-73).

¹⁴² See *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of the First Administrative Review and New Shipper Review*, 72 Fed. Reg. 10,689, pp. 10,691-92 (March 9, 2007) (discussing selection of Fish One, Seaprodex Hanoi and Kisimex, and the failure of Seaprodex Hanoi and Kisimex to respond to Commerce’s questionnaire) (Exhibit US-83).

¹⁴³ U.S. First Written Submission, para. 249. Vietnam provided only the public version of Exhibit 73, which does not show the amount of shrimp shipped by these companies during the period of review, and has not provided any other information to support its assertion that the two exporters in question are “small.”

¹⁴⁴ Vietnam’s Answers to Panel Questions, para. 114; see also *Sunset Determination*, 75 Fed. Reg. p. 75,966 and accompanying Issues and Decision Memorandum, Issue 1 (footnotes omitted) (Exhibit VN-14).

the petition,¹⁴⁵ and a rate that did not involve the so-called “zeroing” methodology.¹⁴⁶ As the United States explained in its first written submission, Commerce selected these two companies for individual examination during the first administrative review “as mandatory respondents but these companies chose not to participate in the administrative review and, as part of the Vietnam-wide entity, received the AFA margin of 25.76% as a result.”¹⁴⁷ This above *de minimis* margin for these two individually investigated respondents is not based on the use of the zeroing methodology and provides uncontroverted evidence of dumping.

111. Similarly, as the United States noted in its first written submission, Commerce began individually reviewing one of the respondents in the fourth review as the result of domestic litigation, but that respondent subsequently declined to provide its own data, explaining that it preferred to maintain the dumping rate of 3.92 percent applied by Commerce in the fourth review.¹⁴⁸

112. The repeated instances of individually investigated respondents refusing to cooperate thus thoroughly undermine Vietnam’s assertion that Commerce ignored the results of “every single individually investigated respondent.”

2. Vietnam Misunderstands the Relevance of Declining Volumes as Part of Commerce’s Analysis

113. Vietnam in its arguments also elects to misread the U.S. position as arguing that Commerce either relied exclusively on WTO-inconsistent margins or exclusively on declining import volumes.¹⁴⁹ Our first written submission and responses to Panel questions demonstrate that declining volumes were a part of the evidence relied on by Commerce and not the exclusive basis for finding likelihood.¹⁵⁰ Specifically, in addition to evidence of continued dumping, Commerce also reviewed public U.S. import data as reported by the ITC Trade Database for 2003-2009 and found that import volumes fell from 56.3 million kilograms in the year preceding the investigation (2003) to 42.1, 35.9, 37.9, 46.7, 40.1 million kilograms in 2005-2009, respectively.¹⁵¹ As explained, this decline in import volumes suggests that the exporters were unable to sustain pre-investigation import levels without dumping.¹⁵² The Appellate Body has

¹⁴⁵ *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, Issues and Decision Memo, p. 37 (Exhibit VN-04).

¹⁴⁶ *See Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People’s Republic of China and the Socialist Republic of Vietnam*, 69 Fed. Reg. 3,876, p. 3881 (Jan. 27, 2004) (Exhibit VN-03).

¹⁴⁷ U.S. First Written Submission, para. 248.

¹⁴⁸ *Ibid.*, para. 271, n. 358.

¹⁴⁹ Vietnam’s Answers to Panel Questions at para. 109.

¹⁵⁰ U.S. First Written Submission, paras. 262-65; U.S. Responses to Panel Questions, paras. 119, 121-22.

¹⁵¹ Preliminary Sunset Determination, Issues and Decision Memo, p. 6 (footnotes omitted) (Exhibit VN-12).

¹⁵² U.S. First Written Submission, paras. 262-65.

confirmed that the “‘volume of dumped imports’ and ‘dumping margins’, before and after the issuance of anti-dumping duty orders, are highly important factors for any determination of likelihood” and that they have “certain probative value.”¹⁵³ Thus “[t]he importance of the two underlying factors (import volumes and dumping margins) for a likelihood-of-dumping determination cannot be questioned.”¹⁵⁴

114. Finally, Vietnam is incorrect in describing the change in import volumes as a “moderate” reduction.¹⁵⁵ In fact, the average volume for years following the review was approximately 40.54 million kilograms – a decline of about 28 percent compared to the 56.3 million kilograms imported in the year preceding the investigation.

3. Vietnam’s Remaining Arguments are Immaterial Because they Do Not Address the Facts at Issue in this Case

115. Vietnam’s answers to the Panel’s questions further highlight that Vietnam has no legitimate basis for questioning the outcome of the sunset review. Rather than responding to the Panel’s questions regarding what evidence was submitted to Commerce, Vietnam asserts that further argument regarding dumping margins and import volume would have been futile, and that arguments to Commerce during the sunset review regarding WTO-consistency is not required in order for Vietnam to challenge the sunset determination.¹⁵⁶ As shown below, Vietnam’s arguments should not be considered as material by the Panel because they ignore undisputed evidence supporting Commerce’s determination. .

116. The Panel asked for the facts that Vietnamese respondents presented to Commerce to explain the relevance of other factors.¹⁵⁷ In response, Vietnam asserts that it was a “useless use of respondents’ resources to argue about the implications of the dumping margins, or in fact, that the margins relied upon were WTO-inconsistent.”¹⁵⁸ Similarly, Vietnam justified the lack of argument from Vietnamese respondents regarding declining volume as “futile” because of the United States’ retrospective system.¹⁵⁹ Vietnam further argues that whether or not it made arguments about the WTO consistency of Commerce’s determination to Commerce is not a relevant inquiry.¹⁶⁰

¹⁵³ *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 208.

¹⁵⁴ *Ibid.*

¹⁵⁵ Vietnam’s Answers to Panel Questions, para. 115.

¹⁵⁶ *Ibid.*, paras. 97-108.

¹⁵⁷ Questions from the Panel to the Parties Following the First Substantive Meeting, 32 and 33.b (Dec. 16, 2013).

¹⁵⁸ Vietnam Answers to Panel Questions, para. 98.

¹⁵⁹ *Ibid.*, para. 99.

¹⁶⁰ *Ibid.*, paras. 102-107.

117. Vietnam’s arguments do not respond to the Panel’s questions, and do not address the evidence Commerce examined. As explained above, the Appellate Body has confirmed the significance of dumping margins and import volumes to an analysis of the likelihood of continuation or recurrence of dumping. Vietnamese respondents had an opportunity to address the facts Commerce relied on as related to these factors, namely, margins of dumping as well as declining import volumes. These respondents participated in the proceeding – which they did not have to do at all – and indeed presented facts and argument to Commerce during the review.¹⁶¹

118. Therefore, to the extent Vietnam’s arguments are to be considered, they fail to rebut Commerce’s likelihood determination. Vietnam’s arguments ignore indisputable evidence of dumping and fail to provide any viable reason why Commerce should not have taken into account declining import volumes. In fact, a reduction in volume caused by application of an antidumping duty (pursuant to a permissible retrospective system) supports a conclusion that exporters were unable to maintain pre-order volumes without dumping.¹⁶² Vietnam’s arguments about the uncertainty resulting from the imposition of trade remedy measures do not explain the relevance of the observed decline in import volumes as part of Commerce’s reasonable conclusion that dumping was likely to continue absent the discipline of the order. For these reasons, Vietnam’s remaining arguments are immaterial to the matter in dispute because they do not address the facts at issue before the Panel.

III. CONCLUSION

119. The United States respectfully requests that the Panel reject Vietnam’s claims that the United States has acted inconsistently with the covered agreements.

¹⁶¹ U.S. Responses to Panel Questions, para. 115.

¹⁶² U.S. First Written Submission, paras. 262-65 (“Commerce thus concluded that ‘with the discipline of the order, imports fell after the initiation of the original investigation, and did not return to pre-initiation levels in any of the individual years or as a whole’”) (quoting Preliminary Sunset Determination, Issues and Decision Memo, p. 6 (footnotes omitted) (Exhibit VN-12)). Vietnam also claims that the use of a non-market economy methodology to determine normal value similarly creates risks that Commerce must address relative to the volume decline. Vietnam’s Answers to Panel Questions, para. 117. Yet Vietnam does not dispute any calculation of normal value. As with the administration of a retrospective system, the undisputed permissible use of a non-market economy normal value calculation does not provide a basis to undermine Commerce’s findings with respect to declining import volumes

ANNEX I:

Additional U.S. Comments on Vietnam’s Answers to the Panel’s Questions Following the First Substantive Meeting

The U.S. Second Written Submission comments on many of the arguments contained in Vietnam’s answers to the Panel’s questions following the first substantive meeting. In this Annex, the United States provides additional comments on Vietnam’s answers. In particular, the United States addresses Vietnam’s answers to Questions 2 and 3 regarding “General Considerations”; Questions 10 and 13 regarding Commerce’s approach to the existence of NME conditions in Vietnam; and Question 20 regarding the Panel’s request for an exhibit. The United States notes that the absence of a comment on any particular answer by Vietnam should not be construed as agreement with Vietnam’s arguments.

I. GENERAL CONSIDERATIONS

Questions 2 (to Viet Nam): In paragraphs 3 and 48-49 of its opening oral statement at the first substantive meeting, Viet Nam indicates that it is relying, in part, on the legal and factual findings of the Panel in DS404, *US – Shrimp (Viet Nam)*. Taking into account that Viet Nam elected to initiate a new dispute, and not compliance proceedings under Article 21.5 of the DSU, and in light of the requirements in Article 11 of the DSU regarding the Panel's duty to make an objective assessment of the matter before it, please explain on what basis the factual findings and conclusions of the *US – Shrimp (Viet Nam)* panel should relieve Viet Nam of its burden of establishing the relevant facts and legal claims in this dispute.

1. We disagree strongly with Vietnam regarding the status of adopted panel reports under the DSU and their relation to the role of this Panel. In WTO dispute settlement proceedings, the burden of proving that a measure is inconsistent with a covered agreement is on the complaining party. Prior adopted panel and Appellate Body reports are not binding on panels considering other disputes.¹⁶³ Rather, the rights and obligations of Members flow from the text of the covered agreements. Contrary then to Vietnam’s response to this question, the Panel, to fulfill its function under Article 11 of the DSU, must make an objective assessment of the matter before it, including an objective assessment of the facts and the conformity of the challenged measures with the relevant covered agreements.

2. In addition, Vietnam’s response to this question misstates the findings of the panel in *US-Shrimp (Viet Nam)*.¹⁶⁴ Vietnam claims that the panel “found” margins in certain proceedings to be WTO-inconsistent and that those margins were relied on in the sunset review, namely all the margins determined in the original investigation and first through fourth administrative

¹⁶³ See *US – Softwood Lumber Dumping (AB)*, para. 111 (citing *Japan – Alcoholic Beverages II (AB)* and *US – Shrimp (Malaysia) (21.5) (AB)*). As the Appellate Body noted in its *US – Softwood Lumber Dumping* report, adopted reports “are not binding, except with respect to resolving the particular dispute between the parties to that dispute.” *US – Softwood Lumber Dumping (AB)*, para. 111 (quoting *Japan – Alcoholic Beverages II (AB)*).

¹⁶⁴ *US – Shrimp (Viet Nam) (Panel)*, para. 8.1.

reviews.¹⁶⁵ This is incorrect. The results of the original investigation, first review and fourth review were not determinations within the panel’s terms of reference, and the investigation and first review were conducted prior to Vietnam’s accession to the WTO. The panel’s “as applied” findings with respect to the Vietnam-government entity rate and use of the so-called “zeroing” methodology pertained only to the results of the second and third administrative reviews.¹⁶⁶ Finally, the determinations to apply adverse facts available to the Vietnam-government entity in the investigation and first review were not before that panel and those determinations rested on different factual circumstances than those in the second review.

3. Vietnam also incorrectly presents the significance of the panel’s findings regarding the second and third reviews. The panel found Commerce’s use of the so-called “zeroing” methodology in the second and third reviews “as such” inconsistent with obligations in the AD Agreement, and Commerce’s application of the “all others” rate (that applied margins from the investigation) in those reviews to be inconsistent with Article 9.4 of the AD Agreement.¹⁶⁷ Vietnam is incorrect to suggest that the panel’s specific findings pertain to alleged measures beyond Commerce’s determinations during the second and third reviews.

4. Finally, as to certain findings made by the panel with respect to the Vietnam-government entity rate in the second and third reviews, the United States indicated in its first written submission that it did not agree with the panel’s conclusions.¹⁶⁸ The United States further pointed out that the panel did not find that positive margins of dumping applied to the separate rate companies would be impermissible, but only found that the rates that Commerce had applied were inconsistent with U.S. obligations under Article 9.4.¹⁶⁹ That the United States did not appeal the panel report does not indicate that the United States agrees with the panel’s reasoning concerning the obligations in the AD Agreement with respect to which the panel found the United States to have acted inconsistently, nor does the decision of the United States not to appeal this decision shift the burden of proving that an alleged measure is inconsistent with a covered agreement from the complaining party.

Question 3 (to both parties): Can you please elaborate on the concept of “practice” (as opposed to other concepts such as “method”, “methodology”, “procedure” or “policy”) as a measure which can be challenged in WTO dispute settlement?

5. Contrary to Vietnam’s response to this question, to conclude that a practice constitutes a measure that can be challenged in WTO dispute settlement because the Merriam-Webster online dictionary implies that the word “practice” “involves consistent and repeated actions taken over a period of time”¹⁷⁰ would incorrectly presuppose the existence of an underlying “measure.” As

¹⁶⁵ Vietnam’s Answers to Panel Questions, para. 4.

¹⁶⁶ *US – Shrimp (Viet Nam) (Panel)*, para. 8.1(b), (i), (j).

¹⁶⁷ *Ibid.*, para. 8.1(c), (g).

¹⁶⁸ U.S. First Written Submission, para. 273, n.363.

¹⁶⁹ *Ibid.*, para. 271. *See also US – Shrimp (Viet Nam) (Panel)*, para. 8.1 (summarizing its conclusions).

¹⁷⁰ Vietnam’s Answers to Panel Questions, para. 7.

the United States indicated in its response to this question, consistent application cannot, as a matter of logic, be the basis on which a “measure” is found to exist. There may be very good policy reasons why an authority, when confronted by a particular factual pattern, might want to respond to a pattern in the same manner when administering its laws and regulations – even without a separate measure requiring them to do so. Therefore, mere application of an individual act in repeated situations does not result in the creation of a measure susceptible of challenge “as such” because repetition of an individual act does not mean that there is some additional measure generating the individual act.

6. The existence then of “consistent results” is not sufficient to demonstrate that there exists a corresponding measure that is causing those results. Similarly, “that expectations are created on the part of foreign governments, exporters, consumers, and petitioners as a result of any particular practice that the [administering authority] ‘normally’ follows would not be sufficient to accord such a practice an independent operational existence.”¹⁷¹ Instead, there must be evidence establishing the existence of an unwritten measure that is independent of consistent application of a “practice.”

7. Finally, even in those instances in which the repetition is sufficient that it might be called a “practice,” this would not answer the question as to whether that practice requires that the Member act in a particular way. To the extent that a “practice” does not actually require a government entity to act in a way that is WTO-inconsistent, there is no basis for concluding that the practice requires WTO-inconsistent action and thus could not be considered inconsistent “as such.”

III. CLAIMS WITH RESPECT TO THE “NON-MARKET ECONOMY-WIDE ENTITY” RATE

Question 10 (to the United States): In paragraph 182 of its first written submission, the United States submits that “Commerce may decide to treat the companies as a single entity for the purpose of setting export prices” (the footnote refers to 19 C.F.R 351.401(f) (Exhibit US-26)). In addition, Section V of Chapter 10 of the Anti-Dumping Manual deals with the USDOC’s “practice with respect to affiliation and the treatment of companies as a single entity in NME cases” (Exhibit VN-24, p. 8) and notes, inter alia, that “[t]he question of whether affiliated parties constitute a single entity can arise among various combinations of producers, exporters, and suppliers of inputs ...” (p. 9).

b. Has the United States made “single entity determinations” pursuant to 19 C.F.R 351.401 (f) and/or Section V of Chapter 10 of the Anti-Dumping Manual under the Shrimp order? If so, please give details.

8. Vietnam states that if Commerce had “made a single entity determination pursuant to 19 C.F.R 351.401 (f) and/or Section V of Chapter 10 of the Anti-Dumping Manual under the *Shrimp* order[,] . . . it is possible that the existence of such a determination would have precluded

¹⁷¹ US – Export Restraints, para. 8.126.

Viet Nam from raising any claims with respect to the Vietnam-wide entity under Articles 6.10 and 9.2 of the Anti-Dumping Agreement.”¹⁷²

9. As explained in the U.S. first and second written submissions, as well as in the U.S. responses to the Panel’s questions, Commerce did determine that a Vietnam-government entity existed and that certain companies, while legally separate, were in fact part of this entity¹⁷³ (albeit not under 19 C.F.R 351.401(f)). Therefore, as Vietnam acknowledges, the existence of this determination should lead this Panel to conclude that Commerce’s determination in the covered reviews that multiple companies in Vietnam were part of the Vietnam-government entity was not inconsistent with Articles 6.10 and 9.2 of the AD Agreement.

Question 13 (to Viet Nam): The United States submits that “[a]t no time during the challenged proceedings did Vietnam, or any Vietnamese exporter, request Commerce to reconsider Vietnam’s nonmarket economy status. [footnote omitted] This is an important distinction between this dispute and *EC – Fasteners*” (United States’ first written submission, para. 176). Can Viet Nam comment on this statement?

10. Contrary to Vietnam’s response to this question, there are several important distinctions between this dispute and *EC – Fasteners*.

11. First, as demonstrated in the response of the United States to Question 11, Commerce’s “separate rate test” differs significantly from Article 9(5) of the EU’s Basic AD Regulation as examined in *EC – Fasteners*.¹⁷⁴

12. Second, China’s challenge in *EC – Fasteners* to the EU’s NME finding resulted in a finding that China’s accession protocol did not necessarily provide a basis for the presumption that China is an NME.¹⁷⁵ Vietnam has not similarly challenged Commerce’s finding that Vietnam is an NME. As explained then in Section II.C.2 of the U.S. Second Written Submission and in our response to Question 14.a, that Commerce’s NME-determination is undisputed means that it was logical and consistent for Commerce to have considered that Vietnam is in a position to exercise restraint or direction over entities located in Vietnam and can materially influence those entities decisions about the price or costs of products (whether destined for consumption in Vietnam or destined for export to the United States). Accordingly, Commerce had a sufficient basis to conclude, absent evidence to the contrary, that a company that had not claimed or established that it was free from governmental control with respect to its export activities is part of a single government entity.

¹⁷² Vietnam’s Answers to Panel Questions, para. 33.

¹⁷³ See U.S. First Written Submission, paras. 30, 35, 39, 179-183; U.S. Responses to Panel Questions, paras. 56-66, 68-82.

¹⁷⁴ U.S. Responses to Panel Questions, paras. 23-38.

¹⁷⁵ *EC – Fasteners (AB)*, para 366 (“Neither can paragraph 15(d) {of China’s Accession Protocol} be interpreted as authorizing WTO Members to treat China as an NME for matters other than the determination of normal value. As explained above, paragraph 15(d) does not pronounce generally on China’s status as a market economy or NME.”).

Question 20 (to Viet Nam) Please provide (as an exhibit) the Panel with the letter sent by the USDOC to the Government of Viet Nam at the beginning of the original investigation.

13. The letter in which the United States asked the Government of Vietnam to respond to the standard antidumping duty questionnaire (which the United States referenced in paragraph 193 of its first written submission) was dated March 11, 2004, not January 29, 2004, as Vietnam suggests in its response to Question 20. The United States provided the March 2004 letter to the Panel as Exhibit US-71 concurrently with the U.S. responses to the Panel's questions. Although it is unclear why Vietnam referenced the January 2004 letter in its response to Question 20, Vietnam has asked that the United States place the January 2004 letter on the record of this dispute. Therefore, per Vietnam's request, the United States has attached Commerce's letter to the Embassy of Vietnam, dated January 29, 2004, as Exhibit US-86.