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

(WT/DS429)

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US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

I. INTRODUCTION

1. The Socialist Republic of Vietnam ("Vietnam") requests that the Panel find that the U.S. Department of Commerce's ("Commerce") application of its zeroing methodology "as such" and as applied in the fourth, fifth and sixth administrative reviews of the antidumping duty order on frozen warmwater shrimp from Vietnam was inconsistent with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

2. Vietnam's "as such" claim is without merit because the United States has already changed the practice for calculating dumping margins in response to the Appellate Body reports finding zeroing to be inconsistent with the AD Agreement: The United States maintains no statute, regulation, or other measure of general and prospective application that requires the use of a so-called "zeroing" methodology.

3. Vietnam's "as applied" claims with respect to the fourth, fifth and sixth administrative reviews are also without merit as there is no obligation under the text of the AD Agreement or the GATT 1994 to grant offsets to reduce the amount of dumping duties levied on dumped entries to account for the extent to which non-dumped entries are priced above normal value. Thus Commerce's calculation of antidumping duties in the challenged assessment proceedings is not inconsistent with the AD Agreement or the GATT 1994.

4. Vietnam has also failed to establish that the alleged "NME-wide entity rate practice" is a measure that may be challenged "as such" as inconsistent with the AD Agreement given that it has not put forward evidence that what it describes as "practice" is a measure. Further, Commerce's decision to identify a Vietnam-government entity in the covered reviews and then assign that entity an individual margin of dumping and an individual antidumping duty was not inconsistent with the obligations of the United States under the AD Agreement. Articles 6.10 and 9.2 of the AD Agreement do not preclude investigating authorities from determining a single dumping rate for a Vietnam-government exporter or producer ("Vietnam-government entity") that is composed of multiple enterprises. In fact, the Report of the Working Party on the Accession of Viet Nam as incorporated into the Protocol of Accession of Viet Nam to the WTO also provides a basis for treating multiple enterprises in Vietnam as part of a Vietnam-government entity. Finally, although the United States would disagree with certain statements made by the Appellate Body in *EC – Fasteners*, a close reading of that report indicates that Commerce's determination regarding the Vietnam-government entity was not inconsistent with the AD Agreement.

5. Vietnam further requests that this Panel find that Section 129(c)(1) of the Uruguay Round Agreements Act (Section 129(c)(1)), which is one of the mechanisms by which the United States implements recommendations and rulings from the Dispute Settlement Body (DSB), is inconsistent, as such, with the AD Agreement. Vietnam's argument suffers from a number of fatal flaws that were identified by the panel in *US – Section 129(c)(1)* when it rejected the nearly identical claims to those made by Vietnam in this dispute. In particular, Vietnam speculates as to how the United States may respond to DSB rulings and recommendations *in the future*. An "as such" claim based on a prediction of how a Member will operate in the future in response to DSB recommendations and rulings is a claim that is based on pure speculation and thus must

fail. Vietnam fails to demonstrate that the panel erred in that earlier dispute. Moreover, Vietnam's remaining arguments similarly fail to show that Section 129(c)(1)(1) precludes the United States from taking WTO-consistent action.

6. Vietnam requests that the Panel find that Commerce's determination in the final sunset review of the antidumping duty order on frozen warmwater shrimp from Vietnam was inconsistent with the AD Agreement. Contrary to Vietnam's claims, Commerce permissibly concluded in the sunset review, based on the evidence before it, that revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping. Commerce conducted a thorough review of the history of the antidumping duty proceeding from the original investigation through the fourth review and relied on positive antidumping duty rates applied to numerous exporters during the four completed reviews, finding that, "by their own admission, Vietnamese Respondents do not dispute there was some dumping that occurred."[1] Meanwhile, Vietnam has failed to establish sufficient evidence in support of its allegations that Commerce's consideration of positive margins of dumping assigned to respondents was inappropriate. In addition, factors other than margins of dumping, in particular post-antidumping order import volumes, fully supported Commerce's finding. Therefore, Commerce objectively and correctly concluded in its sunset review that dumping was likely to continue or recur if Commerce revoked the antidumping duty order.

7. Lastly, Vietnam requests that the Panel find that Commerce's failure to revoke the antidumping duty order on frozen warmwater shrimp from Vietnam with respect to certain companies during the challenged reviews was inconsistent with the AD Agreement. However, the provisions relied on by Vietnam, specifically Articles 11.1 and 11.2 of the AD Agreement, do not provide for company-specific revocation from an antidumping duty order. As a result, Vietnam's argument fails.

II. FACTUAL BACKGROUND

A. Overview of the U.S. Antidumping Law

8. The U.S. antidumping duty law provides domestic producers with a remedy against injurious dumping. The U.S. statute governing antidumping proceedings is the Tariff Act of 1930, as amended ("the Act"). Under U.S. law, an antidumping proceeding may consist of one or more distinct administrative segments.[2] The initial segment of an antidumping proceeding is the investigation. In this initial segment, Commerce will determine whether dumping occurred

[1] Sunset Determination, 75 Fed. Reg. at 75,966 and accompanying Issues and Decision Memorandum at Issue 1 (emphasis added; footnotes omitted) (Exhibit VN-14).

[2] Commerce's regulations define a "segment" of a proceeding as follows:

(i) *In general.* An antidumping or countervailing duty proceeding consists of one or more segments. "Segment of a proceeding" or "segment of the proceeding" refers to a portion of the proceeding that is reviewable under section 516A of the {Tariff Act of 1930, as amended}.

(ii) *Examples.* An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

19 C.F.R. § 351.102(47) (Exhibit US-01).

during the period of investigation by calculating an overall weighted average dumping margin for each foreign producer/exporter examined. Separately, the U.S. International Trade Commission ("ITC") determines whether an industry in the United States is materially injured by reason of the dumped imports. If Commerce finds that dumping existed during the period of investigation, and if the ITC determines that a U.S. industry was injured by reason of dumped imports, then Commerce will publish an antidumping order that covers the subject merchandise.

9. Once the investigation segment of the proceeding ends, the assessment segments of the proceeding begin. Specifically, once each year after the publication of an antidumping duty order, Commerce will provide interested parties with the opportunity to request a review of the order during the month in which the order was published. In these assessment reviews (typically referred to as "administrative reviews"), the focus is on the calculation and assessment of antidumping duties on specific entries by individual importers.[3] Each assessment review is also a separate segment of the same antidumping duty proceeding.

10. Article 9.3 of the AD Agreement recognizes that Members may use either a retrospective or a prospective system to determine the final amount of antidumping duty to be assessed. The United States calculates antidumping duties on a retrospective basis.[4] Pursuant to its retrospective system, liability for antidumping duties attaches at the time the subject merchandise enters the United States.[5] When such a measure has been put into place, the United States will require upon entry that a security be provided to U.S. Customs and Border Protection ("CBP"), usually in the form of a cash deposit, and that collection of the actual duty amount be delayed pending calculation of the amount of the liability. Thus, the date of entry of merchandise subject to an antidumping duty measure triggers application of the antidumping duty to that merchandise. However, the ultimate amount of antidumping duties to be paid will not be calculated until a segment covering that entry (such as an administrative review) is conducted or the time passes to request a review of the entry and no party has requested such a review.[6]

1. The Article 5 Investigation

11. In the investigation, Commerce will generally determine an individual weighted average dumping margin for each known exporter/producer of the subject merchandise.[7] However, if it is not practicable to individually examine each known exporter/producer because of the large number of companies involved in the investigation, Commerce may limit its examination to either a statistically valid sample of exporters, producers, or types of products, or the

[3] The period of time covered by U.S. assessment proceedings is normally 12 months. However, in the case of the first assessment proceeding following the investigation, the period of time may extend to a period of up to 18 months in order to cover all entries that may have been subject to provisional measures.

[4] *See, e.g.*, 19 C.F.R. § 351.212(a) (Exhibit VN-48).

[5] The only exception may occur with respect to entries occurring up to 90 days prior to a preliminary determination in an investigation. Article 10 of the AD Agreement contains specific provisions explicitly permitting retroactive liability for antidumping duties when certain conditions have been met. This possibility of retroactive application of antidumping duties is not at issue in this case.

[6] If no party requests a review of an entry, final liability for antidumping duties will be set at the amount of the cash deposit deposited at the time of entry. *See* 19 C.F.R. § 351.212(c)(1) (Exhibit VN-48).

[7] *See* section 777A(c)(1) of the Act (Exhibit US-02).

exporters/producers accounting for the largest volume of the subject merchandise that can reasonably be examined.[8] If Commerce limits its examination in the investigation, Commerce generally calculates a rate for the remaining cooperative exporters based on the weighted average of rates calculated for the exporters that were individually examined, excluding zero and *de minimis* rates, and rates based entirely on facts available. U.S. law states that if all rates calculated for the individually examined companies are zero, *de minimis*, or based entirely on the facts available, Commerce may use any reasonable method to establish the rate for companies not individually examined, including averaging the rates calculated for the individually examined companies.[9]

12. Commerce will normally use the average-to-average method for comparable transactions during the period of investigation, although it may use transaction-to-transaction comparisons and, provided that there is a pattern of prices that differ significantly by customer, region, or time period, the average-to-transaction method.

13. In the investigation, Commerce must resolve the threshold question of whether dumping "exists" such that the imposition of an antidumping measure is warranted. U.S. law uses the term "dumping margin" to mean "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Thus, the "dumping margin" is the result of a specific comparison between an export price (or constructed export price) and the normal value for comparable transactions. When average-to-average comparisons are used, comparable export transactions[10] are grouped together and an average export price is calculated for the comparison group, which is compared to a comparable normal value.

14. In determining the "weighted average dumping margin," for each exporter/producer individually examined in an investigation, Commerce divides the aggregate amount from the sum of the comparison groups by the aggregate export prices of all U.S. sales by the exporter/producer during the period of investigation. If the overall weighted average dumping margin for a particular exporter/producer is zero or *de minimis*, Commerce excludes the exporter/producer from any antidumping measure resulting from that investigation. If the overall weighted average dumping margin for each examined exporter/producer is zero or *de minimis*, Commerce terminates the antidumping proceeding.

2. The Article 9 Assessment Review

15. The AD Agreement provides Members with the flexibility to adopt a variety of systems to deal with assessment proceedings. There are two basic types of assessment systems – prospective and retrospective.

16. The United States has a retrospective assessment system. Under the U.S. system, an antidumping duty liability attaches at the time of entry, but duties are not actually assessed at that

[8] *See* section 777A(c)(2) of the Act (Exhibit US-02).

[9] *See* section 735(c)(5)(B) of the Act (Exhibit US-03).

[10] Similarity of export transactions is generally determined on the basis of product characteristics. Comparison groups thus are commonly referred to as "models." However, other factors affecting price comparability are taken into account, *e.g.*, level of trade.

time. Instead, the United States estimates the duty to be assessed and collects a security in that amount in the form of a cash deposit at the time of entry. Once a year (during the anniversary month of the order) interested parties may request a review to determine the final amount of duties owed on each entry made during the previous year. Just as in the investigation, Commerce will determine an individual weighted average dumping margin for each known exporter/producer of the subject merchandise, unless the conditions for limiting its examination are satisfied. These conditions for limiting the examination are the same as those in the investigation.[11] In assigning rates to companies that are not individually examined during the assessment review, Commerce generally applies the same methodology used in the investigation, although U.S. law is silent regarding the methodology to be used in this context.

17. In the assessment review, antidumping duties are paid by the importer of the transaction, as in prospective duty systems. If the final antidumping duty liability exceeds the estimated amount of the duty, the importer must pay the difference between the security and the duty. If the final antidumping duty liability ends up being less than the estimated amount, the difference between the final liability and the security is refunded. If no review is requested, the duty is assessed at the estimated rate, and the cash deposits made on the entries during the previous year are retained to pay the final duties.

18. However, Commerce has recently changed its approach.[12] Pursuant to this change, in reviews, except where Commerce determines that application of a different comparison method is more appropriate, Commerce uses the average-to-average method for comparable transactions during the period of review, and will grant an offset for all such comparisons that show export price exceeds normal value in the calculation of the weighted-average margin of dumping and antidumping duty assessment rate.[13]

3. The Article 11 Five-Year ("Sunset") Reviews

19. The U.S. antidumping law provides for the conduct of five-year, or so-called "sunset," reviews of antidumping duty measures, including antidumping duty orders. Commerce's sunset methodologies are governed by sections 751 and 752 of the Act. Commerce and the ITC each conduct sunset reviews pursuant to sections 751(c) and 752 of the Act. Commerce has the responsibility for determining whether revocation of an antidumping duty order would be likely to lead to continuation or recurrence of dumping.[14] Under section 751(d)(2) of the Act, an antidumping duty order must be revoked after five years unless Commerce and the ITC make affirmative determinations that dumping and injury would be likely to continue or recur.[15] If Commerce's determination is negative – *i.e.*, if Commerce finds that there is no such likelihood –

[11] *See* sections 777A(c)(1) and (2) of the Act (Exhibit US-02).

[12] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8101 (Feb. 14, 2012)(*Final Modification*) (Exhibit VN-55).

[13] *Final Modification*, 77 Fed. Reg. at 8102 (Exhibit VN-55).

[14] Under the U.S. antidumping duty law, the term "revocation" is equivalent to the concept of "termination" and "expiry of the duty" as used in Article 11.3 of the AD Agreement.

[15] Section 751(d)(2) of the Act (Exhibit US-04).

Commerce must revoke the order.[16] If Commerce's determination is affirmative, however, Commerce transmits its determination to the ITC, along with a determination regarding the magnitude of the margin of dumping that is likely to prevail if the order is revoked.[17]

20. Commerce's procedures for the conduct of sunset reviews are set forth in 19 C.F.R. § 351.218. Commerce has determined that revocation of an antidumping order is likely to lead to continuation or recurrence of dumping where (1) dumping continued at any level above *de minimis* after the issuance of the order; (2) imports of the subject merchandise ceased after issuance of the order; or (3) dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly.[18]

B. History of the Antidumping Duty Order on Certain Warmwater Shrimp from Vietnam

1. Antidumping Investigation

21. On January 20, 2004, following the filing of an antidumping duty petition by members of the U.S. shrimp industry, Commerce initiated an antidumping duty investigation on certain frozen and canned warmwater shrimp from Vietnam.[19]

22. During the course of the investigation, Commerce determined that Vietnam should be treated as a non-market economy country for antidumping proceeding purposes, meaning that Commerce found that Vietnam's economy did not operate according to market principles of cost or pricing structures.[20] Commerce's determination to treat Vietnam as a non-market economy remained valid during all the proceedings at issue in this dispute. The shrimp industry at no time demonstrated that market economy conditions prevailed in the shrimp industry, nor did Vietnam establish, under U.S. law, that it is a market economy.[21]

23. Generally speaking, if the country from which the subject merchandise is being exported is a non-market economy, such as Vietnam, Commerce may examine the non-market economy entity. This entity encompasses all companies producing/exporting the subject merchandise over which the government is deemed to exert control with respect to business decisions regarding, *inter alia*, pricing, costs, and exports. If a company wishes to receive a rate separate from the

[16] *Ibid*.

[17] *Ibid*.

[18] *See, e.g., Stainless Steel Sheet and Strip in Coils From Italy: Final Results of the Full Five-Year ("Sunset") Review of the Antidumping Duty Order*, 76 Fed. Reg. 25,670 (May 5, 2011) ("the Department finds the following indicative of the likely continuation or recurrence of dumping: whether dumping continued at any level above *de minimis* after the issuance of the antidumping duty order; whether the imports ceased after the issuance of the order; and whether dumping was eliminated and import volumes declined significantly after the issuance of the order") (Exhibit US-05).

[19] Commerce concurrently initiated investigations on the same product from Brazil, Ecuador, India, Thailand, and the People's Republic of China.

[20] Section 771(18)(A) of the Act (Exhibit US-06).

[21] *See* Accession of Viet Nam: Report of the Working Party on the Accession of Viet Nam, paras. 255(a)(ii) and 255(d) (Exhibit VN-30).

non-market economy entity, it must file an application or certification demonstrating that it is not subject to government control, particularly with respect to export activities. As a result of Commerce's determination that Vietnam is a non-market economy, domestic prices and costs could not be used for purposes of the dumping analysis, and Commerce required Vietnamese shrimp companies subject to the antidumping investigation to demonstrate that they were sufficiently free from government influence such that they could be viewed as independent exporters. If a company could not or chose not to demonstrate that it was sufficiently free from government influence, Commerce identified the company as being part of a single non-market economy Vietnam-government entity, which Commerce referred to in shorthand as the "Vietnam wide entity."

24. In the preliminary determination of sales at less than fair value, Commerce explained that "[a]lthough all exporters were given an opportunity to provide information showing they qualify for separate rates, not all of these other exporters provided a response to either the Department's Q&V questionnaire or its Section A questionnaire. Further the Government of Vietnam did not respond to the Department's questionnaire."[22] Because the Government of Vietnam, and a number of other companies did not demonstrate that they were sufficiently free from government influence, they were identified as being part of the Vietnam-government entity, *i.e.*, the group of companies whose export activities are deemed to be under government control. Further, based on the failure of these parties to respond to the questionnaires and provide necessary information, the Vietnam-government entity was preliminarily assigned a dumping margin based on the facts available.[23]

25. On December 8, 2004, Commerce published the final determination of sales at less than fair value, in which it determined that companies had engaged in dumping during the investigation period.[24] Commerce confirmed its finding with respect to the Vietnam-government entity and its assigned rate.[25] Commerce also explained that Kim Anh, a Vietnamese producer/exporter, refused to allow Commerce to verify information it submitted during the investigation.[26] As a result, Commerce determined that Kim Anh did not cooperate to the best of its ability during the investigation and did not demonstrate that it was separate from the Vietnam-government entity. Commerce determined that Kim Anh was part of the Vietnam-government entity and subject to its rate.[27] On January 21, 2005, the ITC notified Commerce of its affirmative determination that the U.S. shrimp industry was being materially injured by dumped imports of non-canned warmwater shrimp from Vietnam. The ITC determined that there was no injury regarding imports of canned warmwater shrimp. Consequently, on February 1, 2005,

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[22] *Notice of Preliminary Determination of Sales at Less Than Fair Value*, 69 Fed. Reg. 42,672, p. 42,679 (July 16, 2004) (Exhibit US-07).

[23] *Ibid*., p. 42,680.

[24] The investigation is not within the Panel's terms of reference and was not subject to the AD Agreement. *See Final Determination of Sales at Less Than Fair Value*, 69 Fed. Reg. 71,005 (Dec. 8, 2004) (Exhibit VN-04).

[25] *Final Determination of Sales at Less Than Fair Value*, 69 Fed. Reg. 71,005, p. 71,008 (Dec. 8, 2004) (Exhibit VN-04).

[26] *Ibid*., pp. 71,008-71,009 (Exhibit VN-04).

[27] *Ibid.*

Commerce published the antidumping duty order on certain frozen warmwater shrimp from Vietnam, imposing estimated rates of duty ranging from 4.30 percent to 25.76 percent.

26. Since the antidumping order was imposed, Commerce has completed seven administrative reviews of the order. Like the investigation, the first administrative review was initiated prior to January 11, 2007, the date on which Vietnam became a Member of the WTO.[28] In this dispute, Vietnam has challenged certain aspects of the results of the fourth, fifth and sixth administrative reviews, as well as the five-year ("sunset") review. [29] Additionally, Vietnam has challenged Section 129(c)(1) of the Uruguay Round Agreements Act ("URAA").[30]

2. Periodic Reviews

a. Fourth Administrative Review

27. On March 26, 2009, Commerce initiated the fourth administrative review for 143 companies.[31] Because of the large number of companies involved in the review, and the lack of resources to determine an individual margin of dumping for each company, Commerce determined that it could examine only two[32] of the 143 companies.

28. Eighteen companies initially requested revocation from the order; however, 13 of those companies subsequently withdrew their requests for revocation.[33] Of the five companies that maintained their requests for revocation, one company, the Minh Phu Group, was selected as a mandatory respondent, and the remaining four companies were separate rate respondents.[34] These companies sought revocation pursuant to Commerce's regulation at 19 C.F.R. § 351.222(b)(2), which states that, in "determining whether to revoke an antidumping duty order in part, the Secretary will consider" whether one or more companies "covered by the order have sold the merchandise at not less than normal value for a period of at least three consecutive years."[35] Commerce denied the requests for revocation because the Minh Phu Group received an above *de minimis* margin and the four separate rate companies were not individually reviewed.[36]

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[28] *See* http://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm.

[29] *See* Vietnam First Written Submission, paras. 23, 42 and 356.

[30] *See ibid.*

[31] *Notice of Initiation*, 74 Fed. Reg. 13178 (March 26, 2009) (Exhibit VN-06).

[32] This number also encompasses affiliated companies, where appropriate.

[33] *Preliminary Results for the Fourth Administrative Review*, 75 Fed. Reg. 12,206, p. 12,209 (June 11, 2009) (Exhibit VN-09).

[34] *Ibid.*

[35] *Ibid.*; 19 C.F.R. §351.222(b)(2) (Exhibit VN-58).

[36] *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. 47771 (August 9, 2010) ("Fourth AR Final Results), and accompanying Issues and Decision Memorandum, pp. 15-17 ("Fourth AR Decision Memorandum") (Exhibit VN-13).

29. Commerce calculated dumping margins of 2.95 percent and 4.89 percent for the two individually examined companies.[37] Thirty companies (including the two cooperative companies individually examined) provided data to demonstrate that their export activities were not subject to government control, and that they should thus receive an individual rate separate from that of the Vietnam-government entity. Based on that data, Commerce granted all thirty companies separate rate status.[38] For the separate rate companies that were not individually examined, Commerce calculated a dumping margin of 3.92 percent.[39]

30. Commerce provided all companies the opportunity to complete a separate rate application or certification (if a company previously received a separate rate). A number of companies for which a review was requested did not submit any information to demonstrate that they operate free of government control. Consequently, these companies were identified as being part of the Vietnam-government entity and were assigned a weighted-average dumping margin of 25.76 percent.[40]

31. Commerce published the final results of the fourth administrative review on August 9, 2010.[41] On October 4, 2010, Commerce published the amended final results.[42]

b. Fifth Administrative Review

32. On April 9, 2010, Commerce initiated the fifth administrative review for 146 companies.[43] Because of the large number of companies involved in the review, and the lack of resources to determine an individual margin of dumping for each company, Commerce determined that it could examine only three[44] of the 146 companies.

33. Additionally, three companies requested revocation from the order, pursuant to Commerce's regulation at 19 C.F.R. § 351.222(b)(2).[45] Of the three companies, one company, Camimex, was selected as a mandatory respondent, and the remaining two companies were

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[37] *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 75 Fed. Reg. 61122 (October 4, 2010) ("Fourth AR Amended Final Results) (Exhibit US-08).

[38] One company, Amanda Foods, initially was not granted separate rate status because it filed its certification after the deadline for such filing had expired and Commerce did not accept the certification.

[39] Fourth AR Amended Final Results, 75 Fed. Reg. 61122 (Exhibit US-08).

[40] *Preliminary Results for the Fourth Administrative Review*, 75 Fed. Reg. 12,206, p. 12,209 (June 11, 2009) (Exhibit VN-09); Fourth AR Final Results, p. 47771, and Fourth AR Decision Memorandum, pp. 15-17 (Exhibit VN-13).

[41] Fourth AR Final Results and Fourth AR Decision Memorandum (Exhibit VN-13).

[42] *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 75 Fed. Reg. 61122 (October 4, 2010) ("Fourth AR Amended Final Results) (Exhibit US-08).

[43] *Notice of Initiation*, 75 Fed. Reg. 18154 (April 9, 2010) (Exhibit VN-10).

[44] This number also encompasses affiliated companies, where appropriate.

[45] *Preliminary Results for the Fifth Administrative Review*, 76 Fed. Reg. 12,054, pp. 12,057-58 (Mar. 4, 2011) (Exhibit VN-15).

separate rate respondents.[46] Commerce denied the requests for revocation because Camimex received an above *de minimis* margin and the two separate rate companies were not individually reviewed.[47]

34. Commerce calculated dumping margins of 0.80 percent, 1.15 percent and *de minimis* for the three individually examined companies.[48] For the individually reviewed company that received *de minimis* margin, Commerce instructed CBP that estimated duties going forward were zero and therefore no security for payment of duties would be required. Thirty companies (including the three cooperative companies individually examined) provided data to demonstrate that their export activities were not subject to government control, and that they should thus receive an individual rate separate from that of the Vietnam-government entity. Based on that data, Commerce granted all thirty companies separate rate status.[49] For the separate rate companies that were not individually examined, Commerce calculated a dumping margin of 1.03% percent.[50]

35. Commerce provided all companies the opportunity to complete a separate rate application or certification (if a company previously received a separate rate). A number of companies for which a review was requested did not submit any information to demonstrate that they operate free of government control. Consequently, these companies were identified as being part of the Vietnam-government entity and were assigned a weighted-average dumping margin of 25.76 percent, the only rate ever determined for the Vietnam-government entity.[51]

36. Commerce published the final results of the fourth administrative review on September 12, 2011.[52] On October 18, 2011, Commerce published the amended final results.[53]

c. Sixth Administrative Review

37. On March 31, 2011, Commerce initiated the sixth administrative review for 68 companies.[54] Because of the large number of companies involved in the review, and the lack of

[46] *Ibid*.

[47] *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) ("Fifth AR Final Results) and accompanying Issues and Decision Memorandum ("Fifth AR Decision Memorandum") (Exhibit VN-18).

[48] *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 76 Fed. Reg. 64,307 (October 18, 2011) ("Fifth AR Amended Final Results") (Exhibit US-09).

[49] Fifth AR Final Results and Fifth AR Decision Memorandum (Exhibit VN-18).

[50] Fifth AR Amended Final Results (Exhibit US-09).

[51] *Preliminary Results for the Fifth Administrative Review*, p. 12,059 (Exhibit VN-15).

[52] Fifth AR Final Results) and Fifth AR Decision Memorandum (Exhibit VN-18).

[53] *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 76 Fed. Reg. 64,307 (October 18, 2011) ("Fifth AR Amended Final Results") (Exhibit US-09).

[54] *Notice of Initiation*, 76 Fed. Reg. 17825 (March 31, 2011) (Exhibit VN-16).

resources to determine an individual margin of dumping for each company, Commerce determined that it could examine only two[55] of the 68 companies.

38. Commerce calculated dumping margins of 1.23 percent and 0.53 percent for the two individually examined companies.[56] Thirty three companies (including the two cooperative companies individually examined) provided data to demonstrate that their export activities were not subject to government control, and that they should thus receive an individual rate separate from that of the Vietnam-government entity. Based on that data, Commerce granted all thirty three companies separate rate status.[57] For the separate rate companies that were not individually examined, Commerce calculated a dumping margin of 0.88 percent.[58]

39. Commerce provided all companies the opportunity to complete a separate rate application or certification (if a company previously received a separate rate). A number of companies for which a review was requested did not submit any information to demonstrate that they operate free of government control. Consequently, these companies were identified as being part of the Vietnam-government entity and were assigned a weighted-average dumping margin of 25.76 percent, the only rate ever determined for the Vietnam-government entity.[59]

40. Commerce published the final results of the sixth administrative review on September 22, 2012.[60] On October 18, 2012, Commerce published the amended final results.[61]

3. Five-Year ("Sunset") Review

41. On January 4, 2010, Commerce initiated the five-year ("sunset") review of the antidumping duty order on frozen warmwater shrimp from Vietnam.[62] Commerce received responses from interested parties and conducted a full sunset review of the antidumping duty order pursuant to section 751(c) of the Tariff Act and 19 CFR 351.218(e)(2)(i). As a result of this sunset review, Commerce found that revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping at levels above *de minimis*.

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[55] This number also encompasses affiliated companies, where appropriate.

[56] *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 77 Fed. Reg. 64102 (October 18, 2012) ("Sixth AR Amended Final Results") (Exhibit VN-22).

[57] *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. 55800 (September 22, 2012) ("Sixth AR Final Results"), and accompanying Issues and Decision Memorandum ("Sixth AR Decision Memorandum") (Exhibit VN-20).

[58] Sixth AR Amended Final Results (Exhibit VN-22).

[59] *Preliminary Results for the Sixth Administrative Review*, 77 Fed. Reg. 13,547, p. 13,552 (Exhibit VN-19); Sixth AR Amended Final Results (Exhibit VN-22).

[60] Sixth AR Final Results and Sixth AR Decision Memorandum (Exhibit VN-20).

[61] Sixth AR Amended Final Results (Exhibit VN-22).

[62] *Initiation of Five-Year ("Sunset") Review*, 75 Fed. Reg. 103 (Dep't of Commerce Jan. 4, 2010) (Exhibit VN-08)).

42. Commerce found that "evidence on the record indicates that dumping of shrimp from Vietnam is likely to continue, or recur, absent the discipline of the antidumping duty order" based on "the positive dumping margins found for numerous companies reviewed, and the decline in import volume during the sunset review period following the initiation of the original investigation."[63] Further, Commerce found "that, while Vietnamese Respondents repeatedly claim that dumping did not continue following the issuance of the order, Vietnamese Respondents also carefully qualify that claim by stating that only the 'vast majority' of the imports were not dumped. Therefore, by their own admission, Vietnamese Respondents do not dispute there was some dumping that occurred."[64]

43. Commerce explained that it "selected two companies during AR1 [*i.e.*, 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."[65] The above *de minimis* margins of these two mandatory respondents were not based on the use of the zeroing methodology. Commerce "also found positive dumping margins for the mandatory respondents in AR4 [*i.e.*, the fourth administrative review]."[66]

44. 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.[67] 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 (an average of 40.5 million kilograms during the sunset review period).[68]

45. Commerce published the final results of its sunset review on December 7, 2010.[69]

C. Revocation under U.S. Law

46. Pursuant to section 751(d) of the Act, Commerce may revoke, in whole or in part, an antidumping duty order upon the completion of a review.[70] One type of revocation review is the five-year sunset review under section 751(c), which is described above. In addition, Commerce may revoke an order based on the results of a "changed circumstances" review (CCR) under section 751(b) of the Act, or the result of an administrative review under section 751(a) of the Act.[71]

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[63] Final Sunset Determination, Exhibit VN-14, Issues and Decision Memo, pp. 3-4 (Exhibit VN-14).

[64] *Ibid.*, p. 4.

[65] *Ibid.*

[66] *Ibid.*, pp. 4-5.

[67] Preliminary Sunset Determination, Issues and Decision Memo, p. 6 (Exhibit VN-12).

[68] *Ibid.*

[69] Final Sunset Determination (Exhibit VN-14).

[70] Section 751(d) of the Act; 19 U.S.C. § 1675(d) (Exhibit VN-47).

[71] Section 751(a) of the Act; 19 U.S.C. § 1675(a) (Exhibit VN-47).

47. Pursuant to section 751(b) of the Act, Commerce may revoke an anti-dumping duty order whenever there are changed circumstances sufficient to warrant review. Section 351.222(g) of Commerce's regulations establish further procedural guidelines for revocation based on a CCR.[72]

48. In addition to Commerce's broad authority to revoke an order whenever changed circumstances warrant through a CCR, under section 351.222(b) Commerce may revoke an antidumping duty order if, based on the results of administrative reviews, Commerce determines that there was an absence of dumping for at least three consecutive years, and that continued application of the antidumping order is not otherwise necessary to offset dumping.[73] During the administrative reviews at issue in this dispute, under section 351.222(b)(2), Commerce's regulations specified a mechanism for partial revocation of an antidumping duty order with respect to a specific exporter or producer. Under these provisions, Commerce determined whether the antidumping duty is no longer warranted as to a specific exporter or producer reviewed, if the company has sold subject merchandise at not less than normal value and in commercial quantities during the previous three consecutive years.[74] Under section 351.222(e), an exporter or producer may request that Commerce revoke an order under section 351.222(b) during the third and subsequent annual anniversary month of the antidumping order.[75]

D. Certain Mechanisms for Implementing DSB Recommendations and Rulings

49. The United States has legislative and administrative mechanisms to enable it to comply with recommendations and rulings from the Dispute Settlement Body ("DSB"). As an initial matter, Congress can pass a law to ensure that the United States implements any such recommendations and rulings. In addition, two administrative mechanisms relevant to this dispute were enacted into U.S. law (sections 123[76] and 129[77] of the URAA) that allow the United States to implement certain DSB recommendations and rulings. Although these administrative mechanisms work in concert, they address distinct objectives.

50. Section 129 of the URAA addresses instances in which the DSB has found that action taken by the ITC or Commerce in a particular antidumping duty proceeding is inconsistent with United States' obligations under the AD Agreement.[78] In such instances, sections 129(a)(4) and

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[72] 19 C.F.R. 351.222(g)(2012) (Exhibit VN-58).

[73] 19 C.F.R. 351.222(b)(2012) (Exhibit VN-58).

[74] 19 C.F.R. 351.222(e)(2012) (Exhibit VN-58).

[75] 19 C.F.R. 351.222(e) and (b)(2012) (Exhibit VN-58).

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

[77] Section 129 of the URAA, 19 U.S.C. § 3538 (Exhibit VN-31).

[78] Section 129 of the URAA also serves as the mechanism through which the ITC or Commerce may make new countervailing duty ("CVD") determinations consistent with adverse WTO panel or Appellate Body reports. *See generally* section 129 of the URAA, 19 U.S.C. § 3538 (Exhibit VN-31). Because Vietnam does not challenge a CVD determination in this dispute, the United States has omitted references to any such determinations in its discussion of section 129 of the URAA.

(b)(2) of the URAA provide that, upon written request from the United States Trade Representative ("USTR"), the ITC or Commerce, as the case may be, shall issue a "determination in connection with the particular proceeding that would render {the ITC's or Commerce's} action … not inconsistent with the findings of the panel or Appellate Body." Section 129(a)(6) of the URAA provides that USTR, after consultation with the appropriate congressional committees, may then instruct Commerce to revoke an antidumping duty order in cases in which the ITC's new determination made pursuant to section 129 of the URAA no longer supports an affirmative injury determination.[79] Section 129(b)(4) of the URAA similarly provides that, after consultation with Commerce and the appropriate congressional committees, USTR may direct Commerce to implement its own new dumping determination made pursuant to section 129 of the URAA.

51. Section 129(c)(1) of the URAA, the particular provision that Vietnam challenges in this dispute, provides an effective date for new determinations made by the ITC or Commerce pursuant to section 129 of the URAA. In relevant part, section 129(c)(1) of the URAA provides that such determinations:

> shall apply with respect to unliquidated entries of the subject merchandise … that are entered, or withdrawn from warehouse, for consumption on or after –
>
> (A) in the case of a determination by the {ITC} under subsection (a)(4), the date on which the Trade Representative directs {Commerce} under subsection (a)(6) to revoke an order pursuant to that determination, and
>
> (B) in the case of a determination by {Commerce} under subsection (b)(2), the date on which the Trade Representative directs {Commerce} under subsection (b)(4) to implement that determination.

52. In plain terms, section 129(c)(1) of the URAA provides that any ITC or Commerce determination made pursuant to section 129 of the URAA and implemented pursuant to direction from USTR will apply to unliquidated entries that enter on or after the date that USTR directs Commerce to implement.

53. Of the consequences that flow from implementing such determinations, three are relevant to this dispute. First, as a result of implementation pursuant to section 129(c)(1) of the URAA, Commerce establishes new cash deposit rates that apply to all entries that enter on or after the date of implementation. Second, as explained above, Commerce will not determine the ultimate amount of antidumping duties to be paid on any entries that enter on or after the date of implementation until a segment covering those entries is conducted or the time passes to request a review of the entry and no party has requested such a review. Third, section 129(c)(1) of the URAA does not speak to what actions Commerce may take with respect to unliquidated entries that entered prior to the date of implementation ("prior unliquidated entries"), nor does it prevent

[79] Under U.S. law, Commerce is responsible for publishing notification of antidumping duty orders. *See* section 735(c)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673d(c)(2) (Exhibit VN-26). As a result, Commerce would perform the ministerial task of revoking an order, even if the revocation is the result of an ITC negative injury determination.

Commerce from calculating the ultimate amount of duties on any such entries in other segments of the same antidumping duty proceeding.

54. Section 129 of the URAA works in tandem with Section 123 of the URAA.[80] Section 123(g)(1) addresses changes in agency regulations or practice to render them consistent with WTO reports. According to that provision, the regulation or practice at issue may be amended, rescinded, or otherwise modified only upon the satisfaction of six conditions, including consultations between the relevant agency, USTR, and the appropriate congressional committees.[81] Any final rule or modification adopted under this provision may go into effect 60 days after the date on which the agency and USTR consult with the relevant congressional committees, unless the President of the United States determines that an earlier effective date is in the national interest.[82] Once effective, any final rule or modification adopted pursuant to section 123(g) of the URAA and applied in particular segments of an antidumping proceeding may affect unliquidated entries that entered prior to the date that USTR directed Commerce to implement determinations made pursuant to section 129 of the URAA.

III. PROCEDURAL BACKGROUND

55. Vietnam's request for consultations with respect to this dispute was received on February 22, 2012. The United States and Vietnam held consultations, but these consultations failed to resolve the dispute. Vietnam's request for the establishment of a panel, as revised, dated January 17, 2013, was then received on January 18. On February 27, 2013, the Dispute Settlement Body ("DSB") established a panel pursuant to Vietnam's request. The Panel was composed on July 12, 2013.

IV. GENERAL PRINCIPLES

A. Vietnam Bears the Burden of Proof

56. In WTO dispute settlement, the burden of proving that a measure is inconsistent with a covered agreement is on the complaining party. In *US – Carbon Steel*, the Appellate Body explained:

> We note, first, that, in dispute settlement proceedings, Members may challenge the consistency with the covered agreements of another Member's laws, as such, as distinguished from any specific application of those laws. In both cases, the complaining Member bears the burden of proving its claim. In this regard, we recall our observation in *US – Wool Shirts and Blouses* that:
>
> > … it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that *the burden of proof rests upon the party, whether complaining or defending, who*

[80] *See* Section 123 of the URAA, 19 U.S.C. § 3533 (Exhibit US-10).

[81] *See* Section 123(g)(1)(A)-(F) of the URAA, 19 U.S.C. § 3533(g)(1)(A)-(F) (Exhibit US-10).

[82] *See* Section 123(g)(2) of the URAA, 19 U.S.C. § 3533(g)(2) (Exhibit US-10).

> *asserts the affirmative of a particular claim or defence*. (emphasis added)

> Thus, a responding Member's law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion.

57. Accordingly, the burden is on Vietnam to prove that U.S. measures exist that are inconsistent with U.S. obligations under the relevant covered agreement.

B. Standard of Review

1. The Panel Should Find the Measures at Issue WTO-Consistent if They Rest on a Permissible Interpretation of the AD Agreement

58. Article 11 of the Dispute Settlement Understanding (DSU) defines generally a panel's mandate in reviewing the consistency with the covered agreements of measures taken by a Member. In a dispute involving the AD Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) of the AD Agreement with respect to an investigating authority's interpretation of provisions of the AD Agreement. Article 17.6(ii) states:

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

59. The question under Article 17.6(ii) is whether an investigating authority's interpretation of the AD Agreement is a permissible interpretation. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation." Where that is the case, and where the investigating authority has relied on one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.[83]

60. The explicit confirmation that there are provisions of the AD Agreement that are susceptible to more than one permissible reading provides context for the interpretation of the AD Agreement. This provision reflects the negotiators' recognition that they had left a number of issues unresolved and that customary rules of interpretation would not always yield only one permissible reading of a given provision.

61. For example, *Argentina – Poultry Anti-Dumping Duties* involved a situation in which Argentina's investigating authority interpreted the term "a major proportion" in Article 4.1 of the AD Agreement (concerning the definition of "domestic industry") as a proportion that may be

[83] *US – Hot Rolled Steel (AB)*, para. 59.

less than 50 percent. The panel in that dispute upheld that interpretation as permissible, even while acknowledging that it may not be the only permissible interpretation. The panel recalled that "in accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it."[84] Similarly in this dispute, it is useful to bear in mind that Article 17.6(ii) applies and there may be more than one permissible interpretation of a particular provision in the AD Agreement:

> This second sentence of Article 17.6(ii) *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would be '*permissible* interpretations'. In that event, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* "if it rests upon one of those permissible interpretations."[85]

62. Thus the Appellate Body note in *US – Continued Zeroing* "that the rules and principles of the *Vienna Convention* cannot contemplate interpretations with mutually contradictory results,"[86] while not fully explained in the light of Articles 31 and 32 of the Vienna Convention and Article 17.6(ii) of the AD Agreement, should not in any event be understood as requiring an interpreter to settle on a single interpretation of a particular provision in the AD Agreement. To the contrary, *US – Continued Zeroing* confirmed the possibility of a "range of interpretations" and simply recalled that the "enterprise of interpretation is "not to generate conflicting, competing interpretations" but to "narrow the range of interpretations" to yield "coherence and harmony among, and effect to, all relevant treaty provisions."[87] Indeed, Article 17.6(ii) would have no function if a panel read it to sanction interpretations that all yield the same result, thereby rendering Article 17.6(ii) inutile.

63. Article 17.6(ii) thus explicitly contemplates that there are provisions of the AD Agreement that admit of more than one permissible interpretation after applying the customary rules of interpretation and that not all of the permissible interpretations would yield the same results. Article 17.6(ii) makes clear that a national authority's measure is to be upheld if it rests on "one" of the permissible interpretations of the AD Agreement. The very premise underlying Article 17.6(ii) is that two distinct interpretations can be permissible simultaneously. By definition, the existence of the second interpretation cannot be a basis for finding that the first is not permissible. Indeed, Article 17.6(ii) would only operate where the different permissible interpretations yield different findings in terms of whether a Member's measure conforms to its obligations under the AD Agreement.

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[84] *See Argentina – Poultry Anti-Dumping Duties*, para. 7.341 and n. 223.

[85] *US – Hot Rolled Steel (AB)*, para. 59 (emphasis in original).

[86] *US – Continued Zeroing (AB)*, para. 273

[87] *Ibid*.

2. The Panel Should Make an Objective Assessment of the Matter Before It and Not Add to or Diminish the Rights and Obligations Provided in the Covered Agreements

64. Article 11 of the DSU requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. The Appellate Body has explained that the matter includes both the facts of the case (and the specific measures at issue in particular) and the legal claims raised.[88] Articles 3.2 and 19.2 of the DSU contain the fundamental principle that the findings and recommendations of a panel or the Appellate Body, and the recommendations and rulings of the DSB, cannot add to or diminish the rights and obligations provided in the covered agreements.

65. While prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members,[89] the Panel in this dispute is not bound to follow the reasoning set forth in any Appellate Body report. Indeed, the Appellate Body itself has stated that its reports are not binding on panels.[90] Members are, of course, free to explain why any reasoning or findings should *not* be adopted by a panel,[91] and, ultimately, each panel is bound by Article 11 of the DSU to make its own objective assessment as to the interpretation of the covered agreements.

V. ARGUMENT

A. Requests for Preliminary Rulings

66. On July 31, 2013, the United States submitted a request for preliminary rulings in this matter. The United States asked, in part, that the Panel find the following measures and claims as outside the terms of reference of the Panel:

- the use of zeroing in original investigations, new shipper reviews, and changed circumstances reviews[92];
- a claim under the *Vienna Convention on the Law of Treaties* ("VCLT") [93]; and
- the Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA").[94]

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[88] *Guatemala – Cement I (AB)*, para. 73

[89] *Japan – Alcoholic Beverages II (AB)*, p. 14

[90] *See US – Softwood Lumber V (AB)*, para. 111 (citing *Japan – Alcoholic Beverages II (AB) and US – Shrimp (Article 21.5) (AB)*).

[91] *See US – Softwood Lumber V(AB)*, n. 175

[92] Request for Preliminary Rulings by the United States ("U.S. PRR"), paras. 3-8 (July 31, 2013).

[93] U.S. PRR, paras. 9-10.

[94] U.S. PRR, paras. 11-16.

Vietnam's response to the first matter stipulated that it "does not challenge the use of zeroing, as applied, to 'original investigations,' 'new shipper reviews,' and 'certain changed circumstances reviews'."[95] Vietnam's response to the second matter stipulated that it "does not assert any claims pursuant to the VCLT."[96] Finally, Vietnam's response to the third matter stipulated that it "does not claim that the SAA is within the Panel's terms of reference."[97] Therefore, given Vietnam's responses to these three matters, the United States respectfully requests that the Panel find the above measures and claims as outside the terms of reference of the Panel.

67. The United States in its July 31 submission also requested that the Panel find that the final results of the sixth administrative review are not within the Panel's terms of reference.

68. In light of Vietnam's clarifications regarding the use of zeroing, the VCLT, the Panel on September 25, 2013, held that it did not consider it necessary to ruling on the United States' request for preliminary rulings on these matters.[98] The Panel reserved the right to revisit these issues.[99] The Panel otherwise found "find that the USDOC's final determination in the sixth administrative review in its anti-dumping investigation of certain Shrimp from Viet Nam, as well as the imposition of anti-dumping duties and cash deposit requirements pursuant to this determination, fall within our terms of reference."[100]

B. Vietnam's "As Applied" Claims Regarding Company-Specific Revocation Have No Basis in the AD Agreement

69. Vietnam argues that Commerce's determinations not to revoke the antidumping duty order for certain individual exporters that requested revocation during administrative reviews are inconsistent with various provisions in the AD Agreement.[101] As discussed below, Vietnam misconstrues the obligations contained in Articles 11.1 and 11.2 of the AD Agreement. Most notably, these provisions impose no obligation for authorities to consider, much less provide, company-specific revocations. For this reason, and for the additional reasons set out below, Vietnam has not established that the United States was obligated to revoke the antidumping duty order with respect to specific respondents. Thus, Vietnam's as applied claims under Articles 11.1 and 11.2 fail.[102]

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[95] Viet Nam's Response to the United States' Request for Preliminary Rulings by the United States ("VN Response to U.S. PRR"), para. 12 (Aug. 5, 2013); *see ibid.*, para. 3.

[96] VN Response to U.S. PRR, para. 12; *see ibid.*, para. 4.

[97] VN Response to U.S. PRR, para. 12; *see ibid.*, para. 5.

[98] *US – Shrimp (Viet Nam) II*, Preliminary Ruling, paras. 3.5, 4.3, 5.5.

[99] *Ibid.*, para. 6.2.

[100] *Ibid.*, paras. 6.1

[101] Vietnam First Written Submission, para. 347.

[102] Before addressing the merits of Vietnam's argument, it may be useful to clarify with respect to which respondents Vietnam is asserting this as-applied claim. Vietnam's Panel request asserts claims with respect to company-specific revocation under Articles 11.1 and 11.2 of the AD Agreement solely on an "as applied" basis. Accordingly, Vietnam's claim is necessarily limited to the relevant administrative reviews within the Panel's terms of reference in which certain exporters made requests for company-specific revocation. As an initial matter, the

1. The United States Did Not Act Inconsistently With Articles 11.1 or 11.2 of the AD Agreement in the Fourth and Fifth Administrative Reviews

70. Vietnam's argument concerning an alleged breach of Articles 11.1 and 11.2 does not rest on the text of these provisions. Instead, Vietnam's argument is that Commerce should have applied, and reached a particular result, under a provision of U.S. domestic law. In particular, under U.S. regulations, Commerce could partially revoke an antidumping duty order as to a particular exporter or producer, based on, *inter alia*, an absence of dumping by the exporter or producer for a period of at least three consecutive years.[103] The adoption or use of this domestic law provision does not, however, involve obligations under Articles 11.1 or 11.2 of the AD Agreement, and thus Commerce's application of this domestic law provision does not raise issues under Article 11. As such, Vietnam's claim has no basis in the text of the AD Agreement.

United States recalls that no such requests for revocation were made by any exporter during the sixth administrative review. Also, in its "Factual Background" on this issue, Vietnam describes requests for revocation made by companies in the third administrative review. The third review is also outside the Panel's terms of reference. Vietnam did not request consultations on, nor did it file a panel request on, the third administrative review. Vietnam First Written Submission, para. 325. As a result, Vietnam's claim is limited to requests made by interested parties in the fourth and fifth administrative reviews. Regarding which interested parties requested revocation, in its first written submission, Vietnam vaguely refers to respondents that were individually investigated in various reviews. Vietnam First Written Submission, paras. 348-349. Vietnam then specifically references three companies (Minh Phu, Camimex and Nha Trang Seafoods). Minh Phu and Nha Trang Seafoods were both individually investigated in the fourth and fifth administrative reviews; Camimex was individually investigated in the fifth review. However, one of these companies, Nha Trang Seafoods, did not request company-specific revocation in the fourth, fifth (or even sixth) administrative review. Notably, Vietnam's Request for Consultations specifically referenced Commerce's determination not to revoke the order with respect to Minh Phu, Camimex and Grobest, not Nha Trang Seafoods. Vietnam Request for Consultations, p. 4 (point "(6)"). As to Grobest, following the final results of the fourth administrative review, Grobest challenged in U.S. court Commerce's determination not to individually examine its data and request for company-specific revocation. Following litigation, a U.S. court remanded the matter, ordering Commerce to individually examine Grobest. *See* Order, *Grobest & I Mei Industrial (Vietnam) Co. v. United States*, Consol. Ct. No. 10-00238 (Exhibit US-11); *Grobest & I Mei Industrial (Vietnam) Co. v. United States*, 853 F.Supp.2d 1352, 1362-65 (CIT 2012) (Exhibit US-12). During the court-ordered individual examination, however, Grobest withdrew its request for individual review, including its request for company-specific revocation, and failed to provide Commerce with responses to requests for information. *See Withdrawal of Request for Voluntary Respondent Review and Revocation of Antidumping Duty Order in Part* (Dec. 12, 2012) (initial withdrawal of request for review and revocation) (Exhibit US-13); Response to January 15, 2013 Supplemental Questionnaire in Reexamination of Grobest & I-Mei Industrial (Vietnam) Co., Ltd. Voluntary Responses (Jan. 29, 2013) (maintaining withdrawal of request) (Exhibit US-14); Response to Department's Supplemental Questionnaire and Petitioners' Objection to Rescission (Feb. 13, 2013) (maintaining withdrawal of request) (Exhibit US-15). Grobest has declared that it wishes to retain the separate rate of 3.92 percent that it was originally assigned in the fourth administrative review. Response to Department's Supplemental Questionnaire and Petitioners' Objection to Rescission (Feb. 13, 2013) (Exhibit US-15). Based on Grobest's failure to cooperate in the court-ordered review, Commerce has preliminarily determined to apply a margin to Grobest based on the application of an adverse inference. *Certain Frozen Warmwater Shrimp From The Socialist Republic of Vietnam: Preliminary Results of Re-conducted Administrative Review of Grobest & I Mei Industrial (Vietnam) Co., Ltd and Intent Not to Revoke; 2008-2009*, 78 Fed. Reg. 57,352 (Sept 18, 2013) (Exhibit US-16). Thus, Grobest should not be included in the group of companies that Vietnam claims were impermissibly denied requests for revocation because Grobest withdrew its request. In fact, it is apparent from Vietnam's First Written Submission that, by no longer referencing Grobest, Vietnam is not pursuing any claim with respect to Grobest.

[103] 19 CFR 351.222(b)(2)(2012) (Exhibit VN-58).

a. Articles 11.1 and 11.2 of the AD Agreement Do Not Obligate Members to Terminate an Antidumping Duty With Respect to Individual Companies

71. Vietnam claims that the United States "denied the Vietnamese respondents requesting revocation their rights under Article 11.1 and 11.2 of the Anti-Dumping Agreement."[104] However, an examination of the text of Articles 11.1 and 11.2, in context and in light of the object and purpose of the AD Agreement, demonstrates that Vietnam's arguments are unfounded. Article 11 does not create an obligation of the nature that Vietnam asserts.

72. 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 Article 11.2 but, as a prior panel observed, it does not establish any independent or additional obligations.[105] For that reason, the inquiry would focus on Article 11.2.

73. With respect to Article 11.2, there is no obligation contained in the text that requires a Member to partially terminate the antidumping duty with respect to individual companies. What Article 11.2 does address is the duration of an antidumping duty. For this purpose, Article 11.2 provides for review to ensure that an antidumping duty remains in place only as long as necessary to offset injurious dumping. Article 11.2 provides, in full:

> The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.* Interested 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. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.
>
> * A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

74. Article 11.2 requires that, "where warranted," a Member must review "the need for continued imposition of the duty." Moreover, "[i]f, as a result of the review under [Article 11.2], the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately." Because procedures for review and termination of duties are also the subject of Article 11.3, Article 11.3 provides relevant context for interpretation of the obligations in Article

[104] Vietnam First Written Submission, para. 347.

[105] *EC – Tube or Pipe Fittings*, 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.

11.2.[106] There are both similarities and differences with respect to the obligations imposed by Article 11.2 and Article 11.3.

75. Article 11.3 requires termination of an antidumping duty after five years, unless the authorities determine in a review that the expiry of the duty would be likely to lead to the continuation or recurrence of dumping and injury. Article 11.3, therefore, requires some action (termination or a review) once a duty has been in force for five years. This obligation is triggered solely by the passage of time.

76. Unlike Article 11.3, Article 11.2 contains a continuing obligation, once a "reasonable period of time has elapsed since the imposition of the duty," to review the need for the duty if "warranted." Thus, taken together, Articles 11.2 and 11.3 of the AD Agreement provide the mechanisms to ensure that an antidumping duty remains in place only as long as necessary. Consistent with the obligation set forth in Article 11.2, U.S. law provides for revocation of an antidumping duty (or, in U.S. terms, the antidumping duty order).[107]

77. Article 11.2 requires a review of the continuing need for "the duty." "The duty," read in the context described above, refers to the application of the antidumping duty on a product, not as it is applied to exports by individual companies. 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.[108] In that dispute, the Appellate Body rejected Japan's argument that Article 11.3 imposed obligations on a company-specific basis in the context of a sunset review.[109] Similarly, nothing in Articles 11.1 or 11.2 imposes an obligation to review and revoke a duty on a company-specific basis. The term "duty" is most logically interpreted as having the same meaning in 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.

78. Context provided by Article 9 and Article 6 of the AD Agreement further confirms that "the duty" in Article 11.2 refers to the antidumping duty on a product and not multiple duties imposed on a company-specific basis. Specifically, reference to "the duty" in Article 11.1 and 11.2 contrasts with references to "individual duties" in Article 9.4 and the reference to "an individual margin of dumping for each exporter or producer" in Article 6.10. "Individual duties" and "an individual margin of dumping for each exporter or producer" must have a different meaning than "the duty." To read "the duty" in the context of Article 11 as a company-specific

[106] As indicated above, the United States considers "termination" of the "duty" under Article 11.2 to be the equivalent of "revocation" of an antidumping duty "order" as it does for the identical language found in Article 11.3.

[107] *See e.g.*, Section 751 (d) of the Act (19 U.S.C. § 1675(b) and (d)) (Exhibit VN-47).

[108] *See US – Corrosion-Resistant Steel Sunset Review*, para. 150 ("Article 11.3 does not require investigating authorities to make their likelihood determination on a company-specific basis.") and para. 154-155 ("The provisions of Article 6.10 concerning the calculation of individual margins of dumping in investigations do not require that the determination of likelihood of continuation or recurrence of dumping under Article 11.3 be made on a company-specific basis.").

[109] *Ibid.*, paras. 140, 155.

reference would render these distinctions a nullity, in violation of customary rules of treaty interpretation.

79. Vietnam has made no argument that any interested party requested an order-wide revocation through, for example, a CCR. Indeed, no such request was ever made. Accordingly, Vietnam cannot assert that the United States deprived any of its exporters the type of review obligated under Article 11.2 of the AD Agreement.

80. In sum, for all of these reasons, Vietnam has no basis for its claim that the United States breached any obligation under Article 11.1 or 11.2 with respect to the denial of requests for company-specific revocations.

b. Vietnam's Arguments Have Additional Flaws

81. As set forth above, Article 11.2 of the AD Agreement does not require company-specific revocation. Even aside from this fundamental, fatal flaw in Vietnam's arguments, it may be useful to recognize that those arguments contain additional flaws. As addressed below, Article 11.1 and 11.2 contain no requirement that Members adopt tests based on an absence of dumping for three years. In addition, the use of the so-called "zeroing" methodology in prior annual reviews does not somehow give rise to an obligation under Article 11.2 to adopt a company-specific revocation based on the absence of dumping for three years.

i. Article 11.1 and 11.2 Do Not Require Revocation Based on the Absence of Dumping for Three Years

82. Under U.S. domestic law, individual companies are allowed to request revocation of an antidumping order either on an order-wide or company-specific basis. In this regard, the United States draws the Panel's attention to the report *US – Anti-Dumping Measures on Oil Country Tubular Goods,* which discusses these domestic law provisions.[110] Such requests can be based on the general "changed circumstances" review (CCR) provision, or (in an administrative review) on the basis of no dumping for three years.[111]

83. A company which did not satisfy the requirement of no dumping for three years (and the other requirements under that particular provision of U.S. law) was nonetheless entitled to seek revocation of the anti-dumping duty order as applied to it under the CCR provision, assuming it can provide information substantiating the need for review, as provided for in Article 11.2 of the AD Agreement.[112]

84. Accordingly, in the face of a similar claim as presented by Vietnam here (including the use of the "zeroing" methodology), the panel found that, given revocation based on three years of no dumping operated "in favour of foreign producers and exporters, and that a more general

[110] The panel in *US – Anti-Dumping Measures on Oil Country Tubular Goods* did not reach the question of whether Article 11.2 of the AD Agreement required company-specific reviews. *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 7.159.

[111] *Ibid.*, para. 7.164.

[112] *Ibid.*, para. 7.165.

opportunity to request review exists [through a CCR], we see no basis to conclude that [Commerce] acted inconsistently with Article 11.2 in the fourth administrative review when it concluded that the Mexican exporters were not entitled to revocation as their situation did not fit the required factual prerequisites."[113] The panel also found that, "[b]y providing that, in certain circumstances, [Commerce] may revoke an antidumping duty order based in part on three years of no dumping, we consider the United States has gone beyond what is required by Article 11.2."[114]

85. For these reasons, even if certain Vietnamese companies had not had positive dumping margins for three years, nothing in Article 11.1 or Article 11.2 of the AD Agreement establishes that this fact would require terminating the application of the antidumping duty to such companies. This is another reason why Vietnam's claim should be rejected.

ii. Commerce Did Not Breach Articles 11.1 or 11.2 by Limiting Its Examination of Respondents

86. Vietnam also argues that Commerce breached Articles 11.1 and 11.2 of the AD Agreement by limiting its examination of respondents in the administrative reviews at issue.[115] Vietnam asserts that as a result of this limitation of respondents, additional companies that were not individually investigated during the fourth and fifth administrative reviews were denied the opportunity to demonstrate eligibility for revocation from the order on a company-specific basis.[116]

87. Commerce's limitation of its examination in the fourth and fifth administrative reviews to selected respondents was fully consistent with U.S. obligations under the AD Agreement, and Vietnam has not alleged a breach of those provisions – i.e., Article 6.10. As explained below, Commerce cannot be found to have breached Articles 11.1 or 11.2 by acting consistently with another article of the AD Agreement that specifically governs the selection of companies to be examined in an annual review.

88. 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 determination impracticable. Thus, any time the conditions are satisfied, an authority may limit its examination.[117] Commerce explained how the particular facts in each case justified its determination to limit its examination in fourth and fifth reviews at issue. Consequently, Commerce acted consistently with the AD Agreement when it limited its examination to certain

[113] *Ibid.*, paras. 7.153, 7.166.

[114] *Ibid.*, para. 7.174.

[115] Vietnam First Written Submission, para. 351.

[116] For example, in the fourth administrative review, Camimex, Vietnam Fish One So., Ltd. ("Fish One"), and Seaprodex Minh Hai did not receive an individually calculated rate and were assigned a separate rate of 3.92 percent. Exhibit US-08. In the fifth administrative review, Phuong Nam and Grobest were not individually investigated and were assigned the separate rate margin of 1.03 percent. Exhibit US-09.

[117] *See Vietnam – Shrimp* (DS404), para. 7.167 ("the exception provided for in the second sentence of Article 6.10 makes it clear that, despite the general preference for individual margins, investigating authorities need not determine individual margins for all known exporters and producers in all cases.").

respondents. Moreover, Vietnam fails to explain how Commerce impermissibly limited its examination in these reviews.

89. Commerce's permissible limitation of the number of exporters it could individually examine under Article 6.10 cannot provide a basis for a breach of Article 11.2. If an administering authority permissibly limits its examination of exporters under Article 6.10, a separate obligation arising from Article 11.2 to review all individual requests for revocation on the basis of individually determined margins of dumping would override the administering authority's determination that it is impracticable to review each company individually. Vietnam's argument, if accepted, would render Article 6.10 a nullity. The panel in *Vietnam – Shrimp* (DS404) rejected a similar argument from Vietnam. In that case the Panel concluded, "[s]ince neither the first sentence of Article 6.10, nor Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement, impose any additional restrictions on the use of limited examinations, there is no basis for us to find that the USDOC's legitimate (*i.e.* consistent with the second sentence of Article 6.10) use of limited examinations is inconsistent with those provisions."[118] Thus, the Panel properly rejected Vietnam's claims under Articles 6.10, 9.3, 11.1 and 11.3. The Panel's reasoning in that case is equally applicable to the similar provision for termination of the duty under Article 11.2.

90. Vietnam also argues that Commerce breached Articles 11.1 and 11.2 of the AD Agreement by not making a separate determination under Articles 9.4 and 6.10 for "periodic reviews [as opposed to] reviews seeking revocation."[119] Vietnam's argument fails as a matter of fact and law. First, the reviews at issue in this dispute – i.e., the fourth and fifth administrative reviews – were periodic (i.e., administrative reviews). Second, Vietnam has provided no support for its claim that Members must apply different standards under Articles 9.4 and 6.10 for different proceedings.

2. Vietnam Appears to Present Claims in its First Written Submission that are Outside this Panel's Terms of Reference

91. It should also be noted that Vietnam appears to present claims in its first written submission that are outside the Panel's terms of reference. Specifically, in its panel request, Vietnam asserted that the legal basis of its "as applied" challenge regarding "Revocation in the absence of any evidence of dumping" was Articles 11.1 and 11.2 of the AD Agreement.[120]

92. In its first written submission, Vietnam now asserts that "[a]bsent revocation, [individually investigated mandatory respondents] are being denied their rights under Articles ***2.1, 2.4.2, 9.3*** … ."[121] However, Articles 2.1, 2.4.2 and 9.3 of the AD Agreement were not included as the relevant provisions of the covered agreements cited by Vietnam related to "Revocation in the absence of any evidence of dumping." Therefore, any claims regarding

[118] *Vietnam – Shrimp* (DS404), paras. 7.151-68.

[119] *Ibid.*, para. 352.

[120] Vietnam Panel Request, p. 8 ("The continued application of anti-dumping measures to respondents that have demonstrated the sustained absence of dumping is inconsistent with US obligations under Articles 11.1 and 11.2.").

[121] Vietnam First Written Submission, para. 349 (emphasis added).

company-specific revocation under these additional articles are outside the Panel's terms of reference.[122]

C. SECTION 129(C)(1) OF THE URUGUAY ROUND AGREEMENTS ACT IS NOT INCONSISTENT, AS SUCH, WITH THE AD AGREEMENT

93. Vietnam argues that section 129(c)(1) of the Uruguay Round Agreements Act[123] is inconsistent, as such, with a number of provisions of the AD Agreement.[124] As discussed below, Vietnam's argument is without merit.

94. As an initial matter, in the *US – Section 129(c)(1)* dispute, the panel, in an exhaustive and well-reasoned finding, observed "that section 129(c)(1) does not mandate or preclude any particular treatment of prior unliquidated entries or have the effect thereof."[125] The panel also found that "only determinations made and implemented under section 129 are within the scope of section 129(c)(1)"[126] and that "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."[127] The panel further found that section 129(c)(1) does not have *the effect* of requiring the United States to take action with respect to other entries subject to a separate segment of the same proceeding.[128]

95. With respect to prior unliquidated entries, the panel in *US – Section 129(c)(1)* found that Commerce could conduct segments (e.g., administrative reviews) that impact those entries in a WTO-inconsistent manner. "However, it is clear to us that such actions, if taken, would not be

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[122] In addition, Vietnam makes no argument as to how these articles may be implicated.

[123] *See* Section 129 of the Uruguay Round Agreements Act ("URAA") (19 U.S.C. § 3538) (Exhibit VN-31).

[124] Vietnam also states that "[a]s a consequence, Section 129(c)(1) and its prohibition against refunds is inconsistent, as such, with the following provisions of …the GATT 1994," but the list does not include any provisions of the GATT 1994 and in its first written submission Vietnam does not appear to actually pursue any claims under the GATT 1994. Vietnam First Written Submission, para 212.

[125] Vietnam First Written Submission, para. 244 (citing *US – Section 129(c)(1)*, paras. 6.54-114).

[126] *See US – Section 129(c)(1)*, para. 6.53. An administrative review is one segment of many that may be conducted within a single administrative proceeding. Commerce's regulations define a "segment" of a proceeding as follows:

> (i) *In general.* An antidumping or countervailing duty proceeding consists of one or more segments. "Segment of a proceeding" or "segment of the proceeding" refers to a portion of the proceeding that is reviewable under section 516A of the [Tariff Act of 1930, as amended].
>
> (ii) *Examples.* An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

19 C.F.R. § 351.102(47) (Exhibit US-01); *see also* Section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a (Exhibit US-17).

[127] *US – Section 129(c)(1)*, para. 6.80.

[128] *Ibid*., paras. 6.68-69, 6.71-73, 6.76, 6.83-84; *see also ibid.* at paras. 6.105-06, 6.109-10, 6.114 (finding that the SAA supports these conclusions).

taken because they were required by section 129(c)(1), but because they were required or allowed under other provisions of US law."[129] Indeed, the panel found that such action by Commerce would not come as a result of action taken pursuant to section 129, but instead through "*separate determinations* made in *separate segments* of the same proceeding and *under separate provisions* of US antidumping or countervailing duty laws, such as administrative review determinations."[130] Thus, the panel correctly determined that section 129(c)(1) does not govern the treatment of unliquidated entries of subject merchandise that are the subject of other segments of the same proceeding, such as in administrative reviews under the relevant AD or CVD order.

96. As is clear from the panel report, Vietnam's argument fails due to a simple threshold issue. Vietnam's argument is based on a presumption of what means the United States will choose ***in the future*** to respond to any DSB recommendations and rulings. This is highlighted in the way Vietnam expresses its claim. Vietnam states that "prior unliquidated entries" "are excluded from any U.S. measure to comply with an adverse DSB ruling. They are liquidated (i.e., final liability assessed) or remain subject to anti-dumping or countervailing duty deposit rates regardless of the adverse DSB ruling or any U.S. measures to comply with that ruling."[131] That is, Vietnam predicts that the United States will choose to undertake any implementation by means of section 129. Vietnam furthermore predicts that the United States will implement ***only*** by means of section 129 and will not utilize any other means under U.S. domestic law. And Vietnam further predicts how any U.S. measure taken to comply will address what Vietnam calls "prior unliquidated entries."

97. It should be apparent on its face that a claim based on a prediction of how a Member will operate in the future in response to DSB recommendations and rulings is a claim that is based on speculation and, thus, fails. Like any other Member, the United States may respond to any DSB recommendations and rulings in any manner it deems appropriate.[132] The fact that the United States has chosen to establish in advance a mechanism in the form of section 129 to do so does not in any way diminish the ability of the United States to choose another means at such time as there are relevant DSB recommendations and rulings.

98. Each Member concerned,[133] when the DSB adopts recommendations and rulings, will need to decide how to respond to those recommendations and rulings and will need to choose the means by which to achieve compliance. In many instances, the Member concerned has no pre-established mechanism specifically for this purpose under domestic law and will therefore

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[129] *Ibid.*, para. 6.110.

[130] *Ibid.*, para. 6.71.

[131] Vietnam First Written Submission, para. 212.

[132] *See, e.g., US – COOL (21.3)*, para. 98 (acknowledging that "the United States has a measure of discretion in selecting the means of implementation that it deems most appropriate."); *US – OCTG (Argentina) (21.5)*, para. 143 (noting that "to comply with the original panel's finding, as adopted by the DSB, the United States had to bring its determination of likelihood of dumping into conformity with Article 11.3 of the Anti-Dumping Agreement. How it chose to do so was, in principle, a matter for the United States to decide.").

[133] Dispute Settlement Understanding, Art. 19.1, n. 9 (defining phrase "Members concerned")

choose some mechanism, either one already in existence that could be used for that purpose or by adopting a new mechanism.

99. There is no basis to predict with certainty today how a Member concerned will implement in the future. By definition, the measure taken to comply in that situation does not yet exist, and there is no basis for a panel to make findings with respect to the precise content, let alone WTO-consistency, of a non-existent measure.

100. Yet Vietnam's entire argument would require the Panel to make a finding now as to precisely how the United States would implement DSB recommendations and rulings in the future. In particular, Vietnam asks the Panel to make findings as to precisely what would be any U.S. measure taken to comply with respect to DSB recommendations and rulings implicating entries that remained unliquidated at the end of any reasonable period of time provided under Article 21.3 of the DSU. And Vietnam asks the Panel to find that the United States will choose to utilize section 129 and no other means available under the U.S. domestic legal system. But it is not possible to make any such finding, and Vietnam's claim fails.

101. In addition to Vietnam's attempt to challenge predicted future actions, Vietnam's argument suffers the basic and fundamental flaw that the provisions of the AD Agreement cited by Vietnam do not contain any affirmative obligations with respect to the implementation of adverse DSB recommendations and rulings. Rather, in the antidumping context, the DSU is the only WTO agreement that addresses Members' obligations in regards to implementation. Vietnam has not pursued any claims under the DSU.[134] For this reason alone, Vietnam's argument should be rejected.

102. The absence of any claims by Vietnam under the DSU is not surprising. The DSU does not prescribe, nor even address, the internal mechanisms (e.g., legislative or administrative) by which Members may implement adverse DSB recommendations and rulings. Because Vietnam does not (nor could it) contest the fact that the United States can implement adverse DSB recommendations and rulings through a legislative or other administrative process, Vietnam's claim, at its core, is that the particular administrative process for implementing adverse DSB recommendations and rulings provided under section129 is the only mechanism available under U.S. law. But the United States is not obligated to provide any particular form of remedy under the DSU (whether administrative or legislative), and Vietnam's arguments to the contrary constitute an attempt to add obligations to the United States that are not in the covered agreements, in direct violation of Article 3.2 of the DSU.[135]

* * *

103. These basic flaws render Vietnam's challenge to Section 129(c)(1) facially deficient. Nonetheless, in the course of its arguments, Vietnam makes a number of incorrect assertions regarding the implications of U.S. domestic law, and the prior panel report in *US – Section 129(c)(1)*. The United States will address these matters separately below. For example, Vietnam

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

[135] It should also be noted that any claim by Vietnam that section 129(c)(1) is inconsistent with the DSU would be outside this Panel's terms of reference.

incorrectly asserts that section 129(c)(1): (1) limits the implementation of DSB recommendations and rulings by the United States to unliquidated entries of merchandise imported on or after the date the USTR directs Commerce to implement the report; and (2) "serves as an absolute legal bar" to the liquidation in a WTO-consistent manner of unliquidated entries of subject merchandise that entered the United States prior to that date.[136] Based on these incorrect assumptions, Vietnam erroneously concludes that, because such prior unliquidated entries cannot be liquidated at lower (or non-existent) rates consistent with DSB recommendations and rulings, section 129(c)(1) is inconsistent with various provisions of the AD Agreement and the GATT 1994.

104. Vietnam's argument also fails to establish any as such inconsistency with the AD Agreement because it fails to establish that section 129(c)(1) governs other administrative segments, let alone mandates actions that are inconsistent with WTO obligations. Section 129(c)(1) provides an effective date for implementation of a determination made under section 129. But as correctly found by the panel in *US – Section 129(c)(1)*, section 129(c)(1) does not, however, "serve{} as an absolute legal bar to any refunds of duties on prior unliquidated entries" that may result from other administrative segments, or through other means, to implement DSB recommendations and rulings.[137] Therefore, section 129(c)(1) is not, as such, inconsistent with the AD Agreement.

1. Vietnam Fails to Demonstrate that Section 129(c)(1) Precludes WTO-Consistent Action

a. Section 129(c)(1) Does Not Prevent the United States from Taking Action with Respect to Prior Unliquidated Entries

105. Vietnam argues that, because section 129(c)(1) "serves as an absolute legal bar" to the WTO-consistent liquidation of prior unliquidated entries, section 129(c)(1) is inconsistent with various provisions of the AD Agreement, specifically Articles 1, 9.2, 9.3, 11.1 and 18.1.[138] As discussed below, Vietnam incorrectly interprets U.S. domestic law.[139]

106. Section 129(c)(1) addresses the implementation of determination ***made under section 129*** in response to DSB recommendations and rulings to unliquidated entries of subject merchandise entered on or after the date USTR directs implementation. Vietnam has no support in the plain language of the statute for the additional assertion that section 129(c)(1) serves as a

[136] Vietnam First Written Submission, para. 213. In several places Vietnam refers to "refunds" of duties in connection with unliquidated entries. *See, e.g., ibid*, para 223 ("duty refunds for prior unliquidated entries"). However, putting aside the question of whether there would be any WTO obligation with respect to a "refund" of a duty already collected, this is incorrect terminology – by definition, if the entry is unliquidated, no duty has been assessed and therefore there is no duty to refund.

[137] *US – Section 129(c)(1)*, para. 6.71.

[138] Vietnam First Written Submission, para. 212.

[139] *See, e.g., US – Section 301 Trade Act*, para. 7.19.

legal bar to WTO-consistent action on prior unliquidated entries in other administrative segments of the proceeding or through other means.[140]

107. Section 129(c)(1) provides for the implementation of these new determinations made under Section 129, effective as of the date that USTR directs implementation (the "implementation date"). Section 129(c)(1) states in its entirety:

> (c) **Effects of Determinations; Notice of Implementation.--**
>
> (1) **Effects of determinations**. – Determinations concerning title VII of the Tariff Act of 1930 *that are implemented under this section shall* apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act) that are entered, or withdrawn from warehouse, for consumption on or after--
>
> (A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and
>
> (B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination. (Emphasis added.)

108. That is all. Section 129 simply does not speak to other actions that may be taken consistent with DSB recommendations and rulings. Thus, contrary to Vietnam's assertions, section 129 is not "the exclusive authority under U.S. law for the United States to comply with adverse DSB rulings."[141]

109. In fact, there are a number of other administrative mechanisms by which the United States can come into compliance with DSB recommendations and rulings and that could impact prior unliquidated entries.[142]

110. One notable example is section 123 of the URAA ("section 123").[143] Section 123(g) addresses changes in agency regulations or practice to render them consistent with DSB recommendations and rulings.

111. The adoption of a methodological change pursuant to section 123 could result in WTO-consistent determinations in administrative reviews covering prior unliquidated entries. For

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[140] *See* Vietnam First Written Submission, paras. 217 – 220.

[141] *See* Vietnam First Written Submission, paras. 224.

[142] *US – Section 129(c)(1)*, para. 6.71.

[143] *See* Section 123 of the URAA, 19 U.S.C. § 3533 (Ex. US-10).

example, the date on which a methodological (whether regulatory or practice) change is implemented under section 123 could be before the implementation date of a determination made under section 129. Thus, section 129(c)(1) does not "serve as an absolute legal bar" vis-à-vis prior unliquidated entries – one means for addressing these entries is an administrative review utilizing a modified methodology as a result of a section 123 determination.

112. Moreover, section 129(c)(1) does not limit the ability of Congress to pass a new law that might have an impact on prior unliquidated entries, either through an act aimed directly at specific unliquidated entries or a change in the antidumping law that, again, would impact unliquidated entries, for example, through the administrative review process (much like a section 123 determination). In other words, section 129(c)(1) does not "serve[] as an absolute legal bar" to Congressional action. This fact alone is fatal to Vietnam's claim in this dispute.

113. Accordingly, because Vietnam has not, and cannot, contest the fact that the United States has other options available under its domestic legal system to implement DSB recommendations and rulings with respect to prior unliquidated entries, Vietnam's as such challenge must fail.

114. For these reasons, section 129(c)(1) does not mandate actions that are inconsistent with the United States' obligations under the WTO or otherwise precludes action that is consistent with those obligations and, therefore, is not, as such, inconsistent with the AD Agreement or the GATT 1994.

b. The Statement of Administrative Action Further Demonstrates That Vietnam's Interpretation of Section 129(c)(1) is Incorrect

115. Vietnam relies on the SAA[144] to support its interpretation of section 129(c)(1), but Vietnam's reliance is misplaced. Vietnam fails to provide meaningful support under the SAA for the assertion that section 129(c)(1) bars any other acts (outside section 129) that would impact prior unliquidated entries.[145]

116. The language from the SAA on which Vietnam relies expressly addresses "relief available under subsection 129(c)(1)."[146] But that does not indicate in any way that this relief would be exclusive.

117. Rather, the SAA plainly indicates that relief under section 129 is ***not*** necessarily exclusive. The paragraph of the SAA immediately preceding the paragraph cited by Vietnam

[144] H.R. Doc. No. 103-316, Vol. 1 (Exhibit VN-34). Of note, we agree with Vietnam that the SAA is an authoritative interpretive tool. *See* Section 102(d) of the URAA, 19 U.S.C. § 3512(d) (explaining that Congress regards the SAA "as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and {the URAA} in any judicial proceeding in which a question arises concerning such interpretation or application") (Exhibit VN-33). The panels in both *US – Export Restraints* and in *US – Section 129(c)(1)* accepted the legal status of the SAA as an authoritative interpretive tool of the URAA. *See US – Export Restraints*, paras. 8.93-98, 8.100; *US – Section 129(c)(1)*, paras. 6.35-38.

[145] Vietnam First Written Submission, paras. 221 – 223.

[146] Vietnam First Written Submission, para. 221.

acknowledges that there may be ways to implement DSB recommendations and rulings besides section 129, such as through an administrative review.[147]

118. In fact, the SAA plainly envisions scenarios such as the following: (1) an adverse WTO report finds that Commerce has applied a WTO-inconsistent methodology in an AD or CVD proceeding, resulting in a rate of duty in excess of what would have been determined consistent with WTO rules; (2) the date that USTR directs implementation is (for example) January 1, 2008; (3) on January 1, 2008, as a consequence of the United States' retrospective assessment system, many entries under the relevant AD or CVD order remain unliquidated (e.g., entries during 2007 would be subject to an administrative review that would be initiated in early 2008 and not completed until late-2008 and would cover those 2007 entries).

119. In such a scenario, section 129(c)(1) does not prevent Commerce from changing the methodology to be applied in that review or from rendering determinations on prior unliquidated entries in that administrative review consistent with DSB recommendations and rulings. Indeed, as discussed above, section 123 expressly provides for such changes.[148] The revised methodology could be applied to unliquidated entries that entered the United States during 2007, well before the implementation date under section 129 (*i.e.*, January 1, 2008).[149]

120. The scenario outlined above, in which a new methodology developed under section 123 is applied to prior unliquidated entries via an administrative review, has, in fact, occurred in various proceedings. Specifically, in response to DSB recommendations and rulings, Commerce made new, WTO-consistent determinations and implemented them at USTR's direction under section 129.[150] The new determinations made pursuant to section 129 affected entries "entered or withdrawn from warehouse, for consumption, on or after June 8, 2012."[151] Meanwhile, Commerce conducted administrative reviews of these antidumping duty orders[152] and applied to

[147] SAA, pp. 1025-1026 ("[f]urthermore, while subsection 129(b) creates a mechanism for making *new determination in response to a WTO report, new determinations may not be necessary in all situations.* In many instances, such as those in which a WTO report merely implicates the size of a dumping margin or countervailable subsidy rate (as opposed to whether a determination is affirmative or negative), *it may be possible to implement the WTO report recommendation in a future administrative review* under section 751 of the Tariff Act.") (emphasis added) (Exhibit VN-34).

[148] *See* Section 123(g) of the URAA, 19 U.S.C. § 3533 (Ex. US-10).

[149] Because the potential to apply revised methodologies was well-understood, the SAA recognized that "new determinations {(under section 129)} may not be necessary in all situations." SAA, p. 1025 (Exhibit VN-34).

[150] *See Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act: Stainless Steel Plate in Coils From Belgium, Steel Concrete Reinforcing Bars From Latvia, Purified Carboxymethylcellulose From Finland, Certain Pasta From Italy, Purified Carboxymethylcellulose From the Netherlands, Stainless Steel Wire Rod From Spain, Granular Polytetrafluoroethylene Resin From Italy, Stainless Steel Sheet and Strip in Coils From Japan*, 77 Fed. Reg. 36,257 (June 18, 2012) ("*Section 129 Notice*") (Exhibit VN-42, Determination 19-1).

[151] *See Section 129 Notice*, p. 36,260 (Exhibit VN-42, Determination 19-1).

[152] *See, e.g., Purified Carboxymethylcellulose from the Netherlands: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Intent to Rescind*, 77 Fed. Reg. 46,024 (Aug. 2, 2012) (in which Commerce applied new methodology for calculating weighted-average dumping margins and assessment rates for entries entered or withdrawn from warehouse, for consumption, between July 1, 2010, and June 30, 2011) (Exhibit US-18); *Certain Pasta from Italy: Notice of Preliminary Results of Antidumping Duty Administrative Review, Preliminary No Shipment Determination and Preliminary Intent to Revoke Order, in Part*, 77 Fed. Reg. 46,377

prior unliquidated entries a methodology specifically developed under section 123 to address DSB recommendations and rulings.[153] Thus, Vietnam is simply mistaken when it claims that section 129(c)(1) has precluded Commerce from making WTO-consistent determinations with respect to prior unliquidated entries.

c. Vietnam's Arguments as to the General "Nature" of Section 129(c)(1) are Inconsistent With Other Provisions of the URAA and the SAA

121. Vietnam further argues that the general "nature" of section 129 supports its assertion that section 129 would be the exclusive authority under U.S. law to implement DSB recommendations and rulings.[154] This is incorrect, as Vietnam misconstrues the provisions of the URAA on which it relies, such as section 102.

122. Section 102(a) of the URAA defines the "Relationship of {the Uruguay Round Agreements} to United States law."[155] Section 102 makes explicit that U.S. law prevails over any inconsistent provision of the Uruguay Round Agreements. To this end, section 102(a)(1) provides that "{n}o provision of any of the Uruguay Round Agreements . . . that is inconsistent with any law of the United States shall have effect." Section 102(a)(2)(B) provides that "{n}othing in this act shall be construed . . . to limit any authority conferred under any law of the United States . . . unless specifically provided for in this Act."

123. Nothing in section 102 of the URAA indicates, however, that section 129 would be the exclusive authority under United States law to implement DSB recommendations and rulings. In fact, section 102(a)(2)(B) supports the opposite position – that "{n}othing in this Act shall be construed . . . to limit any authority conferred under any law of the United States . . . unless specifically provided for in this Act." Because section 129(c)(1) does not specifically provide any restrictions on Commerce's authority under the AD and CVD laws to make separate determinations under separate segments of the same proceeding, nothing in section 129(c)(1) may be construed to limit Commerce's authority to make such determinations. And of course, section 129(c)(1) does not restrict Congress from taking action to bring the United States into compliance with DSB recommendations and rulings.

(Aug. 3, 2012) (in which Commerce applied new methodology for calculating weighted-average dumping margins and assessment rates for entries entered or withdrawn from warehouse, for consumption, between July 1, 2010, and June 30, 2011) (Exhibit US-19), unchanged in 78 Fed. Reg. 9,364 (Feb. 8, 2013) (Exhibit US-19); and *Purified Carboxymethylcellulose from Finland; Notice of Preliminary Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 47,036 (Aug. 7, 2012) (in which Commerce applied new methodology for calculating weighted-average dumping margins and assessment rates for entries entered or withdrawn from warehouse, for consumption, between July 1, 2010, and June 30, 2011) (Exhibit US-20).

[153] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification*, 77 Fed. Reg. 8,101 (Feb. 14, 2012) (Exhibit VN-55). Commerce developed this methodology pursuant to Section 123 of the URAA. *See ibid.*, p. 8102 (Exhibit VN-55).

[154] Vietnam First Written Submission, paras. 224-226.

[155] Section 102(a) of the URAA, 19 U.S.C. § 3512(a) (Exhibit VN-33).

124. In discussing the general "nature" of section 129(c)(1), Vietnam similarly misrepresents a passage from the SAA. Specifically, Vietnam notes that the SAA states that: "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it."[156] The statement at issue is unremarkable. Clearly, only the Member concerned can decide whether and how to implement DSB recommendations and rulings. The statement says nothing about the relationship between section 129(c)(1) and other U.S. laws, as Vietnam suggests. The statement simply means that Congress and the Administration can, through legislative or administrative action, implement DSB recommendations and rulings. Vietnam omits this context in its argument.

125. Accordingly, the general "nature" of section 129(c)(1) supports the fact that section 129(c)(1) is not, as such, inconsistent with the AD Agreement.

d. The Implementation of U.S. International Trade Commission Determinations Made Pursuant to Section 129 Does Not Demonstrate That Section 129(c)(1) Requires the United States to Take WTO-Inconsistent Action With Respect to Prior Unliquidated Entries

126. Vietnam also argues that section 129(c)(1) is the exclusive method by which DSB recommendations and rulings may be implemented because, in instances where the U.S. International Trade Commission ("ITC") implements DSB recommendations and rulings by changing its injury determination from affirmative to negative, the particular AD or CVD order at issue is revoked as of the implementation date.[157] Thus, according to Vietnam, there is no way to prevent the assessment of duties on prior unliquidated entries.[158]

127. Again, Vietnam's argument is based on a fundamental misunderstanding. As the panel explained in *US – Section 129(c)(1)*, "only determinations made and implemented under section 129 are within the scope of section 129(c)(1)"[159] and that "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."[160] Vietnam's characterization of the mechanism provided under section 129 for implementation of DSB recommendations and rulings with respect to the ITC simply misses the point. The provisions applicable to the ITC speak only to determinations made under section 129. They say nothing about what the United States may decide to do with respect to prior unliquidated entries in other segments of the same proceeding.

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[156] SAA, p. 659 (Exhibit VN-34); Vietnam First Written Submission, para. 224.

[157] *See* Vietnam's First Written Submission, paras. 227 - 234.

[158] *See ibid.*

[159] *See US – Section 129(c)(1)*, para. 6.53.

[160] *US – Section 129(c)(1)*, para. 6.80.

128. Thus, the purported differing results with respect to ITC and Commerce determinations do not support Vietnam's argument that section 129(c)(1) "serves as an absolute legal bar" to acting in a WTO consistent manner with respect to prior unliquidated entries.[161]

2. Vietnam's Arguments Fail to Demonstrate That the Panel Erred in *US – Section 129(c)(1)*

129. Vietnam suggests that the Panel not follow the panel report in *US–Section 129(c)(1)* because the argument advanced by Canada in that panel proceeding – that section 129(c)(1) was an absolute bar to any refunds of duties on prior unliquidated entries – has turned out to be correct.[162] As the United States has explained above, not only does section 129(c)(1) ***not*** preclude the implementation of adverse DSB recommendations and rulings under other statutory authority, but Congress and the Executive Branch of the U.S. Government specifically contemplated that such implementation would occur.[163] And, as discussed above, such actions have occurred.

130. Vietnam also relies on the decision of the U.S. Court of International Trade ("CIT") in *Corus Staal, BV v. United States*.[164] That domestic court decision, however, in no way provides any support for Vietnam's contentions.

131. In fact, Vietnam's arguments are the same as the argument made by Canada and that the panel found to be baseless. First, the cited passages in *Corus Staal* do not say that section 129(c)(1) prevents WTO-consistent liquidation of prior unliquidated entries. In particular, Vietnam relies on the court's statement that "revocation of an antidumping order applies

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[161] Vietnam's remaining arguments are unpersuasive. First, Vietnam states that the United States confirmed Vietnam's overly-restrictive reading of section 129(c)(1) in *U.S.—Section 129(c)(1)*. *See* Vietnam's First Written Submission, para. 223 (citing *U.S.—Section 129(c)(1)*, paras. 3.85-3.121). To the contrary, the United States explained that while section 129(c)(1) only addresses entries that entered on or after the implementation date, that provision did not require the United States to act in a WTO-inconsistent manner with respect to prior unliquidated entries. Instead, the United States reasoned that any such prior unliquidated entries would be addressed by "a *separate* determination in a *separate* segment of the proceeding" and that section 129(c)(1) "does not mandate that [Commerce] take (or preclude it from taking) any particular action in any separate segment of the proceeding." *See U.S.—Section 129(c)(1)*, para. 3.76. Second, Vietnam contends that the United States Congress did not have the benefit of the Appellate Body's discussion of prospective compliance in *U.S.—Zeroing (Japan)*. *See* Vietnam First Written Submission, para. 223 (citing *U.S.—Zeroing (Japan) (AB)*, para. 161). But this argument presumes that section 129(c)(1) precludes the United States form taking WTO-consistent action with respect to prior unliquidated entries. As explained above, it plainly does not.

[162] Vietnam First Written Submission, paras. 246 -254. Vietnam concedes that it offers "nearly identical claims" to those raised by Canada in *U.S.—Section 129(c)(1)* and argues that the United States has violated almost all of the same obligations in the AD Agreement cited by Canada in *US—Section 129(c)(1)*. *See* Vietnam's First Written Submission, para. 213; *see also* Vietnam Panel Request at 11-12 (where Vietnam asserts that Section 129(c)(1) necessarily results in a breach of United States obligations under Articles 1, 9.2., 9.3, 11.1, and 18.1 of the AD Agreement) (Exhibit VN-02); *US – Section 129(c)(1)*, para. 6.27 (where Canada claims that Section 129(c)(1) necessarily results in a breach of United States obligations under Articles 1, 9.3, 11.1, and 18.1 of the AD Agreement, among other provisions).

[163] *See* SAA, pp. 1025-1026 (Exhibit VN-34).

[164] Vietnam First Written Submission, para. 250 (quoting *Corus Staal BV v. United States*, 515 F. Supp. 2d 1337, 1347 (Ct. Int'l Trade 2007) ("*Corus Staal*") (Exhibit VN-36)).

prospectively on a date specified by the USTR."[165] But as explained above, revocation through section 129 is only one of many possible ways in which DSB recommendations and rulings might be implemented. Many other options might exist depending on the facts of the particular case,[166] and section 129(c)(1) does not preclude the United States from pursuing them. This statement simply clarifies that, if USTR directed Commerce to implement the determination under section 129 by revoking the order, that revocation would become effective as of the implementation date. This would not prevent prior unliquidated entries being reviewed by Commerce in other segments of the same proceeding from being liquidated at lower rates in response to DSB recommendations and rulings or from Congress taking action vis-à-vis prior unliquidated entries.

132. Vietnam also relies on the court's statement that section 129(c) "supercede{s} the broad requirement of {the U.S. AD law} for imposing antidumping duties."[167] This statement simply makes clear that determinations made pursuant to section 129(a) or (b) and implemented pursuant to section 129(c)(1) supersede the previous determinations found to be WTO-inconsistent by the DSB. Such an effect for determinations made and implemented pursuant to section 129 is necessary to bring the measure in question into conformity with the DSB recommendations and rulings. Because section 129(c)(1) applies only to entries of subject merchandise that entered on or after the implementation date, however, this does not mean that section 129(c)(1) prevents WTO-consistent action on prior unliquidated entries.

133. The limited meaning of the two *Corus Staal* passages quoted by Vietnam becomes more obvious when their context is considered. In the administrative segment under review in that case (*i.e.*, the first administrative review), Corus Staal entered subject merchandise that was subject to an AD order on certain steel products from the Netherlands.[168] Commerce calculated the dumping margin for Corus Staal's entries using the zeroing methodology.[169] Meanwhile, Commerce's use of this methodology in the underlying AD investigation was found to be WTO-inconsistent.[170] In the context of a section 129 determination, Commerce re-calculated the dumping margin assessed on Corus Staal's entries made during the investigation without zeroing, which eliminated the margins.[171] In light of these re-calculations, and because Corus Staal was the only respondent subject to the order, USTR directed Commerce to revoke the order as of April 23, 2007, pursuant to section 129(c)(1).[172] However, after the implementation date, Commerce instructed Customs to collect AD duties on prior unliquidated entries.

134. Corus Staal asked the CIT to rule that Commerce could not instruct U.S. Customs and Border Protection ("CBP") to assess AD duties on prior unliquidated entries (*i.e.*, entries that

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[165] *Ibid.*

[166] *See generally* Section 129(a)-(b) of the URAA (19 U.S.C. § 3538(a)-(b)) (Exhibit VN-31).

[167] Vietnam First Written Submission, para. 250.

[168] *See Corus Staal*, 515 F. Supp. 2d, pp. 1339-40 & n.15 (Exhibit VN-36).

[169] *See ibid.*

[170] *See ibid*.

[171] *See ibid*, p. 1341.

[172] *See ibid.*

entered before April 23, 2007), because the AD order was not valid under United States law at the time that Commerce sent the instructions.[173] The CIT denied the request, ruling that the AD order had been valid under United States law until April 23, 2007, such that the assessment of AD duties on prior unliquidated entries had been proper.[174] 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 AD margins calculated in the first administrative review; rather, it demonstrates only that Commerce did not make such a revision in that particular instance.

135. Commerce did not argue in *Corus Staal* that it had no authority to change those margins, only that that the implementation of the DSB recommendations and rulings under section 129(c)(1) did not affect the validity of the AD duties assessed on prior unliquidated entries. This was the only issue that the CIT was required to resolve in order to reach a decision in *Corus Staal* and the only issue that the CIT, in fact, decided.

136. Finally, Vietnam argues that numerous section 129 determinations implemented by Commerce reveal a consistent pattern of not applying such determinations to prior unliquidated entries, which can only flow from an interpretation that section 129(c)(1) precludes this result.[175] First, this is simply not true, as a matter of either fact or law. As we have shown, there have, in fact, been numerous instances in which Commerce has modified its treatment of prior unliquidated entries.[176] Moreover, as explained above, Vietnam's interpretation is simply not, and has never been, the correct interpretation of section 129(c)(1).

137. Second, the examples cited by Vietnam only show how section 129(c)(1) has been applied. These examples do not show what other options the United States may have to implement DSB recommendations and reports or what the United States may do in the future. And as discussed above, this is a fatal flaw in Vietnam's argument.

3. Conclusion

138. For the foregoing reasons, Vietnam has failed to establish its "as such" claims against section 129(c)(1). As a consequence, the United States respectfully requests that the Panel

[173] *See ibid*, pp. 1343-44.

[174] *See ibid.*, p. 1347.

[175] *See* Vietnam First Written Submission, paras. 255-266.

[176] *See, e.g.*, *Purified Carboxymethylcellulose from the Netherlands: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Intent to Rescind*, 77 Fed. Reg. 46,024 (Aug. 2, 2012) (in which Commerce applied new methodology for calculating weighted-average dumping margins and assessment rates for entries entered or withdrawn from warehouse, for consumption, between July 1, 2010, and June 30, 2011) (Exhibit US-18); *Certain Pasta from Italy: Notice of Preliminary Results of Antidumping Duty Administrative Review, Preliminary No Shipment Determination and Preliminary Intent to Revoke Order, in Part*, 77 Fed. Reg. 46,377 (Aug. 3, 2012) (in which Commerce applied new methodology for calculating weighted-average dumping margins and assessment rates for entries entered or withdrawn from warehouse, for consumption, between July 1, 2010, and June 30, 2011) (Exhibit US-19), unchanged in 78 Fed. Reg. 9,364 (Feb. 8, 2013) (Exhibit US-19); and *Purified Carboxymethylcellulose from Finland; Notice of Preliminary Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 47,036 (Aug. 7, 2012) (in which Commerce applied new methodology for calculating weighted-average dumping margins and assessment rates for entries entered or withdrawn from warehouse, for consumption, between July 1, 2010, and June 30, 2011) (Exhibit US-20).

reject Vietnam's claims that section 129(c)(1) is as such inconsistent with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the AD Agreement.

D. THE TREATMENT OF MULTIPLE COMPANIES IN VIETNAM AS A SINGLE VIETNAM-GOVERNMENT EXPORTER/PRODUCER WAS NOT INCONSISTENT WITH THE ANTIDUMPING AGREEMENT

139. Vietnam asserts that the AD Agreement precludes the United States from assigning an individual margin of dumping and an individual antidumping duty to a group of exporters and producers of Vietnamese-origin shrimp that are in a relationship with the Government of Vietnam such that they legally and factually constitute a single entity, specifically a Vietnam-government entity. Vietnam has failed to demonstrate the existence of a measure of general and prospective application that may be challenged "as such" as inconsistent with the AD Agreement. Besides, Commerce's decisions in the covered reviews to identify a Vietnam-government entity and then assign that entity an individual margin of dumping and an individual antidumping duty were not inconsistent with the obligations of the United States under the AD Agreement. In fact, it is fully consistent with the text of the AD Agreement for investigating authorities to treat related companies as parts of a single exporter or producer for the purpose of determining a dumping margin. Further, Vietnam's reliance on *EC – Fasteners* is misplaced: when read closely, the analysis of the Appellate Body supports, rather than undermines, Commerce's approach to the issue of when legally separate exporters may be considered part of a single entity. Vietnam's reliance on that report is also misplaced because the report addressed a different factual situation than the one that arises in the covered reviews, and to the extent that Vietnam relies on certain reasoning in *EC – Fasteners*, that reasoning did not take account of relevant context provided by the Protocol of Accession of Viet Nam to the WTO ("Accession Protocol").

1. Vietnam Has Failed to Demonstrate the Existence of a Measure of General and Prospective Application That May Be Challenged "As Such" as Inconsistent with the AD Agreement

140. Vietnam contends 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."[177] There is no such "practice" measure.

141. The Appellate Body has identified several criteria in evaluating whether a 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.[178] In addition, the Appellate Body has explained that "particular 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."[179]

[177] Vietnam First Written Submission, para. 94.

[178] *US – Zeroing (EC) (AB)*, para. 198.

[179] *US – Zeroing (EC) (AB)*, para. 198 (emphasis in original).

142. In addition, past panels have approached the issue of whether "practice" may constitute a measure with caution, and have expressed difficulties with accepting such an assertion. The Panel in *US – Zeroing (Japan)* explained that its finding that a measure existed did not rest on repeated application of a methodology: "The evidence before us indicates not only that USDOC *invariably applies* zeroing but also that USDOC has repeatedly described its zeroing methodology in terms of a long-standing policy that it considers to be consistent with its statutory obligations. Therefore, while we believe an "as such" claim based solely on consistent practice raises serious conceptual questions, we consider that it is not necessary for us in the present case to opine on those questions."[180] Other panels have rejected arguments that "practice" can be a measure that gives rise to a breach of WTO obligations.[181]

143. Vietnam has not established that the alleged NME-wide entity rate "practice" exists and can be a measure. First, a challenge to "practice" as a measure raises the same "serious conceptual difficulties" referred to by the *US – Zeroing (Japan)* panel and other panels. The United States does not see, and Vietnam does not explain, how a "practice" can set out a rule or norm of general or prospective application. Second, in relation to the alleged "practice," Vietnam has not demonstrated that Commerce "invariably applies" the alleged "practice" that is subject to its various arguments. In support of its position that the United States has the alleged "practice," Vietnam cites several paragraphs from Commerce's antidumping manual.[182] However, the manual itself clearly states that it "is for the internal training and guidance of Import Administration (IA) personnel only, and the practices set out herein are subject to change without notice. This manual cannot be cited to establish DOC practice."[183]

144. And while Vietnam argues that the U.S. practice of determining the Vietnam-government rate amounts to a breach, as such, of Article 6.8, the only support that Vietnam provides that such "practice" exists is two sentences from the antidumping manual, neither of which requires Commerce to base the "NME-wide entity rate" on the basis of facts available.[184] Vietnam itself concedes that "[t]he USDOC retains broad discretion on the method for calculating the NME-wide entity rate." Thus, even Vietnam does not argue that this alleged "practice" exists and is invariably applied by Commerce.

145. In sum, Vietnam has failed to establish existence of an alleged "practice" as a measure. Accordingly, Vietnam cannot establish a *prima facie* case for an "as such" inconsistency with the

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[180] *US – Zeroing (Japan)*, para. 7.54.

[181] *See, e.g.*, *US – Export Restraints*, para. 8.126 ("[P]ast practice can be departed from as long as a reasoned explanation, which prevents such practice from achieving independent operational status in the sense of doing something or requiring some particular action…US 'practice' therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada."); *US – Steel Plate (India)*, paras. 7.19-7.22.

[182] See, e.g., Vietnam First Submission, paras. 95-106, 165, citing Chapter 10, Non-Market Economies (NME), Department of Commerce 2009 Antidumping Manual, pp. 3, 7-8 (Exhibit VN-24).

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

[184] Chapter 10, Non-Market Economies (NME), Department of Commerce 2009 Antidumping Manual, p. 7. (Exhibit VN-24).

AD Agreement given that it has not brought forward evidence that what it describes as "practice" is a measure.

2. Treating Related Companies in the Covered Reviews as a Single Exporter or Producer for the Purpose of Determining a Dumping Margin is Consistent with Articles 6.10 and 9.2 of the AD Agreement

146. Vietnam asserts that Articles 6.10 and 9.2 of the AD Agreement requires a Member to calculate an *individual* antidumping margin and the assessment of *individual* antidumping duties, respectively, for every Vietnamese exporter even if an exporter is related to the Government of Vietnam.[185] Thus, according to Vietnam, Commerce was precluded from treating multiple companies as part of the Vietnam-government producer or exporter ("Vietnam-government entity").[186] Vietnam's claim fails because treating related companies in the covered reviews as a single exporter or producer for the purpose of determining a dumping margin is consistent with Articles 6.10 and 9.2 of the AD Agreement.

a. Article 6.10 Does Not Preclude Investigating Authorities from Treating Multiple Companies as a Single Entity

147. Article 6.10 provides that an investigating authority "shall, as a rule, determine an individual margin of dumping for each known exporter or producer of the product under investigation."[187] In applying this provision, the initial question is to identify the entity, or group of entities, that constitute each known "exporter" or the known "producer."

148. Vietnam has no basis for asserting that related entities, simply because they may be organized as a formal matter as separate companies, must be treated as individual exporters for the purpose of Article 6.10. To the contrary, context in the AD Agreement indicates that whether producers are related to each other affects the investigating authority's analysis of those firms. For example, in the context of defining the domestic industry, producers should be deemed related to each other

> if *(a)* one of them directly or indirectly controls the other; or *(b)* both of them are directly or indirectly controlled by a third period; or *(c)* together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. . . . [O]ne shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.[188]

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[185] Vietnam First Written Submission, para. 121-132.

[186] Vietnam First Written Submission, para. 121-127.

[187] *See* Article 6.10 of the AD Agreement. The Appellate Body outlined at least four exceptions to the Article 6.10 requirement to determine an individual margin of dumping: (1) sampling (Article 6.10); (2) unknown exporters or producers (Article 6.10); (3) impractical to do so (Articles 6.10 and 9.2); and (4) related exporters or producers (Article 9.5). *EC – Fasteners (AB)*, paras. 319, 324, 326, 329, 348.

[188] Article 4.1(i) of the AD Agreement, n.11.

149. Similarly, Article 9.5 establishes an obligation to carry out a review to determine an "individual" margin of dumping for a new shipper "provided that the[] exporter[] or producer[] can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product." This provision indicates that such an exporter that cannot demonstrate that it is not related to an exporter or producer subject to the duty would not be entitled to an "individual" margin of dumping.

150. Article 6.10 uses similar language: the authority is to establish an "individual" margin of dumping for each known exporter or producer. But where exporters or producers are sufficiently related, they are not economically independent and would not have "individual" margins. That is, depending then on the facts of a given situation, an investigating authority may determine that legally distinct companies should be treated as a single "exporter" or "producer" based on their activities and relationships. As noted by the Appellate Body in *EC – Fasteners*, this includes consideration of actual commercial activities and relationships of companies rather than merely their nominal status as legally distinct companies.[189]

151. In sum, Article 6.10 does not require a Member to find that every company is an independent exporter or producer and thereby entitled to an individual margin of dumping. Rather, where exports or producers are related operationally or legally, it may be appropriate to treat them as related entities with respect to their pricing decisions. Therefore, contrary to Vietnam's argument, Article 6.10 does not preclude Commerce from treating multiple companies as a single entity, including, where appropriate, a Vietnam-government entity.

b. Article 9.2 Also Does Not Preclude Investigating Authorities from Treating Multiple Companies as a Single Entity

152. Vietnam argues that Article 9.2 reinforces its proposed interpretation of Article 6.10 that related exporters and suppliers must be individually investigated.[190] Vietnam's argument regarding Article 9.2 suffers from the same misunderstanding that infects its argument regarding Article 6.10.

153. Article 9 of the AD Agreement does not govern the determination of rates of duty in antidumping proceedings, but the "imposition and collection" of antidumping duties after those proceedings have determined a rate. Article 9.2 provides that "when" antidumping duties are being imposed, they shall be collected in appropriate amounts on a non-discriminatory basis from all sources found to be dumped and causing injury. The requirement that collection be on a non-discriminatory basis means that antidumping duties must be imposed on imports from all sources found to be dumped and at the appropriate rate. Differences in duty rates must reflect differences in the dumping margin for the source. In other words, if one source is found to be dumping at a rate of 25 percent, all exports from that source must bear the 25 percent duty.

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[189] *EC – Fasteners (AB)*, para. 376 ("Whether determining a single dumping margin and a single anti-dumping duty for a number of exporters is inconsistent with Articles 6.10 and 9.2 will depend on the existence of a number of situations, which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity")

[190] Vietnam First Written Submission, paras. 128-132.

154. Article 9.2 also states that antidumping duties shall be "levied in the appropriate amounts in each case." Vietnam argues that the same duty rate for different Vietnamese entities cannot be "appropriate" under Article 9.2.[191] This is simply a restatement of Vietnam's argument under Article 6.10 that Commerce may not treat entities that, in fact, are branches of the Government of Vietnam as part of that government As in the case of its Article 6.10 argument, Vietnam fails to recognize that determining whether a group of companies are in a close enough relationship to support their treatment as a single entity is a decision that an investigating authority must make before it can know how to calculate and apply duties to those companies' exports. If an investigating authority concludes that the relationship between multiple companies is sufficiently close to support treating them as a single entity or "source," an investigating authority may apply a single duty rate to all of those companies' exports, even under Vietnam's construction of Article 9.2. Nothing in Article 9.2 prohibits such treatment, nor does Article 9.2 set out criteria for an investigating authority to examine before concluding that a particular firm or group of firms constitutes a single entity.[192]

155. In sum, Article 9.2 is a non-discrimination provision that directs Members to apply antidumping duties in "the appropriate amounts in each case" for all sources found to be dumped and causing injury. The "appropriate" amount of the antidumping duty to be collected will vary from one source to another depending on the amount of dumping involved. Because each source of imports may have been dumped to varying degrees, "the appropriate amounts" of antidumping duty that may be levied "in each case" are those amounts calculated for each source as determined by the investigating authority. Therefore, contrary to Vietnam's argument, Article 9.2 does not preclude Commerce from treating multiple companies as a single entity, including, where appropriate, a Vietnam-government entity.

3. Vietnam's Protocol of Accession Supports Treating Multiple Companies in the Covered Reviews as Part of a Single Vietnam-Government Entity for the Purpose of Determining Dumping Margins

156. Vietnam's Accession Protocol reflects the rights and obligations of Vietnam upon accession to the WTO. During the accession process, Vietnam described its ongoing shift away from central planning. Members' concerns about the extent to which this shift had occurred are reflected in the Report of the Working Party on the Accession of Viet Nam ("Working Party

[191] Vietnam First Written Submission, paras. 128-132.

[192] The Article 9.2 phrase "the appropriate amounts in each case" further suggests a requirement that antidumping duties be levied in the "proper" or "fitting" amounts, in each "instance" or "occurrence" of levying antidumping duties that otherwise satisfies the obligation not to discriminate between sources found to be dumped. The ordinary meaning of the term "appropriate" includes "specially suitable (for, to); proper, Fitting. *The New Shorter Oxford English Dictionary* (1993), p. 103 (Exhibit US-21). The term "case" is defined as "an instance of a thing's occurrence, a circumstance, a fact, etc." *Ibid.*, p. 345. In this context, the "thing" that is occurring is the levying of an antidumping duty on imports from a source found to be dumped. Finally, use of the definite article "the" before "appropriate amounts" suggests that "the appropriate amounts in each case" is not an open-ended or subjective concept. Instead, "the appropriate amounts" (rather than "in an appropriate amount" or "in appropriate amounts") is an objective concept. To be objective, the metric for "the appropriate amounts" must be known and defined. The rules set out in the AD Agreement itself thus provide the basis on which it can be ascertained if the amounts are "the" appropriate ones. That amount must be determined in each "instance" or "occurrence" of levying a duty on an imported product. Therefore, the amount of antidumping duties imposed should correspond to the rate of dumping determined for imports from a particular source.

Report"). These concerns demonstrate that not all Members were convinced that market-economy conditions prevailed in Vietnam.

157. Against this backdrop, Members had two options. The first option was to make a common factual determination and reach consensus on whether Vietnam was a market economy or non-market economy and to devise common antidumping rules for all Members to apply. The second option was for each Member to decide individually, under their own respective national laws, on their understanding of Vietnam's economy and the appropriate treatment for Vietnamese respondents on a case-by-case basis. Due to the difficulties associated with reaching a consensus on the status of Vietnam's economy, Members chose, and Vietnam agreed, to reserve discretion to determine the appropriate treatment of Vietnamese respondents in antidumping proceedings on a case-by-case basis. Therefore, under the Protocol, a Member can find that non-market economy conditions prevail in Vietnam, as the starting point for a discussion about the extent to which market economy conditions actually prevail in the industry in question, to decide whether market treatment for Vietnamese respondents is warranted. Alternatively, a Member can find that market economy conditions prevail in Vietnam, as the starting point for a discussion about the extent to which non-market-economy conditions actually prevail in the industry in question to decide whether non-market treatment for Vietnamese respondents is warranted. This approach preserved for Members the flexibility to adjust their antidumping policy and practice as Vietnam's reforms unfolded.

158. The Protocol, by design, does not impose on Members any market or non-market characterization of Vietnam's economy, factual or otherwise, as a general rule. It simply permits a Member, as a starting point for further discussion, to find for purposes of its own antidumping proceedings that either market economy conditions prevail or non-market economy conditions prevail in the industry in question.

159. The Accession Protocol thus provides important context in terms of deciding which entities in Vietnam should be considered as a single entity for purposes of Article 6.10.[193] In particular, the Protocol supports Commerce's: (1) decision to calculate the normal value for the shrimp destined for consumption in Vietnam based on a non-market economy (NME) methodology and its continued use of this methodology; (2) recognition that multiple companies may comprise a single exporter or producer, i.e., a single Vietnam-government entity; and (3) understanding that the Government of Vietnam exerts control or material influence over entities

[193] The Accession Protocol provides at paragraph I-2 that: "This Protocol, which shall include the commitments referred to in paragraph 527 of the Working Party Report, shall be an integral part of the WTO Agreement." Exhibit VN-29. Paragraph 527 of the Working Party Report provides, *inter alia*, that the commitments of paragraph 255 of the Working Party Report "had been incorporated in paragraph 2 of the Protocol of Accession of Viet Nam to the WTO." Exhibit US-23. Paragraph 255 of the Working Party Report provides, at paragraph (d), that Viet Nam need not be treated as a market economy until it has established, "pursuant to the national law of the importing WTO Member, that market economy conditions prevail . . . ." *Ibid.* In addition, Article XII:1 of the *Marrakesh Agreement Establishing the World Trade Organization* provides that "[a]ny State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO." Therefore, the Accession Protocol, including paragraph 255 of the Working Party Report, is enforceable in WTO dispute settlement proceedings. *See, e.g.*, *China – Auto Parts (AB)*, para. 253 (making findings on a provision of the Working Party Report that was incorporated by reference into the Accession Protocol and therefore, enforceable in WTO dispute settlement proceedings).

located in Vietnam and can impact their decisions about the production, pricing or costs of products destined for consumption in Vietnam and for export.

a. The Protocol Permits Members to Determine Normal Value in Vietnam Pursuant to a Methodology Not Based on Prices or Costs in Vietnam Because Market Economy Conditions Do Not Prevail There

160. During the accession process, Members expressed concerns in the Working Party Report about how the fact that Vietnam had not yet transitioned to a full market economy would affect the conduct of antidumping and countervailing duty investigations and the application of the AD and SCM Agreement. As a result, the Working Party Report as incorporated into Vietnam's Accession Protocol provides that an "importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product."[194]

161. Specifically, Paragraph 255(a) of the Working Party Report provides that importing Members need not calculate normal value on the basis of Vietnamese prices or costs for an industry subject to an antidumping investigation.[195] Paragraph 255(d) further provides, in part, that "the non-market economy provisions" of paragraph 255(a) no longer apply to a specific industry or sector in situations where Vietnam "establish[ed], pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector."[196] Therefore, where Vietnam has not established under the national law of the importing Member that it is a market economy, or the Vietnamese producers under investigation have failed to "clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product," an importing Member can calculate normal value based on a NME methodology.[197]

162. The Accession Protocol thus expressly provides support for Commerce's decision to calculate the normal value for the shrimp destined for consumption in Vietnam based on a NME methodology and its continued use of this methodology. In this regard, it is notable that Vietnam does not challenge before the Panel Commerce's decision to calculate the normal value for the shrimp destined for consumption in Vietnam based on a NME methodology, nor does Vietnam challenge the NME methodology that Commerce selected for its calculation of this normal value.

[194] Working Party Report, para. 255 (Exhibit US-23).

[195] *Ibid.*, para. 255(a).

[196] *Ibid.*, para. 255(d) (emphasis added).

[197] *Ibid.*, para. 255(a)(ii).

b. In Permitting Members to Determine Normal Value in Vietnam Pursuant to a Methodology Not Based on Prices or Costs in Vietnam, the Protocol Also Provides a Basis for Treating Multiple Companies in Vietnam as Part of a Vietnam-Government Entity

163. In light of the concerns expressed by Members in the Working Party Report, and the undisputed fact that Vietnam is a nonmarket economy, Vietnam's claim should be rejected that Members may not apply "special rules" to Vietnam outside of consideration of normal value.[198]

164. 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.[199] 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.[200] 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.[201]

165. Thus despite Vietnam's views during its accession negotiations that SOEs were independent economic actors responsible for their own profits and losses, 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.[202] In particular, Members of the Working Party noted that special difficulties could arise because Vietnam had not yet transitioned to a full market economy.[203]

166. Underlying the Accession Protocol then is the understanding that NME conditions prevail in Vietnam until clearly demonstrated otherwise. In NME countries, the underlying supply and demand decisions, and the attendant resource allocations, are made or fundamentally distorted by the government. They are not made by independent economic actors. In such a situation, the government effectively controls resource allocations. But when the government

[198] Vietnam First Submission, paras. 197-98.

[199] Working Party Report, paras. 56, 60 (Exhibit US-23).

[200] Working Party Report, Annex 2, Table 4, para. 83 (Exhibit US-23).

[201] Working Party Report, Annex 2, Tables 1 and 2 (Exhibit US-23).

[202] *See, e.g.,* Working Party Report, 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. *Ibid.*, para. 57.

[203] *See ibid.*, para. 254.

controls resource allocations, it effectively controls resource allocators, i.e., firms. Thus the understanding in the Accession Protocol that Vietnam is not yet a market economy is, in effect, an understanding that prices for inputs and outputs are affected by the government which, in turn, is in effect an understanding that there remains government control over all firms. In the face of such an understanding, it would make no sense to automatically assign individual dumping margins to Vietnamese exporters. On the contrary, a single "government-controlled" rate is warranted, unless and until it is clearly demonstrated that market economy conditions prevail for margin calculation and antidumping duty rate assignment purposes.[204]

167. The understanding that market economy conditions do not prevail and the logical consequence that this entails state control over firms, resulting in treating certain enterprises as parts of a government-controlled entity, is not inconsistent with Article 6.10. As explained above, Article 6.10 requires a margin of dumping for each known exporter or producer but does not require a separate margin for each legally distinct exporter that is, in fact, related to the government. The Accession Protocol supports the conclusion that Commerce may consider that there exists a Vietnam-government entity to which exporters belong.

168. In sum, in light of the Accession Protocol provisions on the application of the AD Agreement, there is nothing inconsistent with that Agreement with respect to Commerce's consideration that multiple companies may comprise a single exporter or producer, i.e., a single Vietnam-government entity.

c. The Vietnam-Government Entity Controls Pricing and Output of Exports

169. As reflected in Vietnam's Accession Protocol, an importing Member may recognize that Vietnam controls or materially influences the economic behavior of firms, such that they do not operate according to market conditions. The Accession Protocol further reflects that a Member may conclude that, despite considering all entities as part of a single Vietnam-government entity, market economy conditions exist in an industry or a sector. In *EC – Fasteners*, the Appellate Body found that "Section 15 of China's Accession Protocol[,] [which is similar to Vietnam's Accession Protocol,] permits derogation in respect of the domestic price or normal value aspect of price comparability."[205] Commerce's finding that the Government of Vietnam is legally or operationally in a position to exercise restraint or direction over entities located in Vietnam and can impact their decisions about the production, pricing, or costs of products destined for consumption in Vietnam is not in dispute. By extension then, it was logical for Commerce to consider that the Government of Vietnam simultaneously exerts control or material influence over these entities with respect to the pricing and output of identical or similar products destined for export.

[204] *See e.g., ibid*., paras. 254-255.

[205] *EC – Fasteners (AB),* para. 328.

4. *EC – Fasteners* Does Not Preclude Investigating Authorities from Finding that Multiple Companies in Vietnam Constitute a Single Vietnam-Government Entity for the Purpose of Determining Dumping Margins

170. To a large extent, Vietnam's arguments rely on the Appellate Body report in *EC – Fasteners*. In *EC – Fasteners*, the Appellate Body considered China's challenge to the European Union's presumption that multiple Chinese companies could comprise a single exporter or producer such that an individual dumping margin could be calculated for and applied to that entity. The Appellate Body determined that Article 9(5) of Council Regulation (EC) No. 1225/2009 of 30 November 2009 ("Article 9(5)"), which codified the EU's practice and presumption, was inconsistent with Articles 6.10 and 9.2 of the AD Agreement. In particular, the Appellate Body determined that the regulation improperly "conditions the determination of individual dumping margins for and the imposition of individual anti-dumping duties on NME exporters or producers to the fulfillment of the IT test," which requires an exporter or producer to demonstrate that it is separate from the government by fulfilling certain criteria.[206]

171. Vietnam's reliance on *EC – Fasteners* is misplaced. As explained further below, even aside from certain statements with which the United States would disagree, on a close reading, the Appellate Body in *EC – Fasteners* accepted the very result that Vietnam would have this Panel find WTO-inconsistent – i.e., that "the State controls or materially influences several exporters such that they could be considered as a single entity for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* and be assigned a single dumping margin and anti-dumping duty."[207]

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[206] *EC – Fasteners (AB)*, para. 385. The "individual treatment ('IT') test" refers to the criteria outlined in Article 9(5) of the Council Regulation (EC) No. 1225/2009, which provides for an exception to the specification of a "country-wide" rate in European Union cases. *See* Panel Report, *European Communities – Definitive Antidumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397, adopted 28 July 2011, para. 7.48-7.49 (*EC – Fasteners (Panel)*). "If a producer demonstrates that it meets these conditions and is thus entitled to IT, the EU authorities will specify an individual duty rate for that producer." *Ibid.* Article 9(5) provides:

> Where Article 2(7)(a) applies, an individual duty shall, however, be specified for the exporters which can demonstrate, on the basis of properly substantiated claims that:
>
> (a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;
>
> (b) export prices and quantities, and conditions and terms of sale are freely determined;
>
> (c) the majority of the shares belong to private persons; state officials appearing on the board of directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;
>
> (d) exchange rate conversions are carried out at the market rate; and
>
> (e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.

[207] *EC – Fasteners (AB)*, para. 380.

a. The Antidumping Agreement Does Not Insist that Investigating Authorities Initially Treat Every Entity as an Individual Exporter or Producer

172. In *EC – Fasteners*, the Appellate Body recognized that Article 6.10 does not preclude the possibility that nominally or legally-independent entities may be treated as a single exporter or producer when that determination is based on facts and evidence submitted in that investigation.[208] According to the Appellate Body, "[w]hether determining a single dumping margin and a single anti-dumping duty for a number of exporters is inconsistent with Articles 6.10 and 9.2 will depend on the existence of a number of situations, which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity"[209]:

> These situations may include: (i) the existence of corporate and structural links between the exporters, such as common control, shareholding and management; (ii) the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management; and (iii) control or material influence by the State in respect of pricing and output. We note that the *Anti-Dumping Agreement* addresses pricing behaviour by exporters; if the State instructs or materially influences the behaviour of several exporters in respect of prices and output, they could be effectively regarded as one exporter for purposes of the Anti-Dumping Agreement and a single margin and duty could be assigned to that single exporter. . . .[210]

Further, the criteria used for determining whether a single entity exists from a corporate perspective, while certainly relevant, will not necessarily capture all situations where the State controls or materially influences several exporters such that they could be considered as a single entity for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* and be assigned a single dumping margin and anti-dumping duty."[211]

173. As discussed in Section V.D.2, the AD Agreement requires an authority to determine an individual rate for each "exporter" or "producer." But this provision does not establish or necessarily imply that each legally separate entity will be such a "producer" or "exporter." Where producers or exporters are so related that they constitute a single economic entity, it would make no sense to determine an "individual" margin of dumping for each of them. Only the single entity would have an "individual" margin. An investigating authority thus is permitted to determine whether a given entity constitutes an "exporter" or "producer" as a condition precedent to calculating an individual dumping margin for that entity.

174. In *EC – Fasteners*, the Appellate Body determined that the EU's presumption that exporters in a non-market economy are related to the Chinese government was inconsistent with

[208] *Ibid.*, paras. 376, 382

[209] *Ibid.*, para. 376.

[210] *Ibid.*, para. 376 (emphasis added).

[211] *Ibid.*, para. 380.

Article 6.10 because it contradicted the "rule" of Article 6.10 requiring investigating authorities to determine an individual dumping margin for "each known exporter or producer."[212] The Appellate Body went on to state that "[e]ven accepting in principle that there may be circumstances where exporters and producers from NMEs may be considered a single entity for purposes of Articles 6.10 and 9.2, such singularity cannot be presumed; it has to be determined by the investigating authorities on the basis of facts and evidence submitted or gathered in the investigation."[213] In determining that the EU's regulation was inconsistent with Article 6.10, the Appellate Body thus assumed that underlying Article 6.10 is a presumption that every entity – even if there is a basis for finding a relationship with another exporter – must first be recognized as an individual exporter or producer.[214] This presumption lacks any support in the text of Article 6.10. Moreover, this finding fails to take into account or discuss the express agreement in Vietnam's Accession Protocol that Members may presume that non-market economy conditions prevail, unless and until demonstrated otherwise under the national laws of each Member.

175. Similarly, in *EC – Fasteners*, the Appellate Body noted that Article 9.2 refers to both products and suppliers.[215] Considering its conclusions regarding Article 6.10, the Appellate Body reasoned that "where an individual margin of dumping has been determined . . . the appropriate amount of anti-dumping duty that can be imposed also has to be an individual one."[216] This interpretation flows from a misreading of Article 6.10 and is not grounded in the text of Article 9.2. The presumption in *EC – Fasteners* that Articles 6.10 and 9.2 require Members to first recognize each entity as an individual exporter or producer thus was based on an improper interpretation because the Appellate Body created obligations that are not grounded in the text of these articles. However, as explained below, even under the Appellate Body's flawed interpretive approach, Commerce's determination was not inconsistent with the AD Agreement.

b. Even Under the Reasoning of *EC – Fasteners (AB)*, Commerce's Determination Regarding the Vietnam-Government Entity was Not Inconsistent with Articles 6.10 and 9.2

i. There is No Dispute that Vietnam is a Nonmarket Economy

176. At no time during the challenged proceedings did Vietnam, or any Vietnamese exporter, request Commerce to reconsider Vietnam's nonmarket economy status.[217] This is an important

[212] Article 6.10 of the AD Agreement.

[213] *EC – Fasteners (AB)*, para. 364.

[214] *Ibid.*, para. 364.

[215] *Ibid.*, para. 335.

[216] *Ibid.*, para. 339.

[217] *See* 19 U.S.C. 1677(18)(C) (Exhibit US-6) ("Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority."). In the original investigation and subsequent administrative reviews, Commerce incorporated by reference and relied on a 2002 analysis of the

distinction between this dispute and *EC – Fasteners*. In *EC – Fasteners*, China challenged the EC's finding that China is a nonmarket economy. China argued that the EC improperly relied on China's accession protocol to determine, as a basic fact, that China is a nonmarket economy such that it may be treated differently with respect to the calculation of dumping margins. The Appellate Body agreed with China that the Protocol did not necessarily provide a basis for the presumption that China is a nonmarket economy.[218]

177. In contrast, Commerce has made a factual finding that Vietnam is a nonmarket economy, a finding that Vietnam does not challenge.[219] This finding is consistent with the concerns expressed in Vietnam's Protocol. Unlike in *EC – Fasteners*, there is no question for the Panel to resolve as to whether Vietnam is a nonmarket economy. Thus, to the extent *EC – Fasteners* relied on a finding that China was not necessarily a nonmarket economy,[220] or that such status is irrelevant,[221] Vietnam's status as a nonmarket economy in this case is relevant to an inquiry of the level of government involvement in Vietnam's economy.

178. The Appellate Body's finding in *EC – Fasteners* "that the existence of a number of situations, which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity," has the potential to impact commercial decisions involving the production, pricing, or costs of the subject merchandise (i.e., the export price) as well as commercial decisions involving the foreign like product (i.e., the normal value). Thus corporate or commercial relationships whereby "one shall be deemed to control another

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market conditions in Vietnam to determine whether Vietnam had completed the process of transition towards a full market economy. 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). Commerce's 2002 analysis confirmed that Vietnam is a NME where the government maintains significant control over the Vietnamese economy. Vietnam did not challenge during the covered reviews Commerce's determination that Vietnam operates as a NME.

[218] *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.").

[219] 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). As part of its 2002 analysis, Commerce investigated the extent of government influence on the Vietnamese economy, including the extent of government ownership or control of the means of production and the extent of government control over the allocation of resources and over the price and output decisions of enterprises. Commerce found that the stated objective of the Government of Vietnam was the continued protection of, and investment in, industrial state-owned enterprises (SOEs) to ensure that these enterprises retained a key role in what the government refers to as a socialist market economy. Commerce further confirmed that the SOEs were not limited to traditional natural monopolies but extended to other industries, including the food industry. Finally, Commerce determined that the Government of Vietnam continued to exert influence throughout the Vietnamese economy. *Ibid.*

[220] *Ibid.*, para 366.

[221] *Ibid.*, para 369 ("We are also of the view that the evidence submitted by the European Union concerning NMEs in general and China in particular is not relevant to the *legal* question of whether the European Union is permitted to presume under Article 9(5) of the Basic AD Regulation that the State and the exporters are a single exporter for purposes of Articles 6.10 and 9.2 of the *Anti-dumping Agreement*."); *ibid*, para. 328 ("{W}e do not find any provision in the covered agreements that would allow importing Members to depart from the obligation to determine individual dumping margins only in respect of imports from NMEs.").

when the former is legally or operationally in a position to exercise restraint or direction over the latter"[222] affects the determination of export price in the same manner that it affects the determination of normal value.

ii. Commerce Provided Exporters in the Covered Reviews the Opportunity to Demonstrate Independence from the Vietnam-Government Entity

179. Commerce's determination that a Vietnam-government entity existed and that certain exporters, while legally separate, were in fact part of that entity, rested on adequate factual findings in the course of the relevant reviews. Despite Commerce's finding that Vietnam is an NME, Commerce provided exporters the opportunity to establish that they are independent from the Vietnam-government entity. In *EC – Fasteners*, the Appellate Body did not preclude an investigating authority from collecting and offering enough evidence to justify a presumption that a single government entity exists[223] and, in the challenged proceedings, Commerce has done so.

180. In the reviews Vietnam challenges, Commerce afforded companies the opportunity to submit information about their relationship with the Vietnam-government entity to demonstrate independence from the government. If a company previously provided positive evidence to Commerce that the Government of Vietnam did not materially influence its export activities, then the entity need only certify that its status had not changed. If the entity had not previously provided this positive evidence, then the entity needed to do so by responding to Commerce's "Separate Rate Application."[224] Assuming an entity certified that it remained unrelated or completed an acceptable Separate Rate Application, Commerce assigned the entity an individual margin of dumping (or "separate rate"). However, if a company could not demonstrate that it was sufficiently free from government influence, or chose not to assert independence from the government despite Commerce's finding that Vietnam is a NME, Commerce considered that company ineligible for its own individual rate. Instead, that company was identified as being part of the Vietnam-government entity, i.e., the entity composed of companies that have not demonstrated that they are free of government control.

181. Specifically, in each review proceeding, Commerce determines whether a company is free of government control by considering whether there are any restrictive stipulations associated with a producer's or exporter's business and export licenses and whether any legislative enactments indicate the decentralization of the control of companies.[225] Further, Commerce examines whether a company sets its own export prices independent of the

[222] Article 4.1(i) of the AD Agreement, n.11.

[223] *Ibid.*, para. 364.

[224] Separate Rate Application (Exhibit VN-23).

[225] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, in Part, of the Fourth Administrative Review*, 75 Fed. Reg. 12,206 (Exhibit VN-09); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, In Part, of the Fifth Administrative Review*, 76 Fed. Reg. 12,054 (Exhibit VN-15); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of Administrative Review*, 77 Fed. Reg. 13,547 (Exhibit VN-19).

government, whether it has the authority to negotiate and sign contracts and agreements, whether it has autonomy from the government regarding selection of management, and whether it retains the proceeds from its export sales.[226] As the table below demonstrates, the evidence that Commerce asks an entity to provide is fully consistent with those factors that the Appellate Body in *EC – Fasteners* suggests should be probed to ascertain situations "which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity"[227]:

EC – Fasteners (AB), para. 376	Separate Rate Application (VN-28), p. 2 Commerce Analysis of State Control
"[C]ontrol or material influence by the State in respect of pricing and output"	"whether each exporter sets its own export prices independent of the government and without the approval of a government authority" "whether each exporter retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses" "whether each exporter has the authority to negotiate and sign contracts and other agreements"
"[T]he existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management"	"whether each exporter has autonomy from government regarding the selection of management" "an absence of restrictive stipulations associated with an individual exporter's business and export licenses" "any legislative enactments decentralizing control of companies" "any other formal measures by the central and/or local government decentralizing control of companies"

182. Contrary to Vietnam's argument, this is not a discriminatory approach. By definition, "discrimination" involves treating similarly situated individuals differently. However, the

[226] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, in Part, of the Fourth Administrative Review*, 75 Fed. Reg. 12206 (Mar. 15, 2010) (Exhibit VN-09); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, In Part, of the Fifth Administrative Review*, 76 Fed. Reg. 12054 (Mar. 4, 2011) (Exhibit VN-15); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of Administrative Review*, 77 Fed. Reg. 13547 (Mar. 7, 2012) (Exhibit VN-19).

[227] *EC – Fasteners (AB)*, para. 376.

Accession Protocol expresses that the special difficulties attending to Vietnam's non-market economy indicate that Members intended to distinguish Vietnam's situation from that of market economies. Members did not consider Vietnamese exporters and market economy exporters to be similarly situated. Commerce's solicitation of information pertinent to separate rates is an information gathering exercise that permits the investigating authority to determine whether a company should be considered individually or as part of another entity. Commerce often collects similar information in market economy cases as well, asking about a company's affiliates, including information about ownership shares, control, and ultimate decision-making authority. If the data indicate that companies are affiliated and the relationships are sufficiently close so as to allow one company to influence another, Commerce may decide to treat the companies as a single entity for the purpose of setting export prices.[228] In the NME context, this information allows Commerce to balance the NME considerations described above with the necessary flexibility to respond to changes in such economies, for example, when companies may be sufficiently autonomous in their export activities so as to permit calculation of individual margins of dumping for such companies.

183. In sum, Commerce's conclusion that multiple companies in Vietnam are part of the Vietnam-government entity is based on a permissible (indeed, eminently reasonable) interpretation of Articles 6.10 and 9.2. Therefore, the United States respectfully requests that the Panel find Commerce's conclusion in the covered reviews were not inconsistent with the AD Agreement.

5. Vietnam's Claims that Commerce Applied an Adverse Facts Available Rate in the Fourth, Fifth and Sixth Administrative Reviews Inconsistent with Article 6.8 of the AD Agreement Should be Rejected

184. Vietnam claims Article 6.8 provides that adverse facts available can only be applied to an interested party from which Commerce requests necessary information during a proceeding.[229] Vietnam argues that because Commerce did not request information from the Vietnam-government entity during the fourth, fifth, or sixth administrative reviews, Commerce's application of a rate based on adverse facts available was inconsistent with Article 6.8.[230]

185. Vietnam's analysis is based on faulty facts because in the fourth, fifth, and sixth administrative reviews the Vietnam-government entity was assigned the only rate assigned to it since the initial investigation, which is the only rate it has ever received under this order. Although the entity rate of 25.76 percent originally was based on an adverse facts available determination from the initial investigation, it is the rate Commerce continued to apply to the entity in subsequent reviews. In each of these reviews, any party that is part of the Vietnam-government entity could have requested that Commerce review the Vietnam-government entity, but none did. Thus despite the fact that no party that is part of the Vietnam-government entity requested that Commerce review the entries of that entity during a review or change the rate applied to that entity during the challenged reviews, Vietnam now argues that Commerce's

[228] *See* 19 C.F.R. 351.401(f) (Exhibit US-26).

[229] Vietnam First Written Submission, paras. 175-185.

[230] Vietnam First Written Submission, paras. 186-195.

treatment of the Vietnam-government entity was improper. There is no obligation to make the final assessment of duties different from the amount of security collected on those entries in the absence of a request for review from these parties. Indeed, if any party had been dissatisfied with the margin of dumping assigned to the Vietnam-government entity previously and the amount of security being collected on entries, it could have requested a review to determine the margin of dumping and final duties owed on those precise entries. As there was no such request, the exporters subject to the Vietnam-government entity rate in effect expressed that the duties were appropriate, and the duties were finally determined and collected in the amounts that had been deposited. Commerce's final duty assessments for the respective review periods for exports by companies that are part of the Vietnam-government entity was not based on facts available but rather based on the decision by the exporters not to seek a review of their duties owed, consistent with the AD Agreement.

186. In *US – Shrimp from Vietnam (Panel)*, the Panel found that Commerce applied facts available in the third administrative review when the Vietnam-government entity received the same rate. The Panel, taking a "less formulistic" approach to interpreting Commerce's actions in the third administrative review, found that the applied rate was inconsistent with Article 6.8.[231] The Panel incorrectly reasoned that because the rate applied in the third administrative review was the same rate previously applied to the entity, which originally was determined on the basis of facts available, the rate as applied in the third administrative review was "a facts available rate."[232] The United States submits that the Panel misinterpreted Article 6.8 because this Article cannot apply when Commerce did not make a finding based on facts available.

187. Article 6.8 states that when "an interested party refuses access to, or otherwise does not provide, necessary information . . . determinations . . . may be made on the basis of the facts available."[233] Like in the third administrative review, in the reviews disputed in this case, Commerce made no finding on the basis of facts available. Rather, Commerce applied to the Vietnam-government entity the only rate it ever received. In *US – Shrimp from Vietnam (Panel)*, the Panel's finding was based, in part, on its belief that "although there was no formal application of facts available in the third administrative review," Commerce applied a rate that "had been determined on the basis of facts available."[234] The Panel's findings are misguided. Rather than find that there was no "formal application" of facts available, the Panel should have found that there was, in fact, no application of facts available. The Panel's finding that Commerce, in essence, applied facts available to the Vietnam-government entity was incorrect. As in the third review, Commerce did not request or receive any information from the entity. Commerce's determinations were, therefore, not based on the application of any facts available during these reviews, they were solely an application of the only rate the Vietnam-government entity ever received.

188. When examination has been properly limited to fewer than all exporters, it is not inconsistent with the AD Agreement to apply a rate to unexamined exporters that is the only rate

[231] *US – Shrimp from Vietnam (Panel)*, paras. 7.278-7.279.

[232] *Ibid.*, paras. 7.278-7.279.

[233] Article 6.8 of the AD Agreement.

[234] *US – Shrimp from Vietnam (Panel)*, para. 7.279.

ever determined for those exporters. Vietnam's claim to the contrary must fail. Therefore, for the above reasons, Vietnam's claims that Commerce's determinations in the fourth, fifth, and sixth administrative review were inconsistent with Article 6.8 and Annex II are unfounded.

6. The Vietnam-Government Entity's Rate in the Fourth, Fifth and Sixth Administrative Reviews is Not Inconsistent with Article 9.4 of the AD Agreement

189. Vietnam argues that Commerce's assignment of a margin of dumping based on facts available to the Vietnam-government entity in the fourth, fifth and sixth administrative reviews was inconsistent with Article 9.4 of the AD Agreement.[235] Vietnam argues that Article 9.4 required Commerce to assign to the Vietnam-government entity the "all others" rate – the weighted-average margin for the two firms that received individual rates, excluding rates that are *de minimis* or based on facts available.[236]

190. Commerce did not assign a "country-wide" rate to the Vietnam-government entity. As explained below, the Vietnam-government entity had been individually examined in this antidumping duty proceeding and received its own rate.[237] This rate was assigned to the companies that had not claimed or established that they are free from government control, particularly in their export activities, and thus are properly considered to be parts of the single government entity that Commerce identified as an "exporter" or "producer" consistent with Article 6.10 of the AD Agreement.

191. Vietnam ignores the fact that the Vietnam-government entity received a rate based on facts available *after being included in the examination* in this antidumping duty proceeding and failing to cooperate. Article 9.4 requires investigating authorities to exclude margins based on facts available only from rates applied to "exporters or producer not included in the examination." Article 9.4 provides:

> When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers *not included in the examination* shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
>
> (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

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[235] *See* Vietnam First Written Submission, paras. 157-174.

[236] *See* Vietnam First Written Submission, paras. 154-163.

[237] *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, pp. 19-22 and 29-37 (Exhibit VN-04).

> provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.[238]

By its own terms, Article 9.4 of the AD Agreement applies only to the exporters and producers "*not included in the examination.*" Because the Vietnam-government entity *was* included in the examination in this proceeding and received its own rate, Article 9.4 does not apply. [239]

192. In the original investigation, Commerce limited its examination consistent with the second sentence of paragraph 10 of Article 6 to several mandatory respondents, including Kim Anh Company Limited ("Kim Anh"), which is part of the Vietnam-government entity. Kim Anh informed Commerce that it would no longer participate in the investigation.[240] Additionally, Commerce sent a letter to the Government of Vietnam with enclosed questionnaires. However, the Government of Vietnam failed to respond to the questionnaires or request an extension of time to respond as it was instructed in the letter. [241] Furthermore, several companies that were not mandatory respondents failed to provide the most basic evidence that they were not subject to government control. Because these companies, and Kim Anh, did not demonstrate that they were sufficiently free from government control, they were identified as being part of the Vietnam-government entity, i.e., the group of companies whose export activities are under government control. [242] Based on the failure of Kim Anh and the Government of Vietnam to provide necessary information, the Vietnam-government entity was assigned a dumping margin based on the facts available. As Vietnam acknowledged in its panel request, the AD "Agreement permits the authority to calculate . . . a rate based on facts available for individually investigated producers,"[243] which is what Commerce did for Vietnam-government entity in this proceeding.

193. Article 9.4 does not impose an obligation on Members to replace an existing WTO-consistent rate of a government-entity exporter or producer, which had failed to cooperate in this proceeding, with a different rate that is based on an average rate of independent exporters or producers that fully cooperated. For example, in the sixth administrative review, Commerce explained that it "assigned the entity a rate of 25.76%, the only rate ever determined for the Vietnam-wide entity in this proceeding" and, absent someone requesting a change, Commerce

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[238] *See* Article 9.4 of the AD Agreement (emphasis added).

[239] *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, pp. 19-22 and 29-37 (Exhibit VN-04).

[240] *Ibid.*, pp. 19-22.

[241] *Ibid.*, pp. 19-22 and 29-37.

[242] *Ibid*.

[243] *See* Vietnam Panel Request, pp. 5-6.

will "continue to apply the entity rate."[244] The Agreement does not prohibit Members from continuing to apply the existing rate of a government-entity producer or exporter, which had failed to cooperate in this proceeding, under these circumstances.

194. Additionally, Vietnam offers several textual arguments concerning Article 9.4. Specifically, Vietnam argues that "the text in the opening line of Article 9.4 confirms that the Anti-Dumping Agreement clearly envisions the calculation of only a *single* anti-dumping duty for all exporters/producers not individually examined." [245] Vietnam contends that the text of Article 9.4 refers to "any anti-dumping duty" as distinguished from "anti-dumping duties." [246] Vietnam contends that "any" means "one or some indiscriminately of whatever kind." [247] In Vietnam's view, this language restricts Members to only applying "a single anti-dumping duty to the imports of exporters/producers not individually examined." [248] Vietnam's interpretation is erroneous.

195. Article 9.4 of the AD Agreement does not impose an obligation to calculate a "single anti-dumping duty." Article 9.4 merely provides that any antidumping duty "shall not exceed" the weighted-average margin of dumping for the investigated exporters or producers, and restricts the use of zero and de minimis margins and margins based on facts available in calculation of that ceiling. As long as the antidumping duty for a non-examined exporter or producer does not exceed the ceiling and no zero or de minimis margins or margins based on facts available were used in determining the ceiling, there can be no violation of Article 9.4. Vietnam improperly seeks to create a new obligation to calculate a "single" rate in addition to this ceiling, which is not present in Article 9.4 of the AD Agreement. Moreover, as we explained earlier, because the Vietnam-government entity was included in the examination in this proceeding and received its own rate, Article 9.4 does not apply to the Vietnam-government entity. [249]

196. The Appellate Body reports, which addressed obligations under Article 9.4, provide additional support to the United States' interpretation of this provision. In *US-Hot Rolled Steel*, for example, the Appellate Body explained that "Article 9.4 simply identifies a maximum limit, or ceiling, which authorities 'shall not exceed' in establishing an 'all others' rate."[250] The Appellate Body also identified specific restrictions on how such ceiling should be determined, namely the restrictions on using zero, *de minimis* and facts available margins.[251] The Appellate Body did not interpret Article 9.4 to contain an additional "sub-ceiling" requirement, which

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[244] *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam,* 77 Fed. Reg. p. 55802 (Exhibit VN-20).

[245] *See* Vietnam First Written Submission, para. 159.

[246] *See ibid.*

[247] *See ibid.*, para. 158.

[248] *See ibid.*, para. 159.

[249] *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, pp. 19-22 and 29-37 (Exhibit VN-04).

[250] *See US-Hot Rolled Steel (AB)*, para.116.

[251] *See US-Hot Rolled Steel (AB)*, para.449.

Vietnam advocates here. In *US-Zeroing (EC) (Article 21.5)*, the Appellate Body similarly stated that Article 9.4 contains two obligations that restrict the discretion of investigating authorities:

> First, Article 9.4 establishes that, in cases where the investigating authorities have limited their examination to a sample of selected exporters or producers, any anti-dumping duty applied to exporters that were not individually investigated 'shall not exceed the weighted average margin of dumping established for exporters that have been individually examined. Secondly, Article 9.4 directs investigating authorities to disregard, 'for purposes of this paragraph,' any zero or *de minimis* margins of dumping, and margins of dumping established on the basis of facts available pursuant to Article 6.8. [252]

197. Moreover, Article 9.4 does not use the term "a single antidumping duty." To the contrary, Article 9.4 uses both "anti-dumping duty" and "anti-dumping duties." In a footnote, Vietnam acknowledges the use of plural in paragraph (ii) of Article 9.4, but suggests that because paragraph (ii) discusses the prospective normal value, only Members operating prospective normal value systems have discretion to calculate multiple antidumping duties. [253] This interpretation is manifestly erroneous. First, the AD Agreement does not discriminate between Members operating different systems of duty assessment. Second, the sentence that contains the term "any anti-dumping duty," which Vietnam erroneously interprets as requiring a single rate, imposes a general obligation on all WTO members, including Members that operate prospective normal value systems. Accordingly, the use of the term "any antidumping duty" in Article 9.4 does not require that a "single" rate be determined under Article 9.4, as Vietnam suggests. As the Appellate Body explained, "Article 9.4 simply identifies a maximum limit, or ceiling, which authorities 'shall not exceed' in establishing an 'all others' rate."[254]

198. Further, Vietnam argues that "Article 9.4 does not require the fulfillment of any requirements to receive the rate calculated pursuant to Article 9.4" and "is generally applicable under all circumstances." [255] Vietnam is mistaken. Article 9.4 only applies when authorities limited their examination in accordance with the second sentence of Article 9.4. Moreover, if an exporter was examined in the proceeding and received its own rate, Article 9.4 does not require an investigating authority to replace its existing rate with an average of rates of other exporters or producers. Neither the government of Vietnam nor any company that is part of the Vietnam government entity asked to review the entity to change the rate applied to the entity in the fourth, fifth and sixth administrative reviews.

199. Vietnam also contends that the Appellate Body's prior reports indicate that only a single rate may be calculated under Article 9.4. Vietnam argues that Article 9.4 requires a single rate, because the Appellate Body stated that Article 6.8 should not apply "to non-investigated exporters that eventually will be subject to the 'all others' rate." [256] Vietnam argues that the

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[252] *See US-Zeroing (EC) (21.5) (AB)*, para.449 (emphasis added) and paras. 451-453.

[253] *See* Vietnam First Written Submission, para. 157, n. 168.

[254] *See US-Hot Rolled Steel (AB)*, para.116.

[255] *See* Vietnam First Written Submission, para. 161.

[256] *US – Zeroing (EC) (21.5)(AB)*, para. 459 (emphasis added).

phrasing of "the all-others rate" emphasizes that Article 9.4 of the AD Agreement contemplates only a single all-others rate. Vietnam is mistaken.

200. As an initial matter, Article 9.4 does not even use the term "all-others rate," but rather establishes a maximum limit or ceiling on the duties that may be imposed on exporters or producers not individually examined. It does not impose an obligation with respect to an exporter or producer, such as the Vietnam-government entity, which had been individually examined in this proceeding, received its own rate, and did not request to be reviewed to change its rate in any of the challenged administrative reviews. Moreover, the Appellate Body did not find that a single rate is required under Article 9.4.[257] Rather the Appellate Body explained that "the investigating authorities' discretion to impose duties on non-investigated exporters is subject to the disciplines provided in Article 9.4, including the exclusion of any facts available margins of dumping in the calculation of the maximum permissible duty applied to those exporters." [258] The Appellate Body explained that "Article 9.4 seeks to prevent the exporters, who were not asked to cooperate in the investigation, from being prejudiced by gaps and shortcomings in the information supplied by the investigated exporters."[259] The Appellate Body's logic draws a clear demarcation line between the cooperating and non-cooperating respondents in the context of Article 9.4 of the AD Agreement. Accordingly, the Panel should not interpret Article 9.4 as requiring the investigating authority to assign an average rate of cooperating exporters, which are not controlled by the government of Vietnam, to the Vietnam-government entity, which had been investigated, failed to cooperate, and received its own rate consistent with Article 6.8 of the AD Agreement.

E. Vietnam's Claim That the United States Maintains a Zeroing Measure That May Be Challenged "As Such" Under the AD Agreement is Without Merit

201. Vietnam claims that the United States maintains a measure that involves the use of the so-called "zeroing" methodology, and that this measure is "as such" inconsistent with the AD Agreement. This claim is without merit: among other things, the Vietnam's factual premise is wrong. Effectively in 2007 (with respect to investigations)[260] and in 2012 (with respect to reviews),[261] the United States changed the practice for calculating dumping margins in response to the Appellate Body reports findings on this matter. Accordingly, the United States maintains no statute, regulation, or other measure that requires the use of a so-called "zeroing" methodology. As we demonstrate below, in respect of both investigations and reviews, the

[257] The United States also notes that the Appellate Body repeatedly referred to "an 'all others' rate," which suggests the possibility of multiple all others rates. *See, e.g.*, *US – Zeroing (EC) (21.5) (AB)*, para. 459 ("Rather, Article 9.4 simply identifies a maximum limit, or ceiling, which authorities 'shall not exceed' in establishing an 'all others' rate.") (emphasis added); *US-Hot Rolled Steel (AB)*, para.116 (same).

[258] *US – Zeroing (EC) (21.5)(AB)*, para. 459 (emphasis added).

[259] *US – Zeroing (EC) (21.5)(AB)*, para. 452.

[260] *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).

[261] *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).

United States has set out an approach of offsetting dumping margins on dumped sales with amounts by which normal value is less than export price on non-dumped sales.

1. The United States Has Changed Its Calculation Methodology in Response to the Appellate Body's Reports on Zeroing

202. A prohibition on "zeroing" – understood as calculating a margin of dumping by offsetting the amount by which normal value exceeds export price on sales by the amount by which export price exceeds normal value on other sales – has no basis in the text of the AD Agreement, properly and objectively interpreted using the customary rules of interpretation of public international law and the standard of review found in Article 17.6(ii) of the AD Agreement. Moreover, such prohibitions were rejected by the Uruguay Round negotiators, and the subsequent practice of Members administering antidumping regimes confirmed that Members viewed the covered agreements as containing no requirement for granting offsets in the calculation of dumping margins. [262] For these reasons, among others, a number of dispute settlement panels have confirmed that the AD Agreement did not require Members to grant offsets in calculating margins.[263] As Vietnam points out, however, the Appellate Body found otherwise.

203. Despite its well-founded objections to the Appellate Body reports, the United States changed its long-established approach to calculating antidumping duties. Today, the United States routinely grants offsets in its antidumping calculations, as it has done in the most recent administrative review of the antidumping duty order on Shrimp from Vietnam.[264] In conjunction with these changes, the United States went to great lengths to resolve its zeroing disputes with WTO members.

204. This dispute with Vietnam is no exception with respect to U.S. efforts and desire to have the issue of zeroing resolved. The reason Vietnam continues to advance zeroing claims in this dispute, despite the fact that entries of shrimp from Vietnam into the United States are now benefiting from offsets granted in antidumping calculations, is evident from Vietnam's first

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[262] In 1995, the EU had the largest number of initiations of antidumping investigations (33), followed by Argentina (27), South Africa (16), and the United States (14). *See* Statistics on Antidumping: Anti-dumping initiations: by reporting Member, available athttp://www.wto.org/english/tratop_e/adp_e/ad_init_rep_member_e.pdf. These Members, who were the largest users of dumping remedies at the time, denied offsets for non-dumped transactions in various antidumping duty investigations following the Uruguay Round agreements. *See e.g., US – Softwood Lumber Dumping (AB)*, paras. 86-103; *EC – Bed Linen (AB)*, para. 86(1); *Argentina – Poultry (Panel)*, paras. 7.76-7.78; *See* US-Exhibit___ (Board of Tariffs and Trade, *Investigation into the Alleged Dumping of Meat of Fowls of the Species Gallus Domesticus, Originating in or Imported from the United States of America: Final Determination*, Report No. 4088 (September 12, 2000)), p. 48 ("In determining the dumping margin the Board applied the 'zeroing' methodology. . . . This methodology is applied by a number of jurisdictions including the European Union and the United States.").

[263] *See, e.g., US – Stainless Steel (Mexico) (Panel)*, para. 7.119.

[264] *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 78 FR 15699 (March 12, 2013) (preliminary results of administrative review) (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 FR 56211 (Sept. 13, 2013) (final results of administrative review) (Exhibit US-30).

written submission. The zeroing claims are advanced as a means to seek revocation of the antidumping duty order on shrimp from Vietnam.[265] The antidumping duty order, however, is based on the existence of dumping which has been determined to exist – with or without the application of zeroing. For the reasons explained elsewhere in this submission, Vietnam cannot prevail in its claims for revocation.

2. Vietnam Has Failed to Demonstrate the Existence of a Measure of General and Prospective Application That May Be Challenged "As Such" as Inconsistent with the AD Agreement

205. Vietnam contends that it is challenging zeroing as an "as such" measure, which is a rule or norm, of general and prospective application. In fact, there is no such measure.

206. The Appellate Body has identified several criteria that may be useful in evaluating whether a 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.[266] In addition, the Appellate Body has explained that "particular 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."[267] The United States does not maintain a rule or norm of general and prospective application that requires the use of zeroing. To the contrary, as we explain further below, 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.[268]

207. Vietnam has not established that the alleged "as such" zeroing measure exists. Vietnam's basic argument is that the Appellate Body in *US – Zeroing (Japan)* and in *US-Zeroing (Mexico)* found a zeroing measure to exist, "as such."[269] Vietnam states that the findings concerning the precise content of the zeroing measure in the Appellate Body and panel reports in prior disputes *themselves* constitute conclusive evidence as to the precise content of the measure challenged by

[265] Vietnam argues that the antidumping duty order on warmwater shrimp from Vietnam should have been revoked in the first sunset review based on the absence of dumping in administrative reviews, a contention that is contradicted both by the record and Vietnam's own submission. *Compare* Vietnam First Written Submission, paras. 1-3 *with* Vietnam First Written Submission, para. 307. In fact, Vietnam expressly acknowledged that the positive weighted-average dumping margins of at least two of the three Vietnamese exporters, which were selected for examination in the first administrative review, are WTO-consistent. *Ibid.*, para 307.

[266] *US – Zeroing (EC) (AB)*, para. 198.

[267] *US – Zeroing (EC) (AB)*, para. 198 (emphasis in original).

[268] *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 Deparmtent 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).

[269] Vietnam First Submission, paras. 67-69.

Vietnam in this case.[270] However, as a general matter, a separate panel's or Appellate Body's findings are not evidence but conclusions based on evidence in a separate dispute.[271]

208. Moreover, the facts underlying this dispute are different from the facts in prior disputes. The United States has issued notices announcing a change in approach for determining margins, under which Commerce grants offsets.[272] Numerous determinations illustrate that Commerce now offsets dumping margins on dumped sales with amounts by which normal value is less than export price on non-dumped sales in various contexts, including investigations, [273] administrative reviews,[274] and sunset reviews.[275] In fact, Commerce granted offsets for non-dumped

[270] Vietnam First Submission, para. 69.

[271] *See, e.g., US – Shrimp AD Measure (Ecuador)*, para. 7.9. The Panel has an obligation under DSU Article 11 to exercise its discretion as a fact-finder to make an objective assessment of the matter before it, and must itself be satisfied that the evidence before it supports its conclusions.

[272] *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); *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).

[273] *See, e.g.*, *Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 Fed. Reg. 33,351 (June 4, 2013) ("Likewise, in *United States Steel Corp. v. United States*, 621 F.3d 1351 (Fed. Cir. 2010), the Federal Circuit sustained the Department's decision to no longer apply zeroing when employing the average-to-average method in investigations.") (Exhibit US-31); *Notice of Final Determination of Sales at Less Than Fair Value: Galvanized Steel Wire From Mexico*, 77 Fed. Reg. 17,427 (March 26, 2012) (Exhibit US-32); *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 40,485 (July 15, 2008) ("[T]he Department does allow offsets when using average-to-average comparisons for non-targeted sales in investigations") (Exhibit US-33); *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances, in Part*, 75 Fed. Reg. 57,449 (Sept. 21, 2010) ("[I]t is now the Department's standard practice to grant offsets for non-dumped comparisons (i.e., not to apply the 'zeroing' methodology) where it uses the average-to-average comparison methodology in investigations.") (Exhibit US-34); *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 Fed. Reg. 20,335 (April 19, 2010) (Exhibit US-35); *Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Final Determination of Sales at Less Than Fair Value*, 73 Fed. Reg. 55,036 (Sept. 24, 2008) (Exhibit US-36); *Notice of Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from Mexico*, 73 FR 35649 (June 24, 2008) ("[T]he Department will continue to offset average-to-average comparisons by subtracting the result of such comparisons where the NV is less than the export price EP (i.e., negative margins) from the result of comparisons where the NV exceeds the EP (i.e., positive margins) to determine the weighted-average dumping margin.") (Exhibit US-37).

[274] *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); *Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review*, 78 Fed. Reg. 34,337 (June 7, 2013) (Exhibit US-40); *Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews*; 2010-2011, 77 Fed. Reg. 73,415 (December 10, 2012) (Exhibit US-41).

[275] *See, e.g., Low Enriched Uranium From France: Final Results of the Expedited Second Sunset Review of the Antidumping Duty Order*, 78 Fed. Reg. 21,100 (April 9, 2013) ("[T]he Department has recently announced that in sunset reviews, it will comply with WTO dispute findings against zeroing by not rely[ing] on the methodology

transactions in the most recent administrative review of the antidumping duty order on Shrimp from Vietnam,[276] a fact that Vietnam failed to mention in making its arguments that zeroing constitutes a measure of general and prospective applicability.

209. Therefore, Vietnam has not demonstrated as a matter of fact that the United States maintains a measure of general and prospective application that requires the use of zeroing. As a result, Vietnam's claim that an alleged U.S. zeroing measure is "as such" inconsistent with the AD Agreement is in error and necessarily fails.

F. Vietnam's Claim that The Application of the Zeroing Methodology to Imports of Shrimp From Vietnam in the Fourth, Fifth, and Sixth Administrative Reviews Is, "As Applied," Inconsistent with the AD Agreement Is Incorrect

1. Even if Vietnam's "As Applied" Claims are Considered Within the Panel's Terms of Reference, There is No General Obligation to Provide Offsets Outside of the Limited Context of Using Average-to-Average Comparisons in the Investigation

210. Vietnam contends that Commerce's use of zeroing in the fourth, fifth and sixth administrative reviews to calculate the dumping margins applied to individually examined respondents from Vietnam was inconsistent with the WTO Agreements.[277] Vietnam's argument has no basis in the text of the AD Agreement.[278] As demonstrated below, the text and context of the relevant provisions of the AD Agreement, as properly interpreted in accordance with

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determined by the Appellate Body to be World Trade Organization-inconsistent, and for which the United States has come into compliance.) (Exhibit US-42); *Certain Hot-Rolled Carbon Steel Flat Products From India, Indonesia, the People's Republic of China, Taiwan, Thailand, and Ukraine; Final Results of the Expedited Second Sunset Reviews of the Antidumping Duty Orders*, 78 Fed. Reg. 15,703 (March 12, 2013) (Exhibit US-43); *Lemon Juice From Argentina: Final Results of the Expedited First Sunset Review of the Suspended Antidumping Duty Investigation*, 77 Fed. Reg. 73,021 (Dec. 7, 2012) ("The rates calculated in the suspended investigation were not calculated using zeroing") (Exhibit US-44); *Steel Concrete Reinforcing Bars From Belarus, Indonesia, Latvia, Moldova, Poland, People's Republic of China and Ukraine: Final Results of the Expedited Second Sunset Reviews of the Antidumping Duty Orders*, 77 Fed. Reg. 70,140 (Nov. 23, 2012) ("The Department has recently announced that in sunset reviews, it will comply with WTO dispute findings against 'zeroing' by 'not rely[ing] on weighted-average dumping margins that were calculated using the methodology determined by the Appellate Body to be WTO-inconsistent.'") (Exhibit US-45); *Honey From the People's Republic of China: Final Results of Expedited Sunset Review of the Antidumping Duty Order*, 77 Fed. Reg. 59,896 (Oct. 1, 2012) (Exhibit US-46); *Certain Activated Carbon From the People's Republic of China: Final Results of Expedited Sunset Review of the Antidumping Duty Order*, 77 Fed. Reg. 33,420 (June 6, 2012) ("[I]n the LTFV Investigation, the Department calculated weighted-average dumping margins with offsets.") (Exhibit US-47).

[276] *See 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 FR 56211 (Sept. 13, 2013) (final results of administrative review) (Exhibit US-30).

[277] Vietnam First Written Submission, para. 93.

[278] Vietnam First Written Submission, paras. 93.

customary rules of interpretation of public international law, support the interpretation of the United States that the concepts of dumping and margins of dumping have meaning in relation to individual transactions and, therefore, there is no obligation to aggregate multiple comparison results in assessment proceedings to arrive at an aggregated margin of dumping for the product as a whole.

211. Thus in making an objective assessment of the matter before it in this dispute, the Panel should give particular consideration to the standard of review for matters arising under the AD Agreement – that a Member's measure may not be found inconsistent with the obligations set forth in the AD Agreement if the measure is based on a permissible interpretation of the AD Agreement. In this regard, it is instructive that prior panels – each operating under the same DSU obligation to make an objective assessment, examining the same AD Agreement, applying the same customary rules of interpretation of public international law and standard of review found in Article 17.6(ii) of the AD Agreement – have found that a general prohibition against zeroing has no basis in the text of the AD Agreement. The analysis offered by numerous prior panels is persuasive and correct. For the reasons set forth below, the Panel should reach the same conclusion in the present dispute. The Panel, like prior panels, should find that, at a minimum, it is permissible to interpret the AD Agreement as not prohibiting zeroing in assessment proceedings. Accordingly, there exists in the text of covered agreements, properly interpreted, no obligation to grant offsets to reduce the amount of dumping duties levied on dumped entries to account for the extent to which non-dumped entries are priced above normal value. The calculation of antidumping duties in the assessment proceedings in question rests on a permissible interpretation of the AD Agreement and is, therefore, WTO-consistent.

a. Article 2.4.2 of the AD Agreement Does Not Impose a General Obligation to Provide Offsets

212. The AD Agreement does not include any general obligation to consider transactions for which the export price exceeds normal value as an offset to the amount of dumping found in other transactions at less than normal value. The exclusive textual basis for an obligation to account for such non-dumping in calculating margins of dumping is found in Article 2.4.2 of the AD Agreement that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions . . . ."[279] This particular text of Article 2.4.2 does not impose any obligations outside the limited context of determining whether dumping exists in the investigation when using the average-to-average comparison methodology.[280] There is no textual basis for the additional obligations that Vietnam would have this Panel impose.

213. An appropriate starting point for discussing prior findings on a supposed obligation to provide offsets is *US – Softwood Lumber V (AB)*. In that report, the Appellate Body specifically recognized that the issue before it was whether zeroing was prohibited under the average-to-

[279] Emphasis added. *See US – Softwood Lumber V (AB)*, paras. 82, 86, and 98.

[280] *US – Zeroing (Japan) (Panel)*, para. 7.213; *US – Zeroing (EC) (Panel)*, para. 7.197; *US – Softwood Lumber V (Article 21.5) (Panel)*, paras. 5.65-5.66 and 5.77.

average comparison methodology found in Article 2.4.2 of the AD Agreement.[281] Thus, the Appellate Body there found only that "zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology."[282] The Appellate Body reached this conclusion by interpreting the terms "margins of dumping" and "all comparable export transactions" as they are used in Article 2.4.2 in an "integrated manner."[283] In other words, the term weighted average of "all comparable export transactions" was integral to the interpretation that the multiple comparisons of weighted average normal value and weighted average export price for averaging groups did not satisfy the requirement of Article 2.4.2 unless the results of all such comparisons were aggregated. The obligation to provide offsets, therefore, was tied to the text of the provision addressing the use of the average-to-average comparison methodology in an investigation. It did not arise out of any independent obligation to provide offsets.

214. Vietnam's argument that there is a general prohibition of zeroing or one specifically applicable to the more particular context of assessment proceedings, cannot be reconciled with the interpretation in *US – Softwood Lumber V (AB)*, wherein the phrase "all comparable export transactions" in Article 2.4.2 was interpreted to mean that zeroing was prohibited in the context of average-to-average comparisons in investigations. If there were a general prohibition of zeroing that applies in all proceedings and under all comparison methodologies, the Appellate Body's interpretation of the phrase "all comparable export transactions" to require offsets in average-to-average comparisons in investigations would be redundant of that general prohibition. Indeed, the Appellate Body has recognized the need to avoid interpreting the agreement to contain such a redundancy.[284]

215. Moreover, subsequent to *US – Softwood Lumber V (AB)*, several panels examined whether the obligation not to use "zeroing" when making average-to-average comparisons in an investigation extended beyond that defined context. Consistent with their obligation to make an objective assessment of the matter, these panels determined that the customary rules of interpretation of public international law do not support a reading of the AD Agreement that expands the zeroing prohibition beyond average-to-average comparisons in an investigation.[285]

216. Nonetheless, in subsequent reports, the Appellate Body abandoned the textual basis of Article 2.4.2 it relied on in *US – Softwood Lumber V (AB)* applied in other contexts. To recall, in *US – Softwood Lumber V (AB)*, the Appellate Body had found that in aggregating the results of the model-specific comparisons, "all" comparable export transactions must be accounted for. Thus, the Appellate Body interpreted that phrase as necessarily referring to all transactions across all models of the product under investigation, i.e., the product "as a whole." In short, the textual reference to "all comparable export transactions" in Article 2.4.2 of the AD Agreement

[281] *US – Softwood Lumber V (AB)*, paras. 104, 105, and 108.

[282] *Ibid*., para. 108.

[283] *Ibid*., paras. 86 - 103.

[284] *See US – Zeroing (EC) (AB)*, paras. 126, 127; *US – Softwood Lumber V (Article 21.5) (AB)*, paras. 89, 114; *US – Zeroing (Japan) (AB)*, paras. 121-122, 151.

[285] *US – Zeroing (Japan) (Panel)*, para. 7.213; *US – Zeroing (EC) (Panel)*, para. 7.197; and *US – Softwood Lumber V (Article 21.5) (Panel)*, para. 5.65; *US – Stainless Steel (Mexico) (Panel)*, paras. 7.61, 7.149.

was the basis for the conclusion that "product" must mean "product as a whole" and that the results of all individual averaging *group comparisons* must be aggregated to determine the exporter's margin of dumping in an investigation. The Appellate Body subsequently relied on this "product as a whole" concept, although in a manner detached from its underlying textual basis, in concluding that multiple transaction-specific comparisons of export price and normal value are not margins of dumping. In particular, the Appellate Body found, without a textual basis, that these are mere "intermediate comparison results" that require aggregation to become margins of dumping.[286] In *US – Zeroing (Japan) (AB)*, the Appellate Body reinterpreted "all comparable export transactions" to relate solely to all transactions within a model, and not across models of the product under investigation.[287] In doing so, the Appellate Body abandoned the only textual basis for its reasoning in *US – Softwood Lumber V (AB)* that in aggregating the *results* of the model-specific comparisons in investigations, "all comparable export transactions" must be accounted for across the models.

217. This finding was incorrect. There is no basis in the AD Agreement for finding a general obligation to consider transactions for which the export price exceeds normal value as an offset to the amount of dumping found in relation to other transactions at less than normal value. As noted, the exclusive textual basis for an obligation to account for such non-dumping in calculating margins of dumping appears in connection with the obligation found in Article 2.4.2 that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions . . . ."[288]

218. In sum, for the reasons set out above, Vietnam's argument, which seeks to extend an obligation to provide offsets beyond the specific context of investigations, finds no support in the text of the AD Agreement and must be rejected.

b. Article 2.1 of the AD Agreement and Article VI of the GATT 1994 Do Not Require the Provision of Offsets in Assessment Proceedings

219. Ultimately, the zeroing-related argument in this dispute is about the definitions of "dumping" and "margin of dumping" and whether dumping and margins of dumping are concepts that may have meaning in relation to individual transactions, or if they necessarily must refer only to an aggregation of transactions. Vietnam's position is that the only permissible interpretation of Article 2.1 of the AD Agreement and Article VI of GATT 1994 precludes any possibility that "dumping" or "margins of dumping" may exist at a level of individual transactions. If these terms, as used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994, apply to the difference between export price and normal value for *individual*

[286] *US – Zeroing (EC) (AB)*, paras. 126, 127; *US – Softwood Lumber V (Article 21.5) (AB)*, paras. 89, 114; *US – Zeroing (Japan) (AB)*, paras. 121, 122, 151.

[287] *US – Zeroing (Japan) (AB)*, para. 124 ("[T]he phrase 'all comparable export transactions' requires that each group include only transactions that are comparable and that no export transaction may be left out when determining margins of dumping under [the average-to-average comparison] methodology.")

[288] Emphasis added. *See US – Softwood Lumber Dumping (AB)*, paras. 82, 86, and 98.

transactions, the U.S. assessment of antidumping duties in administrative reviews does not exceed the margin of dumping.

220. In the AD Agreement, the word "margin" is modified by the word "dumping," giving it a special meaning. Paragraph 2 of Article VI of the GATT 1994 provides that "[f]or the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1." When read with the provisions of paragraph 1, the "margin of dumping" is the price difference when a product has been "introduced into the commerce of an importing country at less than its normal value," *i.e.*, the price difference when the product has been dumped.

221. The provisions of the AD Agreement must be read in conjunction with Article VI of the GATT 1994.[289] While the AD Agreement does not provide a definition of "margin of dumping," it does define "dumping" in a manner consistent with the definition of "margin of dumping" provided in Article VI of the GATT 1994. Article 2.1 of the AD Agreement provides:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at *less than* its normal value, if the export price of the product exported from one country to another is *less than* the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[290]

222. The product is always "introduced into the commerce of another country" through individual transactions, and thus "dumping", as defined in Article 2.1 of the AD Agreement, is transaction-specific. The express terms of the GATT 1994 provide that the *margin of dumping* is the amount by which normal value "exceeds" export price, or alternatively the amount by which export price "falls short" of normal value. Consequently, there is no textual support in Article VI of the GATT 1994 or the AD Agreement for the concept of "product as a whole" and "negative dumping."[291]

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[289] This interpretative principle has been underscored by the Appellate Body. In *Argentina – Footwear*, the Appellate Body stated that:

> The GATT 1994 and the *Agreement on Safeguards* are *both* Multilateral Agreements on Trade in Goods contained in Annex 1A of the *WTO Agreement*, and, as such, are *both* "integral parts" of the same treaty, the *WTO Agreement*, that are "binding on all Members". Therefore, the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are all provisions of one treaty, the *WTO Agreement*. . . . [A] treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.

Argentina – Footwear (AB), para. 81 (internal citations omitted). This basic principle applies equally to Article VI of the GATT 1994 and the AD Agreement. The official title of the AD Agreement is "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994." As an agreement whose object is to implement Article VI of the GATT 1994, the AD Agreement is, by its very title, anchored in Article VI of the GATT 1994.

[290] Emphasis added.

[291] Vietnam First Written Submission, para. 84.

i. The Concepts of "Dumping" and "Margin of Dumping" and the Term "Product" In Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 May Refer to Individual Transactions

223. As an initial matter, Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 are definitional provisions that, "read in isolation, do not impose independent obligations."[292] Nevertheless, these definitions are important to the interpretation of other provisions of the AD Agreement at issue in this dispute, which use these terms. In particular, Article 2.1 of the AD Agreement and Article VI of the GATT 1994 do not define "dumping" and "margins of dumping" so as to require that export transactions be examined at an aggregate level. The definition of "dumping" in these provisions references "a product . . . introduced into the commerce of another country at less than its normal value." This definition describes the real-world commercial conduct by which a product is imported into a country, *i.e.*, transaction by transaction.[293] Thus, dumping is defined as occurring in the course of a commercial transaction in which the product, which is the object of the transaction, is "introduced into the commerce" of the importing country at an export price that is "less than normal value."

224. In addition, the term "less than normal value" is defined as when the "price of the product exported . . . is less than the comparable price . . . ."[294] Again, this definition describes the real-world commercial conduct of pricing such that one price is less than another price. The ordinary meaning of "price" as used in the definition of dumping is the "payment in purchase of something."[295] This definition "can easily be applied to individual transactions and does not require an examination of export transactions at an aggregate level."[296]

225. In other words, dumping – as defined under these provisions – may occur in a single transaction. There is nothing in the GATT 1994 or the AD Agreement that suggests that dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price. Indeed, it is the foreign producer or exporter that benefits from the sales it makes at prices that are above normal value, and this does not undo the injury suffered by the domestic industry injured from other sales made at dumped prices.

ii. The Term "Product" In Article 2.1 of the AD Agreement and Article VI of the GATT 1994 Does Not Refer Exclusively to "Product as a Whole"

226. Vietnam's argument that dumping can only be found to exist for the product as a whole[297] is contrary to the ordinary meaning of the text of the relevant provisions of the AD

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[292] *US – Zeroing (Japan) (AB)*, para. 140.

[293] *See US – Zeroing (EC) (Panel)*, para. 7.285 (additional observations of one panel member).

[294] Article VI:1 of the GATT 1994; Article 2.1 of the AD Agreement.

[295] *New Shorter Oxford English Dictionary*, Volume 2, p. 2349, meaning 1b (Exhibit US-21).

[296] *US – Zeroing (Japan) (Panel)*, para. 7.106.

[297] Vietnam First Written Submission, para. 74.

Agreement and the GATT 1994. Article 2.1 of the AD Agreement and Article VI of the GATT 1994 do not define the terms "dumping" and "margin of dumping" such that export transactions must necessarily be examined at an aggregate level.

227. Vietnam's claims in this dispute depend on interpreting these provisions as requiring that the terms "margins of dumping" and "dumping" relate solely, and exclusively, to the "product as a whole." However, the term "product as a whole" does not appear in the text of the AD Agreement. Vietnam's interpretation denies that the ordinary meaning of the word "product" or "products" used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 admits of a meaning that is transaction-specific. As the panel in *US – Zeroing (Japan)* explained, "'[T]here is nothing inherent in the word 'product[]' (as used in Article VI:1 of the GATT 1994 and Article 2.1 of AD Agreement) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis . . . .'"[298]

228. Examination of the term "product" as used throughout the AD Agreement and the GATT 1994 demonstrates that the term "product" in these provisions does not exclusively refer to "product as a whole." Instead, "product" can have either a collective meaning or an individual meaning. For example, Article VII:3 of the GATT 1994 – which refers to "[t]he value for customs purposes of any imported product" – plainly uses the term "product" in the individual sense of the object of a particular transaction (*i.e.*, a sale involving a quantity of specific merchandise that matches the criteria for the "product" at a particular price). Therefore, it cannot be presumed that the same term - "product" - has such an exclusive meaning when used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994.

229. As the panel in *US – Softwood Lumber V (Article 21.5)* explained, "an analysis of the use of the words product and products throughout the *GATT 1994*, indicates that there is no basis to equate product with 'product as a whole'. . . . Thus, for example, when Article VII:3 of the GATT refers to 'the value for customs purposes of any imported product', this can only be interpreted to refer to the value of a product in a particular import transaction."[299] The panel detailed numerous additional instances where the term "product," as used in the AD Agreement and the GATT 1994, do not support a meaning that is solely, and exclusively, synonymous with "product as a whole":

> To extend the Appellate Body's reference to the concept of "product as a whole" in the sense that Canada proposes to the T-T methodology would entail accepting that it applies throughout Article VI of *GATT 1994*, and the *AD Agreement*, wherever the term "product" or "products" appears. A review of the use of these terms does not support the proposition that "product" must always mean the entire universe of exported product subject to an anti-dumping investigation. For instance, Article VI:2 states that a contracting party "may levy on any dumped product" an anti-dumping duty. Article VI:3 provides that "no countervailing

[298] *US – Zeroing (Japan) (Panel)*, para. 7.105 (quoting *US – Softwood Lumber V (Article 21.5) (Panel)*, n. 32); *see also US - Stainless Steel (Mexico) (Panel)*, para. 7.119; *see also US – Continued Zeroing (Panel)*, paras. 7.163-7.169 (substantively agreeing with the prior panels, but erroneously rejecting otherwise permissible interpretation solely on the basis of a conflicting interpretation developed in certain Appellate Body reports).

[299] *US – Softwood Lumber V (Article 21.5) (Panel)*, n. 36; *see also ibid.*, para. 5.23.

> duty shall be levied on any product". Article VI:6(a) provides that no contracting party shall levy any anti-dumping or countervailing duty on the importation of any product...". Similarly, Article VI:6(b) provides that a contracting party may be authorized "to levy an anti-dumping or countervailing duty on the importation of any product". Taken together, these provisions suggest that "to levy a duty on a product" has the same meaning as "to levy a duty on the importation of that product". Canada's position, if applied to these provisions, would mean that the phrase "importation of a product" cannot refer to a single import transaction. In many places where the words product and products are used in Article VI of the GATT 1994, an interpretation of these words as necessarily referring to the entire universe of investigated export transactions is not compelling.[300]

230. In sum, the terms "product" and "products" cannot be interpreted in such an exclusive manner so as to deprive them of one of their ordinary meanings, namely, the "product" or "products" that are the subject of individual transactions. Therefore, the words "product" and "products" as they appear in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 cannot be understood to provide a textual basis for an interpretation that requires margins of dumping established in relation to the "product" to be established on an aggregate basis for the "product as a whole." Accordingly, Vietnam's argument that the mere use of the term "product" in Article 6.10 of the AD Agreement and in Article VI:2 of the GATT 1994 means that "dumping" and "margin of dumping" cannot exist at the level of individual transactions[301] is erroneous.[302]

231. Likewise, examination of the term "margins of dumping" itself provides no support for Vietnam's interpretation of the term as solely, and exclusively, relating to the "product as a whole."[303] In examining the text of Article VI:2 of the GATT 1994, the panel in *US – Softwood Lumber V (Article 21.5)* observed:

> Article VI:2 of the GATT 1994 provides that, for the purposes of Article VI, "the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1" of Article VI. Paragraph 1 of Article VI defines dumping as a practice "by which products of one country are introduced into the commerce of another country at <u>less</u> than the normal value of the products" (emphasis supplied). . . . Article VI:1 provides that "a product is to be considered as being introduced into the commerce of an importing country at <u>less</u> than its normal value, if the price of the product exported from one country to another (a) is <u>less</u> than the comparable price, in the ordinary course of trade, for the like product in the exporting country" (emphasis supplied). In other words, there is dumping when the export "price" is <u>less</u> than the normal value. Given this

[300] *Ibid*., para. 5.23 (footnotes omitted).

[301] Vietnam First Written Submission, para. 76.

[302] *See also U S – Zeroing (EC) (Panel)*, paras. 7.201-7.206 (finding that Article 9.2 of the AD Agreement supports the view that in the context of assessment proceedings, such as administrative reviews, it is permissible to interpret dumping in relation to individual transactions).

[303] Vietnam First Written Submission, para. 77.

> definition of dumping, and the express linkage between this definition and the phrase "price difference", it would be permissible for a Member to interpret the "price difference" referred to in Article VI:2 as the amount by which the export price is less than normal value, and to refer to that "price difference" as the "margin of dumping".[304]

232. Therefore, the panel in *US – Softwood Lumber V (Article 21.5)* saw "no reason why a Member may not . . . establish the 'margin of dumping' on the basis of the total amount by which transaction-specific export prices are less than the transaction-specific normal values."[305] Although the panel was examining margins of dumping in the context of the transaction-to-transaction comparison method in investigations under Article 2.4.2 of the AD Agreement, its reasoning is equally applicable to margins of dumping established on a transaction-specific basis in an assessment proceeding. In fact, Vietnam acknowledged in its first written submission that the so-called "intermediate comparisons" (*i.e.*, comparisons of the export price of an individual transaction with the weighted-average normal value) "produce both positive and negative dumping margins . . . .."[306]

2. Vietnam Has Not Demonstrated Any Inconsistency with Article 9.3 of the AD Agreement nor Article VI:2 of the GATT 1994

233. According to Vietnam, Commerce's "use of zeroing in administrative reviews violates Article VI:2 of GATT 1994 and Article 9.3 of the *Agreement*."[307] Vietnam has not demonstrated any inconsistency with these provisions.

a. The United States Acted Consistently with Article 9.3 of the AD Agreement

234. Article 9.3 states that the "amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Vietnam's argument with respect to assessment proceedings under Article 9.3 of the AD Agreement is that the amount of the antidumping duty has exceeded the margin of dumping established under Article 2 of the AD Agreement.[308] This argument depends entirely on a conclusion that the United States' interpretation of the definitional provisions, such as Article 2.1 of the AD Agreement and Article VI of the GATT 1994, detailed above is not permissible,[309] and that Vietnam's preferred interpretation of the "margin of dumping," which precludes any possibility of transaction-specific margins of

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[304] *US – Softwood Lumber V (Article 21.5) (Panel)*, para. 5.27 (footnote omitted).

[305] *Ibid*., para. 5.28 (emphasis in original).

[306] Vietnam First Written Submission, para. 84 (emphasis added).

[307] Vietnam First Written Submission, para. 84.

[308] *Ibid*.

[309] As noted above, the Appellate Body has explained that Article 2.1 of the AD Agreement and Article VI:1 of GATT 1994 are merely definitional provisions and on their own "do not impose independent obligations." *US – Zeroing (Japan) (AB)*, para. 140. Accordingly, to the extent Vietnam is claiming that the challenged measures are inconsistent with "obligations" found in Article 2.1 or Article VI:1, Vietnam has failed to establish the existence of any obligations pursuant to those definitional provisions and, therefore, Vietnam's claims should be rejected.

dumping, is the only permissible interpretation of this term as used in Article 9.3 of the AD Agreement. In Vietnam's view, a Member breaches Article 9.3 of the AD Agreement by failing to provide offsets. Vietnam contends that, pursuant to Articles 2.1 and 9.3 of the AD Agreement and Article VI:1 of the GATT 1994, Members are required to calculate margins of dumping on an exporter-specific basis for the product "as a whole" and, consequently, a Member is required to aggregate the results of "all" "intermediate comparisons for transactions," including those for which the export price exceeds the normal value.[310] The United States notes that the terms upon which Vietnam's interpretation rests are conspicuously absent from the text of these provisions. Moreover, Vietnam's interpretation is not mandated by the definition of dumping contained in Article 2.1 of the AD Agreement, as described in detail above.

235. The text and context of Article 9.3 of the AD Agreement also indicate that Vietnam's interpretation of the obligation set forth in Article 9.3 is erroneous. Article 9 of the AD Agreement relates, as its title indicates, to the imposition and collection of antidumping duties. In particular, Article 9.3 states that the "amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." The understanding of the term "margin of dumping" as relating to individual transactions is particularly appropriate in the context of antidumping duty assessment, where duties are assessed on individual entries resulting from individual transactions. Therefore, the obligation set forth in Article 9.3 – to assess no more in antidumping duties than the margin of dumping – is similarly applicable at the level of individual transactions.

236. Several panels that have examined this issue have agreed with this interpretation. As the panel in *US – Zeroing (EC)* correctly concluded, there is "no textual support in Article 9.3 for the view that the AD Agreement requires an exporter-oriented assessment of antidumping duties, whereby, if an average normal value is calculated for a particular review period, the amount of anti-dumping duty payable on a particular transaction is determined by whether the overall average of the export prices of all sales made by an exporter during that period is below the average normal value."[311] This does not constitute a denial that dumping is exporter-specific; for the reasons already stated, transaction-specific margins of dumping are exporter-specific. Rather, the panel recognized that averaging of export prices was not required to calculate a margin of dumping under Article 9.3. Accordingly, the panel found no basis in Article 9.3 for mandating aggregation of transaction-specific dumping margins in a manner that replicates an overall comparison of export prices on average with the average normal value. The panel in *US – Zeroing (Japan)* similarly rejected the conclusion that the "margin of dumping under Article 9.3 must be determined on the basis of an aggregate examination of export prices during a review period in which export prices above the normal value carry the same weight as export prices below the normal value . . . ."[312]

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[310] Vietnam First Written Submission, paras. 84-85.

[311] *US – Zeroing (EC) (Panel)*, para. 7.204 ("In our view, if the drafters of the AD Agreement had wanted to impose a uniform requirement to adopt an exporter oriented-method of duty assessment, which would have entailed a significant change to the practice and legislation of some participants in the negotiations, they might have been expected to have indicated this more clearly.").

[312] *US – Zeroing (Japan) (Panel)*, para. 7.199. The panel in *US – Zeroing (EC)* expressed essentially the same view. *US – Zeroing (EC) (Panel)*, paras. 7.204-7.207 and 7.220-7.223.

237. In *US – Zeroing (Japan)*, the panel found that "there are important considerations specific to Article 9 of the AD Agreement that lend further support to the view that it is permissible . . . to interpret Article VI of the GATT 1994 and relevant provisions of the AD Agreement to mean that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing."[313] In particular, the panel explained that such a requirement is inconsistent with the importer-and import-specific obligation to pay an antidumping duty:

> In the context of Article 9.3, a margin of dumping is calculated for the purpose of determining the *final liability for payment of anti-dumping duties* under Article 9.3.1 or for the purpose of determining *the amount of anti-dumping duty* that must be *refunded* under Article 9.3.2. An anti-dumping duty is paid by an importer in respect of a particular import of the product on which an anti-dumping duty has been imposed. An importer does not incur liability for payment of an anti-dumping duty in respect of the totality of sales of a product made by an exporter to the country in question but only in respect of sales made by that exporter to that particular importer. Thus, the obligation to pay an anti-dumping duty is incurred on an *importer*-and *import*-specific basis.
>
> Since the calculation of a margin of dumping in the context of Article 9.3 is part of a process of assessing the amount of duty that must be paid or that must be refunded, this importer- and import-specific character of the payment of anti-dumping duties must be taken into account in interpreting the meaning of "margin of dumping."[314]
>
> Similarly, the panel in *US – Zeroing (EC)* explained:
>
> In our view, the fact that in an assessment proceeding in Article 9.3 the margin of dumping must be related to the liability incurred in respect of particular import transactions is an important element that distinguishes Article 9.3 proceedings from investigations within the meaning of Article 5. . . . [I]n an Article 9.3 context the extent of dumping found with respect to a particular exporter must be translated into an amount of liability for payment of anti-dumping duties by importers in respect of specific import transactions.[315]

238. Accordingly, contrary to Vietnam's contentions, the interpretation that permits the existence of transaction-specific margins of dumping is supported by Article 9.3 of the AD Agreement.

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[313] *US – Zeroing (Japan) (Panel)*, para. 7.196.

[314] *Ibid*., paras. 7.198 - 7.199 (emphasis in the original).

[315] *US – Zeroing (EC) (Panel)*, para. 7.201.

239. In *US – Stainless Steel (Mexico)*, the panel also properly took into account the transaction-specific character of Article 9.3 assessment proceedings:

> We note that the obligation to pay anti-dumping duties is not incurred on the basis of a comparison of an exporter's total sales, but on the basis of an individual sale between the exporter and its importer. It is therefore a transaction-specific liability. This importer-specific or transaction-specific character of the payment of anti-dumping duties has, therefore, to be taken into consideration in interpreting Article 9.3.[316]

240. These panels' understanding of Article 9.3 of the AD Agreement is, at a minimum, a permissible interpretation of the provision. In summary, as long as the margin of dumping is properly understood as applying at the level of individual transactions, there is no tension between the exporter-specific concept of dumping as a pricing behavior and the importer-specific remedy of payment of dumping duties. It is only when an obligation to aggregate transactions is improperly inferred that any perception of conflict arises.

b. The United States Acted Consistently with Article VI:2 of the GATT 1994

241. Vietnam has not demonstrated that the United States acted inconsistently with Article VI:2 of the GATT 1994. In particular, Article VI:2 of the GATT 1994 explains that, "[i]n order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." Vietnam argues that the United States levied an antidumping duty in the amount that is greater than the margin of dumping for the "product as a whole."[317] Vietnam's argument that the United States acted inconsistently with Article VI:2 rests entirely upon its erroneous interpretation of the term "margin of dumping." As we explained above, the examination of the term "margins of dumping" itself provides no support for Vietnam's interpretation of the term as solely, and exclusively, relating to the "product as a whole." In examining the text of Article VI:2 of the GATT 1994, the panel in *US – Softwood Lumber V (Article 21.5)* saw "no reason why a Member may not . . . establish the 'margin of dumping' on the basis of the total amount by which transaction specific export prices are <u>less</u> than the transaction-specific normal values."[318] Although the panel examined dumping margin calculations in an investigation, its basic reasoning and textual interpretation of Article VI:2 are equally applicable to margins of dumping established on a transaction-specific basis in assessment proceedings.

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[316] *US – Stainless Steel (Mexico) (Panel)*, para. 7.124. In *US – Continued Zeroing (Panel)*, para. 7.169, the panel found this reasoning persuasive, but also found that the Appellate Body disagreed with this persuasive reasoning.

[317] Vietnam First Written Submission, paras. 84. We note that Vietnam argues that "Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement explicitly provide that margins of dumping may not be greater than the margin of dumping for the product as a whole." *Id.* However, Vietnam misstates the text of these provisions - these provisions do not reference "the product as a whole."

[318] *US – Softwood Lumber V (Article 21.5) (Panel)*, para. 5.28 (emphasis in the original).

G. COMMERCE'S SUNSET REVIEW DETERMINATION IS NOT INCONSISTENT WITH ARTICLE 11.3 OF THE AD AGREEMENT

242. Vietnam argues that Commerce's Final Results of the First Five-year "Sunset" Review of the Antidumping Duty Order (Sunset Determination) is, as applied, inconsistent with Article 11.3 of the AD Agreement. Vietnam argues that Commerce's determination that dumping was likely to continue or recur was inconsistent with Article 11.3 because certain rates relied on by Commerce in the Sunset Determination were determined in a manner inconsistent with the AD Agreement and that the decline in import volumes does not support a finding that dumping was likely to continue or recur.[319] Even aside from Vietnam's erroneous assertion that Commerce relied on antidumping margins calculated in a WTO-inconsistent manner, Vietnam's arguments fail. In addition to those margins, Commerce based its likelihood determination on other evidence of continued dumping and on a decline in import volumes. Each of these additional bases constitutes positive evidence adequately supporting Commerce's finding. While Vietnam may raise a litany of objections, none of its arguments undermine Commerce's ultimate conclusion in the Sunset Determination, and that determination is consistent with Article 11.3 of the AD Agreement.

1. The AD Agreement Does Not Prescribe Specific Methodologies that Authorities Must Follow in Determining Whether to Terminate Definitive Antidumping Duties under Article 11.3

243. Article 11.3 of the AD Agreement provides as follows:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.

The footnote accompanying Article 11.3 indicates that, "[w]hen the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty."

244. Article 11.3 thus requires that five years after an antidumping duty is imposed, the duty must be terminated unless the authorities determine following a timely review that termination "would be likely to lead to continuation or recurrence of dumping and injury" ("likelihood determination"). Article 11.3 does not specify the exact methodologies or modes of analysis needed to satisfy the likelihood determination.

[319] Vietnam First Written Submission, para. 302.

245. The Appellate Body has confirmed that "Article 11.3 does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review."[320] As the Appellate Body explained,

> WTO Members are free to structure their anti-dumping systems as they choose, provided that those systems do not conflict with the provisions of the Anti-Dumping Agreement. In particular, these provisions include: the requirement in Article 11.3 that a duty be terminated after the period specified in that article unless investigating authorities have properly determined, on the basis of sufficient evidence, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping . . . .[321]

246. 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.[322] Accordingly, attempts to read into Article 11.3 substantive obligations allegedly contained in other provisions of the AD Agreement have been soundly rejected.[323] 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.

2. Vietnam Has Failed to Establish That Commerce's Sunset Determination is Inconsistent with Article 11.3 of the AD Agreement

247. Contrary to Vietnam's claims, Commerce permissibly concluded in the Sunset Determination, based on the evidence before it, that revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping. Vietnam attempts to narrow the scope and relevance of the information examined by Commerce by focusing on antidumping duties calculated or assigned in an allegedly WTO-inconsistent manner, by ignoring other dumping findings that Vietnam admits were permissible, and by dismissing the substantial decline in import volumes following the initiation of the original investigation. These other dumping margins and the decline in import values themselves provided a sufficient basis for Commerce's conclusion that dumping was likely to continue or recur. Accordingly, irrespective of the Panel's findings with respect to the determination of the antidumping duty rates claimed by Vietnam to be WTO-inconsistent, Commerce's Sunset Determination is consistent with U.S. obligations under Article 11.3.

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[320] *US – Corrosion Resistant Steel Sunset Review (AB)*, para. 149.

[321] *Ibid.*, para. 158.

[322] *Ibid.*, 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."

[323] In *US - Carbon Steel*, at paragraph 112, the Appellate Body found that Article 22.1 of the *Agreement on Subsidies and Countervailing Measures* ("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.

a. Commerce Properly Relied On Positive Margins of Dumping in its Sunset Determination

248. 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 rates applied to numerous exporters during the four completed reviews.[324] Commerce also noted: (1) the Vietnamese exporters' recognition as to the continuing existence of some dumping; (2) the appropriate application of adverse facts available to uncooperative mandatory respondents; and (3) the decline in shrimp import volumes following the original investigation. In particular, on the first item, Commerce noted as significant in its Sunset Determination that the "Vietnamese Respondents also carefully qualify [their] claim by stating that only the 'vast majority' of the imports were not dumped. Therefore, by their own admission, Vietnamese Respondents do not dispute there was some dumping that occurred."[325] And on the second item, Commerce found that, notwithstanding the arguments of Vietnamese respondents to the contrary, it had appropriately "selected two companies during AR1 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."[326]

249. In its first written submission to the Panel, Vietnam *confirms* its understanding that Commerce's sunset determination relied on WTO-consistent margins.[327] Vietnam does not deny that the application of a positive rate to companies that chose not to participate in the first review provides WTO-consistent evidence of continued dumping. Instead, Vietnam tries to excuse the failure of these two respondents to cooperate by arguing that respondents "with low levels of shipments to U.S. . . . and low level[s] of exposure to anti-dumping duties" should be exempted from the requirements to participate in antidumping proceedings.[328] Vietnam further tries to excuse the failure of these two respondents to cooperate by making the *post hoc*, unsubstantiated assertion that certain respondents "reached an agreement with petitioners for the petitioners to withdraw the request for a review in exchange for cash payments by each of the respondents."[329] Vietnam appears to offer this assertion in order to undermine the probative value of Commerce's determination that dumping continued. This strained logic falls apart if one considers that after

[324] *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).

[325] Sunset Determination, 75 Fed. Reg. p. 75,966 and accompanying Issues and Decision Memorandum, Issue 1 (emphasis added; footnotes omitted) (Exhibit VN-14).

[326] Sunset Determination, 75 Fed. Reg. p. 75,966 and accompanying Issues and Decision Memorandum, Issue 1 (emphasis added; footnotes omitted) (Exhibit. VN-14).

[327] *See* Vietnam First Written Submission, para. 304.

[328] Vietnam First Written Submission, para. 276.

[329] Vietnam First Written Submission, para. 276.

the withdrawal of the larger companies, the three next largest were selected, one of which fully participated.[330]

250. Finally, a finding of 'no dumping' does not logically ensue from a refusal to provide the information needed to calculate whether dumping exists. To the contrary, it is more plausible that a company that could obtain a zero or *de minimis* finding of dumping would seek to do so through participation in the proceedings. Indeed, it is not uncommon for exporters not initially selected for individual examination to appeal to Commerce to expand the number of companies individually examined to include them.[331] Rather than provide Commerce with information to perform its calculations, these companies made a choice to accept the assessment of antidumping duties on the subject merchandise. Having made this choice, there was positive evidence of dumping by these companies, and no basis to find that dumping did not exist. Even if Vietnam's allegations related to arrangements between companies were true, these alleged respondent settlements would not be evidence of the absence of dumping; indeed, the alleged settlements could well be responding to concerns that the review could result in affirmative findings of dumping.

b. Vietnam Has Failed to Rebut the Evidence of Dumping Relied On in Commerce's Sunset Determination

251. Vietnam argues that "all of the margins of dumping examined by the United States in the Sunset Determination were calculated in a manner inconsistent with U.S. obligations under the Anti-Dumping Agreement, with the exception of two rates based on adverse facts available in the first review which resulted from the non-cooperation of two mandatory respondents."[332] Vietnam bases its assertion mostly on a description of the dumping margins assigned by Commerce to those respondents who cooperated with Commerce during the investigation and first through fourth reviews.[333]

252. Vietnam, however, has failed to establish sufficient evidence in support of its allegations that Commerce's consideration of positive margins of dumping assigned to respondents was inappropriate. In WTO dispute settlement, the burden of proving that a measure is inconsistent with a covered agreement rests on the complaining party. As the Appellate Body observed in *US – Wool Shirts and Blouses*: "it is a generally-accepted canon of evidence in civil law, common

[330] While Vietnam asserts that the two uncooperative companies were "small," it provides no evidence of this allegation or what it means. Given that the United States selected the largest companies for individual examination, even after the largest were no longer under review, the reviewed companies remained the next largest exporters to the United States under review at the time.

[331] *See, e.g., Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea; Final Results of Antidumping Duty Administrative Review; 2010 to 2011*, 78 Fed. Reg. 16,247 (Mar. 14, 2013) and accompanying Issues and Decision Memorandum, Comment 11 (where Commerce limited review to two companies, non-selected respondent argued that Commerce should have selected additional companies to review, including that respondent)(Exhibit US-48); *Diamond Sawblades and Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2009-2010*, 78 Fed. Reg. 11,143 (Feb. 15, 2013) and accompanying Issues and Decision Memorandum, Comments 4-6 ("Bosun requests that the Department re-examine its caseload . . . and select Bosun for individual examination in this review") (Exhibit US-49).

[332] Vietnam First Written Submission, para. 304.

[333] Vietnam First Written Submission, para. 303.

law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[334] Indeed, the Appellate Body found "it difficult . . . to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof."[335]

253. Here, to support its claims, Vietnam provides a table at paragraph 277 of its first written submission that presents a misleading overview of the dumping rates considered by Commerce. This table is incomplete and inaccurate. First, the table selectively omits the positive margins found in these proceedings. As explained above, and as Vietnam concedes, there were positive margins of dumping for at least two companies that had been selected for review but refused to cooperate in the first administrative review.

254. Second, the table fails to provide sufficient evidence in support of the margins it reports as *de minimis*. While Vietnam states that "[t]hese calculations are explained in Exhibit VN-25 (BCI),"[336] that exhibit does not, in fact, explain these calculations. For example, the affidavit provided as Exhibit VN-25 (BCI) does not mention or address the first through third reviews nor does it mention or define the Vietnam- purported "safety margin." To the extent that the exhibit addresses the fourth through sixth reviews, the affidavit merely reports the volume and value of the mandatory respondents' sales that were below normal value; it does not address the Vietnam-purported "safety margins," the Vietnam-wide entity rate, the separate rate companies, or the U.S. court decisions that Vietnam references.[337]

255. Further, although Vietnam alleges that so-called "safety" margins for the mandatory respondents demonstrate that export prices exceed the normal value in each review, Vietnam has failed to point to the relevance of these figures under any provision of the AD Agreement, much less their relevance under Article 11.3 of the AD Agreement.

256. Next, as margins of dumping associated with the fifth and sixth reviews did not form a basis for Commerce's Sunset Determination, the numbers that appear in Vietnam's table that purport to relate to these two reviews are not relevant to the Panel's consideration of Commerce's Sunset Determination.[338]

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[334] *US – Wool Shirts and Blouses (AB)*, p. 14.

[335] *Ibid.*

[336] Vietnam First Written Submission, para. 277 n.301. The affidavit provided at Exhibit VN-25 (BCI) does not appear on the record of any of the proceedings before Commerce. Therefore, the United States objects to the presentation of the affidavit to the extent Vietnam offers it to the Panel as evidence of the record before Commerce during its Sunset Determination.

[337] Vietnam First Written Submission, para. 277.

[338] The final results of the fifth and sixth administrative reviews appropriately did not form a part of Commerce's Sunset Determination. Whereas the final results of Commerce's Sunset Determination was published on December 7, 2010, Commerce did not publish the final results of the fifth and sixth reviews until September 12, 2011, and September 11, 2012, respectively, well after its Sunset Determination. *See* Exhibits VN-18 and VN-20. The results of Commerce's fifth and sixth reviews could not have been considered for purposes of the first sunset review of the antidumping duty order on shrimp from Vietnam. Therefore, Vietnam's assertions about margins of

257. Even if Vietnam were to demonstrate that a finding in the fourth review (*i.e.*, the "most recent assessment proceeding" under Article 9.3.1 of the AD Agreement covered by the Sunset Determination) indicated that no duty should have been levied, the footnote accompanying Article 11.3 confirms that such a finding "shall not by itself require the authorities to terminate the definitive duty."

258. Finally, the United States does not agree that the dumping margins relied on in the Sunset Determination were determined in a WTO-inconsistent manner. In Section V.F above, the United States explains that the application of the zeroing methodology in reviews is WTO-consistent. Further, the United States explains in Section V.D. that the application of a rate to the Vietnam-wide entity generally, and the rate applied in the fourth review in particular, are WTO-consistent. Accordingly, to the extent that Commerce relied on these margins in finding that dumping was likely to continue or recur absent the antidumping duty order, such reliance was not inconsistent with the obligations of the United States under Article 11.3.

259. We otherwise note that there are no obligations under the AD Agreement for either the investigation or the first review because those proceedings were initiated pursuant to an application and requests for review made prior to the entry into force of the WTO Agreement for Vietnam. Therefore, determinations made by Commerce during the course of the investigation and first review are not subject to the provisions of the AD Agreement.[339]

260. Further, with respect to the first review, Vietnam acknowledges that two mandatory respondents failed to cooperate with Commerce during the review and thus were assigned a margin of dumping based on adverse facts available.[340] Vietnam does not argue that the actions of Commerce in assigning a rate based on adverse facts available to these two mandatory respondents was inappropriate. The rate applied to these companies alone provides sufficient support for Commerce's conclusion that dumping continued during the sunset review period, and along with the declining import volumes discussed below, sufficient evidence to support Commerce's likelihood determination.

261. In sum, Vietnam has failed to demonstrate that there were no positive margins of dumping to provide a basis for Commerce to find a likelihood of continuation or recurrence of dumping. To the contrary, the evidence on the record demonstrates that there were positive margins considered by Commerce and that these margins support Commerce's likelihood determination that the termination of the antidumping duty order on shrimp from Vietnam would be likely to lead to the continuation or recurrence of dumping.

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dumping associated with the fifth and sixth reviews are not relevant to the Panel's consideration of Commerce Sunset Determination.

[339] Article 18.3 of the AD Agreement; *Brazil – Desiccated Coconut (AB)*, p. 18, n. 23.

[340] Vietnam First Written Submission, para. 276.

c. Commerce's Reliance on Factors Other than Margins of Dumping, Especially Post-Antidumping Order Import Volumes, Supports its Sunset Determination

i. The Decline in Import Volumes Demonstrates the Likelihood of Dumping without the Discipline of the Order

262. In addition to the margins of dumping examined, Commerce also considered public U.S. import data for the five-year sunset period, which was comparable to the data submitted by respondents, 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, and 40.1 million kilograms in 2005-2009, respectively.[341] 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 (an average of 40.5 million kilograms during the sunset review period, compared to 56.3 million kilograms in the year prior to the investigation)."[342] After considering respondents' comments on its preliminary findings, Commerce confirmed its findings in the final results:

> With regard to the proper import volumes analysis, Vietnamese Respondents have not articulated any rationale that would compel the Department to depart from its established practice to look at the full year prior to initiation of the investigation as the base year for comparison. As the Department explained in the Preliminary Decision Memo, the rationale behind this is that initiation of an investigation may immediately cause a dampening effect on trade, which could skew the comparison, which is precisely the case in the instant review. While the Department acknowledges there were certain recoveries in import volume following the issuance of the order, the record demonstrates, and the Department continues to find that, imports fell after the initiation of the original investigation, and did not return to pre-investigation levels in any of the individual years, or as a whole.[343]

263. Commerce properly relied on this evidence of declining volumes to substantiate its likelihood determination. As explained above, the decline in import volumes suggests that the exporters were unable to sustain pre-investigation import levels without dumping. In this regard, the Appellate Body has 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" which have "certain probative value."[344] Thus "[t]he importance of the two underlying factors (import volumes and dumping margins) for a

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

[342] *Ibid.*

[343] Sunset Determination, Issues and Decision Memo, p. 5 (footnotes omitted) (emphasis added) (Exhibit VN-14).

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

likelihood-of-dumping determination cannot be questioned."[345] These factors provide a sufficient evidentiary basis for Commerce's conclusion that revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping, irrespective of Commerce's additional reliance on other positive antidumping duty rates calculated and assigned to companies or the Vietnam-government entity that Vietnam claims were WTO-inconsistent.

ii. Vietnam Has Failed to Demonstrate that the Decline in Import Volumes Is the Result of Other Factors

264. The decline in import volumes following imposition of the antidumping duty order observed by Commerce were significant, yet Vietnam would have the Panel dismiss Commerce's conclusions as to the meaning of those declining import volumes. Vietnam further argues that the burden should be on the United States to explain why the decline in import volumes cannot be attributed to some other factor apart from the likelihood of continued dumping.[346]

265. During Commerce's sunset review, the only arguments put forward by Vietnamese respondents were that Commerce "failed to account for other relevant market information" such as a purported "decline in the supply of raw shrimp" in 2006 and a purported "decline in demand" in 2009, and the assertion that "imports from Vietnam commanded a stable and increasing market share in the U.S. market from 2005 to 2008."[347] Commerce found these arguments unpersuasive because, despite respondents' "speculat[ion] that import volume could have been higher, if not for the margins assigned to the separate rate companies or supply and demand issues," the Vietnamese respondents "[had] not demonstrated how these factors could have affected import volumes."[348] Commerce thus found "that these market share and other factor arguments do not outweigh the likelihood analysis based on the existence of margins and decline of imports."[349]

266. Nevertheless, Vietnam argues before the Panel that it would have made certain arguments during Commerce's sunset review about the decline in volume, but asserts it was "precluded" from making them because of Commerce's use of the zeroing methodology.[350] Specifically, Vietnam asserts that it would have provided four justifications to refute the probative value of declining import volumes: the degree of uncertainty faced by exporters; uncertainty resulting from the NME methodology; uncertainty caused by recurring changes in Commerce's practice;

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

[346] Vietnam First Written Submission, para. 308.

[347] Sunset Determination, Issues and Decision Memo p. 6 (citing Vietnamese Respondents Case Brief at 5-7) (Exhibit VN-14). To the extent the respondents attempted to substantiate their allegations, Commerce "noted that the market share information provided was incomplete as the data for the last year (2009) of the sunset review period was not provided." Accordingly, Commerce found that "the Vietnamese Respondents' argument concerning market share is unpersuasive because the data provided indicates that the post-order market share levels for the first four years of the review period (2005-2008) continued to be below the pre-investigation level in 2003." *Ibid.* (citing Preliminary Sunset Determination, Issues and Decision Memo, p. 6 (Exhibit VN-12)).

[348] Sunset Determination, Issues and Decision Memo p. 6 (Exhibit VN-14).

[349] *Ibid.*

[350] *See* Vietnam First Written Submission, para. 282.

and distortions caused by limiting respondents to the few largest exporters.[351] Nothing about these allegations suggests that Vietnam could not have presented them to Commerce as arguments "in the alternative" when Commerce solicited comments from interested parties in the sunset review.[352] Further, these speculative *post hoc* arguments are insufficient to undermine Commerce's findings, much less contradict the evidence relied on by Commerce in its Sunset Determination.

267. Vietnam states that "even if" Commerce had examined other factors, it "would have been impossible" for the examination to be unbiased because of the margins relied on which Vietnam views as WTO-inconsistent. However, having admitted – both in the sunset proceeding and in its submission to this Panel – that dumping continued despite the imposition of the order, Vietnam merely uses its objection to zeroing to introduce further, though ultimately inconsequential, *post hoc* arguments about the decline in volume that parties never raised before Commerce.

268. In sum, Commerce properly established that significant dumping continued following the imposition of the order and that import volumes declined, and that other purportedly counter-indicative factors put forward by Vietnamese respondents did not outweigh the likelihood analysis based on the existence of these margins and decline in imports. None of Vietnam's arguments overcome, much less address, Vietnam's repeated acknowledgement of the fact that some level of dumping has persisted throughout the order's duration and that the volume of imports did, in fact, decline. Therefore, irrespective of Commerce's consideration of dumping margins that Vietnam alleges are WTO-inconsistent, these facts provide an ample evidentiary basis to support Commerce's conclusion that revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping.

3. The Appellate Body Reports Cited by Vietnam Do Not Require the Panel to Find that Commerce's Sunset Determination is WTO-Inconsistent

269. Vietnam relies on the Appellate Body reports in *US-Zeroing (Japan)* and *US-Corrosion-Resistant Steel Sunset Review* to argue that "reliance in an Article 11.3 review on margins of dumping determined using a methodology inconsistent with Article 2 of the Anti-Dumping Agreement results in that Article 11.3 review also being inconsistent with the Anti-Dumping Agreement."[353] Specifically, Vietnam relies on language from *US – Zeroing (Japan)* stating that "[a]s the likelihood determinations in these sunset reviews relied on margins calculated [with zeroing] they are inconsistent with Art. 11.3."[354] This statement, however, does not compel the result Vietnam seeks here. The Appellate Body in *US-Zeroing (Japan)* or in *US-Corrosion-*

[351] *See* Vietnam First Written Submission, paras. 283-287.

[352] *See* Preliminary Sunset Determination, 75 Fed. Reg. 47,546 (Aug. 6, 2010) (inviting parties to comment within 30 days) (Exhibit VN-12).

[353] Vietnam First Written Submission, para. 298.

[354] Vietnam First Written Submission, para. 297.

Resistant Steel Sunset Review; was not presented with the situation here, i.e., a sunset determination that relies on a broad range of evidence supporting the continuation of an order.[355]

270. The evidence here demonstrates that Commerce's Sunset Determination is consistent with Article 11.3 since it is justified on the basis of factors other than WTO-inconsistent factors. The United States acknowledges that the Appellate Body has found that, "if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too."[356] However, the Appellate Body subsequently clarified in *US – Anti-Dumping Measures on Oil Country Tubular Goods* that:

> the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review* does not stand for the proposition that a WTO-inconsistent methodology used for the calculation of a dumping margin will, in and of itself, taint a sunset review determination under Article 11.3. The only way the use of such a methodology would render a sunset review determination inconsistent with Article 11.3 is if the investigating authority relied upon that margin of dumping to support its likelihood-of-dumping or likelihood-of injury determination.[357]

Thus, the Appellate Body has indicated that Article 11.3 allows for alternative ways of determining the likelihood of continued dumping even where a WTO-inconsistent methodology has been used at some point for the calculation of a dumping margin. It is only if the investigating authority has relied on WTO-inconsistent margins of dumping for its likelihood finding that such reliance could itself render the likelihood finding WTO-inconsistent. But where the investigating authority has relied not only on that margin of dumping but other, sufficient evidentiary bases, such that the likelihood determination can stand on its own, after any factors based on a WTO-inconsistent methodology have been removed, the likelihood finding will be considered consistent with Article 11.3.

271. More importantly, Vietnam has failed to demonstrate that, absent the comparison methodology used by Commerce, or absent the application of the rate to the Vietnam-government entity, there would have been no dumping.[358] First, Vietnam speculates that

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[355] Accordingly, the United States submits that the phrase quoted above from *US-Zeroing (Japan)*, "*as* the . . . determinations . . . relied on . . ." should be interpreted to mean "*to the extent* the determinations relied on . . . ." *See* Vietnam First Written Submission, para. 297 (quoting *US – Zeroing (Japan) (AB)*, para. 183). The Appellate Body did not conclude that, to the extent that certain of the antidumping duty rates relied on are *not* based on the zeroing methodology, or to the extent that other factors support a finding of likelihood, these facts cannot form an independent basis to demonstrate the continuing need for the discipline of the order.

[356] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 130; *see also ibid.*, paras. 126-127, 135 ("the inherent bias in a zeroing methodology . . . may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping") (citing *EC – Bed Linen*)).

[357] *US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)*, para. 181.

[358] It is important to note that Vietnam does not dispute the positive dumping margins found in the first review determined in accordance with Article 6.8 and Annex II of the AD Agreement. We also note that an additional company has since failed to cooperate with the Department in a recent U.S. court-ordered individual examination of this company's dumping margin for its entries covered by the fourth review (the last review covered by Commerce's Sunset Determination). The company sought the individual examination itself in U.S. court. *See*

assigning a positive rate to companies not selected for individual examination (what Vietnam labels as an "all others" rate) is impermissible, relying on the panel's findings in *US – Shrimp (Viet Nam)* and the results of certain U.S. court proceedings. However, the panel did not find that any positive rate for the "all others" companies would be impermissible.[359] In fact, Vietnam acknowledges that in *US - Shrimp (Viet Nam),* "the panel declined to make a finding or conclusion with respect to the appropriate rate to assign as the all other rate in a situation in which all mandatory respondents had zero or de minimis margins of dumping."[360] Further, even if we agreed with the court decisions Vietnam refers to, in light of the fact that the *Shrimp I* panel *made no finding*, these court decisions are not relevant to the WTO obligations of the United States. Indeed, there is no obligation to assign a zero rate to all other companies in such situations. Even in the court decisions Vietnam relies on, only a portion of the "all others" companies received a zero rate. The remaining portion did not. [361]

272. Further, Vietnam incorrectly likens the facts of the first and fourth administrative reviews to the facts of the administrative reviews considered by the panel in *US - Shrimp (Viet Nam).*[362] Vietnam's assertion is not true, nor does Vietnam support its assertion with any evidence or reference to the facts. For example, Vietnam conspicuously omits the fact that two of three mandatory respondents failed to cooperate with Commerce during the first administrative review.

273. Similarly, Vietnam incorrectly assumes that all rates, including the rate for the Vietnam-government entity, would be zero if the rates for the unselected companies and the government

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Grobest & I-Mei Indus. Vietnam Co. v. United States, 853 F. Supp. 2d 1352 (Ct. Int'l Trade 2012) (Exhibit US-12). In that case, Grobest challenged Commerce's decision not to select it as voluntary respondent. The Court agreed with Grobest and remanded to Commerce to conduct a review of Grobest as a voluntary respondent. *Ibid.*, p. 1365. However, Grobest refused to respond to Commerce's questionnaire and instead sought to withdraw from review, claiming that it would rather accept the 3.92 percent dumping margin than participate in the review. *See* Letter from Grobest, to the Department of Commerce, regarding "Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Withdrawal of Request for Voluntary Respondent Review and Revocation of Antidumping Duty Order in Part" (Dec, 12, 2012) (Exhibit US-13). Thus, any claim that the Sunset Determination was not based on the existence of dumping is futile, because Grobest has already acknowledged that it prefers a 3.92 percent duty rate over the rate it would receive if it were individually examined. *See also* Section V.B (revocation).

[359] The panel found simply that the United States acted inconsistently by imposing "an 'all others' rate determined on the basis of margins of dumping calculated with zeroing." *See US - Shrimp (Viet Nam),* para. 8.1(g).

[360] *See* Vietnam First Written Submission, para. 306.

[361] *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Notice of Court Decision Not in Harmony With Final Results of Administrative Review and Notice of Amended Final Results of Administrative Review Pursuant to Court Decision*, 76 Fed. Reg. 27,991 (May 13, 2011) (where rates from second administrative review were amended as a result of litigation, only 23 of 26 separate rate companies received amended rates) (Exhibit US-50); *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Notice of Court Decision Not in Harmony With Final Results of Administrative Review and Notice of Amended Final Results of Administrative Review*, 77 Fed. Reg. 34,935 (June 12, 2012) (where rates from third administrative review were amended as a result of litigation, only 16 of 21 separate rate companies received amended rates) (Exhibit US-51).

[362] *See* Vietnam First Written Submission, para. 305 ("The facts present in this panel proceeding . . . demonstrate that these same inconsistencies apply to the first and fourth reviews. Thus, we anticipate that this panel will make the same finding . . . as the underlying facts in the first and fourth reviews do not differ from those in the second and third reviews.").

entity were done in a "WTO-consistent" way.[363] This assertion fails, as Vietnam elsewhere admits to certain Commerce findings regarding the existence of dumping during the sunset review period. Further, it is well-established that Commerce may exercise its discretion in determining the exact manner of conducting a sunset review. For example, in *US – Corrosion-Resistant Steel Sunset Review*, Japan argued that the United States was obligated to calculate weighted-average margins of dumping in sunset reviews. The Appellate Body rejected Japan's argument, noting that:

> Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor does Article 11.3 identify any particular factors that authorities must take into account in making such a determination.[364]

The Appellate Body concluded that "[t]his silence in the text of Article 11.3 suggests that no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review."[365] Consistent with this reasoning, and under U.S. law and practice, Commerce relies on multiple factors, including the dumping margins determined in the completed proceedings, as well as import volumes to determine the likelihood of continued dumping. In this case, the evidence of dumping in the first review alone and the decline in import volumes,

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[363] *See* Vietnam First Written Submission, paras. 305-306. Although Vietnam relies on the panel's finding in *US- Shrimp (Viet Nam)* to support its position, the United States respectfully disagrees with the findings of that panel concerning the rates applied to the Vietnam-government entity in the second and third administrative reviews. With respect to the second review, the United States maintains that application of a rate to the entity based on the entity's failure to cooperate was not inconsistent with Article 6.8 of the AD Agreement. *See e.g., US - Shrimp (Viet Nam)*, para. 7.261, 7.268. Specifically, in the second review, the United States issued quantity and value (Q&V) questionnaires to numerous companies that failed to respond, and thus failed to provide information necessary for Commerce's conduct of the administrative review. The panel interpreted certain language appearing in Commerce notices and an antidumping manual, finding that Commerce could not designate Q&V data from non-separate rate respondents as necessary under Article 6.8. *See e.g., US - Shrimp (Viet Nam)*, para. 7.274. The United States maintains that the panel's conclusion was in error, as such responses were requested and necessary in order to determine which exporters to individually examine, prior to any Commerce determination regarding an exporter's status as part of the Vietnam-government entity or as a separate rate company. Commerce did not state, nor is it Commerce's position, that the Vietnam-government entity could not be individually examined.

The United States also respectfully disagrees with the findings of the panel in *U.S.-Shrimp (Vietnam)* regarding the rate applied to the Vietnam-government entity in the third review. As argued before that panel, the United States submits that the provisions Article 9.4 were not applicable to the rate assigned to the Vietnam-government entity, because the circumstances in the third review presented a "lacuna" not covered by Article 9.4. *See, e.g., US - Shrimp (Viet Nam)*, para. 7.242. Further, as argued before the panel, and as argued in this case with respect to the rate applicable to the Vietnam-government entity in the fourth review, application of the rate to the entity was not inconsistent with the provisions of Article 6.8 of the AD Agreement. *See, e.g., US - Shrimp (Viet Nam)*, para. 7.2276.

Notably, the Vietnam-government entity never argued before Commerce that it should have been individually examined in the second review (or in any review) or that any other rate should be applied to it. The United States submits that this Panel need not reach these issues, however, as the evidence relied up by Commerce irrespective of the panel's findings in *US - Shrimp (Viet Nam)*, support Commerce's Sunset Determination. .

[364] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 123 (footnote omitted).

[365] *Ibid.*, paras. 123-124; *see also ibid.*, para. 130 ("We have already concluded that investigating authorities are not *required* to calculate or rely on *dumping margins* in making a likelihood determination in a sunset review under Article 11.3.") (citing paras. 123-124) (interpreting Article 6.10).

supported Commerce's conclusion that revocation of the order would likely lead to continuation or recurrence of dumping. The mere presence of weighted-average dumping margins calculated with the zeroing methodology, or the application of a rate to a Vietnam-government entity is not determinative of the question of likelihood in this case, and this precise question was not before the Appellate Body in the cases relied on by Vietnam.

274. In sum, Commerce's Sunset Determination stands on its own, on the basis of Commerce's examination of evidence and findings, apart from any assertions made in Vietnam's first written submission about margins calculated or assigned using the zeroing methodology, or margins assigned to the Vietnam-government entity. Notwithstanding Vietnam's assertions on these matters, dumping continued during the sunset-review period with respect to certain respondents that failed to cooperate with Commerce. Further, with the discipline of the antidumping duty 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. Given these facts, and given that respondents failed to show that their pricing behavior would change or that imports would cease or not recur, Commerce objectively and correctly concluded in its Sunset Determination that dumping was likely to continue or recur if Commerce revoked the antidumping duty order. Accordingly, even if the Panel were to find that certain dumping margins considered by Commerce were WTO inconsistent, the Panel can still consider and find that the Sunset Determination is not inconsistent with Article 11.3 based on the WTO consistent factors examined by Commerce.

VI. CONCLUSION

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