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

(WT/DS404)

RESPONSES OF THE UNITED STATES TO THE PANEL'S SECOND SET OF QUESTIONS TO THE PARTIES

January 14, 2011

TABLE OF REPORTS CITED

Short Form	Full Citation
EC – Bed Linen (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R, circulated on 3 December 2010
EC – Hormones (AB)	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 8 January 2008
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 19 December 2002
US – Continued Zeroing (AB)	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Zeroing (EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R, adopted 9 May 2006

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. ZEROING

49. (to the United States) The United States argues that there can be no violation of the AD Agreement or GATT 1994 when zeroing has no impact on the margins of dumping calculated. In US – Corrosion Resistant Steel Sunset Review, the Appellate Body stated that the use of zeroing "tend[ed]" to inflate margins of dumping, and "could, in some instances, turn a negative margin of dumping into a positive margin of dumping". As a result, the Appellate Body stated that "the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[1] Does this statement suggest that the Appellate Body considers that the potential for zeroing to inflate margins is sufficient to find a WTO-inconsistency in an "as applied" case? Please comment.

1. This statement does not suggest that the Appellate Body considers that the potential for zeroing to inflate margins is sufficient to find a WTO-inconsistency in an "as applied" case.[2] The Appellate Body, when it made this statement, was considering whether it was possible for it to determine whether the use in a sunset review of margins that may have been calculated using a zeroing methodology was inconsistent with Articles 2.4 and 11.3 of the AD Agreement. The Appellate Body found that the panel had made insufficient factual findings about the U.S. methodology employed so that it was unable to complete the substantive analysis.

2. Indeed, the Appellate Body was commenting on the EC's methodology and its decision thereon in the *EC – Bed Linen* dispute. It was not actually commenting on the U.S. methodology. The Appellate Body stated: "in the absence of uncontested facts on the Panel record, it is not possible for us to assess whether the methodology that USDOC used in calculating the dumping margins in the administrative reviews was equivalent in effect to the methodology used by the European Communities and considered by us in *EC – Bed Linen*."[3]

3. In addition, we would note that the AB statement is heavily qualified. Zeroing "tended" to inflate dumping margins; it "could" turn negative margins into positive margins; it "may" distort the magnitude of dumping or the finding of the existence of dumping. To assess whether there is an "as applied" breach, a panel must determine whether the use of zeroing did inflate dumping margins, whether it did turn negative margins to positive margins, or whether it did distort the magnitude of dumping.

4. Article 9.3 and Article VI:2 limit the amount of antidumping duty to the level of the margin of dumping. Thus, in order to find an "as applied" breach of these provisions, it must be shown that antidumping duties were applied in excess of the margin of dumping. As we have noted, Vietnam in this dispute has failed to demonstrate that any antidumping duties were applied in excess of the margin of dumping.

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[1] *US – Corrosion Resistant Steel Sunset Review (AB)*, para. 135.

[2] We would refer the Panel to our discussion of this Appellate Body report, and the reasons why there can be no "inherent bias" in the zeroing methodology, in our Second Written Submission, at paras. 33-35.

[3] *US – Corrosion Resistant Steel Sunset Review (AB)*, para. 137 (emphasis added).

50. (to both parties) The Panel understands that, under the US procedures for the conduct of administrative reviews, if an exporter obtains a zero margin or a de minimis margin, it necessarily follows that as a result of that same review, no importer will be assessed any duties in respect of imports from that exporter. Please confirm whether this understanding is correct.

5. The Panel is correct that Commerce applies a *de minimis* test in administrative reviews. However, this test is applied separately to the exporter-specific rate and the importer-specific assessment rate. If an exporter-specific rate is zero or *de minimis*, the estimated duty will be zero and no cash deposit will be required on the exporter's future imports of the merchandise. If an importer-specific assessment rate is zero or *de minimis*, no antidumping duties will be assessed on the importer's entries made during the period of review.

54. (to the United States) The last sentence of paragraph 10 of Viet Nam's Opening Statement at the second substantive meeting reads "The zeroing procedures, as described extensively in Exhibit 33 of Viet Nam's First Written Submission, are unchanged from the procedures that constitute a general rule or norm and are susceptible to as such challenge".

i. Does the United States take issue with the evidence contained in Exhibit Viet Nam 33?

6. The evidence contained in Exhibit Viet Nam-33 does not appear to be factually incorrect. However, this is the only "expert opinion" provided by Vietnam to the Panel concerning "zeroing" and it does not even purport to be an "expert opinion" demonstrating the existence of the "zeroing methodology" as a measure of general and prospective application attributable to the United States. Rather, it is, as it states in paragraph 8 of Exhibit Viet Nam-33, merely an analysis of "the USDOC's computer programs used to determine the antidumping duty margins . . . in the original investigation and the second, third, and fourth administrative reviews. . . ." In paragraph 10 of the affidavit, Mr. Ferrier confirms that he "will discuss those aspects of the programming language that address the USDOC's zeroing procedures in the four proceedings at issue . . . ." On its face, this is not evidence that would "clearly establish" all the elements necessary to identify an as such measure, namely that "the alleged 'rule or norm' is attributable to the [United States]; its precise content; and indeed, that it does have general and prospective application."[4]

ii. Is it correct that the zeroing procedures constitute a general rule or norm?

7. The United States does not agree or admit that the "zeroing procedures" constitute a general rule or norm. We would draw the Panel's attention to the U.S. Second Written

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

Submission, paragraphs 15-20. The burden thus is on Vietnam to adduce evidence sufficient to demonstrate the existence of the measure. Vietnam has not done so in this dispute.[5]

iii. What evidence is there on the record that might support a conclusion that there is not a systematic application of zeroing in administrative reviews?

8. As an initial matter, Vietnam has the burden to offer evidence sufficient to substantiate its claim,[6] and Vietnam has failed to put forward the requisite evidence to support an as such claim with respect to the so-called "zeroing methodology." We recall that the Appellate Body has been clear that it is not possible to find that a measure exists that can be challenged "as such" in the absence of evidence that "clearly establishes" that "the alleged 'rule or norm' is attributable to the Member; its precise content; and indeed, that it does have general and prospective application."[7] The Appellate Body explained in *US – Zeroing (EC)* that "a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document."[8] In *US – Zeroing (Japan)*, the Appellate Body applied the same reasoning, when looking for a second time at the question of whether a panel had properly found the existence of a "zeroing methodology" that could be challenged as such. The Appellate Body there warned that "panels must not 'make affirmative findings that lack a basis in the evidence contained in the panel record.'"[9]

9. In *US – Zeroing (EC)* and *US – Zeroing (Japan)*, the Appellate Body went on to describe its view of the extent of evidence that it found to be "sufficient to identify the precise content of the zeroing methodology; that the zeroing methodology is attributable to the United States, and that it does have general and prospective application" in those disputes.[10] The evidence before the panel in *US – Zeroing (EC)* consisted of, *inter alia*, "determinations in the 'as applied' cases challenged by the European Communities," "the standard programs used by [Commerce] to calculate margins of dumping," "expert opinions regarding the use and the content of the zeroing

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[5] The United States notes, for the Panel's information, that following the second substantive meeting, on December 28, 2010, Commerce published a notice in the Federal Register "proposing modifications to its practice in response to [certain] WTO dispute settlement findings" related to "zeroing." *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 75 Fed. Reg. 81,533 (December 28, 2010). This notice, while only a proposal and not a statement concerning the specific facts at issue in this dispute, reinforces the U.S. argument that, in this dispute, Vietnam has failed to establish any rule or norm with respect to the so-called "zeroing methodology," or any indication of future practice with respect to Commerce's dumping calculations. Instead, the notice begins a process reflecting the intention of the United States to comply with the DSB recommendations and rulings in connection with the reports referenced in the notice, despite continued U.S. disagreement with Appellate Body findings in those reports.

[6] *US – Carbon Steel (AB)*, para. 157.

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

[8] *US – Zeroing (EC) (AB)*, para. 196.

[9] *US – Zeroing (Japan) (AB)*, para. 82 (*citing US – Carbon Steel (AB)*, para. 142, *and EC – Hormones (AB)*, para. 133).

[10] *US – Zeroing (EC) (AB)*, para. 204.

methodology," and Commerce's "Anti-Dumping Manual."[11] Similarly, in *US – Zeroing (Japan)*, the Appellate Body found that the "Panel also examined ample evidence regarding the precise content of this rule or norm, its nature as a measure of general and prospective application, and its attribution to the United States."[12] There, again, the panel had before it, *inter alia*, "model computer programs used by [Commerce] that serve as a basis for programs used in specific original investigations and periodic reviews. These programs include an instruction to apply zeroing through the 'standard zeroing line'. The Panel also had evidence before it regarding the application of the zeroing procedures in 16 different anti-dumping proceedings, including four original investigations, one new shipper review, and 11 periodic reviews."[13]

10. The United States argued in both *US – Zeroing (EC)* and *US – Zeroing (Japan)* that the evidence before the panel was not sufficient to find the existence of an unwritten "as such" measure. The United States does not now endorse the characterization of the evidence contained in the Appellate Body reports as entirely accurate, in particular as it regards the role of computer programs and agency manuals. Nevertheless, the merits and demerits of that evidence is not before the Panel here because that evidence is not before the Panel. Vietnam's assertion that the facts in those disputes and the facts here are "identical" with respect to the so-called "zeroing methodology" is unsupported conjecture. It is insufficient for Vietnam to rely on the facts, rationale, and findings in other disputes as the sole basis for a factual determination and legal finding in this dispute.

11. The evidence presented by Vietnam falls far short of the evidence as described by the Appellate Body in *US – Zeroing (EC)* and *US – Zeroing (Japan)*. Here, the Panel has before it the alleged application of, at most, "zeroing" in four administrative reviews of one product, an "expert opinion" that does not even purport to demonstrate the existence of the "zeroing methodology" as a measure of general and prospective application attributable to the United States, and portions of Commerce's Antidumping Manual that do not include the "standard computer programs" used by Commerce to calculate dumping margins. The chapters of the Antidumping Manual on the record before the Panel relate only to Commerce's NME methodology and to sunset reviews.[14]

12. Even if the Panel were to take into account, as factual evidence, the first and fourth administrative reviews, in addition to the second and third administrative reviews, which are the only two measures within the Panel's terms of reference, the Panel would only potentially have before it evidence of the use of "zeroing" in four administrative reviews of one product. This is hardly evidence of "systematic application."[15]

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[11] *US – Zeroing (EC) (AB)*, paras. 201-202.
[12] *US – Zeroing (Japan) (AB)*, para. 88.
[13] *US – Zeroing (Japan) (AB)*, para. 83.
[14] *See* Exhibit Viet Nam-31.
[15] *US – Zeroing (EC) (AB)*, para. 198.

13. The United States believes that the absence of any evidence of systematic application of zeroing in administrative reviews on the record before the Panel supports a conclusion that Vietnam has failed to establish such systematic application. Accordingly, the United States considers that there is insufficient evidence before the Panel to permit a finding that the "zeroing methodology" exists as a measure that can be challenged "as such."

iv. If the Panel were to find that Viet Nam has discharged its initial burden of establishing that the "zeroing methodology" constitutes a rule or norm that may be challenged "as such", the onus would shift to the United States to refute the existence of that measure. What evidence would the United States rely on to do so?

14. The U.S. response would depend upon how Vietnam established that the "zeroing methodology" constitutes a rule or norm that may be challenged "as such." Because Vietnam has not done so in this dispute, it is unclear how the United States would refute the existence of such a measure or norm, and we are not in a position to speculate on our response to evidence that Vietnam has not presented to the Panel.

15. Hypothetically, if the Panel were to determine that Vietnam has discharged its initial burden of establishing that the "zeroing methodology" constitutes a rule or norm that may be challenged "as such," the United States could respond, for example, by supplying evidence that calls into question whether Vietnam's evidence in fact supports that conclusion. Beyond whether the measure exists and may be challenged "as such," Vietnam would need then to establish that the measure is inconsistent with one or more obligations in the covered agreements, and the United States could respond by demonstrating that the methodology is not inconsistent with the any of the obligations in any of the covered agreements. We note that the United States has explained in our written submissions and oral presentations to the Panel why the so-called "zeroing methodology" is not inconsistent with the covered agreements.[16]

54A. (to both parties) How would a complainant properly place before a panel evidence from a previous case? Might the complainant, for instance, quote from the previous panel, might it argue that the situation is similar to that in the previous case, or might the complainant submit factual evidence from the previous dispute, or might it do something else?

16. We recall the Appellate Body report in *US – Continued Zeroing*, in which the Appellate Body explained that:

[16] *See, e.g.,* U.S. First Written Submission, paras. 110-138 *and* U.S. Second Written Submission, paras. 21-54. We would also note, as we did above in footnote 5, that Commerce has begun a process reflecting the intention of the United States to comply with its WTO obligations despite continued U.S. disagreement with the Appellate Body's findings in connection with "zeroing."

> Factual findings made in prior disputes do not determine facts in another dispute. Evidence adduced in one proceeding, and admissions made in respect of the same factual question about the operation of an aspect of municipal law, may be submitted as evidence in another proceeding. The finders of fact are of course obliged to make their own determination afresh and on the basis of all the evidence before them. But if the critical evidence is the same and the factual question about the operation of domestic law is the same, it is likely that the finder of facts would reach similar findings in the two proceedings. Nonetheless, the factual findings adopted by the DSB in prior cases regarding the existence of the zeroing methodology, as a rule or norm, are not binding in another dispute.[17]

17. In this case, Vietnam must provide evidence to the Panel sufficient to satisfy its burden of establishing that a measure is inconsistent with an obligation in a covered agreement. Vietnam would need to present the evidence as it would in any dispute. In other words, the Panel must have the facts and evidence before it in a manner that allows the Panel to review the facts and evidence and conduct an objective assessment of them. That such evidence may have been presented in another dispute does not alter Vietnam's obligation to properly submit evidence in this dispute. In particular, argument regarding another dispute, or mere citation to findings by another panel or the Appellate Body based on the facts in another dispute, is insufficient to place such facts before the Panel. Whether or not facts presented in another dispute would even be relevant to the dispute at issue would depend on the circumstances of the case, and, at a minimum, a complaining party must put the relevant facts before the Panel and explain how those facts are relevant to the particular claim at issue in order for the Panel to make an assessment of them.

18. The United States notes that much of the evidence described by the Appellate Body in *US – Zeroing (EC)* and *US – Zeroing (Japan)* is publicly available. Vietnam could have, for example, assembled the publicly available evidence described by the Appellate Body in those disputes, or similar evidence, and placed such evidence before the Panel. Vietnam did not do so. Indeed, Vietnam has not presented any evidence that would support a finding that the "zeroing methodology" exists as a measure that can be challenged "as such."

54C. (to the United States) During oral questioning (on the second day of the second substantive meeting) the United States indicated that Exhibit Viet Nam-33 was "not factually incorrect", but that this exhibit did not support a finding of the existence of a general rule or norm. In the light of this comment by the US delegation, do you agree that this affidavit (and the exhibits to which it refers) demonstrates that zeroing has been used in the measures covered by that exhibit?

19. We note that even if the Panel were to conclude that this exhibit demonstrates that zeroing was used at one stage in the calculations, it would still need to address whether the

[17] *US – Continued Zeroing (AB)*, para. 190.

challenged measures are based on zeroing. That is, whether zeroing resulted in the assessment of duties in excess of the margin of dumping, such that the challenged measures could be found inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement. As we have explained, Vietnam has failed to establish that Commerce applied any antidumping duties in excess of the margin of dumping in the second and third administrative reviews.[18]

II. ALL OTHERS RATE

56. (to both parties) In paragraph 23 of its Opening Statement at the second substantive meeting, Viet Nam brings to the Panel's attention a recent USDOC "remand" determination in the second administrative review. Please explain the impact of this remand determination on the relevant measures before the Panel, i.e. the all others rates in the second and third administrative reviews. In particular, is the USDOC's remand determination "final" or is it still subject to appeal? If it is final, does it mean that the all others rate in the second administrative review has been replaced by rate(s) determined by the USDOC on remand? Do the rulings of the Court of International Trade affect the all others rates applied by the USDOC in the third administrative review?

20. The remand redetermination filed by Commerce with the United States Court of International Trade on December 9, 2010, has no impact on the measures before the Panel. First, the remand redetermination is not final as the court has not ruled upon whether the remand redetermination comports with its remand order or is otherwise in accordance with U.S. law. Second, any ruling from the court may be subject to appeal. Third, the remand redetermination applies only to those parties involved in that particular litigation, and does not cover all companies subject to the separate rate applied in the final results of the second administrative review. Finally, once there is a final result in the litigation concerning the second administrative review, that result would not impact the results of the third administrative review, which is a separate proceeding.

21. To the extent that Vietnam relies on this remand redetermination as an indication of an alternative methodology that Commerce has now used and/or should utilize in order to comply with the obligations in Article 6.10 of the AD Agreement, the United States disagrees. As we have explained, there is no obligation in the AD Agreement to devise an alternative dumping calculation methodology for companies not selected for individual examination where the examination has been permissibly limited in accordance with Article 6.10. In addition, Commerce issued the remand redetermination under protest, noting its disagreement with the court's conclusions, as well as with the methodology applied in the remand redetermination. On remand, to make normal value and export price comparisons for the plaintiffs, Commerce reopened the administrative record to gather certain detailed quantity and value data for the plaintiffs' sales to the United States during the period of review, but relied on the normal value

[18] *See* U.S. First Written Submission, paras. 104-109 *and* U.S. Second Written Submission, paras. 7-10.

data collected for the individually examined mandatory respondents. Commerce noted in the remand redetermination that this comparison was not a full dumping margin calculation because the record did not contain the plaintiffs' normal value data, and that, thus, the results of the analysis in the remand redetermination did not reflect the entire scope of the plaintiffs' production experiences and costs.

57. (to the United States) Do you agree with the characterization of the US position contained in Viet Nam's Opening Statement at the second substantive meeting, paragraph 18, i.e. that the United States argues that in all instances (and not just in circumstances in which all calculated rates are zero or de minimis), an authority may use data from any segment of an AD proceeding when calculating the ceiling rate for companies not individually investigated?

22. Vietnam has not correctly characterized the U.S. position. The United States has not argued, as alleged by Vietnam, that a Member may use data from any segment of an antidumping proceeding when calculating the ceiling rate for companies not individually examined in all instances. The U.S. argument to which Vietnam refers is found in paragraph 63 of the U.S. Second Written Submission and was a direct response to Vietnam's incorrect assertion that there is a general requirement to use contemporaneous data in the calculation of the separate, or "all others," rate.[19] Specifically, in paragraph 63 of the U.S. Second Written Submission, the United States quoted from Vietnam's responses, in which Vietnam claimed that Article 9.4 of the AD Agreement is concerned with evidence from the specific segment of the proceeding to determine the all others rate. We stated that there was no support in the text of Article 9.4 for this conclusion.[20] We reiterate that contemporaneity simply is not a requirement for the calculation of the all others rate. However, this is not a statement regarding the calculation of the *ceiling*.

23. By its terms, Article 9.4 requires the use of the dumping margins "established with respect to the selected exporters or producers" in the calculation of the ceiling, unless those dumping margins are zero, *de minimis*, or based on facts available. However, where all of the dumping margins calculated for the selected exporters or producers are zero, *de minimis*, or based on facts available, then Article 9.4 does not specify how the ceiling is to be calculated.

58. (to both parties) The first sentence of Article 9.2 provides that anti-dumping duties shall be collected "in the appropriate amounts". Is the Article 9.2 "appropriateness" standard relevant to the amount of duty applied in the Article 9.4 lacuna situation?

24. We would draw the Panel's attention to the panel report in *EC – Salmon (Norway)*. There, the panel analyzed the meaning of Article 9.2 of the AD Agreement and explained that it is:

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[19] *See* U.S. Second Written Submission, para. 63.

[20] *See* U.S. Second Written Submission, para. 63.

> . . . one of several provisions in Article 9 addressing the "Imposition and Collection of Anti-Dumping Duties". One of its requirements is that any antidumping duties imposed must be collected "in the appropriate amounts". However, Article 9.2 does not explain how to determine the "appropriate" amounts of any anti-dumping duty to be collected. The dictionary definitions of the word "appropriate" include "specially suitable (for, to); proper, fitting". This suggests that the "appropriate" amount of anti-dumping duty is the amount of duty that is "proper" or "fitting" in the context of an anti-dumping investigation.[21]

That dispute concerned the EC's imposition of minimum import prices in connection with the application of its prospective normal value assessment system. The panel went on to find that:

> [I]n order to comply with the requirement in Article 9.2 of the AD Agreement that anti-dumping duties be collected in the "appropriate amounts", Members imposing [minimum import prices] on investigated parties must ensure that they do not exceed their respective normal values.[22]

25. This analysis appears correct to the United States. That is, an antidumping duty is "appropriate" if it is consistent with the provisions of the AD Agreement. So, the antidumping duty applied to an individually examined exporter or producer is "appropriate" if it is limited to that exporter/producer's margin of dumping as calculated pursuant to Article 2 of the AD Agreement, assuming cooperation, of course. In the absence of cooperation, the "appropriate" antidumping duty would be the dumping margin determined on the basis of facts available, pursuant to Article 6.8 and Annex II of the AD Agreement. With respect to Article 9.4 of the AD Agreement, the "appropriate" antidumping duty is one that does not exceed the ceiling determined under that provision. Where that provision does not specify a ceiling, that is, where all the dumping margins established with respect to individually examined exporters/producers are zero, *de minimis*, or based on facts available, the "appropriateness" standard of Article 9.2 does not impose an additional obligation or require a particular result.

26. In that sense, the "appropriate amounts" language in Article 9.2 is similar to the "fair comparison" language in Article 2.4 of the AD Agreement. As we have explained, prior panels have exercised caution in interpreting the meaning of Article 2.4 due to the inherently subjective nature of a "fairness" standard. Caution is likewise warranted in the interpretation of Article 9.2, as an "appropriateness" standard could be equally subjective.

III. COUNTRY-WIDE RATE

59. (to the United States) In paragraphs 26-27 of its Opening Statement at the second substantive meeting, Viet Nam argues that the Fish Fillets memo "provides no insight,

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[21] *EC – Salmon (Norway)*, para. 7.704.

[22] *EC – Salmon (Norway)*, para. 7.709.

evidence, or information on the ownership structure of the shrimp industry in Viet Nam" because: (i) it does not relate to the Vietnamese shrimp industry; and (ii) it is outdated. Please comment.

27. Commerce's finding concerning the nonmarket status of the Vietnam economy, and in particular the evidence supporting this finding, does not and need not rest on an evaluation of each industry in each case. It is, logically, an analysis of the economy as a whole. While the nonmarket economy status memorandum was prepared in the context of the referenced fish fillets investigation – because this was the first such case brought with respect to imports from Vietnam – the memorandum did not address the specific structure of the fish fillets industry. As indicated, the memorandum considered the economy as a whole. Specifically, the memorandum documented the ongoing pervasive role of the government in many sectors of the economy. We summarized these findings in the U.S. First Written Submission.[23] The evidence gathered supports the determination to treat Vietnamese companies as part of a single entity because, due to the influence exercised by the Government of Vietnam over economic activities, the government itself is, in effect, the exporter. Because Vietnam's economy is in transition, and to take into account the changing circumstances in Vietnam, Commerce provides respondents the opportunity to demonstrate their independence from such government influence in order that they may obtain a separate rate.

28. Although the memorandum was prepared several years prior to the second and third administrative review proceedings, the United States does not consider the findings therein to be outdated. It is important to note that companies, including those in the shrimp industry, can seek a market oriented industry designation. Further, the Government of Vietnam may request a review of its market economy status at any time during an antidumping proceeding. However, to date, no Vietnamese shrimp company has ever provided such information and the Government of Vietnam has never requested such a review.

29. We would also note that Paragraph 254 of the Working Party Report on Vietnam's Accession reflects that "Several Members noted that Viet Nam was continuing the process of transition towards a full market economy" and that a strict comparison with domestic prices and costs may not be possible. Accordingly, paragraph 255 of the Working Party Report provides certain specific additional rights to WTO Members applying antidumping duties on products from Vietnam, related to the determination of Normal Value. This recognition in the Working Party Report of the transitional nature of Vietnam's economy is closer in time to the commencement of the second and third reviews, and is confirmation of Commerce's conclusions in the nonmarket economy status memorandum. Vietnam accepted the commitments of paragraph 255 of the Working Party Report in its Accession Protocol.[24]

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[23] *See* U.S. First Written Submission at para. 147.

[24] *See* Accession Protocol, para. 2 *and* Working Party Report, para. 527.

59A. (to the United States) Does the United States consider that Viet Nam's NME status suffices to conclude that every industry, including the shrimp industry, is under the control of the Vietnamese government?

30. As explained above and in the nonmarket economy status memo, the study conducted by Commerce concerned the nature of the economy overall, and the government's role in the economy. Commerce's determination that Vietnam did not yet sufficiently allow market forces to operate in the economy such that it could be considered a market economy for antidumping purposes means: 1) that the government's role in the economy is so pervasive generally that it is reasonable and logical to conclude that most companies, operating in any industry in Vietnam, are under (or potentially under) sufficient government influence (direct or indirect) to be treated as part of a single exporting entity, unless it is shown otherwise; and 2) that normal value cannot be adequately measured using the traditional market economy methodology.

31. Since Commerce's determination that Vietnam is a nonmarket economy, there have been several antidumping investigations and administrative reviews involving products from Vietnam. In each of these proceedings, Commerce determined, based upon the nonmarket economy status memorandum, that the government's influence over the economy was sufficient to treat exporters of the merchandise at issue as one entity unless they can demonstrate their eligibility for a separate rate. No party has yet argued that Commerce's conclusions in the nonmarket economy status memorandum are incorrect, or that those conclusions should not apply to a particular industry. If a party were to make these arguments, Commerce would consider them accordingly.

59B. (to the United States) Does a demonstration by an exporter that it is independent of the government not bring into question the factual basis for the presumption applied by the USDOC?

32. No. As indicated in the U.S. responses to Questions 59 and 59A, Commerce determined, based on the ongoing pervasive role of the government in many sectors of the economy as a whole, that Vietnamese companies should be treated as part of a single entity because, due to the influence exercised by the Government of Vietnam over economic activities, the government itself is, in effect, the exporter.[25]

33. Because Vietnam's economy is in transition, and to take into account the changing circumstances in Vietnam, Commerce provided respondents the opportunity to demonstrate their independence from such government influence over their export activities in order to obtain a separate rate. The recognition of Vietnam as a transitional economy is the basis for allowing companies to obtain their own rates when warranted. This allows for the possibility that, while the government continues to maintain significant control over the economy, certain individual enterprises may possess certain operational flexibility. Commerce examined the control of the companies in question, not in every respect, but primarily with respect to their export activities,

[25] *See also* U.S. First Written Submission, paras. 140-153.

in order to determine whether it was reasonable to conclude that a particular company should be treated as an "exporter or producer" within the meaning of Article 6.10 of the AD Agreement that is entitled to its own dumping margin.

59C. (to the United States) What is your response to Viet Nam's argument that there can be no circumvention for exporters subject to the all others rate?

34. Enterprises that are considered to be under government influence in their export activities are believed to engage in export pricing behavior driven by government influence rather than by market forces. Hence, such enterprises are appropriately treated as a single entity for purposes of determining a dumping rate. Commerce has investigated and reviewed the Vietnam-wide entity and determined a dumping rate for it that is distinct from the separate rates (referred to by Vietnam as the "all others" rate) Commerce has determined. In the second administrative review, the dumping rate determined for the Vietnam-wide entity was based on facts available because 35 companies that were part of the Vietnam-wide entity failed to cooperate. In the third administrative review, Commerce applied to the Vietnam-wide entity a dumping rate from the prior administrative review, which was the only rate ever determined for the Vietnam-wide entity, because all of the dumping margins determined for individually examined companies were zero or *de minimis*. This was the methodology Commerce applied to all of the exporters and producers that were not individually examined.

35. Circumvention is a concern where one company or enterprise is somehow able to take advantage of and use a lower dumping rate determined for another company or enterprise. Thus, were a dumping rate calculated for a particular company subject to government influence based only on its limited data, or if, somehow, such a company were permitted to obtain the separate rate average, it would be possible, for example, for the government to order exports to be routed through that company, if the dumping rate determined for it were lower than the Vietnam-wide entity rate, in order to avoid antidumping duties. This is true of affiliated companies in a market economy situation as well.

60. (to the United States) Viet Nam argues that the findings of the panel in EC - Fasteners (Viet Nam Opening Statement at the second substantive meeting, paragraphs 36-38) support its arguments with respect to the Viet Nam-wide rate. Please comment.

36. We note that this panel report has not yet been adopted and, of course, may yet be appealed by the parties. That being said, we do not believe that the panel's findings support Vietnam's arguments with respect to Commerce's determination to apply a single rate to the Vietnam-wide entity. The *EC – Fasteners (China)* panel concluded that an administering authority may find that producers/exporters are sufficiently related to the government to justify treating them as a single entity.[26] This legal conclusion supports the U.S. argument that treating

[26] *EC – Fasteners (China) (Panel)*, para. 7.94.

companies in Vietnam as a single entity, based on evidence of government control over their export activities, is permissible under Article 6.10 of the AD Agreement.

37. The United States believes that Commerce established sufficient facts in this case to support its determination to treat the Vietnam-wide entity as a single exporter/producer. We agree with the *EC – Fasteners (China)* panel that, for purposes of Article 6.10 of the AD Agreement, the facts must establish a basis for finding distinct enterprises to constitute a single entity. However, to the extent that the *EC – Fasteners (China)* panel found that such factors are limited to those identified or analyzed in the *Korea – Certain Paper* dispute, which involved affiliation between private enterprises in a market economy setting, the United States would disagree that there is such a limitation on the possible factors to be considered. The nature of the inquiry involving a market economy is inherently different from the inquiry involving a nonmarket economy, because the role of the government in the economy is very different. There is nothing in the AD Agreement that defines or limits how enterprises may be linked such that they are properly considered a single entity. Accordingly, the *EC – Fasteners (China)* panel report should not be read to interpret Article 6.10 as containing a finite list of relevant facts that must be found in order to justify such a determination.

38. In a market economy case, like that in *Korea – Certain Paper*, the authority will look at the relationship between two or more private companies operating in a commercial, market-oriented environment, in which the government is presumed to have no, or minimal influence. By contrast, in this case, Commerce evaluated the government's role in the economy, and the potential impact of any influence on companies, directly or indirectly, in its nonmarket economy analysis. In this manner, Commerce's nonmarket economy finding supports its conclusion that the state has the ability to exert significant influence over enterprises within the economy, such that multiple enterprises, initially, should be treated as a single entity. Of course, Commerce provided an opportunity to respondents to demonstrate their independence from the government in their export activities such that they could obtain a separate rate. Thus, in this case, Commerce established the necessary facts to support the conclusion that companies not demonstrating that they are separate from the government, at least with respect to their export activities, should be treated as a single exporter/producer under Article 6.10 of the AD Agreement.

61. (to the United States) The United States asserts that the Viet Nam-wide entity could be selected for individual examination if, "for example", an exporter was selected for individual examination and did not establish that it was separate from the Viet Nam-wide entity (see, e.g., US Reply to Panel Question 29, paragraph 58). Please explain:

i. Are there other examples of instances in which the Viet Nam-wide entity may be individually examined?

39. To date, the entity that is referred to (for convenience) as the "Vietnam-wide entity" has not sought individual examination. Thus, this question raises only a hypothetical scenario. In such a hypothetical scenario, Commerce might expect an enterprise to request a review of itself (as or on behalf of the government-controlled entity), and fully identify itself and any other affiliated, constituent parts involved in the production and sale of the merchandise at issue. The entire entity could, in theory, be individually examined. If, as in the second and third administrative reviews, there were a large number of exporters under review, and it were demonstrated, through quantity and value information or through Commerce's review of Customs data, that the government-controlled entity was one of the largest exporters, then it could be selected for individual examination.

ii. How would the USDOC calculate the Viet Nam-wide entity's margin of dumping if it were selected for individual examination?

40. Were circumstances to arise such that all or parts of the Vietnam-wide entity were selected for individual examination, and fully cooperated, it is an open question as to how a dumping margin for such an entity would be calculated. Commerce would need to consider that question in the context of an actual case. Commerce's separate rate test determines whether a company has demonstrated eligibility for a rate separate from the Vietnam-wide entity, based in part on a company's ability to demonstrate that the government does not exercise control over a company's export prices. If the Vietnam-wide entity itself were making the sales, and Commerce were confident that all constituent parts of the entity had been identified, Commerce would then need to consider how best to calculate an accurate rate for such an entity based on data from its component companies.

62. (to the United States) Was the Government of Viet Nam asked by the USDOC to participate in the second or third administrative reviews, either in its capacity as head of, or as part of, the Viet Nam-wide entity? In particular, was the Government of Viet Nam asked to respond to any questionnaires sent to "exporters"? If so, please provide supporting evidence.

41. Commerce received requests for review for specific companies, not the Government of Vietnam. Accordingly, Commerce did not ask the Government of Vietnam to participate in the second or third administrative reviews as "head of, or as part of, the Viet Nam-wide entity" or to respond to any questionnaires sent to the companies under review. In the second administrative review, there were companies, which were ultimately found to be part of the Vietnam-wide entity, that were asked to participate by responding to Commerce's quantity and value questionnaires. In the third administrative review, there were companies for which a review was requested, that were identified as companies under review in the initiation notice, and ultimately found to be part of the Vietnam-wide entity, as they did not submit information demonstrating that they were not subject to government control over their export activities.

63. (to the United States) In its Reply to Question 29 from the Panel (paragraph 58), the United States asserts:

> ***"Once it had been identified as an exporter or producer, the Vietnam wide entity, through its constituent parts, was treated like other exporters or producers, and could have been selected for individual examination if, for example, a named exporter was selected for individual examination and did not establish that it was separate from the Vietnam wide entity."***
>
> ***According to the USDOC's AD Manual (Exhibit Viet Nam-31, page 3), "exporters must pass a separate rate test to receive a rate that is separate from the NME-wide rate." Further, the notice of initiation of the first administrative review indicated that, in the event the USDOC decided to select the mandatory respondents through sampling, it would "allow only those respondents with separate rate status to be included in the sampling pool." (Exhibit Viet Nam-8, page 17818). Furthermore, the notice of initiation in the second administrative review states that "Because the Department intends to select the mandatory respondents by selecting the exporters/producers accounting for the largest volume of subject merchandise exported to the United States during the period of review, the Department will require all potential respondents to demonstrate their eligibility for a separate rate" and, further, that "[o]nly those respondents with separate rate status will be included in the group receiving the weighted-average margin calculated from the selected respondents." (Exhibit Viet Nam 12, page 17100). We therefore understand that, in NME country proceedings, the USDOC will only assign individual margins of dumping, or apply the all others rate, to exporters that demonstrate their independence from government control. In other words, we understand that a NME-wide entity will never be eligible for individual review, and will never be included in a limited examination under Article 6.10 of the AD Agreement.***
>
> ***i. Is our understanding correct? If not, please explain.***

42. We would refer the Panel to the U.S. responses to Question 61 and 63A, which discuss the possibility that the Vietnam-wide entity could be individually examined. As explained, Commerce has not confronted such a hypothetical scenario in the proceedings concerning shrimp from Vietnam. Accordingly, we believe that the Panel's statement that "[i]n other words, we understand that a NME-wide entity will never be eligible for individual review, and will never be included in a limited examination under Article 6.10 of the AD Agreement" is not correct.

43. The Vietnam-wide entity, by definition, is not eligible for individual review *as a company separate and independent from the government* in its export activities. But the implication of the sentence in the Panel's question – that a rate could never be *calculated* for the enterprises comprising the entity – does not necessarily follow, as the U.S. response to Question 61explains. Whether and how such a rate might be *calculated* is not a question that Commerce had to address

in the circumstances presented in the second and third administrative reviews. What is clear is that in the second administrative review, many companies that did not establish independence from government control failed to provide necessary information, and yet a rate had to be determined for these companies, which were deemed to be part of a single entity. Similarly, in the third review, as the entity was under review – because companies comprising the entity had been named in the request for review – it was necessary to determine a rate for the entity.

ii. If our understanding is not correct, could the Viet Nam-wide entity, as opposed to one of its constituent parts, have been selected for individual examination? Please explain.

44. We would refer the Panel to the U.S. response to Question 61 above, in which we explain how the single group of enterprises comprising the Vietnam-wide entity might be individually examined in a hypothetical scenario.

iii. If our understanding is not correct, was the Viet Nam-wide entity, as opposed to its constituent parts, "treated like other exporters or producers"? Please explain.

45. The Vietnam-wide entity was treated like other exporters or producers. In particular, with respect to the dumping rate applied to the Vietnam-wide entity in the second and third administrative review, despite not selecting it for individual examination, Commerce treated the Vietnam-wide entity as it did the other exporters or producers that were not individually examined.

46. Specifically, in the second administrative review, Commerce determined that certain companies that were part of the Vietnam-wide entity failed to cooperate by refusing to respond to questionnaires sent by Commerce. In consequence, Commerce applied an antidumping duty rate to the Vietnam-wide entity that was based upon facts available. Article 6.8 of the AD Agreement permits the use of the facts available in any case "in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation. . . ." Article 6.8 refers to "*any* interested party" and is not limited in its application to individually examined companies. Additionally, Article 6.8 applies to affiliated companies, such that if any component part of an entity comprised of multiple companies fails to cooperate, facts available may be used to determine a dumping margin for the entire entity. Commerce's treatment of the Vietnam-wide entity was, in this regard, no different than its treatment of other exporters or producers.

47. In the third administrative review, all the rates calculated for examined companies were zero, *de minimis*, or based on facts available. Thus, it was not possible to calculate a maximum antidumping duty according to the terms of Article 9.4 of the AD Agreement and Article 9.4 did not specify the maximum antidumping duty that could be applied to companies not individually examined. As it did with all other exporters and producers that were not individually examined,

Commerce applied to the Vietnam-wide entity the rate that had been applied to it in the most recently completed prior proceeding. As we have noted before, all companies subject to the administrative review had the opportunity to provide information demonstrating their independence from the government so as to avoid being assigned the Vietnam-wide entity rate.

iv. Did the USDOC ask the Viet Nam-wide entity, as opposed to its constituent parts, to complete a Q&V questionnaire in either the second or third reviews?

48. Commerce did not ask the Vietnam-wide entity, as such, to complete a quantity and value questionnaire in either the second or third administrative review. In the second administrative review, however, Commerce did ask certain companies, for whom reviews were requested and which were ultimately found to be part of the Vietnam-wide entity, to complete quantity and value questionnaires. In the third administrative review, Commerce did not ask any exporter or producer to complete quantity and value questionnaires, as it relied instead on Customs data to identify the largest exporters for individual examination in that proceeding.

v. Could the authority apply a facts available rate to the entity as a whole on the basis that one of its constituent parts failed to cooperate?

49. Yes. Article 6.8 and Annex II of the AD Agreement permit the use of facts available in any case "in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation. . . ." On its face, this would include a group of enterprises that constitutes a single entity. The failure of any part of such an entity to cooperate or to provide necessary information may necessitate the use of facts available to determine the dumping margin for the entity. There is nothing in the AD Agreement, in Article 6.8 or Annex II, or elsewhere, that would preclude the application of facts available to such an entity when necessary in order for the investigating authority to make a determination.

63A. (to the United States) The United States asserted, in Reply to Question 29 from the Panel, that the Vietnam-wide entity could have been selected for individual examination if one of its constituent parts had been selected for individual examination, and that such constituent part did not establish independence from the Vietnam-wide entity.

How would individual examination of the constituent part constitute individual examination of the Vietnam-wide entity?

50. If a particular company were selected for individual examination, and that company did not establish independence from the Vietnam-wide entity, then the entire Vietnam-wide entity would be subject to individual examination. This is the case where any group of enterprises is treated as a single entity and one or more of the constituent parts of the entity are selected for individual examination. It would be necessary, in such a situation, for all of the constituent parts

of the entity to provide data in order for a dumping margin to be determined for the entity based on its own information. We note that this factual scenario was not present in either the second or third administrative reviews. That is, none of the constituent parts of the Vietnam-wide entity was selected for individual examination in those proceedings.

63B. (to the United States) We note the US assertion (on the second day of the Panel's second substantive meeting with the parties) that the Vietnam-wide entity could not have been selected for individual examination in the reviews at issue because no review had been requested in respect of the Vietnam-wide entity. The United States also asserted that review had been requested in respect of a company that was part of the Vietnam-wide entity.

i. Given the previous determination that the relevant company was part of the Vietnam-wide entity, wouldn't a request for review of part of the Vietnam-wide entity necessarily constitute a request for review of the whole Vietnam-wide entity?

51. A request for review of part of the Vietnam-wide entity may constitute a request for review of the whole Vietnam-wide entity. However, at the time when a review is requested, it is not yet known whether any particular company is part of the Vietnam-wide entity, because all companies have the opportunity to demonstrate their independence from the Vietnam-wide entity with respect to their export activities. This is true even for companies that have previously been found to be part of the Vietnam-wide entity in prior proceedings. Hence, a request for review of an individual company does not necessarily constitute a request for review of enterprises comprising the Vietnam-wide entity.

ii. In a market economy proceeding, would a request for review in respect of an affiliated company necessarily constitute a request for a review of the entire affiliation?

52. In a market economy situation, if an interested party requests a review of a company that has previously been determined to be affiliated with other companies, such that the group of companies was treated as a single entity, that request will be considered a request for review of the entity as a whole. However, just as in a nonmarket economy case, if the company for which a review has been requested believes that it should be treated separately from the companies with which it has previously been determined to be affiliated, it has the opportunity to demonstrate that such independent treatment is warranted. If it could demonstrate such independence, then the entity, *i.e.*, the previously affiliated companies that were not individually named, would not be subject to review.

63C. (to the United States) How would the USDOC calculate the rate applied to the Viet Nam-wide entity if: (i) the USDOC applied sampling but the Viet Nam-wide entity was

not selected for individual examination; (ii) the use of facts available was not justified in respect of the Viet Nam-wide entity; and (iii) a lacuna situation did not arise?

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

IV. LIMITATION OF THE NUMBER OF INDIVIDUALLY-INVESTIGATED EXPORTERS

66. (to United States) Please react to Viet Nam's argument (paragraph 45 Opening Statement at the second substantive meeting) that the use by the Appellate Body of "the singular 'exporter's' rather than the plural 'exporters'" in EC – Tube or Pipe Fittings is an indication that the Appellate Body considered that the language of Article 11.1 is applicable to individual exporters.

54. The *EC – Tube or Pipe Fittings* dispute involved an antidumping investigation that covered only one exporter.[27] In the last clause of paragraph 81 of the Appellate Body report, the Appellate Body noted that certain provisions "ensure that the exporter's [singular] legitimate interests are safeguarded." The Appellate Body likely used the singular "exporter's" there because there was only one exporter in the investigation at issue whose interests were being safeguarded. Indeed, the very next paragraph of the Appellate Body report continues to refer to the one exporter involved in the investigation. There is no indication that the Appellate Body intended to find that the obligations in Article 11 of the AD Agreement apply on a company specific basis, and the Appellate Body did not expressly consider that question in that dispute. Rather, the Appellate Body was simply referring to the one exporter involved in the investigation.

55. Moreover, we note that the issue in *EC – Tube or Pipe Fittings* was whether the rapid devaluation of the Brazilian Real in the middle of a period of investigation meant that an analysis should not include data from a period prior to that devaluation because the investigation must focus upon whether injurious dumping will recur in the future.[28] Thus, the Appellate Body's analysis was concerned with events that could affect the imposition of an antidumping duty overall, not events that affected an individual company. It just happened that the antidumping duty applied to only one exporter in that particular case.

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[27] *See EC – Tube or Pipe Fittings (AB)*, para. 2.

[28] *See EC – Tube or Pipe Fittings (AB)*, para. 82.

56. Consequently, Vietnam's argument – that the use by the Appellate Body of "the singular 'exporter's' rather than the plural 'exporters'" in *EC – Tube or Pipe Fittings* is an indication that the Appellate Body considered that the language of Article 11.1 is applicable to individual exporters – is without merit.

67. (to both parties) What evidence is required to make out a claim that voluntary responses have been discouraged, inconsistently with the closing sentence of Article 6.10.2? In particular, please discuss whether action on the part of the investigating authority (as opposed to mere inaction) is necessary for there to be a violation of the obligation contained in that sentence.

57. As an initial matter, we reiterate that the evidence before the Panel demonstrates that no party submitted the necessary information to be considered as a voluntary respondent in either the second or third administrative review. Thus, it is not possible to find that Commerce acted inconsistently with Article 6.10.2 of the AD Agreement by failing to consider voluntary responses in the second and third administrative reviews.

58. To the extent that Vietnam's argument has now shifted, quite late in this dispute, to a claim that Commerce acted inconsistently with Article 6.10.2 by discouraging voluntary responses, this argument is without merit. Vietnam has not proffered any evidence to show that Commerce discouraged voluntary responses in either of the administrative reviews at issue.

59. Article 6.10.2 of the AD Agreement provides that:

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

While the obligation in the last sentence of Article 6.10.2 is phrased in the passive voice, put another way, and read in the context of the rest of Article 6.10.2, this last sentence mandates that "the authorities" shall not discourage voluntary responses by exporters or producers not initially selected for individual examination.

60. The question, then, is what it means for the investigating authority to "discourage" voluntary responses. The word "discourage" is defined as "[d]eprive of courage, confidence, hope, or the will to proceed; dishearten, deject," "[d]issuade or deter," and "[i]nhibit or seek to

prevent (an action etc.) by expressing disapproval."[29] These definitions of the verb "discourage" all suggest some action on the part of the investigating authority.

61. In addition, the obligation in the last sentence of Article 6.10.2 is framed as a prohibition on action: "Voluntary responses *shall not* be discouraged" (emphasis added). Other provisions of the AD Agreement require the investigating authority to take particular action. For example, Article 6.10 of the AD Agreement requires that "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation."

62. Thus, when the text of Article 6.10.2 is read in accordance with the ordinary meaning of its terms in their context, it is evident that this provision establishes a prohibition on action by the investigating authority that would discourage voluntary responses.

63. In the second and third administrative reviews, Commerce took no action to discourage voluntary responses. Indeed, we note that Vietnam does not cite to any record evidence from the second administrative review with regard to this claim. Vietnam offers as evidence only one letter from the record of the third administrative review, dated October 8, 2008.[30] In that letter, the respondent party at issue, Fish One, is not asking to be treated as a voluntary respondent, but is asking for a specific revocation review, and, if required by Commerce to obtain such a review, to be selected as a mandatory respondent.[31] This letter *does not reference* a possible *voluntary* submission of a full questionnaire, concluding as follows: "Fish One stands ready, even now, to fully participate in this review *as a mandatory respondent* and take the same time as the other mandatory respondents to answer the questionnaires."[32] Fish One, to be treated as a voluntary respondent, needed to actually submit the necessary information by the applicable deadlines. Even if Fish One had sought some indication of Commerce's intent early in the proceeding, Commerce's inability to respond at that time with any commitment one way or the other cannot be viewed as discouraging. This evidence by Vietnam fails to show any action taken by Commerce to discourage a voluntary response by Fish One or any other company.

64. Commerce has, in the past, accepted and relied on voluntary submissions to determine dumping margins on numerous occasions. That no such submissions were received in the second and third administrative reviews does not establish a breach of the prohibition in Article 6.10.2 of the AD Agreement on investigating authorities discouraging voluntary responses. Commerce exercises its discretion to select as many respondents as possible for individual examination, based on the criteria outlined in Article 6.10 of the AD Agreement, and when possible, Commerce uses voluntary submissions to determine individual dumping margins as well. Vietnam's interpretation of the phrase "shall not be discouraged" would deprive Members of the

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[29] *New Shorter Oxford English Dictionary*, Vol. 1, p. 687 (Exhibit US-10).

[30] *See* Exhibit Viet Nam-62.

[31] *See* Exhibit Viet Nam-62, p. 7-8.

[32] Exhibit Viet Nam-62, p. 7-8 (emphasis added).

right to limit the examination, reading this right out of Article 6.10 of the AD Agreement entirely, and, hence, it is not a permissible interpretation.

LIST OF EXHIBITS

US-10 *New Shorter Oxford English Dictionary*, Vol. 1, p. 687