US – ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM

WT/DS404

FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. This is not merely another zeroing dispute. Indeed, in the two administrative reviews[1] that are the only measures properly before this Panel, zeroing, as a factual matter, had no impact on the margins of dumping determined for individually examined exporters or producers, and the zeroing methodology was not used during the proceedings in order to determine any other assessment rates applied. In this dispute, in addition to advancing unfounded claims related to zeroing, the Socialist Republic of Vietnam ("Vietnam") is seeking to undermine the ability of investigating authorities to conduct antidumping examinations when faced with incomplete information, uncooperative interested parties, and large numbers of respondent firms.

2. Vietnam also asks the Panel to ignore certain fundamental aspects of its economy that were recognized by World Trade Organization ("WTO") Members when Vietnam acceded to the WTO, and which pose special difficulties for investigating authorities when examining imports from non-market economy countries, such as Vietnam. Ultimately, this dispute is about whether 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"), if properly interpreted in accordance with the customary rules of interpretation of public international law and with proper application of the standard of review, must be understood to impose the obligations Vietnam claims they do. As the United States will demonstrate, properly interpreted, these Agreements do not impose such obligations.

3. Vietnam claims that the U.S. Department of Commerce ("Commerce") acted inconsistently with the AD Agreement and the GATT 1994 by applying the zeroing methodology in the challenged proceedings. As demonstrated below, Vietnam has failed to identify any calculated margins of dumping that were actually affected by the zeroing methodology. Since all the calculated dumping margins were zero or *de minimis*, there was no violation of the AD Agreement and the GATT 1994. Vietnam also suggests that margins of dumping that were calculated during the investigation and continued to be applied during subsequent administrative reviews are inconsistent with the AD Agreement and the GATT 1994 because those dumping margins were calculated using the zeroing methodology. As will be explained, not only was the investigation initiated prior to Vietnam's accession to the WTO and thus was not subject to the AD Agreement, it also is not within the Panel's terms of reference. Furthermore, the dumping margins calculated during the investigation were not *recalculated* during the challenged administrative reviews and have not become subject to review by this Panel merely by virtue of their continued application.

4. More generally, Vietnam's assertion that the AD Agreement and the GATT 1994 include a general prohibition against zeroing is incorrect. It is a fundamental principle of the customary rules of interpretation of public international law that any interpretation must address the text of

[1] U.S. domestic law and regulations refer to Article 9 assessment proceedings as "administrative reviews."

the agreement and may not impute into the agreement words and obligations that are not there.[2] With respect to zeroing, Vietnam, relying upon past Appellate Body reports, asks the Panel to interpret the AD Agreement to include a general prohibition of zeroing that is based upon the concept of "product as a whole," a term that is absent from the text of the AD Agreement and the GATT 1994. A number of dispute settlement panels, in contrast, have found that there is no obligation to provide offsets – that is, to reduce antidumping duties on dumped imports by the amounts by which any other imports covered by the same assessment proceedings exceed normal value – in proceedings beyond the original investigation.[3]

5. At the heart of the disagreement over whether the AD agreement includes a general prohibition of "zeroing" is the issue of whether the term "dumping" may be reasonably interpreted in relation to specific transactions, that is, to mean that the export price of the product in a particular export transaction is less than the comparable price for the like product, in the ordinary course of trade, in the exporting country. The Appellate Body has taken the view that the definition of "dumping" may only be interpreted as applying at the "level of the product under consideration,"[4] not individual export transactions. In contrast, the United States has argued, and successive panels have agreed, that the interpretation that dumping may be determined at the level of individual export transactions is a permissible interpretation of the AD Agreement and the GATT 1994 under the customary rules of interpretation of public international law.

6. The rights and obligations of WTO Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements. Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") plainly requires each panel to make its own objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. Further, in settling disputes among Members, WTO dispute settlement panels and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements."[5]

7. Accordingly, the United States respectfully requests that this Panel make an objective assessment of the matter before it and refrain from adopting Vietnam's proposed interpretation of the covered agreements. Instead, the United States respectfully requests that this Panel remain faithful to the text of the AD Agreement by finding that the approach taken by the United States

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[2] *India – Patents (AB)*, para. 45.

[3] *US – Stainless Steel (Mexico) (Panel)*, paras. 7.61, 7.149; *US – Zeroing (Japan) (Panel)*, paras. 7.216, 7.219, 7.222, 7.259; *US – Softwood Lumber V (Article 21.5) (Panel)*, paras. 5.65, 5.66, 5.77; *US – Zeroing (EC) (Panel)*, paras. 7.223, 7.284; *see also US – Continued Zeroing (Panel)*, paras. 7.169 and n.131 (explaining that the panel generally "found the reasoning of the earlier panels on these issues to be persuasive").

[4] *US – Continued Zeroing (AB)*, paras. 277, 287.

[5] DSU, Article 19.2.

rests upon a permissible interpretation in accordance with the customary rules of interpretation of public international law.

8. Beyond zeroing, Vietnam challenges Commerce's determination that companies that could not, or that refused to demonstrate their independence from the Government of Vietnam are properly treated as part of a single exporter or producer within the meaning of those terms, as they are used in Article 6.10 of the AD Agreement. There is simply no support in the text of the AD Agreement for Vietnam's claim. The terms "exporter" and "producer" are not defined in the AD Agreement, and a previous panel has determined that it is permissible to treat multiple legal entities as a single exporter or producer in certain circumstances.[6] In this case, the nature of Vietnam's economy, in particular the control exercised by the Government of Vietnam over its economy, including decisions concerning pricing and exportation by particular companies, justify treating Vietnamese companies, in the absence of evidence demonstrating independence from such government control, as part of an entity that constitutes a single exporter or producer subject to a single assessment rate.

9. WTO Members recognized at the time of Vietnam's accession to the WTO that Vietnam is continuing the process of transition towards a full market economy, and that more reforms would be needed for Vietnam's economy to operate fully on market principles.[7] Members therefore raised concerns during Vietnam's accession negotiations about the application of WTO rules, including trade remedies, in the context of the transitioning nature of Vietnam's economy. To address these concerns, Vietnam undertook several commitments in its Protocol of Accession,[8] including with respect to the application of trade remedies by other Members, that sought to address the issues raised by the entry of this transitioning economy into the multilateral trading system. Based on the evidence showing that the Government of Vietnam exercises control over its economy, Commerce justifiably treated respondent firms as a single, Vietnam-wide entity, unless a firm could demonstrate sufficient independence from the Government of Vietnam.

10. Vietnam also challenges Commerce's determinations in the proceedings at issue to limit its examination to a reasonable number of producers and exporters accounting for the largest percentage of the volume of Vietnamese shrimp exports. Commerce determined, in light of the large number of exporters and producers involved, that individually examining all exporters and producers would be impracticable. Commerce's determinations are consistent with Article 6.10 of the AD Agreement. Vietnam asks the Panel to nullify the second sentence of Article 6.10 by

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[6] *See Korea – Certain Paper*, para. 7.161.

[7] *Report of the Working Party on the Accession of Viet Nam*, WT/ACC/VNM/48 (October 27, 2006) ("Working Party Report"), para. 254.

[8] *Protocol on the Accession of the Socialist Republic of Viet Nam*, WT/L/662 (November 15, 2006) ("Vietnam Accession Protocol").

interpreting the provision so strictly that it could never be applied, and by adding a prohibition against repeated use in separate proceedings that has no basis in the AD Agreement.

11. Vietnam further alleges that Commerce rejected the voluntary submission of necessary information by Vietnamese companies that were not selected for individual examination. As explained below, Vietnam has failed to substantiate this claim, and, indeed, it is without any basis in fact. Moreover, investigating authorities are not obligated to accept such voluntary submissions where doing so is unduly burdensome to the authorities and would prevent timely completion of the investigation.[9] Vietnam urges the Panel to impose burdensome obligations on WTO Members that are not contained in the AD Agreement and ignore the detailed procedural provisions of Article 6.10, which provide flexibility to investigating authorities in situations involving large numbers of exporters.

12. As will be demonstrated below, each of Vietnam's claims is without merit. Thus, the United States respectfully requests that the Panel reject Vietnam's claims that the United States has acted inconsistently with the covered agreements.

13. In addition to responding to the arguments advanced in Vietnam's first written submission, the United States also requests preliminary rulings that certain of the "measures" challenged by Vietnam are not subject to the AD Agreement or are outside the Panel's terms of reference. In particular, the investigation, which was initiated, and concluded, prior to Vietnam's accession to the WTO, and was not a subject of consultations, is not subject to the AD Agreement and is not within the Panel's terms of reference. Likewise, the first administrative review, which was also initiated prior to Vietnam's accession to the WTO, is not subject to the AD Agreement. Finally, Vietnam's challenge of the supposed "continued use of challenged practices," which was not identified as a measure in Vietnam's panel request, cannot itself be a measure subject to dispute settlement, and includes proceedings that were not a subject of consultations, is not a measure within the Panel's terms of reference. The United States respectfully requests that the Panel grant the U.S. requests for preliminary rulings.

14. This submission is organized into six parts. Following this introductory **Section I** is a discussion of the factual background of this dispute in **Section II** and the procedural background of this dispute in **Section III**. **Section IV** discusses certain general principles of law relevant to this dispute, including the burden of proof and standard of review to be applied. The substantive arguments of the United States are presented in detail in **Section V**. Specifically, in **Section V.A**, the United States makes a number of requests for preliminary rulings, **Section V.B** addresses Vietnam's claims regarding zeroing, **Section V.C** addresses Vietnam's claims regarding the so-called "country-wide" rate, **Section V.D** addresses Vietnam's claims regarding the all others rate (or separate rate), **Section V.E** addresses Vietnam's claims regarding limiting

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[9] *See* AD Agreement, Article 6.10.2.

the number of respondents selected, and **Section V.F** addresses Vietnam's claims with respect to the continued use of challenged practices. Finally, **Section VI** presents a brief conclusion.

II. FACTUAL BACKGROUND

A. Overview of the U.S. Antidumping Duty Law

15. 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"). The Act provides for two distinct types of antidumping proceedings. The first type of antidumping proceeding is the investigation. Commerce will determine whether dumping occurred 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.

16. 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, the investigation proceeding ends and the other antidumping proceeding – the assessment proceeding – begins. In the assessment proceeding, the focus is on the calculation and assessment of antidumping duties on specific entries by individual importers.

17. In both types of proceeding, if the country from which the subject merchandise is being exported is a non-market economy, Commerce may examine the non-market economy entity, which is the producer/exporter that includes all companies over which the government is presumed to exert influence with respect to business decisions regarding, *inter alia*, pricing, costs, and exports. If a company wishes to receive a rate separate from the non-market economy entity, it must file an application or certification demonstrating that it is not subject to government influence, particularly with respect to export activities.

1. The Article 5 Investigation

18. In the investigation, Commerce will generally determine an individual weighted average dumping margin for each known exporter/producer of the subject merchandise.[10] However, if it is not practicable to individually examine each known exporter/producer because of the large number of companies involved in the examination, Commerce may limit its examination to either a statistically valid sample of exporters, producers, or types of products, or the exporters/producers accounting for the largest volume of the subject merchandise that can

[10] *See* section 777A(c)(1) of the Act.

reasonably be examined.[11] If Commerce limits its examination in the investigation, Commerce generally calculates a rate for the remaining cooperative exporters based upon the weighted average of rates calculated for the exporters that were individually examined, excluding zero and *de minimis* rates, and rates based entirely upon facts available. U.S. law states that if all rates calculated for the individually examined companies are zero, *de minimis*, or based entirely upon 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.[12]

19. 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 differs significantly by customer, region, or time period, the average-to-transaction method.

20. In the investigation, Commerce must resolve the threshold question of whether dumping "exists" such that the imposition of an antidumping measure is warranted. Commerce 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[13] are grouped together and an average export price is calculated for the comparison group, which is compared to a comparable normal value.

21. 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 *de minimis*, Commerce excludes the exporter/producer from any antidumping measure. If the overall weighted average dumping margin for each examined exporter/producer is *de minimis*, Commerce terminates the antidumping proceeding. If Commerce and the ITC make final affirmative determinations of dumping and injury, respectively, then Commerce orders the imposition of antidumping duties (an "antidumping duty order" or simply "order" in U.S. parlance). The issuance of an antidumping duty order completes the investigation.

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[11] *See* section 777A(c)(2) of the Act.

[12] *See* section 735(c)(5)(B) of the Act.

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

2. The Article 9 Assessment Proceeding

22. 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.

23. 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 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 orders) interested parties may request a review to determine the final amount of duties owed on each entry made during the previous year.[14] 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.[15] In assigning rates to companies that are not individually examined during the assessment proceeding, 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.

24. In the assessment proceeding, antidumping duties are calculated on a transaction-specific basis, and 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. To simplify the collection of duties calculated on a transaction-specific basis, the absolute amount of duties calculated for the transactions of each importer are summed up and divided by the total entered value of that importer's transactions, including those for which no duties were calculated. U.S. customs authorities then apply that rate to the entered value of the imports to collect the correct total amount of duties owed.

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

1. The Antidumping Investigation

[14] The period of time covered by U.S. assessment proceedings is normally twelve 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.

[15] *See* sections 777A(c)(1) and (2) of the Act.

25. 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.[16]

26. 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 supply and demand.[17] As a result of this determination, 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 entity, which Commerce refers to in shorthand as the "Vietnam-wide entity." The Vietnam-wide entity is the producer/exporter that includes all companies over which the Government of Vietnam is presumed to exert influence with respect to business decisions regarding, *inter alia*, pricing, costs, and exportation. Commerce's determination to treat Vietnam as a non-market economy remained valid during all the proceedings at issue in this dispute, that is, the shrimp industry at no time demonstrated that market economy conditions prevail in the shrimp industry, nor did Vietnam establish, under U.S. law, that it is a market economy.[18]

27. During the course of the investigation, one individually examined company, Kim Anh Company Limited ("Kim Anh"), informed Commerce that it would no longer participate in the investigation, and several companies that were not individually examined failed to cooperate by not responding to Commerce's requests for necessary information. Because these companies, and Kim Anh, did not demonstrate that they were sufficiently free from government influence, they were identified as being part of the Vietnam-wide entity, *i.e.*, the group of companies whose export activities are deemed to be under government control. Based upon the failure of these various companies, and Kim Anh, to provide necessary information, the Vietnam-wide entity was assigned a dumping margin based upon the facts available.

28. 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.[19] On January 21, 2005, the ITC notified Commerce of its affirmative

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

[17] Section 771(18)(A) of the Act.

[18] *See* Working Party Report, para. 255(a)(ii) and (d).

[19] As explained below in section V.A.1, the investigation is not within the Panel's terms of reference and was not subject to the AD Agreement.

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, 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.

29. Since the antidumping order was imposed, Commerce has completed four 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.[20] The second and third administrative reviews were initiated after Vietnam's accession to the WTO and completed prior to Vietnam's request for consultations in this dispute, which was dated February 1, 2010.[21] The fourth and fifth administrative reviews, and the sunset review were initiated but not completed prior to Vietnam's request for consultations.

2. The First Administrative Review

30. On April 7, 2006, Commerce initiated the first administrative review, covering 84 companies. 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 of the 84 companies.

31. Two of the three companies selected for individual examination failed to respond to Commerce's initial questionnaire. Also, several other companies failed to respond to Commerce's request for necessary information. Further, these unresponsive companies did not demonstrate that they were separate from government influence with respect to export activities. Consequently, they were identified as being part of the Vietnam-wide entity. Commerce assigned the Vietnam-wide entity, which is composed, in part, of these companies, a dumping margin based upon the facts available due to the failure of these various companies to provide necessary information. No cooperative companies were included in the Vietnam-wide entity.

32. Commerce calculated an antidumping duty margin of 0.01 percent for the remaining cooperative individually examined company and instructed U.S. Customs and Border Protection ("CBP") that estimated duties going forward were zero with respect to this company and therefore no security for payment of duties would be required.

33. Five companies (including the one cooperative company individually examined) provided data to demonstrate that their export activities were not subject to government control, and that

[20] *See* http://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm; *see also* Vietnam First Written Submission, paras. 21, 101.

[21] *See Request for Consultations by Viet Nam*, WT/DS404/1 (February, 1, 2010) ("Vietnam Consultations Request") (Exhibit Viet Nam-01).

they should thus receive an individual rate separate from that of the Vietnam-wide entity. Based upon that data, Commerce granted separate rate status to all five companies.

34. Because the only individually determined dumping margins were either *de minimis* or based entirely upon facts available, Commerce determined that, for the companies that were not individually examined but that demonstrated that they were eligible for a separate rate, it would be reasonable to apply the margin calculated for the cooperative separate rate respondents in the most recently completed proceeding, which was 4.57 percent.

35. Commerce did not use the "zeroing" methodology when it applied separate rates to the cooperative companies that were not individually examined and it had no impact upon the calculated dumping margins applied to the companies that were individually examined.

36. Commerce published the final results of the first administrative review on September 12, 2007.[22]

3. The Second Administrative Review

37. On April 6, 2007, Commerce initiated the second administrative review, covering 101 companies. 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 of the 101 companies.

38. Several companies failed to respond to Commerce's request for necessary information. Further, these unresponsive companies did not demonstrate that they were sufficiently free from government influence with respect to export activities. Consequently, they were identified as being part of the Vietnam-wide entity. Commerce assigned the Vietnam-wide entity, which is composed, in part, of these companies, a dumping margin based upon the facts available due to the failure of these various companies to provide necessary information. No cooperative companies were included in the Vietnam-wide entity.

39. Commerce calculated antidumping duty margins of 0.01 percent and zero percent for the two individually examined companies. Commerce instructed CBP that estimated duties going forward were zero with respect to these companies and therefore no security for payment of duties would be required.

40. 26 companies (including the two cooperative companies individually examined) provided data to demonstrate that their export activities were not subject to government control, and that

[22] As explained below in section V.A.2, the first administrative review is not subject to the AD Agreement.

they should thus receive an individual rate separate from that of the Vietnam-wide entity. Based upon that data, Commerce granted all 26 companies separate rate status.[23]

41. Because the only individually calculated rates were either zero or *de minimis*, Commerce determined that, for the companies that were not individually examined but that demonstrated that they were eligible for a separate rate, it would be reasonable to apply the margin calculated for the cooperative separate rate respondents in the most recently completed proceeding in which such rates were available. However, if a company had a more recent calculated rate, Commerce continued to apply that rate to such company. These rates ranged from 0 percent to 4.57 percent.

42. Commerce did not use the "zeroing" methodology when it applied separate rates to the cooperative companies that were not individually examined, and it had no impact upon the calculated dumping margins applied to the companies that were individually examined.

43. Commerce published the final results of the second administrative review on September 9, 2008.

4. The Third Administrative Review

44. On April 7, 2008, Commerce initiated the third administrative review, covering 110 companies. 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 of the 110 companies.

45. Commerce calculated antidumping duty margins of 0.08 percent, 0.21 percent, and 0.43 percent for the individually examined companies. Commerce instructed CBP that estimated duties going forward were zero with respect to these companies and therefore no security for payment of duties would be required.

46. Twenty-five 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-wide entity. Based upon that data, Commerce granted all twenty-five companies separate rate status.

47. Because the only individually calculated rates were *de minimis*, Commerce determined that, for the companies that were not individually examined but that demonstrated that they were

[23] One party that requested a separate rate did not receive it. In that instance, Commerce determined that the party was not a separate company from another company that was granted its own separate rate. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam; Final Results and Final Partial Rescission of Antidumping Administrative Review*, 73 Fed. Reg. 52,273 (Sep. 9, 2008) and accompanying Issues and Decision Memorandum at Comment 7 (Exhibit Viet Nam-15). This determination had no practical effect as the party did not enter any subject merchandise during the period of review.

eligible for a separate rate, it would be reasonable to apply the margin calculated for the cooperative separate rate respondents in the most recently completed proceeding in which such rates were available. However, if a company had a more recent calculated rate, Commerce continued to apply that rate to such company. These rates ranged from 0 percent to 4.57 percent.

48. Because only twenty-five of the 110 companies under review had requested to be treated as separate from the Vietnam-wide entity, Commerce concluded that the remaining companies were under government influence and thus identified them as being part of the Vietnam-wide entity. Commerce applied to the Vietnam-wide entity the same rate it received in the most recently completed proceeding, as this was the only rate available for it.

49. Commerce did not use the "zeroing" methodology when it applied separate rates to the cooperative companies that were not individually examined and that methodology had no impact upon the calculated dumping margins applied to the companies that were individually examined.

50. Commerce published the final results of the third administrative review on September 15, 2009.

5. The Fourth Administrative Review

51. On March 26, 2009, Commerce initiated the fourth administrative review, covering 143 companies. 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 only examine two of the 143 companies.

52. Commerce calculated antidumping duty margins of 2.96 percent and 5.58 percent, respectively, for the individually examined companies.

53. 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-wide entity. Based upon that data, Commerce granted all thirty companies separate rate status.[24]

54. For the companies that were not individually examined but that demonstrated that they were eligible for a separate rate, Commerce assigned the simple average[25] of the rates calculated for the companies that were individually examined, *i.e.*, 4.27 percent.

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[24] One company 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.

[25] Because there were only two companies that were individually examined, Commerce calculated a simple average as opposed to a weighted average to ensure that the total import quantity and value for either of these companies would not be revealed inadvertently.

55. Because only thirty of the 143 companies under review had provided data demonstrating their eligibility to be treated as separate from the Vietnam-wide entity, Commerce concluded that the remaining companies were under government influence and thus Commerce identified them as being part of the Vietnam-wide entity. Commerce applied to the Vietnam-wide entity the same rate it received in the most recently completed proceeding, as this was the only rate available for it.

56. Commerce published the final results of the fourth administrative review on August 9, 2010.[26]

III. PROCEDURAL BACKGROUND

57. This dispute began when Vietnam requested consultations on February 1, 2010.[27] The United States and Vietnam held consultations on March 23, 2010,[28] but these consultations failed to resolve the dispute.

58. On April 9, 2010, Vietnam requested the establishment of a panel.[29] On May 18, 2010, the Dispute Settlement Body ("DSB") established a panel pursuant to Vietnam's request.[30]

IV. GENERAL PRINCIPLES

A. Vietnam Bears the Burden of Proof

59. 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

[26] As explained below in section V.A.3.b, the fourth administrative review is not within the Panel's terms of reference.

[27] Vietnam Consultations Request (Exhibit Viet Nam-01).

[28] *Request for Establishment of a Panel by Viet Nam*, WT/DS404/5, p. 1 (April 9, 2010) ("Vietnam Panel Request") (Exhibit Viet Nam-02).

[29] *Id.*

[30] *See Constitution of the Panel Established at the Request of Viet Nam*, WT/DS404/6 (July 27, 2010).

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 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.[31]

60. 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

61. Article 11 of the 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.[32] 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.

62. 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

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[31] *US – Carbon Steel (AB),* paras. 156-157 (emphasis in original) (footnote omitted).

[32] *See EC – Bed Linen (Article 21.5) (AB)*, paras. 108, 114, 118.

that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.[33]

63. 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.

64. *Argentina – Poultry Anti-Dumping Duties*, for example, 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 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."[34] Similarly in this dispute, it is useful to bear in mind that Article 17.6(ii) applies and there may be multiple permissible interpretations of particular provisions in the AD Agreement.

65. In *US – Continued Zeroing*, however, the Appellate Body concluded that the interpretation of the AD Agreement under the customary rules of interpretation may "not generate conflicting, competing interpretations."[35] However, if Article 17.6(ii) only sanctioned interpretations that all yield the same result, Article 17.6(ii) would have no function. Such an approach would render Article 17.6(ii) inutile. To the contrary, Article 17.6(ii) of the AD Agreement establishes a specific standard of review that operates in the context of dispute settlement under the AD Agreement.

66. Article 17.6(ii) 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 or harmonious results. Article 17.6(ii) makes clear that a national authority's measure is to be upheld if it rests on "one" – not "all" – 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: one that would render the measure at issue consistent with the AD Agreement, and another that would render the measure at issue inconsistent with the AD Agreement. 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

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

[34] *Id.*

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

permissible interpretations yield different findings in terms of whether a Member's measure conforms with its obligations under the AD Agreement.

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

67. 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.[36] 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.

68. While prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members,[37] 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.[38] Members are, of course, free to explain why any reasoning or findings should *not* be adopted by a panel,[39] 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.

69. In connection with reports dealing with "zeroing," the panel in *US – Zeroing (Japan)*, in explaining its reasons for not applying certain reasoning and findings of the Appellate Body, highlighted the obligation of the panels to make their own objective assessment, in accordance with Article 11, and the requirement that recommendations and rulings of the DSB not add to or diminish the rights and obligations provided in covered agreements.[40] In *US – Stainless Steel (Mexico)*, the panel agreed with this conclusion and explained that "the concern over the preservation of a consistent line of jurisprudence should not override a panel's task to carry out

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

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

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

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

[40] *US – Zeroing (Japan) (Panel)*, para. 7.99 and n. 733.

an objective examination of the matter before it through an interpretation of the relevant treaty provisions in accordance with the customary rules of interpretation of public international law."[41]

70. The United States recognizes that the panel in *US – Continued Zeroing*, while acknowledging the reasoning of previous panels that there is no obligation to provide offsets outside of the context of the weighted-average-to-weighted-average comparison in investigations was "persuasive," ultimately found that this interpretation was inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 solely because it differed from an alternative interpretation developed in Appellate Body reports.[42] However, Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization* confers the authority to adopt interpretations of the covered agreements exclusively upon the Ministerial Conference and the General Council.[43] Therefore, while the dispute settlement system serves to resolve a particular dispute, and to clarify agreement provisions in the context of doing so, neither panels nor the Appellate Body can adopt authoritative interpretations that are binding with respect to another dispute.

V. ARGUMENT

A. Requests for Preliminary Rulings

71. The United States requests preliminary rulings that the following measures identified by Vietnam in its panel request and in its first written submission are not properly before the Panel:

- *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, 69 Fed. Reg. 71,005 (Dec. 5, 2004) ("investigation");[44]

- *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and*

[41] *US – Stainless Steel (Mexico) (Panel)*, paras. 7.105.

[42] *US – Continued Zeroing (Panel)*, para. 7.169 and n.131.

[43] The Appellate Body recognized this point in one of its earliest reports, when it noted that "Article IX:2 of the *WTO Agreement* provides: 'The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements'. Article IX:2 provides further that such decisions 'shall be taken by a three-fourths majority of the Members'. The fact that such an 'exclusive authority' in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere." *Japan – Alcoholic Beverages II (AB),* p. 13.

[44] Vietnam Panel Request, at 2 (Exhibit Viet Nam-02).

First New Shipper Review, 72 Fed. Reg. 52,052 (Sept. 12, 2007) ("first administrative review");[45] and

- "the continued use of the practices here at issue in successive segments of this antidumping proceeding. This includes the Fourth Administrative Review, the Fifth Administrative Review, and the Five-Year ('Sunset') Review" ("continued use of challenged practices").[46]

72. As explained in greater detail below, the investigation was initiated, and concluded, prior to Vietnam's accession to the WTO, and thus is not subject to the AD Agreement. Furthermore, the investigation was not a subject of consultations, and so is not within the Panel's terms of reference.

73. The first administrative review was also initiated prior to Vietnam's accession to the WTO. Thus, like the investigation, the first administrative review is not subject to the AD Agreement.

74. Finally, the "continued use of challenged practices" was not identified as a measure in Vietnam's panel request and cannot itself be a measure subject to these panel proceedings because it includes "measures" not in existence and relies on speculation as to what will occur in the future.

75. Consequently, these measures are not properly before the Panel and the Panel should reject Vietnam's claims concerning them.

1. The Investigation Is Not Subject to the AD Agreement, nor Is It Within the Panel's Terms of Reference

a. The Investigation Was Initiated Pursuant to an Application Made Prior to the Entry Into Force of the WTO Agreement for Vietnam

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[45] *Id.*

[46] Vietnam First Written Submission, para. 104. In its panel request, Vietnam identified the "Preliminary Results, Partial Rescission, and Request for Revocation, in Part, of the Fourth Administrative Review" and the "Initiation of Five-Year ('Sunset') Review" as "specific measures at issue." Vietnam Panel Request, at 2 (Exhibit Viet Nam-02). The United States does not believe that these are measures within the Panel's terms of reference. However, Vietnam appears to subsume these determinations within what it identifies in its first written submission as the continued use of challenged practices, so the United States will address them together below.

76. In its panel request, Vietnam identifies the investigation as one of the "measures at issue" in this dispute.[47] The Panel should reject Vietnam's claims with respect to the investigation because the original antidumping investigation on shrimp from Vietnam simply is not subject to the AD Agreement. Article 18.3 of the AD Agreement provides:

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

77. The application ("petition" in U.S. terminology) for antidumping duties in the instant case was made on December 31, 2003,[48] and resulted in a final determination by Commerce on December 8, 2004.[49] Commerce issued an antidumping order on February 1, 2005.[50] Thus, the investigation began and finished well before January 11, 2007, the date on which the WTO Agreement entered into force for Vietnam.[51] Vietnam acknowledges this in its first written submission.[52]

78. Because the investigation was initiated pursuant to an application made before the entry into force of the WTO Agreement for Vietnam, determinations made by Commerce in the course of the investigation are not subject to the provisions of the AD Agreement and may not be reviewed by this Panel.

79. In *Brazil – Desiccated Coconut*, the Appellate Body analyzed the transition provision for countervailing duties contained in Article 32.3 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), a provision that the Appellate Body found to be

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[47] Vietnam Panel Request, at 2 (Exhibit Viet Nam-02).

[48] *Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam*, 69 FR 42,672 (July 16, 2004) (Exhibit Viet Nam-05); *see also* Vietnam First Written Submission, para. 21.

[49] *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam*, 69 FR 71,005 (Dec. 8, 2004) (Exhibit Viet Nam-06); *see also* Vietnam First Written Submission, para. 21.

[50] *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam*, 70 FR 5,152 (Feb. 1, 2005) (Exhibit Viet Nam-07); *see also* Vietnam First Written Submission, para. 21.

[51] *See* http://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm; *see also* Vietnam First Written Submission, paras. 21, 101.

[52] Vietnam First Written Submission, para. 21.

"identical" to Article 18.3 of the AD Agreement.[53] The Appellate Body described Article 32.3 of the SCM Agreement (and, thus, Article 18.3 of the AD Agreement) as follows:

> The Appellate Body sees Article 32.3 of the *SCM Agreement* as a clear statement that for countervailing duty investigations or reviews, the dividing line between the application of the GATT 1947 system of agreements and the *WTO Agreement* is to be determined by the date on which the application was made for the countervailing duty investigation or review. Article 32.3 has limited application only in specific circumstances where a countervailing duty proceeding, either an investigation or a review, was underway at the time of entry into force of the *WTO Agreement*. This does not mean that the *WTO Agreement* does not apply as of 1 January 1995 to all other acts, facts and situations which come within the provisions of the *SCM Agreement* and Article VI of the GATT 1994. However, the Uruguay Round negotiators expressed an explicit intention to draw the line of application of the new *WTO Agreement* to countervailing duty investigations and reviews at a different point in time from that for other general measures. Because a countervailing duty is imposed only as a result of a sequence of acts, a line had to be drawn, and drawn sharply, to avoid uncertainty, unpredictability and unfairness concerning the rights of states and private parties under the domestic laws in force when the *WTO Agreement* came into effect.[54]

80. Because the investigation was initiated prior to the entry into force of the WTO Agreement for Vietnam, the United States respectfully requests that the Panel find that the AD Agreement does not apply to Commerce's determination in the investigation.

b. The Investigation Was Not Subject to Consultations

81. In this dispute, Vietnam requested the establishment of a panel with respect to the "*Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, 69 Fed. Reg. 71005 (Dec. 5, 2004)," the shrimp antidumping investigation. However, in its consultations request, Vietnam referred only to certain "reviews cited in paragraph 1" of its request.[55] Following this listing, Vietnam laid out the legal basis of its complaint solely with respect to these "reviews."[56] Nowhere in its consultations request did Vietnam refer to the investigation. It did not do so despite the fact that Commerce's final determination in the investigation was published in the U.S. Federal Register

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[53] *Brazil – Desiccated Coconut (AB)*, at 18, n. 23.

[54] *Id*. at 18 (footnotes omitted).

[55] Vietnam Consultations Request, p. 3 (Exhibit Viet Nam-01).

[56] *Id*.

in 2004, long before the consultations request was filed. A plain reading of Vietnam's consultations request thus reveals what was—and, equally important, what was not—at issue in this dispute. Notwithstanding the unambiguous limitation in its consultations request of the scope of the dispute to the "reviews" identified therein, in its panel request Vietnam went beyond those specific, identified reviews to add the investigation as another "measure[] at issue" in this dispute.[57]

82. Because the investigation was not included in Vietnam's request for consultations, consistent with Article 4 of the DSU and Article 17.4 of the AD Agreement, it is not properly within this Panel's terms of reference. A Member may only file a panel request with respect to a measure on which the Member has properly consulted in accordance with Article 4 of the DSU. Specifically, Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if "the consultations fail to settle a dispute." In turn, Article 4.4 of the DSU provides that a request for consultations must state the reasons for the request, "including identification of the measure at issue and an indication of the legal basis for the complaint." As the Appellate Body stated in *Brazil – Aircraft*:

> Articles 4 and 6 of the DSU . . . set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.[58]

Consistent with these provisions of the DSU, the Appellate Body has stated that "as a general matter, consultations are a prerequisite to panel proceedings."[59] The Appellate Body has further indicated that in determining the measures at issue, a panel should "compare the respective parameters of the consultations request and the panel request to determine whether an expansion of the scope or change in the essence of the dispute occurred through the addition of instruments in the panel request that were not identified in the consultations request."[60]

83. These rules apply with equal force to disputes brought under the AD Agreement, and the AD Agreement itself clarifies further the relationship between consultations and panel requests

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[57] Vietnam Panel Request, p. 2 (Exhibit Viet Nam-02).

[58] *Brazil – Aircraft (AB)*, para. 131.

[59] *Mexico – Corn Syrup (Article 21.5) (AB)*, para. 58; *see also US – Certain EC Products (AB)*, para. 82 (upholding the panel's finding that a particular action taken by the United States was not part of the panel's terms of reference because the EC, while referring to that action in its panel request, had failed to request consultations upon it).

[60] *US – Customs Bond Directive (AB)*, para. 294.

under that Agreement.[61] Article 17.4 of the AD Agreement states that a Member may only refer "the matter" to the DSB following a failure of consultations to achieve a mutually agreed solution, and final action by the administering authorities of the importing Member to levy definitive antidumping duties or to accept price undertakings. In *Guatemala – Cement I*, the Appellate Body explained that what constitutes the "matter" is the "key concept in defining the scope of a dispute that may be referred to the DSB under the *Anti-Dumping Agreement* and, therefore, in identifying the parameters of a panel's terms of reference in an anti-dumping dispute."[62] The Appellate Body analyzed the "matter" references in Articles 17.3 through 17.6 of the AD Agreement and found that the specific requirements in Article 6.2 of the DSU – identification of the specific measure at issue and the legal basis for the claim – define the "matter" and, accordingly, the panel's terms of reference.[63] The Appellate Body also found that the term "matter" has the same meaning in Article 17.3, relating to the request for consultations, and Articles 17.4 and 17.5, relating to the referral of a matter to the DSB and the request for the formation of a panel to examine the matter.[64]

84. Again, in this dispute, Vietnam failed to include the investigation in its consultations request. Consequently, the United States respectfully requests that the Panel find that the shrimp antidumping investigation is outside the Panel's terms of reference.[65]

2. The First Administrative Review Is Not Subject to the AD Agreement Because It Was Initiated Pursuant to an Application Made Prior to the Entry Into Force of the WTO Agreement for Vietnam

85. In its panel request, Vietnam identifies the first administrative review as one of the "measures at issue" in this dispute.[66] Like the investigation, however, the first administrative review was initiated prior to Vietnam's accession to the WTO. The first administrative review

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[61] As the Appellate Body explained in *Guatemala – Cement I*, the provisions of Article 6.2 of the DSU and Article 17.5 of the AD Agreement are "complementary and should be applied together. A panel request made concerning a dispute brought under the Anti-Dumping Agreement must therefore comply with the relevant dispute settlement provisions of both that Agreement and the DSU." *Guatemala – Cement I (AB)*, para. 75.

[62] *Id*. at para. 70.

[63] *Id*. at paras. 71-73.

[64] *Id*. at para. 76.

[65] The United States notes that Vietnam's first written submission does not identify the investigation as one of the "measures at issue" in this dispute, nor does it advance any arguments directly challenging the consistency of Commerce's final determination in the investigation. *See* Vietnam First Written Submission, paras. 101, 141-143. Thus, it appears that Vietnam has abandoned its claims concerning the investigation. In any event, Vietnam has failed to substantiate any such claims.

[66] Vietnam Panel Request, at 2 (Exhibit Viet Nam-02).

was initiated on April 7, 2006, based on requests for review made in February 2006.[67] Again, the WTO Agreement did not enter into force for Vietnam until January 11, 2007.[68]

86. Per the terms of Article 18.3, the application of the AD Agreement is strictly limited "to investigations, <u>and reviews of existing measures</u>, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement" (emphasis added). Accordingly, for the same reasons given above in section V.A.1.a, with respect to the investigation, the Panel must reject Vietnam's claims with respect to the first administrative review because the AD Agreement does not apply to Commerce's determination in that proceeding.[69]

3. The "Continued Use of Challenged Practices" Is Not Within the Panel's Terms of Reference and Is Not A "Measure" Subject to Dispute Settlement

87. In its first written submission, Vietnam identifies as one of the "measures at issue" in this dispute what it describes as "the continued use of the challenged practices in successive antidumping proceedings under this order."[70] As discussed further below, the "continued use of challenged practices" was not identified in Vietnam's panel request and it is not a "measure" that can be subject to dispute settlement. Rather, it appears to be an indeterminate number of potential future measures. Consequently, the Panel should reject Vietnam's claims regarding this purported "measure."

a. The "Continued Use of Challenged Practices" Was Not Identified in Vietnam's Panel Request

88. As noted above, Article 6.2 of the DSU requires that a panel request "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The Appellate Body has explained that:

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[67] *Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders on Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China*, 71 FR 17,813 (Apr. 7, 2006) (Exhibit Viet Nam-08); *see also* Vietnam First Written Submission, para. 21.

[68] *See* http://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm; *see also* Vietnam First Written Submission, para. 21, 101.

[69] The United States notes that, as with the investigation, Vietnam's first written submission does not identify the first administrative review as one of the "measures at issue" in this dispute, nor does it advance any arguments regarding the consistency of Commerce's final determination in the first administrative review. *See* Vietnam First Written Submission, para. 101. Thus, it appears that Vietnam has abandoned its claims concerning the first administrative. In any event, Vietnam has failed to substantiate any such claims.

[70] Vietnam First Written Submission, para. 101; *see also id.*, para. 104.

> [T]he requirements in Article 6.2 serve two distinct purposes. First, as a panel's terms of reference are established by the claims raised in panel requests, the conditions of Article 6.2 serve to define the jurisdiction of a panel. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the due process objective of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response. To ensure that such purposes are fulfilled, a panel must examine the request for the establishment of a panel "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU". Such compliance must be "demonstrated on the face" of the panel request, read "as a whole".[71]

89. Vietnam's identification in its panel request of the specific measures at issue, in its entirety, reads as follows:

> The specific measures at issue are the anti-dumping order and subsequent periodic reviews conducted by the United States Department of Commerce (USDOC) on certain frozen and canned warmwater shrimp from Viet Nam. <u>The following determinations constitute the measures at issue</u>:
>
> 1. *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, 69 Fed. Reg. 71005 (Dec. 5, 2004)
>
> 2. *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review*, 72 Fed. Reg. 52052 (Sept. 12, 2007)
>
> 3. *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed. Reg. 52273 (Sept. 9, 2008)
>
> 4. *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 Fed. Reg. 47191 (Sept. 15, 2009)

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[71] *US – Continued Zeroing (AB)*, para. 161 (footnotes omitted).

5. *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, in Part, of the Fourth Administrative Review*, 75 Fed. Reg. 12206 (March 15, 2010), including denial of all requests for revocation.

6. *Initiation of Five-Year ("Sunset") Review*, 75 Fed. Reg. 103 (January 4, 2010).[72]

90. On its face, Vietnam's panel request limits the measures at issue to the particular determinations identified therein. Nowhere does Vietnam's panel request identify the "continued use of challenged practices" as a measure at issue in this dispute. Thus, even when read "as a whole," Vietnam's panel request fails to identify the purported "continued use" measure.

91. In its first written submission, Vietnam suggests that there exists a "remarkable factual similarity in this proceeding with the facts in *US – Continued Zeroing*, where the Appellate Body held that the ongoing conduct constituted a measure with prospective effect."[73] Indeed, Vietnam describes the situations in this dispute and *US – Continued Zeroing* as "virtually identical."[74] While the United States has concerns with the Appellate Body's reasoning, in any event, contrary to Vietnam's assertions, the panel request at issue in *US – Continued Zeroing* stands in stark contrast to Vietnam's panel request in this dispute. In *US – Continued Zeroing*, the EU's panel request identified the measures there at issue as follows:

> The measures at issue and the legal basis of the complaint include, but are not limited to, the following:
>
> <u>The continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders</u> enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding at a level <u>in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement</u> (whether duties or cash deposit rates or other form of measure).
>
> In addition to these measures, the administrative reviews, or, as the case may be, original proceedings or changed circumstances or sunset review proceedings listed in the Annex (numbered 1 to 52) with the specific anti-dumping orders and are

[72] Vietnam Panel Request, at 2 (Exhibit Viet Nam-02) (emphasis added).

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

[74] *Id*. at para. 105.

> also considered by the [European Communities] to be measures subject to the current request for establishment of the panel in addition to the anti-dumping orders.
>
> This includes the determinations in relation to all companies and includes any assessment instructions, whether automatic or otherwise, issued at any time pursuant to any of the measures listed in the Annex.[75]

In addition to identifying as measures an itemized list of particular determinations, the Appellate Body found that the EU's panel request "further indicates that the European Communities is challenging the 'continued application of, or the application of' these anti-dumping duties 'as calculated or maintained in place pursuant to the most recent administrative review or ... original proceeding or changed circumstances or sunset review proceeding'."[76] Vietnam's panel request does not similarly identify the "continued use of challenged practices" as a measure in addition to the specific determinations listed.

92. The Appellate Body explained that "[t]he identification of the measure, together with a brief summary of the legal basis of the complaint, serves to demarcate the scope of a panel's jurisdiction and allows parties to engage in the subsequent panel proceedings. Thus, the specificity requirement means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request."[77] In light of all the elements of the EU's panel request, "[t]aken together," the Appellate Body determined that "the United States could reasonably have been expected to understand that the European Communities was challenging the use of the zeroing methodology in successive proceedings, in each of the 18 cases, by which the anti-dumping duties are maintained."[78]

93. Here, Vietnam's panel request fails to identify the "continued use of challenged practices" at all, and certainly fails to do so with "sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request."[79] In consequence, Vietnam's panel request failed to "serve the due process objective of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must

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[75] *US – Continued Zeroing (AB)*, para. 163 (*quoting* from the EC panel request) (emphasis added).

[76] *Id.* at para. 165.

[77] *Id.* at para. 168.

[78] *Id.* at para. 166.

[79] *Id.* at para. 168.

begin preparing a response."[80] More significantly, because the panel request "define[s] the jurisdiction of a panel,"[81] and the continued use of challenged practices was not included in Vietnam's panel request, such a measure is outside the Panel's jurisdiction.

94. In addition, the inclusion of the fourth administrative review, the fifth administrative review, and the sunset review within the "continued use" measure described in Vietnam's first written submission expands the scope of those "measures" in the panel request. Vietnam's panel request identifies as a "measure" the "Preliminary Results"[82] of the fourth administrative review, but Vietnam's first written submission attempts to expand the scope by referring to "the Fourth Administrative Review" itself.[83] Vietnam's panel request makes no reference to the fifth administrative review whatsoever,[84] but Vietnam suggests in its first written submission that the "continued use" measure "includes" the fifth administrative review.[85] Finally, Vietnam's panel request identifies the "initiation" of the sunset review as a measure[86] – though it does not describe the legal basis of any claims concerning Commerce's determination to initiate the sunset review – but Vietnam's first written submission attempts to expand the scope of the dispute beyond the "initiation" of the sunset review.[87] Thus, not only is the "continued use" measure itself beyond the scope of Vietnam's panel request, but the components that Vietnam asserts are part of that "continued use" measure are themselves beyond the scope of the panel request.

95. For these reasons, the "continued use of challenged practices" is not a measure within the Panel's terms of reference.

b. Vietnam's Claim Regarding the "Continued Use of Challenged Practices" Fails Because It Purports to Include Future Measures

[80] *Id.* at para. 161.

[81] *Id.*

[82] Vietnam Panel Request, p. 2 (Exhibit Viet Nam-02).

[83] Vietnam First Written Submission, para. 104. Vietnam also attached to its first written submission the final determination of the fourth administrative (Exhibit Viet Nam-23), but that determination was not published until August 9, 2010, three months after Vietnam requested the establishment of this Panel.

[84] *See* Vietnam Panel Request, p. 2 (Exhibit Viet Nam-02).

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

[86] Vietnam Panel Request, p. 2 (Exhibit Viet Nam-02).

[87] *See* Vietnam First Written Submission, para. 104.

96. Even if Vietnam had identified the "continued use of challenged practices" as a measure in its panel request, which it did not, this purported "measure" would nevertheless not be subject to WTO dispute settlement because it appears to be composed of an indeterminate number of potential future measures. Measures that are not yet in existence at the time of panel establishment are not within a panel's term of reference under the DSU.[88] Article 3.3 of the DSU provides that:

> [t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.[89]

Not only would it be impossible to consult on a measure that does not exist, but a non-existent measure cannot meet the requirement of Article 4.2 of the DSU that the measure be "affecting" the operation of a covered agreement. As the *Upland Cotton* panel found, the legislation challenged in that dispute could not have been impairing any benefits accruing to the complainant because it was not in existence at the time of the request for the establishment of a panel.[90] Similarly, in this dispute, indeterminate future measures that did not exist at the time of Vietnam's panel request (and may never exist) could not be impairing any benefits accruing to Vietnam.

97. Furthermore, Article 17.4 of the AD Agreement provides that a Member may refer "the matter" to dispute settlement only if consultations have failed to resolve the dispute and "final action" has been taken by the administering authorities of the importing Member to levy definitive antidumping duties or to accept price undertakings.[91] Vietnam states that the "continued use" measure "includes the Fourth Administrative Review, the Fifth Administrative Review, and the Five-Year ('Sunset') Review."[92] However, at the time of Vietnam's panel request, neither the particular proceedings identified nor the alleged "continued use of the challenged practices" involved a final action to levy definitive antidumping duties or accept price

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[88] *See, e.g., United States – Upland Cotton (Panel)*, para. 7.158 (finding that a measure that had not yet been adopted could not form a part of the Panel's terms of reference); *Indonesia – Autos*, para. 14.3 (agreeing with the responding party that a measure adopted after the establishment of a panel was not within the panel's terms of reference).

[89] Emphasis added.

[90] *US – Upland Cotton (Panel)*, paras. 7.158-7.160.

[91] While provisional measures may also be challenged in certain circumstances, Vietnam has made no allegations in this regard.

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

undertakings. The final determination in the fourth administrative review was issued on August 9, 2010, six months after Vietnam's consultations request, and the final determinations in the fifth administrative review and the sunset review have not yet been issued.[93]

98. Because the purported "measure" consists of an indeterminate number of future antidumping measures for which no final action had been taken at the time of Vietnam's panel request, the United States respectfully requests that the Panel reject Vietnam's claims concerning the "continued use of challenged practices," including the fourth administrative review, the fifth administrative review, and the sunset review.

B. Vietnam's Claims of Inconsistency Regarding Zeroing Are Without Merit

1. Commerce's Determination in the Original Antidumping Investigation Cannot Be Found Inconsistent with U.S. WTO Obligations

99. Vietnam argues that Commerce's "use of zeroing" in the original investigation is inconsistent with U.S. WTO obligations.[94] In particular, Vietnam asserts that Commerce's "use of zeroing at the investigation phase produced a higher assessment and cash deposit rate for exports in the subsequent reviews than would have existed but for use of the WTO-inconsistent zeroing calculation."[95] Vietnam thus concludes that "this practice violates Article 2.4.2" of the AD Agreement.[96] Vietnam's arguments are without merit.

100. For the reasons given above in section V.A.1, the investigation is not within the Panel's terms of reference. Indeed, Commerce's determination in the investigation, which was made prior to the entry into force of the WTO Agreement with respect to Vietnam, was not subject to the AD Agreement, and thus cannot be found inconsistent with Article 2.4.2 of the AD Agreement.

101. In addition, to the extent that Commerce relied on dumping margins calculated during the investigation in later assessment reviews, the use of such margins in an assessment review cannot result in a finding that the determination in the investigation is inconsistent with Article 2.4.2 of the AD Agreement. The notion that reference to or use of an earlier determination of an investigating authority in a later determination can render the separate, earlier determination

[93] *See id*. at para. 21.

[94] *See id*. at paras. 118-143.

[95] *Id*. at para. 142.

[96] *Id*. at para. 143.

retroactively inconsistent with a provision of the AD Agreement is without logic. There is no basis in the AD Agreement to support such a claim, and Vietnam has identified none.

102. Furthermore, the use of dumping margins from the original investigation in later assessment proceedings cannot itself be found inconsistent with Article 2.4.2 of the AD Agreement, since Article 2.4.2 is limited by its terms to the "investigation phase." Article 2.4.2 provides:

> Subject to the provisions governing fair comparison in paragraph 4, 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 . . . .[97]

The panel in *US – Zeroing (EC)* analyzed the text of the AD Agreement and found that:

> First, the phrase 'the existence of margins of dumping during the investigation phase' in Article 2.4.2 read in its ordinary meaning in the context of the *AD Agreement* as a whole means that Article 2.4.2 applies to the phase of the 'original investigation' i.e. the investigation within the meaning of Article 5 of the *AD Agreement* as opposed to subsequent phases of duty assessment and review. Second, our interpretation of the meaning of this phrase as limiting the applicability of Article 2.4.2 to investigations within the meaning of Article 5 is also consistent with the distinction made between investigations and subsequent proceedings in the various Appellate Body decisions. Third, alternative meanings suggested . . . are implausible at best and deny this phrase any real function, in contradiction with principles of interpretation. Fourth, this interpretation is entirely consistent with different functions played by 'original investigations' and duty assessment proceedings. . . .[98]

Consequently, a determination made in an assessment proceeding cannot be found inconsistent with Article 2.4.2 of the AD Agreement.

103. For the reasons given above, the United States respectfully requests that the Panel reject Vietnam's claim that the original investigation is inconsistent with Article 2.4.2 of the AD Agreement.

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[97] Emphasis added.

[98] *US – Zeroing (EC) (Panel)*, para. 7.220.

2. Commerce's Determinations in the Challenged Periodic Reviews Were Not Inconsistent with U.S. WTO Obligations

104. Vietnam contends that Commerce's use of zeroing in the second and third administrative reviews to calculate the dumping margins applied to individually examined respondents from Vietnam was inconsistent with the WTO Agreements.[99] The Panel should reject Vietnam's claim because Vietnam has failed to demonstrate that any antidumping duties were assessed in excess of the margin of dumping. That is, Vietnam has not shown that zeroing had any impact on the margins of dumping determined for individually examined companies in the second and third administrative reviews. Thus, Vietnam has failed to make a *prima facie* case that the United States has acted inconsistently with its WTO obligations.[100]

105. Furthermore, even if Vietnam could show that zeroing had an impact on the margins of dumping calculated in the second and third administrative reviews, Vietnam's claims should nevertheless be rejected because Commerce's methodology for assessing antidumping duties in periodic reviews is consistent with the obligations in the AD Agreement.[101]

a. Vietnam Has Not Shown that "Zeroing" Had an Impact on the Margins of Dumping Calculated for Individually Examined Firms in the Challenged Assessment Proceedings

106. Vietnam submits that Commerce "engaged in the practice of simple zeroing" to calculate the margins of dumping applied to individually examined firms in the second and third assessment proceedings.[102] Specifically, Vietnam argues that "[b]y systematically disregarding negative comparison results, the USDOC's simple zeroing practice necessarily results in dumping margins that are greater than the margins for the product as a whole (including all export transactions). Hence, the USDOC's use of zeroing in administrative reviews violates Article VI:2 of the GATT 1994 and Article 9.3 of the Agreement."[103] As demonstrated below,

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[99] Vietnam First Written Submission, paras. 144-159.

[100] *See US – Gambling (AB)*, para. 140, quoting *US – Wool Shirts and Blouses (AB).*

[101] In addition to its claims concerning Commerce's use of zeroing to calculate margins of dumping in the second and third administrative reviews, Vietnam also challenges Commerce's determination of dumping margins for separate rate respondents in these reviews – Vietnam refers to this as the "all others" rate. Vietnam argues that Commerce erred by using margins of dumping from the original investigation that were calculated using the zeroing methodology. *See* Vietnam First Written Submission, paras. 207-215. The United States addresses Vietnam's arguments concerning Commerce's determinations of dumping margins for separate rate respondents below in section V.D.

[102] Vietnam First Written Submission, paras. 48, 158.

[103] *Id*. at para. 150.

Vietnam has failed to establish that the margins of dumping determined for individually examined firms in these proceedings were inconsistent with the covered agreements.

107. Vietnam has not explained how the margins of dumping calculated for the individually examined firms in the second and third administrative reviews were affected by "zeroing" such that the United States acted inconsistently with any of the provisions cited by Vietnam. 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." Article 9.3 of the AD Agreement similarly requires that the "amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."

108. Commerce calculated either a zero or *de minimis* margin of dumping for every company individually examined in the second and third administrative reviews. The individually examined firms, Minh Phu[104] and Camau Frozen Seafood Processing Import Export Corporation ("CAMIMEX"), received zero margins in the second administrative review.[105] In the third administrative review, the three individually examined companies, Minh Phu, CAMIMEX, and Phuong Nam Co. Ltd. ("Phuong Nam"), received *de minimis* margins of 0.43, 0.08, and 0.21, respectively.[106]

109. Given the zero and *de minimis* dumping margins,[107] and that no antidumping duties were assessed based on "zeroing," it is not possible that antidumping duties were imposed that exceeded the margins of dumping. For this reason, Vietnam has failed to demonstrate that the

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[104] Minh Phu Seafood Export Import Corporation (and affiliated Minh Qui Seafood Co., Ltd. and Minh Phat Seafood Co., Ltd.), Minh Phu Seafood Corporation; Minh Phu Phat Seafood Co., Ltd., Minh Phat Seafood (collectively, "Minh Phu").

[105] *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed. Reg. 52,273, 52,275-76 (September 9, 2008) (Exhibit Viet Nam-15).

[106] *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 Fed. Reg. 47,191, 47,195-96 (September 15, 2009) (Exhibit Viet Nam-19).

[107] *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed. Reg. 52,273, 52,276 (September 9, 2008) (Exhibit Viet Nam-15); *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 Fed. Reg. 47,191, 47,196-97 (September 15, 2009) (Exhibit Viet Nam-19).

United States acted inconsistently with Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement.[108]

b. Commerce's Methodology for Assessing Antidumping Duties in Periodic Reviews Is Consistent with the Obligations in the AD Agreement

110. Vietnam's argument that the zeroing methodology as applied in assessment proceedings is WTO-inconsistent is directly contradicted by the text of the AD Agreement.[109] As demonstrated below, the text and context of the relevant provisions of the AD Agreement, interpreted in accordance with customary rules of interpretation of public international law, do not support a general prohibition of zeroing that would apply in the context of assessment proceedings. The methodology used by Commerce to calculate antidumping duties in the assessment proceedings in question rests on a permissible interpretation of the AD Agreement and is WTO-consistent.

i. There Is No General Obligation to Provide Offsets Outside of the Limited Context of Using Average-to-Average Comparisons in the Investigation Under Article 2.4.2 of the AD Agreement

111. 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 relation to 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 appears in connection with the obligation 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* . . . ."[110] This particular text of Article 2.4.2 applies only within the limited context of determining whether dumping exists in the investigation when using the

[108] As explained in section V.A.2, the first administrative review is not subject to the AD Agreement and Vietnam appears to have abandoned its claims concerning that proceeding. In any event, the arguments articulated above are equally applicable to that proceeding. Mandatory respondent Fish One received a margin of dumping of zero in the first assessment proceeding, as did respondent Grobest & I-Mei Industrial (Vietnam) Co., Ltd. ("Grobest"), the new shipper company under review. *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Administrative Assessment proceedings and New Shipper Assessment proceedings*, 72 Fed. Reg. 52,052, 52,054 (September 12, 2007) (Exhibit Viet Nam-11).

[109] Vietnam First Written Submission, paras. 144-159.

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

average-to-average comparison methodology in Article 2.4.2.[111] There is no textual basis for the additional obligations that Vietnam would have this Panel impose.

112. In *US – Softwood Lumber V (AB),* the Appellate Body specifically recognized that the issue before it was whether zeroing was prohibited under the average-to-average comparison methodology found in Article 2.4.2 of the AD Agreement.[112] 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."[113] 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."[114] In other words, the term "all comparable export transactions" was integral to the interpretation that the multiple comparisons of average normal value and average export price for averaging groups did not constitute an average-to-average comparison of all comparable export transactions 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 offset prices.

113. In regard to Vietnam's argument that there is a general prohibition of zeroing or one specifically applicable to the more particular context of assessment proceedings, such an argument cannot be reconciled with the interpretation articulated in *US – Softwood Lumber V (AB)*, wherein the phrase "all comparable export transactions" in Article 2.4.2 meant that zeroing was prohibited in the context of average-to-average comparisons in investigations. If, as Vietnam seems to argue, there were a general prohibition of zeroing that applies in all proceedings and under all comparison methodologies, the meaning ascribed to "all comparable export transactions" by the Appellate Body in that dispute would be redundant of the general prohibition of zeroing.

114. The Appellate Body recognized the need to avoid such redundancy in *US – Zeroing (Japan)*. As noted above, in *US – Softwood Lumber V*, the Appellate Body interpreted "margins of dumping" and "all comparable export transactions" in an integrated manner. The Appellate Body found that in aggregating the results of the model-specific comparisons, "all" comparable export transactions must be accounted for. Thus, the phrase necessarily referred to all transactions across all models of the product under investigation, *i.e.,* the product "as a whole."

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[111] *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.

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

[113] *Id*. at para. 108.

[114] *Id*. at paras. 86 - 103.

The textual reference to "all comparable export transactions" was the basis for the conclusion that "product" must mean "product as a whole" and margins of dumping may not be based on individual averaging group comparisons. 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 margins of dumping cannot be calculated for individual transactions.[115] 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.[116] However, this is inconsistent with the reasoning in *US – Softwood Lumber V (AB)*.

115. Subsequent to *US – Softwood Lumber V (AB)*, several panels examined whether the obligation not to "zero" when making average-to-average comparisons in an investigation extended beyond that 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.[117]

116. In making an objective assessment of the matter before it in this dispute, this Panel should give particular consideration to the special 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. This Panel should recognize that the prior panels – each operating under the same obligation to make an objective assessment, examining the same AD Agreement, applying the same customary rules of interpretation of public international law and special 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 the prior panels is persuasive and correct. For the reasons set forth below, the Panel should reach the same conclusion in the present dispute. This Panel, like the prior panels, should find that, at a minimum, it is permissible to interpret the AD Agreement as not prohibiting zeroing outside the context where the interpretation of "all comparable export transactions" articulated in the Appellate Body report in *US – Softwood Lumber V* is applicable.

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[115] *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.

[116] *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.")

[117] *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.

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

117. 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. If these terms, as used in Articles 2.1 and 9.3 of the AD Agreement and Article VI of the GATT 1994, apply to the difference between export price and normal value for *individual transactions*, the U.S. assessment of antidumping duties in administrative reviews does not exceed the margin of dumping within the meaning of these provisions.

118. 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.

119. The provisions of the AD Agreement must be read in conjunction with Article VI of the GATT 1994.[118] 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*

[118] 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.

the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[119]

120. 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 most certainly 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."[120]

iii. The Concepts of "Dumping" and "Margin of Dumping" and the Term "Product" Have a Meaning in Relation to Individual Transactions

121. 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."[121] Nevertheless, these definitions are important to the interpretation of other provisions of the AD Agreement at issue in this dispute. 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.[122] 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."

122. In addition, the term "less than normal value" is defined as when the "price of the product exported . . . is less than the comparable price . . . ."[123] 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

[119] Emphasis added.

[120] Vietnam First Written Submission, paras. 30, 37.

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

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

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

something."[124] This definition "can easily be applied to individual transactions and does not require an examination of export transactions at an aggregate level."[125]

123. 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 above normal value prices, and this does not undo the injury suffered by the domestic industry injured from other sales made at dumped prices.

iv. The Term "Product" Does Not Refer Exclusively to "Product as a Whole"

124. Vietnam's argument that dumping can only be found to exist for the product as a whole[126] is contrary to the ordinary meaning of the text of the relevant provisions of the AD 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.

125. Vietnam's claims in this dispute depend on a contrary interpretation of these provisions holding that "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, and this 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 . . . .'"[127]

126. 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

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[124] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2349, meaning 1b (Exhibit US-1).

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

[126] Vietnam First Written Submission, paras. 121-128, 144.

[127] *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).

meaning. For example, Article 2.6 of the AD Agreement – which defines the term "like product" in relation to "the product under consideration" – plainly uses the term "product" in the collective sense. By contrast, 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 specific quantity of merchandise that matches the criteria for the "product" at a particular price). Therefore, it cannot be presumed that the same term has such an exclusive meaning when used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994.

127. 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."[128] 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 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.[129]

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

[129] *Id*. at para. 5.23 (footnotes omitted).

128. 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, in particular 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."

129. 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."[130] 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 less 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 less than its normal value, if the price of the product exported from one country to another (a) is less 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 less than the normal value. Given this 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".[131]

130. Thus, 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."[132] 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

[130] Vietnam First Written Submission, para. 147 ("[T]he 'margin of dumping' must be calculated on the basis of all transactions for the product as a whole.").

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

[132] *Id*. at para. 5.28 (emphasis in original).

reasoning is equally applicable to margins of dumping established on a transaction-specific basis in an assessment proceeding under Article 9.3 of the AD Agreement.

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

131. 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*."[133] Vietnam has not demonstrated any inconsistency with Article 9.3 of the AD Agreement nor Article VI:2 of the GATT 1994. Article 9 of the AD Agreement relates, as its title indicates, to the imposition and collection of antidumping duties. Vietnam's argument with respect to assessment proceedings under Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 is that the amount of the antidumping duty has exceeded the margin of dumping established under Article 2.[134] This argument depends entirely on a conclusion that the interpretation of Article 2.1 of the AD Agreement and Article VI of the GATT 1994 detailed above is not permissible,[135] and that Vietnam's preferred interpretation of the "margin of dumping," which precludes any possibility of transaction-specific margins of dumping, is the only permissible interpretation of this term as used in Article 9.3 of the AD Agreement. In Vietnam's view, a Member breaches Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by failing to provide offsets, because 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.[136] The United States notes that the terms upon which Vietnam's interpretation rests are conspicuously absent from the text of Articles 2.1 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. 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.

132. As set forth in this section, 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. 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." For the reasons set forth in detail above, the

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[133] Vietnam First Written Submission, para. 150.

[134] *Id*. at paras. 146-148.

[135] 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.

[136] Vietnam First Written Submission, para. 149.

term "margin of dumping," as defined in Article 2.1 of the AD Agreement and Article VI of the GATT 1994, may be applied to individual transactions. This understanding of the term "margin of dumping" is particularly appropriate in the context of antidumping duty assessment. In the real world of administering antidumping regimes, the individual transactions are both the means by which less than fair value prices are established and the mechanism by which the object of the transaction (i.e., the "product") is "introduced into the commerce of the importing country." Likewise, antidumping duties are assessed on individual entries resulting from those 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.

133. All 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."[137] 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 . . . ."[138]

134. 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."[139] In

[137] *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.").

[138] *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.

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

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."[140]

135. 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.[141]

136. 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

[140] *Id*. at paras. 7.198 - 7.199 (emphasis in the original).

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

> character of the payment of anti-dumping duties has, therefore, to be taken into consideration in interpreting Article 9.3.[142]

137. These panels' understanding of Article 9.3 of the AD Agreement is, at a minimum, a permissible interpretation of the provision. So long as the margin of dumping is understood to apply at the level of individual transactions there is absolutely 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 under Article 9.3 is improperly inferred that any perception of conflict arises.

138. For these reasons, we respectfully request that this Panel reject Vietnam's claim that Commerce's methodology for assessing antidumping duties is inconsistent with the covered agreements.

C. Vietnam's Claims of Inconsistency Regarding the So-Called "Country-Wide" Rate Are Without Merit

139. Vietnam argues that Commerce's assignment of a margin of dumping based upon facts available to the Vietnam-wide entity in the second and third administrative reviews[143] was inconsistent with various obligations under the AD Agreement.[144] As discussed below, Vietnam's arguments are based upon misunderstandings of the relevant provisions of the AD Agreement and Vietnam's claims should be rejected.

1. Commerce Properly Considered the Vietnam-Wide Entity as an "Exporter" or "Producer" Under Investigation

140. At the outset, we note that Vietnam incorrectly refers to the assignment of an assessment rate to the Vietnam-wide entity as an assignment of a "country-wide" rate. The essence of Vietnam's argument is that various provisions of the AD Agreement do not contemplate the assignment of a "country-wide" rate based upon facts available. However, the premise of Vietnam's argument is factually incorrect: Commerce did not assign a "country-wide" rate. The Vietnam-wide entity rate was not assigned to all Vietnamese exporters. Rather, as explained further below, this rate was assigned to those companies that had not established that they are free from government influence, particularly in their export activities, and thus are reasonably

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[142] *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.

[143] As explained above, these are the only two proceedings properly within the scope of the Panel's terms of reference.

[144] *See* Vietnam First Written Submission, paras. 160-206.

considered to be parts of one entity that Commerce has identified as an "exporter" or "producer" under Article 6.10 of the AD Agreement. For ease of reference, Commerce has termed this entity the "Vietnam-wide entity" in the proceedings at issue. Vietnam's arguments regarding the assessment rate applied to the Vietnam-wide entity are without merit.

141. Article 6.10 of the AD Agreement requires an investigating authority to determine an individual margin of dumping for each known "exporter" or "producer"of the product under investigation, unless this is not practicable. Prior to assigning an individual dumping margin, however, the authority must identify whether an entity is an "exporter" or "producer."

142. The AD Agreement does not define the terms "exporter" or "producer," nor does it establish criteria for an investigating authority to examine in order to determine whether a particular entity constitutes an "exporter" or "producer." Therefore, an authority is permitted to determine, based upon the facts on the record, whether a given entity constitutes an "exporter" or "producer" as a condition precedent to calculating an individual dumping margin for that entity. In the absence of specific guidance in the AD Agreement, the investigating authority has discretion to establish the factors that may be relevant to identifying an "exporter" or "producer," including actual commercial activities and relationships of companies, rather than merely their status as legally distinct companies. Depending on the facts of a given situation, an investigating authority may determine that legally distinct companies should be treated as a single "exporter" or "producer" based upon their activities and relationships.

143. The reasoning of the panel in *Korea – Certain Paper* supports this interpretation of Article 6.10 of the AD Agreement. In that dispute, Indonesia argued that Article 6.10 requires an investigating authority to calculate a separate margin of dumping for each separate legal entity.[145] The panel rejected this interpretation of Article 6.10, noting that several provisions of the AD Agreement "confirm that the Agreement recognizes that relationships between legally distinct entities may impact behavior and are thus relevant to the application of the rules of the Agreement."[146] The panel concluded:

> Article 6.10 does not necessarily preclude treating distinct legal entities as a single exporter or producer for purposes of dumping determinations in anti-dumping investigations. . . Whether or not the circumstances of a given investigation justify such treatment must be determined on the basis of the record of that investigation. In our view, in order to properly treat multiple companies as a single exporter or producer in the context of its dumping determinations in an investigation, the IA

[145] *See Korea – Certain Paper*, para. 7.155.

[146] *Id.* at para. 7.160. The Appellate Body similarly recognized in *US – Hot-Rolled Steel* that under certain circumstances, separate legal entities may constitute a "single economic enterprise" such that sales between them may not reflect ordinary market principles. *See US – Hot-Rolled Steel (AB)*, paras. 141-144.

has to determine that these companies are in a relationship close enough to support that treatment.[147]

The facts of a particular case may therefore support a finding that the nature of the relationship or operations of two or more legally distinct companies are so closely connected that the companies effectively constitute a single "exporter" or "producer" within the meaning of Article 6.10.

144. The rationale for an investigating authority to treat several companies as one exporter/producer can be illustrated by considering a basic example where one parent company has four subsidiary factories manufacturing the product under investigation, each separately incorporated and wholly-owned by the parent, and each of these factories claims entitlement to a separate margin of dumping. Although there are five legally distinct companies, commercial decisions, including decisions pertaining to production and export of the product under consideration, are made or influenced by the parent company. Given that the parent company makes decisions, *inter alia*, related to production priorities and pricing, it would be illogical, and would compromise the effectiveness of the antidumping remedy, to consider the parent company and each factory a separate "producer" or "exporter" and assign each a separate margin of dumping. Potentially, for example, if three of the four individual companies are found to have dumped and are assigned high cash deposit rates, but the fourth company does not receive a high rate, the parent company can decide to export all of the merchandise from all four factories through the fourth company, thus circumventing the antidumping measure. Nothing in Article 6.10 requires such a result.

145. An inquiry into the relationship between companies and the reality of their respective commercial activities is also relevant in the context of exporters from a non-market economy. As the term suggests, in a non-market economy, government influence on the economy interferes with the full functioning of market principles. Due to this distortion, prices in a non-market economy cannot be used in antidumping calculations because they do not sufficiently reflect demand conditions or the relative scarcity of resources. In other words, there is an absence of the demand and supply elements that separately and collectively make a market-based price system work.

146. During Vietnam's accession negotiations, Members expressed concern about the influence of the Government of Vietnam on its economy and how such influence could affect cost and price comparisons in antidumping duty proceedings.[148] Paragraph 254 of the Working Party Report reflects the concern among Members that government influence may create special difficulties in determining cost and price comparability in the context of antidumping and countervailing duty investigations, and that a strict comparison with Vietnamese costs and prices

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[147] *Id*. at para. 7.161.

[148] *See, e.g.,* Working Party Report, para. 254 (members of the Working Party noted that special difficulties could arise because Vietnam had not yet transitioned to a full market economy).

might not always be appropriate. Indeed, the Working Party Report indicates that a dumping comparison using domestic costs and prices in Vietnam is not required for imports from Vietnam *unless and until* investigated producers demonstrate that market conditions exist in the industry producing the like product.[149] In light of the Working Party Report and the commitments made therein, Members are free to determine that, absent a demonstration to the contrary by Vietnamese producers, government influence will prevent market principles from functioning in the Vietnamese industry manufacturing the product under investigation.

147. Commerce's 2002 inquiry into the non-market nature of Vietnam's economy has confirmed that the Government of Vietnam maintains significant control over the Vietnamese economy. During the antidumping duty investigation on frozen fish fillets from Vietnam, Commerce investigated and analyzed the extent of government influence on the Vietnamese economy for the purpose of determining whether Vietnam should be classified as a non-market economy in Commerce's antidumping proceedings.[150] Commerce considered several factors in its analysis, including the extent to which Vietnam's currency is convertible, 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 explained that the stated objective of the Government of Vietnam is continued protection of, and investment in, industrial state-owned enterprises to ensure that they retain a key role in what the government refers to as a socialist market economy. Commerce clarified that these enterprises are not limited to traditional natural monopolies, but extend to other industries, including the food industry.[151] The result is that the Government of Vietnam exerts significant influence over the Vietnamese economy, and the Government Pricing Committee continues to maintain discretionary control over the prices in these industries. Thus, Commerce concluded, Vietnamese prices and costs could not be used for antidumping analysis purposes. Commerce incorporated by reference and relied on the analysis in the fish fillets investigation when it determined that Vietnam continues to be a non-market economy for the purposes of the determinations challenged in this dispute.[152]

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[149] Working Party Report , para. 254-255.

[150] *See* Memorandum from Shauna Lee-Alaia, et al. to Faryar Shirzad, *Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status* ("NME Status Memo") (Exhibit US-2).

[151] *See* NME Status Memo at 43 (Exhibit US-2).

[152] *See Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam*, 69 FR 42,672, 42,678 (July 16, 2004) (Exhibit Viet Nam-05). *See also Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Partial Rescission and Final Partial Rescission of the Second Administrative Review*, 73 FR 12,127, 12,132 (Mar. 6, 2008) (Exhibit Viet Nam-14) *and Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Partial Rescission and Request for Revocation, In Part, of the Third Administrative Review*, 74 FR 10,009, 10,012 (Mar. 9, 2009) (Exhibit Viet Nam-18) (both noting that, in the second

148. Given this evidence of government influence, it would make little sense for an investigating authority to assign an individual dumping margin to an exporting company in Vietnam, a non-market economy country, without first confirming, at the very least, that the company functions as an exporter separate from and independent of influence by the government, *e.g.*, evidence that export prices are not set by the government or subject to governmental approval at the company level. Otherwise, if the exporter's prices were set by the government, there would be no reason to assign that company its own dumping margin based solely upon data related to its own pricing prices. This is because significant and pervasive government influence over the economy, writ large, as seen in non-market economy countries such as Vietnam, leaves open the potential for the government to exert influence over the export behavior of individual companies, including possible shifting of export activities between production facilities and companies that may be legally distinct, in order to avoid antidumping duties.

149. Such government influence may take the form of restrictive stipulations associated with a company's business or export licenses, government approval of export prices, government oversight regarding disposition of profits or financing of losses, and influence over the selection of management. Consistent with the panel's reasoning in *Korea – Certain Paper*, these factors would support a finding by the investigating authority that the companies and the government "are in a relationship close enough" that they should be treated as a single exporter and subject to a single dumping margin.[153]

150. In light of the non-market economy considerations described above, one of the first steps in the administrative reviews at issue was for Commerce to determine whether the particular companies being examined were sufficiently free from government control so that, *inter alia*, their export prices were not being set by the government. In order to make this determination, Commerce required each company to submit information demonstrating the company's independence from government control regarding export activities. If Commerce had previously determined that a company was entitled to an individual rate, then that company needed only submit a certification that its status had not changed. However, if a company could not demonstrate that it was sufficiently free from government influence, Commerce considered that company ineligible for an individual (or "separate") rate. Instead, that company was identified as being part of the Vietnam-wide entity, *i.e.*, the entity that is presumed to control the export activities of the companies that compose it.

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and third administrative reviews, none of the parties to the proceedings contested the treatment of Vietnam as a non-market economy).

[153] *Korea – Certain Paper*, paras. 7.161, 7.165.

151. Contrary to Vietnam's claim, this is not a discriminatory practice.[154] Rather, it 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. The collection of such relevant information in antidumping proceedings is a standard practice of Commerce in market economy cases as well. In such cases, Commerce requests information regarding each company's affiliates, including information regarding percentage of ownership and ultimate decision making authority. If the data indicate that companies are affiliated and the relationships are sufficiently close so as to allow one company to influence another, Commerce treats the companies as a single entity.[155] In the non-market economy context, this information allows Commerce to balance the non-market economy 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.

152. In sum, an investigating authority may determine whether a particular company is an "exporter" or "producer" entitled to an individual rate. If evidence on the record does not demonstrate a company's independence from government control in a non-market economy case, the investigating authority may identify that company as a member of the non-market economy entity, which Commerce determined was a single "exporter" or "producer" consistent with Article 6.10 of the AD Agreement. For the reasons given above, Vietnam's claim that Commerce's determination of a rate for the Vietnam-wide entity in the challenged determinations were inconsistent with the AD Agreement is without merit.

153. Vietnam also advances a number of arguments against Commerce's determination of a rate for the Vietnam-wide entity that are based upon Vietnam's *Protocol of Accession*.[156] However, these arguments are dependent upon a finding that Commerce's methodology is inconsistent with the AD Agreement.[157] Because Commerce's methodology is consistent with the AD Agreement, these arguments are also without merit.

2. Commerce's Assignment of a Rate to the Vietnam-Wide Entity Based Upon the Facts Available in the Second Administrative Review Was Consistent with Article 6.8 and Annex II of the AD Agreement

154. Once Commerce has identified the non-market economy entity as a single "exporter" or "producer," it then must determine a rate for that "exporter" or "producer." In this sense, the

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[154] *See* Vietnam First Written Submission, paras. 201-203.

[155] *See* 19 C.F.R. 351.401(f) (Exhibit US-3).

[156] Vietnam First Written Submission, paras. 188-203.

[157] *See* Vietnam First Written Submission, para. 188.

non-market economy entity is treated just like any other "exporter" or "producer" being examined under Article 9 of the AD Agreement. That is, Commerce generally requests information from that "exporter" or "producer" for the purposes of calculating an assessment rate. And just like any other "exporter" or "producer" being examined under Article 9 of the AD Agreement, if the non-market economy entity does not provide the information requested, the authority may rely upon the facts available pursuant to Article 6.8 and Annex II of the AD Agreement. As demonstrated below, the Vietnam-wide entity failed to respond to requests for necessary information in the second administrative review. Accordingly, Commerce properly relied upon the facts available, consistent with the requirements of Article 6.8 and Annex II.

155. In the second administrative review, numerous interested parties determined to be part of the Vietnam-wide entity failed to provide necessary information requested by Commerce. Thus, Commerce had to rely upon the facts available pursuant to Article 6.8 and Annex II of the AD Agreement in order to determine the margin of dumping for the Vietnam-wide entity. Specifically, Commerce requested information regarding the quantity of subject merchandise produced and the value of the sales of merchandise sold into the United States. Because of the large number of companies involved and Commerce's available resources, it was necessary for Commerce to limit its examination to a reasonable number of the largest exporters, by volume, of subject merchandise to the United States. Consequently, this information was necessary in order to define the pool of companies from which Commerce could select the largest exporters. If a company fails to provide this data, Commerce is prevented from determining if that company is large enough to be selected for individual examination. This threshold data is vital as it goes to the determination of what data will be used to calculate dumping margins and what data could serve, in certain circumstances, as a basis for rates assigned to companies not selected for individual examination. Vietnam's argument that this data is not necessary is at odds with the very purpose of Article 6.10 of the AD Agreement. Furthermore, the heart of an antidumping proceeding is the comparison between the normal value and the export price. The quantity and value of a company's sales are the principal data needed for determining the export price. Thus, contrary to Vietnam's claims, failure to provide this information is a failure to provide necessary information.

156. Vietnam argues that an investigating authority may only rely upon the facts available when calculating a margin for an individually examined party, *i.e.*, a party that is not individually examined cannot receive a rate based upon facts available.[158] This interpretation, however, ignores the text of Article 6.8 and Annex II of the AD Agreement. Article 6.8 expressly provides that if an "interested party" does not provide necessary information, determinations may be based upon the facts available. Annex II further explains that if an "interested party" does not cooperate, the result could be less favorable "to that party" than if it did cooperate. Neither Article 6.8 nor Annex II requires investigating authorities to limit the application of facts

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[158] *See* Vietnam First Written Submission, paras. 171-182.

available to "individually examined exporters/producers."[159] Indeed, Vietnam's interpretation offers the illogical result that any exporter that is under review, but that has not been selected for individual examination, has an incentive not to cooperate and to withhold data in an antidumping proceeding, thereby assuring that any rate assigned to that company could not be based upon the facts available. The Panel should reject Vietnam's invitation to create an obligation that does not exist in the AD Agreement, because, of course, to do so would be contrary to the prohibition against adding to or diminishing the rights and obligations in the covered agreements.[160]

157. Vietnam further attempts to limit the ability of investigating authorities to rely on facts available by arguing that "necessary information" should be narrowly understood as only that information which is used to calculate dumping margins.[161] There is no basis in the text of the AD Agreement for such a limitation.

158. In support of its position, Vietnam relies on a statement by the panel in *Argentina – Ceramic Tiles*, emphasizing the panel's view that "the provisions of Article 2 concerning the determination of dumping and Article 6.8 AD Agreement concerning facts available are intended to allow the investigating authority to complete the data with regard to a particular exporter in order to determine a dumping margin. . . ."[162] This statement is found in a footnote to the panel's analysis of Argentina's argument that "in the absence of reliable and useful information with regard to each of the size categories of the product subject of the investigation, no individual margin of dumping could be calculated for each exporter for the product under investigation. . . ."[163] The panel was not examining the definition of the term"necessary information" in Article 6.8 of the AD Agreement and made no finding about its definition. Rather, the panel was pointing out that, despite Argentina's argument that it was not possible to calculate a dumping margin without complete information, the AD Agreement provides a mechanism through which an investigating authority can calculate a dumping margin, even where an interested party fails to provide all necessary information. Vietnam's reliance on the panel report in *Argentina – Ceramic Tiles* is thus misplaced.

159. Vietnam also suggests that the *Egypt – Steel Rebar* panel "made clear that Article 6.8 applies to information necessary for purposes of calculating the antidumping margin."[164]

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[159] Vietnam First Written Submission, para. 171.

[160] *See* Articles 3.2 and 19.2 of the DSU.

[161] Vietnam First Written Submission, paras. 176-179.

[162] Vietnam First Written Submission, para. 176 (quoting *Argentina – Ceramic Tiles (Panel)*, fn 96 (emphasis supplied by Vietnam)).

[163] *Argentina – Ceramic Tiles*, para. 6.95 (emphasis in the original).

[164] *See* Vietnam First Written Submission, para. 178.

Vietnam mischaracterizes the finding of the panel. In actuality, the panel's finding is directly opposed to Vietnam's position:

> On the question of the "necessary" information, reading Article 6.8 in conjunction with Annex II, paragraph 1, it is apparent that it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.), as the authority is charged by paragraph 1 to "specify ... the information required from any interested party".[165]

Based on the reasoning of the panel in *Egypt – Steel Rebar*, the scope of the information that an investigating authority may deem "necessary" is hardly restricted to data used to calculate dumping margins. Indeed, if Vietnam's interpretation were correct, then information used by an investigating authority to make an injury determination, as required by Article 3 of the AD Agreement, would not be considered "necessary" information, and investigating authorities would be hamstrung in the absence of full cooperation from interested parties. Contrary to Vietnam's position, as elaborated in Annex II of the AD Agreement, "necessary information" is that information which is "required"[166] by the investigating authority and "relevant"[167] to the investigation.

160. As explained above, the information that Commerce requested was necessary in order to define the pool from which Commerce selected the largest exporters, and the information also represented the data necessary for determining a company's export price, once selected for individual examination. Because interested parties did not cooperate and failed to provide necessary information, consistent with Article 6.8 and Annex II of the AD Agreement, Commerce relied upon the facts available, and its use of that information led to a result that was "less favourable to the party than if the party did cooperate."[168] Specifically, Commerce relied upon the highest rate calculated in the petition that could be corroborated. This result is based upon the permissible and reasonable assumption that the parties would have cooperated had they been eligible for a lower rate. Otherwise, for example, if a company were aware that is was dumping at a high level and it was one of the largest exporters to the United States of subject merchandise, it would have no incentive to respond to the quantity and value questionnaire because it would receive a lower rate by not cooperating.

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[165] *Egypt – Steel Rebar*, para. 7.155 (emphasis added).

[166] AD Agreement Annex II, para. 1.

[167] AD Agreement Annex II, para. 7.

[168] AD Agreement Annex II, para. 7.

161. Because these uncooperative interested parties were companies that were identified as being part of the Vietnam-wide entity, the Vietnam-wide entity was assigned a rate based upon the facts available. The rationale for this determination is that, as explained above, because the companies that are part of the Vietnam-wide entity are in a relationship close enough to be treated as one "exporter" or "producer," that "exporter" or "producer" must receive one rate. If the different parts of that "exporter" or "producer" received different rates, then the Vietnam-wide entity could simply shift its exporting activity to the arm that has the lowest rate. This possibility would create a perverse incentive for companies to not cooperate with the investigating authority, and would render the provisions of Article 6.8 and Annex II of the AD agreement meaningless.

162. Contrary to Vietnam's suggestion, Commerce did not punish parties for not meeting the criteria to receive an individual (or "separate") rate. Rather, Commerce simply identified those parties as part of the Vietnam-wide entity. It is important to emphasize that, in the second administrative review, the Vietnam-wide entity received a rate based upon the facts available because of the non-cooperation of several of the parties that make up that entity. In fact, every party under review that was identified as being part of the Vietnam-wide entity failed to cooperate by not responding to a request for necessary information, *i.e.*, the quantity and value questionnaires. As a result, the rate assigned to each of the companies that were identified as being part of the Vietnam-wide entity would also have been based upon the facts available even if they each had been assigned an individual rate. That is, consistent with Article 6.8 and Annex II of the AD Agreement, each of these companies would have been assigned a rate based entirely upon the facts available because they failed to cooperate with the investigation by refusing to provide necessary information.

3. The Vietnam-Wide Entity Received the Only Rate Available to It in the Third Administrative Review

163. In the third administrative review, Commerce did not request quantity and value information from all companies involved in the review. Instead, Commerce determined the largest exporters of subject merchandise into the United States by relying upon information from CBP regarding the volume and value of entries of subject merchandise from the exporters under review.[169]

164. Many of the companies under review did not provide information to demonstrate that their export activities were independent of government control. Accordingly, as in the second administrative review, Commerce determined that they were part of the single Vietnam-wide entity and determined an appropriate rate to apply to entries from this entity. The nature of government influence over pricing and production, as described above, means that decisions regarding export activities among such companies cannot be assumed to be independent of

[169] *See* Memorandum from Paul Walker to James Doyle, dated June 9, 2008. (Exhibit Viet Nam-17).

government control. Accordingly, Commerce reasonably determines a non-market economy entity-wide rate that is distinct from any separate rate assigned to companies found to be sufficiently independent of government control in their export activities. Thus, in the third administrative review, Commerce applied to the Vietnam-wide entity the same rate applied to it in the most recently completed proceeding, because this was "the only rate ever determined for the Vietnam-wide entity in this proceeding."[170]

165. This is analogous to the methodology used for separate rate companies, in that Commerce applied to a specific company the most recent average rate, or if available, a concurrent or more recent rate that had been applied to the company. In this manner, separate rate companies that had received a calculated zero or *de minimis* margin in recent proceeding retained that margin in the third administrative review as the most recent individual rate determined for that company.

166. When examination has been properly limited to fewer than all exporters, and the examined exporters receive zero or *de minimis* rates, nothing in the AD Agreement prohibits applying a rate to unexamined exporters that is the only rate ever determined for those exporters. Vietnam's claim to the contrary must fail.

D. Vietnam's Claims of Inconsistency Regarding the All Others Rate (or Separate Rate) Are Without Merit

167. Vietnam claims that the separate rates applied by Commerce to certain exporters or producers in the challenged determinations are inconsistent with Articles 2.4, 9.3, and 9.4 of the AD Agreement.[171] In particular, Vietnam argues that the separate rates Commerce applied to non-examined exporters and producers in the second and third administrative reviews was inconsistent with Articles 2.4 and 9.4 because 1) the rate was calculated using the zeroing methodology, and 2) the rate was a weighted average of dumping margins calculated during the original investigation rather than a weighted average of dumping margins calculated during the particular administrative reviews. Vietnam's arguments are without merit and should be rejected.

1. Vietnam Has Not Shown that the Rates Applied to Separate Rate Respondents are Subject to the AD Agreement nor that Commerce

[170] *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 47,191, 47,195 (Sep.15, 2009) (Exhibit Viet Nam-19).

[171] Vietnam First Written Submission, paras. 207-234. The United States notes that, while Vietnam refers to Article 9.3 of the AD Agreement in paragraph 207 of its first written submission, it makes no arguments in the subsequent discussion to substantiate any claim under Article 9.3, and indeed does not refer to Article 9.3 again in connection with its discussion of this issue.

Used "Zeroing" When Applying These Rates in the Second and Third Administrative Reviews

168. Vietnam argues that Commerce acted inconsistently with Articles 2.4 and 9.4 of the AD Agreement by applying a dumping margin to companies not selected for individual examination during the second and third administrative reviews that was calculated in the original investigation using the zeroing methodology. Vietnam's argument is without merit.

169. As an initial matter, Vietnam's argument is dependent upon its claim that Commerce acted inconsistently with the AD Agreement when it employed the zeroing methodology in the original investigation. Vietnam asserts that Commerce "utilized model zeroing in the original investigation of this proceeding, an action inconsistent with Article 2.4 of the Agreement. Accordingly, the weighted-average margins used by the USDOC to calculate the all-others rate in the original investigation was calculated using an impermissible methodology."[172]

170. As explained above, however, Commerce's determination of the separate rate for non-examined exporters and producers in the investigation, which Vietnam refers to as the "all-others rate," was made prior to the entry into force of the WTO Agreement with respect to Vietnam. Thus, that determination was not subject to the AD Agreement.[173] Hence, it cannot have been inconsistent with Article 2.4 of the AD Agreement.

171. In addition, the separate rates determined in the original investigation do not become subject to the AD Agreement simply because they continued to be applied on or after the date of entry into force of the WTO Agreement for Vietnam. Article 18.3 of the AD Agreement provides that "the provisions of this Agreement shall apply to investigations, and assessment proceedings of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement." In *US – DRAMS*, the panel analyzed Article 18.3 of the AD Agreement, and reasoned that:

> [P]re-WTO measures do not become subject to the AD Agreement simply because they continue to be applied on or after the date of entry into force of the WTO Agreement for the Member concerned. Rather, by virtue of the ordinary meaning of the terms of Article 18.3, the AD Agreement applies only to "reviews of existing measures" initiated pursuant to applications made on or after the date of entry into force of the AD Agreement for the Member concerned ("post-WTO reviews"). However, we do not believe that the terms of Article 18.3 provide for the application of the AD Agreement to all aspects of a pre-WTO measure simply because parts of that measure are under post-WTO review. Instead, we believe that the wording of Article 18.3 only applies the AD Agreement to the post-WTO

[172] Vietnam First Written Submission, para. 214.

[173] *See supra*, section V.A.1.

> review. In other words, the scope of application of the AD Agreement is determined by the scope of the post-WTO review, so that pursuant to Article 18.3, the AD Agreement only applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. Any aspects of a pre-WTO measure that are not covered by the scope of the post-WTO review do not become subject to the AD Agreement by virtue of Article 18.3 of the AD Agreement. By way of example, a pre-WTO injury determination does not become subject to the AD Agreement merely because a post-WTO review is conducted relating to the pre-WTO determination of the margin of dumping.[174]

In that dispute, the question before the panel was whether a "1993 product scope determination was subject to review" in a post-WTO administrative review.[175] The panel found that:

> [T]he product scope of the *DRAMs from Korea* order, and thus of the third administrative review, was determined once and only once in the original pre-WTO investigation, well before the entry into force of the WTO Agreement for the United States on 1 January 1995. The product scope of the order was not subject to any re-examination in the third administrative review, nor was any determination regarding product scope made at that time. In effect, therefore, Korea is asking the Panel to review the WTO-consistency of an anti-dumping measure with regard to an aspect governed solely by a pre-WTO determination.[176]

The panel in *US – DRAMS* declined Korea's invitation to "review the WTO-consistency of an anti-dumping measure with regard to an aspect governed solely by a pre-WTO determination" and ruled that Korea's claim was inadmissible.[177]

172. In this dispute, several of the separate rates applied in the second and third administrative reviews were calculated during the original investigation, prior to the entry into force of the WTO Agreement for Vietnam.[178] The calculations that Commerce performed to determine the separate rates "were not subject to any re-examination" in the second and third assessment proceedings. Therefore, as in *US – DRAMS*, the separate rates determined in the original investigation, and applied in the second and third administrative reviews, did not become subject

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[174] *US – DRAMS*, para. 6.14.

[175] *Id.* at para. 6.15.

[176] *Id.* at para. 6.16.

[177] *Id.* at paras. 6.16-17.

[178] For several companies, individual rates calculated in prior proceedings based on their own data continued to be applied.

to the AD Agreement simply because they continued to be applied after the date of entry into force of the WTO Agreement for Vietnam.

173. Vietnam argues that the separate rate applied in the second and third administrative reviews is inconsistent with Articles 2.4 and 9.4 of the AD Agreement due to zeroing. For this argument to succeed, Vietnam must show that zeroing was actually used in the second and third administrative reviews when Commerce applied the separate rates. Vietnam has not and cannot make such a showing.

174. In the second and third administrative reviews, in applying to eligible respondents the separate rates calculated in the original investigation, Commerce made no new comparisons between the export price and the normal value. Commerce simply applied a previously calculated rate from the investigation, or a prior proceeding, to respondents that demonstrated sufficient independence from the government during the second and third administrative reviews.[179] This rate, as explained below, is reasonably reflective of commercial behavior during a recent period. In the absence of any actual comparison between the export price and the normal value to determine the margin of dumping, it is impossible that a negative comparison resulted that could have been zeroed.

175. For the reasons given above, Vietnam's argument should be rejected.

2. Commerce Did Not Act Inconsistently with Article 9.4 of the AD Agreement by Declining to Calculate for Non-Examined Exporters and Producers a Weighted Average Dumping Margin Consisting of Zero and *De Minimis* Margins in the Second and Third Administrative Reviews

176. In addition to its arguments related to zeroing, Vietnam also asserts that the rate Commerce applied to companies that were not individually examined in the second and third administrative reviews "unfairly prejudiced" such companies, and for this reason was inconsistent with Article 9.4 of the AD Agreement.[180] Vietnam misunderstands the requirements of Article 9.4 and has not substantiated its claim that Commerce acted inconsistently with that provision.

177. Article 9.4 of the AD Agreement provides, in relevant part:

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[179] *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed. Reg. 52,273, 52,274-76 (September 9, 2008); *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 Fed. Reg. 47,191, 47,194-97 (September 15, 2009) (Exhibit Viet Nam-19).

[180] Vietnam First Written Submission, para. 225-228.

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

178. The Appellate Body explained the meaning of Article 9.4 of the AD Agreement in *US – Hot-Rolled Steel*:

> Article 9.4 does not prescribe any method that WTO members must use to establish the "all others" rate that is actually applied to exporters or producers that are not investigated. Rather, Article 9.4 simply identifies a maximum limit, or ceiling, which investigating authorities "*shall not exceed*" in establishing an "all others" rate. . . . [I]n determining the amount of the ceiling for the "all others" rate, Article 9.4 establishes two *prohibitions*. The first prevents investigating authorities from calculating the "all others" ceiling using zero or *de minimis* margins; while the second precludes investigating authorities from calculating that ceiling using margins established under the circumstances referred to in Article 6.8.[181]

As the Appellate Body explained, on its face, Article 9.4 of the AD Agreement expressly requires an investigating authority to disregard zero or *de minimis* margins, or margins based on facts available, when determining a dumping margin ceiling for non-examined exporters or producers based on the weighted average margin of dumping of the examined exporters or producers.

179. Vietnam correctly notes the possibility that "[i]n certain situations, . . . the individually examined exporters/producers may all receive an antidumping duty of zero, *de minimis*, or based on facts available, the three margins explicitly prohibited by Article 9.4 from calculation of the guiding <u>ceiling</u>."[182] Indeed, this is not merely a theoretical possibility. It is the case here with respect to the second and third administrative reviews. In those proceedings, Commerce limited its examination under Article 6.10 of the AD Agreement and the assessment rates calculated for cooperative individually examined exporters or producers in those proceedings were zero or *de*

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[181] *US – Hot-Rolled Steel (AB)*, para. 116.

[182] Vietnam First Written Submission, para. 219 (emphasis in original).

minimis.[183] In the absence rates that could be used to calculate a weighted average consistent with the requirements of Article 9.4, Commerce determined that it would be appropriate to rely on either a rate calculated during the original investigation, which was a weighted average of dumping margins calculated for exporters and producers individually examined in that proceeding, excluding any zero and *de minimis* margins and margins based on facts available, or a company-specific rate from a more recently completed proceeding where such a rate had been determined for a company. Despite Vietnam's complaints, this determination was not inconsistent with Article 9.4 of the AD Agreement.

180. As the Appellate Body has explained, Article 9.4 of the AD Agreement identifies a "ceiling" but "does not expressly address the issue of *how* that ceiling should be calculated in the event that *all* margins are to be *excluded* from the calculation under the prohibitions."[184] Indeed, as the panel in *US – Zeroing (EC) (21.5)* found, "Article 9.4 does not . . . give <u>any guidance</u> as to how that value is to be established in a situation where all margins are either zero, *de minimis*, or based on facts available."[185] That panel concluded that:

> In a situation . . . where all the margins of dumping determined for selected exporters and producer [sic] fall within one of these categories, there are simply no margins of dumping from which the investigating authority or a panel may calculate the maximum allowable "all others" rate. Thus, in such a case, Article 9.4 simply imposes no prohibition, as no *ceiling* can be calculated. It follows that there would be no legal basis for a panel to conclude that the "all others" rate actually established is inconsistent with Article 9.4.[186]

181. The panel's conclusion in *US – Zeroing (EC) (21.5)* is consistent with the Appellate Body's admonition that the "principles of interpretation [referred to in DSU Article 3.2] neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[187] In other words, silence has meaning. For example, in *US – Corrosion-Resistant Steel Sunset Review,* Japan argued that the United States was obligated to calculate margins of dumping in sunset reviews. The Appellate Body rejected Japan's argument, noting that:

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[183] We note that the second administrative review also involved a rate based entirely upon facts available that was assigned to the Vietnam-wide entity. As with the zero and *de minimis* rates, Commerce did not consider this rate in determining the rates for the companies not selected for individual examination.

[184] *US – Hot-Rolled Steel (AB)*, para. 126 (emphasis in original).

[185] *US – Zeroing (EC) (21.5) (Panel)*, para. 8.279.

[186] *Id.* at para. 8.283.

[187] *India – Patents (AB)*, para. 45.

> 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.[188]

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."[189]

182. Similarly here, Article 9.4 of the AD Agreement is silent and there is simply no obligation in that provision, or anywhere else in the AD Agreement, regarding the maximum rate that may be applied to non-examined exporters or producers when *all* calculated weighted average margins of dumping are zero, *de minimis*, or entirely based upon facts available.

183. The United States understands that the Appellate Body disagreed with the panel's conclusion in *US – Zeroing (EC) (21.5)*.[190] Respectfully, the United States believes that the Appellate Body was incorrect. Although the Appellate Body recognized that Article 9.4 of the AD Agreement is silent regarding this issue,[191] it nevertheless found that Article 9.4 includes some, notably undefined, obligation relating to the calculation of the rate for non-examined companies. The Appellate Body posited that:

> In our view, the fact that all margins of dumping for the investigated exporters fall within one of the categories that Article 9.4 directs investigating authorities to disregard, for purposes of that paragraph, does not imply that investigating authorities' discretion to apply duties on non-investigated exporters is unbounded. The lacuna that the Appellate Body recognized to exist in Article 9.4 is one of a specific *method*. Thus, the absence of guidance in Article 9.4 on what particular methodology to follow does not imply an absence of any obligation with respect to the "all others" rate applicable to non-investigated exporters where all margins of dumping for the investigated exporters are either zero, *de minimis*, or based on facts available.[192]

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

[189] *Id.*

[190] *US – Zeroing (EC) (21.5) (AB)*, para. 453.

[191] *Id.* at para. 452.

[192] *Id.* at para. 453.

The Appellate Body did not opine on any "specific alternative methodologies to calculate the maximum allowable 'all others' rate in situations where all margins of dumping calculated for the examined exporters fall into the three categories to be disregarded . . ." nor did it articulate a legal standard for assessing the consistency of an investigating authority's action with the "obligation" in Article 9.4 in such situations.[193] Hence, the Appellate Body report in *US – Zeroing (EC) (21.5)* offers the Panel no guidance for its analysis of the consistency with Article 9.4 of the methodology applied by Commerce in the second and third administrative review.

184. In the absence of any legal standard or defined obligation, it is not clear to the United States how the separate rates Commerce applied to non-examined exporters and producers in the second and third administrative reviews could be deemed inconsistent with Article 9.4 of the AD Agreement. Apparently extrapolating the Appellate Body's reasoning, Vietnam simply suggests that:

> It cannot be the case that the administering authority can rely on the highest margin that can be determined where the individually examined entities receive a zero or *de minimis* duty. To do so would vest in the administering authority unbridled discretion and unfairly punish entities denied the opportunity for individual examination, in direct conflict with the purpose of Article 9.4.[194]

The relevance of Vietnam's statement is unclear. Commerce did not "rely on the highest margin that can be determined" nor did Commerce exercise "unbridled," or in the words of the Appellate Body, "unbounded"[195] discretion.

185. Rather, in the proceedings at issue, once Commerce eliminated the rates "that Article 9.4 directs investigating authorities to disregard,"[196] Commerce determined that it would be reasonable to apply to certain of the cooperative companies that were not selected for individual examination an average of the rates, excluding zero, *de minimis*, and rates based entirely on facts available, calculated for cooperating companies in the most recent proceeding in which usable rates were available, which in most instances was the original investigation. Where a more recent individually calculated dumping margin was available for a cooperating company, Commerce continued to apply such dumping margin to that company. Thus, for example, the same dumping margins calculated for two companies, based on their own data, in the first administrative review and the first new shipper review were applied to those companies in the second administrative review even though those companies were not selected for individual

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[193] *Id.*

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

[195] *US – Zeroing (EC) (21.5) (AB)*, para. 453.

[196] *Id.*

examination.[197] This is a reasonable method of determining dumping margins because it is reflective of the range of commercial behavior demonstrated by exporters and producers of the subject merchandise during a very recent period and provides a reasonable security going forward for the payment of antidumping duties for those companies that have not been individually examined.[198]

186. Contrary to Vietnam's complaints, Commerce's determinations did not "unfairly punish"[199] nor "unfairly prejudice[]"[200] exporters and producers not selected for individual examination. Vietnam argues that non-examined companies were "unfairly prejudiced" by Commerce's "refusal to review additional entities."[201] This argument, however, is entirely dependent on Vietnam's challenge of Commerce's determinations to limit its examination in the second and third administrative reviews pursuant to Article 6.10 of the AD Agreement. As discussed below, Commerce's determinations were not inconsistent with Article 6.10. In addition, Vietnam's argument implies that, in an Article 9 assessment proceeding, the investigating authority must examine all exporters or producers; otherwise, producers may be prejudiced. This interpretation ignores the text of Article 9.4, which expressly incorporates the limited examination provision of Article 6.10. A proper determination to limit the examination under Article 6.10 is not, in itself, prejudicial to non-examined exporters and producers.

187. Vietnam also criticizes the "application of an antidumping margin that has no basis in the relevant period of review."[202] Vietnam proposes that Commerce should be required to "recalculate the all-others rate using a weighted-average of the individually reviewed exporters/producers for the contemporaneous phase of the proceeding."[203] However, Vietnam recognized that "[f]or the measures at issue . . . all individually examined exporters and producers received zero or *de minimis* margins . . . ."[204] Vietnam further recognized that zero and *de minimis* margins, and margins based on facts available, are "the three margins explicitly

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[197] These companies were Fish One and Grobest.

[198] The Ad Note 1 to paragraphs 2 and 3 of Article VI of the GATT 1994 provides that "a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts of any case of suspected dumping or subsidization."

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

[200] *Id*. at para. 225.

[201] *Id*. at para. 226.

[202] *Id*. at para. 227.

[203] *Id*. at para. 228.

[204] *Id*. at para. 213.

prohibited by Article 9.4 from calculation of the guiding ceiling."[205] Vietnam appears to be arguing that Commerce violated Article 9.4 of the AD Agreement by acting consistently with the explicit prohibition in Article 9.4 against using zero and *de minimis* margins to determine the ceiling for the dumping margin to be applied to non-examined exporters and producers. Vietnam's argument is internally incoherent and cannot be accepted. In addition, as explained above, the rates were the most recently calculated rates available not incorporating rates that were zero, *de minimis*, or entirely based upon facts available. In addition, the rates were reflective of the range of commercial behavior demonstrated by exporters of the subject merchandise during a recent period, and provided for a reasonable security for the payment of antidumping duties for those companies that had not been individually examined.[206]

188. For the reasons given above, the United States respectfully requests that the Panel reject Vietnam's claim that the United States acted inconsistently with Articles 2.4, 9.3, and 9.4 of the AD Agreement.

E. Vietnam's Claims of Inconsistency Regarding Limiting the Number of Respondents Selected Are Without Merit

189. Vietnam argues that Commerce's determinations to limit its examination in each of the proceedings at issue are inconsistent with various obligations under the AD Agreement.[207] As discussed below, Vietnam misconstrues the obligations under the provisions of the AD Agreement to which it refers, and its arguments should be rejected.

1. Commerce's Determinations Are Consistent with Article 6.10 of the AD Agreement

190. Article 6.10 of the AD Agreement allows Members to determine individual margins of dumping for a *reasonable* number of exporters and producers, and does not require the determination of an individual margin of dumping for *all* exporters and producers, where a large number of exporters and producers is involved. Specifically, Article 6.10 provides:

> The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities

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[205] *Id*. at para. 219.

[206] The United States notes that Vietnam also discusses several cases in litigation in U.S. domestic courts. *See* Vietnam First Written Submission, paras. 229-234. These cases concern U.S. domestic law and have yet to be finalized. They have no bearing on this Panel's assessment of U.S. compliance with the covered agreements.

[207] *See* Vietnam First Written Submission, paras. 235-284.

> may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

191. The only condition placed on the authority of a Member to limit an examination is that the number of exporters or producers must be so large as to make a determination of individual margins of dumping for all exporters or producers "impracticable." However, Article 6.10 does not define the term "impracticable." The ordinary meaning of the term "impracticable" is "unable to be carried out or done; impossible in practice,"[208] or "incapable of being performed or accomplished by the means employed or at command."[209] When read in the context of Article 6 of the AD Agreement, which concerns the conduct of investigations by administering authorities, which necessarily have finite resources, it is evident that the term "impracticable" is employed in Article 6.10 to strike a balance between the general obligation to individually examine each exporter or producer and the potential that investigating authorities may lack the ability to do so in all instances. In other words, Article 6.10 permits the limiting of an examination when an authority does not have the resources to individually examine all parties involved in an investigation.

192. In this sense, Vietnam is incorrect when it argues that a determination to limit an examination under Article 6.10 must be based solely upon the number of companies involved in the proceeding, without regard to an investigating authority's resources. As the panel in *EC – Salmon (Norway)* stated:

> In our view, the volume of export sales that may be reasonable for an investigating authority to investigate is a question that must be assessed on a case-by-case basis, taking into account all relevant facts that are before the investigating authority, including the nature and type of interested parties, the products involved and *the investigating authority's own investigating capacity and resources*.[210]

193. In each of the challenged proceedings, Commerce fully explained why it was necessary to limit the examination. Specifically, Commerce noted the large number of companies involved,

[208] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1325 (Exhibit US-4).

[209] *Webster's New Collegiate Dictionary*, p. 572 (1979) (Exhibit US-5).

[210] *EC – Salmon (Norway)*, para. 7.188 (emphasis added).

and provided an analysis of Commerce's available resources.[211] Based upon this analysis, Commerce determined that it would be impracticable to individually examine all of the companies involved, and determined the number of companies that Commerce would be able to examine. For example, in the second administrative review, a review was requested for 101 individual firms.[212] Commerce explained that it would be impracticable to examine all companies for which a review was requested.[213] Similarly, for the third administrative review, a review was requested for 110 companies, and Commerce explained that it had the capability to individually examine only three.[214] Each of Commerce's determinations to limit the examination was justified and consistent with the requirements of Article 6.10 of the AD Agreement. The AD Agreement requires no further explanation.

194. Vietnam further suggests that there is a limit to the number of times an authority may limit its examination, and that Commerce has surpassed that limit and turned the exception into the rule.[215] However, the text of Article 6.10 of the AD Agreement contains no such limitation. Rather, Article 6.10 permits an authority to 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. Commerce explained how the particular facts in each case justified its determination to limit its examination in each of the proceedings at issue. Consequently, Commerce was entitled to limit its examination in each of those proceedings consistent with Article 6.10. That the conditions for limiting the examination were met in multiple proceedings does not mean that Commerce transformed the exception found in Article 6.10 into the rule. Commerce simply could not practically, individually examine the remaining companies involved in the proceedings at issue, and complied with the obligations in the AD Agreement accordingly.

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[211] Vietnam's suggestions regarding how the United States could increase Commerce's budget are inappropriate. *See* Vietnam First Written Submission, para. 245. Obviously, the AD Agreement does not require a Member to allocate resources to its investigating authority at any particular level, and there is no requirement that a Member ensure that it individually examines each company involved in an antidumping proceeding. On the contrary, rather than require an authority to tailor its resources to accommodate all companies, Article 6.10 permits an authority to limit its examination based upon its resources.

[212] *See* Memorandum James C. Doyle to Stephen J. Claeys, dated July 18, 2007. (Exhibit Viet Nam-13).

[213] Commerce explained that the office assigned to conduct the administrative review was concurrently conducting numerous other proceedings, which constrained the number of analysts that could be assigned to the administrative review at issue, and thus it would only be possible for Commerce to individually examine two companies.

[214] *See* Memorandum from Paul Walker to James Doyle, dated June 9, 2008. (Exhibit Viet Nam-17).

[215] Vietnam First Written Submission, para. 238 *et seq.*

195. Vietnam's discussion of the ordinary meaning of the terms "rule" and "exception" is inapposite.[216] Neither of these terms appears in Article 6.10 of the AD Agreement. It is sufficient and appropriate for the Panel to limit itself to analyzing the words in the AD Agreement. It is not necessary to address the meaning of external terms, such as "rule" and "exception."

196. Vietnam also addresses the object and purpose of the AD Agreement, as well as the object and purpose of particular provisions of the AD Agreement. Article 31 of the Vienna Convention, which establishes the general rules of treaty interpretation, provides, in relevant part:

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

Importantly, the relevant object and purpose under Article 31 of the Vienna Convention is that of the treaty itself. The word "its" refers to the word "treaty." Consequently, Vietnam's discussion of the purported object and purpose of particular provisions of the AD Agreement is not germane to the Panel's consideration of Vietnam's claims in this dispute.

197. With respect to the object and purpose of the AD Agreement as a whole, Vietnam engages in speculation without offering any support for its contentions and even suggests that there are "two broad objects and purposes" of the AD Agreement.[217] As the Appellate Body noted in *US – Softwood Lumber V*, the AD Agreement "does not contain a preamble or an explicit indication of its object and purpose."[218] There, the Appellate Body indicated that it did not "consider it necessary for purposes of resolving the issue before us on appeal to engage in an in-depth analysis of the object and purpose of the *Anti-Dumping Agreement*."[219]

198. The United States does not consider that it is necessary for the Panel to determine the object and purpose of the AD Agreement in order to resolve this dispute. As explained above, consistent with the plain meaning of the terms of Article 6.10 of the AD Agreement, Commerce limited its examination in the second and third administrative reviews because, in light of the large number of companies involved, it was impracticable to review all of them and assign each

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[216] *See id.*, paras. 268, 270.

[217] *Id.* at paras. 275-276.

[218] *US – Softwood Lumber V (AB)*, para. 118.

[219] *Id.* In *US – Offset Act (Byrd Amendment)*, the Appellate Body opined that the object and purpose of the AD Agreement is "to further the substantial reduction of tariffs and other barriers to trade, to eliminate discriminatory treatment in international trade relations and to develop a more viable and durable multilateral trading system." *US – Offset Act (Byrd Amendment) (AB)*, para. 62.

an individual margin of dumping. For the reasons given above, the Panel should reject Vietnam's claims.

2. Commerce Did Not Act Inconsistently with Article 11.1 of the AD Agreement by Limiting Its Examination in the Challenged Proceedings

199. Vietnam argues that Commerce violated Article 11.1 of the AD Agreement by limiting its examination in the proceedings at issue, which, Vietnam asserts, ultimately denied particular companies the opportunity to have the antidumping order revoked with respect to their exports.[220] This claim is entirely dependent on Vietnam's claim under Article 6.10 of the AD Agreement, which, as explained above, is without merit. Additionally, Vietnam misunderstands the meaning of Article 11.1 of the AD Agreement.

200. Article 11.1 of the AD Agreement addresses the duration of an "antidumping duty." As the Appellate Body has confirmed, however, Article 11.1 does not impose any independent or additional obligations on Members.[221] Rather, Article 11.1 merely informs Article 11.2, under which Vietnam has not made any claims, and Article 11.3, which will be discussed further below. Articles 11.2 and 11.3 provide the mechanisms to ensure that an antidumping duty remains in place only as long as necessary. Consequently, Commerce's methodology cannot violate Article 11.1, as that provision does not impose an independent obligation on the United States.

201. Vietnam focuses its arguments regarding Article 11.1 of the AD Agreement upon a U.S. regulation that permits Commerce to revoke an antidumping duty order with respect to an individual company, *i.e.*, it permits Commerce to terminate antidumping duties with respect to an individual company if that company satisfies certain criteria.[222] Specifically, Vietnam argues that, by limiting its examination in the proceedings at issue, Commerce prevented companies from obtaining the revocation described in the regulation, and thus acted inconsistently with Article 11.1. Vietnam is incorrect.

202. The obligations in Article 11 apply to the antidumping duty order as a whole, not as applied to individual companies. As the Appellate Body found in *US — Corrosion-Resistant Steel Sunset Review*, "the duty" referenced in Article 11.3 is imposed on a product-specific (*i.e.*,

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[220] Vietnam First Written Submission, paras. 259-260.

[221] *EC – Tube or Pipe Fittings (AB)*, para. 81, 84 (Affirming the panel's finding. The panel explained that "Article 11.1 does not set out an independent or additional obligation for Members." *EC – Tube or Pipe Fittings (Panel)*, para. 7.113).

[222] *See* 19 C.F.R. 351.222(b)(2) (Exhibit US-6).

order-wide) basis, not a company-specific basis.[223] Article 11.2 operates together with Article 11.3 to ensure that "the duty" is terminated when the investigating authority determines that the duty is no longer necessary to offset injurious dumping. These provisions concern review of the need for "the duty" as a whole, *i.e.*, the need for the antidumping duty order. Article 11 does not address, and does not require, termination on a company-specific basis. All that is required is that, whenever warranted, or after five years, a Member will review the continuing need for "the duty," *i.e.*, the order as a whole. To the extent that Vietnam's claim rests on an alleged obligation to revoke the antidumping duty order on shrimp with respect to certain individual companies, that claim must fail. There simply is no obligation in Article 11 to terminate a duty on a company-specific basis.[224]

203. Even assuming *arguendo* that there is an obligation under Article 11 of the AD Agreement to provide for company-specific opportunities for revocation, pursuant to Article 11.4, the provisions of Article 6 regarding evidence and procedure would apply to such a review. Notably, Vietnam does not reference Article 11.4. Since the provisions of Article 6 apply to reviews under Article 11, the provisions of Article 6.10, which authorizes the investigating authority to limit its examination, would also apply to any request for a company-specific revocation. Because, as explained above, Commerce properly limited its examination in the challenged proceedings consistent with Article 6.10, no company was impermissibly denied an opportunity to seek revocation of the antidumping order.

3. Commerce Did Not Act Inconsistently with Article 11.3 of the AD Agreement by Limiting Its Examination in the Challenged Proceedings

204. Vietnam similarly argues that Commerce violated Article 11.3 of the AD Agreement because, in declining to individually examine all companies requesting review in every proceeding at issue, Commerce has prevented these companies from demonstrating an absence of dumping, which Vietnam contends is the basis for determining whether to continue the order.[225]

205. As an initial matter, the United States notes that, as explained above, the sunset review of the shrimp antidumping order, *i.e.*, the review pursuant to Article 11.3 of the AD Agreement, is not within the Panel's terms of reference. Indeed, the sunset review has not yet been completed and, consequently, there is no determination for the Panel to review. It is thus not possible for

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[223] *US — Corrosion-Resistant Steel Sunset Review (AB)*, para. 150.

[224] We note that the United States provides opportunities for revocation beyond those to which it is obligated under the AD Agreement. These include the opportunity for revocation during an assessment proceeding pursuant to section 751(a) of the Act.

[225] Vietnam First Written Submission, paras. 261-263.

the Panel to find that Commerce has made any determination that is inconsistent with Article 11.3.

206. Even if the Panel were to consider the substance of Vietnam's arguments, however, those arguments must nevertheless be rejected. Article 11.3 of the AD Agreement provides that a definitive antidumping duty must be terminated after five years unless the authorities determine that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The focus of a sunset review under Article 11.3 is on future behavior, *i.e.*, whether dumping and injury are likely to continue or recur in the event of expiry of the duty, not whether or to what extent dumping or injury currently exists.

207. As the starting point for making its likelihood determination in a sunset review, Commerce generally considers the findings concerning dumping made in the original investigation. The rationale for this approach is that the findings in the original investigation provide the only evidence of the behavior of the respondents without the discipline of an antidumping order in place. Commerce then examines any subsequent evidence, including, but not limited to, the final results of administrative reviews.[226]

208. In any event, contrary to Vietnam's assertion, Commerce's determination of whether the revocation of an antidumping order would likely lead to the continuation or recurrence of dumping is not based solely upon the existence of dumping margins in administrative reviews. Parties are permitted to place any information they choose on the administrative record of the sunset review, including information to demonstrate that the existence of dumping and reduced or depressed import volumes does not indicate that dumping is likely to continue or recur in the particular case. If good cause is shown, Commerce will also consider "other factors," such as price, cost, market, or other economic factors in determining the likelihood of continuation or recurrence of dumping.[227] Thus, Vietnam's argument relies on a mischaracterization of the analysis Commerce performs in a sunset review. Contrary to Vietnam's assertion, a sunset determination is not, necessarily, based solely upon an absence of dumping that may have been demonstrated during the five year period.

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[226] *Policies Regarding the Conduct of Five-year ("Sunset") reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin*, 63 FR 18,871 (April 16, 1988) ("*Sunset Policy Bulletin*") (Exhibit US-7).

[227] *Sunset Policy Bulletin* at 18,874 (Exhibit US-7). The Statement of Administrative Action Accompanying the Uruguay Round Agreements Act ("SAA") also provides that such other factors may include:

> the market share of foreign producers subject to the dumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilization; any history of sales below cost of production; changes in manufacturing technology in the industry; and prevailing prices in the relevant markets.

SAA, H.R. Doc. 316, Vol. 1, 103d Cong. (1994) at 890. The SAA provides that this list is merely illustrative and that Commerce should analyze such information on a case-by-case basis. *Id.*

209. For these reasons, Vietnam's claim that the United States acted inconsistently with Article 11.3 of the AD Agreement should be rejected.

4. Commerce Did Not Act Inconsistently with Article 6.10.2 of the AD Agreement

210. Vietnam alleges that Commerce acted inconsistently with Article 6.10.2 of the AD Agreement by not determining individual dumping margins for companies that voluntarily submitted necessary information.[228] Article 6.10.2 provides that:

> In cases where the authorities have limited their examination . . . 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.

211. Commerce could not have acted inconsistently with Article 6.10.2 of the AD Agreement in the proceedings at issue because no company voluntarily provided the necessary information such that any obligation under that provision was triggered. Specifically, in the second administrative review, no company requested voluntary respondent status. In the third administrative review, one company requested voluntary respondent status, but that company subsequently did not submit any data. Because no company submitted "necessary information" in these administrative reviews, Commerce was not obligated by Article 6.10.2 to determine an individual margin of dumping for any voluntary respondent.

212. In the fourth administrative review, two companies requested voluntary respondent status and submitted what they purported was the necessary information.[229] As explained above, the fourth administrative review is not within the Panel's terms of reference. In any event, though, Commerce did not act inconsistently with Article 6.10.2 of the AD Agreement. In that review, Commerce determined that it could only individually examine two companies. This

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[228] Vietnam First Written Submission, paras. 285-288.

[229] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 75 FR 47,771 (Aug. 9, 2010), Issues and Decision Memo at Comment 5 (Exhibit Viet Nam-23).

determination was made based upon the large number of companies involved in the proceeding, as well as Commerce's resource constraints.[230]

213. Vietnam argues that it was impermissible for Commerce to decline to determine individual dumping margins for these two companies pursuant to Article 6.10.2 of the AD Agreement based upon the same standard that permits the limitation of an examination under Article 6.10 of the AD Agreement.[231] Vietnam correctly notes that Article 6.10 establishes a different standard for determining whether to limit an examination than that in Article 6.10.2 for determining whether to individually examine a company that voluntarily provides information.[232] Specifically, as explained above, Article 6.10 permits the limitation of an examination when the number of companies involved is so large as to make an individual determination for each company impracticable. Article 6.10.2, on the other hand, requires an authority to determine an individual margin of dumping for each company that voluntarily submits necessary information, unless the amount of companies involved is so large as to make an individual determination for each company that voluntarily submits information "unduly burdensome."

214. In light of the different standards in Articles 6.10 and 6.10.2 of the AD Agreement, it is possible for an authority to limit its examination under Article 6.10 to a number of companies that would be practicable, but that authority could still choose to determine an individual margin of dumping for a company that voluntarily submits necessary information if it is not unduly burdensome. For example, if an authority determines that it is practicable to individually examine three companies, but one of the companies selected for individual examination indicates that it will not cooperate in the proceeding, then it may not be unduly burdensome for the authority to examine a company that has voluntarily submitted the necessary information.[233] However, this was not possible in the fourth administrative review. As Commerce explained in its initial determination to limit its examination, it could individually examine only two companies. That is, it would be impossible to examine any more. Consequently, not only would it have been "unduly burdensome" for Commerce to have individually examined the two companies that voluntarily submitted information, it would have been impossible. Thus, Commerce's determination to not examine these companies in the fourth administrative review was consistent with Article 6.10.2.

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[230] *Id.*

[231] Vietnam First Written Submission, paras. 285-288.

[232] Vietnam First Written Submission, para. 286.

[233] Indeed, Commerce has done this when it was able. *See*, *e.g.*, *Certain Activated Carbon From the Peoples' Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review and Extension of Time Limits for the Final Results*, 74 Fed. Reg. 21,317, 21,318 (May 7, 2009) (unchanged in Final Results).

215. For the reasons given above, the United States respectfully requests that the Panel reject Vietnam's claims that the United States acted inconsistently with various provisions of the AD Agreement in connection with Commerce's determination to limit its examination in the challenged proceedings.

F. Vietnam's Claim with Respect to the Continued Use of Challenged Practices Is Without Merit

216. Vietnam asserts that Commerce's "continued use of the practices here at issue in successive segments of this antidumping proceeding," including in the fourth and fifth administrative reviews and the sunset review, is inconsistent with various provisions of the AD Agreement and the GATT1994.[234] In support of this view, Vietnam submits that "the USDOC has utilized the challenged practices in an original investigation, four consecutive administrative reviews, and in the preliminary results of the ongoing sunset review."[235]

217. As explained above in section V.A.3, the "continued use of the challenged practices" is not a measure within the Panel's terms of reference. However, should the Panel conclude that Vietnam's "continued use" claim is within its terms of reference, it should nevertheless reject Vietnam's claim. Vietnam's argument that the alleged "continued use of the challenged practices" is even a measure that can be challenged, as well as a violation of the WTO agreements, is premised on its assertion that such "continued use" constitutes an "ongoing conduct."[236] Even were this a cognizable claim, as detailed above, the facts belie a conclusion that any such "ongoing conduct" exists or is likely to continue under the antidumping duty order that is at issue in this dispute.[237]

218. The United States has serious concerns about the rationale articulated by the Appellate Body with respect to "the use of the zeroing methodology in a string of connected and sequential determinations, in each of the 18 cases, by which the duties are maintained" in the *US – Continued Zeroing* dispute.[238] As explained above in connection with our request for a preliminary ruling,[239] measures that do not and may never exist cannot be measures within a

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[234] Vietnam First Written Submission, paras. 101, 104, 294-295.

[235] *Id*. at para. 105.

[236] *Id*. at para. 294.

[237] When bringing a challenge against an unwritten measure, a complaining party must clearly establish, through arguments and supporting evidence, both the existence of the alleged measure, and its precise content. *US – Zeroing (EC) (AB)*, paras. 196-98.

[238] *US – Continued Zeroing (AB)*, para. 180.

[239] *See supra*, section V.A.3.b.

dispute settlement panel's terms of reference. However, it should be noted that Vietnam's assertion that the facts of this case are "virtually identical" to the cases found to be inconsistent in that dispute[240] is without foundation. In *US – Continued Zeroing*, the Appellate Body found that the record supported findings of inconsistency in only four of the eighteen cases challenged, *i.e.*, where "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time."[241] Each of the four cases where the Appellate Body concluded that there was "a sufficient basis for [the Appellate Body] to conclude that the zeroing methodology would likely continue to be applied in successive proceedings"[242] included: (1) the use of the zeroing methodology in the initial less than fair value investigation; (2) the use of the zeroing methodology in four successive administrative reviews; and (3) reliance in a sunset review upon rates determined using the zeroing methodology.

219. The facts in this dispute do not support a conclusion that the challenged practices "would likely continue to be applied in successive proceedings." As set forth above in section V.A, the original investigation, the first, fourth, and fifth administrative reviews, and the sunset review are not within the Panel's terms of reference. Thus, there can be no finding that Commerce acted inconsistently with the AD Agreement or the GATT 1994 in connection with the "challenged practices" in those proceedings. Additionally, Vietnam has failed to establish that "zeroing" had any impact on the margins of dumping calculated for the individually examined respondents in the second and third administrative reviews, and Vietnam has failed to establish as a factual matter that Commerce used the zeroing methodology in connection with the application of a dumping margin to separate rate respondents in those proceedings, or to the Vietnam-wide entity. Hence, with respect to Commerce's use of zeroing, Vietnam cannot establish "a string of determinations, made sequentially. . . over an extended period of time."[243]

220. Vietnam seeks to expand the Appellate Body's reasoning in *US – Continued Zeroing* beyond zeroing to encompass the other "challenged practices." As demonstrated above, though, Vietnam's claims regarding the other "challenged practices" are without merit, and thus Vietnam cannot establish "a string of determinations, made sequentially. . . over an extended period of time"[244] with respect to those "challenged practices" either.

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[240] Vietnam First Written Submission, para. 105.

[241] *US – Continued Zeroing (AB)*, para. 191.

[242] *Id*.

[243] *Id*.

[244] *Id*.

221. For the reasons given above, the United States respectfully requests that the Panel reject Vietnam's claim that Commerce's alleged "continued use of the challenged practices" is inconsistent with the covered agreements.

VI. CONCLUSION

222. For the reasons given above, the United States respectfully requests that the Panel grant the U.S. requests for preliminary rulings and reject Vietnam's claims that the United States has acted inconsistently with the covered agreements.

LIST OF EXHIBITS

US-1	*New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2349
US-2	Memorandum from Shauna Lee-Alaia, et al. to Faryar Shirzad, *Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status* ("NME Status Memo")
US-3	19 C.F.R. 351.401(f)
US-4	*New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1325
US-5	*Webster's New Collegiate Dictionary*, p. 572 (1979)
US-6	19 C.F.R. 351.222(b)(2)
US-7	*Policies Regarding the Conduct of Five-year ("Sunset") reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin*, 63 FR 18,871 (April 16, 1988) ("*Sunset Policy Bulletin*")