

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

WT/DS404

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

November 16, 2010

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<i>Argentina – Footwear (Panel)</i>	Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R and Corr. 1
<i>Argentina – Poultry Anti-Dumping Duties</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003
<i>Brazil – Desiccated Coconut (AB)</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997
<i>EC – Asbestos (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Products Containing Asbestos</i> , WT/DS135/AB/R, adopted 5 April 2001
<i>EC – Bed Linen (Article 21.5) (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/RW, adopted 24 April 2003, as modified by the Appellate Body Report, WT/DS141/AB/RW
<i>EC – Tube or Pipe Fittings (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by the Appellate Body Report, WT/DS219/AB/R
<i>EC – Tube or Pipe Fittings (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002
<i>India – Patents (AB)</i>	Appellate Body Report, <i>India – Patent Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998
<i>Korea – Certain Paper</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia</i> , WT/DS312/R, adopted 28 November 2005
<i>Japan – Film</i>	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R, adopted 22 April 1998

<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 19 December 2002
<i>US – Continued Zeroing (AB)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – Corrosion-Resistant Steel Sunset Review (Panel)</i>	Panel Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/R, adopted 9 January 2004, as modified by the Appellate Body Report, WT/DS244/AB/R
<i>US – Corrosion-Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – DRAMS</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea</i> , WT/DS99/R, adopted 19 March 1999
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001
<i>US – Lead and Bismuth II (AB)</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted on 7 June 2000
<i>US – Oil Country Tubular Goods Sunset Reviews (AB)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
<i>US – Softwood Lumber V (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report, WT/DS264/AB/R
<i>US – Softwood Lumber V (Article 21.5) (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada</i> , WT/DS264/RW, adopted 1 September 2006, as modified by the Appellate Body Report, WT/DS264/AB/RW

<i>US – Softwood Lumber V (Article 21.5) (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 1 September 2006
<i>US – Zeroing (EC) (Panel)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins</i> , WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R
<i>US – Zeroing (EC) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins</i> , WT/DS294/AB/R, adopted 9 May 2006
<i>US – Zeroing (EC) (Article 21.5) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins – Recourse to 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW, adopted 11 June 2009
<i>US – Zeroing (Japan) (Panel)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report, WT/DS322/AB/R
<i>US – Zeroing (Japan) (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007

I. INTRODUCTION

1. As the United States noted in its closing statement at the first substantive meeting with the Panel, this dispute, like all WTO disputes, presents questions about the interpretation of the covered agreements. Yet, notwithstanding Vietnam's lengthy First Written Submission and responses to the Panel's written questions, Vietnam has largely failed to articulate what specific obligations contained in the covered agreements it believes the United States has violated. While Vietnam has referenced multiple provisions of the AD Agreement and the GATT 1994, Vietnam has not provided a proper interpretive analysis of those provisions. Additionally, Vietnam ignores critical facts and makes irrelevant assertions that are unsupported by any evidence. Vietnam's arguments do not provide a basis on which the Panel could sustain Vietnam's allegations that the United States has acted inconsistently with any of its WTO obligations.

2. Instead, Vietnam departs from the accepted rules of treaty interpretation, invents obligations found nowhere in the text of any covered agreement, and ignores relevant facts. Indeed, Vietnam has gone to great lengths to discuss anything *but* the specific obligations found in the text of the covered agreements or the actual facts of this dispute. For example:

- Failure to specifically identify a measure in the panel request: Rather than identify anywhere in its panel request where it specifically identified a "continued use" measure, as required by Article 6.2 of the DSU, Vietnam seeks to excuse its failure to identify a "continued use" measure on the ground that this so-called "measure" can be inferred from and is "related to" other "as applied" measures that are identified in the panel request.
- "Zeroing" as applied: Vietnam asks the Panel to ignore the fact that the margins of dumping calculated for individually examined companies in the second and third administrative reviews were all zero or *de minimis*, and, rather than focus on a proper Vienna Convention analysis of the text of the AD Agreement and the GATT 1994, Vietnam makes unsupported assertions about the impact of "zeroing" on the behavior of exporters and producers, an issue that is totally irrelevant to the Panel's analysis.
- "Zeroing" as such: Vietnam waited until late in this dispute settlement proceeding before advancing any arguments related to an "as such" claim against "zeroing," and its arguments ignore the text of the AD Agreement, in particular Article 2.4.2, the application of which is expressly limited to the "investigation phase."
- Separate rates: Vietnam studiously avoids the text of Article 9.4 of the AD Agreement and asks the Panel to impose on the United States a host of obligations that have no basis whatsoever in the text of that provision, while at the same time seeking to obtain the benefits of the WTO Agreement in respect of a determination made prior to Vietnam's WTO accession.

- Vietnam-wide entity rate: Rather than focus on the specific obligations in Articles 6.8, 6.10, 9.4, and Annex II of the AD Agreement, Vietnam makes broad, baseless claims of discrimination and prejudicial treatment, ignoring substantial evidence before Commerce that justified treating the Vietnam-wide entity as a single exporter, the failure of companies to cooperate in the second administrative review that justified Commerce’s reliance on facts available, and the absence of any dumping margins that could be used to calculate a maximum antidumping duty consistent with the requirement of Article 9.4 in the third administrative review, which led Commerce to rely on margins determined in prior proceedings.
- Limiting the examination: Vietnam concedes that Commerce was justified in limiting its examination in the second and third administrative reviews, but nevertheless asks the Panel to impose on the United States an obligation to “explore alternatives” to examine more companies, despite the absence of any support in the text of the AD Agreement for any such requirement, and despite the fact that no company that was not selected for individual examination ever voluntarily submitted the information necessary to make an individual dumping margin determination in the second and third administrative reviews.
- Continued use of the challenged practices: Vietnam claims that the facts in this dispute are “virtually identical” to the facts in *US – Continued Zeroing*, but ignores critical differences that, when taken into account, would prevent Vietnam from establishing a string of determinations, made sequentially over an extended period of time with respect to any of the “challenged practices.”

Throughout this dispute, Vietnam’s arguments have consistently failed to meaningfully address the specific rights and obligations provided in the covered agreements, and Vietnam has ignored the relevant facts.

3. The proper focus of the Panel’s attention, of course, is the text of the covered agreements and the rights and obligations established therein. The United States takes the opportunity in this submission not only to reiterate its arguments on the basis of those rights and obligations, but also to address Vietnam’s arguments on their own terms. In so doing, the United States does not intend to signal its agreement with the view, implicit in Vietnam’s approach, that it would be appropriate for the Panel to base its findings on elements extraneous to the text of the covered agreements.

4. We will not repeat in this submission all of the arguments we have advanced in the U.S. First Written Submission, in oral statements during the first substantive panel meeting, and in the U.S. responses to the Panel’s written questions, though we continue to rely on the arguments contained therein. For the reasons we have already given, together with those we provide in this submission, the United States respectfully submits that the only conclusion to be drawn is that Vietnam’s claims are without merit and must be rejected.

II. VIETNAM'S CLAIMS OF INCONSISTENCY REGARDING "ZEROING" ARE WITHOUT MERIT

5. The United States has demonstrated that Vietnam's claims with respect to Commerce's alleged use of the "zeroing" methodology in the second and third administrative reviews are without merit. We will not repeat in this submission all of the arguments made in the U.S. First Written Submission, in oral statements during the first substantive panel meeting, and in response to the Panel's written questions.

6. In the sections that follow, we respond to a number of arguments raised by Vietnam for the first time during the first substantive panel meeting or in response to the Panel's written questions, in particular arguments related to Vietnam's "as such" challenge of "zeroing" in administrative reviews.

A. There Can Be No Violation of the AD Agreement or the GATT 1994 When "Zeroing" Has No Impact on the Margins of Dumping Calculated

7. As we have explained, Vietnam has failed to demonstrate that any antidumping duties were applied in excess of the margins of dumping determined for individually examined exporters and producers in the second and third administrative reviews. Vietnam has not shown that zeroing had any impact on the calculated dumping margins for the individually examined exporters and producers in these reviews, all of which were determined to be zero or *de minimis*.

8. Vietnam continues to offer no relevant evidence in support of its claims against the margins of dumping calculated for individually examined exporters/producers in the second and third administrative reviews. Instead, Vietnam attempts to bolster its claims of inconsistency by making an unsubstantiated assertion about the impact of the use of "zeroing" on the behavior of exporters/producers.¹

9. As we noted in response to the Panel's Question 19, Vietnam has offered no evidence to support its assertion that the use of "zeroing" impacts the behavior of exporters/producers. Furthermore, even if Vietnam could provide evidence to support its assertion, there is no obligation in Article VI:2 of the GATT 1994 or Article 9.3 of the AD Agreement that addresses such an impact upon the behavior of exporters/producers. Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement prohibit the imposition of antidumping duties in excess of the margin of dumping. These provisions contain no language whatsoever concerning the impact upon the behavior of exporters/producers. Vietnam's unsupported assertion thus does nothing to substantiate Vietnam's claims against the margins of dumping calculated for individually examined exporters/producers in the second and third administrative reviews.

¹ Vietnam Opening Statement at the First Substantive Panel Meeting, para. 49.

10. Vietnam also argues that the Panel should find it “relevant” that the “zeroing” methodology was “embedded” in Commerce’s determinations in the second and third administrative reviews.² The “embedded” characterization appears to be no more than another attempt at a formulation that skirts the fact that the margins of dumping calculated for the individually examined companies were zero or *de minimis* and avoids the actual language of the provisions of the covered agreements that are at issue. It is Vietnam’s burden to prove that a measure taken by the United States is inconsistent with a covered agreement. The U.S. measures at issue are treated as WTO-consistent until proven otherwise.³ To the extent that there is a prohibition on the use of a “zeroing” methodology in administrative reviews, such an obligation is found in Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. These provisions prohibit the imposition of antidumping duties in excess of the margin of dumping. The fact that the “zeroing” methodology is embedded in a proceeding is irrelevant unless it can be demonstrated that antidumping duties were applied in excess of the margin of dumping. As we explained previously, Vietnam has not established that the United States acted inconsistently with Article 9.3 of the AD Agreement or Article VI:2 of the GATT 1994 because it has not demonstrated that any antidumping duties were applied in excess of the margin of dumping.

B. Vietnam Has Not Demonstrated that the Use of the “Zeroing” Methodology in Proceedings Other than Original Investigations is Inconsistent with the Covered Agreements “As Such”

11. In response to the Panel’s written questions, Vietnam, for the first time in this dispute, has advanced arguments in support of an “as such” challenge against the use of “zeroing” in administrative reviews.⁴ Vietnam said nothing about any “as such” claim in its First Written Submission. Indeed, the Panel indicated in its Question 11 that it understood from Vietnam’s answers at the first substantive meeting that Vietnam was not maintaining any “as such” claims against “zeroing.”

12. Vietnam’s introduction of arguments related to its “as such” claims in response to the Panel’s written questions reflects a substantial change in the nature of Vietnam’s claims. As the Appellate Body has explained:

“[A]s such” challenges against a Member’s measures in WTO dispute settlement proceedings are serious challenges. By definition, an “as such” claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member’s conduct – not only in a

² Vietnam Responses to Panel Questions Following the First Substantive Meeting with the Parties (“Vietnam Responses to Panel Questions”), Question 19, para. 50.

³ *US – Carbon Steel (AB)*, paras. 156-157.

⁴ *See* Vietnam Responses to Panel Questions, Question 11, para. 20.

particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member’s WTO obligations. In essence, complaining parties bringing “as such” challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than “as applied” claims.⁵

In light of the seriousness of an “as such” challenge, it is unfortunate that Vietnam has waited until so late in this proceeding to present any arguments related to its “as such” claim.

13. The U.S. First Written Submission explains in detail that the text and context of the relevant provisions of the AD Agreement and the GATT 1994, 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.⁶ The U.S. First Written Submission further explains that Vietnam has not established that Commerce acted inconsistently with U.S. WTO obligations when it calculated dumping margins for individually examined exporters/producers in the second and third administrative reviews. Though the same arguments are equally relevant to Vietnam’s recently renewed “as such” claims against the use of the “zeroing” methodology in administrative reviews, we will refrain from repeating them in this submission.

14. We take the opportunity here to respond to arguments Vietnam raised for the first time in response to the Panel’s written questions, namely that: 1) “simple zeroing” violates the “fair comparison” requirement of Article 2.4 of the AD Agreement; 2) Article 2.4.2 of the AD Agreement applies beyond the context of investigations; and 3) Article VI:I of the GATT 1994 and Article 2.1 of the AD Agreement define the terms “dumping” and “margin of dumping” in relation to a “product as a whole.” First, though, we address Vietnam’s failure to demonstrate the existence of any so-called “zeroing methodology” that can be challenged “as such.”

1. Vietnam Has Failed to Demonstrate the Existence of Any “Zeroing Methodology” That Can Be Challenged “As Such”

15. At the outset, before responding to Vietnam’s new arguments related to its “as such” claims, the United States notes that Vietnam has advanced no arguments and pointed to no evidence that would support a finding by the Panel that any “zeroing methodology” exists as a measure that can be challenged “as such.”

16. The Appellate Body explained in *US – Zeroing (EC)* that “a panel must not lightly assume the existence of a ‘rule or norm’ constituting a measure of general and prospective

⁵ *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.

⁶ U.S. First Written Submission, paras. 110-138.

application, especially when it is not expressed in the form of a written document.”⁷ The Appellate Body further explained that:

When an “as such” challenge is brought against a “rule or norm” that is expressed in the form of a written document – such as a law or regulation – there would, in most cases, be no uncertainty as to the existence or content of the measure that has been challenged. The situation is different, however, when a challenge is brought against a “rule or norm” that is not expressed in the form of a written document. In such cases, the very existence of the challenged “rule or norm” may be uncertain.

In our view, when bringing a challenge against such a “rule or norm” that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged “rule or norm” is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the “rule or norm” may be challenged, as such. This evidence may include proof of the systematic application of the challenged “rule or norm”. Particular rigour is required on the part of a panel to support a conclusion as to the existence of a “rule or norm” that is not expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported “rule or norm” in order to conclude that such “rule or norm” can be challenged, as such.⁸

In *US – Zeroing (Japan)*, the Appellate Body applied the same reasoning, warning that “panels must not ‘make affirmative findings that lack a basis in the evidence contained in the panel record.’”⁹

17. In this dispute, Vietnam has pointed to no evidence and made no argument that would “clearly establish” that “the alleged ‘rule or norm’ is attributable to the [United States]; its precise content; and indeed, that it does have general and prospective application.”¹⁰ The analysis provided by Vietnam, which is limited to “the USDOC’s computer programs used to

⁷ *US – Zeroing (EC) (AB)*, para. 196.

⁸ *Id.*, paras. 197-198 (citations omitted).

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

¹⁰ *US – Zeroing (EC) (AB)*, para. 198.

determine the antidumping duty margins . . . in the original investigation and the second, third, and fourth administrative reviews. . .”¹¹ does not even purport to demonstrate the existence of the “zeroing methodology” as a measure of general and prospective application attributable to the United States. Likewise, the portions of Commerce’s Antidumping Manual placed before the Panel by Vietnam relate only to Commerce’s NME methodology and sunset reviews.¹²

18. Instead of identifying evidence before the Panel that would demonstrate the existence of the “zeroing methodology” as an “as such” measure, Vietnam merely cites repeatedly to prior panel and Appellate Body reports.¹³ Consequently, with respect to the so-called “zeroing methodology,” Vietnam has not provided a sufficient evidentiary basis for the Panel to make any findings regarding the precise content of any rule or norm, its nature as a measure of general and prospective application, and its attribution to the United States.

19. In *US – Continued Zeroing*, the Appellate Body “note[d] the European Communities’ reference to adopted panel and Appellate Body reports in which the existence of the United States’ zeroing methodology, as an unwritten norm of general and prospective application, was found to exist in the context of both original investigations and periodic reviews.”¹⁴ The Appellate Body explained that:

Factual findings made in prior disputes do not determine facts in another dispute. Evidence adduced in one proceeding, and admissions made in respect of the same factual question about the operation of an aspect of municipal law, may be submitted as evidence in another proceeding. The finders of fact are of course obliged to make their own determination afresh and on the basis of all the evidence before them. But if the critical evidence is the same and the factual question about the operation of domestic law is the same, it is likely that the finder of facts would reach similar findings in the two proceedings. Nonetheless, the factual findings adopted by the DSB in prior cases regarding the existence of the zeroing methodology, as a rule or norm, are not binding in another dispute.¹⁵

20. Vietnam was required in this dispute to put forward evidence of the existence of the

¹¹ Affidavit of Mr. Michael Ferrier, para. 8 (Exhibit Viet Nam-33); *see also* Vietnam First Written Submission, para. 45.

¹² *See* Exhibit Viet Nam-31.

¹³ *See, e.g.*, Vietnam Responses to Panel Questions, Question 11, para. 20 (“Viet Nam does maintain an ‘as such’ claim based on the Appellate Body’s repeated determinations that the identical practice here at-issue is, as such, inconsistent with the Anti-Dumping Agreement.”).

¹⁴ *US – Continued Zeroing (AB)*, para. 190.

¹⁵ *Id.*

“zeroing methodology,” including its precise content, its nature as a measure of general and prospective application, and its attribution to the United States. Vietnam has failed to do so. For this reason, the United States respectfully submits that the Panel lacks any evidentiary basis for finding that “zeroing” in administrative reviews is inconsistent with U.S. WTO obligations “as such.”

2. There Is No Obligation to Offset Any Negative Differences Between Normal Value and Export Price in Article 2.4 of the AD Agreement

21. Vietnam argues that the Appellate Body has recognized that the “simple zeroing” methodology allegedly used in the challenged administrative reviews violates the “fair comparison” requirement of Article 2.4 of the AD Agreement.¹⁶ Specifically, Vietnam explains that the Appellate Body has found that “the zeroing methodology in the context of transaction to transaction comparisons ‘artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely.’”¹⁷ In sum, Vietnam appears to argue that the “fair comparison” requirement provided in Article 2.4 creates an obligation to provide offsets. On the contrary, as we explain below, the obligation to make a “fair comparison” under Article 2.4 does not create an obligation to provide for offsets. Thus, Vietnam’s argument is without merit and the Panel should reject it.

22. An analysis of the obligations in Article 2.4 of AD Agreement necessarily begins with the text of that provision. Article 2.4 provides that:

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases, price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

¹⁶ Vietnam Responses to Panel Questions, Question 17, para. 45.

¹⁷ *Id.*

23. From the text, it is clear that Article 2.4 establishes an obligation that a fair comparison be made between normal value and export price and provides detailed guidance as to how that fair comparison is to be made. Article 2.4 recognizes that the normal value and export transactions to be compared may occur, *inter alia*, (a) with respect to models with differing physical characteristics, (b) at distinct levels of trade, (c) pursuant to different terms and conditions, and (d) in varying quantities.

24. The focus of Article 2.4 is on how the authorities are to select transactions for comparison and make appropriate adjustments for differences that affect price comparability. As the panel in *Egypt – Steel Rebar* explained:

[A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value.¹⁸

The panel in *Argentina – Poultry Anti-Dumping Duties* quoted the *Egypt – Steel Rebar* panel's discussion of the scope of the fair comparison language and supported it.¹⁹

25. Likewise, a number of other Appellate Body and panel reports that have considered the question of price comparability have interpreted Article 2.4 to address pre-comparison price adjustments that affect the comparability of prices between markets.²⁰ For example, the panel in *US – Softwood Lumber V* summarized the scope of Article 2.4 when it found:

An examination of a request for an Article 2.4 adjustment should therefore start with a determination of whether a *difference* between the export price and the normal value exists. That is, a difference between the price at which the like product is sold in the domestic market of the exporting country and that at which the allegedly dumped product is sold in the importing country. *Ultimately, this provision requires that differences exist between two markets. If there is no difference affecting the products sold in the markets concerned, for instance, where the packaging of the allegedly dumped product and that of the like product sold in the domestic market of the exporting country is identical, in our view, an adjustment would not be required to be made by that provision.*²¹

¹⁸ *Egypt – Steel Rebar*, para. 7.335.

¹⁹ *Argentina – Poultry Anti-Dumping Duties*, para. 7.264-265.

²⁰ See, e.g., *Argentina – Poultry Anti-Dumping Duties*, para. 7.265; *Egypt – Steel Rebar*, para. 7.269; *US – Softwood Lumber V (Panel)*, para. 7.356; *US – Hot-Rolled Steel (AB)*, para. 179.

²¹ *US – Softwood Lumber V (Panel)*, para. 7.356 (emphasis added).

26. Accordingly, as the Appellate Body stated in *US – Hot-Rolled Steel*, “an examination of whether USDOC acted consistently with Article 2.4 of the *Anti-Dumping Agreement* must focus on . . . whether there were ‘differences’, relevant under Article 2.4, which affected the comparability of export price and normal value.”²² Vietnam’s proposed interpretation of Article 2.4 – to encompass the *aggregation* of comparisons between export price and normal value – is inconsistent with prior panel and Appellate Body interpretations, and it is erroneous. Article 2.4 does not apply to the *aggregation* of comparisons.

27. Vietnam has not offered any argument as to how an offset to the dumping found for one export transaction as a result of a distinct export transaction having been sold at above normal value would be considered an adjustment or other comparison criterion that falls under Article 2.4. Because the “fair comparison” obligation in Article 2.4 refers to the price adjustments necessary in order to make comparisons, it does not create an obligation with respect to how the results of those comparisons are treated. Assessment of antidumping duties on a transaction-specific basis in the amount by which the normal value exceeds the export price simply does not implicate the “fair comparison” obligation in Article 2.4.

28. Vietnam appears to be arguing that, in addition to requiring a fair comparison in connection with each transaction, Article 2.4 also requires an aggregation of comparison results and that Article 2.4 further imposes an obligation on the manner of such aggregation. The text of Article 2.4, however, offers no support for Vietnam’s argument. Article 2.4 is limited to the selection of comparable transactions and the making of appropriate adjustments to those transactions so as to render them comparable. The customary rules of treaty interpretation “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.”²³ As discussed above, a proper reading of the actual language of Article 2.4 yields the conclusion that the phrase “fair comparison” simply has nothing to do with the aggregation of comparison results. The text of Article 2.4 is silent on the issue of aggregation and silent on the issue of offsets for non-dumped transactions.

29. In short, no obligation to offset any negative differences between normal value and export price can be found in the text of Article 2.4. The United States cannot be found to have acted inconsistently with an obligation that does not exist.

30. Rather than engage the text of Article 2.4, Vietnam instead relies upon isolated statements from the Appellate Body. However, the Appellate Body statements on which Vietnam relies are either inapplicable or, we respectfully submit, incorrect.

31. In *US – Zeroing (Japan)*, while the Appellate Body found that the use of “zeroing” in

²² *US – Hot-Rolled Steel (AB)*, para. 179.

²³ *India – Patents (AB)*, para. 45.

assessment proceedings was inconsistent with Article 2.4, this finding flowed from the Appellate Body’s finding that the amount of the antidumping duty exceeded the margin of dumping under Article 9.3.²⁴ The Appellate Body stated that, “[i]f antidumping duties *are assessed* on the basis of a methodology involving comparisons between the export price and the normal value *in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping* of the exporter or foreign producer, then this methodology cannot be viewed as involving a ‘fair comparison’ within the meaning of the first sentence of Article 2.4.”²⁵ As we have explained, however, Vietnam has not demonstrated that the United States assessed any duties in excess of the margins of dumping in the second or third administrative reviews. Thus, even under the Appellate Body’s rationale, there can be no inconsistency with either Article 9.3 or Article 2.4 of the AD Agreement.

32. In *US – Softwood Lumber V (Article 21.5)*, the Appellate Body stated that “the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination more likely.”²⁶ We note that the use of the transaction-to-transaction comparison methodology in investigations is not at issue in this dispute. It is also worth noting that the Appellate Body limited its statement to dumping margins in investigations that violated Article 2.4.2 of the AD Agreement, while accepting the panel’s conclusion that higher margins are “fair” as long as they are otherwise WTO consistent.²⁷ Indeed, the United States considers that the imposition of an obligation to reduce the amount of dumping found based on a fair comparison of export price and normal value to account for a separate non-dumped transaction improperly decreases the margin of dumping found on the dumped transaction. As we discuss below, Article 2.4.2 does not apply in the context of the assessment proceedings. Additionally, where, as here, the United States determined either zero or *de minimis* dumping margins for the individually examined companies, these margins cannot be characterized as “artificially inflate[d]” or “inherently unfair” even under the Appellate Body’s rationale.

33. In *US – Corrosion Resistant Steel Sunset Review*, which concerned a sunset review – a proceeding not at issue in this dispute – the Appellate Body declined to find that the United States acted inconsistently with Article 2.4 of the AD Agreement.²⁸ The Appellate Body’s

²⁴ *US – Zeroing (Japan) (AB)*, para. 168.

²⁵ *Id.* (emphasis added).

²⁶ *US – Softwood Lumber (Article 21.5) (AB)*, para. 142.

²⁷ *Id.*, paras. 143-44.

²⁸ *US – Corrosion Resistant Steel Sunset Review (AB)*, para. 138 (“For these reasons, we find that we are unable to rule on whether the United States acted inconsistently with Article 2.4 or Article 11.3 of the Anti-Dumping Agreement by relying on the dumping margins from the administrative reviews in making its likelihood determination in the CRS sunset review.”).

statement that there “is an inherent bias in a zeroing methodology”²⁹ was a reference to the EC methodology in investigations challenged in *EC – Bed Linen*.³⁰ The Appellate Body declined to equate the methodology used by the United States with the methodology at issue in *EC – Bed Linen*.³¹ Thus, the Appellate Body’s characterization of “inherent bias” was not a characterization of the methodology that Vietnam alleges Commerce used in this dispute.

34. Moreover, any allegation of bias is based upon the assumption that a methodology “artificially” inflates the magnitude of dumping – otherwise, the methodology would produce the correct magnitude of the margin of dumping. It may be that a methodology always produces higher margins of dumping, and that exporters or foreign producers may consider that to be biased and “unfair.” However, it is then equally true that prohibiting the methodology always produces lower margins of dumping, and the domestic industry – an industry that must have been found to be injured by dumping before any duty is imposed – may consider *that* to be biased and “unfair.” Higher or lower margins are not inherently fair or unfair.

35. The text of Article 2.4 requires that a “fair comparison shall be made between the export price and the normal value.” However, the text of Article 2.4 does not resolve whether any particular assessment of antidumping duties exceeds the margin of dumping because the text of Article 2.4 does not resolve whether “dumping” and “margins of dumping” are concepts that apply to individual transactions. Indeed, the text of Article 2.4 does not resolve the question of whether zeroing is “fair” or “unfair.” As the panel in *US – Zeroing (Japan)* noted, the “precise meaning [of the fair comparison requirement] must be understood in light of the nature of the activity at issue.”³² The panel concluded that “the ‘fair comparison’ requirement cannot have been intended to allow a panel to review a measure in light of a necessarily somewhat subjective judgment of what fairness means in the abstract and in complete isolation from the substantive context.”³³ Other panels have reached the same conclusion. In *US – Softwood Lumber V (Article 21.5)*, for example, the panel cautioned against the overly liberal use of the “fair comparison” language of Article 2.4:

[W]e believe that a claim based on a highly general and subjective test such as ‘fair comparison’ should be approached with caution by treaty interpreters. For this reason, any concept of ‘fairness’ should be solidly rooted in the context provided by the *AD Agreement*, and perhaps the *WTO Agreement* more generally.

²⁹ *Id.*, para. 135.

³⁰ *Id.*, paras. 135-138.

³¹ *Id.*, para. 137.

³² *US – Zeroing (Japan) (Panel)*, para. 7.155.

³³ *Id.*, para. 7.158 (citing *US – Zeroing (EC) (Panel)*, para. 7.261).

As such there must be a discernible standard within the *AD Agreement*, and perhaps the *WTO Agreement*, by which to assess whether or not a comparison has been ‘fair’ or ‘unfair.’ Thus, the fact that comparison methodology A produces a higher margin of dumping than comparison methodology B would only make comparison methodology A unfair if comparison methodology B were the applicable standard. If however, the *AD Agreement* were to permit either comparison methodology A or B, this would not be the case.”³⁴

36. In *US – Zeroing (EC)*, the panel similarly stated: “[C]aution . . . is especially warranted where as in the case of the first sentence of Article 2.4, a legal rule is expressed in terms of a standard that by its very nature is more abstract and less determinate than most other rules in the *AD Agreement*. The meaning of ‘fair’ in a legal rule must necessarily be determined having regard to the particular context within which the rule operates.”³⁵

37. The open-ended approach inherent in Vietnam’s interpretation of Article 2.4 of the *AD Agreement* would result in disputes that are virtually impossible to resolve in any principled, text-based way. The term “fair” is highly subjective, and its meaning varies widely depending on one’s interests and perspective. Absent any principled basis for resolving such disputes, the Appellate Body and panels would be required to apply a vague, subjective, and ill-defined legal standard to factual situations where “fairness” depends on the eye of the beholder. We respectfully submit that the Panel should reject an expansive interpretation of a “fair comparison” requirement that leads to a flood of antidumping disputes that are virtually impossible to resolve in any credible way.

3. There Is No General Obligation to Provide Offsets Outside of the Limited Context of Using Average-to-Average Comparisons under Article 2.4.2 of the AD Agreement

38. Vietnam also argues that the Panel should find that the prohibition on the use of “zeroing” during investigations that the Appellate Body has identified in Article 2.4.2 of the *AD Agreement* applies in the context of administrative reviews.³⁶ Vietnam’s argument is without merit and the Panel should reject it.

39. Article 2.4.2 of the *AD Agreement* provides as follows:

Subject to the provisions governing fair comparison in paragraph 4 of this Article, the existence of margins of dumping during the investigation phase shall normally

³⁴ *US – Softwood Lumber V (Article 21.5) (Panel)*, para. 5.74.

³⁵ *US – Zeroing (EC) (Panel)*, para. 7.260.

³⁶ Vietnam Responses to Panel Questions, Question 16, paras. 34-40.

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 or by a comparison of normal value and export prices on a transaction to transaction basis. (Emphasis added.)

40. Vietnam contends that the phrase “investigation phase” in Article 2.4.2 of the AD Agreement refers to the “inquiry undertaken by authorities to determine the margin of dumping in each segment of the proceeding,” and thus Article 2.4.2 applies beyond the context of original investigations.³⁷ The text of the AD Agreement, as well as prior panel and Appellate Body reports, does not support Vietnam’s argument.

41. Article 18.3 of the AD Agreement explicitly recognizes the difference between investigations, which may lead to the imposition of a measure, and “reviews” of existing measures. In *Brazil – Desiccated Coconut*, the Appellate Body, analyzing an identical distinction in Article 32.3 of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”), noted that the imposition of “definitive” duties ends the investigative phase.³⁸ This distinction in the transitional provisions of the AD Agreement mirrors the distinctions between investigations and reviews contained in the substantive provisions of the Agreement.

42. The Appellate Body and prior panels have recognized these distinctions, consistently finding that the provisions in the AD Agreement with express limitations to investigations are, in fact, limited to the investigation phase of a proceeding. In evaluating whether restrictions on cumulation in investigations were equally applicable to sunset reviews, the Appellate Body noted that Article 3.3 of the AD Agreement – like Article 2.4.2 – “plainly speaks to . . . anti-dumping investigations It makes no mention of injury analyses undertaken in any proceeding other than original investigations [T]he text of Article 3.3 plainly limits its applicability to original investigations.”³⁹

43. The Appellate Body’s finding confirms the approach taken by prior panels. For example, the panel in *US – DRAMS* found that it is “clear” that the term “investigation” means “the investigative phase leading up to the final determination of the investigating authority.”⁴⁰ The panel in *US – Zeroing (EC)* reached a similar finding, and further elaborated:

³⁷ *Id.*, Question 16, para. 39.

³⁸ *Brazil – Desiccated Coconut (AB)*, p. 11 (“[W]e see a decision to impose a definitive countervailing duty as the culminating act of a domestic legal process which starts with the filing of an application by the domestic industry, includes the initiation and conduct of an investigation by an investigating authority, and normally leads to a preliminary determination and a final determination.”); *see also, US – Lead and Bismuth II (AB)*, paras. 53, 61 (distinguishing between Article 21.2 reviews and the original determination in an investigation).

³⁹ *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 294, 301.

⁴⁰ *US – DRAMS*, para. 6.87, footnote 519, discussing Article 5 of the AD Agreement.

“[T]he phrase ‘the existence of margins of dumping during the investigation phase’ in Article 2.4.2 read in its ordinary meaning in 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 various Appellate Body decisions. Third, alternative meanings suggested by the [EC] are implausible at best and deny this phrase any real function, in contradiction with principles of interpretation. Fourth, this interpretation is entirely consistent with the different functions played by ‘original investigations’ and duty assessment proceedings.⁴¹

The panel in *US – Zeroing (Japan)* agreed with the *US – Zeroing (EC)* panel’s interpretation. In rejecting Japan’s arguments, which are very similar to those presented by Vietnam, the panel in *US – Zeroing (Japan)* concluded that “[i]nterpreting ‘during the investigation phase’ to apply to any activity of an investigating authority that involves the calculation of an anti-dumping margin would deprive that phrase of its useful effect because it would essentially apply whenever an authority determines a margin of dumping.”⁴² The panel additionally concluded that “it does not follow that ‘investigation’ in Article 2.4.2 must necessarily be interpreted in accordance with a generic dictionary definition of that word.”⁴³ In support of this conclusion, the panel explained that a reading of various provisions in the AD Agreement confirms that the term “investigation” has a specific meaning.⁴⁴

44. The repeated recognition by panels and the Appellate Body of the distinctions between investigations and review proceedings is consistent with the distinct function of the investigation phase, which is to establish as a threshold matter whether the imposition of an antidumping duty is warranted. Other phases (such as Article 9 assessment proceedings or Article 11 sunset reviews) have different functions. Whereas the function of an investigation is to determine whether a remedy against dumping should be provided, the function of an assessment proceeding is to determine the precise amount of that remedy.

⁴¹ *US – Zeroing (EC) (Panel)*, para. 7.220.

⁴² *US – Zeroing (Japan) (Panel)*, para. 7.213.

⁴³ *US – Zeroing (Japan) (Panel)*, para. 7.214; *cf.* Vietnam Responses to Panel Questions, Question 16, para. 37 (defining the word “investigation” and subsequently concluding that “[t]he plain meaning of the word is general in nature, describing the nature of the action taken by the actor. The definition contains no limitation to narrow the focus or the meaning of the word beyond the generalized actions described.”) (internal citations omitted).

⁴⁴ *US – Zeroing (Japan) (Panel)*, para. 7.214.

45. Other provisions of the AD Agreement also expressly limit their application to the investigation phase of an antidumping proceeding, and do not apply elsewhere. For instance, Article 5.1 establishes that “an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated by or on behalf of a domestic industry.” Similarly, Article 5.7 provides that evidence of dumping and injury must be considered simultaneously “in the decision whether or not to initiate an investigation” and “during the course of the investigation.” Panels have consistently found that the references to “investigation” in Article 5 refer only to the original investigation and not to subsequent phases of an antidumping proceeding.⁴⁵ As the panel in *US – Corrosion-Resistant Steel Sunset Review* found:

[T]he text of paragraph 8 of Article 5 refers expressly to the termination of an investigation in the event of *de minimis* dumping margins. There is, therefore, no textual indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also applies to sunset reviews.⁴⁶

46. The limited applicability of Article 2.4.2 could not be plainer. Article 2.4.2, by its very terms, is limited to the “investigation phase.” Analyzing the text of Article 2.4.2, the panel in *Argentina – Poultry Anti-Dumping Duties* recognized that the application of that provision is expressly limited to the investigation phase of an antidumping proceeding:

Article 2.4.2, uniquely among the provisions of Article 2, relates to the establishment of the margin of dumping “during the investigation phase. . . .”⁴⁷

The text of Article 2.4.2 leaves no doubt that the Members did not intend to extend the obligations in that provision to any phase beyond the investigation phase. The term “investigation phase” in Article 2.4.2, when read together with other provisions of the AD Agreement, cannot be interpreted as including subsequent phases, such as assessment reviews.

47. Furthermore, the express limitation of the obligations in Article 2.4.2 to the investigation phase is consistent with the differences in the antidumping systems applied by Members for purposes of the assessment phase. The different methods used by Members include the use of prospective normal values, retrospective normal values, and prospective *ad valorem* duties. If the obligations regarding comparison methodologies found in Article 2.4.2 were applied to the assessment of antidumping duties, this divergence of assessment systems would not be possible. For example, it is not possible to reconcile the prospective normal value system used by some

⁴⁵ *US – DRAMS*, para. 6.87, at footnote 519 (“investigation” means the investigative phase leading up to the final determination of the investigating authority); *EC – Bed Linen (Article 21.5) (Panel)*, para. 6.114 (Article 5.7 applies to investigations).

⁴⁶ *US – Corrosion-Resistant Steel Sunset Review (Panel)*, para. 7.70.

⁴⁷ *Argentina – Poultry Anti-Dumping Duties*, para. 7.357.

Members with a requirement to use either the average-to-average or transaction-to-transaction comparison methodology, because such systems compare weighted average normal values to individual export prices in order to assess antidumping duties on individual transactions. Thus, to retain the flexibility for Members to apply different assessment systems that is reflected in Article 9, it was not only appropriate, but necessary, to limit the requirements of Article 2.4.2 to the investigation phase.

48. Vietnam mischaracterizes everything in the AD Agreement as an “investigation” and asks the Panel to vitiate the express limitation of Article 2.4.2 to the investigation phase. Vietnam’s argument must necessarily fail, however, because it is contrary to the text of the AD Agreement and it is at odds with consistent findings of prior panels and the Appellate Body that the AD Agreement recognizes the investigation phase as a discrete phase of an antidumping proceeding. For these reasons, the United States respectfully submits that the Panel should reject Vietnam’s arguments concerning Article 2.4.2 of the AD Agreement.

4. Article VI:1 of the GATT 1994 and Article 2.1 of the AD Agreement Do Not Preclude Understanding of the Terms “Dumping” and “Margin of Dumping” in Relation to Individual Transactions

49. Vietnam argues that Article VI:1 of the GATT 1994 and Article 2.1 of the AD Agreement define the “concepts” of “dumping” and “margin of dumping” in relation to a “product as a whole”.⁴⁸ Vietnam suggests that its interpretation is confirmed by the text of other provisions of the AD Agreement. However, the term “product as a whole” is not found anywhere in the GATT 1994 or the AD Agreement, and Vietnam’s purportedly “textual” argument is divorced from the actual text of the relevant provisions.

50. The implication of Vietnam’s argument is that the terms “margin of dumping” and “dumping” must always relate to the “product as a whole” regardless of the context in which the terms are used. However, consistent with the customary rules of treaty interpretation, the precise meaning of the terms “dumping” and “margin of dumping” in a particular provision must be informed by the context in which the term is used. These terms appear in many different provisions of the covered agreements, and, in each case, must be interpreted in accordance with the ordinary meaning of the text, read in context, and in light of the object and purpose of the covered agreement at issue.⁴⁹

51. The terms “dumping” and “margin of dumping” are defined in relation to the term “product.”⁵⁰ The ordinary meaning of “product” may refer to a single transaction or multiple

⁴⁸ Vietnam Opening Statement at the First Substantive Panel Meeting, para. 42.

⁴⁹ See *EC – Asbestos (AB)*, para. 88.

⁵⁰ See GATT 1994, Articles VI:1 and VI:2; see also AD Agreement, Article 2.1.

transactions. The fundamental problem with Vietnam’s interpretation is that it effectively denies the possibility that the terms “dumping” and “margin of dumping” may need to be interpreted in different contexts, and the context matters.

52. Dumping is defined as occurring in the course of ordinary commercial transactions, where products are “introduced into the commerce”⁵¹ of the importing Member transaction by transaction, not “as a whole.” The drafters of the GATT 1994 and the AD Agreement wrote a *definition* of dumping and put into the *definition* the essential meaning of this fundamental, foundational concept. Dumping is defined using terms and phrases that have an ordinary meaning, such as a “product,” “price,” and “introduced into the commerce.” These terms and phrases are nowhere in the agreements defined as having a meaning that is more limited than or otherwise different from their ordinary meaning. It is inconsistent with the customary rules of treaty interpretation to redefine the terms “dumping” and “margin of dumping” by finding new additional components of its meaning hidden in other provisions of the AD Agreement that do not purport to define those terms.

53. Article 2.1 defines “dumping” in relation to the terms “export price” and “normal value.” These fundamental concepts have flexible meaning because “normal value” and “export price” could relate to either an individual transaction or multiple transactions depending upon the context. Normal value may be established on a weighted-average basis (to be used in weighted-average-to-weighted-average comparisons and weighted-average-to-transaction comparisons) or on a transaction basis (to be used in transaction-to-transaction comparisons). In the context of transaction-to-transaction comparisons the normal value is most certainly defined in relation to a transaction, not a “product as a whole.” The term “export price” is similarly defined in relation to a single transaction (when transaction-to-transaction or weighted-average-to-transaction comparisons are used) or multiple transactions (in weighted-average-to-weighted-average comparisons). Because the term “dumping” is defined in relation to the terms “normal value” and “export price,” it would be illogical to conclude that the term “dumping,” which is derived from these flexible terms, may not itself have a similarly flexible definition.

54. Accordingly, the United States respectfully requests that the Panel reject Vietnam’s arguments related to Article VI:1 of the GATT 1994 and Article 2.1 of the AD Agreement.

III. VIETNAM’S CLAIMS AGAINST THE RATES APPLIED TO COMPANIES NOT SELECTED FOR INDIVIDUAL EXAMINATION IN THE SECOND AND THIRD ADMINISTRATIVE REVIEWS ARE WITHOUT MERIT

55. As a result of the second and third administrative reviews, Commerce assigned or continued to apply the following antidumping duty rates to the companies not individually investigated:

⁵¹ GATT 1994, Article VI:1 and AD Agreement, Article 2.1.

- 4.57% to some of those companies not individually investigated that were determined to be independent from government control in their export activities (separate rate companies);⁵²
- 0.0% to several companies determined to be independent from government control in their export activities for which this rate had been calculated based on their own data during prior proceedings;⁵³
- 4.30% to a company determined to be independent from government control in its export activities for which this rate had been calculated with its own data in the investigation;⁵⁴ and
- 25.76% to companies not determined to be independent from government control in their export activities, and collectively identified as the Vietnam-wide entity:
 - as a rate based upon the facts available in the second administrative review;⁵⁵ and
 - as the only rate ever found applicable to the Vietnam-wide entity in the third administrative review.⁵⁶

56. Vietnam argues not only that Commerce’s methodology for assigning these rates was inconsistent with the AD Agreement, but that various provisions of the Agreement, including Articles 2.4, 9.3, and 17.6(i) of the AD Agreement, when read together with Article 9.4, obligated Commerce to assign only a rate of zero to all of these entities.⁵⁷ Vietnam’s arguments

⁵² See *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed. Reg. 52273 (September 9, 2008) and accompanying Issues and Decision Memorandum at Comment 6 (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. 47191 (September 15, 2009) and accompanying Issues and Decision Memorandum at Comment 1 (Exhibit Viet Nam-19).

⁵³ See *Id.*

⁵⁴ See *Id.*

⁵⁵ See *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed. Reg. 52273 (September 9, 2008) (Exhibit Viet Nam-15).

⁵⁶ *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 Fed. Reg. 47191 (September 15, 2009) (Exhibit Viet Nam-19).

⁵⁷ See, e.g., Vietnam Responses to Panel Questions, Question 21, para. 55 (“Article 9.4 is only applicable in situations where the authority has limited investigation in that particular segment of the proceeding, requiring that the margins of dumping of the entities selected for that investigation serve as the basis for calculating the all others rate.”); *id.*, Question 24, para. 65 (“Except when confronted with a situation where the mandatory respondents have dumping margins of zero or de minimis, the USDOC properly relies on the evidence before it to determine the estimated all-others rate. Viet Nam submits that the USDOC has no basis for choosing to ignore this probative

are premised on invented obligations that have no basis in the text of the AD Agreement and an inaccurate portrayal of the facts in the challenged proceedings.

A. Vietnam Has Failed to Demonstrate that the United States Acted Inconsistently with the Limited Obligations Contained in Article 9.4 of the AD Agreement

57. Vietnam asks the Panel to impose on the United States an affirmative obligation to assign to all companies not individually examined in the second and third administrative reviews the zero and *de minimis* rates calculated for companies individually examined during those proceedings. Vietnam suggests that this specific obligation can be found in Article 9.4 of the AD Agreement, when that provision is read in light of other provisions, including Articles 2 and 9.3 of the AD Agreement. Vietnam also argues that the rate Commerce applied to the Vietnam-wide entity, which was based on an adverse inference in the second administrative review, was inconsistent with the requirements of Article 6.8 and Annex II of the AD Agreement, and that application of a rate to the Vietnam-wide entity is discriminatory. None of Vietnam's arguments has any basis in the AD Agreement. Immediately below, we address Vietnam's arguments with respect to Article 9.4, as well as Articles 2, 9.3, and 17.6(i), and we respond to Vietnam's discussion, in response to the Panel's Question 18, of the relevance of the panel report in *US – DRAMS*. Further below, in section IV of this submission, we will address Vietnam's arguments related to the rate Commerce applied to the Vietnam-wide entity in the second and third administrative reviews.

1. Article 9.4 of the AD Agreement Imposes Only Limited Obligations on the Maximum Antidumping Duty Applied to Companies Not Individually Examined

58. In its entirety, Article 9.4 of the AD Agreement provides as follows:

When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

- (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

evidence simply because that evidence indicates an industry has ceased dumping.”); Vietnam First Written Submission, para. 223 (“An antidumping duty based on the weighted average margins provides a reasonable ceiling on the potential liability, one based on actually calculated margins.”); *id.*, para. 228 (“Viet Nam believes that the USDOC should recalculate the all-others rate using a weighted average of the individually reviewed exporters/producers for the contemporaneous phase of the proceeding.”).

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

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

59. On the face of its text, Article 9.4 of the AD Agreement simply establishes the maximum antidumping duty that may be applied to companies not individually examined, in certain circumstances. Article 9.4 does not prescribe a methodology for assigning a rate to companies not individually examined in an assessment review. Further, Article 9.4 does not prescribe the *maximum* rate that may be applied to companies not individually examined in situations where the rates calculated for the individually examined companies are all zero, *de minimis*, or based on facts available. Despite the absence of any such rules in the text of Article 9.4, Vietnam argues that Article 9.4 somehow requires the application of zero or *de minimis* rates to companies not individually examined if all the rates determined for individually examined companies are also zero or *de minimis*. Vietnam's argument cannot be accepted.

60. If the Members had agreed to the specific obligation that Vietnam is asking the Panel to impose on the United States, one would expect to find such an obligation in the text of Article 9.4, particularly since the relevance of zero, *de minimis*, and facts available dumping margins to the maximum antidumping duty Members may apply is specifically addressed in that provision. Contrary to Vietnam's arguments, the limited obligations agreed to by the Members are contained in the plain language of Article 9.4 and nothing more may be read into the text. To invent further obligations under the circumstances presented here would be contrary to the DSU, which makes it clear that dispute settlement is not to add to or diminish Members' rights and obligations. The dispute settlement process must recognize and respect the inherent limitations in a negotiated agreement such as this that result from the necessary accommodation of the varied interests and positions of the Members. Panels, the Appellate Body, and even the Members themselves when acting as the DSB, are prohibited from adding to or diminishing the rights and obligations provided in the covered agreements.⁵⁸

61. The text of Article 9.4 reflects the limited nature of the obligation related to the maximum antidumping duty that Members may apply, as well as the compromise that Members

⁵⁸ DSU, Articles 3.2 and 19.2.

made in agreeing to this provision. Article 9.4 requires investigating authorities to disregard not only facts available margins (rates that would increase the maximum antidumping duty that may be applied), but also zero and *de minimis* margins as well (rates that would lower the ceiling). To interpret Article 9.4 as requiring Members to apply only zero or *de minimis* rates in instances in which only zero or *de minimis* rates have been calculated for individually examined companies would be inconsistent with the text and would upend the compromise that is evidenced by the text.

62. The interpretation of Article 9.4 proposed by Vietnam is inconsistent with the customary rules of treaty interpretation. Article 9.4 says nothing about the antidumping duties that should be applied to companies not individually examined in the circumstances present in the second and third administrative reviews. The rules of treaty interpretation indicate that silence has meaning, and a treaty interpreter may not read into the text obligations that are not there.⁵⁹ Accordingly, Article 9.4 cannot be interpreted as requiring Commerce to apply only zero or *de minimis* margins to the separate rate companies and the companies comprising the Vietnam-wide entity in the second and third administrative reviews, and Commerce’s application of rates to companies not individually examined in those proceedings cannot be found to be inconsistent with Article 9.4.

2. Neither Article 9.4 nor Any Other Provision of the AD Agreement Requires the Use of Contemporaneous Data in the Application of Antidumping Duties to Companies Not Individually Examined

63. Despite its response to an oral question during the first substantive panel meeting, in which Vietnam appeared to concede that Article 9.4 of the AD Agreement does not require the use of contemporaneous data in all cases, Vietnam attempts, in response to the Panel’s written questions, to read a contemporaneity requirement into Article 9.4. Vietnam asserts that Article 9.4 “is concerned with ensuring the use of evidence gathered from that specific segment of the proceeding to determine the appropriate estimated all others rate.”⁶⁰ Vietnam offers no support for this conclusory statement, and it has no textual basis in Article 9.4.

64. Vietnam suggests that the language of Article 2.4 of the AD Agreement informs the interpretation of the text of Article 9.4 of the AD Agreement.⁶¹ Specifically, Vietnam argues that Article 9.4 is subject to the provisions governing “fair comparison” in Article 2.4, in particular the requirement that “the sales being compared be made ‘at as nearly as possible the same

⁵⁹ *India – Patents (AB)*, para. 45.

⁶⁰ Vietnam Responses to Panel Questions, Question 21, para. 55.

⁶¹ *Id.*, Question 20, para. 52.

time.”⁶² Vietnam is mistaken.

65. Article 2.4 addresses the determination of margins of dumping, specifically the comparison of export price and normal value and adjustments that must be made to ensure a “fair comparison.” The obligation in Article 2.4 that the export price and normal value comparison be made “in respect of sales made at as nearly as possible the same time” relates to the calculation underlying the determination of dumping. It does not relate to the calculation of the maximum antidumping duty that may be applied to companies not individually examined pursuant to Article 9.4, nor to the actual antidumping duty applied to such companies when the duty is based on a previously determined dumping margin.

66. Indeed, no comparison of normal value and export price is made in connection with the calculation of a “weighted average margin of dumping established with respect to the selected exporters or producers” pursuant to Article 9.4 of the AD Agreement. Likewise, in the second and third administrative reviews, Commerce did not make any comparison of normal value and export price when it applied to companies not individually examined antidumping duty rates that had been previously determined in prior proceedings. Consequently, the obligations in Article 2.4 are of no relevance to the Panel’s examination of Commerce’s determinations in those proceedings.

67. Nothing in the text of the AD Agreement supports the linkage that Vietnam attempts to establish between Articles 2.4 and 9.4. It is particularly noteworthy that there are no cross references between these provisions. This contrasts sharply with the reference in Article 9.3 of the AD Agreement to “the margin of dumping as established under Article 2.” It also contrasts with Article 2.4.2 of the AD Agreement, which expressly is “[s]ubject to the provisions governing fair comparison” in Article 2.4. Indeed, Article 9.4 itself cross references Articles 6.8, 6.10, and 6.10.2 of the AD Agreement, but makes no mention of Article 2.4. The Appellate Body has previously explained that the absence of cross references is of some consequence, as the drafters made “active use” of cross references in the covered agreements when they intended to apply obligations in different contexts.⁶³ There are numerous other cross references throughout the AD Agreement, but none that link Articles 2.4 and 9.4.

68. Vietnam also points to Article 9.3 of the AD Agreement as a basis for imputing a contemporaneity requirement into Article 9.4. Vietnam asserts that the reference in Article 9.3 to the “margin of dumping established pursuant to Article 2” for a given “period of time” indicates that “there must be a degree of symmetry between the period for which the margin of dumping is calculated and the period for which the antidumping duty is assessed.”⁶⁴ Vietnam

⁶² *Id.*

⁶³ See *US – Carbon Steel (AB)*, para. 105.

⁶⁴ Vietnam Responses to Panel Questions, Question 21, para. 56.

then further asserts that “[i]t follows that the rates calculated for companies not individually reviewed pursuant to Article 9.4 must likewise be based on the dumping behavior for the most recently completed review period.”⁶⁵ The connection that Vietnam attempts to draw between Articles 9.3 and 9.4 is fatally strained.

69. Just as Article 9.4 does not cross reference Article 2.4, it makes no reference to Article 9.3. Hence, there is no direct connection between the two provisions. Additionally, while Article 9.3 establishes obligations with respect to the application of duties to individually examined companies, Article 9.4 establishes certain obligations with the respect to the maximum duty that may be applied to companies not individually examined in some situations. Unsurprisingly, the obligations are different.

70. Vietnam incorrectly suggests that “Article 9.4 requires as a general matter that these margins of dumping [from the most recently completed review period] serve as the basis for the calculation of the all-others rate.”⁶⁶ Article 9.4 requires no such thing. As we have explained, Article 9.4 does not impose any obligations on Members regarding the methodology to be used in determining what antidumping duty should be applied to companies not individually examined. Article 9.4 simply sets the maximum duty rate that may be applied in certain circumstances. When all the dumping margins calculated for individually examined companies, are zero, *de minimis*, or based on facts available, Article 9.4 does not specify a maximum duty.

71. The United States recognizes that the Appellate Body has disagreed with this view.⁶⁷ However, the Appellate Body has simply stated that, when all the dumping margins calculated for individually examined companies are zero, *de minimis*, or based on facts available, an investigating authority’s discretion to apply antidumping duties pursuant to Article 9.4 to companies not individually examined is not “unbounded.”⁶⁸ Although we respectfully disagree with the Appellate Body that this is the appropriate standard, Vietnam has nevertheless failed to demonstrate that Commerce’s determinations in the second and third administrative reviews are inconsistent with such a standard. As the United States has explained, Commerce did not act with “unbounded” discretion. Rather, Commerce reasonably looked toward rates determined in recent proceedings as they would reflect the behavior of exporters of subject merchandise during a recent period of time.

72. Finally, we note that Vietnam’s interpretation, if accepted, could lead to odd, if not absurd, results. For example, if the weighted average margin of dumping established with

⁶⁵ *Id.*, Question 21, para. 57.

⁶⁶ *Id.*

⁶⁷ *US – Zeroing (EC) (Article 21.5) (AB)*, para. 453.

⁶⁸ *Id.*

respect to the selected exporters or producers were 5% and an administering authority applied a rate of 3% to a company not individually examined because the authority had calculated that rate for the company in a prior review using its own data, this would appear to run afoul of Vietnam's contemporaneity requirement. However, it is unclear why the application of a rate *lower than the ceiling* established pursuant to Article 9.4 should be deemed inconsistent with that provision.⁶⁹ This would clearly be an illogical result, though one that would be required if Vietnam is correct that there is a contemporaneity requirement in Article 9.4.

73. In sum, there simply is no basis in the AD Agreement for the contemporaneity requirement that Vietnam asks the Panel to read into Article 9.4, and the Panel should reject Vietnam's arguments in this regard.

B. Vietnam's Arguments under Article 17.6(i) of the AD Agreement Are without Merit

74. Vietnam argues for the first time in response to the Panel's written questions that Commerce failed to make "an unbiased and objective evaluation of the facts" in assigning rates to companies not individually examined in the second and third administrative reviews.⁷⁰ In support of this contention, Vietnam asserts that "[t]he entire record before the USDOC evidenced an industry that did not dump subject merchandise above a *de minimis* amount."⁷¹ Vietnam further contends that, because the rate assigned to companies not individually examined purportedly had "no basis in fact," the Panel should find that the United States violated Articles 9.4 and 17.6(i) of the AD Agreement. Vietnam misunderstands Article 17.6(i) and selectively ignores certain facts, which, when taken into account, undermine the basic premise of Vietnam's argument.

75. As an initial matter, the United States notes that Vietnam did not raise any claims under Article 17.6(i) in its panel request, so no claims under this provision are within the panel's terms of reference.

76. Furthermore, Article 17.6(i) of the AD Agreement establishes a general obligation in respect of a dispute settlement panel's assessment of the facts of the matter:

in its assessment of the facts of the matter, the panel shall determine whether the

⁶⁹ In the second and third administrative reviews, Commerce assigned to some companies the zero or *de minimis* rates they had received, as calculated rates, in prior proceedings. Vietnam's interpretation of Article 9.4 could render this action by Commerce inconsistent with Article 9.4 (even though the result is the same as that sought by Vietnam for all companies).

⁷⁰ Vietnam Responses to Panel Questions, Question 22, para. 61.

⁷¹ Vietnam Responses to Panel Questions, Question 22, para. 60; *see also* Vietnam Responses to Panel Questions, Question 24, para. 65 ("evidence indicates an industry that has ceased dumping").

authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

On its face, Article 17.6(i) imposes certain obligations on *panels* rather than on *WTO Members*. Thus, it is not clear how a Member may be found to have acted inconsistently with Article 17.6(i). In any event, Article 17.6(i) does not impose any additional obligations on Members in a *lacuna* situation under Article 9.4 of the AD Agreement. Rather, Article 17.6(i) provides a specific standard for the Panel's examination of Commerce's assessment of the facts.

77. Additionally, Article 9.4 of the AD Agreement does not condition a Member's right to apply antidumping duties to companies that are not individually examined on a factual finding that other companies continued to dump during a particular period. As we have explained, the limited obligation in Article 9.4 concerns only the calculation of the maximum antidumping duty that may be applied in certain situations. Where all of the dumping margins calculated for individually examined exporters or producers are zero, *de minimis*, or based on facts available, Article 9.4 does not specify a maximum duty. Vietnam's assertion that dumping had ceased for some companies thus does not determine whether the United States acted inconsistently with Article 9.4.

78. Furthermore, Vietnam's assertion that the "evidence indicates an industry that has ceased dumping" is wrong.⁷² In the second administrative review, numerous companies avoided any possibility of being selected for individual examination by refusing to respond to Commerce's request for information concerning the quantity and value of their shipments to the United States. It is impossible to know the motivation behind such companies' refusal to provide the requested data, but companies that know that they are dumping and do not wish to have their data examined have an incentive not to respond to such a request for information. Accordingly, as permitted by Article 6.8 and Annex II of the AD Agreement, Commerce determined the margin of dumping for these companies based on facts available using an adverse inference.⁷³

79. It is a company's own choice whether or not to cooperate with the investigating authorities. Where a company refuses to cooperate, an administering authority may still make a determination of dumping. That this determination is based on an inference, rather than individual company data, is not evidence that dumping has ceased.

⁷² Vietnam Responses to Panel Questions, Question 24, para. 65.

⁷³ See *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); See *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed. Reg. 52273 (September 9, 2008) (Exhibit Viet Nam-15).

80. In the second administrative review, Commerce found that certain cooperative companies were not dumping (or were dumping at *de minimis* levels) and certain uncooperative companies were dumping at a rate determined based on an adverse inference. When the facts of the second administrative review are viewed in light of the facts of the first administrative review, Vietnam’s claim that the industry had ceased dumping becomes further strained. In the first administrative review (not a measure at issue in this dispute), not only did companies not respond to quantity and value questionnaires, but several companies *selected for individual examination* failed to respond to Commerce’s full sales and cost questionnaire.⁷⁴ Thus, as with the second administrative review, the resulting adverse finding with respect to dumping certainly cannot be considered evidence that dumping in the industry had ceased. Vietnam would have the Panel ignore these facts when evaluating Commerce’s application of rates to companies not individually selected in the second and third administrative reviews.

81. Finally, we note Vietnam’s assertion in its responses to the Panel’s written questions that “[r]eliance on the margins of dumping of the individually investigated respondents to calculate the all others rate must necessarily be based on the understanding that the dumping behavior of these respondents are reflective of the dumping behavior for the subject industry as a whole.” Vietnam offers no textual support for this statement, and there is none in the AD Agreement. Nothing in Article 9.4 of the AD Agreement suggests that the dumping margins determined for examined companies are “reflective” of the dumping margins of companies not individually examined. Article 9.4 simply establishes the maximum duty that may be applied to companies not individually examined, which is to be calculated as a weighted average dumping margin with respect to examined companies, excluding zero, *de minimis*, and facts available margins. There is no basis for ascribing to Article 9.4 the purpose that Vietnam suggests. It is sufficient to interpret the text itself, which establishes certain obligations but does not describe the purpose of doing so.

82. For the reasons given above, Commerce did not fail to make “an unbiased and objective evaluation of the facts” when it applied rates from prior proceedings to companies not selected for individual examination in the second and third administrative review, and the United States cannot be found to have acted inconsistently with Articles 9.4 and 17.6(i) of the AD Agreement.

C. Vietnam Misunderstands the Panel’s Rationale in *US – DRAMS* and Its Relevance to this Dispute

83. In its responses to the Panel’s written questions, Vietnam argues that *US – DRAMS* is “incongruent” with the facts of this dispute because Commerce “fully considered the issue” of what rate to apply to companies not individually examined in the second and third administrative reviews before ultimately determining to apply the separate rates determined in the original

⁷⁴ See *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results of the First Administrative Review and New Shipper Review*, 72 Fed. Reg. 10689 (March 9, 2007) (Exhibit Viet Nam-10) (unchanged in final results).

investigation.⁷⁵ Vietnam posits that “the relevant question for this Panel is whether the USDOC examined in the second and third administrative reviews the appropriate method for determining the separate rate?”⁷⁶

84. This is not the relevant question. Of course, the answer to this question is, “yes.” As we have explained, in the absence of rates that could be used to calculate an applicable ceiling rate consistent with the requirements of Article 9.4, Commerce “fully considered” what rates to apply and determined that it would be appropriate to rely on either a weighted average of dumping margins calculated for exporters and producers individually examined in the most recently completed proceeding, excluding any zero and *de minimis* margins and margins based on facts available, or a company-specific rate from a more recently completed proceeding where such a rate had been determined for a company. Commerce considered these rates to be reasonably reflective of commercial behavior during a recent period.

85. Vietnam has asked the Panel to find that the rates applied in the second and third administrative reviews to companies not individually examined are inconsistent with the covered agreements because they were inconsistent with the covered agreements when they were originally calculated.⁷⁷ But the rates were not inconsistent with the covered agreements when they were originally calculated. The rates were not subject to the covered agreements when they were originally calculated – because the WTO Agreement did not apply between the United States and Vietnam at that time – and they cannot now be found to have been inconsistent with the covered agreements at the time they were originally calculated. Vietnam appears to be seeking to obtain the benefits of WTO Membership prior to its accession to the WTO.

86. The panel in *US – DRAMS* explained that “the AD Agreement only applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. Any aspects of a pre-WTO measure that are not covered by the scope of the post-WTO review do not become subject to the AD Agreement by virtue of Article 18.3 of the AD Agreement.”⁷⁸ The relevant question, then, is whether the rates calculated in the original investigation were subject to post-WTO review? The answer to this question is, “no.”

87. While Commerce “fully considered” what rates to apply in the situation where it was not possible to calculate a ceiling pursuant to Article 9.4, Commerce did not recalculate the rates that were calculated in the original investigation and Commerce did not make any new comparisons of export price and normal value. That is, Commerce did not conduct a “post-WTO review” of

⁷⁵ Vietnam Responses to Panel Questions, Question 18, paras. 46-47.

⁷⁶ *Id.*, Question 18, para. 46.

⁷⁷ See Vietnam First Written Submission, para. 214.

⁷⁸ *US – DRAMS*, para. 6.14.

the rates such that they became subject to the AD Agreement by virtue of such review.

88. In *US – DRAMS*, the panel explained that “the 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.”⁷⁹ Similarly, in this dispute, the separate rates in question were determined once and only once in the original pre-WTO investigation – before the entry into force of the WTO Agreement for Vietnam – and were then applied in the final results for the second and third administrative reviews. The factual situation in this dispute is thus closely analogous to that in *US – DRAMS*.

89. For these reasons, the United States respectfully submits that the reasoning of the panel in *US – DRAMS* does provide a useful approach for the Panel’s analysis of Vietnam’s claims in respect of the rates Commerce applied to companies not individually examined in the second and third administrative reviews.

IV. VIETNAM’S CLAIMS OF INCONSISTENCY REGARDING THE RATE APPLIED TO THE VIETNAM-WIDE ENTITY ARE WITHOUT MERIT

90. We have previously explained, in the U.S. First Written Submission, in oral statements during the first substantive panel meeting, and in response to the Panel’s written questions, that Vietnam has failed to demonstrate that Commerce’s assignment of a single antidumping rate to the Vietnam-wide entity in the second and third administrative reviews was inconsistent with any obligations under the AD Agreement. In this submission, we will address only a few points raised by Vietnam in its responses to the Panel’s written questions.

A. Commerce’s Determination that the Vietnam-Wide Entity Is a Single “Exporter” or “Producer” Was Based on Properly Established Facts

91. Vietnam agrees with the United States that, as a general matter, an authority may, consistent with Article 6.10 of the AD Agreement, treat more than one company as a single entity based upon the relationship between those companies.⁸⁰ However, Vietnam suggests that, in the challenged proceedings, Commerce relied on an “unjustified and impermissible presumption that all exporters are owned or controlled by the government” and Commerce “lacks the affirmative evidence necessary to conclude that the entities it believes constitute the Vietnam-wide entity are

⁷⁹ *Id.*, para. 6.16.

⁸⁰ *See, e.g.*, Vietnam Responses to Panel Questions, Question 35, para. 90. In addition, during the first panel meeting, Vietnam indicated in response to an oral question from the Panel that it agreed that the reasoning of the panel in *Korea – Certain Paper* is correct.

affiliated”⁸¹ Vietnam ignores the underlying factual record that supported Commerce’s determination.

92. As explained in detail in the U.S. First Written Submission, evidence of the non-market nature of Vietnam’s economy confirmed that the Government of Vietnam exerts significant influence over the Vietnamese economy.⁸² In investigating and analyzing the extent of government influence for the purpose of determining whether Vietnam should be classified as a non-market economy in Commerce’s antidumping proceedings, Commerce considered several factors, 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.⁸³ 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.⁸⁴ 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. Relying on extensive analysis, the NME Status Memo also notes that “[t]he limited extent of reform in other critical areas of Vietnam’s economy raises similar concerns about continued significant government control over the economy,” citing to government control over land-use rights and the banking sector.⁸⁵ Thus, Commerce concluded, Vietnamese prices and costs could not be used for antidumping analysis purposes. Commerce incorporated by reference and relied on this analysis when it determined that Vietnam continues to be a non-market economy for the purposes of the determinations challenged in this dispute.⁸⁶

⁸¹ Vietnam Responses to Panel Questions, Question 35, para. 90.

⁸² See U.S. First Written Submission, paras. 140-153.

⁸³ 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).

⁸⁴ See NME Status Memo at 43 (Exhibit US-2).

⁸⁵ *Id.*

⁸⁶ 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*

93. Vietnam’s challenge of Commerce’s determination to treat the Vietnam-wide entity as a single exporter/producer is premised on its criticism of Commerce’s establishment of the facts.⁸⁷ Accordingly, pursuant to Article 17.6(i) of the AD Agreement, the issue before the Panel is whether Commerce properly established the facts and evaluated such facts in an unbiased and objective manner in finding a relationship between the Government of Vietnam and certain companies that is sufficiently close to warrant treating multiple companies as a single entity. The United States submits that this question must be answered in the affirmative. As we have explained, Commerce had before it ample evidence of the influence exerted by the Government of Vietnam over its economy, including over exportation, and this evidence fully supported Commerce’s determinations.

94. Vietnam also argues that an investigating authority may only make a finding of affiliation with respect to “companies that are subject to individual examination.”⁸⁸ Otherwise, in Vietnam’s view, the authority would not have the necessary information to determine affiliation, and the authority should not be interested in obtaining such information because all companies not individually examined receive the same antidumping rate.⁸⁹ Vietnam’s arguments are without merit.

95. Vietnam has identified nothing in the text of the AD Agreement that limits the right of Members to make affiliation determinations only with respect to “companies that are subject to individual examination.”⁹⁰ There is no such limitation in the text of the Agreement. This is understandable, as there are situations where it may be appropriate to make affiliation determinations with respect to companies that are not individually examined. For example, Commerce has analyzed affiliation and collapsing with respect to a group of companies not individually examined when the issue was relevant to what rates the companies would receive, as without collapsing, some of the companies would not be covered by the administrative review.⁹¹

96. Vietnam is also incorrect that an investigating authority would not have the necessary

Administrative Review, 74 FR 10,009, 10,012 (Mar. 9, 2009) (Exhibit Viet Nam-18) (both noting that, in the second and third administrative reviews, none of the parties to the proceedings contested the treatment of Vietnam as a non-market economy).

⁸⁷ See Vietnam Responses to Panel Questions, Question 35, para. 90 (Commerce “lacks the affirmative evidence necessary to conclude that the entities it believes constitute the Vietnam-wide entity are affiliated . . .”).

⁸⁸ Vietnam Responses to Panel Questions, Question 35, para. 88.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *Certain Frozen Warmwater Shrimp from India: Preliminary Results and Preliminary Partial Rescission of Antidumping Administrative Review*, 74 Fed. Reg. 9,991, 9,994 (March 9, 2009), unchanged in final, 74 Fed. Reg. 33409 (July 13, 2009) (Exhibit US-9).

information to make an affiliation determination with respect to companies that are not individually examined. As we have explained, while no company that was part of the Vietnam-wide entity was selected for individual examination in the second and third administrative reviews, Commerce nonetheless had ample evidence before it to support a determination that the Vietnam-wide entity should be treated as a single exporter/producer. This evidence included information about the non-market nature of Vietnam’s economy and the influence exerted over it by the Government of Vietnam, in particular with respect to exportation, as well as information provided by some companies regarding their independence from the government. Thus, Commerce had the necessary information in the second and third administrative reviews to determine that the Vietnam-wide entity should be treated as a single exporter/producer.

97. Finally, Vietnam again misconstrues the obligations in Article 9.4 of the AD Agreement, asserting that “**all** companies not individually investigated receive the same antidumping rate, per Article 9.4.”⁹² Article 9.4 does not require Members to apply the same antidumping duty rate to all companies not individually examined. Article 9.4 provides, in certain circumstances, for the calculation of the maximum antidumping duty rate that may be applied to companies not individually examined. In the second and third administrative reviews, as has been explained, it was not possible to calculate a maximum antidumping duty according to the terms of Article 9.4, and thus Article 9.4 did not specify a maximum duty that could be applied.

98. Furthermore, it is simply incorrect that all companies not individually examined should receive the same antidumping duty rate. Different companies may be differently situated. For example, as we have explained, companies may attempt to avoid being selected for individual examination by refusing to respond to initial questionnaires used to identify the largest exporters, as occurred in the second administrative review. It is appropriate in that situation to apply a different antidumping rate to such uncooperative companies, one that is based on adverse inferences.

B. Commerce’s Determination that the Vietnam-Wide Entity Is a Single “Exporter” or “Producer” Was Not Discriminatory

99. Vietnam argues that the opportunity Commerce provided to respondents in the second and third administrative reviews “to demonstrate the lack of government control” is “simply a device to avoid the application of the all others rate in the same manner to non market economies as it is applied in market economies and has no foundation in either Article 6.8 or elsewhere in the Agreement.”⁹³ Vietnam is incorrect.

100. The opportunity Commerce provided to respondents in the second and third administrative reviews to demonstrate their independence from the government was not

⁹² Vietnam Responses to Panel Questions, Question 35, para. 88 (emphasis in original).

⁹³ *Id.*, Question 27, para. 69.

discriminatory. It was an information gathering exercise that permitted Commerce to determine whether particular companies should be considered individually or as part of another entity. Commerce collects similar information in market economy cases as well. 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.⁹⁴ 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.

101. As explained above, Commerce determined, based upon a detailed analysis of substantial evidence, that the Government of Vietnam's influence over companies was such that the companies should be treated as one entity. Commerce also gathered evidence necessary to determine whether certain companies should not be treated as part of the single entity. This is no different than a determination in a market economy case that more than one company should be treated as a single entity.

C. Commerce's Determination of the Antidumping Duty Rate Applied to the Vietnam-Wide Entity Was Not Inconsistent with the AD Agreement

102. In its responses to the Panel's written questions, Vietnam asserts that the "assumption underlying the USDOC practice is that it can apply an adverse facts available rate to companies that do not demonstrate independence from government control."⁹⁵ Vietnam asserts that the Panel's analysis should start with the following hypothetical question: "if a company that is not being individually investigated is requested to provide information demonstrating that it operates independent of government control and provides information in response indicating that it is not operating independent of government control, is there any provision in the Anti-Dumping Agreement which would permit an authority to apply adverse facts available to that company rather than applying the all others rate?"⁹⁶

103. Vietnam is incorrect; this is not a relevant question at all. As an initial matter, the factual situation portrayed in Vietnam's hypothetical question was not present in either the second or third administrative review. Commerce did not apply a rate based upon the facts available to any interested party that cooperated in the proceedings. Furthermore, Vietnam mistakenly conflates Commerce's finding that the Vietnam-wide entity is a single exporter/producer and Commerce's

⁹⁴ See 19 C.F.R. 351.401(f) (Exhibit US-3).

⁹⁵ Vietnam Responses to Panel Questions, Question 27, para. 70.

⁹⁶ *Id.*, Question 27, para. 72.

separate determination in the second administrative review to apply to the Vietnam-wide entity an antidumping duty rate based upon facts available. Vietnam also mischaracterizes the basis for the antidumping duty rate applied to the Vietnam-wide entity in the third administrative review. When properly analyzed, Commerce's determinations should be found consistent with Articles 6.8, 6.10, 9.4, and Annex II of the AD Agreement.

104. As we have explained, consistent with Article 6.10 of the AD Agreement, Commerce determined, based upon a detailed analysis and substantial evidence, that the Government of Vietnam's influence over companies was such that the companies should be treated as a single entity. In both the second and third administrative reviews, Commerce provided all companies an opportunity to demonstrate their independence from the government in order to show that they should not be treated as part of the single entity.

105. Separately, in the second administrative review, Commerce determined that certain companies that were part of the Vietnam-wide entity failed to cooperate by refusing to respond to questionnaires sent by Commerce. In consequence, Commerce applied an antidumping duty rate to the Vietnam-wide entity that was based upon facts available. Commerce's application of facts available to the Vietnam-wide entity in the second administrative review was not inconsistent with Article 6.8 and Annex II of the AD Agreement.

106. Article 6.8 of the AD Agreement permits the use of the facts available in any case "in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation. . . ." Rather than being limited in its application to individually examined companies, Article 6.8 refers to "any interested party." That includes companies not selected for individual examination and groups of companies treated as a single entity. Because certain companies that were part of the Vietnam-wide entity refused to provide necessary information in the second administrative review, Commerce applied an antidumping duty rate to the Vietnam-wide entity that was based upon the facts available.

107. In the third administrative review, Commerce did not apply to the Vietnam-wide entity a rate based upon facts available. Rather, Commerce applied to the Vietnam-wide entity the only rate that had ever been applied to it. As noted above, this was similar to the methodology used for the other separate rate companies in the third administrative review.⁹⁷ It also was not inconsistent with any provision of the AD Agreement. Again, all companies subject to the administrative review had the opportunity to provide information demonstrating their independence from the government so as to avoid being assigned the Vietnam-wide entity rate.

108. Article 6.8 and Annex II of the AD Agreement govern the use of facts available. Commerce did not use facts available in the third administrative review, so the United States

⁹⁷ See *supra*, Section III, para. 55.

cannot be found to have acted inconsistently with Article 6.8 and Annex II.

109. Article 9.4 of the AD Agreement establishes the maximum antidumping duty that Members may apply to companies not individually examined. However, as we have explained, where all the rates calculated for examined companies are zero, *de minimis*, or based on facts available, then it is not possible to calculate a maximum antidumping duty according to the terms of Article 9.4, and Article 9.4 does not specify the maximum antidumping duty that may be applied to companies not individually examined. This was the situation in the third administrative review, and the United States therefore cannot be found to have acted inconsistently with Article 9.4.

110. For these reasons, Vietnam’s claims against the antidumping duty rate applied to the Vietnam-wide entity in the second and third administrative reviews are unfounded.

**D. Commerce Properly Determined that Companies Failed to Provide
“Necessary Information” in the Second Administrative Review**

111. As we explained in the U.S. First Written Submission, in oral statements during the first substantive panel meeting, and in the U.S. responses to the Panel’s written questions, the quantity and value data requested from all respondents under review in the second administrative review was “necessary information” within the meaning of Article 6.8 and Annex II of the AD Agreement.

112. In its responses to the Panel’s written questions, Vietnam argues that the quantity and value information that companies refused to provide was not “necessary information” for two reasons. First, Vietnam argues that the fact that Commerce did not request this information from companies in the third administrative review “raises questions about whether or not the information supposedly not provided in the second administrative review can be characterized as necessary. . . .”⁹⁸ The logic of Vietnam’s argument is flawed. The fact that Commerce obtained information regarding the quantity and value of companies’ imports in the third administrative review from U.S. Customs and Border Protection data, as opposed to sending questionnaires to companies, does not demonstrate that the information was not necessary. On the contrary, Commerce’s collection of quantity and value information in both the second and third administrative reviews, albeit from different sources, confirms that this information was required in order for Commerce to conduct the proceedings.

113. Second, Vietnam argues that the information is not “necessary information” because it is aggregate sales data, and Commerce calculates dumping margins based upon individual sales.⁹⁹ Regardless of whether Commerce calculates dumping margins based upon individual sales, a

⁹⁸ Vietnam Responses to Panel Questions, Question 27, para. 68.

⁹⁹ *Id.*, Question 33, para. 84.

company's aggregate quantity and value is the starting point of any dumping analysis. That Commerce later requires companies that are individually investigated to report each sale does not mean that the total quantity and value of a company's sales is not necessary information.

114. Contrary to Vietnam's argument in this dispute, the scope of "necessary information" is not limited to the information used to calculate margins of dumping.¹⁰⁰ As the *Egypt – Steel Rebar* panel explained, "it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.)"¹⁰¹ Indeed, Vietnam itself appears to agree that "necessary information" includes information other than that used to calculate dumping margins. In its responses to the Panel's written questions, Vietnam argues that an investigating authority cannot make an affiliation finding for a company not individually examined because, *inter alia*, "the authority does not have the information necessary to make such a determination."¹⁰² An affiliation finding is different from a calculation of a margin of dumping, but, as Vietnam notes, the information required to make an affiliation finding is nevertheless "necessary information."

115. In the second administrative review, the quantity and value information that Commerce requested was necessary to determine which companies were among the largest exporters or producers for purposes of selecting the companies that would be individually examined. Because companies failed to provide the requested information, Commerce appropriately assigned an antidumping duty rate based upon the facts available, which is consistent with the obligations in Article 6.8 and Annex II of the AD Agreement.

V. VIETNAM'S CLAIMS OF INCONSISTENCY REGARDING LIMITING THE NUMBER OF RESPONDENTS SELECTED ARE WITHOUT MERIT

116. As we have previously explained, in the U.S. First Written Submission, in oral statements during the first substantive meeting with the Panel, and in the U.S. responses to the Panel's written questions, Article 6.10 of the AD Agreement broadly provides that investigating authorities are not required to determine margins of dumping for every exporter or producer where the number of exporters or producers "is so large as to make such a determination impracticable." In the second and third administrative reviews, there were more than 100 exporters or producers under review. Vietnam has clarified that it is not arguing that Commerce "should have or could have investigated all the producers and exporters requesting reviews in each segment of the proceeding."¹⁰³ Despite this concession, Vietnam nevertheless maintains

¹⁰⁰ See Vietnam First Written Submission, paras. 176-179.

¹⁰¹ *Egypt – Steel Rebar*, para. 7.155.

¹⁰² Vietnam Responses to Panel Questions, Question 35, para. 88 (emphasis added).

¹⁰³ Vietnam Opening Statement at the First Substantive Panel Meeting, para. 75.

that the Panel should find that the United States acted inconsistently with various provisions of the AD Agreement. Vietnam’s arguments are without merit.

A. Vietnam Has Not Demonstrated that Commerce Acted Inconsistently with Article 6.10 of the AD Agreement

117. As just noted, Vietnam clarified in its opening statement during the first substantive panel meeting that it is not arguing that Commerce “should have or could have investigated all the producers and exporters requesting reviews in each segment of the proceeding.”¹⁰⁴ Vietnam indicates that requiring Commerce to do so would not be “reasonable.”¹⁰⁵ Vietnam thus concedes that it was “impracticable” for Commerce to determine individual dumping margins for all exporters and producers. Therefore, the United States cannot be found to have acted inconsistently with the obligations in the first sentence or the first part of the second sentence of Article 6.10 of the AD Agreement.

118. The only remaining obligation in Article 6.10 is that Commerce examine “the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.” Vietnam has not alleged that the Commerce acted inconsistently with Article 6.10 by failing to individually examine the largest number of exporters or producers that “reasonably” could be examined. Indeed, in its responses to the Panel’s written questions, Vietnam states that, “[f]or purposes of this dispute, the Panel does not need to determine the precise percentage of producers or production that the USDOC could reasonably investigate under Article 6.10.”¹⁰⁶

119. As we have explained,¹⁰⁷ in the second and third administrative reviews, in order to determine the “largest percentage of the volume of exports” that “reasonably” could be examined, Commerce first determined the largest number of exporters or producers that it reasonably could examine – two in the second administrative review and three in the third – and then selected for individual examination the top two or three exporters, respectively, with the largest volume of exports to the United States during the period of review. In this way, Commerce ensured that it examined “the largest percentage of the volume of exports” that reasonably could be examined.

120. For these reasons, the United States cannot be found to have acted inconsistently with any of the obligations in Article 6.10 of the AD Agreement.

¹⁰⁴ *Id.* (emphasis added).

¹⁰⁵ *Id.*

¹⁰⁶ Vietnam Responses to Panel Questions, Question 39, para. 95.

¹⁰⁷ *See* U.S. Responses to Panel Questions, Question 40, paras. 79-80.

121. Nevertheless, Vietnam argues that the United States violated Articles 6.10 and 9.4 of the AD Agreement because Commerce “made no effort to explore alternatives” to examine more exporters and producers when it limited its examination.¹⁰⁸ In the immediately preceding discussion, we explained that Commerce’s determinations to limit its examination in the second and third administrative reviews cannot be found inconsistent with any of the obligations found in the text of Article 6.10. Nothing in Article 6.10, or any other provision of the AD Agreement, requires Commerce to “explore alternatives” as proposed by Vietnam. This is another instance of Vietnam inventing an obligation that has no basis in the text of the AD Agreement.

122. Vietnam appears to suggest that whenever an authority properly limits its examination under Article 6.10, it must nonetheless determine another way, beyond any obligations in the text of the AD Agreement, to individually examine all other exporters or producers. Failure to do so, in Vietnam’s view, would be inconsistent with “other obligations” that Vietnam does not identify.¹⁰⁹ Not only is there no obligation in the text of the AD Agreement to “explore alternatives,” Vietnam’s interpretation would render the provisions of Articles 6.10 and 9.4 meaningless. There would be no point in permitting limited examinations under Articles 6.10 and 9.4 if “other obligations” require examination of all other exporters or producers. Vietnam’s argument is incoherent and cannot be accepted.

B. Vietnam Cannot Demonstrate that Commerce Acted Inconsistently with Article 6.10.2 of the AD Agreement

123. By its terms, Article 6.10.2 of the AD Agreement requires that companies not initially selected who wish to have an individual margin of dumping calculated must “submit[] the necessary information in time for that information to be considered.” The information Vietnam has put before the Panel demonstrates that the “necessary information” was never submitted in either the second or third administrative reviews.¹¹⁰

124. With respect to the second administrative review, Vietnam notes that some companies, in their “case brief,” offered to provide certain information to Commerce if requested to do so.¹¹¹ Significantly, Vietnam does not represent that the companies in question ever submitted the “necessary information in time for that information to be considered.” Such information would be a complete response to a full antidumping questionnaire, submitted early in the proceeding. The companies never, in fact, submitted such information. They merely indicated in the case

¹⁰⁸ Vietnam Responses to Panel Questions, Question 41, para. 98.

¹⁰⁹ *Id.*

¹¹⁰ The United States does not dispute Vietnam’s description of the facts with respect to the fourth administrative review. *See* Vietnam Responses to Panel Questions, Question 42, para. 100. We note, however, that the fourth administrative review is not within the Panel’s terms of reference.

¹¹¹ Vietnam Responses to Panel Questions, Question 42, para. 100.

brief, which was filed following the preliminary determination, that they were willing to provide certain limited U.S. price data.¹¹²

125. With respect to the third administrative review, Vietnam states that the company in question met with Commerce to “again request inclusion as a mandatory respondent” and that the company indicated that it was willing to provide information.¹¹³ Significantly, Vietnam does not suggest that this company actually submitted the “necessary information,” nor is it apparent that it requested treatment as anything other than a selected (mandatory) respondent.

126. The factual information Vietnam has provided in response to the Panel’s Question 42 conclusively demonstrates that Commerce was under no obligation to determine individual dumping margins for “voluntary respondents” in the second and third administrative reviews, which are the only proceedings within the Panel’s terms of reference. For this reason, the United States cannot be found to have acted inconsistently with Article 6.10.2 of the AD Agreement.

C. Vietnam Has Not Demonstrated that Commerce Acted Inconsistently with Articles 11.1 or 11.3 the AD Agreement

127. In the U.S. First Written Submission, we explained that Vietnam’s claims under Article 11.1 and 11.3 of the AD Agreement are without merit.¹¹⁴ As an initial matter, as the Appellate Body has confirmed, Article 11.1 does not impose any independent or additional obligations on Members.¹¹⁵ In addition, these claims are dependent on Vietnam’s claims that Commerce’s determinations to limit its examination are inconsistent with Article 6.10 of the AD Agreement. Indeed, in its responses to the Panel’s written questions, Vietnam argues that Commerce’s “limited selection of respondents frustrates the unambiguous requirement of Article 11.1”¹¹⁶ As we have shown, however, Commerce’s determinations to limit its examination are not inconsistent with the AD Agreement. The United States cannot be found to have acted inconsistently with one provision of the AD Agreement due to the proper exercise of its rights under a separate provision of the AD Agreement.

128. In its responses to the Panel’s written questions, Vietnam articulates its interpretation of

¹¹² Case Brief of Separate Rate Respondents in the Second Administrative Review, dated May 7, 2008, p. 10 (Exhibit Viet Nam-73).

¹¹³ *Id.*

¹¹⁴ See U.S. First Written Submission, paras. 199-209.

¹¹⁵ *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).

¹¹⁶ Vietnam Responses to Panel Questions, Question 46, para. 116.

Article 11 and ultimately concludes that Articles 11.1 and 11.3 “require that an authority permit revocation determinations on a company-specific basis.”¹¹⁷ In Vietnam’s view, “[t]here does not appear to be any other way of reading the plain meaning of . . . Article 11.1.”¹¹⁸ The United States does not agree with Vietnam’s interpretation.

129. The Appellate Body, analyzing the meaning of the word “duty” in Article 11.3, found that “the duty” is imposed on a product-specific (*i.e.*, order-wide) basis, not a company-specific basis.¹¹⁹ Vietnam asserts that “the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* did not interpret Article 11.3 to mean that an authority may not make a company-specific determination.”¹²⁰ However, Vietnam ignores the Appellate Body’s unequivocal finding that “Article 11.3 does not require investigating authorities to make their likelihood determination on a company-specific basis.”¹²¹ The Appellate Body explained that “when the drafters of the Anti-Dumping Agreement intended to impose obligations on authorities regarding individual exporters or producers, they did so explicitly.”¹²²

130. The Appellate Body also rejected the same arguments Vietnam makes now regarding Article 11.4 of the AD Agreement. Specifically, Vietnam argues that the reference in Article 11.4 to Article 6, which includes Article 6.10, means that authorities are required “to examine and act on an individual producer or exporter basis in terms of the margins of dumping when deciding whether or not that producer or exporter should or should not continue to be subject to antidumping duties.”¹²³ However, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body found that the first sentence of Article 6.10 is “primarily directed to original investigations,” and “is not, in principle, relevant to sunset reviews.”¹²⁴ Agreeing with the panel, the Appellate Body concluded that “[t]he provisions of Article 6.10 concerning the calculation of individual margins of dumping in investigations do not require that the determination of likelihood of continuation or recurrence of dumping under Article 11.3 be made on a company-specific basis.”¹²⁵

¹¹⁷ *Id.*, Question 45, paras. 110.

¹¹⁸ *Id.*, Question 45, para. 107.

¹¹⁹ *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 150.

¹²⁰ Vietnam Responses to Panel Questions, Question 45, para. 110.

¹²¹ *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 150 (emphasis added).

¹²² *Id.*, para. 152.

¹²³ Vietnam Responses to Panel Questions, Question 45, para. 109.

¹²⁴ *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 154-155.

¹²⁵ *Id.*, para. 155.

131. Vietnam also asserts that Article 11.1 was “not considered by the Appellate Body” in its analysis in *US – Corrosion-Resistant Steel Sunset Review*.¹²⁶ While the Appellate Body was not called upon to directly analyze the text of Article 11.1 in *US – Corrosion-Resistant Steel Sunset Review*, after finding that Article 11.3 neither requires nor prohibits separate likelihood determinations for individual exporters or producers in a sunset review, the Appellate Body observed that “WTO Members are free to structure their anti-dumping systems as they choose, provided that those systems do not conflict with the provisions of the *Anti-Dumping Agreement*,” including “the rule in Article 11.1 that an ‘anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury’.”¹²⁷ Thus, it is evident that the Appellate Body was aware of Article 11.1 when it was analyzing Article 11.3.

132. Finally, Vietnam asserts that a U.S. regulation that provides for company-specific revocation of an antidumping duty order under certain circumstances is “the United States’ chosen method for implementing Article 11.1. . . .”¹²⁸ The United States does not agree with this statement. The United States considers that the regulatory provision at issue goes beyond any obligation contained in Article 11 of the AD Agreement.

133. Vietnam’s understanding of the Appellate Body’s report in *US – Corrosion-Resistant Sunset Review* is mistaken, and its interpretation of Article 11 of the AD Agreement is flawed. For these reasons, the Panel should reject Vietnam’s arguments with respect to Article 11.

VI. VIETNAM’S CLAIM WITH RESPECT TO THE “CONTINUED USE OF THE CHALLENGED PRACTICES” IS WITHOUT MERIT

A. The Investigation, the First Administrative Review, and the “Continued Use of the Challenged Practices” Are Not Properly Before the Panel

134. As reflected in the U.S. requests for preliminary rulings with respect to the investigation, the first administrative review, and the so-called “continued use of the challenged practices,” none of these measures or alleged measures are properly before the Panel. At different points during this dispute, Vietnam has characterized each of these as “measures at issue.” Vietnam identified the investigation and the first administrative review as measures in its panel request, but the determinations in those proceedings were not subject to the AD Agreement when they were made and are not subject to WTO dispute settlement now; in addition, the investigation was not a subject of consultations. Vietnam advanced arguments in its First Written Submission related to a so-called “continued use” measure, but Vietnam failed to specifically identify such a “measure” in its panel request; indeed, the panel request makes no reference to it at all. As a

¹²⁶ Vietnam Responses to Panel Questions, Question 45, para. 110.

¹²⁷ See *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 158.

¹²⁸ Vietnam Responses to Panel Questions, Question 47, para. 117.

consequence, these “measures” are not properly before the Panel, and Vietnam has failed to demonstrate otherwise during the course of this dispute.

1. The Investigation and the First Administrative Review

135. In light of Vietnam’s clarification during the first substantive panel meeting that it is not asking the Panel to make any findings on the WTO-inconsistency of Commerce’s determinations in the investigation and the first administrative review, there appears to be no disagreement that those proceedings are “not within the Panel’s jurisdiction. . . .”¹²⁹ The United States therefore respectfully requests that the Panel reflect this in its report.

136. In addition, as we explained in the U.S. First Written Submission and in the U.S. opening statement at the first substantive panel meeting, the investigation is not within the Panel’s terms of reference because it was not a subject of consultations.¹³⁰ Vietnam has never responded to the U.S. argument in this regard. The Panel could therefore also include in its report a finding that the investigation is not within its terms of reference for this reason as well.

2. The “Continued Use of the Challenged Practices”

137. The United States has demonstrated that no so-called “continued use” measure is within the Panel’s terms of reference because Vietnam failed to specifically identify any such measure in its panel request, contrary to the obligation in Article 6.2 of the DSU. Vietnam asks the Panel to infer from the description of other “as applied” measures that a “continued use” measure is also identified in the panel request. Such an inference is not permissible. Rather, the Panel must determine whether, “on the face” of the panel request, read “as a whole,” a “continued use” measure was specifically identified consistently with the requirement in Article 6.2.¹³¹ In short, as the United States has shown and will explain further below, it was not.

a. The Panel Request is Expressly Limited to the Particular Determinations Identified in Section 2 of the Request

138. In response to the Panel’s written questions, Vietnam now suggests that the following language, found in the opening line of Section 2 of the panel request, specifically identified a “continued use” measure:

The specific measures at issue are the anti-dumping order and subsequent periodic

¹²⁹ Vietnam Response to U.S. Preliminary Ruling Request, para. 6.

¹³⁰ See U.S. First Written Submission, paras. 81-84; see also U.S. Opening Statement at the First Substantive Panel Meeting, para. 12.

¹³¹ *US – Continued Zeroing (AB)*, para. 161 (footnotes omitted).

reviews conducted by the United States Department of Commerce (USDOC) on certain frozen and canned warmwater shrimp from Viet Nam.¹³²

Vietnam asserts that “[t]he language of the Panel Request does not include limiting language that would restrict the measure’s applicability to only those reviews already completed or initiated.”¹³³

139. Vietnam’s position is not credible. Vietnam asks the Panel to ignore or erase the very next sentence of the panel request, which states that “[t]he following determinations constitute the measures at issue”¹³⁴ and then lists six particular determinations that are specifically identified. Contrary to Vietnam’s assertion, this sentence does indeed expressly “limit” the measures at issue in this dispute to the determinations identified.

140. Other language in the panel request similarly limits the claims raised to the “as applied” measures identified in Section 2. Other than one “as such” claim referenced in relation to “zeroing,” the panel request limits the claims presented to “the anti-dumping proceedings at issue,”¹³⁵ “the proceedings,”¹³⁶ and the “application of the above-mentioned laws and procedures in the original investigation and periodic reviews here at issue.”¹³⁷ Throughout the document, Vietnam’s panel request limits itself to the application of the laws and procedures in the determinations individually identified. There is no indication in the panel request that Vietnam seeks to challenge a so-called “continued use” measure.

b. The Language Used in Vietnam’s Consultations Request and in Vietnam’s First Written Submission Confirms that the Panel Request Does Not Specifically Identify a “Continued Use” Measure

141. Vietnam suggests that its identification of a “continued use” measure in the panel request was “presented in as clear a manner as possible.”¹³⁸ If that is the case, it is not evident why Vietnam would have used such different language to reference this “measure” in its consultations request and in Vietnam’s First Written Submission. In the consultations request, Vietnam

¹³² See Vietnam Responses to Panel Questions, Questions 1 and 3, paras. 2 and 5

¹³³ *Id.*, Question 1, para. 2.

¹³⁴ Vietnam Panel Request, p. 2 (Exhibit Viet Nam-02).

¹³⁵ *Id.*, p. 5 (“Country-Wide Rate Based on Adverse Facts Available”) (Viet Nam Exhibit-02).

¹³⁶ *Id.*, p. 6 (“Limiting the Number of Respondents Selected for Full Investigation or Review”).

¹³⁷ *Id.* We note that this last reference expressly excludes the sunset review from the scope of the challenge.

¹³⁸ Vietnam Responses to Panel Questions, Question 3, para. 4.

described its concern that the United States “will . . . continue to act inconsistent with its WTO obligations.”¹³⁹ Vietnam has asserted that this is a reference to a “continued use” measure.¹⁴⁰ In its First Written Submission, Vietnam described the measure as the “continued use of the challenged practices.”¹⁴¹ The words used in the consultations request and Vietnam’s First Written Submission are similar to each other, and the language in the First Written Submission is similar to that used in *US – Continued Zeroing* by the EC in its panel request and by the Appellate Body in its report. Vietnam has offered no explanation for why the words in the consultations request and Vietnam’s First Written Submission are so dissimilar from the words in Vietnam’s panel request in this dispute.

142. Vietnam simply responds that, “[p]revious panels have recognized that the DSU does not require that a request for consultations mirror a panel request”¹⁴² While it is correct that previous panels have recognized this, that does not answer the question: What conclusion is to be drawn from the significant differences in the words used in the consultations request and Vietnam’s First Written Submission, on the one hand, and the panel request, on the other? The principal conclusion to be drawn from the dissimilarity is that the panel request does not specifically identify any “continued use” measure, and thus no such measure is within the Panel’s terms of reference.

143. Vietnam further offers that its suggestion in the consultations request that the United States “will . . . continue to act inconsistent with its WTO obligations” demonstrates its “concern with the ‘continued use’ measure since the beginning of this dispute.”¹⁴³ This is of no help to Vietnam. Vietnam’s concern must have been demonstrated, and a “continued use” measure must have been specifically identified in the panel request itself.

c. Section 2(d) of Vietnam’s Panel Request Does Not Specifically Identify a “Continued Use” Measure

144. Vietnam argues that Section 2(d) of the panel request “makes clear that the ultimate

¹³⁹ Vietnam Consultations Request, p. 3 (Exhibit Viet Nam-01).

¹⁴⁰ See Questions from the Panel to the Parties Following the First Substantive Meeting, Question 2. The United States does not agree that this purported reference to a “continued use” measure would be sufficient to identify a measure for purposes of a consultations request, as required by Article 4.4 of the DSU, nor that it would be sufficient to specifically identify such a measure consistently with the requirement in Article 6.2 of the DSU. However, the United States respectfully suggests that it will not be necessary for the Panel to determine whether the language used in Vietnam’s consultations request is sufficient to meet the requirements of Articles 4.4 and 6.2 in order to resolve this dispute.

¹⁴¹ Vietnam First Written Submission, para. 101.

¹⁴² Vietnam Responses to Panel Questions, Question 2, para. 3.

¹⁴³ *Id.*

remedy sought in this dispute is not immediate revocation of the antidumping duty order.”¹⁴⁴ Vietnam further explains that this section of its panel request reflects that Vietnam’s “primary concern is the impact of the USDOC’s continued and ongoing use of the challenged practices on the USDOC’s ability to make a proper five-year sunset review determination and to assess duties that do not exceed the margin of dumping.”¹⁴⁵

145. Nothing in the text of Section 2(d) of Vietnam’s panel request says anything about the remedy sought by Vietnam, and nothing in that section can be read as specifically identifying a “continued use” measure. The words in Section 2(d) merely allege that the “sunset review is inconsistent with Articles 11.2 and 11.3 of the Agreement.” If not for the fact that Commerce had not yet made a final determination in the sunset review at the time Vietnam made its panel request, this would inarguably describe just another “as applied” claim. As it is, the allegation in Section 2(d) of the panel request is nothing more than speculation about a future event concerning a determination that cannot be a measure within the Panel’s terms of reference because it did not yet exist at the time of the panel request.

d. The “Continued Use” Measure Is Not “Closely Related” to the “As Applied” Measures and the Panel Reports in *Japan – Film* and *Argentina – Footwear* Do Not Support Vietnam’s Argument

146. Vietnam argues that “the measures identified in the panel request are closely related to the ‘continued use’ measure.”¹⁴⁶ It would appear that Vietnam is asking the Panel to find that Vietnam should be relieved of the obligation to specifically identify a “continued use” measure in its panel request because, in Vietnam’s view, “[t]he listed determinations are closely associated with the ‘continued use’ measure, as the cumulative actions of those determinations produce the ‘continued use’ measure.”¹⁴⁷ For support, Vietnam relies on the panel reports in *Japan – Film* and *Argentina – Footwear*.¹⁴⁸ Vietnam’s reliance on these panel reports is misplaced.

147. First, in *Japan – Film*, as Vietnam notes, the panel reasoned that “[t]o fall within the terms of Article 6.2, it seems clear that a ‘measure’ not explicitly described in a panel request must have a clear relationship to a ‘measure’ that is specifically described therein, so that it can

¹⁴⁴ *Id.*, Question 5, para. 9.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*, Question 6, para. 11.

¹⁴⁷ *Id.*

¹⁴⁸ *See id.*, Question 6, paras. 10-11; *see also* Vietnam Response to U.S. Preliminary Ruling Requests, para.

be said to be ‘included’ in the specified ‘measure’.”¹⁴⁹ Likewise, the *Argentina – Footwear* panel “considered whether subsequent modifications of a definitive measure, which were not explicitly mentioned in the request, fall within the meaning of Article 6.2.”¹⁵⁰ Vietnam’s invocation of these panel reports is, in this regard, inconsistent with its assertion elsewhere that the “continued use” measure was “presented in as clear a manner as possible” in the panel request.¹⁵¹

148. Second, the factual situations under consideration in *Japan – Film* and *Argentina – Footwear* were entirely different from the facts of this dispute. *Japan – Film* concerned “implementing measures” that were “subsidiary or closely related to” a “basic framework law.” The panel explained:

[W]here a basic framework law dealing with a narrow subject matter that provides for implementing “measures” is specified in a panel request, implementing “measures” might be considered in appropriate circumstances as effectively included in the panel request as well for purposes of Article 6.2. Such circumstances include the case of a basic framework law that specifies the form and circumscribes the possible content and scope of implementing “measures”.¹⁵²

149. In *Argentina – Footwear*, “the panel considered whether subsequent modifications of a definitive measure, which were not explicitly mentioned in the request, fall within the meaning of Article 6.2.”¹⁵³ Vietnam suggests that “[t]he panel’s reasoning, applied in a safeguard context, is of general application.”¹⁵⁴ However, the panel explained that the later “resolutions” were “explicitly characterised . . . as ‘modifying’ ‘the safeguard measure’,” and were “characterised as only implementing the tariff rate quota system . . . on a quarterly basis.”¹⁵⁵ The panel thus concluded that “the legal framework provided for in the ‘definitive safeguard measure’ as such clearly remains in force, although its specific implementation has been subsequently modified in form.”¹⁵⁶

¹⁴⁹ *Id.*, Question 6, para. 10 (citing *Japan – Film*, para. 10.8) (emphasis added).

¹⁵⁰ Vietnam Response to U.S. Preliminary Ruling Requests, para. 23 (emphasis added).

¹⁵¹ Vietnam Responses to Panel Questions, Question 3, para. 4.

¹⁵² *Japan – Film*, para. 10.8.

¹⁵³ Vietnam Response to U.S. Preliminary Ruling Requests, para. 23.

¹⁵⁴ *Id.*

¹⁵⁵ *Argentina – Footwear (Panel)*, para. 8.37.

¹⁵⁶ *Id.*

150. In this dispute, the “measure” that Vietnam failed to “explicitly describe”¹⁵⁷ in the panel request is a so-called “continued use” measure. A “continued use” measure is not “subsidiary or closely related to” the second and third administrative reviews – the only measures properly described in the panel request. If anything, the second and third administrative reviews would be subsidiary to, *i.e.*, part of a “continued use” measure; not the reverse.

151. Additionally, the “continued use” measure does not modify or implement the second and third administrative reviews – the measures “explicitly described.” It is significant that, in *Japan – Film* and *Argentina – Footwear*, the complaining Members could not have “explicitly described” the implementing measures in the panel request because the implementing measures were not put into place until after the panel request had been made. That is not the case in this dispute. Vietnam had all of the information it needed to describe a “continued use” measure at the time the panel request was made. Indeed, Vietnam asserts that it referenced a “continued use” measure in the consultations request, which was made prior to the panel request.¹⁵⁸

152. Furthermore, a “continued use” measure, if it existed, would be something entirely distinct from the individual determinations that would comprise it. A “continued use” measure would be more than merely the sum of its parts because, as the Appellate Body explained in *US – Continued Zeroing*, there must be something in the panel request that “links” the elements together so as to describe a “continued use” measure.¹⁵⁹ Consequently, such a measure must itself be “explicitly described” in the panel request and cannot simply be inferred from a listing of other “as applied” measures.

153. For these reasons, the panel reports in *Japan – Film* and *Argentina – Footwear* are inapposite. The United States therefore respectfully suggests that these panel reports are not helpful for the Panel’s understanding of the issues in this dispute.

e. Vietnam Misunderstands Article 6.2 of the DSU, Which Requires Members to Identify the Specific Measures at Issue in the Panel Request

154. Vietnam has noted that “the United States makes no argument that it did not have notice of the substantive claims associated with the ‘continued use of challenged practices’ measure.”¹⁶⁰ Vietnam further asserts that “[t]here is no meaningful distinction substantively between the arguments set forth by Viet Nam, the United States, or third parties on the specified claims,

¹⁵⁷ *Japan – Film*, para. 10.8.

¹⁵⁸ See Questions from the Panel to the Parties Following the First Substantive Meeting, Question 2.

¹⁵⁹ See *US – Continued Zeroing (AB)*, para. 166.

¹⁶⁰ Vietnam Response to U.S. Preliminary Ruling Requests, para. 28.

whether in relation to the second and third administrative review or the ‘continued use of challenged practices’ measure.”¹⁶¹ Thus, Vietnam reasons that “[d]enial of the United States’ request has negligible substantive impact on the issues considered in this dispute.”¹⁶² Vietnam misunderstands the obligations in Article 6.2 of the DSU and the measures about which it seeks panel findings.

155. First, the obligation in Article 6.2 of the DSU is on Vietnam to “identify the specific measures at issue” in its panel request. Yet Vietnam would have the Panel look only at the “claims” and not the “measures” identified in its panel request. Indeed, the logical conclusion of Vietnam’s argument is that a complaining party could identify just one measure in its panel request, and bring before a panel as many additional measures as it wished as long as the claims with respect to each measure were the same. This is not what the DSU requires. Indeed, it is very important for a responding party to know the particular measures at issue. Among other things, the facts for each measure could be very different as well as the legal response to the claims made. Just because a complaining party makes the same claims with respect to a series of measures does not mean that the responding party’s response to those claims will be the same for each measure.

156. Furthermore, the basic premise of Vietnam’s assertion that there is no “meaningful distinction substantively between the arguments” to be made in relation to “as applied” and “continued use” measures is flawed. The facts and legal arguments relevant to “as applied” claims related to a particular determination are substantially different from the facts and legal arguments relevant to claims related to a so-called “continued use” measure. For example, the Appellate Body has explained that to prevail on a “continued use” claim requires that the complaining Member establish repeated use in “a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time.”¹⁶³ This issue is wholly irrelevant to claims against an “as applied” measure.

f. Vietnam’s Claim Regarding the “Continued Use of Challenged Practices” Fails Because It Purports to Include Future Measures

157. Finally, on the separate question of whether “continued use” can constitute a measure, we will not repeat all of our arguments, which are explained in detail in the U.S. First Written Submission.¹⁶⁴ However, the United States would again like to emphasize that the “continued

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *US – Continued Zeroing (AB)*, para. 191.

¹⁶⁴ U.S. First Written Submission, paras. 96-98.

use of challenged practices” appears to be a fictional measure supposedly composed of an indeterminate number of potential future measures that did not exist at the time of Vietnam’s panel request (and may never exist). Thus, such so-called “continued use” could not be impairing any benefits accruing to Vietnam, and therefore cannot be subject to WTO dispute settlement.

158. Furthermore, to the extent that the “continued use” measure consists of proceedings that had not resulted in final action to levy definitive antidumping duties or accept price undertakings at the time of the consultations request, Article 17.4 of the AD Agreement precludes dispute settlement with respect to such a measure.

159. Hence, even aside from the fact that a “continued use” measure cannot be inferred from the listing of the “as applied” measures in the panel request, there are other reasons for the Panel to find that Vietnam’s claims concerning the “continued use of challenged practices,” including the fourth administrative review, the fifth administrative review, and the sunset review, are not within its terms of reference.

B. Vietnam Cannot Establish a String of Determinations, Made Sequentially Over an Extended Period of Time with Respect to any of the Challenged Practices

160. Not only is the “continued use of the challenged practices” not a measure within the Panel’s terms of reference, the facts in this dispute do not support a conclusion that the challenged practices “would likely continue to be applied in successive proceedings.”¹⁶⁵

161. In its responses to the Panel’s written questions, Vietnam cites the Appellate Body’s explanation in *US – Continued Zeroing* that “only where the Panel has made clear findings of fact concerning the use of the zeroing methodology, without interruption, in different types of proceedings over an extended period of time, have we considered these findings sufficient to complete the analysis and to make findings regarding the continued application of zeroing in these cases.”¹⁶⁶ Vietnam suggests that “[t]his statement is particularly instructive because it informs the Panel of the elements that must be established prior to conducting an analysis on the propriety of a given action.”¹⁶⁷ Vietnam further “submits that it has provided substantial evidence in the first written submission on the USDOC’s extended and ongoing use of the

¹⁶⁵ *US – Continued Zeroing (AB)*, para. 191.

¹⁶⁶ Vietnam Responses to Panel Questions, Question 12, para. 21 (*quoting US – Continued Zeroing (AB)*, para. 195).

¹⁶⁷ *Id.*, Question 12, para. 22.

challenged practices across different types of proceedings.”¹⁶⁸ Vietnam is incorrect.

162. In *US – Continued Zeroing*, the Appellate Body found that the record supported findings of inconsistency in only four of the eighteen cases challenged. As a factual matter, in the fourteen other cases, the record did not reflect that “the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time.” In each of the four cases where the Appellate Body concluded that there was “a sufficient basis . . . to conclude that the zeroing methodology would likely continue to be applied in successive proceedings,” the panel had found the following: (1) the use of the zeroing methodology in the initial less than fair value investigation; (2) the use of the zeroing methodology in four successive administrative reviews; and (3) reliance in a sunset review upon rates determined using the zeroing methodology. Where there was “a lack of evidence showing that zeroing was used in one periodic review listed in the panel request” or “the sunset review determination was excluded from the Panel’s terms of reference,” the Appellate Body found that “the Panel made no finding confirming the use of the zeroing methodology in successive stages over an extended period of time whereby the duties are maintained.”¹⁶⁹ Consequently, the Appellate Body was “unable to complete the analysis on whether the use of the zeroing methodology exists as an ongoing conduct in successive proceedings”¹⁷⁰

163. In this dispute, the original investigation, the first, fourth, and fifth administrative reviews, and the sunset review are not within the Panel’s terms of reference. 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.

164. 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.”¹⁷¹

165. Vietnam also seeks to expand the Appellate Body’s reasoning in *US – Continued Zeroing* beyond zeroing to encompass the other “challenged practices.” As we have explained, though, Vietnam’s claims regarding the other “challenged practices” are without merit, and thus Vietnam

¹⁶⁸ *Id.*

¹⁶⁹ *US – Continued Zeroing (AB)*, para. 194.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*, para 191.

cannot establish “a string of determinations, made sequentially. . . over an extended period of time”¹⁷² with respect to those “challenged practices” either.

166. For these reasons, 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.

VII. CONCLUSION

167. For the reasons set forth above, along with those set forth in the U.S. First Written Submission, oral statements at the first substantive meeting with the Panel, and responses to the Panel’s written questions, 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.

¹⁷² *Id.*

LIST OF EXHIBITS

- US-9 *Certain Frozen Warmwater Shrimp from India: Preliminary Results and Preliminary Partial Rescission of Antidumping Administrative Review*, 74 Fed. Reg. 9,991 (March 9, 2009)