ANNEX D

ORAL STATEMENTS OF THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

ANNEX D-1

THIRD PARTY ORAL STATEMENT OF CHINA

China appreciates this opportunity to provide its views on two matters arising in this dispute.

I. INCONSISTENCY REGARDING THE COUNTRY-WIDE RATE PRACTICE

China takes the view that the Country-Wide Rate practice, as a result of the "Separate Rate Application" practice adopted by the United States, is inconsistent with the AD Agreement.

When determining antidumping rates for companies in economies that are not treated as market economy by the United States, the USDOC requires that non-investigated companies first satisfy some established criteria, *i.e.*, Separate Rate Application, in order to receive a margin based on the weighted average of the rates for the individually investigated respondents, namely, by establishing "an absence of central government control, both in law and in fact, with respect to exports". Otherwise, what they receive would be a "country-wide rate" base on adverse facts available.

This is substantially differed from the USDOC's practice for determining antidumping rates for companies in market economies. In an antidumping proceeding involving a market economy country, companies not individually investigated are assigned an "all-others" rate, which is based on the weighted-average margins for the firms individually investigated.

By adopting the Separate Rate Application practice, the United States introduces additional requirement differentiating market economy and non-market economy, which is not provided in the AD Agreement.

According to the first sentence of Article 6.10 of the AD Agreement, it is clear that the investigating authorities must, "as a rule", calculate an individual dumping margin for each known exporter or producer of the product under investigation. The second sentence introduces an exception to the principle laid out in the first sentence, *i.e.*, where the number of exporting producers is so large as to make the determination of an individual dumping margin impracticable, investigating authorities may limit their examination "by using samples". The Wording of Article 6.10 suggests that sampling is the sole exception to the rule of individual margins.

According to Article 6.10, there should be only two categories of respondents before the investigating authorities, 1) those "samples" that are investigated and assigned individual rates, and 2) those not selected and assigned an "all-others" rate. The provisions of the AD Agreement never requires non-selected companies to first demonstrate that they should be assigned an "all-others" rate.

The United States argues that it is proper for the USDOC to consider that the Vietnam-Wide entity as an exporter or producer under investigation. There is no legal basis for this argument. Under the test applied by the panel in Korea-Certain Paper, the investigating authorities have to show that there is sufficiently close structural and commercial relationship between individual producers to justify treating them as a single entity. If this cannot be demonstrated, the authorities, pursuant to the first sentence of Article 6.10, must treat each legal entity as a separate producer/exporter, and calculate individual dumping margins for each of them.

In this case, China does not believe that the "sufficiently close structural and commercial relationship" exists.

II. ZEROING

It is well-settled by the Appellate Body and panels that the practice of zeroing employed by the United States, either in original investigations or in periodic reviews, is inconsistent with the WTO obligations of the United States. China requests that the Panel recommend that the United States bring its measures into conformity with its obligations under the relevant covered agreements of the WTO.

There are also some Chinese shrimp companies suffering from the related measures on shrimp from China by United States. China keeps on requesting the United States to recalculate the antidumping rates for the affected Chinese exporting producers of shrimp, but has no substantial result. China urges the United States to provide a package solution to this issue so as to fully bring its measures into conformity with its obligations under the relevant covered agreement of the WTO.

China thinks that it is not enough for the USDOC to modify its methodology in original antidumping investigations with respect to the calculation of the weighted-average dumping margin. According to the current practice of the USDOC, the relevant antidumping rates of the companies assigned any antidumping rates before January 2007 cannot be recalculated retrospectively.

China requests the United States to recalculate the antidumping rates also for such Chinese companies, including those exporting producers of shrimp in China.

For the stated reasons above, China requests that the Panel find that the U.S. measures at issue violate relevant provisions of the AD Agreement and that the Panel recommend to the Dispute Settlement Body to request that the U.S. bring its measures into conformity with its obligations under the AD Agreement and the GATT 1994.

Thank you for your attention.

ANNEX D-2

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN UNION

1. The European Union makes this third party oral statement because of its systemic interest in the correct and consistent interpretation and application of the *Anti-Dumping Agreement* and the *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)*. The European Union would like to briefly comment on the four main substantive issues in the current proceedings.

I. ZEROING

2. None of the issues in relation to the use of zeroing by the United States raised in this proceeding are new. Vietnam's claims appear to be supported by a consistent body of reasoning and findings, contained in all previous reports issued by panels and the Appellate Body, most recently in *EC – Continued Zeroing*. Further, the United States has not raised anything new in its argumentation to defend its zeroing methodologies and practices.

3. The European Union's oral statement on this matter will therefore be brief. In its written submission the European Union set out at length the reasons why in its view, this Panel should follow the findings and conclusions contained in previous panel and Appellate Body reports on zeroing. It is beyond dispute that the practice of zeroing in anti-dumping cases has been contested many times in WTO dispute settlement proceedings. The Appellate Body in particular has adjudicated on the issues raised in this case frequently, including in cases involving different variations of zeroing, both in original investigations and review investigations, in different factual circumstances and between different parties.

4. The United States does not contest this, but argues that this Panel should not follow these prior Appellate Body reports. Further, the United States explicitly invites this Panel to re-apply findings and follow the reasoning contained in panel reports that have been rejected and overturned – in many cases more than once – by the Appellate Body, in reports which have subsequently been adopted by the DSB. The European Union submits that the suggestion by the United States that, according to Article 11 of the *DSU* this Panel should be free to depart from adopted Appellate Body reports on issues of law and legal interpretations relating to the covered agreements, is misguided. It is rather the opposite. The Appellate Body itself has addressed this very question in several cases, notably in *US – Stainless Steel from Mexico*, and thus the U.S. proposition should be rejected.

5. On the substance, the European Union has set out its views in its written submission, and has only a few comments in this oral statement, on two specific aspects of the U.S. written submission.

6. First, zeroing has nothing to do with "offsets" or "credits". The key issue and the fundamental problem raised by the U.S. methodology is the selection of the relatively low priced export transactions *per se*, as a sub-category, as the only or preponderant basis for the dumping margin calculation, regardless of whether or not they are clustered by purchaser, region or time. This does not reflect the compromise set out in the text of Article 2.4.2 of the *Anti-Dumping Agreement.* It is clear that according to Article 2.4.2 of the *Anti-Dumping Agreement* there are only three sub-categories of clustered low priced export transactions that it is permissible to respond to: those clustered by purchaser, region or time. Thus, it is not permissible, and it is not fair, to pick up low-priced export transactions clustered by model or *per se*, as the U.S. zeroing methodology does. This is also clear from the term "all" in the first sentence of Article 2.4.2, and the definition of dumping in

Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the *GATT 1994* in terms of the product as a whole; read together with the absence in the targeted dumping provisions of any reference to a sub-category by model or low-priced transactions *per se*. Thus, the relevant provisions, and particularly the normal rule and the exception, are read harmoniously, so as to give meaning – both legal and economic – to all the treaty terms.

7. Second, the United States continues to rely on the legally erroneous proposition that the disciplines of Article 2.4.2 of the *Anti-Dumping Agreement* are excluded from retrospective assessment proceedings. In this respect, we believe that the Panel does not need to enter into this issue. Confronted with the same argument by the United States, the Appellate Body has repeatedly found that Article VI of the *GATT 1994* and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement* require that the dumping margin must be established on the basis of the product under investigation *as a whole.* In any event, should the Panel enter into this discussion, we invite the Panel to take into account the analysis set out in our written submission.

II. VIETNAM-WIDE RATE

8. Moving on to the Vietnam-wide rate issue, the European Union considers that the *Anti-Dumping Agreement* permits the calculation of dumping margins and the imposition of anti-dumping duties on a country-wide basis in cases of imports from non-market economy countries, such as Vietnam. Vietnam's references to the types of anti-dumping margins contemplated by Articles 2, 6 and 9 of the *Anti-Dumping Agreement* are unavailing. In fact, Vietnam does not seem to indicate the particular provision which the United States violates when calculating a Vietnam-wide duty rate. In the EU's view, several provisions in the *Anti-Dumping Agreement*, in particular Articles 6.10, 9.2 and 9.4, when read together, speak against Vietnam's claim.

9. First, Article 6.10, first sentence contains a general principle or preference for the calculation of dumping margins on an individual basis, rather than a strict obligation to do so in each and every case.

10. Second, Article 6.10, second sentence cannot be interpreted as meaning that sampling is the only exception to the alleged general rule. In practice, there are more situations where the calculation of dumping margins cannot be carried out on an individual basis: for example, when investigating authorities cannot identify the relevant producer and actual source of dumping; or where the information colleted and verified in the course of the investigation leads to identical dumping margin results for all suppliers.

11. Third, the WTO case law interpreting Article 6.10 as not requiring the determination of dumping margins for each legal entity in all cases further permits the determination of one dumping margin for related companies as a whole, as a single supplier and the actual source of the alleged price discrimination.

12. Fourth, Article 9.2 of the *Anti-Dumping Agreement* permits the imposition of anti-dumping duties on a country-wide basis also in the particular case of imports from non-market economy countries.[1] Indeed, absent market economy conditions, the State is considered the actual supplier and the "source" of the alleged price discrimination, and any "amounts" collected from the State or its

[1] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 150 ("Article 9.2 refers to the imposition of 'an anti-dumping duty ... in respect of any product', rather than the imposition of a duty in respect of individual exporters or producers. We agree that this reference in Article 9.2 informs the interpretation of Article 11.3. (…) Therefore, Article 9.2 confirms our initial view that Article 11.3 does not require investigating authorities to make their likelihood determination on a company-specific basis").

export branches (*i.e.*, companies which do not act *de jure* or *de facto* independently from the State) is "appropriate".

13. Fifth, in any event, the third sentence of Article 9.2 of the *Anti-Dumping Agreement* also permits the imposition of duties on a country-wide basis when there are several suppliers and it is "impracticable" to specify individual anti-dumping duties per supplier. The notion of "impracticable" implies "something which is not feasible in practice" or "something which cannot be done for practical reasons". In other words, suppliers cannot be specified by name and duties cannot be imposed on an individual basis because of "practical" reasons (*i.e.*, it would render those duties ineffective, not feasible or not suited for being used for a particular purpose, *i.e.*, offsetting or preventing dumping from the actual supplier, that being the State in non-market economy countries).

14. Sixth, Article 9.4 of the *Anti-Dumping Agreement* cannot be the only exception to the individual imposition of duties because, by definition, that would deprive the third sentence of Article 9.2 of the *Anti-Dumping Agreement* of any meaning. In fact, this interpretation would make that sentence (and particularly the term "impracticable") redundant and unnecessary, contrary to the principle of effectiveness in treaty interpretation[2], since the only exception would already be mentioned in Article 9.4.

15. Therefore, the European Union considers that, whilst not taking a position on the facts of this case and, in particular on the U.S. methodology to calculate dumping margins and impose anti-dumping duties on the Vietnam-wide entity, the *Anti-Dumping Agreement* permits the imposition of anti-dumping duties on a country-wide basis in cases of imports from non-market economy countries.

III. ALL OTHERS RATE

16. With respect to Vietnam's claims against the U.S. calculation of the "all others" rate, the European Union recalls that, as the Appellate Body has noted, the absence of guidance in Article 9.4 on what particular methodology to follow does not imply an absence of any obligation with respect to the "all others" rate applicable to non-investigated exporters where all margins of dumping for the investigated exporters are either zero, *de minimis*, or based on facts available.

17. The European Union has not encountered in its practical experience a case where all the dumping margins found for the companies within the sample were zero/*de minimis* or based on facts available. However, the European Union considers that, when all the results found for the sampled companies are zero/*de minimis*, the same result should be extrapolated to "all others" thus leading to the non imposition of measures. In contrast, if some dumping margins are zero/*de minimis* and some others are based on facts available, a reasonable method should be followed in order to impose duties on "all others" as well, for example, by taking into account the level of cooperation of exporting producers. In this respect, the European Union invites the Panel to examine whether the methodology used by the U.S. was reasonable in view of the specific circumstances of the case.

IV. LIMITATIONS IN THE NUMBER OF RESPONDENTS

18. Finally, as regards Vietnam's claims on the USDOC's limitations in the number of respondents examined in each of the anti-dumping proceedings at issue and the continued denials of requests by individual respondents to be individually examined, the European Union refers to the exception contained in Article 6.10, second sentence. If the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation, investigating authorities are not required to individually

[2] Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, at 21.

examine all known exporters or producers outside the sample. It is for the Panel to verify whether the facts of the case show that this was the case.

Mr. Chairman, Members of the Panel, the European Union stands ready to participate further in the discussion and answer any questions that this Panel may have. Thank you for your attention.

ANNEX D-3

THIRD PARTY ORAL STATEMENT OF INDIA

India would like to thank the panel for providing an opportunity to present its views as a third party in this dispute.

1. The issue of zeroing is of extreme systemic importance to the multilateral trading system. It is a matter of regret that the United States continues to apply the "zeroing" methodology for determining anti-dumping margins despite the well settled position of its denouncement by numerous reports of Panels and the Appellate Body that use of this zeroing methodology is inconsistent with Articles 2.4, 2.4.2, 9.3, 9.5 and 11.3 of the Anti-Dumping Agreement (ADA). The Appellate Body in *US – Zeroing (Japan)*, in *US – Zeroing (EC), US – Softwood Lumber V* has held that the United States zeroing procedures, and anti-dumping measures adopted using these procedures, are inconsistent with Articles 2.4 and 2.4.2, 9.3, 9.5 and 11.3 of the *ADA.*

2. Mr. Chairman, India believes that Members will eventually come to realize the futility of pursuing the use of "zeroing". India is deeply concerned at the impact of the prolonged use of this methodology on the credibility and predictability of the multilateral dispute settlement system. In view of the settled jurisprudence by the Appellate Body, India believes that the panel will reiterate that the practice of "zeroing" by any WTO Member in the original investigation, or during periodic or administrative reviews and sunset reviews is inconsistent with Members' WTO obligations under the ADA.

I. INTRODUCTION

3. Vietnam challenges three measures at issue and four practices adopted by the U.S. in this dispute that relate to the imposition by the United States of antidumping duties under the USDOC's antidumping duty order involving certain frozen and canned warm water shrimp from Viet Nam.

4. The U.S. practices under challenge are: (i) the use of zeroing to calculate antidumping margins, (ii) the application of a country-wide rate to certain respondents not individually investigated or reviewed, (iii) the all-others rate calculated and applied to certain other non-investigated or non-reviewed respondents, and (iv) the repeated refusal by the USDOC to review individual respondents requesting such a review and thus determining margins for only a limited selection of respondents.

Mr Chair we will confine our statement in respect of two of the challenged practices;

5. Vietnam has claimed that each of these practices limits the ability of Vietnamese exporters and producers to prove the absence of dumping, resulting in the continuation of an antidumping order for companies that have in fact gone to great lengths to alter their conduct to eliminate dumping.

6. India understands that Vietnam has challenged the USDOC's use of zeroing to determine margins of dumping for selected respondents in the second and third administrative reviews and the USDOC's continued use of the so called zeroing procedures in successive segments of the continuing proceedings of *certain frozen warm water shrimp from Viet Nam (*including subsequent administrative reviews and the five year sunset review).Vietnam also requests the Panel to examine the USDOC's use of zeroing in the original investigation and first administrative review to the extent they are relevant to the challenged measures.

7. Vietnam challenges the U.S. practices as inconsistent with United States obligations under Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Agreement*"). Vietnam alleges that the USDOC has relied on, and continues to rely on, the above-listed practices for each stage of the antidumping proceeding.

A. CLAIM OF USE OF ZEROING IN THESE PROCEEDINGS AS INCONSISTENT WITH UNITED STATES WTO OBLIGATIONS

8. Vietnam challenges the USDOC's zeroing, as applied, in two administrative reviews and its continued use in subsequent phases of this antidumping proceeding. Vietnam states that the USDOC's Final Determination in the original investigation stated in explicit terms that the USDOC utilized the model zeroing and acknowledged the use of the same zeroing methodology that was at issue in the *US – Softwood Lumber V* dispute. Vietnam states that as the USDOC stated plainly in the determinations, the zeroing methodology has been applied in each phase of this antidumping proceeding.

9. Vietnam, thus, challenges the USDOC's use of the zeroing methodology in the original investigation to determine the "all-others" rate in the subsequent administrative reviews. It alleges that the USDOC relied on the margin calculated in the original investigation for purposes of assigning rates in subsequent administrative reviews. Thus, the USDOC's use of the zeroing methodology has a direct relationship with the measures at-issue in this dispute. The USDOC's use of zeroing at the investigation phase produced a higher assessment and cash deposit rate for exports in the subsequent reviews than would have existed but for use of the WTO-inconsistent zeroing calculation.

10. India states that in the case the U.S. has used the zeroing methodology in the original investigation it would lead to an inflated dumping margin rate. This would be in conflict with the well settled WTO jurisprudence wherein zeroing has been held to be inconsistent with the provisions of the WTO Agreements. As per Vietnam's claim, the use of such zeroing methodology in the original investigation to determine the "all others" rate in subsequent administrative reviews would also lead to inflated rates and be inconsistent with the WTO Agreements. The Appellate Body in *US – Zeroing (Japan)*, has, ruled that the "maintenance" of zeroing procedures in original investigations and administrative reviews is inconsistent with Article 2.4 of the *ADA*. It states that "[I]n a review proceeding under Article 9.3.1, the authority is required to ensure that the total amount of anti-dumping duties collected from all the importers of that product does not exceed the total amount of dumping found in all sales made by the exporter or foreign producer, calculated according to the margin of dumping established for that exporter or foreign producer without zeroing. The AB held in *US – Zeroing (EC)* that the zeroing methodology, as applied by the USDOC in the administrative reviews at issue, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. The AB in *US – Stainless Steel (Mexico)* found that the use of zeroing by the USDOC in administrative reviews was inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

11. On a reading of the opening clause of Article 2.1 of the ADA, the Appellate Body has also ruled that the definition of "dumping" "applies to the entire ADA including the provisions governing administrative reviews such as in *US – Zeroing (Japan)*; *US – Softwood Lumber V*, and *US – Corrosion-Resistant Steel Sunset Review*.

12. India has consistently opposed the use of the zeroing method in calculating dumping margins from its initial dispute initiated against the EC as zeroing is inconsistent with Article 2.4.2 of the ADA.[1] India states that it is important that this Panel reiterates and reinforces the conclusion that

[1] DS141 (*EC – Bed Linen*)

practice of zeroing as stated above is "as such" inconsistent with the obligations under GATT, 1994, Anti-Dumping Agreement and the Agreement for Establishing the WTO as consistently held by the Panels and Appellate Body in several reports. Any other conclusion would result in the purported continuance of the zeroing practice, which not only inflates dumping margins, but also detracts from the obligation to undertake an objective examination of the impact of dumped imports and ascribes dumping even in cases where no dumping may exist. India urges that in the interest of judicial economy and fairness, the Panel should follow the judicial well settled position and find that the zeroing used in this proceeding by the USDOC, violates United States' obligations under the WTO Agreement.

B. CLAIMS OF INCONSISTENCY REGARDING THE ALL OTHERS RATE

13. Vietnam states that the USDOC generally calculates the all others rate based on the weight-average of the weighted average margins of the firms individually examined excluding those margins that are zero, de minimis or based on facts available. Vietnam states that the all others rate applied in the second and third administrative reviews was based on the "All others rate" in the original investigation. In turn, the "all others" rate from the original investigation was determined by taking the weighted average of margins of dumping determined for individually investigated respondents in the original investigation using "model zeroing".

14. Vietnam argues that Article 2.4.2 requires that a fair comparison shall be made between the export price and the normal value. Anti dumping margins that do not adhere to Article 2 are construed to be WTO inconsistent and must be recalculated.

15. Article 9.4 require that these anti dumping margins calculated in a manner consistent with Article 2 serve as a basis for the administrating authority's calculation of the All Others rate. Thus, the weighted average of dumping for those companies individually examined is the ceiling for the margin of dumping to be applied to the All Others Rate.

16. India would, thus, support the view that margins of dumping determined in original investigations using zeroing are inconsistent among others with Articles 2.4 and 2.4.2 of the ADA and that an "all others" rate calculated by using WTO inconsistent model zeroing in the original investigation violates Article 9.4 of the ADA. Therefore, the "all others rate" applied in the second and third administrative reviews is inconsistent with Article 9.4 of the ADA.

17. In Appellate Body Report, *US – Hot-Rolled Steel*, it has been held that Article 9.4 simply identifies a maximum limit, or ceiling, which investigating authorities '*shall not exceed*' in establishing an 'all others' rate". The AB has also held that, although Article 9.4 addresses the calculation of the ceiling for the "all others" rate, as opposed to the "all others" rate itself, it does not provide unlimited discretion to investigating authorities when no ceiling can be calculated due to the *lacuna* in Article 9.4.

We quote:

> "*[W]e do not agree with the Panel's statement that, in situations where all margins of dumping are either zero, de minimis, or based on facts available, Article 9.4 "simply imposes no prohibition, as no ceiling can be calculated." In our view, the fact that all margins of dumping for the investigated exporters fall within one of the categories that Article 9.4 directs investigating authorities to disregard, for purposes of that paragraph, does not imply that the investigating authorities' discretion to apply duties on non-investigated exporters is unbounded. The lacuna that the Appellate Body recognized to exist in Article 9.4 is one of a specific method. Thus, the absence of guidance in Article 9.4 on what particular methodology to follow does not imply an*

> *absence of any obligation with respect to the "all others" rate applicable to non-investigated exporters where all margins of dumping for the investigated exporters are either zero, de minimis, or based on facts available.*"

18. However, the Appellate Body has not stated the bounds of an investigating authority's obligations under Article 9.4 in determining an "all others" rate when the *lacuna* exists.

19. In India's view, a point for consideration is whether Article 9.4 of the ADA require a mandatory obligation on the Investigating Authority to make a fresh or updated determination in a review on the basis of respondents selected in the review. In the case that no such obligation exists then the investigating authority may apply the unchanged "All Others rate" calculated in the original investigations as the USDOC has done as claimed by Vietnam in the present case. India would like to submit to the Panel that the language used in Article 9.4 suggest that the All Others rate be based on the weighted average margin of dumping calculated for "selected" exporters or producers. In an administrative review, if the investigating authority has made a new selection of exporters and producers and calculates new margins for them, then a reading of Article 9.4 may suggest that the margin of dumping be based on the new "selected" exporters or producers.

20. It appears that the dispute at hand falls within the lacuna described above. Further, it has been held that in such matters, the discretion with the investigating authorities to apply duties on non investigated exporters is not unbounded and does not imply an absence of any obligation with respect to the all others rate applicable to non investigated exporters.[2]

21. A point for consideration for the Panel, maybe whether it is incongruous that if the individually examined producers are no longer dumping (as in the second and third administrative reviews in the present dispute) and not paying anti dumping duties on their imports, should there be a rationale (on the basis of rates calculated in the original investigation) to impose duties on non examined exporters during the same period. It has been held in *US – Hot-Rolled Steel* and *US – Zeroing (EC) (21.5)* that the purpose of Article 9.4 is to "prevent" exporters that were not selected for participation in the review from being "prejudiced".

22. In view of the lacuna in Article 9.4 as stated above, India would therefore, urge the Panel to examine the consistency of U.S. measures as regards determination of "all others rate" with its obligations under Article 9.4 of the ADA.

We would like to end our submission with thanking the panel again for providing us with is opportunity.

[2] *US – Zeroing (EC) (21.5)* (ABR).

ANNEX D-4

THIRD PARTY ORAL STATEMENT OF JAPAN

1. Japan appreciates the opportunity to present its views as a third party in this important dispute. The views expressed today and in our written submission are based on Japan's systemic interest in the sound interpretation of the legal obligation at issue. In this statement, Japan would like to briefly tough upon the following three points: (1) the issue of zeroing in administrative reviews; (2) whether the United States' application of the "all others" rates are inconsistent with members' obligations under the Anti-Dumping Agreement; and (3) Viet Nam's claims of inconsistency regarding the country-wide rate with the Anti-Dumping Agreement.

2. *First*, Japan will not reiterate its arguments set out in our third party submission here. Suffice it to say that all of the relevant legal issues involved over the WTO-inconsistency of the zeroing methodology in the context of administrative views have been thoroughly and fully examined and already resolved by the Appellate Body based on well-reasoned analyses in the previous zeroing disputes. Japan agrees with the Viet Nam that the use of zeroing in administrative reviews is inconsistent with Article 2.4 and Article 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994.

3. *Second*, as stated in Japan's written submission, Japan is of the view that the USDOC's determinations of "all others" rate in the second and third administrative reviews is inconsistent with its obligation under Article 9.4 of the Anti-Dumping Agreement. Japan considers that the USDOC is obliged to determine a contemporaneous "all others" rate in an administrative review based on the dumping margins determined for respondents selected in that review. If the USDOC finds that the each of the rates determined for the selected respondents was zero or *de minimis*, then the only reasonable outcome is to apply "all others" rate of zero, because none of the exporters individually examined for that period was found to be engaged in dumping. There is no basis to assume that during the same period, non-examined exporters should be subject to anti-dumping duties. Even if the panel determines that an investigating authority may apply the "all others" rate determined in an original investigation to non-selected exporters in administrative reviews, such all other rate must be based on WTO-consistent margins of dumping. The administrative reviews and the all others rate at issue are subject to the disciplines of the Anti-Dumping Agreement, and the term "margins of dumping" in Article 9.4 refers to margins of dumping that are WTO-consistent at the time when they are used to calculated the all other rate.

4. *Third*, Japan wishes to offer a few observations to Viet Nam's claims of inconsistency regarding the "country-wide" rate with the Anti-Dumping Agreement. The first sentence of Article 6.10 of the Anti-Dumping Agreement establishes a general obligation to determine an individual dumping margin for each known exporter or producer concerned. Viet Nam argues that the "country-wide" rate to exporters of subject merchandise that did not meet "separate rate criteria" was not permitted under the Viet Nam's Protocol of Accession or the Anti-Dumping Agreement.[1] The U.S., in contrast, argues that the rate was assigned to those companies that had not established that they are free from government influence, particularly in their export activities, and thus are reasonably considered to be parts of one entity that the USDOC has identified as an "exporter" or "producer".[2]

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[1] *See* Viet Nam's First Written Submission, Section VI.B.
[2] *See* U.S. First Written Submission, Section V.C.

5. Japan considers that the Anti-Dumping Agreement allows investigating authorities to calculate a single dumping margin for "legally distinct entities" to the extent that they can be considered a single "exporter" or "producer" in the sense of the first sentence of Article 6.10, However, as explained by the panel in *Korea – Certain Paper*, the treatment of legally distinct entities as a single exporter or producer is allowed only in the case where "the structural and commercial relationship between the companies in questions is sufficiently close to be considered as a single exporter or producer."[3]

6. This question becomes particularly pertinent in a case like this where non-market economy involves because of a particular role the government plays in non-market economy. Therefore, Japan requests that the panel pay special attention to the role of the government of Viet Nam in its economy in examining whether the exporters or producers to which the "country-wide" rate is applied have structural and commercial relationship between themselves and the government.

7. This concludes Japan's oral statement. Japan thanks for this opportunity. Japan would welcome any questions you may have.

[3] *See* Panel Report, *Korea – Certain Paper*, para. 7.161 – 7.162.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF THE REPUBLIC OF KOREA

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views on key issues included in Korea's third party submission.

A. THE CLEAR IDENTIFICATION OF THE FOURTH ADMINISTRATIVE REVIEW AND THE SUNSET REVIEW MADE IN THE PANEL REQUEST SHOULD BE TAKEN INTO ACCOUNT IN PRELIMINARY RULING ON THE CONTINUED USE OF CHALLENGED PRACTICES.

2. First, in this dispute, Vietnam contests the "continued use of challenged practices" clearly and strongly in its first written submission, while the United States argues that the "continued use of challenged practices" was not identified in Vietnam's Panel Request, and it would appear to apply to an indeterminate number of potential future measures, and thus is not within the Panel's Terms of Reference.

3. Korea finds that "continued use of challenged practices" is not a mere potential future measure as alleged by the United States. Rather, that is an ongoing use of zeroing practice in successive proceedings of a certain anti-dumping case, which has some similarity with the measure in the *US – Continued Zeroing* case.

4. With respect to whether it was properly identified in Vietnam's Panel Request, Korea notes that the Panel should review carefully whether it could find a description in the Panel Request that is sufficient to indicate the nature of the "continued use of challenged practices". Especially, Korea would like to emphasize that the Fourth Administrative Review and the Sunset Review, which seem to be parts of the "continued use of challenged practices", are inarguably within Vietnam's Panel Request. Korea is of the view that above-mentioned measures, as either components of the "continued use of challenged practices" or as independent measures at issue, are subject to this dispute.

B. THE PANEL SHOULD FIND THAT THE PRACTICE OF "ZEROING" IN ADMINISTRATIVE REVIEWS IS INCONSISTENT WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

5. Regarding the United States' practice of zeroing in administrative reviews, Korea is of the view that the Panel should find that the United States' practice is inconsistent with the *Anti-Dumping Agreement*.

6. The United States argues the measures at issue rest on a permissible interpretation of *Anti-Dumping Agreement*, and thus, they are WTO-consistent. Specifically, the United States asserts that the concept of "dumping" and "margin of dumping" have a meaning in relation to individual transaction, that is to say, dumping may occur in a single transaction and dumping which occurs with respect to one transaction does not need to be mitigated by the occurrence of another transaction made at a non-dumped price. However, the Appellate Body has explicitly rejected the United States' arguments that "dumping" and "margin of dumping" can be found to exist at the level of individual transactions in a previous ruling regarding the USDOC's practice of zeroing in periodic administrative reviews.

7. Furthermore, the United States also argues that the term "product" used in Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 does not refer exclusively to "product as a whole" and thus, the relevant provision does not require margins of dumping to be established on an aggregate basis for the "product as whole". This argument is contrary to the Appellate Body's reasoning in *United States – Final Dumping Determination on Softwood Lumber from Canada*, in which the Appellate Body held that "margin of dumping" could only be established for the product under investigation as a whole.

8. Korea is of the view that the argument by the United States is simply not compatible with the rulings and reasoning of the aforementioned Appellate Body's decisions. Korea is unable to find any reason for the Panel to see the USDOC's zeroing methodology in the assessment proceedings rests on a permissible interpretation of the *Anti-Dumping Agreement*, although the Panel should make an objective assessment of the matter before it.

9. For the aforementioned reasons, Korea respectfully requests that the Panel find the United States' practice of zeroing as used in the administrative reviews in anti-dumping proceedings concerning imports of certain shrimp from Vietnam to be inconsistent with the *Anti-Dumping Agreement*.