ANNEX F

ORAL STATEMENTS OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL OR EXECUTIVE SUMMARIES THEREOF

ANNEX F-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF VIET NAM AT THE SECOND MEETING OF THE PANEL

I. OVERVIEW

1. Viet Nam would like to again thank the Panel for the work done thus far in connection with this dispute. As an initial matter, Viet Nam would like to very briefly address a claim made repeatedly by the United States throughout this proceeding: that is, that Viet Nam is "inventing" obligations not present in the Anti-Dumping Agreement. The Anti-Dumping Agreement is not concerned solely with the obligations facing the administering authority. In addition to these obligations, the Anti-Dumping Agreement also grants certain rights to the exporters and producers subject to the antidumping proceeding. The Appellate Body, panels, and authorities therefore have a duty – an obligation – to ensure that these rights are safeguarded against the interests of the domestic parties.[1]

II. ARGUMENTS OF THE PARTIES PERTAINING TO THE USDOC'S ZEROING METHODOLOGY

2. We begin with the claims related to use of the zeroing methodology. The United States first argues that, "there can be no violation of the AD Agreement or the GATT 1994 when 'zeroing' has no impact on the margins of dumping calculated." The United States' argument ignores the plain language of Article 9.3 and should be dismissed. The first sentence of Article 9.3 imposes two independent obligations on the authority. The provision requires that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." The first obligation of the authority is to determine a "margin of dumping as established under Article 2." This requirement serves an important purpose: without guidelines for calculating the ceiling amount of duties that may be applied, the authority could adopt a methodology that produces an artificially inflated dumping margin, such as zeroing, rendering the ceiling of Article 9.3 meaningless. These words must be given effect.

3. The second argument of the United States is that Viet Nam has shown neither that the zeroing methodology may be challenged on an as such basis nor that zeroing is as such inconsistent with the Anti-Dumping Agreement. With these claims, the United States would have the Panel disregard clear Appellate Body findings that directly address these two arguments. First, the Appellate Body concluded on multiple occasions that the zeroing methodology can be susceptible to challenge on an as such basis; the zeroing procedures at issue then and the zeroing procedures at issue in this dispute are the same, and must be analyzed in the same manner. Second, the Appellate Body has repeatedly found the exact procedures at issue here to be inconsistent with the Anti-Dumping Agreement. Article 3.2 of the DSU requires security and predictability in the dispute settlement process. Refusing to recognize prior determinations involving identical factual situations frustrates these goals. It is absurd that countries must continue to waste their limited resources to contest a practice repeatedly found by the DSB to be inconsistent as such with the Anti-Dumping Agreement. It cannot be the case that in doing so, countries must also re-litigate in full these identical issues.

[1] Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613 at para. 81.

4. The third argument of the United States regards Viet Nam's interpretation of Article 2.4.2 and specifically interpretation of the word "investigation" in that provision. Viet Nam asks the Panel to consider the plain meaning of the word "investigation." While the United States would ignore this definition, it cites to no Appellate Body determinations that support disregarding the first step of treaty interpretation: that is, the plain meaning of the text. Viet Nam reminds the Panel that "investigation" is defined as a "systematic inquiry; a careful study of a particular subject." There can be no question that an antidumping assessment proceeding constitutes a "systematic inquiry" into the proper amount of duties to be assessed. Further, Viet Nam notes that the United States' contextual discussion omits Article 6, which governs the collection and evaluation of evidence. Article 6 refers repeatedly to the "investigation," but does not set forth separate rules for an assessment proceeding.

III. ARGUMENTS OF THE PARTIES PERTAINING TO THE ALL-OTHERS ("SEPARATE") RATE APPLIED IN THE SECOND AND THIRD ADMINISTRATIVE REVIEWS

5. We will now turn to issues concerning the all others – or separate – rate and whether the USDOC assigned a permissible separate rate to companies not selected for individual examination in the second and third administrative reviews. The United States' first argument is that Article 9.4 imposes no obligation on an authority under the present factual scenario. Viet Nam is asking the Panel to protect the rights of respondent parties that have literally zero recourse against an authority that – according to the United States – can operate with complete discretion in this scenario. It is these rights of respondent parties under the Anti-Dumping Agreement that the Appellate Body considered when it concluded that Article 9.4 prohibits actions prejudicial to non-investigated companies and that this Panel is asked to protect.

6. The United States' second argument, that an authority may use data from any segment of an antidumping proceeding when calculating the ceiling rate for companies not individually investigated, is illogical and contrary to the terms of the Anti-Dumping Agreement. We would note the significance of the cross-reference in Article 9.4 to the companies selected for individual review pursuant to Article 6.10. This makes a direct link between the companies selected for that investigation with the calculated all others rate. Moreover, the Appellate Body in *EC – Tube or Pipe Fittings* recognized this principle, stating that use of a period of investigation "assures the investigating authority and exporters of a consistent and reasonable methodology for determining present dumping, which anti-dumping duties are intended to offset." This right applies to all exporters of subject merchandise.

7. The United States' third argument that the factual records of the second and third administrative reviews support the "determination" that separate rate companies had dumping margins of 4.57 percent relies on a distorted reading of the facts. The United States begins by asserting that Viet Nam did not raise any claims under Article 17.6(i) in the Panel request. Article 17.6(i) provides the standard by which the Panel must evaluate the factual conclusion reached by the USDOC in calculating the Article 9.4-prescribed all others rate. This is the general obligation of the Panel in dispute resolution, and just as Viet Nam need not cite to Article 17.6(ii) in the panel request to state the standard of review for legal claims, any citation to Article 17.6(i) would be misplaced. Nonetheless, Article 17.6(i) requires that "the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective." Thus, the Panel must confirm that the authority met this obligation when confronted with an Article 9.4 lacuna situation.

8. The United States relies on a selection of largely irrelevant facts to justify the applied rate of 4.57 percent. The United States does not find relevant – and in fact appears to completely ignore – the data of individually examined companies that, like the separate rate companies, complied with all USDOC requests. The USDOC ignored all of the actual sales data on the record when determining the rate for the fully cooperating, non-investigated companies. Instead, the USDOC relied on the

non-cooperation of some companies to justify the rates applied to cooperating companies. Separate rate companies, which fully cooperated with the USDOC's investigation, are therefore penalized for the inaction of companies to which they have no relation. As a result, certain cooperating companies not selected for individual examination are being unfairly prejudiced relative to other cooperating companies; that is, those selected for individual examination. This is not an unbiased or objective result.

9. Viet Nam directs the Panel's attention to the USDOC's recent revised or "remand" determination for the second administrative review. The United States Court of International Trade agreed with the position taken by Viet Nam's in this dispute that the assessed duty of 4.57 percent bears no relationship to the separate rate companies' actual margin of dumping. To remedy this defect, the USDOC calculated dumping margins for the 23 separate rate companies based on a comparison of sales information they provided to the USDOC and the normal values of the individually investigated companies. These calculations produced evidence of no dumping for all 23 separate rate companies, further illustrating the absence of any evidence supporting the all others rate applied in the original determination of the second administrative review.

10. Finally, we would note that the margin of dumping assigned to the separate rate companies not only was not supported by any factual information on the record, but also was certainly in excess of "the margin of dumping" that would have been established under Article 2. Thus in reviewing the separate rate, the Panel should find that neither the factual determination nor the legal interpretation of the United States met the standards of Articles 17.6(i) or 17.6(ii) respectively.

IV. ARGUMENTS OF THE PARTIES PERTAINING TO THE RATE APPLIED TO THE VIETNAM-WIDE ENTITY

11. We next address the United States' arguments regarding application of a rate based on adverse facts available to what has been called the Vietnam-wide entity. The United States first argues that record evidence supported the USDOC's presumption that all companies are controlled by the government, basing the presumption of government ownership, and the existence of a Vietnam-wide entity, exclusively on the findings contained in a memo prepared by the USDOC. Two important facts not mentioned by the United States must be highlighted regarding this memo. First, the USDOC did not prepare the memo in connection with the shrimp antidumping proceeding at issue in this dispute and the memo provides no information on the ownership structure of the shrimp industry in Viet Nam. The USDOC can cite to no evidence in the memo to conclude broad state ownership of the shrimp industry; it can only cite to general conclusions on the economy as a whole, which may have little or no resemblance to the reality of the shrimp industry. The second important fact regarding this memo is the date: The USDOC published the memo on 8 November 2002, over eight years ago. Despite the rapid pace at which Viet Nam's economy continues to develop, the USDOC relies on the generalized conclusions drawn in a memo from over eight years ago to presume that all shrimp companies are currently owned by the government of Viet Nam. The United States has no basis under Articles 6.8 or 6.10 for concluding that the known and unknown sub-entities that allegedly comprise the Vietnam-wide entity may all be treated as a single entity.

12. The United States next relies on a misleading presentation of the facts to argue that its actions with regard to the collection of detailed ownership and sales process information from shrimp companies not individually examined is not discriminatory. The United States appears to imply that in market economy cases companies not selected for individual investigation must likewise as a matter of course submit extensive affiliation and sales process information. This insinuation is false. The USDOC only requests affiliation information as a matter of course from individually examined companies in market economy cases.

13. For the third administrative review, the United States next argues that the USDOC simply applied to the Vietnam-wide entity the only rate ever applied to the Vietnam-wide entity. On this fact,

the United States is correct; left unsaid in the United States' argument is that the only rate ever applied to the Vietnam-wide entity was based upon adverse facts available. That the USDOC had previously applied the rate to the Vietnam-wide entity does not alter the facts available nature of the rate. Despite lacking any basis for doing so, the USDOC applied a rate based entirely on adverse inferences to the Vietnam-wide entity.

14. Finally, we refer the Panel to the recent report of a Panel that found the European Communities' use of an identical, country-wide rate practice to be inconsistent with WTO obligations. The Panel in *EC – Fasteners* concluded that the EC's "individual treatment" test violates Articles 6.10 and 9.2 of the Anti-Dumping Agreement and Article I:1 of the GATT 1994. Under the individual treatment test, as with the USDOC's separate rate test, the EC "presumes that the State should be considered a 'parent company'" and requires companies to establish independence from the state. The Panel first concluded that reliance on this presumption violates Article 6.10 of the Anti-Dumping Agreement, finding that "sampling is the sole exception to the rule of individual margins" and that reliance on a presumption of state control could not override this general rule. Based on application of the presumption, the test violates Article 6.10 "in that it conditions the calculation of individual margins for producers on the fulfillment of the IT test." The Panel also found the EC's conduct to be discriminatory towards Chinese producers in violation of Article I:1 of GATT 1994. The Panel concluded that this requirement will "result in imports of the same product from different WTO Members being treated differently in anti-dumping investigations conducted by the European Union." As the Panel in *EC –Fasteners* recognized, there is not a single provision of the Anti-Dumping Agreement or any other WTO Agreement that allows for such treatment.

V. ARGUMENTS OF THE PARTIES PERTAINING TO THE LIMITED SELECTION OF INDIVIDUALLY INVESTIGATED RESPONDENTS

15. Finally, Viet Nam would like to address the United States' arguments regarding the limited selection of mandatory respondents. First, the United States addresses Viet Nam's claims under Article 6.10.2, concluding that the USDOC has no obligation to accept voluntary respondents for the measures at issue. We remind the Panel that the final sentence of Article 6.10.2 requires that "[v]oluntary responses shall not be discouraged." As fully explained in Viet Nam's second written submission, the voluntary respondent treatment standard applied by the USDOC would prohibit in all measures relevant to this dispute the addition of a voluntary respondent. Furthermore, the actions of the USDOC in the third administrative review illustrate this discouraging behavior, as the USDOC ignored repeated efforts by an entity to gain some assurance that it would be properly treated as a voluntary respondent.

16. The final United States argument concerns Viet Nam's interpretations of Articles 11.1 and 11.3 of the Anti-Dumping Agreement. Notably, the United States' discussion of Article 11.1 completely ignores the actual language of the Article, which is unambiguous and requires, in full, 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." These words must be given meaning. The Article provides respondent entities with important and clearly articulated rights, and the United States cannot be allowed to unilaterally eliminate these rights from the Agreement. The United States' argument regarding Article 11.1 rests exclusively upon citation to Appellate Body determinations, citations that are both misleading and incomplete. In the first instance, the United States claims, "[a]s an initial matter, as the Appellate Body has confirmed, Article 11.1 does not impose any independent or additional obligations on Members," citing to the Appellate Body's report in *EC – Tube or Pipe Fittings*. The Appellate Body did indeed uphold certain findings of the Panel and cited to the specific paragraphs of the Panel report being upheld, but none of which contain the stated proposition or even concern the alternative claims made under Article 11.1.[2] Moreover, paragraph 81 of that Appellate

[2] Appellate Body Report, *EC – Tube or Pipe Fittings* at para. 84.

Body report, cited by the United States, actually appears to contradict the proposition for which it was cited.

17. The United States also relies heavily on the Appellate Body's decision in *US – Corrosion-Resistant Steel Sunset Review* for the proposition that the words of Article 11.1 have no meaning. Again, however, the United States has selectively omitted important caveats in the Appellate Body's finding, in which the Appellate Body made clear that any purported finding with regard to Article 11.1 was contingent upon a company's ability to have the order revoked through review proceedings separate and apart from a sunset review. As previously explained, this option does not exist for company's not selected for individual examination. When viewed in full, the Appellate Body's determinations do not support the United States' interpretation.

18. Finally, we would again remind the Panel that it is not Viet Nam's position that the United States cannot invoke Article 6.10 in situations where it is not practicable to investigate all respondents either requesting a review or for which a review has been requested. Rather, it is Viet Nam's position that an authority must reconcile its actions under Article 6.10 with the rights of the respondents under other provisions of the Anti-Dumping Agreement.

VI. CONSEQUENTIAL VIOLATION OF UNITED STATES' OBLIGATIONS UNDER THE ANTI-DUMPING AGREEMENT

19. The cumulative effect of the challenged practices has resulted in the USDOC finding that dumping is likely to continue or recur if the antidumping duties are terminated pursuant to the recently concluded sunset review.[3] Thus, the continued use of these practices has resulted in a violation of the obligations imposed on authorities under Article 11.3 of the Anti-Dumping Agreement. Moreover, the continued use of zeroing by the USDOC in the fourth administrative review resulted in a finding of margins of dumping for the individually investigated respondents, a margin of dumping which would not exist but for the continued use of zeroing. Additionally, the continued use of all practices subject to this Panel proceeding has resulted in actions in the fourth administrative review which continue to be inconsistent with Articles 2, 2.4, 6.8, 6.10, 9.3, 9.4, 11.1, 11.3 and Annex II of the Anti-Dumping Agreement.

20. Similarly, the USDOC has continued to use the exception provided in Article 6.10 of the Anti-Dumping Agreement to limit the number of individually investigated companies in the fifth administrative review and, in light of the USDOC's prior conduct, we expect that the use of the challenged practices will continue in the fifth administrative review with a consequent violation of Articles 2, 2.4, 6.8, 6.10, 9.3, 11.1, 11.3 and Annex II of the Anti-Dumping Agreement.

VII. CONCLUSION

21. Based on the above, Viet Nam hereby requests that the Panel render the conclusions described in Viet Nam's Second Written Submission. In rendering such conclusions, the Panel should take into consideration that none of the complained of practices require a change in legislation or regulations. Under these circumstances, the Panel should recommend that the United States bring its practices into conformity with its obligations as specified in the Panel's report immediately.

[3] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of the Five-Year "Sunset" Review of the Antidumping Duty Order*, 75 Fed. Reg. 75965 (7 December 2010), available at http://ia.ita.doc.gov/frn/summary/vietnam/2010-30664.txt.

ANNEX F-2

CLOSING STATEMENT OF VIET NAM AT THE SECOND MEETING OF THE PANEL

1. I would like to begin Viet Nam's closing statement in this Panel proceeding by thanking the members of the Panel and the Secretariat for their patience throughout this proceeding. At this point, I believe every argument has been stated and restated many times. This, of course, makes it challenging to deliver a closing statement which does not repeat arguments that have already been made. I hope to avoid this as much as possible.

2. Unfortunately, at the outset I do want to reiterate a comment made in Viet Nam's opening statement yesterday; namely, that Viet Nam has neither invented obligations which do not exist under the Anti-Dumping Agreement nor engaged in interpretations which are inconsistent with the norms of treaty interpretation as set forth in the Vienna Convention. Rather, Viet Nam has, with respect to each claimed violation of U.S. obligations, relied on the language of the Anti-Dumping Agreement, prior and consistent Appellate Body Reports interpreting particular provisions of the Agreement, the object and purpose of specific provisions of the Anti-Dumping Agreement, as well as the broader object and purpose of the Agreement itself and of the Dispute Settlement Understanding, and the standards of review set forth in Article 17.6 of the Anti-Dumping Agreement.

3. Thus, with respect to the issue of zeroing, we have relied upon the consistent interpretation by the Appellate Body and its rationale in finding that the practice of zeroing in periodic reviews is contrary to various subparagraphs of Articles 2 and 9 of the Anti-Dumping Agreement. The Appellate Body has found zeroing to be inconsistent with these Articles both "as applied" and "as such." Viet Nam has similarly argued that the zeroing in the measures before this Panel is "as applied" and "as such" inconsistent with U.S. obligations. There is no invented obligation. Nor is there any invented inconsistency, as the United States applied zeroing in calculating both the margins of dumping for the individually examined companies and the all others "separate" rate in the second and third administrative review, and continues this practice as illustrated by the results of the fourth administrative review.

4. Our claim with respect to the all others rate is equally well grounded. We concede that Article 6.10 allows for sampling in periodic reviews. That is not the question before this Panel. Rather, there are two questions before this Panel related to the U.S. application of the exception provided in Article 6.10. First, does the lacuna in Article 6.10 and 9.4 allow for the application of an all others rate that cannot be considered objective or unbiased since there is a total absence of factual support for the rate applied by the United States. Here we rely on the factual standard of review set forth in Article 17.6(i) of the Anti-Dumping Agreement, not some invented standard. Second, does the exception of Article 6.10 and 9.4 permit a Member to ignore the most fundamental obligations regarding the amount of the anti-dumping duty to be assessed and the duration of the anti-dumping measures as provided in Articles 9.3, 11.1 and 11.3. These are not invented obligations; rather they are obligations that are clearly articulated in the Agreement and which relate to the most fundamental rights protecting respondents under the Agreement, namely the amount and duration of anti-dumping duties.

5. Similarly, Viet Nam's arguments regarding the rate applied to the so-called Vietnam-wide entity are grounded in the obligations of the Anti-Dumping Agreement as set forth in the text of that Agreement. First, Articles 6.10 and 9.4 clearly articulate the exclusive methodology for determining the anti-dumping duties to be applied to non-investigated companies. There is simply no support for

applying a rate other than the all others rate to the so-called Vietnam-wide entity. Furthermore, Article 6.8 and Annex II to the Anti-Dumping Agreement stipulate the necessary conditions for applying facts available and facts available with adverse inferences. The United States demonstrated in the third administrative review that the quantity and value information on which they sought to justify the application of facts available with adverse inferences was not "necessary" information and, thereby, undermined this justification for applying facts available with adverse inferences to the so-called Vietnam-wide entity. Nor has the United States provided any justification whatsoever for its so-called separate rate questionnaire or certification which would allow it to apply facts available with adverse inferences for failure by companies to submit such information even if such information were directly requested. Again, Viet Nam is not inventing obligations but is basing its position on the text of the Anti-Dumping Agreement. In this regard, we would again call the Panel's attention to the recent Panel Report in *EC – Fasteners* which finds that there is no basis for an authority to presume government control of non-investigated entities and no basis to apply a rate other than the all other rate to any non-investigated entities.

6. Finally, there is the question of continued use by the United States of practices which are inconsistent with its obligations under the Anti-Dumping Agreement. All of the practices subject to this Panel proceeding have been applied by the United States beginning with the original investigation and have carried through to the fourth administrative review. In addition, the margins of dumping determinations based on these WTO inconsistent practices served as the basis for the United States' analysis of whether dumping was likely to continue or recur if the anti-dumping measures were terminated pursuant to the sunset review. The continued application of these practices will result in (1) the continued assessment of duties in excess of the margins of dumping for all or some of the exporters and producers of shrimp from Viet Nam and (2) prevent the antidumping duty order from ever being terminated pursuant to the rights of the producers and exporters of shrimp from Viet Nam under Articles 11.1 and 11.3.

7. In contrast to Viet Nam's position on each of these issues, the positions of the United States on each of the issues subject to this proceeding are contrary to the precise language of the Anti-Dumping Agreement, involve interpretations inconsistent with the rules of treaty interpretation set forth in Articles 31 and 32 of the Vienna Convention, ignore the object and purpose of the Anti-Dumping Agreement and the specific provisions of that Agreement, ignore the object and purpose of the Dispute Settlement Understanding, and/or are contrary to consistent Appellate Body precedent.

8. In the case of zeroing, the United States relies on arguments which have been rejected by the Appellate Body time and time again. The Appellate Body's findings on zeroing are, in turn, based on a careful analysis of the language of Article 2 of the Anti-Dumping Agreement which requires a "fair comparison" and the calculation of antidumping duties based on the product as a whole. The practice of zeroing, which eliminates from the calculation of the margins of dumping those transactions in which export price is above normal value, is not a "fair comparison" and does not take into account whether the product as a whole has been dumped in the importing country market. The United States has not presented anything new in regards to zeroing which could or should motivate the Panel to overturn established and consistent Appellate Body precedent.

9. The United States has also tried to justify its position on zeroing by interpreting the phrase in Article 2.4.2 "investigation phase" to limit the application of Article 2.4.2 to initial investigations of dumping, excluding it application in investigations for purposes of duty assessment and collection. However, there is no basis for such a distinction if the rules of treaty interpretation are properly applied. First, the plain meaning of the word "investigation" is applicable to all segments of the proceeding during which the authority must make a "systematic inquiry" of normal value and export prices in order to determine the margins of dumping. The United States attempts to read the word "first" or "original" into this phrase, words that simply do not appear in the text of the Agreement. Second, the U.S. interpretation would lead to absurd results. Article 2.4.2. would not apply to duty

assessment and collection investigations, thereby leaving an enormous gap in the Anti-Dumping Agreement with respect to how the comparison of normal value and export price should be made when assessing and collecting duties. It is absurd to conclude that the negotiators of the Anti-Dumping Agreement did not intend to provide a comparison methodology to be applied for purposes of duty assessment and collection. Third, if the word "investigation" has a special meaning in Article 2.4.2, consistency demands that this same special meaning apply elsewhere in the Agreement. Article 6, for example, repeatedly uses the word "investigation." Article 6 provides the evidentiary rules governing antidumping proceedings. If the word "investigation" is interpreted as the United States suggests, not only would there be no guidance in the Agreement on how to make pricing comparisons for purposes of duty assessment and collection, there would be no evidentiary rules to guide authorities except in the original investigation. Again, it is absurd to conclude that the negotiators did not intend to provide evidentiary rules for purposes of duty assessment and collection.

10. As regards the all others or "separate" rate, the United States urges the Panel to adopt an interpretation of the exception of Article 6.10 and 9.4 that would allow authorities to ignore their obligations under Articles 9.3, 11.1 and 11.3 in any situation where it is impracticable to investigate all respondents individually. These provisions, which the United States urges the Panel to allow it to disregard, provide vital protections for respondents subject to anti-dumping measures. These include limiting the amount of anti-dumping duties to the margins of dumping, limiting the duration of anti-dumping duties for only so long and to the extent necessary to prevent injurious dumping, and providing for a mechanism to terminate the anti-dumping duties. There is nothing in Articles 6.10 or 9.4, much less elsewhere in the Anti-Dumping Agreement, which would allow the application of Article 6.10 or 9.4 in a manner which would allow authorities to nullify other obligations under the Agreement. Nor is the United States' interpretation consistent with the object and purpose of the Anti-Dumping Agreement. In short, the interpretation being urged on the Panel by the United States' leads to an absurd result.

11. Having used Article 6.10 and 9.4 to eliminate basic rights of Vietnamese exporters and producers under the Anti-Dumping Agreement, the United States proceeds to impose an anti-dumping duty on these same respondents unsupported by any facts and which is calculated using zeroing. In the face of having found zero or de minimis margins for every individually investigated company in periodic reviews since issuance of the anti-dumping duty order, the United States imposes a margin of dumping on the non-investigated respondents based on the pre-order margin of dumping found in the original investigation, a margin of dumping calculated using zeroing. A margin of dumping unsupported by any facts on the record of the relevant periodic review cannot be found by the Panel to be either objective or unbiased, as is required by Article 17.6(i). Furthermore, a margin of dumping which is calculated using zeroing has been found to be "as applied" and "as such" inconsistent with the obligations of the Anti-Dumping Agreement.

12. As noted in our opening statement, in its second remand determination in the U.S. Court of International Trade litigation *Amanda Foods v. United States,* the U.S. Department of Commerce, upon further investigation in connection with the second administrative review, remained unable to find any evidence that the separate rate companies were engaged in dumping during the period covered by the second administrative review. This finding reinforces Viet Nam's position that the margins of dumping assigned to the separate rate respondents was not based on an objective and unbiased evaluation of the facts.

13. Finally, the United States has invented a new category of respondent, the Vietnam-wide entity, which has no foundation in any provision of the Anti-Dumping Agreement. Article 6.10 and 9.4 address the treatment of non-investigated respondents in cases where an authority has deemed the individual investigation of all respondents to be impracticable. No other provision of the Anti-Dumping Agreement addresses the treatment of non-investigated respondents and no provision of Viet Nam's Protocol of Accession or the accompanying Working Party Report addresses the treatment of non-investigated respondents. Thus, Articles 6.10 and 9.4 provide the exclusive basis for

determining the margins of dumping for non-investigated respondents. Neither provision contemplates a presumption of government control, differential treatment between government controlled and non-government controlled non-investigated producers and exporters, or the need for non-investigated producers or exporters to overcome a presumption of government control by responding to a questionnaire from the authorities. The recently released Panel Report in *EC – Fasteners* supports the position of Viet Nam on these issues.

14. As a consequence of these practices and the continued use of these practices by the United States, Vietnamese producers and exporters have been assessed duties in excess of the margin of dumping, including at the unwarranted rates imposed on separate rate and Vietnam-wide rate respondents; they continue to be assessed duties in excess of the margin of dumping as illustrated by the results of the fourth administrative review; and they have been denied the opportunity to ever demonstrate the absence of dumping and thereby obtain a termination of the anti-dumping measures as contemplated by Articles 11.1 and 11.3 of the Anti-Dumping Agreement. We hope that the Panel Report will serve to reinstate the rights of Vietnamese respondents under the Anti-Dumping Agreement which have been denied to them and continue to be denied to them by the practices of the United States.

15. In closing, I and my colleagues appearing on behalf of Viet Nam in this proceeding would like to thank the Panelists and the Secretariat for the time, effort and energy that each of you have devoted to this proceeding. We look forward to receiving your report in this proceeding.

ANNEX F-3

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

1. Consistently, throughout this dispute, Vietnam's arguments have failed to meaningfully address the specific rights and obligations as established by the covered agreements. Instead of addressing actual obligations to which Members agreed, Vietnam departs from the accepted rules of treaty interpretation and invents obligations found nowhere in the text of the covered agreements. At the end of its second written submission, Vietnam makes six specific requests for findings. We will clarify what each request would entail and, importantly, why the Panel should not do what Vietnam asks.

2. In its first request for findings, Vietnam asks the Panel to find:

> ***That the application of zeroing to individually investigated respondents in the second and third administrative reviews, and its continued application in the subsequent reviews, is inconsistent with Articles 9.3, 2.1, 2.4.2, and 2.4 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.***

3. Vietnam's claims under Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 fail because Vietnam has not demonstrated that any antidumping duties were applied in excess of the margin of dumping with respect to the individually examined exporters/producers in the second and third administrative reviews. As we have explained, Article 9.3 and Article VI:2 provide that any antidumping duty applied shall not exceed the margin of dumping. Because Vietnam has not established that any antidumping duty was applied at all, Vietnam has not established that any antidumping duty was applied in excess of the margin of dumping.

4. Vietnam asks the Panel nevertheless to find that the United States acted inconsistently with Article 9.3 because that provision limits the antidumping duty to the margin of dumping "as established under Article 2." Vietnam suggests that, "prior to reaching the additional obligations regarding duty assessment contained in Article 9.3, the authority must calculate the margin of dumping in accordance with Article 2." Vietnam's interpretation of Article 9.3 is incorrect and would be redundant of the obligations in Article 2, which are found within the text of that provision. In any event, however, this aspect of Vietnam's claim under Article 9.3 is dependent upon Vietnam's separate claims under Articles 2.1, 2.4.2, and 2.4 of the AD Agreement, which are without merit.

5. Article 2.1 describes the situation wherein "a product is to be considered as being dumped." The Appellate Body has explained that Article 2.1 is a "definitional" provision, which, "read in isolation, [does] not impose independent obligations."[1] It is not clear how the challenged measures could be found inconsistent with a definition.

6. Vietnam also asks the Panel to find that the application of zeroing to individually investigated respondents in the second and third administrative reviews is inconsistent with Article 2.4.2 of the AD Agreement. For this claim to succeed, the Panel must find that Article 2.4.2 applies to administrative reviews. However, Article 2.4.2, by its terms, is limited to the "investigation phase." The Appellate Body and prior panels have recognized distinctions between investigations and other

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

proceedings under the AD Agreement, 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. 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. 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. Thus, to retain the flexibility for Members to apply different assessment systems, it was necessary to limit the requirements of Article 2.4.2 to the investigation phase.

7. Lastly, Article 2.4 of the AD Agreement requires investigating authorities to make a "fair comparison" between normal value and export price and then provides detailed guidance as to how that fair comparison is to be made. Article 2.4 recognizes that the normal value and export price transactions to be compared may occur, among other things, with respect to models with differing physical characteristics, at distinct levels of trade, pursuant to different terms and conditions, and in varying quantities. 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. This all occurs prior to making the comparisons between export price and normal value to ensure that the comparisons are "fair" comparisons. Vietnam proposes an interpretation of Article 2.4 that would encompass the aggregation of comparisons, which takes place, if at all, after the comparisons are made. Nothing in the text of Article 2.4 indicates that the scope of that provision reaches such post-comparison aggregation.

8. The open-ended approach inherent in Vietnam's interpretation of the "fair comparison" obligation in Article 2.4 would result in disputes that are virtually impossible to resolve in any principled, text-based way. Several prior panels have cautioned against such a broad, open-ended understanding of the "fair comparison" requirement.

9. In its second request for findings, Vietnam asks the Panel to find:

> ***That the USDOC's zeroing methodology is, as such, inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.***

10. Vietnam asserted very late in this proceeding, in response to a written question from the Panel after the first substantive meeting, that it is seeking an "as such" finding against "zeroing." However, Vietnam has advanced no arguments and pointed to no evidence that would support a finding that any "zeroing methodology" exists as a measure that can be challenged "as such." As the Appellate Body explained in *US – Zeroing (EC)*:

> [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.[2]

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." Instead Vietnam merely cites repeatedly to prior panel and Appellate Body reports. While "[e]vidence 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,"[3] it is necessary to

[2] *US – Zeroing (EC) (AB)*, paras. 197-198 (citations omitted).
[3] *US – Continued Zeroing (AB)*, para. 190.

actually adduce the evidence and point to any such admissions. Vietnam has not done so with respect to the existence of any "zeroing methodology." The United States submits that the Panel lacks any evidentiary basis for finding that the "zeroing methodology" is a measure that is inconsistent, as such, with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.

11. In its third request for findings, Vietnam asks the Panel to find that:

> ***The use of margins of dumping determined using the zeroing methodology to calculate the all others ("separate") rate in the second and third administrative reviews is, as applied, inconsistent with Articles 9.4, 9.3, 2.4.2 and 2.4 of the Anti-Dumping Agreement.***

12. Article 9.4 of the AD Agreement, on the face of its text, establishes only a limited obligation related to 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. 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. And Article 9.4 certainly does not prohibit "zeroing."

13. To the extent that any prohibition of "zeroing" exists in the AD Agreement, it has been identified by panels and the Appellate Body in provisions other than Article 9.4. Even if the challenged measures were found to be inconsistent with those other provisions, that would not mean that, as a consequence, the measures are also inconsistent with the limited obligations in Article 9.4.

14. With respect to Article 9.3 of the AD Agreement, Vietnam's Second Written Submission asserts that "Article 9.3 prohibits the assessment of antidumping duties that exceed the margin of dumping properly calculated pursuant to Article 2. Thus, the margin of dumping for a respondent, individually examined or not, serves as the maximum for the amount of antidumping duties to be applied."[4] Even if Vietnam were correct that Article 9.3 establishes obligations with respect to the antidumping duty applied to companies not individually examined – and the United States believes that Vietnam's understanding is not correct – Vietnam's claim under Article 9.3 is nevertheless dependent on the Panel finding that the separate rates applied to companies not individually examined in the second and third administrative reviews were inconsistent with the covered agreements when they were originally calculated in the original investigation.[5] But those 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.

15. As we have noted, 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."[6] In this dispute, 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. 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.

---

[4] Vietnam Second Written Submission, para. 49 (emphasis added).
[5] *See* Vietnam First Written Submission, para. 214.
[6] *US – DRAMS*, para. 6.14.

16. Vietnam also claims that the separate rates applied to companies not individually examined in the second and third administrative reviews are inconsistent with Article 2.4.2 of the AD Agreement. Article 2.4.2 is limited to the "investigation phase" and does not apply to determinations in administrative reviews. Vietnam asks the Panel to ignore the limitation in the text of Article 2.4.2 in order to find that the determinations in the second and third administrative reviews are inconsistent with that provision. Furthermore, Commerce made no comparisons of normal value and export price during the second and third administrative reviews in order to determine the separate rates to apply to companies that were not individually examined. Commerce relied on rates calculated during the original investigation, but did not recalculate or otherwise reexamine those rates, and nothing in the AD Agreement required Commerce to do so. Thus, Commerce took no action during the second and third administrative reviews that was inconsistent with the obligations in Article 2.4.2 of the AD Agreement. For Vietnam's claim to succeed, the Panel would have to find that the pre-WTO dumping margin calculations performed during the investigation were inconsistent with Article 2.4.2 at the time they were calculated. But, as we have explained, that is not possible because the United States had no WTO obligations with respect to Vietnam at that time.

17. Vietnam also claims that the separate rates applied to companies not individually examined in the second and third administrative reviews are inconsistent with Article 2.4 of the AD Agreement. Article 2.4 establishes an obligation that a "fair comparison" be made between normal value and export price and then provides detailed guidance as to how that fair comparison is to be made. Commerce made no comparisons of normal value and export price during the second and third administrative reviews in order to determine the separate rates to apply to companies that were not individually examined. So, there can be no breach of the "fair comparison" requirement based on action taken by Commerce during the second and third administrative reviews.

18. To the extent that Vietnam's claim is dependent upon a finding that the dumping margins calculated during the investigation were inconsistent with Article 2.4 at the time that they were originally calculated, the claim must fail because such a finding is not possible. The dumping margin calculations made during the investigation were performed prior to Vietnam's accession to the WTO and the United States had no WTO obligations with respect to Vietnam at that time. Additionally, we would recall that Article 2.4 does not contain any obligations in respect of post-comparison aggregation, and it does not create an obligation to provide for offsets, or a prohibition of "zeroing."

19. In its fourth request for findings, Vietnam asks the Panel to find that the:

> ***Application of an all others ("separate") rate that fails to consider the results of the individually investigated respondents in the contemporaneous proceeding and produces an antidumping duty prejudicial to companies not selected for individual investigation is, as applied in the second and third administrative reviews, inconsistent with Articles 9.4, 17.6(i), and 2.4 of the Anti-Dumping Agreement.***

20. No provision of the AD Agreement establishes a contemporaneity requirement with respect to the antidumping duty rates applied to companies not selected for individual examination when all of the margins of dumping calculated for examined companies are zero or *de minimis* or based on facts available. Article 9.4 of the AD Agreement only establishes limited obligations relating to the maximum antidumping duty that may be applied to companies not individually examined. However, when all dumping margins calculated for individually examined companies are zero or *de minimis* or based on facts available, as was the case in the second and third administrative reviews, then Article 9.4 does not specify the maximum antidumping duty that may be applied. There is nothing in the text of Article 9.4 that establishes a contemporaneity requirement in such a situation.

21. Vietnam claims in its second written submission that "The actions of the individually investigated exporters, all of whom eliminated their dumping behavior, constitutes the entirety of the

evidence available on the response of exporters to the antidumping duty order."[7] Vietnam's claim is not relevant as a legal matter because nothing in the text of Article 9.4 conditions 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. Furthermore, Vietnam is incorrect as a matter of fact. In the first and second administrative reviews, numerous companies failed to respond to Commerce's questionnaires and Commerce accordingly determined the margin of dumping for these companies based on facts available using an adverse inference. These adverse findings with respect to dumping cannot be considered evidence that dumping in the industry had ceased, but Vietnam asks the Panel to ignore these facts.

22. With respect to Vietnam's claim under Article 17.6(i) of the AD Agreement, because Vietnam did not raise any claims under Article 17.6(i) in its panel request, no claims under this provision are within the Panel's terms of reference. Furthermore, Article 17.6(i) establishes a general obligation in respect of a dispute settlement panel's assessment of the facts of the matter. On its face, Article 17.6(i) does not impose any obligations 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 situation in which Article 9.4 of the AD Agreement does not specify the maximum antidumping duty that may be applied to companies not individually examined. Rather, Article 17.6(i) provides a specific standard for the Panel's examination of Commerce's assessment of the facts.

23. Vietnam contends 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 because "[t]he entire record before the USDOC evidenced an industry that did not dump subject merchandise above a *de minimis* amount" and thus, the rates assigned to companies not individually examined purportedly had "no basis in fact."[8] Nothing in the text of Article 9.4 conditions a Member's right to apply antidumping duties to companies that are not individually examined on a separate factual finding that other companies continued to dump during a particular period. Even if it did, though, Vietnam's claim would be undermined by the facts: a number of producers/exporters failed to cooperate in the first and second administrative reviews and Commerce therefore assigned to them antidumping duty rates determined on the basis of facts available. This is hardly evidence that dumping had stopped.

24. Vietnam asks the Panel to find that the challenged measures are inconsistent with Article 2.4 of the AD Agreement, this time because of the requirement in Article 2.4 that "the sales being compared be made 'at as nearly as possible the same time.'"[9] Vietnam asserts that this establishes a general contemporaneity requirement, including with respect to the application of antidumping duties to companies not individually examined. 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. This obligation 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. Nothing in the text of the AD Agreement supports the linkage that Vietnam attempts to establish between Articles 2.4 and 9.4.

25. Additionally, the margins of dumping calculated during the original investigation were not inconsistent with Article 2.4 at the time that they were calculated, both because the calculations were performed prior to Vietnam's accession to the WTO and because there is no evidence and Vietnam

[7] Vietnam Second Written Submission, para. 75.

[8] Vietnam Responses to Panel Questions, Question 22, paras. 60-61; *see also* Vietnam Responses to Panel Questions, Question 24, para. 65; *see also* Vietnam Second Written Submission, paras. 75-76, 80.

[9] Vietnam Responses to Panel Questions, Question 20, para. 52.

does not appear to suggest that the comparisons made during the original investigation were not made "in respect of sales made at as nearly as possible the same time."

26. In its fifth request for findings, Vietnam asks the Panel to find that:

> ***The application of an antidumping duty based on adverse facts available to the Vietnam-wide entity in the second and third administrative reviews, and its continued application in subsequent reviews, is inconsistent with Articles 6.8, 9.4, 17.6(i) and Annex II of the Anti-Dumping Agreement.***

27. As noted earlier, no claim under Article 17.6(i) of the AD Agreement is within the Panel's terms of reference, and, on its face, Article 17.6(i) does not impose any obligations on WTO Members. Vietnam appears to invoke Article 17.6(i) in relation to its argument that Commerce lacked sufficient evidence to justify treating the Vietnam-wide entity as a single exporter or producer comprised of companies that did not demonstrate their independence from the government. However, the United States and Vietnam agree that, as a general matter, an investigating 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.[10] In its second written submission, Vietnam confirms its view "that common control by the government of multiple entities may permit an authority to collapse this entity into a single entity and to apply a single rate to this single entity."[11]

28. The question is whether the facts of record in the second and third administrative reviews justified Commerce's determinations to treat the Vietnam-wide entity as a single exporter or producer. We have explained that the facts amply supported Commerce's determinations, and there is no basis for Vietnam's assertion that Commerce failed to make an "unbiased and objective" evaluation of the facts.

29. Article 6.8 and Annex II of the AD Agreement permit 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. Additionally, contrary to Vietnam's arguments, the quantity and value information requested was "necessary information" within the meaning of Article 6.8 and Annex II. The scope of "necessary information" is not limited only to that information used to calculate a dumping margin.

30. 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. 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. 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, relying on the same methodology used for the other separate rate companies in the third administrative review.

31. With respect to Vietnam's claim under Article 9.4 of the AD Agreement, as we have explained, Article 9.4 establishes a limited obligation with respect to the maximum antidumping duty that Members may apply to companies not individually examined. Where all the rates calculated for examined companies are zero or *de minimis*, as in the measures at issue in this case, then it is not possible to calculate a maximum antidumping duty according to the terms of Article 9.4, and

[10] *See, e.g.*, Vietnam Responses to Panel Questions, Question 35, para. 90.
[11] Vietnam Second Written Submission, para. 117.

Article 9.4 does not specify a maximum antidumping duty that may be applied to companies not individually examined.

32. In its last request for findings, Vietnam asks the Panel to find that:

> ***The USDOC's determinations in the second and third administrative reviews, and on a continuing basis, to limit the number of individually investigated respondents such that they restrict certain substantive rights under the Anti-Dumping Agreement is inconsistent with Articles 6.10, 6.10.2, 9.3, 11.1, and 11.3 of the Anti-Dumping Agreement.***

33. Article 6.10 of the AD Agreement does not require investigating authorities 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." Vietnam argues that Commerce's determinations were inconsistent with Article 6.10 because Commerce "made no effort to explore alternatives" to examine more exporters and producers when it limited its examination. Nothing in the text of Article 6.10, or any other provision of the AD Agreement, requires Commerce to "explore alternatives" as proposed by Vietnam.

34. With respect to Vietnam's claim under Article 6.10.2 of the AD Agreement, Vietnam itself has put before the Panel the evidence necessary to demonstrate that Commerce did not act inconsistently with the obligations in that provision. Article 6.10.2 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 provided by Vietnam in response to the Panel's written questions demonstrates that the "necessary information" was never submitted in either the second or third administrative reviews and this conclusively establishes that Commerce was under no obligation to determine individual margins of dumping for "voluntary respondents" in those proceedings.[12]

35. Vietnam now suggests that Commerce acted inconsistently with Article 6.10.2 by "discouraging" voluntary responses, contrary to the prohibition against doing so in the last sentence of that provision.[13] Vietnam offers no evidence of so-called "discouraging behavior" other than Commerce's determinations to limit its examination, which, as we have explained, are consistent with the requirements of Article 6.10. Commerce cannot be found to have acted inconsistently with one provision of the AD Agreement by virtue of its proper application of another provision.

36. Vietnam's assertion that Commerce acted inconsistently with Article 9.3 because it "failed throughout the shrimp antidumping proceeding to make any connection between the antidumping duty assigned to companies not selected for individual examination and their margin of dumping or any facts otherwise on the record" makes no sense.[14] Of course there is no connection between the antidumping duty applied to companies not individually examined and "their margin of dumping," because no margin of dumping was determined for them. If Vietnam's interpretation were accepted, Members would no longer have the right to limit the examination and would, in all cases, be required to determine individual margins of dumping for all companies. Vietnam's proposed interpretation reads the second sentence of Article 6.10, and all of Article 9.4, out of the AD Agreement.

37. Vietnam's claims under Articles 11.1 and 11.3 are likewise devoid of merit. Vietnam's claims under Articles 11.1 and 11.3 appear to be dependent on its claims that Commerce's determinations to limit its examination are inconsistent with Article 6.10 of the AD Agreement, but we have shown that they are not. A somewhat more disturbing implication of Vietnam's argument is that, regardless of whether Commerce's determinations are inconsistent with Article 6.10, the determinations to limit the

[12] *See* Vietnam Responses to Panel Questions, Question 42, para. 100.
[13] Vietnam Second Written Submission, para. 133.
[14] Vietnam Second Written Submission, para. 120.

examination nevertheless are inconsistent with Articles 11.1 and 11.3. But Commerce cannot be found to have acted inconsistently with one provision of the AD Agreement due to the proper exercise of U.S. rights under a separate provision of the AD Agreement.

38. Additionally, Vietnam's interpretation that Articles 11.1 and 11.3 "require that an authority permit revocation determinations on a company-specific basis" is incorrect and inconsistent with prior Appellate Body reports interpreting these provisions. The Appellate Body has confirmed that Article 11.1 does not impose any independent or additional obligations on Members[15] and that "Article 11.3 does not require investigating authorities to make their likelihood determination on a company-specific basis."[16] Vietnam's proposed interpretations have been considered before and rejected.

39. Finally, in its first, fifth, and sixth requests for findings, Vietnam asks the Panel to make findings related to the "continued application" of "zeroing," the "continued application" of "an antidumping duty based on adverse facts available to the Vietnam-wide entity," and Commerce's determinations "on a continuing basis" to limit its examination. 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.

40. Even if Vietnam had referenced a "continued use" measure in its panel request, such a measure appears to be a fictional construct 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). Such so-called "continued use" cannot be subject to dispute settlement because it could not be impairing any benefits accruing to Vietnam, and it consists of proceedings that had not resulted in "final action" at the time of the consultations request, as required by Article 17.4 of the AD Agreement.

41. Additionally, the facts in this dispute do not support a conclusion that the three challenged "practices" "would likely continue to be applied in successive proceedings."[17] In *US – Continued Zeroing*, 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 [had] made no finding confirming the use of the zeroing methodology in successive stages over an extended period of time whereby the duties are maintained."[18] 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 and hence no substantive findings that Commerce acted inconsistently with the AD Agreement or the GATT 1994 may be made with respect to those proceedings.[19]

42. 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.

---

[15] *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).

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

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

[18] *US – Continued Zeroing (AB)*, para. 194.

[19] *See US – Continued Zeroing (AB)*, para. 194.

43. We also note that Vietnam asks the Panel to expand the Appellate Body's reasoning in *US – Continued Zeroing* beyond "zeroing" to encompass the other "challenged practices", but Vietnam's claims regarding the other "challenged practices" are without merit, as we have shown.

44. Therefore, Vietnam cannot establish "a string of determinations, made sequentially ... over an extended period of time" with respect to any of the "challenged practices," and so its claims must fail.

45. For all of the reasons we have given, the United States submits that each of Vietnam's claims is without merit and we thus respectfully request that the Panel reject Vietnam's claims.