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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS429/R.

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ANNEX A-1

WORKING PROCEDURES FOR THE PANEL

UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM (DS429)

WORKING PROCEDURES FOR THE PANEL

Revised 9 August 2013

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be submitted no later than ten days after the written submission is presented to the Panel, unless a different deadline is granted by the Panel upon showing of good cause.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. The parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information, set out in Annex 1 to these Working Procedures.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Vietnam requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Vietnam shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised in writing as promptly as possible, and in any case no later than the deadline for the next written filing by the objecting party or third party following the submission which contains the translation in question. In exceptional circumstances, the Panel may grant an extension to this deadline upon good cause shown. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Vietnam could be numbered VNM-1, VNM-2, etc. If the last exhibit in connection with the first submission was numbered VNM-5, the first exhibit of the next submission thus would be numbered VNM-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Vietnam to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Vietnam presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by Vietnam. If the respondent chooses not to avail itself of that right, the Panel shall invite Vietnam to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than responses to questions, and its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages, and each summary of statements presented at a substantive meeting shall be limited to no more than 5 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 7 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 6 CD-ROMS/DVDs and 6 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic

copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to XXXX@wto.org, XXXX@wto.org and XXXX@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES ON BCI

(ANNEX 1 TO THE WORKING PROCEDURES FOR THE PANEL)

Adopted 9 August 2013

1. The following procedures apply to business confidential information as defined in paragraph 2 that is submitted in the course of the Panel proceedings. These procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any such business confidential information if the person who provided the information in the course of the reviews referenced in paragraph 2 agrees in writing to make the information publicly available.

2. For the purposes of the Panel proceedings, "business confidential information" ("BCI") means information previously submitted to the U.S. Department of Commerce as confidential information protected by Administrative Protective Order ("APO") in the course of the anti-dumping duty reviews at issue (Investigation No. A-552-802) that is submitted to the Panel by the Viet Nam or the United States.

3. The first time that a party submits to the Panel BCI from an entity that submitted that information in the reviews at issue, the party shall also provide, with a copy to the other party, an authorizing letter from the entity. That letter shall authorize both Viet Nam and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those reviews.

4. No person shall have access to BCI except a member of the WTO Secretariat or the Panel, an employee of a party or third party, or an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the proceedings at issue. Where an outside advisor has received BCI under the relevant APO, nothing in these procedures alters that outside advisor's obligations under the APO.

5. A party or third party having access to BCI submitted in these Panel proceedings shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Any information submitted as BCI under these procedures shall only be used for the purposes of this dispute and for no other purpose. Each party and third party is responsible for ensuring that its employees and its outside advisors, if any, comply with these procedures.

6. A party submitting BCI, or a party or third party referring to BCI, in any written submission (including in any exhibits) shall mark the cover and the top of each page of the document containing any such information with the words "Contains Business Confidential Information". The specific information in question shall be enclosed in double brackets (i.e., [[xx.xxx.xx]]). Exhibits containing BCI shall be numbered to reflect that fact by including "(BCI)" in the exhibit number (e.g., Exhibit US-1(BCI)). A non-confidential version, clearly marked as such, of any written submission (including any exhibits) containing BCI shall be submitted pursuant to paragraph 2 of the Working Procedures within ten working days after the submission of the confidential version containing the BCI. The non-confidential version shall exclude all BCI.

7. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. Each party or third party filing a written version of an oral statement containing BCI (a "written BCI oral statement") shall mark the document as set forth in paragraph 6, first and second sentences. A party or third party filing a written BCI oral statement

shall file a non-confidential version of its written BCI oral statement no later than two working days following the meeting where the statement was made. The non-confidential version shall exclude all BCI.

8. Any BCI information that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium and clearly marked with the statement "Business Confidential Information" in the title of the binary-encoded files.

9. The Panel shall not disclose in its report, or in any other way, any BCI. The Panel may, however, make statements of conclusion based on such information. Before the Panel circulates its final report, the Panel will give each party an opportunity to review the report to ensure that it does not contain any BCI.

10. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of any appeal of the Panel's report.

ANNEX A-3

PRELIMINARY RULING

1 INTRODUCTION

1.1. On 31 July 2013, prior to Viet Nam filing its first written submission, the United States submitted a request for preliminary rulings. The United States' request objects to the inclusion of certain claims and measures in Viet Nam's panel request. Specifically, the United States requests that the Panel find that:

a. the sixth administrative review is not within the panel's terms of reference because it was not listed as a measure at issue in Viet Nam's request for consultations;

b. the "use of zeroing in original investigations, new shipper reviews and changed circumstances reviews" are not measures within the panel's terms of reference because they were not listed as measures at issue in Viet Nam's request for consultations;

c. the claim set forth in Viet Nam's panel request under Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention") is outside the Panel's terms of reference because the Vienna Convention is not a covered agreement; and

d. the claim set forth in Viet Nam's panel request regarding the US Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act is not within the Panel's terms of reference because the SAA is not a measure susceptible to dispute resolution.

1.2. Viet Nam responded to the United States' request on 5 August 2013.[1] The United States replied to Viet Nam's response on 13 August 2013, and two third parties, the European Union and China, filed observations regarding the United States' request on 14 August 2013.[2] On 19 August 2013, Viet Nam provided comments on the United States' reply.[3] Finally, on 27 August 2013, Viet Nam filed its first written submission.

1.3. We consider each of the objections raised by the United States in turn.

2 US PRELIMINARY OBJECTION WITH RESPECT TO THE SIXTH ADMINISTRATIVE REVIEW

2.1 Arguments of the parties

2.1.1 United States

2.1. The United States submits that Viet Nam's panel request lays out claims with respect to the sixth administrative review, which was not mentioned in the consultations request. The United States acknowledges that there need not be a "precise and exact identity" of measures between a request for consultations and a panel request "provided that the 'essence' of the challenged measures had not changed" and "[a]s long as the complaining party does not expand the scope of the dispute."[4] However, the United States submits that a comparison of the respective parameters of Viet Nam's consultations and panel requests shows that the latter expanded the

[1] Viet Nam's response to the United States' request for preliminary rulings.

[2] United States' reply to Viet Nam's response to the US request for preliminary rulings; China's submission on the United States' request for preliminary rulings; European Union comments on the US request for a preliminary ruling.

[3] Viet Nam's response to the United States' reply for the request for preliminary rulings.

[4] United States' request for preliminary rulings, paras. 4-5 (quoting Appellate Body Report, *US – Customs Bond Directive*, para. 293, in turn citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 137).

scope and changed the essence of its consultations request by including measures – notably the sixth administrative review – that were not the subject of its consultations request.[5]

2.2. The United States further argues that the sixth administrative review did not constitute a measure pursuant to Article 4.4 of the DSU since it was not concluded at the time of Viet Nam's request for consultations; the United States argues that a determination that is not final cannot be a measure under Article 4.4 of the DSU.[6] Because it could not have been the subject of consultations, the United States submits, this measure is not within the panel's terms of reference.[7]

2.3. In response to Viet Nam's arguments, the United States argues that just because a complaining party makes the same claims regarding a different measure does not mean that the responding party's response to those claims will be the same for both measures.[8] The United States also disagrees with the proposition that all administrative reviews involving the same product are of the "same essence", because the facts, record evidence, determinations and resulting anti-dumping rates may all differ. For the United States, each administrative review determination is a separate and discrete measure, a situation different from one in which a measure replaces or amends another measure after the panel is established without affecting the essence of the measure on which consultations were held.[9]

2.4. The United States submits that the reference to on-going administrative reviews in the consultations request does not constitute the identification of a "measure" subject to dispute settlement because this reference addresses an indeterminate number of potential future measures. The United States submits that Article 3.3 of the DSU makes reference to dispute settlement pertaining to situations in which benefits accruing to Members under the covered agreement are presently being impaired. Measures not yet in existence at the time of a request for consultations cannot be considered to be impairing benefits, and it would be impossible to consult on such measures. Moreover, it would be impossible for a non-existent measure to be "affecting" the operation of a covered agreement, as further required by Article 4.2 of the DSU.[10] The United States relies, in this respect, on the statement of the Appellate Body in *US – Upland Cotton*, that "the present tense of the phrase 'affecting the operation of any covered agreement' denotes that the effects of such measures must relate to the present impact of those measures on the operation of a covered agreement".[11] In sum, the United States submits, a "supposed future measure" that does not yet – and may never – exist is not a "measure" at that point in time, may never be one, and cannot be a measure having a present impact on the operation of a covered agreement.

2.2 Viet Nam

2.5. Viet Nam asks the Panel to find that the sixth administrative review falls within its terms of reference. Viet Nam cites prior Appellate Body decisions in which the Appellate Body considered that there need not be a precise identity between the measures identified in the request for consultations and panel request and that the relevant question is whether the addition of a measure in the panel request changes the "essence" of the challenged measure.[12] Viet Nam considers that its consultations request identified the sixth administrative review as a measure at issue through the reference to "any other ongoing or future anti-dumping administrative reviews" related to the Shrimp from Viet Nam anti-dumping investigation, and through the reference to the "continued use" of the practices identified in its request in subsequent reviews.[13]

2.6. Viet Nam considers that the United States' reference to Article 3.3 of the DSU means that the United States would have Viet Nam file new consultations and panel requests and force the DSB to

[5] United States' request for preliminary rulings, para. 5.
[6] United States' request for preliminary rulings, para. 6; United States' reply to Viet Nam's response to the US request for preliminary rulings, para. 5.
[7] United States' request for preliminary rulings, para. 6.
[8] United States' reply to Viet Nam's response to the US request for preliminary rulings, para. 5.
[9] United States' reply to Viet Nam's response to the US request for preliminary rulings, para. 6.
[10] United States' reply to Viet Nam's response to the US request for preliminary rulings, paras. 2-4.
[11] United States' reply to Viet Nam's response to the US request for preliminary rulings, para. 4 (quoting Appellate Body Report, *US – Upland Cotton*, para. 261).
[12] Viet Nam's response to the United States' request for preliminary rulings, para. 8.
[13] Viet Nam's response to the United States' request for preliminary rulings, paras. 9-10.

compose a new panel to examine its claims with respect to the sixth administrative review, concerning the same issues that are before this Panel. Viet Nam argues that this does not further that Article's objective of prompt settlement of disputes.[14] Viet Nam also submits that contrary to the United States' arguments, the sixth administrative review is not a measure "that may never exist". Rather it is a measure that does exist and is having a significant present impact on Viet Nam. Viet Nam adds that it is for this reason that it identified in its consultations request "any other ongoing or future administrative reviews", a clear reference to the sixth administrative review that was on-going at the time of the consultations request.[15] Viet Nam submits that the United States' reference to Article 4.4 of the DSU is equally misguided – the Appellate Body has explained that there need not be a precise and exact identity between the measures identified in the consultations request and panel request.[16]

2.3 Arguments of the third parties

2.3.1 China

2.7. China does not take a position on whether the sixth administrative review falls within the Panel's terms of reference, but submits a number of observations to the Panel. First, China recalls that the Appellate Body has indicated that "measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference".[17] China submits that it would be inappropriate to *a priori* exclude that a review that is on-going at the time of a request for consultations could, in certain circumstances, also constitute a "measure" subject to consultations. China adds that panels and the Appellate Body have sometimes found that a review that is on-going at the time the matter was referred to a panel could be a "measure" within that panel's terms of reference.[18]

2.8. China also notes that in *US – Continued Zeroing*, the panel and the Appellate Body found that the inclusion in the panel request of certain administrative and sunset reviews pertaining to the same anti-dumping duties that had not been identified in the consultations request did not expand the scope or change the essence of the dispute, and further noted that the legal basis of the claims raised were the same. Hence, China submits, the fact that the sixth administrative review was not subject to consultations does not necessarily lead to the conclusion that the panel request expands the scope or changes the essence of the dispute; rather, the Panel should examine whether the sixth administrative review relates to the same anti-dumping duty as other administrative reviews explicitly listed in the consultations request and whether the legal basis of the claims raised is the same.[19]

2.3.2 European Union

2.9. The European Union agrees with Viet Nam that the sixth administrative review falls within the Panel's terms of reference. The European Union recalls that the relevant question in determining whether an additional measure identified in the panel request falls within the Panel's terms of reference is whether the "scope of the dispute" was expanded as a result, not (as the United States posits) whether the measure existed in accordance with Article 4.4 of the DSU. The European Union argues that a measure that closely relates to measures explicitly identified in the consultations request may be in the process of being adopted when the request for consultations is submitted. The existence or adoption of the measure should not be an obstacle to requesting consultations on a matter whose scope is precisely delimited and then identifying such an additional measure in the panel request.[20]

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[14] Viet Nam's response to the United States' reply for the request for preliminary rulings, para. 5.
[15] Viet Nam's response to the United States' reply for the request for preliminary rulings, para. 6.
[16] Viet Nam's response to the United States' reply for the request for preliminary rulings, para. 7.
[17] China's submission on the United States' request for preliminary rulings, paras. 2-9.
[18] China's submission on the United States' request for preliminary rulings, para. 6 (referring to Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 124–127; Panel Report, *US – Continued Zeroing*, paras. 7.11 and 7.28).
[19] China's submission on the United States' request for preliminary rulings, paras. 7-9 (quoting, *inter alia*, Panel Report, *US – Continued Zeroing*, para. 7.28; and Appellate Body Report, *US – Continued Zeroing*, paras. 228 and 231).
[20] European Union's comments on the US request for a preliminary ruling, paras. 13-17.

2.10. The European Union submits that the language used by Viet Nam in its consultations request made it clear that it intended to include on-going and future anti-dumping administrative reviews in the Shrimp from Viet Nam anti-dumping investigation. Thus, the inclusion of the sixth administrative review did not extend the scope of the matter covered in the consultations request. The European Union notes the similar ruling by the Appellate Body in *US – Continued Zeroing*.[21]

2.4 Evaluation by the Panel

2.11. Pursuant to Article 7.1 of the DSU, a panel's terms of reference are normally defined on the basis of the panel request. Furthermore, the Appellate Body has clarified that pursuant to the terms of Article 4 of the DSU, which set forth the requirements applicable to consultations and consultations requests[22], and those of Article 6.2 of the DSU, governing panel requests[23], the request for consultations constitutes a prerequisite for the panel request and as a result circumscribes the scope of the panel request and, therefore, the panel's terms of reference.[24]

2.12. The Appellate Body has indicated that Articles 4 and 6 of the DSU "set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel"[25], and that "consultations provide the parties an opportunity to define and delimit the scope of the dispute between them".[26] The Appellate Body has also held that Articles 4 and 6 do not "require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel".[27] Thus, the Appellate Body has indicated that:

> As long as the complaining party does not expand the scope of the dispute, we hesitate to impose too rigid a standard for the "precise and exact identity" between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request.[28]

2.13. Thus, the relevant question before the Panel is not whether the measures at issue were included in the request for consultations but, rather, whether the "scope of the dispute" was expanded as a result of the inclusion of additional measures in the panel request.[29] There is no disagreement between the parties on this point. Rather, the parties disagree on the application of this principle to the case at hand with respect to the sixth administrative review.

2.14. In the present case, Viet Nam's request for consultations identifies as "measures at issue" not only the fourth and fifth administrative reviews, but also:

> [a]ny other ongoing or future anti-dumping administrative reviews, and the preliminary and final results thereof, related to the imports of certain frozen warmwater shrimp from Viet Nam (DOC Case A-552-802), as well as any assessment

[21] European Union's comments on the US request for a preliminary ruling, paras. 18-22 (quoting Appellate Body Report, *US – Continued Zeroing (EC)*, para. 231).

[22] Article 4.4 provides, in particular, that:
Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

[23] Article 6.2 of the DSU provides, in relevant part:
The request for establishment of the panel ... shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

[24] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 58.

[25] Appellate Body Report, *Brazil – Aircraft*, para. 131.

[26] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.

[27] Appellate Body, *Brazil – Aircraft*, para. 132. (original emphasis)

[28] Appellate Body Report, *US – Upland Cotton*, para. 293 (citing Appellate Body Report, *Brazil – Aircraft*, para. 132). (footnote omitted)

[29] Appellate Body Report, *US – Continued Zeroing*, para. 224 (referring to Appellate Body Report, *US – Upland Cotton*, para. 293); see also Panel Report, *US — Orange Juice (Brazil)*, para. 7.18.

> instructions, cash deposit requirements, and revocation determinations issued pursuant to such reviews.[30]

The reference to "[a]ny other ongoing or future" administrative reviews in our view clearly reflects an intention on the part of Viet Nam to include additional, and future, related measures within the scope of the dispute.

2.15. We note that an objection similar to that raised by the United States in its request was rejected by the panel and the Appellate Body in *US – Continued Zeroing*. In that case, the United States objected to the addition in the panel request of 14 anti-dumping determinations (administrative reviews and sunset reviews) that had not been included in the consultations request.[31] The panel in that case considered that the European Communities' consultations request and panel request referred "to the same subject matter, the same dispute".[32] It reasoned that the 38 determinations that had been included in the request for consultations and the 14 determinations that were added in the panel request:

> concern different determinations pertaining to the same products originating in the same countries. Furthermore, these two groups of measures entail the alleged use of the same methodology, zeroing, which is the gist of the EC's claims before us. … the substantive similarity between the two sets of measures at issue, and the fact that they concern the same country and the same product outweigh the fact that they represent independent determinations under US law.[33]

2.16. In reaching the conclusion that the additional measures fell within its terms of reference, the panel also attached importance to the fact that the EC's claims with respect to the additional measures were the same as those it made with respect to the measures set out in the request for consultations. The panel noted that "the legal nature of the EC's claims regarding the additional 14 measures does not in any way differ from that of the 38 measures identified in the EC's consultations request" and that "the 14 measures entailed the same types of zeroing methodology as the 38 measures."[34]

2.17. The panel's finding rejecting the US objection was upheld by the Appellate Body. The Appellate Body attached importance to the fact that the consultations request made clear that, in addition to the zeroing methodology, the European Communities challenged the "*outcome* of the administrative reviews", the "imposition of definitive *duties*", and "the continuation of the anti-dumping [*duty*]" resulting from the proceedings listed in the requests.[35] Thus, the Appellate Body concluded, the measures referred to in the consultations request included the duties imposed, or continued to be applied, as a result of the specific anti-dumping proceedings listed in the annexes. The Appellate Body noted that all of the 14 additional measures identified in the panel request pertained to the same anti-dumping duties that were included in the consultations request. Some were sunset review determinations continuing anti-dumping duties in relation to which successive administrative reviews were identified in the consultations request. Others were more recent administrative reviews (under the same anti-dumping order), than the ones listed in the consultations request, including two final determinations issued subsequent to preliminary determinations that were listed in the consultations request. Hence, the proceedings listed in the consultations request and the panel request were "successive stages subsequent to the issuance of the same anti-dumping duty orders".[36]

2.18. The Appellate Body also noted that both the consultations request and the panel request made clear that the European Communities was challenging the proceedings at issue because of the USDOC's use of the WTO-inconsistent zeroing methodology which, it alleged, the USDOC "systematically" applied in all types of review proceedings. In sum, the Appellate Body concluded,

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[30] WT/DS429/1, G/L/980, G/ADP/D91/1, p. 1, point (5).
[31] Panel Report, *US – Continued Zeroing*, paras. 7.17-7.28; Appellate Body Report, *US – Continued Zeroing*, paras. 220-236.
[32] Panel Report, *US – Continued Zeroing*, para. 7.28.
[33] Panel Report, *US – Continued Zeroing*, para. 7.25.
[34] Panel Report, *US – Continued Zeroing*, para. 7.28.
[35] Appellate Body Report, *US – Continued Zeroing*, para. 226. (emphasis added by the Appellate Body)
[36] Appellate Body Report, *US – Continued Zeroing*, para. 228.

the 14 additional measures "relate to the same duties identified in the consultations request, and the legal basis of the claims raised is the same."[37]

2.19. As in *US – Continued Zeroing*, the additional measure in the present case is one which constitutes a subsequent step in the imposition of anti-dumping duties under a single anti-dumping order. Moreover, as was the case in *US – Continued Zeroing*, Viet Nam's challenge of the sixth administrative review proceeds under the same provisions of the covered agreement as its challenge to the two administrative reviews that had already been completed at the time of Viet Nam's request for consultations, and which Viet Nam had explicitly identified therein. Finally, as noted above, Viet Nam's request for consultations specifically identified "[a]ny other ongoing or future anti-dumping administrative reviews, and the preliminary and final results thereof" as part of the matter submitted to the dispute settlement in that request. In these circumstances, we cannot conclude that the inclusion of the sixth administrative review – which was under way at the time of the request for consultations[38] – has expanded the scope of the dispute.

2.20. The United States argues that the sixth administrative review is legally distinct from the two administrative reviews that were listed by name in the consultations request and for this reason, it cannot properly fall within the Panel's terms of reference. We do not consider that the inclusion in a panel request of a measure that is legally distinct from the measures included in the consultations request necessarily has the effect of expanding the scope of the dispute. In addition, as we have already noted, and as the Appellate Body found in *US – Continued Zeroing* in rejecting the same argument, the determinations identified in both the consultations request and the panel request "derive from the same underlying legal basis, that is, the anti-dumping duty orders issued pursuant to the original investigation[] in which dumping, material injury, and the causal link between the two were determined."[39]

2.21. We note that the United States relies on Articles 3.3, 4.2 and 4.4 of the DSU for the proposition that measures not yet in existence at the time of the request for consultations are not challengeable before a dispute settlement panel.[40] The United States relies, *inter alia*, on the Appellate Body's statement in *US – Upland Cotton* that "the present tense of the phrase 'affecting the operation of any covered agreement' denotes that the effects of such measures must relate to the present impact of those measures on the operation of a covered agreement".[41] We note, however, that this statement was made in the context of the Appellate Body discussing whether a party may request consultations on expired measures. We do not read the statement as reflecting a conclusion by the Appellate Body that a complaining party is precluded from requesting consultations with respect to a matter comprised in part of measures not yet in existence at the time of the request.[42]

2.22. In addition, the United States cites the report of the panel in *US – Upland Cotton*, where the panel found that payments under a legislative act that was listed in the *panel request* but had not yet been adopted at the time of the submission of that request could not fall within the Panel's

[37] Appellate Body Report, *US – Continued Zeroing*, para. 228.

[38] The sixth administrative review in the USDOC's anti-investigation concerning certain Shrimp from Viet Nam was initiated on 31 March 2011, the preliminary results of that administrative review were issued on 7 March 2012 and the final results on 11 September 2012 (USDOC, Initiation Notice for Sixth Administrative Review (31 March 2011), Exhibit VN-16; USDOC, Preliminary Results for Sixth Administrative Review (7 March 2012), Exhibit VN-19; USDOC, Final Results and Accompanying Issues and Decision Memorandum for Sixth Administrative Review (11 September 2012), Exhibit VN-20. The USDOC issued amended final results of the sixth administrative review on 18 October 2012 (USDOC, Amended Final Results for Sixth Administrative Review (18 October 2012), Exhibit VN-22). Viet Nam submitted its request for consultations on 22 February 2012 (WT/DS429/1, G/L/980, G/ADP/D91/1), and requested the establishment of a panel on 20 December 2012 (WT/DS429/2). Viet Nam submitted a revised request for the establishment of the panel on 17 January 2013 (WT/DS429/2/Rev.1).

[39] Appellate Body Report, *US – Continued Zeroing*, para. 231.

[40] United States' reply to Viet Nam's response to the US request for preliminary rulings, paras. 2-4.

[41] United States' Reply to Viet Nam's response to the US request for preliminary rulings, para. 4 (quoting Appellate Body Report, *US – Upland Cotton*, para. 261).

[42] We note, in this regard, that the Appellate Body added that the fact that "the representations of the Member requesting consultations must indicate that the effects are occurring in the present" "does not exclude the possibility that the effects of a measure may occur in future". (Appellate Body Report, *US – Upland Cotton*, footnote 205).

terms of reference.[43] The United States also cites the report of the panel in *Indonesia – Autos*, asserting that the panel in that dispute "agree[d] with the responding party that a measure adopted after the establishment of the panel was not within the panel's terms of reference".[44] However, the *Indonesia – Autos* panel found that the measure in question did not fall within its terms of reference because it was not identified in the panel request, not, as the United States describes, because it had not been adopted at the time of the panel request. In any event, even on the United States' reading, these two panel findings concern the question of whether measures adopted **after the submission of the panel request or the establishment of the panel** may fall within a panel's terms of reference. The question before us concerns measures that were adopted **after the submission of the request for consultations, but before the submission of the panel request**. The findings of prior panels and of the Appellate Body on this issue make it clear that a measure may fall within a panel's terms of reference even if it is adopted or issued after the request for consultations.

3 US PRELIMINARY OBJECTION WITH RESPECT TO VIET NAM CLAIMS CONCERNING THE USDOC'S "USE OF ZEROING" IN ORIGINAL INVESTIGATIONS, NEW SHIPPER REVIEWS AND CHANGED CIRCUMSTANCES REVIEWS

3.1. Viet Nam's panel request sets forth "as such" and "as applied" claims with respect to the USDOC's use of zeroing in, *inter alia*, original investigations, new shipper reviews, and changed circumstances reviews:

> Viet Nam considers the above-mentioned laws and procedures by the USDOC to be, as such and as applied in a continued and ongoing basis, inconsistent with several provisions of the Anti-Dumping Agreement, GATT 1994, and the Marrakesh Agreement. In original investigations, periodic reviews, new shipper reviews, sunset reviews, and certain changed circumstances reviews, USDOC's use of zeroing is inconsistent with …
>
> Moreover, Viet Nam challenges the USDOC's use of the zeroing methodology in the original investigation and the first, second, third, fourth, fifth, and sixth administrative reviews, (1) to the extent that this practice impacted the USDOC's revocation and five-year "sunset" review determinations in the measures at issue and (2) to the extent that these determinations demonstrate the USDOC's continued and ongoing use of this practice throughout the full course of the shrimp anti-dumping proceeding.[45]

3.2. The United States submits that the request for consultations refers to only one original investigation, the original investigation on certain Shrimp from Viet Nam, and notes that Viet Nam's panel request makes it clear that that determination is being challenged only to the extent that it has an effect on subsequent reviews. The United States further submits that Viet Nam's consultations request does not otherwise include a challenge to the use of zeroing broadly in original investigations, and does not challenge the use of zeroing in new shipper reviews or certain changed circumstances reviews. Consequently, the United States argues, original investigations in general, and new shipper and changed circumstances reviews are not within the Panel's terms of reference.[46]

3.3. Viet Nam indicates in its response to the United States' request for preliminary rulings, that it is not challenging the use of zeroing, as applied, to these particular types of proceedings:

> on the United States' concern regarding Viet Nam's reference to the use of zeroing in "original investigations," "new shipper reviews," and "certain changed circumstances reviews," Viet Nam is not challenging the use of zeroing, as applied, to these particular types of proceedings. Viet Nam's panel request makes clear that the "zeroing" as applied claims are limited to the fourth, fifth, and sixth administrative

[43] United States' Reply to Viet Nam's response to the US request for preliminary rulings, footnote 13 (referring to Panel Report, *US – Upland Cotton*, para. 7.158).

[44] United States' reply to Viet Nam's response to the US request for preliminary rulings, footnote 13 (referring to Panel Report, *Indonesia – Autos*, para. 14.3).

[45] WT/DS429/2/Rev.1, section 2(a)(ii).

[46] United States' request for preliminary rulings, para. 7.

> reviews. The original investigation and the sunset review are relevant to the extent that zeroing affects the Panel's analysis on the claims that are particular to the sunset review.[47]

Viet Nam adds that its consultations and panel requests also identify an "as such" claim with respect to the USDOC's "zeroing practice".

3.4. In its response to the United States' reply for the request for preliminary ruling, Viet Nam further clarifies that it is not challenging, *inter alia*, the use of zeroing in original investigations, new shipper reviews, and changed circumstances reviews "as measures". According to Viet Nam, inclusion of these "items" in the panel request "was warranted because of their relevance to the measures that are being challenged".[48]

3.5. We read these responses as indicating that Viet Nam does not intend to pursue any claim with respect to original investigations – other than with respect to the original investigation in the USDOC's Shrimp proceedings, insofar as it affects the sunset review – or with respect to new shipper reviews or changed circumstances reviews. We note that consistent with our understanding of Viet Nam's responses, Viet Nam formulates no arguments in support of any claim in respect of these types of proceedings in its first written submission. This being the case, we do not consider it necessary to rule on this aspect of the United States' request for preliminary rulings.

4 US PRELIMINARY OBJECTION WITH RESPECT TO VIET NAM'S CLAIM UNDER ARTICLE 31 OF THE VIENNA CONVENTION

4.1. Viet Nam's panel request sets forth a claim with respect to the USDOC's limitation of the number of respondents selected for full investigation or review under, *inter alia*,

> Article 31 of the Vienna Convention on the Law of Treaties because the USDOC's practice does not comport with the overall purpose and intent of the Anti-Dumping Agreement, namely, the fair and effective imposition of anti-dumping duties so as to prevent the sale of goods for less than fair value.[49]

4.2. The United States requests that the Panel find that this claim does not fall within its terms of reference. The United States argues that the Vienna Convention is not a "covered agreement" as defined in the DSU.[50] Viet Nam indicates that it did not and does not intend to assert a claim under the Vienna Convention.[51]

4.3. In light of this clarification, we do not consider it necessary to rule on this aspect of the United States' request for preliminary rulings.

5 US PRELIMINARY OBJECTION WITH RESPECT TO THE STATEMENT OF ADMINISTRATIVE ACTION (SAA) ACCOMPANYING THE URUGUAY ROUND AGREEMENTS ACT

5.1. Viet Nam's panel request indicates that it is made with respect to, *inter alia*, "Section 129 of the Uruguay Round Agreements Act ("URAA"), 19 U.S.C. §3538, as elaborated upon in the Statement of Administrative Action accompanying the URAA and as implemented by the relevant United States authorities."[52]

5.2. In addition, in section 2(f)(i) of its panel request, Viet Nam challenges the temporal aspect of the United States' implementation of adverse DSB rulings and recommendations under Section 129. The request alleges that Viet Nam's reading of Section 129 as requiring that implementation only be made effective with respect to unliquidated entries entered or withdrawn from warehouse on or after the date on which the USTR directs implementation "is confirmed by

[47] Viet Nam's response to the United States' request for preliminary rulings, para. 3.
[48] Viet Nam's response to the United States' reply for the request for preliminary ruling, paras. 2-3.
[49] WT/DS/429/2/Rev.1, point 2(c)(ii)6.
[50] United States' request for preliminary rulings, paras. 9-10.
[51] Viet Nam's response to the United States' request for preliminary rulings, para. 4.
[52] WT/DS429/2/Rev.1, point2(9).

the Statement of Administrative Action ("SAA"), which has been properly recognized as a definitive statement on operation of the URAA", adding that "[t]he SAA is the most probative authority available for purposes of interpreting the language of the URAA." The request indicates that the US practice with respect to implementation of DSB recommendations and rulings:

> is applied pursuant, in particular, to the following United States laws and measures:
>
> 1. Section 129 of the URAA, codified as 19 U.S.C. § 3538;
>
> 2. the United States Statement of Administrative Action that accompanied the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. 1.

5.3. The United States contends that Viet Nam's panel request appears to identify the SAA as a measure at issue in the dispute. The United States submits that the SAA is not a measure susceptible to dispute resolution because it does not have any legal effect independent of the relevant US statute or regulation.[53]

5.4. Viet Nam indicates that it did not and does not intend to assert a claim with respect to the SAA.[54]

5.5. In light of this clarification, we do not consider it necessary to rule on this aspect of the United States' request for preliminary rulings.

6 CONCLUSION

6.1. On the basis of the foregoing, we find that the USDOC's final determination in the sixth administrative review in its anti-dumping investigation of certain Shrimp from Viet Nam, as well as the imposition of anti-dumping duties and cash deposit requirements pursuant to this determination, fall within our terms of reference.

6.2. In light of the clarifications provided by Viet Nam in its responses to the United States' request for preliminary rulings concerning the claims it is pursuing, we do not consider it necessary, at this time, to make any findings with respect to the other objections formulated by the United States in its request. However, the Panel reserves the right to revisit these issues, as well as any other issues pertaining to its terms of reference, as necessary, in its Final Report or at any other time during the dispute.

6.3. This preliminary ruling will become an integral part of the Panel's final report, subject to any changes that may be necessary in light of comments received from the parties at the interim review stage.

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[53] United States' request for preliminary rulings, paras. 11-16.
[54] Viet Nam's response to the United States' request for preliminary rulings, para. 5.

ANNEX B

ARGUMENTS OF VIET NAM

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ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF VIET NAM

I. INTRODUCTION

1. Viet Nam's First Written Submission provides the factual context and legal arguments challenging certain practices used by the United States Department of Commerce ("USDOC") in a general and prospective manner and in the context of the ongoing anti-dumping proceedings involving certain shrimp products from Viet Nam. Each of these practices limits the ability of Vietnamese exporters and producers to prove the absence of dumping, resulting in the continuation of an anti-dumping duty order for companies that have gone to great lengths to alter their conduct to eliminate dumping.

2. The purpose of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement") and *Article VI of the General Agreement on Tariffs and Trade 1994* ("GATT 1994") is to set the rules for the imposition of anti-dumping duties intended "to offset or prevent dumping". Administering authorities are required to adhere to the provisions therein so that anti-dumping duties are imposed only where a party is properly found to sell merchandise for less than fair value. The general principle contained in Article 11.1 of the Anti-Dumping Agreement is that following the imposition of anti-dumping duties, the duties should remain in effect "only as long as and to the extent necessary to counteract dumping which is causing injury". Articles 11.2 and 11.3 specify the mechanisms provided to companies subject to anti-dumping duties in order to obtain revocation of those duties.

3. Yet, the practices repeatedly adopted by the USDOC in the ongoing anti-dumping proceeding of shrimp from Viet Nam have frustrated achievement of the general principle of Article 11.1. This case contests several of the practices that have been used by the USDOC in this anti-dumping proceeding: (1) application of the zeroing methodology to determine the margins of dumping for individually investigated respondents and for calculation of the "all others" rate; (2) application of an NME-wide entity rate based on adverse facts available to non-investigated respondents that do not submit a separate rate application or certification; (3) issuance of an affirmative determination in the five year "sunset" review based on margins of dumping that were calculated using WTO- inconsistent practices, and ignoring factors other than changes in import volumes in determining the likelihood of dumping continuing or recurring; and (4) repeated refusal by the USDOC to review individual respondents requesting a review or providing voluntary responses in order to demonstrate the absence of dumping. The combined effect of these practices has resulted in the continuation of anti-dumping duties beyond the duration allowed under Article 11.1. In addition, this case contests the U.S. law and practice of limiting implementation of adverse WTO decisions related to anti-dumping duties to those entries of subject merchandise made after the date the United States Trade Representative determines to implement.

II. MEASURES AT ISSUE

4. Viet Nam sets forth the claims raised in this dispute:

- With respect to zeroing, Viet Nam claims that the United States' zeroing procedures are inconsistent, as such, with the Anti-Dumping Agreement and the GATT 1994. Furthermore, Viet Nam claims that, through the application of the zeroing procedures in the fourth, fifth, and sixth administrative reviews, the United States acted inconsistently with the Anti-Dumping Agreement and the GATT 1994;

- With respect to the NME-wide entity practice, Viet Nam claims that the United States' NME-wide entity practice is inconsistent, as such, with the Anti-Dumping Agreement. Furthermore, Viet Nam claims that, through the application of the Vietnam-wide entity practice in the fourth, fifth, and sixth administrative reviews, the United States acted inconsistently with the Anti-Dumping Agreement. Additionally, Viet Nam claims that the United States' application of the Vietnam-wide entity practice on a continued and ongoing

basis through the course of the shrimp anti-dumping proceedings is inconsistent with the Anti-Dumping Agreement;

- Viet Nam claims that Section 129(c)(1) is inconsistent, as such, with the Anti-Dumping Agreement and the GATT 1994;

- Viet Nam claims that the final sunset review determination in the shrimp from Viet Nam proceeding was inconsistent with the Anti-Dumping Agreement; and

- Viet Nam claims that, through the United States' failure to revoke the antidumping duty order with respect to certain companies in the fourth, fifth, and sixth administrative reviews, the United States acted inconsistently with the Anti-Dumping Agreement.

III. CLAIMS ON THE USE OF ZEROING IN PERIODIC REVIEWS

A. Factual Background

5. The USDOC calculates the margin of dumping based on a comparison of normal value and United States export price or constructed export price. Normal value in proceedings involving a nonmarket economy country is based on the producer's factors of production, which include individual inputs for raw materials, labor, and energy based on the actual production experience of the individual respondent. The resulting normal value is compared to the export price or constructed export, which is the price at which the product is first sold to an unaffiliated purchaser. The comparison of normal value and price is made between products of similar characteristics. That is, within the broad category of subject merchandise – certain frozen and canned warmwater shrimp – are many sub-categories with differing key characteristics, as determined by the USDOC. Each of these sub-categories, or "models" under USDOC terminology, is assigned a control number ("CONNUM") by the USDOC.

6. In administrative reviews, the USDOC engages in what is referred to as "simple zeroing," in which individual export transactions are compared with a contemporaneous weighted-average normal value; the amount by which normal value exceeds the export price is the dumping margin for that export transaction. These intermediate comparisons may produce either positive or negative dumping margins; with simple zeroing, comparisons that produce a negative dumping margin are ignored for purposes of calculating the overall dumping margin. Thus, the total amount of dumping reflected in the numerator is inflated by an amount equal to the excluded negative differences.

B. Claims of Inconsistency Regarding Zeroing

7. Viet Nam challenges the zeroing procedures "as applied" and, with respect to its use in administrative reviews, "as such," as identified in the panel request. Including the present dispute, there have now been thirteen zeroing disputes brought against the United States, and in each one so far decided by the Appellate Body, zeroing has been found to be WTO-inconsistent. Repeated determinations on the inconsistency of a practice create obligations that Members should be entitled to rely upon. Viet Nam submits that the Panel should adhere to the fundamental principles of the dispute settlement process and adhere to the prior findings of the Appellate Body with regard to zeroing.

8. The GATT 1994 and the Anti-Dumping Agreement both define the concepts of "dumping" and "margin of dumping" with regard to the product under investigation as a whole, not models or categories that are subsets of the product. First, Article VI:1 of the GATT 1994 defines dumping as when "products of one country are introduced into the commerce of another country at less than the normal value of the products", referring to the product as a whole, not subsets.

9. Second, Article 2.1 of the Anti-Dumping Agreement, which, based on the terms of the provision applies to the entire Anti-Dumping Agreement, defines "dumping" for purposes of the Anti-Dumping Agreement with clear reference to the "product" that is subject to the proceeding. The Appellate Body has repeatedly understood this definition to preclude a finding of dumping for any subcategory of the product under review. Additional articles of the Anti-Dumping Agreement and GATT 1994 provide contextual support for this interpretation: Article 9.2 discusses the imposition of an antidumping duty with respect to a "product"; Article 6.10 states that the

investigating authority shall calculate an "individual margin of dumping for each exporter or producer concerned of the product under investigation"; and Article VI:2 of the GATT 1994 provides that "in order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of that product".

10. Thus, although an investigating authority may undertake multiple comparisons using averaging groups or models, the results of the multiple comparisons at the sub-level are not "margins of dumping". Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation.

11. Article 9.3 of the Anti-Dumping Agreement governs the assessment of final anti-dumping duties and thus bears on the USDOC's use of simple zeroing in administrative reviews. The Article does not mandate use of a particular methodology for calculation of final assessment, but does require that the "amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Thus, the margin of dumping, calculated pursuant to Article 2, serves as a ceiling to the amount of antidumping duties that may be collected in the assessment phase. Additionally, as is clear from the reference to Article 2, the "margin of dumping" in Article 9.3 must likewise be calculated on the basis of all transactions for the product as a whole, not merely a subset of the transactions for that product.

12. The USDOC's zeroing methodology does not take into consideration all transactions for the product, treating as zero and disregarding those intermediate comparisons where export price of an individual transaction exceeds normal value. By doing so, the calculation necessarily results in dumping margins that are higher than would be true if all export transactions were taken into account, *i.e.*, higher than the dumping margins would be for the product as a whole.

13. The GATT 1994 and the Anti-Dumping Agreement require that where the administering authority makes multiple comparisons at an intermediate stage, *all* intermediate comparisons must be aggregated, including comparisons that produce both negative and positive dumping margins. As has been repeatedly construed by the Appellate Body and prior panels, this action violates Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement.

IV. CHALLENGES TO THE "NME-WIDE ENTITY" RATE

A. Factual Background

14. The USDOC's Anti-Dumping Manual identifies the USDOC's NME-wide entity rate practice, both on a generalized and prospective basis, and with respect to the fourth, fifth, and sixth administrative reviews of the shrimp proceeding. In the case of anti-dumping proceedings involving NME countries, the USDOC begins with a rebuttable presumption that all companies are part of a single entity, called the NME-wide entity. To receive a separate rate – that is, a rate separate from the NME-wide entity – the burden falls on each individual company to rebut the presumption and satisfy the USDOC's separate rate criteria. Companies not individually reviewed must submit to the USDOC a "separate rate application" or a "separate rate certification" to establish the absence of government control, both in law and in fact, with respect to exports. Companies must present affirmative evidence to satisfy the criteria established by the USDOC to prove the absence of government control.

15. Companies that satisfy the criteria will typically receive a rate based on the weighted average of the rates individually calculated for the mandatory respondents, excluding rates that are zero, *de minimis*, or based on facts available. Companies that do not satisfy the USDOC's criteria receive the NME-wide rate, a punitive rate based on adverse facts available. The result of this practice is grossly inflated margins for companies that are unable to satisfy the unjustified criteria established by the USDOC.

16. For administrative reviews four, five, and six, the Vietnam-wide entity rate greatly exceeded the separate rate: 25.76 percent for the Vietnam-wide entity, compared to between 1.04 percent and 4.27 percent, as the Vietnam-wide entity rate was based on the adverse facts available rate of the original investigation.

B. Claims of Inconsistency Regarding The "NME-Wide Entity" Rate

17. Viet Nam sets forth three independent legal bases under which the USDOC's practice, as such and as applied, creates an impermissible rate not allowed for under the WTO Agreements.

18. First, the plain language of Articles 6.10 and 9.2 of the Anti-Dumping Agreement require the calculation of individual anti-dumping margins and assessment of individual anti-dumping duties. As the Appellate Body clarified in *EC – Fasteners (China)* – a dispute with facts nearly identical to the present dispute – these articles require authorities to specify an individual duty for each supplier, except where doing so would be impracticable. The Appellate Body explained that an authority may not assume affiliation among several suppliers, as doing so is contrary to the general requirement that individual dumping margins and duties be determined for each known supplier. Rather, the authority must make an affirmative determination that a particular exporter and the state constitute a single entity.

19. Here, the USDOC's presumption of the existence of an NME-wide entity and application of a single, NME-wide entity rate does not comply with the plain language of Articles 6.10 and 9.2, which requires individual anti-dumping margins and duties for exporters and producers. The obligation is on the authority to make an affirmative finding on the existence of a single entity, and not on the company to establish entitlement to a separate rate.

20. Second, the USDOC's failure to assign a rate to companies not individually investigated consistent with Article 9.4 violates the plain terms of that Article. Article 9.4 governs situations where an authority limits the number of exporters individually investigated and identifies the maximum permissible anti-dumping rates to be applied. Specifically, as a general rule, the rate must be no greater than the weighted-average margin of dumping for the selected exporters. Here, the NME-wide entity has not been and can never be individually investigated. Accordingly, the NME-wide entity must be assigned an anti-dumping margin consistent with the requirements of Article 9.4. The USDOC's failure to do so violates the express requirements of the Article.

21. Third, the USDOC's application of a rate based on adverse inferences to the NME-wide entity is inconsistent with Article 6.8 of the Anti-Dumping Agreement. Article 6.8 and Annex II set forth the conditions that must be satisfied before an authority may apply facts available based on adverse inferences. An authority may apply adverse inferences only when an "interested party" refuses to provide "necessary information" or significantly impedes the investigation. The Appellate Body clarified that "interested party" refers only to investigated exporters, and does not extend to non-investigated exporters. As the Panel recalls, dumping margins of non-investigated exporters are governed exclusively by Article 9.4. The USDOC's application of a rate based on adverse facts available to an NME-wide entity is, as such and as applied to the reviews at-issue, inconsistent with the requirements of Article 6.8 of the Anti-Dumping Agreement.

22. Finally, we note that Viet Nam's Protocol of Accession does not allow for discriminatory treatment that is contrary to the plain language of the Anti-Dumping Agreement. The Protocol identifies the entire universe of situations in which an authority may deviate from the terms of the Anti-Dumping Agreement. In anti-dumping proceedings, the only rights and obligations affected by the Protocol relate to the substitution of surrogate values for actual values in calculating normal value in anti-dumping proceedings. At the time of Viet Nam's accession, Members, with the full understanding of Viet Nam's economic development, determined that they would account for Viet Nam's non-market economy status with this alternative calculation methodology. Allowance for further discriminatory treatment cannot be read into the Protocol or the Working Party Report that accompanied the Protocol. The USDOC has no legal basis for applying the presumption of state ownership and control that underpins the NME-wide entity practice.

V. SECTION 129 OF THE URUGUAY ROUND AGREEMENTS ACT IS INCONSISTENT AS SUCH WITH NUMEROUS PROVISIONS OF THE WTO AD AGREEMENT AND GATT 1994

A. Factual Background

23. Section 129 of the Uruguay Round Agreements Act ("URAA") provides the legal authority under U.S. law for the United States to comply with adverse DSB rulings concerning its obligations under the WTO agreements where implementation can be achieved by a new administrative

determination without the need for statutory or regulatory amendment. By law, the effect of such implementation is strictly limited to entries of subject merchandise made on or after the date on which the administering authority is directed to implement the new determination. Because of the U.S. retrospective system for assessing anti-dumping and countervailing duties, the implication of this legal prohibition is that "prior unliquidated entries" (*i.e.*, imports that entered the United States prior to the date on which USTR directs implementation for which there has been no definitive assessment of liability for anti-dumping or countervailing duties) are excluded from any U.S. measure to comply with an adverse DSB ruling.

B. Claims of Inconsistency Regarding Section 129(c)(1) of the URAA

24. The panel hearing the dispute in *US – Section 129(c)(1) of the Uruguay Round Agreements Act* found that Canada in that dispute did not meet its burden to establish that Section 129(c)(1) was inconsistent as such with the United States' obligations under the WTO. But the panel in *US – Section 129(c)(1)* erred in its interpretation of Section 129, and otherwise lacked critical factual context. At the time, the United States had implemented only one Section 129 determination and there seemed to be some confusion as to what that determination revealed. Moreover, U.S. courts had not yet had an opportunity to interpret the provision. The situation now is dramatically different. There have now been dozens of Section 129 determinations. There have now been opinions issued by the U.S. judiciary concerning the limits of Section 129. This context demonstrates that Section 129 serves as an absolute legal bar to any refunds of duties on prior unliquidated entries. As a consequence, Section 129(c)(1) and its prohibition against refunds is inconsistent, as such, with the following provisions of the Anti-Dumping Agreement and the GATT 1994:

- Article 1 of the Anti-Dumping Agreement, to the extent that an anti-dumping measure is applied despite imposition of the duty pursuant to an investigation conducted in violation of the GATT 1994 and the Anti-Dumping Agreement.

- Article 9.2 of the Anti-Dumping Agreement, to the extent that the USDOC and other relevant United States agencies continue to collect anti-dumping duties at a level known to be in excess of the appropriate amount.

- Article 9.3 of the Anti-Dumping Agreement, to the extent that the USDOC and other relevant United States agencies continue to collect AD duties at a level that exceeds the margin of dumping as established under Article 2.

- Article 11.1 of the Anti-Dumping Agreement, to the extent that the AD order remains in effect, and anti-dumping duties continue to be collected, beyond the period necessary to counteract dumping.

- Article 18.1 of the Anti-Dumping Agreement, to the extent that the continued collection of duties amounts to an action that is performed without the authority provided in the GATT 1994.

VI. THE USDOC'S FINAL SUNSET REVIEW DETERMINATION IS INCONSISTENT WITH ARTICLE 11 OF THE ANTI-DUMPING AGREEMENT

A. Factual Background

25. The United States implements Article 11.3 of the Anti-Dumping Agreement through five-year sunset reviews under Section 751(c)(1) of the Tariff Act of 1930 (19 U.S.C. § 1675a(a)). Consistent with its obligations under Article 11.3, on January 4, 2010, the USDOC published its notice of initiation of the "First Five-year 'Sunset' Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam".[1] Ultimately, the USDOC found that the revocation of the anti-dumping duty order on frozen warmwater shrimp from the Socialist Republic of Vietnam "would likely lead to continuation or recurrence of dumping".

26. The USDOC's conclusion relied upon the margins of dumping determined in the original investigation and the four subsequent reviews, all of which were calculated using the WTO-

[1] *Initiation of Five-Year ("Sunset") Review*, 75 Fed. Reg. 103 (January 4, 2010). (Exhibit VN-08).

inconsistent zeroing methodology. First, for the rates of individually investigated exporters, the USDOC relied on rates calculated using the zeroing methodology. Second, for the "separate," or all others, rate, the rates were based on the weighted-average margin of the mandatory respondents, rates that were calculated using the zeroing methodology. Third, for the so-called Vietnam-wide entity, as already found by the panel in *US – Shrimp (Viet Nam)*, the USDOC's application of a rate based on adverse facts to this entity is inconsistent with several provisions of the Anti-Dumping Agreement.

27. In addition, the USDOC cited to a decline in imports, a conclusion that was not factually or analytically sound. The USDOC's analysis of the decline failed to fully consider the circumstances in which any decline may have occurred.

B. Claims of Inconsistency Regarding the USDOC's Final Sunset Review

28. The Appellate Body has repeatedly explained that where an authority uses a methodology for the sunset review determination that relies on the margins of dumping in the original investigation or subsequent reviews, the margins of dumping relied upon must have been calculated in a WTO-consistent manner. The logic of the Appellate Body's interpretation rests on its finding that the only definition of dumping applicable to Article 11.3 is a definition that is consistent with the terms of Article 2 of the Anti-Dumping Agreement. The "likelihood" of dumping continuing or recurring must be based on a WTO-consistent definition of dumping, both in terms of future prospects of dumping and in terms of any reliance on past margins of dumping in determining the likelihood of future dumping. Reliance on dumping otherwise defined, as was the case here, is inconsistent with Article 11.3.

29. As explained above, each of the margins relied upon by the USDOC to determine the "likelihood" of a continuation or recurrence of dumping was affected, either directly or indirectly, by use of a WTO-inconsistent methodology. Use of zeroing produced a distortion with respect to the margins calculated for the individually examined companies and the separate rate margin, and the so-called Vietnam-wide entity should have received the separate rate margin. These WTO-inconsistencies essentially infected the sunset review determination, producing a separate and distinct WTO-inconsistency.

VII. CONTINUATION OF THE ANTI-DUMPING DUTIES AGAINST RESPONDENTS REQUESTING REVOCATION BASED ON THE ABSENCE OF DUMPING OVER A PERIOD OF MORE THAN A SINGLE REVIEW IS INCONSISTENT WITH THE OBLIGATIONS OF THE UNITED STATES UNDER ARTICLES 11.1 AND 11.2

A. Factual Background

30. The U.S. anti-dumping law provides for revocation of an anti-dumping duty, in whole or in part, under section 751(d)(1) of the Tariff Act of 1930, as amended (19 U.S.C. §1675). During the period covered by the reviews included in this proceeding and *US – Shrimp (Viet Nam)*, the relevant USDOC regulation governing partial revocations was section 351.222 (19 CFR §351.222).[2] Section 351.222 (b)(B)(ii)(2)(i)(A) permits partial revocation (i.e. revocation of the anti-dumping duties as to one or more individual exporters) based on the absence of dumping "for a period of at least three consecutive years". Also relevant to this proceeding, because it is cited as the basis of the USDOC declining to undertake reviews on the necessity of continuing anti-dumping duties, is the issue of limiting the number of individually investigated companies. United States law requires, as a general rule, that each known producer or exporter of subject merchandise be individually examined. However, like Article 6.10 of the Anti-Dumping Agreement, U.S. law provides for an exception where it would be "impracticable" to individually examine all exporters. While United States law is consistent with Article 6.10 of the Anti-Dumping Agreement, in practice the exception has become the rule. The USDOC has made no effort to balance its supposed resource constraints with the interests and rights of the Vietnamese exporters/producers to have duties assessed based on individual company margins of dumping and to obtain a company specific review in order to demonstrate the absence of dumping.

31. There are three categories of exporters that have sought revocation of the anti-dumping duties with respect to their exports to the United States: (1) exporters that have been mandatory

[2] 19 CFR § 351.222. (Exhibit VN-58).

respondents and have received or should have received zero or de minimis margins of dumping if the margins were determined in a manner consistent with the Anti-Dumping Agreement and which have or should have received zero or de minimis margins in multiple reviews; (2) exporters that have been mandatory respondents in less than three reviews which believe they can demonstrate the absence of margins of dumping in all reviews for a period of three consecutive years; and (3) respondents that have not been mandatory respondents in any reviews which believe that they can demonstrate the absence of margins of dumping for a period of at least three years. Based on Section 751(d)(1) of the Tariff Act of 1930 and Articles 11.1 and 11.2 of the Anti-Dumping Agreement, requests for revocations were filed with the USDOC by various exporters in these categories beginning with the third administrative review, in accordance with the three year requirement stipulated by USDOC regulation section 351.222(b)(B)(ii)(2)(i)(A).

B. Claims Of Inconsistency Regarding The USDOC's Revocation Determinations

32. The relevant provisions related to the revocation of anti-dumping duties are provided in Article 11 of the Anti-Dumping Agreement. It is clear that Article 11 attempts to effect the establishment of precise limits on the form, duration, and amount of any anti-dumping duties imposed on the exporters and producers in the Member country subject to the anti-dumping measures. Article 11.3 has already been addressed as it applies only to five-year or so-called sunset reviews. However, Article 11 does not only provide for revocation of anti-dumping duties as a result of required five-year reviews under Article 11.3; it also provides for reviews under Article 11.2 in order to give effect to the general principle articulated in Article 11.1. Article 11 specifically contemplates the possibility that exporters and producers subject to the anti-dumping measures will cease dumping, that dumping will not recur, and that anti-dumping duties will be revoked. This is clear from Article 11.1. The principles set out in Article 11.1 limiting the duration of anti-dumping duties is no less an object and purpose of the Anti-Dumping Agreement than is the protection provided by the Anti-Dumping Agreement against injurious dumping. Yet giving effect to this object and purpose of the Anti-Dumping Agreement through reviews under Article 11.2 has been rendered meaningless by the actions of the United States.

33. There is no ambiguity in the language of Article 11.1. Anti-dumping duties are to be imposed only as long as necessary to counteract dumping. Article 11.2, by using the phrase "shall review", indicates that the obligations imposed on the authority under Article 11.2 are mandatory, not discretionary. Furthermore, the review contemplated by Article 11.2 may be requested "by any interested party which submits positive information substantiating the need for a review". Consistent with the language in Article 11.1, if dumping is not continuing there would appear to be no need for anti-dumping duties to offset the dumping. Viet Nam would further note that permitting an authority to extend the application of the exception contained in Article 6.10 in a periodic review to Article 11.2 on the basis of the application of the exception has allowed the U.S. to avoid its obligations under Article 11.2. An interpretation of Article 11.4 which renders the rights and obligations under Article 11.2 a nullity is not acceptable under the normal terms of treaty interpretation.

34. The United States' failure to base its Article 11.1 and 11.2 revocation determination on margins of dumping calculated in a manner consistent with Article 2 was in violation of the Anti-Dumping Agreement. Furthermore, the United States' failure to revoke the anti-dumping order with respect to companies that have been denied the opportunity to demonstrate the absence of dumping was in violation of Articles 11.1 and 11.2 of the Anti-Dumping Agreement. An interpretation of the exception in Article 6.10 that allows an authority, in this case the USDOC, to use the exception to undermine the disciplines governing duration of anti-dumping duties, and, in effect, prevent the revocation or termination of the anti-dumping measures other than in a sunset review under Article 11.3, must be considered inconsistent with the United States' obligations under Articles 11.1 and 11.2 of the Anti-Dumping Agreement.

ANNEX B-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF
VIET NAM AT THE FIRST PANEL MEETING

I. INTRODUCTION

1. Many of the claims Viet Nam raises in this dispute have been addressed, directly or indirectly, by the Appellate Body. The Appellate Body has provided substantial guidance on the appropriate legal interpretation of several provisions of the covered agreements implicated in this proceeding. It is incumbent on the Panel to closely review and follow the principles articulated by the Appellate Body in prior proceedings. In multiple reports, the Appellate Body has made clear this expectation that panels adhere to Appellate Body and prior panel guidance on issues of legal interpretation. The Appellate Body has explained that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same."[1] Specifically, Viet Nam believes that in this particular proceeding the reasoning of the panel in DS404 could usefully inform this Panel's deliberations.

II. COMMERCE'S NME-WIDE ENTITY POLICY

2. The United States contests Viet Nam's assertion that the USDOC's "NME-wide entity" policy constitutes a measure that may be challenged as such. As such claims serve important functions to the dispute settlement system: resolution of as such measures helps provide security and predictability in the conduct of future trade and prevents the need for duplicative litigation. To evaluate whether a measure may be challenged on an as such basis, the Appellate Body considers whether the rule or norm is attributable to the Member; the precise content of the rule or norm; and whether the rule or norm has general and prospective application. Overlaying these criteria is the understanding that non-mandatory measures can be challenged as such.

3. The record before the Panel demonstrates that the USDOC's adoption of its NME-wide entity policy constitutes an act "setting forth rules or norms that are intended to have general and prospective application," and therefore constitutes a measure subject to an as such challenge. First, the USDOC's Anti-Dumping Manual states that, in market-economy country proceedings, "individual dumping margins are automatically assigned". In the next sentence, the Manual explains that in NME cases, exporters must pass the so-called separate rate test to receive a rate independent from the NME-wide entity. In these cases, the Manual explains, "the Department begins with a rebuttable presumption that all companies" are part of a single, government-wide entity. The rules, including the separate rate test and the presumption of single ownership, are applicable in all anti-dumping cases involving NME countries. Second, the USDOC's policy bulletin sets forth the same presumption for NME countries as the Manual. The very purpose of the bulletin is to provide certainty and predictability to NME exporters on the expectations and requirements for a separate rate. Finally, the Panel has before it the final anti-dumping determinations relevant to this proceeding. These determinations illustrate the USDOC's continued and ongoing application of this policy.

4. Viet Nam's claim of inconsistency with Articles 6.10 and 9.2 of the Anti-Dumping Agreement is quite simple: the USDOC has no legal basis under either the Anti-Dumping Agreement or Viet Nam's Accession Protocol to presume the existence of a single, government-wide entity. Viet Nam does not claim that an authority may never make a finding of affiliation, which could permit application of a single rate to multiple entities. That ability is not in dispute. Rather, this claim concerns the USDOC's presumption of government ownership of all firms. The Appellate Body in *EC – Fasteners* and the panel in *US – Shrimp (Viet Nam)* rejected the exact arguments by the United States on this claim. The U.S. position reads into Viet Nam's Accession Protocol a concession that does not exist: that an authority may presume that every firm in an NME country is under the control of the government.

[1] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.

5. As explicitly provided for in the Accession Protocol, the only special rule to be applied in an anti-dumping proceeding is that an authority may substitute surrogate values for actual values in calculating normal value. Viet Nam did not commit – nor does the Accession Protocol or Working Party Report contain any evidence of commitment – to an understanding that all firms in Viet Nam may be presumed to be affiliated. The Appellate Body has made clear that this particular special rule – an assumption of affiliation across all firms in an NME country – cannot be read into a country's Accession Protocol. We urge the Panel to follow the plain language of the Anti-Dumping Agreement, Viet Nam's Accession Protocol, and the directly applicable instruction from the Appellate Body.

6. Viet Nam and the United States appear to agree with the basic legal obligations of Article 9.4: "As long as the antidumping duty for a non-examined exporter or producer does not exceed the ceiling and no zero or de minimis margins or margins based on facts available were used in determining the ceiling, there can be no violation of Article 9.4". As shown in the respondent selection memos of the fourth, fifth, and sixth administrative reviews, the Vietnam-wide entity was never selected for individual examination. Because the Vietnam-wide entity was "not included in the examination," the USDOC's failure to assign a dumping margin consistent with Article 9.4 constitutes a violation of the Anti-Dumping Agreement.

7. The United States also does not appear to dispute Viet Nam's legal interpretation of the obligations contained in Article 6.8. The USDOC never requested any information from the Vietnam-wide entity in the fourth, fifth, or sixth administrative reviews; thus, the USDOC has no factual basis to conclude that the Vietnam-wide entity did not cooperate with the investigation and therefore warrant a rate pursuant to Article 6.8. Instead, the rate applied in each administrative review was from the original investigation, where the USDOC confirmed that it would apply a rate based on adverse inferences. As the panel in DS404 concluded – under identical circumstances – "[t]o fail to treat this rate as a facts available rate would elevate form over substance, and ignore the true factual circumstances surrounding the assignment of that rate".[2] The only basis for applying the rate to the Vietnam-wide entity in the fourth, fifth, and sixth administrative reviews is Article 6.8. Because no necessary information was ever requested from the Vietnam-wide entity during those reviews, the USDOC had no justification for assigning a rate based on adverse inferences.

III. ZEROING

8. The issue of zeroing in the context of administrative reviews has been long settled by the DSB. Use of the zeroing methodology is inconsistent with Articles 2.1 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. The Appellate Body has adopted this interpretation on multiple occasions, and emphatically rejected the exact arguments that are again being made by the United States. We urge the Panel to follow the clear and consistent instruction of the Appellate Body.

IV. SECTION 129 OF THE URAA

9. Viet Nam's claims with respect to Section 129 center on the legal effect given new determinations issued under Section 129(c)(1). Focusing on determinations issued by the U.S. Department of Commerce, Section 129(c)(1) limits implementation of adverse WTO rulings to entries of subject merchandise made on or after the date on which the administering authority is directed to implement the new determination by the U.S. Trade Representative. Section 129(c)(1) does not allow any refund of invalid duties applicable to entries made before the USTR implementation date.

10. Because of the U.S. retrospective system for assessing anti-dumping and countervailing duties, the implication of this prohibition against refunds is that "prior unliquidated entries" where there has been no definitive assessment of liability for anti-dumping or countervailing duties are excluded from any U.S. measure to comply with an adverse DSB ruling. Final liability is assessed on such entries, or they remain subject to excessive anti-dumping or countervailing duty deposit rates, regardless of the adverse DSB ruling or any U.S. measures to comply with that ruling. As a consequence, Section 129(c)(1) and its prohibition against refunds is inconsistent, as such, with

[2] Panel Report, *US – Shrimp from Viet Nam*, para. 7.279.

various provisions of the Anti-Dumping Agreement, including Articles 1, 9.2, 9.3, 11.1, and Article 18.1.

11. The United States does not challenge Viet Nam's characterization of Section 129 and the fact that the legal effect of determinations issued under that provision extends only to entries made on or after the USTR implementation date. The United States also does not challenge what Viet Nam has carefully documented in relation to every relevant Section 129 determination issued to date, and specifically the systematic liquidation of entries made prior to the reasonable period of time to implement under circumstances the DSB found to be WTO-inconsistent. Finally, the United States does not dispute Appellate Body precedent set forth in Viet Nam's first written submission, namely that implementation of DSB recommendations and rulings should be immediate, and that prior unliquidated entries as of the close of the RPT are within the scope of the measure necessary to render complete and effective compliance with DSB rulings and recommendations.[3]

12. The pattern of conduct documented by Viet Nam can only flow from a statute that precludes implementation on a WTO-consistent basis. While the United States continues to claim that Section 129(c)(1) does not prevents WTO-consistent action on prior unliquidated entries,[4] it remains incapable of providing any legitimate example. The fact that Congress could simply pass a law that might have an impact on prior unliquidated entries[5] is an untenable defense as it would effectively render "as such" claims meaningless if the permitted. The only other example offered by the United States concerns Section 123 of the Uruguay Round Agreements Act.[6] But Viet Nam is not challenging Section 123. Beyond this fundamental point, a review of the U.S. examples that attempt to demonstrate what the United States claims are real world examples of Section 123 and Section 129 working in tandem to render WTO-consistent results makes clear the error in the U.S. claims.[7]

13. The Panel should ask itself two simple questions: Why is the United States assessing duties on entries under invalid AD/CVD orders even after it issues a Section 129 determination invalidating that order? Is it really true that the U.S. Congress created a limitation in Section 129(c)(1) merely to permit the temporary retention of cash deposits that would be returned at the end of a later administrative review? Any doubts as to the answers to these questions have long since been resolved. There is a long history here in terms of actual conduct and judicial interpretation that the panel hearing the dispute in DS221 simply did not have, all of which confirm an interpretation of U.S. law that denies relief for prior unliquidated entries when implementing adverse DSB rulings and recommendations.

V. THE SUNSET REVIEW

14. Viet Nam would like to provide the Panel with a simplified overview of the facts and the Appellate Body jurisprudence which conclusively demonstrates that the U.S. Department of Commerce's sunset determination was inconsistent with its obligations under Article 11.3 of the Anti-Dumping Agreement:

- Section 752(c)(1)(A) and (B) of U.S. law provides that in making a sunset determination the Department "shall" consider the weighted-average dumping margins determined in the investigation and subsequent reviews.

- The U.S. Department of Commerce Policy Bulletin, "Policies Governing the Conduct of Five Year (Sunset) Reviews of Antidumping and Countervailing Duty Orders", similarly requires the examination of the weighted-average dumping margins in the investigation and subsequent reviews in determining the likelihood of dumping continuing or recurring.

- The Decision Memoranda in the Sunset Review of *Shrimp from Viet Nam* specifically relies on the margins of dumping in the investigation and subsequent reviews in making the determination that dumping is likely to continue or recur.

[3] *See*, *e.g.*, Viet Nam's First Written Submission at para. 279, citing Appellate Body Report, *US – Zeroing (Japan)*, para. 161.
[4] U.S. First Written Submission, para. 132.
[5] *Id*. at para. 112
[6] *Id*., paras. 118-120.
[7] *Id*.

- The Decision Memoranda and underlying computer calculations by the Department of Commerce indicate that in the original investigation and each subsequent review, including those reviews examined for purposes of the Department of Commerce's Sunset Review of *Shrimp from Vietnam*, relied on so-called zeroing in determining the margins of dumping.

- Beginning with its report in *US – Zeroing (EC)*, the Appellate Body has repeatedly confirmed that the application of zeroing in determining the margins of dumping in reviews is "as such" inconsistent with Member's obligations under the Anti-Dumping Agreement.

- The Panel in *US – Shrimp (Viet Nam)* (DS404) found that "evidence submitted by Viet Nam – the accuracy of which is not contested by the United States – demonstrates that the USDOC applied 'simple zeroing' not only in the second and third administrative reviews, but also in each of the additional administrative reviews conducted under the *Shrimp* order".[8]

- The evidence on the record of this investigation similarly demonstrates the use of zeroing throughout the course of the *Shrimp* proceeding.

- In *US – Corrosion Resistant Steel Sunset Review*, the Appellate Body stated that while an authority has no obligation to rely on the margins of dumping found in the original investigation and review in making its determination under Article 11.3, "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4".[9]

- Finally, in *US-Zeroing (Japan),* the Appellate Body stated that "as the likelihood-of-dumping determinations in the sunset reviews at issue in this appeal relied on margins of dumping calculated inconsistently with the Anti-Dumping Agreement, they are inconsistent with Article 11.3 of that Agreement".[10]

15. Thus, the facts and jurisprudence above provide a sufficient basis for the Panel to determine that the sunset review was conducted in a manner inconsistent with the requirements of Article 11.3 of the Anti-Dumping Agreement because it relied on WTO inconsistent margins of dumping.

16. We will now address the U.S. arguments that it properly relied on positive margins of dumping in making its determination as to the likelihood of dumping continuing or recurring. The only positive margins of dumping that should have been found and relied upon in the Sunset Review were in fact the margins of dumping based on "facts available" in the first review. The two adverse facts available rates continually cited by the U.S. must be evaluated in the proper context. Considering those rates in the context of the margins used by USDOC in the Sunset Review is very different than considering the rates in the context of a uniform and sustained pattern of no dumping over a period of years by each and every company investigated individually who cooperated in the review. Similarly, the relevance of the USDOC's volume analysis for determining whether dumping is likely to continue or recur is very different in the context of a pattern of sporadic dumping, as would be shown by using the WTO inconsistent margins on which the USDOC relied, than in the context of a uniform and sustained pattern of "safety margins". In other words, the use of WTO inconsistent margins of dumping infected every aspect of the Sunset Review.

17. The broader point is that the margins relied upon, other than the two adverse facts available findings in the first review, were established using a WTO inconsistent methodology and, therefore, were necessarily not established properly. Furthermore, by basing its likelihood determination on improperly established margins, the USDOC evaluation of the facts could not be unbiased or objective.

[8] Panel Report, *US – Shrimp (Viet Nam)*, para. 7.113.
[9] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 127.
[10] Appellate Body Report, *US – Zeroing (Japan)*, para. 185.

VI. COMPANY SPECIFIC REVOCATION

18. It is Viet Nam's contention that Article 11.2 imposes an obligation on an authority to terminate antidumping duties as to individual producers or exporters who demonstrate that the continued imposition of antidumping duties is no longer necessary to offset dumping as to that individual producer or exporter. The starting point for analysis of Article 11.2 is the "general rule" provided in Article 11.1 of the Anti-Dumping Agreement which states 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". Articles 11.2 and 11.3 provide the rules governing the implementation of the general rule contained in Article 11.1. Article 11.1 limits both the duration of the application of anti-dumping duties in stating that duties shall remain in effect "only as long as … necessary" and the scope of their application by using the language "only ... to the extent necessary".

19. The United States fails to acknowledge the distinction between Article 11.2 and 11.3. A review under Article 11.2 is triggered by a request from one or more interested parties submitting positive information substantiating the need for a review, while Article 11.3 is automatically triggered by the passage of time without any requirement that there be a request. This distinction should inform the interpretation of both Articles 11.2 and 11.3. The United States has provided no rational basis for a conclusion that different rules should apply to the original determination of dumping and the determination of the amount of the duties to be collected than are applied in reviews under Article 11.2.

ANNEX B-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF VIET NAM

I. INTRODUCTION

1. In this submission, Viet Nam sets forth in a clear and straightforward manner the legal and factual basis for each of its claims, the legal and factual basis of the U.S. arguments, and analyzes both in the context of the Anti-Dumping Agreement and WTO jurisprudence.

II. CLAIMS REGARDING USE OF ZEROING TO CALCULATE MARGINS OF DUMPING IN ADMINISTRATIVE REVIEWS

A. Applicable WTO Obligations: Arguments of Viet Nam

2. Articles 2 and 9.3 of the Anti-Dumping Agreement, in tandem, prohibit the USDOC's use of zeroing as such and as to Vietnamese exporters in the fourth, fifth, and sixth administrative reviews. A margin of dumping that does not take into consideration the result of all comparisons of normal value and export price does not meet the definition of dumping as articulated in Article 2. This failure to calculate a margin of dumping "in accordance with Article 2" renders the margins of dumping assigned to the individually investigated respondents and the separate rate respondents, whose margins of dumping were based on the margins of dumping calculated for the individually investigated respondents, inconsistent with Article 9.3 and Article 2 of the Anti-Dumping Agreement.

3. The United States does not appear to dispute that the USDOC used the zeroing methodology to calculate margins of dumping in the fourth, fifth, or sixth administrative reviews of the shrimp proceeding. Viet Nam challenges the USDOC's use of the zeroing methodology as such and as applied in the fourth, fifth, and sixth administrative reviews. The USDOC's use of the zeroing methodology affected the calculation of dumping margins assigned to the individually investigated respondents and the separate rate respondents, whose margins of dumping were based on the margins of dumping calculated for the individually investigated respondents.

B. Applicable WTO Obligations: Arguments of the United States

4. The United States advances several arguments in response to Viet Nam's claims concerning the USDOC's use of zeroing in administrative reviews. First, the United States claims that "dumping" may occur at an individual, transaction-specific level, and is not limited to an aggregated analysis of all transactions.[1] A second, related argument is that the authority is not required to calculate a margin of dumping for the product as a whole, but may instead calculate a dumping margin for each transaction of that product.[2] The United States disagrees with consistent Appellate Body determinations that the term "product" has a collective meaning, such that the authority must determine a dumping margin based on all transactions for that product.

C. Analysis

5. Use of the zeroing methodology as such and as applied to the calculation of dumping margins assigned to the individually investigated respondents and the separate rate respondents – whose margins of dumping were based on the margins of dumping calculated for the individually investigated respondents – in the fourth, fifth, and sixth administrative reviews is inconsistent with Articles 2.1 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Article 9.3 requires that the margin of dumping "as established under Article 2" serve as the ceiling when determining the maximum antidumping duty to be applied to an exporter. Thus, 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.

[1] U.S. First Written Submission, paras. 223-225.
[2] Ibid. para. 226.

6. The USDOC failed to do so by systematically excluding certain transactions from the margin of dumping calculation: the USDOC did not calculate a dumping margin for the product as a whole. The Appellate Body has time and again concluded that only a single margin of dumping can be calculated for each exporter, refusing to accept the United States' position that each transaction can produce a dumping margin. To ensure predictability and security in the dispute settlement process, the Panel must recognize the now-settled definitions of these concepts that are so fundamental to the Anti-Dumping Agreement.

III. CLAIMS REGARDING THE USDOC'S NME-WIDE ENTITY POLICY

7. Viet Nam raises three independent claims with respect to the USDOC's NME-wide entity practice. In light of the extensive discussion already provided to the Panel on this issue, this submission contains only a brief summary of the arguments already set forth in greater detail. As an initial matter, however, Viet Nam makes the following comments.

8. First, Viet Nam believes that it has adduced sufficient evidence to support its assertion that the NME-wide entity policy establishing a rebuttable presumption that all companies are part of a single, government-wide entity, constitutes a rule or norm of general and prospective application.[3] Second, the United States' attempts to retrofit the facts of the original investigation in order to fit within its claim that the USDOC investigated the Vietnam-wide entity in the original investigation in the form of both Kim Anh Company, Ltd. and the Government of Vietnam, and that the rate determined for the Vietnam-wide entity was based on adverse facts available because neither cooperated in the investigation, is contradicted by the facts.[4]

A. Claim of Inconsistency with Articles 6.10 and 9.2 of the Anti-Dumping Agreement

(1) Applicable WTO Obligations: Arguments of Viet Nam

9. The plain text of Articles 6.10 and 9.2, as clarified by the Appellate Body, requires authorities to apply, as a general rule, individual dumping margins and assessment rates. Article 6.10 requires that "authorities shall, as a rule, determine an individual margin for each known exporter or producer concerned of the product under investigation". Use of the verb "shall" conveys the mandatory nature of the obligation, subject to the defined, limited exceptions.[5] Article 9.2 applies the principles of Article 6.10 – which govern the determination of dumping margins – to the actual imposition of antidumping duties. The Appellate Body recognized that these obligations are linked, together answering the legal question of whether an authority may use a presumption to assign a single antidumping margin to multiple entities. Significantly, Viet Nam's Accession Protocol does nothing to limit application of the general rule contained in Articles 6.10 and 9.2. The only special rule committed to by Viet Nam concerns the substitution of surrogate values for actual values in calculating normal value. Viet Nam did not commit to any other special rules deviating from the general rules of the Anti-Dumping Agreement, and the Appellate Body has explained that an authority may not read into an Accession Protocol special rules that are not enumerated.[6]

(2) Applicable WTO Obligations: Arguments of the United States

10. The United States advances multiple arguments in response to this claim. First, the U.S. argues that the Working Party Report justifies use of the rebuttable presumption.[7] Second, the U.S. argues that the facts of the present dispute are sufficiently different from the *EC – Fasteners (China)* case that the Panel should deviate from the reasoning and conclusions reached in that report.[8]

[3] U.S. First Written Submission, paras. 141-143; Viet Nam Answers to Questions, paras. 19-20.
[4] U.S. Answers to Questions, Question 17.
[5] Appellate Body Report, *EC – Fasteners (China)*, para. 320.
[6] Ibid. para. 290.
[7] U.S. First Written Submission, paras. 163-167.
[8] U.S. First Written Submission, para. 179; U.S. Answers, para. 23.

(3) Analysis

11. The Panel should conclude that the United States' application of a rebuttable presumption that all exporters are part of a single, government-wide entity is inconsistent as such and as applied in the fourth, fifth, and sixth administrative reviews with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. The United States' reliance on Viet Nam's Accession Protocol and Working Party Report as a legal justification for the presumption is unavailing. Viet Nam's Accession Protocol contains only a single exception to the provisions of the Anti-Dumping Agreement: the use of surrogate values instead of actual values in the calculation of normal value. The Accession Protocol identifies the entire universe of commitments considered and made by Viet Nam in its accession to the WTO. Furthermore, the Appellate Body has confirmed that no legal basis be *assumed* from the Accession Protocol or Working Party Report based on the discussion on Viet Nam's economy contained in those documents.[9]

12. Lacking any legal justification for its presumption, the U.S. attempts to turn the issue into a question of fact. This is a distraction from the fundamental issue, as described by the Appellate Body: an authority cannot use a presumption to apply a single rate to multiple entities; the covered agreements do not allow for use of a presumption, regardless of the "evidence" cited by an authority. As the Appellate Body explained in *EC – Fasteners (China)*, "the evidence submitted … cannot establish that the economic structure in China {generally} justifies a general presumption that the State and all the exporters in all industries that might be subject to an anti-dumping investigation constitute a single legal entity, where no legal basis for such a presumption is provided for in the covered agreements".[10]

B. Claim of Inconsistency with Article 9.4 of the Anti-Dumping Agreement

(1) Applicable WTO Obligations: Arguments of Viet Nam

13. Where an authority limits the number of exporters subject to individual examination pursuant to Article 6.10, Article 9.4 establishes the ceiling anti-dumping duty rate that may be applied to those exporters not selected for individual examination. As demonstrated in the respondent selection memoranda for the fourth, fifth, and sixth administrative reviews[11], the USDOC in each administrative review "limited {its} examination" ostensibly pursuant to Article 6.10 of the Anti-Dumping Agreement.[12] Because the Vietnam-wide entity was not selected for individual examination in the fourth, fifth, and sixth administrative reviews[13], the Vietnam-wide entity, as an "exporter{} or producer{} not included in the examination," should have received an antidumping duty that did not exceed the weighted average margin of dumping of the selected exporters or producers, excluding rates that are zero, *de minimis*, or based on facts available.

(2) Applicable WTO Obligations: Arguments of the United States

14. The United States argues that Article 9.4 is not applicable to the Vietnam-wide entity, explaining that "Article 9.4 does not obligate Members to replace an existing WTO-consistent rate that was individually determined for the entity, which had failed to cooperate in the proceeding, with a different rate that is based on an average rate of independent exporters or producers that fully cooperated".[14]

(3) Analysis

15. The antidumping duty rate applied to the Vietnam-wide entity in the fourth, fifth, and sixth administrative reviews is inconsistent with the plain language of Article 9.4 of the Anti-Dumping Agreement.

16. The United States attempts to read into the provision exceptions that do not exist. Under the United States' reading of Article 9.4, the provision would be applicable only under certain

[9] Appellate Body Report, *EC – Fasteners (China)*, para. 290 (emphasis added).
[10] Appellate Body Report, *EC – Fasteners (China)*, para. 369.
[11] Exhibits VN-07, -11, -17.
[12] Ibid.
[13] Ibid.
[14] U.S. Answers to Questions, para. 50; U.S. First Written Submission, para. 193.

circumstances, including when an exporter has not been previously examined. Yet, the article does not contain this open-ended exception that the United States' interpretation would require.

17. The United States' factual claims similarly fail. The United States suggests that a rate was never requested for the Vietnam-wide entity and therefore the USDOC was required to apply the same rate.[15] This argument is factually incorrect. In the fourth, fifth, and sixth administrative reviews, a review was requested for constituent parts of the Vietnam-wide entity.[16]

C. Claim of Inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement

(1) Applicable WTO Obligations: Arguments of Viet Nam

18. The USDOC also failed to comply with Article 6.8 of the Anti-Dumping Agreement when it assigned a rate based on adverse facts available to the Vietnam-wide entity. The USDOC has no basis under Article 6.8 and Annex II to apply a rate based on adverse facts available to the Vietnam-wide entity in the fourth, fifth, and sixth administrative reviews, as well as the first, second, and third administrative reviews, relevant to the extent that the USDOC relied on the rate for purposes of its Sunset Review determination. Because the USDOC did not request any information from the Vietnam-wide entity, it had no factual or legal basis to apply an antidumping duty rate based on adverse facts available.

(2) Applicable WTO Obligations: Arguments of the United States

19. The United States argues that the rates applied in the fourth, fifth, and sixth administrative reviews are not based on adverse facts available.[17] Rather, the USDOC "based the final assessment for entries by the Vietnam-government entity during the review period on the 'rate in effect'".[18]

(3) Analysis

20. An authority may apply adverse facts available only where an "interested party" refuses to provide "necessary information" to the authority. As the United States acknowledges, no information was requested from the Vietnam-wide entity. The United States explains: "Commerce did not request information from, or send letters to, the Vietnam government entity (or the Government of Vietnam) during the covered reviews".[19] The USDOC therefore did not satisfy the requisite criteria, as set forth in Article 6.8, in order to apply a rate based on adverse facts available to the Vietnam-wide entity.

21. The panel in *US – Shrimp (Viet Nam)* confronted this precise issue, concluding that "there is no basis for any valid finding of non-cooperation, and therefore no basis for any valid application of facts available in the sense of Article 6.8".[20] Based on the evidence of this proceeding, we urge the Panel to adopt the reasoning of the panel in *US – Shrimp (Viet Nam)* and find that application of a rate based on adverse facts available to the Vietnam-wide entity is inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

IV. CLAIMS REGARDING SECTION 129 OF THE URUGUAY ROUND AGREEMENTS ACT

A. Applicable WTO Obligations: Arguments of Viet Nam

22. Viet Nam's claims regarding Section 129 concern the legal effect given new determinations issued under Section 129(c)(1) of the Uruguay Round Agreements Act ("URAA"), which limits implementation of adverse WTO rulings and recommendations to entries of subject merchandise, entered or withdrawn from warehouse for consumption on or after the date on which the administering authority is directed to implement the new determination by the U.S. Trade

[15] U.S. First Written Submission, para. 185.

[16] *Compare* Third AR Final Results, 74 Fed. Reg. at 47197 at fn. 19 (Exhibit VN-72) *with* Notice of Initiation for Fourth AR, 74 Fed. Reg. at 13179.

[17] U.S. First Written Submission, para. 187.

[18] U.S. Answers to Questions, para. 69.

[19] U.S. Answers to Questions, para. 70.

[20] Panel Report, *US – Shrimp (Viet Nam)*, para. 7.280.

Representative. Section 129(c)(1) does not allow any refund of invalid duties applicable to entries made before the USTR implementation date. As a consequence, Section 129(c)(1) and its prohibition against refunds is inconsistent, as such, with various provisions of the Anti-Dumping Agreement, including Articles 1, 9.2, 9.3, 11.1, and Article 18.1.

23. Viet Nam's claims are buttressed by a plain reading of Section 129(c)(1) and associated legislative history, accepted principles of statutory construction as applied under U.S. law, U.S. judicial precedent, and a long, consistent pattern of practice by the U.S. administering authority. All point to a statutory provision that precludes relief for prior unliquidated entries through mandated retention or liquidation of duties based on WTO-inconsistent practices.

B. Application WTO Obligations: Arguments of the United States

24. The United States advances two fundamental arguments in response to Viet Nam's claims that Section 129(c)(1) is inconsistent with various provisions of the WTO Anti-Dumping Agreement. First, the United States contends that Viet Nam has failed to set forth a proper claim in respect of Section 129(c)(1) because Viet Nam did not claim that Section 129(c)(1) was inconsistent with any provisions of the WTO Understanding on the Settlement of Disputes ("DSU").[21] Second, the United States claims that Viet Nam erroneously argues that Section 129(c)(1) is the exclusive mechanism under U.S. law by which the United States can bring itself into compliance with DSB recommendations and rulings.[22] According to the United States, Viet Nam's claims are overly speculative and based on the flawed premise that the United States must have a pre-existing administrative mechanism to implement DSB recommendations and rulings, or an exclusive administrative mechanism that addresses all potential entries including "prior unliquidated entries".[23]

C. Analysis

(1) Viet Nam's case is not dependent on claims raised under the DSU

25. Viet Nam's claims focus on the implications of Section 129(c)(1) with respect to the United States' substantive obligations under the WTO Anti-Dumping Agreement. No other party participating in this dispute that has offered views on this issue agrees with the U.S. contention that Viet Nam's claims are ineffective because they were not brought under provisions of the DSU. The U.S. argument finds no support in the text of the DSU. The DSU governs procedural aspects of dispute settlement and a Member's obligation to comply with dispute settlement findings.[24] But whether conformance is assured must be based on consideration of other substantive violations. This is precisely why the examination under Article 21.5 of the DSU concerns "the existence or consistency *with a covered agreement* of measures taken to comply with the recommendations and rulings such dispute ... ".[25] It is these other substantive violations that are the target of Viet Nam's claims and Viet Nam has articulated why the specific provisions under which its claims have been brought are relevant to the circumstances dictated by Section 129(c)(1).

(2) The presence of alternative mechanisms under U.S. law to implement DSB rulings and recommendations is not an affirmative defense to Viet Nam's claims

26. Viet Nam's claims relate to Section 129(c)(1). They do not involve any other mechanism that the United States might apply in implementing DSB rulings and recommendations, or any specific actual action taken pursuant to Section 129(c)(1). To this end, any act or omission attributable to a WTO Member may be the subject of dispute settlement proceedings.[26] The Appellate Body has further clarified that the presence of discretion or alternative measures does not exempt a measure from being challenged as such. Indeed, there is no requirement that the measure identified by the complaining Member has been or is being applied. Section 129 need not apply in even a single specific instance for it to be found inconsistent "as such" with U.S.

[21] *See* Executive Summary of U.S. Oral Statement at the First Substantive Meeting of the Panel, para. 5.
[22] *See* U.S. Answers to Questions, para. 93.
[23] Ibid. paras. 90 and 95.
[24] Viet Nam Answers to Questions, para. 89.
[25] DSU Article 21.5 (emphasis added).
[26] Appellate Body Report, *Corrosion-Resistant Steel Sunset Review*, para. 81.

obligations under the WTO.[27] Thus, the presence of other implementing mechanisms under U.S. law does not lead to the conclusion that Section 129(c)(1) is consistent, as such, with U.S. obligations under the Anti-Dumping Agreement, contrary to U.S. claims. That determination must be based on the terms of the Section 129(c)(1) itself.

(3) The United States continues to mischaracterize both Viet Nam's description of Section 129 and that provision's purpose

27. The United States wrongly asserts that Viet Nam contends in this dispute that Section 129 is the exclusive mechanism for the United States to implement DSB recommendations and rulings.[28] That is not Viet Nam's position. As stated in Viet Nam's First Written Submission, Section 129 provides the legal authority under U.S. law for the United States to comply with adverse DSB rulings concerning its obligations under the WTO agreements where implementation in a trade remedy context can be achieved by a new administrative determination.[29] It provides the exclusive authority for the U.S. Department of Commerce to "issue a new determination in connection with a particular proceeding that would render" its action "not inconsistent with the findings of the panel or the Appellate Body".[30] The United States cites to no other authority that permits such action short of an act of Congress.

28. The United States engages in further mischaracterization by effectively turning the subject matter of Section 129 on its head. The purpose of Section 129 is not to address future entries, leaving prior unliquidated entries to other authority or potential mechanisms, as suggested by the United States. The purpose of Section 129 is to grant authority for the U.S. Department of Commerce to "issue a new determination in connection with a particular proceeding that would render" its action "not inconsistent with the findings of the panel or the Appellate Body".[31] Likewise, the purpose of Section 123 is not to address "prior unliquidated entries". The purpose of Section 123 is to grant authority to amend agency practice or regulation "in a case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with the any of the Uruguay Round Agreements ... ".[32] Section 123 has no bearing on the effective date of any Section 129 determination, which is limited to entries after implementation, even where the practice or regulation applied in the Section 129 determination is derived from a Section 123 proceeding.[33] The fact that "the application of any new methodology developed pursuant to Section 123(g) *can* impact 'prior unliquidated entries'", as argued by the United States, does not mean Section 129(c)(1) is consistent as such with U.S. obligations under the Anti-Dumping Agreement.

(4) Viet Nam's claims are not premised on a requirement that Members must have a pre-existing administrative mechanism to implement DSB recommendations and rulings, but on the fact that a pre-existing inconsistent administrative mechanism exists in the United States

29. The United States wrongly asserts that Viet Nam's claims are premised on a requirement that Members must have a pre-existing administrative mechanism to implement DSB recommendations and rulings. That is not Viet Nam's position. Viet Nam recognizes that there is no requirement under the WTO for Members to have in place pre-existing administrative mechanism for implementation, or even more specifically a comprehensive mechanism addressing all potential entries including "prior unliquidated entries". Viet Nam's case is premised on the fact that the United States does have an administrative mechanism for implementation that grants the U.S. Department of Commerce authority to bring an action in a specific proceeding *(i.e.*, the measure that is the target of the Section 129 proceeding) into conformity with the United States' obligations under the covered agreements through a new determination. As noted by the EU in its responses to the Panel's questions, "if a WTO Member decides to enact or maintain such a measure, such measure must be consistent with WTO law".[34] Viet Nam concurs.

[27] Ibid. paras. 75-78 and 93-95.
[28] U.S. Answers to Questions, para. 93.
[29] Viet Nam's First Written Submission, para. 211.
[30] Exhibit VN-31.
[31] Ibid.
[32] Exhibit U.S.-10.
[33] *See* Viet Nam's Answers to Questions, paras. 82-86.
[34] EU Answers to Questions, para. 46.

30. The U.S. argument is merely an extension of other arguments it has made claiming that Section 129 is not the exclusive mechanism under U.S. law for implementing DSB rulings and recommendations and other mechanisms exist for addressing "prior unliquidated entries". As previously noted, this is not an affirmative defense to Viet Nam's claims. The issue is whether, by its own terms, Section 129(c)(1) is inconsistent, as such, with U.S. obligations. The presence of other mechanisms is irrelevant to the question presented by Viet Nam.

(5) The U.S. admission that Section 129(c)(1) is not designed to address every conceivable circumstance in which compliance action may be necessary is effectively a concession that it is WTO-inconsistent in specific circumstances and therefore is inconsistent as such with U.S. obligations under the AD Agreement

31. In its answers to the Panel's questions the United States concedes that "Section 129 is not designed to address every conceivable circumstance in which compliance action may be necessary".[35] To the extent that compliance involves circumstances other than correcting prior administrative decisions Viet Nam can agree. But this says nothing about the specific circumstances Section 129 is intended to address, which Viet Nam has demonstrated does lead to WTO-inconsistent action. To this end, the United States has offered no response to the repeated application of Section 129 under specific circumstances that give rise to violations of its obligations under the Anti-Dumping Agreement.[36] As Viet Nam has presented in detail, this is not a function of discretion under U.S. law, but a law that requires such outcomes.

32. Although the United States has attempted to show that Section 123 somehow ameliorates these circumstances, Viet Nam has rebutted every example the United States has attempted to advance. Given the U.S. inability to rebut Viet Nam's claims, the Panel should find for Viet Nam that Section 129(c)(1) is inconsistent, as such, with U.S. obligations under the Ant-Dumping Agreement.

V. CLAIMS REGARDING THE SUNSET REVIEW DETERMINATION

A. Applicable WTO Obligations: Arguments of Viet Nam

33. The Appellate Body has determined that to the extent an investigating authority relies upon dumping margins in making a likelihood determination in a Sunset Review Determination, the calculation of the margins relied upon must be consistent with Article 2 of the Anti-Dumping Agreement and that relying on margins calculated in a WTO inconsistent manner results in an inconsistency both with Article 2 and Article 11.3.[37] Evidence that "zeroing" was used in the original investigation and each subsequent review prior to the Sunset Review has been provided in this proceeding in the form of the USDOC *Decision Memoranda* from the original investigation and the first through fourth administrative reviews.[38]

34. The USDOC refusal to rely on WTO consistent margins of dumping also affected the broader analysis of likelihood of dumping based on the presumption embedded in U.S. practice that a decline in volume after the imposition of dumping duties supports a finding of the likelihood of dumping in the future if the antidumping duties are terminated.[39] Given the negative or safety margins evident when the margins of dumping are calculated in a WTO consistent manner, the notion that Vietnamese Respondents would have to engage in dumping to recover market share is simply not an objective and unbiased evaluation of the facts. This evaluation could not be made by the USDOC based on the WTO inconsistent margins it relied upon in the Sunset Review Determination.

B. Applicable WTO Obligations: Arguments of the United States

35. The United States offers multiple defenses of the Sunset Review Determination. First, that Viet Nam has not met its evidentiary burden of demonstrating that the margins relied upon were WTO inconsistent. Second, that the existence of any positive margins of dumping calculated in a

[35] U.S. Answers to Questions, para. 92.
[36] *See* Exhibit VN-42.
[37] *See* Viet Nam First Written Submission, footnote 293 and accompanying text.
[38] Ibid., footnote 294, accompanying text and Exhibits VN-25 and VN-51.
[39] U.S. First Written Submission, paras. 281-289.

WTO consistent manner justifies a finding of likelihood of continued or recurring dumping. Third, the USDOC argues that "the decline in import volumes suggests that exporters were unable to sustain pre-investigation import levels without dumping" and that Viet Nam failed to demonstrate that this decline in import volumes resulted from some other factor or factors other than the antidumping duties.[40]

C. Analysis

36. The Sunset Review at issue in this panel proceeding was conducted pursuant to U.S. law and practice, not WTO law. Thus, whether arguments which might be appropriate and successful under WTO law but which are not plausible or likely to succeed under U.S. law were made in the underlying Sunset Review is not a relevant consideration.[41]

37. With the exception of the two facts available margins determined in the first review, all of the margins of dumping relied upon by the USDOC in the Sunset Review Determination were WTO inconsistent. These include the margins for the mandatory respondents, the margins for the "separate rate" respondents, and the margins for the Vietnam-wide entity.

38. In *US – Oil Country Tubular Goods Sunset Reviews,* the Appellate Body examined each of the scenarios provided for under the USDOC's *Sunset Policy Bulletin* and commented as follows:

> In our view, "volume of dumped imports" and "dumping margins" before and after the issuance of anti-dumping duty orders, are highly important factors for any determination of likelihood of continuation or recurrence of dumping in sunset reviews, although other factors may also be important depending on the circumstances of the case. The three factual scenarios in Section II.A.3 of the SPB which describe how these factors will be considered in individual determinations thus have certain probative value, the degree of which may vary from case to case. For example, if, under scenario (a) of Section II.A.3 of the SPB, dumping continued with substantial margins despite the existence of the anti-dumping duty order, this would be highly probative of the likelihood that dumping would continue if the anti-dumping duty order were revoked. Conversely, if, under scenarios (b) and (c) of Section II.A.3 of the SPB, imports ceased after issuance of the anti-dumping duty order, or imports continued but without dumping margins, the probative value of the scenarios may be much less, and other relevant factors may have to be examined to determine whether imports *with dumping margins* would "recur" if the antidumping duty order were revoked. The importance of the two underlying factors (import volumes and dumping margins) for a likelihood-of-dumping determination cannot be questioned; however, our concern here is with the possible mechanistic application of the three scenarios based on these factors, such that other factors that may be of equal importance are disregarded.[42]

39. Given the above analysis suggested by the Appellate Body based on the *Sunset Policy Bulletin*, the need to consider other factors, including volume, varies depending on which factual scenario is being examined. In the Sunset Review at issue in this proceeding, USDOC was proceeding on the basis of scenario (a) in which dumping continued with substantial margins. In our view, the absence of dumping, except for two adverse facts available determinations in the first review, during the first, second and third reviews would seem to be comparable to scenario (c) rather than scenario (a). This, in turn, would seem to require more than a mechanistic application of the volume presumption. By relying on dumping margins which support scenario (a), Vietnamese Respondents were prevented from arguing that scenario (c) should apply and then placing the other factors, including volume, into the context of scenario (c). One such factor is temporal (i.e. that the only margins found were found only in the first review); another relates to the volume accounted for by the imports subject to adverse facts available in comparison with the volume of imports with no dumping margins based on a WTO consistent determination of the margins of dumping.

[40] Ibid. paras. 262-268.
[41] Appellate Body Report, *US – Lamb*, para. 113.
[42] Appellate Body Report, *US – OCTG Sunset Review*, para. 208.

40. In addition, as recognized by the Appellate Body, the volume issue becomes more complicated and other factors more important under scenario (c). As such, the use of WTO inconsistent margins of dumping infected all aspects of the likelihood-of-dumping determination and, therefore, tainted the entire determination. While there may be situations in which the reliance on WTO inconsistent margins of dumping does not taint the entire investigation (e.g. when there are consistent positive margins of dumping throughout the investigation using both a WTO consistent and WTO inconsistent methodology), that is simply not the case here and the United States has not demonstrated it to be the case.

41. Based on the above, Viet Nam believes that the panel must find that the *Sunset Review* conducted by the USDOC of the antidumping duty order on *Certain Frozen Warmwater Shrimp from Viet Nam* was inconsistent with U.S. obligations under Article 11.3 of the *Anti-Dumping Agreement* in that; (1) it relied on WTO-inconsistent margins of dumping which constituted an improper establishment of the facts and prevented an unbiased and objective evaluation of the proper facts; and (2) it relied on a volume presumption which itself is not supported by the facts and its improper evaluation of changes in volume based on the facts of the review.

VI. CLAIMS REGARDING INDIVIDUAL COMPANY REVOCATION OF AN ANTIDUMPING DUTY ORDER PURSUANT TO ARTICLE 11.2

A. Applicable WTO Obligations: Arguments of Viet Nam

42. Viet Nam argues that Article 11.2 mandates the termination of antidumping duties as to individual respondents which have demonstrated that the continuation of the duties is not necessary to offset dumping.[43] Viet Nam is not contesting either the three year period which the USDOC examines under Regulation 351.222, the certification requirement of the Regulation, or the "not likely" standard used to determine whether to revoke antidumping duties as to individual respondents. Viet Nam for purposes of this proceeding accepts a three year period as providing a proper basis on which to determine whether the dumping has ceased and the likelihood that it would recur if the antidumping duties were terminated. With regard to specific exporters, we note the following:

- In the case of Minh Phu, its request for revocation was rejected because Minh Phu was found to have a positive margin of dumping in the fourth administrative review based on the WTO inconsistent application of zeroing after having zero or *de minimis* margins in the second and third reviews. The legal issues before this Panel is whether or not an authority can rely on a WTO inconsistent margin of dumping in determining whether or not to terminate the antidumping duty as to individual respondents under Article 11.2.

- In the case of the other respondents, the USDOC rejected their requests for revocation based on the absence of a sufficient number of individually calculated margins of dumping for each requesting respondent to qualify for consideration for revocation.[44] The legal issue before the Panel is whether an authority's failure to review the margins of dumping for individual respondents under Article 9.4 can serve as a basis for the authority to void its obligations under Article 11.2

B. Applicable WTO Obligations: Arguments of the United States

43. The United States has presented three arguments to counter Viet Nam's request for a finding that the denials of the revocation requests of individual respondents were WTO inconsistent. The first and principal argument is that Article 11.2 does not impose any obligation on authorities to terminate antidumping duties as to individual respondents. Second, it argues that the requirement of the absence of dumping margins for a period of three years is a U.S. law requirement and not a requirement of Articles 11.1 and 11.2. Finally, it argues that the USDOC did not breach Articles 11.1 and 11.2 by limiting its examination of individual respondents and using this limitation as a basis for rejecting proposals for revocation of the antidumping duties.

[43] *See* Viet Nam Answers to Questions, paras. 150-154.
[44] Ibid.

C. Analysis

44. The threshold issue which the panel must address before addressing any other issues is whether or not Article 11.2 imposes upon a Member an obligation to revoke antidumping duties as to individual respondents once the criteria set forth in Article 11.2 are met by that individual respondent. Article 11.1 sets forth clearly the object and purpose of the balance of the provisions in Article 11 and, more specifically, of Articles 11.2 and 11.3. Article 11.1 seeks to limit the imposition of dumping duties both in terms of "time" ("only so long as") and scope ("to the extent necessary"). Both Articles 11.2 and 11.3 address the time period during which antidumping duties may remain in effect absent certain conditions. Article 11.3 states that antidumping duties can only remain in effect for five year periods absent certain conditions related to the continuation or recurrence of dumping and injury. Article 11.2 imposes an obligation to terminate antidumping duties earlier than the five year period under similar, although not identical, conditions as Article 11.3. Article 11.3, however, only addresses the issue of the "expiry" of duties and not "the extent" to which duties are continued. Since Article 11.3 does not address "the extent" limitation which is clearly a purpose of Article 11 as specified in Article 11.1, the "the extent" of the antidumping duties must be addressed under Article 11.2. Indeed, this is contemplated by Article 11.2 in that it contemplates duties not only being "removed" but also "varied." The "extent" to which antidumping duties continue to be "necessary" cannot be read to limit the examination to the "country-wide" "product specific" duties. Rather, to give the "extent" and "varied" meaning, Article 11.2 can only be read as permitting changes in both the exporters and products subject to antidumping duties.

45. Finally, the exception of Article 6.10 cannot be used as the basis for acting inconsistently with the obligations of Article 11.2. It is the obligation of the Member to interpret and apply the provisions of an agreement in a manner which gives meaning to all provisions and does not read some provisions fully or partially out of the same agreement.

ANNEX B-4

EXECUTIVE SUMMARY OF THE STATEMENTS OF
VIET NAM AT THE SECOND PANEL MEETING

I. COMMERCE'S NME-WIDE ENTITY POLICY

1. With respect to Viet Nam's Articles 6.10 and 9.2 claims, the U.S. has been persistent in its attempt to turn this issue into a question of fact, or even a mixed question of law and fact. As made clear by the Appellate Body, the Panel has no reason to consider whether the factual evidence cited by the United States justifies a presumption of government ownership of all companies in all industries, if the legal texts prohibit the presumption in the first place. The United States must first assert a legitimate legal basis for the presumption; a legal basis that overcomes the plain language of Articles 6.10 and 9.2, which requires assignment of individual dumping rates. The United States has failed to do so. The only concession made by Viet Nam with respect to antidumping measures concerned the substitution of surrogate for actual values when determining normal value. The U.S. cannot take what specifically identified concessions do exist in the Accession Protocol and Working Party Report, and unilaterally expand the scope of those concessions. Articles 6.10 and 9.2 require assignment of individual rates. The United States' presumption directly violates that requirement.

2. The U.S. also argues that Viet Nam's decision to not challenge the "nonmarket economy country" status makes the Appellate Body's guidance in *EC – Fasteners (China)* inapplicable. Viet Nam is not challenging in this dispute the United States' ability to currently apply the concessions that do exist in Viet Nam's Accession Protocol. The issue is the U.S. adoption of a presumption that is contrary to the plain language of the Anti-Dumping Agreement for which Viet Nam made no concession. Lastly on this claim, the U.S. argument that the Working Party Report and a 2002 DOC determination from a different proceeding justify reliance on the presumption. As explained above, this argument is moot, as the United States cannot provide a legal basis for the existence of the presumption.

3. On Viet Nam's claims of inconsistency with Article 6.8, the United States and Viet Nam largely agree on the legal standard. With respect to the facts, as we have thoroughly discussed and documented, and as found by the panel in DS404, the U.S. position would require this Panel to "elevate form over substance, and ignore the true factual circumstances surrounding the assignment of that rate".[1] The United States acknowledged that it did not request information from the Vietnam-wide entity during the covered reviews. Accordingly, the United States had no legal basis under Article 6.8 to apply a dumping rate based on adverse facts available to the Vietnam-wide entity. Viet Nam believes that this fact alone is determinative. Nevertheless, two factual issues require clarification. First, the DOC never requested information from the Vietnamese government. Second, the United States could not identify a single instance in which the DOC applied an Article 9.4-consistent rate to a producer that was presumed to be part of an NME-wide entity. The DOC applies a rate based on adverse facts available as a practice in all such circumstances.

4. Last, we address Viet Nam's Article 9.4 claim. The plain language of Article 9.4 makes clear its application where the authority has limited the examination. In the covered reviews, the DOC limited the examination, and its failure to apply a rate to the Vietnam-wide entity consistent with Article 9.4 amounts to a violation. Furthermore, as a factual matter, the U.S. suggests that a review was never requested for the constituent companies of the so-called Vietnam-wide entity, such that a new rate could not be assigned. In fact, as shown in Viet Nam's second written submission, requests were made for constituent companies.

II. ZEROING

5. The issue of zeroing is before the Panel in two contexts: first, as applied in the third, fourth, and fifth administrative reviews; and second, as such. With respect to the applied claims, there is little dispute. The zeroing methodology, as found by several Appellate Body Reports to be

[1] Panel Report, *US – Shrimp (Viet Nam)*, para. 7.279.

WTO-inconsistent, was as a matter of fact applied in the covered reviews. Accordingly, the United States' determined arguments notwithstanding, there is little question that the use of zeroing in the third, fourth, and fifth administrative reviews is inconsistent with the Anti-Dumping Agreement. With respect to the as such claims, Viet Nam has set forth a sufficient basis for the Panel to make a decision on the merits.

III. SECTION 129 OF THE URAA

6. Viet Nam's claims regarding Section 129 concern the legal effect given new determinations issued under Section 129(c)(1) of the Uruguay Round Agreements Act, which limits implementation of adverse WTO rulings and recommendations to entries of subject merchandise, entered or withdrawn from warehouse for consumption on or after the date on which the administering authority is directed to implement the new determination by the U.S. Trade Representative. Section 129(c)(1) does not allow any refund of invalid duties applicable to entries made before the USTR implementation date. As a consequence, Section 129(c)(1) and its prohibition against refunds is inconsistent, as such, with various provisions of the Anti-Dumping Agreement, including Articles 1, 9.2, 9.3, 11.1, and Article 18.1.

7. Viet Nam's claims do not concern any other mechanism that the United States might apply in implementing DSB rulings and recommendations. As much as the United States would like to introduce other mechanisms into the debate, their existence does nothing to undercut Viet Nam's claims regarding Section 129(c)(1). Even if *some* prior unliquidated entries may be treated in a WTO-consistent manner in *some* situations over the course of administrative action under other provisions of U.S. law, that does not save Section 129(c)(1) and the effect it has on prior unliquidated entries. Section 129(c)(1) need not apply in even a single specific instance for it to be found inconsistent "as such" with U.S. obligations under the WTO.[2] We have in this instance a statutory provision that sets forth rules and norms for responding to adverse findings of the DSB, the effect of which has not been denied by the United States. Thus, the mere fact that the United States might apply a different mechanism to implement adverse DSB rulings and recommendations in the future does not resolve the question of whether the mechanism set forth in Section 129 is or is not inconsistent. When Section 129 is the mechanism for effecting implementation, that implementation is necessarily WTO inconsistent as it applies to unliquidated entries.

8. The U.S. arguments are simply an attempt to obfuscate and there is no better example of this fact than its efforts to present Section 123 of the Uruguay Round Agreements Act as a kind of prior unliquidated entry analog to the purely prospective effect given Section 129(c)(1) determinations. The characterization is simply incorrect.

9. Section 129 provides the exclusive authority for the DOC to "issue a new determination in connection with a particular proceeding that would render" its action "not inconsistent with the findings of the panel or the Appellate Body". Viet Nam again submits that the United States cites to no other authority that permits such action short of an act of Congress. It is abundantly clear from the statute that Section 129 is not intended to address future entries, *per se*, thereby leaving prior unliquidated entries to other authority, as suggested by the United States. Rather, the purpose of Section 129 is to grant authority for the DOC to issue a new, WTO-consistent determination. Section 123 does not alter these facts or otherwise save the U.S. argument. The purpose of Section 123 is not to address prior unliquidated entries, but to grant authority to amend agency practice or regulation "in a case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with the any of the Uruguay Round Agreements ...". Unlike Section 129, Section 123 is not intended to bring a *specific* determination *(i.e.*, the measure that is the target of the Section 129 proceeding) into conformity with the United States' obligations under the covered agreements.

10. The United States has yet to provide a single example in which prior unliquidated entries were in play and Section 129 provided the entitled relief for those entries. This is true even when paired with an action under Section 123. The Panel should therefore ask the United States to reconcile its position on Section 129(c)(1) and the "other mechanisms" it posits address prior liquidated entries with its actual practice as carefully documented by Viet Nam. It cannot and it

[2] *See* Appellate Body Report, *United States – 1916 Act*, para. 61.

has chosen not to address the numerous examples presented by Viet Nam. It does not address the effect of the Section 129 determination or the measure it is intended to correct. It does not address instances where Section 123 is not involved. And it does not address the reality that even where a regulation or practice modified pursuant to Section 123 is applied in a subsequent administrative review, the result is the continued retention of excessive deposits while that process plays out. On this last point we have come full circle: The WTO-inconsistent retention of excessive deposits is based on a determination the Section 129 determination is intended to correct and replace but only prospectively on entries made after the USTR implementation date.

11. The other main U.S. argument is that Viet Nam has not raised claims under the DSU and therefore its challenge is deficient. Contrary to U.S. arguments, the fact that Section 129(c)(1) deals with measures to implement DSB rulings and recommendations does not mean that the only recourse under the WTO is through provisions of the DSU. The question of compliance must be based on consideration of other substantive obligations. Viet Nam believes Japan framed the inquiry quite succinctly.[3] As Japan noted in its responses to questions, the Appellate Body made clear in *US – Zeroing (EC) (Article 21.5 – EC)* and *US – Zeroing (Japan) (Article 21.5 – Japan)* that a Member's obligation to comply with DSB recommendations and rulings covers actions or omissions subsequent to the reasonable period of time, even if they relate to imports that entered the territory of a WTO Member at an earlier date. Accordingly, the interpretive question in the current dispute is not whether "prior unliquidated entries" are subject to the recommendations and rulings of the DSB, or whether a Member violates the covered agreements by liquidating certain "prior unliquidated entries" in a WTO-inconsistent manner after the expiration of the reasonable period of time. The only issue in the current dispute is whether Viet Nam has demonstrated that, in certain circumstances, Section 129(c)(1) necessarily excludes the possibility of DOC to take WTO-consistent action with respect to prior unliquidated entries. Again, because of the limited effective date under Section 129(c)(1), numerous substantive violations of the Anti-Dumping Agreement necessarily arise as of the close of the RPT with respect to prior unliquidated entries. This is the focus of Viet Nam's claims, as explicitly set forth in its request for a panel and in its first written submission.

IV. THE SUNSET REVIEW

12. The United States relies essentially on three arguments to claim that the Sunset Review of *Frozen Warmwater Shrimp from Vietnam* was consistent with U.S. WTO obligations. First, that the DOC did not rely exclusively on WTO-inconsistent margins of dumping. The Appellate Body has been clear that an authority must make a sunset review determination based on an evidentiary record that contains WTO-consistent margins of dumping. The Panel does not need to speculate on the bias inherent in the DOC's failure to rely on WTO consistent margins of dumping. On one side of the ledger is the table of margins determined consistent with U.S. WTO obligations and the U.S. Court of International Trade's findings in *Amanda Foods*, provided at paragraph 277 of Viet Nam's First Written Submission. The table demonstrates that dumping ceased entirely after the first review. On the other side of the ledger are two findings based on adverse facts available in the first review. It is clear that a WTO consistent evidentiary record for the sunset review would be very different than the record actually relied upon by the DOC.

13. The second U.S. argument concerns the question of volume. The DOC conducted its analysis based on the incorrect belief that the dumping had continued since the duty was imposed; WTO consistent margins of dumping would have given rise to the third scenario identified in Section II.A.3 of the DOC's Sunset Policy Bulletin, namely the dumping had ceased and there had been a moderate decline in import levels. The Appellate Body has indicated that the validity of the presumption of declining imports supporting a finding of "likelihood" (and, in turn, the analysis required) will be different depending on which scenario applies. Accordingly, the Appellate Body has stated that the scenario in which dumping has ceased and imports have continued requires a more detailed examination of the causes of the decline in imports than does the scenario in which the dumping has continued. The question of "likelihood" addressed by the DOC was in the context of continued dumping. In fact, the question of "likelihood" should have been addressed in the context of the cessation of dumping. It is difficult to see how a conclusion can be unbiased and objective when that conclusion is directed at an entirely different scenario than the one that would have existed if the DOC were relying on WTO consistent margins of dumping.

[3] Japan's Responses to the Panel's Questions, para. 11.

14. The third U.S. argument, that Viet Nam should be barred from making arguments before this Panel that were not made in the underlying proceeding, has already been rejected in WTO jurisprudence.

15. The DOC's refusal to recognize WTO consistent margins of dumping for purposes of its "likelihood" analysis infected every aspect of the sunset review determination. The most effective factual argument related to volume (the existence of substantial safety margins) could not be made because the margins relied upon by the DOC were not WTO consistent. Moreover, any decline in imports must be evaluated in the context of the cessation of dumping, as would be the case using WTO consistent dumping margins. This evaluation did not take place in the sunset review.

V. COMPANY SPECIFIC REVOCATION

16. The U.S. relies primarily on one argument in suggesting that Article 11.2 imposes no obligations on a Member to revoke an antidumping duty as to an individual exporter that has demonstrated that dumping has ceased and is not likely to recur: the interpretation by the Appellate Body in *US – Corrosion Resistant Steel Sunset Review* that Article 11.3 addresses only an order-wide revocation and not a revocation of antidumping duties on individual exporters. In particular, the U.S. relies on use of the term "duty" in Article 11.3 and the reference in Article 9.2 to "an anti-dumping duty … in respect of any product".[4] Viet Nam, however, would note that the Appellate Body found that this phrasing "informs" the interpretation and not that it governs the interpretation. Indeed, the prior paragraph of the very same Appellate Body report states:

> In fact, Article 11.3 contains no express reference to individual exporters, producers, or interested parties. **This contrasts with Article 11.2 which does refer to "any interested party" and "interested parties."**[5]

17. Subsequently, the Appellate Body, referring to the term "interested parties" states:

> These references suggest that, when the drafters of the *Anti-Dumping Agreement* intended to impose obligations on authorities regarding individual exporters or producers, they did so explicitly.[6]

18. In other words, use of the term interested parties according to the Appellate Body is an explicit reference to individual importers, exporters, or foreign producers. Use of the term "interested party" in Article 11.2 in fact distinguishes it from Article 11.3. The Panel should be aware that the Appellate Body made this distinction in the very report relied upon by the United States and in the paragraphs immediately preceding and following the paragraph relied on primarily by the U.S. relating to the reference to "the duty".

19. The U.S. then proceeds to claim that the distinction between Articles 11.2 and 11.3 is based on the fact that interested parties would have an interest in revocation under Article 11.2, while the domestic industry would have an interest in preventing the expiry of the duties under Article 11.3. Viet Nam would first note that the term "any interested party" is not limited to an interested party or parties which are importers, exporters, or foreign producers of the subject merchandise. Second, while the use of "any interested party" is necessary to define those parties which may request a review under Article 11.2, it also, as found by the Appellate Body, indicates an obligation with respect to individual importers, exporters or foreign producers. Third, while the word "varied" appears in reference to the injury aspect of Article 11.2, the variation must refer to variations in the "extent" of the duty and, therefore, makes clear the intention of the Anti-Dumping Agreement to address variations in the duty within the context of Article 11.2 reviews. Fourth, use of "any" indicates that individual importers, exporters, or foreign producers may request a review of either the need for continuation of the antidumping duties or injury. Given that any individual importer, exporter, or foreign producer would gain a competitive advantage vis-à-vis other importers, exporters, or foreign producers by having the duty as applied to it removed while it continues to be applied to others, the use of the word "any" must inform the interpretation of Article 11.2.

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[4] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 150.
[5] Ibid. para. 149.
[6] Ibid. para 152.

20. Thus, the specific language of Article 11.2, and the contrast between the language of Articles 11.2 and 11.3, must inform the Panel's interpretation of Article 11.2. This, of course, brings us back to the object and purpose of Article 11 as articulated in Article 11.1. Article 11.1 addresses both the duration (only as long as) and coverage (the extent necessary) of antidumping duties. An interpretation of Article 11.2 which is consistent with limiting the extent of the application of antidumping duties to importers, exporters, and foreign producers who can demonstrate that dumping is not taking place and is unlikely to recur is consistent with the application of antidumping duties only to those importers, exporters, and foreign producers that are demonstrated to be dumping as provided in Article 5.8.

ANNEX B-5

VIET NAM'S RESPONSE TO THE UNITED STATES' REQUEST FOR PRELIMINARY RULINGS

TABLE OF CASES

Short Title	Full Case Title and Citation
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853
US – Customs Bond Directive	Panel Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R, WT/DS345/AB/R
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3

I. INTRODUCTION

1. With this submission, Viet Nam respectfully provides its response to the request for preliminary rulings asserted in the United States' submission received on July 31, 2013. Viet Nam believes that the United States' requests are premature in that many of the United States' concerns would have been alleviated upon receipt of Viet Nam's first written submission.

2. Viet Nam limits its discussion in this submission to a single argument raised in Section II of the United States' request for preliminary rulings. Specifically, Viet Nam addresses below the United States' claim that the sixth administrative review is not a measure at issue, nor is it within the Panel's terms of reference.

3. As an initial matter, Viet Nam addresses the additional points raised in the United States' request. First, on the United States' concern regarding Viet Nam's reference to the use of zeroing in "original investigations", "new shipper reviews", and "certain changed circumstances reviews", Viet Nam is not challenging the use of zeroing, as applied, to these particular types of proceedings. Viet Nam's panel request makes clear that the "zeroing" as applied claims are limited to the fourth, fifth, and sixth administrative reviews. The original investigation and the sunset review are relevant to the extent that zeroing affects the Panel's analysis on the claims that are particular to the sunset review. To be clear, Viet Nam's consultation and panel request also identify, however, an as such claim with respect to the USDOC's zeroing practice.

4. Second, on the United States' concern regarding a claim based on the Vienna Convention on the Law of Treaties ("VCLT"), Viet Nam did not intend before, and does not intend now, to assert its claim pursuant to the VCLT. Viet Nam simply included reference to the VCLT to make clear the importance of the object and purpose of the relevant agreement in the course of treaty interpretation.

5. Third, on the United States' concern regarding Viet Nam's supposed identification of the Statement of Administrative Action ("SAA") as a measure, Viet Nam did no such thing. Viet Nam's request does not identify the SAA as a measure within the Panel's terms of reference nor does Viet Nam intend to challenge the SAA as a measure.

6. Viet Nam addresses the remaining issue below.

II. Viet Nam's Panel Request Did Not Expand the Scope of the Measures At Issue With Respect to the Sixth Administrative Review and the Panel Should Dismiss the United States' Request

7. The Panel should dismiss the request made by the United States concerning the sixth administrative review. The United States claims that Viet Nam's panel request "expanded the scope and changed the essence of its consultations request by including measures that were not the subject of its consultation request". Viet Nam has done no such thing, and the Panel should continue to find this measure within its terms of reference.

8. The Appellate Body has explained that there need not be a "precise and exact identity" between the measures identified in the consultation request and the panel request. The issue is whether or not the "essence" of the challenged measures has changed, a determination that can only be made on an individual, case-by-case basis. The purpose of the panel request is to narrow the focus of the inquiry from the consultation request and to identify with greater precision the issues before the Panel.

9. Viet Nam identified the sixth administrative review as a measure at issue in the request for consultations. First, page 1 of Viet Nam's Consultations Request states that the request is made with respect to the fourth administrative review, the fifth administrative review, and "any other ongoing or future anti-dumping administrative reviews, and the preliminary and final results thereof, related to the imports of certain frozen warm-water shrimp from Viet Nam (DOC Case A-552-802)."

10. Second, page 3 of Viet Nam's Consultations Request states that Viet Nam would like to raise in the course of consultations the use of the identified practices in the fourth administrative

review, the fifth administrative review, and "the continued use of the practices described [] above in subsequent reviews".

11. Viet Nam conveyed to the United States, by way of the language included in the consultation request, the understanding that the sixth administrative review was a measure at issue. The United States was placed on notice of this fact through Viet Nam's identification of "ongoing" administrative reviews. The "essence" of the challenge has not changed from the consultation request to the panel request; rather, Viet Nam's panel request merely provides greater precision on the measures at issue.

III. CONCLUSION

12. On the basis of the above, Viet Nam submits as follows:

- Viet Nam does not challenge the use of zeroing, as applied, to "original investigations", "new shipper reviews," and "certain changed circumstances reviews", other than the original investigation to the extent it has an effect on subsequent reviews and the sunset review;
- Viet Nam does not assert any claims pursuant to the VCLT;
- Viet Nam does not claim that the SAA is within the Panel's terms of reference; and
- Viet Nam did identify the sixth administrative review, as an ongoing administrative review, in the consultation request.

13. Accordingly, Viet Nam respectfully requests that the Panel deny the request made by the United States with respect to the sixth administrative review and proceed to consider the merits of the claims raised.

ANNEX B-6

VIET NAM'S RESPONSE TO THE UNITED STATES' REPLY FOR THE REQUEST FOR PRELIMINARY RULINGS

TABLE OF CASES

Short Title	Full Case Title and Citation
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3

1. With this submission, Viet Nam respectfully provides its response to United States' "Reply to Viet Nam's Response to the Request for Preliminary Rulings by the United States of America" submission received on August 13, 2013. Viet Nam's focus here is on the request for a preliminary ruling concerning the final results of the sixth administrative review.

2. As the Panel recalls, the United States' request did identify three additional "measures":

- The use of zeroing in original investigations, new shipper reviews, and changed circumstances reviews;
- The Vienna Convention on the Law of Treaties; and
- The Statement of Administrative Action accompanying the Uruguay Round Agreements Act.

3. Viet Nam has not challenged the items listed above as measures. Rather, inclusion of these three items in the request for establishment of a Panel was warranted because of their relevance to the measures that are being challenged.

4. The final result of the sixth administrative review, however, is a measure within the terms of reference of the panel. Viet Nam sets forth two points on this issue to supplement the submission made on August 5. The "fundamental flaws" identified in the United States' reply are not applicable and do not disqualify this measure as within the terms of reference of the Panel.

5. First, the United States' citation to Article 3.3 of the DSU does not support the United States' position. That article calls for the "prompt settlement" of situations in which a Member's benefits are impaired. Yet, under the United States' argument, the Panel should ignore the final results of the sixth administrative review, despite the fact that Viet Nam makes the same claims with respect to the sixth administrative review as it has with the fourth and fifth administrative. The fourth and fifth administrative reviews are unquestionably properly before the Panel. The United States would have Viet Nam file a new request for consultations and request for establishment of a panel and force the DSB to compose a new panel to review the same issues presently before this panel. This does not further Article 3.3's objective of prompt settlement.

6. Moreover, contrary to the United States' claim, the final results of the sixth administrative review are presently affecting Viet Nam's rights under the covered agreements. The sixth administrative review is not a measure "that may never exist". To the contrary, it is a measure that does exist and is having a significant present impact on Viet Nam. The United States' attempt to engage in hypothetical situations should be dismissed. Viet Nam is being adversely affected by the results of the sixth administrative review and seeks the prompt settlement of this situation. It is for this very reason that Viet Nam identified in the consultation request "any other ongoing or future administrative reviews", a clear reference to the sixth administrative review that was ongoing at the time of the consultation request.

7. Second, the United States' citation to Article 4.4 of the DSU is similarly misguided. The Appellate Body has explained that there need not be a "precise and exact identity" between the measures identified in the consultation request and the panel request. The panel request serves to narrow the inquiry, which is precisely what was done in this case. Viet Nam's panel request narrowed the scope of the dispute to, among other measures, the fourth, fifth, and sixth administrative reviews. Far from expanding the scope, as claimed by the United States, the panel request clearly identified the specific administrative reviews before the panel.

8. Accordingly, Viet Nam respectfully requests that the Panel deny the request made by the United States with respect to the sixth administrative review and proceed to consider the merits of the claims raised.

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ANNEX C

ARGUMENTS OF THE UNITED STATES

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ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. Introduction

1. Vietnam requests that the Panel find that Commerce's application of its zeroing methodology "as such" and as applied in the fourth, fifth and sixth administrative reviews of the antidumping duty order on frozen warmwater shrimp from Vietnam was inconsistent with the AD Agreement and the GATT 1994. Vietnam's "as such" claim is without merit because the United States has already changed the practice for calculating dumping margins. Vietnam's "as applied" claims are without merit as there is no obligation under the text of the AD Agreement and the GATT 1994 requiring an investigating authority to grant offsets to reduce the amount of dumping duties levied on dumped entries to account for non-dumped entries priced above normal value.

2. Vietnam has also failed to establish that the alleged "NME-wide entity rate practice" is a measure that may be challenged "as such" as inconsistent with the AD Agreement given that it has not put forward evidence that what it describes as "practice" is a measure. Further, Commerce's decision to identify a Vietnam-government entity in the covered reviews and assign that entity an individual margin of dumping and an individual antidumping duty was not inconsistent with the obligations of the United States under the AD Agreement. In fact, the Working Party Report as incorporated into the Accession Protocol provides a basis for treating multiple enterprises in Vietnam as part of a Vietnam-government entity. Finally, although the United States would disagree with certain statements made by the Appellate Body in *EC – Fasteners*, a close reading of that report indicates that Commerce's determination regarding the Vietnam-government entity was not inconsistent with the AD Agreement.

3. Vietnam's challenge to Section 129(c)(1) of the Uruguay Round Agreements Act, which is one of the mechanisms by which the United States implements recommendations and rulings from the DSB, suffers from a number of fatal flaws that were identified by the panel in *US – Section 129(c)(1)* when it rejected the nearly identical claims to those made by Vietnam in this dispute. Vietnam fails to demonstrate that the panel erred in that earlier dispute. Moreover, Vietnam's remaining arguments similarly fail to show that Section 129(c)(1) precludes the United States from taking WTO-consistent action.

4. Contrary to Vietnam's claims, Commerce permissibly concluded in the sunset review that revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping. Commerce conducted a thorough review of the history of the antidumping duty proceeding and relied on positive antidumping duty rates applied to numerous exporters during the four completed reviews, finding that Vietnam has failed to establish sufficient evidence in support of its allegations that Commerce's consideration of positive margins of dumping assigned to respondents was inappropriate. In addition, factors other than margins of dumping, in particular post-antidumping order import volumes, fully supported Commerce's finding.

5. Lastly, Vietnam requests that the Panel find that Commerce's failure to revoke the antidumping duty order with respect to certain companies during the challenged reviews was inconsistent with the AD Agreement. However, the provisions relied on by Vietnam, specifically Articles 11.1 and 11.2 of the AD Agreement, do not provide for company-specific revocation from an antidumping duty order. As a result, Vietnam's argument fails.

II. Vietnam's "As Applied" Claims Regarding Company-Specific Revocation Have No Basis in the AD Agreement

6. Vietnam's argument concerning an alleged breach of Articles 11.1 and 11.2 does not rest on the text of these provisions. Article 11.1 of the AD Agreement states that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury". With respect to Article 11.2, there is no obligation contained in the text

that requires a Member to partially terminate the antidumping duty with respect to individual companies.

7. Articles 11.1 and 11.2 also do not require revocation based on an absence of dumping for three years. Under U.S. domestic law, individual companies are allowed to request revocation of an antidumping order either on an order-wide or company-specific basis. In this regard, the United States draws the Panel's attention to the report *US – Anti-Dumping Measures on Oil Country Tubular Goods,* which discusses these domestic law provisions. In the face of a similar claim as presented by Vietnam here (including the use of the "zeroing" methodology), the panel found that, given revocation based on three years of no dumping operated "in favour of foreign producers and exporters, and that a more general opportunity to request review exists [through a CCR], we see no basis to conclude that [Commerce] acted inconsistently with Article 11.2 in the fourth administrative review when it concluded that the Mexican exporters were not entitled to revocation as their situation did not fit the required factual prerequisites". The panel also found that, "[b]y providing that, in certain circumstances, [Commerce] may revoke an antidumping duty order based in part on three years of no dumping, we consider the United States has gone beyond what is required by Article 11.2". For these reasons, even if certain Vietnamese companies had not had positive dumping margins for three years, nothing in Article 11.1 or Article 11.2 of the AD Agreement establishes that this fact would require terminating the application of the antidumping duty to such companies.

8. Finally, in its first written submission, Vietnam now asserts that "[a]bsent revocation, [individually investigated mandatory respondents] are being denied their rights under Articles 2.1, 2.4.2, 9.3 ...". However, Articles 2.1, 2.4.2 and 9.3 of the AD Agreement were not included as the relevant provisions of the covered agreements cited by Vietnam related to "Revocation in the absence of any evidence of dumping". Therefore, any claims regarding company-specific revocation under these additional articles are outside the terms of reference.

III. Section 129(c)(1) is Not Inconsistent, As Such, with the AD Agreement

9. In the *US – Section 129(c)(1)* dispute, the panel observed "that section 129(c)(1) does not mandate or preclude any particular treatment of prior unliquidated entries or have the effect thereof". With respect to prior unliquidated entries, the panel in *US – Section 129(c)(1)* found that Commerce could conduct segments (e.g., administrative reviews) that impact those entries in a WTO-inconsistent manner. "However, it is clear to us that such actions, if taken, would not be taken because they were required by section 129(c)(1), but because they were required or allowed under other provisions of US law." Thus, the panel correctly determined that section 129(c)(1) does not govern the treatment of unliquidated entries of subject merchandise that are the subject of other segments of the same proceeding, such as in administrative reviews under the relevant AD or CVD order.

10. As is clear from the panel report, Vietnam's argument fails due to a simple threshold issue. Vietnam's argument is based on a presumption of what means the United States will choose ***in the future*** to respond to any DSB recommendations and rulings. That is, Vietnam predicts that the United States will choose to undertake any implementation by means of section 129. Vietnam furthermore predicts that the United States will implement ***only*** by means of section 129 and will not utilize any other means under U.S. domestic law. And Vietnam further predicts how any U.S. measure taken to comply will address what Vietnam calls "prior unliquidated entries". It should be apparent on its face that a claim based on a prediction of how a Member will operate in the future in response to DSB recommendations and rulings is a claim that is based on speculation and, thus, fails.

11. In addition to Vietnam's attempt to challenge predicted future actions, Vietnam's argument suffers the basic and fundamental flaw that the provisions of the AD Agreement cited by Vietnam do not contain any affirmative obligations with respect to the implementation of adverse DSB recommendations and rulings. Rather, in the antidumping context, the DSU is the only WTO agreement that addresses Members' obligations in regards to implementation. Vietnam has not pursued any claims under the DSU. For this reason alone, Vietnam's argument should be rejected.

12. In the course of its arguments, Vietnam also makes a number of incorrect assertions regarding the implications of U.S. domestic law and the prior panel report in *US – Section 129(c)(1)*. First, Vietnam argues that, because section 129(c)(1) "serves as an absolute

legal bar" to the WTO-consistent liquidation of prior unliquidated entries, section 129(c)(1) is inconsistent with various provisions of the AD Agreement, specifically Articles 1, 9.2, 9.3, 11.1 and 18.1. Section 129(c)(1) addresses the implementation of determinations made under section 129 in response to DSB recommendations and rulings to unliquidated entries of subject merchandise entered on or after the date USTR directs implementation. Vietnam has no support in the plain language of the statute for the additional assertion that section 129(c)(1) serves as a legal bar to WTO-consistent action on prior unliquidated entries in other administrative segments of the proceeding or through other means.

13. Second, Vietnam relies on the SAA to support its interpretation of section 129(c)(1), but Vietnam's reliance is misplaced because Vietnam fails to provide meaningful support under the SAA for the assertion that section 129(c)(1) bars any other acts (outside section 129) that would impact prior unliquidated entries. Vietnam is simply mistaken when it claims that section 129(c)(1) has precluded Commerce from making WTO-consistent determinations with respect to prior unliquidated entries.

14. Vietnam further argues that the general "nature" of section 129 supports its assertion that section 129 would be the exclusive authority under U.S. law to implement DSB recommendations and rulings. This is incorrect, as Vietnam misconstrues the provisions of the URAA on which it relies, such as section 102. Nothing in section 102 of the URAA indicates that section 129 would be the exclusive authority under U.S. law to implement DSB recommendations and rulings. In fact, section 102(a)(2)(B) supports the opposite position that "[n]othing in this Act shall be construed ... to limit any authority conferred under any law of the United States ... unless specifically provided for in this Act".

15. Vietnam also argues that section 129(c)(1) is the exclusive method by which DSB recommendations and rulings may be implemented because, in instances where the U.S. International Trade Commission implements DSB recommendations and rulings by changing its injury determination from affirmative to negative, the particular AD or CVD order at issue is revoked as of the implementation date. Again, Vietnam's argument is based on a fundamental misunderstanding. As the panel explained in *US – Section 129(c)(1)*, "only determinations made and implemented under section 129 are within the scope of section 129(c)(1)" and that "section 129(c)(1) only addresses the application of section 129 determinations. It does not require or preclude any particular actions with respect to [other entries] in a separate segment of the same proceeding".

16. Finally, Vietnam suggests that the Panel not follow the panel report in *US – Section 129(c)(1)* because the argument advanced by Canada in that panel proceeding – that section 129(c)(1) was an absolute bar to any refunds of duties on prior unliquidated entries – has turned out to be correct. As the United States has explained, not only does section 129(c)(1) not preclude the implementation of adverse DSB recommendations and rulings under other statutory authority, but Congress and the Executive Branch of the U.S. Government specifically contemplated that such implementation would occur. There have, in fact, been numerous instances in which Commerce has modified its treatment of prior unliquidated entries. For the foregoing reasons, the United States respectfully requests that the Panel reject Vietnam's claims that section 129(c)(1) is as such inconsistent with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the AD Agreement.

IV. The Treatment of Multiple Companies as a Single Vietnam-Government Exporter/ Producer was Not Inconsistent with the AD Agreement

A. Vietnam Has Failed to Demonstrate the Existence of a Measure of General and Prospective Application That May Be Challenged "As Such" as Inconsistent with the AD Agreement

17. Vietnam has not established that the alleged NME-wide entity rate "practice" exists and can be a measure. First, Vietnam does not explain how a "practice" can set out a rule or norm of general or prospective application. Second, in relation to the alleged "practice," Vietnam has not demonstrated that Commerce "invariably applies" the alleged "practice" that is subject to its various arguments. Vietnam cites several paragraphs from Commerce's antidumping manual; however, the manual itself clearly states that it "is for the internal training and guidance of Import

Administration (IA) personnel only, and the practices set out herein are subject to change without notice. This manual cannot be cited to establish DOC practice". In sum, given Vietnam has failed to establish existence of an alleged "practice" as a measure, Vietnam cannot establish a *prima facie* case for an "as such" inconsistency with the AD Agreement given that it has not brought forward evidence that what it describes as "practice" is a measure.

B. Treating Related Companies in the Covered Reviews as a Single Exporter or Producer for the Purpose of Determining a Dumping Margin is Consistent with Articles 6.10 and 9.2 of the AD Agreement

18. Article 6.10 provides that an investigating authority "shall, as a rule, determine an individual margin of dumping for each known exporter or producer of the product under investigation". Context in the AD Agreement indicates that whether producers are related to each other affects the investigating authority's analysis of those firms. Depending then on the facts of a given situation, an investigating authority may determine that legally distinct companies should be treated as a single "exporter" or "producer" based on their activities and relationships. As noted by the Appellate Body in *EC – Fasteners*, this includes consideration of actual commercial activities and relationships of companies rather than merely their nominal status as legally distinct companies. Therefore, contrary to Vietnam's argument, Article 6.10 does not preclude Commerce from treating multiple companies as a single entity, including, where appropriate, a Vietnam-government entity.

19. Under Article 9.2, if an investigating authority concludes that the relationship between multiple companies is sufficiently close to support treating them as a single entity, an investigating authority may apply a single duty rate to all of those companies' exports. Nothing in Article 9.2 prohibits such treatment, nor does Article 9.2 set out criteria for an investigating authority to examine before concluding that a particular firm or group of firms constitutes a single entity. Therefore, contrary to Vietnam's argument, Article 9.2 does not preclude Commerce from treating multiple companies as a single entity, including, where appropriate, a Vietnam-government entity.

C. Vietnam's Protocol of Accession Supports Treating Multiple Companies in the Covered Reviews as Part of a Single Vietnam-Government Entity for the Purpose of Determining Dumping Margins

20. Vietnam's Accession Protocol reflects the rights and obligations of Vietnam upon accession to the WTO. During the accession process, Vietnam described its ongoing shift away from central planning. Members' concerns about the extent to which this shift had occurred are reflected in the Working Party Report. These concerns demonstrate that not all Members were convinced that market-economy conditions prevailed in Vietnam. The Protocol thus, by design, does not impose on Members any market or non-market characterization of Vietnam's economy, factual or otherwise, as a general rule. It simply permits a Member, as a starting point for further discussion, to find for purposes of its own antidumping proceedings that either market economy conditions prevail or non-market economy conditions prevail in the industry in question.

21. Specifically, Paragraph 255(a) of the Working Party Report provides that importing Members need not calculate normal value on the basis of Vietnamese prices or costs for an industry subject to an antidumping investigation. Paragraph 255(d) further provides, in part, that "the non-market economy provisions" of paragraph 255(a) no longer apply to a specific industry or sector in situations where Vietnam "establish[ed], pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector". Therefore, where Vietnam has not established under the national law of the importing Member that it is a market economy, or the Vietnamese producers under investigation have failed to "clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product," an importing Member can calculate normal value based on a NME methodology.

22. The Accession Protocol thus expressly provides support for Commerce's decision to calculate the normal value for the shrimp destined for consumption in Vietnam based on a NME methodology and its continued use of this methodology. In this regard, it is notable that Vietnam does not challenge before the Panel Commerce's decision to calculate the normal value for the shrimp destined for consumption in Vietnam based on a NME methodology, nor does Vietnam challenge the NME methodology that Commerce selected for its calculation of this normal value.

23. In permitting Members to determine normal value in Vietnam pursuant to a methodology not based on prices or costs in Vietnam, the Protocol also provides a basis for treating multiple companies in Vietnam as part of a Vietnam-government entity. In NME countries, the underlying supply and demand decisions, and the attendant resource allocations, are made or fundamentally distorted by the government. They are not made by independent economic actors. In such a situation, the government effectively controls resource allocations. But when the government controls resource allocations, it effectively controls resource allocators, i.e., firms. Thus the understanding in the Accession Protocol that Vietnam is not yet a market economy is, in effect, an understanding that prices for inputs and outputs are affected by the government which, in turn, is in effect an understanding that there remains government control over all firms. In the face of such an understanding, it would make no sense to automatically assign individual dumping margins to Vietnamese exporters. On the contrary, a single "government-controlled" rate is warranted, unless and until it is clearly demonstrated that market economy conditions prevail for margin calculation and antidumping duty rate assignment purposes.

D. *EC – Fasteners* Does Not Preclude Investigating Authorities from Finding that Multiple Companies in Vietnam Constitute a Single Vietnam-Government Entity for the Purpose of Determining Dumping Margins

24. In *EC – Fasteners*, the Appellate Body recognized that Article 6.10 does not preclude the possibility that nominally or legally-independent entities may be treated as a single exporter or producer when that determination is based on evidence submitted in that investigation. According to the Appellate Body, "[w]hether determining a single dumping margin and a single anti-dumping duty for a number of exporters is inconsistent with Articles 6.10 and 9.2 will depend on the existence of a number of situations, which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity". Further, "the criteria used for determining whether a single entity exists from a corporate perspective, while certainly relevant, will not necessarily capture all situations where the State controls or materially influences several exporters such that they could be considered as a single entity for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* and be assigned a single dumping margin and anti-dumping duty". An investigating authority thus is permitted to determine whether a given entity constitutes an "exporter" or "producer" as a condition precedent to calculating an individual dumping margin for that entity.

25. In *EC – Fasteners*, the Appellate Body determined that the EU's presumption that exporters in a NME are related to the Chinese Government was inconsistent with Article 6.10 because it contradicted the "rule" of Article 6.10 requiring investigating authorities to determine an individual dumping margin for "each known exporter or producer". The Appellate Body thus assumed that underlying Article 6.10 is a presumption that every entity must first be recognized as an individual exporter or producer. This presumption was based on an improper interpretation because the Appellate Body created obligations that are not grounded in the text of these articles.

26. However, even under the Appellate Body's flawed interpretive approach, Commerce's determination was not inconsistent with the AD Agreement. Unlike *EC – Fasteners*, there is no dispute that Vietnam is a non-market economy. Thus, to the extent *EC – Fasteners* relied on a finding that China was not necessarily a non-market economy, or that such status is irrelevant, Vietnam's status as a non-market economy in this case is relevant to an inquiry of the level of government involvement in Vietnam's economy.

27. Second, unlike *EC – Fasteners*, Commerce's determination that a Vietnam-government entity existed and that certain exporters, while legally separate, were in fact part of that entity, rested on adequate factual findings in the course of the relevant reviews. *EC – Fasteners* did not preclude an investigating authority from collecting and offering enough evidence to justify a presumption that a single government entity exists and, in the challenged reviews, Commerce has done so. In the reviews Vietnam challenges, Commerce afforded companies the opportunity to submit information about their relationship with the Vietnam-government entity to demonstrate independence from the government. The evidence that Commerce asks an entity to provide is fully consistent with those factors that the Appellate Body in *EC – Fasteners* suggests should be probed to ascertain situations "which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity".

28. In sum, Commerce's conclusion that multiple companies in Vietnam are part of the Vietnam-government entity is based on a permissible (indeed, eminently reasonable) interpretation of Articles 6.10 and 9.2.

E. Vietnam's Claims that Commerce Applied an Adverse Facts Available Rate in the Fourth, Fifth and Sixth Administrative Reviews Inconsistent with Article 6.8 of the AD Agreement Should be Rejected

29. Vietnam's analysis is based on faulty facts because in the fourth, fifth, and sixth administrative reviews the Vietnam-government entity was assigned the only rate assigned to it since the initial investigation, which is the only rate it has ever received under this order. In each review, any party that is part of the Vietnam-government entity could have requested that Commerce review the Vietnam-government entity, but none did. As there was no such request, the exporters subject to the Vietnam-government entity rate in effect expressed that the duties were appropriate, and the duties were finally determined and collected in the amounts that had been deposited. Commerce's final duty assessments for the respective review periods for exports by companies that are part of the Vietnam-government entity was not based on facts available but rather based on the decision by the exporters not to seek a review of their duties owed, consistent with the AD Agreement. Therefore, when examination has been properly limited to fewer than all exporters, it is not inconsistent with the AD Agreement to apply a rate to unexamined exporters that is the only rate ever determined for those exporters.

F. The Vietnam-Government Entity's Rate in the Fourth, Fifth and Sixth Administrative Reviews is Not Inconsistent with Article 9.4 of the AD Agreement

30. Commerce did not assign a "country-wide" rate to the Vietnam-government entity. As explained below, the Vietnam-government entity had been individually examined in this antidumping duty proceeding and received its own rate. This rate was assigned to the companies that had not claimed or established that they are free from government control, particularly in their export activities, and thus are properly considered to be parts of the single government entity that Commerce identified as an "exporter" or "producer" consistent with Article 6.10.

31. Article 9.4 otherwise does not impose an obligation on Members to replace an existing WTO-consistent rate of a government-entity exporter or producer, which had failed to cooperate in this proceeding with a different rate that is based on an average rate of independent exporters or producers that fully cooperated, nor does it impose an obligation to calculate a single antidumping duty. Therefore, Article 9.4 does not require that an investigating authority assign an average rate of cooperating exporters, which are not controlled by the Government of Vietnam, to the Vietnam-government entity, which had been investigated, failed to cooperate, and received its own rate consistent with Article 6.8 of the AD Agreement.

V. Vietnam's Claim That the United States Maintains a Zeroing Measure That May Be Challenged "As Such" Under the AD Agreement is Without Merit

32. Vietnam claims that the United States maintains a measure that involves the use of the so-called "zeroing" methodology, and that this measure is "as such" inconsistent with the AD Agreement. This claim is without merit. The United States maintains no statute, regulation, or other measure that requires the use of a so-called "zeroing" methodology. To the contrary, the United States has modified its calculation methodology and grants offsets for non-dumped comparisons (i.e., does calculations without the 'zeroing' methodology) in various types of proceedings. Therefore, Vietnam has not demonstrated as a matter of fact that the United States maintains a measure of general and prospective application that requires the use of zeroing. As a result, Vietnam's claim that an alleged U.S. zeroing measure is "as such" inconsistent with the AD Agreement is in error and necessarily fails.

VI. Vietnam's Claim that The Application of the Zeroing Methodology to Imports of Shrimp From Vietnam in the Fourth, Fifth, and Sixth Administrative Reviews Is, "As Applied", Inconsistent with the AD Agreement Is Incorrect

33. The text and context of the relevant provisions of the AD Agreement, as properly interpreted in accordance with customary rules of interpretation of public international law, support the interpretation of the United States that the concepts of dumping and margins of

dumping have meaning in relation to individual transactions and, therefore, there is no obligation to aggregate multiple comparison results in assessment proceedings to arrive at an aggregated margin of dumping for the product as a whole. The exclusive textual basis for an obligation to account for such non-dumping in calculating margins of dumping is found in Article 2.4.2 of the AD Agreement that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions ...". This particular text of Article 2.4.2 does not impose any obligations outside the limited context of determining whether dumping exists in the investigation when using the average-to-average comparison methodology. Vietnam's argument, which seeks to extend an obligation to provide offsets beyond the specific context of investigations, finds no support in the text of the AD Agreement and must be rejected.

34. Article 2.1 of the AD Agreement and Article VI of the GATT 1994 also do not require the provision of offsets in assessment proceedings. The product is always "introduced into the commerce of another country" through individual transactions, and thus "dumping," as defined in Article 2.1, is transaction-specific. The express terms of the GATT 1994 provide that the margin of dumping is the amount by which normal value "exceeds" export price, or alternatively the amount by which export price "falls short" of normal value. Consequently, there is no textual support in Article VI of the GATT 1994 or the AD Agreement for the concept of "product as a whole" and "negative dumping".

35. Vietnam also has not demonstrated any inconsistency with Article 9.3 of the AD Agreement nor Article VI:2 of the GATT 1994. The United States notes that the terms upon which Vietnam's interpretation rests are conspicuously absent from the text of these provisions. Moreover, Vietnam's interpretation is not mandated by the definition of dumping contained in Article 2.1 of the AD Agreement. As the panel in *US – Zeroing (EC)* correctly concluded, there is "no textual support in Article 9.3 for the view that the AD Agreement requires an exporter-oriented assessment of antidumping duties, whereby, if an average normal value is calculated for a particular review period, the amount of anti-dumping duty payable on a particular transaction is determined by whether the overall average of the export prices of all sales made by an exporter during that period is below the average normal value". Accordingly, an interpretation that permits the existence of transaction-specific margins of dumping is supported by Article 9.3.

36. Finally, Vietnam's argument that the United States acted inconsistently with Article VI:2 rests entirely upon its erroneous interpretation of the term "margin of dumping". In examining the text of Article VI:2 of the GATT 1994, the panel in *US – Softwood Lumber V (Article 21.5)* saw "no reason why a Member may not ... establish the 'margin of dumping' on the basis of the total amount by which transaction specific export prices are less than the transaction-specific normal values". Although the panel examined dumping margin calculations in an investigation, its basic reasoning and textual interpretation of Article VI:2 are equally applicable to margins of dumping established on a transaction-specific basis in assessment proceedings.

VII. Commerce's Sunset Determination is Not Inconsistent with the AD Agreement

37. Article 11.3 requires that five years after an antidumping duty is imposed, the duty must be terminated unless the authorities determine following a timely review that termination "would be likely to lead to continuation or recurrence of dumping and injury" ("likelihood determination"). Article 11.3 does not specify the exact methodologies or modes of analysis needed to satisfy the likelihood determination. Accordingly, aside from the obligations contained in Article 11.3, the AD Agreement leaves the conduct of sunset reviews to the discretion of the Member concerned.

38. Commerce permissibly concluded in the Sunset Determination, based on the evidence before it, that revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping. In its likelihood determination, Commerce relied on positive antidumping duty rates applied to numerous exporters during the four completed reviews. Commerce also noted: (1) the Vietnamese exporters' recognition as to the continuing existence of some dumping; (2) the appropriate application of adverse facts available to uncooperative mandatory respondents; and (3) the decline in shrimp import volumes following the original investigation.

39. Meanwhile, Vietnam has failed to establish sufficient evidence in support of its allegations that Commerce's consideration of positive margins of dumping assigned to respondents was

inappropriate. In WTO dispute settlement, the burden of proving that a measure is inconsistent with a covered agreement rests on the complaining party. First, the table that Vietnam presents is a misleading overview of the dumping rates considered by Commerce. This table is incomplete and inaccurate. Second, with respect to the first review, Vietnam acknowledges that two mandatory respondents failed to cooperate with Commerce and were assigned a margin of dumping based on adverse facts available. The rate applied to these companies alone provides sufficient support for Commerce's conclusion that dumping continued during the sunset review period, and along with the declining import volumes discussed below, sufficient evidence to support Commerce's likelihood determination. Finally, Vietnam failed to demonstrate that the decline in import volumes was solely the result of factors other than the discipline of the antidumping duty order.

40. None of Vietnam's arguments overcome, much less address, Vietnam's repeated acknowledgement of the fact that some level of dumping has persisted throughout the order's duration and that the volume of imports did, in fact, decline. Therefore, irrespective of Commerce's consideration of dumping margins that Vietnam alleges are WTO-inconsistent, these facts provide an ample evidentiary basis to support Commerce's conclusion that revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping.

41. Finally, the Appellate Body reports cited by Vietnam do not require a finding that Commerce's Sunset Determination is WTO-inconsistent. Vietnam relies on the Appellate Body reports in *US – Zeroing (Japan)* and *US – Corrosion-Resistant Steel Sunset Review* to argue that "reliance in an Article 11.3 review on margins of dumping determined using a methodology inconsistent with Article 2 of the Anti-Dumping Agreement results in that Article 11.3 review also being inconsistent with the Anti-Dumping Agreement". The evidence here demonstrates that Commerce's Sunset Determination is consistent with Article 11.3 since it is justified on the basis of factors other than WTO-inconsistent factors. Where the investigating authority has relied not only on that margin of dumping but other, sufficient evidentiary bases, such that the likelihood determination can stand on its own, after any factors based on a WTO-inconsistent methodology have been removed, the likelihood finding will be considered consistent with Article 11.3. Accordingly, even if the Panel were to find that certain dumping margins considered by Commerce were WTO inconsistent, the Panel can still consider and find that the Sunset Determination is not inconsistent with Article 11.3 based on the WTO consistent factors examined by Commerce.

VIII. Conclusion

42. The United States respectfully requests that the Panel reject Vietnam's claims that the United States has acted inconsistently with the covered agreements.

ANNEX C-2

EXECUTIVE SUMMARY OF THE STATEMENTS OF THE UNITED STATES
AT THE FIRST PANEL MEETING

1. Vietnam is asking the Panel to impose on the United States obligations found nowhere in the Agreement on Implementation of *Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") or the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and asking the Panel to do so without foundation in facts.

A. Vietnam's Claim Regarding Section 129(c)(1) of the Uruguay Rounds Agreement Act Lacks Merit

2. Vietnam's assertion that Section 129(c)(1) of the Uruguay Rounds Agreement Act ("URAA") is inconsistent with the AD Agreement is plagued by a number of fundamental flaws, any one of which is fatal to Vietnam's claim, and provides a sufficient basis for this Panel to reject Vietnam's argument.

3. First, Vietnam asserts that Section 129(c)(1) of the URAA prevents the United States from properly implementing the recommendations and rulings by the DSB. However, Vietnam's panel request did not assert that Section 129(c)(1) was inconsistent with any provisions of the DSU – rather, it was based solely on the claim that Section 129(c)(1) is inconsistent with the AD Agreement.

4. Second, Vietnam's argument is based on a number of flawed premises that have no basis in the AD Agreement, the GATT 1994, or U.S. law. In particular, Vietnam's argument incorrectly assumes that Section 129 is the sole mechanism by which the United States can bring itself into compliance with the DSB recommendations and rulings.

5. Lastly, Vietnam asserts that this Panel should disregard the panel report in *US – Section 129(c)(1)* as a result of subsequent events, most notably the decision by the U.S. Court of International Trade ("CIT") in *Corus Staal, BV v. United States ("Corus Staal")*. In particular, Vietnam misreads the effect of the CIT's decision in *Corus Staal*.

B. The Treatment of Multiple Companies in Vietnam as a Single Vietnam-Government Exporter/Producer was not Inconsistent with the AD Agreement

1. Vietnam's "As Such" Claim is Without Merit

6. Vietnam contends that it is challenging Commerce's "NME-wide entity rate practices as set forth in [Commerce's] Anti-Dumping Manual ...". In the context of an unwritten measure that allegedly governs the administrative application of another measure (such as AD regulations or an AD statute), the Appellate Body has identified several criteria for evaluating whether a measure exists that can be challenged "as such," including whether the rule or norm has general and prospective applicability. Vietnam failed to put forth sufficient evidence in its first written submission and during this hearing showing that this alleged practice exists as a measure and is invariably applied by Commerce.

7. Commerce's AD Manual specifically sets forth that it "is for the internal training and guidance of ... personnel only, and the practices set out herein are subject to change without notice. This manual cannot be cited to establish [Commerce] practice." Commerce thus has explicitly circumscribed the relevance of its AD Manual and has alerted both petitioners and respondents that the Manual cannot serve as a basis to argue that Commerce has adopted an approach that must be followed for any particular, future proceeding. For these reasons, the Manual cannot be considered as having general or prospective application.

8. The United States also notes that Commerce was under no obligation to develop the Manual, that Commerce does not need the Manual to have sufficient legal foundation under domestic law for its actions, and that Commerce was not required under the U.S. Administrative

Procedure Act to publish the Manual in the *Federal Register*. In other words, use of the Manual, or the Policy Bulletin that Vietnam mentioned for the first time in its opening statement, are not required under domestic law or under the WTO Agreement. Vietnam thus is attacking the United States for taking a non-required step to promote transparency. Accordingly, an "as such" finding against the Manual accomplishes nothing except to discourage transparency.

9. Finally, Vietnam has not pointed to a principle of U.S. law that in any way supports the conclusion that the Manual or Policy Bulletin "requires" Commerce to do anything at all, or that following the same logic as that expressed in this non-binding document somehow makes the document binding. Indeed, Vietnam readily acknowledges that Commerce "retains broad discretion on the method for calculating the NME-wide entity rate ...".

2. Vietnam's "As Applied" Claim Also is Without Merit

10. Vietnam has also failed to establish that Commerce's decisions in the covered reviews regarding the assignment of an individual margin of dumping and an individual antidumping duty to the Vietnam-government entity were inconsistent with the obligations of the United States under the AD Agreement. As noted by the Appellate Body in *EC – Fasteners*, Articles 6.10 and 9.2 definitely permit an investigating authority to treat multiple companies as a single entity where they are related operationally or legally.

11. Thus here, where unlike *EC – Fasteners* Commerce has made a factual finding that non-market economy conditions in the export country – a finding which, by the way, Vietnam does not challenge – it was not inconsistent with the AD Agreement for Commerce to consider multiple companies as a single entity in light of the fact that paragraph 255 of Vietnam's Accession Protocol stipulates that the AD Agreement shall be applied in a manner consistent with the rules set forth in that paragraph. Contrary then to Vietnam's and China's statements, Commerce's methodology is not discriminatory because it flows from the Accession Protocol.

12. Commerce's treatment of the Vietnam-government entity was also fully consistent with Articles 6.8 and 9.4 of the AD Agreement. No party that is part of the Vietnam-government entity requested that Commerce review the entries of that entity during the fourth, fifth or sixth reviews. As such, the exporters subject to the Vietnam-government entity rate effectively expressed that the rate in effect that Commerce had calculated for this entity was preferable to the possible rate that might be calculated if Commerce were to conduct a review.

13. Thus Vietnam's claim that Commerce's decision to assigned this last rate to the Vietnam-government entity during the covered reviews was not inconsistent with Article 6.8 and Annex II of the AD Agreement. This was the "rate in effect" at the time, not a "new" rate that was based on facts available. And contrary to Vietnam's claim, Commerce's decision to continue applying the rate in effect to the Vietnam-government entity during the covered reviews was not inconsistent with Article 9.4 of the AD Agreement. The rate in effect applies to the group of companies whose export activities were determined to be materially influenced by the Government of Vietnam.

C. The U.S. Application of its Zeroing Methodology "As Such" and "As Applied" Was Not Inconsistent with the AD Agreement and GATT 1994

14. Vietnam's "as such" claim with respect to the so-called "zeroing" methodology is without merit. The United States changed this practice in 2007 with respect to investigations and in 2012 with respect to administrative reviews. Thus by the time Vietnam requested the establishment of this Panel, there was no "zeroing" measure as found in previous WTO reports and nothing that required the use of that methodology.

15. To the contrary, as pointed out in paragraph 208 of the U.S. First Written Submission, Commerce has issued numerous determinations in which it has offset dumping margins on dumped sales by the amount equal to the amount by which normal value is less than export price on non-dumped sales.

16. In fact, Commerce granted offsets for non-dumped transactions in the most recent administrative review of the antidumping duty order on shrimp from Vietnam. Vietnam's claim that an alleged U.S. zeroing measure is "as such" inconsistent with the AD Agreement thus is without any factual basis.

17. As to Vietnam's "as applied" claim, the United States continues to have serious concerns about past Appellate Body "zeroing" reports and continues to believe that they are incorrect. That said, the United States will not repeat today the detailed points regarding "zeroing" included in our First Written Submission, but will simply note that the rights and obligations of Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements.

D. Commerce's Sunset Review Determination Was Not Inconsistent with the AD Agreement

18. The Appellate Body has confirmed that "Article 11.3 does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review". No other provisions of the AD Agreement set forth rules regarding the methodologies or analysis to be employed by investigating authorities in making a determination in a sunset review of whether dumping and injury is likely to continue or recur. Accordingly, Vietnam's efforts to read into Article 11.3 substantive methodological obligations of Vietnam's own choosing must be rejected.

19. There is no question that Commerce, in arriving at its Sunset Determination, conducted a thorough review of the history of the antidumping duty order on shrimp from Vietnam, from the original investigation through the last review relevant to that determination (the fourth review). There is also no question that Commerce, in arriving at its Sunset Determination, relied on positive antidumping duty rates applied to numerous exporters during the completed reviews. And there is no question that Commerce, in arriving at its Sunset Determination, relied on declining volumes of imports after the initiation of the original investigation that failed to return to pre-investigation levels in any of the individual years.

20. Thus the existence of dumping margins determined based on failures to cooperate and a significant decline in import volumes were expressly relied upon by Commerce to support its conclusion that dumping was likely to continue or recur. In light of these facts, and Commerce's analysis in this case, the Appellate Body decisions cited by Vietnam concerning reliance on WTO-inconsistent dumping margins simply do not compel the result Vietnam seeks here. The Panel may, and should, find this sunset determination to be WTO-consistent.

E. The AD Agreement Does Not Obligate the United States to Provide Company-Specific Revocation After Three Years of No Dumping

21. There is nothing in the AD Agreement that obligates the United States to provide for company-specific revocation, or to provide for such company-specific revocation based on the absence of dumping for three years.

22. Nothing in Article 11.2 of the AD Agreement imposes an obligation to review and revoke a duty on a company-specific basis. This is demonstrated, for example, by the use of the "duty" in both Articles 11.2 and 11.3. The term "duty" is most logically interpreted as having the same meaning in Articles 11.2 and 11.3, especially given the fact that these two Articles provide the mechanisms to ensure that, per Article 11.1, an antidumping duty remains in place only as long as necessary to counteract injurious dumping.

23. As the Appellate Body found in *US – Corrosion-Resistant Steel Sunset Review*, "the duty" referenced in Article 11.3 is imposed on a product-specific or, in U.S. terminology, an "order-wide" basis, not a company-specific basis. The Appellate Body thus rejected Japan's argument that Article 11.3 imposed obligations on a company-specific basis. Vietnam has provided no reason, and cannot provide such a reason, as to why this Panel should find that "the duty" has a different meaning in Article 11.3 as opposed to Article 11.2. This was the finding of the Appellate Body in *US – Corrosion Resistant Steel Sunset Review* and it is persuasive based on the references to injury in Article 11.2 as well as the contrast between "the duty" and references to "individual duties" elsewhere in the AD Agreement.

24. Here, Vietnamese respondents did not make a request for order-wide revocation. Accordingly, the United States did not breach its obligations under Article 11.2.

ANNEX C-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION
OF THE UNITED STATES

I. INTRODUCTION

1. Throughout this dispute, Viet Nam's arguments have consistently failed to meaningfully address the specific rights and obligations provided in the covered agreements and ignored relevant facts. The United States will not repeat all of its arguments related to these matters in this submission, but rather will focus on the flaws in arguments Viet Nam made in its oral statements at the first substantive Panel meeting and in its answers to the Panel's questions following that meeting.

2. First, Viet Nam's claim with respect to company-specific revocation based on the absence of dumping for three years fails because, as a threshold matter, there is no requirement for company-specific revocation in Article 11.2. Reference to "the duty" in Article 11 is an order-wide reference. This was the finding of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* and it is persuasive based on the references to injury in Article 11.2 as well as the contrast between "the duty" and references to "individual duties" elsewhere in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").

3. Next, Viet Nam's claim with respect to section 129(c)(1) of the Uruguay Round Agreement Act ("URAA") also fails. When Members wanted to place implementation obligations in WTO agreements, they clearly did so, as with Article 4.7 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). No such obligations are contained in the AD Agreement, which is the covered agreement relied on by Viet Nam to make its claim. In addition, Viet Nam's central premise – that section 129(c)(1) is the exclusive mechanism by which the United States can implement DSB recommendations and rulings – is simply false. That is what the panel found in *US – Section 129(c)(1)* and, simply put, nothing has changed, and the Panel here should make the same finding.

4. Viet Nam has also failed to demonstrate any of its claims with respect to Commerce's approach to the Viet Nam-government entity rate. First, Viet Nam still has failed to put forth sufficient evidence showing that this alleged practice exists as a measure and is invariably applied by Commerce. Second, Viet Nam has failed to demonstrate that Commerce's decision to treat related companies in the covered reviews as a single exporter or producer for the purpose of determining a dumping margin is inconsistent with Articles 6.10 and 9.2 of the AD Agreement. Finally, Commerce's treatment of the Viet Nam-government entity was fully consistent with Articles 6.8 and 9.4 of the AD Agreement. No party that is part of the Viet Nam-government entity requested that Commerce review the entries of that entity during the covered reviews. Thus the companies subject to the Viet Nam-government entity rate essentially expressed that the rate in effect was preferable to the rate that might be calculated if Commerce were to conduct a review.

5. Viet Nam's "as such" claim with respect to Commerce's application of the so-called "zeroing" methodology is without merit because no such measure exists; the United States has already changed its approach for calculating dumping margins. Commerce has issued numerous determinations, including in the most recent administrative review of the antidumping duty order on shrimp from Viet Nam, in which it has offset dumping margins on dumped sales by the amount equal to the amount by which normal value is less than export price on non-dumped sales. Commerce changed its approach to calculating dumping margins pursuant to section 123(g) of the URAA after extensive consultations with appropriate congressional committees, relevant private sector advisory committees, and public comment. Thus Viet Nam's assertion that Commerce can easily re-impose an alleged U.S. zeroing measure is without merit.

6. Finally, on the issue of the Sunset Determination, Commerce had a sufficient evidentiary basis to conclude that revocation of the antidumping duty order on shrimp from Viet Nam would likely lead to continuation or recurrence of dumping. The determination relied on multiple factors,

including dumping margins that Viet Nam does not dispute were calculated in a "WTO-consistent" way and declining import volumes. Thus the mere fact that this Panel may consider other dumping margins examined by Commerce as "WTO-inconsistent" does not undermine Commerce's likelihood-of-dumping determination. That determination continues to stand on its own, substantiated by evidence and fully consistent with Article 11.3 of the AD Agreement.

II. ARGUMENT

A. The United States Did Not Act Inconsistently with Article 11.2 of the AD Agreement by Not Granting Company-Specific Revocation Based on the Absence of Company-Specific Dumping for Three Years

7. Viet Nam argues that the ordinary meaning of Article 11.2 as well as context provided by other provisions of the AD Agreement support its interpretation that Article 11.2, in contrast to Article 11.3, mandates company-specific revocation. For the reasons set forth in the U.S. First Written Submission, Article 11.2 of the AD Agreement does not obligate Members to consider, much less provide, company-specific revocation of an antidumping duty order. But even aside from the fact that Article 11.2 does not provide for company-specific revocation, Article 11.2 does not contain a requirement that a Member revoke an order based on the absence of company-specific dumping for three years.

1. Article 11.2 of the AD Agreement Does Not Contain Obligations Vis-à-vis Company-Specific Revocation

8. The ordinary meaning of Article 11.2, as well as context provided by other provisions of the AD Agreement, makes clear that company-specific revocation is not an obligation. First, Article 11.2 requires a review of the continuing need for "the duty." As the Appellate Body found in *US – Corrosion-Resistant Steel Sunset Review*, "the duty" referenced in Article 11.3 is imposed on a product-specific (*i.e.*, in U.S. terminology, "order-wide") basis, not a company-specific basis. The term "duty" is most logically interpreted as having the same meaning in Articles 11.2 and 11.3, especially given the fact that these two Articles provide the mechanisms to ensure that, per Article 11.1, an antidumping duty remains in place only as long as necessary to counteract injurious dumping.

2. Article 11.2 of the AD Agreement Does Not Require Revocation Based on the Absence of Dumping for Three Years

9. Even assuming, *arguendo*, that company-specific revocation is an obligation under Article 11.2 of the AD Agreement, there is nothing in Article 11.2 that obligates a Member to adopt a standard that revocation must occur based on the absence of dumping for three years. This was the panel's observation in *US – Anti-Dumping Measures on Oil Country Tubular Goods* when it found that the standard of revocation based on three years of no dumping "operates in favour of foreign producers and exporters." As such, it goes "beyond what is required by Article 11.2" and, therefore, cannot serve as a basis for a breach of Article 11.2 of the AD Agreement by the United States.

3. The United States Did Not Act Inconsistently with Article 11.2 of the AD Agreement in Limiting the Number of Exporters for Individual Examination, Including Requests for Revocation

10. Even if Article 11.2 could be read to provide for company-specific revocations, Article 11.2 cannot be read as requiring administering authorities to initiate separate reviews of any company that makes a request for revocation. Viet Nam's argument in this regard is based on the premise that the AD Agreement has an ambiguity in, and apparent conflict between, the limited examination provisions of Article 6.10 and the review contemplated under Article 11.2. However, Viet Nam has no basis for the premise of its argument. A proper reading of the terms of these provisions, in light of their plain meaning, and in context and in light of the object and purpose of the AD Agreement, demonstrates that Members may limit the examination of requests made under Article 11.2. And indeed, it is Viet Nam's proposed interpretation that would create a conflict between Articles 6.10 and 11.2.

B. Viet Nam Has Failed to Establish that Section 129(c)(1) of the URAA is Inconsistent, As Such, with the AD Agreement

11. As set forth in both the U.S. First Written Submission and the panel's report in *US – Section 129(c)(1)*, section 129(c)(1) of the URAA does not mandate or preclude any particular treatment of "prior unliquidated" entries nor does it have "the effect" thereof. Indeed, "only determinations made and implemented under section 129 are within the scope of section 129(c)(1)" and "section 129(c)(1) only addresses the application of section 129 determinations. It does not require or preclude any particular actions with respect to {other entries} in a separate segment of the same proceeding." These DSB rulings remain as true today as they were when the panel examined the U.S. system for implementing DSB recommendations and rulings in *US – Section 129(c)(1)*. Section 129 remains the same and has not been amended. Viet Nam's arguments do not provide any reason for the Panel to make different findings from those previously adopted by the DSB.

1. The AD Agreement Does Not Address Implementation of DSB Recommendations and Rulings

12. As an initial matter, and as discussed in the U.S. First Written Submission, the DSU is the only WTO agreement that addresses Members' obligations in regards to implementation in the antidumping context. Viet Nam has not pursued any claims *vis-à-vis* section 129(c)(1) of the URAA under the DSU. For this reason alone, Viet Nam's claim as to section 129(c)(1) should be rejected.

2. The United States Implements DSB Recommendations and Rulings Through a Number of Mechanisms

13. At various points in its answers to Panel questions, Viet Nam asserts that while the United States may have a number of mechanisms besides section 129 to implement DSB recommendations and rulings, those mechanisms are "irrelevant" because implementation through other means is not "automatic." Viet Nam thus asks the Panel to ignore the existence of other avenues, both administrative and legislative, by which the United States can implement DSB recommendations and rulings to treat "prior unliquidated entries" in a WTO consistent manner.

14. These arguments should be rejected. Section 123 and congressional action are two mechanisms within a larger domestic scheme by which the United States maintains the discretion to bring itself into compliance with DSB recommendations and rulings. Viet Nam's attempts to have the Panel analyze section 129(c)(1) in a vacuum that is isolated from the other parts of this domestic scheme should be rejected.

3. Viet Nam Misconstrues the Statement of Administrative Action (SAA)

15. In an attempt to discredit the fact that the United States has used other administrative mechanisms (such as section 123) to accord WTO-consistent treatment to "prior unliquidated entries", Viet Nam asserts that such administrative mechanisms could only be used in "size of margin" cases but could not be used in "revocation" cases. In support of this argument, Viet Nam notes that the SAA states that section 129 determinations may not be necessary where the DSB recommendations and rulings "merely implicate[] the size of a dumping margin or countervailable subsidy rate [("size of margin")] (as opposed to whether a determination is affirmative or negative [("revocation")])."

16. The fact that the SAA distinguishes "size of margin" and "revocation" situations does not mean that prior unliquidated entries cannot be accorded WTO-consistent treatment pursuant to other mechanisms. The passage of the SAA relied upon by Viet Nam establishes only that the implementation of DSB recommendations and rulings under section 129(c)(1) does not affect duties assessed on "prior unliquidated entries". To suggest that this passage, which pertains explicitly to section 129, dictates the application of other U.S. measures or the scope of potential congressional action is a conclusion unsupported by the text.

C. The Treatment of Multiple Companies in Viet Nam as a Single Viet Nam-Government Exporter/Producer Was Not Inconsistent with the AD Agreement

1. Viet Nam Still Has Failed to Demonstrate the Existence of a Measure that May be Challenged "As Such" as Inconsistent with the AD Agreement

17. Viet Nam in its first written submission contended that it is challenging Commerce's "NME-wide entity rate practice as set forth in the USDOC's Anti-Dumping Manual, which confirms the practice is applied on a generalized and prospective basis." As discussed in the U.S. First Written Submission and elsewhere, Viet Nam has not demonstrated the existence of a measure – based on an alleged "practice" – that may be challenged "as such" under the AD Agreement.

2. Commerce's Approach with Respect to the Government of Viet Nam's Control over Multiple Companies is based on the Undisputed NME Conditions in Viet Nam and is Not Inconsistent with Articles 6.10 and 9.2 of the AD Agreement

18. Viet Nam states that it contests in this dispute "whether the covered agreements provide a legal – not a factual – basis for the presumption of government control that is central to the NME-wide entity policy." As an initial matter, the United States notes that the question presented is a **mixed question of fact and law**; namely, whether the U.S. approach for deciding what sets of exports from an NME are considered to be from one exporter or from separate exporters. The matter at issue – at least as Viet Nam has presented it – does not involve a pure question of legal interpretation of any particular provision of the AD Agreement. Indeed, Viet Nam cannot point to any provision of the AD Agreement that specifies exactly how an authority is to decide whether different sets of exports are considered to be from one exporter or multiple exporters. Rather, the question is whether Viet Nam has demonstrated that the approach used by the United States to determine which exports from an NME are matched to particular exporters is inconsistent with the WTO Agreement.

a. Viet Nam's Working Party Report Provides the Basis for Commerce's Presumption that Viet Nam Controls Companies Involved in Exportation and Production of the Subject Merchandise until Demonstrated Otherwise

19. The Working Party Report reflects that Viet Nam, in the course of its accession process, presented a range of reforms to the Working Party about prices, the banking sector, the role of state-owned enterprises (SOEs) and commercial activity and trade generally, all of which were aimed at establishing a multi-sector economy. At the same time, Viet Nam also stated that its economy was still in the process of shifting from central planning to a market-based economy. Despite this statement, which itself indicates that Viet Nam considered its reforms incomplete, the description of Viet Nam's economy in the Working Party Report did not indicate a shift toward a true market-based economy. Rather, the description of Viet Nam's economy in the Working Party Report indicated that Viet Nam planned to develop a "socialist-oriented market economy" in which the state preserves a predominant role for SOEs.

20. In sum, the concerns expressed in the Working Party Report regarding the nature of Viet Nam's economy and the provisions on antidumping clearly indicate that Members were not convinced that market economy conditions prevailed in Viet Nam. Members thus insisted on, and received from Viet Nam, discretion in determining under their own national laws when market economy conditions prevailed in Viet Nam, with implications that necessarily extended beyond the calculation of normal value. The Working Party Report memorializes the concerns with the Viet Nam government's influence and provides the basis for Commerce's presumption that the government may control companies in various industries until otherwise demonstrated.

b. Given the Working Party Report Provides a Basis for doing so, Commerce's Presumption that Companies in Viet Nam are Part of a Viet Nam-Government Entity Pending Contrary Evidence was Not Inconsistent with the AD Agreement

21. Paragraph 255(a) of the Working Party Report states that "an importing WTO Member shall use Vietnamese prices or costs for the industry under investigation in determining price comparability" where the producers "can clearly show that market economy conditions prevail." But where the producers do not make this showing, "[t]he importing WTO Member [in determining price comparability] may use a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product".

22. Therefore, contrary to Viet Nam's argument, the introductory phrase to paragraph 255(a) of the Working Party Report – "[i]n determining the price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement" – and the associated language that permits importing Members to use a methodology for price comparability "not based on a strict comparison with domestic prices or costs in Viet Nam" together provide a legal basis for Members to treat Viet Nam differently in antidumping proceedings with respect to the determination of a NME-government entity margin. Commerce's determination in the covered reviews that a Viet Nam-government entity existed and that certain companies, while legally separate, were in fact part of this entity for purposes of ensuring appropriate price comparability between the normal value and the export price thus were not inconsistent with the AD Agreement and Article VI of the GATT 1994.

c. Commerce's Determination to Treat Related Companies in the Covered Reviews as a Single Exporter or Producer for the Purpose of Determining a Dumping Margin is Not Inconsistent with Articles 6.10 and 9.2 of the AD Agreement

23. As demonstrated in Section II.C.2.a., Commerce's presumption that all companies in the antidumping proceedings involving shrimp from Viet Nam are part of the Viet Nam-government entity until a company provides evidence to the contrary regarding its export activities is based on the Working Party Report (and Commerce's 2002 determination) that NME conditions prevail in Viet Nam. As further demonstrated in Section II.C.2.b., Commerce's presumption and eventual determination in the covered reviews that a Viet Nam-government entity existed because certain companies, while legally separate, were in fact part of the Viet Nam-government entity, was not inconsistent with the AD Agreement and Article VI of the GATT 1994.

24. Finally, Viet Nam indicated in a written response to a question from the Panel that it "does not contest here the general question of whether, under the covered agreements, the State and exporters can be considered a single entity." Therefore, given Viet Nam's position plus the fact that Commerce's approach results in a reading of the AD Agreement that is consistent with paragraph 255, Commerce's conclusion in the covered reviews that multiple companies in Viet Nam were part of the Viet Nam-government entity and subsequent decision to assign that entity an individual margin of dumping and an individual antidumping duty were not inconsistent with Articles 6.10 and 9.2 of the AD Agreement.

3. The Rate Applied to the Viet Nam-Government Entity is Not Inconsistent with Articles 6.8 and 9.4 of the AD Agreement

25. Commerce's treatment of the Viet Nam-government entity was fully consistent with Articles 6.8 and 9.4 of the AD Agreement. No party that is part of the Viet Nam-government entity requested that Commerce review the entries of that entity during the covered reviews. The companies subject to the Viet Nam-government entity rate thus essentially expressed that the rate in effect that Commerce had calculated for this entity was preferable to the rate that might be calculated if Commerce were to conduct a review. Thus Commerce's decision to assign this last rate to the Viet Nam-government entity during the covered reviews was not inconsistent with Articles 6.8 and 9.4 because this last rate was neither a "new" rate based on facts available nor an "all others" rate, but the "rate in effect" at the time.

a. Viet Nam's Argument that the Investigating Authority May Not Apply Facts Available if the Government of Viet Nam Refuses to Cooperate Is Unfounded

26. Although Commerce did not assign the Viet Nam-government entity a rate based on facts available in the covered reviews, Viet Nam nonetheless argues that facts available cannot be applied to this entity because the government of the exporting country plays a different role in antidumping cases than it does in countervailing duty cases. According to Viet Nam, in antidumping cases, it "cannot foresee a situation in which an authority could apply facts available in case of a failure to cooperate by a government".

27. Viet Nam's argument lacks any support in the text of the AD Agreement. The issue is not how AD proceedings compare to countervailing duty proceedings, or what Viet Nam can or cannot "foresee". Rather, the issue is what the AD Agreement provides. And in the circumstances of this case, Commerce's application of facts available following the government of Viet Nam's failure to cooperate is supported by the plain text of the AD Agreement. According to Article 6.8, preliminary and final determinations may be made on the basis of the facts available whenever "any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation" (emphasis added). Article 6.11 explicitly defines "interested parties" as including, *inter alia*, "the government of the exporting Member." Articles 6.8 and 6.11 thus expressly contemplate that an antidumping determination may be based on facts available whenever the government of an exporting Member does not cooperate during an investigation.

b. Commerce's Application of the Rate in Effect during the Covered Reviews is Not Inconsistent with the AD Agreement

28. Although prior panel reports are not binding on panels considering other disputes, Viet Nam further argues that the Panel should look to the *US – Shrimp (Viet Nam)* (DS404) panel report for guidance as it considers whether the rate that Commerce's assigned to the Viet Nam-government entity during the covered reviews was not inconsistent with the AD Agreement. This panel report treated the rate applied to the Viet Nam-government entity in the third administrative review as a "facts available" rate. As explained in the U.S. First Written Submission, however, it would be incorrect to apply the DS404 panel finding to the covered reviews because Commerce did not apply facts available (substantively or otherwise) to the Viet Nam-government entity in those reviews. Again, the rate applied to the Viet Nam-government entity in the covered reviews is not, and cannot be, a facts available rate because it is not based on the interested party's refusal to give access to, or otherwise provide, necessary information during the covered reviews. Instead, it was based on the fact that the Viet Nam-government entity, and those Vietnamese parties who would be subject to the Viet Nam-government entity's rate, did not seek a different rate but accepted the existing rate of the Viet Nam-government entity. Accordingly, Commerce applied the existing rate of the Viet Nam-government entity during the covered reviews and was under no obligation to change the existing rate for final assessment purposes.

D. Viet Nam's Claim That the United States Maintains a Zeroing Measure That May Be Challenged "As Such" Under the AD Agreement is Without Merit

29. Commerce's so-called "zeroing" methodology does not exist today as a measure of general and prospective application. Commerce changed its approach for calculating dumping margins for investigations (effective early 2007) and for administrative reviews (effective early 2012) in response to the DSB's recommendations and rulings on this matter. The measure subject to the recommendations and rulings in prior disputes thus no longer exists.

30. In addition, it is wrong to conclude that Commerce can simply re-impose the so-called "zeroing" methodology that it changed in response to the DSB's recommendations and rulings just because it "is not explicitly required or prohibited by [U.S.] law". Commerce changed its approach for calculating dumping margins in both investigations and administrative reviews in accordance with U.S. law and, in particular, under the procedures outlined in section 123(g) of the URAA. Commerce's changes in methodology were made after extensive consultations with appropriate congressional committees, relevant private sector advisory committees, and public comment regarding its modifications. Viet Nam has not provided a single example of the agency practice,

which was found to be WTO inconsistent and changed pursuant to section 123(g), being subsequently "easily re-imposed."

E. Commerce's Sunset Review Determination is Not Inconsistent with Articles 11.3 of the AD Agreement

31. The AD Agreement does not prescribe specific methodologies that authorities must follow in determining whether to terminate definitive antidumping duties under Article 11.3. No other provisions of the AD Agreement set forth rules regarding the methodologies or analysis to be employed in making the determination of whether dumping and injury is likely to continue or recur. Accordingly, attempts to read into Article 11.3 substantive obligations allegedly contained in other provisions of the AD Agreement have been soundly rejected. Aside from the obligations contained in Article 11.3, the AD Agreement leaves the conduct of sunset reviews to the discretion of the Member concerned.

1. Notwithstanding its Statements to the Contrary, Viet Nam Continues to Acknowledge that Commerce Relied on WTO-Consistent Margins of Dumping in the Sunset Review

32. In its Sunset Determination, Commerce conducted a thorough review of the history of the antidumping duty proceeding from the original investigation through the fourth review. In its likelihood determination, Commerce relied on positive antidumping duty margins applied to numerous companies during the four completed reviews. Nonetheless, Viet Nam in its arguments elects to mischaracterize the margins relied on by Commerce in making its likelihood determination.

2. Viet Nam Misunderstands the Relevance of Declining Volumes as Part of Commerce's Analysis

33. Viet Nam in its arguments also elects to misread the U.S. position as arguing that Commerce either relied exclusively on WTO-inconsistent margins or exclusively on declining import volumes. Our first written submission and responses to Panel questions demonstrate that declining volumes were a part of the evidence relied on by Commerce and not the exclusive basis for finding likelihood. Specifically, in addition to evidence of continued dumping, Commerce also reviewed public U.S. import data as reported by the ITC Trade Database for 2003-2009 and found that import volumes fell from 56.3 million kilograms in the year preceding the investigation (2003) to 42.1, 35.9, 37.9, 46.7, 40.1 million kilograms in 2005-2009, respectively. As explained, this decline in import volumes suggests that the exporters were unable to sustain pre-investigation import levels without dumping. The Appellate Body has confirmed that the "'volume of dumped imports' and 'dumping margins', before and after the issuance of anti-dumping duty orders, are highly important factors for any determination of likelihood" and that they have "certain probative value". Thus "[t]he importance of the two underlying factors (import volumes and dumping margins) for a likelihood-of-dumping determination cannot be questioned".

34. Finally, Viet Nam is incorrect in describing the change in import volumes as a "moderate" reduction. In fact, the average volume for years following the review was approximately 40.54 million kilograms – a decline of about 28 percent compared to the 56.3 million kilograms imported in the year preceding the investigation.

3. Viet Nam's Remaining Arguments are Immaterial Because they Do Not Address the Facts at Issue in this Case

35. Viet Nam's answers to the Panel's questions further highlight that Viet Nam has no legitimate basis for questioning the outcome of the sunset review. Rather than responding to the Panel's questions regarding what evidence was submitted to Commerce, Viet Nam asserts that further argument regarding dumping margins and import volume would have been futile, and that arguments to Commerce during the sunset review regarding WTO-consistency is not required in order for Viet Nam to challenge the sunset determination.

36. To the extent Viet Nam's arguments are to be considered, they fail to rebut Commerce's likelihood determination. Viet Nam's arguments ignore indisputable evidence of dumping and fail to provide any viable reason why Commerce should not have taken into account declining import

volumes. In fact, a reduction in volume caused by application of an antidumping duty (pursuant to a permissible retrospective system) supports a conclusion that exporters were unable to maintain pre-order volumes without dumping. Viet Nam's arguments about the uncertainty resulting from the imposition of trade remedy measures do not explain the relevance of the observed decline in import volumes as part of Commerce's reasonable conclusion that dumping was likely to continue absent the discipline of the order. For these reasons, Viet Nam's remaining arguments are immaterial to the matter in dispute because they do not address the facts at issue before the Panel.

III. CONCLUSION

37. The United States respectfully requests that the Panel reject Viet Nam's claims that the United States has acted inconsistently with the covered agreements.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF THE UNITED STATES AT THE SECOND PANEL MEETING

1. The United States would like to thank once again the Panel, and the Secretariat assisting the Panel, for your on-going service in this dispute.

A. Vietnam Has Failed to Establish that Section 129(c)(1) is Inconsistent with the AD Agreement

2. Regarding section 129(c)(1) of the URAA, Vietnam has rewritten its legal theory on two occasions, submitting a total of three distinct approaches that purportedly demonstrate that section 129(c)(1) is inconsistent "as such" with various articles of the AD Agreement.

3. Vietnam's first theory was that section 129(c)(1) "serves as an absolute legal bar" to the WTO-consistent liquidation of "prior unliquidated entries" – *i.e.*, subject merchandise that entered the United States prior to the date that the United States Trade Representative ("USTR") directs the U.S. Department of Commerce ("Commerce") to implement a section 129 determination.

4. The United States rebutted this theory in its first written submission by showing that section 129(c)(1) does not preclude WTO-consistent liquidation of prior unliquidated entries and that through other mechanisms, including section 123 of the URAA and legislative action by Congress, the United States can implement DSB recommendations and rulings as to prior unliquidated entries.

5. In its opening statement at the first Panel meeting, Vietnam admitted that section 129(c)(1) does not amount to an "absolute legal bar". Nevertheless, Vietnam avers that the liquidation of prior unliquidated entries by the United States is merely "WTO-consistent action by coincidence". Putting aside Vietnam's characterization of these facts, these so-called "coincidences" are fatal to Vietnam's assertion that section 129(c)(1) is an "absolute legal bar" and, consequently, its "as such" claim.

6. Then, in its answers to the Panel's questions, Vietnam abandoned its initial theory and tried a second one. Vietnam claimed that "section 129 of the URAA is the immediate point of inquiry under U.S. law" and that, consequently, the United States is obligated to implement all DSB recommendations and rulings exclusively through section 129. That argument fails for the reason, subsequently acknowledged in Vietnam's second written submission, that "there is no requirement under the WTO for Members to have in place a pre-existing administrative mechanism for implementation".

7. Having twice proposed unpersuasive theories, Vietnam changed course yet again in its second written submission. Under its latest version, Vietnam contends that, while the United States is under no obligation to have a pre-existing mechanism like section 129 to implement DSB recommendations and rulings, because the United States enacted the statute, it must cover all possible permutations of implementation that involve prior administrative determinations by Commerce. This new argument fares no better.

8. First, Vietnam's latest argument is built upon the faulty premise that, because the United States enacted section 129, this provision must cover all possible implementation permutations vis-à-vis prior administrative determinations by Commerce. Neither the AD Agreement (which Vietnam cites) nor the DSU (which it does not) contains any such obligation.

9. Second, Vietnam continues to misunderstand U.S. law in relation to the implementation of WTO rulings. Under U.S. law, the U.S. Executive Branch is not required to use section 129 of the URAA to implement DSB recommendations and rulings.

10. Indeed, Vietnam itself agrees that the United States need not have a pre-existing administrative mechanism for the implementation of DSB recommendations and rulings.

Accordingly, the fact that the United States has the discretion simply not to use the pre-existing administrative mechanism that Vietnam alleges is WTO-inconsistent means that Vietnam's "as such" claim fails.

B. The Treatment of Multiple Companies in Vietnam as a Single Vietnam-Government Exporter/Producer Is Not Inconsistent with the AD Agreement

11. Commerce's decision to treat multiple companies in Vietnam as a single Vietnam-government exporter and producer is not inconsistent with the AD Agreement.

12. The Working Party Report that accompanies Vietnam's Accession Protocol and Commerce's 2002 inquiry of Vietnam's market economy status provide a basis for Commerce's presumption that Vietnam controls companies involved in the exportation and production of subject merchandise until demonstrated otherwise.

13. The hallmark of all market economies, of course, is a price system that allocates resources on the basis of the individual and collective supply and demand decisions of independent economic actors as reflected in prices that mirror true resource availability. Market economy conditions thus give rise to market-based prices for inputs and outputs.

14. In a contrasting non-market-based price system, however, these underlying supply and demand decisions, and the attendant resource allocations, are made or fundamentally distorted by the government. In non-market economies, the government effectively controls resource allocations, and when the government controls resource allocations, it necessarily has the ability to control resource allocators, *i.e.*, firms.

15. The points that we have made so far about government control over resource allocation and allocators in non-market economies have not been challenged by Vietnam in this matter, nor have the Commerce findings that emanate from these points. A firm basis thus existed for Commerce to have considered that Vietnam exercised restraint or direction over entities located in Vietnam generally, including with respect to the price or costs of the same or similar products destined for export to the United States.

16. Vietnam nonetheless continues to argue that the burden rests on the United States to demonstrate "whether the covered agreements provide a <u>legal</u> – not a factual – basis for the presumption of government control that is central to the NME-wide entity policy."

17. Vietnam's contention is incorrect. In any antidumping proceeding, the administering authority must make a factual determination with respect to which entities are included within the meaning of an "exporter" for the purposes of determining "an individual margin" under Article 6.10. The United States has used a particular approach for making this factual determination.

18. In a WTO dispute settlement, the burden of proving that a measure is inconsistent with a covered agreement is on the complaining party. Thus the question before this Panel is whether Vietnam has met its burden and demonstrated that the approach used by the United States is inconsistent with the WTO Agreement. Vietnam has failed to point to any provision of the AD Agreement that required Commerce to have automatically assigned individual dumping margins to Vietnamese companies operating under the government's control. Vietnam thus has failed to meet its burden.

19. That said, even though it was not necessary for the United States to do so, we have further demonstrated in our second written submission that it was not inconsistent with paragraph 255(a) of the Working Party Report, as well as Articles 6.10 and 9.2 of the AD Agreement, for Commerce to have presumed in this matter, consistent with past findings, that all companies were part of a Vietnam-government entity until a company demonstrated otherwise with respect to its export activities.

20. Paragraph 255(a) of the Working Party Report states that "an importing WTO Member shall use Vietnamese prices or costs for the industry under investigation in determining price comparability", but only where producers in Vietnam "can clearly show that market economy

conditions prevail".[1] Where these producers do not make this showing, "[t]he importing WTO Member [in determining price comparability] may use a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam ...".

21. "Price comparability" is a central tenet of every dumping analysis. It concerns and shapes all aspects of the dumping analysis under the AD Agreement and Article VI of the GATT 1994, both with respect to the methodology used to derive normal value as well as the methodology used to derive export price and constructed export price.

22. The methodology that Commerce uses for determining price comparability with respect to "domestic prices or costs in Vietnam" routinely determines normal value using "factors of production". These factors are based on actual inputs consumed by a foreign entity to manufacture the exact product or model types sold to the United States. If a foreign entity manufactures these product or model types at more than one facility, it must report the factor use and output for each product or model type at each facility. Thus if Commerce cannot determine the actual inputs consumed by a foreign entity in the manufacture of a relevant product or model types, it cannot calculate normal value for purposes of price comparability.

23. Commerce, in its effort to ensure appropriate price comparability between normal value and export price, thus reasonably: (1) presumed for purposes of the antidumping proceedings involving shrimp from Vietnam that companies within Vietnam should initially be considered part of a Vietnam-government entity; and (2) required as a result that the Vietnam-government entity report all inputs consumed by those companies with respect to the manufacture of each product or model type sold to the U.S. market.

24. It was legally permissible under paragraph 255 of the Working Party Report for Commerce to presume that Vietnam is legally or operationally in a position to exercise restraint or direction over all companies located in Vietnam for purposes of the calculation of normal value. It thus also was legally permissible – and indeed the most logical next step for purposes of price comparability – for Commerce to presume that the same companies should, pending contrary evidence, be considered part of the Vietnam-government entity for purposes of the calculation of export price.

25. Paragraph 255 of the Working Party Report states that the Agreements, including the AD Agreement, "shall apply in proceedings involving exports from Vietnam into a WTO Member consistent with the following" subparagraphs (a) through (d). The plain language of paragraph 255 stipulates then that the AD Agreement, and thus Articles 6.10 and 9.2, must be read in a manner "consistent with" paragraph 255 and the exceptions provided therein when NME conditions prevail.

26. Therefore, contrary to Vietnam's argument, Vietnam's Accession Protocol and Working Party Report provide a basis – factual and legal – for Members to treat Vietnam differently in antidumping proceedings with respect to the determination of a NME-government entity margin. Commerce's determination in the covered reviews that a Vietnam-government entity existed and that certain companies, while legally separate, were in fact part of this entity for purposes of ensuring appropriate price comparability between the normal value and the export price, and the continued application to the entity of the rate in effect, thus were not inconsistent with Articles 6.10 and 9.2 of the AD Agreement.

2. The Rate Commerce Applied to the Vietnam-Government Entity Was Also Not Inconsistent with Articles 6.8 and 9.4 of the AD Agreement

27. Commerce's decision to assign the last available rate to the Vietnam-government entity during the covered reviews was not inconsistent with Articles 6.8 and 9.4 of the AD Agreement.

28. No party that is part of the Vietnam-government entity requested that Commerce change the rate in effect for the entity during the fourth, fifth or sixth reviews. The companies subject to the Vietnam-government entity rate, by not doing so, thus expressed the view that the last available rate that Commerce had calculated for this entity, the "rate in effect" at the time, was adequate (indeed perhaps preferable) to the rate that might be calculated if Commerce were to conduct a review.

[1] Working Party Report, para. 255 (a)(i) (Exhibit US-23).

29. It is incorrect then to describe this rate as a "facts available" rate, as the panel report in DS404 mistakenly did, because it is not based on the interested party's refusal to give access to, or otherwise provide, necessary information during the fourth, fifth or sixth reviews.

30. It is also incorrect to describe this rate as an "all others" rate because it is not based on an average rate of independent exporters or producers that fully cooperated during the fourth, fifth or sixth reviews.

31. Rather, the "rate in effect" is simply the rate for a particular exporter that Commerce calculated in a previous time period consistent with the obligations of the AD Agreement based on information from that previous time period that no interested party has asked to be changed for the present review period.

32. The Ad note to GATT Article VI confirms that "a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping ... duty pending final determination of the facts in any case of suspect dumping ...". The AD Agreement otherwise does not require Members to change the rate on which this security is based and assess a duty at a different rate absent a request by an interested party to do so. Therefore, because neither the Vietnam-government entity nor any constituent parts of the entity requested a change to the existing rate of the Vietnam-government entity, Commerce's decision to apply that rate in the fourth, fifth, and sixth administrative reviews was not inconsistent with Articles 6.8 and 9.4 of the AD Agreement.

C. Vietnam's Claim That the United States Maintains a Zeroing Measure That May in Turn Be Challenged Under the AD Agreement is Without Merit

33. As discussed during the first Panel meeting and in our written submissions, Commerce's so-called "zeroing" methodology does not exist and therefore also cannot be "as such" inconsistent. The United States thus cannot breach a covered agreement "as such" given that Commerce changed its approach for calculating dumping margins for investigations and for administrative reviews in response to the DSB's recommendations and rulings on this matter.

D. Commerce's Sunset Review Determination is Not Inconsistent with Articles 11.3 of the AD Agreement

34. As the Panel considers Commerce's sunset determination, it is useful to recall that the determination as challenged by Vietnam relates only to the question of whether dumping, as opposed to material injury, is likely to continue or recur if the antidumping duty order on shrimp from Vietnam is revoked.

35. Thus as long as there is sufficient support for Commerce's determination that dumping is likely to continue or recur if the antidumping duty order on shrimp from Vietnam is revoked, there is no basis for Vietnam's claim that Commerce's sunset determination was inconsistent with obligations under the AD Agreement.

36. And as shown in our written submissions, there is sufficient support for Commerce's sunset determination.

37. Accordingly, even if the Panel were to find that certain dumping margins considered by Commerce were WTO inconsistent, the Panel can still consider and find that the sunset determination is not inconsistent with Article 11.3 based on the remaining WTO consistent factors examined by Commerce.

E. Company-Specific Revocation is Not an Obligation Under the AD Agreement

38. Regarding Vietnam's arguments under the AD Agreement, the United States agrees with Vietnam's acknowledgement that, to prevail on its claim, the Panel must find that Article 11.2 obligates Members to revoke an antidumping duty order on a company-specific basis.

39. However, Article 11.2 contains no such obligation. As discussed by the United States in its second written submission and elsewhere, Vietnam's assertion that Article 11.2 imposes an obligation to revoke antidumping duty orders on a company-specific basis is without any

foundation in the plain meaning of Article 11.2. As the Appellate Body found in *US – Corrosion-Resistant Steel Sunset Review*, with respect to the same relevant language in Article 11.3, "the duty" is imposed on a product-specific basis, not a company-specific basis.

40. In addition to the fact that Article 11.2 does not provide for company-specific revocation, Vietnam's claim fails because Commerce's practice of revocation based in part on three years of no dumping "operates in favour of foreign producers and exporters" and, therefore, cannot serve as a basis for a breach of Article 11.2 of the AD Agreement by the United States.

41. In sum, the fact that the United States considered certain company-specific revocation requests went beyond what was required of it under the AD Agreement rather than being somehow contrary to it. Similarly, the fact that the United States would grant revocation based in part on the absence of dumping for three years also went beyond what was required.

ANNEX C-5

UNITED STATES' REQUEST FOR PRELIMINARY RULINGS

TABLE OF REPORTS

Short Form	Full Citation
Australia – Apples (AB)	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010
Brazil – Aircraft (AB)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft,* WT/DS46/AB/R, adopted 20 August 1999
China – Raw Materials (AB)	Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WTDS398/AB/R, adopted 22 February 2012
Dominican Republic – Cigarettes (AB)	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
EC – Bananas III (AB)	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Large Civil Aircraft (AB)	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011
Mexico – Anti-Dumping Measures on Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
Mexico – Corn Syrup (Article 21.5 – US) (AB)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001
Mexico –Taxes on Soft Drinks (AB)	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Certain EC Products (AB)	Appellate Body Report, *United States – Import Measures on Certain Products from the European Community*, WT/DS165/AB/R, adopted 10 January 2001
US – Customs Bond Directive (AB)	Appellate Body Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/AB/R, adopted 1 August 2008
US – Export Restraints	Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001
US – Section 129(c)(1)	Panel Report, *United States – Section 129(c)(1)* of the Uruguay Round Agreements Act, WT/DS221/R, adopted 30 August 2002

I. Introduction

1. Viet Nam's request for the establishment of a panel ("panel request")[1] raises a number of concerns, some of which the United States addresses in this request for preliminary rulings.[2] First, the panel request improperly includes measures that were not the subject of Viet Nam's consultation request ("consultations request"). Second, the panel request improperly includes a claim under the *Vienna Convention on the Law of Treaties*. Finally, the panel request's claim regarding the Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA") fails to satisfy the requirements of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") because it does not identify a "measure."

2. It is appropriate for a panel to address issues concerning the terms of reference of the panel at the outset of a dispute.[3] Therefore, as explained below, the United States respectfully requests that the Panel find, before Viet Nam submits its first written submission, that certain measures and claims referenced in Viet Nam's panel request are not properly within the Panel's terms of reference, in particular: (1) certain measures that were not included in its request for consultations; (2) Viet Nam's claim under the *Vienna Convention on the Law of Treaties*; and (3) Viet Nam's claim as to the SAA.

II. Viet Nam's Panel Request Improperly Included Certain Measures that Were Not the Subject of Consultations.

3. Consultations play an important role in helping to resolve a dispute. Because of this, Members agreed in the DSU that a measure must be the subject of consultations prior to requesting a panel to review that measure.[4] Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if "the consultations fail to settle a dispute." Article 4.4 of the DSU further provides that a request for consultations must state the reasons for the request, "including identification of the measure at issue and an indication of the legal basis for the complaint." As the Appellate Body stated in *Brazil – Aircraft*:

> Articles 4 and 6 of the DSU ... set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.[5]

4. A panel request may neither expand the scope nor change the essence of a consultations request. "[A]s a general matter, consultations are a prerequisite to panel proceedings".[6] That said, there need not be a "precise and exact identity" of measures between a request for consultations and a panel request "provided that the 'essence' of the challenged measures had not changed"[7] and "[a]s long as the complaining party does not expand the scope of the dispute".[8] Accordingly, in determining the measures at issue, a panel should "compare the respective parameters of the consultations request and the panel request to determine whether an expansion of the scope or change in the essence of the dispute occurred through the addition of instruments in the panel request that were not identified in the consultations request".[9]

5. A comparison of the respective parameters of Viet Nam's consultations request and its panel request shows that Viet Nam's panel request both expanded the scope and changed the essence of its consultations request by including measures that were not the subject of its consultation request.

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[1] WT/DS429/2/Rev.1 and WT/DS429/2/Rev.1/Corr.2 ("Panel Request").

[2] The fact that an aspect of the panel request is not addressed in this request for preliminary rulings does not indicate acceptance that the aspect is properly within the terms of reference of the Panel.

[3] *China – Raw Materials (AB)*, para. 233.

[4] *US – Customs Bond Directive (AB)*, para. 293.

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

[6] *Mexico – Corn Syrup (Article 21.5 – US) (AB),* para. 58; *see also US – Certain EC Products (AB),* paras. 70, 82 (upholding the panel's finding that a particular action taken by the United States was not part of the panel's terms of reference because the EC, while referring to that action in its panel request, had failed to request consultations upon it).

[7] *US – Customs Bond Directive (AB)*, para. 293 (citing *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 137).

[8] *Id.*

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

6. First, Viet Nam's panel request identifies the final results of the sixth administrative review as a measure at issue. These final results were published on September 11, 2012, well after Viet Nam's request for consultations, which is dated February 20, 2012. A determination that is not yet final cannot be a measure under Article 4.4 of the DSU. Therefore, at the time of Viet Nam's request for consultations, the sixth administrative review did not constitute a "measure" within the meaning of Article 4.4 of the DSU. Because the sixth administrative review was not (and could not have been) subject to consultations[10], this measure is not within the Panel's terms of reference.

7. Second, Viet Nam's panel request challenges "the use of zeroing," in part, in "original investigations", "new shipper reviews," and "certain [unspecified] change circumstances reviews".[11] None of the named determinations are listed in Viet Nam's consultation request. Specifically, Viet Nam cites to only one original investigation in its consultation request, the original investigation involving certain shrimp from Viet Nam.[12] Viet Nam makes clear that it is challenging that investigation only to the extent it has an effect on subsequent reviews.[13] Viet Nam's consultation request does not otherwise include a challenge to "the use of zeroing" broadly in "original investigations." Viet Nam's consultation request also does not challenge the use of zeroing in new shipper reviews or certain changed circumstances reviews.[14] Accordingly, Viet Nam's failure to request consultations on original investigations generally and on new shipper and certain changed circumstances reviews means that these measures are not within from the Panel's terms of reference.

8. In sum, Viet Nam's panel request identifies a number of measures that were not included in its consultation request. For this reason, the United States respectfully requests that the Panel find that the following measures are not within its terms of reference:

- the sixth administrative review; and
- the use of zeroing in original investigations, new shipper reviews, and changed circumstances reviews.

III. Viet Nam's Claim Regarding the *Vienna Convention on the Law of Treaties* Does Not Involve a Covered Agreement.

9. Viet Nam's panel request includes a claim that the United States acted in a manner inconsistent with Article 31 of the *Vienna Convention on the Law of Treaties* ("VCLT").[15] However, a claim under the VCLT is not permissible under the WTO dispute settlement system. The VCLT is not a "covered agreement" as defined in the DSU[16] and so the DSU does not apply to it.

10. As explained by the Appellate Body in *Mexico – Taxes on Soft Drinks*:

> We see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes. Article 3.2 of the DSU states that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the *covered agreements*, and to clarify the existing provisions of *those agreements*". (emphasis added) Accepting Mexico's interpretation would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements.[17]

Accordingly, the claim under the VCLT is outside the terms of reference of the Panel.

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[10] WT/DS429/1, pp.1-2 ("Consultation Request").

[11] Panel Request, p. 3.

[12] *See* Consultations Request, p. 4-5.

[13] *Id.* Indeed, that specific challenge is present in Viet Nam's panel request in a section separate from its identification of "original investigations". *See* Panel Request, p.4.

[14] *See* Consultations Request, p. 2 (discussing only "five year sunset reviews" and specific administrative reviews).

[15] Panel Request, p. 6.

[16] DSU, Art. 1.1 and Appendix 1. In addition, even aside from the fact that the VCLT is not a covered agreement, the United States could not be in breach of the VCLT since the United States is not a party to the VCLT.

[17] *Mexico – Taxes on Soft Drinks (AB)*, para. 56.

IV. Viet Nam's Panel Request Regarding the SAA Incorrectly Identifies the SAA as a "Measure."

11. Viet Nam's panel request concerning the SAA appears to identify the SAA as a "measure", which is incorrect.[18]

12. As noted above, Article 4.4 of the DSU provides that any request for consultations must include an "identification of the measures at issue".[19] To identify a measure at issue, there must first be a measure.

13. Similarly, Article 6.2 of the DSU provides that the panel request must identify "the specific measures at issue." A Member must satisfy the requirements of Article 6.2 on the face of the panel request at the outset of the proceeding.[20] As such, Article 6.2 "serves a pivotal function in WTO dispute settlement"[21], stating in relevant part that

> [t]he request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

Article 6.2 thus "sets out two key requirements that a complainant must satisfy in its panel request"[22]: (1) the requirement to "identify the specific measure at issue"; and (2) the requirement to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[23] Together, these two elements comprise the "matter referred to the DSB," which serves as the basis for a panel's terms of reference under Article 7.1 of the DSU.[24] "[I]f either of them is not properly identified, the matter would not be within the panel's terms of reference".[25] Finally, panels "are inhibited from addressing legal claims falling outside their terms of reference".[26]

14. Compliance with the two requirements of Article 6.2 of the DSU requires a case-by-case analysis, considering the request "as a whole, and in light of the attendant circumstances".[27] "[I]t is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU".[28] Such an examination "must be objectively determined on the basis of the panel request as it existed at the time of filing" and be "demonstrated on the face" of the panel request.[29] Any deficiencies in the panel request cannot be "cured" in subsequent submissions[30], and a deficient claim must be excluded from a panel's terms of reference.[31]

15. Viet Nam's panel request fails to comply with the requirements of Articles 4.4 and 6.2 of the DSU because it incorrectly identifies the SAA as a measure susceptible to dispute resolution. As the Panel stated in *US – Export Restraints*, the SAA does not have "an operational life or status independent of the statute such that it could, on its own, give rise to a violation of WTO rules.

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[18] Panel Request, pp. 11-12.

[19] Article 4.2 of the DSU further provides that consultations must concern "measures affecting the operation of any covered agreements."

[20] *China – Raw Materials (AB)*, para. 230; *see Australia – Apples (AB)*, para. 416 (the requirements of Article 6.2 of the DSU are "not a mere formality").

[21] *Australia – Apples (AB)*, para. 416.

[22] *Australia – Apples (AB)*, para. 416; see also *China – Raw Materials (AB)*, para. 219; *EC – Large Civil Aircraft (AB)*, para 786; *US – Carbon Steel (AB)*, para. 125.

[23] *Australia – Apples (AB)*, para. 416; *see also China – Raw Materials (AB)*, para. 219; *EC – Large Civil Aircraft (AB)*, para 786; *US – Carbon Steel (AB)*, para. 125.

[24] *Australia – Apples (AB),* para. 416.

[25] Id.

[26] *EC – Hormones (AB)*, para. 156. "[A] defective panel request may impair a panel's ability to perform its adjudicative function within the strict timeframes contemplated in the DSU and, thus, may have implications for the prompt settlement of a dispute in accordance with Article 3.3 of the DSU". *China – Raw Materials (AB)*, para. 220.

[27] *US – Carbon Steel (AB)*, para. 127.

[28] *EC – Bananas III (AB)*, para. 142.

[29] *US – Carbon Steel (AB)*, para. 127.

[30] Id.

[31] *China – Raw Materials (AB)*, para 171; *Dominican Republic – Cigarettes (AB)*, para. 120.

Independent of the statute, the SAA does not *do* anything; rather, it interprets (i.e., informs the meaning of) the statute".[32] The SAA thus does not constitute a measure susceptible to dispute resolution because it does not have any legal effect independent of a U.S. statute or regulation.

16. In sum, Viet Nam's panel request concerning the SAA appears to identify the SAA incorrectly as a "measure". As a consequence, the United States respectfully requests that the Panel determine that Viet Nam's SAA claim is not within the Panel's terms of reference.

V. It is Appropriate to Clarify the Panel's Terms of Reference before the Parties Submit Their First Written Submissions.

17. The United States respectfully requests the Panel to make the findings requested before Viet Nam files its first written submission. Knowledge of the terms of reference, of course, is fundamental to the task of the Panel and to the parties' participation in this proceeding. Findings on this request for preliminary rulings will necessarily bring clarity to those terms of reference. It is thus important to resolve this request for preliminary rulings as a threshold issue.

18. Further, there is no need to delay a finding in order to obtain further information regarding the issues that are the subject of this request. As a general matter "compliance with the due process objective of Article 6.2 cannot be inferred from a respondent's response to arguments and claims found in a complaining party's first written submission"[33], nor can they be "cured" in subsequent submissions.[34] Rather, "[i]n every dispute, the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing".[35]

19. Finally, findings by the Panel in response to this request would serve Viet Nam's interests. Early resolution of these procedural issues would give Viet Nam clarity on the options available to it and permit Viet Nam to act according to its interests, knowing the legal consequences of its choice.

VI. Conclusion

20. For the reasons set forth in this request for preliminary rulings, the United States respectfully requests that the Panel find that the following measures and claims are outside the terms of reference of the Panel:

- the sixth administrative review;
- the practice of zeroing in original investigations, new shipper reviews, and changed circumstances reviews;
- the Vienna Convention on the Law of Treaties; and
- the Statement of Administrative Action accompanying the Uruguay Round Agreements Act (*i.e.*, the SAA).

21. To save the time and resources of the Panel, the Secretariat, and the parties, and to avoid further prejudice to the United States, the United States respectfully requests that the Panel make findings on this request as a preliminary matter before Viet Nam files its first written submission.

[32] *US – Export Restraints*, para. 8.99; *see also US – Section 129(c)(1)*, para. 6.38, n. 89
[33] *China – Raw Materials (AB)*, para. 233.
[34] *US – Carbon Steel (AB)*, para. 127.
[35] *EC – Large Civil Aircraft (AB)*, para. 642.

ANNEX C-6

UNITED STATES' REPLY TO VIET NAM'S RESPONSE TO THE UNITED STATES' REQUEST FOR PRELIMINARY RULINGS

TABLE OF REPORTS

Short Form	Full Citation
China – Raw Materials (Panel)	Panel Report, *China – Measures Relating to the Exportation of Various Raw Materials*, WT/DS394/R WT/DS394/R, WT/DS398/R and Corr. 1, adopted 22 February 2012, as modified by the Appellate Body Report, WT/DS394/AB/R
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr. 1 and 2, adopted 23 July 1998, and Corr. 3 and 4
US – Upland Cotton (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
US – Upland Cotton (Panel)	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, adopted 21 March 2005, as modified by the Appellate Body Report, WT/DS267/AB/R

I. Introduction

1. The request for preliminary rulings filed by the United States requested, in part, that the Panel find the following measures and claims as outside the terms of reference of the Panel:

- the use of zeroing in original investigations, new shipper reviews, and changed circumstances reviews;[1]
- a claim under the Vienna Convention on the Law of Treaties ("VCLT");[2] and
- the Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA").[3]

Viet Nam's response to the first matter stipulates that it "does not challenge the use of zeroing, as applied, to 'original investigations,' 'new shipper reviews,' and 'certain changed circumstances reviews'."[4] Viet Nam's response to the second matter stipulates that it "does not assert any claims pursuant to the VCLT".[5] Finally, Viet Nam's response to the third matter stipulates that it "does not claim that the SAA is within the Panel's terms of reference".[6] Therefore, given Viet Nam's responses to these three matters, the United States respectfully requests that the Panel find the above measures and claims as outside the terms of reference of the Panel.

II. The Final Results of the Sixth Administrative Review are Outside the Panel's Terms of Reference.

2. The United States also requested that the Panel find that the final results of the sixth administrative review are not within the Panel's terms of reference. The United States demonstrated that, at the time of the consultations request, the results of the sixth administrative review did not constitute a "measure" within the meaning of Article 4.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") because these results were published after Viet Nam's request for consultations. Because the sixth administrative review was not (and could not have been) subject to consultations, this measure cannot be within the Panel's terms of reference.[7]

3. Viet Nam responded to this request by arguing that the Panel should find the final results of the sixth administrative review within its terms of reference because its consultations request mentioned "'any other ongoing or future anti-dumping administrative reviews, and the preliminary and final results thereof, related to the imports of certain frozen warm-water shrimp from Viet Nam (DOC Case A-522-802)'"[8] and "'the continued use of practices described [] above in subsequent reviews'."[9] According to Viet Nam, these statements placed the United States "on notice that the sixth administrative review was a measure at issue ... through Viet Nam's identification [in its consultations request] of 'ongoing' administrative reviews".[10]

4. The United States disagrees. Viet Nam's statement about ongoing administrative reviews does not constitute the identification of a "measure" subject to WTO dispute settlement because the statement appears to address an indeterminate number of potential future measures. Article 3.3 of the DSU provides that:

> [t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the

[1] Request for Preliminary Rulings by the United States ("U.S. PRR"), paras. 3-8 (July 31, 2013).
[2] US PRR, paras. 9-10.
[3] US PRR, paras. 11-16.
[4] Viet Nam's Response to the United States' Request for Preliminary Rulings by the United States ("VN Response to U.S. PRR"), para. 12 (Aug. 5, 2013); *see id.*, para. 3.
[5] VN Response to U.S. PRR, para. 12; *see id.*, para. 4.
[6] VN Response to U.S. PRR, para. 12; *see id.*, para. 5.
[7] U.S. PRR, para. 6.
[8] VN Response to U.S. PRR, para. 9 (footnote omitted).
[9] VN Response to U.S. PRR, para. 10 (footnote omitted).
[10] VN Response to U.S. PRR, para. 11.

> WTO and the maintenance of a proper balance between the rights and obligations of Members.[11]

Measures not yet in existence at the time of the request for consultations cannot be considered as impairing benefits accruing to a Member directly or indirectly under the covered agreements. Not only would it be impossible to consult on such a measure, but it would also be impossible for the non-existent measure to be "affecting" the operation of a covered agreement as further required by Article 4.2 of the DSU. As the Appellate Body has recognized, "the present tense of the phrase 'affecting the operation of any covered agreement' denotes that the effects of such measures must relate to the present impact of those measures on the operation of a covered agreement".[12] A supposed future measure that does not yet exist, and may never exist, is not only not a "measure" at that point in time (and may never be one), it also cannot be a measure having a present impact on the operation of a covered agreement. Therefore, indeterminate future measures that do not exist at the time of Viet Nam's request for consultations (and may arguably never exist) cannot be within the Panel's term of reference under the DSU.[13]

5. For this reason as well, Viet Nam errs in claiming that it had identified the sixth administrative review at the time of its consultations request when it referred to "any other ongoing or future anti-dumping administrative reviews, and the preliminary and final results thereof, related to the imports of certain frozen warm-water shrimp from Viet Nam (DOC Case A-552-802)". Article 4.4 of the DSU requires Members to identify "the measures at issue". If a measure does not exist, it cannot be "identified" for purposes of Article 4.4. And it is critical for a responding party to know in this regard the particular measures at issue, especially since the facts for each measure could be very different as well as the legal response to the claims made. Just because a complaining party makes the same claims with respect to some <u>other</u> measures does not mean that the responding party's response to those claims will be the same for a <u>different</u> measure.

6. These fundamental flaws as they relate to Viet Nam's panel request cannot be cured by simply describing a potential future measure as being of the "same essence" as the measures that did exist and were identified. Article 4.4 of the DSU does not contain any exception where a measure is of the "same essence". Furthermore, Viet Nam is incorrect in asserting that all administrative reviews involving the same products are of the "same essence". The facts, record evidence, determinations and resulting antidumping duty may all differ. These are discrete measures. Furthermore, Viet Nam's approach would add more measures to the dispute, which would "change the essence" of the dispute. The results of the sixth administrative review are separate and discrete from the measures identified in Viet Nam's consultation request – this is not a situation where one measure replaces or amends another measure after the panel is established without affecting the essence of the measure on which consultations were held.[14]

7. Therefore, for the reasons set forth in the request for preliminary rulings and this reply to Viet Nam's response to that request, the United States respectfully requests that the Panel find that the following measures and claims are outside the terms of reference of the Panel:

- the practice of zeroing in original investigations, new shipper reviews, and changed circumstances reviews;
- the claim under the Vienna Convention on the Law of Treaties;
- the Statement of Administrative Action accompanying the Uruguay Round Agreements Act; and
- the sixth administrative review.

8. To save the time and resources of the Panel, the Secretariat, and the parties, and to avoid further prejudice to the United States, the United States renews its request that the Panel make findings on this request for preliminary rulings before Viet Nam files its first written submission.

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[11] Emphasis added.

[12] *US – Upland Cotton (AB)*, para. 261.

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

[14] *See*, *e.g.*, *China – Raw Materials (Panel)*, paras. 7.15-7.16.

ANNEX D

ARGUMENTS OF THIRD PARTIES

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ANNEX D-1

EXECUTIVE SUMMARY OF THE THIRD PARTY
ARGUMENTS OF CHINA

I. Introduction

1. The People's Republic of China intervenes in this case because of its systemic interest in the correct interpretation of GATT 1994 and the AD Agreement. China does not address all the issues raised by Vietnam in this dispute, but discusses certain aspects of the following issues.

II. The Use of Zeroing in Periodic Reviews

2. The Appellate Body, in previous disputes, has repeatedly found that the zeroing methodology, including its use in the context of periodic reviews, is, as such and whenever it is applied, inconsistent with GATT 1994 and the AD Agreement. China anticipates the Panel will follow the consistent and well-founded decisions of the Appellate Body.

III. The NME-Wide Rate Practice

A. The "as such" claim

3. China agrees with Vietnam that the USDOC's NME-wide rate practice is a measure that may be challenged "as such". First, China notes that the NME-wide rate practice as such is not only set forth in the USDOC's Anti-dumping Manual, but also set out in the Import Administration Policy Bulletin Number 05.1. Second, the key test for whether a measure could be subject to an "as such" challenge is whether it is "generally applicable" or has "general and prospective application". From the plain texts of the Policy Bulletin, the NME-wide rate practice has general and prospective application and thus can be challenged "as such". Third, this Policy Bulletin is identical in its material effect to that of the Sunset Policy Bulletin, which, as found by the Appellate Body in other disputes, may be subject to WTO dispute settlement as a norm of general and prospective application.

B. The Claim under Articles 6.10 and 9.2 of the AD Agreement

4. China agrees with Vietnam that the NME-wide rate practice is, as such, inconsistent with Articles 6.10 and 9.2 of the AD Agreement. As clarified by the Appellate Body in *EC – Fasteners (China)*, Article 6.10 allows for limited exceptions for the general obligation to determine individual margins of dumping, but "such exceptions must be provided for in the covered agreements"; and Article 9.2 requires authorities to determine an individual anti-dumping duty for each exporter, with *only* one exception that it is impracticable to do so. Nothing in the covered agreements allows Members to depart from the obligation to determine individual dumping margins and anti-dumping duties only in respect of imports of NMEs.

5. The United States tries to shift the essence of the issue by arguing that Articles 6.10 and 9.2 allow authorities to treat sufficiently related exporters as an individual exporter. However, the real issue is whether Members are allowed to presume that all the exporters in an NME country constitute a single entity. As the Appellate Body found in *EC – Fasteners (China)*, there is no legal basis in the covered agreements for such a general presumption, and placing the burden on NME exporters to rebut the presumption is inconsistent with Articles 6.10 and 9.2.

6. The United States argues that this case can be distinguished from *EC – Fasteners (China)*. It appears to China that both cases are essentially the same with respect to both the measures at issue and the claims raised. The United States specifically argues that the USDOC's determination that certain exporters constitute a Vietnam-government entity rested on adequate factual findings. However, in the own words of the United States, the USDOC required Vietnamese companies to "demonstrate independence from the government". In other words, the USDOC presumed that companies in Vietnam were subject to government control and placed the burden on Vietnamese companies to rebut this presumption. The USDOC did not establish by itself that distinct Vietnamese companies are sufficiently integrated with each other or with the State.

C. The Claim under Article 9.4 of the AD Agreement

7. The text of Article 9.4 makes clear that there is only one requirement for its application, i.e. certain exporters or producers are not included in the examination. And as clarified by the panel in *US – Shrimp (Vietnam)*, authorities are not allowed to render application of Article 9.4 conditional on the fulfilment of some additional requirement, such as the separate rate test. Therefore, even if an authority may determine that certain exporters within an NME constitute a single entity, the authority shall still determine the rate for the single entity consistently with Article 9.4, as long as the single entity is not included in the examination.

8. The United States and Vietnam disagree on the issue whether Article 9.4 requires a single "all others" rate or permits more than one rate. China first considers that the Panel is not required to decide this issue. The United States does not disagree with Vietnam that the determination of any anti-dumping rate for non-examined exporters shall be governed by Article 9.4, but focuses its rebuttal on a factual issue that "the Vietnam-government entity had been individually examined" and "received its own rate". The Panel thus need first evaluate this factual issue. If it finds that the Vietnam-government entity was not individually examined, the Panel could conclude that the United States acted inconsistently with Article 9.4 by assigning a rate based on facts available to the Vietnam-government entity, without deciding the above issue.

9. Secondly, although Article 9.4 does not explicitly require a single "all others" rate, it is questionable whether this provision permits multiple rates. Article 9.2 requires that anti-dumping duties must be collected in "appropriate" amounts and "on a non-discriminatory basis". It appears impracticable for an authority to comply with this requirement by applying different rates to the non-examined exporters which are similarly situated, to the extent that all of them are excluded from the examination and dumping margins are determined for none of them. Furthermore, the Appellate Body has consistently used the term "the 'all others' rate" or "the rate applied to 'all others'", which implies that Article 9.4 requires a single "all others" rate.

D. The Claim under Article 6.8 of the AD Agreement

10. Article 6.8 and Annex II set forth the conditions that must be satisfied before an authority may apply facts available. Logically, if the authority has never requested an interested party to supply necessary information, it has no basis to find that this party "refuse access to" or "does not provide" necessary information, and thus has no authority under Article 6.8 to make determinations based on facts available. As the Appellate Body found in *US – Zeroing (EC) (Article 21.5 – EC)*, it is impermissible to apply facts available to determine the anti-dumping duty rates for exporters not individually investigated.

11. Article 6.8 and Annex II also apply to a single "exporter", including a so called country-wide entity, constituted of several distinct legal entities, and the application must take into account the special characteristics of the single "exporter", i.e., it is a *fictional and artificial* entity and constituted of distinct legal entities. First, the authority must request necessary information from all the distinct entities and inform all of them that the authority may resort to facts available if requested information is not supplied. Second, in assessing whether or not the fictional single "exporter" has cooperated, an authority must take into account the conduct of the single "exporter" as a whole. In case the authority requests information *only* from a mandatory respondent, which is a part of the single "exporter", a lack of cooperation by this mandatory respondent is not sufficient to conclude that the entire single "exporter" fails to cooperate, and nor the authority may determine the failure of cooperation on the ground that other exporters comprising the single "exporter" do not provide information.

12. The United States seeks to rebut the "as applied" claims by arguing that the rate for the Vietnam-wide entity in the covered reviews is just the continuation of the rate assigned in the original investigation. Following the finding of the panel in *US – Shrimp (Viet Nam),* China considers that this "formalistic" approach should be rejected. From the legal aspect, there are only three legal bases to determine rates under the AD Agreement: Articles 2, 9.4 and 6.8. Since the rate for the Vietnam-wide entity was not determined under Articles 2 or 9.4, the only other basis would be Article 6.8. As to the factual aspect, the rate ultimately assigned to the Vietnam-wide entity was expressly derived from the rate that had previously been assigned in the original investigation on the basis of facts available. "To fail to treat this rate as a facts available rate would elevate form over substance, and ignore the true factual circumstances".

E. Vietnam's Protocol of Accession

13. China agrees with Vietnam that the NME-wide rate practice is not allowed under Vietnam's Protocol of Accession. First, with respect to the United States' argument that Vietnam does not challenge, in the present dispute, the USDOC's finding that Vietnam is a non-market economy, China considers that the label of non-market economy is not decisive for the dispute. What really matters is what Vietnam's Protocol does provide and what it does not provide. Second, out of the five paragraphs of Vietnam's Working Party Report relied upon by the United States to justify the NME-wide rate practice, only Paragraph 255 is incorporated into Vietnam's Protocol and therefore only this paragraph has binding force. In accordance with Paragraph 255, the AD Agreement, including Articles 6.10, 9.2, 9.4 and 6.8, shall apply in anti-dumping proceedings against imports from Vietnam, with the sole exception explicitly set out in the subparagraph (a), which concerns nothing other than the determination of normal value. No other departure is allowed under Vietnam's Protocol.

IV. Section 129 of the Uruguay Round Agreement Act

14. It appears to China that Section 129(c)(1) is WTO-inconsistent as it precludes prior unliquidated entries from the application of Section 129 determinations. First, it is the obligation of WTO Members to comply with DSB recommendations and rulings immediately or by the end of a reasonable period of time at the latest. As the Appellate Body stated in *US – Zeroing (Japan) (Article 21.5 – Japan)*, all WTO-inconsistent conduct, including WTO-inconsistent assessment or liquidation of the duties, must cease completely, even if it is related to imports that entered the implementing Member's territory before the end of the reasonable period of time. Second, Section 129 is the applicable provision under the United States law governing the implementation of adverse DSB recommendations and rulings. By precluding the application of Section 129 determinations to prior unliquidated entries, the WTO-inconsistent conduct, i.e. liquidation of the duties, does not cease completely.

15. China notes that the United States does not contest that Section 129(c)(1) precludes the application of Section 129 determinations to prior unliquidated entries, but concentrates its rebuttals on a "threshold" issue that Section 129(c)(1) does not preclude actions with respect to prior unliquidated entries under *other* "mechanism". With respect to the "threshold" issue, China first considers that, as a jurisdictional matter, Section 129(c)(1) of the URAA can be challenged "as such", as it is a rule of general and prospective application. When it comes to the assessment of the WTO-consistency, although whether Section 129(c)(1) is a mandatory measure may be relevant, the Appellate Body has cautioned that the "mandatory/discretionary" distinction shall not be applied in a mechanistic fashion and there is possibility that "a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its obligation".

16. China is not convinced by the two other "mechanism" identified by the United States. With respect to the adoption of new legislation by Congress, China submits that the mere possibility that the legislative authority of a Member may pass a new law in light of adverse DSB rulings in the future cannot cure the inconsistency of that Member's existing laws, practice or particular measures with the covered agreements. With respect to actions under Section 123, China notes that Section 123 only applies to the implementation of adverse DSB rulings with respect to "as such" claims against the United States' "regulation or practice". The United States may not rely on any broad policy change under Section 123 as a means of avoiding its mandatory obligation to comply with DSB rulings in individual reviews under Section 129.

17. The United States also argues that only provisions under the DSU would be implicated by a violation of the obligation to comply with DSB recommendations and rulings. China considers that there are two levels of obligations under the WTO legal system. First, each Member has the obligation, all the time, to ensure the conformity of its measures with covered agreements. Second, when the DSB recommends that the Member concerned bring its measures into conformity with certain agreements, the Member concerned has the obligation to comply with the recommendations. In other words, the Member concerned bears both obligations simultaneously. By failing to comply with the DSB recommendations, the Member concerned not only violates the obligation under DSU, but also is in continued violation of the obligation under the relevant covered agreements, such as the AD Agreement. And this has been confirmed by the Appellate Body in *US – Zeroing (Japan) (Article 21.5-Japan)*.

V. The Sunset Review Determination

18. China recalls that the Appellate Body has stressed, in *US-Corrosion Resistant Steel Sunset Review*, that "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4." Otherwise, the sunset review determination will be inconsistent with Article 11.3 of the AD Agreement.

19. The United States makes an alternative argument, i.e. the USDOC relied not only on dumping margins, but on "multiple factors". China considers that it is possible for an investigating authority to base its likelihood-of-dumping determination on intermediate findings with respect to multiple factors, as Article 11.3 does not prescribe any specific methodology or identify any particular factors that authorities must use or take into account when making a likelihood determination. If an authority so did, the panel must evaluate the significance of the different factors considered by the authority. In the present case, the United States does not disagree that the USDOC did rely upon margins of dumping to support its likelihood determination. Thus, the factor of margins of dumping is not just one of multiple factors considered, but a factor which was "central" to the ultimate likelihood determination. And the errors relating to this factor may necessarily invalidate the final determination.

VI. The Review under Article 11.2 of the AD Agreement

20. China considers the claim of Vietnam raises important legal interpretation issues, particularly including: (1) the nature and subject matter of the review under Article 11.2, (2) the relation between Article 11.2 reviews and Article 9.3.1 assessment, and (3) whether and how the exception provided for under Article 6.10 applies to Article 11.2 reviews.

A. The Nature and Subject Matter of Article 11.2 Reviews

21. Article 11.2 is an "application of the general rule in Article 11.1", which provides that anti-dumping duties "shall remain in force only as long as and to the extent necessary" to counteract injurious dumping. Thus Article 11.2 and the review thereunder are essentially about the necessity of the anti-dumping duty.

22. The United States argues that Article 11.2 does not provide a right to seek company-specific revocations, based on its interpretation of the term "duty" in Article 11.2, i.e. this term is a reference to the application of the antidumping duty on a product, not as it is applied to exports by individual companies. China is not convinced by this interpretation.

23. Unlike the United States, China considers that the term "duty" in Article 11.2 may have a broader meaning than the same term in Article 11.3, taking into account the material distinctions between the two provisions. First, the two provisions have different purposes. The finding that an duty can only be terminated or remain in force on an "order-wide" basis by the end of a five-year period does not necessarily lead to the conclusion that the duties under the same "order" cannot be revoked partially with respect to certain exporters under Article 11.2.

24. Secondly, unlike Article 11.3, Article 11.2 provides "any interested party", including any individual exporter, the right to request a review. This distinction is significant for present purposes. In fact, the Appellate Body used this distinction as one of the elements supporting its conclusion that Article 11.3 does not oblige authorities to make "company-specific" determinations in sunset reviews.

25. More importantly, unlike Article 11.3, Article 11.2 provides that a duty may be terminated after a review only with respect to "dumping", which is an exporter-specific concept. Accordingly, an individual exporter is permitted to request an authority to review its own dumping status and thereafter to determine whether to terminate the duty imposed on it. In addition, unlike Article 11.3, which obliges authorities to review only the likelihood of dumping, Article 11.2 requires authorities to examine whether the continued imposition of the duty is necessary to *offset* dumping. The authorities thus have to assess the exact dumping status, which is company specific.

26. As to the second argument of the United States, i.e., the term "duty" in Article 11.2 must be different from the term "individual duties" in Article 9.4, China considers that this does not preclude that the former "duty" could refer to either of the duties on individual companies or the duty on a product. The first sentence of Article 9.5 reinforces that the distinction between "duty" and "duties" is not absolute. As the term "duties" may be used with respect to a product, the term "duty" may also refer to duties levied on companies.

B. The Relation between Article 11.2 Reviews and Article 9.3.1 Assessment

27. Article 11.2 reviews and Article 9.3.1 assessment are of different legal nature and have different functions. Unlike the former, Article 9.3.1 assessment concerns essentially the amount of the final duty liability, rather than the necessity of the continued imposition of duties. The distinction is confirmed by the footnote to Article 11.2. Article 11.2 reviews and Article 9.3.1 assessment need not take place simultaneously, as certain interested parties, particularly exporters, may request an Article 11.2 review in order to revoke the duty while other interested parties may request an Article 9.3.1 assessment procedure to assess the final duty amount. However, if an authority determines to conduct an Article 11.2 review in the context of an Article 9.3.1 assessment procedure, it must comply with the obligations under both provisions.

C. The Application of Article 6.10 to Article 11.2 Reviews

28. China notes that Article 11.4 provides that "the provisions of Article 6 regarding evidence and procedure" shall apply to any review carried out under Article 11, but considers that it is worthwhile for the Panel to clarify whether and how the exception provided for in the second sentence of Article 6.10 applies to Article 11.2 reviews.

29. The text of Article 11.2 indicates that authorities bear an obligation to review the need for the continued imposition of the duty and interested parties "shall have the right" to request the authorities to do so. As the Appellate Body held in *Mexico – Anti Dumping Measures on Rice,* authorities have "no discretion to refuse" a request to initiate an Article 11.2 review, when an interested party has met the conditions, and Members may not impose further requirement upon the party requesting the review. The exception under Article 6.10 should not be applied in a manner, if applicable at all, whereby the right of interested parties to request a review is fundamentally deprived and Article 11.2 is rendered largely a nullity. Specifically, it appears inappropriate for authorities to reject a request for an Article 11.2 review by a company simply on the ground that this company was not selected for individual examination during the original investigation or assessment procedures.

ANNEX D-2

EXECUTIVE SUMMARY OF THE THIRD PARTY ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. The European Union intervenes in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the rights and obligations contained therein, in particular the General Agreement on Tariffs and Trade (the GATT 1994), the Agreement on Implementation of Article VI of the GATT 1994 (the Anti-Dumping Agreement) and the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU).

II. ZEROING

2. The issue of "zeroing" has been exhaustively litigated in the WTO; the European Union does not see that the Panel should deal with it other than in a summary way.

3. Selecting a methodology that averages domestic prices, so that export prices oscillate above and below normal value, and that treats export transactions below the line as dumped whilst setting to zero the comparison results of export transactions above the line is obviously WTO inconsistent: the calculation is not made for the product as a whole; the comparison is unfair, particularly because the selection of the methodology pre-determines the outcome; unjustified adjustments are made to the export transactions above the line; and no regard is paid to the targeted dumping rules, which permit patterns of relatively low priced exports to be identified. A municipal law measure that states otherwise is WTO inconsistent. Therefore, the European Union anticipates that Viet Nam will be successful with the "as applied" claims.

4. With respect to Viet Nam's "as such" claims, the European Union anticipates that the Panel will need to consider whether or not the United States has in fact eliminated the US administrative review simple zeroing methodology; or in other words whether Viet Nam has demonstrated the existence and precise content of the measure that allegedly continues to exist. The European Union agrees with the United States that demonstrating the existence and precise content of an unwritten measure is a difficult task, which is not to be lightly assumed, and which requires particular rigour. The European Union understands that it is the position of the United States to have changed the US administrative review simple zeroing methodology so as to eliminate zeroing; the experience of the European Union has indeed been that the United States no longer systematically resorts to zeroing in all cases, in accordance with the provisions of its new methodology applied from April 2012. The European Union also observes that the United States frequently makes use of provisions in this methodology which allow it to depart from this general rule and to apply zeroing in certain original investigations and administrative reviews. The European Union considers that this question will ultimately depend on a close analysis of all the evidence before the Panel.

III. THE NME-WIDE ENTITY RATE

5. The Parties refer extensively to the Appellate Body Report in *EC – Fasteners (China)*. In that case the Panel found that Article 9(5) of the EU Basic Anti-Dumping Regulation, which set out a procedure for exporters from a non-market economy to demonstrate that they were separate from the State, thus receiving individual treatment and individual dumping margins, was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

6. This was confirmed on appeal. The Appellate Body first observed that Section 15 of China's Accession Protocol, drafted in very similar terms to paragraph 255 of the Working Party Report concerning the accession of Viet Nam, contains a similar acknowledgement of the difficulties in determining price comparability as that contained in the second *Ad Note* to Article VI of the GATT 1994 with respect to countries where the State has a monopoly of trade and where domestic prices are fixed by the State. The Appellate Body found that Section 15 concerns solely the determination of normal value; it does not permit derogation regarding export price or country-

wide margins or duties. Next, the Appellate Body confirmed that the measure at issue concerned not only the imposition of anti-dumping duties but also the calculation of dumping margins. The Appellate Body found that Article 6.10 of the Anti-Dumping Agreement establishes an obligation to calculate individual margins of dumping; that the term "sources" in Article 9.2 refers to individual exporters and not to the exporting country as whole; that the requirement to "name" suppliers requires the specification of anti-dumping duties for individual suppliers; and that the concept of "impracticable" was not the same as the concept of ineffective, so it did not justify the measure at issue. Finally, the Appellate Body found that the measure at issue was inconsistent with Articles 6.10 and 9.2 as it *presumed* the existence of a single entity and that the individual treatment test was not apt to establish whether the exporting State and one or more exporters should be deemed to be a single entity. According to the Appellate Body the economic structure of a WTO Member cannot be used to imply a presumption that has not been written into the covered agreements, thereby assessing the measure at issue on an "as such" basis, without reference to particular proceedings.

7. Contrary to what Viet Nam seems to suggest, the measure at issue in *EC – Fasteners (China)* is no longer in force, the European Union having fully complied with the recommendations and rulings of the DSB by repealing the measure and replacing it with a single entity test that does not impose any presumption.

8. The European Union anticipates that the Panel will be guided by the clarifications provided by the Appellate Body in *EC – Fasteners (China)*. In particular, the Panel will have to consider whether Viet Nam has demonstrated the existence and precise content of the measure, and the existence of a presumption. It will also have to consider whether the test applied by the United States is apt to establish whether the exporting State and one or more exporters should be deemed to be a single entity. The European Union agrees with the United States that a Member is free to make single entity determinations based on the type of criteria referred to by the United States, which differ from the ones contained in Article 9(5) of the EU Basic Anti-Dumping Regulation under scrutiny in *EC – Fasteners (China)*.

9. With regard to Viet Nam's other claims, the European Union would recall that in *Mexico – Anti-Dumping Measures on Rice* the Appellate Body confirmed that an investigating authority is not required to notify or provide an application to unknown firms; nor calculate an individual margin of dumping for them. The Appellate Body merely found that, in the particular factual circumstances of that case, and given the particular procedures followed by the investigating authority, facts available should not have been used in the calculation of the all others rate, because the others were not notified of the information required or the consequences of not providing it. Thus, the Appellate Body did not find that facts available could *never* be used in the calculation of an "all others" rate.

10. The European Union anticipates that the Panel will be guided by the clarifications provided by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*. In particular, the European Union agrees with the United States that when an individual rate is determined for a single entity consisting of multiple firms and/or the State in the case of a non-market economy, that falls within the examination provided for in Article 9.4 of the Anti-Dumping Agreement. Article 9.4 does not require that there be a single "all-others" rate, which can be deduced from its text: The opening line of Article 9.4 does not state "the" antidumping duty, but "any" antidumping duty, Article 9.4 (ii) even mentioning explicitly "antidumping duties" in the plural. As to the purpose of Article 9.4, the key message of the first sentence is that any anti-dumping duty "shall not exceed" what has been calculated according to Article 9.4 (i) or (ii). Article 9.4 contains thus a ceiling on the *amount* of any rate applied, not a ceiling on the *number* of different rates applied.

11. It is the view of the European Union that the disciplines on the use of facts available under the Anti-Dumping Agreement with respect to an exporter constituted of a single legal entity do not differ from those applicable to an exporter constituted of two or more distinct legal entities; they are subject to the same rights and obligations under the Anti-Dumping Agreement.

IV. SECTION 129(C)(1) OF THE URUGUAY ROUND AGREEMENTS ACT

12. The European Union recalls that in *US – Zeroing (EC) (Article 21.5 – EC)* and *US – Zeroing (Japan) (Article 21.5 – Japan)* the Appellate Body clarified the relevant obligations of WTO

Members with respect to the final collection of anti-dumping duties after the end of the reasonable period of time for compliance.

13. The Appellate Body recalled that recommendations and rulings of the DSB give rise to a compliance obligation once the DSB has adopted a report. The Appellate Body noted that, although the term "withdrawal" in Article 3.7 of the DSU could be understood as requiring abrogation, alternative means of implementation may exist and that the choice belongs in principle to the Member (if however a WTO Member decides to enact or maintain a measure, such measure must be consistent with WTO law). The Appellate Body confirmed that compliance must be immediate; it rejected the proposition that the date of importation is the relevant parameter for determining compliance; WTO-inconsistencies must cease by the end of the reasonable period of time. The Appellate Body considered further that any delays resulting from domestic judicial proceedings could not excuse a Member from complying by the end of the reasonable period of time. The Appellate Body found no provision supporting such a conclusion. Referring to Article 27 of the Vienna Convention, the Appellate Body recalled that a Member bears responsibility for acts of all its departments of government, including its judiciary, even if requested by private parties.

14. The European Union anticipates that the Panel will be guided by these clarifications provided by the Appellate Body in *US – Zeroing (EC) (Article 21.5 – EC)* and *US – Zeroing (Japan) (Article 21.5 – Japan)* confirming that under WTO law, the relevant event is final liquidation. In the measure at issue the relevant event is import. Therefore, the question is whether or not, notwithstanding this discrepancy between WTO law and US municipal law, the measure at issue effectively ensures compliance. For that to be the case import would have to be a proxy for final liquidation; that is, there would have to be a relationship between import and final liquidation. However, there appears to be no such relationship, the period during which final liquidation may be delayed and/or suspended by municipal injunction being variable and uncertain. Therefore, it is the view of the European Union that the measure at issue does not ensure compliance.

15. With respect to an assessment of the "as such" consistency of the US measure, the European Union recalls that any act or omission attributable to a WTO Member may be the subject of dispute settlement proceedings; no requirement exists that the measure identified by the complaining Member has been or is being applied. If the United States refers to the possibility of a municipal authority revoking, modifying or countermanding the measure, this is of no relevance to the question of whether the measure may be the subject of dispute settlement proceedings and whether or not the measure is WTO consistent.

16. The issue before the Panel is whether Section 129(c)(1) *itself* is inconsistent with one or more obligations assumed by the United States pursuant to a provision of the covered agreements; it is not whether the measure *has led* to or *may lead* to WTO inconsistent *action* (that is, *some other measure* that is inconsistent): whether "necessarily" or by reference to some other causal test; or whether in "all instances" or less than all instances. How the measure is applied or may be applied may provide *evidence* as to the consistency of the measure itself; but this will not be determinative on the question of the WTO consistency of the measure itself.

17. The Appellate Body has clarified that the mandatory/discretionary distinction is a useful analytical tool, but not to be mechanistically applied. It is less in the nature of a distinction and more in the nature of two sides of the same coin. The more mandatory something is (that is, the less discretionary), then the more likely it is that it will lead to the WTO inconsistent behaviour complained of, and the more likely it is that the measure itself is WTO inconsistent. Conversely, the less mandatory something is (that is, the more discretionary), then the less likely it is that it will lead to the WTO inconsistent behaviour complained off, and the less likely it is that the measure itself is WTO inconsistent.

18. The Appellate Body has adopted a similarly flexible approach to other analytical tools, such as the as such/as applied distinction and the *de jure*/*de facto* distinction. Notably with respect to subsidies contingent upon export, the Appellate Body has explained that Article 3.1(a) of the SCM Agreement sets out a single legal standard. The difference between a *de jure* claim and a *de facto* claim is the evidence. In a *de jure* claim the evidence consists of the text of the measure. In a *de facto* claim the existence of a subsidy contingency in fact upon export must be inferred from the total configuration of facts constituting and surrounding the grant. In essence, the claim is that the measure is wholly or partially unwritten or undisclosed, and the complainant sets out to demonstrate its alleged existence and precise content. While there seems to be widespread

agreement that an unwritten measure can, in principle, be challenged as such, the Appellate Body has clarified in *US – Zeroing (EC)* that there is a high threshold to make such a claim, particular rigour is required, and a breach is not to be lightly assumed. The Appellate Body requires a complaining party to clearly establish at least three criteria: that the alleged "rule or norm" is attributable to the Member; its precise content; and its general and prospective application. These clarifications of the Appellate Body were particularly important and made clear that practice can indeed be challenged if it amounts to sufficient evidence of a "rule or norm" meeting the three criteria. Earlier panel reports should be read in the light of the later clarifications provided by the Appellate Body in *US – Zeroing (EC)* and may be only of limited guidance.

19. In light of this case law, the European Union anticipates that the Panel may need to consider whether the evidence presented by Viet Nam is sufficient to demonstrate the existence and precise content of the measure alleged to exist. Whilst the mandatory/discretionary distinction may provide a useful analytical tool for the Panel to approach that problem, it should not be applied mechanistically.

20. It seems to the European Union that, in considering whether a dualist WTO Member is complying with its WTO obligations, it may be relevant to consider whether there is an interpretation in conformity rule, being applied in practice. We observe analogous problems in the EU jurisdiction where EU member States may be either monist or dualist, but there is a general obligation on national judges to interpret and apply their national legislation so as to render it in conformity with EU law. This interpretation in conformity rule is an essential part of the mechanics to ensure synchronisation between EU law and the national law of EU member States. Turning to WTO law, Article XVI:4 of the WTO Agreement merely provides that all WTO Members shall ensure the conformity of their laws, regulations and administrative procedures with their WTO obligations. If a Member is dualist, it can choose to transpose WTO law perfectly, or to have an interpretation in conformity rule in order to correct for any inadvertently imperfect transposition. In this context, the nature of the treaty obligation in question, particularly whether it is sufficiently clear, is important; clarifications of WTO law provided by the Appellate Body should be taken into account. For its part, the EU is in principle dualist *vis-à-vis* WTO law (there is no direct effect), but there is an interpretation in conformity rule, and direct reference to WTO law is permitted where the Union legislator provides for this, as it does in the area of anti-dumping.

21. The European Union understands that there is such an interpretation in conformity rule in the United States, that being the *Charming Betsy* doctrine. Yet, it is unclear how the existence of that doctrine can be squared with what the evidence seems to suggest about how Article 129(c)(1) is actually being applied in practice. If the doctrine is not being consistently applied, then we wonder what steps the United States may have taken in order to ensure compliance with its WTO obligations.

V. ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT: THE SUNSET REVIEW

22. The European Union considers that a sunset review determination that relies on prior dumping determinations that are (partly, not necessarily all) WTO inconsistent, notably because of the use of zeroing, is itself WTO inconsistent. The question of what the sunset finding would be absent reliance on the prior WTO inconsistent measures is not a matter for an original panel deciding such a dispute.

VI. ARTICLE 11.2 OF THE ANTI-DUMPING AGREEMENT

23. The European Union understands that Viet Nam does not dispute the reasoning contained in the Panel Report in *US – DRAMs* to the effect that the absence of dumping in the most recent data period does not *automatically* mandate immediate termination under Articles 11.1 and 11.2 of the Anti-Dumping Agreement. Rather, Viet Nam appears to accept that the question of *necessity* under Article 11.2 is also *prospective* in nature. Nor does the European Union understand that Viet Nam seeks from the Panel a positive finding that the relevant anti-dumping duties should have been terminated, because it is the Panel's task to assess the WTO consistency of the measures at issue, and not to proactively direct defending Members as to measures they should have adopted or must adopt in the future.

24. Rather, the European Union understands that Viet Nam seeks a finding that the specified measures at issue are inconsistent with Articles 11.1 and 11.2 insofar as they determine *not to*

terminate the duties. In this respect, Viet Nam claims that the dumping margins calculated in the past administrative reviews were calculated using zeroing. If this is correct, then applying the WTO case-law to the effect that, if a sunset review relies on a prior margin calculation that is WTO inconsistent, then the sunset review itself is WTO inconsistent, the Panel would have to reach the same conclusion regarding the reviews under Articles 11.1 and 11.2.

25. Similarly, if the US determinations pursuant to Articles 11.1 and 11.2 are WTO inconsistent because they rely on past zeroed margins, they will in any event have to be re-considered by the United States; that outcome can be achieved without deciding on whether sampling is possible in reviews under Articles 11.1 and 11.2 of the Anti-Dumping Agreement. That being said, the European Union notes that Article 11.4 refers expressly to the provisions of Article 6 regarding "evidence" and "procedure", and this includes Article 6.10 providing for the possibility of sampling. The European Union is not aware of any case in which a provision of Article 6 has been held inapplicable to a review investigation conducted pursuant to Article 11.2. Thus, the European Union considers that sampling may be used in reviews conducted pursuant to Articles 11.1 and 11.2.

26. Finally, insofar as Viet Nam's claim is directed against a measure that determines not to *conduct a review* pursuant to Article 11.1 and 11.2, the European Union notes that Article 11.2 first sentence refers to a request "by any interested party". Article 11.2 second sentence also refers to "interested parties", which, in the light of the first sentence, does not refer only to all interested parties acting together, but rather to any interested party. Article 6.11 defines interested parties for the purposes of the Anti-Dumping Agreement as including an exporter or foreign producer. Therefore, the request referred to in Article 11.2 may be made by an individual company. Furthermore, by the express terms of that provision, a request under Article 11.2 may relate either to dumping or to injury; the request may relate only to the company-specific dumping margin calculated for that company and the duty imposed on that company. If such a request is made, then one of the conditions provided for in Article 11.2 is met. The obligation to conduct a review is subject to three other conditions: it must be warranted; a reasonable time must have elapsed since imposition; and positive information is submitted substantiating the need for such review. If all conditions are fulfilled, then the authority must review the need for the continued imposition of the duty and if the duty is no longer warranted, it must be terminated immediately. However, simply because such firm would demonstrate that for a particular period of time it has not been dumping, that would not in itself obligate the importing Member to terminate the duty. The very purpose of an anti-dumping duty is that it is supposed to counteract or offset dumping, by inducing the exporter to raise its export price. If this alone were to mean that the duty would have to be terminated, and only re-imposed if the firm started dumping again, then the system would have built into it an automatic on/off switch, in the sense that the duty would automatically alternate on and off. This would be inconsistent with the security and predictability in international trade sought by the WTO Agreement.

ANNEX D-3

EXECUTIVE SUMMARY OF THE THIRD PARTY ARGUMENTS OF JAPAN

A. The Consistency of the USDOC's Practice of Zeroing in Administrative Reviews

1. The disciplines for determining both the existence of "dumping" and the "margin of dumping" are set forth in Article 2 of the Anti-Dumping Agreement. Article 2.1 defines "dumping" as follows:

> For the purpose of this Agreement, *a product* is to be considered as being *dumped*, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price … for the like product when destined for consumption in the exporting country.[1]

This definition of "dumping", set forth in Article 2.1 of the Anti-Dumping Agreement, reflects the definition of "dumping" in Article VI:1 of the GATT 1994.[2] In both texts, "dumping" is defined in relation to the "product".[3] The term "margin of dumping" in Article VI:2 of the GATT 1994 is also understood by reference to the "product". The Appellate Body has concluded on the basis of these texts that "dumping" and the "margin of dumping" must be defined in relation to "the product under investigation as a whole".[4]

2. Furthermore, Article 2.1 makes clear that the definition of "dumping" in that provision applies throughout the Anti-Dumping Agreement and for purposes of all anti-dumping proceedings.[5]

3. Given that "dumping" must be defined "in relation to a product as a whole", the Appellate Body has explained that "while an investigating authority may choose to undertake multiple comparisons or multiple averaging at an intermediate stage to establish margins of dumping, it is only on the basis of aggregating *all* these 'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole".[6] The requirement under Article 2.1 to aggregate multiple comparisons would apply regardless of whether the investigating authority conducts multiple model-specific W-to-W comparisons; multiple transactions-specific W-to-T comparisons; or multiple transaction-specific T-to-T comparisons.[7]

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[1] Emphasis added.

[2] Appellate Body Report, *US – Softwood Lumber V*, para. 92.

[3] Appellate Body Report, *US – Softwood Lumber V*, para. 93.

[4] See Appellate Body Report, *US – Zeroing (EC)*, para. 126, quoting Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93. See also Appellate Body Report, *US – Zeroing (EC)*, paras. 125, 127-129, 132.

[5] Appellate Body Report, *US – Zeroing (Japan)*, para.109. See also Appellate Body Report, *US – Zeroing (EC)*, para. 125 ("The Appellate Body stated, in *US – Softwood Lumber V*, that 'the opening phrase of Article 2.1—'[f]or the purpose of this Agreement'—indicates that the definition of 'dumping' as contained in Article 2.1 applies to the entire Agreement'."). The Appellate Body cited Appellate Body Report, *US – Softwood Lumber V*, para. 93 and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 108-109 and 126-127.

[6] Appellate Body Report, *US – Zeroing (EC)*, para. 126 (emphasis in original) (internal quotations omitted).

[7] Appellate Body Report, *US – Softwood Lumber V*, paras. 97-98 (W-to-W comparisons in original investigations); Appellate Body Report, *US – Zeroing (EC)*, para. 132 (W-to-T comparisons in periodic reviews); and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 89 and 122 (T-to-T comparisons in original investigations). For example, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body held that the extension of the "product as a whole" requirement to T-to-T comparisons under Article 2.4.2 did not involve a "dramatic departure" from its earlier rulings on the product-wide definition of "dumping". Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 114. The Appellate Body noted it had "referred generally to the use of zeroing in relation to the use of 'multiple comparisons' when it stated that, '[i]f an investigating authority has chosen to undertake multiple

4. The U.S. practice of "zeroing" is inconsistent with Articles 2.1, 2.4 and 2.4.2 of the Anti-Dumping Agreement, because the United States ignores the results of certain intermediate comparisons instead of properly aggregating all intermediate values. Japan agrees with Viet Nam that "zeroing" in administrative reviews is likewise prohibited under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

5. The *chapeau* of Article 9.3 of the Anti-Dumping Agreement, which governs periodic reviews, states: "The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". This requirement parallels the language in Article VI:2 of the GATT 1994, which provides that, "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product". It also reflects the statement in Article 9.1 that the amount of the anti-dumping duty must be less than or equal to the margin of dumping, and the idea that anti-dumping duties are collected in "appropriate" amounts when the amount does not exceed the margin of dumping.

6. Pursuant to these provisions, it is evident that "the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding".[8] Furthermore, because Article 9.3 explicitly references Article 2, the Appellate Body has explained that "under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, the amount of the assessed anti-dumping duties shall not exceed the margin of dumping as established '*for the product as a whole*'."[9]

7. Accordingly, if the investigating authority chooses to undertake multiple comparisons at an intermediate stage, it is not allowed to take into account the results of only some multiple comparisons, while disregarding others.[10] For purposes of periodic reviews, the investigating authority must aggregate all multiple comparison results in order to properly establish a margin of dumping for the "product" under investigation as a whole. The investigating authority is required to compare the anti-dumping duties collected on all entries of the subject product from a given exporter or foreign producer with that exporter's or foreign producer's margin of dumping "for the product as a whole" to ensure that the total amount of the former does not exceed the latter.[11]

8. In *US – Zeroing (EC)*, the Appellate Body found that, because the USDOC "systematically disregarded" negative comparison results under its zeroing procedures, "the methodology applied by the USDOC in the administrative reviews at issue resulted in amounts of assessed anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared".[12] As noted by Viet Nam in its first written submission, the Appellate Body has, on several occasions, specifically affirmed its holding in *US – Zeroing (EC)* that the application of zeroing in administrative reviews to disregard or eliminate negative comparison results is inconsistent with the Anti-Dumping Agreement and the GATT 1994.

9. In light of the thorough and well-reasoned analysis by the Appellate Body with respect to the issue of zeroing in administrative reviews, Japan agrees with Viet Nam that the Panel should find the zeroing methodology, as it relates to the use of simple zeroing in administrative reviews, to be inconsistent with the United States' obligations under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

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comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole". Ibid. (emphasis in original).

[8] Appellate Body Report, *US – Zeroing (EC)*, para.130 (emphasis in original). See also Appellate Body Report, *US – Zeroing (Japan)* para.155.

[9] Appellate Body Report, *US – Zeroing (EC)*, para. 127, quoting Appellate Body Report, *US – Softwood Lumber V*, para. 99 (emphasis added).

[10] Appellate Body Report, *US – Zeroing (EC)*, para. 127, quoting Appellate Body Report, *US – Softwood Lumber V*, para. 99. See also ibid. para. 132 (making the same statement in the context of the United States' W-to-T comparisons in periodic reviews).

[11] Appellate Body Report, *US – Zeroing (EC)*, para. 132.

[12] Appellate Body Report, *US – Zeroing (EC)*, para. 133.

B. The Consistency of Section 129(c)(1) of the URAA with the Anti-Dumping Agreement

10. Pursuant to Article 21.3 of DSU, "implementation of the recommendations and rulings of the DSB must be done 'immediately', unless it is 'practicable' to do so", and "the reasonable period of time is a limited exception from the obligation to comply immediately"[13]. Thus "the obligation to comply with the recommendations and ruling of the DSB has to be fulfilled by the end of the reasonable period of time at the latest".[14] If, in certain circumstances, the statute pursuant to which a Member implements such recommendations and rulings necessarily leads to the failure to comply after the expiration of the reasonable period of time, that statute would itself be inconsistent with the covered agreements. Specifically, in the context of zeroing disputes, to the extent that the obligation to comply with the DSB recommendations and rulings would cover "prior unliquidated entries", if Section 129(c)(1) of the URAA necessarily excludes such entries from the scope of any U.S. measure taken to comply with the DSB's recommendations and rulings, Section 129(c)(1) is inconsistent, as such, with Articles 2.4, 9.3 18.4 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, Articles 17.14, 19.1, 21.1 and 21.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, and Article 16.4 of the Marrakesh Agreement Establishing the World Trade Organization.

11. Viet Nam explains that, in its view, the panel's finding in *US – Section 129(c)(1) URAA* that Section 129(c) of the URAA is not "as such" inconsistent with the Anti-Dumping Agreement should be revisited. In particular, Viet Nam notes that only one Section 129 determination had been issued when the panel reached its conclusion in *US – Section 129(c)(1) URAA* that Section 129(c) is not inconsistent with the Anti-Dumping Agreement. By contrast, Viet Nam explains that there have now been 21 Section 129 determinations affecting more than 40 distinct anti-dumping or countervailing duty orders. In a period of more than ten years, there is no instance in which the USDOC has applied its Section 129 determination to prior unliquidated entries.

12. Japan notes that the text of Section 129 as a whole suggests that a Section 129 proceeding is meant to be the exclusive avenue pursuant to which an administering authority of the United States may bring an anti-dumping measure into compliance with adopted panel or Appellate Body reports. This understanding follows from the text of Sections 129(a)(1) and (b)(1), which address those cases in which a panel or the Appellate Body determines that an action by the ITC or the USDOC in an anti-dumping proceeding is not in conformity with the obligations of the United States under the Anti-Dumping Agreement. The general wording in these provisions suggests that Section 129 is meant to address all instances in which an anti-dumping measure has been found WTO-inconsistent by a panel or the Appellate Body, and it further suggests that there are no other measures pursuant to which the ITC or the USDOC may bring a WTO-inconsistent measure into compliance with the Anti-Dumping Agreement.

13. This understanding of the text is supported by the text of the Statement of Administrative Action ("SAA") accompanying the URAA, which explicitly outlines the limited prospective effect of Section 129 determinations. Furthermore, the U.S. Court of International Trade, which is the judicial body in the United States that is charged with interpreting the meaning of the statute, has confirmed that Section 129 expressly precludes any relief with respect to unliquidated entries made prior to the implementation date designated by USTR, even when the Section 129 determination has led to the complete revocation of the underlying anti-dumping duty order.[15] In sum, Japan is of the view that in those cases where "prior unliquidated entries" will be liquidated after the expiration of the reasonable period of time for compliance with an adverse panel or Appellate Body ruling, Section 129 will necessarily lead to the WTO-inconsistent liquidation of such entries. Accordingly, Section 129 appears to be inconsistent "as such" with the Anti-Dumping Agreement. In Japan's view, it is then incumbent upon the United States to explain what provisions of U.S. law other than Section 129 would allow it to liquidate "prior unliquidated entries" in a WTO-consistent manner.

14. U.S. argues that Section 129 is not the exclusive authority under U.S. law to implement the recommendations and rulings of the DSB, pointing to Section 123 of the URAA ("Section 123").

[13] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 - Japan)*, para. 157.

[14] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 - Japan)*, para. 157, quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 299.

[15] *Corus Staal BV v. United States*, Court No. 07-00270, Slip Op. 07-140, pp. 17-18 (Ct. Int'l Trade Sept. 19, 2007) (Exhibit VN-36).

However, Section 123, by its terms, appears to apply only when a panel or the Appellate Body finds "that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements". In other words, it appears that on its face Section 123 is only relevant to the implementation of adverse DSB rulings with respect to a U.S. agency's "regulation or practice" itself and would not apply to rectification of WTO-inconsistent determinations of U.S. agencies in specific cases. Viet Nam claims that Section 129 provides the "exclusive authority" under U.S. law for the United States "to comply with adverse DSB rulings concerning its obligations under the WTO agreements where implementation can be achieved by a new administrative determination without the need for statutory or regulatory amendment". Accordingly, the existence of Section 123 does not seem to detract from the veracity of Viet Nam's claim. To the extent that the United States argues that Section 129 does not provide exclusive authority for it to comply with the DSB ruling on a particular administrative determination and Section 123 is available to rectify the deficiency of the determination not covered by Section 129, the United States must explain how Section 123 can address such deficiency in this case, the WTO inconsistency with respect to "prior unliquidated entries" that Viet Nam is concerned about.

15. Japan is also not fully convinced by the U.S. argument that Section 129 is not the exclusive authority under U.S. law to implement the recommendations and rulings of the DSB because the U.S. Congress could always "pass a new law that might have an impact on prior unliquidated entries". Japan does not believe this type of speculation is relevant to the Panel's consideration of Viet Nam's claim. The Appellate Body has explained that "allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated". WTO Members always retain the ability to modify or abandon particular measures in the future, but that theoretical possibility does not preclude other Members from establishing that an existing law or practice is inconsistent, as such, with the covered agreements. Taken to extremes, the US argument will lead to all measures by virtue of being amendable will be WTO consistent. The U.S. argument to the contrary is flatly inconsistent with prior Appellate Body jurisprudence in this regard.

C. The Consistency of the USDOC's Sunset Review Determination with the Anti-Dumping Agreement

16. First, in relation to Viet Nam's claims regarding the consistency of the sunset review determination with Article 11.3 of the Anti-Dumping Agreement, Japan believes that if the investigating authority relies on dumping margins that were calculated in a past investigation in order to determine the likelihood that dumping would continue or recur, those margins must be consistent with the Anti-Dumping Agreement.[16] Accordingly, Japan agrees with the Appellate Body that if an investigating authority relies on margins calculated on the basis of zeroing in its likelihood of dumping determination, that determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement.[17]

17. The United States suggests, however, that it was not necessary for the USDOC to "rely" on WTO-inconsistent margins of dumping for its affirmative likelihood finding in this case because the USDOC's sunset review determination "is justified on the basis of factors other than WTO-inconsistent factors."

18. In relation to this argument, Japan agrees with the views expressed by the European Union in its third party submission. Namely, Japan believes that if the USDOC relied on margins calculated on the basis of zeroing in its likelihood of dumping determination, then this Panel should conclude that the sunset review determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement on that basis alone. Japan does not believe it would be appropriate for this Panel to try to determine, based on a counterfactual analysis, whether the USDOC would have reached the same conclusion in the sunset review determination had it relied only on other WTO-consistent factors. In Japan's view, such an exercise would amount to an impermissible *de novo* review of the evidence before the investigating authority.

19. Second, Viet Nam claims that the USDOC's reliance on the decline in import volume in its sunset review determination was not unbiased and objective. Viet Nam maintains that the USDOC "fail[ed] to adequately examine or evaluate other factors affecting import volume", and thus failed

[16] See Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 128.
[17] See Appellate Body Report, *US – Zeroing (Japan)*, para. 183.

to recognize that "changes in the volume of imports from Viet Nam do not support a conclusion that dumping is likely to continue or recur".

20. Japan agrees with the Appellate Body that "a firm evidentiary foundation is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping", and that "[s]uch a determination cannot be based solely on the mechanistic application of presumptions".[18] In relation to import volume in particular, the Appellate Body explained in *US – Corrosion Resistant Steel Sunset Review* that a decline in import volume could be "caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone", such that "a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated".[19]

21. In its evaluation of Viet Nam's claim that the USDOC did not consider the decline in import volume in a manner that was unbiased and objective, Japan believes that the Panel should examine whether the USDOC engaged in a "a case-specific analysis of the factors behind [the] decline in import volumes". Japan agrees that such an analysis is necessary in order for an investigating authority's reliance on a decline in import volumes to be considered unbiased and objective under Article 11.3 of the Anti-Dumping Agreement.

[18] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review,* para. 178.
[19] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review,* para. 177.

ANNEX D-4

EXECUTIVE SUMMARY OF THE THIRD PARTY ARGUMENTS OF NORWAY

I. STANDARD OF REVIEW

1. In its first written submission, the United States refers to Article 17.6(ii) of the *Anti-Dumping Agreement (the AD Agreement)* and asserts that the Panel should find the measures at issue WTO-consistent if they rest on a permissible interpretation of the *AD Agreement*.[1]

2. The first sentence of 17.6(ii) of the *AD Agreement* contains the general rule for the interpretation of the *AD Agreement,* while the second sentence refers to the situation where there are more than one permissible interpretation of one of the provisions in the Agreement. It is important to always bear in mind that the first sentence of Article 17.6 (ii) requires a panel to apply the rules of treaty interpretation of customary international law. This means to apply the interpretative rules of the *Vienna Convention on the Law of Treaties (the Vienna Convention)*[2], codifying customary rules of treaty interpretation.[3]

3. The second sentence of Article 17.6 (ii) only takes effect *after* all the principles of treaty interpretation of public international law have been exhausted.[4] In *US – Continued Zeroing,* the Appellate Body gave a thorough interpretation of Article 17.6(ii) of the *AD Agreement* and its relationship with the *Vienna Convention*.[5] Norway fully shares the interpretation and the approach laid down by the Appellate Body in this case.

II. THE ROLE OF PRECEDENT

4. Appellate Body reports adopted by the Dispute Settlement Body (DSB) are binding on the parties. However, adopted panel and Appellate Body Reports also play an important role in subsequent cases.[6] The Appellate Body has repeatedly submitted that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where issues are the same".[7] Norway would add that following previous reports also ensures fewer disputes and preserves both the system and the systemic function of the Appellate Body.

5. Norway further considers that if it were permissible to depart from previous legal interpretations in adopted Appellate Body reports, it would create a situation where all cases could be perpetually reargued. Such a result would be contrary to the object and purpose of the dispute settlement system, as well as the object and purpose of a rule based multilateral trading system ensuring security and predictability for all economic actors. Norway recalls the importance given to the security and predictability of the system, as set out in Article 3.2 of the *Dispute Settlement Understanding (DSU)*.

III. ZEROING IS PROHIBITED UNDER THE AD AGREEMENT AND THE GATT 1994

6. In line with the Appellate Body's ruling in previous cases, Norway finds that the use of all forms of zeroing in all forms of proceedings under the *AD Agreement* is prohibited.

7. The point of departure for Norway is that there is but one definition of "dumping" in the *AD Agreement*, and that this definition is applicable to all proceedings under the *AD Agreement*.[8]

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[1] US First Written Submission, paras. 58-63.
[2] *Vienna Convention on the Law of Treaties,* 23 May 1969.
[3] *US – Continued Zeroing,* WT/DS350/AB/R, para. 267.
[4] *US – Continued Zeroing,* WT/DS350/AB/R, paras. 271 and 272.
[5] *US – Continued Zeroing,* WT/DS350/AB/R, paras. 265-275.
[6] *US – Continued Zeroing,* WT/DS350/AB/R, para. 362.
[7] *US – Continued Zeroing,* WT/DS350/AB/R, para. 362. *US – OCTG Sunset Reviews,* WT/DS268/AB/R, para. 188.
[8] There are five such instances where the authorities calculate dumping margins, those being (i) original proceedings, (ii) "assessment reviews" (*AD Agreement* Article 9.3), (iii) "new shipper reviews" (*AD Agreement*

The definition applicable to all calculations of dumping margins throughout the agreement can be found in Article 2.1 of the *AD Agreement*.

8. It is clear from the interpretation of the relevant provisions of the *AD Agreement* and the GATT 1994 that the margin of dumping must be calculated for the product under investigation as a whole in all proceedings under the *AD Agreement*.

9. The Appellate Body has in several rulings pointed out that the use of zeroing distorts the process of establishing dumping margins and inflates the dumping margin for the product as a whole. Norway holds that zeroing procedures in all forms and in all proceedings under the *AD Agreement* is contrary to the principle that the margin of dumping must be established for the product as a whole.

IV. RELIANCE ON WTO-INCONSISTENT FACTORS IN SUNSET REVIEWS

10. The reliance on anti-dumping duties calculated by the use of zeroing in sunset reviews is inconsistent with WTO law.[9] Accordingly, a margin calculated with zeroing cannot be the foundation for a determination of the likelihood of continuation or recurrence of dumping.

11. In its first written submission, the United States asserts that where the investigating authority has relied on WTO-consistent factors, a sunset determination may be WTO-consistent even if the authority also considered WTO-inconsistent factors.[10]

12. The Appellate Body has stated that it would render a sunset review inconsistent with Article 11.3 if the investigating authority relied upon a WTO-inconsistent margin of dumping. In accordance with this, the Panel must thus assess whether the investigation authority *did* rely upon WTO-inconsistent margins, for instance by the use of zeroing, and not whether other factors may justify the determination.

V. INDIVIDUAL REVIEWS IN CHANGED CIRCUMSTANCES

13. Article 11.2 of the *AD Agreement* states that the relevant authorities shall review the need for a continued imposition of the duty where warranted or, on certain conditions, upon request by any interested party.

14. Article 6.10 states that dumping margins, as the main rule, should be determined individually for each known exporter or producer concerned of the product under investigation. However, this provision also allows for derogations from the main rule where the number of exporters, producers, importers or type of products involved is so large as to make an individual determination impracticable. In these cases, the relevant authorities may limit their examination on certain conditions, so called "sampling".

15. When an interested party is in a position to submit positive information substantiating the need for a review and a reasonable period of time has passed since the imposition of the definitive anti-dumping duty, this party has a legitimate interest in a review. The language of Article 11.2 gives any interested party a right to a review, whether or not they have been individually investigated.

16. Thus, it is our view that there can be no automatic rejection of a request for review, even if the exception in Article 6.10 has been applied at a previous stage of the anti-dumping procedure. The cross-reference in Article 11.4 to Article 6 does not influence this interpretation.[11] Furthermore, the overarching principle in Article 11.1 that anti-dumping duties shall not remain in force longer than necessary supports this view.

Article 9.5), (iv) "changed circumstances reviews" (*AD Agreement* Article 11.2), and (v) "sunset reviews" (*AD Agreement* Article 11.3).

[9] *US – Continued Zeroing,* WT/DS350/AB/R, para. 199.

[10] United States, First Written Submission, para. 270.

[11] Article 11.4 of the Anti-Dumping Agreement sets out that the provisions of Article 6 "regarding evidence and procedure" shall apply to reviews carried out under Article 11.

VI. WTO-INCONSISTENT CONDUCT MUST CEASE BY THE END OF THE REASONABLE PERIOD OF TIME

17. In its first written submission, Viet Nam argues that Section 129 of the Uruguay Round Agreements Acts is as such inconsistent with a number of provisions in the *AD Agreement* and the GATT 1994. Viet Nam maintains that due to the retrospective system for assessing anti-dumping duties, this provision prohibits the United States from complying with adverse rulings and recommendations of the DSB.[12]

18. In accordance with Article 21.3 of the *DSU*, Members shall comply with the rulings and recommendations of the DSB immediately. If immediate compliance is impracticable, the Member shall have a reasonable period of time in which to comply.

19. Norway recalls that the Appellate Body has clarified that Members have an obligation to comply with the rulings and recommendations of the DSB no later than by the end of the reasonable period of time. In *US – Zeroing (Japan) (Article 21.5 - Japan),* the Appellate Body explicitly addressed the obligation to implement recommendations and rulings of the DSB in respect of conduct relating to imports that entered a Members territory prior to the expiration of the reasonable period of time. In this case, the Appellate Body stated that WTO-inconsistent conduct must cease completely by the end of the reasonable period of time, irrespective of the date on which the imports entered the territory of the implementing Member.[13] Thus, WTO-inconsistent measures affecting imports that entered the implementing Member's territory prior to the expiration of the reasonable period of time must be rectified by the end of the reasonable period of time.

[12] Viet Nam, First Written Submission, paras. 211-212.
[13] *US – Zeroing (Japan) (Article 21.5 - Japan),* WT/DS322/AB/RW, paras. 160-161.

ANNEX D-5

THAILAND'S THIRD PARTY RESPONSES TO QUESTIONS FROM THE PANEL

1 GENERAL CONSIDERATIONS

1. Can you please elaborate on the concept of "practice" (as opposed to other concepts such as "method", "methodology", "procedure" or "policy") as a measure which can be challenged in WTO dispute settlement?

2 CLAIMS CONCERNING ZEROING

2. Does the USDOC's zeroing methodology still exist as a measure which can be challenged "as such" in light of the fact that the USDOC modified its calculation methodology in administrative reviews in April 2012?

Response to Questions 1 and 2:

The Government of Thailand (the "GOT") would like to remind the Panel of the legal standard to be applied to the evidence before it. In the past, the Appellate Body found that the zeroing methodology, as it then existed, could be challenged in WTO dispute settlement proceedings on an "as such" basis because, even though "zeroing" was not found in the US anti-dumping law, the USDOC applied, in effect, the same zeroing methodology in every anti-dumping determination. For example, in its report in US – Zeroing (EC), the Appellate Body stated that "we believe that, in the specific circumstances of this case, the evidence before the Panel was sufficient to identify the precise content of the zeroing methodology; that the zeroing methodology is attributable to the United States, and that it does have general and prospective application. This evidence consisted of considerably more than a string of cases, or repeat action, based on which the Panel would have simply divined the existence of a measure in the abstract. We therefore cannot agree with the United States that the Panel's approach, in this case, would mean that when a Member does something in a particular instance, the Member's action results in a separate measure that may be subject to an "as such" challenge, at least if the Member repeats the action with some indeterminate frequency" (Appellate Body Report, US – Zeroing (EC), para. 204).

The legal issue facing the current Panel here seems to be whether the USDOC's "practice" of zeroing remains in effect as a measure of general and prospective application "which consist[s] of considerably more than a string of cases, or repeat action". If the Panel so finds, Thailand considers that "practice" in this dispute is equivalent to other concepts such as "method", "methodology", "procedure" or "policy" as a measure which can be challenged in WTO dispute settlement.

The GOT further notes that even if the zeroing methodology used prior to 2012 has changed and thus can no longer be challenged "as such" in dispute settlement proceedings, it is possible that the old methodology has now replaced by a new zeroing methodology that could, in itself, be challenged "as such" in dispute settlement proceedings. The Panel may also wish to consider whether, if it finds that the old practice or methodology no longer exists, there is a new practice or methodology that would separately meet the test for being susceptible to challenge on an "as such" basis.

3 CLAIMS CONCERNING THE "NON-MARKET ECONOMY-WIDE ENTITY" RATE

3. Do you agree with the United States that Article 9.4 does not require that there be a single "all others" rate, but rather permits an investigating authority to impose more than one such rate under this provision?

Response to Question 3: *The GOT considers that Article 9.4 does not require that there be a single "all others" rate provided that "all others" rates are based on the different levels of cooperation established throughout the proceedings.*

4. The United States maintains that this case can be distinguished from *EC – Fasteners (China)*. Do you agree or disagree? Please explain.

5. The United States submits that "[a]t no time during the challenged proceedings did Vietnam, or any Vietnamese exporter, request Commerce to reconsider Vietnam's nonmarket economy status. [footnote omitted] This is an important distinction between this dispute and *EC – Fasteners*" (United States' first written submission, para. 176). Do you agree that this is a relevant distinction? If so, what effect does this distinction have on Viet Nam's claims?

6. The European Union argues that it is permissible to apply a rate determined on the basis of facts available to "unknown" producers/exporters provided that the investigating authority makes some additional effort to notify these producers/exporters of the information required and the consequence of not providing it (see European Union's third-party submission, para. 23). Do you agree?

Response to Question 6: *The GOT agrees with the European Union that it is permissible to apply different rates for different producers/exporters on the basis of facts available. Thailand considers that it is sufficient for the investigating authority to inform exporting Members of the initiation of the proceedings and to contact all those producers that are known to the authority. In the meantime, the authority is to make reasonable effort to notify "unknown" producers/exporters of the information required and consequence of non-cooperation. The authority should also encourage Members concerned to provide all relevant information and inform them the consequence of non-cooperation. This is important because the onus should remain on exporting producers to make themselves known to the authority within prescribed deadlines.*

7. Do you agree with the Appellate Body's ruling in *EC – Fasteners (China)* that Articles 6.10 and 9.2 do not preclude treating several companies as a single exporter but that it is not permissible under these provisions to presume that the companies form a single entity? (See Appellate Body Report in *EC – Fasteners (China)*, paras. 364 and 376).

Response to Question 7: *The GOT agrees with the Appellate Body's Ruling that Articles 6.10 and 9.2 do not preclude treating several companies as a single entity provided that it is not presumed but based on evidence available on the record of the investigation or the best information available in the absence of cooperation.*

8. Considering the criteria used by the USDOC to determine absence of government control, both *de jure* and *de facto*, with respect to export activities (see Exhibit VN-24, Chapter 10 of USDOC Anti-Dumping Manual, p. 4). To what extent are these criteria similar/different from the criteria contained in Article 9(5) of the Basic AD Regulation under consideration in *EC – Fasteners (China)*?

9. Are there any limitations on the use of facts available to determine the dumping margin of a single "exporter" constituted of several distinct legal entities? Do the disciplines on the use of facts available under the Anti-Dumping Agreement with respect to such an exporter differ from those applicable to other individually-examined producers or exporters? If so, please explain.

4 CLAIMS CONCERNING SECTION 129(C)(1) OF THE URAA

10. Do you agree with Viet Nam that Section 129(c)(1) can be challenged "as such"? If so, what is the relevance (if any) for Viet Nam's case of the other avenues for implementation identified by the United States (adoption of new legislation by Congress and/or action under Section 123 of the URAA)?

11. What does Viet Nam need to establish in order to succeed in claiming that Section 129(c)(1) is "as such" inconsistent with the US obligations? For instance, must Viet Nam establish that Section 129(c)(1) necessarily leads to WTO-inconsistent action in all instances? In answering, please discuss the continued relevance, if any, of the "mandatory/discretionary" distinction.

12. The United States argues that only provisions under the DSU, and not provisions under the Anti-Dumping Agreement, would be implicated by a violation of the obligation to bring WTO-inconsistent measures into conformity with DSB recommendations and rulings. Do you agree?

13. What are the implications, if any, for Viet Nam's "as such" claims of the Appellate Body statements indicating that the date of the assessment or liquidation of the duties, and not the date of importation, is the relevant date to determine compliance with the obligation to bring measures into conformity with DSB recommendations and rulings? (See Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 286-355; and *US – Zeroing (Japan) (Article 21.5 –* Japan*)*, paras. 153-197).

5 CLAIMS CONCERNING THE SUNSET REVIEW DETERMINATION

14. The United States argues that the USDOC relied not only on dumping margins that Viet Nam alleges were WTO-inconsistent, but on "multiple factors". Can a likelihood-of-dumping determination be found to be WTO-consistent in a case where part, but not all, of the investigating authority's analysis of relevant factors is found to be WTO-inconsistent?

Response to Question 14: *The GOT is of the view that a likelihood-of-dumping determination can be found to be WTO-consistent when the investigating authority's consideration of relevant factors identified to support the determination is WTO-consistent.*

6 CLAIMS CONCERNING COMPANY-SPECIFIC REVOCATIONS

15. Do you consider that, when interpreted in accordance with the Vienna Convention (including, as relevant, any preparatory work), Article 11.2 of the Anti-Dumping Agreement provides a right to seek company-specific revocations?

16. Please comment on the United States' argument (in, e.g., the United States' opening oral statement at the first substantive meeting, paras. 54-55) that the term "duty" in Article 11.2 should be interpreted, identically to the same term in Article 11.3, as a reference to the imposition of duties on an "product-specific", or "order-wider" basis.

17. What is the meaning to be given to the term "dumping" in Article 11.2? Does it refer to dumping by an interested party, for example an individual producer/exporter seeking a review, or does it have a broader meaning?

Response to Question 17: *The GOT considers that Article 11.2 refers to a specific interested party as it addresses the issue of partial reviews whereas Article 11.3 governs the review of an overall proceeding covering both dumping and injuries involving all interested parties concerned.*

18. In your view, to what extent do the detailed evidentiary and procedural requirements contained in Article 6, including but not limited to the limited examination exception under the second sentence of Article 6.10, apply in the context of Article 11.2 reviews?

19. To what extent is the US mechanism providing for revocation in the context of administrative reviews governed by the disciplines of Article 11.2?

ANNEX D-6

CHINA'S SUBMISSION ON THE UNITED STATES' REQUEST FOR PRELIMINARY RULING

TABLE OF CASES

Short Title	Full Case Title and Citation
Brazil – Aircraft(AB)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft,* WT/DS46/AB/R, adopted 20 August 1999
US – Customs Bond Directive(AB)	Appellate Body Report, United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties, WT/DS345/AB/R, adopted 1 August 2008
EC – Chicken Cuts(AB)	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts,* WT/DS269/AB/R,WT/DS286/AB/R, adopted 27 September 2005
US – Zeroing (Japan) (Article 21.5 – Japan)(AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews((Article 21.5 – Japan),* WT/DS322/AB/RW, adopted 31 August 2009
US – Continued Zeroing	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology,* WT/DS350/R, adopted 19 February 2009
US – Continued Zeroing(AB)	Appellate Body Report, United States – Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R, adopted 19 February 2009
US – Upland Cotton(AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005

I. INTRODUCTION

1. The People's Republic of China thanks the Panel for this opportunity to submit views on the Unite States' request for preliminary rulings. Whilst not taking a final position on the facts of this case, China would like to present views, in this third party submission, on a single issue raised in Section II of the US request for preliminary rulings, i.e. whether the sixth administrative review is within the Panel's terms of reference.

II. DISCUSSION

2. The United States argues that Viet Nam's panel request, by including the sixth administrative review, has both expanded the scope and changed the essence of its consultations request. In the US's view, the sixth administrative review did not constitute a "measure" under Article 4.4 of the *Dispute Settlement Understanding* (DSU) at the time of Viet Nam's request for consultations, because its final results were concluded and published after the consultations request. Consequently, as the sixth administrative review was not (and could not have been) subject to consultations, it is not within the Panel's terms of reference.[1]

3. Viet Nam replies that the "essence" of the dispute has not changed from the consultations request to the panel request. In its view, it did identify the sixth administrative review as a measure at issue in the consultations request, through its identification of "ongoing" administrative reviews and "subsequent" reviews in page 1 and 3 of the consultation request, and the panel request merely provides greater precision on the measures at issue.[2]

4. In respect of this disagreement between the parties, China recalls that Article 7.1 of the DSU provides that a panel's terms of reference are governed by the panel request, and that Article 4 and 6 of the DSU do not require a "precise and exact identity" between the measures that were the subject of consultations and those identified in the panel request.[3] The basic issue is whether the "scope of the dispute" has been expanded or the "essence" of the dispute has been changed between the two requests, which must be determined on a case-by-case basis.[4]

5. It appears that both parties do not disagree on the above principles. However, the parties have different reading on the facts of this case and thus make different conclusion. The Viet Nam emphasizes that it has identified in its consultations request "ongoing" administrative reviews and "subsequent" reviews, which is said to include the sixth administrative review, and so argues the essence of the dispute has not changed. In contrast, the US focuses on another factual allegation that the then-ongoing sixth administrative review did not constitute a "measure" at the time of request for consultations and thus could not have been subject to consultations. The underlying logic of the US argument is that a panel request will expand the scope and change the essence of the dispute if it includes something which was not subject to consultations.[5]

6. Accordingly, the first question is whether and under what circumstances an ongoing action at the time of the request for consultations could constitute a measure subject to consultations. In this regard, China recalls that the Appellate Body has clarified that "measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference".[6] Specifically, the Appellate Body has determined that a periodic review "initiated at the time the matter was referred to the Panel and was due to be completed during the Article 21.5 proceedings" was within the panel's terms of reference.[7] A panel also found that three "then-ongoing" sunset reviews and one "then-ongoing" periodic review were within its terms of reference.[8] Since an ongoing review at the time the matter was referred to the Panel could be a "measure" within the panel's terms of reference, it appears inappropriate to priori exclude that an ongoing review at the time of the request for consultations may, in certain circumstances, also constitute a "measure" subject to consultations.

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[1] Request for Preliminary Rulings by the United States of America, paras. 5-6.
[2] Viet Nam's Response to the United States' Request for Preliminary Rulings, paras. 9-11.
[3] *Brazil – Aircraft(AB)*, para. 132; *US – Customs Bond Directive (AB)*, para. 293.
[4] *US – Customs Bond Directive (AB)*, para. 293.
[5] Request for Preliminary Rulings by the United States of America, para. 5.
[6] *EC – Chicken Cuts (AB),* para. 156.
[7] *US – Zeroing (Japan) (Article 21.5–Japan) (AB),* paras. 124–127.
[8] *US – Continued Zeroing*, para.7.11 and para.7.28.

7. And the second question is, assuming the then-ongoing sixth administrative review was indeed not subject to consultations as alleged by the US, whether this will lead to the conclusion that the six administrative review is not within the panel's terms of reference. This question concerns the significance that a consultations request may have on a panel's terms of reference. As a general rule, a panel's terms of reference can include measures not included in the consultations request, as long as a complaining party "does not expand the scope of the dispute" or change the "essence of the challenged measures".[9] Specifically, the Appellate Body and the panel have addressed circumstances similar to this dispute in *US – Continued Zeroing*.

8. In *US – Continued Zeroing*, the European Communities added to the panel request 14 periodic reviews and sunset reviews that were not identified in the consultations request. The panel rejected the claim by the US that the EC had thereby expanded the scope of the dispute. The panel observed that the additional 14 measures and the original 38 measures "relate to the same products originating in the same countries" and "the legal nature of the EC's claims" regarding the two sets of measures "does not in any way differ". For this reason, the panel concluded that "the EC's consultations request and its panel request refer to the same subject matter, the same dispute."[10] The Appellate Body upheld this finding of the panel, further confirming that the additional 14 measures and those explicitly listed in the consultations request are "successive stages subsequent to the issuance of the same anti-dumping duty orders", and "the legal basis of the claims raised is the same".[11]

9. Following the above reasoning of the Appellate Body and the panel, it appears unconvincing to conclude that the panel request expands the scope or change the essence of the dispute simply on the ground that the sixth administrative review was not subject to consultations. Rather, it should be examined whether the sixth administrative review relates to the same anti-dumping duty as other administrative reviews explicitly listed in the consultations request and whether the legal basis of the claims raised is the same.

III. CONCLUSION

10. As a third party, China does not take any specific position on the issue whether the sixth administrative review is within the Panel's terms of reference. However, since this issue raises systemic questions, i.e. under what circumstances an ongoing action could constitute a measure subject to consultations and the significance that a consultations request has on a panel's terms of reference, China respectfully requests the Panel to examine carefully the issue in light of the observations made in this submission.

[9] *US – Upland Cotton (AB)*, para. 293; *US – Customs Bond Directive (AB)*, para. 293.
[10] *US – Continued Zeroing*, para. 7.28.
[11] *US – Continued Zeroing (AB)*, para. 228 and para. 231.

ANNEX D-7

EUROPEAN UNION COMMENTS ON THE US REQUEST
FOR A PRELIMINARY RULING

TABLE OF CASES CITED

Short Title	Full Case Title and Citation
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1161
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
Colombia – Ports of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (Corr.1, DSR 2006:XII, p. 5475)
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3

I. INTRODUCTION

1. The European Union refers to the Panel's communication of 6 August 2013, where the Panel invites the third parties to submit their views, if any, on the US request for preliminary rulings. The European Union welcomes and accepts such an invitation. In the European Union's view, panels should provide third parties with an opportunity to be heard on the preliminary issues before a communication (acceptance, rejection, deferral) is issued, in line with the requirements of Article 10 of the DSU. Otherwise, *de facto*, a third party would stand little if any chance of persuading a panel to change its mind. And, in any event, the panel would have lost the opportunity to reflect the views and arguments of third parties in perhaps more subtle ways in the reasoning of its preliminary ruling. This would inevitably mean that third party rights would, in effect, be diminished. In this respect, the European Union would point to the term "fully" in Article 10.1 of the DSU. The European Union considers that effectively diminishing third party rights (by hearing third parties only after a decision has been taken) would not be consistent with the requirement that the interests of third parties should be "fully" taken into account.

2. That being said, the European Union provides these comments on the US request for a preliminary ruling because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the obligations contained therein, in particular the *Agreement on Implementation of Article VI of the GATT 1994* (the *Anti-Dumping Agreement*) and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the DSU).

II. SUMMARY OF THE US PRELIMINARY RULING REQUEST

3. The United States requests a preliminary ruling on several issues.

4. First, the United States argues that Viet Nam's Panel Request improperly includes measures that were not the subject of Viet Nam's Consultation Request. In particular, the United States maintains that Viet Nam's Panel Request identifies the final results of the sixth administrative review as a measure at issue. However, at the time of Viet Nam's Consultation Request, there was no such final determination. According to the United States, a determination that is not yet final cannot be a "measure" under Article 4.4 of the DSU and, thus, could not be subject to consultations. Moreover, the United States observes that Viet Nam's Consultation Request did not challenge the use of zeroing in original investigations, new shipper reviews, and changed circumstances reviews. Accordingly, these measures included in Viet Nam's Panel Request are not within the Panel's terms of reference.[1]

5. Second, the United States maintains that Viet Nam's Panel Request improperly includes a claim under the *Vienna Convention on the Law of Treaties* (VCLT). According to the United States, the VCLT is not a "covered agreement" as defined in the DSU and, thus, the DSU does not apply to it. The United States observes that, in any event, United States is not a party to the VCLT.[2]

6. Finally, the United States argues that Viet Nam's claim against the Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA") fails to satisfy the requirements of Article 6.2 of the DSU because it does not identify a "measure". The United States refers to the panel in *US – Export Restraints* concluding that the SAA does not have any legal effect independent of a US statute or regulation. Consequently, the United States maintains that the SAA does not constitute a measure susceptible to dispute resolution.[3]

7. In view of the foregoing, the United States requests that the Panel find, before Viet Nam submits its first written submission, that certain measures and claims referenced in Viet Nam's Panel request are not properly within the Panel's terms of reference.[4]

III. SUMMARY OF VIET NAM'S RESPONSE

8. Viet Nam points out that the US request for a preliminary ruling is premature since many of the US concerns would have been alleviated upon receipt of Viet Nam's first written submission.

[1] US Preliminary Ruling Request, paras. 3 – 8.
[2] US Preliminary Ruling Request, paras. 9 – 10.
[3] US Preliminary Ruling Request, paras. 11 – 16.
[4] US Preliminary Ruling Request, paras. 17 – 19.

9. In this sense, first Viet Nam observes that Viet Nam is not challenging the use of zeroing, as applied broadly in original investigations, new shipper reviews, and certain changed circumstances reviews. Viet Nam clarifies that its Panel Request includes as applied claims against the use of zeroing in the fourth, fifth and sixth administrative reviews. Furthermore, Viet Nam confirms that the original investigation and the sunset review are relevant to the extent that zeroing affects the Panel's analysis on the claims that are particular to the sunset review. Finally, Viet Nam states that both its Consultation and Panel requests identify an as such claim with respect to the USDOC's zeroing practice.[5]

10. Second, Viet Nam confirms that it did not intend before and does not intend now to assert its claim pursuant to the VCLT. Viet Nam simply included a reference to the VCLT to make clear the importance of the object and purpose of the relevant agreement in the course of treaty interpretation.[6]

11. Third, Viet Nam also confirms that Viet Nam's Panel Request does not identify the SAA as a measure and that Viet Nam does not intend to challenge the SAA as a measure.[7]

12. Finally, Viet Nam maintains that the sixth administrative review is within the Panel's terms of reference, contrary to what the United States posits. According to Viet Nam, Viet Nam conveyed to the United States, by way of the language included in the consultation request, the understanding that the sixth administrative review was a measure at issue. The United States was placed on notice of this fact through Viet Nam's identification of "ongoing" administrative reviews. Thus, according to Viet Nam, the "essence" of the challenge has not changed from its Consultation Request to the Panel Request; rather, Viet Nam's Panel Request provides greater precision on the measures at issue.[8]

IV. OBSERVATIONS OF THE EUROPEAN UNION

13. The European Union observes that Viet Nam appears to agree with most of the issues raised by the United States in its request for a preliminary ruling. In particular, Viet Nam confirms that (i) it is not challenging the use of zeroing broadly in several types of proceedings, but rather, the use of zeroing in the investigations involving certain shrimp from Viet Nam; (ii) it is not raising a claim under Article 31 of the VCLT; and (iii) it is not challenging the SAA as a measure. The only issue which appears to remain contested is whether the sixth administrative review falls within the Panel's terms of reference.

14. Before addressing whether the sixth administrative review falls within the Panel's terms of reference, the European Union notes that, notwithstanding the absence of disagreement between the parties, a panel has a basic obligation under Article 11 of the DSU to make an objective assessment of the matter before it, including an objective assessment of the facts of the case.[9] Such assessment should include the facts, evidence and legal argument. A panel should therefore exercise particular care in this respect, particularly where, as in this case, the dispute touches on matters that the complaining party does not pursue. The Panel should particularly distinguish between finding that the Parties agree with respect to a particular fact, evidentiary matter or legal issue; and the Panel itself making such finding. Thus, the European Union invites the Panel to make an objective assessment of this matter by examining, in particular, Viet Nam's Consultation and Panel Requests.

15. That being said, the European Union considers that the sixth administrative review falls within the Panel's terms of reference.

16. The Appellate Body has found that Articles 4 and 6 of the DSU "set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel".[10] Moreover, the Appellate

[5] Viet Nam's Response to the US Preliminary Ruling Request, para. 3.
[6] Viet Nam's Response to the US Preliminary Ruling Request, para. 4.
[7] Viet Nam's Response to the US Preliminary Ruling Request, para. 5.
[8] Viet Nam's Response to the US Preliminary Ruling Request, paras. 7 – 11.
[9] Panel Report, *Colombia – Indicative Prices*, para. 181; and Appellate Body Report, *US – Gambling*, para. 281 ("[W]hen a panel rules on a claim in the absence of evidence and supporting arguments, it acts inconsistently with its obligations under Article 11 of the *DSU*").
[10] Appellate Body Report, *Brazil – Aircraft*, para. 131.

Body has held that "consultations provide the parties an opportunity to define and delimit the scope of the dispute between them".[11] At the same time, the Appellate Body has also explained that Articles 4 and 6 do not "require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel".[12] Rather, "[a]s long as the complaining party does not expand the scope of the dispute", the Appellate Body has said it would "hesitate to impose too rigid a standard for the 'precise and exact identity' between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request".[13]

17. As previously explained by the Appellate Body, the relevant question in determining whether any additional measure identified in a panel request (such as the sixth administrative review) falls within the Panel's terms of reference, is whether the "scope of the dispute" was expanded as a result of its addition. It is not, as the United States posits, whether the measure "existed" in accordance with Article 4.4 of the DSU. A measure that closely relates to measures explicitly identified in a request for consultations may be in the process of being adopted when the request for consultation is submitted. However, the "existence" or the adoption of the measure should not be an obstacle for requesting consultations on a matter whose scope is precisely delimited and then identifying such an additional measure in a panel request. Thus, in the European Union's view, the Panel needs to examine the texts of the Consultation Request and the Panel Request in order to determine whether the scope of the dispute has been broadened.[14]

18. In the present case, Viet Nam confirms that it did not identify the sixth administrative review by name in its Consultation Request. However, Viet Nam's Consultation Request dated 22 February 2012 explicitly identified the fourth and fifth administrative reviews involving certain shrimp from Viet Nam, "any other ongoing or future anti-dumping administrative reviews, and the preliminary and final results thereof, related to the imports of certain frozen warmwater shrimp from Viet Nam (DOC Case A-552-802)" as well as the final results of the First Five-year "Sunset" Review in the same proceeding.[15] Viet Nam's Panel Request includes the sixth administrative review which was concluded on 11 September 2012.

19. The European Union considers that the language used by Viet Nam in its Consultation Request made it clear that it intended to include any "ongoing or future anti-dumping administrative reviews" concerning the same product originating in Viet Nam. Thus, the inclusion of the sixth administrative review, which took place between the date of Viet Nam's Consultation Request and Viet Nam's Panel Request, did not extend the scope of the matter.

20. The European Union observes that in *US – Continued Zeroing*, the Appellate Body ruled on a similar matter finding that 14 additional measures included in the EU's panel request (when compared to the EU's consultation request) fell within the panel's terms of reference:

> As noted, the 14 additional measures and those explicitly listed in the consultations request relate to the same duties on the same products from the same countries imposed pursuant to the same authorities (that is, the relevant anti-dumping rules and regulations of the United States). In relation to each of the duties, the proceedings identified in both the consultations request and the panel request derive from the same underlying legal basis, that is, the anti-dumping duty orders issued pursuant to the original investigations in which dumping, material injury, and the causal link between the two were determined.[16]

21. In the case at hand, the sixth administrative review relates to the same anti-dumping duties on certain shrimp from Viet Nam, the case identified by number in Viet Nam's Consultation Request, and Viet Nam makes the same underlying legal claims.

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[11] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.
[12] Appellate Body, *Brazil – Aircraft*, para. 132.
[13] Appellate Body Report, *US – Upland Cotton*, para. 293.
[14] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 224.
[15] Viet Nam's Consultation Request (WT/DS426/1), pp. 1 and 2.
[16] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 231.

22. Consequently, the European Union considers that the sixth administrative review falls within the Panel's terms of reference.

23. Finally, in view of the exchange between the parties and third parties on this matter, the European Union invites the Panel to issue its preliminary ruling as early as possible, following the Appellate Body's guidance in *China – Raw Materials*.[17]

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[17] Appellate Body Report, *China – Raw Materials*, para. 233.