

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

**(WT/DS429)**

**EXECUTIVE SUMMARY OF THE  
FIRST WRITTEN SUBMISSION OF  
THE UNITED STATES OF AMERICA**

**October 22, 2013**

## 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 Article 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.