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

(DS404)

COMMENTS OF THE UNITED STATES OF AMERICA ON VIETNAM'S RESPONSES TO THE PANEL'S QUESTIONS TO THE PARTIES FOLLOWING THE SECOND SUBSTANTIVE MEETING

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TABLE OF REPORTS

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Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
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
EC – Bed Linen (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002
US – Anti-Dumping Measures on PET Bags	Panel Report, *United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WT/DS383/R, adopted 18 February 2010
US – Continued Zeroing (Panel)	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, as modified by the Appellate Body Report, WT/DS350/AB/R
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 – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Oil Country Tubular Goods Sunset Reviews (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004

US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted 20 February 2007
US – Softwood Lumber V (Article 21.5 – Canada) (Panel)	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada*, WT/DS264/RW, adopted 1 September 2006, as modified by the Appellate Body Report, WT/DS264/AB/RW
US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber From Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr. 1
US – Stainless Steel (Mexico) (Panel)	Panel Report, *United States – Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by the Appellate Body Report, WT/DS344/AB/R
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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
US – Zeroing (EC) (Panel)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R
US – Zeroing (Japan) (Panel)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report, WT/DS322/AB/R

I. INTRODUCTION

1. In this submission, the United States comments on certain of Vietnam's responses to the Panel's second set of questions. For any response for which we are providing comments, we reproduce the Panel's question and then provide comments on Vietnam's response. The absence of a comment on or response to a statement or argument made by Vietnam in its responses to the Panel's second set of questions should not be understood as agreement by the United States with the statement or argument made. Many of Vietnam's responses to the Panel's second set of questions restate arguments that Vietnam has made previously, to which the United States has responded in detail in prior written submissions and in oral presentations to the Panel.

II. ZEROING

51. (to Viet Nam) Please comment on the US argument (US Second Written Submission, paragraph 27) that, "[b]ecause the 'fair comparison' obligation in Article 2.4 refers to the price adjustments necessary in order to make comparisons, it does not create an obligation with respect to how the results of those comparisons are treated."

2. At the outset of its response to question 51, Vietnam repeats the argument it has made previously that "zeroing" is inconsistent with Article 2.4 of the AD Agreement.[1] The United States refers the Panel to paragraphs 21 to 37 of the U.S. Second Written Submission, which explains in detail why there is no prohibition of "zeroing" located in Article 2.4.[2]

3. When it turns to the U.S. argument that Article 2.4 "does not create an obligation with respect to how the results of those comparisons are treated," Vietnam asserts that "[t]here is nothing in the text of Article 2.4 that would limit the fairness requirement in the manner asserted by the United States. . . ."[3] In fact, Vietnam's own description of the relationship between the chapeau and the rest of the provision supports the position of the United States.

4. Vietnam explains that:

> [t]he first sentence of Article 2.4 provides a chapeau for the balance of the article, setting a rule "expressed in terms of a general and abstract standard." It states simply that a fair comparison must be made between export price and normal value. Article 2.4 then proceeds to elaborate on what it means by a "fair comparison", namely addressing (1) how prices must be adjusted to achieve a fair comparison, (2) how currency conversions must be applied to achieve a fair comparison, and (3) what methodology must be used in comparing normal values

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[1] *See* Vietnam Responses to the Panel's Second Set of Questions, Question 51, paras. 3-11.

[2] *See also*, U.S. Opening Statement at the Second Substantive Meeting, paras. 16-24 and 45-50.

[3] Vietnam Responses to the Panel's Second Set of Questions, Question 51, para. 8.

with export prices.[4]

The United States agrees with this explanation, but it is of no support to Vietnam's position. On the face of its text, Article 2.4 sets forth obligations related to the comparison of normal value and export price, not the potential aggregation of multiple comparison results (*i.e.*, the multiple dumping margins that result from the multiple comparisons), which necessarily would occur after such comparisons have been made.

5. The United States also agrees with Vietnam that "the customary rules of treaty interpretation 'neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.'"[5] An interpretation that the obligations in Article 2.4 apply to anything other than the comparison of normal value and export price would require the imputation into the AD Agreement of words that are not there and thus would not be a permissible interpretation under the customary rules of interpretation.

6. Vietnam also notes that "the opening phrase of Article 2.4.2 references the fair comparison requirement of Article 2.4," and argues that, consequently, "the fair comparison requirement applies both to the adjustments made to normal value and export price to ensure an apple to apple comparison, and to how normal value and export price are compared after those adjustments are made."[6] Once again, however, there is nothing in the text of Article 2.4 or Article 2.4.2 that indicates that the "fair comparison" obligation, whatever it entails, applies after the comparison of normal value and export price is made, for example, when multiple comparison results are aggregated.

7. Additionally, we refer the Panel to paragraphs 38-48 of the U.S. Second Written Submission, which explains that the obligations in Article 2.4.2 are limited only to the "investigation phase" and are not applicable in administrative reviews.[7] As we have explained, the only measures within the Panel's terms of reference are the second and third administrative reviews.[8] We also refer the Panel to our response to question 53A, below, where we explain that there would be no reason to include the term "investigation phase" if Article 2.4.2 were meant to apply universally.

8. Finally, Vietnam contends that "[t]o conclude that imposing the requirement of a fair

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[4] Vietnam Responses to the Panel's Second Set of Questions, Question 51, para. 12 (citation omitted) (emphasis added).

[5] Vietnam Responses to the Panel's Second Set of Questions, Question 51, para. 8.

[6] Vietnam Responses to the Panel's Second Set of Questions, Question 51, para. 12.

[7] *See also*, U.S. Opening Statement at the Second Substantive Meeting, paras. 12-15 and 40-44.

[8] *See* U.S. First Written Submission, paras. 71-98; U.S. Second Written Submission, paras. 134-159.

comparison on each stage necessary to determine the margins of dumping does not then apply to the results of the final comparison on which the margins of dumping are based is absurd and contrary to the rules of treaty interpretation."[9] However, the aggregation of the results of multiple comparisons of normal value and export price that may occur after such comparisons have been made does not constitute a "final comparison" such that it would fall within the meaning of "comparison" as that term is used in Article 2.4. There is no textual basis whatsoever for Vietnam's assertion that the concept of a "final comparison" is addressed in Article 2.4 and Vietnam does not explain what it means when it uses this term, which is found nowhere in the AD Agreement.

9. We note that Vietnam here and elsewhere contends that the results of interpretations proposed by the United States would be "absurd."[10] In each case, of course, we disagree, and Vietnam has not substantiated its assertions. In this case, there is nothing "absurd" about the notion that the detailed obligations provided in Article 2.4, which relate to adjustments to be made to normal value and export price in order to ensure a "fair comparison," would be limited to the comparison of normal value and export price and would not apply to the aggregation of multiple comparison results, to which they would not be relevant.

52. (to Viet Nam) Please comment on the US argument (US Opening Statement at the second substantive meeting, paragraph 14 and US Second Written Submission, paragraph 47) that "If the obligations regarding comparison methodologies found in Article 2.4.2 were applied to the assessment of antidumping duties", the divergence of assessment systems used by Members "would not be possible."

10. In its response to question 52, Vietnam attempts to explain how prospective normal value systems could be consistent with Article 2.4.2 of the AD Agreement by noting that these systems have refund proceedings, and inaccurately equating prospective normal value systems with the U.S. retrospective system. As explained in paragraphs 47 and 48 of the U.S. Second Written Submission, the obligations found in Article 2.4.2 must be interpreted as being limited to only the investigation phase of an antidumping proceeding, *i.e.*, Article 5 investigations, and can not apply to Article 9 assessment proceedings, because, if the obligations regarding comparison methodologies found in Article 2.4.2 were applied to the assessment of antidumping duties, the divergence of assessment systems applied by Members would not be possible.

11. Specifically, if the obligations regarding comparison methodologies found in Article 2.4.2 were applied to Article 9 assessment proceedings, then the prospective normal value systems used by many Members would not be permissible. This is because, as further explained below, in a prospective normal value system, duties are necessarily collected on the basis of average-to-transaction comparisons when the merchandise enters the export market. Thus, it is not possible

[9] Vietnam Responses to the Panel's Second Set of Questions, Question 51, para. 12 (emphasis added).

[10] *See* Vietnam Responses to the Panel's Second Set of Questions, paras. 18, 20, 22, 78.

to make an average-to-average comparison when collecting a duty for a specific entry of merchandise in these systems. Nor is it possible to aggregate multiple comparison results in this situation. Hence, to the extent that an obligation to aggregate comparison results has been found in Article 2.4.2 through an integrated interpretation of the terms "margins of dumping" and "all comparable export transactions," that obligation is necessarily limited to the situations where Article 2.4.2 applies (*i.e.*, the Article 5 investigations phase).

12. Generally, the Members with prospective normal value systems establish normal value in the original investigation and apply this normal value prospectively.[11] In doing so, they determine a dumping margin by comparing the export prices of individual transactions from subsequent periods to that normal value (*i.e.*, they generally make a comparison between a non-contemporaneous normal value and the export price of an individual export transaction). In other words, the dumping margin is determined and final duty liability is assessed on a transaction-specific basis when merchandise is entered. There is no aggregation with other entries of that merchandise and there are no offsets provided for other, non-dumped entries. Rather, the determination of the final liability for antidumping duties in the prospective normal value system is on a transaction-specific basis rather than for the "product as a whole." Several panels have confirmed that this is how such systems work.[12] If Vietnam is correct that Article 2.4.2 applies to Article 9 assessment proceedings, then the type of prospective normal value system described above would be inconsistent with this obligation.

13. Vietnam appears to acknowledge that prospective normal value systems operate on a transaction-specific basis and do not provide offsets for other transactions. However, Vietnam argues that this is permissible because parties may request a refund pursuant to Article 9.3.2. Vietnam's position implies that the supposed obligation to calculate a margin for the "product as a whole" in a prospective normal value system would only be triggered when a refund is requested. In the meantime, duties are collected on a transaction-specific basis without providing offsets for non-dumped transactions. So, Vietnam's view is that not providing offsets while

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[11] The prospective normal values are sometimes updated.

[12] *See US – Stainless Steel (Mexico) (Panel),* para. 7.131 (Article 9.4(ii) clearly provides for a prospective normal value system. In a prospective normal value system, the importer's liability is determined through the comparison of the price paid by the importer in a given transaction and the prospective normal value. Under this system, prices paid in other export transactions have no bearing on this importer's liability.); *US – Softwood Lumber V (Article 21.5 – Canada) (Panel)*, para. 5.53 ("Under a prospective normal value duty assessment system, anti-dumping duties are assessed as individual import transactions occur, by comparing a transaction-specific export price against a prospective normal value. . . . In the context of such transaction-specific duty assessment, it makes no sense to talk of a margin of dumping being established for the product as a whole, by aggregating the results of all comparisons, since there is only one comparison at issue."); *US – Continued Zeroing (EC) (Panel),* para. 7.166 (The panel stated that it tended to "agree with the proposition that the recognition in the Agreement of a prospective normal value system reinforces the argument that dumping may be determined on the basis of individual export transactions, and note[d] that the panel in *US – Stainless Steel (Mexico)* also agreed with this point of view."); *US – Zeroing Japan (Panel)*, paras. 7.200-7.206; *US – Zeroing (EC) (Panel),* paras. 7.205-7.206.

collecting duties in a prospective normal value system is WTO-consistent because there is a possibility that a subsequent refund review might be initiated upon request. In other words, a Member must calculate a dumping margin consistent with Article 2.4.2 only if a refund is requested; otherwise there is no obligation to consider the "product as a whole" in a prospective normal value system.

14. Vietnam's interpretation also assumes that a refund proceeding in a prospective normal value system must, then, include aggregation and offsets. However, as the panel in *US – Zeroing (Japan)* found, "Article 9.3 contains no language requiring such an aggregate examination of export transactions in determining . . . the amount, if any, of refund due under Article 9.3.2."[13]

15. Vietnam then incorrectly states that the prospective normal value systems' refund option is exactly the same as the U.S. retrospective system of collecting cash deposits prior to assessing final duty liability. Contrary to Vietnam's assertion, however, the collection of a cash deposit in the U.S. system is not the same as the collection of an antidumping duty upon entry in the prospective normal value system. In the U.S. system, there is no final antidumping duty liability determined until a review is complete or no party requests a review by the deadline for such a request. Only then is the antidumping duty assessed.

16. A cash deposit is not an antidumping duty at all, but is a reasonable security for the payment of antidumping duties, as permitted explicitly by Ad Note Article VI of the GATT 1994. This is different from a prospective normal value system where the final antidumping duty is collected on a transaction-specific basis upon entry of the merchandise. In a prospective normal value system, the final liability for payment of antidumping duties is not determined through a review under Article 9.3.2, because, as the panel in *US – Zeroing (Japan)* noted, such a review would be "inconsistent with the *prospective* nature of such a system."[14]

17. Article 9.4(ii) clarifies this point, in that the *liability* for duty payment is calculated on the basis of a *prospective* normal value, and that value would cease to be *prospective* if it were calculated on the basis of a retrospective examination of transactions.[15] Moreover, while a refund procedure exists, that refund proceeding, as the panel in *US – Zeroing (Japan)* explained, is "not a *determination of final liability for payment of anti-dumping duties.* The phrase 'determination of the final liability for payment of anti-dumping duties' is used in Article 9.3.1 in connection with retrospective duty assessment procedures but does not figure in Article 9.3.2."[16]

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[13] *US – Zeroing (Japan) (Panel)*, para. 7.199.

[14] *US – Zeroing (Japan) (Panel)*, para. 7.204.

[15] *US – Zeroing (Japan) (Panel)*, para. 7.204.

[16] *US – Zeroing (Japan) (Panel)*, para. 7.204 (emphasis in original). A refund procedure under a prospective normal value system allows an importer to receive a refund, for example, for errors in completing the importation documents for a transaction.

Thus, liability attaches at the time of importation and is not reconsidered in a later proceeding – *i.e.*, after taking into account other export transactions during a particular period of time.[17]

18. Finally, Vietnam states that the issue of whether Members use a prospective normal value system is not before the Panel in this dispute. However, prospective systems are expressly permitted by the AD Agreement, but Vietnam's proposed interpretation of Article 2.4.2, *i.e.*, that it establishes a prohibition on zeroing in Article 9 assessment proceedings, would forbid these systems. Consequently, the issue is directly relevant to the Panel's analysis of whether Vietnam's interpretation of Article 2.4.2 is permissible.

53. (to Viet Nam) Article 11.4 of the AD Agreement provides that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article..." Might this suggest that the provisions of Article 6, which contain numerous references to "investigation", would not otherwise apply to Article 11 reviews?

19. We refer the Panel to the U.S. comment on Vietnam's response to question 53A, below, as much of Vietnam's response to this question is similar to arguments it makes in response to question 53A.

20. The United States does not take a position on whether the provisions of Article 6 would apply to Article 11 reviews absent Article 11.4. However, the United States does consider that an interpretation that would render Article 11.4 inutile would be contrary to the customary rules of interpretation. If Article 6 would apply to Article 11 reviews in the absence of Article 11.4, then the language in Article 11.4 to which the question refers would appear to be unnecessary.

21. We would also like to note that Vietnam's analysis of footnote 21 to Article 11.2 is incorrect. Vietnam asserts that the footnote clarifies that "a 'review' for purposes of Article 11 is different than a 'review' for purposes of Article 9."[18] However, assessment proceedings under Article 9 are not described as "reviews." The only reference to a review in Article 9 is to a new shipper review under Article 9.5. Thus, Vietnam's attempt to support its argument that "an 'investigation' for purposes of Article 5 is different than an 'investigation' for purposes of Article 6" by reference to footnote 21 to Article 11.2 fails.

53A. (to Viet Nam) What is the relevance of the use, in Article 2.4.2, of the term "investigation phase", as opposed to "investigation"?

22. Vietnam argues that the term "investigation phase" in Article 2.4.2 of the AD Agreement refers to any "systematic inquiry that occurs during a distinct period of time," and that there is an

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[17] *US – Zeroing (Japan) (Panel)*, para. 7.204.

[18] Vietnam Responses to the Panel's Second Set of Questions, Question 53, para. 18.

"investigation phase" in every antidumping proceeding.[19] Vietnam's interpretation of the term "investigation phase" is incorrect. As explained in paragraphs 38-44 of the U.S. Second Written Submission, and in the following discussion, the phrase "investigation phase" in Article 2.4.2 refers to the original Article 5 investigation.

23. Vietnam argues that there is only one "investigation phase" during any segment of a proceeding, and contrasts the "investigation phase" with the "initiation" and "respondent selection" phases.[20] However, Vietnam's argument is contradicted by its own proposed ordinary meaning of the term "investigation phase." As noted above, Vietnam argues that the term "investigation phase" means "a systematic inquiry that occurs during a distinct period of time."[21] Such a definition would encompass all of the purported "phases" of antidumping proceedings that Vietnam identifies.

24. In the initiation "phase" of an assessment proceeding, for example, Commerce must systematically inquire whether initiation is warranted by publishing a notice of opportunity to request a review and analyzing any such requests in order to determine whether they have been properly filed prior to publishing a notice of initiation. In the respondent selection "phase," Commerce must systematically inquire which type of respondent selection methodology to use, must analyze the relevant data identifying exporters and producers, and must analyze all party comments related to respondent selection. If Vietnam's proposed interpretation is correct, every "phase" of an antidumping duty proceeding is an "investigation phase."

25. Vietnam further argues that Article 2.4.2 must apply in Article 9 assessment proceedings because Article 9.3 cross references Article 2, and Article 9.3 "provides no limiting qualifiers on the paragraphs contained in Article 2."[22] The United States agrees that the cross reference to Article 2 in Article 9.3 means that all of Article 2 applies to Article 9.3. However, this includes the express limitation on the application of Article 2.4.2 to the "investigation phase," a "limiting qualifier" found not in Article 9.3, but in the text of Article 2.4.2 itself. Contrary to Vietnam's argument, Commerce does not "selectively determine those paragraphs in Article 2 with which it will comply when calculating the margin of dumping."[23] Rather, Commerce's determinations in the second and third administrative reviews are consistent with all of the provisions of Article 2, including the limiting language of Article 2.4.2.

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[19] Vietnam Responses to the Panel's Second Set of Questions, Question 53A, para. 28.

[20] Vietnam Responses to the Panel's Second Set of Questions, Question 53A, para. 28.

[21] Vietnam Responses to the Panel's Second Set of Questions, Question 53A, para. 28.

[22] Vietnam Responses to the Panel's Second Set of Questions, Question 53A, para. 25.

[23] Vietnam Responses to the Panel's Second Set of Questions, Question 53A, para. 25.

26. The text of Article 2.4.2 expressly limits itself to an Article 5 investigation in two different ways. First, it expressly provides that it applies only "during the investigation phase." Second, it refers to the determination of the "existence" of margins of dumping. There is only one investigation phase that requires a determination of the "existence" of dumping: the Article 5 investigation that follows the initiation of an antidumping investigation.

27. As explained in the U.S. Second Written Submission, the Appellate Body and panels have found that the application of Article 2.4.2 is limited to Article 5 investigations. The Appellate Body in *EC – Bed Linen* found that there is no connection between Article 9.3 and Article 2.4.2, and that the "requirements of Article 9 do not have a bearing on Article 2.4.2, because the rules on the *determination* of the margin of dumping are distinct and separate from the rules on the *imposition and collection* of anti-dumping duties."[24] The panel in *Argentina – Poultry Anti-Dumping Duties* reasoned that "[i]f the drafters of the *AD Agreement* had intended to refer exclusively to Article 2.4.2 in the context of Article 9.3, the latter provision would have stated that 'the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.4.2'. This is not what Article 9.3 says."[25]

28. For the reasons we have given, the term "investigation phase" in Article 2.4.2 of the AD Agreement limits the application of that provision to the original Article 5 investigation. Vietnam's proposed interpretation would read the phrase "during the investigation phase" out of Article 2.4.2, and thus is not a permissible interpretation.

54A. (to both parties) How would a complainant properly place before a panel evidence from a previous case? Might the complainant, for instance, quote from the previous panel, might it argue that the situation is similar to that in the previous case, or might the complainant submit factual evidence from the previous dispute, or might it do something else?

29. In response to question 54A, Vietnam suggests that "citation to the report of a previous panel for a particular proposition places that evidence properly before this Panel" and that this "position is supported by various provisions of the DSU and prior practice of panels."[26] Vietnam is incorrect.

30. As noted in paragraphs 15-20 of the U.S. Second Written Submission, and in the U.S. response to question 54A, Vietnam's position is at odds with prior Appellate Body findings.[27] In

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[24] *EC – Bed Linen (Article 21.5) (AB)*, paras. 123-124 (emphasis in original).

[25] *Argentina – Poultry Anti-Dumping Duties*, para. 7.358. *See also US – Zeroing (EC) (Panel)*, para. 7.220.

[26] Vietnam Responses to the Panel's Second Set of Questions, Question 54A, para. 31.

[27] *See also*, U.S. Opening Statement at the Second Substantive Meeting, paras. 26-29.

particular, the Appellate Body has stated clearly that:

> Factual findings made in prior disputes do not determine facts in another dispute. Evidence adduced in one proceeding, and admissions made in respect of the same factual question about the operation of an aspect of municipal law, may be submitted as evidence in another proceeding. The finders of fact are of course obliged to make their own determination afresh and on the basis of all the evidence before them. But if the critical evidence is the same and the factual question about the operation of domestic law is the same, it is likely that the finder of facts would reach similar findings in the two proceedings. Nonetheless, the factual findings adopted by the DSB in prior cases regarding the existence of the zeroing methodology, as a rule or norm, are not binding in another dispute.[28]

31. Vietnam also notes the requirement in Article 15 of the DSU that panel reports include a descriptive part, which contains the facts and legal arguments relied upon by the parties, and the fact that the descriptive part is reviewed by the parties. However, Vietnam misperceives the function and status of a descriptive part. In short, the descriptive part reflects what each party has argued – it does not represent agreement of the parties on any statement presented in the descriptive part. To the contrary, since the descriptive part contains each party's arguments, Vietnam cannot consider that each party has agreed to the other party's arguments. In addition, the descriptive part does not contain any findings of the panel.

32. Furthermore, the presence of a descriptive part in prior panel reports does not excuse Vietnam from providing to the Panel evidence of the existence of the "zeroing methodology" as a measure that may be challenged "as such."[29] Surely, the Appellate Body was aware of the provisions of Article 15 of the DSU when it made the statement in *US – Continued Zeroing* referred to above. Indeed, in that dispute, the Appellate Body "note[d] the European Communities' reference to adopted panel and Appellate Body reports in which the existence of the United States' zeroing methodology, as an unwritten norm of general and prospective application, was found to exist in the context of both original investigations and periodic reviews."[30] Nevertheless, the Appellate Body explained that a complaining party must put before the panel the evidence so that the panel may make an objective assessment of it. Vietnam is wrong that doing so "would produce no value-added benefit in terms of the factual basis for a panel's findings and conclusions."[31] To the contrary, doing so is essential to the Panel's task.

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[28] *US – Continued Zeroing (AB)*, para. 190.

[29] *See* Vietnam Responses to the Panel's Second Set of Questions, Question 54A, para. 32.

[30] *US – Continued Zeroing (AB)*, para. 190.

[31] Vietnam Responses to the Panel's Second Set of Questions, Question 54A, para. 36.

33. The "prior practice of panels" to which Vietnam refers does not support Vietnam's position. The measures at issue in *US – Anti-Dumping Measures on PET Bags*, to which Vietnam refers, were "the anti-dumping order imposed by the United States on polyethylene retail carrier bags from Thailand (the 'Order') and the Final Determination (the 'Final Determination') by the United States Department of Commerce (the 'USDOC'), as amended, leading to that Order."[32] Likewise, in *US – Shrimp (Ecuador)*, to which Vietnam also refers, the "as applied" measures at issue were "the final determination of dumping, the amended final determination of dumping, and the anti-dumping order" on certain frozen warmwater shrimp from Ecuador.[33] The evidence of these measures was the determinations and orders themselves, all of which were submitted to the panel as evidence in the applicable proceeding.

34. Vietnam refers to *US – Oil Country Tubular Goods Sunset Reviews*, in which the alleged measure, among other alleged measures, was the Sunset Policy Bulletin ("SPB"). The Appellate Body found that the panel there "was correct in its understanding of the Appellate Body's finding with respect to the SPB and was correct to rely on that finding in coming to the same conclusion in this case, without having to re-examine the very same question all over again."[34] Again, however, the alleged measure was the SPB and the evidence of that measure and its content was the document itself, which was submitted to the panel as evidence in that proceeding.

35. Finally, Vietnam refers to the *US – Stainless Steel (Mexico)* dispute, in particular paragraph 66 of the Appellate Body report.[35] Vietnam does not explain this reference. In paragraph 66 of its report, the Appellate Body merely summarizes certain of its previous findings relating to the "zeroing" issue. More relevant to the Panel's analysis here is the panel report in that dispute, which describes the evidence Mexico produced in order to establish the existence of "Simple Zeroing Procedures" as a measure that may be challenged "as such."[36] The panel described the evidence Mexico had put before it as including:

> (a) the Standard Computer Programme used by the USDOC, (b) the Anti-Dumping Manual, (c) the application of the Simple Zeroing Procedures in all the five periodic reviews on Stainless Steel Sheet and Strip in Coils from Mexico, (d) further evidence on the consistent application of the Simple Zeroing Procedures in all the periodic reviews previously conducted by the USDOC, and (e) evidence showing continued application of the Simple Zeroing Procedures in

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[32] *US – Anti-Dumping Measures on PET Bags*, para. 2.1.

[33] *US – Shrimp (Ecuador)*, para. 2.1.

[34] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 186.

[35] *See* Vietnam Responses to the Panel's Second Set of Questions, Question 54A, footnote 20.

[36] *See US – Stainless Steel (Mexico) (Panel)*, paras. 7.84-7.97.

> the current periodic reviews.[37]

Mexico further sought to substantiate its assertion that Commerce had "consistently applied the Simple Zeroing Procedures in all the past periodic reviews" by, *inter alia*, providing the panel with an "expert opinion" relevant to that question.[38]

36. The panel in *US – Stainless Steel (Mexico)* ultimately found that Mexico had "presented evidence sufficient to demonstrate the existence of the *Simple Zeroing Procedures* under US law."[39] While the panel noted that "other WTO panels as well as the Appellate Body have made similar findings in cases that concerned the zeroing methodology applied by the United States in anti-dumping proceedings," it further noted that its "findings [were] based on the evidence presented by Mexico in these proceedings, not on the WTO jurisprudence."[40]

37. The evidence before the panel in *US – Stainless Steel (Mexico)* was similar to that before the panels in *US – Zeroing (EC)* and *US – Zeroing (Japan)*, which is described in paragraph 9 of the U.S. responses to the Panel's second set of questions. The alleged measure here, which Vietnam argues exists and may be challenged "as such," is the unwritten "zeroing methodology." The Appellate Body has explained that "a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document."[41] Vietnam is required – as were Mexico, Japan, and the EC – to produce evidence establishing the existence of the measure it seeks to challenge. Vietnam has failed to do so.

38. In addition, we refer the Panel to the panel report in *US – Upland Cotton*. In that dispute, "Brazil argue[d] that its reference to the panel and Appellate Body reports [was] evidence reflecting the nature, function and WTO-inconsistency of the ETI Act of 2000," the measure under examination.[42] The panel there noted, however, that:

> Brazil has not submitted any direct evidence to us. Brazil has not, for example, even submitted a direct quotation from the underlying legal instrument in question, nor has Brazil itself asserted its own specific claims or arguments on the matter dealt with in the previous dispute, beyond purporting to incorporate by

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[37] *US – Stainless Steel (Mexico) (Panel)*, para. 7.89.

[38] *US – Stainless Steel (Mexico) (Panel)*, para. 7.93.

[39] *US – Stainless Steel (Mexico) (Panel)*, para. 7.97.

[40] *US – Stainless Steel (Mexico) (Panel)*, para. 7.96.

[41] *US – Zeroing (EC) (AB)*, para. 196.

[42] *US – Upland Cotton (Panel)*, para. 7.959.

> reference the claims and arguments made by the European Communities, and the reasoning, findings and conclusions of the panel and Appellate Body in the previous dispute.[43]

39. While the panel recognized that "the panel and Appellate Body findings in the previous *US – FSC (Article 21.5 – EC)* dispute between the European Communities and the United States provide relevant guidance and we may – indeed must – take them into account," the panel explained that "they are not legally binding, except with respect to resolving the particular dispute between the parties to that dispute."[44] The panel understood:

> Brazil to nevertheless seek a Panel process whereby we would simply apply the reasoning, and findings and conclusions of the panel, as modified by the Appellate Body, in the *US – FSC (Article 21.5 – EC)* dispute, without going through the ordinary procedural steps constituting panel proceedings set out in the *DSU*, including the examination of the legal claims against the measures constituting the matter before this Panel on the basis of direct evidence and argumentation submitted by the complaining and defending parties in this dispute.[45]

The panel rejected such an approach, reasoning that there is:

> no basis in the text of the *DSU* as it currently stands for such incorporation by reference of claims and arguments made in a previous dispute nor for a quasi-automatic application of findings, recommendations and rulings from a previous dispute. Nowhere is such a procedure required or envisaged in the *DSU* or the relevant special rules and procedures.[46]

40. In this dispute, the Panel should reject Vietnam's attempt to incorporate by reference evidence submitted in prior disputes relating to the existence of the "zeroing methodology," which Vietnam has not itself put before the Panel. As the *US – Upland Cotton* panel correctly found, no such procedure for the "quasi-automatic application of findings, recommendations and rulings from a previous dispute" is required or envisaged by the DSU.

54B. (to Viet Nam) During oral questioning (on the second day of the second substantive meeting), Viet Nam suggested that the Panel may take judicial notice of the facts underlying findings by previous panels or by the Appellate Body of the existence of the

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[43] *US – Upland Cotton (Panel)*, para. 7.959.

[44] *US – Upland Cotton (Panel)*, para. 7.960.

[45] *US – Upland Cotton (Panel)*, para. 7.961.

[46] *US – Upland Cotton (Panel)*, para. 7.962.

zeroing methodology as a rule or norm of general and prospective application? On what legal basis may the Panel do so?

41. Vietnam's response to question 54B does not directly address the question asked by the Panel. In its question, the Panel asked "on what legal basis may the Panel" "take judicial notice of the facts underlying findings by previous panels or by the Appellate Body of the existence of the zeroing methodology as a rule or norm of general and prospective application?" (emphasis added). In the view of the United States, there is none. Indeed, in the only panel or Appellate Body report to date addressing in even a cursory manner the subject of judicial notice, the panel in *Egypt – Steel Rebar* noted that it was "not aware of a principle of 'judicial notice' at the WTO level."[47]

42. As explained in paragraphs 15-20 of the U.S. Second Written Submission, in the U.S. response to question 54A, and in the U.S. comments on Vietnam's response to question 54A above, prior Appellate Body statements about the obligation on a complaining party to put forward evidence to substantiate its claims demonstrate that no concept of "judicial notice," at least with respect to the facts underlying prior panel and Appellate Body reports, exists within the WTO dispute settlement system. Vietnam is required to produce evidence establishing the existence of the measure it seeks to challenge. It has failed to do so with respect to the alleged "zeroing methodology."

55. (to Viet Nam) Is there a difference between Viet Nam's claim against the zeroing methodology "as such", and Viet Nam's claim regarding the "continued use" of zeroing? If so, please explain.

43. In its response to question 55, Vietnam states that "[t]he zeroing 'as such' and the 'continued use' claims are distinct."[48] However, Vietnam also states that "if the Panel, consistent with Appellate Body precedent, finds that the United States' zeroing in the instant proceeding is 'as such' inconsistent with its obligations under the Anti-Dumping Agreement, the obligation placed upon the United States would be the same as a finding of continued use."[49] These statements appear inconsistent with one another and are somewhat confusing.

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[47] *Egypt – Steel Rebar*, para. 7.19. The only other reference to "judicial notice" we were able to find is contained in the Appellate Body report in *Brazil – Aircraft*. There, Brazil argued that "[t]he Appellate Body may take 'judicial notice' that currencies tend to depreciate over time because of inflationary pressures, and these pressures are greatest in developing countries." *Brazil – Aircraft (AB)*, para. 70. The matter of which Brazil suggested that the Appellate Body might take judicial notice was, of course, not the facts in a prior dispute. In any event, the Appellate Body did not address there the concept of judicial notice and whether such a principle exists within WTO dispute settlement.

[48] Vietnam Responses to the Panel's Second Set of Questions, Question 55, para. 44.

[49] Vietnam Responses to the Panel's Second Set of Questions, Question 55, para. 44.

44. First, if the "obligation placed upon the United States would be the same" as a result of either an "as such" or "continued use" finding, it is unclear how the claims are "distinct" or what the purpose of making both claims would be.

45. Second, Vietnam's reference to a finding "that the United States' zeroing in the instant proceeding is 'as such' inconsistent with its obligations under the Anti-Dumping Agreement" is confusing, because an "as such" finding would, it seems, be something different from a finding with respect to the use of "zeroing in the instant proceedings."[50] Vietnam appears to fundamentally misunderstand the basis of the "as such" claim it seeks to make. In any event, as we have explained, Vietnam has failed to produce evidence of the existence of any alleged "zeroing methodology" that may be challenged "as such."

46. Vietnam suggests that the Panel should "take note of"[51] the December 28, 2010 Federal Register notice published by Commerce "proposing modifications to its practice in response to [certain] WTO dispute settlement findings" related to "zeroing."[52] Vietnam further asserts that the notice "is an admission by the United States that it has been applying zeroing in administrative reviews inconsistent with its obligation under the Anti-Dumping Agreement."[53] Vietnam is incorrect.

47. The Federal Register notice is not an "admission" by the United States of the existence of any "zeroing methodology" as a measure that may be challenged "as such." As explained in the U.S. responses to the Panel's second set of questions, the notice begins a process reflecting the intention of the United States to comply with the DSB recommendations and rulings in connection with the reports referenced in the notice, despite continued U.S. disagreement with Appellate Body findings in those reports.[54]

48. To the extent that Vietnam suggests that the Federal Register notice should be considered as evidence of the existence of the "zeroing methodology" as a measure that may be challenged "as such," it is too late in this panel proceeding to introduce such new evidence. As provided in paragraph 16 of the Working Procedures for the Panel, Vietnam was required to "submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals or answers to questions." Vietnam cannot remedy its failure to submit evidence of the existence of a "zeroing methodology" earlier in this

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[50] Vietnam Responses to the Panel's Second Set of Questions, Question 55, para. 44 (emphasis added).

[51] Vietnam Responses to the Panel's Second Set of Questions, Question 55, para. 47.

[52] *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 75 Fed. Reg. 81,533 (December 28, 2010).

[53] Vietnam Responses to the Panel's Second Set of Questions, Question 55, para. 48.

[54] *See* U.S. Responses to the Panel's Second Set of Questions, Question 54(ii), footnote 5.

proceeding by submitting new information now. Furthermore, the notice simply proposes a specific methodology that, if adopted, would be applicable in the future.

49. With respect to Vietnam's arguments about "continued use," we recall our explanation in the U.S. First Written Submission and the U.S. Second Written Submission that no such measure is within the Panel's terms of reference.[55] Vietnam confirms in its response to question 55 that it is referring to "future proceedings,"[56] and thus Vietnam confirms that a so-called "continued use" "measure" could not be within the Panel's terms of reference because, as we have explained, a claim against a future measure is not possible under Article 17.4 of the AD Agreement. We further recall that, even aside from the fact that no "continued use" measure is within the Panel's terms of reference, we have explained why there is no basis to find that the challenged practices "would likely continue to be applied in successive proceedings."[57]

III. ALL OTHERS RATE

56. (to both parties) In paragraph 23 of its Opening Statement at the second substantive meeting, Viet Nam brings to the Panel's attention a recent USDOC "remand" determination in the second administrative review. Please explain the impact of this remand determination on the relevant measures before the Panel, i.e. the all others rates in the second and third administrative reviews. In particular, is the USDOC's remand determination "final" or is it still subject to appeal? If it is final, does it mean that the all others rate in the second administrative review has been replaced by rate(s) determined by the USDOC on remand? Do the rulings of the Court of International Trade affect the all others rates applied by the USDOC in the third administrative review?

50. In its response to question 56, Vietnam suggests that it "alerted the Panel to the Court of International Trade decision because it believed that the decision might help to inform the Panel's deliberations."[58] Vietnam asserts that "[i]f a determination is not supported by 'substantial evidence' on the record, it would also appear that the same determination could not

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[55] *See* U.S. First Written Submission, paras. 87-98; U.S. Second Written Submission, paras. 137-159.

[56] Vietnam Responses to the Panel's Second Set of Questions, Question 55, para. 44.

[57] *US – Continued Zeroing (AB)*, para. 191. *See* U.S. First Written Submission, paras. 216-221; U.S. Second Written Submission, paras. 160-166. In this regard, the December 28, 2010 Federal Register notice belies Vietnam's contention that past Commerce determinations necessarily indicate how Commerce will determine dumping rates in future proceedings. As explained in the notice, Commerce has proposed to modify "its practice in response to [certain] WTO dispute settlement findings" and will not use "zeroing" when calculating dumping rates in future administrative reviews. *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 75 Fed. Reg. 81,533 (December 28, 2010).

[58] Vietnam Responses to the Panel's Second Set of Questions, Question 56, para. 52.

be found to be 'unbiased and objective' or the result of a 'proper' establishment of the facts as required under Article 17.6(i) of the Anti-Dumping Agreement."[59] Vietnam is incorrect. A determination by the U.S. Court of International Trade that a Commerce determination is not consistent with U.S. law is of little or no relevance to the Panel's assessment of the determination's consistency with U.S. obligations under the covered agreements.

51. We recall that Article 17.6(i) of the AD Agreement does not impose any obligations on Members, and thus the challenged measures cannot be found inconsistent with Article 17.6(i).[60] Article 17.6(i) establishes the standard of review to be applied by WTO panels when evaluating whether Commerce's "establishment of the facts was proper and whether [its] evaluation of those facts was unbiased and objective." Whether this standard of review is similar to or the same as the "substantial evidence" standard applied by the U.S. Court of International Trade is not a question that the Panel needs to address in order to resolve this dispute.

52. Additionally, this dispute does not involve an issue of fact with respect to the establishment of the rates applied to the separate rate companies. The relevant facts established by Commerce are not in dispute. Commerce established that the rates of the individually examined companies in the second and third administrative reviews were all zero or *de minimis* and applied to the separate rate companies in these reviews rates determined in prior proceedings (either individual calculated rates, or an average of calculated rates from the investigation if no individual rate had been calculated for the company in question).

53. The issue before the Panel is whether or not the use of rates determined in prior proceedings for companies not individually examined was in accordance with the obligations found in Article 9.4 of the AD Agreement. This is a question of law concerning the obligations established in the text of Article 9.4. As we have explained, Commerce's determinations in the second and third administrative reviews were not inconsistent with Article 9.4 *as a matter of law*.

54. Even if the Panel were to conclude that this issue presents a mixed question of fact and law, the Panel would need to evaluate the application of the facts based on the obligations contained in Article 9.4 of the AD Agreement. The Appellate Body has stated that the standard of review to be applied in a given case is also a function of the substantive provisions of the specific covered agreements that are at issue in the dispute.[61] Accordingly, the application of prior determined rates in the second and third administrative reviews must be evaluated in light of the obligations of Article 9.4 and, as we have explained, nothing in Article 9.4 prohibits the

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[59] Vietnam Responses to the Panel's Second Set of Questions, Question 56, para. 52.

[60] *See* U.S. Second Written Submission, para. 76. We also recall that Vietnam did not raise any claims under Article 17.6(i) in its panel request, so no claims under this provision are within the panel's terms of reference.

[61] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB),* para. 95; *see also US – Countervailing Duty Investigation on DRAMS (AB)*, para. 184.

use of such rates when all of the rates determined for individually examined companies are zero or *de minimis*. In light of the obligations established by Article 9.4, and in light of Commerce's determination that the dumping rates of the examined companies were zero or *de minimis*, the Panel should find that Commerce's application of rates from prior proceedings was permissible under Article 9.4, and that its evaluation of the facts was unbiased and objective.

58. (to both parties) The first sentence of Article 9.2 provides that anti-dumping duties shall be collected "in the appropriate amounts". Is the Article 9.2 "appropriateness" standard relevant to the amount of duty applied in the Article 9.4 lacuna situation?

55. In its response to question 58, Vietnam "submits that this 'appropriateness' standard can be equated to a reasonableness standard: when confronted with an Article 9.4 lacuna situation, the authority must act in an appropriate and reasonable manner, assessing and collecting duties at the appropriate level to offset dumping."[62] Vietnam is incorrect.

56. Nothing in the text of Article 9.2 of the AD Agreement suggests that it establishes a general "appropriateness standard" that would supplant the obligations contained in other provisions of the AD Agreement or supplement them in the absence of specific obligations. Indeed, such a standard, if it existed, would obviate the need for the detailed rules agreed to by Members in the AD Agreement and, of serious concern, would result in disputes that would be virtually impossible to resolve in any principled, text-based way. Caution is warranted in the interpretation of Article 9.2, as an "appropriateness" standard of the kind suggested by Vietnam would be entirely subjective.[63]

57. When all the dumping margins calculated for individually examined companies are zero, *de minimis*, or based on facts available, Article 9.4 of the AD Agreement does not specify the maximum duty that may be applied to exporters and producers that are not individually examined. In such cases, Article 9.2, on its face, does not impose an "appropriateness" standard with respect to the amount of antidumping duties applied.

IV. COUNTRY-WIDE RATE

59D. (to Viet Nam) The Panel understands Viet Nam to have stated (on the second day of the Panel's second substantive meeting with the parties) that Viet Nam is not challenging the basis for the USDOC's findings in the second and third administrative reviews that the Viet Nam-wide entity was an affiliated single exporter or producer. Is our understanding correct? If not, please explain.

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[62] Vietnam Responses to the Panel's Second Set of Questions, Question 58, para. 55.

[63] The United States discussed the meaning of the term "appropriate" in response to question 58 in the Panel's second set of questions. *See* U.S. Responses to the Panel's Second Set of Questions, Question 58, paras. 24-26.

58. While Vietnam's response to question 59D does not directly address the question the Panel asked, it does appear to confirm – by virtue, in particular, of the absence of any reference to Article 6.10 of the AD Agreement – that Vietnam is not requesting that the Panel find that Commerce's determinations to treat the Vietnam-wide entity as a single exporter in the second and third administrative reviews were not consistent with Article 6.10.

59. Vietnam's response makes reference to or summarizes certain of its arguments under Articles 2.1, 2.4, 2.4.2, 6.8, 9.3, and 9.4, and Annex II of the AD Agreement, and Article VI:2 of the GATT 1994. The United States does not repeat here its responses to these arguments, which we have explained in detail in prior written submissions and oral presentations to the Panel. For the reasons we have given, the Panel should reject all of Vietnam's arguments.

62A. (to Viet Nam) Could the authority apply a facts available rate to the Viet Nam-wide entity as a whole in the absence of any finding of non-cooperation on the part of the head of that entity?

60. Vietnam responds that the answer to question 62A is "No."[64] Vietnam is incorrect.

61. As we explained in response to question 35 in the first set of written questions from the Panel, nothing in the text of Article 6.8 or Annex II of the AD Agreement indicates that the disciplines applicable to the use of facts available with respect to a single exporter properly constituted of several distinct legal entities differ in any respect from those applicable to other interested parties.[65] There is no obligation in the AD Agreement to identify the "head" of such an entity, and the application of facts available to the entity is not conditioned on the failure of the "head" of the entity to cooperate, nor on the failure of all component parts of the entity to cooperate.[66] If any part of such an entity fails to cooperate, the entire entity may be subject to an antidumping duty determined based upon the facts available. This is equally the case for entities comprised of multiple enterprises in both market and nonmarket economy situations.

62. Vietnam's discussion of what constitutes "necessary information" and the purported limitation on the use of facts available only to individually examined companies simply restates

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[64] Vietnam Responses to the Panel's Second Set of Questions, Question 62A, para. 68.

[65] We recall that Vietnam has not asked the Panel to find that Commerce's determinations to treat the Vietnam-wide entity as a single exporter in the second and third administrative reviews were not consistent with Article 6.10. *See* U.S. comment on Vietnam's response to question 59D, *supra*.

[66] We note that in both market and nonmarket economy cases, the specific identity of the "head" of a company or group of companies may not be known to the investigating authority. Accordingly, it is incumbent upon the entity in question to come forward and provide any relevant information once a part or parts of it have been identified and are included in the proceeding. Commerce did not preclude any entity or head of an entity from coming forward and providing relevant identifying or requested information.

arguments Vietnam has made previously, and to which the United States has already responded.[67] For the reasons we have given, Vietnam's arguments are without merit.

V. LIMITATION OF THE NUMBER OF INDIVIDUALLY-INVESTIGATED EXPORTERS

64. (to Viet Nam) The Panel understands Viet Nam to have stated (on the second day of the Panel's second substantive meeting with the parties) that Viet Nam is not challenging the USDOC's findings in the second and third administrative reviews that it was "impracticable" to individually investigate all exporters. Is our understanding correct? If not, please explain.

63. The United States appreciates Vietnam's confirmation that it "is not challenging in this dispute the USDOC's factual findings in the second and third administrative reviews that it was impracticable to individually investigate all exporters."[68]

64. However, Vietnam goes on to state that "[t]his . . . begs the question of whether the USDOC had an obligation to obtain the resources to investigate all exporters at the time of the second, third, fourth and fifth reviews, rather than continuing to invoke the exception in Article 6.10 in review after review."[69] Obviously, the AD Agreement does not require a Member to allocate resources to its investigating authority in order to ensure that it individually examines each company involved in an antidumping proceeding. On the contrary, rather than require an authority to tailor its resources to accommodate all companies, Article 6.10 permits an authority to limit its examination based upon its resources. In this regard, Vietnam's statements here and elsewhere in its responses to the Panel's questions, as well as in its First Written Submission, about Commerce's resources are not germane to the Panel's consideration of Vietnam's claims that the challenged measures are inconsistent with the cited provisions of the covered agreements.[70]

65. Vietnam also states that it "begs the question of whether, given the continued absence of the resources to investigate all exporters, the United States still had an obligation to give meaning to the general rule in Article 6.10 and its obligations under Article 9.3, 11.1 and 11.3."[71] We note

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[67] *See* U.S. First Written Submission, paras. 156-160; U.S. Second Written Submission, paras. 106, 111-115. *See also* U.S. Opening Statement at the Second Substantive Meeting, paras. 74-76.

[68] Vietnam Responses to the Panel's Second Set of Questions, Question 64, para. 76.

[69] Vietnam Responses to the Panel's Second Set of Questions, Question 64, para. 76.

[70] *See* Vietnam Responses to the Panel's Second Set of Questions, Question 65, para. 77 and Vietnam First Written Submission, para. 245.

[71] Vietnam Responses to the Panel's Second Set of Questions, Question 64, para. 76.

that Vietnam does not explain how the U.S. interpretation fails "to give meaning" to the cited provisions, nor has Vietnam established that the challenged measures are inconsistent with any of those provisions. Additionally, as we have explained, the United States cannot be found to have acted inconsistently with one provision of the AD Agreement due to the proper exercise of its rights under a separate provision of the AD Agreement.

65. (to Viet Nam) Viet Nam has argued that the USDOC had an obligation to consider alternative methodologies to calculate dumping margins for non-selected exporters. Please identify the legal basis, in the Anti-Dumping Agreement, for this obligation.

66. The United States notes that nowhere in Vietnam's response to this question does Vietnam identify the legal basis, in the AD Agreement, for the purported obligation on investigating authorities to "consider alternative methodologies to calculate dumping margins for non-selected exporters," as the Panel asked it to do. This is unsurprising. As we explained in paragraphs 121 and 122 of the U.S. Second Written Submission, there is no textual basis in the AD Agreement for any such obligation, and this is an instance of Vietnam inventing an obligation that simply does not exist.[72] Vietnam bears the burden of establishing that the challenged measures are inconsistent with precise obligations actually contained in the covered agreements, and it has failed to do so.

67. (to both parties) What evidence is required to make out a claim that voluntary responses have been discouraged, inconsistently with the closing sentence of Article 6.10.2? In particular, please discuss whether action on the part of the investigating authority (as opposed to mere inaction) is necessary for there to be a violation of the obligation contained in that sentence.

67. The United States will comment on Vietnam's responses to questions 67 and 68 together, below.

68. (to Viet Nam) Please explain what evidence Viet Nam has placed on the record to substantiate a claim under the last sentence of Article 6.10.2.

68. In its response to question 67, Vietnam suggests that "so-called 'inaction' on the part of the authority could certainly constitute 'discouraging' behavior in violation of Article 6.10.2."[73] Vietnam seeks to illustrate its point by positing a hypothetical scenario in which "an authority passively compl[ies] with a regulation that prohibits the acceptance of voluntary responses."[74] However, Vietnam's hypothetical scenario would appear to be more akin to an "as such" breach

[72] *See also*, U.S. Opening Statement at the Second Substantive Meeting, para. 85.

[73] Vietnam Responses to the Panel's Second Set of Questions, Question 67, para. 81.

[74] Vietnam Responses to the Panel's Second Set of Questions, Question 67, para. 81.

of the prohibition against discouraging responses, in that there would exist a regulation prohibiting the acceptance of voluntary responses in all cases. In addition, the promulgation of such a regulation might itself be viewed as action that would discourage voluntary responses. Thus, Vietnam's hypothetical scenario would not appear to support its argument.

69. In any event, Vietnam's hypothetical does not reflect the facts in this dispute and there is no merit whatsoever to Vietnam's assertion that "[t]he present situation is virtually identical" to the hypothetical scenario Vietnam describes.[75] U.S. law in no way prohibited the submission of voluntary responses in the second or third administrative reviews. Indeed, Vietnam concedes that Commerce did not "prohibit[] the acceptance or use of voluntary responses in those terms . . . ."[76] Rather, in its responses to questions 67 and 68, Vietnam refers to "the standard applied by the USDOC for the selection of mandatory respondents in support of the claim made under the last sentence of Article 6.10.2."[77]

70. We recall that Vietnam has agreed that it was "impracticable" within the meaning of Article 6.10 of the AD Agreement for Commerce to determine individual dumping margins for all exporters and producers,[78] and Vietnam has not alleged that Commerce acted inconsistently with Article 6.10 by failing to individually examine the largest number of exporters or producers that "reasonably" could be examined.[79]

71. Consequently, Vietnam's position would appear to be that an investigating authority, by properly limiting its examination under Article 6.10 of the AD Agreement, necessarily, as a consequence, acts inconsistently with Article 6.10.2 of the AD Agreement because its decision to limit its examination would "discourage" voluntary responses. Looking at the matter in reverse, it would seem that, under Vietnam's proposed interpretation, an investigating authority, in order to act consistently with Article 6.10.2 and not impliedly "discourage" voluntary responses, would need to preserve its ability to accept and consider voluntary responses, and to do so would be required to act inconsistently with Article 6.10, by examining some percentage of the volume of exports that is less than the largest percentage that can reasonably be examined in order to reserve additional resources for possible voluntary responses.

72. Vietnam claims that it "recognizes and appreciates the tension between the right of the administering authority to limit the number of respondents under Article 6.10 and the rights of

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[75] Vietnam Responses to the Panel's Second Set of Questions, Question 67, para. 81.

[76] Vietnam Responses to the Panel's Second Set of Questions, Question 67, para. 81.

[77] Vietnam Responses to the Panel's Second Set of Questions, Question 68, para. 82; *see also id*., Question 67, para. 81.

[78] *See* Vietnam Opening Statement at the First Substantive Panel Meeting, para. 75.

[79] Vietnam Responses to the Panel's First Set of Questions, Question 39, para. 95.

respondents not selected for examination guaranteed under Article 6.10.2."[80] However, in Vietnam's view, "[i]t is the responsibility of neither the Panel nor Viet Nam to identify the specific manner in which an authority is to reconcile this tension."[81] Vietnam is wrong.

73. It is, in the first instance, Vietnam's responsibility to present evidence and arguments sufficient to establish that the challenged measures are inconsistent with the cited provision of the covered agreement, here Article 6.10.2 of the AD Agreement. The only evidence that Vietnam presents that the challenged measures are inconsistent with Article 6.10.2 is evidence that they are not inconsistent with Article 6.10. Furthermore, Vietnam's only argument is a proposed interpretation of the obligation in the last sentence of Article 6.10.2 that is in "tension" with, or, in actuality, irreconcilable with the obligations in Article 6.10. Vietnam's proposed interpretation of Article 6.10.2 is untenable and unnecessary. The far better interpretation of this provision is that proposed by the United States in response to question 67, and we refer the Panel to the U.S. response to that question.[82]

VI. CONSEQUENTIAL CLAIMS

69. (to Viet Nam) Does Viet Nam maintain its consequential claims in the event that the Panel considers that the "continued use" measure does not fall within its terms of reference?

74. The concept of a "consequential" claim that Vietnam has advanced in this dispute appears to be a novel one. The United States generally understands that a "consequential claim" might include, for example, a claim that, if a panel finds that a challenged measure is inconsistent with a particular provision of the AD Agreement, it should also find, as a consequence, that the defending Member has acted inconsistently with Article 18.1 of the AD Agreement, which requires that "[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

75. Here, Vietnam suggests that "because the USDOC has not correctly calculated the margins of dumping during the challenged measures, it necessarily follows that the USDOC cannot properly determine whether the dumping continues to take place for purposes of Article 11.1 or whether the dumping is likely to continue or recur for purposes of Article 11.3."[83] Vietnam appears to be suggesting that, should the panel find the challenged determinations in the second and third administrative reviews inconsistent with U.S. obligations under the covered

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[80] Vietnam Responses to the Panel's Second Set of Questions, Question 68, para. 83.

[81] Vietnam Responses to the Panel's Second Set of Questions, Question 68, para. 83.

[82] *See* U.S. Responses to the Panel's Second Set of Questions, Question 67, paras. 59-64.

[83] Vietnam Responses to the Panel's Second Set of Questions, Question 69, para. 84.

agreements, it should further find that there would necessarily be a consequential violation in a separate Article 11 review proceeding, irrespective of whether such a final determination in such a proceeding exists, what the content of the final determination in such a proceeding might be, or whether any such determination is within the Panel's terms of reference.

76. We recall that in this dispute, no determinations relevant to the obligations in Articles 11.1 and 11.3 are within the Panel's terms of reference. Specifically, the final determination in the sunset review is not a measure within the Panel's terms of reference and Vietnam has clarified that it is not "making claims before this Panel regarding the final determination of the sunset review, per se."[84] Consequently, there is no basis for the Panel to find either of the challenged measures inconsistent with Article 11.1 or Article 11.3 of the AD Agreement.

77. Further, we note that, in *Australia – Apples*, the Appellate Body cautioned that "[t]he violation of one obligation does not, without more, imply the violation of [another]," though "factual elements relevant to the analysis under one provision may also be relevant to the analysis under the other provision."[85] Consistent with the Appellate Body's admonition, a finding that a dumping calculation in one proceeding is inconsistent with one provision of the AD Agreement would not, without more, imply the breach of Articles 11.1 or 11.3 in another proceeding. Indeed, nothing in the text of Articles 11.1 or 11.3 even requires the calculation of a margin of dumping.[86] Thus, it does not "necessarily follow," as Vietnam argues, that, if the Panel found Commerce's dumping margin calculation in one proceeding inconsistent with a given provision of the AD Agreement, it would also need to find Commerce's determination in another proceeding inconsistent with the obligations in Articles 11.1 and 11.3. The Panel would be required to examine any such determinations in order to assess their conformity with Articles 11.1 and 11.3.[87]

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[84] Vietnam Responses to the Panel's First Set of Questions, Question 9, para. 15.

[85] *Australia – Apples (AB)*, paras. 346-347.

[86] *See US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 123 ("Article 11.3 neither explicitly requires authorities in a sunset review to calculate fresh dumping margins, nor explicitly prohibits them from relying on dumping margins calculated in the past.").

[87] In any event, Vietnam overlooks and has never addressed the differences in the obligations in the provisions under which it has directly advanced claims and the obligations in Articles 11.1 and 11.3 of the AD Agreement. Additionally, as explained in paragraphs 199-209 of the U.S. First Written Submission and paragraphs 127-133 of the U.S. Second Written Submission, Vietnam's proposed interpretations of Articles 11.1 and 11.3 are not in accordance with the customary rules of interpretation, and its claims under those provisions are without merit. *See also*, U.S. Opening Statement at the Second Substantive Meeting, para. 91-97.