OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM
(DS404)

DECEMBER 14, 2010

Mr. Chairman, members of the Panel:

1. Good morning. It's good to see you again. On behalf of the United States delegation, I would like to thank you again for agreeing to serve on this Panel.

2. At the outset of this second substantive meeting, we would like to reiterate an important point that we have made before. Consistently, throughout this dispute, Vietnam's arguments have failed to meaningfully address the specific rights and obligations as established by the covered agreements. Instead of addressing actual obligations to which Members agreed, Vietnam departs from the accepted rules of treaty interpretation and invents obligations found nowhere in the text of the covered agreements.

3. In our opening statement this morning, we would like to demonstrate this by walking through each of the six specific requests for findings that Vietnam has made at the end of its second written submission.[1] We will clarify what each request would entail and, importantly, why the Panel should not do what Vietnam asks. Put simply, Vietnam's interpretative analysis is flawed and the facts do not support the conclusion that the challenged measures are inconsistent with any obligation in any of the covered agreements.

4. Consequently, the United States respectfully requests that the Panel find that Vietnam's claims are without merit.

I. Vietnam's First and Second Requests for Findings, Related to "Zeroing," Should Be Rejected

5. At the end of its second written submission Vietnam makes three requests for findings related to "zeroing", one of which also relates to the question of the rates applied to companies not individually examined. We will address each request in turn.

A. Vietnam's First Request for Findings

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

> ***That the application of zeroing to individually investigated respondents in the second and third administrative reviews, and its continued application in the***

[1] *See* Vietnam Second Written Submission, para. 144.

subsequent reviews, is inconsistent with Articles 9.3, 2.1, 2.4.2, and 2.4 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

This request for findings, as well as Vietnam's fifth and sixth requests, includes both "as applied" and "continued use" claims. We will address Vietnam's "continued use" claims toward the end of this statement. For now, we will touch on each of the provisions of the covered agreements under which Vietnam makes "as applied" claims in this request.

1. Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994

7. Vietnam's claims under Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 fail because Vietnam has not demonstrated that any antidumping duties were applied in excess of the margin of dumping with respect to the individually examined exporters/producers in the second and third administrative reviews.

8. As we have explained, Article 9.3 and Article VI:2 provide that any antidumping duty applied shall not exceed the margin of dumping. Because Vietnam has not established that any antidumping duty was applied at all, Vietnam has not established that any antidumping duty was applied in excess of the margin of dumping. Consequently, Vietnam has not and cannot establish that the United States has acted inconsistently with Article 9.3 of the AD Agreement or Article VI:2 of the GATT 1994.

9. Recognizing this shortcoming in its claims under Article 9.3 and Article VI:2, Vietnam asks the Panel nevertheless to find that the United States acted inconsistently with Article 9.3 because that provision limits the antidumping duty to the margin of dumping "as established under Article 2." Vietnam suggests that, "prior to reaching the additional obligations regarding duty assessment contained in Article 9.3, the authority must calculate the margin of dumping in accordance with Article 2."[2]

10. In this regard, Vietnam's interpretation of Article 9.3 – that it establishes a separate obligation to calculate the margins of dumping consistently with Article 2 – is incorrect and would be redundant of the obligations in Article 2, which are found within the text of that provision. In any event, however, this aspect of Vietnam's claim under Article 9.3 is dependent upon Vietnam's separate claims under Articles 2.1, 2.4.2, and 2.4 of the AD Agreement, which, as we have shown, and will discuss again now, are without merit.

2. Article 2.1 of the AD Agreement

11. Vietnam asks the Panel to find that the application of zeroing to individually investigated respondents in the second and third administrative reviews is inconsistent with Article 2.1 of the AD Agreement. Article 2.1 describes the situation wherein "a product is to be considered as being dumped." The Appellate Body has explained that Article 2.1 is a "definitional" provision,

[2] Vietnam Second Written Submission, para. 38.

which, "read in isolation, [does] not impose independent obligations."[3] It is not clear how the challenged measures could be found inconsistent with a definition. Thus, Vietnam's request for a finding under Article 2.1 must fail.

3. Article 2.4.2 of the AD Agreement

12. Vietnam also asks the Panel to find that the application of zeroing to individually investigated respondents in the second and third administrative reviews is inconsistent with Article 2.4.2 of the AD Agreement.

13. For this claim to succeed, the Panel must find that Article 2.4.2 applies to administrative reviews. However, Article 2.4.2, by its terms, is limited to the "investigation phase." The Appellate Body and prior panels have recognized distinctions between investigations and other proceedings under the AD Agreement, consistently finding that the provisions in the AD Agreement with express limitations to investigations are, in fact, limited to the investigation phase of a proceeding. The repeated recognition by panels and the Appellate Body of the distinctions between investigations and review proceedings is consistent with the distinct function of the investigation phase, which is to establish as a threshold matter whether the imposition of an antidumping duty is warranted. Other phases (such as Article 9 assessment proceedings – what we would call administrative reviews – or Article 11 sunset reviews) have different functions.

14. The express limitation of the obligations in Article 2.4.2 to the investigation phase is consistent with the differences in the antidumping systems applied by Members for purposes of the assessment phase. The different methods used by Members include the use of prospective normal values, retrospective normal values, and prospective *ad valorem* duties. If the obligations regarding comparison methodologies found in Article 2.4.2 were applied to the assessment of antidumping duties, this divergence of assessment systems would not be possible. For example, it is not possible to reconcile the prospective normal value system that is used by some Members with a requirement to use either the average-to-average or transaction-to-transaction comparison methodology, because those prospective normal value systems compare weighted average prospective normal values to individual export prices in order to assess antidumping duties on individual transactions. So, that's an average-to-transaction comparison. Thus, to retain the flexibility for Members to apply different assessment systems, as reflected in Article 9, it was necessary to limit the requirements of Article 2.4.2 to the investigation phase.

15. Consequently, it is not possible to find that Commerce's determinations in the second and third administrative reviews are inconsistent with Article 2.4.2 of the AD Agreement.

4. Article 2.4 of the AD Agreement

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

16. The last element of Vietnam's first request for a finding is its claim that Commerce's application of zeroing to individually investigated respondents in the second and third administrative reviews is inconsistent with Article 2.4 of the AD Agreement. Once again, Vietnam ignores the text of the provision under which it raises a claim.

17. Article 2.4 requires investigating authorities to make a "fair comparison" between normal value and export price and then provides detailed guidance as to how that fair comparison is to be made. Article 2.4 recognizes that the normal value and export price transactions to be compared may occur, among other things, with respect to models with differing physical characteristics, at distinct levels of trade, pursuant to different terms and conditions, and in varying quantities. The focus of Article 2.4 is on how the authorities are to select transactions for comparison and make appropriate adjustments for differences that affect price comparability. This all occurs prior to making the comparisons between export price and normal value to ensure that the comparisons are "fair," apples-to-apples comparisons.

18. Vietnam proposes an interpretation of Article 2.4 that would encompass the aggregation of comparisons, which takes place, if at all, after the comparisons are made. Nothing in the text of Article 2.4 indicates that the scope of that provision reaches such post-comparison aggregation. Vietnam's interpretation of Article 2.4 cannot be reconciled with the text of that provision.

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

20. For example, the panel in *US – Zeroing (Japan)* explained that the "precise meaning [of the fair comparison requirement] must be understood in light of the nature of the activity at issue."[4] That panel concluded that "the 'fair comparison' requirement cannot have been intended to allow a panel to review a measure in light of a necessarily somewhat subjective judgment of what fairness means in the abstract and in complete isolation from the substantive context."[5]

21. The panel in *US – Softwood Lumber V (Article 21.5)* warned that "a claim based on a highly general and subjective test such as 'fair comparison' should be approached with caution by treaty interpreters."[6]

22. In *US – Zeroing (EC)*, the panel similarly stated: "[C]aution . . . is especially warranted where, as in the case of the first sentence of Article 2.4, a legal rule is expressed in terms of a

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[4] *US – Zeroing (Japan) (Panel)*, para. 7.155.

[5] *Id.*, para. 7.158 (*citing US – Zeroing (EC) (Panel)*, para. 7.261).

[6] *US – Softwood Lumber V (Article 21.5) (Panel)*, para. 5.74.

standard that by its very nature is more abstract and less determinate than most other rules in the *AD Agreement*. The meaning of 'fair' in a legal rule must necessarily be determined having regard to the particular context within which that rule operates."[7]

23. Contrary to Vietnam's argument, the obligation to make a "fair comparison" under Article 2.4 does not create an obligation to provide for offsets, or a prohibition of "zeroing." Consequently, Vietnam's claim that Commerce's determinations are inconsistent with Article 2.4 of the AD Agreement must fail.

24. As we have shown, all of the "as applied" claims in Vietnam's first request for findings are without merit. We thus respectfully ask the Panel to reject Vietnam's first request.

B. Vietnam's Second Request for Findings

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

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

26. Vietnam asserted very late in this proceeding, and only in response to a written question from the Panel after the first substantive meeting, that it is seeking an "as such" finding against "zeroing." However, Vietnam has advanced no arguments and pointed to no evidence that would support a finding by the Panel that any "zeroing methodology" exists as a measure that can be challenged "as such." Thus, Vietnam's claim must fail.

27. As the Appellate Body explained in *US – Zeroing (EC)*, when bringing a challenge against a "rule or norm" that is not expressed in the form of a written document, as is the case with the alleged "zeroing methodology":

> [A] complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or norm" may be challenged, as such.[8]

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[7] *US – Zeroing (EC) (Panel)*, para. 7.260.

[8] *US – Zeroing (EC) (AB)*, paras. 197-198 (citations omitted).

In *US – Zeroing (Japan)*, the Appellate Body applied the same reasoning, warning that "panels must not 'make affirmative findings that lack a basis in the evidence contained in the panel record.'"[9]

28. In this dispute, Vietnam has pointed to no evidence and made no argument that would "clearly establish" that "the alleged 'rule or norm' is attributable to the [United States]; its precise content; and indeed, that it does have general and prospective application."[10] Instead Vietnam merely cites repeatedly to prior panel and Appellate Body reports.[11] While "[e]vidence adduced in one proceeding, and admissions made in respect of the same factual question about the operation of an aspect of municipal law, may be submitted as evidence in another proceeding,"[12] it is necessary to actually adduce the evidence and point to any such admissions. Vietnam has not done so with respect to the existence of any "zeroing methodology."

29. For this reason, the United States submits that the Panel lacks any evidentiary basis for finding that the "zeroing methodology" is a measure that is inconsistent, as such, with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. We thus respectfully ask the Panel to reject Vietnam's second request for a finding.

II. Vietnam's Third and Fourth Requests for Findings, Related to the Rates Assigned to Companies Not Individually Examined in the Second and Third Administrative Reviews, Should Be Rejected

A. Vietnam's Third Request for Findings

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

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

We will discuss each of the claims identified in this request in turn.

1. Article 9.4 of the AD Agreement

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[9] *US – Zeroing (Japan) (AB)*, para. 82 (*citing US – Carbon Steel (AB)*, para. 142, *and EC – Hormones (AB)*, para. 133).

[10] *US – Zeroing (EC) (AB)*, para. 198.

[11] *See, e.g.*, Vietnam Responses to Panel Questions, Question 11, para. 20.

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

31. As we have explained, Article 9.4 of the AD Agreement, on the face of its text, establishes only a limited obligation related to the maximum antidumping duty that may be applied to companies not individually examined, in certain circumstances. Article 9.4 does not prescribe a methodology for assigning a rate to companies not individually examined in an assessment review. Article 9.4 does not prescribe the *maximum* rate that may be applied to companies not individually examined in situations where the rates calculated for the individually examined companies are all zero, *de minimis*, or based on facts available. And Article 9.4 certainly does not prohibit "zeroing."

32. To the extent that any prohibition of "zeroing" exists in the AD Agreement, it has been identified by panels and the Appellate Body in provisions other than Article 9.4. Even if the challenged measures were found to be inconsistent with those other provisions, that would not mean that, as a consequence, the measures are also inconsistent with the limited obligations in Article 9.4, which, again, relate only to the maximum antidumping duty that may be applied to companies not individually examined in certain circumstances.

33. In the second and third administrative reviews, all of the rates calculated for individually examined companies were zero or *de minimis*. Consequently, Article 9.4 did not specify a maximum antidumping duty for companies not individually examined, and we respectfully submit that it is not possible to find the challenged measures inconsistent with Article 9.4 of the AD Agreement.

2. Article 9.3 of the AD Agreement

34. With respect to Article 9.3 of the AD Agreement, Vietnam's Second Written Submission asserts that "Article 9.3 prohibits the assessment of antidumping duties that exceed the margin of dumping properly calculated pursuant to Article 2. Thus, the margin of dumping for a respondent, individually examined or not, serves as the maximum for the amount of antidumping duties to be applied."[13]

35. Even if Vietnam were correct that Article 9.3 establishes obligations with respect to the antidumping duty applied to companies not individually examined – and the United States believes that Vietnam's understanding is not correct – Vietnam's claim under Article 9.3 is nevertheless dependent on the Panel finding that the separate rates applied to companies not individually examined in the second and third administrative reviews were inconsistent with the covered agreements when they were originally calculated in the original investigation.[14]

36. But those rates were not inconsistent with the covered agreements when they were originally calculated. The rates were not subject to the covered agreements when they were originally calculated – because the WTO Agreement did not apply between the United States and

[13] Vietnam Second Written Submission, para. 49 (emphasis added).

[14] *See* Vietnam First Written Submission, para. 214.

Vietnam at that time – and they cannot now be found to have been inconsistent with the covered agreements at the time they were originally calculated. Vietnam appears to be seeking to obtain the benefits of WTO Membership prior to its accession to the WTO.

37. As we have noted, the panel in *US – DRAMS* explained that "the AD Agreement only applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. Any aspects of a pre-WTO measure that are not covered by the scope of the post-WTO review do not become subject to the AD Agreement by virtue of Article 18.3 of the AD Agreement."[15] In that dispute, the panel found that "the product scope of the *DRAMS from Korea* order, and thus of the third administrative review, was determined once and only once in the original pre-WTO investigation, well before the entry into force of the WTO Agreement for the United States."[16]

38. Similarly, in this dispute, Commerce did not recalculate the rates that were calculated in the original investigation and Commerce did not make any new comparisons of export price and normal value. The separate rates in question were determined once and only once in the original pre-WTO investigation – before the entry into force of the WTO Agreement for Vietnam – and were then applied in the final results for the second and third administrative reviews. Commerce did not conduct a "post-WTO review" of the rates such that they became subject to the AD Agreement by virtue of such review.

39. Consequently, we respectfully submit that Vietnam's claim that the challenged measures are inconsistent with Article 9.3 of the AD Agreement must fail.

3. Article 2.4.2 of the AD Agreement

40. Vietnam also claims that the separate rates applied to companies not individually examined in the second and third administrative reviews are inconsistent with Article 2.4.2 of the AD Agreement, but this claim also must fail, for a number of reasons.

41. As we have previously explained , Article 2.4.2 is limited to the "investigation phase" and does not apply to determinations in administrative reviews. Vietnam asks the Panel to ignore the limitation in the text of Article 2.4.2 in order to find that the determinations in the second and third administrative reviews are inconsistent with that provision.

42. Furthermore, Commerce made no comparisons of normal value and export price during the second and third administrative reviews in order to determine the separate rates to apply to companies that were not individually examined. In the absence of rates that could be used to calculate a maximum antidumping duty according to the terms of Article 9.4, Commerce relied on rates calculated during the original investigation, but did not recalculate or otherwise

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[15] *US – DRAMS*, para. 6.14.

[16] *Id.*, para. 6.16 (emphasis added).

reexamine those rates, and nothing in the AD Agreement required Commerce to do so. Thus, Commerce took no action during the second and third administrative reviews that was even remotely related to or inconsistent with the obligations in Article 2.4.2 of the AD Agreement.

43. For Vietnam's claim to succeed, the Panel would have to find that the pre-WTO dumping margin calculations performed during the investigation were inconsistent with Article 2.4.2 at the time they were calculated. But, as we have explained, that is not possible because the United States had no WTO obligations with respect to Vietnam at that time.

44. Consequently, we respectfully submit that Vietnam's claim under Article 2.4.2 of the AD Agreement must fail.

4. Article 2.4 of the AD Agreement

45. Vietnam also claims that the separate rates applied to companies not individually examined in the second and third administrative reviews are inconsistent with Article 2.4 of the AD Agreement.

46. As we have explained, Article 2.4 establishes an obligation that a "fair comparison" be made between normal value and export price and then provides detailed guidance as to how that fair comparison is to be made. Again, Commerce made no comparisons of normal value and export price during the second and third administrative reviews in order to determine the separate rates to apply to companies that were not individually examined. So, there can be no breach of the "fair comparison" requirement based on action taken by Commerce during the second and third administrative reviews.

47. To the extent that Vietnam's claim is dependent upon a finding that the dumping margins calculated during the investigation were inconsistent with Article 2.4 at the time that they were originally calculated, the claim must fail because such a finding is not possible. The dumping margin calculations made during the investigation were performed prior to Vietnam's accession to the WTO and the United States had no WTO obligations with respect to Vietnam at that time.

48. Additionally, we would recall that Article 2.4 does not contain any obligations in respect of post-comparison aggregation, and it does not create an obligation to provide for offsets, or a prohibition of "zeroing."

49. Thus, Vietnam's claim that the challenged measures are inconsistent with Article 2.4 of the AD Agreement must fail.

50. For the reasons we have given, all of the claims in Vietnam's third request for findings are without merit. We thus respectfully ask the Panel to reject Vietnam's third request.

B. Vietnam's Fourth Request for Findings

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

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

As an initial matter, we would note that Commerce did not "fail" to consider the results of the individually examined respondents in the contemporaneous proceeding. Commerce was not required to consider them. None of the provisions cited by Vietnam – indeed, no provision of the AD Agreement – establishes a contemporaneity requirement with respect to the antidumping duty rates applied to companies not selected for individual examination when all of the margins of dumping calculated for examined companies are zero or *de minimis* or based on facts available. And it should go without saying that there is nothing prejudicial about the application of antidumping duty rates that are not inconsistent with any provision of the AD Agreement.

1. Article 9.4 of the AD Agreement

52. Turning to the specific provisions of the AD Agreement about which Vietnam asks the Panel to make findings, Article 9.4 of the AD Agreement, again, only establishes limited obligations relating to the maximum antidumping duty that may be applied to companies not individually examined. However, when all dumping margins calculated for individually examined companies are zero or *de minimis* or based on facts available, as was the case in the second and third administrative reviews, then Article 9.4 does not specify the maximum antidumping duty that may be applied. There is nothing in the text of Article 9.4 that establishes a contemporaneity requirement in a such a situation. Vietnam's interpretation is entirely divorced from the text.

53. Vietnam argues in its second written submission that:

> [t]he USDOC calculated the 4.57 percent rate three years prior, during the original investigation. This dumping margin does not reflect actions taken by exporters to modify their pricing behavior under the discipline of the order. The actions of the individually investigated exporters, all of whom eliminated their dumping behavior, constitutes the entirety of the evidence available on the response of exporters to the antidumping duty order.[17]

54. Nothing in the text of Article 9.4 conditions a Member's right to apply antidumping duties to companies that are not individually examined on a factual finding that other companies continued to dump during a particular period.

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

55. Furthermore, Vietnam is incorrect as a matter of fact. In the second administrative review, numerous companies avoided any possibility of being selected for individual examination by refusing to respond to Commerce's request for information concerning the quantity and value of their shipments to the United States, and Commerce determined the margin of dumping for these companies based on facts available using an adverse inference. In the first administrative review, which is not a measure at issue in this dispute, not only did companies not respond to quantity and value questionnaires, but several companies *selected for individual examination* failed to respond to Commerce's full sales and cost questionnaire. These adverse findings with respect to dumping cannot be considered evidence that dumping in the industry had ceased, but Vietnam asks the Panel to ignore these facts.

56. In any event, there simply is nothing in the text of Article 9.4 to support the imposition of the contemporaneity requirement that Vietnam asks the Panel to create. Consequently, we respectfully submit that Vietnam's claim under Article 9.4 of the AD Agreement must fail.

2. Article 17.6(i) of the AD Agreement

57. With respect to Vietnam's claim under Article 17.6(i) of the AD Agreement, because Vietnam did not raise any claims under Article 17.6(i) in its panel request, no claims under this provision are within the Panel's terms of reference.

58. Furthermore, Article 17.6(i) establishes a general obligation in respect of a dispute settlement panel's assessment of the facts of the matter. On its face, Article 17.6(i) does not impose any obligations on WTO Members. Thus, it is not clear how a Member may be found to have acted inconsistently with Article 17.6(i). In any event, Article 17.6(i) does not impose any additional obligations on Members in a situation in which Article 9.4 of the AD Agreement does not specify the maximum antidumping duty that may be applied to companies not individually examined. Rather, Article 17.6(i) provides a specific standard for the Panel's examination of Commerce's assessment of the facts.

59. Vietnam contends that Commerce failed to make "an unbiased and objective evaluation of the facts" in assigning rates to companies not individually examined in the second and third administrative reviews because "[t]he entire record before the USDOC evidenced an industry that did not dump subject merchandise above a *de minimis* amount" and thus, the rates assigned to companies not individually examined purportedly had "no basis in fact."[18]

60. As we have just explained, nothing in the text of Article 9.4 conditions a Member's right to apply antidumping duties to companies that are not individually examined on a separate factual finding that other companies continued to dump during a particular period. Even if it did, though, Vietnam's claim would be undermined by the facts – specifically, the fact that a number of producers/exporters failed to cooperate in the first and second administrative reviews and

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

Commerce therefore assigned to them antidumping duty rates determined on the basis of facts available. This is hardly evidence that dumping had stopped. Vietnam's argument that Commerce failed to make "an unbiased and objective evaluation of the facts" is without merit.

61. Consequently, Vietnam's argument that the challenged measures are inconsistent with Article 17.6(i) of the AD Agreement must fail.

3. Article 2.4 of the AD Agreement

62. Vietnam once again asks the Panel to find that the challenged measures are inconsistent with Article 2.4 of the AD Agreement, this time because of the requirement in Article 2.4 that "the sales being compared be made 'at as nearly as possible the same time.'"[19] Vietnam asserts that this establishes a general contemporaneity requirement, including with respect to the application of antidumping duties to companies not individually examined.

63. Again, Article 2.4 addresses the determination of margins of dumping, specifically the comparison of export price and normal value and adjustments to be made to ensure a "fair comparison." The obligation in Article 2.4 that the export price and normal value comparison be made "in respect of sales made at as nearly as possible the same time" relates to the calculation underlying the determination of dumping.

64. This obligation does not relate to the calculation of the maximum antidumping duty that may be applied to companies not individually examined pursuant to Article 9.4, nor to the actual antidumping duty applied to such companies when the duty is based on a previously determined dumping margin. Nothing in the text of the AD Agreement supports the linkage that Vietnam attempts to establish between Articles 2.4 and 9.4. It is particularly noteworthy that there are no cross references between these provisions. The Appellate Body has previously explained that the absence of cross references is of some consequence, as the drafters made "active use" of cross references in the covered agreements when they intended to apply obligations in different contexts. There are numerous cross references throughout the AD Agreement, but none that link Articles 2.4 and 9.4.

65. As we have explained, Commerce made no comparisons of normal value and export price during the second and third administrative reviews in order to determine the separate rates. Thus, there can be no breach of the "fair comparison" requirement based on action taken by Commerce during the second and third administrative reviews. Furthermore, the determination in the second and third administrative reviews to apply rates from the original investigation is not inconsistent with any of the obligations found in the text of Article 2.4.

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

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

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

67. Consequently, like its claims under Articles 9.4 and 17.6(i), Vietnam's claim under Article 2.4 of the AD Agreement must fail.

68. As we have shown, all of the claims in Vietnam's fourth request for findings are without merit. We thus respectfully ask the Panel to reject Vietnam's fourth request.

III. Vietnam's Fifth Request for Findings, Related to the Rate Assigned to the Vietnam-Wide Entity, Should Be Rejected

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

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

Vietnam has not established that the challenged measures are inconsistent with any of the cited provisions.

A. Article 17.6(i) of the AD Agreement

70. As noted earlier, no claim under Article 17.6(i) of the AD Agreement is within the Panel's terms of reference, and, on its face, Article 17.6(i) does not impose any obligations on WTO Members. Thus, it is not possible that the challenged measures could be found inconsistent with this provision.

71. Vietnam appears to invoke Article 17.6(i) in relation to its argument that Commerce lacked sufficient evidence to justify treating the Vietnam-wide entity as a single exporter or producer comprised of companies that did not demonstrate their independence from the government. However, the United States and Vietnam agree that, as a general matter, an investigating authority may, consistent with Article 6.10 of the AD Agreement, treat more than one company as a single entity based upon the relationship between those companies.[20] During the first panel meeting, Vietnam indicated in response to an oral question from the Panel that it agreed that the reasoning of the panel in *Korea – Certain Paper* is correct. In its second written submission, Vietnam confirms its view "that common control by the government of multiple entities may permit an authority to collapse this entity into a single entity and to apply a single rate to this single entity."[21]

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[20] *See, e.g.,* Vietnam Responses to Panel Questions, Question 35, para. 90.

[21] Vietnam Second Written Submission, para. 117.

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

73. For these reasons, Vietnam's argument under Article 17.6(i) of the AD Agreement must fail.

B. Article 6.8 and Annex II of the AD Agreement

74. Article 6.8 and Annex II of the AD Agreement permit the use of the facts available in any case "in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation. . . ." Rather than being limited in its application to individually examined companies, Article 6.8 refers to "*any* interested party." That includes companies not selected for individual examination and groups of companies treated as a single entity.

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

76. Because certain companies that were part of the Vietnam-wide entity refused to provide necessary information in the second administrative review, Commerce applied an antidumping duty rate to the Vietnam-wide entity that was based upon the facts available. Commerce's application of facts available to the Vietnam-wide entity in the second administrative review was not inconsistent with Article 6.8 and Annex II of the AD Agreement, and Vietnam's claim must fail.

77. In the third administrative review, Commerce did not apply to the Vietnam-wide entity a rate based upon facts available. Rather, Commerce applied to the Vietnam-wide entity the only rate that had ever been applied to it, relying on the same methodology used for the other separate rate companies in the third administrative review. Article 6.8 and Annex II of the AD Agreement govern the use of facts available. As Commerce did not apply to the Vietnam-wide entity a rate based upon facts available in the third administrative review, Vietnam's claim that the challenged measure is inconsistent with Article 6.8 and Annex II must fail.

C. Article 9.4 of the AD Agreement

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

maximum antidumping duty according to the terms of Article 9.4, and Article 9.4 does not specify a maximum antidumping duty that may be applied to companies not individually examined. Because that was the situation in the second and third administrative reviews, Commerce's determinations cannot be found inconsistent with Article 9.4 of the AD Agreement.

79. For these reasons, all of the claims in Vietnam's fifth request for findings are without merit, and we respectfully ask the Panel to reject Vietnam's fifth request.

IV. Vietnam's Sixth Request for Findings, Related to Commerce's Determinations to Limit Its Examination, Should Be Rejected

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

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

A. Article 6.10 of the AD Agreement

81. Article 6.10 of the AD Agreement does not require investigating authorities to determine margins of dumping for every exporter or producer where the number of exporters or producers "is so large as to make such a determination impracticable." In the second and third administrative reviews, there were more than 100 exporters or producers under review.

82. Vietnam has clarified that it is <u>not</u> arguing that Commerce "should have or could have investigated all the producers and exporters requesting reviews in each segment of the proceeding."[22] Vietnam indicates that requiring Commerce to do so would not be "reasonable."[23] Vietnam thus concedes that it was "impracticable" for Commerce to determine individual dumping margins for all exporters and producers.

83. Furthermore, 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. Vietnam has explained that, "[f]or purposes of this dispute, the Panel does not need to determine the precise percentage of producers or production that the USDOC could reasonably investigate under Article 6.10."[24]

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[22] Vietnam Opening Statement at the First Substantive Panel Meeting, para. 75.

[23] *Id*.

[24] Vietnam Responses to Panel Questions, Question 39, para. 95.

84. Thus, Vietnam has provided no basis to support its claim that the United States acted inconsistently with any obligation actually contained in the text of Article 6.10.

85. Vietnam's argument that Commerce's determinations were inconsistent with Article 6.10 because Commerce "made no effort to explore alternatives" to examine more exporters and producers when it limited its examination is simply another attempt by Vietnam to invent an obligation that has no textual basis. Nothing in Article 6.10, or any other provision of the AD Agreement, requires Commerce to "explore alternatives" as proposed by Vietnam.

86. Consequently, we respectfully submit that Vietnam's claim under Article 6.10 of the AD Agreement must fail.

B. Article 6.10.2 of the AD Agreement

87. With respect to Vietnam's claim under Article 6.10.2 of the AD Agreement, Vietnam itself has put before the Panel the evidence necessary to demonstrate that Commerce did not act inconsistently with the obligations in that provision.

88. Article 6.10.2 requires that companies not initially selected who wish to have an individual margin of dumping calculated must "submit[] the necessary information in time for that information to be considered." The information provided by Vietnam in response to the Panel's written questions demonstrates that the "necessary information" was never submitted in either the second or third administrative reviews and this conclusively establishes that Commerce was under no obligation to determine individual margins of dumping for "voluntary respondents" in those proceedings.[25]

89. In its second written submission, Vietnam for the first time suggests that Commerce acted inconsistently with Article 6.10.2 by "discouraging" voluntary responses, contrary to the prohibition against doing so in the last sentence of that provision.[26] There is no basis for Vietnam's assertion. Vietnam offers no evidence of so-called "discouraging behavior" other than Commerce's determinations to limit its examination, which, as we have explained, are consistent with the requirements of Article 6.10. Again, Commerce cannot be found to have acted inconsistently with one provision of the AD Agreement by virtue of its proper application of another provision.

90. Consequently, Vietnam's claim under Article 6.10.2 of the AD Agreement must fail.

C. Articles 9.3, 11.1, and 11.3 of the AD Agreement

[25] *See* Vietnam Responses to Panel Questions, Question 42, para. 100.

[26] Vietnam Second Written Submission, para. 133.

91. Vietnam's request that the Panel find the challenged measures inconsistent with Articles 9.3, 11.1, and 11.3 of the AD Agreement, due to Commerce's determinations to limit its examination in the second and third administrative reviews, is difficult to understand and entirely without merit.

92. As an initial matter, none of these provisions establish any obligations with respect to an investigating authority's determination to limit its examination. And the determination to limit the examination and the application of antidumping duties to companies not individually examined is unrelated to the obligations in the cited provisions.

93. Where there is a valid determination to limit the examination, consistent with the requirements of Articles 6.10 and 6.10.2, as there was in the second and third administrative reviews, then Article 9.4 permits the application of an antidumping duty to the companies not individually examined that, necessarily, is not based on any information provided by those companies. Where all of the dumping margins calculated for examined companies are zero or *de minimis* or based on facts available, Article 9.4 does not specify the maximum antidumping duty that may be applied to such companies.

94. Vietnam's assertion that Commerce acted inconsistently with Article 9.3 because it "failed throughout the shrimp antidumping proceeding to make any connection between the antidumping duty assigned to companies not selected for individual examination and their margin of dumping or any facts otherwise on the record" makes no sense.[27] Of course there is no connection between the antidumping duty applied to companies not individually examined and "their margin of dumping," because no margin of dumping was determined for them. This is true whether or not Article 9.4 specifies a maximum antidumping duty that may be applied. If Vietnam's interpretation were accepted, Members would no longer have the right to limit the examination and would, in all cases, be required to determine individual margins of dumping for all companies. Vietnam's proposed interpretation reads the second sentence of Article 6.10, and all of Article 9.4, out of the AD Agreement. Vietnam's proposed interpretation thus is not permissible under the customary rules of treaty interpretation.

95. Vietnam's claims under Articles 11.1 and 11.3 are likewise devoid of merit. Vietnam argues that Commerce "has applied Article 6.10 in a manner that produces results inconsistent with Article 11.1,"[28] and Commerce's "application of Article 6.10 restricts the rights of respondent parties granted under Article 11.3."[29] Vietnam's claims under Article 11.1 and 11.3 appear to be dependent on its claims that Commerce's determinations to limit its examination are inconsistent with Article 6.10 of the AD Agreement, but we have shown that they are not.

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[27] Vietnam Second Written Submission, para. 120.

[28] Vietnam Second Written Submission, para. 130.

[29] Vietnam Second Written Submission, para. 131.

96. A somewhat more disturbing implication of Vietnam's argument is that, regardless of whether Commerce's determinations are inconsistent with Article 6.10, the determinations to limit the examination nevertheless are inconsistent with Articles 11.1 and 11.3. But Commerce cannot be found to have acted inconsistently with one provision of the AD Agreement due to the proper exercise of U.S. rights under a separate provision of the AD Agreement. Vietnam's interpretation would, again, read out of the AD Agreement the right to limit the examination as provided in the second sentence of Article 6.10 and in Article 9.4.

97. Additionally, Vietnam's interpretation that Articles 11.1 and 11.3 "require that an authority permit revocation determinations on a company-specific basis" is incorrect and inconsistent with prior Appellate Body reports interpreting these provisions. The Appellate Body has confirmed that Article 11.1 does not impose any independent or additional obligations on Members[30] and that "Article 11.3 does not require investigating authorities to make their likelihood determination on a company-specific basis."[31] Vietnam's proposed interpretations have been considered before and rejected.

98. Consequently, all of the claims in Vietnam's sixth request for findings must fail. We thus respectfully ask the Panel to reject Vietnam's sixth request.

V. Vietnam's Requests for Findings Related to Its "Continued Use" Claims Should Be Rejected

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

100. We have demonstrated in our written submissions and oral presentations to the Panel that no so-called "continued use" measure is within the Panel's terms of reference because Vietnam failed to specifically identify any such measure in its panel request, contrary to the obligation in Article 6.2 of the DSU.

101. Furthermore, even if Vietnam had referenced a "continued use" measure in its panel request, such a measure appears to be a fictional construct supposedly composed of an indeterminate number of potential future measures that did not exist at the time of Vietnam's panel request (and may never exist). Such so-called "continued use" cannot be subject to dispute settlement because it could not be impairing any benefits accruing to Vietnam, and it consists of proceedings that had not resulted in "final action" at the time of the consultations request, as required by Article 17.4 of the AD Agreement.

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[30] *EC – Tube or Pipe Fittings (AB)*, para. 81, 84 (Affirming the panel's finding. The panel explained that "Article 11.1 does not set out an independent or additional obligation for Members." *EC – Tube or Pipe Fittings (Panel)*, para. 7.113).

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

102. For these reasons, Vietnam's claims in respect of the alleged "continued use" measures must fail.

103. Additionally, the facts in this dispute do not support a conclusion that the three challenged "practices" "would likely continue to be applied in successive proceedings."[32] In *US – Continued Zeroing*, the Appellate Body found that the record supported findings of inconsistency in only four of the eighteen cases challenged. Where there was "a lack of evidence showing that zeroing was used in one periodic review listed in the panel request" or "the sunset review determination was excluded from the Panel's terms of reference," the Appellate Body found that "the Panel [had] made no finding confirming the use of the zeroing methodology in successive stages over an extended period of time whereby the duties are maintained."[33]

104. In this dispute, the original investigation, the first, fourth, and fifth administrative reviews, and the sunset review are not within the Panel's terms of reference and hence no substantive findings that Commerce acted inconsistently with the AD Agreement or the GATT 1994 may be made with respect to those proceedings.[34]

105. Additionally, Vietnam has failed to establish that "zeroing" had any impact on the margins of dumping calculated for the individually examined respondents in the second and third administrative reviews, and Vietnam has failed to establish as a factual matter that Commerce used the zeroing methodology in connection with the application of a dumping margin to separate rate respondents in those proceedings, or to the Vietnam-wide entity.

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

107. Therefore, Vietnam cannot establish "a string of determinations, made sequentially. . . over an extended period of time" with respect to any of the "challenged practices," and so its claims must fail. Consequently, we respectfully request that the Panel reject Vietnam's requests for findings related to "continued use."

VI. Conclusion

108. While we have not repeated this morning all of the arguments advanced in our two written submissions, in oral statements during the first substantive panel meeting, and in response to the Panel's written questions, we continue to rely on all of the arguments we have made during this proceeding. For all of the reasons we have given, the United States submits that

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

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

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

the only conclusion to be drawn is that each of Vietnam's claims is without merit and we thus respectfully request that the Panel reject Vietnam's claims in their entirety.

109. Mr. Chairman, members of the Panel, this concludes our opening statement. We would be pleased to respond to any questions you may have.