# US – ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM

**WT/DS404**

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

**September 20, 2010**

## I. Introduction

1. This is not merely another zeroing dispute. Zeroing, as a factual matter, had no impact on the margins of dumping determined for individually examined exporters or producers in the challenged proceedings, and it was not used during the proceedings in order to determine any other assessment rates applied. Beyond its unfounded zeroing claims, Vietnam seeks to undermine the ability of investigating authorities to conduct antidumping examinations when faced with incomplete information, uncooperative interested parties, and large numbers of respondent firms. Ultimately, Vietnam asks this Panel to read obligations into the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), notwithstanding the fact that there is no textual basis for such obligations. This Panel should make an objective assessment of the matter before it and refrain from adopting Vietnam's interpretations.

2. Vietnam also challenges a number of "measures" that are not properly before the Panel. The United States requests that the Panel grant the requests for preliminary rulings with respect to these "measures."

## II. General Principles

3. The complaining party bears the burden of proving that a measure is inconsistent with the obligations in a covered agreement. In a dispute involving the AD Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) of the AD Agreement, which confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation." Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.

4. Article 11 of the Dispute Settlement Understanding ("DSU") requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. The Appellate Body has explained that the matter includes both the facts of the case (and the specific measures at issue in particular) and the legal claims raised.

5. Articles 3.2 and 19.2 of the DSU mandate that the findings and recommendations of a panel or the Appellate Body, and the recommendations and rulings of the Dispute Settlement Body ("DSB"), cannot add to or diminish the rights and obligations provided in the covered agreements. While prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members, the Panel is not bound to follow the reasoning set forth in any Appellate Body report. The rights and obligations of the Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements.

## III. Requests for Preliminary Rulings

6. **The Investigation**: Pursuant to Article 18.3 of the AD Agreement, the original antidumping investigation of shrimp from Vietnam is not subject to the AD Agreement. The investigation was initiated pursuant to an application made before January 11, 2007, the date on which the WTO Agreement entered into force for Vietnam. Consequently, determinations made by Commerce in the course of the investigation are not subject to the provisions of the AD Agreement and may not be reviewed by this Panel.

7. In addition, the investigation was not included in Vietnam's request for consultations. Article 4.4 of the DSU provides that a request for consultations must state the reasons for the request, "including identification of the measure at issue and an indication of the legal basis for the complaint." Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if "the consultations fail to settle a dispute." Article 17.4 of the AD Agreement states that a Member may only refer "the matter" to the DSB following a failure of consultations to achieve a mutually agreed solution, and final action by the administering authorities of the importing Member to levy definitive antidumping duties or to accept price undertakings. Because Vietnam failed to include the investigation in its consultations request, the shrimp antidumping investigation is outside the Panel's terms of reference.

8. **The First Administrative Review**: Like the investigation, the first administrative review was initiated prior to Vietnam's accession to the WTO. Per the terms of Article 18.3 of the AD Agreement, the application of the AD Agreement is strictly limited "to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement" (emphasis added). Accordingly, for the same reasons given with respect to the investigation, the AD Agreement does not apply to Commerce's determination in the first administrative review.

9. **The "Continued Use of Challenged Practices"**: The "continued use of challenged practices" is not a "measure" within the Panel's terms of reference. Article 6.2 of the DSU requires that a panel request "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Vietnam's panel request limits the measures at issue to the particular determinations identified therein and fails to identify the "continued use of challenged practices" as a measure at issue in this dispute. Vietnam's panel request here is distinguishable from the EC's request in *US – Continued Zeroing*; Vietnam's panel request fails to identify the "continued use of challenged practices" at all. Because the panel request defines the jurisdiction of a panel, the "continued use of challenged practices" is outside the Panel's jurisdiction. The component proceedings of the "continued use" measure are outside the Panel's terms of reference as well, because Vietnam is attempting to expand the scope of the proceedings it identified in its panel request.

10. Additionally, this purported "measure" is not subject to WTO dispute settlement because it appears to be composed of an indeterminate number of potential future measures. It is impossible for Members to consult on a measure that does not exist, and a non-existent measure cannot meet the requirement of Article 4.2 of the DSU that the measure be "affecting" the operation of a covered agreement. In *US – Upland Cotton*, the panel found that a measure that had not yet been adopted could not form part of its terms of reference, noting that such a "measure" could not have been impairing any benefits because it was not in existence at the time of the panel request. Furthermore, Article 17.4 of the AD Agreement provides that a Member may refer "the matter" to dispute settlement only if consultations have failed to resolve the dispute and "final action" has been taken by the administering authorities of the importing Member to levy definitive antidumping duties or to accept price undertakings. At the time of Vietnam's panel request, the alleged "continued use of the challenged practices" did not involve a final action to levy definitive antidumping duties or accept price undertakings.

## IV. Vietnam's Claims Regarding Zeroing Are Without Merit

11. Vietnam argues that Commerce's "use of zeroing" in the original investigation is inconsistent with U.S. WTO obligations. The investigation is not within the Panel's terms of reference and was not subject to the AD Agreement, so Commerce's determination therein cannot be found inconsistent with Article 2.4.2 of the AD Agreement. To the extent that Commerce relied on dumping margins calculated during the investigation in later assessment reviews, the use of such margins in an assessment review cannot result in a finding that the determination in the investigation is inconsistent with Article 2.4.2 of the AD Agreement. Furthermore, the use of dumping margins from the original investigation in later assessment proceedings cannot itself be found inconsistent with Article 2.4.2 of the AD Agreement, since Article 2.4.2 is limited by its terms to the "investigation phase."

12. Vietnam contends that the use of zeroing in the second and third administrative reviews to calculate dumping margins applied to individually examined respondents was inconsistent with the WTO Agreements. Vietnam has not explained how the margins of dumping calculated for the individually examined firms were affected by "zeroing." Commerce calculated either a zero or *de minimis* margin of dumping for every company individually examined in the second and third administrative reviews. Given the zero and *de minimis* dumping margins, and that no antidumping duties were assessed based on "zeroing," it is not possible that antidumping duties were imposed that exceeded the margins of dumping, so there can be no violation of the obligations in Article VI:2 of the GATT 1994 or Article 9.3 of the AD Agreement.

13. In addition, the text and context of the relevant provisions of the AD Agreement, interpreted in accordance with customary rules of interpretation of public international law, do not support a general prohibition of zeroing that would apply in the context of assessment proceedings. The methodology used by Commerce to calculate antidumping duties in the assessment proceedings in question rests on a permissible interpretation of the AD Agreement and is WTO-consistent.

14. In *US – Softwood Lumber V (AB)*, the Appellate Body found that the exclusive textual basis for an obligation to account for such non-dumping in calculating margins of dumping appears in connection with the obligation in Article 2.4.2 that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a *weighted average normal value with a weighted average of prices of all comparable export transactions* . . . ." This particular text of Article 2.4.2 applies only within the limited context of determining whether dumping exists in the investigation phase when using the average-to-average comparison methodology in Article 2.4.2.

15. If Vietnam is correct that there is a general prohibition of zeroing that applies in all proceedings and under all comparison methodologies, the meaning ascribed to "all comparable export transactions" by the Appellate Body in *US – Softwood Lumber V* would be redundant of the general prohibition of zeroing. The Appellate Body recognized the need to avoid such redundancy in *US – Zeroing (Japan)*. There, the Appellate Body reinterpreted "all comparable export transactions" to relate solely to all transactions within a model, and not across models of the product under investigation. However, this is inconsistent with the reasoning in *US – Softwood Lumber V (AB)*.

16. Subsequent to *US – Softwood Lumber V (AB)*, several panels examined whether the obligation not to "zero" when making average-to-average comparisons in an investigation extended beyond that context. In making an objective assessment of the matter, these panels determined that the customary rules of interpretation of public international law do not support a

reading of the AD Agreement that expands the zeroing prohibition beyond average-to-average comparisons in an investigation. This Panel should likewise find that, at a minimum, it is permissible to interpret the AD Agreement as not prohibiting zeroing outside the context where the interpretation of "all comparable export transactions" articulated in the Appellate Body report in *US – Softwood Lumber V* is applicable.

17. Vietnam's claims depend on interpreting "margins of dumping" and "dumping" as relating exc lusively to the "product as a whole." The term "product as a whole" does not appear in the text of the AD Agreement. The panel in *US – Zeroing (Japan)* explained, "'[T]here is nothing inherent in the word 'product[]' (as used in Article VI:1 of the GATT 1994 and Article 2.1 of AD Agreement) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis . . . .'" The panel in *US – Softwood Lumber V (Article 21.5)* explained, "an analysis of the use of the words product and products throughout the *GATT 1994*, indicates that there is no basis to equate product with 'product as a whole'. . . . Thus, for example, when Article VII:3 of the GATT refers to 'the value for customs purposes of any imported product', this can only be interpreted to refer to the value of a product in a particular import transaction."

18. Vietnam also has not demonstrated any inconsistency with Article 9.3 of the AD Agreement nor Article VI:2 of the GATT 1994. Vietnam argues that the antidumping duty has exceeded the margin of dumping established under Article 2. This argument depends entirely on a conclusion that Vietnam's preferred interpretation of the "margin of dumping," which precludes any possibility of transaction-specific margins of dumping, is the only permissible interpretation of this term as used in Article 9.3 of the AD Agreement. However, antidumping duties are assessed on individual entries resulting from those individual transactions. The obligation set forth in Article 9.3 – to assess no more in antidumping duties than the margin of dumping – is similarly applicable at the level of individual transactions. All panels that have examined this issue – in *US – Zeroing (EC)*, *US – Zeroing (Japan)*, and *US – Stainless Steel (Mexico)* – have agreed with this interpretation. These panels' understanding of Article 9.3 of the AD Agreement is, at a minimum, a permissible interpretation of the provision.

## V. Vietnam's Claims Regarding the "Country-Wide" Rate Are Without Merit

19. Vietnam argues that Commerce's assignment of a margin of dumping to the Vietnam-wide entity in the second and third administrative reviews was inconsistent with various obligations under the AD Agreement. Vietnam incorrectly refers to the assignment of an assessment rate to the Vietnam-wide entity as an assignment of a "country-wide" rate. The premise of Vietnam's argument is factually incorrect: Commerce did not assign a "country-wide" rate. The Vietnam-wide entity rate was assigned to those companies that had not established that they are free from government influence, particularly in their export activities, and thus are reasonably considered to be parts of one entity that Commerce has identified as an "exporter" or "producer" under Article 6.10 of the AD Agreement.

20. Article 6.10 requires an investigating authority to determine an individual margin of dumping for each known "exporter" or "producer" of the product under investigation, unless this is not practicable. Prior to assigning an individual dumping margin, however, the authority must identify whether an entity is an "exporter" or "producer." The AD Agreement does not define the terms "exporter" or "producer," nor does it establish criteria for an investigating authority to examine in order to determine whether a particular entity constitutes an "exporter" or "producer." Therefore, an authority is permitted to determine, based upon the facts on the record, whether a

given entity constitutes an "exporter" or "producer" as a condition precedent to calculating an individual dumping margin for that entity. Depending on the facts of a given situation, an investigating authority may determine that legally distinct companies should be treated as a single "exporter" or "producer" based upon their activities and relationships. The reasoning of the panel in *Korea – Certain Paper* supports this interpretation of Article 6.10 of the AD Agreement.

21. An inquiry into the relationship between companies and the reality of their respective commercial activities is also relevant in the context of exporters from a non-market economy. As the term suggests, in a non-market economy, government influence on the economy interferes with the full functioning of market principles. Due to this distortion, prices in a non-market economy cannot be used in antidumping calculations because they do not sufficiently reflect demand conditions or the relative scarcity of resources. In other words, there is an absence of the demand and supply elements that separately and collectively make a market-based price system work. During Vietnam's accession negotiations, Members expressed concern about the influence of the Government of Vietnam on its economy and how such influence could affect cost and price comparisons in antidumping duty proceedings.

22. Commerce's 2002 inquiry into the non-market nature of Vietnam's economy confirmed that the Government of Vietnam maintains significant control over the Vietnamese economy. During the antidumping duty investigation on frozen fish fillets from Vietnam, Commerce investigated and analyzed the extent of government influence on the Vietnamese economy for the purpose of determining whether Vietnam should be classified as a non-market economy in Commerce's antidumping proceedings. Commerce incorporated by reference and relied on the analysis in the fish fillets investigation when it determined that Vietnam continues to be a non-market economy for the purposes of the determinations challenged in this dispute. Thus, as one of the first steps in the administrative reviews at issue, Commerce determined whether the particular companies being examined were sufficiently free from government control so that, *inter alia*, their export prices were not being set by the government. In order to make this determination, Commerce required each company to submit information demonstrating the company's independence from government control regarding export activities. If Commerce had previously determined that a company was entitled to an individual rate, then that company needed only submit a certification that its status had not changed. However, if a company could not demonstrate that it was sufficiently free from government influence, Commerce considered that company ineligible for an individual (or "separate") rate. Instead, that company was identified as being part of the Vietnam-wide entity, *i.e.*, the entity that is presumed to control the export activities of the companies that compose it.

23. Contrary to Vietnam's claim, this is not a discriminatory practice. Commerce collects similar information in market economy cases to identify each company's affiliates, including information regarding percentage of ownership and ultimate decision making authority. If the data indicate that companies are affiliated and the relationships are sufficiently close so as to allow one company to influence another, Commerce treats the companies as a single entity.

24. The non-market economy entity is treated just like any other "exporter" or "producer" being examined under Article 9 of the AD Agreement. If the non-market economy entity does not provide information requested, the authority may rely upon the facts available pursuant to Article 6.8 and Annex II of the AD Agreement. In the second administrative review, numerous interested parties determined to be part of the Vietnam-wide entity failed to provide necessary information requested by Commerce. Thus, Commerce had to rely upon the facts available.

Neither Article 6.8 nor Annex II requires investigating authorities to limit the application of facts available to "individually examined exporters/producers."

25. Vietnam further attempts to limit the ability of investigating authorities to rely on facts available by arguing that "necessary information" should be narrowly understood as only that information which is used to calculate dumping margins. There is no basis in the text of the AD Agreement for such a limitation. Vietnam's reliance on the panel report in *Argentina – Ceramic Tiles* is misplaced; that panel was not examining the definition of the term"necessary information" in Article 6.8. Vietnam also mischaracterizes the finding of the panel in *Egypt – Steel Rebar*. That panel found that "it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.) . . . ." Regardless, the information that Commerce requested was necessary in order to define the pool from which Commerce selected the largest exporters, and the information also represented the data necessary for determining a company's export price, once selected for individual examination.

26. It is important to emphasize that, in the second administrative review, the Vietnam-wide entity received a rate based upon the facts available because of the non-cooperation of several of the parties that make up that entity. In fact, every party under review that was identified as being part of the Vietnam-wide entity failed to cooperate by not responding to a request for necessary information, *i.e.*, the quantity and value questionnaires. As a result, the rate assigned to each of the companies that were identified as being part of the Vietnam-wide entity would also have been based upon the facts available even if they each had been assigned an individual rate. That is, consistent with Article 6.8 and Annex II of the AD Agreement, each of these companies would have been assigned a rate based entirely upon the facts available because they failed to cooperate with the investigation by refusing to provide necessary information.

27. In the third administrative review, many of the companies under review did not provide information to demonstrate that their export activities were independent of government control. Accordingly, Commerce determined that they were part of the single Vietnam-wide entity and determined an appropriate rate to apply to entries from this entity. Commerce applied to the Vietnam-wide entity the same rate applied to it in the most recently completed proceeding, because this was "the only rate ever determined for the Vietnam-wide entity in this proceeding."

## VI. Vietnam's Claims Regarding the "All Others Rate" Are Without Merit

28. Vietnam claims that the separate rates applied by Commerce to certain exporters or producers in the challenged determinations are inconsistent with Articles 2.4 and 9.4 of the AD Agreement because 1) the rate was calculated using the zeroing methodology, and 2) the rate was a weighted average of dumping margins calculated during the original investigation rather than a weighted average of dumping margins calculated during the particular administrative reviews.

29. Vietnam's argument is dependent upon its claim that Commerce acted inconsistently with the AD Agreement when it employed the zeroing methodology in the original investigation. Commerce's determination of the separate rate for non-examined exporters and producers in the investigation, which Vietnam refers to as the "all-others rate," was made prior to the entry into force of the WTO Agreement with respect to Vietnam. Thus, that determination was not subject to the AD Agreement and cannot have been inconsistent with Article 2.4 of the AD Agreement.

30. In addition, the separate rates determined in the original investigation do not become subject to the AD Agreement simply because they continued to be applied on or after the date of entry into force of the WTO Agreement for Vietnam. Article 18.3 of the AD Agreement provides that "the provisions of this Agreement shall apply to investigations, and assessment proceedings of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement." In *US – DRAMS*, the panel analyzed Article 18.3 of the AD Agreement, and reasoned that "[P]re-WTO measures do not become subject to the AD Agreement simply because they continue to be applied on or after the date of entry into force of the WTO Agreement for the Member concerned."

31. The calculations that Commerce performed in the investigation to determine the separate rates "were not subject to any re-examination" in the second and third assessment proceedings. Commerce made no new comparisons between the export price and the normal value. Commerce simply applied a previously calculated rate from the investigation, or a prior proceeding, to respondents that demonstrated sufficient independence from the government during the second and third administrative reviews. Therefore, as in *US – DRAMS*, the separate rates determined in the original investigation, and applied in the second and third administrative reviews, did not become subject to the AD Agreement simply because they continued to be applied after the date of entry into force of the WTO Agreement for Vietnam.

32. In addition to its arguments related to zeroing, Vietnam asserts that the rate Commerce applied to companies that were not individually examined in the second and third administrative reviews "unfairly prejudiced" such companies, and for this reason was inconsistent with Article 9.4 of the AD Agreement. Vietnam misunderstands the requirements of Article 9.4 and has not substantiated its claim that Commerce acted inconsistently with that provision. The Appellate Body explained in *US – Hot-Rolled Steel* that, on its face, Article 9.4 expressly requires an investigating authority to disregard zero or *de minimis* margins, or margins based on facts available, when determining a dumping margin ceiling for non-examined exporters or producers based on the weighted average margin of dumping of the examined exporters or producers. Vietnam correctly notes the possibility that "[i]n certain situations, . . . the individually examined exporters/producers may all receive an antidumping duty of zero, *de minimis*, or based on facts available, the three margins explicitly prohibited by Article 9.4 from calculation of the guiding ceiling." That is the case here. In the absence of rates that could be used to calculate a weighted average consistent with the requirements of Article 9.4, Commerce determined that it would be appropriate to rely on either a rate calculated during the original investigation, which was a weighted average of dumping margins calculated for exporters and producers individually examined in that proceeding, excluding any zero and *de minimis* margins and margins based on facts available, or a company-specific rate from a more recently completed proceeding where such a rate had been determined for a company.

33. In *US – Zeroing (EC) (21.5)*, while the Appellate Body recognized that Article 9.4 is silent regarding this situation, it nevertheless found that Article 9.4 includes some, notably undefined, obligation relating to the calculation of the rate for non-examined companies. Respectfully, the United States believes that the Appellate Body was incorrect. The Appellate Body did not opine on any "specific alternative methodologies to calculate the maximum allowable 'all others' rate in situations where all margins of dumping calculated for the examined exporters fall into the three categories to be disregarded . . ." nor did it articulate a legal standard for assessing the consistency of an investigating authority's action with the "obligation" in Article 9.4 in such situations. Hence, the Appellate Body report in *US – Zeroing (EC) (21.5)*

offers the Panel no guidance for its analysis of the consistency with Article 9.4 of the methodology applied by Commerce in the second and third administrative review.

34. In the absence of any legal standard or defined obligation, it is not clear how the separate rates Commerce applied to non-examined exporters and producers in the second and third administrative reviews could be deemed inconsistent with Article 9.4. Commerce applied a reasonable method of determining dumping margins that was reflective of the range of commercial behavior demonstrated by exporters and producers of the subject merchandise during a very recent period and provided a reasonable security going forward for the payment of antidumping duties for those companies that were not individually examined.

35. Vietnam criticizes the "application of an antidumping margin that has no basis in the relevant period of review" and proposes that Commerce should be required to "recalculate the all-others rate using a weighted-average of the individually reviewed exporters/producers for the contemporaneous phase of the proceeding." Vietnam appears to be arguing that Commerce violated Article 9.4 of the AD Agreement by acting consistently with the explicit prohibition in Article 9.4 against using zero and *de minimis* margins to determine the ceiling for the dumping margin to be applied to non-examined exporters and producers. Vietnam's argument is internally incoherent and cannot be accepted.

## VII. Vietnam's Claims Regarding Limiting the Number of Respondents Selected Are Without Merit

36. Vietnam argues that Commerce's determinations to limit its examination in each of the proceedings at issue are inconsistent with the AD Agreement. Vietnam misconstrues the AD Agreement obligations. Article 6.10 of the AD Agreement allows Members to determine individual margins of dumping for a *reasonable* number of exporters and producers, and does not require the determination of an individual margin of dumping for *all* exporters and producers, where a large number of exporters and producers is involved. The only condition for limiting an examination is that the number of exporters or producers must be so large as to make a determination of individual margins of dumping for all exporters or producers "impracticable."

37. Article 6.10 does not define the term "impracticable." The ordinary meaning of the term "impracticable" is "unable to be carried out or done; impossible in practice," or "incapable of being performed or accomplished by the means employed or at command." Vietnam incorrectly argues, contrary to the panel's findings in *EC – Salmon (Norway)*, that a determination to limit an examination must be based solely upon the number of companies involved in the proceeding, without regard to an investigating authority's resources. Article 6.10 permits the limiting of an examination when an authority does not have the resources to individually examine all parties involved in an investigation. Here, Commerce explained why it was necessary to limit the examination, noting the large number of companies involved, and providing an analysis of Commerce's available resources. Based upon this analysis, Commerce determined that it would be impracticable to individually examine all of the companies involved.

38. Vietnam further suggests that there is a limit to the number of times an authority may limit its examination, and that Commerce has surpassed that limit and turned the exception into the rule. Article 6.10 of the AD Agreement contains no such limitation. Any time the Article 6.10 conditions are satisfied, an authority may limit its examination.

39. Vietnam asserts that, by limiting its examination in the proceedings at issue, Commerce denied particular companies the opportunity, pursuant to a U.S. regulation, to have the antidumping order revoked with respect to their exports. Vietnam argues that this violated Article 11.1 of the AD Agreement. This claim is entirely dependent on Vietnam's claim under Article 6.10 of the AD Agreement, which, as explained above, is without merit. Additionally, Vietnam misunderstands the meaning of Article 11.1. As the Appellate Body has confirmed, Article 11.1 does not impose any independent or additional obligations on Members, so Commerce's determinations cannot violate Article 11.1. Furthermore, the obligations in Article 11 apply to the antidumping duty order as a whole, not as applied to individual companies. As the Appellate Body found in *US — Corrosion-Resistant Steel Sunset Review*, "the duty" referenced in Article 11.3 is imposed on a product-specific (*i.e.*, order-wide) basis, not a company-specific basis. To the extent that Vietnam's claim rests on an alleged obligation to revoke the antidumping duty order on shrimp with respect to certain individual companies, that claim must fail.

40. Vietnam argues that Commerce violated Article 11.3 of the AD Agreement because, in declining to individually examine all companies requesting review in every proceeding at issue, Commerce has prevented these companies from demonstrating an absence of dumping, which Vietnam contends is the basis for determining whether to continue the order. The sunset review of the shrimp antidumping order, *i.e.*, the Article 11.3 review, is not within the Panel's terms of reference. The sunset review has not yet been completed and, consequently, there is no determination for the Panel to review. In any event, Article 11.3 provides that a definitive antidumping duty must be terminated after five years unless the authorities determine that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The focus of a sunset review is on future behavior, *i.e.*, whether dumping and injury are likely to continue or recur in the event of expiry of the duty, not whether or to what extent dumping or injury currently exists. Contrary to Vietnam's assertion, Commerce's sunset review determination is not based solely upon the existence of dumping margins in administrative reviews. Parties are permitted to place any information they choose on the administrative record of the sunset review. Vietnam's argument relies on a mischaracterization of the analysis Commerce performs in a sunset review.

41. Vietnam alleges that Commerce acted inconsistently with Article 6.10.2 of the AD Agreement by not determining individual dumping margins for companies that voluntarily submitted necessary information. Commerce could not have acted inconsistently with Article 6.10.2 because no company voluntarily provided the necessary information in the second and third administrative reviews such that any obligation under that provision was triggered.

42. In the fourth administrative review, which is not within the Panel's terms of reference, two companies requested voluntary respondent status and submitted what they purported was the necessary information. Commerce determined that it could only individually examine two companies. This determination was made based upon the large number of companies involved in the proceeding, as well as Commerce's resource constraints. Article 6.10 permits the limitation of an examination when the number of companies involved is so large as to make an individual determination for each company impracticable. Article 6.10.2, on the other hand, requires an authority to determine an individual margin of dumping for each company that voluntarily submits necessary information, unless the amount of companies involved is so large as to make an individual determination for each company that voluntarily submits information "unduly burdensome." Commerce explained that it could individually examine only two companies, and, more than being "unduly burdensome," it was impossible to examine any more. Thus,

Commerce's decision not to determine individual dumping margins for these two companies was consistent with Article 6.10.2.

## VIII. Vietnam's Claim with Respect to the Continued Use of Challenged Practices Is Without Merit

43. Vietnam submits that "the USDOC has utilized the challenged practices in an original investigation, four consecutive administrative reviews, and in the preliminary results of the ongoing sunset review" and argues that this is inconsistent with various provisions of the AD Agreement and the GATT1994. As explained above, the "continued use of the challenged practices" is not a measure within the Panel's terms of reference. In any event, Vietnam's argument is premised on its assertion that such "continued use" constitutes an "ongoing conduct." Even were this a cognizable claim, the facts belie a conclusion that any such "ongoing conduct" exists or is likely to continue.

44. The United States has serious concerns about the rationale articulated by the Appellate Body in the *US – Continued Zeroing* dispute. Vietnam incorrectly asserts that the facts of this case are "virtually identical" to the cases found to be inconsistent in that dispute. In *US – Continued Zeroing*, the Appellate Body found that the record supported findings of inconsistency in only four of the eighteen cases challenged, *i.e.*, where "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time." Each of the four cases where the Appellate Body concluded that there was "a sufficient basis for [the Appellate Body] to conclude that the zeroing methodology would likely continue to be applied in successive proceedings" included: (1) the use of the zeroing methodology in the initial less than fair value investigation; (2) the use of the zeroing methodology in four successive administrative reviews; and (3) reliance in a sunset review upon rates determined using the zeroing methodology.

45. The facts in this dispute do not support a conclusion that the challenged practices "would likely continue to be applied in successive proceedings." The original investigation, the first, fourth, and fifth administrative reviews, and the sunset review are not within the Panel's terms of reference and there can be no finding of inconsistency in connection with those proceedings. Additionally, Vietnam has failed to establish that "zeroing" had any impact on the margins of dumping calculated 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. Hence, with respect to Commerce's use of zeroing, Vietnam cannot establish "a string of determinations, made sequentially. . . over an extended period of time."

46. Vietnam seeks to expand the Appellate Body's reasoning in *US – Continued Zeroing* beyond zeroing to encompass the other "challenged practices." As demonstrated above, though, Vietnam's claims regarding the other "challenged practices" are without merit, and thus Vietnam cannot establish "a string of determinations, made sequentially. . . over an extended period of time" with respect to those "challenged practices" either.

## IX. Conclusion

47. The United States respectfully requests that the Panel grant the U.S. requests for preliminary rulings and reject Vietnam's claims that the United States has acted inconsistently with the covered agreements.