

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

(WT/DS404)

**RESPONSES OF THE UNITED STATES TO THE PANEL'S
FIRST SET OF QUESTIONS TO THE PARTIES**

November 3, 2010

TABLE OF REPORTS CITED

Short Form	Full Citation
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr. 1 and 2, adopted 23 July 1998, and Corr. 3 and 4
<i>Korea – Certain Paper</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia</i> , WT/DS312/R, adopted 28 November 2005
<i>US – Continued Zeroing (Panel)</i>	Panel Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/R, adopted 19 February 2009, as modified by the Appellate Body Report, WT/DS350/AB/R
<i>US – Continued Zeroing (AB)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – Corrosion-Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – Customs Bond Directive (AB)</i>	Appellate Body Report, <i>United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping / Countervailing Duties</i> , WT/DS345/AB/R, adopted 1 August 2008
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>US – Upland Cotton (Panel)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, adopted 21 March 2005, as modified by the Appellate Body Report, WT/DS267/AB/R
<i>US – Zeroing (EC) (Article 21.5) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins – Recourse to 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW, adopted 11 June 2009

I. TERMS OF REFERENCE

A. “CONTINUED USE OF CHALLENGED PRACTICES” MEASURE

2. *(to both parties) Viet Nam’s request for consultations, page 3, para. 3, last sentence, reads as follows:*

“Vietnam further believes that the US has an established practice with respect to each of these issues and will, therefore, continue to act inconsistent with its WTO obligations relating to these issues in ongoing and future reviews, including the five year review provided under Article 18.1 of the Antidumping Agreement.”

In oral questions at the Panel’s meeting with the parties, the Panel asked Viet Nam whether the Panel should understand this sentence to refer to the “continued use” measure. Viet Nam responded in the affirmative. Please discuss what inferences, if any, the Panel may reasonably draw from the absence of similar language, in Viet Nam’s request for the establishment of the panel.

1. In light of Vietnam’s confirmation during the first panel meeting that the Panel should understand the sentence quoted in the question to refer to a “continued use” measure, the presence in the consultations request of this language and the absence of similar language in Vietnam’s panel request supports the conclusion that no such “continued use” measure is identified in the panel request.

2. Article 6.2 of the DSU requires that a panel request “identify the specific measures at issue. . . .” The Appellate Body has explained that compliance with Article 6.2 “must be ‘demonstrated on the face’ of the panel request, read ‘as a whole’.”¹ As we explained in the U.S. First Written Submission,² the U.S. opening statement at the first meeting with the Panel,³ and during the first panel meeting, Vietnam’s panel request, read “as a whole,” makes no reference to any “continued use” measure and, on the contrary, expressly limits the “measures at issue” to the specific determinations identified in Section 2 of the panel request.

3. In *US – Customs Bond Directive*, examining whether a panel request included *additional* measures not identified in the consultations request, the Appellate Body explained that panels are “required to compare the respective parameters of the consultations request and the panel request to determine whether an expansion of the scope or change in the essence of the dispute occurred through the addition of instruments in the panel request that were not identified in the consultations request.”⁴

¹ *US – Continued Zeroing (AB)*, para. 161 (footnotes omitted).

² U.S. First Written Submission, paras. 88-95.

³ U.S. Opening Statement at the First Panel Meeting, paras. 13-19.

⁴ *US – Customs Bond Directive (AB)*, para. 294.

4. Here, it appears to be the opposite situation. The panel request, on its face, appears to include *fewer* measures than the consultations request and a narrower scope of the dispute.⁵ However, the approach described by the Appellate Body in *US – Customs Bond Directive* may be useful for this Panel. By comparing the language of the panel request and the consultations request, the Panel can confirm the absence in the panel request of any reference to a “continued use” “measure” that is related to Vietnam’s description in the consultations request of its concern that the United States “will . . . continue to act inconsistent with its WTO obligations relating to these issues in ongoing and future reviews.”⁶

5. The Panel should infer from the dissimilarity between the language of the panel request and the consultations request that Vietnam did not specifically identify any “continued use” measure in its panel request, and thus no such “measure” is within the Panel’s terms of reference.

4. (to both parties) At paragraph 166 of its Report in *US – Continued Zeroing*, the Appellate Body found the “United States could reasonably be expected to understand that the European Communities was challenging the use of the zeroing methodology in successive proceedings” on the basis that the panel request in that case linked three factors: (1) duties resulting from listed anti-dumping orders; (2) the most recent proceedings; and (3) use of zeroing in such proceedings. Is this approach of the Appellate Body in that case of relevance for the Panel in dealing with the US request for preliminary rulings in this case?

6. As we have noted previously, the United States has concerns with the Appellate Body’s finding in *US – Continued Zeroing* that a so-called “continued use” measure can be determined to exist, and therefore can be identified as a “specific measure” in a panel request, and that any such “measure” not yet in existence could meet the terms of Article 17.4 of the AD Agreement.⁷ That being said, to the extent that the Panel finds that the Appellate Body report in *US – Continued Zeroing* is relevant to its analysis, the Appellate Body’s reasoning supports the conclusion that Vietnam has failed in its panel request to “link” the elements described by the Appellate Body.

7. Vietnam has described the situations in this dispute and *US – Continued Zeroing* as being “virtually identical.”⁸ As we explained in the U.S. First Written Submission, however,

⁵ The United States takes no position on the question of whether Vietnam’s consultations request properly identified a “continued use” measure consistent with the obligation in Article 4.4 of the DSU. We respectfully suggest that it will not be necessary for the Panel to determine whether Vietnam’s consultations request met the requirements of Article 4.4 of the DSU with respect to any “continued use” measure in order to resolve this dispute. We note that the U.S. preliminary ruling request is limited to Vietnam’s failure to specifically identify a “continued use” measure in its panel request, as required by Article 6.2 of the DSU.

⁶ Vietnam Consultations Request, p. 3.

⁷ See U.S. First Written Submission, paras. 96-98; see also U.S. Opening Statement at the First Panel Meeting, paras. 20-23.

⁸ Vietnam First Written Submission, para. 105.

Vietnam’s panel request in this dispute is markedly different from the panel request analyzed by the Appellate Body in *US – Continued Zeroing*.⁹

8. In *US – Continued Zeroing*, the Appellate Body understood the EC to be “challeng[ing] two distinct sets of ‘measures’.”¹⁰ Specifically, the EC was challenging 1) “the continued application of the duties resulting from the 18 anti-dumping duty orders listed in the annex to its panel request, as calculated or maintained in the most recent proceeding pertaining to such duties” and 2) “the use of the zeroing methodology in 52 specific anti-dumping proceedings (four original investigations, 37 periodic reviews, and 11 sunset reviews) that pertain to the duties resulting from these 18 anti-dumping duty orders.”¹¹ Thus, the EC identified and was challenging 18 “continued application” measures and 52 “as applied” measures, each of which was separately identified as a “specific measure” in the panel request.

9. In addition, the Appellate Body found that the EC’s description in its panel request of “[t]he continued application of, or the application of the specific antidumping duties resulting from the anti-dumping orders . . . at a level in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement”¹² established a “link” sufficient to describe a separate measure.¹³

10. In this dispute, Vietnam identified a number of “as applied” measures in the panel request, but the panel request does not “link” these determinations or the elements identified by the Appellate Body in *US – Continued Zeroing* so as to identify a separate “continued use” measure.¹⁴ Rather, Vietnam asks the Panel to infer this “link,” both with respect to “zeroing” and also with respect the other challenged “practices,” which were not at issue in *US – Continued Zeroing*, and which have not been established to be “practices” at all. Such an inference simply is not plausible, though, when the panel request, on its face, expressly limits the “measures at issue” to the determinations specifically identified, and when virtually all of the legal claims described are likewise limited to the application of laws and procedures in the determinations individually identified.¹⁵

11. Thus, again, to the extent that the Panel finds that the Appellate Body report in *US – Continued Zeroing* is relevant to its analysis, the Appellate Body’s reasoning supports the

⁹ See U.S. First Written Submission, paras. 91-93.

¹⁰ *US – Continued Zeroing (AB)*, para 164.

¹¹ *Id.*

¹² *Id.*

¹³ See *id.*, para. 166.

¹⁴ See *id.*, para. 166.

¹⁵ The only reference to an “as such” claim in the panel request relates to “zeroing.” All the other claims described in the panel request are expressly described as “as applied” claims. However, the panel request does not specifically identify an “as such” measure relating to “zeroing,” Vietnam’s First Written Submission does not advance any arguments against “zeroing” “as such,” and, during the first panel meeting in response to an oral question from the Panel, Vietnam confirmed that it is not asking the Panel to find “zeroing” inconsistent with the covered agreements “as such.”

conclusion that Vietnam has failed in its panel request to “link” the elements described by the Appellate Body, and Vietnam has failed to otherwise identify any “continued use” measure in the panel request.

5. *(to both parties) Viet Nam indicated, in its oral presentations to the Panel, that it is making claims with respect to the “continued use” measure in order to avoid Viet Nam continuously having to re-litigate the same issues with respect to successive segments under the Shrimp proceedings. The Appellate Body said, at paragraph 171 of its Report in US – Continued Zeroing, that “in our view, the remedy sought by the complainant may provide further confirmation as to the measure that is the subject of the complaint”. Might the broader context of the remedy sought by Viet Nam in this case be a relevant consideration for the Panel in construing the words of the panel request “as a whole”?*

12. The Appellate Body’s statement in *US – Continued Zeroing* – that “the remedy sought by the complainant may provide further confirmation as to the measure that is the subject of the complaint” – would not appear to be helpful for the Panel’s assessment of Vietnam’s panel request. As an initial matter, the EC’s panel request at issue in *US – Continued Zeroing* contained a reference to the “continued application” of “zeroing,” and the Appellate Body’s statement was made in the context of understanding this reference. By contrast, Vietnam’s panel request makes no reference to “continued use,” so there is nothing to be “confirmed” by the remedy sought by Vietnam. Furthermore, Vietnam’s panel request contained no reference whatsoever to the remedy sought by Vietnam in this dispute. The “broader context of the remedy sought” was described only later, during the first panel meeting, and this cannot supplement the words of the panel request. The Panel must determine whether, “on the face” of the panel request, read “as a whole,” Vietnam has identified a “continued use” measure.

13. Furthermore, in *US – Continued Zeroing*, the Appellate Body was reviewing the panel’s conclusion that, “because the remedy sought by the European Communities was prospective in nature, the ‘measures’ with respect to which such remedy was sought could not be regarded as specifically identified in the panel request.”¹⁶ Put another way, the Appellate Body was reviewing the panel’s determination that, despite the reference to “continued application” in the panel request, the alleged “measure” could not be a measure at all, and thus was not, and could not have been “specifically identified.”

14. The situation here is different. As we described in the U.S. First Written Submission and during the panel meeting, there simply is no reference whatsoever in Vietnam’s panel request to any “continued use” measure. Because the Appellate Body’s statement in *US – Continued Zeroing* was directed at the issue of whether “continued use” can be a measure at all, it is not helpful for the Panel in making its assessment of whether Vietnam’s panel request specifically identified a “continued use” measure in this dispute.

¹⁶ *US – Continued Zeroing (AB)*, para. 171.

6. ***(to both parties) What is the relevance of the Appellate Body’s statement, at paragraph 169 of its Report in US – Continued Zeroing, that identification of a measure in the panel request need only be done with “sufficient particularity to give an indication of the gist of what is at issue”.***

15. It is useful, in considering the statement in paragraph 169 of the Appellate Body report in *US – Continued Zeroing*, to read that statement together with the explanation in the immediately preceding paragraph that “the specificity requirement means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request.”¹⁷

16. As we have explained, Vietnam’s panel request made no reference whatsoever to a “continued use” measure, and certainly no such measure was “identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request.” Indeed, the difference in language between the consultations request and the panel request would, if anything, support reading the panel request as having excluded any “continued use” measure. Consequently, Vietnam’s panel request failed to meet the requirement of Article 6.2 of the DSU to identify the “specific measures at issue” in the case of a “continued use” measure.

B. DETERMINATIONS IN THE ORIGINAL INVESTIGATION AND FIRST ADMINISTRATIVE REVIEW

8. ***(to the United States) Given Viet Nam’s clarification that it is not asking the Panel to make any findings on the WTO-consistency of the US Department of Commerce’s determinations in the original investigation and the first administrative review, do you maintain your request for preliminary rulings in respect of these two determinations.***

17. The United States appreciates that Vietnam’s First Written Submission does not include the investigation and the first administrative review in its description of the measures at issue, and that Vietnam clarified during the first panel meeting that it is not asking the Panel to make any findings on the WTO-inconsistency of Commerce’s determinations in those proceedings. In light of this, there appears to be no disagreement that the investigation and the first administrative review are “not within the Panel’s jurisdiction. . . .”¹⁸ The United States therefore respectfully requests that the Panel reflect this in its report.

18. In addition, as we explained in the U.S. First Written Submission and in the U.S. opening statement at the first panel meeting, the investigation is not within the Panel’s terms of reference because it was not a subject of consultations.¹⁹ The United States notes that Vietnam has never

¹⁷ *Id.*, para. 168.

¹⁸ Vietnam Response to U.S. Preliminary Ruling Request, para. 6.

¹⁹ See U.S. First Written Submission, paras. 81-84; see also U.S. Opening Statement at the First Panel Meeting, para. 12.

responded to the U.S. argument in this regard. The Panel could therefore also include in its report a finding that the investigation is not within its terms of reference for this reason as well.

III. CLAIMS WITH RESPECT TO THE “CONTINUED USE” MEASURE

12. (to both parties) What substantive elements must Viet Nam demonstrate in order to establish the existence of the alleged “continued use” measure, as distinct from the other measures at issue in this proceeding?

19. As Vietnam failed to identify a “continued use” measure in its panel request, which is to say that there is no reference whatsoever to such a measure in the panel request, and the request appears expressly to limit the “measures at issue” to a handful of determinations named in its Section 2, the United States respectfully suggests that it will not be necessary for the Panel to determine what substantive elements Vietnam would need to demonstrate in order to establish the existence of the alleged “continued use” measure in order to resolve this dispute.

20. In any event, however, as discussed in detail in the U.S. First Written Submission, the alleged “continued use of challenged practices” cannot be a “measure” subject to WTO dispute settlement because it appears to be composed of an indeterminate number of potential future measures.²⁰ Measures that are not yet in existence at the time of panel establishment are not within a panel’s term of reference under the DSU.²¹

21. Additionally, a measure that is not yet in existence cannot meet the requirement of Article 4.2 of the DSU that the measure be “affecting” the operation of a covered agreement. As the *Upland Cotton* panel found, the legislation challenged in that dispute could not have been impairing any benefits accruing to the complainant because it was not in existence at the time of the request for the establishment of a panel.²² Similarly, in this dispute, indeterminate future measures that did not exist at the time of Vietnam’s panel request (and may never exist) could not be impairing any benefits accruing to Vietnam.

22. 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.²³ Vietnam states that the “continued use” measure “includes the Fourth Administrative Review, the Fifth Administrative

²⁰ See U.S. First Written Submission, paras. 96-98.

²¹ See, e.g., *United States – Upland Cotton (Panel)*, para. 7.158 (finding that a measure that had not yet been adopted could not form a part of the Panel’s terms of reference); *Indonesia – Autos*, para. 14.3 (agreeing with the responding party that a measure adopted after the establishment of a panel was not within the panel’s terms of reference).

²² *US – Upland Cotton (Panel)*, paras. 7.158-7.160.

²³ While provisional measures may also be challenged in certain circumstances, Vietnam has made no allegations in this regard.

Review, and the Five-Year (‘Sunset’) Review.”²⁴ However, at the time of Vietnam’s panel request, neither the particular proceedings identified nor the alleged “continued use of the challenged practices” involved a final action to levy definitive antidumping duties or accept price undertakings. The final determination in the fourth administrative review was issued on August 9, 2010, six months after Vietnam’s consultations request, and the final determinations in the fifth administrative review and the sunset review have not yet been issued.²⁵

23. Because the purported measure consists of an indeterminate number of future antidumping measures for which no final action had been taken at the time of Vietnam’s panel request, Vietnam cannot establish the existence of the alleged “continued use” measure, as distinct from the other measures at issue in this proceeding.

24. The United States recognizes that, in *US – Continued Zeroing*, the Appellate Body disagreed with the U.S. position, as well as the finding of the panel, and found that “continued use” of “zeroing” in successive antidumping proceedings can be a measure deemed to exist and can be specifically identified in a panel request. The United States believes that the Appellate Body’s conclusion in that regard was incorrect.

25. In any event, though, Vietnam’s assertion that the facts of this case are “virtually identical” to the cases found to be “continued use” measures in *US – Continued Zeroing* is without foundation.²⁶ There, 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.”²⁷ In 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,”²⁸ the panel had found the following: (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.

26. Examined under this standard, Vietnam has not established that the challenged practices “would likely continue to be applied in successive proceedings.” As we have explained, only the second and third administrative reviews are properly before the Panel.²⁹ Thus, there can be no finding that Commerce acted inconsistently with the AD Agreement or the GATT 1994 in connection with the “challenged practices” over an extended number of proceedings.

²⁴ Vietnam First Written Submission, para. 104.

²⁵ *See id.* at para. 21.

²⁶ Vietnam First Written Submission, para. 105.

²⁷ *US – Continued Zeroing (AB)*, para. 191.

²⁸ *Id.*

²⁹ *See, e.g.*, U.S. First Written Submission, paras. 76-86, 94, and 219

27. Furthermore, with respect to its “zeroing” claims, 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. Hence, with respect to Commerce’s use of zeroing, Vietnam cannot establish “a string of determinations, made sequentially. . . over an extended period of time.”³⁰

28. Vietnam also seeks to expand the Appellate Body’s reasoning in *US – Continued Zeroing* beyond zeroing to encompass the other “challenged practices.” As we explained in detail in the U.S. First Written Submission, 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”³¹ with respect to those “challenged practices” either.

V. ZEROING

14. (to the United States) Does the United States concede that the US Department of Commerce used “model zeroing” in calculating margins of dumping in the original investigation and used “simple zeroing” in the administrative reviews under the AD order on Certain Shrimp from Viet Nam?

29. As an initial matter, the United States notes that, as discussed previously, the only measures properly before the Panel are the second and third administrative reviews.³² The original investigation and the first administrative review were initiated prior to Vietnam’s accession to the WTO, and thus the AD Agreement did not apply to them.³³ In addition, the original investigation was not a subject of consultations and, thus, is not within the Panel’s terms of reference.³⁴ Similarly, the fourth and fifth administrative reviews were not concluded at the time of Vietnam’s Panel request, and thus are also not within the Panel’s terms of reference.³⁵ Consequently, the United States cannot be found to have acted inconsistently with its WTO obligations with respect to the original investigation or the first, fourth, and fifth administrative reviews.

30. Furthermore, the burden is on Vietnam to establish whether zeroing had any impact on the antidumping duties applied as a result of the two administrative reviews at issue. However, as explained in detail in the U.S. First Written Submission, “zeroing” did not impact the margins of dumping calculated for individually examined exporters and producers in the second and third administrative reviews. The margins of dumping determined for the individually examined

³⁰ *US – Continued Zeroing (AB)*, para. 191.

³¹ *Id.*

³² See U.S. First Written Submission, paras. 71-98.

³³ See U.S. First Written Submission, paras. 76-80 and 85-86.

³⁴ See U.S. First Written Submission, paras. 81-84.

³⁵ See U.S. First Written Submission, para. 97.

exporters were zero or *de minimis*. In addition, the zeroing methodology was not used during the proceedings in order to determine the separate rates applied to companies not individually examined. Furthermore, Vietnam has failed to demonstrate that any duties were applied in excess of the margins of dumping, and thus has not established that the United States acted inconsistently with the obligations in Article VI:2 of the GATT 1994 or Article 9.3 of the AD Agreement. Finally, we emphasize that, as explained in detail in the U.S. First Written Submission, Commerce’s methodology for assessing antidumping duties in periodic reviews is consistent with U.S. obligations under the covered agreements.³⁶

19. (to the United States) Please react to the argument of Viet Nam (paragraph 49 of Viet Nam’s Opening Oral Statement), that the application of zeroing impacts an exporter’s behaviour, even when it does not result in the collection of duties. Please also comment on the suggestion by some third parties, during the third party session, that a violation of Article 9.3 may result from fact that the zeroing methodology is “embedded” in the determination, irrespective of the actual imposition or collection of duties.

31. While Vietnam has asserted in its opening statement at the first panel meeting that the potential application of “zeroing” impacts an exporter’s behavior, even when it has not, in fact, been applied (that is, when it does not affect the assessment rate calculated for the exporter), Vietnam has provided no evidence to support this assertion. However, even if Vietnam could demonstrate that the use of “zeroing” affected an exporter’s behavior, Vietnam can point to no obligation in the AD Agreement that concerns such an impact on exporter behavior. The provisions with which the United States is alleged to have acted inconsistently, namely Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement, prohibit the imposition of antidumping duties in excess of the margin of dumping. Vietnam has not established that the United States applied any antidumping duties in excess of the margins of dumping, and thus has failed to substantiate any claim under Article VI:2 of the GATT 1994 or Article 9.3 of the AD Agreement.

32. The suggestion by some third parties that a violation of Article 9.3 may result solely from the fact that the “zeroing” methodology is “embedded” in the determination is misguided. Article 9.3 requires that the antidumping duty not exceed the margin of dumping “as established under Article 2.” The only prohibition of “zeroing” that has been identified by the Appellate Body in Article 2 is contained in Article 2.4.2, which, by its express terms, is limited in its application to “the investigation phase.” The prohibition of zeroing in administrative reviews, if one exists, is a prohibition against imposing antidumping duties in excess of the margin of dumping. That is the obligation in Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement. Hence, the fact that the “zeroing” methodology is “embedded” in the determination, in the absence of any showing that antidumping duties were actually applied in excess of the

³⁶ See U.S. First Written Submission, paras. 110-138.

margin of dumping, is insufficient to establish a violation of Article VI:2 of the GATT 1994 or Article 9.3 of the AD Agreement.

VI. “ALL OTHERS” RATE

20. *(to both parties) The Appellate Body has observed that there is a lacuna in Article 9.4, such that this provision gives no explicit guidance on what a Member must or may do in the event that all data from selected exporters have been excluded because it is zero, de minimis, or based on facts available. If, in such a case, an investigating authority’s discretion under Article 9.4 is not entirely unbounded:*

(i) *Please describe the boundaries of an investigating authority’s discretion?*

(ii) *What is the basis, in the Anti-Dumping Agreement, for these boundaries?*

33. In *US – Continued Zeroing*, the Appellate Body stated that “the fact that all margins of dumping for the investigated exporters fall within one of the categories that Article 9.4 directs investigating authorities to disregard, for purposes of that paragraph, does not imply that investigating authorities’ discretion to apply duties on non-investigated exporters is unbounded.”³⁷ However, the Appellate Body did not identify anything in the text of the AD Agreement that would provide 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 any legal standard in the text for assessing the consistency of an investigating authority’s action with the “obligation” in Article 9.4 in such situations.³⁸

34. Article 9.4 of the AD Agreement is silent and there simply is no obligation in that provision, or anywhere else in the AD Agreement, regarding the maximum rate that may be applied to non-examined exporters or producers when *all* calculated margins of dumping are zero, *de minimis*, or based upon facts available.³⁹

35. Additionally, there is nothing in the DSU or the AD Agreement to support the imposition of a general “reasonableness test” in the absence of specific obligations. Article 11 of the DSU provides that “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.” In addition, under Article 17.6(i) of the AD Agreement, the Panel must consider whether Commerce’s establishment of the facts was proper and whether its evaluation of those facts was unbiased and

³⁷ *Id.* at para. 453.

³⁸ *Id.*

³⁹ See U.S. First Written Submission, paras. 176-188.

objective, and under Article 17.6(ii), the Panel must assess whether an investigating authority’s interpretation of the AD Agreement is a permissible interpretation. The question for the Panel, then, is whether Commerce’s determination was inconsistent with any provision of the AD Agreement.⁴⁰ In the absence of any defined obligation, it is not possible that the United States could be found to have acted inconsistently with Article 9.4 of the AD Agreement.

36. Nevertheless, Commerce’s determinations in the second and third administrative reviews were reasonable.⁴¹ Contrary to Vietnam’s statement in its First Written Submission, Commerce did not “rely on the highest margin that can be determined,”⁴² nor did Commerce exercise “unbridled,” or in the words of the Appellate Body, “unbounded”⁴³ discretion.

37. Rather, in the proceedings at issue, once Commerce eliminated the rates “that Article 9.4 directs investigating authorities to disregard,”⁴⁴ Commerce determined that it would be reasonable to apply to certain of the cooperative companies that were not selected for individual examination an average of the rates – excluding zero, *de minimis*, and rates based entirely on facts available – that were calculated for cooperating companies in the most recent proceeding in which usable rates were available, which in most instances was the original investigation. Where a more recent individually calculated dumping margin was available for a cooperating company, Commerce continued to apply such dumping margin to that company. Thus, for example, the same dumping margins calculated for two companies, based on their own data, in the first administrative review and the first new shipper review were applied to those companies in the second administrative review even though those companies were not selected for individual examination. This is a reasonable method of assigning assessment rates because it is reflective of the range of commercial behavior demonstrated by exporters and producers of the subject merchandise during a very recent period.

38. In any event, in the absence of any legal standard or defined obligation, it is not clear to the United States 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 of the AD Agreement. For this reason, the United States respectfully requests that the Panel reject Vietnam’s claims under Article 9.4.

21. (to both parties) Article 18.3.1 of the Anti-Dumping Agreement requires the use of the rules applied in the most recent determination or review. Might this provide contextual guidance in determining whether an investigating authority must rely on contemporaneous dumping margins in determining the “all others” rate in a lacuna

⁴⁰ Vietnam has not alleged that Commerce’s establishment of the facts was improper or that Commerce’s evaluation of those facts was biased or not objective.

⁴¹ See U.S. First Written Submission, paras. 184-185.

⁴² Vietnam First Written Submission, para. 221.

⁴³ *US – Zeroing (EC) (Article 21.5) (AB)*, para. 453.

⁴⁴ *Id.*

situation, i.e. where all individual margins are either zero, de minimis, or based on facts available.

39. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the provisions of the covered agreements “in accordance with customary rules of interpretation of public international law.” Article 31 of the *Vienna Convention on the Law of Treaties* (“Vienna Convention”) reflects such rules.⁴⁵ Article 31 provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” While the terms of Article 9.4 of the AD Agreement must be read “in their context,” context is not a substitute for the terms in Article 9.4.

40. As we explained in response to Question 20 and elsewhere, Article 9.4 of the AD Agreement is silent and there simply is no obligation in that provision, or anywhere else in the AD Agreement, regarding the maximum rate that may be applied to non-examined exporters or producers when *all* calculated margins of dumping are zero, *de minimis*, or based upon facts available.

41. Furthermore, Article 9.4 provides only for the maximum or ceiling rate to be applied to non-examined exporters or producers. Even in a situation not involving the *lacuna*, Article 9.4 says nothing about the calculation of the “all others” rate itself. It simply establishes an upper limit on the “all others” rate under certain circumstances. Without question, nothing in the text of Article 9.4 requires the use of contemporaneous data in the calculation of the “all others” rate.

42. Article 18.3.1 of the AD Agreement provides that, “[w]ith respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.” On its face, Article 18.3.1 is limited in its application to “refund procedures” under Article 9.3. Article 18.3.1 says nothing about the calculation of the ceiling under Article 9.4 or the determination of the “all others” rate. Article 18.3.1 concerns an unrelated calculation under a different provision of the AD Agreement. Consequently, it does not appear that Article 18.3.1 can provide contextual guidance in determining whether an investigating authority must rely on contemporaneous dumping margins in determining the “all others” rate in a situation where all individual margins are either zero, *de minimis*, or based on facts available.

22. (to both parties) Does Article 17.6(i) shed light on the standard that the Panel must apply in reviewing the “all others” rate established by an investigating authority in such a lacuna situation?

43. Article 17.6(i) of the AD Agreement establishes a general obligation in respect of a dispute settlement panel’s assessment of the facts of the matter:

⁴⁵ *US – Gasoline (AB)*, p. 17.

in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

Article 17.6(i) of the AD Agreement does not establish a standard to be used in a *lacuna* situation under Article 9.4 of the AD Agreement. Rather, Article 17.6(i) provides a specific standard for the Panel’s assessment of the facts.

44. The question is whether Commerce’s establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective. Where Vietnam has not demonstrated that the United States acted inconsistently with any specific obligation of the AD Agreement, if Commerce’s establishment of the facts was proper and its evaluation was unbiased and objective, Commerce’s determination cannot be found inconsistent with the AD Agreement. In this regard, the United States notes that Vietnam has not suggested that Commerce’s establishment of the facts was improper or that Commerce’s evaluation of the facts was biased or not objective.

23. (to both parties) Do any other provisions of the Anti-Dumping Agreement or of the covered agreements provide contextual guidance as to the standard that the Panel must apply in reviewing the “all others” rate established by an investigating authority in a lacuna situation?

45. There is no special or different standard for the Panel to apply in reviewing the “all others” rate established by an investigating authority in a *lacuna* situation. In terms of the substantive standard, Members did not agree on a ceiling to be applied in the situation where all individual margins are either zero, *de minimis*, or based on facts available. In terms of the standard of review, the general standard of review established by the DSU, as elaborated by the AD Agreement, would apply.

25. (to the United States) Please comment on Viet Nam’s assertion, at para. 56 of its oral statement, that “[u]nder the approach adopted by the US Department of Commerce, mandatory respondents serve as valid proxies for all other exporters”.

46. In paragraph 56 of its opening statement during the first panel meeting, Vietnam asserts that, “[u]nder the approach adopted by the US Department of Commerce, mandatory respondents serve as valid proxies for all other exporters, except when reliance on the mandatory respondents as proxies produces a zero or *de minimis* all-others rate.” Vietnam’s assertion is without foundation and mischaracterizes Commerce’s determinations in the second and third administrative reviews.

47. When Commerce limits the examination in an administrative review, Commerce will generally determine an assessment rate for cooperative exporters and producers not selected for

individual examination by calculating an average of the rates determined for examined exporters or producers, known in U.S. parlance as “mandatory respondents,” excluding from the average any rates that are zero, *de minimis*, or based on facts available. This is consistent with Article 9.4 of the AD Agreement, which provides that the amount of the antidumping duty applied to non-examined exporters or producers shall not exceed the weighted average margin of dumping established with respect to the selected exporters or producers. When all the rates determined for individually examined exporters or producers are zero, *de minimis*, or based on facts available, however, Article 9.4 does not impose any specific obligation with respect to the maximum antidumping duty that may be applied to non-examined exporters or producers and, in any event, Article 9.4 imposes no obligations whatsoever with regard to the actual rate applied, other than a ceiling under certain circumstances.

48. In the second and third administrative reviews, all of the rates determined for individually examined exporters or producers fell into one of the categories that Article 9.4 requires Commerce to disregard in the determination of the maximum antidumping duty that may be applied to non-examined exporters or producers. Commerce thus determined to apply rates that it considered reasonably reflective of the range of commercial behavior demonstrated by exporters of the subject merchandise during a recent period that were not based on zero, *de minimis*, or facts available margins. In the absence of any obligation under the AD Agreement, this approach cannot be found inconsistent with the AD Agreement.

26. (to the United States) Please provide your views on the argument of Viet Nam, in paragraph 55 of its Oral Statement, that Article 9.4 does not actually prohibit the use of zero or *de minimis* margins in the calculation of the “all others” rate (as opposed to the ceiling). Where in the text of Article 9.4 or in WTO jurisprudence can we find an indication that such margins cannot serve as the basis of an “all others” rate?

49. Vietnam states in paragraph 55 of its opening statement at the first panel meeting that “Article 9.4 does not prohibit an authority from using rates that are zero, *de minimis*, or based on facts available to calculate the all-others rate.” (emphasis in original). The United States agrees with this statement.

50. Article 9.4 of the AD Agreement does not prohibit the use of rates that are zero, *de minimis*, or based on facts available. Nor, however, does Article 9.4 require the use of such rates. Indeed, Article 9.4 does not establish any particular requirements in respect of the determination of the assessment rate actually applied to exporters or producers not selected for individual examination.

51. Rather, Article 9.4 simply establishes a maximum level, or ceiling for the antidumping duty that may be applied to exporters or producers that were not selected for individual examination. As discussed at length in the U.S. First Written Submission and during the first panel meeting, however, where all the rates determined for individually examined exporters or producers are zero, *de minimis*, or based on facts available, Article 9.4 does not establish any obligation with respect to the calculation of the maximum antidumping duty that may be applied.

52. Later in the same paragraph of Vietnam’s opening statement at the first panel meeting, Vietnam goes on to argue that “where there is no prohibition in the Anti-Dumping Agreement for the USDOC to use the rates actually calculated in this segment of the proceeding – even if those rates are zero or *de minimis* – it is not reasonable for the USDOC to instead rely on rates calculated several years ago.”⁴⁶ The United States strongly disagrees with this statement.

53. As a matter of logic, it simply does not follow that the absence of a prohibition on the use of zero and *de minimis* rates in the determination of the rates to be applied to companies not selected for individual examination means that it was “not reasonable” for Commerce to rely on rates determined in recent prior proceedings in applying rates to non-selected companies. As explained in the U.S. First Written Submission, the rates Commerce applied were the most recently calculated rates available not incorporating rates that were zero, *de minimis*, or based upon facts available. In addition, the rates were reflective of the range of commercial behavior demonstrated by exporters of the subject merchandise during a recent period.

54. As discussed above, however, there is no “reasonableness test” in the AD Agreement or the DSU. The relevant question is whether Article 9.4 establishes any obligations with respect to the calculation of the “all others” rate or the maximum duty that may be applied in a *lacuna* situation. As we have explained, Article 9.4 does not impose any obligations in the factual situation that was present in the second and third administrative reviews, and thus the United States cannot be found to have acted inconsistently with Article 9.4.

VII. COUNTRY WIDE RATE

28. *(to the United States) Do you agree with Viet Nam’s description of the facts in the last three sentences of paragraph 65 of its Oral Statement, i.e. that the Viet Nam-wide entity was:*

- *not treated as an “interested party” in any segments of the proceedings;*
- *never selected for individual investigation or review; and*
- *never received a questionnaire from the US Department of Commerce.*

55. In paragraph 65 of its opening statement at the first panel meeting, Vietnam asserts that “the Vietnam-wide entity has never been established as an ‘interested party’ in any segment of the antidumping proceeding.” Vietnam offers no explanation or support for this assertion, and the United States does not agree with it. Article 6.11 of the AD Agreement defines “interested parties” as including, *inter alia*, “an exporter or foreign producer or the importer of a product subject to investigation.” As explained in detail in the U.S. First Written Submission, Commerce determined that the Vietnam-wide entity is an exporter or producer within the meaning of the

⁴⁶ Vietnam Opening Statement at the First Panel Meeting, para. 55.

AD Agreement, and thus an interested party. Although the meaning of Vietnam’s statement is not entirely clear, in this sense the Vietnam-wide entity was most certainly “established as an ‘interested party’” in the second and third administrative reviews, which are the only proceedings properly before the Panel.

56. Vietnam also states that “the Vietnam-wide entity has never been selected for individual investigation or review.” The United States confirms that the Vietnam-wide entity was not selected for individual examination in either the second or third administrative review.

57. Finally, Vietnam suggests that neither “the Vietnam-wide entity [nor] any sub-entity” has ever received a questionnaire from Commerce. This statement is false. In the second administrative review, Commerce sent “quantity and value” questionnaires to firms that comprise the Vietnam-wide entity, but received no response. However, the United States confirms that, in the third administrative review, Commerce did not send any questionnaires to any of the firms that comprise the Vietnam-wide entity.

29. (to the United States) Please confirm whether the logic of the United States’ argument is, in essence, that the country-wide entity is one of the individually investigated or reviewed “exporters” and is treated as such by the Department of Commerce. In the affirmative, please explain how this “exporter”, the Viet Nam-wide entity, was treated, or considered in the respondent selection process which the US Department of Commerce conducted pursuant to Article 6.10 of the Agreement?

58. Because of the nature of Vietnam’s economy, in particular the control exercised by the Government of Vietnam over the economy, including over pricing and exportation, Commerce determined that the Vietnam-wide entity, which is comprised of many firms, should be treated as a single exporter or producer. Once it had been identified as an exporter or producer, the Vietnam-wide entity, through its constituent parts, was treated like other exporters or producers, and could have been selected for individual examination if, for example, a named exporter was selected for individual examination and did not establish that it was separate from the Vietnam-wide entity.

59. Commerce did not select any of the companies that comprise the Vietnam-wide entity for individual examination in either the second or third administrative reviews. Commerce initiated reviews of the entries of large numbers of exporters, over 100 in each review period, based on requests for such reviews. Because the number of companies was too large for Commerce to examine all of them individually, Commerce limited the examination in accordance with Article 6.10 of the AD Agreement. In the second administrative review, in order to determine what companies to select for individual examination, Commerce issued a questionnaire to all companies involved in the review, asking each to provide the quantity and value of their exports to the United States. This questionnaire further requested that if a firm believed that it should be treated as a single entity along with other named exporters, then it should report its quantity and value, both in the aggregate for all named parties in the firm’s group, and individually for each named company. Any company that did not respond to this questionnaire was then sent a letter

providing the company a second opportunity to report the information. Numerous companies did not answer this questionnaire, thus inhibiting Commerce’s ability to determine accurately the largest exporters. Out of the companies that responded to the questionnaire, two companies were selected and each of these companies established that it was separate from the Vietnam-wide entity. In the third administrative review, three companies were selected and each of these companies established that it was separate from the Vietnam-wide entity. Consequently, the Vietnam-wide entity was not selected for individual examination in either the second or third administrative review.

30. (to the United States) At what point were companies selected for individual review given the opportunity to demonstrate that they were not subject to government control, and should thus receive an individual rate?

60. Each company under review, including companies not selected for individual examination, had an opportunity to demonstrate that it was not subject to government control and thus should receive an individual rate. In both the second and third administrative reviews, any company that had demonstrated its eligibility in a prior proceeding had one month from the date of the initiation of the review to submit a certification stating that it continued to be eligible. Companies that had not been determined to be eligible in a prior proceeding had two months to file an application for a separate rate. In both reviews, companies that did not submit a certification or an application by the respective deadline were given an extra month to request separate rate treatment. Additionally, in the third administrative review, some companies requested an extension of the deadlines, and those extension requests were granted.

31. (to the United States) The United States asserts at para. 38 of its First Written Submission that the Viet Nam-wide entity in the second administrative review was composed “in part” of unresponsive companies that failed to respond to the US Department of Commerce’s request for necessary information. Were other companies forming part of the Viet Nam-wide entity asked to provide any information to the US Department of Commerce? If so, please provide details.

61. We described the Vietnam-wide entity as being composed, in part, of unresponsive companies because the identity of all of the sub-entities within the Vietnam-wide entity is not known with certainty. The Government of Vietnam and the companies that comprise the Vietnam-wide entity possess the information necessary to identify all the sub-entities within the Vietnam-wide entity, but they have not disclosed this information to Commerce.

62. In the second administrative review, a review was initiated for 101 companies. Questionnaires requesting quantity and value information were sent to all of the companies covered by the review. A number of companies failed to respond to Commerce’s request for necessary information. Further, these unresponsive companies did not demonstrate that they were sufficiently free from government influence with respect to export activities. Consequently, they were identified as being part of the Vietnam-wide entity. Due to the failure of these various companies to provide necessary information, Commerce assigned the Vietnam-

wide entity, which is composed, in part, of these companies, a dumping margin based upon the facts available. No cooperative companies were included in the Vietnam-wide entity.

63. It is likely, but cannot be known with certainty, that other companies forming part of the Vietnam-wide entity, but which had not been named in any of the requests for review, had exports during the second period of review. Such companies were not asked to provide any information to Commerce. However, all such “other companies” had the opportunity to request a review of their exports to the United States and to demonstrate their independence from the Government of Vietnam with respect to their export activities. They chose not to do so. Consequently, they were treated as being part of the Vietnam-wide entity, and because a number of firms that were part of the Vietnam-wide entity failed to provide necessary information requested from them, all the firms that comprise the Vietnam-wide entity were assigned a rate based upon the facts available.

32. (to the United States) At paragraph 36 of its Opening Oral Statement, the United States asserts that the US Department of Commerce requested certain information of the Viet Nam-wide entity after determining that the latter was an individual exporter or producer. Precisely what information was requested of the Viet Nam-wide entity, and when?

64. In paragraph 36 of the U.S. opening statement at the first panel meeting, the United States was referring to the second administrative review, during which Commerce requested quantity and value information from all companies upon which a review had been requested, including companies that comprised the Vietnam-wide entity. This information was requested in the early stages of the review, prior to the selection of respondents for individual examination.

33. (to both parties) With respect to the information which was requested from the Viet Nam-wide entity, please confirm that:

- (i) the US Department of Commerce did not ask the Viet Nam-wide entity (or any company comprising this entity) to provide any information on domestic and export sales in the third administrative review.**
- (ii) only some of the companies comprising the Viet Nam-wide entity were asked to provide aggregate sales listings (in the form of Quantity and Value questionnaires) in the second administrative review; none of these companies were required to provide export sales listings and/or factors of production data allowing the calculation of individual margins of dumping?**

If the data requested was only aggregate sales value, please explain the statement, in paragraph 38 of the US Opening Oral Statement, that the information “also represented the data necessary for determining a company’s export price, once selected for individual investigation”.

65. The United States confirms that Commerce did not ask the Vietnam-wide entity, or any company comprising the Vietnam-wide entity, to provide any information on domestic and export sales in the third administrative review.

66. In the second administrative review, all companies subject to the review were asked to provide aggregate sales listings (in the form of quantity and value questionnaires). However, it is likely that not all companies that comprise the Vietnam-wide entity were asked to provide such information, as some companies that were part of the Vietnam-wide entity were unknown.

67. The United States confirms that none of the companies that comprise the Vietnam-wide entity were required to provide export sales listings and/or factors of production data allowing the calculation of individual margins of dumping. Only the companies selected for individual examination, both of which established their entitlement to a separate rate, were ultimately asked for that detailed information. Companies that are selected for individual examination are required to submit more detailed pricing data used for calculating margins of dumping. Such data must reconcile with the aggregate data provided to ensure that all required information has been submitted.

34. (to both parties) Please react to the argument of the European Union (paragraph 13 of the European Union’s Oral Statement) to the effect that Article 9.2 is relevant to the Panel’s analysis because it allows the imposition of duties on a country-wide basis when there are several suppliers and it is impracticable to specify individual duties per supplier.

68. As an initial matter, the United States notes that Vietnam did not raise any claims under Article 9.2 of the AD Agreement in its panel request, nor has Vietnam suggested at any point during this proceeding that the United States acted inconsistently with Article 9.2. Likewise, the United States made no reference to Article 9.2 in the U.S. First Written Submission or during the first panel meeting. In connection with its claims against the antidumping duty rates Commerce applied to the Vietnam-wide entity in the second and third administrative reviews, Vietnam has referred to Articles 6.8, 6.10, and 9.4 of the AD Agreement.

69. Article 6.10 of the AD Agreement 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. 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.” As the panel in *Korea – Certain Paper* found, 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.⁴⁷ During the first

⁴⁷ See *Korea – Certain Paper*, para. 7.161.

panel meeting, Vietnam indicated that it agreed that the reasoning of the panel in *Korea – Certain Paper* is correct.

70. While the second sentence of Article 6.10 of the AD Agreement establishes an exception to the general rule and permits investigating authorities to limit their examination when the number of exporters, producers, importers, or types of products is so large as to make individual determinations for all exporters or producers impracticable, Commerce’s application of a single antidumping duty rate to the Vietnam-wide entity was not premised on this exception. Rather, as we have explained, Commerce identified the Vietnam-wide entity as a single exporter or producer consisting of all Vietnamese shrimp producing firms that could not demonstrate independence from government control because evidence on the record showed that the Government of Vietnam exercises control over its economy, and in particular over pricing and exportation.

71. After identifying the Vietnam-wide entity as an exporter or producer, Commerce treated it like any other exporter or producer, including for purposes of Articles 6.8 and 9.4 of the AD Agreement, which concern the use of facts available and the maximum antidumping duty that may be applied to non-examined exporters or producers.

72. Article 9.2 of the AD Agreement provides for certain obligations that are different than those established in Articles 6.8, 6.10, and 9.4. These include non-discriminatory application of antidumping duties, naming of the supplier or suppliers of the product, and, where it is impracticable to name all of the suppliers, naming of the supplying country concerned. While Article 9.2 establishes a general rule and an exception in situations of impracticability with respect to the naming of suppliers, which is somewhat similar to the rule/exception framework in Article 6.10, the obligation in Article 9.2 does not appear to be directly related to the obligations in Article 6.10. For this reason, and because Vietnam is not pursuing any claims under that provision, the United States respectfully suggests that it will not be necessary for the Panel to analyze the obligations in Article 9.2 of the AD Agreement in order to resolve this dispute.

35. *(to both parties) Are there any limitations on the use of facts available to determine the dumping margin of a single “exporter” properly constituted of several distinct legal entities? If so, please explain how the disciplines applicable to the use of facts available with respect to such an exporter differ from those applicable to other individually investigated or reviewed producers or exporters, and identify any relevant text of the Agreement.*

73. The obligations regarding the use of facts available are established in Article 6.8 and Annex II of the AD Agreement. Nothing in the text of these provisions indicates that the disciplines applicable to the use of facts available with respect to a single exporter properly constituted of several distinct legal entities differ in any respect from those applicable to other interested parties.

VIII. LIMITATION OF NUMBER OF INDIVIDUALLY REVIEWED EXPORTERS

37. (to both parties) Article 6.10.2 contains the phrase “except where the number of exporters or producers is so large”. In your view, do the terms “exporters or producers” in that phrase refer to the overall number of exporters or producers subject to the AD order, or do they, rather, refer to the number of producers that make a voluntary response under Article 6.10.2?

74. As we explained in the U.S. First Written Submission, Commerce could not have acted inconsistently with Article 6.10.2 of the AD Agreement in the proceedings at issue because no company voluntarily provided the “necessary information” such that any obligation under that provision was triggered. Specifically, in the second administrative review, no company requested voluntary respondent status or submitted any information purported to be the “necessary information.” In the third administrative review, one company requested voluntary respondent status, but that company subsequently did not submit any data. Because no company submitted the “necessary information” in these administrative reviews, Commerce was not obligated by Article 6.10.2 to determine an individual margin of dumping for any voluntary respondent. In light of this, the United States respectfully suggests that it will not be necessary for the Panel to interpret the phrase “except where the number of exporters or producers is so large” in Article 6.10.2 in order to resolve this dispute.

38. (to both parties) Please discuss whether, in your view, the “tests” established under, on the one hand, the second sentence of Article 6.10, and, on the other hand, Article 6.10.2 differ, given the use of different language in these two provision.

75. As discussed above in response to Question 37 and elsewhere, Commerce could not have acted inconsistently with Article 6.10.2 of the AD Agreement in the second and third administrative reviews because no company voluntarily provided the “necessary information” such that any obligation under that provision was triggered. In light of this, the United States respectfully suggests that it will not be necessary for the Panel to analyze whether the “tests” established in the second sentence of Article 6.10 and in Article 6.10.2 differ in order to resolve this dispute.

39. (to both parties) How should a Panel review whether a given number of producers, or a given percentage of production, was the “largest” that could be “reasonably be investigated” under Article 6.10? In particular, please discuss whether what can “reasonably” be investigated is, or is not, a purely subjective question?

76. As an initial matter, we note that Vietnam has not alleged that the Commerce acted inconsistently with Article 6.10 of the AD Agreement by failing to individually examine the largest number of exporters or producers that “reasonably” could be examined. Rather, Vietnam appears to argue that Commerce acted inconsistently with Article 6.10 because Commerce failed to examine “each known exporter or producer” after making a determination that it would be “impracticable” to do so based on Commerce’s lack of resources. Consequently, the United States respectfully suggests that it will not be necessary for the Panel to interpret the meaning of the terms “largest” or “which can reasonably be investigated” in order to resolve this dispute.

77. That being said, an investigating authority’s determination of the “largest percentage of the volume of exports” or, in practice, the largest number of exporters or producers that can “reasonably” be examined must be made on a case-by-case basis, and will depend on the facts of a given situation, including the resources available to the investigating authority. This is not a “purely subjective question.” Rather, it is a question that must be answered based on facts.

78. Likewise, the Panel’s review of whether a given number of producers, or a given percentage of production, was the “largest” that could be “reasonably be investigated” under Article 6.10 must involve an analysis of the facts before the investigating authority and the investigating authority’s evaluation of those facts. As discussed above in response to Question 22, Article 17.6(i) of the AD Agreement provides general guidance for the Panel’s analysis. In light of Article 17.6(i), relevant questions for the Panel to consider may include: Was the investigating authority’s establishment of the facts proper? Was the investigating authority’s evaluation of the facts unbiased and objective? Put another way, did the investigating authority identify factors relevant to the question of what number of exporters or producers is the largest that could reasonably be examined? Did the investigating authority base its determination on factual evidence related to these relevant factors? These, too, are not purely subjective questions. They can be analyzed and answered in light of the facts before Commerce and Commerce’s evaluation of those facts.

40. (to the United States) Was the US Department of Commerce’s selection of two or three respondents in the second and third administrative reviews the “largest percentage of the volume of the exports” from Viet Nam “which [could] reasonably be investigated”? Please explain.

79. Yes. In the second and third administrative reviews, in order to determine the “largest percentage of the volume of exports” that “reasonably” could be examined, Commerce first determined the largest number of exporters or producers that it reasonably could examine. Commerce explained that, in selecting respondents for review, it “carefully considers its resources including its current and anticipated workload and deadlines coinciding with the segment in question.”⁴⁸ Commerce further explained that:

AD/CVD Operations Office 9, the office to which this administrative review is assigned, does not have the resources to examine all such exporters/producers. This office is conducting numerous concurrent antidumping proceedings which place a constraint on the number of analysts that can be assigned to this case. Not only do these other cases present a significant workload, but the deadlines for a number of the cases coincide and/or overlap with deadlines in this antidumping proceeding. In addition, because of the significant workload throughout Import

⁴⁸ Memorandum James C. Doyle to Stephen J. Claeys, dated July 18, 2007 (Exhibit Viet Nam-13). See also Memorandum from Paul Walker to James Doyle, dated June 9, 2008 (Exhibit Viet Nam-17).

Administration, we do not anticipate receiving any additional resources to devote to this antidumping proceeding.⁴⁹

Thus, after “careful consideration of [its] resources” and “in light of . . . resource constraints,” Commerce determined that it was “practicable” to review two companies in the second administrative review⁵⁰ and three companies in the third administrative review.⁵¹

80. Having determined the largest number of exporters or producers that “reasonably,” indeed “practicably,” could be examined, Commerce then selected for individual examination in the second and third administrative reviews the top two or three exporters, respectively, with the largest volume of exports to the United States during the period of review. In this way, Commerce ensured that it examined “the largest percentage of the volume of exports” that reasonably could be examined. Commerce considered that selecting for individual examination the fourth largest exporter by volume, or the tenth, or the twentieth, would not have resulted in the examination of “the largest percentage of the volume of exports” that reasonably could be examined. It was necessary, in this regard, to select for individual examination the largest exporters.

41. (to the United States) Please react to paragraph 75 of Viet Nam’s Oral Statement. Specifically, please discuss whether the US Department of Commerce could have or should have developed methodologies to investigate more producers, given the particularities of investigations involving non-market economies (i.e. that in the proceedings at issue, any difference in the normal value for individual Vietnamese exporters and producers would be “negligible”)?

81. Vietnam makes a number of statements and assertions in paragraph 75 of its opening statement at the first panel meeting. In the first sentence of paragraph 75, Vietnam clarifies that “it is not Viet Nam’s position that the USDOC should have or could have investigated all the producers and exporters requesting reviews in each segment of the proceeding.” The United States notes that, with this statement, Vietnam appears to concede that Commerce’s determinations in the second and third administrative reviews that it was “impracticable” to examine all exporters or producers were consistent with the requirements of Article 6.10 of the AD Agreement.

82. Vietnam goes on to assert that “it is clear that the amount of duties redistributed to U.S. petitioners probably provided sufficient resources to increase staff levels to enable USDOC to review all companies.” We do not believe that this statement is appropriate or well founded, and

⁴⁹ Memorandum James C. Doyle to Stephen J. Claeys, dated July 18, 2007 (footnote describing concurrent antidumping proceedings omitted) (Exhibit Viet Nam-13). See also Memorandum from Paul Walker to James Doyle, dated June 9, 2008 (Exhibit Viet Nam-17).

⁵⁰ See Memorandum James C. Doyle to Stephen J. Claeys, dated July 18, 2007 (Exhibit Viet Nam-13).

⁵¹ See Memorandum from Paul Walker to James Doyle, dated June 9, 2008 (Exhibit Viet Nam-17).

Vietnam itself appears to agree that the imposition on Members of any particular requirement concerning the allocation of resources among government priorities would not be “reasonable.”

83. After these introductory statements, Vietnam gets to the matter that appears to be the central concern of the Panel’s question:

[W]e believe that the USDOC should have developed methodologies which permitted it to both avoid an undue burden on its resources and meet its other obligations under Articles 6.10, 9.3, 11.1 and 11.3 in some form. Because under the USDOC non market economy methodology the input values for all producers and exporters are uniform and the shrimp input accounts for the bulk of all costs, the difference in the normal value between each producer is negligible. . . . [I]t would have simply required the USDOC to take the same computer program and the same normal values already developed for the mandatory respondents and run the program with the export prices of each of the non reviewed respondents, a task that could be accomplished in a few hours for each of the non reviewed respondents.

The United States does not agree with the factual premise of Vietnam’s statement. In addition, there simply is no obligation under the AD Agreement to develop the methodologies that Vietnam proposes.

84. Vietnam’s unsupported assertion that differences in the normal value among Vietnamese exporters and producers would be negligible is simply not accurate. By its own admission, even when the non-market economy methodology is applied, there are differences in normal value among exporters and producers. Normal value is not dependent solely on the surrogate factor values used for factors of production. The shrimp industry in Vietnam is comprised of both fully integrated producers that farm their own shrimp, limited processors that purchase all of their shrimp, and companies that both farm and purchase shrimp. Certain companies not selected for individual review may have been export trading companies that purchased the finished product and resold it in the United States. The cost structures of these different types of companies are significantly different. Each type of company will thus have its own list of its factors of production that will be used to determine normal value. In addition, as in all non-market economy cases, each company may be more or less efficient than its competitors and thus the utilization of inputs can vary significantly among companies. All of these elements have an impact, which can be significant, on the final normal value for each company. Finally, it is important to note that producers and exporters also sell varying combinations of “count sizes” of shrimp, which can impact not only normal value, but export prices. It is simply not the case that Commerce could have taken “the same computer program and the same normal values already developed for the mandatory respondents and run the program with the export prices of each of the non reviewed respondents, a task that could be accomplished in a few hours for each of the non reviewed respondents.” Vietnam’s statement is just wrong.

85. Furthermore, Vietnam has not identified any obligation in the AD Agreement for Commerce to develop special methodologies to investigate more producers, given the particularities of investigations involving non-market economies. In particular, there are no additional rights and obligations provided in Vietnam’s Protocol of Accession in this regard. All of the obligations related to an investigating authority’s determination to limit its examination and to determine individual margins of dumping for voluntary respondents are contained in Articles 6.10 and 6.10.2 of the AD Agreement. The Panel should not accept Vietnam’s invitation to impose on the United States new obligations not found anywhere in the AD Agreement.

42. (to both parties) The United States in para. 45 of its Oral statement, argued that “no company voluntarily provided the necessary information in the second and third administrative reviews” under Article 6.10.2. Further, during oral questioning by the Panel, Viet Nam indicated that while no Vietnamese respondents submitted voluntary responses pursuant to Article 6.10.2, several Vietnamese producers had approached the US Department of Commerce to enquire into the possibility of submitting such responses. Please provide any relevant information with respect to the submission of voluntary responses, and/or any contacts between Vietnamese parties and the US Department of Commerce concerning this matter in each of the second, third and fourth administrative reviews. In doing so, please refer to any relevant exhibit(s) and submit any additional relevant factual evidence.

86. As we explained in the U.S. First Written Submission and during the first panel meeting, no company voluntarily provided the “necessary information” during the second or third administrative reviews, which are the only proceedings properly before this Panel.⁵² Commerce is not aware of any other relevant communication with any party during the second and third administrative reviews.

87. As we also explained in the U.S. First Written Submission, in the fourth administrative review, two companies requested voluntary respondent status and submitted what they purported was the “necessary information.”⁵³ However, in that review, 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.⁵⁴

43. (to the United States) Please comment on Viet Nam’s assertion that the United States has clarified that “the USDOC will never consider a voluntary respondent where it has

⁵² See U.S. First Written Submission, paras. 211-212.

⁵³ See *id.* See also *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 75 FR 47,771 (Aug. 9, 2010), Issues and Decision Memo at Comment 5 (Exhibit Viet Nam-23).

⁵⁴ *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 75 FR 47,771 (Aug. 9, 2010), Issues and Decision Memo at Comment 5 (Exhibit Viet Nam-23).

already limited the number of respondents begin individually examined” (Viet Nam’s oral statement, para. 74).

88. Vietnam’s assertion is without basis. Vietnam can point to no such “clarification” in the administrative records of either the second or third administrative reviews, because none exists. We note once again that no voluntary respondent submitted the necessary information in either the second or third administrative reviews. To the extent that Vietnam is referring to proceedings other than the second and third administrative reviews, such proceedings are outside the Panel’s terms of reference.

89. In any event, though, Commerce has, in other proceedings, accepted and reviewed voluntary responses when it has limited its examination. Commerce did so, for example, when one of the exporters initially selected for individual examination withdrew its request for review and the review was thereby rescinded for that exporter, or the exporter ceased cooperating with the examination, in which case, it became practicable to individually investigate another respondent.⁵⁵

45. (to both parties) Please discuss whether the terms “anti-dumping duty” in Article 11.1 and “a definitive anti-dumping duty” in Article 11.3 must be understood to refer to the antidumping duty order as a whole or whether they, instead, refer to duties imposed on individual exporters or producers.

90. The obligations in Article 11 apply to the antidumping “duty” itself, or the “antidumping duty order” in U.S. parlance. Article 11 does not concern the particular antidumping duties applied to individual companies. This interpretation is supported by the Appellate Body’s finding in *US – Corrosion-Resistant Steel Sunset Review* that “the duty” referenced in Article 11.3 is imposed on a product-specific (i.e., order-wide) basis, not a company-specific basis.⁵⁶ Article 11.2 operates together with Article 11.3 to ensure that “the duty” is terminated when the investigating authority determines that the duty is no longer necessary to offset injurious dumping. These provisions concern review of the need for “the duty,” i.e., the need for the antidumping duty order. Article 11 does not address, and does not require, termination of the antidumping duty on a company-specific basis. All that is required is that, whenever warranted, or after five years, a Member will review the continuing need for “the duty.”

47. (to both parties) What is the relevance to Viet Nam’s claims of the fact that the US regulation for the repeal of an order, when the respondent received three successive zero margins, has no counterpart under the Anti-Dumping Agreement?

⁵⁵ See, e.g., *Certain Activated Carbon From the Peoples’ Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review and Extension of Time Limits for the Final Results*, 74 Fed. Reg. 21,317, 21,318 (May 7, 2009) (unchanged in Final Results) (Exhibit US-8).

⁵⁶ *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 150.

91. The fact that the U.S. regulation referenced by Vietnam has no counterpart under the AD Agreement is of great relevance to the Panel’s analysis of Vietnam’s claims. There simply is no obligation under the AD Agreement to “repeal” an order, or “revoke” it in U.S. parlance, with respect to an individual company after the company receives three successive zero margins, or at any time. As discussed in response to Question 46, the provisions in Article 11 of the AD Agreement concerning the termination of an antidumping duty relate to the antidumping duty order. The U.S. provision of the opportunity for individual companies to have the antidumping order revoked with respect to their exports under certain circumstances is above and beyond any obligation in the AD Agreement. While Vietnam claims that its exporters have been denied an adequate opportunity to seek revocation under the U.S. regulation (a claim that the United States believes is unfounded as a matter of fact), the United States cannot be found to have acted inconsistently with the AD Agreement for failing to take action that the agreement does not require.

LIST OF EXHIBITS

US-8 *Certain Activated Carbon From the Peoples' Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review and Extension of Time Limits for the Final Results*, 74 Fed. Reg. 21,317, 21,318 (May 7, 2009) (unchanged in Final Results)