ANNEX B

EXECUTIVE SUMMARIES OF THIRD PARTIES' WRITTEN SUBMISSIONS

ANNEX B-1

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. PRELIMINARY ISSUES RAISED BY THE U.S.

1. The EU considers that the Panel should reject the U.S. request for preliminary rulings. First, the EU considers that to the extent that dumping margins from the original investigation and the first administrative review were used in subsequent reviews as the basis for calculating dumping margins or imposing/collecting anti-dumping duties, the Panel is due to examine, as part of the evidence and facts of this case, whether the U.S. applied zeroing in those measures. Second, the U.S. already tried the argument that that "continued used of zeroing" is not a measure which can be subject to WTO dispute settlement in *US – Continued Zeroing (EC)* and failed.

II. STANDARD OF REVIEW: THE ROLE OF THE PRECEDENT IN THIS DISPUTE

2. In *US – Stainless Steel from Mexico* the Appellate Body clarified the role of its previous reports and indicated how panels should act in cases where the same legal issues arise (paras 157-162). The EU fully agrees with these statements without reservation. WTO panels are obliged to correctly apply the law; in the context of this dispute this also means that the Panel should follow the rulings of the Appellate Body where the Appellate Body has previously interpreted the same legal questions. Otherwise, the security and predictability enshrined in Article 3.2 of the DSU would be put in serious danger.

III. OVERVIEW OF THE CORE PROBLEM

3. The term "zeroing" – which does not appear in the ADA, may be considered something of a misnomer, because it describes only part of the problem: that is, the downward adjustment of the relatively high export transactions; or, in other words, the setting to zero of the negative amounts. The heart of the matter, however, is the selection of the relatively low priced export transactions *per se*, as a sub-category, as the only or preponderant basis for the dumping margin calculation. This has nothing to do with "offsets" or "credits".

4. This is not a new problem. It is discussed at length in Jacob Viner's Memorandum, and was specifically addressed in the Uruguay Round negotiations, during which the Members were fully informed of the issue and knew exactly what they were talking about. After more than three years of public negotiations, the problem was nicely summarised by the WTO secretariat: it was generally considered that the practice of comparing a weighted average normal value with individual export transactions was obviously unfair to exporters – particularly from developing countries – and required amendment of the Tokyo Round AD Code; the U.S. explained that such a method was necessary to reveal targeted dumping – that is, successive attacks on different parts of an importing market; the consensus was that the Membership should try to find a solution to accommodate the legitimate concerns of both sides. That compromise was the text of Article 2.4.2 of the ADA, as it stands today.

5. Looking at the overall design and architecture of Article 2.4.2, and reading its provisions intelligently, in the light of the underlying economic realities that the legal rules are intended to address and respond to – that is, the real world, it is clear that there are only three sub-categories of clustered low priced export transactions that it is permissible to respond to: those clustered by

purchaser, region or time. These categories broadly correspond to typical market definition parameters: they make economic sense.

6. Thus, it is not permissible, and it is not fair, to pick up low priced export transactions clustered by model. The U.S. has acknowledged as much. This is clear from the term "all" in the first sentence of Article 2.4.2, and the definition of dumping in Article 2.1 of the ADA and Article VI:1 of the GATT 1994 in terms of the product; read together with the absence in the targeted dumping provisions of any reference to a sub-category by model. Thus, the relevant provisions, and particularly the normal rule and the exception, are read harmoniously, so as to give meaning – both legal and economic – to all the treaty terms.

7. In exactly the same way, it is not possible to pick up low priced export transactions *per se* as a sub-category. There is no reference to any such sub-category in the provisions on targeted dumping. To accept such a proposition would be to render the targeted dumping provisions useless; and to negate the compromise, negotiated and agreed by all the WTO Members (in return for other concessions), to which we have just referred. The proof of this is that for some 15 years the U.S. has simply ignored the targeted dumping requirements, content to continue doing exactly what it was doing before, based on its own unilateral interpretation of Article 2.4.2. The further proof of this is that, by its own assertion, the U.S. sought the insertion of the phrase "the existence of margins of dumping during the investigation phase" (the "Phrase") precisely with the intention of side-stepping the compromise and the obligations that we have just outlined. This is a highly significant point that bears repetition: the entire U.S. position is premised on the implied admission that the overall design and architecture of Article 2.4.2 is to be interpreted in the manner advocated by the EU in previous cases.

8. We turn, therefore, to the Phrase "the existence of margins of dumping during the investigation phase", added – behind closed doors – after some three and a half years of public negotiations. According to the U.S., this means that the obligations in Article 2.4.2 do not apply to the re-calculation of dumping margins in assessment proceedings. Rather, the U.S. is completely free to choose the methodology to be used for calculating a contemporaneous dumping margin and finally collecting duties. Since the results of the first retrospective assessment proceeding are applied with effect from the date on which duties were first imposed, this would negate entirely the compromise enshrined in Article 2.4.2.

9. In the view of the EU, assuming Members negotiate in full knowledge of the 1969 Vienna Convention on the Law of the Treaties (the "Vienna Convention"), it may reasonably be assumed that they negotiate in good faith, just as they agree that the terms of the ADA are to be interpreted in good faith. In such negotiations, the EU would neither expect nor accept that what is clearly given, after lengthy debate, with one hand (that is, agreement not to use asymmetry absent targeted dumping) would be surreptitiously entirely taken away with the other hand. The U.S. position reflects what might be termed the "last minute" "spanner in the works" theory of international negotiation – a tactic that, in the view of the EU, is hardly suited to a multilateral organisation with 153 Members, including many developing countries.

10. However, assuming for the sake of argument, that such negotiation tactics are permissible, the EU would like to draw the Panel's very close attention to what a Member forfeits when it adopts such an approach. First, most obviously, the Member chooses to leave no trace of its intended unilateral interpretation in the preparatory work. Second, and in similar vein, the Member chooses not to offer any explanation to its negotiating partners – many of whom are developing countries – as to what the object and purpose of such a provision might be. This is particularly problematic when the subsequent unilateral interpretation flies in the face of the overall design and architecture of the ADA. Especially when there is no object and purpose capable of explaining why, on the basis of identical data, the mere act of collection should inflate the dumping margin many times over – a proposition

that is "manifestly absurd or unreasonable" within the meaning of the Vienna Convention – both in legal terms and in economic terms. Third, and in similar vein, the Member chooses to forego any attempt to reconcile conflicting context with its intended unilateral interpretation. The Panel may thus note that of the various elements of the interpretive rule in the Vienna Convention, by the U.S.' own choice, there is only one that stands between the U.S. and failure: the supposed ordinary meaning of the Phrase.

11. We believe we have previously amply demonstrated – and we do so again below – that the ordinary meaning of the Phrase is not that advocated by the U.S.. We believe that, for the U.S., the term "investigation" was key in its intended unilateral interpretation. In fact, we have an express admission of this in the U.S. Statement of Administrative Action (SAA), which accompanied the adoption of the U.S. Uruguay Round Agreements Act, and which contains the words ("not reviews"). Obviously, the drafter of the SAA well appreciated that these words are not contained in Article 2.4.2 of the ADA, and do not result from a proper interpretation of that provision, which is precisely why they were inserted in the SAA in an attempt at ex post rationalisation – an attempt doomed to fail, as subsequent WTO litigation has demonstrated.

12. The discussion could stop here. But there are a multitude of other interpretative points against the U.S. First, the grammatical structure of the Phrase, in which the term "during … phase" is grammatically linked to a period of time in which margins exist (an investigation period) as opposed to one in which they are established (as the U.S. would have it). This both confirms the EU interpretation and precludes the U.S. interpretation. Second, the defined term "margin of dumping" has the same meaning throughout the ADA, and must inform the meaning of the Phrase – there being no support in the text for the view that the definition should change at the moment of final collection. Third, the overall design and architecture of Article 2.4.2, as outlined above. It is particularly significant in this respect that the EU position reads the normal rule referring to the investigation period in counterpoint to the exceptional rule permitting a response to time based targeted dumping. Thus, once again, the EU advances a harmonious reading of all the treaty terms, which makes legal and economic sense of all of them. Fourth, the numerous references in Article 2 to "investigations", which are considered, even in U.S. municipal law, to refer to all types of investigations, including assessment proceedings. Fifth, the rule in Article 9.3 that the amount assessed cannot exceed the dumping margin – with an express cross-reference to all of Article 2. Sixth, the absence of any object and purpose argument capable of supporting the U.S. position. Seventh, the preparatory work, as outlined above … And the list goes on.

13. Finally, the U.S. turns to some other general arguments, equally without merit. First, the so-called "mathematical equivalence" argument, which is obviously vitiated by a simple intellectual error: something can perfectly well be fair as a response to targeted dumping, but unfair absent targeted dumping. Second, the argument derived from Article 9(4)(ii) and the so-called "variable duty" or prospective normal value. This provision concerns sampling, and insofar as it implies the possibility that one of the measures that could be imposed pursuant to Article 9.2 ADA could be a variable duty, it equally implies that any such duty is ultimately subject to final assessment or refund under Article 9.3, with dumping margins re-calculated in accordance with all of the provisions of Article 2. This is completely logical. It plugs the gap that would otherwise arise in the refund system under Article 9.3.2, in which final liability cannot, by definition, increase. The only option for Members operating such systems who are fearful of targeted dumping is a variable duty, with refund in the event that the feared targeted dumping does not materialise. The proposition that Article 9(4)(ii) in any way contradicts any of the interpretative points that we have already outlined is thus without merit. Third, the proposition that because, in the U.S., assessment proceedings are importer driven, this should change the analysis. This practical assertion is without merit. The ADA responds to international price discrimination by exporters; and it is a matter of elementary accounting to calculate final liabilities for importers, whilst respecting the ceiling fixed by the amount of dumping practiced by an exporter.

14. If all of the interpretative elements in the Vienna Convention support the position of the EU and Vietnam, and disprove the position of the U.S., the U.S. interpretation cannot be said to be "permissible" within the meaning of Article 17.6 of the ADA.

IV. VIETNAM-WIDE RATE

15. The European Union considers that Article 6.10 of the ADA allows for the determination of a single margin of dumping per producer and thus permits to combine separate entities into a single supplier which is the actual source of the alleged price discrimination. The fact that Vietnam is a non-market economy country, and issue which clearly arises from its Protocol of Accession, is very relevant for the proper identification of the actual supplier in the present case. Indeed, in a non-market economy country, the State control over the means of production and State intervention in the economy, including international trade, imply that all the means of production and natural resources belong to one entity, the State. All imports from non-market economy countries are therefore considered to emanate from a single supplier, the State. The State (in this case, Vietnam) in this sense can be considered as one supplier whose dumping behaviour can be identified and addressed in accordance with the disciplines in the ADA. In view of the State's control over international trade, it would not be relevant to name exporting companies which do not act independently from the State separately since they collectively constituted one single supplier or exporting entity, *i.e.*, the State. The application of a single duty rate then also becomes necessary to avoid circumvention of the duties (*i.e.*, the channelling of exports through the supplier with the lowest duty rate). As also evidenced by the U.S., Vietnam as a non-market economy country, meets these concerns. Consequently, in the EU's view, Article 6.10 of the ADA allows investigating authorities to consider the State in cases of non-market economy countries as an "exporter" or "producer" and, thus, a single dumping margin for the State and its export branches can be calculated.

V. ALL OTHERS RATE

16. Whether the USDOC applied zeroing in the original investigation and/or any subsequent reviews is a factual matter that the Panel has to determine on the basis of the evidence provided by Vietnam. If the Panel concludes that the USDOC used zeroing when determining the dumping margins in the context of those anti-dumping proceedings, the use of those dumping margins and the application of those rates in subsequent determinations amount to a new and separate measure attributable to the U.S. which is subject to this Panel's proceedings.

17. Moreover, the European Union considers that, even assuming that Article 9.4 of the ADA contains a lacuna and, thus, does not provide any specific methodology for the calculation of a margin of dumping to be applied to non-investigated companies when the only margins calculated during the investigation are either zero or *de minimis* or calculated pursuant to Article 6.8, such a silence does not imply that no obligation is imposed on WTO Members when calculating "all others" rates in those circumstances. In this respect, the European Union invites the Panel to examine whether, looking at the ADA as a whole, the methodology used by the U.S. was reasonable in view of the specific circumstances of the case.

VI. LIMITATIONS IN THE NUMBER OF RESPONDENTS

18. The European Union considers that, since Article 6.10 is procedural in nature, it applies in the context of review proceedings. Moreover, the European Union considers that, in cases where investigating authorities have limited their examination in accordance with Article 6.10, second sentence, they are also required to consider requests for individual examination, "except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation". The exception is defined by reference to a large number of exporters or producers, as a condition for the application

of the exception. The exception is justified on the basis that individual examination would be unduly burdensome to the authorities and would prevent the timely completion of the investigation. In the EU's view, it is for the Panel to verify whether these elements were present in view of the specific facts of the case.

ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. Japan's written submission focuses on two of the issues raised by Viet Nam: (i) the use of the zeroing procedures by the United States Department of Commerce ("USDOC")[1]; and (ii) the USDOC's determination of "all others" rates.[2] In both respects, the United States appears to act inconsistently with its WTO obligations.[3]

II. THE USE OF ZEROING PROCEDURES IS INCONSISTENT WITH MEMBERS' OBLIGATIONS UNDER THE *AD AGREEMENT* AND THE GATT 1994

2. Viet Nam has challenged the USDOC's use of zeroing to determine margins of dumping for selected respondents in the second and third administrative reviews, as well as the USDOC's continued use[4] of the so-called "zeroing" procedures in successive segments of the ongoing proceeding pertaining to *Certain Frozen Warmwater Shrimp from Viet Nam* (including subsequent administrative reviews and the five-year sunset review).[5] Viet Nam has also asked the Panel to examine the USDOC's use of zeroing in the original investigation and first administrative review to the extent they are relevant to the challenged measures.[6] Japan agrees with Viet Nam that the use of zeroing in administrative reviews is inconsistent with Article 2.4 and Article 9.3 of the *AD Agreement*, and Article VI:2 of the GATT 1994.

3. The consequences of zeroing in the measures at issue are precisely the same as the consequences of zeroing addressed in many previous WTO disputes. *First*, by excluding all negative comparison results, the USDOC makes a "dumping" determination that disregards an entire category of the export transactions making up the "product" – namely, those low-priced export transactions that generate the negative comparison results. "Dumping" is, therefore, *not* determined for the "*product*" as defined by the investigating authority, but for a sub-part of it.

4. In *EC – Bed Linen*, *US – Softwood Lumber V*, *US – Zeroing (EC)*, *US – Softwood Lumber V (21.5)*, *US – Zeroing (Japan)*, *US – Stainless Steel (Mexico)*, and *US – Continued Zeroing (EC)*, the Appellate Body ruled that a partial determination of this type, taking account of just some comparison results, is inconsistent with the definition of "dumping" in Article 2.1 of the

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[1] *See* Viet Nam's First Written Submission, Section VI.A.

[2] *See* Viet Nam's First Written Submission, Section VI.C.

[3] Viet Nam also raises two other issues: (i) calculation of the country-wide rate; and (ii) sampling. *See* Viet Nam's First Written Submission, Sections VI.B and VI.D. In this submission, Japan does not offer comments on these other two elements of the measures at issue.

[4] Japan does not further address this "continued use" measure in the present submission, but notes that the Appellate Body has considered the continued use of the zeroing methodology in successive proceedings to be susceptible to challenge in WTO dispute settlement. *See* Appellate Body Report, *US – Continued Zeroing (EC)*, paras. 175-185.

[5] *See* Viet Nam's First Written Submission, Section IV.

[6] *See* Viet Nam's First Written Submission, Section IV.

AD Agreement, and Article VI of the GATT 1994, because it is not made for the "'product' as a whole".[7]

5. *Second*, zeroing means that an affirmative "dumping" determination is much more likely to be made than not.[8] The reason is that the positive comparison results *included* in the determination relate to export transactions with prices that are *lower* than normal value; in sharp contrast, the *excluded* negative results relate to export transactions with prices *higher* than normal value. The export transactions selected for inclusion in the determination, therefore, relate to the sub-part of the product that is the most likely to generate an affirmative dumping determination.

6. As a result, zeroing can produce a "dumping" determination where, in fact, the product as a whole is not dumped.[9] The exclusion of negative comparison results also "inflates" the amount of any "dumping" determination that is made.[10]

7. Thus, zeroing systematically prejudices the interests of foreign producers and exporters because the negative comparison results that are favorable to them are purposefully set aside by the USDOC. As a result, the Appellate Body has held that the maintenance and use of zeroing procedures involve an "inherent bias" and "distortion" in the comparison of export price and normal value.[11] This is the very antithesis of the "fair comparison" required by Article 2.4 of the *AD Agreement*.

8. For these reasons, the United States' zeroing procedures, and anti-dumping measures adopted using these procedures, have been found to be incompatible with Articles 2.4 and 2.4.2, 9.3, 9.5 and 11.3 of the *AD Agreement* in a series of previous disputes.[12]

9. In the current dispute, the United States repeats the interpretive stance it has now taken in a string of previous *Zeroing* disputes. The arguments relied upon by the United States have been refuted by the complainants and third parties in previous disputes, and rejected by the Appellate Body. Japan urges the Panel to reject the United States' arguments that the use of zeroing is not inconsistent with the *AD Agreement* and the GATT 1994.

III. THE "ALL OTHERS" RATES APPLIED BY THE USDOC IN THE SECOND AND THIRD ADMINISTRATIVE REVIEWS ARE INCONSISTENT WITH THE UNITED STATES' OBLIGATIONS UNDER THE *AD AGREEMENT*

10. Viet Nam challenges the USDOC's determinations of the "all others" rate in the second and third administrative reviews as inconsistent with Article 9.4 of the *AD Agreement*.[13] Based on Viet Nam's and the United States' description of the facts, Japan understands that the USDOC did not calculate "all others" rates but applied the "all others" rate determined in the original investigation

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[7] *See, e.g.*, Appellate Body Report, *EC – Bed Linen*, para. 53; Appellate Body Report, *US – Softwood Lumber V*, para. 99; Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Softwood Lumber V (21.5)*, paras. 87 and 89; Appellate Body Report, *US – Zeroing (Japan)*, para. 115.

[8] Appellate Body Report, *US – Softwood Lumber V (21.5)*, paras. 140-142; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[9] Appellate Body Report, *US – Softwood Lumber V (21.5)*, paras. 140-142; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[10] Appellate Body Report, *EC – Bed Linen*, para. 55; Appellate Body Report, *US – Softwood Lumber V*, para. 101; *and* Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[11] *See* Appellate Body Report, *US – Softwood Lumber V (21.5)*, paras. 140-142; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 134-135; *and* Appellate Body Report, *EC – Bed Linen*, para. 55.

[12] *See, e.g.*, Appellate Body Report, *US – Zeroing (Japan)*, para. 190; Appellate Body Report, *US – Zeroing (EC)*, para. 263; Appellate Body Report, *US – Softwood Lumber V*, para. 183.

[13] Viet Nam's First Written Submission, Section VI.C.

using "model zeroing" to non-investigated respondents in the second and third administrative reviews. Pursuant to U.S. law[14], the USDOC considered this to be a "reasonable" approach. Japan addresses three points.

A. AN INVESTIGATING AUTHORITY IS OBLIGATED TO UPDATE THE "ALL OTHERS" RATE IN AN ADMINISTRATIVE REVIEW BASED ON THE DUMPING MARGINS DETERMINED FOR RESPONDENTS SELECTED IN THAT REVIEW PURSUANT TO ARTICLE 9.4 OF THE *AD AGREEMENT*

11. With regard to this first question, in Japan's view, an investigating authority is obliged, pursuant to Article 9.4 of the *AD Agreement*, to update the "all others" rate to be applied to non-selected respondents based on the dumping margins determined for the selected respondents when it conducts an administrative review and selects respondents to be investigated in that review.

12. Article 9.4 *does* give rise to an obligation to update the "all others" rate when an investigating authority decides to conduct an administrative review because it establishes the general rule that an investigating authority must determine the ceiling for the "all others" rate based on "the weighted average margin of dumping established with respect to the *selected* exporters or producers".[15] If an investigating authority *mak*es a new selection of exporters and producers in an administrative review, and determines new margins for them, Article 9.4 requires that the "all others" rate be based on the updated margins for the selection made.

13. Under Article 9.4., Members are entitled to impose an "all others" rate on *non-examined* exporters, on the grounds that individually examined producers are engaged in dumping. Thus, if the examined producers are dumping and subject to anti-dumping duties, the non-examined producers are also deemed to be dumping and subject to such duties. However, if the individually examined producers are no longer dumping and no longer subject to anti-dumping duties, there is no rational basis to presume that non-examined exporters are dumping or to impose anti-dumping duties on them *alone*.

14. Further, if the "all others" rate were not updated to reflect the latest situation when individually determined rates in a given administrative review were all zero or *de minimis*, then the level of the "all others" rate would be greater than the level required to offset the level of dumping most recently determined, which would be contrary to Article 11.1 of the *AD Agreement* which establishes the principle that anti-dumping duties "shall remain in force *only as long as and to the extent* necessary to counteract dumping".[16]

B. AN INVESTIGATING AUTHORITY DOES NOT HAVE UNLIMITED DISCRETION IN DETERMINING AN "ALL OTHERS" RATE IF ALL SELECTED RESPONDENTS IN AN ADMINISTRATIVE REVIEW RECEIVE RATES THAT ARE EXPLICITLY TO BE EXCLUDED PURSUANT TO ARTICLE 9.4

15. Next, Japan turns to the second question, which considers what methodologies are available to an investigating authority for determining the "all others" rate, if all the individually investigated respondents in an administrative review receive rates that are explicitly to be excluded in determining the ceiling for the "all others" rate pursuant to Article 9.4. The Appellate Body has not stated the bounds of an investigating authority's obligations under Article 9.4 in determining an "all others" rate when the *lacuna* exists.

[14] *See* Viet Nam's First Written Submission, para. 230.
[15] Emphasis added.
[16] Emphasis added.

16. The case at hand appears to fall within the *lacuna* in Article 9.4 because, in the second and third administrative reviews, each of the rates determined by the USDOC for the selected respondents was zero or *de minimis*. Japan submits that the investigating authority's obligation under Article 9.4 requires it to apply an "all others" rate of zero in the second and third administrative reviews. In Japan's view, this would be the only reasonable outcome, because none of the individually examined exporters was found to be engaged in dumping. Thus, in Japan's view, the United States acted inconsistently with its obligations under Article 9.4 by applying the "all others" rate from the original investigation in the second and third administrative reviews, where the respondents selected for investigation all received zero or *de minimis* rates.

C. IF AN INVESTIGATING AUTHORITY IS ENTITLED TO RELY ON AN "ALL OTHERS" RATE DETERMINED IN AN EARLIER PROCEEDING PURSUANT TO ARTICLE 9.4, THAT RATE MUST BE BASED ON WTO-CONSISTENT MARGINS OF DUMPING

17. With regard to the third question, Japan submits that, if the Panel determines that an investigating authority may apply the "all others" rate determined in an original investigation to non-selected respondents in administrative reviews when the *lacuna* in Article 9.4 is triggered, such "all others" rate *must* be based on *WTO-consistent* margins of dumping. That is, if the "all others" rate from the original investigation was calculated based on WTO-inconsistent margins of dumping, the "all others" rate violates Article 9.4.

18. Yet, this is precisely what the United States has done in the second and third administrative reviews in this case. In Japan's view, this is neither "reasonable" nor consistent with the United States' obligations under the *AD Agreement* or the GATT 1994. Rather, the United States must re-calculate the "all others" rate from the original investigation without using "model zeroing" if it is to apply it in subsequent administrative reviews.

19. The United States contends that it is entitled to rely on margins of dumping established in the original investigation because the original investigation was initiated pursuant to an application made before Viet Nam's accession to the WTO.[17] This argument is without merit. The administrative reviews at issue, and the all others rate, are subject to the disciplines of the *AD Agreement*, a fact that the United States does not dispute. Therefore, in these administrative reviews, and in setting the revised all others rate, the United States may not rely on "margins of dumping" established in a WTO-inconsistent manner, irrespective of when these margins were *first* established.

[17] *See* U.S. First Written Submission, paras. 169-175.

ANNEX B-3

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE REPUBLIC OF KOREA

I. INTRODUCTION

1. This third party submission is presented by the Government of the Republic of Korea ("Korea") with respect to certain aspects of the First Written Submissions by Viet Nam dated 20 August 2010 and by the United States of America dated 13 September 2010.

II. ARGUMENTS

A. THE CLEAR IDENTIFICATION OF THE FOURTH ADMINISTRATIVE REVIEW AND THE SUNSET REVIEW MADE IN THE PANEL REQUEST SHOULD BE TAKEN INTO ACCOUNT IN PRELIMINARY RULING ON THE CONTINUED USE OF CHALLENGED PRACTICES.

2. In this dispute, Vietnam contests the "continued use of challenged practices" clearly and strongly in its first written submission, while the United States argues that the "continued use of challenged practices" was not identified in Vietnam's Panel Request, and it would appear to apply to an indeterminate number of potential future measures, and thus is not within the Panel's Terms of Reference.[1]

3. Although Vietnam did not use the term "continued use of challenged practices" in its Panel Request, Korea notes that the Panel should review carefully whether it could find a description in the Panel Request that is sufficient to indicate the nature of the "continued use of challenged practices". Especially, Korea would like to emphasize that the Fourth Administrative Review and the Sunset Review, which seem to be parts of the "continued use of challenged practices", are inarguably within Vietnam's Panel Request. Korea views that above-mentioned measures, as either components of the "continued use of challenged practices" or as independent measures at issue, are subject to this dispute.

B. THE PANEL SHOULD FIND THAT THE PRACTICE OF "ZEROING" IN ADMINISTRATIVE REVIEWS IS INCONSISTENT WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

4. Korea considers the United States' arguments on United States' practice of zeroing in administrative reviews unconvincing, and believes that the Panel should find that the United States' practice of zeroing is inconsistent with the *Anti-Dumping Agreement*.

5. Specifically, the United States argues in its first submission that the concept of "dumping" and "margin of dumping" have a meaning in relation to individual transaction, that is to say, dumping may occur in a single transaction and dumping which occurs with respect to one transaction does not need to be mitigated by the occurrence of another transaction made at a non-dumped price. However, the Appellate Body has explicitly rejected the United States' arguments that "dumping" and

[1] U.S. First Written Submission, para. 87.

"margin of dumping" can be found to exist at the level of individual transactions in ruling the USDOC's practice of zeroing in periodic administrative reviews.[2]

6. The Appellate Body, in analyzing the concept of "dumping" and "margin of dumping," has examined the context in other provisions of the *Anti-Dumping Agreement*, such as Articles 5.8, 6.10, 9.5 as well as the concept of injurious dumping, and concluded that the *Anti-Dumping Agreement* does not refer to "dumping" and "margin of dumping" as existing at the level of individual transactions. The argument by the United States is simply not compatible with the rulings and reasoning of the Appellate Body's decisions.

7. Furthermore, the United States also argues that the term "product" used in Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 does not refer exclusively to "product as a whole" and thus, the relevant provision does not require margins of dumping to be established on an aggregate basis for the "product as whole". This argument is contrary to the Appellate Body's reasoning in *United States – Final Dumping Determination on Softwood Lumber from Canada*[3], in which the Appellate Body held that "margin of dumping" could only be established for the product under investigation as a whole.[4]

8. Considering the Appellate Body's reasoning, Korea is unable to find that the USDOC's zeroing methodology in the assessment proceedings rests on a permissible interpretation of the *Anti-Dumping Agreement* and WTO-consistent.

III. CONCLUSION

9. For the reasons stated above, Korea respectfully requests that the Panel find the United States' practice of zeroing as used in the administrative reviews in anti-dumping proceedings concerning imports of certain shrimp from Vietnam to be inconsistent with the *Anti-Dumping Agreement.*

[2] See *US – Continued Existence and Application of Zeroing Methodology*, Appellate Body Report, WT/DS350/AB/R, 2 April 2009, para. 287.

[3] See *United States – Final Dumping Determination on Softwood Lumber from Canada*, Appellate Body Report, WT/DS264/AB/R, 11 August 2004, paras. 92 to 93.

[4] *Id*. para. 99.

ANNEX B-4

THIRD PARTY WRITTEN SUBMISSION OF MEXICO

I. INTRODUCTION

1. This third party submission is presented by the Government of Mexico ("Mexico") with respect to certain aspects of the *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam* (WT/DS404). The issues addressed in this submission are contained in the First Written Submission of the Socialist Republic of Viet Nam[1] and the First Written Submission of the United States of America.[2]

2. As a World Trade Organization ("WTO") member likewise seeking compliance by the United States with its WTO obligations in relation to the practice of "zeroing" in anti-dumping ("AD") duty "administrative reviews"[3] and related measures by the U.S. Department of Commerce ("USDOC"), Mexico has a systemic interest in the proper interpretation and application of the various provisions of *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"), the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and *the Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Mexico appreciates this opportunity to participate in this proceeding and present its views to the Panel.

3. Mexico will limit its response to issues of broader systemic concern. In particular, Mexico will address: (1) the proper and important role of established Appellate Body precedent in subsequent panel reviews dealing with identical issues; (2) the *Anti-Dumping Agreement's* clear preclusion of zeroing in administrative reviews, as confirmed repeatedly by the Appellate Body; (3) the appropriateness of Vietnam's challenge to the continued use of zeroing as ongoing conduct subject to WTO dispute settlement; (4) the appropriateness of Vietnam's challenge to zeroed rates incorporated in measures within this Panel's terms of reference; and (5) the role of panel requests, as opposed to consultations requests, in determining a panel's terms of reference.

II. THE PANEL SHOULD FOLLOW ESTABLISHED PRECEDENT OF THE APPELLATE BODY

4. The zeroing methodology presented for review in this dispute has been ruled WTO-inconsistent time and time again.[4] The First Written Submission of the United States raises no new substantive arguments in defense of the zeroing measure that have not been fully addressed in other proceedings. Instead, the United States requests this Panel ignore the long line of consistent Appellate Body rulings in this area and to chart a course of its own. This Panel should reject that invitation and should adhere to the established WTO jurisprudence – not only because the prior Appellate Body

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[1] First Written Submission of the Socialist Republic of Viet Nam, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404, 20 August 2010 ("Viet Nam First Written Submission").

[2] First Written Submission of the United States of America, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404, 13 September 2010 ("U.S. First Written Submission").

[3] Period reviews, in the parlance of the *Anti-Dumping Agreement*, are referred to as "administrative reviews" under U.S. law. These terms are used interchangeably throughout this third party submission.

[4] *See* Appellate Body Report, *US – Zeroing (EC)*, para. 263; Appellate Body Report, *US – Zeroing (Japan)*, paras. 123-127, 190; Appellate Body Report, *US – Stainless Steel from Mexico*, para. 133; Appellate Body Report, *US – Continued Zeroing*, para. 316.

decisions were correctly decided, but because there are strong systemic reasons to adhere to this consistent body of law.

5. In an effort to distance itself from the long-line of contrary Appellate Body jurisprudence, the United States argues that "[w]hile prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members, the Panel in this dispute is not bound to follow the reasoning set forth in any Appellate Body Report."[5] The United States continues, "while the dispute settlement system serves to resolve a particular dispute, and to clarify agreement provisions in the context of doing so, neither panels nor the Appellate Body can adopt authoritative interpretations that are binding with respect to another dispute."[6] However, this "does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB,"[7] and the United States vastly underplays the important role of prior consistent rulings in future WTO disputes where the same issues have been addressed by the Appellate Body.

6. As recognized both by WTO panels and the Appellate Body, there are important systemic reasons for following the decisions of the Appellate Body in previous disputes when issues already decided are presented again to a new panel. The Appellate Body has expressed its deep concern about the implications of a panel ignoring prior Appellate Body reports on the same issues before it as follows:

> Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, ***absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case***.
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> In the hierarchical structure contemplated in the DSU, panels and the Appellate Body have distinct roles to play. In order to strengthen dispute settlement in the multilateral trading system, the Uruguay Round established the Appellate Body as a standing body. Pursuant to Article 17.6 of the DSU, the Appellate Body is vested with the authority to review "issues of law covered in the panel report and legal interpretations developed by the panel". Accordingly, Article 17.13 provides that the Appellate Body may "uphold, modify or reverse" the legal findings and conclusions of panels. The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized

[5] U.S. First Written Submission, para. 68.
[6] *Id.*, para. 70.
[7] Appellate Body Report, *US – Stainless Steel from Mexico*, para. 158 (citations omitted).

> the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote "security and predictability" in the dispute settlement system, and to ensure the "prompt settlement" of disputes. ***The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU***. Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, ***the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case***.
>
> We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system, as explained above.[8]

7. In another dispute, the Appellate Body succinctly summarized the same point, stating that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."[9]

8. This understanding of the significance of prior Appellate Body rulings to subsequent disputes involving the same issues has also been emphasized specifically within the context of the U.S. zeroing methodology at issue in this dispute. In *US – Zeroing (EC)*, the Appellate Body observed that "[a]lthough previous Appellate Body decisions are not strictly speaking binding on panels, there clearly is an expectation that panels will follow such decisions in subsequent cases raising issues that the Appellate Body has expressly addressed. The Appellate Body has stated that adopted Appellate Body reports should be taken into account where they are relevant to any dispute."[10]

9. As explained in greater detail below, the substance of Vietnam's zeroing claims have been considered and affirmed in a long line of consistent prior Appellate Body decisions. The United States does not offer in its Written Submission any new substantive arguments not already rejected in previous proceedings. Accordingly, this Panel should adopt the reasoning from those prior decisions and hold (yet again) the United States' zeroing methodology, including as applied in administrative reviews and "sunset" reviews, in violation of the *Anti-Dumping Agreement* and the GATT 1994.

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[8] *Id.*, paras 160-162 (emphasis added).

[9] Appellate Body Report, *OCTG from Argentina*, para. 188; *see also* Appellate Body Report, *US – Certain Shrimp and Shrimp Products (Malaysia)(21.5)*, para. 109 ("[I]n taking into account the reasoning in an adopted Appellate Body Report – a Report, moreover, that was directly relevant to the Panel's disposition of the issues before it – the Panel did not err. The Panel was correct in using our findings as a tool for its own reasoning.").

[10] Panel Report, *US – Zeroing (EC)*, para. 7.30.

III. THE UNITED STATES' ZEROING METHODOLOGY IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

10. The United States' application of its zeroing methodology in administrative reviews has repeatedly been held by the Appellate Body to violate the *Anti-Dumping Agreement*. The United States asks this Panel to ignore established precedent on the exact issue presented in this dispute based on its erroneous theory that margins of dumping can be calculated at the transaction level. This repeatedly rejected theory, which the United States potentially plans to employ to avoid its WTO obligation not to zero, should be rejected yet again by this Panel. Moreover, the United States' application of zeroing is not somehow rendered consistent with the *Anti-Dumping Agreement* by virtue of USDOC calculating certain dumping margins as zero or *de minimis*. Prior to addressing these issues, however, Mexico will first highlight the irrelevance of Article 17.6(ii) on which the United States relies.

A. THE UNITED STATES' EMPHASIS ON ARTICLE 17.6(II) IS MISPLACED IN THIS DISPUTE

11. Article 17.6(ii) of the *Anti-Dumping Agreement* is not relevant to this dispute, despite claims by the United States to the contrary. Article 17.6(ii) provides:

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

12. The United States seizes on the second sentence to suggest that it somehow renders zeroing permissible under the *Anti-Dumping Agreement*. The United States is misguided about how Article 17.6(ii) operates.

13. According to the United States, "[t]he very premise underlying Article 17.6(ii) is that two distinct interpretations can be permissible simultaneously: one that would render the measure at issue consistent with the AD Agreement, and another that would render the measure at issue inconsistent with the AD Agreement."[11]

14. If an interpretation "would render the measure at issue inconsistent with the AD Agreement," nothing in Article 17.6(ii) makes that interpretation permissible. Article 17.6(ii) never renders an inconsistent measure permissible. Rather, Article 17.6(ii) merely clarifies that two interpretations may both be "permissible" and consistent with a Member's obligations under the Agreement. Accordingly, the second sentence only becomes relevant when application of the customary rules of interpretation of international law yield more than one permissible interpretation.

15. As discussed in greater detail in the following section, the interpretation of the *Anti-Dumping Agreement* advanced by the United States in this proceeding, in particular, is one that has repeatedly been held ***impermissible*** based on application of the rules of interpretation of international law, which are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("VCLT").[12] Because the U.S. interpretation of the *Anti-Dumping Agreement* as allowing zeroing has always been rejected for being ***impermissible*** under the language, context, and purpose of the treaty, the provision in Article 17.6(ii) is irrelevant to this dispute.

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[11] U.S. First Written Submission, para. 66.

[12] *See* Appellate Body Report, *US – Hot-Rolled Steel from Japan*, para. 57.

B. ZEROING IS UNQUESTIONABLY PROHIBITED IN ADMINISTRATIVE REVIEWS AND "SUNSET" REVIEWS

16. Mexico would like to state very plainly that the United States raises no new issues that have not already been squarely addressed by the Appellate Body. In short – the *Anti-Dumping Agreement* prohibits the use of zeroing in any anti-dumping proceeding and under any comparison method, including those challenged here.[13] The Appellate Body has confirmed this fact no fewer than five times, rejecting each of the United States' arguments raised here in the process.

17. Mexico has already challenged the same methodology employed by the United States under the AD order on certain shrimp from Vietnam. In that dispute, the Appellate Body definitively ruled that simple zeroing is "as such, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement."[14] This ruling only confirmed the Appellate Body's ruling in *US – Zeroing (EC)* that the zeroing methodology used by USDOC in administrative reviews is inconsistent with the *Anti-Dumping Agreement*.[15] Furthermore, the Appellate Body in *US – Zeroing (Japan)* likewise found that zeroing in administrative reviews was "as such" and "as applied" inconsistent with Articles VI:1 and VI:2 of the GATT 1994, and Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*.[16] The Appellate Body reconfirmed this ruling twice more in 2009 in *US – Continued Zeroing* and *US – Zeroing (Japan)(21.5)*.[17] This issue has been adequately addressed and resolved by the Appellate Body.

18. In fact, one member of the Panel issued a separate concurring opinion in *US – Continued Zeroing* to express frustration with the United States' recalcitrance, stating:

> In matters of adjudication, there must be an end to every great debate. The Appellate Body exists to clarify the meaning of the covered agreements. On the question of zeroing it has spoken definitively. Its decisions have been adopted by the DSB. ... Whatever the difficulty of interpreting the meaning of "dumping", it cannot bear a meaning that is both export-specific and transaction-specific. ... One must prevail. The Appellate Body has decided the matter. At a point in every debate, there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past. With respect to zeroing, that time has come.[18]

19. As the member alluded to in the passage above, and as the United States admits[19], the crux of the argument on zeroing is whether "dumping" and "margins of dumping" are concepts that can have meaning at the transaction-specific level, as the United States suggests, or if they only have meaning with reference to the "product as a whole," as Vietnam contends.

20. The Appellate Body has explained in no uncertain terms that Vietnam's position is correct and that the United States' interpretation is not permissible within the context of the *Anti-Dumping Agreement*:

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[13] *See* Appellate Body Report, *US – Zeroing (Japan)*, paras. 123-127, 190.
[14] Appellate Body Report, *US – Stainless Steel from Mexico*, para. 133.
[15] Appellate Body Report, *US – Zeroing (EC)*, para. 263.
[16] *See* Appellate Body Report, *US – Zeroing (Japan)*, para. 190(c).
[17] *See* Appellate Body Report, *US – Continued Zeroing*, para. 316; Appellate Body Report, *US – Zeroing (Japan)(21.5)*, paras. 195, 197.
[18] Appellate Body Report, *US – Continued Zeroing*, para. 312.
[19] *See* U.S. First Written Submission, para. 117.

> A product under investigation may be defined by an investigating authority. But "dumping" and "margins of dumping" can be found to exist only in relation to that product as defined by that authority. They cannot be found to exist for only a type, model, or category of that product. ***Nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist at the level of an individual transaction***. Thus, when an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are not, in themselves, margins of dumping. Rather, they are merely "inputs that are [to be] aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer."[20]

21. The Appellate Body has also been equally clear in refuting the United States argument, raised again here, that the *Anti-Dumping Agreement*'s preclusion of zeroing is limited to original investigations.[21] Importantly, the Appellate Body has recognized that the definition of a product must remain consistent through all stages of an investigation, and furthermore, that the concepts of "dumping," "injury," and "margin of dumping" are interlinked and should be considered and interpreted in a coherent and consistent manner for all parts of the *Anti-Dumping Agreement*.[22] Based, in part, on these premises, the Appellate Body concluded as follows:

> We fail to see a textual or contextual basis in the GATT 1994 or the *Anti-Dumping Agreement* for treating transactions that occur above normal value as "dumped", for purposes of determining the existence and magnitude of dumping in the original investigation, and as "non-dumped", for purposes of assessing the final liability for payment of anti-dumping duties in a period review. If as a consequence of zeroing, the results of certain comparisons are disregarded only for purposes of assessing final liability for payment of anti-dumping duties in a periodic review, a mismatch is created between the product considered "dumped" in the original investigation and the product for which anti-dumping duties are collected. This is not consonant with the need for consistent treatment of a product at the various stages of anti-dumping duty proceedings.[23]

22. Even though the United States acknowledges that "[t]he Appellate Body has taken the view that the definition of 'dumping' may only be interpreted as applying at the 'level of the product under consideration,' not individual export transactions," the United States nevertheless requests that this Panel ignore the prior Appellate Body rulings and endorse the United States' transaction-specific interpretation.

23. To avoid still more futile rounds of dispute settlement at the WTO, this Panel should reconfirm not only that zeroing is absolutely prohibited in all antidumping proceedings, including administrative reviews and sunset reviews, but that "dumping" and "margins of dumping" are inherently aggregate concepts that apply exclusively to products as a whole under the *Anti-Dumping Agreement*.

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[20] Appellate Body Report, *US – Zeroing (Japan)*, para. 115 (emphasis added).

[21] *See* U.S. First Written Submission, para. 111.

[22] *See* Appellate Body Report, *US – Stainless Steel from Mexico*, para. 106; Appellate Body Report, *US – Continued Zeroing*, para. 284.

[23] Appellate Body Report, *US – Continued Zeroing*, para. 285.

24. In summary, the United States offers nothing more than rehashed arguments that have been roundly rejected by the Appellate Body.

C. THE UNITED STATES' CALCULATION OF ZERO OR *DE MINIMIS* RATES FOR INDIVIDUALLY EXAMINED RESPONDENTS IN ADMINISTRATIVE REVIEWS DOES NOT RENDER ITS ZEROING METHODOLOGY COMPLIANT WITH THE ANTI-DUMPING AGREEMENT

25. Despite its continued use of zeroing to calculate the margins of dumping for individually examined respondents in the second and third administrative reviews, the United States argues that it did not act inconsistently with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* because zero or *de minimis* margins were calculated for all such respondents.[24] Given that no antidumping duties were assessed, the United States reasons, it is not possible that antidumping duties in excess of the margins of dumping were imposed, as prohibited by Article 9.3. The United States ignores, however, the clear requirement in Article 9.3 that a margin be established consistent with Article 2 (*i.e.* without zeroing).

26. The United States is correct that, under Article 9.3 of the *Anti-Dumping Agreement*, a Member is prohibited from imposing an antidumping duty in excess of the margin of dumping as established in Article 2. Pursuant to Articles 9.3.1 and 9.3.2, a Member is required to refund any duties in excess of the actual margin of dumping determined under Article 2. A Member is, thus, required to first calculate the margin of dumping for the relevant exporter(s) during the period of review consistent with Article 2 (Step 1), and to then compare this amount to the total amount of duties actually collected (Step 2). To the extent the latter is greater than the former, the Member must provide refunds within the time allotted in Articles 9.3.1 and 9.3.2.

27. If the amount of duties actually collected on imports from a particular exporter or exporters is zero, it cannot exceed the actual margin of dumping.[25] Mexico therefore agrees that where no duties are collected from an importer, as is the case with respect to the imports from the individually examined respondents in the second and third administrative reviews here, no violation of Article 9.3.1 or 9.3.2 would exist. However, even where no duties are actually collected, the use of zeroing in the calculation of the margin of dumping would still violate Article 9.3.

28. Specifically, the use of zeroing would violate the obligation in the chapeau of Article 9.3 that requires a Member to calculate a margin of dumping "as established under Article 2" (Step 1 above). As the Appellate Body has repeatedly affirmed, zeroing cannot be used to calculate a margin of dumping under Article 2, including in periodic reviews.

29. Accordingly, a Member that used zeroing has failed to calculate a "margin of dumping as established under Article 2," regardless of whether any antidumping duties were actually collected on the basis of that margin calculation. Accordingly, USDOC's undisputed use of zeroing to calculate the margins of dumping for individually examined respondents in the second and third administrative reviews still violates the *Anti-Dumping Agreement*.

[24] U.S. First Written Submission, para. 109.

[25] Theoretically, zero duties collected would be greater than a negative margin of dumping, but a Member is not required to provide refunds for sales above normal value. *See* Appellate Body Report, *US – Stainless Steel from Mexico*, para. 113 n. 237; Appellate Body Report, *US – Zeroing (Japan)*, para. 155 n. 363; Appellate Body Report, *US – Zeroing (EC)*, para. 131 n. 234.

IV. THE CONTINUED USE OF THE ZEROING PROCEDURES BY THE UNITED STATES IS PROPERLY CHALLENGED AND SUBJECT TO PANEL REVIEW IN THIS DISPUTE

30. The United States is also misguided in its request for a preliminary ruling that Vietnam's challenge to the continued use of U.S. zeroing procedures fails because it purports to include "future measures." The United States argues that Vietnam appears to be challenging "an indeterminate number of potential future measures," and that "[m]easures that are not yet in existence are not within a panel's term [sic] of reference under the DSU."[26] As the Appellate Body has confirmed, the United States' position is flawed because it fails to recognize administrative reviews as segments of the same proceeding and because it erroneously assumes that all future conduct is beyond the reach of the WTO dispute settlement process.

31. The United States would like this tribunal to treat an AD order as series of autonomous and independent measures. For the United States, a definitive AD original determination would be an independent measure from the first subsequent administrative review, which would be itself independent from the second review, and so on with respect to the third, fourth, and even after the sunset review. Following the United States' suggestion would mean that an application of a practice in the original final determination that violates the *Anti-Dumping Agreement*, such as zeroing, would be independent from the application of the same practice in the first administrative review, and subsequent reviews. In the eyes of the United States, the AD order would be a series of one-year-hit-and-run measures outside the scope of WTO dispute settlement.

32. The United States' only support for its contention is the panel report in *United States – Upland Cotton*.[27] The United States' reliance on *Upland Cotton* is misplaced. In *Upland Cotton*, the Panel found that payments under the Agricultural Assistance Act of 2003 (the "Act") were not within the Panel's terms of reference because the Act was not enacted until after the panel request. As a result, consultations were not sought or held on the payments under the Act. The Panel also specifically "noted[d] that the cottonseed payments for each year were *ad hoc* appropriations, each with a separate legal basis, which did not follow a single model."[28] The Panel further found that the relevant section "did not amend or modify any existing or previous programme. Unlike Public Law 107-25, it did not provide for assistance under an earlier law, it did not define the recipients as those who had previously received assistance an it was not implemented by an existing regulation."[29] The Panel thus concluded that "[t]his evidence discloses the existence of separate and legally distinct cottonseed payment programmes for crops in different years rather than a single cottonseed payment programme."[30]

33. In contrast, in this dispute Vietnam challenges the continued application of zeroing in periodic reviews and "sunset" reviews conducted as stages of a continuous proceeding involving the imposition, assessment, and collection of duties under the same AD order. In fact, USDOC's own regulations regard administrative reviews as "segments" in one single proceeding beginning on the date the anti-dumping petition is filed and continuing until the AD order is revoked.[31] Therefore, Vietnam has every right to challenge in this dispute USDOC's continued use of zeroing in successive proceedings under a single AD order.

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[26] U.S. First Written Submission, para. 96.
[27] *Id.*
[28] Panel Report, *US – Upland Cotton*, para. 7.162 (citations omitted).
[29] *Id.*, para. 7.165 (citations omitted).
[30] *Id.*, para. 7.167.
[31] *See* 19 C.F.R. § 351.102(40),(47).

34. The Appellate Body endorsed just such a challenge in *US – Continued Zeroing*, where it concluded that "continued use of the zeroing methodology in successive proceedings in which duties resulting from the 18 anti-dumping duty orders are maintained, constitute 'measures' that can be challenged in WTO dispute settlement."[32] The Appellate Body noted that the complaining Member, "in seeking an effective resolution of its dispute with the United States, is entitled to frame the subject of its challenge in such a way as to bring the ongoing conduct, regarding the use of the zeroing methodology in [the case], under the scrutiny of WTO dispute settlement."[33]

35. In arriving at its conclusion, the Appellate Body reasoned as follows:

> As discussed, we are of the view that it can be discerned from the panel request, read as a whole, that the measures at issue consist of an ongoing conduct, that is, the use of the zeroing methodology in successive proceedings in each of the 18 cases whereby anti-dumping duties are maintained. The prospective nature of the remedy sought by the European Communities is congruent with the fact that the measures at issue are alleged to be ongoing, with prospective application and a life potentially stretching into the future. Moreover, it is not uncommon for remedies sought in WTO dispute settlement to have prospective effect, such as a finding against laws or regulations, as such, or a subsidy programme with regularly recurring payments.
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> ...
>
> We see no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement. The successive determinations by which duties are maintained are connected stages in each of the 18 cases involving imposition, assessment, and collection of duties under the same anti-dumping duty order. The use of the zeroing methodology in a string of these stages is the allegedly unchanged component of each of the 18 measures at issue. It is with respect to this ongoing conduct that the European Communities brought its challenge, seeking its cessation.[34]

36. With respect to the AD order on certain shrimp from Vietnam, USDOC has applied zeroing at every stage and has given no indication that it will change its approach in future stages. The United States erroneously claims that Vietnam cannot establish a sequential string of determinations over a period of time sufficient to justify a finding that zeroing would likely continue to be applied in successive proceedings.[35] The United States reasons that this is so because: 1) the first, fourth, and fifth administrative reviews are not within the Panel's terms of reference; 2) zeroing did not impact the individually examined respondents in the second and third administrative reviews; and 3) zeroing arguably was not used to calculate the margins for respondents not individually examined (*i.e.* those subject to a separate rate or the country-wide rate) in the second and third administrative reviews.[36]

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[32] *See* Appellate Body Report, *US – Continued Zeroing*, para. 185.
[33] *Id.*, para 181.
[34] Appellate Body Report, *US – Continued Zeroing*, paras 171 and 181.
[35] *See* U.S. First Written Submission, para. 219.
[36] *See id.*

37. Even putting aside whether the United States' three premises are correct, an established and sequential pattern can be established on this record because, as a factual matter, USDOC applied zeroing in every one of those reviews. Even if Vietnam's accession date precludes a WTO panel from issuing legal rulings with respect to the first administrative review, this Panel is not required to pretend that, as a factual matter, that proceeding never occurred. Therefore, this Panel has every reason to believe, based on evidence of USDOC's consistent practice up to this point, that zeroing is likely to continue in successive proceedings under the AD order on certain shrimp from Vietnam.

38. It is the ongoing conduct of the United States in continuing to use zeroing in successive determinations by which anti-dumping duties are applied and maintained that Vietnam is challenging as "ongoing conduct" here. Vietnam is entitled to frame its challenge in way that subjects this ongoing conduct to the scrutiny of WTO dispute settlement. Accordingly, the United States' request for a preliminary ruling in this respect should be denied.

V. THE ZEROED "SEPARATE RATES" INCORPORATED BY THE UNITED STATES IN THE SECOND AND THIRD ADMINISTRATIVE REVIEWS ARE PROPERLY CHALLENGED AND SUBJECT TO PANEL REVIEW IN THIS DISPUTE

39. The United States argues that "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."[37] The United States relies on this reasoning to suggest that this Panel cannot review the "separate rates" determined in the second and third administrative reviews, which merely adopted a weighted-average margin of dumping calculated using zeroing in the original investigation. The United States misconstrues Vietnam's challenge in this regard.

40. As Mexico understands it, Vietnam is not seeking a finding that the determination in the investigation is inconsistent with the *Anti-Dumping Agreement*. Such a finding would, in theory, result in revocation of the AD order and would affect the assessment of duties on imports during the period of investigation.

41. Rather, Vietnam is challenging the "separate rate" (or "all-others rate") as determined in the second and third administrative reviews, and there is no question that these reviews are properly subject to review by this Panel.[38] The separate rates in these reviews are distinct determinations published in by USDOC in the *Federal Register* and bear no obvious (or usual) relationship to rates determined in the original investigation. It is the United States that chose to incorporate data from the original investigation to reach its determinations in these reviews and, regardless of whether that decision was reasonable and WTO-consistent, it certainly cannot shield the United States' determinations in the second and third administrative reviews from the scrutiny of this Panel.

42. Accordingly, this Panel should review Vietnam's challenge to the separate rates determined by USDOC in the second and third administrative reviews. And because these rates were unquestionably calculated through the use of zeroing, they should be rejected as unreasonable and inconsistent with the *Anti-Dumping Agreement*.

[37] *Id.*, para. 101 (emphasis in original).
[38] *See* Viet Nam First Written Submission, paras. 208, 210.

VI. THE ORIGINAL INVESTIGATION IS NOT EXCLUDED FROM THIS PANEL'S TERMS OF REFERENCE BY VIRTUE OF THE CONSULTATIONS BETWEEN VIETNAM AND THE UNITED STATES

43. The United States argues that the original investigation resulting in the AD Order on certain shrimp from Vietnam is not subject to this Panel's terms of reference. The United States relies, in part, on Vietnam's request for consultations.[39] The United States places undue emphasis on the request for consultations and ignores Vietnam's request for the establishment of a panel.

44. Previous panels and the Appellate Body have specifically highlighted that "a WTO panel's terms of reference are governed by the complaining Member's panel request, as opposed to it its consultations request."[40] Thus, the United States is incorrect in its suggestion that the consultations request sets the matter in stone, thereby limiting what can properly be raised before this Panel.[41] As the Appellate Body has noted, "the purpose of consultations is to clarify the facts of the situation and to arrive at a mutually agreed solution."[42] Neither "Articles 4 and 6 of the DSU, [n]or paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."[43]

45. The Panel in *United States – Continued Zeroing* made clear that that, "as long as the consultations request and the panel request concern the same matter, or dispute, claims raised in connection with measures identified in the complaining Member's panel request would fall within a panel's terms of reference even if those precise measures were not identified in the consultations request."[44] Vietnam clearly cited USDOC's original investigation determination in its panel request. The United States errs by failing to acknowledge or address this inclusion in the panel request, which determines this Panel's proper terms of reference.

VII. CONCLUSION

46. Mexico appreciates the opportunity to participate in these proceedings, and to present its views to the Panel.

47. For the foregoing reasons, Mexico respectfully urges the Panel to find, consistent with established Appellate Body precedent, that "dumping" and "margin of dumping" are inherently aggregate concepts that cannot exist on a transaction-specific basis, and thus, zeroing in administrative reviews and sunset reviews is precluded by the *Anti-Dumping Agreement* and the GATT 1994. Mexico requests that the Panel further find that the United States' continued use of zeroing in subsequent proceedings is properly subject to review by this Panel, as are zeroed rates incorporated in measures within this Panel's terms of reference.

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[39] *See* U.S. First Written Submission, paras. 81-84.
[40] Panel Report, *US – Continued Zeroing*, para. 7.23 (citing Appellate Body Report, *Brazil – Aircraft*).
[41] *See* U.S. First Written Submission, para. 82.
[42] Panel Report, *Brazil – Aircraft*, para. 131 (internal quotations omitted).
[43] *Id.*, para. 132 (emphasis in original).
[44] Panel Report, *US – Continued Zeroing*, para. 7.22.