UNITED STATES – ANTI-DUMPING MEASURES ON FISH FILLETS FROM VIET NAM
(DS536)

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

May 29, 2019

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Short Form	Full Citation
EC – Fasteners (China) (AB)	Appellate Body Report, *European Communities – Definitive Anti- Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
US – Continued Zeroing (AB)	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – Oil Country Tubular Goods Sunset Reviews (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Shrimp (Ecuador) (Panel)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007
US – Shrimp (Thailand) / US – Customs Bond Directive (AB)	Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008
US – Shrimp II (Viet Nam) (Panel)	Panel Report, *United States – Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from Viet Nam*, WT/DS429/R and Add. 1, adopted 22 April 2015
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1
US – Zeroing (EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006

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U.S. First Written Submission	
USA-1	Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002)
USA-2	19 U.S.C. § 1677(18)(C)
USA-3	Accession of Viet Nam, Report of the Working Party on the Accession of Viet Nam, WT/ACC/VNM/48 (27 Oct. 2006)
USA-4	*Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Selection of Respondents for Individual Review* (Jan. 7, 2011)
USA-5	19 CFR § 351.401
USA-6	*Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen Fish Fillets From the Socialist Republic of Viet Nam*, 68 Fed. Reg. 4,986 (Jan. 31, 2003)
USA-7	*The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.)
USA-8	Request for Administrative Review by Vinh Hoan Corporation, QVD Food Company, Ltd., and An Giang Fisheries Import and Export Joint Stock Company (Period of Review 8/1/09-7/31/10) (August 30, 2010)
USA-9	*Modification to Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 77 Fed. Reg. 29,875 (May 21, 2012)
U.S. Opening Statement at the First Substantive Meeting of the Panel	
USA-10	Chapter 1, Department of Commerce Antidumping Manual, p. 1 (2009)
USA-11	19 CFR § 351.107(d)
USA-12	*Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 11,349 (March 17, 2009)

Exhibit No.	Description
USA-13	*Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review, and Intent To Revoke Order in Part*, 77 Fed. Reg. 56,180 (September 12, 2012)
USA-14	*Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results, and Final Results of No Shipments of the Antidumping Duty Review; 2016-2017*, 84 Fed. Reg. 18,007 (April, 29, 2019)
USA-15	Issues and Decisions for the Final Results of the 17th Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea (2009-2010) (March 5, 2012)
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USA-16	USDOC Separate Rate Certification for Producers/Exporters from Viet Nam (Blank)
USA-17	Article 9(5), Council Regulation (EC) No 1225/2009, L 343/63
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USA-19	19 CFR § 351.303
USA-20	19 CFR § 351.221
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USA-22	Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results of the Eighth Administrative Review and Aligned New Shipper Reviews (March 13, 2013) (pp. 1, 48-49)

5. <u>To the United States</u>: The United States argues at paras. 188-189 of its first written submission that the concepts of a "consistent practice" or "the simple repetition of the application of a certain methodology to specific cases" are distinguishable from "the notion of a rule or norm of general and prospective application".

How can a complaining party establish the general and prospective application of an unwritten measure? Please explain.

<u>Response</u>:

1. In WTO dispute settlement proceedings, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[1] Where, as here, Viet Nam seeks to challenge an unwritten measure as such, the burden falls to Viet Nam to prove the existence of an unwritten measure having general and prospective application.

2. The Appellate Body has stated that a "panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document."[2] The Appellate Body reasoned as follows:

> In our view, when bringing a challenge against such a "rule or norm" that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or norm" may be challenged, as such. Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is *not* expressed in the form of a written document. This evidence may include proof of the systematic application of the challenged "rule or norm". A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged, as such. [3]

[1] *US – Wool Shirts and Blouses (AB)*, p. 14.

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

[3] *US – Zeroing (EC) (AB)*, para. 198 (italics in original).

3. With respect to Viet Nam's claim regarding the so-called differential pricing methodology, a claim which the United States explained in its first written submission is outside the Panel's terms of reference,[4] Viet Nam has not come close to meeting its burden of establishing the existence of an unwritten measure adopted by the United States.

4. Viet Nam's contention rests on just two documents, and one of those documents is a *preliminary* analysis memorandum.[5] These documents are incomplete and brief, and fall short of demonstrating the existence of, or the precise contents of, a purported unwritten measure. Furthermore, the United States is not in a position to speculate as to the type of evidence Viet Nam might put forward in order to demonstrate the precise contents of the purported measure.

5. With regard to whether the so-called differential pricing methodology has general and prospective application, the United States would note that, as demonstrated in Exhibit USA-14, the differential pricing analysis was ultimately not used in the final results of the fourteenth review.[6] Thus, the record in the case contains only a single incomplete document purporting to evidence the application of the purported methodology. One instance of the application of the so-called differential pricing methodology is hardly sufficient to demonstrate the purported methodology as having general and prospective application.

6. Viet Nam's reliance on prior panel and Appellate Body reports to establish the so-called differential pricing methodology as having general and prospective application is misplaced as prior findings in other reports cannot establish the existence of an unwritten measure having general and prospective application in this case. Separate panel or Appellate Body's findings are not evidence, but conclusions based on evidence in a separate dispute.[7]

7. With respect to simple zeroing, the evidence on which Viet Nam relies, namely a public notice filed by the USDOC announcing that it would begin to provide offsets for non-dumped comparisons in administrative reviews effective April 16, 2012,[8] disapproves Viet Nam's claim

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[4] U.S. First Written Submission, paras. 55-59.

[5] Viet Nam has put forward two documents in the record regarding the purported methodology – a final analysis memorandum for the ninth administrative review, and preliminary analysis memorandum for the fourteenth administrative review. *See Ninth Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results Analysis Memorandum for Vinh Hoan Corporation*, p.10 (Exhibit VN-16-2); *14th Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results Analysis Memorandum for the Hung Vuong Group*, p.10 (Exhibit VN-16-3).

[6] *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results, and Final Results of No Shipments of the Antidumping Duty Review; 2016-2017*, 84 Fed. Reg. 18,007 (April, 29, 2019) (Exhibit USA-14).

[7] *See, e.g., US – Shrimp (Ecuador) (Panel)*, para. 7.9. The Panel has an obligation under DSU Article 11 to exercise its discretion as a fact-finder to make an objective assessment of the matter before it, and must itself be satisfied that the evidence before it supports its conclusions.

[8] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8,101 (Feb. 14, 2012) (Exhibit VN-27).

that simple zeroing is a rule or norm of general and prospective application. To the contrary, Viet Nam's evidence demonstrates the simple zeroing methodology no longer exists.

6. <u>To both parties</u>: Should a panel in deciding whether a measure can be challenged "as such" consider previous findings of panels and/or the Appellate Body, which dealt with arguably the same measure? What weight, if any, should a panel give to such previous findings of panels and/or the Appellate Body?

<u>Response</u>:

8. Under Article 11 of the DSU, the function of a panel is to 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."[9] Specifically with respect to zeroing, the Appellate Body has observed that "the factual findings adopted by the DSB in prior cases regarding the existence of the zeroing methodology, as a rule or norm, are not binding …." on subsequent panels.[10] To the extent that a panel finds prior Appellate Body or panel reasoning to be persuasive, a panel may refer to that reasoning in conducting its own objective assessment of the matter.

9. In the present dispute, Viet Nam asks the Panel to reach the same conclusions of the Appellate Body concerning an as such challenge to simple zeroing and the so-called differential pricing methodology without a scintilla of evidence in the **record of this case** to support its claims. However, the findings of prior panels and the Appellate Body regarding whether certain unwritten measures may be challenged as such were based on a review and assessment of the evidence in the panel record in those cases. Factual findings made in prior disputes, however, do not determine facts in another dispute.[11]

10. The Appellate Body in *US – Continued Zeroing* explained,

> Evidence adduced in one proceeding, and admissions made in respect of the same factual question about the operation of an aspect of municipal law, may be submitted as evidence in another proceeding. The finders of fact are of course obliged to make their own determination afresh and on the basis of all the evidence before them. But if the critical evidence is the same and the factual question about the operation of domestic law is the same, it is likely that the finder of facts would reach similar findings in the two proceedings.[12]

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[9] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Art. 11.

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

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

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

Implicit in the Appellate Body's reasoning above is an acknowledgment that subsequent panels even when reviewing measures previously reviewed by other panels or the Appellate Body, must make **their own objective assessment of the evidence before them**, and that panels are not bound by prior findings of fact.

11. In this case, Viet Nam has not put forward any evidence, much less the type of documentation submitted in prior cases involving as such challenges to the simple zeroing and so-called differential pricing methodologies, sufficient to establish the existence of the unwritten measures as rules or norms of general and prospective application. And, as the United States explained in its first written submission, Viet Nam's claim regarding an alleged differential pricing methodology is outside the Panel's terms of reference because the alleged methodology was not identified as a measure at issue in the panel request.[13]

10. To the United States: Does the United States agree with Viet Nam that the USDOC applied zeroing in the reviews at issue? If yes, please explain how this was done,

Response:

12. Viet Nam indicated in its first written submission that the "reviews at issue" for its as applied claims are the fifth, sixth, and seventh administrative reviews **only**.[14] With respect to these reviews, the United States does not dispute that zeroing was applied. The documents before the Panel from the official record of each of these reviews, including the preliminary and final decision memoranda, and relevant excerpts of the computer program language, explain how zeroing was applied.[15] These documents speak for themselves.

11. To the United States: With respect to the sixth review, Viet Nam submits at para. 100 and footnote 137 of its first written submission that the affidavit by Ms Tenore demonstrates that, had the USDOC not used simple zeroing in the remand redetermination, Vinh Hoan's dumping margin would have been a negative margin of $ 0.13 per kilogram, i.e., *de minimis*. Do you agree with Viet Nam's contention? Please explain.

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[13] U.S. First Written Submission, paras. 55-59.

[14] *See, e.g.,* Viet Nam First Written Submission, para. 18.

[15] *See, e.g., Analysis of the Final Results of the Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Vinh Hoan Corporation ("Vinh Hoan")*, 75 Fed. Reg. 12,726 (March 17. 2010) (Exhibit VN-06-4 (BCI)); *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15,941 (March 22, 2011) (Exhibit VN-07-4 (BCI)); *Final Results of Redetermination Pursuant to Catfish Farmers of America et al. v. United States*, Court Nos. 11-00109 and 11-00110, Slip Ops. 13-63 and 13-64, (May 23, 2013) (Exhibit VN-07-6 (BCI)); *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 Fed. Reg. 15039 (March 14, 2012) (Exhibit VN-08-4 (BCI)); *Final Results of Redetermination Pursuant to Catfish Farmers of America et al. v. United States*, Consol. Court No. 12-00087, Slip Op. 14-146, (Dec. 18, 2014) (Exhibit VN-08-6 (BCI)).

Response:

13. As an initial matter, the United States does not agree with Viet Nam's view that the level of Vinh Hoan's margin calculated with offsets would be relevant to any pertinent WTO obligation. As the United States has explained,[16] the absence of dumping for three years would not establish any requirement to revoke a duty under the Anti-Dumping Agreement. Whether a respondent has engaged in dumping in the context of any particular administrative review period, or set of periods, is a completely separate question from whether there is a "need for continued imposition of the duty" for purposes of Article 11.2 of the Anti-Dumping Agreement. One question looks retrospectively and the other prospectively. Thus, whether continuation of an antidumping duty is necessary to offset dumping is not determined by an absence of dumping during past periods when the antidumping order was in place.[17] U.S. law recognizes this as well, providing for revocation requests to be considered in light of both whether there was an absence of dumping over a specified period and whether continuation of the order is "otherwise necessary to offset dumping."[18]

14. Furthermore, as the party presenting a proposition, it is Viet Nam's burden to adduce evidence that would support its contention that Vinh Hoan would have received a *de minimis* dumping margin had "simple zeroing" not been used. Viet Nam has not carried its evidentiary burden in this regard. The United States does not agree that the Tenore affidavit is any sort of expert opinion or evidence. The statements of Ms. Tenore represent additional arguments being made by Viet Nam. The fact that Viet Nam included these additional arguments in an attachment to its brief, rather than in the body of its brief, does not change the character of the argument or ascribe to those arguments evidentiary value.

15. Moreover, the documents before the Panel from the official record from the sixth administrative review do not establish the impact on Vinh Hoan's dumping margin if the USDOC had not applied zeroing. Because the USDOC did not perform this calculation in conducting the review, the United States cannot speculate as to the outcome of any such calculation.

12. To Viet Nam: The United States at paras. 67-69 of its first written submission states that Section VII of Viet Nam's first written submission "sets out a confusing argument that could potentially be read to advance additional claims" that the USDOC:

a. should have granted a revocation *proprio motu* following a finding of zero margin for Vinh Hoan in the seventh review; and

[16] U.S. Opening Statement at the First Substantive Meeting of the Panel, para. 25.

[17] *US – DRAMS*, paras. 6.29-6.32, 6.34.

[18] 19 CFR § 351.222 (Exhibit VN-02).

b. applied zeroing in the context of Vinh Hoan's request for revocation, failing to base its revocation determination under Article 11 on margins of dumping consistent with Article 2 of the Anti-Dumping Agreement.

Does Viet Nam indeed bring these additional claims? If so, please identify these claims in the panel request. If not, what claim, if any, does Viet Nam bring in Section VII of its first written submission?

Response:

16. In paragraph 35 of the Response of Viet Nam to the U.S. Request for a Preliminary Ruling, Viet Nam disclaimed any attempt to advance these additional claims. Accordingly, they are not presented in this dispute.

14. To both parties: Does the obligation under Article 11.2 apply to a company-specific revocation?

Response:

17. No. The United States refers to the discussion of this subject in its first written submission[19] and its opening and closing statements[20] at the first meeting of the Panel with the Parties.

15. To both parties: Does the absence of any time limitation for the submission of revocation requests in Article 11.2 indicate that investigating authorities have discretion in setting deadlines for submitting revocation requests?

Response:

18. Yes. An investigating authority does not need a grant of permission in the WTO Agreements to impose a procedural deadline. This authority is inherent in any administrative system, subject only to specific obligations set out in a covered agreement. Indeed, the Appellate Body has acknowledged "the right of investigating authorities to rely on deadlines in the conduct of their investigations and reviews."[21] Nothing in Anti-Dumping Agreement Article 11 limits that right with respect to revocation requests.

16. To the United States: Section 351.222(e) of the USDOC's regulations provides that exporters can request revocation during "the third and subsequent annual anniversary months of … an anti-dumping order".

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[19] U.S. First Written Submission, paras 133-149.

[20] U.S. Opening Statement at the First Substantive Meeting of the Panel, paras. 26-29; U.S. Closing Statement at the First Substantive Meeting of the Panel, para. 15.

[21] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 242.

a. Is it a correct understanding that an interested party cannot apply before the third anniversary month?

Response:

19. Yes.

b. Does the United States consider the third annual anniversary month to be when a "reasonable period of time has elapsed" under Article 11.2? Please explain.

Response:

20. Viet Nam has not raised a challenge to the USDOC's requirement that revocation be sought no sooner than the window for seeking administrative review for the third year after imposition of an antidumping duty order. Accordingly, the question of what does or does not constitute a "reasonable period of time … since the imposition of the definitive anti-dumping duty" is not presented here.

21. That said, 19 CFR § 351.222 (2010) is consistent with all aspects of Article 11.2 of the Anti-Dumping Agreement, including the requirement that "the authorities shall review the need for the continued imposition of the duty, where warranted, … provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review."

c. Please identify any textual basis under Article 11.2 or elsewhere in the Anti-Dumping Agreement for imposing such a specific "window of opportunity" during which interested parties can apply for revocation.

Response:

22. As noted in the U.S. response to question 15, there does not need to be a grant of authorization in the Anti-Dumping Agreement for an investigating authority to impose a procedural deadline. Rather, this authority exists so long as there is no text precluding the investigating authority from imposing the deadline. The Appellate Body has acknowledged "the right of investigating authorities to rely on deadlines in the conduct of their investigations and reviews."[22] Nothing in Anti-Dumping Agreement Article 11 limits that right with respect to revocation requests.

23. Furthermore, the text of Article 11.2 recognizes that an authority may impose limits on requests for revocation. It provides for consideration of revocation requests only if supported by positive information and made after a reasonable period of time, and only "where warranted". The phrase "where warranted" explicitly contemplates that in some circumstances, initiation of a

[22] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 242.

review may not be warranted even if a request has been made and supported by positive information and a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty. This could be, for instance, because recent dumping has made clear that continuation of the order is necessary to offset dumping, and thus no review is needed to ascertain the need for the order's continuation. Likewise, in a retrospective system like that of the United States, it could be because the request was filed at a time that does not permit consideration in a procedurally orderly manner that respects the rights of other participants in the proceeding.

17. <u>To both parties</u>: Article 11.2 provides that "[t]he authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review".

a. Does Article 11.2 create an obligation to accept revocation requests as long as the request meets the requirements explicitly set out in this provision? Please explain.

<u>Response</u>:

24. No. As noted in the U.S. response to question 15, there does not need to be a grant of authorization in the Anti-Dumping Agreement for an investigating authority to impose a procedural deadline. Rather, this authority exists so long as there is no text precluding the investigating authority from imposing the deadline. The Appellate Body has acknowledged "the right of investigating authorities to rely on deadlines in the conduct of their investigations and reviews."[23] Nothing in Anti-Dumping Agreement Article 11 limits that right with respect to revocation requests.

25. Accordingly, a Member will satisfy its burden under Article 11.2 by maintaining procedures through which revocation may be sought at appropriate times, and in appropriate manners, after a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, where warranted. Article 11.2 provides a practical means of preventing the continuation of anti-dumping duty orders where no longer necessary. Nothing about its text suggests that it aims to give respondents full control of when revocation reviews occur and how they start.

26. That Article 11.2 provides for consideration of revocation requests supported by positive information and made after a reasonable period of time only "where warranted" underscores the ability of investigating authorities to impose procedural deadlines. This phrase explicitly contemplates that in some circumstances, initiation of a review may not be warranted even if a request has been made and supported by positive information and a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty. In a retrospective system like

[23] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 242.

that of the United States, it could be because the request was filed at a time that does not permit consideration in a procedurally orderly manner that respects the rights of other participants in the proceeding.

27. Reading Article 11.2 to preclude investigating authorities from imposing procedural requirements with respect to revocation requests would have consequences beyond the context of deadlines and would facilitate abusive conduct by respondents. Indeed, any understanding of Article 11.2 that precludes the imposition of reasonable filing deadlines like those maintained by the USDOC would necessarily also preclude the use of other procedural requirements with respect to revocation requests. This interpretation would preclude the use of reasonable requirements with respect to the form of requests, such as a requirement to submit information in a particular language or even a requirement that the request be made in writing. Likewise, it could require investigating authorities to expend resources considering repeated, meritless requests timed to divert resources from matters of substantive significance – and to thereby encourage the investigating authority to grant revocation as a means of halting the resource drain.

b. What does the term "positive information substantiating the need for review" entail? How is this reflected in the law and practice of the United States? Please explain.

Response:

28. As an initial matter, the United States notes that it is not in the position to address questions about undefined "practices" of an administrative agency. The issue in this dispute is whether Viet Nam has established that the specific determinations raised in Viet Nam's request for panel establishment are somehow inconsistent with obligations under the AD Agreement.

29. As noted in greater detail in the U.S. response to question 18, in the determinations at issue, the United States did not require that a request for revocation be accompanied by the results of administrative reviews documenting an absence of dumping during the three-year period at issue. Rather, Vinh Hoan's revocation request had to be accompanied only by: (1) a certification that it did not dump in the one-year period covered by the administrative review requested at the same time as the revocation request, (2) a certification that it sold goods in commercial quantities for three consecutive periods of review, and (3) an agreement to the reinstatement of the duty if it continued to dump in the future.[24]

30. Accordingly, even though Article 11.2 would permit an investigating authority to require that a request for revocation be accompanied by evidence substantiating the need for review, the USDOC chose not to require that the request be accompanied by such evidence. The USDOC's approach was thus consistent with Article 11.2 regardless of what evidence could be entailed by the phrased "positive information substantiating the need for review." And crucially, moreover, in light of the USDOC's actual requirements, Viet Nam has no basis for claiming that Vinh Hoan

[24] 19 CFR § 351.222 (2010) (Exhibit VN-02).

had to submit any evidence that was unavailable to it at the time of the deadline for making a timely revocation request. Vinh Hoan has no excuse for failing to meet the relevant deadline.

18. <u>To both parties</u>: Can an interested party properly file a revocation request in the context of an administrative review under section 751(a) of the Act and Section 351.222(e) of the USDOC's regulations even though it does not have in its possession the results of all three administrative reviews? Please explain.

<u>Response</u>:

31. Yes. A respondent can file a revocation request even though it does not have in its possession the results of all three administrative reviews. Indeed, because the request must be submitted during the window for requesting the review that would be the third to find an absence of dumping, a respondent filing a timely revocation request will *never* have in its possession, at the time for seeking revocation, the results of all three administrative reviews.

32. The United States would like to clarify the content of one certification that was required to be submitted with a revocation request at the time of the seventh administrative review. 19 CFR § 351.222(e)(i) (2010) stipulated that an interested party had to submit a certification that it did not dump in the one-year period covered by the upcoming administrative review.[25] Section 351.222 *did not* require interested parties to submit certifications that they did not dump in the periods covered by prior administrative reviews, regardless of whether the results of the prior reviews were known at the time of submission of the revocation request.[26]

33. Pursuant to section 351.222(e) (2010), an interested party only needed to submit along with its revocation request: (1) a certification that it did not dump in the one-year period covered by the administrative review requested at the same time as the revocation request, (2) a certification that it sold goods in commercial quantities for three consecutive periods of review, and (3) an agreement to the reinstatement of the duty if it resumed dumping in the future. No additional information or evidence was required for the USDOC to accept the revocation request. Requiring these certifications, and not the results of a prior review, is consistent with the practical realities of a retrospective system. Regardless of how quickly prior administrative reviews were conducted, such results would, at the time of filing of a timely request for revocation, be impossible to obtain for at least the last year of the review period.

34. The USDOC accepted revocation requests and initiated revocation reviews under section 351.222 without the results of the prior review in two different segments of the order on fish fillets from Viet Nam. In the fifth administrative review of this order, QVD submitted a revocation request before the USDOC published the final results of the fourth review.[27]

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[25] 19 CFR § 351.222 (2010) (Exhibit VN-02).

[26] 19 CFR § 351.222 (2010) (Exhibit VN-02).

[27] *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 11,349 (March 17, 2009) (Exhibit USA-12).

Likewise, in the eighth administrative review of this order, both QVD and Vinh Hoan submitted revocation requests before the USDOC published the final results of the seventh review.[28] The USDOC accepted and considered all three requests.[29]

19. To the United States: Under Section 351.222(b) of the USDOC regulations, it seems that to file a revocation request an interested party is required to provide certifications concerning (1) the absence of dumping over three consecutive years and in the future, (2) the sales of subject merchandise to the United States in commercial quantities over three consecutive years, and where applicable an agreement to the reinstatement of the order in case of future dumping. What information or evidence is required for an interested party to provide the certification concerning the absence of dumping in three consecutive years? Would a self-certification suffice for this purpose?

Response:

35. As explained in the U.S. response to question 18, pursuant to section 351.222 (2010), an interested party needed only to submit along with its revocation request: (1) a certification that it did not dump in the one-year period covered by the administrative review requested at the same time as the revocation request; (2) a certification that it sold goods in commercial quantities for three consecutive periods of review; and (3) an agreement to the reinstatement of the duty if it resumed dumping in the future. No additional information or evidence was required for the USDOC to accept the revocation request. Self-certifications sufficed for these purposes.

20. To the United States: If a request for revocation is made with: 1) only the results of one administrative review; and 2) a self-certification that the interested party did not engage in dumping for the periods covered by the other two pending administrative reviews, will the USDOC accept the revocation request and initiate the revocation review? If so, please provide examples of such practice.

Response:

36. Yes. To clarify, as described above, the respondent only needed to provide a self-certification that it did not engage in dumping *for the period covered by the third of the three consecutive administrative reviews – the period covered by the administrative review requested at the same time as the revocation request*. The respondent *did not* need to provide a

[28] *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review and Intent To Revoke Order in Part*, 77 Fed. Reg. 56,180 (Sept. 12, 2012) (Exhibit USA-13).

[29] *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 11,349 (March 17, 2009) (Exhibit USA-12); *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review and Intent To Revoke Order in Part*, 77 Fed. Reg. 56,180 (Sept. 12, 2012) (Exhibit USA-13).

certification that it did not engage in dumping for the periods covered by the first or second of the three administrative reviews.

37. If the respondent timely and properly made a request for revocation with 1) a self-certification that it did not engage in dumping during the period covered by the administrative review requested at the same time as the revocation request, 2) the self-certification that it sold goods in commercial quantities, and 3) the agreement to reinstatement if it resumed dumping, then the USDOC would accept the revocation request and initiate the revocation review. As described in the U.S. response to question 18, the USDOC accepted similar revocation requests in the fifth and eighth administrative reviews of the order on fish fillets.[30]

21. <u>To the United States</u>: What is the purpose of the deadline for submitting the revocation request under Section 351.222(e) of the USDOC's regulations? Does the deadline mark the beginning for the USDOC's consideration of the revocation request? Please explain.

<u>Response</u>:

38. Yes. The deadline in 19 CFR 351.222(e) (2010) marked the beginning for the USDOC's consideration of a revocation request.

39. The USDOC required revocation requests at the beginning of an administrative review because of the nature of the revocation process and the interconnectedness of that process with the administrative review process. Other parties' interest in participation in the administrative review may have hinged on whether revocation had been requested, and whether revocation was thus a live possibility. The comments received from other interested parties in response to a notice indicating that revocation had been requested could shape follow-up questions from the USDOC, and the respondent's subsequent submissions. If other interested parties had been alerted to a revocation request, their comments, and subsequent follow up questions by the USDOC to any interested party, could have been relevant to both the existence of dumping during the relevant administrative review period and the question of whether, in the absence of dumping during that period, continued application of the order was otherwise necessary to offset dumping.[31]

40. The USDOC, moreover, was required to conduct a verification after a revocation

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[30] *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 11,349 (Mar. 17, 2009) (Exhibit USA-12); *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review and Intent To Revoke Order in Part*, 77 Fed. Reg. 56,180 (Sept. 12, 2012) (Exhibit USA-13).

[31] *See* Issues and Decisions Memorandum for the Final Results of the 17th Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea (2009-2010), pp. 24-26 (March 5, 2012) (Exhibit USA-15).

request.[32] The timing of the verification depended on the facts and circumstances of each case, including the USDOC's resources and personnel availability, as well as the availability of the company and its officials who will participate in verification. Under the regulations in effect at the time of the seventh review, the USDOC did not have to verify a respondent in a year in which it was not eligible for revocation, but the USDOC would verify where the respondent was eligible for revocation.

41. The USDOC's process and inquiries were thus not the same regardless of whether revocation was requested, and parallel consideration of the administrative review and revocation request was important for protection of the procedural rights of other interested parties and efficient operation of the review processes. Accepting an egregiously late revocation request would have significantly burdened the USDOC and parties who relied on its processes to protect their procedural rights and to achieve accurate results.[33]

22. <u>To the United States</u>. Where an interested party submits a revocation request within the context of an administrative review before receiving the results of all three reviews, what steps does the USDOC usually take before and after the publication of the missing review results:

<u>Response</u>:

42. The United States is not in a position to address what may have occurred in certain hypothetical situations that could have arisen under a later-amended regulation. The precise steps taken in hypothetical situations before and after the publication of missing administrative review results would have turned on the conduct, pacing, and information required in the specific circumstances of a requested revocation review. How far work on the prior administrative review had progressed by the deadline for submitting a revocation request (and for seeking the subsequent administrative review) would be pertinent. In any event, speculation about what steps the USDOC might have taken at different times in hypothetical situations is not relevant to the question of whether application of the revocation-request deadline with respect to Vinh Hoan was consistent with Article 11 of the Anti-Dumping Agreement.

23. <u>To both parties</u>: Viet Nam argued at para. 262 of its first written submission that in the absence of results from the sixth and seventh reviews, Vinh Hoan had no ability to provide sufficient positive information substantiating the need for a revocation review. Please comment.

<u>Response</u>:

43. Viet Nam's assertion is incorrect. As explained above, parties were permitted to submit revocation requests without the results of the prior or current administrative reviews. For

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[32] *See* 19 CFR § 351.225(f)(2)(ii) (2010).

[33] *See* U.S. First Written Submission, paras. 171-172.

example, the USDOC initiated revocation reviews in response to timely revocation requests submitted with requests for the fifth and eighth administrative reviews of the order on fish fillets without the results of the prior reviews.[34]

24. <u>To the United States</u>: Viet Nam argues at para. 221 of its first written submission that "all partial revocations based on the cessation of dumping by individual respondent have taken place during the course of reviews under Section 751 (a)". Please comment.

<u>Response</u>:

44. Whether all partial revocations based on the cessation of dumping by an individual respondent have taken place during the course of reviews under section 751(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a), is not relevant to the revocation claims advanced by Viet Nam in this proceeding. Those claims relate to the handling of the untimely revocation request by Vinh Hoan. Viet Nam has not alleged any breach of a WTO obligation by virtue of the USDOC not having revoked the order with respect to Vinh Hoan by means of a statutory provision other than section 751(a), including a changed circumstances review under section 751(b). Paragraph 221 of Viet Nam's first written submission falls under the heading "Factual Background" and the subheading "Legal basis for revocation under U.S. law, regulations and practice." Paragraph 221 appears to merely constitute explanation by Viet Nam of its views of which U.S. statutory provisions were relevant to its revocation request.

25. <u>To both parties</u>: At paragraph 156 of its first written submission, the United States relied on the Appellate Body's statement that it is not an unreasonable burden to impose an early deadline for respondents to file a simple notice at the start of the sunset review. Are there any differences between the situation in United States – Oil Country Tubular Goods Sunset Reviews and in the present case? If so, what are they?

<u>Response</u>:

45. The situation at issue here is similar in all relevant respects to the situation addressed by the Appellate Body in paragraphs 248-252 in its report in *United States – Oil Country Tubular Goods Sunset Reviews*.

46. That discussion involved initiation stage documents. As the Appellate Body explained, "the initial submissions enable an investigating authority to conduct sunset reviews in a fair and

[34] *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 11,349 (March 17, 2009) (Exhibit USA-12); *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review and Intent To Revoke Order in Part*, 77 Fed. Reg. 56,180 (Sept. 12, 2012) (Exhibit USA-13).

orderly manner."[35] The Appellate Body further noted that "[r]espondents' initial submissions also serve to inform other interested parties of the critical issues in dispute in the sunset review."[36] The Appellate Body concluded that "[w]e do not see it as an unreasonable burden on respondents to require them to file a timely submission in order to preserve their rights for the remainder of the sunset review. … Accordingly, we are of the view that, if a respondent decides not to undertake the necessary initial steps to avail itself of the 'ample' and 'full' opportunities available for the defence of its interests, the fault lies with the respondent."[37]

47. Like the documents at issue in *United States – Oil Country Tubular Goods Sunset Reviews*, had any revocation requests been timely filed in the proceedings at issue, they would have established a crucial aspect of what would be at issue in connection with the upcoming administrative review: the requests would have indicated that revocation could have occurred in the event the review resulted in a finding of no dumping for a period that would be the third without dumping. The request would have let other interested parties know that participation could have been necessary to defend their rights – including with respect to the question of whether dumping in fact did not occur and the question of whether, if there was no dumping over a three year period, continued application of the order was otherwise necessary to offset dumping. In so doing, the request could have resulted in the other parties submitting information that shaped the contours of the USDOC's factual investigation.

27. <u>To both parties</u>. If an investigating authority is permitted to require the submission of a revocation request during a specific "window of opportunity", what is the standard to be applied by a panel to determine whether this specific "window of opportunity" is consistent with Articles 11.1 and 11.2?

a. Does Article 6 shed any light on the consistency of the USDOC's revocation deadline with Articles 11.1 and 11.2?

b. Given that Viet Nam has not brought any claim under GATT Article X.3 (a) nor Article 6 of the Anti-Dumping Agreement, can the Panel apply a reasonableness test as suggested by Viet Nam, Japan and the European Union?

Please explain.

<u>Response</u>:

48. An assessment of what is or is not consistent with Articles 11.1 and 11.2 must be based on the text of those articles. Because the text of these Articles does not speak to the question of

[35] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 249.

[36] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 250.

[37] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 251.

"windows of opportunity," a particular "window of opportunity" could result in a breach of Article 11.1 or 11.2 only if that window made it impossible for a Member to comply with obligations that are in fact contained in those provisions.

49. As noted in the U.S. First Written Submission, Article 11.1 contains no independent obligations.[38] Accordingly, a filing window could breach Article 11.1 or 11.2 only if it prevented "review [of] the need for the continued imposition of the duty, where warranted, … provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review" or frustrated the "right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both."[39] In other words, the window would need to render the possibility of seeking revocation of the order a nullity in practice.

50. The USDOC's one-month filing window clearly did not render the possibility of revocation a nullity. Vinh Hoan could easily have submitted its request during the window, without regard to whether the administrative review initiated a year earlier had been completed. The USDOC's window was fully consistent with Article 11, including in circumstances where such earlier reviews had not been completed.

51. With respect to question 27.a, contrary to Viet Nam's argument,[40] Anti-Dumping Agreement Article 6 sheds no light on the consistency of the USDOC's revocation request deadline with Article 11. As the panel in *US – Shrimp II* explained (citing the Appellate Body's decision in *US – Corrosion Resistant Steel Sunset Review*), "Article 11.4 does not import the requirements under Article 6 into Article 11 wholesale."[41] Article 11.4 provides only that the "provisions of Article 6 regarding evidence and procedure" shall apply to reviews conducted under Article 11. Those rules apply to the submission of evidentiary information and the procedure by which a Member must accept that information or use other information available. Nothing in Article 6 addresses deadlines for initiation documents.

52. In fact, the subject of initiation is covered in an entirely separate article of the Anti-Dumping Agreement. Article 5, entitled "Initiation and Subsequent Investigation," addresses initiation of investigations in detail. Article 11.4 does not indicate that the provisions of Article 5 apply to reviews under Article 11.

53. Article 6 provisions on the submission of evidence in an already-initiated proceeding apply to revocation proceedings in the same way that they apply to original investigations. In other words, they apply only with respect to the submission of evidentiary information in

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[38] U.S. First Written Submission, paras. 131-132.

[39] Anti-Dumping Agreement, Article 11.2.

[40] Viet Nam First Written Submission, paras. 258 et seq.

[41] *US – Shrimp II (Viet Nam) (Panel)*, para. 7.388.

already-initiated revocation proceedings and the procedure by which, in such proceedings, a Member must accept that information or use other information available. But because the "provisions of Article 6 regarding evidence and procedure" do no cover initiation with respect to initial investigations, those provisions likewise do not discipline initiation with respect to a revocation review.

54. With respect to question 27.b, Viet Nam has no basis for proposing the adoption of a reasonableness test because Article 11 does not impose a reasonableness text, and Viet Nam's revocation claims were raised under Article 11. Anti-Dumping Agreement Article 11 does not incorporate GATT Article X.3 and Viet Nam raised no claim under GATT Article X.3. Accordingly, tests or standards under Article X.3 do not apply with respect to Viet Nam's revocation claims.

55. As discussed above, standards from Article 6 cannot be imported into Article 11 for use in the initiation context – both because Article 6 does not itself address initiation and because Article 11.4 refers only to "provisions of Article 6 regarding evidence and procedure". Those Article 6 standards that are applicable in the revocation context by virtue of Article 11.4 apply to revocation proceedings in the same manner that they apply to initial investigations. The "reasonableness" standard that Viet Nam suggests exists in and should be imported from Article 6 does not apply to initiation documents in original investigations. Rather, as Viet Nam itself concedes,[42] it relates to when a failure to provide information in an already-initiated investigation can result in determinations being made on the basis of the facts available.[43] Accordingly, it does not apply pursuant to Article 11.4 to the submission of a request for revocation.

28. <u>To both parties</u>: Was there any other opportunity for Vinh Hoan, including in the context of a changed circumstances review, to request revocation after the deadline expired? Did Vinh Hoan apply again and, if so, what happened? If Vinh Hoan did not apply again, why was that?

<u>Response</u>:

56. Yes. Vinh Hoan could have requested revocation under 19 CFR § 351.222 at the beginning of an administrative review initiated after the seventh administrative review. In fact, Vinh Hoan did request revocation under 19 CFR § 351.222 at the beginning of the eighth administrative review.[44] That revocation request was denied on the merits, as Vinh Hoan was found to have engaged in dumping during one of the three years at issue in the review of that

[42] Viet Nam First Written Submission, para. 259.

[43] Anti-Dumping Agreement, Art. 6.8.

[44] *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review, and Intent To Revoke Order in Part*, 77 Fed. Reg. 56,180, 56.186 (September 12, 2012) (Exhibit USA-13).

request.[45]

29. <u>To the United States</u>: Do the USDOC's regulations foresee the possibility for extension of the deadline to make a revocation request? If so, please explain by reference to the relevant provision.

<u>Response</u>:

57. Section 351.222(e) does not specifically contemplate the extension of the deadline. However, a different provision of the USDOC's regulations – 19 CFR § 351.302(b) (2010)[46] – which was in effect at the time of the seventh administrative review, allowed the USDOC to extend any deadline, including the deadline for revocation requests in section 351.222(e), for "good cause."

58. Vinh Hoan did not reference this provision in its untimely revocation request, nor did Vinh Hoan demonstrate why there was "good cause" for the USDOC to extend the deadline.

59. As discussed above in the U.S. response to question 21, the USDOC's revocation process and inquiries were dependent on timely requests for revocation. Accepting an egregiously late revocation request would have significantly burdened the USDOC and parties who relied on its processes to protect their procedural rights and to achieve accurate results.[47]

31. <u>To both parties</u>: The United States argues at para. 189 of its first written submission that the 2015 Anti-Dumping manual does not establish that there is any norm of general and prospective application because:

- **The Manual itself stipulates that it "is for the internal training and guidance of Import Administration (AI) personnel only";**
- **Approaches set out in the Manual "are subject to change without notice"; and**
- **The Manual itself stipulates that it "cannot be cited to establish DOC practice".**

How does Viet Nam respond to this argument of the United States?

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[45] Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results of the Eighth Administrative Review and Aligned New Shipper Reviews, pp. 48-49 (March 13, 2013) (Exhibit USA-22).

[46] 19 CFR § 351.302(b) (2010) (Exhibit USA-21).

[47] *See* U.S. First Written Submission, paras. 171-172.

Response:

60. Although question 31 indicates that it is addressed to both parties, the question asks Viet Nam to respond to arguments put forward by the United States. Nonetheless, the United States will provide a brief summary of its views on these issues.

61. As the United States demonstrated in previous submissions,[48] the USDOC's Antidumping Manual, by its own terms, does not establish a rule or norm of general and prospective application.[49] The one instrument that is authoritative under the U.S. legal system – 19 CFR § 351.107(d) – indicates that "[i]n an antidumping proceeding involving imports from a nonmarket economy country, 'rates' **may** consist of a single dumping margin applicable to all exporters and producers."[50] Viet Nam has not challenged this regulation, nor could it have, because the regulation, on its face, does not mandate a single rate to a Viet Nam-government entity.

62. In sum, Viet Nam has failed to demonstrate that there is anything more than an approach that the USDOC has applied in a discrete number of challenged reviews. Viet Nam therefore has not established the existence of an unwritten measure involving the rate assigned to an entity controlled by the government.

32. To both parties: We note that Viet Nam argues at para. 109 of its first written submission that the USDOC's practice is articulated in page 3 of its 2015 Antidumping Manual, which states that:

> **In proceedings involving NME countries, the Department begins with a rebuttable presumption that all companies within the country are essentially operating units of a single, government-wide entity and, thus, should receive a single antidumping duty rate (i.e., an NME-wide rate).**

Could you point to:

a. any statute, regulation or other measure that requires application of this presumption to the case of each and every NME?

b. any other examples involving NMEs, beyond the *Fish Fillets* order, where the USDOC used or did not use this rebuttable presumption?:

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[48] *See* U.S. First Written Submission, paras. 185-192; U.S. Opening Statement at First Substantive Meeting of the Panel, paras. 41-47.

[49] *See* U.S. First Written Submission, para. 189; U.S. Opening Statement at First Substantive Meeting of the Panel, para. 42.

[50] 19 CFR § 351.107(d) (bold added) (Exhibit USA-11).

Response:

63. There is no statute, regulation, or other measure that requires the USDOC to apply the same approach involving the so-called NME-government entity to every case without consideration of the record evidence or a party's arguments. Indeed, as noted in the U.S. response to question 31, the U.S. regulation 19 CFR § 351.107(d) indicates that "'rates' **may** consist of a single dumping margin applicable to all exporters and producers."[51] There is nothing binding, authoritative, compulsory, or otherwise indicative in 19 CFR § 351.107(d) that creates expectations that the USDOC will assign a single rate to a Viet Nam-government entity in the future.

64. In WTO dispute settlement proceedings, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[52] Viet Nam has not established the existence of an unwritten measure. Indeed, Viet Nam itself refers to an alleged 'practice,'[53] which would be far less than a rule or norm of prospective and general application.

65. The United States further notes that:

- The USDOC's Antidumping Manual on which Viet Nam relies does not even establish a 'practice' because it explicitly disclaims any suggestion that it is authoritative or controlling with respect to the USDOC's policy or practice and merely describes a procedure that is subject to change at any time.

- The outcomes of the three challenged administrative reviews on which Viet Nam relies do not show whether there is some separate decision by the United States – that is, a written or unwritten measure – that accounts for the USDOC's behavior.

- The findings in other disputes on which Viet Nam relies do not mitigate Viet Nam's burden to demonstrate that an unwritten measure has general and prospective application.

66. Furthermore, the United States notes that in evaluating whether a party has made out a *prima facie* claim, the relevant evidence is the evidence that the party submitted up through the first panel meeting. Rule 5(1) of the Working Procedures of the Panel provides that "[e]ach party shall submit **all** evidence to the Panel no later than during the first substantive meeting,

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[51] 19 CFR § 351.107(d) (bold added) (Exhibit USA-11).

[52] *US – Wool Shirts and Blouses (AB)*, p. 14.

[53] *E.g.* Viet Nam First Written Submission, paras. 103-107 and subtitles VI.A.1, VI.A.2, VI.B.1.

except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party."[54]

33. <u>To both parties</u>: Once the USDOC determines that a country is a NME how does it proceed to determine that companies within the NME constitute a single entity?

<u>Response</u>:

67. As an initial matter, the Panel's question is phrased in terms of what the USDOC "does" in particular situations. The United States is not in a position to speculate on how the USDOC might or might not address certain evidence and/or certain arguments in hypothetical situations. However, the United States can address the specific USDOC determinations at issue in this dispute.

68. The USDOC's findings in the determinations at issue that Viet Nam is a nonmarket economy and is in a position to exercise control or material influence over entities located in Viet Nam with respect to the pricing and output of products destined for consumption in Viet Nam[55] – together with Viet Nam's commitment in its Accession Protocol to alter its nonmarket behavior[56] – provided the basis for the USDOC's treatment of Vietnamese firms as part of a single government entity. For further details about the Viet Nam-government entity, please refer to the U.S. responses to questions 34, 35, and 49.

69. Each Vietnamese exporter or producer subsequently had the opportunity to respond to these findings[57] and demonstrate that the Government of Viet Nam does not exercise control or materially influence its pricing and output of products destined for export:

- If a company had previously provided evidence to the USDOC that the Government of Viet Nam did not control or materially influence its export activities, the firm needed only to certify that its status had not changed.[58]

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[54] Bold added.

[55] *See* U.S. First Written Submission, para. 195.

[56] *See* U.S. First Written Submission, paras. 196-197.

[57] *See, e.g., Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results of New Shipper Reviews and Fifth Antidumping Duty Administrative Review*, 74 Fed. Reg. 45,806-07 (Sept.4, 2009) (Exhibit VN-06-3 (BCI)); *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 76 Fed. Reg. 55,873-74 (Sept. 9, 2011) (Exhibit VN-08-3 (BCI)).

[58] *See, e.g., Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results of New Shipper Reviews and Fifth Antidumping Duty Administrative Review*, 74 Fed. Reg. 45,806-07 (Sept. 4, 2009) (Exhibit VN-06-3 (BCI)); *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 76 Fed. Reg. 55,873-74 (Sept. 9,

- If a company had not previously provided this evidence, the firm needed only to provide information for purposes of the USDOC's separate rate analysis.[59]

Whenever a firm certified that its export activities were not controlled or materially influenced by the Government of Viet Nam, or demonstrated such independence, the USDOC assigned the firm its own dumping rate.[60]

34. <u>To both parties</u>: To what extent is the USDOC's analysis in the context of the NME-wide entity approach, similar to, or dissimilar from, the presumption in Article 9(5) of the EC's Basic Anti-Dumping Regulation that in NMEs all exporters and producers are related to the State, and the analysis undertaken thereunder, which was at issue in *EC – Fasteners (China)*?

<u>Response</u>:

70. As an initial matter, the Panel's question appears to inquire into hypothetical situations. The United States is not in a position to speculate on how the USDOC might or might not address certain evidence and/or certain arguments in hypothetical situations. However, the United States can address the specific USDOC determinations at issue in this dispute.

71. The measure at issue in *EC – Fasteners (China)* differs in several ways from the USDOC determinations at issue in this dispute. As explained below and in the U.S. response to question 35, this dispute presents an entirely different measure at issue; different facts (such as the U.S. separate rate analysis); and different legal arguments (such as the significance of the USDOC's undisputed factual finding that Viet Nam is a nonmarket economy and Viet Nam's Working Party Report).

72. The measure at issue in *EC – Fasteners (China)* was a written measure based on the EC's regulation, Article 9(5) of Council Regulation (EC) No. 1225/2009 of 30 November 2009 ("Article 9(5)").[61] Here, Viet Nam has challenged an alleged unwritten measure, even though a

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2011) (Exhibit VN-08-3 (BCI)); USDOC Separate Rate Certification for Producers/Exporters from Viet Nam (Blank) (Exhibit USA-16).

[59] *See, e.g., Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results of New Shipper Reviews and Fifth Antidumping Duty Administrative Review*, 74 Fed. Reg. 45,806-07 (Sept. 4, 2009) (Exhibit VN-06-3 (BCI); *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 76 Fed. Reg. 55,873-74 (Sept. 9, 2011) (Exhibit VN-08-3 (BCI)).

[60] *See, e.g., Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results of New Shipper Reviews and Fifth Antidumping Duty Administrative Review*, 74 Fed. Reg. 45,806-07 (Sept. 4, 2009) (Exhibit VN-06-3 (BCI)).

[61] *See EC – Fasteners (China) (AB)*, paras. 267, 385.

written measure on this subject exists.[62] Viet Nam has not satisfied the high evidentiary burden it must in order to establish the existence of the unwritten measure it seeks to challenge. This is a key distinction between these two disputes which the Panel must take into account in determining whether there actually exists a measure which may be subject to an "as such" challenge.

73. The measure at issue in *EC – Fasteners (China)* is not based on a factual finding. Unlike the EU's application of Article 9(5), the USDOC made a factual finding based on an extensive evidentiary review that Viet Nam is a nonmarket economy and is in a position to exercise control or material influence over entities located in Viet Nam with respect to the pricing and output of products destined for consumption in Viet Nam.[63] The USDOC's findings – together with Viet Nam's commitment in its Accession Protocol to alter its nonmarket behavior[64] – provided the basis for the USDOC's treatment of Vietnamese companies as part of a single government entity, until (and unless) it is clearly demonstrated otherwise.

74. Furthermore, in contrast to *EC – Fasteners (China)*, Viet Nam has not challenged in this dispute the USDOC's approach for determining whether legal entities were distinct exporters or producers, but rather argues that the mere existence of such an analysis – regardless of content – is *ipso facto* inconsistent with WTO rules. *EC – Fasteners (China)*, however, did not make such a sweeping finding that an investigating authority was barred from conducting such an analysis. Rather, the Appellate Body found in *EC – Fasteners (China)* that the criteria in the EC's "individual treatment" (IT) test did not concern the relationship between the Chinese government and the particular company at issue.

75. This bears emphasis. *EC – Fasteners (China)* did not say investigating authorities were prohibited from examining legal entities in order to determine whether to treat them as a single producer or exporter.[65] Rather, it found the specific inquiry employed by the EC in that case was insufficient to determine whether several distinct exporters constitute a single entity because of structural and commercial integration or due to control or material influence by the government.[66]

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[62] *See* 19 CFR 351.107(d) ("In an antidumping proceeding involving imports from a nonmarket economy country, "rates" may consist of a single dumping margin applicable to all exporters and producers.") (Exhibit USA-11).

[63] *See* Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002) (Exhibit USA-1).

[64] *See* U.S. First Written Submission, paras. 196-197.

[65] *EC – Fasteners (China) (AB)*, para. 376 ("Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* do not preclude an investigating authority from determination a single dumping margin and a single anti-dumping duty for a number of exporters if it establishes that they constitute a single exporter for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*.").

[66] *EC – Fasteners (China) (AB)*, paras. 377-382 (explaining that it is "of the view that there may be situations where nominally distinct exporters may be considered as a single entity for the purpose of determining individual dumping margins," but "that the IT test in Article 9(5) of the Basic AD Regulation is not direct at such an inquiry").

76. Viet Nam has not challenged or claimed that the USDOC's separate rate analysis in the determinations at issue bears any resemblance to the EC's IT test, which was found to be part of the measure at issue in *EC – Fasteners (China)*. There are key differences between the criteria in the IT test and the USDOC's separate rate analysis, as the USDOC's analysis allowed for an in-depth and individualized review of a firm's relationship with the Viet Nam government.[67] Such an analysis goes beyond the criteria that formed the IT test at issue in *EC – Fasteners (China)* and that the Appellate Body found was inconsistent with Articles 6.10 and 9.2.

77. Finally, the legal basis for the presumption that *EC – Fasteners (China)* held improper is different from the legal basis for the so-called approach in the present dispute. In particular, the Appellate Body found a presumption could not be justified under Section 15 of China's Accession Protocol alone, on its face.[68] The Appellate Body did not decide whether a factual finding that the country at issue is a nonmarket economy[69] and/or whether Viet Nam's Working Party Report[70] may provide such a basis.

35. <u>To both parties</u>: To what extent is the USDOC's "separate rate" test applied in investigations involving NME countries similar to, or dissimilar from, the European Union's "individual" treatment test at issue in *EC – Fasteners (China)*?

<u>Response</u>:

78. As an initial matter, the Panel's question appears to inquire about an unspecific and unstated "separate rate 'test,'" unconnected from any determinations on the record in this dispute. The United States is not in a position to speculate on how the USDOC might or might not address certain evidence and/or certain arguments in hypothetical situations. However, the United States can address the specific USDOC determinations at issue in this dispute.

79. The USDOC's separate rate analysis used in the determinations at issue in this dispute differed significantly from Article 9(5) of the EU's Basic AD Regulation (as examined in *EC – Fasteners (China)*) with respect to the context in which the USDOC's analysis was applied as well as the criteria considered.

<u>Differences in Context in which the Analysis was Applied</u>

80. Unlike the EU's application of Article 9(5), the USDOC made a factual finding based on an extensive evidentiary review that Viet Nam is a nonmarket economy. The USDOC's inquiry

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[67] U.S. First Written Submission, para. 226.

[68] *See EC – Fasteners (China) (AB)*, paras. 369-370.

[69] *See* Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002) (Exhibit USA-1).

[70] Paragraph 1.2 of the Protocol incorporates various paragraphs of the Working Party Report into the Protocol of Accession itself (Exhibit USA-3).

focused on whether Viet Nam should be considered a nonmarket economy based on evidence about the following factors:[71]

i. the extent to which the currency of the foreign country is convertible into the currency of other countries;[72]

ii. the extent to which wage rates in the foreign country are determined by free bargaining between labor and management;[73]

iii. the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;[74]

iv. the extent of government ownership or control of the means of production, including the extent and pace of privatization of enterprises and land and land use rights;[75]

v. the extent of government control over the allocation of resources and over the price and output decisions of enterprises, including the extent of price liberalization, the status of commercial banking reform, and the degree to which individuals and businesses can engage in entrepreneurial activities;[76] and

[71] Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002) (Exhibit USA-1).

[72] Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002), pp. 8-11 (Exhibit USA-1), as based on 19 U.S.C. § 1677(18)(B)(i) (Exhibit USA-2).

[73] Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002), pp. 11-16 (Exhibit USA-1), as based on 19 U.S.C. § 1677(18)(B)(ii) (Exhibit USA-2).

[74] Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002), pp. 16-22 (Exhibit USA-1), as based on 19 U.S.C. § 1677(18)(B)(iii) (Exhibit USA-2).

[75] Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002), pp. 22-29 (Exhibit USA-1), as based on 19 U.S.C. § 1677(18)(B)(iv) (Exhibit USA-2).

[76] Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002), pp. 30-39 (Exhibit USA-1), as based on 19 U.S.C. § 1677(18)(B)(v) (Exhibit USA-2).

vi. other appropriate factors, including trade liberalization, the rule of law, and corruption.[77]

81. After the USDOC considered the evidence collected regarding these factors, including facts and arguments presented by the Government of Viet Nam as well as "the expert evaluations of … the World Bank, the International Monetary Fund, the European Bank for Reconstruction and Development, the Asian Development Bank, the Asian-Pacific Economic Cooperation and the Economist Intelligence Unit,"[78] it determined to "treat Vietnam as a [nonmarket economy] NME country for purposes of antidumping and countervailing duty proceedings, effective July 1, 2001."[79]

82. In the proceedings at issue, the Government of Viet Nam, or a foreign producer or exporter located in Viet Nam, could have requested that the USDOC reconsider its designation of Viet Nam as an nonmarket economy (and many parties have done so successfully with respect to other designated nonmarket economy countries[80]), but no party involved in the anti-dumping duty order on fish fillets from Viet Nam made such a request,[81] nor put forward evidence to demonstrate that the Vietnamese fish fillet industry operates as a "market-oriented industry."[82] Indeed, as already noted in the U.S. First Written Submission, Viet Nam has not challenged in this matter the USDOC's determination that nonmarket economy conditions prevailed in Viet Nam during the challenged reviews, or the USDOC's designation of Viet Nam as a nonmarket economy country.

83. Therefore, in addition to the Working Party Report, the USDOC's decision to conduct a separate rate analysis was, unlike the EU's application of Article 9(5), based on an evidentiary determination that found, in part, "that market forces in Vietnam are not yet sufficiently

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[77] Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002), pp. 40-42 (Exhibit USA-1), as based on 19 U.S.C. § 1677(18)(B)(vi) (Exhibit USA-2).

[78] Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002), pp. 7-8 (Exhibit USA-1).

[79] Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002), p. 44 (Exhibit USA-1).

[80] For example, the USDOC revoked Russia's NME status effective April 1, 2002; Romania's NME status effective January 1, 2003; and Ukraine's NME status effective February 1, 2006.

[81] In the original investigation, the Government of Viet Nam and others expressed support for granting Viet Nam market economy status (Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002), pp. 3-5 (Exhibit USA-1)), but no one has argued in any subsequent administrative reviews that Viet Nam is a market economy country.

[82] *See* Chapter 10, Non-Market Economies (NME), Department of Commerce 2009 Antidumping Manual, pp. 30-31 (Exhibit VN-01).

developed to permit the use of prices and costs in that country for purposes of the Department's dumping analysis."[83]

Differences in Criteria Used in the EU IT Test and the U.S. Separate Rate Analysis

84. Article 9(5) as considered by the Appellate Body in *EC – Fasteners (China)* specified that exporters must substantiate the following five claims before the EU would assign the exporter an individual duty:

> (a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;
>
> (b) export prices and quantities, and conditions and terms of sale are freely determined;
>
> (c) the majority of the shares belong to private persons; state officials appearing on the board of directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;
>
> (d) exchange rate conversions are carried out at the market rate; and
>
> (e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.[84]

According to the panel in *EC – Fasteners (China)*, an exporter will be unable to get an individual duty unless it satisfies all of the above criteria.[85]

85. In contrast, with respect to the USDOC separate rate analysis used in the determinations at issue, an exporter located in a nonmarket economy country that was owned wholly by entities located in market-economy countries was assigned a separate rate. It need not have demonstrated an absence of *de jure* and *de facto* governmental control over its export activities. It only needed to certify that the information contained in the separate rate application was "accurate and complete to the best of my knowledge" and to complete a few fields that pertained to the firm's eligibility for separate rate consideration.[86]

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[83] Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002), p. 43 (Exhibit USA-01).

[84] Article 9(5), Council Regulation (EC) No 1225/2009, L 343/63 (Exhibit USA-17).

[85] *See EC – Fasteners (China) (Panel)*, para. 7.106.

[86] *See* USDOC Separate Rate Application for Producers/Exporters from Viet Nam (Blank), p. 6 n.2 (Exhibit VN-19).

86. An exporter located in a nonmarket economy country that has previously been assigned a separate rate was not required again to demonstrate an absence of *de jure* and *de facto* governmental control over its export activities. It only needed to certify that its status has not changed.[87]

87. Finally, an exporter located in an nonmarket economy country that was not owned wholly by entities located in market-economy countries, or was not previously been assigned a separate rate, needed only to fill out a form confirming that its export activities were sufficiently free from the governmental control or material influence over pricing and output that the USDOC found to exist when it determined that Viet Nam should be treated as a nonmarket economy.

88. As the table below demonstrates, the evidence that the USDOC asked such firms to provide regarding their export activities is fully consistent with those factors that the Appellate Body in *EC – Fasteners (China)* suggested should be probed to ascertain situations "which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity."[88]

EC – Fasteners (AB), para. 376	The USDOC Separate Rate Application (Exhibit VN-19), p. 2
"control or material influence by the State in respect of pricing and output"	"whether each exporter sets its own export prices independent of the government and without the approval of a government authority" "whether each exporter retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses" "whether each exporter has the authority to negotiate and sign contracts and other agreements"

[87] USDOC Separate Rate Certification for Producers/Exporters from Viet Nam (Blank) (Exhibit USA-16).

[88] *EC – Fasteners (China) (AB)*, para. 376.

"[T]he existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management"	"whether each exporter has autonomy from government regarding the selection of management" "an absence of restrictive stipulations associated with an individual exporter's business and export licenses" "any legislative enactments decentralizing control of companies" "any other formal measures by the central and/or local government decentralizing control of companies"

89. All the criteria considered by the USDOC during its separate rate analysis used in the determinations at issue thus focused on whether a firm's export activities were sufficiently free from the governmental control or material influence over pricing and output that the USDOC found to exist when it determined that Viet Nam should be treated as a nonmarket economy, which is very different from the EU's Article 9(5) criteria examined by the Appellate Body in *EC – Fasteners (China)*.

90. For example, the Article 9(5) criteria apply just to entities majority-owned by private persons (*i.e.*, Article 9(5)(c) indicates that "the majority of the [entity's] shares [must] belong to private persons," while Article 9(5)(a) applies to "wholly or partly foreign owned firms or joint ventures"). In contrast, any entity could qualify for a separate rate under the USDOC's analysis, including entities whose corporate structure indicated ownership by the government (*i.e.*, they were "owned by all of the people" or "collective").[89] As long as the firm could demonstrate that its export activities were sufficiently free from the governmental control or material influence, it could have qualified for a separate rate. And as previously mentioned, by definition, firms wholly owned by market economy firms qualified for a separate rate under the USDOC's analysis.

91. The Article 9(5)(a) criterion further differs from the criteria set forth in the USDOC's separate rate analysis in that it requires that the exporter demonstrate that all of its capital and profits can be repatriated. In contrast, the USDOC's consideration of whether an exporter

[89] USDOC Separate Rate Application for Producers/Exporters from Viet Nam (Blank), p. 14, question 2d (Exhibit VN-19).

retained the proceeds from its sales and made independent decisions regarding disposition of profits or financing of losses was restricted to "export sales."[90]

92. Also, assuming the majority of an entity's shares belong to private persons, the Article 9(5)(c) criterion further requires that state officials listed on the board of directors or in key management positions hold a minority status unless the entity can demonstrate that it "is nonetheless sufficiently independent from State interference." In contrast, the USDOC's criterion in this regard only considered whether the exporter had autonomy from government regarding the selection of management, nothing more.[91]

93. Finally, there was nothing in the USDOC's separate rate analysis that was anything like the criteria found in Articles 9(5)(d) and 9(5)(e). Thus an exporter did not need to demonstrate as part of the USDOC's analysis, as it would under Article 9(5)(d), that "exchange rate conversions [were] carried out at the market rate," nor did it need to demonstrate as it does under Article 9(5)(e) that "State interference is not such as to permit circumvention of measures if individual exporters [were] given different rates of duty."

94. This leaves Article 9(5)(b) as the sole criterion under Article 9(5) that is similar in most respects to the criteria found under the USDOC's separate rate analysis used in the determinations at issue. Article 9(5)(b) requires an entity to demonstrate that "export prices and quantities, and conditions and terms of sale are freely determined." As shown in the above table, an entity must make a similar demonstration under the USDOC's analysis. That said, as discussed earlier, the context in which an entity provided this evidence – where the USDOC had made an evidentiary finding that there exists governmental control or material influence over pricing and output in Viet Nam – differed significantly from the context in which an entity had to provide this evidence under Article 9(5), where the EU had presumed such control.

36. <u>To the United States</u>: What makes the export prices from the companies that belong to the Viet Nam-wide entity somehow inappropriate for the necessary comparison between export price and normal value?

<u>Response</u>:

95. The United States does **not** consider the export prices from the firms that belong to the Viet Nam-government entity as being inappropriate for the necessary comparison between export price and normal value. To the contrary, to the extent such export prices are consistent with Article 2.3 of the Anti-Dumping Agreement, the USDOC would calculate the export price

[90] USDOC Separate Rate Application for Producers/Exporters from Viet Nam (Blank), p. 19, question 14 (Exhibit VN-19).

[91] The USDOC did ask the entity to describe the government involvement of any board member or manager who had worked for the government in the past three years (USDOC Separate Rate Application for Producers/Exporters from Viet Nam (Blank), p. 19, question 12 (Exhibit VN-19)), but unlike Article 9(5)(c), it did not automatically disqualify an entity's request for a separate rate because of this possible government involvement.

for the Viet Nam-government entity based on the export prices reported by the firms that comprise the Viet Nam-government entity.

96. In addition, the approach used by the USDOC in the determinations at issue did **not** alter the methodology by which the USDOC calculated export price as defined under Article 2 of the Anti-Dumping Agreement. The approach simply served to correctly identify, based on the evidence, the known exporter or producer of the product under investigation.

37. <u>To both parties</u>: The Appellate Body in *EC – Fasteners (China)* noted that:

> **In our view, only a dumping margin that is based on a weighted average of the export prices of each individual exporter that forms part of the single entity would be consistent with the obligation in Article 6.10 to determine an individual dumping margin for the single entity that is composed of several legally distinct exporters.[92]**

Do you agree? Please explain.

<u>Response</u>:

97. Subject to the obligations set out in Article 2 of the Anti-Dumping Agreement with respect to the calculation of export price, the United States generally agrees with the Appellate Body's reasoning as set out in the above quote.

98. Specifically, assuming that a known NME-government exporter or producer of the product under investigation or review does not refuse access to, or otherwise does not provide, necessary information within a reasonable period, or does not significantly impede an investigation, an investigatory authority should calculate the dumping margin of the known NME-government exporter or producer based on the weighted average of the export prices of each individual entity that forms part of the NME-government entity consistent with the obligations set out in Articles 2 and 6.10 of the Anti-Dumping Agreement.

39. <u>To both parties</u>: Does the Anti-Dumping Agreement accommodate the possibility to calculate more than one "all others" rate under the same order to apply to different groups of non-investigated companies? Please explain.

<u>Response</u>:

99. The Anti-Dumping Agreement accommodates the possibility of there being more than one "all others" rate under the same anti-dumping duty order, because the obligations of Article 9.4 are **not** implicated in the situation where an exporter has previously been individually

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[92] Appellate Body Report, *EC – Fasteners (China)*, para. 384.

examined but for which no change in rate was requested during the ongoing administrative review.

- In investigations, a rate is normally individually calculated for all or, if appropriate, selected known exporters, and an "all others" rate is applied to known and unknown exporters that have not been individually examined under Article 9.4.[93]

- In contrast, in administrative reviews, Article 9.3.1 (which applies to assessments under a retrospective duty assessment system) stipulates that "the determination of the final liability for payment of anti-dumping duties shall take place … after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made." Article 9.3.1 goes on to link the provision of any refunds to this determination upon "request." Article 9.3.2 (which applies to assessments under a prospective duty assessment system) also stipulates that provision shall be made for a prompt refund under a prospective duty assessment system, but again only "upon request."

This context shows that where administrative reviews are involved, an assessment proceeding is limited to the exporters covered by a request for review and does not address the "all others" rate previously determined in the investigation.

100. In addition, Article 9.4 merely provides that "any" anti-dumping duty "shall not exceed" the limits imposed by that provision. Article 9.4 by its terms provides only a ceiling for such a rate if an investigating authority has limited its examination in accordance with the second sentence of Article 6.10. Article 9.4 therefore does not appear to preclude the possibility of more than one "all others" rate.

101. The Appellate Body has also reasoned that the first supplementary *Ad* Note to Articles VI:2 and VI:3, read together with the Anti-Dumping Agreement, permits a Member to assess a final liability for anti-dumping duties on the basis of the security collected as a protection against possible non-payment.[94] Viet Nam's contention that Article 9.4 requires a Member to determine a new "all others" rate every time it conducts an assessment proceeding is not supported by any text in the Anti-Dumping Agreement and conflicts with the Appellate Body's reasoning, which permits Members to assess final liability for anti-dumping duties on the basis of security collected with respect to exporters that did **not** request an assessment proceeding. Specifically, an exporter may decide not to request a review (or a refund proceeding) and rely instead on the already collected cash deposit as its final anti-dumping duty liability. If Viet Nam's proposed

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[93] *See, e.g.*, Anti-Dumping Agreement, Art. 5.2(ii) (requiring the application of domestic industry for investigation to include the identity of each known exporter or producer of the product under investigation), and Art. 6.1.3 (requiring the authorities to provide the full text of application for investigation to the known exporters).

[94] *See US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, paras. 220-227.

interpretation was adopted, it would essentially forbid Members from allowing exporters the option of not requesting a review.

102. Finally, the United States would like to reiterate that the rate applied to the Viet Nam-government entity in the challenged reviews is **not** an "all others rate" governed by the terms of Article 9.4. As stated in our previous submissions,[95] Article 9.4 does not obligate Members to replace an existing WTO-consistent rate that was individually determined for the entity (which had failed to cooperate in the proceeding) with a different rate that is based on an average rate of independent exporters or producers that fully cooperated.

103. In sum, the rate assigned to the Viet Nam-government entity during the covered reviews as the rate in effect at the time for the entity, which was first determined in the original investigation based on an individual examination and application of facts available. In other words, in the challenged reviews, the rate in effect and applied to the Viet Nam-government entity was not newly, individually determined. Therefore, the decision to continue to assign this last rate to the Viet Nam-government entity during the challenged reviews was not inconsistent with Articles 6.8 and 9.4, because this last rate was neither a "new" rate based on facts available, nor an "all others" rate, but the rate in effect for the entity at the time.

40. <u>To both parties</u>: Does Article 6.8 apply to an entity not individually investigated and from which no necessary information has been requested in the context of a given proceeding?

<u>Response</u>:

104. For purposes of its analysis of Viet Nam's Article 6.8 claims, it is important to distinguish between the different instances in which an investigating authority may not individually investigate an entity under an administrative review conducted pursuant to the U.S. retrospective duty assessment system.

105. There a number of circumstances in which a government-entity may not be investigated during a review, including: if no interested party requested a review of the entity; if a request has been made but withdrawn in a timely manner; or if the review has been rescinded because the entity had no exports, sales, or entries during the time period under review. In these situations, Article 6.8 would **not** apply because the investigating authority would have no reason to request information from an entity that is not subject to the administrative review. This describes the factual pattern present in this dispute, because no one requested a review of the Viet Nam-government entity for purposes of the challenged administrative reviews.

106. An investigating authority also may not individually investigate an entity during a review because the investigating authority may limit its detailed examination to some entities for which

[95] U.S. First Written Submission, paras. 241-246; U.S. Opening Statement at First Substantive Meeting of the Panel, para. 62.

a review was requested ("selected entity") but not others ("non-selected entity"). In this situation, Article 6.8 nonetheless may apply to a non-selected entity. Although Article 6.8 is commonly implicated where an entity withholds necessary information, Article 6.8 also applies to "any interested party … [that] significantly impedes the investigation."[96] There thus may be circumstances in which that a non-selected entity may be subject to "facts available" if the evidentiary record nonetheless shows that it acted in a way that significantly impeded an investigation.

41. To both parties: At para. 200 of its first written submission the United States submits that:

> **In each challenged proceeding, the USDOC notified companies within the Viet Nam-government entity of the information needed to determine that the Government of Viet Nam did not control or materially influence, directly or indirectly, their export activities.**
>
> **…**
>
> **Further, the USDOC examined whether a company sets its own export prices independent of the government, whether it had the authority to negotiate and sign contracts and agreements, whether it had autonomy from the government regarding selection of management, and whether it retained the proceeds from its export sales.**

a. How were these companies notified and was each known exporter so notified?

Response:

107. Under U.S. regulations, once a year (during the anniversary month of an anti-dumping duty order), interested parties may request an administrative review to determine the final amount of duties owed on each entry made during the previous year.[97] If the request for an

[96] Anti-Dumping Agreement, Art. 6.8.

[97] *See* section 751(a) of the Act (19 U.S.C. § 1675(a)) (Exhibit VN-25); 19 CFR §§ 351.212, 351.213 (Exhibit USA-18). The United States calculates anti-dumping duties on a retrospective basis. Pursuant to its retrospective system, liability for anti-dumping duties attaches at the time the subject merchandise enters the United States. When such a measure has been put into place, the United States will require upon entry that a security be provided to U.S. Customs and Border Protection, usually in the form of a cash deposit, and that collection of the actual duty amount be delayed pending calculation of the amount of the liability. The date of entry of merchandise subject to an anti-dumping duty measure thus triggers application of the anti-dumping duty to that merchandise. However, the ultimate amount of anti-dumping duties to be paid will **not** be calculated until a segment covering that entry (such as

administrative review is filed by an interested party other than the exporter (*e.g.*, the petitioner), that interested party is required by the USDOC rules to "serve a copy of the request by personal service or first class mail on each exporter or producer specified in the request … by the end of the anniversary month or within ten days of filing the request for review, whichever is later."[98] The USDOC will then publish a notice of initiation in the *Federal Register* informing exporters or producers that it has received requests to conduct an administrative review of the firm's exports, sales, or entries of subject merchandise during the time period under review.[99]

b. Was each known exporter so examined, how was this examination conducted and how were the results of this examination disseminated?

Response:

108. The USDOC examined each exporter or producer for which a review had been requested unless the request was withdrawn in a timely manner, or the USDOC rescinded the review because the firm had no exports, sales, or entries during the time period under review. In other words, that a firm may have been identified as a "known" exporter or producer **at the beginning** of an anti-dumping proceeding should not be considered, for purposes of Article 6.10 of the Anti-Dumping Agreement, as the equivalent of identifying a firm as a "known" exporter or producer **at the end** of an anti-dumping proceeding, because developments during the course of the review may demonstrate otherwise.

109. For example, at the start of the sixth review, the USDOC received requests to conduct an administrative review for 22 allegedly "known" exporters or producers of fish fillets from Viet Nam.[100] Subsequent to the publication of the initiation notice for the sixth review, the USDOC rescinded this review with respect to 17 firms based on the following developments during the review:

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an administrative review) is conducted, or the time passes to request a review of the entry and no party has requested such a review.

[98] 19 CFR § 351.303(f)(3)(ii) (Exhibit USA-19).

[99] 19 CFR §§ 351.221(b)(1), 351.221(c) (Exhibit USA-20). *See, e.g.*, *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 73 Fed. Reg. 56,796 (Sept. 30, 2008) (Exhibit VN-06-1*); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 74 Fed. Reg. 48,225-26 (Sept. 22, 2009) (Exhibit VN-07-1); *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 75 Fed. Reg. 6,0078 (Sept. 29, 2010) (Exhibit VN-08-1).

[100] *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 74 Fed. Reg. 48,225-26 (Sept. 22, 2009) (Exhibit VN-07-1). This initiation notice provided detailed instructions on how a firm could establish that it "is sufficiently independent from government control of its export activities to be entitled to a separate rate." *Ibid.*, 74 Fed. Reg. 48,225 (Exhibit VN-07-1).

- Requests for review were withdrawn for 13 firms.[101]

- The review was rescinded with respect to two more firms because one did not export subject merchandise during the review period and the other only shipped a sample transaction for no financial consideration.[102]

- Another company – ESS LLC – also did not export subject merchandise during the review under its own name, but rather all entries came in under ESS JVC.[103]

- The review was rescinded for one more company as part of the USDOC's final results,[104] leaving a total of five firms subject to the sixth review plus one company subject to a new shipper review.[105]

110. The final five firms received a specific rate for purposes of the final results of the sixth review.[106] Therefore, the record for the sixth review confirms that the USDOC determine a margin of dumping for each known exporter or producer of the product under investigation for which a review was requested.

42. <u>To both parties</u>: With regard to the fifth review, Viet Nam refers, at paras. 178-179, 203 of its first written submission, to the preliminary results, while the United States

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[101] *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 75 Fed. Reg. 56,063 (Sept. 15, 2010) (Exhibit VN-07-3 (BCI)).

[102] *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 75 Fed. Reg. 56,064 (Sept. 15, 2010) (Exhibit VN-07-3 (BCI)).

[103] *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 75 Fed. Reg. 56,065 (Sept. 15, 2010) (Exhibit VN-07-3 (BCI)); *see Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15,942 n.13 (March 22, 2011) (Exhibit VN-07-4 (BCI)).

[104] *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decisions Memorandum for the Final Results of the Sixth Antidumping Duty Administrative Review and New Shipper Review*, Comment VII: Rescission of Anvifish JSC, p. 36 (March 14, 2011) (Exhibit VN-07-4 (BCI)).

[105] The sixth firm listed "is a new shipper review, aligned with, but not part of the administrative review." *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15,944 n.20 (March 22, 2011) (Exhibit VN-07-4 (BCI)).

[106] *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15,944 (March 22, 2011) (Exhibit VN-07-4 (BCI)).

at paras. 28-29 of its first written submission refers to the final results. For the purpose of assessing consistency with Articles 6.10, 9.2, 9.4, 6.8 and Annex II of the Anti-Dumping Agreement should the Panel make a finding with respect to:

a. the preliminary results; or

b. the final results?

Please explain.

Response:

111. Only a final determination may be challenged in WTO dispute settlement.[107]

112. To the extent that the USDOC's final results do not differ from determinations made by the USDOC prior to the publication of the final results, the Panel may find that the detailed explanation for the USDOC's final results is set forth in the USDOC's preliminary results for the fifth review, or in another document appearing in the evidentiary record of the fifth review.

43. To both parties: The United States argues at paras. 29 and 231 of its first written submission that in the final results of the fifth review the USDOC granted all companies subject to the review a separate rate, and not the Viet Nam-wide entity rate although the USDOC established a rate for the Viet Nam-wide entity in the preliminary results.

a. Is the understanding correct that the USDOC did not set the Viet Nam-wide entity rate in the final results of the fifth review?

Response:

113. The Panel's understanding is correct that the USDOC did not set the Viet Nam-government entity rate in the final results of the fifth administrative review. No one requested that the USDOC conduct a review of the Viet Nam-government entity as part of the USDOC's fifth review of the anti-dumping duty order on fish fillets from Viet Nam. The publication of the Viet Nam-government entity's rate in the final results of that review served as a continuing notification to interested parties and the public of this rate

b. If that is the case, why do the final results of the fifth review, including Comment 7 of the Issues and Decision Memorandum (at page 40, last paragraph), include a Viet Nam-wide entity rate of $2.11 per kilogram with a

[107] Anti-Dumping Agreement, Art. 17.4.

reference that the entity included ESS LLC, and with instructions to CBP to assess such rate on all appropriate entries from ESS LLC?[108]

Please explain.

Response:

114. At the request of an interested party, the USDOC initiated a review for East Sea Seafoods Joint Venture Co., Ltd., ("ESS JVC") for the period covered by the fifth administrative review of the anti-dumping duty order on fish fillets from Viet Nam.[109] The USDOC determined that ESS JVC qualified for a separate rate.[110]

115. As explained in Comment 7 of the USDOC's Issues and Decision Memorandum, during the fifth review, East Sea Seafoods LCC ("ESS LCC") alleged that it was the successor-in-interest to ESS JVC and argued that it should be assigned the separate rate that had been previously assigned to ESS JVC.[111] The USDOC examined the evidence and concluded that, for purposes of the fifth review, ESS LCC was not the same company as, or the successor-of-interest to, ESS JVC.[112] As a result, the USDOC continued to find that ESS JVC should be assigned a separate rate for the fifth review up to the effective date of its name change,[113] and that ESS LCC should be assigned the Viet Nam-government entity rate because it was not subject to the fifth review (*i.e.*, no one requested that the USDOC review this firm) and thus remained part of the Viet Nam-government entity.[114] As noted in the U.S. response to question 43.a, the publication

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[108] See Exhibit VN-06-4 (BCI), Final results of the fifth review, p. 12728, and Issues and Decision Memorandum of the final results, Comment 7, p. 40.

[109] *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 73 Fed. Reg. 56,796 (Sept. 30, 2008) (Exhibit VN-06-1*)*.

[110] *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 51 Fed. Reg. 12,728 (March 17, 2010) (Exhibit VN-06-4 (BCI)); *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decisions Memorandum for the Final Results of the 5th Antidumping Duty Administrative Review and 4th New Shipper Review*, Comment 7: Rate for East Sea Seafood JVC/East Sea Seafood LLC, pp. 35-40 (March 10, 2010) (Exhibit VN-06-4 (BCI)).

[111] *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decisions Memorandum for the Final Results of the 5th Antidumping Duty Administrative Review and 4th New Shipper Review*, Comment 7: Rate for East Sea Seafood JVC/East Sea Seafood LLC, pp. 35-40 (March 10, 2010) (Exhibit VN-06-4 (BCI)).

[112] *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decisions Memorandum for the Final Results of the 5th Antidumping Duty Administrative Review and 4th New Shipper Review*, Comment 7: Rate for East Sea Seafood JVC/East Sea Seafood LLC, pp. 38-40 (March 10, 2010) (Exhibit VN-06-4 (BCI)).

[113] *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decisions Memorandum for the Final Results of the 5th Antidumping Duty Administrative Review and 4th New Shipper Review*, Comment 7: Rate for East Sea Seafood JVC/East Sea Seafood LLC, p. 40 (March 10, 2010) (Exhibit VN-06-4 (BCI)).

[114] *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decisions Memorandum for the Final Results of the 5th Antidumping Duty Administrative Review and 4th New Shipper Review*, Comment 7: Rate for East Sea Seafood JVC/East Sea Seafood LLC, p. 40 (March 10, 2010) (Exhibit VN-06-4 (BCI)).

of the Viet Nam-government entity's rate in the final results of that review served as a continuing notification to interested parties and the public of this rate, as well as providing further clarity and notice with respect to the USDOC's findings concerning ESS JVC and ESS LCC.

44. <u>To both parties</u>: At para. 31 (fn. 33) of its first written submission the United States points to the fact that the USDOC assigned to the Viet Nam-wide entity a rate set at $2.11 per kilogram in the preliminary results of the sixth review, but in the final results the USDOC noted that since Anvifish JSC, the only company receiving this rate in the preliminary results, was no longer under review, then the Viet Nam-wide entity was also not under review and did not set a rate for it.[115] On the other hand, Viet Nam argues at paras. 181 (fn. 230) and 204 (fn. 258) of its first written submission that the Viet Nam wide entity received in the preliminary results a rate of $2.11 per kilogram, which was unchanged in the final results.

a. Please confirm whether the USDOC applied a Viet Nam-wide entity rate in the sixth review.

<u>Response</u>:

116. The USDOC did not determine a Viet Nam-government entity rate in the final results of the sixth administrative review, because no one requested that the USDOC conduct a review of the Viet Nam-government entity as part of the USDOC's sixth review of the anti-dumping duty order on fish fillets from Viet Nam.

117. When an anti-dumping duty order has been put into place, the United States will require upon entry that a security be provided to U.S. Customs and Border Protection, usually in the form of a cash deposit, and that collection of the actual duty amount be delayed pending calculation of the amount of the liability for anti-dumping duties.[116] If an interested party requests a review of an exporter's or producer's import entries during the period covered by the review, the USDOC will initiate a review and calculate the amount of this liability as part of the final results of that review.[117] However, if no one requests a review of these import entries, the USDOC will instruct U.S. Customs and Border Protection to "[a]ssess antidumping duties … on the subject merchandise … at rates equal to the cash deposit of … estimated antidumping duties … required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption."[118] Therefore, because no one requested that the USDOC conduct a review of the Viet Nam-government entity during the sixth review, U.S. Customs and Border Protection

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[115] See Exhibit VN-07-4 (BCI), pp. 15943-15944.

[116] 19 CFR § 351.211 (Exhibit USA-18). The Appellate Body has reasoned that the first supplementary *Ad* Note to Articles VI:2 and VI:3, read together with the Anti-Dumping Agreement, permits a Member to assess a final liability for anti-dumping duties on the basis of the security collected as a protection against possible non-payment. *See US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, paras. 220-227.

[117] 19 CFR § 351.212(b) (Exhibit USA-18) and 19 CFR § 351.221(b)(5) (Exhibit USA-20).

[118] 19 CFR § 351.212(c)(i) (Exhibit USA-18).

assessed anti-dumping duties on fish fillets exported to the United States by the Viet Nam-government entity during the relevant period at the rate equal to the cash deposit of estimated anti-dumping duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption.

b. If the USDOC did not apply such rate in the final results, does Viet Nam still seek a finding of inconsistency under Articles 9.4, 6.8 and Annex II of the Anti-Dumping Agreement with respect to:

i. the preliminary results of the sixth review; or

ii. the final results of the sixth review; or

iii. the final redetermination results of the sixth review?

Response:

118. Question 44.b appears to be addressed to Viet Nam. In addition, the final re-determination results for the sixth review are outside the Panel's terms of reference because Viet Nam did include the re-determination results in its panel request.[119]

45. To both parties: With regard to the seventh review, Viet Nam refers, at paras. 183 (fn. 237), 205 (fn. 262) of its first written submission, to the preliminary and final results, while the United States at para. 34 of its first written submission refers to the final results and the final re-determination results. For the purpose of assessing consistency with Articles 6.10. 9.2, 9.4, 6.8 and Annex II of the Anti-Dumping Agreement should the Panel make a finding with respect to:

a. the preliminary results; or

b. the final results; or

c. the final re-determination results?

Please explain.

Response:

[119] *See* Request for the Establishment of a Panel by Viet Nam, WT/DS536/2, pp. 2, 5-6 (12 June 2018).

119. Only a final determination may be challenged in WTO dispute settlement.[120] In addition, the final re-determination results for the seventh review are outside the Panel's terms of reference because Viet Nam did include the re-determination results in its panel request.[121]

120. To the extent that the USDOC's final results do not differ from determinations made by the USDOC prior to the publication of the final results, the Panel may find that the detailed explanation for the USDOC's final results is set forth in the USDOC's preliminary results for the seventh review, or in another document appearing in the evidentiary record of the seventh review.

46. To the United States: Article 6.10 requires the authority to determine an individual dumping margin for each known exporter or producer. In the reviews at issue if known but non-selected exporters have not qualified for a separate rate, have they been individually named in the final results? Please explain by reference to the reviews at issue.

Response:

121. In the challenged reviews, a known exporter or producer that was not selected by the USDOC as a mandatory respondent for the purposes of a detailed examination during an administrative review would, should it qualify for a separate rate, be named in the final results of the review.

122. Fifth Administrative Review: On September 30, 2008, the USDOC initiated the fifth administrative review for 20 firms.[122] The USDOC determined that it could individually examine only two firms.[123] After certain requests for review were timely withdrawn, four firms remained subject to the fifth review.[124] Each of these firms qualified for a separate rate. For the

[120] Anti-Dumping Agreement, Art. 17.4.

[121] *See* Request for the Establishment of a Panel by Viet Nam, WT/DS536/2, pp. 2, 5-6 (12 June 2018).

[122] *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 73 Fed. Reg. 56,796 (Sept. 30, 2008) (Exhibit VN-06-1).

[123] Antidumping Duty Administrative Review of Frozen Fish Fillets from the Socialist Republic of Vietnam: Selection of Respondents for Individual Review (Oct. 29, 2008) (Exhibit VN-06-2).

[124] *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results of New Shipper Reviews and Fifth Antidumping Duty Administrative Review*, 74 Fed. Reg. 45,806 and n.3 (Sept. 9, 2009) (Exhibit VN-06-3 (BCI)) (the notice indicates that there are seven companies remaining, but then states that the QVD single entity represented three affiliated and collapsed companies and that Vinh Hoan Co., Ltd., and Vinh Hoan Corp. were the same company).

two exporters or producers not selected as mandatory respondents, the USDOC named these firms in its final results and assigned them a separate rate.[125]

123. Sixth Administrative Review: On September 22, 2009, the USDOC initiated the sixth administrative review for 22 companies.[126] The USDOC determined that it could individually examine only two firms.[127] After certain requests for review were timely withdrawn, five companies remained subject to the sixth review. Each of these firms qualified for a separate rate. For the three exporters or producers not selected as mandatory respondents, the USDOC named these firms in its final results and assigned them a separate rate.[128]

124. Seventh Administrative Review: On September 29, 2010, the USDOC initiated the seventh administrative review for 26 companies.[129] The USDOC determined that it could individually examine only two firms.[130] After certain requests for review were timely withdrawn, 19 firms remained subject to the seventh review. Thirteen of these firms qualified for a separate rate. For the 11 exporters or producers not selected as mandatory respondents, the USDOC named these firms in its final results and assigned them a separate rate.[131]

47. To the United States: Does the United States agree that in the reviews at issue there was a rebuttable presumption that all companies within Vietnam belong to the single Viet Nam-wide entity, unless they could demonstrate absence of government control?

Response:

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[125] *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 75 Fed. Reg. 12,728 and n.6 (March 10, 2010) (Exhibit VN-06-4 (BCI)).

[126] *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 74 Fed. Reg. 48,225-26 (Sept. 22, 2009) (Exhibit VN-07-1).

[127] Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Selection of Respondents for Individual Review (Nov. 10, 2009) (Exhibit VN-07-2).

[128] *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15,941, 15,944 (March 22, 2011) (Exhibit VN-07-4 (BCI)). See also the U.S. response to question 41.b. The sixth firm listed "is a new shipper review, aligned with, but not part of the administrative review." *Ibid.*, 76 Fed. Reg. 15,944 n.20 (Exhibit VN-07-4 (BCI)).

[129] *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 75 Fed. Reg. 60,078 (Sept. 29, 2010) (Exhibit VN-08-1).

[130] Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Selection of Respondents for Individual Review, dated (Jan. 7, 2011) (Exhibit USA-4).

[131] *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 Fed. Reg. 15,040-41 (March 14, 2012) (Exhibit VN-08-4 (BCI)).

125. The USDOC determined during the course of the anti-dumping duty investigation on fish fillets from Viet Nam that Viet Nam's economy did not operate according to market principles regarding pricing or cost structures and that Viet Nam should be treated as a nonmarket economy country for anti-dumping proceedings.[132] The Viet Nam fish fillets industry at no time during these reviews demonstrated that market economy conditions prevailed in this industry, nor did the Government of Viet Nam establish, under U.S. law, that it is a market economy.[133]

126. Given that the United States recognized the Viet Nam-government entity as a known exporter or producer of fish fillets from Viet Nam consistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement, the USDOC continued to treat Vietnamese firms as part of this entity for the specific time periods covered by the fifth, sixth, and seventh administrative reviews, unless a firm clearly demonstrated otherwise. Whenever a firm certified that its export activities were not controlled or materially influenced by the Government of Viet Nam, or demonstrated such independence, the USDOC assigned the firm its own dumping margin.[134]

48. To both parties: If, as the United States argues, the USDOC did not assign a Viet Nam-wide entity rate in the fifth and sixth reviews, but only separate rates to the companies subject to the review, would the Panel need to examine the inconsistency of a Viet Nam-wide entity rate in the fifth and sixth reviews with Articles 6.10 and 9.2? And, why?

Response:

127. Article 9.2 of the Anti-Dumping Agreement directs Members to collect anti-dumping duties in "the appropriate amounts in each case, on a non-discriminatory basis, … from all sources found to be dumped and causing injury." Article 6.10 of the Anti-Dumping Agreement further requires a margin of dumping for each known exporter or producer, although it does not require a separate margin for each nominally distinct exporter or producer. Therefore, although no one requested that the USDOC examine the Viet Nam-government entity in the challenged reviews, the United States assessed anti-dumping duties for the Viet Nam-government entity at the cash deposit rate applicable at the time merchandise was entered, consistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.[135]

49. To both parties: The United States argues at paras. 196-198 of its first written submission that the USDOC's treatment of Vietnamese companies as a part of a

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[132] *See* Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002) (Exhibit USA-1). Viet Nam does not challenge in this dispute the USDOC's determination that Viet Nam is a nonmarket economy country.

[133] *See* Accession of Viet Nam: Report of the Working Party on the Accession of Viet Nam, paras. 255(a)(ii) and 255(d) (Exhibit USA-3).

[134] *See, e.g.*, *Notice of Preliminary Results of New Shipper Reviews and Fifth Antidumping Duty Administrative Review*, 74 Fed. Reg. 45806-07 (Aug. 28, 2009) (Exhibit VN-06-3 (BCI)).

[135] *See* U.S. Responses to Questions 39, 43, and 44.

single government entity is based inter alia on Viet Nam's accession commitments to alter its non-market economy behaviour.

a. Does the United States argue that there is a legal basis in the provisions of Viet Nam's Accession Protocol for a presumption that country-wide dumping margins be calculated and country-wide duties be imposed on all Vietnamese exporters of a product under investigation?

Response:

128. The provisions of Viet Nam's Accession Protocol discussed below, together with the USDOC's undisputed finding that Viet Nam is a nonmarket economy, provided the basis for the USDOC's treatment of Vietnamese companies as part of a single government entity. The commitments made by Viet Nam as part of its Accession Protocol are an integral part of the WTO Agreements.[136]

b. If yes, please identify the relevant provisions.

Response:

129. When Viet Nam acceded to the WTO, Viet Nam acknowledged that it had not completed the transition from a nonmarket economy to a market economy but was in the midst of "shifting from a system of central planning to a market-based economy."[137] In this regard, the Working Party Report accompanying Viet Nam's accession to the WTO included multiple examples confirming that Viet Nam had not yet shifted completely away from a centrally planned economy to a market-based economy.[138]

130. For example, Viet Nam's state-owned enterprises (SOEs) for the most part were not undergoing full privatization. Instead, the government opted for a program of equitization whereby SOEs were converted into joint-stock or limited liability companies in which the State could hold any percentage of shares up to and including 100-percent ownership.[139] Line ministries (which controlled SOEs during the central planning era) would hold the state's stakes in these companies.[140] Viet Nam envisioned that an indefinite number of SOEs, including large and important ones as well as the banks, would remain wholly or majority state-owned for an undefined time period. The open-ended list of such enterprises in the Working Party Report is extensive and encompasses industries and sectors far beyond those normally considered national

[136] *See* Accession Protocol, para. I:2 (Exhibit VN-28) and Working Party Report, para. 527 (Exhibit USA-3).

[137] Working Party Report, para. 52 (Exhibit USA-3).

[138] *See*, *e.g.*, Working Party Report, paras. 4, 7, 52, 80-81, 96, 104, 254-255 (Exhibit USA-3).

[139] Working Party Report, para. 81 (Exhibit USA-3).

[140] Working Party Report, paras. 56, 60 (Exhibit USA-3).

security-related or natural monopolies.[141] Investment also was heavily regulated on a sector-specific basis, and the Government of Viet Nam maintained a long list of industries and sectors in which investment was prohibited, conditional, or restricted.[142]

131. When Viet Nam acceded to the WTO, Viet Nam committed to alter its nonmarket behavior. In this regard, Viet Nam committed to make sure all enterprises owned by the Government of Viet Nam, controlled by the Government of Viet Nam, or granted special or exclusive privileges by the Government of Viet Nam, "would make purchases … and sales in international trade, based solely on commercial considerations."[143] Viet Nam also committed to "not influence, directly or indirectly, commercial decisions on the part of [these] enterprises …, including decisions on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreements …."[144]

132. Furthermore, when Viet Nam acceded to the WTO, Viet Nam recognized that where Viet Nam cannot establish under the national law of the importing Member that it is a market economy, or where Viet Nam or the Vietnamese producers under investigation cannot show that market economy conditions prevail in particular industry, an importing WTO Member, in determining price comparability under Article VI of the GATT 1994 or the Anti-Dumping Agreement, may use a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam (*i.e.*, a nonmarket economy methodology).[145]

133. The undisputed fact that Viet Nam is a nonmarket economy country entails that Viet Nam is in a position to exercise restraint or direction over firms located in Viet Nam and can materially influence these firms' decisions about the price or cost of products destined for consumption in Viet Nam. The USDOC's approach with respect to the Viet Nam-government entity recognizes that Viet Nam is in the same position to exercise restraint or direction over the same firms with respect to their export activities, especially given Viet Nam's commitments under paragraph 78 of the Working Party Report. Therefore, because Article 2.4 of the Anti-Dumping Agreement instructs importing Members for purposes of price comparability to compare the export price of the product under consideration to the normal value of the like product at the ex-factory level, the USDOC's approach correctly applies the Anti-Dumping Agreement. None of Viet Nam's arguments establish that the USDOC's approach was inconsistent, "as such" or "as applied," with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

50. <u>To both parties</u>: If, as the United States argues, the USDOC did not assign a Viet Nam-wide entity rate in the fifth and sixth reviews, but only separate rates to the companies subject to the review, would the Panel need to examine the inconsistency

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[141] Working Party Report, Annex 2, Table 4 (Exhibit USA-3).

[142] Working Party Report, Annex 2, Tables 1 and 2 (Exhibit USA-3).

[143] Working Party Report, para. 78 (Exhibit USA-3).

[144] Working Party Report, para. 78 (Exhibit USA-3).

[145] Working Party Report, paras. 255(a), 255(d) (Exhibit USA-3).

of a Viet Nam-wide entity rate in the fifth and sixth reviews with Article 9.4? And, why?

Response:

134. Viet Nam's claim that the United States violated the obligations set out in Article 9.4 of the Anti-Dumping Act should be summarily rejected. As explained in previous submissions and in responses to other questions, no one requested that the USDOC review the Viet Nam-government entity during the challenged administrative reviews. The obligations set out in Article 9.4 therefore are not implicated.

51. To the United States: Viet Nam argues at para. 184 of its first written submission that the Viet Nam-wide entity was not selected for individual examination in the three reviews at issue. Does the United States agree?

Response:

135. The United States disagrees with the arguments put forward by Viet Nam at paragraph 184 of Viet Nam's first written submission.

136. Viet Nam is wrong when it argues at paragraph 184 of its first written submission that the Viet Nam-government entity should have received a rate under the provisions of Article 9.4 because "the so-called Vietnam-wide entity was an entity not selected for individual examination." The USDOC did not select the Viet Nam-government entity for individual examination during the challenged reviews because no one asked the USDOC to review the Viet Nam-government entity. Therefore, the obligations set out in Article 9.4 are not applicable to the challenged reviews, because Article 9.4 does not impose an obligation with respect to an exporter or producer, such as the Viet Nam-government entity, that did not request the USDOC to review and change its rate in any of the challenged administrative reviews.

52. To both parties: The United States argues at paras. 240-247 of its first written submission that since the Viet Nam-wide entity was individually examined and failed to cooperate, Article 9.4 is inapplicable in this case. Please comment.

Response:

137. Please see the U.S. responses to questions 39 and 40 for a detailed discussion of this issue.

138. In short, Article 9.4 of the Anti-Dumping Agreement is only applicable under the U.S. retrospective assessment systems if an interested party requests a review of an exporter or a producer of the product under consideration. Article 9.4 therefore is not applicable in this case because no one requested a review of the Viet Nam-government entity for purposes of the USDOC's fifth, sixth, or seventh administrative review.

53. <u>To both parties</u>: Viet Nam argues at paras. 203-205 of its first written submission that the Viet Nam-wide entity received in the reviews at issue a rate based on adverse facts available inconsistent with Article 6.8 and Annex II.

If, as the United States argues, the USDOC did not assign a Viet Nam-wide entity rate in the fifth and sixth reviews, but only separate rates to the companies subject to the review, would the Panel need to examine the inconsistency of a Viet Nam-wide entity rate in the fifth and sixth reviews with Article 6.8 and Annex II? Please explain.

<u>Response</u>:

139. Please see the U.S. response to question 40 for a detailed discussion of this issue.

140. In short, Article 6.8 and Annex II of the Anti-Dumping Agreement are only applicable under the U.S. retrospective assessment systems if an interested party requests a review of an exporter or a producer of the product under consideration; the USDOC initiates such a review; and the exporter or producer in question "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation."[146] Article 6.8 and Annex II therefore are not applicable in this case because no one requested a review of the Viet Nam-government entity for purposes of the USDOC's fifth, sixth, or seventh administrative review and, as a result, the USDOC did not determine a rate for the Viet Nam-government entity in the challenged reviews.

54. <u>To the United States</u>: Viet Nam argues at paras. 203-205 of its first written submission that the USDOC did not request necessary information within the meaning of Article 6.8 from the Viet Nam-wide entity, but only information regarding elements of government control over the operations of the companies. Please comment.

<u>Response</u>:

141. Please see the U.S. responses to questions 40 and 53 for a detailed discussion of this issue.

142. Viet Nam is wrong when it argues in paragraphs 203-205 of its first written submission that the USDOC requested information from the Viet Nam government entity because it asked exporters or producers about government control over their operations. The USDOC's questions were addressed to those exporters or producers for which an interested party had asked the USDOC to conduct a review. The USDOC's questions were **not** addressed to the Viet Nam-government entity for which **no** interested party had asked the USDOC to conduct a review. Viet Nam's arguments therefore are flawed because the USDOC made no finding on the basis of facts available under Article 6.8 and Annex II of the Anti-Dumping Agreement with respect to

[146] Anti-Dumping Agreement, Art. 6.8.

the Viet Nam-government entity, because the entity was not the subject of a review by the USDOC, and as such the USDOC did not request or receive any information from the Viet Nam government-entity during any of the challenged reviews.

55. <u>To both parties</u>: Are Article 6.8 and Annex II applicable when the investigating authority does not make a determination based on facts available in the review at issue, but rather continues to apply a rate determined in the original investigation? Please explain by reference to the wording of Article 6.8.

<u>Response</u>:

143. Article 6.8 and Annex II of the Anti-Dumping Agreement are not applicable when a party is not an "interested party" with respect to a particular investigation or review and, as a result, the investigating authority is not required to make a "preliminary [or] final determination, affirmative or negative," in such investigation or review with respect to such a non-party.[147] Please also see the U.S. responses to questions 40 and 53.

[147] Anti-Dumping Agreement, Art. 6.8.