

***UNITED STATES – ANTI-DUMPING MEASURES ON
FISH FILLETS FROM VIET NAM***

(DS536)

**FIRST WRITTEN SUBMISSION
OF THE UNITED STATES OF AMERICA**

March 7, 2019

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TABLE OF REPORTS

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC) (AB)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000
<i>Brazil – Aircraft (AB)</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999
<i>China – Autos (US) (Panel)</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States</i> , WT/DS440/R and Add.1, adopted 18 June 2014
<i>China – Broiler Products (Panel)</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R and Add.1, adopted 25 September 2013
<i>China – GOES (Panel)</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
<i>China – HP-SSST (AB)</i>	Appellate Body Reports, <i>China - Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan and the European Union</i> , WT/DS454/AB/R; WT/DS460/AB/R adopted 28 October 2015
<i>EC – Countervailing Measures on DRAM Chips (Panel)</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005
<i>EC – Fasteners (China) (AB)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011
<i>EC – Hormones (AB)</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<i>EC – Poultry (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998

<i>EC – Selected Customs Matters (AB)</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
<i>Korea – Dairy (AB)</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
<i>Mexico – Anti-Dumping Measures on Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>Mexico – Corn Syrup (Article 21.5 – US) (AB)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001
<i>US – Certain EC Products (AB)</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001
<i>US – Continued Zeroing (AB)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – Cotton Yarn (AB)</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001
<i>US – Countervailing and Anti-Dumping Measures (AB)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R and Corr.1, adopted 22 July 2014
<i>US – Countervailing Duty Investigation on DRAMS (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005

<i>US – Countervailing Measures (China) (Panel)</i>	Panel Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/R and Add.1, adopted 16 January 2015
<i>US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS212/RW, adopted 27 September 2005
<i>US – Continued Zeroing (AB)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – Continued Zeroing (Panel)</i>	Panel Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/R, adopted 19 February 2009, as modified as Appellate Body Report WT/DS350/AB/R
<i>US – Customs Bond Directive</i>	Panel Report, <i>United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS345/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>US – Shrimp (Ecuador) (Panel)</i>	Panel Report, <i>United States – Anti-Dumping Measure on Shrimp from Ecuador</i> , WT/DS335/R, adopted on 20 February 2007
<i>US – Shrimp (Viet Nam) (Panel)</i>	Panel Report, <i>United States – Anti-Dumping Measure on Certain Shrimp from Viet Nam</i> , WT/DS404/R, adopted 2 September 2011
<i>US – Shrimp II (Viet Nam) (Panel)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , WT/DS429/R, adopted 17 November 2014
<i>US – Softwood Lumber V (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004

<i>US – Softwood Lumber V (Article 21.5 – Canada) (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 1 September 2006
<i>US – Softwood Lumber V (Article 21.5 – Canada) (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/RW, adopted 1 September 2006, as reversed by Appellate Body Report WT/DS264/AB/RW
<i>US – Stainless Steel (Mexico) (Panel)</i>	Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R
<i>US – Supercalendered Paper (Panel)</i>	Panel Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , WT/DS505/R and Add. 1, circulated 5 July 2018
<i>US – Tyres (China) (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011
<i>US – Upland Cotton (AB)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005
<i>US – Washing Machines (Panel)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/R, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R
<i>US – Wheat Gluten (AB)</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001
<i>US – Wool Shirts and Blouses (AB)</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1
<i>US – Zeroing (EC) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006
<i>US – Zeroing (EC) (Panel)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R

<i>US – Zeroing (Japan) (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007
<i>US – Zeroing (Japan) (Panel)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R

TABLE OF EXHIBITS

Exhibit No.	Description
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	<i>Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Selection of Respondents for Individual Review</i> (Jan. 7, 2011)
USA-5	19 C.F.R. § 351.401
USA-6	<i>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</i> , 68 Fed. Reg. 4,986 (Jan. 31, 2003)
USA-7	<i>The New Shorter Oxford English Dictionary</i> , 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	<i>Modification to Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders</i> , 77 Fed. Reg. 29,875 (May 21, 2012)

I. INTRODUCTION

1. According to Article 3.10 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), “if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.” The United States understands, however, that Viet Nam launched this extensive dispute for the sole purpose of trying to force the U.S. Department of Commerce (“the USDOC”) to revoke the anti-dumping duty order on frozen fish fillets from Viet Nam with respect to Vinh Hoan Corporation. To accomplish this, Viet Nam has stacked together claims that it has previously made in *US – Shrimp (Viet Nam)* (WT/DS404) and *US – Shrimp II (Viet Nam)* (WT/DS429), and has asked the Panel to adopt certain systemic findings in an unrelated dispute brought by another Member, without any attempt to define the measure supposedly at issue or to meet a burden of fact or burden of argument. In the two *Shrimp* disputes, the United States and Viet Nam reached a mutually agreed solution that included a redetermination by the USDOC whether to revoke the applicable anti-dumping duty order as applied to the Minh Phu Group. Viet Nam wants to achieve a similar result here with respect to Vinh Hoan, hence its repetitive claims. The United States questions whether Viet Nam’s course of action is an appropriate use of the dispute settlement system. Furthermore, Viet Nam’s focus on achieving a revocation for a single company explains why – as the United States will discuss throughout this submission – a number of Viet Nam’s arguments on systemic issues are conclusory or incoherent, and why there are fundamental mismatches between the request for consultations, the request for panel establishment, and Viet Nam’s first written submission.

2. Viet Nam argues that the USDOC application of a so-called “simple zeroing methodology” “as such” in periodic (or administrative reviews) was inconsistent with Article VI:2 of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) and Article 9.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“Anti-Dumping Agreement”). Viet Nam acknowledges, however, that “the USDOC terminated the practice of simple zeroing with respect to reviews” in 2012.¹ The United States therefore maintains no statute, regulation, or other measure of general and prospective application that requires the use of a so-called “simple zeroing” methodology in periodic reviews.²

3. Viet Nam argues that the USDOC’s application of a so-called “simple zeroing methodology” “as applied” in the fifth, sixth, and seventh administrative reviews of the anti-dumping duty order on frozen fish fillets from Viet Nam was inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement. There is no obligation under the text of the Anti-Dumping Agreement or the GATT 1994 to grant offsets to reduce the amount of dumping duties levied on dumped entries to account for the extent to which non-dumped entries are priced above normal value. The USDOC’s calculation of antidumping duties in the challenged assessment proceedings therefore is not inconsistent with the Anti-Dumping Agreement or the GATT 1994.

¹ Viet Nam first written submission, para. 60 (citing *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8,101 (February 14, 2012) (*Final Modification*) (Exhibit VN-27)).

² *US – Shrimp II (Viet Nam)*, paras. 7.55-7.56.

4. Viet Nam next argues that the USDOC’s failure to revoke the anti-dumping duty order with respect to Vinh Hoan during the seventh administrative review was inconsistent with Articles 11.1 and 11.2 of the Anti-Dumping Agreement. Articles 11.1 and 11.2 do not provide for company-specific revocation from an antidumping duty order. Even if Articles 11.1 and 11.2 did so provide, Viet Nam would still have failed to establish that the USDOC acted inconsistently with Articles 11.1 and 11.2 when the USDOC rejected the revocation request that Vinh Hoan filed 232 days after the applicable deadline.

5. Finally, Viet Nam argues that the alleged “NME-wide entity rate practice” is a measure that may be challenged “as such” and “as applied” as inconsistent with Articles 6.8, 6.10, 9.2, and 9.4 of the Anti-Dumping Agreement. Viet Nam failed to put forward evidence that demonstrates this alleged “practice” is a measure. Further, the USDOC’s decision to identify a Viet Nam-government entity³ rate in the covered reviews and assign that rate to multiple enterprises that constituted part of that entity was not inconsistent with the obligations of the United States under 6.8, 6.10, 9.2, and 9.4 of the Anti-Dumping Agreement.

II. STRUCTURE OF THE U.S. SUBMISSION

6. The United States has structured this submission as follows.

7. Section III describes the standard of review, rules of interpretation, and burden of proof applicable in WTO dispute settlement proceedings. Section IV provides details about the factual background of this dispute.

8. Section V discusses the United States’ request for a preliminary ruling that certain of Viet Nam’s claims are outside the Panel’s terms of reference. Section V.A explains that certain measures and claims related to zeroing and revocation included in Viet Nam’s panel request were not subject to consultations and are therefore outside the Panel’s terms of reference. Section V.B addresses certain claims included Viet Nam’s first written submission that were not included in Viet Nam’s panel request, or that are otherwise outside of the Panel’s terms of reference because the claim fails to meet the requirements of DSU Article 6.2.

9. Section VI discusses that Viet Nam’s as such claims related to simple zeroing and differential pricing lack merit. As demonstrated in Section VI.A, Viet Nam’s as such claim related to so-described “simple zeroing” fails because Viet Nam cannot demonstrate that the USDOC maintains a rule or norm of general and prospective application. Viet Nam’s as such differential pricing claim fails for similar reasons, and because Viet Nam fails to put forth evidence of the precise content of the purported “differential pricing” measure. Section VI.B discusses Viet Nam’s as applied claims regarding the application of zeroing in the fifth, sixth and seventh administrative reviews. The United States demonstrates that the practice of zeroing is not inconsistent with the Anti-Dumping Agreement, or GATT 1994.

10. Section VII explains that the USDOC’s decision not to consider Vinh Hoan’s untimely request for revocation was not inconsistent with Article 11 of the Anti-Dumping Agreement.

³ The United States will refer to the Viet Nam-wide entity or the Viet Nam-government exporter/producer as the “Viet Nam-government entity.”

After Section VII.A presents relevant factual background, Section VII.B explains that Article 11.1 of the Anti-Dumping Agreement does not impose independent obligations. Section V.C then discusses the fact that Article 11 of the Anti-Dumping Agreement provides no basis for claims concerning company-specific revocation because Article 11 creates no obligation for an investigating authority to permit company-specific revocation at all. Section V.D explains that Article 11 of the Anti-Dumping Agreement does not require investigating authorities to accept untimely requests for revocation. After explaining that creating a filing window for such requests is fully consistent with the Anti-Dumping Agreement, section VII.D discusses the fact that circumstances did not prevent Vinh Hoan from requesting revocation in the timeframe provided for by the USDOC, and that consideration of Vinh Hoan's untimely request would have burdened the USDOC and other participants in the review. Section VII.E briefly addresses certain additional claims that Viet Nam may be attempting to articulate with respect to revocation, explaining that they are without merit.

11. Section VIII addresses Viet Nam's claims that the United States breached the Anti-Dumping Agreement in assigned the Viet Nam-government entity a single anti-dumping duty rate. Section VIII.A demonstrates that Viet Nam's "as such" claims cannot be sustained with respect to the anti-dumping duty rate assigned to a government entity because Viet Nam's evidence fails to meet the high threshold standard such claims must meet. Section VIII.B demonstrates that the USDOC's approach with respect to Viet Nam's control over multiple companies is based on the undisputed nonmarket economy conditions in Viet Nam and is not inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. Section VIII.C demonstrates that the application of an adverse facts available rate to the Viet Nam-government entity in the challenged determinations is not inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement. Section VIII.D demonstrates that the anti-dumping duty rate published for the Viet Nam-government entity in the challenged determinations is not inconsistent with Article 9.4 of the Anti-Dumping Agreement.

III. STANDARD OF REVIEW, RULES OF INTERPRETATION, AND BURDEN OF PROOF

12. As set out in Article 11 of the DSU, the Panel is "to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements" by "mak[ing] 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." Pursuant to the Panel's terms of reference, as established by Article 7.1 of the DSU, the Panel is then to "make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for" in the covered agreements, as required by Article 19.1 of the DSU.

13. With respect to the specific standard of review for anti-dumping measures, Article 17.6 of the Anti-Dumping Agreement further provides that:

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

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

14. The Panel's task in this dispute then is to assess whether the USDOC properly established the facts and evaluated them in an unbiased and objective way.⁴ The Panel's task is **not** to determine whether it would have reached the same results as the USDOC. Put differently, the Panel's task is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as the USDOC, could have – not would have – reached the same conclusions that the USDOC reached. It is well established that the Panel must not conduct a *de novo* evidentiary review, but instead should “bear in mind its role as *reviewer* of agency action” and not as “*initial trier of fact*.”⁵ Indeed, it would be inconsistent with a panel's function under Article 11 of the DSU to go beyond its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the investigating authority.⁶

15. In assessing the “applicability of and conformity with the covered agreements,” Article 3.2 of the DSU indicates that the Panel is to utilize customary rules of interpretation of public international law to discern the meaning of relevant provisions of the covered agreements. Previous WTO reports have recognized that Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“Vienna Convention”) reflects such customary rules. Article 31 of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” A corollary of this customary rule of interpretation is that an “interpretation must give meaning and effect to all the terms of the treaty.”

16. The DSU does not assign precedential value to panel or Appellate Body reports adopted by the DSB or interpretations contained in those reports. Instead, it reserves such weight to “authoritative interpretations” adopted by WTO Members in a different body. The WTO Agreement states that the Ministerial Conference or General Council have the “exclusive authority” to adopt interpretations, acting not by negative consensus (as in the DSB) but by positive consensus, and under different procedures that promote awareness and participation by

⁴ This is consistent with the findings in numerous panel and Appellate Body reports. *See, e.g., US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.82 (referring to the Appellate Body report in *US – Cotton Yarn*, as well as other reports concerning the Anti-Dumping Agreement, and observing that its role was to assess “whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner.”). *See also ibid.*, paras. 7.78-7.83.

⁵ *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (italics in original).

⁶ *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 188-190.

Members.⁷ The DSU explicitly notes that the dispute settlement system operates without prejudice to this interpretative authority reserved to Members.⁸

17. As noted, the DSU states that a panel is to apply customary rules of interpretation of public international law in assisting the DSB in determining whether a measure is inconsistent with a Member's commitments under the covered agreements. Those rules of interpretation do not assign to interpretations given as part of dispute settlement a precedential value for purposes of discerning the meaning of agreement text. A panel is not permitted under its terms of reference as established by the DSB or under the DSU to ignore this task and instead simply treat prior panel or Appellate Body reports as binding "precedent."⁹

18. Indeed, were a panel to decide to simply apply the reasoning in prior Appellate Body reports alone, it would fail to carry out its function, as established by the DSB, under DSU Articles 7.1, 11, and 3.2 to make findings on the applicability of existing provisions of the covered agreements, as understood objectively through customary rules of interpretation.

19. This does not mean that the United States considers a prior panel or Appellate Body interpretation to be without any value. 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. Such a use of prior reasoning likely would add to the persuasiveness of the panel's own analysis, whether or not the panel agrees with the prior reasoning. But **considering** an interpretation in a prior Appellate Body report is very different from a statement that the interpretation is controlling or "precedent" in a later dispute.

20. Finally, it is generally accepted that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."¹⁰ Accordingly, Viet Nam, as the complaining party, bears the burden of demonstrating that the U.S. measures within the Panel's terms of reference are inconsistent with a provision or provisions of the Anti-Dumping Agreement or GATT 1994. Viet Nam must establish a *prima facie* case of inconsistency with a provision of a WTO covered agreement before the burden shifts to the United States, as the party complained against, to rebut Viet Nam's *prima facie* case.¹¹

⁷ WTO Agreement, Art. IX:2 ("The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.").

⁸ DSU Art. 3.9 ("The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.").

⁹ For a detailed elaboration of these provisions, *see* Statement by the United States on the Precedential Value of Panel or Appellate Body Reports Under the WTO Agreement and DSU, Meeting of the DSB on December 18, 2018, *available at*: https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_.public.pdf.

¹⁰ *US – Wool Shirts and Blouses (AB)*, p. 14. *See also* *China – Autos (US) (Panel)*, para. 7.6.

¹¹ *EC – Hormones (AB)*, para. 109 (*citing* *US – Wool Shirts and Blouses (AB)*, pp. 14-16). *See also* *China – Broiler Products (Panel)*, para. 7.6.

IV. FACTUAL BACKGROUND

23. On July 24, 2002, following the filing of an antidumping duty petition by members of the U.S. fish fillets industry, the USDOC initiated an antidumping duty investigation on fish fillets from Viet Nam.¹²

24. During the course of the investigation, the USDOC determined 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 antidumping proceedings.¹³ This determination remained applicable throughout the fifth, sixth, and seventh administrative reviews.¹⁴ 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.¹⁵

25. On June 23, 2003, the USDOC published the final determination, in which it determined that companies had engaged in dumping during the investigation period.¹⁶ The USDOC published the antidumping duty order on fish fillets from Viet Nam after it received notification from the U.S. International Trade Commission of its affirmative injury determination.¹⁷

26. On March 21, 2006, the USDOC published its final results in the first administrative review of the antidumping duty order on fish fillets from Viet Nam.¹⁸ During this review, the USDOC determined weighted average-dumping margins for two individually-examined companies, including Vinh Hoan, which received a 6.81 percent margin.¹⁹ The USDOC published the results of the second, third, and fourth administrative review on March 21, 2007,

¹² *Initiation of Antidumping Duty Investigation*, 67 Fed. Reg. 48,437 (July 24, 2002) (Exhibit VN-05-1). Viet Nam was not a Member of the WTO at this time and did not become a Member until January 11, 2007. See WTO Membership, Accessions, Viet Nam, https://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm (accessed Feb. 25, 2019) (“Viet Nam became the WTO’s 150th member on 11 January 2007”).

¹³ 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.

¹⁴ 19 U.S.C. § 1677(18)(C) (Exhibit USA-2) (“Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority.”).

¹⁵ 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). The United States filed this exhibit because Exhibit VN-24 includes only excerpts of this document.

¹⁶ *Notice of Final Determination of Sales at Less Than Fair Value*, 68 Fed. Reg. 37,116 (June 23, 2003) (Exhibit VN-05-02). The USDOC published an amended final determination addressing certain ministerial errors in its final determination on July 24, 2003. *Notice of Amended Final Determination of Sales at Less Than Fair Value*, 68 Fed. Reg. 43,713 (July 24, 2003) (Exhibit VN-05-3).

¹⁷ *Notice of Antidumping Duty Order*, 68 Fed. Reg. 47,909 (August 12, 2003) (Exhibit VN-05-4).

¹⁸ *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam*, 71 Fed. Reg. 14,170 (Dep’t Commerce Mar. 21, 2006) (final results of admin. review).

¹⁹ See *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam*, 71 Fed. Reg. 14,170, 14,172 (Dep’t Commerce Mar. 21, 2006) (final results of admin. review).

March 24, 2008, and March 17, 2009, respectively.²⁰ Vinh Hoan did not participate and was not selected for individual examination in any of these reviews.²¹ The USDOC published the final results of the first sunset review of the order on February 2, 2009, finding that dumping would be likely to recur if the order were revoked.²²

27. Viet Nam has challenged in this dispute certain aspects of the results of the fifth, sixth, and seventh administrative reviews, which are discussed below.²³

A. Fifth Administrative Review

28. On August 1, 2008, the USDOC provided interested parties an opportunity to request an administrative review for the period covered by a fifth administrative review of the antidumping duty order on fish fillets from Viet Nam, covering August 1, 2007 through July 31, 2008.²⁴ The USDOC individually examined two companies, including Vinh Hoan.²⁵ The USDOC issued its final results on March 10, 2010, in which it calculated a dumping margin of \$0.00 per kilogram for Vinh Hoan.²⁶

29. The USDOC provided all Vietnamese companies subject to review the opportunity to complete a separate rate application or certification and demonstrate that its export activities were not subject to government control. Based on the data received, the USDOC granted all companies subject to the review separate rate status.²⁷ The USDOC calculated a dumping

²⁰ *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam*, 72 Fed. Reg. 13,242 (Dep't Commerce Mar. 21, 2007) (final results of admin. review); *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 73 Fed. Reg. 15,479 (Dep't Commerce Mar. 24, 2008) (final results of admin. review); *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 74 Fed. Reg. 11,349 (Dep't Commerce Mar. 17, 2009) (final results of admin. review).

²¹ *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam*, 72 Fed. Reg. 13,242 (Dep't Commerce Mar. 21, 2007) (final results of admin. review); *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 73 Fed. Reg. 15,479 (Dep't Commerce Mar. 24, 2008) (final results of admin. review); *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 74 Fed. Reg. 11,349 (Dep't Commerce Mar. 17, 2009) (final results of admin. review).

²² *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam*, 74 Fed. Reg. 5,819 (Dep't Commerce Feb. 2, 2009) (final results of expedited sunset review), and accompanying Issues and Decision Memorandum at 3.

²³ *See* Viet Nam first written submission, para. 44

²⁴ *Opportunity to Request Administrative Review*, 73 Fed. Reg. 44,966 (August 1, 2008) (*Opportunity to Request Notice for Fifth AR*) (Exhibit VN-12).

²⁵ Antidumping Duty Administrative Review of Frozen Fish Fillets from the Socialist Republic of Vietnam: Selection of Respondents for Individual Review, dated October 29, 2008 (Respondent Selection Memorandum for Fifth AR) (Exhibit VN-06-2).

²⁶ *Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 75 Fed. Reg. 12,726, p. 12,728 (March 10, 2010) and accompanying Issues and Decision Memorandum (*Final Results for Fifth AR*) (Exhibit VN-06-4).

²⁷ *Notice of Preliminary Results of New Shipper Reviews and Fifth Antidumping Duty Administrative Review*, 74 Fed. Reg. 45,805, 45,806-07 (August 28, 2009) (*Preliminary Results for Fifth AR*) (Exhibit VN-06-03), unchanged in *Final Results for Fifth AR*. The USDOC further determined that one company, East Sea Seafoods Joint Venture Company, ceased to exist during the period of review, and that East Sea Seafoods Limited Liability Company, a company not subject to review, was not its successor-in-interest. As a result, although USDOC established a rate for

margin of \$0.02 per kilogram for the separate rate companies that were not individually examined.²⁸

B. Sixth Administrative Review

30. On August 3, 2009, the USDOC provided interested parties an opportunity to request an administrative review for the sixth administrative review of the antidumping duty order on fish fillets from Viet Nam, covering the period of August 1, 2008 through July 31, 2009.²⁹ The USDOC individually examined two companies, including Vinh Hoan.³⁰ The USDOC initially calculated dumping margins of \$0.00 per kilogram for Vinh Hoan;³¹ however, after a redetermination pursuant to a court remand, Vinh Hoan's margin increased to \$0.06.³²

31. The USDOC provided all Vietnamese companies subject to review the opportunity to complete a separate rate application or certification and demonstrate that its export activities were not subject to government control. Based on the data received, the USDOC granted all companies subject to the review separate rate status.³³ The USDOC calculated a dumping margin of \$0.02 per kilogram for the separate rate companies that were not individually examined,³⁴ which after a redetermination pursuant to court remand was increased to \$0.06.³⁵

the Viet Nam-government entity, no company subject to the review was subject to this assessment rate in the fifth administrative review. *Final Results for Fifth AR*, p. 40.

²⁸ *Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 75 Fed. Reg. 12,726, 12,728 (March 10, 2010) and accompanying Issues and Decision Memorandum (*Final Results for Fifth AR*) (Exhibit VN-06-4).

²⁹ *Opportunity to Request Administrative Review*, 74 Fed. Reg. 38,397 (August 3, 2009) (*Opportunity to Request Notice for Sixth AR*) (Exhibit VN-13).

³⁰ Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Selection of Respondents for Individual Review, dated November 10, 2009 (Respondent Selection Memorandum for Sixth AR) (Exhibit VN-07-2).

³¹ *Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15,941, 15,944 (March 22, 2011) and accompanying Issues and Decision Memorandum (*Final Results for Sixth AR*) (Exhibit VN-07-4).

³² *Final Results of Redetermination Pursuant to Catfish Farmers of America et al. v. United States*, Court Nos. 11-00109, Slip Ops. 13-63 and 13-64 (May 23, 2013), dated January 17, 2014 (Final Results of Redetermination for Sixth AR Pursuant to *Catfish Farmers of America v. U.S.*) (Exhibit VN-07-6) (BCI). See also *Catfish Farmers of America v. U.S.*, Slip Op. 13-63 (USCIT) (May 23, 2013) (remanding USDOC's results for reconsideration) (Exhibit VN-07-5); *Catfish Farmers of America v. U.S.*, Slip Op. 14-144 (USCIT) (December 18, 2014) (sustaining USDOC's redetermination results) (Exhibit VN-07-7); *Catfish Farmers of America v. U.S.*, 645 Fed. Appx. 1001 (CAFC) (April 12, 2016) (affirming the USCIT's order sustaining USDOC's redetermination) (Exhibit VN-07-8).

³³ *Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15,941, 15,943 (March 22, 2011) and accompanying Issues and Decision Memorandum (*Final Results for Sixth AR*) (Exhibit VN-07-4) (noting that the Viet Nam-government entity ultimately was not under review).

³⁴ *Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15,941, 15,944 (March 22, 2011) and accompanying Issues and Decision Memorandum (*Final Results for Sixth AR*) (Exhibit VN-07-4).

³⁵ *Final Results of Redetermination Pursuant to Catfish Farmers of America et al. v. United States*, Court Nos. 11-00109, Slip Ops. 13-63 and 13-64 (May 23, 2013), dated January 17, 2014 (Final Results of Redetermination for

C. Seventh Administrative Review

32. On August 2, 2010, the USDOC provided interested parties an opportunity to request an administrative review for the seventh administrative review of the antidumping duty order on fish fillets from Viet Nam, covering the period August 1, 2009 through July 31, 2010.³⁶ The USDOC individually examined two companies, including Vinh Hoan.³⁷

33. On April 20, 2011, Vinh Hoan submitted a request for revocation.³⁸ Under the USDOC's procedures at the time, Vinh Hoan should have submitted this request no later than August 31, 2010, the deadline for submitting a request for administrative review of its entries.³⁹ Vinh Hoan's request thus was late by 232 days. Accordingly, the USDOC did not accept Vinh Hoan's request to examine a possible revocation.⁴⁰ The USDOC issued its final results on March 14, 2012.⁴¹ The USDOC initially calculated a dumping margins of \$0.00 per kilogram Vinh Hoan,⁴² which continued to remain *de minimis* after litigation.⁴³

Sixth AR Pursuant to *Catfish Farmers of America v. U.S.*) (Exhibit VN-07-6) (BCI). See also *Catfish Farmers of America v. U.S.*, Slip Op. 13-63 (USCIT) (May 23, 2013) (remanding USDOC's results for reconsideration) (Exhibit VN-07-5); *Catfish Farmers of America v. U.S.*, Slip Op. 14-144 (USCIT) (December 18, 2014) (sustaining USDOC's redetermination results) (Exhibit VN-07-7); *Catfish Farmers of America v. U.S.*, 645 Fed. Appx. 1001 (CAFC) (April 12, 2016) (affirming the USCIT's order sustaining USDOC's redetermination) (Exhibit VN-07-8).

³⁶ *Opportunity to Request Administrative Review*, 75 Fed. Reg. 45,094 (August 2, 2010) (*Opportunity to Request Notice for Seventh AR*) (Exhibit VN-14).

³⁷ Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Selection of Respondents for Individual Review, dated January 7, 2011 (Respondent Selection Memorandum for Seventh AR) (Exhibit USA-4). The United States filed this exhibit because Exhibit VN-08-2 incorrectly provides the respondent selection memorandum from the eighth administrative review, not the seventh administrative review.

³⁸ Letter from Mayer Brown LLP Requesting Revocation, in Part, for QVD and Vinh Hoan, April 20, 2011 (Exhibit VN-09).

³⁹ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 75 Fed. Reg. 60,076 (September 29, 2010) (*Initiation Notice for Seventh AR*) (Exhibit VN-08-1). The USDOC noted that it had received timely requests to revoke, in part, for unrelated orders. *Ibid.*, 60,076.

⁴⁰ *Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 Fed. Reg. 15,039 (March 14, 2012) and accompanying Issues and Decision Memorandum, pp. 37-38 (*Final Results for Seventh AR*) (Exhibit VN-08-4). Vinh Hoan unsuccessfully challenged this aspect of the final results in litigation. See *Catfish Farmers of America et al. v. United States*, Slip Op. 14-146, p. 35 (USCIT December 18, 2014) (Exhibit VN-08-5) (sustaining in part, remanding in part various aspect of the seventh administrative review final results) ("Vinh Hoan has failed to show that USDOC's rejection of its untimely revocation request was an abuse of discretion or otherwise improper.")

⁴¹ *Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 Fed. Reg. 15,039 (March 14, 2012) and accompanying Issues and Decision Memorandum (*Final Results for Seventh AR*) (Exhibit VN-08-4).

⁴² *Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 Fed. Reg. 15,039, 15,041 (March 14, 2012) and accompanying Issues and Decision Memorandum (*Final Results for Seventh AR*) (Exhibit VN-08-4).

⁴³ USDOC's Final Results of Redetermination for Seventh AR Pursuant to *Catfish Farmers of America v. U.S.* (Exhibit VN-08-6) (BCI), p. 29. See also *Catfish Farmers of America v. U.S.*, Slip Op. 14-146 (USCIT) (December

34. The USDOC provided all Vietnamese companies subject to review the opportunity to complete a separate rate application or certification and demonstrate that its export activities were not subject to government control and receive a separate rate. Based on the data received, the USDOC granted 13 companies subject to the review separate rate status.⁴⁴ The USDOC initially calculated a dumping margin of \$0.03 per kilogram for the separate rate companies that were not individually examined, which increased to \$0.19 per kilogram after litigation.⁴⁵

V. PRELIMINARY RULING REQUEST

35. Viet Nam raised in its panel request certain purported measures that were not the subject of consultations. In addition, Viet Nam raised certain claims in its first written submission that were not properly identified in its panel request.

36. Pursuant to paragraph 4 of the Panel’s Working Procedures, the United States requests a preliminary ruling that the claims regarding purported measures not subject to consultations, are outside of the Panel’s terms of reference, and that, accordingly, these claims should be rejected on this basis. As provided for in the Working Procedures, this preliminary ruling request is filed concurrently with the United States’ first written submission and is incorporated into this section of the submission.

A. Viet Nam’s Panel Request Improperly Included Claims With Respect to Certain Purported Measures That Were Not the Subject of Consultations

37. Consultations play an important role in helping to resolve a dispute. Because of this, Members agreed in the DSU that a measure must be the subject of consultations prior to requesting a panel to review that measure.⁴⁶ Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if “the consultations fail to settle a dispute.” Article 4.4 of the DSU further provides that a request for consultations must state the reasons for the request, “including identification of the measure at issue and an indication of the legal basis for the complaint.” Article 6.2 of the DSU further requires that a request for establishment of a panel must “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.” As the Appellate Body stated in *Brazil – Aircraft*:

28, 2014) (remanding USDOC’s results for reconsideration) (Exhibit VN-08-5); *Catfish Farmers of America v. U.S.*, Slip Op. 16-29 (USCIT) (March 30, 2016) (sustaining USDOC’s redetermination results) (Exhibit VN-08-7).

⁴⁴ *Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 Fed. Reg. 15,039, 15,040-41 (March 14, 2012) and accompanying Issues and Decision Memorandum (*Final Results for Seventh AR*) (Exhibit VN-08-4).

⁴⁵ *Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 Fed. Reg. 15,039, 15,040-41 (March 14, 2012) and accompanying Issues and Decision Memorandum (*Final Results for Seventh AR*) (Exhibit VN-08-4).

⁴⁶ See *US – Customs Bond Directive (AB)*, para. 293.

Articles 4 and 6 of the DSU . . . set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.⁴⁷

38. A panel request may neither expand the scope nor change the essence of a consultations request. “[A]s a general matter, consultations are a prerequisite to panel proceedings.”⁴⁸ That said, there need not be a “precise and exact identity” of measures between a request for consultations and a panel request “provided that the ‘essence’ of the challenged measures had not changed”⁴⁹ and “[a]s long as the complaining party does not expand the scope of the dispute.”⁵⁰ Accordingly, in determining the measures at issue, a panel should “compare the respective parameters of the consultations request and the panel request to determine whether an expansion of the scope or change in the essence of the dispute occurred through the addition of instruments in the panel request that were not identified in the consultations request.”⁵¹

39. A comparison of the respective parameters of Viet Nam’s consultations request and its panel request shows that Viet Nam’s panel request expands the scope and changes the essence of the dispute.

1. Zeroing

40. With respect to its as-such zeroing claim, claims with respect to the following measures are outside the Panel’s terms of reference because the measures were not included in Viet Nam’s request for consultations:

- “The original U.S. practice of zeroing”;
- “The more recent application of zeroing in the context of targeted dumping”; and
- 19 C.F.R. § 351.408.

41. First, the “original U.S. practice of zeroing” was not included in Viet Nam’s request for consultations. Viet Nam’s consultations request sought consultations specifically regarding “[the USDOC’s]... practice, as such, of (1) improper use of the zeroing methodology in original investigations and reviews pursuant to its so-called differential pricing methodology”⁵² Thus, with respect to its zeroing as such claim, the scope of Viet Nam’s consultation request was

⁴⁷ *Brazil – Aircraft (AB)*, para. 131.

⁴⁸ *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, para. 58; *see also US – Certain EC Products (AB)*, paras. 70, 82 (upholding the panel’s finding that a particular action taken by the United States was not part of the panel’s terms of reference because the EC, while referring to that action in its panel request, had failed to request consultations upon it).

⁴⁹ *US – Customs Bond Directive (AB)*, para. 293 (citing *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 137).

⁵⁰ *US – Customs Bond Directive (AB)*, para. 293 (citing *US – Upland Cotton (AB)*, para 293).

⁵¹ *US – Customs Bond Directive (AB)*, para. 294.

⁵² Viet Nam Request for Consultations (12 January 2018), p. 2 (Exhibit VN-03) (bold added).

limited to the USDOC’s use of “so-called differential pricing methodology” in original investigations and reviews.

42. Viet Nam’s panel request, however, describes an entirely different so-called “zeroing methodology” that the USDOC purportedly used “in each of the administrative reviews at issue.” Viet Nam’s panel request describes this zeroing measure as follows:

Specifically, in making an average-to-average comparison of export price and normal value, the USDOC did not allow the margin above normal value on non-dumped sales to offset the margin of dumping on sales below with margins below normal value.⁵³

43. Viet Nam coins this purported measure as “the original U.S. practice of zeroing”⁵⁴ in its panel request. Referring to the above statement, the panel request goes on to state that Viet Nam “considers the above-mentioned laws and procedures by the USDOC to be, as such and as applied on a continued and ongoing basis, inconsistent with several provisions of the Anti-Dumping Agreement, GATT 1994, and the Marrakesh Agreement.” Viet Nam’s reference to the “above-mentioned laws and procedures” in this sentence—which is the sentence that sets out Vietnam’s claim in the panel request regarding zeroing—clearly refers only to Viet Nam’s description of the “the original U.S. practice of zeroing” which appears two paragraphs above this statement, and not “differential pricing” which first appears on the page that follows.

44. Viet Nam’s panel request thus expands the scope of its consultation request as the panel request identifies the “original U.S. practice of zeroing” to be the measure at issue for its as such claim, rather than the “so-called differential pricing methodology” included in the consultation request. The panel request also changes the essence of the consultation request because Viet Nam no longer identifies the “so-called differential pricing methodology” as the central measure at issue for its as such claim. (Part B will separately discuss how the failure of Viet Nam’s panel request to identify “so-called differential pricing” as a measure at issue for its as-such claim also renders the differential pricing measure discussed in Viet Nam’s first written submission outside the panels terms of reference.)

45. Before turning to the second point, the United States notes that the “the original U.S. practice of zeroing” as described in Viet Nam’s panel request ultimately does not appear in Viet Nam’s first written submission. Viet Nam instead refers to a description of so-called “simple zeroing” as the measure at issue for its as-such claim. As discussed in greater detail in part .B, to the extent Viet Nam’s first written submission intends to equate so described “simple zeroing” with its description of “the original U.S. practice zeroing” from its panel request, such an attempt must fail, among other reasons, because as demonstrated above, neither “the original U.S. practice of zeroing” nor “simple zeroing” were included as “as such” claims in Viet Nam’s consultations request.

⁵³ Viet Nam Request for the Establishment of a Panel (12 June 2018), p. 3 (Exhibit VN-04).

⁵⁴ Viet Nam Request for the Establishment of a Panel (12 June 2018), p. 4 (Exhibit VN-04).

46. Turning to the second point, Viet Nam’s reference in its panel request to the “more recent application of zeroing in the context of targeted dumping”⁵⁵ is improper because targeted dumping was not identified as a “measure at issue” in its consultations request. Finally, Viet Nam’s identification of the USDOC implementing regulation 19 C.F.R. § 351.408 in its panel request as the basis for “calculations and methodologies [of ‘the original U.S. practice of zeroing’]”⁵⁶ is similarly improper as 19 C.F.R. § 351.408 was not among the regulations identified in Viet Nam’s consultations request.

47. For the aforementioned reasons, the United States requests the Panel find the above claims and measures are not within its terms of reference with respect to Viet Nam’s as such “zeroing” claims.

2. Request for Revocation

48. In its request for consultations, Vietnam framed the revocation-related issues that it sought to raise as:

The rejection of the request for revocation by Vinh Hoan in the 7th administrative review when the final determination in that review would not occur until 330 days after the request for revocation; [and]

(2) The rejection of the request for revocation by Vinh Hoan in the 7th administrative review when the date specified by USDOC for such a request was before the date of the final determination in the prior review;[.]

49. The request for consultations thus raised concerns with the rejection of the revocation request in light of the status of the sixth and seventh administrative reviews. The consultations request did not mention the regulations at the heart of the revocation claim that Vietnam actually advanced in its request for establishment of a panel and its first written submission: namely, 19 C.F.R. § 351.222 and 19 C.F.R. § 351.213.⁵⁷ The 2010 version of 19 C.F.R. § 351.222, is of particular significance to Viet Nam’s claim, as it set forth the requirement that requests for review be made during the anniversary month of the order.⁵⁸

50. Unlike Viet Nam’s request for consultations, its request for establishment of a Panel highlighted USDOC’s application of 19 C.F.R. § 351.222(e) when rejecting the revocation request. The Panel Request explained that “[t]he US rejected Vinh Hoan’s request based on it being untimely under Department of Commerce regulation 19 CFR 351.222(e) which states that such a request should be made during the anniversary month of the anti-dumping order.” Viet Nam’s First Written Submission similarly challenged USDOC’s application of 19 C.F.R. §

⁵⁵ Viet Nam Request for the Establishment of a Panel (12 June 2018), p. 4 (Exhibit VN-04)

⁵⁶ Viet Nam Request for the Establishment of a Panel (12 June 2018), p. 3 (Exhibit VN-04).

⁵⁷ In its Panel Request, Vietnam argues that denial of its request for revocation was an action “taken pursuant to Commerce Department regulations 351.222 and 351.213 and *Samsung Electronics v. United States*, 946 F. Supp5 {sic} (CIT 1996).” Viet Nam Request for the Establishment of a Panel (12 June 2018), p. 7 (Exhibit VN-04).

⁵⁸ 19 C.F.R. § 351.222(e) (2010) (Exhibit VN-2).

351.222(e)’s requirement that a revocation request be made during the third or subsent anniversary month of the order.⁵⁹ Indeed, Viet Nam emphasizes in its First Written Submission that USDOC found Vinh Hoan ineligible for revocation because Vinh Hoan filed an untimely request.⁶⁰

51. Changing the revocation claim to challenge the application of a measure not mentioned in the request for consultations, 19 C.F.R. § 351.222(e) (2010), Viet Nam’s request for establishment of a panel expanded the scope of the dispute and breached the DSU Article 4 requirement that consultations on a claim precede panel proceedings on that claim. Indeed, by virtue of this reframing, Viet Nam’s request for establishment of a panel and first written submission changed “the legal basis for the complaint”⁶¹ from that articulated in the request for consultations. DSU Article 4.4 is clear that a request for consultations must include the “identification of the measures at issue and an indication of the legal basis for the complaint.” Viet Nam’s consultations request did not do so with respect to the revocation claim actually advanced before the Panel. That claim accordingly falls outside the Panel’s terms of reference, and the Panel should not consider it.

B. Viet Nam Presents Claims in its First Written Submission that are Not Covered in the Panel Request and Are Thus Outside the Terms of Reference in This Dispute

52. As noted above, Article 6.2 of the DSU requires that a panel request “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.” As the Appellate Body has found,

[T]he requirements in Article 6.2 serve two distinct purposes. First, as a panel’s terms of reference are established by the claims raised in panel requests, the conditions of Article 6.2 serve to define the jurisdiction of a panel. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the due process objective of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response. To ensure that such purposes are fulfilled, a panel must examine the request for the establishment of a panel “to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU”. Such compliance must be “demonstrated on the face” of the panel request, read “as a whole.”⁶²

53. In addition to improperly attempting to expand the scope of this dispute by including new matters in the panel request not set out in its consultation request, Viet Nam has also presented

⁵⁹ Viet Nam first written submission, section VIII.

⁶⁰ Viet Nam first written submission, para. 249.

⁶¹ Dispute Settlement Understanding, Art. 4.4.

⁶² *US – Continued Zeroing (AB)*, para 161 (internal cites omitted).

claims in its first written submission that were not identified in its panel request. Such claims, therefore, are outside the Panel's terms of reference.

54. This section will proceed in two parts. Part 1 will first discuss that the claim regarding a purported unwritten measure that Viet Nam's first written submission calls "differential pricing" was not identified as a measure at issue in Viet Nam's panel request. Next, part 1 will demonstrate that the panel request fails to provide a brief summary of the legal basis of Viet Nam's complaint with respect to "differential pricing" sufficient to present the problem clearly in accordance with Article 6.2 of the DSU. Part 1 will then demonstrate that Viet Nam's as such claims regarding "simple zeroing" and "model zeroing" in its first written submission are outside the Panel's terms of reference because neither "simple zeroing" nor "model zeroing" were identified as measures at issue in the panel request. Part 2 of this section will then explain that two claims that Viet Nam's first written submission may be attempting to advance with respect to revocation would be outside the Panel's terms of reference. In particular, Part 2 will explain that Viet Nam's panel request did not assert a claim that USDOC should have granted revocation proprio motu after the seventh administrative review, and that far from asserting a claim with respect to the application of zeroing in the context of Vinh Hoan's request for revocation, the panel request was clear that the revocation request was rejected because it was untimely.

1. Zeroing

a. An Unwritten "Differential Pricing" Measure was Not Identified as a Measure at Issue in Viet Nam's Panel Request

55. In its first written submission, Viet Nam discusses a purported unwritten measure which Viet Nam calls "differential pricing" as one of the "measures at issue" in this dispute.⁶³ As discussed above, Viet Nam's panel request in no uncertain terms only identified "the original U.S. practice of zeroing" as being "as such, and as applied on a continued an ongoing basis, inconsistent with...the Anti-Dumping Agreement, GATT 1994, and the Marrakesh Agreement".⁶⁴ Nowhere does Viet Nam's panel request identify an unwritten "differential pricing" measure as a measure at issue in this dispute.

56. Viet Nam's panel request contains only the following single reference to "differential pricing":

There are numerous WTO Appellate Body and Panel decisions finding the original U.S. practice of zeroing to be WTO inconsistent and its more recent application of zeroing in the context of targeted dumping and differential pricing to be similarly WTO inconsistent.⁶⁵

This cursory reference to "differential pricing" in the panel request can in no way serve to identify "differential pricing" as a measure subject to a claim of inconsistency in this dispute. The above-quoted sentence is describing certain findings in prior reports, does not identify any

⁶³ Viet Nam first written submission, paras. 95-99.

⁶⁴ Viet Nam Request for the Establishment of a Panel (12 June 2018), p. 3 (Exhibit VN-04).

⁶⁵ Viet Nam Request for the Establishment of a Panel (12 June 2018), p. 4 (Exhibit VN-04).

particular measure; does not state that Viet Nam is bringing a claim with respect to any particular measure; and does not set out the legal basis for any such claim. Viet Nam’s panel request also fails to provide a description of a so-called “differential pricing” measure. Where, as here, a complainant seeks to challenge a purported unwritten measure, the panel request must provide some description of the purported measure at issue. In short, nothing in the above sentence from the panel request serves to notify the United States or third parties that “differential pricing” is a measure at issue in this dispute.

57. The United States would also highlight that Viet Nam’s panel request fails to provide a summary of the legal basis of the complaint – here, differential pricing – as required by Article 6.2 of the DSU. The Appellate Body has stated that the “legal basis of the complaint . . . [is] ‘the specific provision of the covered agreement that contains the obligation alleged to be violated.’”⁶⁶ The identification of the covered agreement provision claimed to have been breached is thus the “minimum prerequisite” for presenting the legal basis of the complaint.⁶⁷

58. Here, Viet Nam’s panel request provides nothing more than a generic reference to “numerous WTO Appellate Body and Panel decisions finding . . . zeroing in the context of . . . differential pricing to be . . . WTO inconsistent.”⁶⁸ Viet Nam’s statement is problematic for two reasons. First, the rights and obligations of WTO Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements. Thus, neither Appellate Body reports nor panel reports themselves can serve as the legal basis of any dispute. Further, Viet Nam’s allegation that differential pricing is “WTO inconsistent” fails to identify the specific covered agreement on which Viet Nam’s claim is based. Viet Nam belatedly identifies Articles 2.4.2 and 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994 as the legal basis of its differential pricing claim in its first written submission.⁶⁹ However, Viet Nam’s failure to identify these provisions of the Anti-Dumping Agreement and the GATT 1994 as the legal basis of its differential pricing claim in its panel request is fatal to the claim.

59. For these reasons, the United States requests the Panel find any claim with respect to a so called “differential pricing” measure to be outside its terms of reference.

b. “Simple Zeroing” and “Model Zeroing” were Not Identified as Being Measures at Issue in Viet Nam’s Panel Request

60. Viet Nam’s first written submission broadly raises the following as such claim: “Viet Nam claims that the United States’ zeroing procedures are inconsistent, as such, with the Anti-Dumping Agreement and the GATT 1994.”⁷⁰ Viet Nam also describes this purported as-such

⁶⁶ *China – HP-SSST (AB)*, para. 5.14; *US – Countervailing and Anti-Dumping Measures (China) (AB)*, para. 4.12; *EC – Selected Customs Matters (AB)*, para. 130.

⁶⁷ *China – HP-SSST (AB)*, para. 5.14; *Korea – Dairy (AB)*, para. 124.

⁶⁸ Viet Nam Request for the Establishment of a Panel (12 June 2018), p.4 (Exhibit VN-04).

⁶⁹ Viet Nam first written submission, para. 98.

⁷⁰ Viet Nam first written submission, para. 44.

claim as applying to "the USDOC's simple zeroing methodology" in periodic reviews.⁷¹ As explained below, the "simple zeroing" as such claim is outside the Panel's terms reference because this purported unwritten measure was not identified in Viet Nam's panel request.

61. As explained above, Viet Nam's panel request improperly attempted to expand the scope of the matters covered in the consultations request by identifying in the panel request "the original U.S. practice of zeroing" as the purported measure at issue. Viet Nam's first written submission further compounds the problem by departing even further from the zeroing measure that was improperly included in its panel request by asserting the existence of a "simple zeroing methodology" – apparently, a separate zeroing methodology entirely, as forming the basis of its as such claim.

62. Again, Viet Nam's panel request describes "the original U.S. practice of zeroing" as follows:

Specifically, in making an **average-to-average comparison** of export price and normal value, the USDOC did not allow the margin above normal value on non-dumped sales to offset the margin of dumping on sales below with margins below normal value.⁷²

Viet Nam further alleged in its panel request that "these calculations and methodologies are applied pursuant, in particular," to section 771(35)(A) of the Act, 19 C.F.R. § 351.408 and 19 C.F.R. §351.414.⁷³

63. Viet Nam's first written submission, however, describes the "simple zeroing" methodology as follows:

In the reviews at issue in this dispute, the USDOC engaged in what is known as simple zeroing. The USDOC first makes a "comparison of the weighted average of the normal **values to the export prices of individual transactions for comparable merchandise.**"* (**W-to-T comparison**). When comparing an individual export transaction with a contemporaneous weighted-average normal value, the amount by which normal value exceeds the export price is the dumping margin for that export transaction.

The comparison may produce a positive dumping margin, a negative dumping margin, or no dumping margin, if normal value and export price are equal. Positive dumping occurs when the normal value exceeds the export price of an individual transaction; negative dumping occurs when the individual export transaction price exceeds normal value. The total dumping amount is expressed as a fraction of the total export price. The USDOC aggregates the intermediate comparison results to determine the numerator; all negative results, where export price is higher than normal value, are zeroed and disregarded. Thus, the USDOC

⁷¹ Viet Nam first written submission, paras. 50-51.

⁷² Viet Nam Request for the Establishment of a Panel (12 June 2018), p. 3 (Exhibit VN-04) (bold added).

⁷³ Viet Nam Request for the Establishment of a Panel (12 June 2018), p. 3 (Exhibit VN-04).

here zeros by individual export transaction. The total amount of dumping reflected in the numerator is inflated by an amount equal to the excluded negative differences. The impact of zeroing is pronounced as each United States transaction is compared to a normal value because each transaction has the potential to create a positive comparison result. For the denominator, the USDOC uses the sales value of all export transactions.⁷⁴

* 19 C.F.R. § 351.414(b)(3).

64. Comparing the zeroing description in the panel request against the description in Viet Nam’s first written submission, the panel request alleges that the zeroing methodology that Viet Nam seeks to challenge applies when “making an average-to-average comparison of export price and normal value” (the so-called “original U.S. practice of zeroing”), but the first written submission identifies “simple zeroing” as applying when making a “weighted average-to-transaction” comparison. Viet Nam’s first written submission therefore identifies a purported zeroing methodology entirely different from the methodology identified in its panel request. Because Viet Nam did not identify the “simple zeroing” methodology as a measure at issue for its at such claim in its panel request, the claim is outside the Panel’s terms of reference. Moreover, as discussed above, neither the methodology described as “the original U.S. practice of zeroing”, nor the methodology described as “simple zeroing” were included in Viet Nam’s consultation request as “as such”.

65. Lastly, to the extent Viet Nam’s first written submission seeks to challenge so-called “model zeroing”⁷⁵ as such, such a measure would also be outside the Panel’s terms of reference because “model zeroing” was not identified as a measure in Viet Nam’s panel request.

66. The United States requests the Panel find “simple zeroing” and “model zeroing” to be outside its terms of reference for the above reasons.

2. Request for Revocation

67. Viet Nam asserts a single, central claim with respect to revocation in its Request for Establishment of a Panel: that USDOC breached Article 11 of the Anti-Dumping Agreement by enforcing its filing deadline requiring filing during the anniversary month of the AD order.⁷⁶ Section VII of Viet Nam’s First Written Submission, however, sets out a confusing argument that could potentially be read to advance additional claims. As this subsection will explain, these additional claims were not raised in the panel request, and they accordingly should not be considered. In the section below on Viet Nam’s request for revocation, the United States will explain why these claims would lack merit even if they had been properly presented in this dispute.

⁷⁴ Viet Nam first written submission, paras. 55-56 (bold added).

⁷⁵ Viet Nam first written submission, paras. 6-7.

⁷⁶ Viet Nam Request for the Establishment of a Panel (12 June 2018), section 2.2 (Exhibit VN-04).

68. Viet Nam may be trying, in Section VII of Viet Nam’s First Written Submission, to assert a claim that the United States breached Article 11 of the Anti-Dumping Agreement by virtue of USDOC not automatically granting revocation with respect to Vinh Hoan following a finding of zero margin with respect to Vinh Hoan in the seventh administrative review – without regard to whether a revocation request had been made, be it in a timely or untimely manner.⁷⁷ Vietnam’s Request for Establishment of a Panel, however, never takes issue with the fact that USDOC did not automatically grant revocation on the basis of the results of the seventh administrative review. Rather, the revocation claim identified by Viet Nam in its Request for Establishment of a Panel focuses entirely on the denial of Viet Nam’s revocation request – a denial based on the untimeliness of that request. Specifically, Viet Nam asserts that:

Based on having received *de minimis* margins in the fifth and sixth administrative reviews, in the seventh review **Vinh Hoan requested a revocation** of the antidumping duties as to Vinh Hoan based on the expectation that after the seventh administrative review it would have demonstrated the absence of continued dumping in three consecutive reviews with *de minimis* margins of dumping. **The US rejected Vinh Hoan’s request based on it being untimely under Department of Commerce regulation 19 CFR 351.222(e) which states that such a request should be made during the anniversary month of the anti-dumping order.** At the time of the anniversary month of the seventh review, the US had not issued even a preliminary determination with respect to the sixth administrative review. The anniversary month for the seventh review was August 2010 while the preliminary determination in the sixth review was not issued until 9 September 2011. The final determination in the seventh review was not made until 330 days after Vinh Hoan made its request for revocation.⁷⁸

In light of the fact that the revocation-related claim actually articulated in Viet Nam’s panel request focuses only on the denial of its request for revocation, and not on the fact that USDOC did not grant revocation *proprio motu* (that is, on USDOC’s own motion, without a request), any claim with respect to the fact that USDOC did not grant revocation *proprio motu* would fall outside the Panel’s terms of reference and should not be considered.

69. It also appears from Viet Nam’s first written submission that Viet Nam may be trying to assert a claim that the United States breached the Anti-Dumping Agreement by failing “to base its Articles 11.1 and 11.2 revocation determination on margins of dumping calculated in a manner consistent with Article 2.”⁷⁹ Any such argument would also fall outside the Panel’s terms of reference.

70. Viet Nam was clear in its Request for Establishment of a Panel that “[t]he US rejected Vinh Hoan’s request [for revocation] based on it being untimely.”⁸⁰ In connection with its

⁷⁷ See Viet Nam first written submission, paras. 236 and 238.

⁷⁸ Viet Nam Request for the Establishment of a Panel (12 June 2018), section 2.2.1 (Exhibit VN-04) (bold added).

⁷⁹ Viet Nam first written submission, para. 238.

⁸⁰ Viet Nam Request for the Establishment of a Panel (12 June 2018), section 2.2.1 (Exhibit VN-04).

challenge to USDOC's denial of the revocation request on the grounds of untimeliness, the first written submission also acknowledges this point.⁸¹ Yet Viet Nam also asserts that "[i]n the absence of the application of zeroing in determining the margins of dumping, Vinh Hoan demonstrated the absence of dumping," and goes on to argue that "[j]ust as it is inconsistent with WTO obligations for an authority to base the results of an Article 11.3 review on margins of dumping determined in a manner inconsistent with the Anti-Dumping Agreement, it must be inconsistent for an authority to base the results of a determination under Article 11.2 on margins of dumping determined in a manner inconsistent with the Anti-Dumping Agreement."⁸²

71. While Viet Nam's panel request does contend, in connection with its arguments about dumping methodology, that zeroing "prevented [Vinh Hoan] from demonstrating the absence of dumping necessary to obtain a revocation of the antidumping duties as to Vinh Hoan," the panel request makes clear that the only Article 11 claims being raised in connection with zeroing methodology concern "sunset reviews only."⁸³ Indeed, the panel request's lengthy list of Anti-Dumping Agreement provisions allegedly breached by application in the underlying investigation here of USDOC's dumping methodology conspicuously omits Article 11.2, mentioning instead Articles 11.1 and 11.3 – the articles that would be at issue in 5-year sunset reviews but not reviews of revocation requests.

72. Viet Nam thus did not raise in the panel request any claim about the application of zeroing to the consideration of the revocation request in this dispute. This is logical, because USDOC did not apply zeroing or any other methodology in rejecting the revocation request; rather, USDOC denied the request because it was untimely. Accordingly, any claim about the application of zeroing in the revocation context here falls outside of the Panel's terms of reference.

C. Conclusion

73. For the reasons set out above, the United States requests that the Panel issue a preliminary ruling finding that the following matters raised by Vietnam are outside the terms of reference in this dispute:

- "The original U.S. practice of zeroing";
- "The more recent application of zeroing in the context of targeted dumping";
- 19 C.F.R. § 351.408
- an unwritten "differential pricing" measure;

⁸¹ Viet Nam first written submission, para. 249 ("[T]he USDOC found that Vinh Hoan was not eligible for revocation of the order for the sole reason that Vinh Hoan's request for revocation was untimely filed.") (underline original).

⁸² Viet Nam first written submission, para. 236 (footnoted omitted).

⁸³ Viet Nam Request for the Establishment of a Panel (12 June 2018), section 2.1.2 (5) (Exhibit VN-04).

- “simple zeroing” and “model zeroing”
- enforcement with respect to Vinh Hoan of USDOC’s requirement, found in 19 C.F.R. § 351.222(e), that requests for revocation be submitted during the anniversary month of the antidumping duty order;
- the fact that USDOC did not grant revocation proprio motu with respect to Vinh Hoan; and
- any claim regarding the application of zeroing in the context of a request for revocation.

VI. VIET NAM’S CLAIMS RELATED TO ZEROING

74. The following discussion of Viet Nam’s zeroing related claims will proceed first with a discussion of Viet Nam’s as such claims related to alleged unwritten measures that Viet Nam calls “simple zeroing” and “differential pricing”, followed by a discussion of Viet Nam’s as applied claims.

75. Based on the presentation of its claim related to “zeroing” in its first written submission, it appears that Viet Nam purports to challenge a so-called “simple zeroing” methodology in periodic reviews as such and as applied in the fifth, sixth, and seventh administrative reviews. As discussed above, this purported measure was not included within the scope of Viet Nam’s consultations request as the measure forming the basis for its as such “zeroing” claim, in contravention of Article 4.4 of the DSU. Further, this purported measure also was not properly identified as the “specific measure at issue” in Viet Nam’s panel request as required by Article 6.2 of the DSU. Accordingly, these matters are outside the Panel’s terms of reference. Nonetheless, given that the Panel has not yet had a chance to make a finding on the U.S. request for a preliminary ruling, the United States preliminarily will address these matters in this first written submission. Viet Nam’s as such claim related to “simple zeroing” would fail on the merits because Viet Nam has not demonstrated there exists a measure of general and prospective application that may be challenged as such as inconsistent with the Anti-Dumping Agreement and the GATT 1994.

76. Viet Nam also appears to challenge the USDOC’s alleged use of “zeroing” through application of what Viet Nam calls “differential pricing”. As with Viet Nam’s “simple zeroing claim”, its claim regarding “differential pricing” mechanism is outside the Panel’s terms of reference because this alleged measure was not identified in the panel request as an as such measure at issue in accordance with Article 6.2 of the DSU. The Panel should reject Viet Nam’s differential pricing claim on this basis alone.

77. The differential pricing claim also fails because Viet Nam has not demonstrated there exists a measure of general and prospective application that may be challenged as such as inconsistent with the Anti-Dumping Agreement or the GATT 1994.

78. Second, turning to Viet Nam’s as applied claims, Viet Nam claims that the application of a “simple zeroing” methodology in the fifth, sixth, and seventh administrative reviews is

inconsistent as applied with Article 9.3 of the Anti-Dumping Agreement and Article VI.2 of the GATT 1994. As we demonstrate below, such claims are without merit because they have no basis in the text of the Anti-Dumping Agreement or GATT 1994.

79. Before turning to the substantive issues, the United States recalls that a panel has the discretion to address only those claims which it deems necessary to resolve a dispute.⁸⁴ Here, with respect to the fifth and seventh administrative reviews, it is uncontested that Vinh Hoan (the only party at issue in the as applied claims) received a zero or de minimis dumping margin even with the use of an alleged “simple zeroing” methodology. Therefore, the Panel need not reach a finding with respect to these claims in order to reach a positive resolution of the dispute because there would be no change to Vinh Hoan’s margin if the Panel were to rule in Viet Nam’s favor.

80. Further, if the Panel agrees with the United States that Viet Nam has failed to establish its prima facie case concerning the revocation of Vinh Hoan from the order in the seventh administrative review, then the United States encourages the Panel to consider whether reaching the merits of Viet Nam’s as applied “zeroing” claims with respect to the sixth administrative review would lead to a positive resolution of this dispute. We direct the Panel’s attention to Viet Nam’s ultimate request (and indeed, ultimate goal in bringing this dispute), which is to ask the Panel to exercise its discretion under Article 19.1 of the DSU to recommend that the United States revoke the order with respect to Vinh Hoan. If the Panel does not side with Viet Nam on the revocation issue, this should effectively bring an end to the dispute.

A. Viet Nam’s Claim that the United States Maintains a Zeroing Measure that may be Challenged As Such Under the Anti-Dumping Agreement and GATT 1994 is Without Merit

1. Viet Nam’s As Such Claims Regarding “Simple Zeroing” are Without Merit.

81. Viet Nam requests the Panel find that the USDOC’s use of a so-called “simple zeroing” methodology in periodic reviews is inconsistent, as such, with the Anti-Dumping Agreement and GATT 1994.⁸⁵ Prior reports have examined several criteria that may be useful in evaluating whether a measure exists that can be challenged as such: whether the rule or norm embodied in that measure is attributable to the responding Member; the precise content of the rule or norm; and whether the rule or norm has general and prospective application.⁸⁶ Further, the United States agrees with the Appellate Body’s observation that “particular rigor is required on the part

⁸⁴ See, e.g., Appellate Body Reports, *EC – Fasteners (China)*, para. 511; *EC – Poultry*, para. 135.

⁸⁵ See, e.g., Viet Nam first written submission, para. 94. To be clear, the United States does not agree with Viet Nam that an unwritten measure existed prior to 2012. But, regardless of that issue, such an unwritten measure most certainly did not exist at the time of panel establishment – 6 years after the cited USDOC notice on changing approaches with respect to the calculation of margins.

⁸⁶ *US – Zeroing (EC) (AB)*, para. 198.

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.”⁸⁷

82. The USDOC does not maintain a rule or norm of general and prospective application which Viet Nam describes as a “simple zeroing” methodology in periodic reviews. To the contrary, and as Viet Nam plainly acknowledges, “the USDOC terminated the practice of simple zeroing with respect to reviews” in 2012.⁸⁸ Viet Nam further acknowledges that the USDOC “declin[ed] to apply zeroing pursuant to the practice announced in its [Final Modification]” in the eighth administrative review of the fish fillets order.⁸⁹ Therefore, this Panel should reach the same conclusion as the panel in *US – Shrimp II (Viet Nam)*, that the United States maintains no statute, regulation, or other measure of general and prospective application that requires the use of a so-called “zeroing” methodology.⁹⁰

83. Notwithstanding its recognition of these facts which are fatal to its as such claim, Viet Nam’s basic argument is that the Appellate Body in *US – Zeroing (Japan)* and other prior Appellate Body and panel reports found a zeroing measure to exist, “as such.”⁹¹ Viet Nam argues that the findings concerning the precise content of the zeroing measure in the Appellate Body and panel reports in prior disputes themselves constitute conclusive evidence as to the precise content of the measure challenged by Viet Nam in this case.⁹² However, as recognized by the panel in *US – Shrimp II* in rejecting virtually this same claim from Viet Nam, it is a well-established principle that “the party who asserts a fact...is responsible for providing proof thereof.”⁹³ Additionally, the Appellate Body has previously observed that “[f]actual findings made in prior disputes do not determine facts in another dispute[,]” and, specifically, “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 in another dispute.”⁹⁴ In sum, as a general matter, a separate panel or Appellate Body’s findings are not evidence but conclusions based on evidence in a separate dispute.⁹⁵

⁸⁷ *US – Zeroing (EC) (AB)*, para. 198 (italics in original).

⁸⁸ Viet Nam first written submission, para. 60 (citing *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8,101 (February 14, 2012) (*Modification to Regulation to End Simple Zeroing*) (Exhibit VN-27)).

⁸⁹ Viet Nam first written submission, para. 60 n.80.

⁹⁰ *US – Shrimp II (Viet Nam) (Panel)*, paras. 7.55-56.

⁹¹ Viet Nam first written submission, paras. 70-73.

⁹² Viet Nam first written submission, para. 72.

⁹³ See *US – Shrimp II (Viet Nam) (Panel)*, para. 7.39 (citing *US – Wool Shirts and Blouses (AB)*, p. 14).

⁹⁴ *US – Continued Zeroing (AB)*, para. 190.

⁹⁵ 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.

84. In light of the above, the Panel should find that Viet Nam has not established its prima facie case that there exists a so-called “simple zeroing” methodology in periodic reviews which constitutes a measure of general and prospective application.

2. Viet Nam’s As Such Claims Regarding “Differential Pricing” are Without Merit

85. To the extent Viet Nam attempts to raise “[t]he USDOC’s use of zeroing through application of its differential pricing mechanism” as part of its as such “zeroing” claim, this claim should similarly be rejected. As set out above, this claim is outside the Panel’s terms of reference. The claim fails because Viet Nam has not presented evidence to establish that there exists an unwritten differential pricing measure that can be challenged as such.

86. Appellate Body wrote as follows in *US – Zeroing (EC)*:

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.** This evidence may include proof of the systematic application of the challenged “rule or norm”. 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. 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.⁹⁶

In *US – Zeroing (Japan)*, the Appellate Body applied the same reasoning, warning that “panels must not ‘make affirmative findings that lack a basis in the evidence contained in the panel record.’”⁹⁷

87. In *US – Zeroing (EC)*, the Appellate Body observed that:

[T]he evidence before the Panel consisted of the USDOC determinations in the “as applied” cases challenged by the European Communities, as well as the standard programs used by the USDOC to calculate margins of dumping. Furthermore, the Panel had before it expert opinions regarding the use and the content of the zeroing methodology. In addition, we note that the Panel had

⁹⁶ *US – Zeroing (EC) (AB)*, paras. 197-198 (bold added, citations omitted).

⁹⁷ *US – Zeroing (Japan) (AB)*, para. 82 (citing *US – Wheat Gluten (AB)*, paras. 160-162).

before it the United States’ recognition that it had been “unable to identify any instance where [the] USDOC had given a credit for non-dumped sales”.⁹⁸

The Appellate Body found that this evidence was, “in the specific circumstances of this case, ... sufficient to identify the precise content of the zeroing methodology; that the zeroing methodology is attributable to the United States, and that it does have general and prospective application.”⁹⁹ The Appellate Body noted that “[t]his evidence consisted of considerably more than a string of cases, or repeat action, based on which the Panel would simply have divined the existence of a measure in the abstract.”¹⁰⁰

88. Instead of putting forth evidence to meet its burden of proof and establish its prima facie case regarding a so-called “differential pricing measure”, Viet Nam chooses instead to rely only on certain findings of the Appellate Body report in *US – Washing Machines (AB)*.¹⁰¹ Strikingly, even while relying on the Appellate Body report in *US – Washing Machines* to support its “differential pricing” as such claim, Viet Nam completely ignores the scope of information presented to the panel on which the panel relied when determining in that case that there existed a zeroing measure that could be challenged as such, which is not present in this dispute.

89. While the United States has serious concerns with certain findings of the panel in *US – Washing Machines*, the United States notes that the panel had different information before it when determining that Korea presented sufficient evidence of the precise content of the differential pricing measure than Viet Nam presents here. The panel observed the following concerning the evidence in panel record:

Concerning the precise content of the [differential pricing mechanism], Korea refers to a number of USDOC memoranda pertaining to particular anti-dumping proceedings. These memoranda contain statements confirming that the USDOC applied the DPM in those proceedings. **They also contain a detailed description of the nature and content of the DPM applied by the USDOC in those proceedings.**¹⁰²

The panel further observed that the description provided in certain USDOC memoranda “clearly identifies three main components of the [differential pricing mechanism]”¹⁰³ In addition, the panel record contained a purported “expert opinion” that claimed to analyze the USDOC’s

⁹⁸ *US – Zeroing (EC) (AB)*, para. 201 (citations omitted).

⁹⁹ *US – Zeroing (EC) (AB)*, para. 204.

¹⁰⁰ *US – Zeroing (EC) (AB)*, para. 204.

¹⁰¹ Viet Nam first written submission, paras. 95-99.

¹⁰² *US – Washing Machines (Panel)*, para. 7.100 (bold added).

¹⁰³ *US – Washing Machines (Panel)*, para. 7.101.

standard computer program.¹⁰⁴ The panel determined based on the entirety of evidence before it that Korea demonstrated the precise content of the differential pricing measure.¹⁰⁵

90. Here, Viet Nam has failed to place evidence in the panel record to establish the precise content of the purported differential pricing measure. While Viet Nam has submitted the USDOC's Final Analysis Memorandum in the Ninth Administrative Review¹⁰⁶ and the USDOC's Preliminary Analysis Memorandum in the Fourteenth Administrative Review,¹⁰⁷ neither of these memoranda evidence the precise content of the so-called "differential pricing" measure. Notably, the memoranda do not provide a *detailed description* of the nature and content of what Viet Nam labels a differential pricing mechanism.¹⁰⁸ Again, Viet Nam solely relies on the Appellate Body decision in *US – Washing Machines*. As noted above, reliance on prior panel or Appellate Body findings are not evidence but conclusions based on evidence in a separate dispute.

91. Viet Nam also points to no evidence of its own that would establish the existence of a purported differential pricing measure of general or prospective application. Instead, Viet Nam asserts “**as evident** in later reviews of the Fish Fillets order, the USDOC continues to use zeroing through application of its differential pricing mechanism[.]”¹⁰⁹ and that “the USDOC continues to apply the differential pricing mechanism in investigations and reviews, including reviews that continue to take place under the *Fish Fillets* order.”¹¹⁰ Yet within the contours of this argument, Viet Nam fails to direct the Panel to examples that would demonstrate the continued application of differential pricing by the USDOC.

92. Viet Nam's reference to the USDOC's Final Analysis Memorandum for the Ninth Administrative review and the USDOC's Preliminary Analysis Memorandum for the Fourteenth Administrative Review in other parts of its first written submission, namely in footnotes and other perfunctory references, do not suffice to meet Viet Nam's burden of establishing the supposed existence of an unwritten measure.¹¹¹ Viet Nam's haphazard references to two administrative reviews necessarily falls short of demonstrating the existence of "differential pricing" as a measure of general and prospective application. Viet Nam's references in its first written submission to a single USDOC final analysis memorandum and a single preliminary analysis memorandum can only demonstrate, at best, that the USDOC used a so-called differential pricing approach on two occasions in proceedings arising under the Fish Fillets order.

93. In sum, Viet Nam presents little more than a “string of cases, or repeat action” in support of its claim that an unwritten measure exists that can be challenged “as such.” Viet Nam argues,

¹⁰⁴ *US – Washing Machines (Panel)*, paras. 7.104 – 7.105.

¹⁰⁵ *See US – Washing Machines (Panel)*, para. 7.107.

¹⁰⁶ USDOC's Final Analysis Memorandum for Ninth AR (28 March 2014) (Exhibit VN-16-2).

¹⁰⁷ USDOC's Preliminary Analysis Memorandum for the Fourteenth AR (4 September 2018) (Exhibit VN-16-3).

¹⁰⁸ *See US – Washing Machines (Panel)*, paras. 7.100 – 7.102.

¹⁰⁹ Viet Nam first written submission, para. 95 (bold added).

¹¹⁰ Viet Nam first written submission, para. 99.

¹¹¹ *See, e.g.,* Viet Nam first written submission, para. 60 (fn. 81).

contrary to the admonition expressed by the Appellate Body, simply to divine the existence of a measure in the abstract on the basis of such a few instances. This argument is unpersuasive, and is insufficient for Viet Nam to meet its burden of establishing the existence of a specific, well defined “differential pricing” measure of general and prospective application.

94. Given that Viet Nam has not defined the unwritten “differential pricing” measure that it seeks to challenge, the United States is not in a position to provide a detailed legal response. Moreover, Viet Nam’s submission does not come close to meeting the burden of evidence or argument necessary to make a *prima facie* case that the United States has breached the AD Agreement with regard to this matter. Rather, Viet Nam covers this complex set of issues in just a few paragraphs, relying entirely on the Appellate Body report in *US – Washing Machines*. Citing a prior report does not suffice to meet Viet Nam’s factual burden, or burden of argument. As discussed in the standard of review section above, a panel is tasked with making an objective assessment based on the evidence and arguments in the proceeding, and may not – as Viet Nam suggests -- simply adopt the findings in prior reports. Although Viet Nam’s absence of evidence or arguments does not provide the United States with a set of factual and legal arguments that might warrant rebuttal, the United States is providing in an Annex to this submission a detailed rebuttal of arguments made by another Member in challenging a specific measure that employed a differential pricing approach. In particular, the Annex to this submission contains relevant excerpts of the U.S. response to arguments advanced by Canada in *United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada* (DS534). To the extent that Viet Nam’s submission contains any concrete arguments with respect to an undefined “differential pricing” measure, those arguments are fully rebutted in the Annex to this submission.

B. Viet Nam’s Claim that the Application of the Zeroing Methodology in the Fifth, Sixth, and Seventh Administrative Reviews is As Applied Inconsistent with the Anti-Dumping Agreement is Incorrect

1. There is No General Obligation to Provide Offsets Outside of the Limited Context of Using Average-to-Average Comparisons in the Investigation

95. Viet Nam contends that the USDOC’s use of “simple” zeroing in the fifth, sixth, and seventh administrative reviews to calculate the dumping margins applied to Vinh Hoan was inconsistent with the WTO Agreements.¹¹² As demonstrated below, the text and context of the relevant provisions of the Anti-Dumping Agreement, as properly interpreted in accordance with customary rules of interpretation of public international law, support the interpretation of the United States that the concepts of dumping and margins of dumping have meaning in relation to individual transactions and, therefore, there is no obligation to aggregate multiple comparison results in assessment proceedings to arrive at an aggregated margin of dumping for the product as a whole. As demonstrated below, the text and context of the relevant provisions of the Anti-Dumping Agreement, as properly interpreted in accordance with customary rules of interpretation of public international law, support the interpretation of the United States that the concepts of dumping and margins of dumping have meaning in relation to individual transactions

¹¹² Viet Nam first written submission, paras. 74-101.

and, therefore, there is no obligation to aggregate multiple comparison results in assessment proceedings to arrive at an aggregated margin of dumping for the product as a whole.

96. Contrary to Viet Nam's claims,¹¹³ a prohibition on "zeroing" – understood as calculating a margin of dumping by offsetting the amount by which normal value exceeds export price on sales by the amount by which export price exceeds normal value on other sales – has no basis in the text of the Anti-Dumping Agreement, properly and objectively interpreted using the customary rules of interpretation of public international law and the standard of review found in Article 17.6(ii) of the Anti-Dumping Agreement. Moreover, such prohibitions were rejected by the Uruguay Round negotiators, and the subsequent practice of Members administering antidumping regimes confirmed that Members viewed the covered agreements as containing no requirement for granting offsets in the calculation of dumping margins.¹¹⁴ For these reasons, among others, a number of dispute settlement panels have confirmed that the Anti-Dumping Agreement did not require Members to grant offsets in calculating margins.¹¹⁵ As Viet Nam points out, however, the Appellate Body found otherwise.

97. Thus, in making an objective assessment of the matter before it in this dispute, the Panel should give particular consideration to the standard of review for matters arising under the Anti-Dumping Agreement – that a Member's measure may not be found inconsistent with the obligations set forth in the Anti-Dumping Agreement if the measure is based on a permissible interpretation of the Anti-Dumping Agreement. In this regard, it is instructive that prior panels – each operating under the same DSU obligation to make an objective assessment, examining the same Anti-Dumping Agreement, applying the same customary rules of interpretation of public international law and standard of review found in Article 17.6(ii) of the Anti-Dumping Agreement – have found that a general prohibition against zeroing has no basis in the text of the Anti-Dumping Agreement. The analysis offered by numerous prior panels is persuasive and correct. For the reasons set forth below, the Panel should reach the same conclusion in the present dispute. The Panel, like prior panels, should find that, at a minimum, it is permissible to interpret the Anti-Dumping Agreement as not prohibiting zeroing in assessment proceedings. Accordingly, there exists in the text of covered agreements, properly interpreted, no obligation to grant offsets to reduce the amount of dumping duties levied on dumped entries to account for the extent to which non-dumped entries are priced above normal value. The calculation of antidumping duties in the assessment proceedings in question rests on a permissible interpretation of the Anti-Dumping Agreement and is, therefore, WTO consistent.

¹¹³ See Viet Nam first written submission, paras. 74-100.

¹¹⁴ In 1995, the EU had the largest number of initiations of antidumping investigations (33), followed by Argentina (27), South Africa (16), and the United States (14). See Statistics on Antidumping: Anti-dumping initiations: by reporting Member, available at http://www.wto.org/english/tratop_e/adp_e/ad_init_rep_member_e.pdf. These Members, who were the largest users of dumping remedies at the time, denied offsets for non-dumped transactions in various antidumping duty investigations following the Uruguay Round agreements. See, e.g., *US – Softwood Lumber Dumping (AB)*, paras. 86-103; *EC – Bed Linen (AB)*, para. 86(1); *Argentina – Poultry (Panel)*, paras. 7.76-7.78.

¹¹⁵ See, e.g., *US – Stainless Steel (Mexico) (Panel)*, para. 7.119.

a. Article 2.4.2 of the Anti-Dumping Agreement Does Not Impose a General Obligation to Provide Offsets

98. The Anti-Dumping Agreement does not include any general obligation to consider transactions for which the export price exceeds normal value as an offset to the amount of dumping found in other transactions at less than normal value. The exclusive textual basis for an obligation to account for such non-dumping in calculating margins of dumping is found in Article 2.4.2 of the Anti-Dumping Agreement that “the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a **weighted average normal value with a weighted average of prices of all comparable export transactions**”¹¹⁶ This particular text of Article 2.4.2 does not impose any obligations outside the limited context of determining whether dumping exists in the investigation when using the average-to-average comparison methodology.¹¹⁷ There is no textual basis for the additional obligations that Viet Nam would have this Panel impose.

99. An appropriate starting point for discussing prior findings on a supposed obligation to provide offsets is *US – Softwood Lumber V (AB)*. In that report, the Appellate Body specifically recognized that the issue before it was whether zeroing was prohibited under the average-to-average comparison methodology found in Article 2.4.2 of the Anti-Dumping Agreement.¹¹⁸ Thus, the Appellate Body there found only that “zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology.”¹¹⁹ The Appellate Body reached this conclusion by interpreting the terms “margins of dumping” and “all comparable export transactions” as they are used in Article 2.4.2 in an “integrated manner.”¹²⁰ In other words, the term weighted average of “all comparable export transactions” was integral to the interpretation that the multiple comparisons of weighted average normal value and weighted average export price for averaging groups did not satisfy the requirement of Article 2.4.2 unless the results of all such comparisons were aggregated. The obligation to provide offsets, therefore, was tied to the text of the provision addressing the use of the average-to-average comparison methodology in an investigation. It did not arise out of any independent obligation to provide offsets.

100. Viet Nam’s argument that there is a general prohibition of zeroing or one specifically applicable to the more particular context of assessment proceedings, cannot be reconciled with the interpretation in *US – Softwood Lumber V (AB)*, wherein the phrase “all comparable export transactions” in Article 2.4.2 was interpreted to mean that zeroing was prohibited in the context of average-to-average comparisons in investigations. If there were a general prohibition of zeroing that applies in all proceedings and under all comparison methodologies, the Appellate Body’s interpretation of the phrase “all comparable export transactions” to require offsets in

¹¹⁶ See *US – Softwood Lumber V (AB)*, paras. 82, 86, and 98 (bold added).

¹¹⁷ *US – Zeroing (Japan) (Panel)*, para. 7.213; *US – Zeroing (EC) (Panel)*, para. 7.197; *US – Softwood Lumber V (Article 21.5 – Canada) (Panel)*, paras. 5.65-5.66 and 5.77.

¹¹⁸ *US – Softwood Lumber V (AB)*, paras. 104, 105, and 108.

¹¹⁹ *US – Softwood Lumber V (AB)*, para. 108.

¹²⁰ *US – Softwood Lumber V (AB)*, paras. 86 - 103.

average-to-average comparisons in investigations would be redundant of that general prohibition. Indeed, the Appellate Body has recognized the need to avoid interpreting the agreement to contain such a redundancy.¹²¹

101. Moreover, subsequent to *US – Softwood Lumber V (AB)*, several panels examined whether the obligation not to use “zeroing” when making average-to-average comparisons in an investigation extended beyond that defined context. Consistent with their obligation to make an objective assessment of the matter, these panels determined that the customary rules of interpretation of public international law do not support a reading of the Anti-Dumping Agreement that expands the zeroing prohibition beyond average-to-average comparisons in an investigation.¹²²

102. Nonetheless, in subsequent reports, the Appellate Body abandoned the textual basis of Article 2.4.2 it relied on in *US – Softwood Lumber V (AB)* applied in other contexts. To recall, in *US – Softwood Lumber V (AB)*, the Appellate Body had found that in aggregating the results of the model-specific comparisons, “all” comparable export transactions must be accounted for. Thus, the Appellate Body interpreted that phrase as necessarily referring to all transactions across all models of the product under investigation, *i.e.*, the product “as a whole.” In short, the textual reference to “all comparable export transactions” in Article 2.4.2 of the Anti-Dumping Agreement was the basis for the conclusion that “product” must mean “product as a whole” and that the results of all individual averaging *group comparisons* must be aggregated to determine the exporter’s margin of dumping in an investigation. The Appellate Body subsequently relied on this “product as a whole” concept, even though the AD Agreement contains no such term. Further, the Appellate Body relied on this supposed concept in a manner detached from its underlying textual basis, and found without any discernable legal reasoning, that multiple transaction-specific comparisons of export price and normal value are not margins of dumping. In particular, the Appellate Body found, without a textual basis, that these are mere “intermediate comparison results” that require aggregation to become margins of dumping.¹²³ In *US – Zeroing (Japan) (AB)*, the Appellate Body reinterpreted “all comparable export transactions” to relate solely to all transactions within a model, and not across models of the product under investigation.¹²⁴ In doing so, the Appellate Body abandoned the only textual basis for its reasoning in *US – Softwood Lumber V (AB)* that in aggregating the *results* of the model-specific comparisons in investigations, “all comparable export transactions” must be accounted for across the models.

¹²¹ See *US – Zeroing (EC) (AB)*, paras. 126, 127; *US – Softwood Lumber V (Article 21.5 - Canada) (AB)*, paras. 89, 114; *US – Zeroing (Japan) (AB)*, paras. 121-122, 151.

¹²² *US – Zeroing (Japan) (Panel)*, para. 7.213; *US – Zeroing (EC) (Panel)*, para. 7.197; and *US – Softwood Lumber V (Article 21.5 - Canada) (Panel)*, para. 5.65; *US – Stainless Steel (Mexico) (Panel)*, paras. 7.61, 7.149.

¹²³ *US – Zeroing (EC) (AB)*, paras. 126, 127; *US – Softwood Lumber V (Article 21.5 - Canada) (AB)*, paras. 89, 114; *US – Zeroing (Japan) (AB)*, paras. 121, 122, 151.

¹²⁴ *US – Zeroing (Japan) (AB)*, para. 124 (“[T]he phrase ‘all comparable export transactions’ requires that each group include only transactions that are comparable and that no export transaction may be left out when determining margins of dumping under [the average-to-average comparison] methodology.”)

103. This finding was incorrect. There is no basis in the Anti-Dumping Agreement for finding a general obligation to consider transactions for which the export price exceeds normal value as an offset to the amount of dumping found in relation to other transactions at less than normal value. As noted, the exclusive textual basis for an obligation to account for such non-dumping in calculating margins of dumping appears in connection with the obligation found in Article 2.4.2 that “the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a **weighted average normal value with a weighted average of prices of all comparable export transactions**”¹²⁵

104. In sum, for the reasons set out above, Viet Nam’s argument, which seeks to extend an obligation to provide offsets beyond the specific context of investigations, finds no support in the text of the Anti-Dumping Agreement and must be rejected.

b. Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 Do Not Require the Provision of Offsets in Assessment Proceedings

105. Ultimately, the zeroing-related argument in this dispute is about the definitions of “dumping” and “margin of dumping” and whether dumping and margins of dumping are concepts that may have meaning in relation to individual transactions, or if they necessarily must refer only to an aggregation of transactions. Viet Nam’s position is that the only permissible interpretation of Article 2.1 of the Anti-Dumping Agreement and Article VI of GATT 1994 precludes any possibility that “dumping” or “margins of dumping” may exist at a level of individual transactions. But this position is not supportable based on the text of the WTO Agreement. And if these terms, as used in Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994, may apply to the difference between export price and normal value for *individual transactions*, as the United States will demonstrate, the U.S. assessment of antidumping duties in administrative reviews does not exceed the margin of dumping.

106. In the Anti-Dumping Agreement, the word “margin” is modified by the word “dumping,” giving it a special meaning. Paragraph 2 of Article VI of the GATT 1994 provides that “[f]or the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.” When read with the provisions of paragraph 1, the “margin of dumping” is the price difference when a product has been “introduced into the commerce of an importing country at less than its normal value,” *i.e.*, the price difference when the product has been dumped.

107. The provisions of the Anti-Dumping Agreement must be read in conjunction with Article VI of the GATT 1994.¹²⁶ While the Anti-Dumping Agreement does not provide a definition of

¹²⁵ See *US – Softwood Lumber V (AB)*, paras. 82, 86, and 98 (bold added).

¹²⁶ This interpretative principle has been underscored by the Appellate Body. In *Argentina – Footwear*, the Appellate Body stated that:

The GATT 1994 and the *Agreement on Safeguards* are both Multilateral Agreements on Trade in Goods contained in Annex 1A of the *WTO Agreement*, and, as such, are both “integral parts” of the same treaty, the *WTO Agreement*, that are “binding on all Members”. Therefore, the provisions of Article XIX of the GATT 1994 and the provisions of the *Agreement on Safeguards*

“margin of dumping,” it does define “dumping” in a manner consistent with the definition of “margin of dumping” provided in Article VI of the GATT 1994. Article 2.1 of the Anti-Dumping Agreement provides:

For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at **less than** its normal value, if the export price of the product exported from one country to another is **less than** the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.¹²⁷

108. The product is always “introduced into the commerce of another country” through individual transactions, and thus “dumping”, as defined in Article 2.1 of the Anti-Dumping Agreement, is transaction-specific. The express terms of the GATT 1994 provide that the *margin of dumping* is the amount by which normal value “exceeds” export price, or alternatively the amount by which export price “falls short” of normal value. Consequently, there is no textual support in Article VI of the GATT 1994 or the Anti-Dumping Agreement for the concept of “product as a whole” and “negative dumping.”¹²⁸

i. The Concepts of “Dumping” and “Margin of Dumping” and the Term “Product” In Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 May Refer to Individual Transactions

109. As an initial matter, Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 are definitional provisions that, “read in isolation, do not impose independent obligations.”¹²⁹ Nevertheless, these definitions are important to the interpretation of other provisions of the Anti-Dumping Agreement at issue in this dispute, which use these terms. In particular, Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 do not define “dumping” and “margins of dumping” so as to require that export transactions be examined at an aggregate level. The definition of “dumping” in these provisions references “a product . . . introduced into the commerce of another country at less than its normal value.” This definition describes the real-world commercial conduct by which a product is imported into a country, i.e., transaction by transaction.¹³⁰ Thus, dumping is defined as occurring in the course of a commercial transaction in which the product, which is the object of the transaction, is

are all provisions of one treaty, the *WTO Agreement*. . . . [A] treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.

Argentina – Footwear (AB), para. 81 (internal citations omitted). This basic principle applies equally to Article VI of the GATT 1994 and the Anti-Dumping Agreement. The official title of the Anti-Dumping Agreement is “Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.” As an agreement whose object is to implement Article VI of the GATT 1994, the Anti-Dumping Agreement is, by its very title, anchored in Article VI of the GATT 1994.

¹²⁷ Bold added.

¹²⁸ Viet Nam first written submission, para. 86-87.

¹²⁹ *US – Zeroing (Japan) (AB)*, para. 140.

¹³⁰ See *US – Zeroing (EC) (Panel)*, para. 7.285 (additional observations of one panel member).

“introduced into the commerce” of the importing country at an export price that is “less than normal value.”

110. In addition, the term “less than normal value” is defined as when the “price of the product exported . . . is less than the comparable price”¹³¹ Again, this definition describes the real-world commercial conduct of pricing such that one price is less than another price. The ordinary meaning of “price” as used in the definition of dumping is the “payment in purchase of something.”¹³² This definition “can easily be applied to individual transactions and does not require an examination of export transactions at an aggregate level.”¹³³

111. In other words, dumping – as defined under these provisions – may occur in a single transaction. There is nothing in the GATT 1994 or the Anti-Dumping Agreement that suggests that dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price. Indeed, it is the foreign producer or exporter that benefits from the sales it makes at prices that are above normal value, and this does not undo the injury suffered by the domestic industry injured from other sales made at dumped prices.

ii. The Term “Product” in Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 Does Not Refer Exclusively to “Product as a Whole”

112. Viet Nam’s argument that dumping can only be found to exist for the product as a whole¹³⁴ is contrary to the ordinary meaning of the text of the relevant provisions of the Anti-Dumping Agreement and the GATT 1994. Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 do not define the terms “dumping” and “margin of dumping” such that export transactions must necessarily be examined at an aggregate level.

113. Viet Nam’s claims in this dispute depend on interpreting these provisions as requiring that the terms “margins of dumping” and “dumping” relate solely, and exclusively, to the “product as a whole.” However, the term “product as a whole” does not appear in the text of the Anti-Dumping Agreement. Viet Nam’s interpretation denies that the ordinary meaning of the word “product” or “products” used in Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 admits of a meaning that is transaction-specific. As the panel in *US – Zeroing (Japan)* explained, “[T]here is nothing inherent in the word ‘product[]’ (as used in Article VI:1 of the GATT 1994 and Article 2.1 of Anti-Dumping Agreement) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis”¹³⁵

¹³¹ GATT 1994, Art. VI:1; Anti-Dumping Agreement, Art. 2.1.

¹³² *New Shorter Oxford English Dictionary*, Volume 2, p. 2349, meaning 1b (Exhibit USA-07).

¹³³ *US – Zeroing (Japan) (Panel)*, para. 7.106.

¹³⁴ Viet Nam first written submission, paras. 86-87.

¹³⁵ *US – Zeroing (Japan) (Panel)*, para. 7.105 (quoting *US – Softwood Lumber V (Article 21.5 – Canada) (Panel)*, n. 32); see also *US – Stainless Steel (Mexico) (Panel)*, para. 7.119; see also *US – Continued Zeroing (Panel)*, paras.

114. Examination of the term “product” as used throughout the Anti-Dumping Agreement and the GATT 1994 demonstrates that the term “product” in these provisions does not exclusively refer to “product as a whole.” Instead, “product” can have either a collective meaning or an individual meaning. For example, Article VII:3 of the GATT 1994 – which refers to “[t]he value for customs purposes of any imported product” – plainly uses the term “product” in the individual sense of the object of a particular transaction (*i.e.*, a sale involving a quantity of specific merchandise that matches the criteria for the “product” at a particular price). Therefore, it cannot be presumed that the same term - “product” - has such an exclusive meaning when used in Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

115. As the panel in *US – Softwood Lumber V (Article 21.5)* explained, “an analysis of the use of the words product and products throughout the *GATT 1994*, indicates that there is no basis to equate product with ‘product as a whole’. . . . Thus, for example, when Article VII:3 of the GATT refers to ‘the value for customs purposes of any imported product’, this can only be interpreted to refer to the value of a product in a particular import transaction.”¹³⁶ The panel detailed numerous additional instances where the term “product,” as used in the Anti-Dumping Agreement and the GATT 1994, do not support a meaning that is solely, and exclusively, synonymous with “product as a whole”:

To extend the Appellate Body’s reference to the concept of “product as a whole” in the sense that Canada proposes to the T-T methodology would entail accepting that it applies throughout Article VI of *GATT 1994*, and the *Anti-Dumping Agreement*, wherever the term “product” or “products” appears. A review of the use of these terms does not support the proposition that “product” must always mean the entire universe of exported product subject to an anti-dumping investigation. For instance, Article VI:2 states that a contracting party “may levy on any dumped product” an anti-dumping duty. Article VI:3 provides that “no countervailing duty shall be levied on any product”. Article VI:6(a) provides that no contracting party shall levy any anti-dumping or countervailing duty on the importation of any product...”. Similarly, Article VI:6(b) provides that a contracting party may be authorized “to levy an anti-dumping or countervailing duty on the importation of any product”. Taken together, these provisions suggest that “to levy a duty on a product” has the same meaning as “to levy a duty on the importation of that product”. Canada’s position, if applied to these provisions, would mean that the phrase “importation of a product” cannot refer to a single import transaction. In many places where the words product and products are used in Article VI of the GATT 1994, an interpretation of these words as necessarily referring to the entire universe of investigated export transactions is not compelling.¹³⁷

116. In sum, the terms “product” and “products” cannot be interpreted in such an exclusive manner so as to deprive them of one of their ordinary meanings, namely, the “product” or

7.163-7.169 (substantively agreeing with the prior panels, but erroneously rejecting otherwise permissible interpretation solely on the basis of a conflicting interpretation developed in certain Appellate Body reports).

¹³⁶ *US – Softwood Lumber V (Article 21.5 – Canada) (Panel)*, n. 36; *see also ibid.*, para. 5.23.

¹³⁷ *US – Softwood Lumber V (Article 21.5 – Canada) (Panel)*, para. 5.23 (footnotes omitted).

“products” that are the subject of individual transactions. Therefore, the words “product” and “products” as they appear in Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 cannot be understood to provide a textual basis for an interpretation that requires margins of dumping established in relation to the “product” to be established on an aggregate basis for the “product as a whole.” Accordingly, Viet Nam’s argument that the mere use of the term “product” in Article 6.10 of the Anti-Dumping Agreement and in Article VI:2 of the GATT 1994 means that “dumping” and “margin of dumping” cannot exist at the level of individual transactions¹³⁸ is erroneous.¹³⁹

117. Likewise, examination of the term “margins of dumping” itself provides no support for Viet Nam’s interpretation of the term as solely, and exclusively, relating to the “product as a whole.”¹⁴⁰ In examining the text of Article VI:2 of the GATT 1994, the panel in *US – Softwood Lumber V (Article 21.5)* observed:

Article VI:2 of the GATT 1994 provides that, for the purposes of Article VI, “the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1” of Article VI. Paragraph 1 of Article VI defines dumping as a practice “by which products of one country are introduced into the commerce of another country at less than the normal value of the products” (emphasis supplied). . . . Article VI:1 provides that “a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product in the exporting country” (emphasis supplied). In other words, there is dumping when the export “price” is less than the normal value. Given this definition of dumping, and the express linkage between this definition and the phrase “price difference”, it would be permissible for a Member to interpret the “price difference” referred to in Article VI:2 as the amount by which the export price is less than normal value, and to refer to that “price difference” as the “margin of dumping”.¹⁴¹

118. Therefore, the panel in *US – Softwood Lumber V (Article 21.5)* saw “no reason why a Member may not . . . establish the ‘margin of dumping’ on the basis of the total amount by which transaction-specific export prices are less than the transaction-specific normal values.”¹⁴² Although the panel was examining margins of dumping in the context of the transaction-to-transaction comparison method in investigations under Article 2.4.2 of the Anti-Dumping Agreement, its reasoning is equally applicable to margins of dumping established on a

¹³⁸ Viet Nam first written submission, paras. 74-81.

¹³⁹ See also *US – Zeroing (EC) (Panel)*, paras. 7.201-7.206 (finding that Article 9.2 of the Anti-Dumping Agreement supports the view that in the context of assessment proceedings, such as administrative reviews, it is permissible to interpret dumping in relation to individual transactions).

¹⁴⁰ Viet Nam first written submission, paras. 74-81.

¹⁴¹ *US – Softwood Lumber V (Article 21.5 – Canada) (Panel)*, para. 5.27 (footnote omitted).

¹⁴² *US – Softwood Lumber V (Article 21.5 – Canada) (Panel)*, para. 5.28 (underline in original).

transaction-specific basis in an assessment proceeding. In fact, Viet Nam acknowledges the so-called “intermediate comparisons” (*i.e.*, comparisons of the export price of an individual transaction with the weighted-average normal value) “**produce both positive and negative dumping margins . . .**”¹⁴³

2. Viet Nam Has Not Demonstrated Any Inconsistency with Article 9.3 of the Anti-Dumping Agreement nor Article VI:2 of the GATT 1994

119. According to Viet Nam, the USDOC’s “use of zeroing in reviews violates Article VI:2 of GATT 1994 and Article 9.3 of the Anti-Dumping Agreement.”¹⁴⁴ Viet Nam has not demonstrated any inconsistency with these provisions.

a. The United States Acted Consistently with Article 9.3 of the Anti-Dumping Agreement

120. Article 9.3 states that the “amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.” Viet Nam’s argument with respect to assessment proceedings under Article 9.3 of the Anti-Dumping Agreement is that the amount of the antidumping duty has exceeded the margin of dumping established under Article 2 of the Anti-Dumping Agreement.¹⁴⁵ This argument depends entirely on a conclusion that the United States’ interpretation of the definitional provisions, such as Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994, is not permissible,¹⁴⁶ and that Viet Nam’s preferred interpretation of the “margin of dumping,” which precludes any possibility of transaction-specific margins of dumping, is the only permissible interpretation of this term as used in Article 9.3 of the Anti-Dumping Agreement. Viet Nam’s proposed interpretation, however, is unsupportable: the terms upon which Viet Nam’s interpretation rests are conspicuously absent from the text of these provisions. Moreover, Viet Nam’s interpretation is not mandated by the definition of dumping contained in Article 2.1 of the Anti-Dumping Agreement, as described in detailed below.

121. The text and context of Article 9.3 of the Anti-Dumping Agreement also indicate that Viet Nam’s interpretation of the obligation set forth in Article 9.3 is erroneous. Article 9 of the Anti-Dumping Agreement relates, as its title indicates, to the imposition and collection of antidumping duties. In particular, Article 9.3 states that the “amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.” The understanding of the term “margin of dumping” as relating to individual transactions is particularly appropriate in the context of antidumping duty assessment, where duties are assessed on individual entries

¹⁴³ Viet Nam first written submission, para. 87 (bold added).

¹⁴⁴ Viet Nam first written submission, para. 87.

¹⁴⁵ See Viet Nam first written submission, paras. 82-94.

¹⁴⁶ As noted above, the Appellate Body has explained that Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of GATT 1994 are merely definitional provisions and on their own “do not impose independent obligations.” *US – Zeroing (Japan) (AB)*, para. 140. Accordingly, to the extent Viet Nam is claiming that the challenged measures are inconsistent with “obligations” found in Article 2.1 or Article VI:1, Viet Nam has failed to establish the existence of any obligations pursuant to those definitional provisions and, therefore, Viet Nam’s claims should be rejected.

resulting from individual transactions. Therefore, the obligation set forth in Article 9.3 – to assess no more in antidumping duties than the margin of dumping – is similarly applicable at the level of individual transactions.

122. Several panels that have examined this issue have agreed with this interpretation. As the panel in *US – Zeroing (EC)* correctly concluded, there is “no textual support in Article 9.3 for the view that the Anti-Dumping Agreement requires an exporter-oriented assessment of antidumping duties, whereby, if an average normal value is calculated for a particular review period, the amount of anti-dumping duty payable on a particular transaction is determined by whether the overall average of the export prices of all sales made by an exporter during that period is below the average normal value.”¹⁴⁷ This does not constitute a denial that dumping is exporter-specific; for the reasons already stated, transaction-specific margins of dumping are exporter-specific. Rather, the panel recognized that averaging of export prices was not required to calculate a margin of dumping under Article 9.3. Accordingly, the panel found no basis in Article 9.3 for mandating aggregation of transaction-specific dumping margins in a manner that replicates an overall comparison of export prices on average with the average normal value. The panel in *US – Zeroing (Japan)* similarly rejected the conclusion that the “margin of dumping under Article 9.3 must be determined on the basis of an aggregate examination of export prices during a review period in which export prices above the normal value carry the same weight as export prices below the normal value”¹⁴⁸

123. In *US – Zeroing (Japan)*, the panel found that “there are important considerations specific to Article 9 of the Anti-Dumping Agreement that lend further support to the view that it is permissible . . . to interpret Article VI of the GATT 1994 and relevant provisions of the Anti-Dumping Agreement to mean that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing.”¹⁴⁹ In particular, the panel explained that such a requirement is inconsistent with the importer-and import-specific obligation to pay an antidumping duty:

In the context of Article 9.3, a margin of dumping is calculated for the purpose of determining the *final liability for payment of anti-dumping duties* under Article 9.3.1 or for the purpose of determining *the amount of anti-dumping duty* that must be *refunded* under Article 9.3.2. An anti-dumping duty is paid by an importer in respect of a particular import of the product on which an anti-dumping duty has been imposed. An importer does not incur liability for payment of an anti-dumping duty in respect of the totality of sales of a product made by an exporter to the country in question but only in respect of sales made by that exporter to that

¹⁴⁷ *US – Zeroing (EC) (Panel)*, para. 7.204 (“In our view, if the drafters of the Anti-Dumping Agreement had wanted to impose a uniform requirement to adopt an exporter oriented-method of duty assessment, which would have entailed a significant change to the practice and legislation of some participants in the negotiations, they might have been expected to have indicated this more clearly.”).

¹⁴⁸ *US – Zeroing (Japan) (Panel)*, para. 7.199. The panel in *US – Zeroing (EC)* expressed essentially the same view. *US – Zeroing (EC) (Panel)*, paras. 7.204-7.207 and 7.220-7.223.

¹⁴⁹ *US – Zeroing (Japan) (Panel)*, para. 7.196.

particular importer. Thus, the obligation to pay an anti-dumping duty is incurred on an *importer*-and *import*-specific basis.

Since the calculation of a margin of dumping in the context of Article 9.3 is part of a process of assessing the amount of duty that must be paid or that must be refunded, this importer- and import-specific character of the payment of anti-dumping duties must be taken into account in interpreting the meaning of “margin of dumping.”¹⁵⁰

Similarly, the panel in *US – Zeroing (EC)* explained:

In our view, the fact that in an assessment proceeding in Article 9.3 the margin of dumping must be related to the liability incurred in respect of particular import transactions is an important element that distinguishes Article 9.3 proceedings from investigations within the meaning of Article 5. . . . [I]n an Article 9.3 context the extent of dumping found with respect to a particular exporter must be translated into an amount of liability for payment of anti-dumping duties by importers in respect of specific import transactions.¹⁵¹

124. Accordingly, contrary to Viet Nam’s contentions, the interpretation that permits the existence of transaction-specific margins of dumping is supported by Article 9.3 of the Anti-Dumping Agreement.

125. In *US – Stainless Steel (Mexico)*, the panel also properly took into account the transaction-specific character of Article 9.3 assessment proceedings:

We note that the obligation to pay anti-dumping duties is not incurred on the basis of a comparison of an exporter’s total sales, but on the basis of an individual sale between the exporter and its importer. It is therefore a transaction-specific liability. This importer-specific or transaction-specific character of the payment of anti-dumping duties has, therefore, to be taken into consideration in interpreting Article 9.3.¹⁵²

126. These panels’ understanding of Article 9.3 of the Anti-Dumping Agreement is, at a minimum, a permissible interpretation of the provision. In summary, as long as the margin of dumping is properly understood as applying at the level of individual transactions, there is no tension between the exporter-specific concept of dumping as a pricing behavior and the importer-specific remedy of payment of dumping duties. It is only when an obligation to aggregate transactions is improperly inferred that any perception of conflict arises.

¹⁵⁰ *US – Zeroing (Japan) (Panel)*, paras. 7.198 - 7.199 (italics in original).

¹⁵¹ *US – Zeroing (EC) (Panel)*, para. 7.201.

¹⁵² *US – Stainless Steel (Mexico) (Panel)*, para. 7.124. In *US – Continued Zeroing (Panel)*, para. 7.169, the panel found this reasoning persuasive, but also found that the Appellate Body disagreed with this persuasive reasoning.

b. The United States Acted Consistently with Article VI:2 of the GATT 1994

127. Viet Nam has not demonstrated that the United States acted inconsistently with Article VI:2 of the GATT 1994. In particular, Article VI:2 of the GATT 1994 explains that, “[i]n order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product.” Viet Nam argues that the United States levied an antidumping duty in the amount that is greater than the margin of dumping for the “product as a whole.”¹⁵³ Viet Nam’s argument that the United States acted inconsistently with Article VI:2 rests entirely upon its erroneous interpretation of the term “margin of dumping.” As we explained above, the examination of the term “margins of dumping” itself provides no support for Viet Nam’s interpretation of the term as solely, and exclusively, relating to the “product as a whole.” In examining the text of Article VI:2 of the GATT 1994, the panel in *US – Softwood Lumber V (Article 21.5)* saw “no reason why a Member may not ... establish the ‘margin of dumping’ on the basis of the total amount by which transaction specific export prices are less than the transaction-specific normal values.”¹⁵⁴ Although the panel examined dumping margin calculations in an investigation, its basic reasoning and textual interpretation of Article VI:2 are equally applicable to margins of dumping established on a transaction-specific basis in assessment proceedings.

VII. THE USDOC’S DENIAL OF VINH HOAN’S REQUEST FOR REVOCATION WAS FULLY CONSISTENT WITH THE PROVISIONS OF ARTICLE 11 OF THE ANTI-DUMPING AGREEMENT

128. Viet Nam’s claim that the USDOC breached the Anti-Dumping Agreement by denying Vinh Hoan’s revocation request is without merit. Indeed, this claim reflects a misunderstanding of the obligations contained in Articles 11.1 and 11.2 of the Anti-Dumping Agreement. These provisions impose no obligation for investigating authorities to consider, much less provide, company-specific revocations. Similarly, nothing in these provisions obliges investigating authorities to accept untimely requests for revocation. Vinh Hoan could have submitted a request for revocation at the time that it submitted its request for administrative review of its exports for the seventh review period, but Vinh Hoan did not do so. In short, Viet Nam has no legal basis under the Anti-Dumping Agreement to transform Vinh Hoan’s simple procedural failure into a WTO matter.

A. Factual Background

129. As explained above, the USDOC’s regulation in effect at the time of the seventh administrative review, 19 C.F.R. § 351.222, allowed the USDOC to consider a request for revocation with respect to a specific exporter or producer based on the result of an administrative

¹⁵³ Viet Nam first written submission, paras. 74-94. We note that Viet Nam argues that “Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement explicitly provide that margins of dumping may not be greater than the margin of dumping for the product as a whole.” *Ibid.*, para. 87. However, Viet Nam misstates the text of these provisions - these provisions do not reference “the product as a whole.”

¹⁵⁴ *US – Softwood Lumber V (Article 21.5 – Canada) (Panel)*, para. 5.28 (underline in original).

review under section 751(a) of the Act.¹⁵⁵ Specifically, section 351.222(b) allowed the USDOC to revoke an antidumping duty order if the USDOC determined that there was an absence of dumping for at least three consecutive years during which sales were made in commercial quantities, and that continued application of the antidumping order was not otherwise necessary to offset dumping.¹⁵⁶ Under section 351.222(e), an exporter or producer could request revocation under section 351.222(b) during the third and subsequent annual anniversary months of the antidumping order.¹⁵⁷ The request needed to have been accompanied by relevant certifications concerning an absence of dumping and sales of subject merchandise in commercial quantities over three consecutive years, and an agreement to the reinstatement of the order in the event that the Secretary of Commerce determined that, subsequent to revocation, the producer or exporter sold the subject merchandise at less than normal value.¹⁵⁸

130. The annual anniversary month for the USDOC's antidumping order for fish fillets from Viet Nam is August, meaning that exporters' and producers' requests for revocation for the seventh administrative review, and the accompanying certifications, were due on August 31, 2010. On August 2, 2010, the USDOC published a notice of the opportunity to request an administrative review of the order.¹⁵⁹ Although Vinh Hoan submitted a timely request for administrative review, it did not submit a revocation request by August 31.¹⁶⁰ Vinh Hoan was later selected as a mandatory respondent, and was issued questionnaires to which it responded, yet waited until April 20, 2011, or 232 days after the deadline, to provide its revocation request and certifications to the USDOC.¹⁶¹ In its preliminary results, the USDOC noted that it was "not considering" the revocation request because it was untimely.¹⁶² In the final results, the USDOC explained:

We disagree with Vinh Hoan's argument that no party will be unduly burdened by its late request. Revocations require additional analysis beyond the requirements

¹⁵⁵ Section 751(a) of the Act (19 U.S.C. § 1675(a)) (Exhibit VN-25); 19 C.F.R. § 351.222(b)(2) (2010) (Exhibit VN-2). Effective for all administrative reviews initiated on or after June 20, 2012, these provisions of the regulation were eliminated. *Modification to Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 77 Fed. Reg. 29,875, 29,875-76 (May 21, 2012) (Exhibit USA-9).

¹⁵⁶ 19 C.F.R. § 351.222(b) (2010) (Exhibit VN-2). At the time of the seventh administrative review, section 351.222 also required that the exporter or producer agree in writing to reinstatement of the order in the event that, during the period that any other exporter or producer remained subject to the order, the Secretary of Commerce determined that the exporter or producer seeking revocation had sold subject merchandise at less than normal value. 19 C.F.R. § 351.222(e) (2010) (Exhibit VN-2).

¹⁵⁷ 19 C.F.R. § 351.222(b), (e) (2010) (Exhibit VN-2).

¹⁵⁸ 19 C.F.R. § 351.222(e)(1) (2010) (Exhibit VN-2).

¹⁵⁹ *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 75 Fed. Reg. 45,094 (August 2, 2010) (Exhibit VN-14).

¹⁶⁰ 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). (Exhibit USA-8)

¹⁶¹ Vinh Hoan's Request for Revocation (Exhibit VN-09).

¹⁶² *Certain Frozen Fish Fillets From the Socialist Republic of Viet Nam*, 76 Fed. Reg. 55,872, 55,873 (September 9, 2011) (prelim. results of admin. review) (Exhibit VN-08-3) (BCI).

of an administrative review, including conducting verification, and determining if sales of subject merchandise were made in commercial quantities. After completing such analysis, the Department publishes its preliminary results and allows all interested parties to comment. By submitting its request 232 days after the deadline Vinh Hoan did not allow for sufficient time for the analysis and comment period. Therefore, the Department considers this untimely request an administrative burden, and as such, will continue to reject the late request for revocation.¹⁶³

The USDOC further explained that in numerous cases, it had similarly rejected untimely extension requests, and that U.S. courts had upheld these determinations.¹⁶⁴ Vinh Hoan unsuccessfully challenged this aspect of the final results in litigation, where the U.S. Court of International Trade held that “Vinh Hoan has failed to show that the USDOC’s rejection of its untimely revocation request was an abuse of discretion or otherwise improper.”¹⁶⁵

B. Article 11.1 Does Not Impose Independent Obligations

131. Article 11.1 does not impose independent obligations on authorities, and cannot be breached absent a breach of Article 11.2 or 11.3. As the *US – Shrimp II* panel explained:

Several prior panel decisions suggest that Article 11.1 does not impose independent obligations upon Members, but rather, establishes the general principle that duties may only continue to be imposed so long as they remain necessary, which principle is operationalized in Articles 11.2 and 11.3.¹⁶⁶

As the panel put it in *EC – Tube or Pipe Fittings*, “Article 11.1 does not set out an independent or additional obligation for Members.” Rather, Article 11.1 “furnishes the basis for the review procedures contained in Article 11.2 (and 11.3) by stating a general and overarching principle, the modalities of which are set forth in paragraph 2 (and 3) of that Article.”¹⁶⁷

132. Accordingly, there would be no basis for a finding of a breach of Article 11.1 in this dispute in the absence of a finding of a breach of Article 11.2. And as explained elsewhere in

¹⁶³ *Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 Fed. Reg. 15,039 (March 14, 2012) and accompanying Issues and Decision Memorandum at p. 37 (*Final Results for Fifth AR*) (Exhibit VN-08-4) (internal footnotes excluded).

¹⁶⁴ *Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 Fed. Reg. 15,039 (March 14, 2012) and accompanying Issues and Decision Memorandum at pp. 37-38 (*Final Results for Fifth AR*) (Exhibit VN-08-4).

¹⁶⁵ See *Catfish Farmers of America et al. v. United States*, Slip Op. 14-146, p. 35 (USCIT December 18, 2014) (Exhibit VN-08-5) (sustaining in part, remanding in part various aspect of the seventh administrative review final results).

¹⁶⁶ *US – Shrimp II (Viet Nam) (Panel)*, para 7.363 (footnote omitted) (citing *EC – Tube or Pipe Fittings (Panel)*, para. 7.113; *US – DRAMS (Panel)*, para. 6.41).

¹⁶⁷ *EC – Tube or Pipe Fittings (Panel)*, para. 7.113.

this section, the fact that the United States rejected as untimely Vinh Hoan’s request to revoke the AD order with respect to Vinh Hoan was not inconsistent with Article 11.2.

C. Articles 11.1 and 11.2 of the Anti-Dumping Agreement Do Not Obligate Members to Terminate an Antidumping Duty Order With Respect to Individual Companies

133. Viet Nam claims that the United States breached Articles 11.1 and 11.2 of the Anti-Dumping Agreement by denying Vinh Hoan’s untimely request for revocation.¹⁶⁸ However, an examination of the text of Articles 11.1 and 11.2, in context and in light of the object and purpose of the Anti-Dumping Agreement, demonstrates that denial of the request could not have breached Article 11 because that Article creates no obligation for an investigating authority to permit company-specific revocation at all.

134. Article 11.1 of the Anti-Dumping Agreement states that “{a}n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.” The general rule in Article 11.1 informs Article 11.2 but, as a prior panel observed, it does not establish any independent or additional obligations.¹⁶⁹ Accordingly, whether Article 11 provides an obligation to consider company-specific revocation hinges on the text of Article 11.2.

135. The text of Article 11.2 contains no obligation for a Member to partially terminate an antidumping duty order with respect to individual companies. What Article 11.2 does address is the duration of an antidumping duty. For this purpose, Article 11.2 provides for review to ensure that an antidumping duty remains in place only as long as necessary to offset injurious dumping. Article 11.2 provides, in full:

136. The 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.* Interested parties shall have 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. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

* A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

¹⁶⁸ Viet Nam first written submission, para. 276.

¹⁶⁹ *EC – Tube or Pipe Fittings (Panel)*, para. 7.113 (“Article 11.1 does not set out an independent or additional obligation for Members.”). The Appellate Body, like the panel, characterized Article 11.1 as a “general rule.” *EC – Tube or Pipe Fittings (AB)*, para. 81.

137. Because procedures for review and termination of duties are also the subject of Article 11.3, Article 11.3 provides relevant context for interpretation of the obligations in Article 11.2.¹⁷⁰ There are both similarities and differences with respect to the obligations imposed by Article 11.2 and Article 11.3.

138. Article 11.3 requires termination of an antidumping duty after five years, unless the authorities determine in a review that the expiry of the duty would be likely to lead to the continuation or recurrence of dumping and injury. Article 11.3, therefore, requires some action (termination or a review) once a duty has been in force for five years. This obligation is triggered solely by the passage of time.¹⁷¹

139. Unlike Article 11.3, Article 11.2 contains a continuing obligation regarding two scenarios. First, “where warranted, on [its] own initiative” an investigating authority must review “the need for continued imposition of the duty.” Second, “provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty,” an interested party may request that the investigating authority “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.” Under both scenarios, “[i]f, as a result of the review under [Article 11.2], the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.”

140. Thus, taken together, Articles 11.2 and 11.3 of the Anti-Dumping Agreement provide the mechanisms to ensure that an antidumping duty remains in place only as long as necessary. Consistent with the obligation set forth in Article 11.2, U.S. law provides for termination of an antidumping duty (or, in U.S. terms, revocation of the antidumping duty order).¹⁷²

141. Article 11.2 requires a review of the continuing need for “the duty.” “The duty,” read in the context described above, refers to the application of the antidumping duty on a product, not as it is applied to exports by individual companies. As the Appellate Body found in *US – Corrosion-Resistant Steel Sunset Review*, “the duty” referenced in Article 11.3 is imposed on a product-specific (*i.e.*, in USDOC terminology, “order-wide”) basis, not a company-specific basis.¹⁷³ In that dispute, the Appellate Body rejected Japan’s argument that Article 11.3 imposed

¹⁷⁰ As indicated above, the United States considers “termination” of the “duty” under Article 11.2 to be the equivalent of “revocation” of an antidumping duty “order” as it does for the identical language found in Article 11.3.

¹⁷¹ Article 11.3 provides in full:

Notwithstanding the provisions of paragraphs 1 and 2, any definitive antidumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.

¹⁷² See *e.g.*, section 751(d) of the Act (19 U.S.C. § 1675(d)) (Exhibit VN-25).

¹⁷³ See *US – Corrosion-Resistant Steel Sunset Review*, para. 150 (“Article 11.3 does not require investigating authorities to make their likelihood determination on a company-specific basis.”) and para. 154-155 (“The

obligations on a company-specific basis in the context of a sunset review.¹⁷⁴ Similarly, nothing in Articles 11.1 or 11.2 imposes an obligation to review and revoke a duty on a company-specific basis. The term “duty” is most logically interpreted as having the same meaning in Articles 11.2 and 11.3, especially given the fact that these two Articles provide the mechanisms to ensure that, per Article 11.1, an antidumping duty remains in place only as long as necessary to counteract injurious dumping.

142. That “the duty” refers to the duty on a product and not on imports from a specific company is further confirmed by the references to injury in Articles 11.1 and 11.2. Article 11.1 provides that the “duty shall remain in force only as long as and to the extent necessary to counteract dumping **which is causing injury**.”¹⁷⁵ Likewise, Article 11.2 provides that interested parties shall have the right to request the authorities to examine whether ... the injury would be likely to continue or recur if the duty were removed or varied.”

143. In antidumping proceedings, injury is not assessed on a producer-specific basis. Rather, the impact of dumped imports of a product from another Member is assessed cumulatively; petitioners need not show that the imports of each particular producer individually cause injury.¹⁷⁶ Given that injury caused by individual producers is not assessed separately, the references to injury in 11.1 and 11.2 show that it would make little sense for “the duty” in those paragraphs to mean the duty applied to products of specific producers. “The dumping ... which is causing injury” for purposes of Article 11.1 would not be the dumping of an individual producer and thus “the duty” necessary to counteract that dumping could not be the margin applied just to an individual producer. Similarly, for purposes of Article 11.2, “the injury” that would be “likely to continue or recur” absent continued imposition of “the duty” is not injury assessed to have been caused by an individual producer, but rather injury caused by the dumped imports from another country cumulatively – and potentially the total injury caused by dumped imports from multiple countries if the requirements for multi-country cumulation are satisfied.¹⁷⁷ Thus, “the duty” that may or may not be necessary to prevent continuation or recurrence of that duty is the duty in general – *i.e.*, antidumping duties on subject merchandise generally – and not a duty applicable to merchandise of a particular foreign producer.

144. Context provided by Article 9 and Article 6 of the Anti-Dumping Agreement further confirms that “the duty” in Article 11.2 refers to the antidumping duty on a product and not multiple duties imposed on a company-specific basis. Specifically, reference to “the duty” in Article 11.1 and 11.2 contrasts with references to “individual duties” in Article 9.4 and the reference to “an individual margin of dumping for each exporter or producer” in Article 6.10. “Individual duties” and “an individual margin of dumping for each exporter or producer” must

provisions of Article 6.10 concerning the calculation of individual margins of dumping in investigations do not require that the determination of likelihood of continuation or recurrence of dumping under Article 11.3 be made on a company-specific basis.”).

¹⁷⁴ *US – Corrosion-Resistant Steel Sunset Review*, paras. 140, 155.

¹⁷⁵ Bold added.

¹⁷⁶ *See*, Anti-Dumping Agreement, Art. 3.

¹⁷⁷ *See*, Anti-Dumping Agreement Art. 3.3.

have a different meaning than “the duty.” To read “the duty” in the context of Article 11 as a company-specific reference would render these distinctions a nullity, in violation of customary rules of treaty interpretation.

145. The conclusion of the panel in *US – Shrimp II* that Article 11.2 covered requests for revocation of duties on individual producers was flawed; it was based on the illogical position that the “duty” in Article 11.2 has a different meaning than in the very next paragraph, Article 11.3. In so doing, that Panel disregarded that a term will ordinarily have the same meaning each time that it is used in an agreement – a principle that applies with particular force when uses of the term occur in consecutive paragraphs.¹⁷⁸ As noted above, Article 11.3’s provisions on sunset reviews clearly do not require company-specific determinations, as the Appellate Body explained in *US – Corrosion-Resistant Steel Sunset Review*.¹⁷⁹ The “duty” referred to in 11.3 thus clearly refers to the duty applied to a product, not to a producer.

146. The *US – Shrimp II* panel’s basis for reading the same term in two entirely different ways makes little sense. Viet Nam argues that “Article 11.1, by using the language ‘to the extent necessary,’ indicates that it contemplates” company-specific revocations, and that this is “reinforced” by Article 11.2.¹⁸⁰ However, Article 11.2 implements Article 11.1 by providing for either 1) the removal of “the duty,” which the Appellate Body has interpreted in the context of Article 11.3 to mean the duty as a whole,¹⁸¹ or 2) that the duty can be “varied” based upon the likely injury to the domestic industry. The language “to the extent necessary” contemplates the variation of the duty for injury purposes (*i.e.*, the second implementation option), not company-specific revocations.

147. The *US – Shrimp II* panel also relied on the fact that Article 11.2 permits a request limited to the question of whether continued imposition of the duty is necessary to offset dumping, and that dumping can be determined with respect to individual producers and exporters.¹⁸² But the need for AD duties to offset dumping can also be examined with respect to all imports from a country. And as explained above, the request envisioned in Art. 11.2 can also cover, or be limited to, the issue of causation of injury – something assessed based on the cumulative impact of dumped imports and not just those of a particular producer. In light of that, “the duty” referred to in Article 11.2 clearly refers to the antidumping duty overall, and not the duties applicable for individual producers.

148. Finally, the *US – Shrimp II* panel found support for its reading of Articles 11.1 and 11.2 in the fact that Article 11.5 states that Article 11.2 and the other paragraphs of Article 11 “shall apply *mutatis mutandis* to price undertakings accepted under Article 8.” That panel relied

¹⁷⁸ See *US – Wheat Gluten (AB)*, para. 96; see also *US – Line Pipe (AB)*, para. 180 (quoting *US – Wheat Gluten (AB)*, para. 96.).

¹⁷⁹ *US – Corrosion-Resistant Steel Sunset Review (AB)*, paras 150, 154-155.

¹⁸⁰ *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 255.

¹⁸¹ *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 150.

¹⁸² *US – Shrimp II (Viet Nam) (Panel)*, para. 7.372.

specifically on the fact that price undertakings are company specific.¹⁸³ Yet by the *US – Shrimp II* panel’s logic, Article 11.3 would likewise have to apply on a company-specific basis, contrary to what the Appellate Body has concluded.¹⁸⁴ The *US – Shrimp II* panel’s logic also ignores the key phrase “*mutatis mutandis*” in paragraph 5, which makes clear that necessary alterations to Article 11 provisions may be needed when a price undertaking is at issue. Accordingly, Article 11.5 in no way suggests that other provisions of Article 11 must be read in ways that would render them functional without modification if applied to review of a price undertaking.

149. Viet Nam has made no argument that any interested party requested an order-wide revocation. Indeed, no such request was ever made. Accordingly, because Article 11.1 and 11.2 suggest no obligation by Members to provide producer-specific reviews, Viet Nam cannot assert that the United States deprived any of its exporters the type of review obligated under Article 11.2 of the Anti-Dumping Agreement. Viet Nam thus has no basis for its claim that the United States breached any obligation under Article 11.1 or 11.2 with respect to the denial of Vinh Hoan’s request for company-specific revocations.

D. Articles 11.1 and 11.2 of the Anti-Dumping Agreement Do Not Obligate Members to Accept Untimely Requests for Revocation

150. Even if Anti-Dumping Agreement Article 11 could be read to require investigating authorities to provide an opportunity for company-specific revocation – and as explained above, Article 11 does not – Viet Nam’s Article 11 claims would still fail. Nothing in Article 11 requires a Member to accept or consider an untimely request for revocation.

151. Viet Nam’s revocation claims amount to an attempt to use the WTO dispute settlement system to escape the consequences of the failure by Vinh Hoan to meet a basic procedural deadline. The deadline in question was clearly set forth in relevant procedural rules¹⁸⁵ and was not an unreasonable burden.

1. Anti-Dumping Agreement Article 11 Does Not Preclude Investigating Authorities from Imposing a Deadline for Requesting Revocation

152. Viet Nam appears to misunderstand the implication of the Anti-Dumping Agreement’s absence of language concerning filing deadlines. In the absence of language precluding investigating authorities from setting reasonable filing deadlines, investigating authorities are free to do so. The fact that the Anti-Dumping Agreement does not require the imposition of such deadlines in no way suggests that an investigating authority may not choose to do so. The Appellate Body has highlighted “the right of investigating authorities to rely on deadlines in the conduct of their investigations and reviews.”¹⁸⁶ Nothing in Anti-Dumping Agreement Article 11 limits that right with respect to revocation requests.

¹⁸³ *US – Shrimp II (Viet Nam) (Panel)*, para. 7.373.

¹⁸⁴ *US – Corrosion-Resistant Steel Sunset Review (AB)*, paras. 150-155.

¹⁸⁵ 19 CFR § 351.222 (2010).

¹⁸⁶ *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 242.

153. As the panel in *US – Shrimp II* explained, “Article 11.2 provides little or no guidance for the authorities as to the methodology or criteria for the conduct of a review under that provision.”¹⁸⁷ Crucially, it is silent as to the question of whether investigating authorities can require submission of a revocation request during a specific window – which can facilitate efficient handling of matters by investigating authorities and provide domestic producers, importers, wholesalers and retailers, and other foreign producers with certainty about the marketplace landscape, thereby facilitating business planning and decision-making. In the absence of an obligation on the timing of revocation requests, an investigating authority’s procedural requirement for filing during a window – here, the anniversary month of the order – is not in conflict with Article 11.

154. Contrary to Viet Nam’s argument,¹⁸⁸ Anti-Dumping Agreement Article 6 says nothing about the consistency of 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.”¹⁸⁹ Article 11.4 provides only that the “provisions of Article 6 regarding evidence and procedure” shall apply to reviews conducted under Article 11.¹⁹⁰ 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.

155. 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 – Article 11.4 mentions only “[t]he provisions of Article 6 regarding evidence and procedure.” Article 11.4’s reference to certain Article 6 provisions but not to Article 5 makes clear that Article 5 disciplines do not apply to Article 11 reviews. Article 11.4 thus makes clear that Article 11 consciously does not discipline initiation of Article 11 reviews.

156. This is further confirmed by the clear distinctions drawn by the Appellate Body between initiating documents and subsequent submissions. In *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, the Appellate Body stated unambiguously that it is not an unreasonable burden to impose an early deadline for respondents to file a simple notice at the start of a sunset review, and that “if a respondent decides not to

¹⁸⁷ *US – Shrimp II (Viet Nam) (Panel)*, para. 7.388.

¹⁸⁸ Viet Nam first written submission, paras. 258 et seq.

¹⁸⁹ *US – Shrimp II (Viet Nam) (Panel)*, para. 7.388.

¹⁹⁰ Bold added.

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.”¹⁹¹

157. The reason is that the initiating filings serve to provide notice to interested parties and frame the context of the review (much like a panel’s terms of reference). “Thus, the initial submissions enable an investigating authority to conduct ... reviews in a fair and orderly manner.”¹⁹² They do not inhibit a party’s right to participate fully in the remainder of the investigation.

158. In fact, the Appellate Body has reasoned that “in the interest of orderly administration investigating authorities do, and indeed must establish [procedural] deadlines.”¹⁹³ The Appellate Body further reasoned that “[i]nvestigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination. Indeed, in the absence of time-limits, authorities would effectively cede control of investigations to the interested parties.”¹⁹⁴

159. For this reason, the Appellate Body declined to find a breach of the Anti-Dumping Agreement as a result of a U.S. regulation that precludes a respondent from participating or submitting evidence in a sunset reviews if the respondent did not submit a notification of interest in participating in the sunset review.¹⁹⁵ The Appellate Body explained that:

an investigating authority may have at the initiation stage particular concerns about enforcing its deadline for receiving notifications of a respondent’s interest in participating. The submissions filed by respondents and domestic interested parties frame the scope of the ... review for the investigating authority. These submissions inform the agency as to the extent of the issues and company-specific data that may need to be investigated and adjudicated upon in the course of the sunset review.¹⁹⁶

160. The Appellate Body further elaborated on the reasonableness of an investigating authority imposing a deadline on a respondent to show interest in participating in a review.

161. We 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

¹⁹¹ *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 252 (“We 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”).

¹⁹² *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 249.

¹⁹³ *US – Hot-Rolled Steel (AB)*, para. 73 (*US – Hot-Rolled Steel (Panel)*, para. 7.54)).

¹⁹⁴ *US – Hot-Rolled Steel (AB)*, para. 73.

¹⁹⁵ *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 249.

¹⁹⁶ *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 249.

initial steps to avail itself of the “ample” and “full” opportunities available for the defence of its interests, the fault lies with the respondent, and not with the [deadline-establishing] provision.¹⁹⁷

162. The Appellate Body’s reasoning amply demonstrates that USDOC acted in full consistency with the Anti-Dumping Agreement in rejecting Vinh Hoan’s untimely request for revocation.

2. The Fact That The Sixth Administrative Review Had Not Concluded by the Deadline for Requesting Revocation with the Seventh Administrative Review in No Way Precluded Vinh Hoan from Meeting the Deadline

163. Viet Nam argues that Vinh Hoan should have been permitted to submit an untimely request for revocation because the results of the sixth administrative review were not known at the time of the deadline for requesting revocation concurrently with the seventh administrative review. However, the fact that the sixth administrative review had not concluded by the applicable deadline for requesting revocation in the context of the seventh administrative review in no way precluded Vinh Hoan from meeting the deadline.

164. Under 19 C.F.R. § 351.222, one criteria that USDOC would use to evaluate a request for revocation is whether Vinh Hoan had sold subject merchandise for three consecutive years and had not done so at less than normal value. In the fifth administrative review, which was final on March 10, 2010, Vinh Hoan was found not to have sold at less than normal value.¹⁹⁸ Accordingly, Vinh Hoan was aware by the August 31, 2010 deadline for seeking revocation with the seventh administrative review that, provided a timely revocation request was submitted, findings in the sixth and seventh administrative review that it had not sold at less than normal value would result in satisfaction of the three-year criteria.

165. At the time of commencement of the seventh administrative review, there was one entity that knew the prices at which Vinh Hoan had sold goods during the sixth and seventh administrative review periods: Vinh Hoan – the entity that made the sales. Vinh Hoan thus lacks any basis to claim that uncertainty about the eventual result of the sixth administrative review would have precluded it from making a timely revocation request by the relevant deadline – the deadline for requests to be considered concurrently with the seventh review.

166. The uncertainty faced by Vinh Hoan was in fact no different in kind than that it would have faced had the sixth administrative review concluded prior to the deadline for requesting revocation concurrently with the seventh administrative review. In both circumstances, there would have been uncertainty about the eventual results of the seventh administrative review, but Vinh Hoan would have had knowledge of the actual prices of its sales during the period that had not yet been reviewed. The circumstances at issue here differ only in that Vinh Hoan likewise

¹⁹⁷ *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 252.

¹⁹⁸ *Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 75 Fed. Reg. 12,726, 12,728 (March 10, 2010) and accompanying Issues and Decision Memorandum (*Final Results for Fifth AR*) (Exhibit VN-06-4).

did not know with certainty the final results of the sixth administrative review at the time of the deadline for a revocation request.

167. Contrary to what Vinh Hoan appears to suggest,¹⁹⁹ there was no evidence of eligibility that it would have needed to submit with its revocation request that was unavailable to Vinh Hoan at the time of the deadline. Rather, under the terms of section 351.222, Vinh Hoan merely needed to certify: a) that it had sold the subject merchandise to the United States in commercial quantities during each of the three years of the review period; b) that it had sold the subject merchandise at not less than normal value during the three-year period of review; and c) that in the future it would not sell the merchandise at less than normal value. That there was no need to submit the results of a prior or forthcoming review showing no sales at less than normal value during the review period was consistent with the practical realities of a retrospective system. Indeed, such evidence 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.

168. Under U.S. regulations, there is no penalty for submitting a request for revocation that is ultimately unsuccessful. Accordingly, there was simply no reason for Vinh Hoan not to have submitted a timely request for revocation. The worst potential outcome for Vinh Hoan would have been a denial of its request.

3. Consideration of Vinh Hoan's Untimely Request Would Have Burdened USDOC and Other Participants in the Review

169. Vinh Hoan filed its request for revocation 232 days late.²⁰⁰ While nothing in the Anti-Dumping Agreement would prevent the USDOC from enforcing its requirement to seek revocation during the anniversary month of the order even in situations where considering a late request would impose no burdens on anyone, Vinh Hoan's untimely request did not present such a situation. Contrary to Viet Nam's argument,²⁰¹ considering a request this egregiously late would have imposed significant burdens on USDOC and other participants in the review.

170. By the time that Viet Nam submitted its request for revocation, the seventh administrative review was well underway. In fact, the preliminary determination in that review was issued just over four months after Vinh Hoan's untimely request for revocation.²⁰²

171. Consideration of the request for revocation would have required additional procedural steps which could have had the effect of delaying the seventh administrative review. USDOC regulations governing revocation proceedings provide that:

(2) In addition to the requirements of § 351.221 regarding the conduct of an administrative review, the Secretary will:

¹⁹⁹ Viet Nam first written submission, para. 262.

²⁰⁰ Vinh Hoan's Request for Revocation (20 April 2011) (Exhibit VN-09).

²⁰¹ See, e.g., Viet Nam first written submission, para. 261.

²⁰² USDOC's Final Results for Seventh AR (7 March 2012) (BCI) (Exhibit VN-08-3).

- (i) Publish with the notice of initiation under § 351.221(b)(1), notice of “Request for Revocation of Order (in part)” or “Request for Termination of Suspended Investigation” (whichever is applicable);
- (ii) Conduct a verification under § 351.307;
- (iii) Include in the preliminary results of review under § 351.221(b)(4) the Secretary's decision whether there is a reasonable basis to believe that the requirements for revocation or termination are met;
- (iv) If the Secretary decides that there is a reasonable basis to believe that the requirements for revocation or termination are met, publish with the notice of preliminary results of review under § 351.221(b)(4) notice of “Intent to Revoke Order (in Part)” or “Intent to Terminate Suspended Investigation” (whichever is applicable);
- (v) Include in the final results of review under § 351.221(b)(5) the Secretary's final decision whether the requirements for revocation or termination are met; and
- (vi) If the Secretary determines that the requirements for revocation or termination are met, publish with the notice of final results of review under § 351.221(b)(5) notice of “Revocation of Order (in Part)” or “Termination of Suspended Investigation” (whichever is applicable).²⁰³

Accordingly, to examine a request for revocation, the USDOC would have had to publish a notice of initiation, conduct a verification, and, if the USDOC concluded that the order should be revoked, provide notice of intent to revoke the order with the preliminary determination in the seventh administrative review.

172. The USDOC reasonably determined that it could not satisfy these mandatory requirements, along with its obligation to conduct other aspects of the administrative review, within the time remaining.²⁰⁴ Additionally, the USDOC would have needed to provide an opportunity for comment and submission of evidence by other parties regarding whether Vinh Hoan satisfied the criteria for revocation, including criteria that would not have been at issue in an ordinary administrative review: *i.e.*, whether Vinh Hoan made sales in commercial quantities and whether continued application of the order to Vinh Hoan was otherwise necessary to offset dumping.²⁰⁵ Had the USDOC failed to provide this extra time to other parties, they would have suffered significant prejudice. The deadline for submission of additional evidence in the seventh administrative review had already passed;²⁰⁶ accordingly, absent additional time for submission of evidence, other parties in the proceeding, including petitioners, would have been denied an

²⁰³ 19 C.F.R. § 351.222(f)(2) (Exhibit VN-02).

²⁰⁴ USDOC's Final Results for Seventh AR, Issues and Decision Memorandum at 37 (7 March 2012) (BCI) (Exhibit VN-08-3).

²⁰⁵ See 19 C.F.R. § 351.222(b) (Exhibit VN-02).

²⁰⁶ See 19 C.F.R. § 351.301 (Establishing a deadline of 140 days from the end of the anniversary month by which interested parties in an administrative review must submit their evidence) (Exhibit VN-30-1).

opportunity to submit evidence bearing on whether Vinh Hoan satisfied the criteria for revocation.

173. Further, given section 351.222(f)'s requirement for verification in a revocation proceeding, accepting the untimely revocation request would have resulted in significant extra burden for the USDOC. Having previously verified Vinh Hoan,²⁰⁷ USDOC did not do so in the seventh administrative review. The USDOC would have been required by its regulations to conduct such a verification, however, in order to consider a request for verification. This would have imposed a time and financial burden on the USDOC and likely would have delayed the results of the seventh administrative review. This would have prejudiced the interests of other participants.

174. In sum, it is patently incorrect for Vinh Hoan to contend that consideration of its untimely revocation request would not have imposed significant burdens on others.

E. Viet Nam's Other Arguments are Without Merit

175. As noted above in the discussion of the panel's terms of reference, the revocation section of Viet Nam's first written submission makes certain assertions that are difficult to understand, but that may amount to two additional claims concerning revocation: a claim that USDOC somehow breached Article 11 by virtue of its antidumping methodology in the denial of Vinh Hoan's request for revocation, and a claim that USDOC breached Article 11 by failing to grant revocation proprio motu with respect to Vinh Hoan after finding a zero margin for Vinh Hoan in the seventh administrative review. As the United States explained above, these claims would fall outside the Panel's terms of reference. Furthermore, these arguments are entirely lacking in merit.

176. Viet Nam has no basis to contend that the application of zeroing in administrative reviews could have given rise to a breach of Article 11 with respect to Vinh Hoan's request for revocation. By Viet Nam's own admission, "the USDOC's decisions denying Vinh Hoan's request for revocation was based solely on its missing a[] ... deadline[.]"²⁰⁸ Therefore, the question of whether "it must be inconsistent for an authority to base the results of a determination under Article 11.2 on margins of dumping determined in a manner inconsistent with the Anti-Dumping Agreement[.]"²⁰⁹ is simply irrelevant to the present dispute. USDOC did not continue to apply the order to Vinh Hoan as a result of the margins that it calculated for Vinh Hoan. Rather, USDOC continued to apply the order to Vinh Hoan because it rejected Vinh Hoan's request for revocation on the grounds of untimeliness.

177. Further, to the extent that Viet Nam is arguing that USDOC had an obligation under Article 11 to revoke the order with respect to Vinh Hoan after finding an absence of dumping in

²⁰⁷ See USDOC's Final Results for Sixth AR (BCI) (Exhibit VN-07-6); USDOC's Final Results for Fifth AR (10 March, 2010) (BCI) (Exhibit VN-06-4).

²⁰⁸ Viet Nam first written submission, para. 235.

²⁰⁹ Viet Nam first written submission, paras. 236-238.

the seventh administrative review,²¹⁰ that too is incorrect. As Viet Nam acknowledges, “Article 11.2 reviews involve ... the application of a different substantive standard”²¹¹ and “the absence of present dumping by itself is not determinative of whether the anti-dumping duties are necessary in that the ‘necessity’ standard relates to the necessity of continuing dumping duties in order to prevent prospective dumping.”²¹² As the panel explained in *U.S. – DRAMS*, Article 11.2 permits continuation of a duty when the continuation is necessary to offset dumping.²¹³ Whether continuation of the duty is necessary to offset dumping is not determined by an absence of dumping while the order was in place.²¹⁴ Accordingly, even in the absence of present dumping, an investigating authority considering revocation is entitled to assess whether dumping would likely occur in the future in the absence of the order.

178. The findings of the seventh administrative review accordingly did not serve to establish that continuation of the order was not needed to prevent dumping. Those findings thus likewise did not establish that continued application of the duties is inconsistent with Article 11. Those findings merely established that Vinh Hoan had not engaged in dumping during the period covered by the seventh administrative review. USDOC did not breach Article 11 by failing to revoke the order after finding an absence of dumping in the seventh administrative review.

VIII. VIET NAM FAILED TO ESTABLISH THAT THE UNITED STATES BREACHED THE ANTI-DUMPING AGREEMENT IN ASSIGNING THE VIET NAM-GOVERNMENT ENTITY A SINGLE ANTI-DUMPING DUTY RATE

179. Viet Nam claims that the United States breached various obligations under the Anti-Dumping Agreement because the USDOC determined an anti-dumping duty rate for the Viet Nam-government exporter/producer²¹⁵ on the basis of adverse facts available. Viet Nam’s claims are both factually and legally untenable for a number of reasons.

180. Viet Nam’s “as such” claims cannot be sustained with respect to the anti-dumping duty rate assigned to a government entity because Viet Nam’s evidence fails to meet the high threshold standard such claims must meet. In particular, the evidence does not establish that there is any norm of general and prospective application because it does not support a finding that the USDOC is legally or otherwise obliged to treat Vietnamese companies in the future in the manner that Viet Nam claims.

²¹⁰ See Viet Nam first written submission, paras. 236 & 238; *see also* the title of Section VII of Viet Nam’s first Written Submission: “Continuation of the Anti-dumping Duties Against a Respondent Requesting Revocation Based on the Absence of Dumping Over a Period of More Than a Single Review is Inconsistent with the Obligations of the United States Under Articles 11.1 and 11.2.”

²¹¹ Viet Nam first written submission, para. 231.

²¹² Viet Nam first written submission, para. 228.

²¹³ *U.S. – DRAMS (Panel)*, paras. 6.26-6.28.

²¹⁴ *U.S. – DRAMS (Panel)*, paras. 6.29-6.32, 6.34.

²¹⁵ As previously noted, the United States will refer to the Viet Nam-wide entity or the Viet Nam-government exporter/producer as the “Viet Nam-government entity.”

181. Viet Nam’s claims also rest on the incorrect premise that the USDOC has no basis for its treatment of Vietnamese companies as part of a government entity in anti-dumping proceedings involving Viet Nam. The USDOC’s finding that Viet Nam is a nonmarket economy and Viet Nam’s commitment to reduce the level of government involvement in its economy provides the factual basis by which the USDOC may consider that the Government of Viet Nam controls or materially influences all Vietnamese companies with respect to pricing and output of products destined for export. As such, the USDOC correctly considered all Vietnamese exporters or producers as part of a single Viet Nam-government entity, absent evidence to the contrary. The USDOC’s treatment is fully supported by the Anti-Dumping Agreement, which does not require an investigating authority to find that every company is entitled to an individual margin of dumping. Furthermore, the USDOC has not denied any Vietnamese exporter or producer the ability to demonstrate that it is not part of the Viet Nam-government entity and qualify for an individual margin of dumping.

182. Viet Nam’s reliance on *EC – Fasteners* is misplaced. The Appellate Body report in *EC – Fasteners* supports the USDOC’s approach to the issue of when exporters and producers may be considered part of a single entity. That report otherwise addressed a different factual situation than the one before the Panel in this dispute. Further, the reasoning in *EC – Fasteners* also did not take into account Viet Nam’s Accession Protocol.

183. To resolve Viet Nam’s claims, the Panel will need to make an objective assessment of the matter before it²¹⁶ and undertake an interpretive analysis of the terms of these obligations in accordance with the customary rules of interpretation of public international law.²¹⁷ A WTO dispute settlement panel must interpret and apply the text of the covered agreements, and it would be legal error simply to apply an interpretation in a report adopted by the DSB in a prior dispute.²¹⁸ And under the DSU, neither the Appellate Body nor any panel can issue – because the DSB has no authority to adopt – an authoritative interpretation of the covered agreements.²¹⁹ That authority is reserved to the Ministerial Conference or the General Council acting under a special procedure.²²⁰

184. As the United States will demonstrate below, Viet Nam has omitted critical aspects of the pertinent factual background, has failed to establish its prima facie case with respect to its “as such” claims, and has misinterpreted applicable law. The United States will demonstrate that Viet Nam’s treatment of certain Vietnamese companies as part of the Viet Nam-government entity is not “as such” or “as applied” inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. The United States will also demonstrate that Viet Nam’s claims regarding Article 6.8, Annex II, and Article 9.4 of the Anti-Dumping Agreement are equally misplaced.

²¹⁶ See DSU, Art. 11.

²¹⁷ See DSU, Art. 3.2.

²¹⁸ See U.S. first written submission, Section III, *infra*.

²¹⁹ See U.S. first written submission, Section III, *infra*.

²²⁰ See WTO Agreement, Art. IX.2.

Once these issues are clarified, it will become clear that Viet Nam has no valid basis for its claims.

A. Viet Nam Failed to Establish that the USDOC’s Decision to Assign the Viet Nam-Government Entity a Single Rate Amounts to a Rule or Norm of General and Prospective Application that may be Challenged “As Such”

185. Viet Nam asserts that the USDOC “Antidumping Manual makes clear that the USDOC’s NME-wide entity practice is applied on a generalized and prospective basis.”²²¹ There is no such “practice” measure.

186. In prior disputes, the Appellate Body has used several criteria in evaluating whether a measure exists that can be challenged as such: whether the rule or norm embodied in that measure is attributable to the responding Member; the precise content of the rule or norm; and whether the rule or norm has general and prospective application.²²²

“[A]s such” challenges against a Member’s measures in WTO dispute settlement proceedings are serious challenges. By definition, an “as such” claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member’s conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member’s WTO obligations. In essence, complaining parties bringing “as such” challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than “as applied” claims.²²³

187. The Appellate Body has reasoned that “[p]articular rigor 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.”²²⁴ According to the Appellate Body, 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,” because to do so would mean a panel “would act inconsistently with its obligations under Article 11 of the DSU to ‘make an objective assessment of the matter’ before it.”²²⁵

188. A challenge to “practice” as a measure raises serious conceptual difficulties. For example, the panel in *US – Zeroing (Japan)* indicated that the concepts of a “consistent practice” or “the simple repetition of the application of a certain methodology to specific cases” is distinguishable from “the notion of a rule or norm of general and prospective application.”²²⁶

²²¹ Viet Nam first written submission, para. 115.

²²² *US – Zeroing (EC) (AB)*, para. 198.

²²³ *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.

²²⁴ *US – Zeroing (EC) (AB)*, para. 198 (italics original).

²²⁵ *US – Zeroing (EC) (AB)*, para. 196.

²²⁶ *US – Zeroing (Japan) (Panel)*, paras. 7.50-7.52.

The panel explained that its finding that a measure existed in that instance did not rest on repeated application of a methodology:

The evidence before us indicates not only that the USDOC invariably applies zeroing but also that the USDOC has repeatedly described its zeroing methodology in terms of a long-standing policy that it considers to be consistent with its statutory obligations. Therefore, while we believe an ‘as such’ claim based solely on consistent practice raises serious conceptual questions, we consider that it is not necessary for us in the present case to opine on those questions.²²⁷

Other panels have similarly rejected arguments that a “practice” can be a measure that gives rise to a breach of WTO obligations.²²⁸

189. Viet Nam has failed to establish that the alleged Viet Nam-government entity rate “practice” exists and can be a measure. The USDOC’s Antidumping Manual is not a practice.²²⁹ The manual itself stipulates that it “is for the internal training and guidance of Import Administration (IA) personnel only”; that approaches set out in the manual “are subject to change without notice”; that the “manual cannot be cited to establish DOC practice.”²³⁰ Viet Nam’s argument that this internal training manual articulates “the USDOC’s standard practice”²³¹ thus is unequivocally disproven by the document on which it relies. Indeed, the Antidumping Manual, given every favorable inference (which is not warranted considering the high burden for an unwritten measure) merely describes a procedure that is subject to change at any time. There is a fundamental flaw in Viet Nam’s reliance on past practice, because repeated application in and of itself is not sufficient to establish the necessary predicate to establish the existence of a measure. By relying almost exclusively on arguments as related to the Antidumping Manual, plus a small number of determinations by the USDOC just in the Viet Nam fish fillets anti-dumping proceeding, Viet Nam has failed to demonstrate that the USDOC “invariably applies” the alleged “practice” and therefore has failed to meet its burden to establish a measure of general and prospective application.

190. Viet Nam’s effort to rely on the panel reports in *US – Shrimp I (Viet Nam)*, *US – Shrimp II (Viet Nam)*, and *US – Anti-dumping Methodologies (China)*²³² does not mitigate its burden to

²²⁷ *US – Zeroing (Japan) (Panel)*, para. 7.54.

²²⁸ See, e.g., *US – Export Restraints*, para. 8.126 (“[P]ast practice can be departed from as long as a reasoned explanation, which prevents such practice from achieving independent operational status in the sense of doing something or requiring some particular action.... US ‘practice’ therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada.”); *US – Steel Plate (India)*, paras. 7.19-7.22 (rejecting claim that the U.S. practice in the application of facts available was a challengeable measure).

²²⁹ See Viet Nam first written submission, paras. 104-115, citing, e.g., Chapter 10, Non-Market Economies (NME), Department of Commerce 2009 Antidumping Manual, pp. 3, 7-8 (Exhibit VN-01).

²³⁰ Chapter 1, Department of Commerce Antidumping Manual, p. 1 (Exhibit VN-01).

²³¹ See Viet Nam first written submission, paras. 105, 110.

²³² Viet Nam first written submission, para. 102.

demonstrate that an unwritten measure has general and prospective application.²³³ 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.”²³⁴ The panel findings in the disputes referenced by Viet Nam concern the USDOC’s treatment of an entirely different set of companies, as well as another Member’s companies. “[T]he factual findings in previous decisions do not relieve a complainant of the burden of establishing the facts in a subsequent dispute it initiated.”²³⁵

191. Finally, the USDOC is not applying the same outcome to every case without consideration of the record evidence or a party’s arguments, but evaluates, in each instance where a party provides such information and argument, whether that party is under government control. Moreover, the Government of Viet Nam could request the USDOC re-examine its nonmarket economy status under U.S. anti-dumping duty law. Given that this flexibility exists, and that the USDOC does not automatically reach the same outcome in each case, Viet Nam has failed to demonstrate that this is anything more than an approach that the USDOC has applied in a discrete number of cases.²³⁶

192. Viet Nam therefore has not established a *prima facie* case for an “as such” inconsistency with the Anti-Dumping Agreement given that it has not brought forward evidence that what it describes as “practice” is a measure.

B. The USDOC’s Approach with Respect to Viet Nam’s Control over Multiple Companies is based on the Undisputed Nonmarket Economy Conditions in Viet Nam and is Not Inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement

193. Viet Nam asserts that Articles 6.10 of the Anti-Dumping Agreement requires a Member to determine an individual anti-dumping margin and Article 9.2 requires a Member to assess

²³³ *US – Shrimp I (Viet Nam)*, para. 7.112 fn.163 (finding that “the factual findings of the[] prior panels and the Appellate Body [do not] alleviate Viet Nam’s burden of establishing, before us, that the U.S. zeroing methodology is a norm of general and prospective application.”).

²³⁴ *US – Wool Shirts and Blouses (AB)*, p. 14.

²³⁵ *US – Shrimp II (Viet Nam) (Panel)*, para. 7.39; *see also US – Shrimp I (Viet Nam)*, para. 7.112 fn.163 (finding that “the factual findings of the[] prior panels and the Appellate Body [do not] alleviate Viet Nam’s burden of establishing, before us, that the U.S. zeroing methodology is a norm of general and prospective application.”).

²³⁶ In this respect, the USDOC’s treatment of Vietnamese companies under common control is akin to the practice examined by the panel in *US – Steel Plate (India)*. *See* para. 7.22 (“[A] practice is a repeated pattern of similar responses to a set of circumstances – that is, it is the past decisions of the USDOC. We note in this regard that the USDOC decisions on application of facts available turn on the particular facts of each case, and the outcome may be the application of total facts available or partial facts available, depending on those facts. India argues that at some point, repetition turns the practice into a ‘procedure’, and hence into a measure. We do not agree. That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its past practice. If a Member were obligated to abide by its practice, it might be possible to deem that practice a measure. The United States, however, has asserted that under its governing laws, the USDOC may change a practice provided it explains its decision.”).

individual anti-dumping duties for every exporter.²³⁷ According to Viet Nam, the obligations set out in Articles 6.10 and 9.2 preclude the USDOC from treating multiple companies as part of a Viet Nam-government entity.²³⁸

194. Viet Nam’s claims are deficient and must fail. Articles 6.10 and 9.2 of the Anti-Dumping Agreement do not require an investigating authority to treat every legal entity as a distinct exporter or producer. Where warranted, these provisions clearly permit an investigating authority to treat the export activity of multiple companies as the pricing behavior of a single entity. The record in this dispute also fully supports the USDOC’s treatment of Vietnamese companies as part of a single government entity.

1. The USDOC Finding that Viet Nam is a Nonmarket Economy, Plus Viet Nam’s Commitment to Reduce its Involvement in its Economy, Provided the Basis for the USDOC to Consider, Until Demonstrated Otherwise, that Viet Nam Controls or Materially Influences All Vietnamese Companies with Respect to Pricing and Output of Products Destined for Export

195. This dispute does not involve a challenge to the USDOC’s finding that the exports at issue originate from a nonmarket economy country. Before Viet Nam acceded to the WTO, the USDOC made a factual finding that Viet Nam is a nonmarket economy.²³⁹ Viet Nam does not challenge this finding. Therefore, unlike EC – Fasteners, where the Appellate Body agreed with China that its protocol did not, by itself, provide a basis for the European Commission to presume that China is a nonmarket economy, the Panel’s consideration of Viet Nam’s government-entity claims must regard Viet Nam as a nonmarket economy.

196. When Viet Nam acceded to the WTO, Viet Nam committed to alter its nonmarket behavior and 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.”²⁴⁰ Viet Nam also committed to alter its behavior and “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

²³⁷ Viet Nam first written submission, paras. 130-144.

²³⁸ Viet Nam first written submission, paras. 130-144.

²³⁹ 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). As part of its 2002 analysis, the USDOC investigated the extent of government influence on the Vietnamese economy, including the extent of government ownership or control of the means of production and the extent of government control over the allocation of resources and over the price and output decisions of enterprises. The USDOC found that the stated objective of the Government of Viet Nam was the continued protection of, and investment in, industrial state-owned enterprises to ensure that these enterprises retained a key role in what the government refers to as a socialist market economy. The USDOC further confirmed that the state-owned enterprises were not limited to traditional natural monopolies but extended to other industries, including the food industry. Finally, the USDOC determined that the Government of Viet Nam continued to exert influence throughout the Vietnamese economy. *Ibid.*

²⁴⁰ Working Party Report, para. 78 (Exhibit USA-3).

consistent with the WTO Agreements”²⁴¹ Viet Nam’s commitments are “an integral part of the WTO Agreement.”²⁴²

197. When Viet Nam acceded to the WTO, it also 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.”²⁴³ 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. For the most part, Viet Nam’s state-owned enterprises (SOEs) 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 can hold any percentage of shares up to and including 100-percent ownership. Line ministries (which controlled SOEs during the central planning era) would hold the state’s stakes in these companies.²⁴⁴ 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 security-related or natural monopolies.²⁴⁵ 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.²⁴⁶

198. When Viet Nam acceded to the WTO, Members specifically expressed concern about the influence of the Government of Viet Nam on its economy and how such influence could affect trade remedy proceedings, including cost and price comparisons in anti-dumping duty proceedings.²⁴⁷ In particular, Members of the Working Party noted that special difficulties could arise because Viet Nam had not yet transitioned to a full market economy.²⁴⁸ The USDOC’s findings 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

²⁴¹ Working Party Report, para. 78 (Exhibit USA-3).

²⁴² The Accession Protocol provides that the “Protocol, which shall include the commitments referred to in paragraph 527 of the Working Party Report, shall be an integral part of the WTO Agreement.” Accession Protocol, para. I:2 (Exhibit VN-28). Paragraph 527 of the Working Party Report provides, *inter alia*, that the commitments of paragraph 78 of the Working Party Report “had been incorporated in paragraph 2 of the Protocol of Accession of Viet Nam to the WTO.” Working Party Report, para. 527 (Exhibit USA-3).

²⁴³ Working Party Report, para. 52 (Exhibit USA-3).

²⁴⁴ Working Party Report, paras. 56, 60 (Exhibit USA-3).

²⁴⁵ Working Party Report, Annex 2, Table 4, para. 83 (Exhibit USA-3).

²⁴⁶ Working Party Report, Annex 2, Tables 1 and 2 (Exhibit USA-3).

²⁴⁷ See, e.g., Working Party Report, para. 254 (Exhibit USA-3). For example, at least one Member expressed concerns regarding independence of enterprises even in those instances where government had less than majority shareholding. *Ibid.*, para. 57.

²⁴⁸ See Working Party Report, para. 254 (Exhibit USA-3).

products destined for consumption in Viet Nam²⁴⁹ – together with Viet Nam’s commitment in its Accession Protocol to alter its nonmarket behavior – provide 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.²⁵⁰

199. Furthermore, in the reviews Viet Nam challenges, each Vietnamese exporter or producer had the opportunity to respond to the USDOC’s “Separate Rate Application,”²⁵¹ which streamlined a company’s ability to demonstrate that the Government of Viet Nam did 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 company need only certify that its status had not changed.²⁵²
- If a company had not previously provided this evidence, the company needed to do so by responding to the USDOC’s “Separate Rate Application.”²⁵³

Assuming the company certified that its export activities were not controlled or materially influenced by the Government of Viet Nam, or completed an acceptable Separate Rate Application demonstrating such independence, the USDOC assigned the entity an individual margin of dumping (or “separate rate”).²⁵⁴

²⁴⁹ Where Viet Nam has not established 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). *See* Working Party Report, paras. 255(a), 255(d). In this regard, it is notable that Viet Nam does not dispute the USDOC’s decision to calculate normal value based on a nonmarket economy methodology, nor does Viet Nam challenge the nonmarket economy methodology that the USDOC selected for this calculation.

²⁵⁰ *See, e.g.*, Working Party Report, paras. 254-255 (Exhibit USA-3).

²⁵¹ *See, e.g.*, *Preliminary Results for Fifth AR*, 74 Fed. Reg. 45,806-07 (August 28, 2009) (Exhibit VN-06-03); *Preliminary Results for Seventh AR*, 76 Fed. Reg. 55,873-74 (Exhibit VN-08-3).

²⁵² *See, e.g.*, *Preliminary Results for Fifth AR*, 74 Fed. Reg. 45,806-07 (August 28, 2009) (Exhibit VN-06-03); *Preliminary Results for Seventh AR*, 76 Fed. Reg. 55,873-74 (Exhibit VN-08-3).

²⁵³ *See, e.g.*, *Preliminary Results for Fifth AR*, 74 Fed. Reg. 45,806-07 (August 28, 2009) (Exhibit VN-06-03); *Preliminary Results for Seventh AR*, 76 Fed. Reg. 55,873-74 (Exhibit VN-08-3).

²⁵⁴ *See, e.g.*, *Preliminary Results for Fifth AR*, 74 Fed. Reg. 45,806-07 (August 28, 2009) (Exhibit VN-06-03). If a company could not provide such evidence, the USDOC considered that company ineligible for a separate rate. The USDOC instead determined that the company had not demonstrated that the Government of Viet Nam did not control or materially influence, directly or indirectly, the export activities of that company and considered it part of the Viet Nam-government entity, *i.e.*, the entity comprised of exporters or producers that had not demonstrated that they are free of government control or material influence. The seventh administrative review is the only one of the three challenged administrative reviews in which certain companies subject to review failed to establish their separate rate eligibility. *See, e.g.*, *Preliminary Results for Seventh AR*, 76 Fed. Reg. 55,873-74 (Exhibit VN-08-3).

200. 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. This information included whether there were any restrictive stipulations associated with a producer's or exporter's business and export licenses.²⁵⁵ 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.²⁵⁶

201. Given the evidence present here, the U.S. approach for deciding in the proceedings covered by this dispute what sets of exports from Viet Nam are considered to be from one exporter or from separate exporters is not inconsistent with the Anti-Dumping Agreement. Absent positive evidence to the contrary, it is not inconsistent with the Anti-Dumping Agreement to consider Vietnamese companies in an anti-dumping proceeding as part of a single Viet Nam-government entity subject to the same anti-dumping rate. Therefore, the USDOC's recognition that the Government of Viet Nam exerts control or material influence over the pricing and output of products destined for export that are identical or similar to the like product when destined for consumption in Viet Nam is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it.

2. Article 6.10 of the Anti-Dumping Agreement Does Not Require that Each Legal Entity be Afforded a Separate Dumping Margin

202. Article 6.10 of the Anti-Dumping Agreement provides:

The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

203. In applying this provision, the initial question is to identify the entity, or group of entities, that constitute "each known exporter" or "each known ... producer."²⁵⁷ Viet Nam has no basis for asserting that related entities, simply because they may be organized as separate companies,

²⁵⁵ See, e.g., *Preliminary Results for Fifth AR*, 74 Fed. Reg. 45,806-07 (August 28, 2009) (Exhibit VN-06-03); *Preliminary Results for Seventh AR*, 76 Fed. Reg. 55,873-74 (Exhibit VN-08-3).

²⁵⁶ See, e.g., *Preliminary Results for Fifth AR*, 74 Fed. Reg. at 45,806-07 (August 28, 2009) (Exhibit VN-06-03); *Preliminary Results for Seventh AR*, 76 Fed. Reg. 55,873-74 (Exhibit VN-08-3).

²⁵⁷ The Appellate Body outlined at least four exceptions to the Article 6.10 requirement to determine an individual margin of dumping: (1) sampling (Article 6.10); (2) unknown exporters or producers (Article 6.10); (3) impractical to do so (Articles 6.10 and 9.2); and (4) related exporters or producers (Article 9.5). *EC – Fasteners (AB)*, paras. 319, 324, 326, 329, 348.

must be treated as individual exporters for the purpose of Article 6.10. To the contrary, context in the Anti-Dumping Agreement indicates that whether producers are related to each other affects the investigating authority's analysis of those firms.

204. In particular, the language in Article 6.10 speaks to an individual margin of dumping for “known exporters or producers,” not companies, firms, or foreign participants. Accordingly, the text of the provision does not require an investigating authority to find that every company or legal entity is *ipso facto* a separate “known exporter or producer,” and thereby entitled to an individual margin of dumping.

205. Additional context in the Anti-Dumping Agreement confirms that whether producers are related to each other affects the investigating authority's analysis of those firms. For example, Article 4.1(i) establishes that, in the context of defining the domestic industry, producers should be deemed related to each other:

if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers.... [O]ne shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.²⁵⁸

206. Similarly, Article 9.5 establishes an obligation to carry out a review to determine an “individual” margin of dumping for a new shipper “provided that the[] exporter[] or producer[] can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product.”²⁵⁹ This provision indicates that such an exporter that cannot demonstrate that it is not related to an exporter or producer subject to the duty would not be entitled to an “individual” margin of dumping.

207. Nothing in Article 6.10, or elsewhere in the Anti-Dumping Agreement, thus limits requires an investigating authority to investigate and determine that each particular entity necessarily constitutes a single “known exporter or producer.” Accordingly, an investigating authority may reasonably consider actual commercial activities and relationships of companies in deciding whether they should be treated as a single exporter or producer as opposed to simply accepting their nominal status as legally distinct companies. Depending on the facts of a given situation, an investigating authority may determine that even legally distinct companies should be treated as a single “exporter” or “producer” based on their activities and relationships.

208. This textual analysis is consistent with the Appellate Body findings in *EC – Fasteners*. In that dispute, the Appellate Body (although it used the term “exporter” rather than “entity”), expressly found certain exporters could be combined for a single rate provided circumstances for such treatment existed:

²⁵⁸ Anti-Dumping Agreement, Art. 4.1(i).

²⁵⁹ Anti-Dumping Agreement, Art. 9.5.

In our view, Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* do not preclude an investigating authority from determining 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*. Whether determining a single dumping margin and a single anti-dumping duty for a number of exporters is inconsistent with Articles 6.10 and 9.2 will depend on the existence of a number of 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. These situations may include: (i) the existence of corporate and structural links between the exporters, such as common control, shareholding and management; (ii) the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management; and (iii) **control or material influence by the State in respect of pricing and output**. We note that the *Anti-Dumping Agreement* addresses pricing behaviour by exporters; **if the State instructs or materially influences the behaviour of several exporters in respect of prices and output, they could be effectively regarded as one exporter for purposes of the *Anti-Dumping Agreement* and a single margin and duty could be assigned to that single exporter.**²⁶⁰

209. In reaching its conclusion, the Appellate Body approvingly drew from the panel report in *Korea – Certain Paper*,²⁶¹ where the panel found that treating multiple nominally-independent exporters or producers as a single entity may be justified in a particular proceeding.²⁶² The panel acknowledged the absence of a specific directive in Article 6.10 requiring a Member to treat companies independently if the evidence indicated otherwise.²⁶³ Viet Nam does not address this aspect of the Appellate Body's decision in *EC – Fasteners* or the panel's finding in *Korea – Certain Paper*.

210. Article 6.10 does not require an investigating authority to find that every company is a known exporter or a known producer entitled to an individual margin of dumping. Therefore, contrary to Viet Nam's argument, Article 6.10 does not preclude the USDOC from treating

²⁶⁰ *EC – Fasteners (AB)*, para. 376 (bold added).

²⁶¹ *EC – Fasteners (AB)*, para. 380 (“[T]he test developed by the panel in *Korea – Certain Paper* may not capture all situations where the State effectively controls or materially influences and coordinates several exporters such that they can be considered a single entity. The panel in *Korea – Certain Paper* addressed the question of when two or more legally distinct private companies can be deemed a 'single exporter' under Article 6.10 of the *Anti-Dumping Agreement* due to their commercial and structural relationship. The situation analyzed by the panel in *Korea – Certain Paper* presents some relevance to the determination of whether the State and several exporters constitute a single entity. However, the criteria used for determining whether a single entity exists from a corporate perspective, while certainly relevant, will not necessarily capture all situations where the State controls or materially influences several exporters such that they could be considered as a single entity for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* and be assigned a single dumping margin and anti-dumping duty.”).

²⁶² *Korea – Certain Paper*, para. 7.157.

²⁶³ *Korea – Certain Paper*, para. 7.157.

multiple companies as a single entity, including, where appropriate, a Viet Nam-government entity.

3. Article 9.2 of the Anti-Dumping Agreement Allows an Investigating Authority to Treat Multiple Companies in Viet Nam as Part of a Single Exporter or Producer for the Purpose of Imposing Anti-dumping duties

211. Article 9.2 of the Anti-Dumping Agreement provides:

When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.²⁶⁴

212. As with the text of Article 6.10, nothing in the text of Article 9.2 precludes the USDOC from treating multiple companies as a single entity, including, where appropriate, a Viet Nam-government entity. As the above quotation to *EC – Fasteners* confirms, the Appellate Body has found that Article 9.2, like Article 6.10, does not prohibit an investigating authority from imposing a single anti-dumping duty on a number of entities.²⁶⁵ Viet Nam’s argument regarding Article 9.2²⁶⁶ thus suffers from the same misunderstanding that underlies its argument regarding Article 6.10, *i.e.*, that neither Article 6.10 nor Article 9.2 require an authority to find that every company is a known exporter or a known producer entitled to an individual margin of dumping. Therefore, contrary to Viet Nam’s argument, Article 9.2 does not preclude the USDOC from assigning the same rate to multiple companies as a single entity, including, where appropriate, a Viet Nam-government entity.

213. Viet Nam’s attempts to rely on *EC – Fasteners*²⁶⁷ to dismiss this interpretation is misplaced because Viet Nam ignores the Appellate Body’s finding that “if the State instructs or materially influences the behavior of several exporters in respect of prices and output, they could be effectively regarded as one exporter for purposes of the *Anti-Dumping Agreement* and a single

²⁶⁴ Notably, the language of Article 9.2 provides that “when” antidumping duties are being imposed, they shall be collected in appropriate amounts on a non-discriminatory basis from all sources, *i.e.*, imposed on imports from all sources found to be dumped and at the appropriate rate. Differences in duty rates must reflect differences in the dumping margin for the source.

²⁶⁵ *EC – Fasteners (AB)*, para. 376.

²⁶⁶ Viet Nam first written submission, para. 138.

²⁶⁷ Viet Nam first written submission, para. 139 (citing *EC – Fasteners (AB)*, para. 339).

margin and duty could be assigned to that single exporter.”²⁶⁸ According to the Appellate Body, and contrary to Viet Nam’s argument, Article 9.2 “does not preclude an investigating authority from determining 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*.”²⁶⁹

214. As in the case of its Article 6.10 argument, Viet Nam’s argument fails to recognize that determining whether a group of companies are in a close enough relationship to support their treatment as a single entity is a decision that an investigating authority must make before it can know how to determine and apply duties to those companies’ imports. If an investigating authority concludes that the relationship between multiple companies is sufficiently close to support treating it as a single entity, an investigating authority may apply a single rate duty to all of those companies’ imports. Nothing in Article 9.2 prohibits such treatment, nor does Article 9.2 set out criteria for an investigating authority to examine before concluding that a particular firm or group of firms constitutes a single entity.

215. Finally, Viet Nam’s Article 9.2 arguments are inapplicable to investigations, because Article 9.2 applies just to the anti-dumping duties that are collected – it does not apply to the cash deposit rate that is set for an exporter or producer following the conclusion of an investigation.²⁷⁰ In the U.S. retrospective system, the USDOC’s anti-dumping investigation serves to determine: (1) whether certain merchandise is being, or is likely to be sold, in the United States at less than its fair value; and (2) estimated weighted average dumping margins. These estimated margins of dumping establish a cash deposit rate for merchandise entering the United States after the USDOC’s determinations. This cash deposit rate is only an estimate of the final duties that may be owed by an importer. The actual collection of anti-dumping duties in the appropriate amounts does not occur until the USDOC conducts administrative reviews.

216. Article 9.2 is a non-discrimination provision that directs Members to apply anti-dumping duties in “the appropriate amounts in each case” for all sources found to be dumped and causing injury. Under a proper interpretation of Article 9.2, taking into account the framework of Article 9.3 (which expressly allows for the final amount of the duty collected to be set at a later time in a retrospective system), the “appropriate” amount of the antidumping duty to be collected is not necessarily the cash deposit rate set in an investigation. Viet Nam has not demonstrated that its claims under Article 9.2 apply to the USDOC’s anti-dumping investigations, nor has it generally demonstrated that Article 9.2 prohibits an investigating authority from imposing a single anti-dumping duty on a number of entities.

²⁶⁸ *EC – Fasteners (AB)*, para. 376.

²⁶⁹ *EC – Fasteners (AB)*, para. 376.

²⁷⁰ Article 9.2 just addresses the “antidumping duty . . . collected,” unlike Article 6.10 which addresses the “dumping margin” “determined.”

4. EC – Fasteners Does Not Preclude an Investigating Authority from Finding that Multiple Companies in Viet Nam Constitute a Single Viet Nam-Government Entity for the Purpose of Determining Dumping Margins

217. Viet Nam’s arguments rely to a large extent on the Appellate Body report in *EC – Fasteners*. In *EC – Fasteners*, the Appellate Body considered China’s challenge to the European Communities’ finding that multiple Chinese companies could comprise a single exporter or producer such that an individual dumping margin could be calculated for and applied to that entity. The Appellate Body determined that Article 9(5) of Council Regulation (EC) No. 1225/2009 of 30 November 2009 (“Article 9(5)”), which codified the EC’s practice, was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. In particular, the Appellate Body determined that the regulation improperly “conditions the determination of individual dumping margins for and the imposition of individual anti-dumping duties on NME exporters or producers to the fulfillment of the IT test,” which requires an exporter or producer to demonstrate that it is separate from the government by fulfilling certain criteria.²⁷¹

218. Viet Nam’s reliance on *EC – Fasteners* is misplaced. As explained below, even aside from certain statements with which the United States would disagree, on a close reading, the Appellate Body in *EC – Fasteners* accepted the very result that Viet Nam would have this Panel find WTO-inconsistent – *i.e.*, that an investigating authority may find that “the State controls or materially influences several exporters such that they could be considered as a single entity for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* and be assigned a single dumping margin and anti-dumping duty.”²⁷²

a. The Appellate Body in EC – Fasteners Did Not Find that the Anti-Dumping Agreement Requires an Investigating Authority to Initially Treat Every Entity as an Individual Exporter or Producer

219. In *EC – Fasteners*, the Appellate Body recognized that Article 6.10 does not preclude the possibility that nominally or legally-independent entities may be treated as a single exporter or producer when that determination is based on facts and evidence submitted in that investigation.²⁷³ According to the Appellate Body, “[w]hether determining a single dumping margin and a single anti-dumping duty for a number of exporters is inconsistent with Articles 6.10 and 9.2 will depend on the existence of a number of 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.”²⁷⁴ “These situations may include: ... the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management; and ... control or material influence by the State in respect of pricing and

²⁷¹ *EC – Fasteners* (AB), para. 385. The “individual treatment (‘IT’) test” refers to the criteria outlined in Article 9(5) of the Council Regulation (EC) No. 1225/2009, which provides for an exception to the specification of a “country-wide” rate in European Union cases. See *EC – Fasteners* (Panel), paras. 7.48-7.49.

²⁷² *EC – Fasteners* (AB), para. 380.

²⁷³ *EC – Fasteners* (AB), paras. 376, 382.

²⁷⁴ *EC – Fasteners* (AB), para. 376.

output.”²⁷⁵ According to the Appellate Body, “if the State instructs or materially influences the behaviour of several exporters in respect of prices and output, they could be effectively regarded as one exporter for purposes of the Anti-Dumping Agreement and a single margin and duty could be assigned to that single exporter.”²⁷⁶ Further, “the criteria used for determining whether a single entity exists from a corporate perspective, while certainly relevant, will not necessarily capture all situations where the State controls or materially influences several exporters such that they could be considered as a single entity for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* and be assigned a single dumping margin and anti-dumping duty.”²⁷⁷

220. As discussed above, although Article 6.10 of the Anti-Dumping Agreement requires an authority to determine an individual rate for each “known exporter” or “known producer,” this provision does not establish or necessarily imply that each legally separate entity will be such an “exporter” or “producer.” Where exporters or producers are so related that they constitute a single economic entity, it would make no sense to determine an “individual” margin of dumping for each. Only the single entity would have an “individual” margin. Therefore, contrary to Viet Nam’s argument, the Appellate Body in *EC – Fasteners* fully recognized that an investigating authority is permitted under Article 6.10 of the Anti-Dumping Agreement to determine whether a given entity constitutes an “exporter” or “producer” as a condition precedent to calculating an individual dumping margin for that entity.

b. The USDOC’s Determination Regarding the Vietnam-Government Entity was Not Inconsistent with the Appellate Body’s Findings in *EC – Fasteners* in respect of Articles 6.10 and 9.2

221. Beyond a cursory claim that the USDOC’s decision to assign the Viet Nam-government entity a single rate is like the EC regulation that formed the basis for the EC’s finding, Viet Nam makes no attempt to demonstrate that the Appellate Body’s conclusion in *EC – Fasteners* with respect to the EC’s regulation should apply equally here.²⁷⁸ As previously demonstrated, the USDOC’s treatment of the Viet Nam-government entity in the challenged proceedings is supported by the evidence, differs from the EC’s regulation, and is not inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

i. The USDOC Established that Viet Nam is a Nonmarket Economy

222. In *EC – Fasteners*, China challenged the EC’s finding that China is a nonmarket economy. China argued that the EC improperly relied on China’s Accession Protocol to determine, as a basic fact, that China is a nonmarket economy such that it may be treated differently with respect to the calculation of dumping margins. The Appellate Body agreed with

²⁷⁵ *EC – Fasteners* (AB), para. 376.

²⁷⁶ *EC – Fasteners* (AB), para. 376.

²⁷⁷ *EC – Fasteners* (AB), para. 380.

²⁷⁸ See Viet Nam first written submission, paras. 155-163.

China that the Protocol did not necessarily provide a basis for finding that China is a nonmarket economy.²⁷⁹

223. In contrast, the USDOC has made a factual finding that Viet Nam is a nonmarket economy.²⁸⁰ This is a fundamental distinction between this dispute and *EC – Fasteners*. Furthermore, at no time during any of the challenged proceedings did Viet Nam, or any Vietnamese exporter or producer, request that the USDOC reconsider Viet Nam’s nonmarket economy status.²⁸¹ Likewise, Viet Nam does not challenge in this dispute the USDOC’s factual finding that it is a nonmarket economy.

224. As a result, unlike in *EC – Fasteners*, there is no question in this dispute as to whether Viet Nam is a nonmarket economy under U.S. law. To the extent *EC – Fasteners* rested on a determination that the complaining Member was not necessarily a nonmarket economy,²⁸² the Panel should find that the USDOC’s undisputed finding that Viet Nam is a nonmarket economy is based on record evidence and relevant to an inquiry of the level of government involvement in Viet Nam’s economy.

ii. *The USDOC Provided Exporters the Opportunity to Demonstrate They Were Not Part of the Viet Nam-Government Entity During Each Review*

225. Viet Nam overlays the Appellate Body’s findings in *EC – Fasteners* here without addressing the specifics of the USDOC’s approach, including the USDOC’s separate rate analysis, which renders *EC – Fasteners* inapposite. In other words, the Appellate Body’s reasoning in *EC – Fasteners* does not support Viet Nam’s apparent position that an investigating authority is precluded from collecting and offering enough evidence to justify the treatment of certain exporters or producers as a single government entity in terms of their export activities,²⁸³ which as discussed above, the USDOC has done in the challenged proceedings. Contrary to Viet Nam’s arguments, the USDOC’s treatment of the companies as part of the Viet Nam-government entity was adequately supported by the evidence and consistent with the Appellate Body’s understanding in *EC – Fasteners* of the obligations set out in Articles 6.10 and 9.2 of the Anti-Dumping Agreement. Furthermore, the USDOC ensured that Vietnamese companies had an opportunity to establish that they are not controlled or materially influenced by the Government of Viet Nam and thus entitled to a rate separate from the Viet Nam-government entity.

²⁷⁹ *EC – Fasteners (AB)*, para 366 (“Neither can paragraph 15(d) [of Viet Nam’s Accession Protocol] be interpreted as authorizing WTO Members to treat Viet Nam as an NME for matters other than the determination of normal value. As explained above, paragraph 15(d) does not pronounce generally on Viet Nam’s status as a market economy or NME.”).

²⁸⁰ 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).

²⁸¹ See 19 U.S.C. § 1677(18)(C) (Exhibit USA-2) (“Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority.”).

²⁸² *EC – Fasteners (AB)*, para 366.

²⁸³ *EC – Fasteners (AB)*, para. 364.

226. Indeed, as the table below demonstrates, the evidence that the USDOC asks a company to provide is fully consistent with those factors that the Appellate Body in *EC – Fasteners* suggests should be probed to ascertain situations that signal when two or more companies are, or are not, in such a relationship that they should be treated either as a single entity or as separate entities²⁸⁴:

<i>EC – Fasteners</i> (AB), para. 376	The USDOC Analysis of State Control Separate Rate Application, p. 2
“[C]ontrol or material influence by the State in respect of pricing and output”	<p>“whether each exporter sets its own export prices independent of the government and without the approval of a government authority”</p> <p>“whether each exporter retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses”</p> <p>“whether each exporter has the authority to negotiate and sign contracts and other agreements”</p>
“[T]he existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management”	<p>“whether each exporter has autonomy from government regarding the selection of management”</p> <p>“an absence of restrictive stipulations associated with an individual exporter’s business and export licenses”</p> <p>“any legislative enactments decentralizing control of companies”</p> <p>“any other formal measures by the central and/or local government decentralizing control of companies”</p>

227. In sum, the USDOC’s separate rate analysis allows for an in-depth and individualized review of each company’s relationship with Viet Nam’s government. The USDOC’s analysis goes well beyond the criteria that formed the individual treatment test that the Appellate Body in *EC Fasteners* found inconsistent with Articles 6.10 and 9.2.²⁸⁵

²⁸⁴ *EC Fasteners* (AB), para. 376.

²⁸⁵ *EC Fasteners* (AB), para. 378.

228. The USDOC’s conclusion that multiple companies in Viet Nam are part of the Viet Nam-government entity is based on a permissible and reasonable interpretation of Articles 6.10 and 9.2. Therefore, the United States requests that the Panel reject Viet Nam’s claims under both these provisions, both “as such” and “as applied.”

C. Viet Nam’s “As Such” and “As Applied” Claims Relative to Article 6.8 and Annex II of the Anti-Dumping Agreement are Without Merit

229. Viet Nam claims that “[t]he USDOC’s practice of assigning a rate based on facts available to an NME-wide entity without first requesting necessary information is a violation, as such, of Article 6.8 and Annex II of the Anti-Dumping Agreement.”²⁸⁶ Viet Nam also argues that because the USDOC did not request information from the Viet Nam-government entity during the challenged proceedings, the USDOC’s application of a rate based on adverse facts available was inconsistent with Article 6.8.²⁸⁷

230. Viet Nam has failed to establish that the alleged Viet Nam-government entity rate “practice” exists and can be a measure. The only support that Viet Nam provides that such “practice” exists is two sentences from the Antidumping Manual,²⁸⁸ neither of which requires the USDOC to base the Viet Nam-government entity rate on the basis of facts available.²⁸⁹ Viet Nam itself concedes that “[t]he the USDOC retains broad discretion on the method for calculating the NME-wide entity rate.”²⁹⁰ Even Viet Nam does not argue that this alleged “practice” exists and is invariably applied by the USDOC on the basis of facts available. Viet Nam therefore has not established a *prima facie* case for an “as such” inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement given that it has not brought forward evidence that what it describes as “practice” is a measure.

231. Viet Nam’s arguments as applied are equally flawed because they ignore key facts in the proceedings at issue that are fatal to this claim. In the fifth administrative review, the USDOC granted all companies subject to the review separate rate status, and therefore²⁹¹ the Viet Nam-

²⁸⁶ Viet Nam first written submission, para. 201; *see* Viet Nam first written submission, paras. 196-201.

²⁸⁷ *See* Viet Nam first written submission, paras. 202-206.

²⁸⁸ *See* Viet Nam first written submission, paras. 197-198. Viet Nam’s further reliance on one statement from the panel report in *US – Shrimp II* (Viet Nam first written submission, para. 199) is also unavailing because, as that panel noted, “factual findings in previous decisions do not relieve a complainant of the burden of establishing the facts in a subsequent dispute it initiated.” *US – Shrimp II (Viet Nam) (Panel)*, para. 7.39.

²⁸⁹ Chapter 10, Non-Market Economies (NME), Department of Commerce Antidumping Manual, p. 7 (Exhibit VN-1).

²⁹⁰ Viet Nam first written submission, para. 113.

²⁹¹ *Notice of Preliminary Results of New Shipper Reviews and Fifth Antidumping Duty Administrative Review*, 74 Fed. Reg. 45,805, 45,806-07 (August 28, 2009) (*Preliminary Results for Fifth AR*) (Exhibit VN-06-03), unchanged in *Final Results for Fifth AR*. The USDOC further determined that one company, East Sea Seafoods Joint Venture Company, ceased to exist during the period of review, and that East Sea Seafoods Limited Liability Company, a company not subject to review, was not its successor-in-interest. As a result, although the USDOC established a rate for the Viet Nam-government entity, no company subject to the review was subject to this assessment rate in the fifth administrative review. *Final Results of the Antidumping Duty Administrative Review and New Shipper*

government entity ultimately was not subject to review and never assigned a rate in the review (let alone a rate based on adverse facts available).²⁹² Similarly, in the sixth administrative review, the USDOC granted all companies subject to the review separate rate status, meaning the Viet Nam-government entity was not subject to review and was never assigned a rate – including one based on adverse facts available.²⁹³ Viet Nam ignores these pertinent facts, which relate to two of the three administrative reviews it has challenged, by selectively relying on language from the preliminary results in those reviews.²⁹⁴ Without establishing that the Viet Nam-government entity was subject to review and received a rate based on adverse facts available in these reviews, Viet Nam has failed to meet its *prima facie* case.

232. In the seventh administrative review, the Viet Nam-government entity was assigned the only rate assigned to it since the initial investigation, which is the only rate it has ever received under this anti-dumping duty order. Although the rate originated from an adverse facts available determination from the initial investigation, it is the rate the USDOC continued to apply to the entity in subsequent reviews. Any party that is part of the Viet Nam-government entity could have requested that the USDOC review the Viet Nam-government entity, but none did.

233. There is no obligation to make the final assessment of duties different from the amount of security collected on entries in the absence of a request for review of the entries. Indeed, if an interested party had been dissatisfied with the margin of dumping assigned to the Viet Nam-government entity previously and the amount of security being collected on entries, it could have requested a review to determine the margin of dumping and final duties owed on the precise entries. As there was no such request, the exporters subject to the Viet Nam-government entity rate never asserted that the deposit rate was inappropriate, and the duties were finally determined and collected in the amounts that had been deposited. The USDOC's final duty assessments for the respective review periods for exports by companies that are part of the Viet Nam-government entity was not based on facts available but rather based on the decision by the exporters not to seek a review of the duties they owed. Viet Nam thus has not even presented any argument as to why the USDOC's final duty assessments were somehow inconsistent with the Anti-Dumping Agreement.

234. The United States further submits that the panel report in *US – Shrimp I (Viet Nam)*, on which Viet Nam relies in part, misinterpreted Article 6.8, because this provision cannot apply when the USDOC did not make a finding based on facts available.²⁹⁵ In *US – Shrimp I (Viet*

Reviews, 75 Fed. Reg. 12,726 (March 10, 2010) and accompanying Issues and Decision Memorandum, p. 40 (Exhibit VN-06-04).

²⁹² *Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 75 Fed. Reg. 12,726, 12,728 (March 10, 2010) and accompanying Issues and Decision Memorandum (*Final Results for Fifth AR*) (Exhibit VN-06-4).

²⁹³ *Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15,941, 15,943 (March 22, 2011) and accompanying Issues and Decision Memorandum (*Final Results for Sixth AR*) (Exhibit VN-07-4) (noting that the Viet Nam-government entity ultimately was not under review).

²⁹⁴ See Viet Nam first written submission, paras. 203-204.

²⁹⁵ Article 6.8 states that when “an interested party refuses access to, or otherwise does not provide, necessary information ... determinations ... may be made on the basis of the facts available.” Anti-Dumping Agreement, Art.

Nam), the panel found that the USDOC applied facts available in the administrative review at issue when the Viet Nam-government entity received the same rate. The panel, after acknowledging that it was taking a “less formulaistic” approach to interpreting the USDOC’s actions, found that the applied rate was inconsistent with Article 6.8.²⁹⁶ The panel reasoned that because the rate applied in the review was the same rate previously applied to the entity, which originally was determined on the basis of facts available, the rate as applied in the review was “a facts available rate.”²⁹⁷

235. The panel’s reasoning in *US – Shrimp I (Viet Nam)* is flawed because, like the fifth and sixth administrative reviews at issue here, the USDOC made no finding on the basis of facts available in the review at issue in that dispute. Just as with the fifth and sixth administrative reviews here, and the seventh administrative review in which the USDOC applied to the Viet Nam-government entity the only rate it ever received, the Viet Nam-government entity was not subject of a review by the USDOC. Indeed, the panel in *US – Shrimp I (Viet Nam)* conceded that its finding was based, in part, on its belief that, “although there was no formal application of facts available in the ... review,” the USDOC applied a rate that “had been determined on the basis of facts available.”²⁹⁸ This was not true, nor is it true with respect to the fifth, sixth, and seventh administrative reviews at issue in this dispute. Here, as in the review at issue in *US – Shrimp I (Viet Nam)*, the USDOC did not request or receive any information from the Viet Nam government-entity. The USDOC, therefore, did not based its determinations during these reviews on the application of any facts available; the USDOC’s determinations were solely based on an application of the only rate the Viet Nam-government entity ever received.

236. Furthermore, Article 6.8 of the Anti-Dumping Agreement allows an investigating authority to resort to facts available if “any interested party” does not respond to a request for “necessary information” or otherwise significantly impedes the proceeding. Annex II also provides that the investigating authority must notify the interested parties of the specific information required. These provisions do not specify that facts available may be applied only to those parties that were issued and failed to respond to a dumping questionnaire. The USDOC thus may appropriately find that a failure to respond to an initial request for information may result in the application of facts available. The application of facts available in such an instance is permissible so long as the investigating authority had notified the interested parties of the information required, and specified in detail the information required.²⁹⁹ Although not at issue in this dispute, in the underlying investigation,³⁰⁰ the USDOC determined that exporters that were part of the Viet Nam-government entity had been notified of an initial request for quantity and value information and failed to respond to that request. The USDOC also determined that the

6.8. As such, an interested party must be subject to investigation or review before an investigating authority may make a determination on the basis of the facts available.

²⁹⁶ *US – Shrimp I (Viet Nam)*, paras. 7.278-7.279.

²⁹⁷ *US – Shrimp I (Viet Nam)*, paras. 7.278-7.279.

²⁹⁸ *US – Shrimp I (Viet Nam)*, para. 7.279.

²⁹⁹ *China – Broiler Products*, para. 7.306 fn. 501; *US – Shrimp (Viet Nam) I*, para. 7.263.

³⁰⁰ Viet Nam does not challenge the USDOC’s determination in the investigation to assign a rate based on facts available to the Viet Nam-government entity.

Viet Nam-government entity had been notified of the initial questionnaire and failed to respond to that questionnaire and the USDOC's request for information.³⁰¹ As a result, the USDOC determined that the Viet Nam-government entity had failed to respond to a request for necessary information and had significantly impeded the progress of the proceeding. In the seventh administrative review, the Viet Nam-government entity was assigned the only rate assigned to it since the initial investigation, which is the only rate it has ever received under this anti-dumping duty order. Viet Nam has not established, as discussed above, that the rate applied to the Viet Nam-government entity in the seventh administrative review, which is the only rate it ever received, is inconsistent with Article 6.8 and Annex II.

237. In sum, when examination has been properly limited to fewer than all exporters, it is not inconsistent with the Anti-Dumping Agreement to apply a rate to unexamined exporters that is the only rate ever determined for those exporters. Viet Nam's claims to the contrary must fail. For the above reasons, Viet Nam has not established a *prima facie* case for an "as such" inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement given that it has not brought forward evidence that what it describes as "practice" is a measure. Viet Nam also has not established that the USDOC's determinations in the challenged proceedings were inconsistent with Article 6.8 and Annex II are unfounded.

D. The Anti-Dumping Duty Rate Published for the Viet Nam-Government Entity in the Challenged Determinations is Not Inconsistent with Article 9.4 of the Anti-Dumping Agreement

238. Viet Nam argues that the USDOC's assignment of a margin of dumping based on facts available to the Viet Nam-government entity in the challenged determinations was inconsistent with Article 9.4 of the Anti-Dumping Agreement.³⁰² According to Viet Nam, Article 9.4 required the USDOC to assign to the Viet Nam-government entity the "all others" rate – the weighted-average margin for the two firms that received individual rates, excluding rates that are *de minimis* or based on facts available.³⁰³ As noted above with respect to its Article 6.8 and Annex II claims, Viet Nam's analysis ignores key facts in the proceedings at issue that are fatal to its claims.

239. In both the fifth and sixth administrative reviews, the Viet Nam-government entity was not subject to review, nor assigned a rate in either review, in either the fifth or sixth administrative reviews because again, as explained above, the USDOC granted all companies subject to the review separate rate status.³⁰⁴ Without establishing that the Viet Nam-government

³⁰¹ *Notice of Final Determination of Sales at Less Than Fair Value*, 68 Fed. Reg. 37,116 (June 23, 2003) (Exhibit VN-05-02). The USDOC published an amended final determination addressing certain ministerial errors in its final determination on July 24, 2003. *Notice of Amended Final Determination of Sales at Less Than Fair Value*, 68 Fed. Reg. 43,713 (July 24, 2003) (Exhibit VN-05-3).

³⁰² See Viet Nam first written submission, paras. 164-184.

³⁰³ See Viet Nam first written submission, paras. 164-184.

³⁰⁴ *Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 75 Fed. Reg. 12,726, 12,728 (March 10, 2010) and accompanying Issues and Decision Memorandum, p. 40 (*Final Results for Fifth AR*) (Exhibit VN-06-4); *Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15,941, 15,943 (March 22, 2011) and accompanying Issues and Decision Memorandum (*Final*

entity was subject to review and received a rate in these reviews, Viet Nam has failed to meet its *prima facie* case. Viet Nam also has failed to demonstrate any such practice of applying an “NME-wide entity rate” inconsistent with Article 9.4 of the Anti-Dumping Agreement.

240. The USDOC did not assign a “country-wide” rate to the Viet Nam-government entity in the seventh administrative review because again, as explained above, the Viet Nam-government entity had been individually examined in this anti-dumping duty proceeding and received its own rate.³⁰⁵ This rate was assigned to the companies that had not claimed or established that they are free from government control, particularly in their export activities, and thus are properly considered to be part of the single government entity that the USDOC identified as an “exporter” or “producer” consistent with Article 6.10 of the Anti-Dumping Agreement.

241. Viet Nam ignores the fact that the Viet Nam-government entity received a rate based on facts available after being included in the initial investigation of this anti-dumping duty proceeding and failing to cooperate.³⁰⁶ Article 9.4 provides, in part, “[w]hen the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination”³⁰⁷ By its own terms, Article 9.4 applies just to the exporters and producers **“not included in the examination.”** Article 9.4 thus does not apply to the Viet Nam-government entity, because this entity had received its own rate when it had been included in the initial investigation of this proceeding.

242. Further, contrary to Viet Nam’s argument,³⁰⁸ Article 9.4 of the Anti-Dumping Agreement does not otherwise impose an obligation to calculate a “single anti-dumping duty.” Article 9.4 provides that any anti-dumping duty “shall not exceed” the weighted-average margin of dumping for the investigated exporters or producers and restricts the use of zero and *de minimis* margins and margins based on facts available in calculation of that ceiling. As long as the anti-dumping duty for a non-examined exporter or producer does not exceed the ceiling, and no zero or *de minimis* margins or margins based on facts available were used in determining the ceiling, there can be no violation of Article 9.4.

243. The Appellate Body’s reasoning in *US – Hot Rolled Steel* and *US – Zeroing (EC) (Article 21.5)* supports this interpretation of the obligations set forth in Article 9.4. In *US – Hot Rolled Steel*, the Appellate Body reasoned that “Article 9.4 simply identifies a maximum limit, or

Results for Sixth AR) (Exhibit VN-07-4) (noting that the Viet Nam-government entity ultimately was not under review).

³⁰⁵ *Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Viet Nam*, 68 Fed. Reg. 37,116 (Dep’t Commerce June 23, 2003), and accompanying Issues and Decision Memo, pp. 59-62 (Exhibit VN-05-02).

³⁰⁶ *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, 4,991-92 (Dep’t Commerce Jan. 31, 2003) (Exhibit USA-6).

³⁰⁷ Anti-Dumping Agreement, Art. 9.4.

³⁰⁸ Viet Nam first written submission, paras. 168-169.

ceiling, which authorities ‘shall not exceed’ in establishing an ‘all others’ rate.”³⁰⁹ The Appellate Body also noted specific restrictions on how such ceiling should be determined, namely the restrictions on using zero, *de minimis* and facts available margins.³¹⁰ The Appellate Body did not interpret Article 9.4 to contain an additional “sub-ceiling” requirement, which is essentially what Viet Nam advocates here.

244. In *US – Zeroing (EC) (Article 21.5)*, the Appellate Body similarly noted that Article 9.4 contains two obligations that restrict the discretion of investigating authorities:

First, Article 9.4 establishes that, in cases where the investigating authorities have limited their examination to a sample of selected exporters or producers, any anti-dumping duty applied to exporters that were not individually investigated ‘shall not exceed’ the weighted average margin of dumping established for exporters that have been individually examined. Secondly, Article 9.4 directs investigating authorities to disregard, ‘for purposes of this paragraph,’ any zero or *de minimis* margins of dumping, and margins of dumping established on the basis of facts available pursuant to Article 6.8.³¹¹

Therefore, according to the Appellate Body, the obligations set out in Article 9.4 do not envision, a Viet Nam suggests,³¹² the calculation of only a single anti-dumping duty for all exporters and producers not individually examined.

245. Moreover, Article 9.4 does not use the term “a single anti-dumping duty,” but rather uses the terms “anti-dumping duty” and “anti-dumping duties.” Viet Nam acknowledges the use of the plural in paragraph (ii) of Article 9.4, but suggests that because paragraph (ii) discusses the prospective normal value, only Members operating prospective normal value systems have discretion to calculate multiple anti-dumping duties.³¹³ To the contrary, the Anti-Dumping Agreement does not discriminate between Members operating different systems of duty assessment. In addition, the sentence that contains the term “any anti-dumping duty” – which Viet Nam erroneously interprets as requiring a single rate – imposes a general obligation on all WTO members, including Members that operate prospective normal value systems. Accordingly, the use of the term “any anti-dumping duty” in Article 9.4 does not require that a “single” rate be determined under Article 9.4. As the Appellate Body explained, “Article 9.4 simply identifies a maximum limit, or ceiling, which authorities ‘shall not exceed’ in establishing an ‘all others’ rate.”³¹⁴

246. Finally, Article 9.4 only applies when authorities limited their examination in accordance with the second sentence of Article 9.4. Neither the government of Viet Nam, nor any company that is part of the Viet Nam-government entity, asked to review the entity in the fifth, sixth, or

³⁰⁹ See *US – Hot Rolled Steel (AB)*, para. 116.

³¹⁰ See *US – Hot Rolled Steel (AB)*, para. 449.

³¹¹ See *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, paras. 449 and 451-453.

³¹² Viet Nam first written submission, para. 169.

³¹³ See Viet Nam first written submission, para. 171.

³¹⁴ See *US – Hot Rolled Steel (AB)*, para. 116.

seventh administrative reviews to change the rate applied to the Viet Nam-government entity. Given the Viet Nam-government entity had been examined in the proceeding and received its own rate, Article 9.4 did not require the USDOC to subsequently replace the entity's existing rate with an average of rates of other exporters or producers when neither the government of Viet Nam, nor any company that is part of the Viet Nam-government entity, asked the USDOC to consider doing so.

247. Article 9.4 establishes a maximum limit or ceiling on the duties that may be imposed on exporters or producers not individually examined. It does not impose an obligation with respect to an exporter or producer, such as the Viet Nam-government entity, which had been individually examined in this proceeding, received its own rate, and did not request to be reviewed to change its rate in any of the challenged administrative reviews. Accordingly, the Panel should not interpret Article 9.4 as requiring the investigating authority to assign an average rate of cooperating exporters, which are not controlled by the Viet Nam government, to the Viet Nam-government entity, which had been investigated, failed to cooperate, and received its own rate consistent with Article 6.8 of the Anti-Dumping Agreement

IX. CONCLUSION

248. For the foregoing reasons, the United States respectfully requests that the Panel reject Viet Nam's claims.