

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

(DS536)

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

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<i>Argentina – Textiles and Apparel (AB)</i>	Panel Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R
<i>Chile – Price Band System (AB)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002
<i>Canada – Wheat Exports and Grain Imports (AB)</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004
<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 – IT Products</i>	Panel Reports, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010
<i>US – Anti-Dumping Methodologies (China) (AB)</i>	Appellate Body Report, <i>United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/AB/R, adopted 22 May 2017
<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 – Gambling (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005
<i>US – Oil Country Tubular Goods Sunset Reviews (AB)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
<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

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<i>US – Shrimp (Thailand) / US – Customs Bond Directive (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008
<i>US – Shrimp II (Viet Nam) (Panel)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from Viet Nam</i> , WT/DS429/R and Add. 1, adopted 22 April 2015
<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

TABLE OF EXHIBITS

Exhibit No.	Description
U.S. First Written Submission	
USA-1	Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002)
USA-2	19 U.S.C. § 1677(18)(C)
USA-3	Accession of Viet Nam, Report of the Working Party on the Accession of Viet Nam, WT/ACC/VNM/48 (27 Oct. 2006)
USA-4	<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 CFR § 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)
U.S. Opening Statement at the First Substantive Meeting of the Panel	
USA-10	Chapter 1, Department of Commerce Antidumping Manual, p. 1 (2009)
USA-11	19 CFR § 351.107(d)
USA-12	<i>Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews</i> , 74 Fed. Reg. 11,349 (March 17, 2009)

Exhibit No.	Description
USA-13	<i>Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review, and Intent To Revoke Order in Part</i> , 77 Fed. Reg. 56,180 (September 12, 2012)
USA-14	<i>Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results, and Final Results of No Shipments of the Antidumping Duty Review; 2016-2017</i> , 84 Fed. Reg. 18,007 (April, 29, 2019)
USA-15	Issues and Decisions for the Final Results of the 17 th Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea (2009-2010) (March 5, 2012)
U.S. Responses to the Panel’s First Set of Questions	
USA-16	USDOC Separate Rate Certification for Producers/Exporters from Viet Nam (Blank)
USA-17	Article 9(5), Council Regulation (EC) No 1225/2009, L 343/63
USA-18	19 CFR §§ 351.211, 351.212, and 351.213
USA-19	19 CFR § 351.303
USA-20	19 CFR § 351.221
USA-21	19 CFR § 351.302 (2010)
USA-22	Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results of the Eighth Administrative Review and Aligned New Shipper Reviews (March 13, 2013) (pp. 1, 48-49)
U.S. Second Written Submission	
USA-23	Letter to Ministry of Trade, The Socialist Republic of Vietnam, Request for Information, Section A (General Information) (Sept. 16, 2002)
USA-24	Letter to Ministry of Trade, The Socialist Republic of Vietnam, Request for Information, Sections C, D, & E (Sales to the United States, Factors of Production and Cost of Further Manufacturing Performed in the United States) (Sept. 23, 2002)
USA-25	Section 123 of the Uruguay Round Agreements Act, 19 U.S.C. § 3533

I. INTRODUCTION

1. In previous submissions, the United States has explained why each of Viet Nam's claims must fail. In this second written submission, the United States will focus on arguments made by Viet Nam in response to the United States' preliminary ruling request, in its oral statement at the first substantive meeting the parties, and in its response to Panel Questions.
2. Section II explains that Viet Nam's arguments continue to ignore the correct standard of review and fundamentally misunderstand the Panel's role in interpreting the Anti-Dumping Agreement.
3. Section III explains why Viet Nam's opposition to the United States' preliminary ruling request lacks merit. Nothing in Viet Nam's submissions can, or did, correct Viet Nam's failure to comply with the consultation requirements in Article 4 of the DSU or the requirements for panel requests in Article 6 of the DSU.
4. Section IV demonstrate that at the late stage of these proceedings, Viet Nam still has not established a "differential pricing methodology" measure that can be challenged as such. Having failed to establish a *prima facie* case in its submissions up through the first substantive meeting, Viet Nam may no longer present new arguments, and its claim must be rejected.
5. Section V explains that Viet Nam's as such challenge to the "simple zeroing" measure, which Viet Nam admits no longer exists, lacks merit.
6. Section VI will explain the various reasons why Viet Nam's revocation claims are unavailing. This section shows that Viet Nam remains confused about the relationship between zeroing and its revocation claims, that Article 11.2 does not obligate Members to terminate an anti-dumping duty order with respect to individual companies, and that Viet Nam's revocation claims also rest on other misunderstandings concerning Article 11. In particular, Section VI explains that, contrary to what Viet Nam argues, Article 11's absence of language on filing deadlines for revocation requests leaves the setting of such deadlines to the discretion of the investigating authority. Section VI also explains that, contrary to what Viet Nam argues, the fact that the sixth review had not concluded by the deadline for requesting revocation with the seventh review in no way precluded Vinh Hoan from meeting the deadline, and that considering Vinh Hoan's egregiously untimely revocation request would have caused significant prejudice to the USDOC and other participants in the proceeding.
7. Finally, Section VII explains that it was entirely appropriate for the USDOC to consider all nominally distinct Vietnamese entities as part of the Viet Nam-government entity. Section VII also continues to demonstrate that the USDOC was not required to examine, or seek information from, the Viet Nam-government entity, nor was it required to determine anew the entity's anti-dumping duty rate, because no one asked the USDOC to do so.

II. STANDARD OF REVIEW

8. Viet Nam acknowledged during the first meeting of the Panel with the Parties that Article 17.6 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement") provides the relevant standards of review in this

proceeding.¹ However, Viet Nam’s arguments ignore this standard and fundamentally misunderstand the Panel’s role in interpreting the Anti-Dumping Agreement.

9. Article 17.6 of the Anti-Dumping Agreement explains first 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.

10. As this is an anti-dumping matter, the Panel’s task with respect to the facts here is accordingly not to assess whether it would have made the same factual determinations as the USDOC. Rather, the Panel may consider only whether the USDOC’s “establishment of the facts was proper and the evaluation was unbiased and objective.”

11. With respect to interpretation of the Anti-Dumping Agreement, Article 17.6 further provides that:

- (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.

12. Therefore, in situations where provisions of the agreement admit of more than one permissible interpretation, the Panel may not adopt the interpretation it considers most plausible or best. Rather, if the Panel finds that the U.S. measures are consistent with a permissible interpretation of the relevant provisions, then the panel must find the measures to be in conformity with U.S. WTO obligations.

13. As the United States has explained in its past submissions and explains further below, the interpretations of the Anti-Dumping Agreement on which the USDOC’s measures rest are in accordance with customary rules of interpretation of public international law.² Under the terms of Article 17.6, it is abundantly clear that these interpretations cannot form a basis for a finding of non-conformity with the Anti-Dumping Agreement.

14. Viet Nam, by contrast, has astonishingly criticized the United States for contending that the only disciplines imposed by the Anti-Dumping Agreement are those actually set forth in the

¹ Viet Nam Opening Statement at the First Panel Meeting, paras. 12-14.

² See DSU, Art. 3.2.

Anti-Dumping Agreement.³ Viet Nam’s criticism displays a misunderstanding not just of the standard of review but of the fundamental nature of the Anti-Dumping Agreement. Moreover, the criticism betrays the fact that Viet Nam’s claims are based on purported disciplines that do not actually exist in the text of the Anti-Dumping Agreement.

15. The Anti-Dumping Agreement means what it says, not more, regardless of whether additional disciplines might be consistent with the views of some Members about the Agreement’s object and purpose.⁴ Indeed, the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) is clear that “the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.”⁵ Where Members did not agree to an obligation governing an aspect of anti-dumping proceedings, the investigating authority is free under the Anti-Dumping Agreement to handle the issue in the manner that it considers appropriate.

16. While it is the case in all WTO dispute settlement proceedings that a panel may not invent new disciplines by extrapolation or analogy, this is especially clear with respect to claims under the Anti-Dumping Agreement due to Article 17.6. Under that Article, the Panel must defer to permissible interpretations of the Anti-Dumping Agreement on which the responding Member’s measures are based. It is clearly permissible to base measures on the understanding that the Anti-Dumping Agreement disciplines an investigating authority only in the manners spelled out in the Agreement. Article 17.6 thus reinforces the invalidity of Viet Nam’s attempts here to find breaches based on purported disciplines that do not appear in the Agreement.

III. THE PANEL SHOULD ISSUE A PRELIMINARY RULING THAT THE MEASURES AND CLAIMS ADDRESSED IN THE UNITED STATES’ PRELIMINARY RULING REQUEST FALL OUTSIDE THE PANEL’S TERMS OF REFERENCE

17. The United States’ preliminary ruling request asks that the Panel reject claims of Viet Nam that fall within the following categories: (i) claims made in the panel request that were not subject to consultations; (ii) claims made in the panel request that do not meet the requirements of Article 6.2 of the DSU, and; (iii) claims included in Viet Nam’s first written submission that were not raised in the panel request at all. Viet Nam has raised various arguments in response to the United States’ preliminary ruling request. As discussed below, these arguments are unpersuasive.

18. This section explains that Viet Nam, in its panel request, improperly sought to expand the scope of the dispute by raising simple zeroing, model zeroing, and a U.S. regulation relating to zeroing – measures that were not included in Viet Nam’s consultations request. This section further explains that, even apart from the deficiencies in the request for consultations, Viet Nam’s Panel request did not properly present claims with respect to simple zeroing,” “model zeroing,” the “original U.S. practice of zeroing” or “differential pricing.” This section also highlights that, in the subsequent proceedings before this Panel, Viet Nam likewise failed to

³ Viet Nam Opening Statement at the First Panel Meeting, para. 15.

⁴ See *Vienna Convention on the Law of Treaties*, Art. 31.1.

⁵ DSU, Art. 19.2.

present a “differential pricing” claim in the manner required by the DSU and this Panel’s Working Procedures. Although the United States does not elaborate on this aspect of its preliminary ruling request in this section, the United States continues to consider a preliminary ruling request necessary with respect to Viet Nam’s revocation-related claims, as outlined in the first written submission of the United States.

A. Viet Nam’s As Such Claims Regarding “Simple Zeroing,” “Model Zeroing,” and 19 C.F.R. § 351.408 are Outside the Panel’s Terms of Reference Because these Measures Were Not Included in the Consultations Request

19. As explained in the U.S. first written submission, with respect to its zeroing as such claims, Viet Nam sought to consult on “[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”⁶ Thus, with respect to the zeroing as such claim, the scope of Viet Nam’s consultation request was expressly limited to use of the “so-called differential pricing methodology” in original investigations and reviews.

20. Viet Nam’s response to the U.S. preliminary ruling request focuses in large part on distinguishing the pleading requirements found in Articles 4 and 6.2 of the DSU. But the issue the United States has raised in its preliminary ruling request is not the level of detail required in panel requests versus consultation requests. The issue is whether Viet Nam’s panel request expanded the scope of these proceedings to include additional matters not subject to consultations, and it has.

21. As the Appellate Body observed in *Brazil – Aircraft*, “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.”⁷ Viet Nam, as the complainant, is free to pursue its claim as it sees fit, provided the claim meets the requirements of Articles 4 and 6 of the DSU. It is evident, however, from the consultation request that Viet Nam chose to raise as an as such matter only the “so-called differential pricing methodology.” This choice likely reflects the fact, as the United States has explained, that the United States ended the use of simple zeroing and model zeroing over five years ago. In any event, under the DSU, Viet Nam may not expand the scope of the dispute beyond the matters covered in the request for consultations.

22. For these reasons, Viet Nam’s as such claims regarding the zeroing methodology used in fifth, sixth, and seventh administrative reviews, targeted dumping,⁸ and 19 C.F.R. 351.408 are outside the Panel’s terms of reference.

⁶ Viet Nam Request for Consultations (Exhibit VN-03) (bold added).

⁷ *Brazil – Aircraft (AB)*, para. 131.

⁸ Viet Nam admits in its response to Panel Question 2 that it considers “targeted dumping” to be distinct from the “so-called differential pricing methodology.” See Viet Nam’s Responses to the Panel’s First Set of Questions, para. 9.

B. Claims Regarding “Simple Zeroing,” “Model Zeroing,” and “Differential Pricing” are Outside the Panel’s Terms of Reference Because They Were Not Identified as Measures at Issue in the Panel Request

23. As discussed above, the only zeroing as such matter addressed in the request for consultations was zeroing in the context of “differential pricing.” This is fatal to Viet Nam’s as such claims regarding “simple zeroing,” “model zeroing,” and even, as Viet Nam puts it, the “original U.S. practice of zeroing.”

24. We now turn to the discussion that Viet Nam’s “differential pricing claim” is outside the Panel’s terms of reference. The United States demonstrated in its first written submission that Viet Nam’s “differential pricing” claim was outside the Panel’s terms of reference because the panel request failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in accordance with Article 6.2 of the DSU.⁹

25. In its response to the United States’ preliminary ruling request, Viet Nam states:

It is impossible to believe that the United States misunderstood the inclusion of zeroing under the “differential pricing” rationale in the Request for Consultations, as it is clearly stated. Similarly it is obvious that the inclusion of the zeroing pursuant to differential pricing was a claim separate from and in addition to the claim that the zeroing used in the fifth, sixth and seventh reviews of Fish Fillets from Viet Nam was WTO- inconsistent.¹⁰

26. Viet Nam’s response misses the point entirely. First, as noted, the United States agrees that Viet Nam’s request for consultations covered only the so-called differential pricing methodology as such. This is the very reason that other alleged unwritten measures involving zeroing are outside the Panel’s terms of reference.

27. Second, as explained in the U.S. first written submission,¹¹ and again in the U.S. opening statement at the first substantive meeting of the parties,¹² Viet Nam’s panel request contained only a cursory reference to the so-called differential pricing methodology. That mention did not include reference to any covered agreement that could serve as the legal basis of the claim as required by Article 6.2 of the DSU. Further, the panel request did not include an indication that Viet Nam intended to advance any claim whatsoever regarding the purported methodology. For this reason, any claim regarding the so-called differential pricing methodology is outside the terms of reference of this dispute.

28. For the sake of completeness, however, and in light of the late-filed evidence submitted after the first substantive meeting of the Parties, the United States will discuss that at this stage in

⁹ U.S. First Written Submission, paras. 55-59.

¹⁰ Viet Nam’s Response to U.S. Preliminary Ruling Request, p. 23.

¹¹ U.S. First Written Submission, paras. 55-59.

¹² U.S. Opening Statement at the First Panel Meeting, paras. 5-6.

the proceedings, Viet Nam still has not established a measure it describes as the differential pricing methodology as having general and prospective application.

IV. VIET NAM STILL HAS NOT ESTABLISHED A “DIFFERENTIAL PRICING METHODOLOGY” MEASURE THAT CAN BE CHALLENGED AS SUCH.

29. Viet Nam’s claim regarding a measure it describes as “differential pricing” is not coherent and, at times, simply contradictory. While Viet Nam appears to accept that “as such claims are of general and prospective application,”¹³ Viet Nam also appears to take the position that it should be permitted to prevail on an as such challenge to the so-called differential pricing methodology without having first established the existence of a measure that indeed does have general and prospective application.

30. The Appellate Body observed in *US – Oil Country Tubular Goods Sunset Reviews* that “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.”¹⁴ Here, Viet Nam has gone back and forth on whether differential pricing, or zeroing in context of differential pricing has occurred in any of reviews in the *Fish Fillets* order.

31. Viet Nam states in its first written submission that

starting in the ninth review, the USDOC began to use zeroing again through the application of differential pricing mechanism, which it has continued to use ever since, i.e. up to the preliminary results of the fourteenth review which were issued 4 September 2018.¹⁵

Yet in response to questions from the Panel, Viet Nam states,

because this proceeding does not involve any specific measure taken by the USDOC which involved differential pricing, it would not appear that the Panel can make a ruling on whether an ‘as applied’ violation occurred. It can only make a determination that differential pricing constitutes an ‘as such’ violation.¹⁶

32. In response to another question from the Panel, Viet Nam states

it can be discerned that USDOC applied differential pricing in the ninth, tenth, eleventh, and fourteenth reviews – it did not apply

¹³ Viet Nam First Written Submission, para. 72.

¹⁴ *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172 (bold added).

¹⁵ Viet Nam First Written Submission, para. 72.

¹⁶ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 15.

differential pricing in the twelfth and thirteenth review because it applied the Viet Nam-wide rate as total adverse facts available.¹⁷

33. Finally, when asked by the Panel for evidence of “zeroing in the context of the DPM” in the ninth through fourteenth administrative reviews of the *Fish Fillets* order, Viet Nam produces documentation related to the purported operation of the methodology, but no evidence of zeroing whatsoever. The source of these contradictions appears to be Viet Nam’s conflation of the two “differential pricing claims” it claims are distinct.¹⁸ More importantly, however, Viet Nam’s lack of supporting evidence (even if considering its late-filed evidence which we discuss below) supports the conclusion that Viet Nam has not, and cannot, establish a measure which it describes as the differential pricing methodology as having general and prospective application.

34. The section that follows will first discuss that Viet Nam has not advanced its “differential pricing claim” in the manner required by the Working Procedures of the Panel. Following this discussion, the remainder of this section will demonstrate that the evidence presented by Viet Nam in response to Panel Question 8 and Panel Question 2 do not establish the differential pricing as a measure having general and prospective application. The discussion will also address specifically that the evidence has not been submitted in accordance with the Working Procedures of the Panel.

A. Viet Nam’s Late-Filed Evidence Has Not Been Presented in the Manner Required by the Working Procedures of the Panel

35. The DSU, together with the working procedures of the panel set forth the framework for a Member to pursue a claim. A Member must first meet the consultations requirements found in Article 4 of the DSU and from there must submit a request for the establishment of a panel consistent with the requirements of Article 6.2 of the DSU.

36. Consistent with Article 12.1 of the DSU, the Panel’s Working Procedures are derived from Appendix 3 of the DSU. Subparagraph 4 of Appendix 3 of the DSU states that parties are to transmit written submissions “in which they present facts of the case and their arguments” **before** the first substantive meeting of the parties. Subparagraph 5 of the Appendix 3 requires states that **at the first substantive** meeting of the parties, that the panel shall ask the complaining party to “present its case.” Further, the Working Procedures of the Panel specifically require each party to submit a written submission in which it “presents the **facts of the case and its arguments,**” **before** the first substantive meeting of the parties.¹⁹

37. Throughout these proceedings, Viet Nam has gone about making its “differential pricing claim” in a piecemeal fashion, inconsistent with the requirements of the Panel’s Working Procedures. Viet Nam’s approach to pursuing any type of “differential pricing” claim has included:

¹⁷ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 31.

¹⁸ See Viet Nam’s Responses to the Panel’s First Set of Questions, para. 10.

¹⁹ Working Procedures of the Panel, para. 3.1.

- (1) a cursory reference to the purported methodology in its panel request without a reference to a legal basis for the claim;²⁰
- (2) in its first written submission, a recitation of Appellate Body conclusions regarding the purported methodology **without substantive argumentation or evidence, or a request that the Panel make any findings regarding the purported methodology**;²¹
- (3) at the first substantive meeting of the Parties in its opening statement, an acknowledgment that Viet Nam had not provided the requisite detail to establish its *prima facie* case with respect to such claim, a remarkable proclamation in its opening statement that Viet Nam intends to set out detailed arguments regarding the purported methodology for the first time in its **rebuttal** submission,²² and allegedly a brief preview of such argument;²³
- (4) in response to Panel questions, a statement that Viet Nam actually intends to pursue **two** separate claims regarding the purported methodology;²⁴ and
- (5) the submission of late-filed evidence, without sufficient explanation, in its written response to Panel questions.²⁵

And now, at the point in these proceedings where the Parties are to submit arguments in rebuttal, Viet Nam apparently intends to introduce new claims and new arguments.

38. Requirements in the DSU and the Panel’s Working Procedure for the orderly presentment of claims are not merely technical requirements. These requirements ensure procedural fairness is afforded to the responding Member. By not presenting its legal arguments, claims, or factual case prior to its second written submission, Viet Nam has deprived the United States of a meaningful opportunity to respond.

39. Viet Nam conceded in its opening statement that its first written submission “did not go into great detail regarding the WTO inconsistency of the new U.S. practice for applying zeroing, namely its differential pricing methodology.... Viet Nam will provide a much more exhaustive

²⁰ Panel Request of Viet Nam (Exhibit VN-04). This element of Viet Nam’s failure to follow the applicable rules for presenting claims is addressed in detail in the U.S. preliminary ruling request, and the prior section.

²¹ Viet Nam First Written Submission, paras. 95-99, 277

²² See Viet Nam Opening Statement at the First Panel Meeting, para. 23. (“In its First Written Submission, Viet Nam did not go into great detail regarding the WTO inconsistency of the new U.S. practice for applying zeroing, namely its differential pricing methodology... Viet Nam will provide a much more exhaustive treatment of this issue in its Second Written Submission to the Panel.”).

²³ See Viet Nam Opening Statement at the First Panel Meeting, paras. 24-30.

²⁴ See Viet Nam’s Responses to the Panel’s First Set of Questions, paras. 10-11.

²⁵ See *e.g.*, Viet Nam’s Responses to the Panel’s First Set of Questions, paras. 9, 31.

treatment of the issue in its Second Written Submission to the Panel.”²⁶ Having admittedly failed to make its affirmative case in its first written submission,²⁷ or even during the first panel meeting, that such a “practice” exists, Viet Nam cannot make its case at this late stage of the panel proceedings where the Panel’s Working Procedures require that parties present the facts of their case, their arguments, and evidence before the first substantive meeting of the parties.²⁸ Viet Nam’s new arguments and evidence with respect to the purported methodology is contrary to the Panel’s Working Procedures and basic principles of procedural fairness. For these reasons, the Panel should not consider Viet Nam’s late-filed evidence, arguments, or claims. Furthermore, the evidence does not establish a norm having general or prospective application.

B. The Evidence Submitted by Viet Nam in Response to Panel Question 8 Does Not Establish a Measure Having General and Prospective Application

40. As a preliminary matter, Viet Nam as the complaining party challenging an unwritten measure, bears the burden of establishing the existence of a measure having general and prospective application. The Appellate Body explained in *US – Zeroing (EC)* that “a panel must not lightly assume the existence of a ‘rule or norm’ constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document.”²⁹ The Appellate Body reasoned as follows:

In our view, when bringing a challenge against such a “rule or norm” that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged “rule or norm” is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the “rule or norm” may be challenged, as such. Particular rigour is required on the part of a panel to support a conclusion as to the existence of a “rule or norm” that is *not* expressed in the form of a written document. This evidence may include proof of the systematic application of the challenged “rule or norm”. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported “rule or norm” in order to conclude that such “rule or norm” can be challenged, as such.³⁰

²⁶ See Viet Nam Opening Statement at the First Panel Meeting, para. 23.

²⁷ See Viet Nam Opening Statement at the First Panel Meeting, para. 23.

²⁸ Working Procedures of the Panel, para. 3. See also Working Procedures of the Panel, para. 7 (“Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party.”).

²⁹ *US – Zeroing (EC) (AB)*, para. 196.

³⁰ *US – Zeroing (EC) (AB)*, para. 198 (italics in original).

41. Under the guise of a response to Panel Question 8, Viet Nam presents six new exhibits, purportedly related to comparison methodologies used by the USDOC in the ninth through fourteenth administrative reviews. These six exhibits contain at least 12 different documents. Before examining these documents, particular attention should be paid to the scope of the Panel’s question. Panel Question 8 states as follows:

Viet Nam contends at para. 60 of its first written submission that the USDOC starting in the ninth review began using the differential pricing methodology and zeroing in the differential pricing methodology, and it has continued to use it ever since, up to the preliminary determination of the fourteenth review under the Fish Fillets order.

Could you point to excerpts of the record in each of these reviews (ninth to fourteenth) **where it states that the USDOC used zeroing in the DPM?** When referring to each review, please provide the relevant Exhibits.³¹

42. As can be seen, the Panel’s question seeks an evidentiary demonstration of the USDOC’s alleged use of zeroing **in the context** of the so-called differential pricing methodology.

43. Viet Nam’s response to Panel Question 8 in its entirety states as follows:

Attached are Exhibits VN-37 to VN-42, which contain the Federal Register Notices relevant to the ninth to fourteenth reviews and the related Issues and Decision Memoranda and calculation memoranda accompanying each determination. Viet Nam highlights those sections which reference the application of zeroing. From the calculation memoranda, it can be discerned that USDOC applied differential pricing in the ninth, tenth, eleventh, and fourteenth reviews – it did not apply differential pricing in the twelfth and thirteenth review because it applied the Viet Nam-wide rate as total adverse facts available.³²

44. As an initial matter, the United States would remark that Viet Nam’s inability to point to **existing** evidence in the record of this case to answer the Panel’s question illustrates the insufficiency of Viet Nam’s first written submission and its failure to make even the most basic showing in support of its “claims” regarding the so-called differential pricing methodology.

³¹ Questions to the Parties After the First Substantive Meeting, Question 8 (bold added).

³² Viet Nam’s Responses to the Panel’s First Set of Questions, para. 31. The United States notes Viet Nam’s concession that the USDOC “**did not** apply differential pricing in the twelfth and thirteenth review” directly contradicts Viet Nam’s assertion in its first written submission that “the USDOC began to use zeroing again through the application of its differential pricing mechanism, which it has continued to use ever since, i.e. up to the preliminary results of the fourteenth review....”

45. Moreover, the new exhibits that Viet Nam has presented after the first substantive meeting do not, as Viet Nam asserts, provide any evidence of the use of zeroing in the context of so-called differential pricing methodology whatsoever. The evidence produced purportedly “in response” to Panel Question 8 in actuality is wholly unresponsive to the Panel’s question regarding proof of “zeroing in the DPM.”

46. Exhibit VN-37 contains the Preliminary Issues and Decision Memorandum (Preliminary IDM) for the ninth review, and an April 7, 2014 Federal Register notice (April 7 notice) announcing the results for that review.³³ The first page of the Preliminary IDM includes a handwritten notation by Viet Nam which states “differential pricing discussed at pages 19-21.” On the first page of the April 7 notice, which begins at the 31st page of the exhibit, Viet Nam includes a handwritten notation which states “differential pricing discussed in the preliminary results memo.” The Panel will recall that its question concerned not simply differential pricing, but specifically “zeroing in the DPM.” Outside of these handwritten notations, and Viet Nam’s brief response to Question 8, no further explanation of these documents is provided.

47. Notwithstanding the lack of explanation, the Preliminary IDM for the ninth review indicates that the USDOC “determined to use the A-A method,” *i.e.*, the average-to-average comparison method, for the two companies being reviewed, Hung Vuong Group (HVG) and Vinh Hoan.³⁴ Viet Nam has not pointed to any portion of Exhibit VN-37 evidencing the use of zeroing in context of the so-called differential pricing methodology for the ninth review.

48. Exhibit VN-38 similarly contains a Preliminary IDM for the tenth administrative review, a final results memorandum for HVG, and a January 16, 2015 Federal Register notice (January 15 notice) announcing the final results for that review.³⁵ Again, no further explanation of this 45-page exhibit is provided, beyond the handwritten notation of the page numbers where “differential pricing is discussed.” The first page of the January 15 notice, which begins at page 31 of the exhibit, includes a handwritten note that “differential pricing is only discussed in the final results memo.” Here again, the Preliminary IDM, final results memorandum for HVG, and the January 15 notice indicate that the USDOC determined to use the average-to-average comparison method in making its comparisons of export prices and normal value for the

³³ Preliminary Results for Ninth AR (Dep’t Commerce Sept. 3, 2013) and Final Results Notice (*Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2011-2012*, 79 Fed. Reg. 19,053 (Apr. 7, 2014) (Exhibit VN-37).

³⁴ Preliminary Results for Ninth AR (Dep’t of Commerce Sept. 3, 2013) and Final Results Notice (*Certain Frozen Fish Fillets from the Socialist Republic of Viet Nam: Final Results of Antidumping Duty Administrative Review and New Shipper Review*, 79 Fed. Reg. 19, 053 (April 7, 2014) (Exhibit VN-37). Golden Quality, a third company, was also reviewed in the ninth administrative review. However, the USDOC found that “because it had one sale under review, there are no comparisons to be made with regard to the differential pricing analysis.”

³⁵ Preliminary Results for the Tenth AR (Dep’t, Commerce July 2, 2014) and *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review; 2012- 2013*, 80 Fed. Reg. 2,394 (Jan. 16, 2015) and Final Results Analysis Memorandum (Dept’t Commerce Jan. 7, 2015) (Exhibit VN-38).

company under review, which was HVG.³⁶ Nothing in Exhibit VN-38 indicates the use of zeroing.

49. Exhibit VN-39 contains a March 29, 2016 Federal Register notice (March 29 notice) announcing the final results in the eleventh administrative review for two companies under review, HVG and Tashfishco, as well as two preliminary calculation memoranda for the eleventh review.³⁷ Once again, Viet Nam has provided no explanation of these three documents included in its late-filed exhibit. The first page of the March 29 notice includes a handwritten notation from Viet Nam which states “memorandum did not discuss differential pricing.” We assume Viet Nam’s reference to the “memorandum” in this context refers to the Preliminary IDM for the eleventh review which has not been submitted into evidence.

50. The preliminary calculation memorandum for An Giang Fisheries Import and Export Joint Stock Company and HVG, however, which begins at the ninth page of the exhibit, indicates that the USDOC determined to use the average-to-average comparison methodology for the company being reviewed, HVG.³⁸ The preliminary calculation memorandum for Thuan An Production Trading and Service Co., Ltd., which begins at the 32nd page of the exhibit, indicates that the USDOC determined to use the average-to-average comparison methodology for the company being reviewed, Tashfishco.³⁹ Nothing in Exhibit VN-39 indicates the use of zeroing.

51. With respect to the twelfth and thirteen administrative reviews, Viet Nam admitted in its response to Panel Question 8 that the USDOC “did not apply differential pricing in the twelfth and thirteen review because it applied the Viet Nam-wide rate as total adverse facts available.”⁴⁰ Viet Nam nevertheless submitted evidence concerning these reviews, even though such evidence clearly would not be responsive to the Panel Question 8. Exhibit VN-40, a March 27, 2017 Federal Register notice concerning the final results for the twelfth review,⁴¹ and Exhibit VN-41,

³⁶ Preliminary Results for Tenth AR (Dep’t Commerce July 2, 2014) and *Certain Frozen Fish Fillets of Antidumping Duty Administrative Review: 2012-2013*, 80 Fed. Reg. 2, 394 (Jan. 15, 2016) (Exhibit VN-38).

³⁷ Although Viet Nam’s table of exhibits refers only one “Preliminary Results Analysis Memorandum,” Exhibit VN-39 actually includes two preliminary calculation memoranda regarding the eleventh administrative review: *11th Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results Analysis Memorandum for An Giang Fisheries Import and Export Joint Stock Company and the Hung Vuong Group* (Aug. 31, 2015) which begins at the ninth page of the exhibit and; *11th Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results Analysis Memorandum for Thuan An Production Trading and Service Co., Ltd.* (Aug. 31, 2015) which begins at 32nd page of the exhibit.

³⁸ *11th Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results Analysis Memorandum for An Giang Fisheries Import and Export Joint Stock Company and the Hung Vuong Group* (Aug. 31, 2015) (Exhibit VN-39).

³⁹ *11th Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results Analysis Memorandum for Thuan An Production Trading and Service Co., Ltd.* (Aug. 31, 2015) (Exhibit VN-39).

⁴⁰ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 31.

⁴¹ *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review: 2014-2015*, 82 Fed. Reg. 15,181 (March 27, 2017) (Exhibit VN-40).

a March 23, 2018 Federal Register notice concerning the final results for the thirteenth review,⁴² contain no information regarding the so-called differential pricing methodology whatsoever. As Viet Nam admits, the USDOC applied adverse facts available.⁴³

52. Finally, Exhibit VN-42 contains an April 29, 2019 Federal Register notice (April 29 notice) which announced the final results of the fourteenth administrative review as it relates to two companies under review, HVG and NTSF, and a final issues and decision memorandum (Final IDM) for the fourteenth review.⁴⁴ The April 29 notice (at the third page of the exhibit) indicates that adverse facts available were applied to HVG.⁴⁵ The third page of the Final IDM (which begins at the sixth page of the exhibit) states that the average-to-average comparison method was applied to company NTSF.⁴⁶ Exhibit VN-42 contains no evidence of the use of zeroing in the context of the so-called differential pricing methodology.

53. In sum, the evidence contained at Exhibits VN-37 through VN-42 do not provide any information concerning the use of zeroing “in the DPM,” which was the information sought in Panel Question 8. Consequently, and as a procedural matter, the exhibits do not appear to have been submitted in accordance with the Working Procedures of the Panel which provide that “each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party.”⁴⁷

54. And as a substantive matter, the newly submitted evidence (Exhibits VN-37 through VN-42) fails to support Viet Nam’s claim of the systematic application of zeroing in the context of the so-called differential pricing methodology. Viet Nam even admits at paragraph 15 of its written response to Panel questions that “this proceeding does not involve any specific measure taken by the USDOC which involved differential pricing...”⁴⁸

55. Viet Nam’s inability to produce an example of a single occurrence of zeroing in the context of the so-called differential pricing methodology over the course of the dispute further

⁴² *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results, Final Results of no Shipments, and Partial Rescission of the Antidumping Duty Administrative Review*; 2015-2016, 83 Fed. Reg. 12,717 (March 23, 2018) (Exhibit VN-41).

⁴³ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 31.

⁴⁴ *Certain Frozen Fish fillets From the Socialist Republic of Vietnam: Final Results, and Final Results of No Shipments of the Antidumping Duty Administrative Review*; 2016-2017, 84 Fed. Reg. 18,007 (April 19, 2019) (Exhibit VN-42).

⁴⁵ *Certain Frozen Fish fillets From the Socialist Republic of Vietnam: Final Results, and Final Results of No Shipments of the Antidumping Duty Administrative Review*; 2016-2017, 84 Fed. Reg. 18,007 (April 19, 2019) (Exhibit VN-42).

⁴⁶ 14th Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results Analysis Memorandum for the NTSF Seafood Joint Stock Company (Exhibit VN-42).

⁴⁷ Working Procedures of the Panel, para. 5(1).

⁴⁸ Viet Nam’s Responses to the Panel’s first Set of Questions, para. 15.

shows that Viet Nam has failed to establish the existence of an unwritten measure involving zeroing in the context of a differential pricing approach.

C. The Evidence Submitted by Viet Nam in Response to Panel Question 2 Does Not Establish a Measure Having General and Prospective Application

56. Question 2 of the Panel’s first set of questions is directed to Viet Nam and asks as follows:

In page 4 of its panel request Viet Nam refers to “zeroing in the context of targeted dumping and differential pricing”. Does Viet Nam consider “targeted dumping” to be the same or distinct from “differential pricing”? Please explain

57. In response to Panel Question 2, Viet Nam has put before the Panel Exhibit VN-46, a May 9, 2014 Federal Register (May 9 notice) published by the USDOC in the U.S. Federal Register⁴⁹ requesting public comment on the differential pricing analysis.⁵⁰ Before discussing that this document also does not establish the existence of a measure having general and prospective application, the United States would first express its skepticism that the submission of this documentation was “necessary” to respond to the Panel’s question of whether “Viet Nam **consider[s]** ‘targeted dumping’ to be the same or distinct from ‘differential pricing.’”⁵¹ The United States also would note that Viet Nam has not provided any explanation of the May 9 notice.

58. Specific to this evidence, Viet Nam’s written response to the Panel’s question simply states that “the differential pricing methodology replaced the targeted dumping methodology and proved more reliable in creating circumstances in which USDOC could apply zeroing and is incorporated in USDOC’s regulations.”⁵² This statement contains no explanation of the documentation itself. Rather, it is a self-serving argument that, as we have demonstrated, is factually unsupported. In addition, Viet Nam has not identified a USDOC regulation incorporating the so-called differential pricing methodology.

59. The Appellate Body has found that a complainant cannot succeed in making a *prima facie* case by submitting evidence without explaining how its content is relevant to the claims before the panel. In *Canada – Wheat*, the Appellate Body noted that:

[I]t is incumbent upon a party to identify in its submissions the *relevance* of the provisions of legislation—the evidence—on which it relies to supports its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover,

⁴⁹ *Differential Pricing Analysis: Request for Comments*, 79 Fed. Reg. 26,720-23 (May 9, 2014) (Exhibit VN-36).

⁵⁰ See Viet Nam’s Responses to the Panel’s First Set of Questions, paras. 7-9.

⁵¹ Questions to the Parties After the First Substantive Meeting, Question 2.

⁵² Viet Nam’s Responses to the Panel’s First Set of Questions, para. 9.

on its own, what relevance the various provisions may or may not have for a party's legal position.⁵³

60. Furthermore, a panel may not make the case for a complaining party.⁵⁴ Because Viet Nam has provided no argumentation or analysis in connection with any of its late-filed evidence, the Panel should not consider the evidence further. However, the May 9 notice, whether considered alone or even in connection with the other evidence in the record, still fails to establish a measure having general and prospective application.

61. The May 9 notice explains the USDOC's desire in the future to "continue[] to seek to refine its approach with respect to the use of an alternative comparison method."⁵⁵ The USDOC states in the notice that it "is seeking comments to further develop and/or refine its differential pricing analysis."⁵⁶ The USDOC continues:

As the Department gains greater experience with addressing potentially hidden or masked dumping that can occur when the Department determines weighted-average dumping margins using the average-to-average comparison method, the Department expects to continue to develop its approach with respect to the use of an alternative comparison method. The Department is requesting comments on this analysis to facilitate that development as the Department expects to take account of all comments received, as appropriate. Further, in the context of ongoing and future proceedings, parties to the particular proceeding will have an opportunity to provide comments that are relevant to the possible use of an alternative comparison method in that proceeding.⁵⁷

62. These statements by the USDOC evidence that its approach was being developed and was not fixed and thus do not establish the existence of a measure having general and prospective application. Indeed, Viet Nam itself has identified instances within the *Fish Fillets* order where the "differential pricing methodology" was not applied.

⁵³ *Canada – Wheat Exports and Grain Imports (AB)*, para. 191 (emphasis added). See also *US – Gambling (AB)*, paras. 151-154.

⁵⁴ See *Japan – Agricultural Products II (AB)*, para. 129.

⁵⁵ *Differential Pricing Analysis: Request for Comments*, 79 Fed. Reg. 26,722 (Exhibit VN-36).

⁵⁶ *Differential Pricing Analysis: Request for Comments*, 79 Fed. Reg. 26,722 (Exhibit VN-36).

⁵⁷ *Differential Pricing Analysis: Request for Comments*, 79 Fed. Reg. 26,722 (Exhibit VN-36).

D. Viet Nam’s As Such Challenge to the Differential Pricing Methodology Fails Because it Has Not Established the Purported Methodology Results in a Breach of the Anti-Dumping Agreement

63. Viet Nam also has not established that the “differential pricing methodology” – however defined – causes a breach of Article 2.4.2 of the Anti-Dumping Agreement.

64. As the Appellate Body explained in *US – Oil Country Tubular Goods Sunset Reviews*, “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.”⁵⁸ The panel in *EC – IT Products* observed that, “[i]t flows from this that, in general, measures challenged ‘as such’ should have general and prospective application, and ‘necessarily’ result in a breach of WTO obligations.”⁵⁹ In other words, the complainant must demonstrate that the challenged measure always will result in an inconsistency with a covered agreement, and not merely that the measure might result in an inconsistency in certain circumstances.

65. In this dispute, for its as such challenge to succeed, Viet Nam must demonstrate that the “differential pricing methodology” necessarily will result in a breach of Article 2.4.2 of the Anti-Dumping Agreement. To make such a demonstration, Viet Nam must present to the Panel **evidence and legal argument** sufficient to show that every application of the “differential pricing methodology” necessarily results in an inconsistency with Article 2.4.2 of the Anti-Dumping Agreement. Viet Nam has not done so, and it cannot do so.

66. Regarding legal arguments, at this point in the dispute Viet Nam has not made substantive arguments regarding “differential pricing methodology’s” alleged inconsistency with the “pattern” or “explanation” clauses of Article 2.4.2, and has instead relied entirely on Appellate Body reports, which themselves concerned different facts and different evidence in other cases. Again, Viet Nam admitted its failure to make detailed arguments in its opening statements at the Panel meeting.⁶⁰

67. Regarding evidentiary support, Viet Nam also has not explained how the evidence it has presented demonstrates any inconsistency with the “pattern clause” or “explanation clause” of Article 2.4.2. Finally, Viet Nam has not even attempted to demonstrate that the “differential pricing methodology” necessarily results in a breach of Article 2.4.2. Simply put, Viet Nam has provided no basis for the Panel to conclude that a differential pricing analysis necessarily breaches Article 2.4.2 of the Anti-Dumping Agreement.

68. As explained in the U.S. first written submission, Viet Nam’s failure to present adequate evidence or arguments leaves the United States without factual or legal arguments that might warrant rebuttal. To the extent the Panel determines the differential pricing claims to be within its terms of reference, and that Viet Nam’s submission contains concrete arguments with respect

⁵⁸ *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.

⁵⁹ *EC – IT Products*, para. 7.154.

⁶⁰ See Viet Nam Opening Statement at the First Panel Meeting, para. 23.

to the unwritten measure, the United States would refer the Panel to Annex A attached to the U.S. first written submission for a complete rebuttal of such arguments.

V. VIET NAM’S ARGUMENT THAT A MEASURE THAT NO LONGER EXISTS – THE SO-CALLED “SIMPLE ZEROING” METHODOLOGY – MAY BE CHALLENGED AS SUCH LACKS MERIT

69. The so-called “simple zeroing” methodology to which Viet Nam complains of does not exist today as a measure of general and prospective application. As Viet Nam has admitted, and as Viet Nam’s evidence demonstrates, the USDOC changed its approach for calculating dumping margins for investigations (effective early 2007)⁶¹ and for administrative reviews (effective early 2012)⁶² in response to the DSB’s recommendations and rulings on this matter. The measure subject to the recommendations and rulings in prior disputes thus no longer exists.

70. Viet Nam appears to accept the premise that measures subject to an as such challenge must have general and prospective application⁶³ and also does not dispute that the United States modified its calculation methodology and grants offsets for non-dumped comparisons (*i.e.*, does calculations without the ‘zeroing’ methodology) in various types of proceedings. Further, Viet Nam has not identified any provision of U.S. law or regulation that requires the USDOC to use a so-called “simple zeroing” methodology. Nonetheless, Viet Nam argues that the Panel should still find that the so-called “simple zeroing” methodology exists as an “as such” measure because the United States did not retroactively apply its 2014 determination to grant offsets for non-dumped comparisons in the fifth, sixth, and seventh reviews of Vinh Hoan.⁶⁴ Viet Nam further argues, without basis, that zeroing could be, and has been re-imposed.⁶⁵

71. Viet Nam’s response to Panel Question 7 makes clear that its primary concern regarding “simple zeroing” is not the continued use of the practice, but rather the application of zeroing in the fifth, sixth, and seventh reviews.⁶⁶ To the extent that this is indeed Viet Nam’s concern, Viet Nam has already challenged simple zeroing on an as applied basis, and the United States has explained in its first written submission why the zeroing practice which was used prior to 2012 was WTO-consistent.⁶⁷ The Appellate Body has observed that “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

⁶¹ *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dec. 27, 2006) (Exhibit VN-33).

⁶² *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8,101 (Feb. 14, 2012) (Exhibit VN-34).

⁶³ Viet Nam First Written Submission, para. 72.

⁶⁴ Viet Nam’s Responses to the Panel’s First Set of Questions, paras. 28, 30.

⁶⁵ Viet Nam’s Responses to the Panel’s First Set of Questions, paras. 30.

⁶⁶ Viet Nam’s Responses to the Panel’s First Set of Questions, paras. 25-30.

⁶⁷ U.S. First Written Submission, paras. 95-127.

WTO obligations.”⁶⁸ As Viet Nam acknowledges the simple zeroing measure no longer exists, it necessarily follows that no future application of the measure can occur.

72. Viet Nam’s argument that the USDOC can simply re-impose the so-called “zeroing” methodology that it changed in response to the DSB’s recommendations and rulings is completely meritless.⁶⁹ As a legal matter, the argument proves too much. Members can always change their measures, and thus every Member hypothetically has infinite possible measures that may or may not be adopted in the future. The fact that measures hypothetically may change in the future does not support the proposition that a Member may challenge any hypothetical future measure. Indeed, Viet Nam’s argument is essentially that the DSB should issue advisory opinions – covering hypothetical future situations – at the whim of a Member bringing a dispute. This proposition has no support in the text of the DSU.

73. Furthermore, the facts involving the United States’ prior use of zeroing provides no support for Viet Nam’s position. The USDOC changed its approach for calculating dumping margins in both investigations and administrative reviews in accordance with U.S. law and, in particular, under the procedures outlined in section 123(g) of the Uruguay Round Agreements Act.⁷⁰ The USDOC changed its approach for calculating dumping margins following extensive consultations with appropriate congressional committees, relevant private sector advisory committees, and public comment regarding its modifications. Viet Nam has not provided a single example of the agency practice, which was changed pursuant to section 123(g), being subsequently re-imposed. Furthermore, Viet Nam has not evidenced even a single instance of zeroing in the context of the so-called differential pricing methodology.

74. The situation before this Panel differs significantly from the matters before the Appellate Body in *US – Upland Cotton* and the panel in *EC - IT Products*, which was discussed in a third party submission.⁷¹ The issue before the Appellate Body in *Upland Cotton* was whether an expired measure could be subject to consultations under Article 4.2 of the DSU, and whether an expired measure could be considered a measure “at issue” under Article 6.2 of the DSU. Put another way, the issue was whether an expired measure could be considered to be within the Panel’s terms of reference and could thus be “considered” in the first place. This is not the issue here. Setting aside the U.S. Preliminary Ruling Request, the United States’ position is that the Panel’s consideration of the as such challenge to simple zeroing must begin, and end, with Viet Nam’s admission that the simple zeroing measure no longer exists.

75. The present case also differs from the issue before the panel in *EC – IT Products*. First, *EC- IT products* concerned an as such challenge to a measure that existed at the time the panel was established and where the legal status of the measure was unclear and in dispute. In determining to issue findings concerning the measures, the panel noted the complainant’s “belief that a finding from the panel on the consistency of the measures ... would aid in the positive

⁶⁸ *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172 (bold added).

⁶⁹ Viet Nam’s Responses to the Panel’s First Set of Questions, paras. 28, 30.

⁷⁰ Section 123 of the Uruguay Round Agreements Act, 19 U.S.C. § 3533 (Exhibit USA-25).

⁷¹ See Canada’s Responses to the Panel’s First of Questions to Third Parties, para. 10.

resolution of the dispute where the complainants claimed the measures continued to have lingering effects.”⁷²

76. Here, however, Viet Nam admits that the measure at issue was terminated five years prior to the establishment of the Panel. The United States would further draw the Panel’s attention to Viet Nam’s statement in its response to Panel questions that “whether the zeroing practice at issue in this proceeding is “as applied” or “as such” WTO inconsistent is irrelevant to the conclusions rendered by the Panel in this proceeding.”⁷³ Furthermore, if the Panel were to reject Viet Nam’s claims regarding revocation, resolution of the simple zeroing as such claim would not serve to resolve the dispute in any event.

77. In sum, the Panel should reject Viet Nam’s as such claim regarding simple zeroing, a claim Viet Nam concedes is “irrelevant,” because no such measure having general and prospective application exists.

VI. 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

A. Viet Nam Remains Confused about the Relationship Between Zeroing and Its Revocation Claims

78. Viet Nam’s Responses to the Panels’ First Set of Questions contain a lengthy discussion of the alleged relationship between zeroing and Viet Nam’s revocation claims. Though unclear, Viet Nam appears to be suggesting that the USDOC somehow breached Article 11 of the Anti-Dumping Agreement by applying zeroing in the context of Vinh Hoan’s request for revocation in the seventh administrative review.

79. Viet Nam acknowledges,⁷⁴ however, that the USDOC did not deny Vinh Hoan’s revocation request on the basis of a finding of dumping by Vinh Hoan. Indeed, at the time that the USDOC denied the revocation request, it had found Vinh Hoan not to have engaged in dumping in the fifth, sixth, and seventh administrative reviews⁷⁵ – although following a successful judicial challenge to the USDOC’s findings in the sixth review, the USDOC

⁷² See *EC – IT Products*, para. 7.166.

⁷³ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 27.

⁷⁴ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 41 (explaining that Viet Nam’s First Written Submission “notes that ‘USDOC’s decisions denying Vinh Hoan’s request for revocation was based solely on its missing an arbitrary deadline’”).

⁷⁵ *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); *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); *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 76 Fed. Reg. 55,872, 55,879 (Sept. 9, 2011) (Exhibit VN-08-3).

reassessed and found that Vinh Hoan engaged in dumping during the sixth review.⁷⁶ The USDOC’s denial of Vinh Hoan’s revocation request was based entirely on the fact that the request was filed many months after the filing deadline.⁷⁷ The manner in which the USDOC made calculations for the fifth, sixth, or seventh reviews simply had no bearing on denial of the request.

80. The USDOC could not have breached Article 11 of the Anti-Dumping Agreement by virtue of having calculated or not calculated dumping margins in any particular manner during various administrative reviews because Vinh Hoan’s dumping margins during administrative reviews were not the basis for the USDOC’s rejection of Vinh Hoan’s revocation request. As Viet Nam acknowledges,⁷⁸ the revocation request was denied for a single, straightforward reason: because Vinh Hoan did not make the request until long after the relevant deadline for doing so.

81. If Viet Nam is asking the Panel, in the event the Panel finds Vinh Hoan’s untimely revocation request should have been accepted, to proceed to find that Vinh Hoan was entitled to revocation, such a request would be wholly improper. As Vinh Hoan’s request was denied on the grounds of untimeliness, the USDOC has not evaluated the request based on the applicable substantive criteria. Important questions bearing on Vinh Hoan’s eligibility would need to be decided by the USDOC in the first instance – particularly given that eligibility for revocation involves more than a mere absence of past dumping.

82. Of course, as the United States has explained in other submissions and as it further explains elsewhere in this submission, neither the USDOC’s enforcement of its filing deadline for revocation requests with respect to Vinh Hoan nor the USDOC’s dumping calculation methodology is inconsistent with any WTO obligations.

B. Article 11.2 Does Not Obligate Members to Terminate an Anti-Dumping Duty Order With Respect to Individual Companies

83. The United States explained in detail in its First Written Submission and its opening statement at the first meeting of the parties with the Panel why Article 11.2 in no way obligates Members to terminate an anti-dumping duty order with respect to an individual company. The United States would here note a few additional points of relevance.

84. First, as noted above, Article 17.6(ii) requires a panel to find an investigating authority’s measure to be in conformity with the Anti-Dumping Agreement if the measure rests on a

⁷⁶ *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).

⁷⁷ *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 76 Fed. Reg. 55872, 55,873 (Sept. 9, 2011) (Exhibit VN-08-3).

⁷⁸ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 41 (explaining that Viet Nam’s First Written Submission “notes that ‘USDOC’s decisions denying Vinh Hoan’s request for revocation was based solely on its missing an arbitrary deadline’”).

permissible interpretation of that agreement. Accordingly, while the United States does not consider that the WTO-consistency of the denial of Vinh Hoan’s revocation request hinges on whether Article 11.2 imposes such an obligation, if the Panel were to consider otherwise, then the Panel should uphold the denial of revocation unless the absence of an obligation to terminate with respect to individual companies is an impermissible interpretation. As the United States has explained,⁷⁹ an understanding of Article 11.2 as applying only with respect to revocation of the order as a whole is certainly a permissible interpretation in accordance with customary rules of interpretation of public international law.

85. Second, Viet Nam relies on language in Article 11.2 stating that “any interested party” can submit positive information substantiating the need for review.⁸⁰ But this in no way indicates that Article 11.2 requires company-specific review. In fact, it does not speak in any way to the question of whether company-specific reviews must be offered. Rather, it indicates who can *request* whatever kind of review is provided for in Article 11.2. A request can of course seek revocation as to more than just the requesting entity. Understood in light of the textual indicia, discussed in prior U.S. submissions, that Article 11.2 refers to the order as a whole, it is clear that the language about who can *request* revocation speaks only to the need to let any interested party seek review of whether the order as a whole remains necessary.

86. Third, nothing about Article 11.1 suggests that Article 11.2 requires revocation with respect to specific companies. Rather, Article 11.1, like Articles 11.2 and 11.3, discusses the investigating authority’s obligations with respect to the “duty.” The Appellate Body found in *US – Corrosion-Resistant Steel Sunset Review* that “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.⁸¹ The term “duty” is most logically interpreted as having the same meaning in Articles 11.1, 11.2 and 11.3, especially given the fact that Articles 11.2 and 11.3 provide the mechanisms to ensure that, per Article 11.1, an anti-dumping duty remains in place only as long as necessary to counteract injurious dumping. In and of itself, the understanding of “duty” that has already been identified in the Article 11.3 context demonstrates that the “duty” to which Article 11.2 obligations apply is the duty applicable to the relevant products – not to a specific company. Moreover, it shows that the “duty” to which Article 11.1 refers is likewise the duty order as a whole and not company-specific margins. With Article 11.1 referring to the importance of preventing unnecessary continuation of duty orders, not of company-specific margins, Article 11.1 does not have an object and purpose that would be served by reading Article 11.2 – contrary

⁷⁹ U.S. First Written Submission, paras 133-149; U.S. Opening Statement at the First Substantive Meeting of the Panel, paras. 26-29; U.S. Closing Statement at the First Substantive Meeting of the Panel, para. 15.

⁸⁰ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 49.

⁸¹ 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 paras. 154-155 (“The 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.”).

to its language – to require company-specific revocation. Viet Nam’s argument to the contrary⁸² rests on ignoring the actual language, not just of Article 11.2, but also of Article 11.1.

87. Fourth, contrary to what Viet Nam argues,⁸³ nothing about Article 9.1 of the Anti-Dumping Agreement suggests that the word “extent” in Article 11.1 must refer to providing company-specific revocation. Article 9.1 provides that “it is desirable” for an authority to impose duties less than the margin of dumping. Article 11.1’s applicability with respect to products and not companies does not make the preference expressed in Article 9.1 mandatory. Rather, Article 11.1 sets out the principle that orders should not be maintained longer than necessary. Adoption of Viet Nam’s proposed interpretation is in no way needed to avoid creating a requirement that anti-dumping duties be less than the dumping margin.

88. Finally, nothing about the other Anti-Dumping Agreement provisions⁸⁴ raised by Viet Nam in its answers to the Panel’s questions in any way suggests an Article 11 requirement to offer company-specific revocation. Indeed, it does not follow from the calculation of individual dumping margins for specific companies that revocation must be offered on such a basis. Likewise, contrary to what Viet Nam illogically asserts,⁸⁵ nothing about the way that injury is assessed is at all inconsistent with revocation occurring only with respect to orders and not individual companies. In its arguments about provisions of the Anti-Dumping Agreement outside of Article 11, Viet Nam makes unsupported observations about the practices of the USDOC or “investigating authorities,” infers from that certain interpretations of the other provisions, then illogically suggests that support for its interpretation of Article 11 can be inferred from its inferred interpretations of those other provisions.⁸⁶ As the United States has explained, however, the actual text of Article 11 and of the Anti-Dumping Agreement as a whole make clear that Article 11 in no way requires an investigating authority to offer revocation with respect to individual companies.

89. 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 anti-dumping duty on a product, not as it is applied to exports by individual companies. 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.⁸⁷ The Appellate Body rejected Japan’s argument that Article 11.3 imposed obligations on

⁸² Viet Nam’s Responses to the Panel’s First Set of Questions, para. 52.

⁸³ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 53.

⁸⁴ See Viet Nam’s Responses to the Panel’s First Set of Questions, paras. 55-57.

⁸⁵ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 57.

⁸⁶ See Viet Nam’s Responses to the Panel’s First Set of Questions, paras. 55-56.

⁸⁷ 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 paras. 154-155 (“The 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.”).

a company-specific basis in the context of a sunset review.⁸⁸ 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 anti-dumping duty remains in place only as long as necessary to counteract injurious dumping. Nothing in Articles 11.1 or 11.2 imposes an obligation to review and revoke a duty on a company-specific basis.

90. References to injury in Article 11, far from supporting Viet Nam’s interpretation, illustrate that Article 11 does *not* provide for company-specific revocation. 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**.”⁸⁹ 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.” In anti-dumping 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.⁹⁰ 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.⁹¹ Thus, “the duty” that may or may not be necessary to prevent continuation or recurrence of that injury is the duty in general – *i.e.*, anti-dumping duties on subject merchandise generally – and not a duty applicable to merchandise of a particular foreign producer.

91. Likewise, the context provided by Article 9 and Article 6 of the Anti-Dumping Agreement *confirms* that “the duty” in Article 11.2 refers to the anti-dumping duty on a product and not multiple duties imposed on a company-specific basis. 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 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.

⁸⁸ *US – Corrosion-Resistant Steel Sunset Review*, paras. 140, 155.

⁸⁹ Bold added.

⁹⁰ *See* Anti-Dumping Agreement, Art. 3.

⁹¹ *See* Anti-Dumping Agreement, Art. 3.3.

92. The actual language of the Anti-Dumping Agreement makes clear that Article 11.2 does not provide for company specific revocation. Rather, Article 11.2 speaks to reviews of the need for continued imposition of a duty on a dumped product.

C. Viet Nam’s Revocation Claims Rest on Misunderstandings Concerning Anti-Dumping Agreement Article 11

93. Viet Nam’s submissions and its statements at the first meeting of the Panel with the Parties demonstrate that its revocation claims rest on fundamental misunderstandings concerning Article 11. The United States has already addressed Viet Nam’s misconception that the Article requires the availability of company-specific revocation. Two additional misconceptions by Viet Nam warrant further elaboration. First, Viet Nam mistakenly believes that the absence of any Article 11 language on filing deadlines for revocation requests means that a limitation on investigating authorities’ use of deadlines can be invented by the Panel. Second, Viet Nam appears to be under the impression that Article 11.2 language allowing an investigating authority to demand that revocation requests be supported with positive information somehow requires respondents to present such evidence even when not required by the investigating authority, rendering unreasonable a deadline that would preclude the presentation of a particular piece of unsolicited information.

1. Article 11’s Absence of Language on Filing Deadlines Leaves the Setting of such Deadlines to the Discretion of the Investigating Authority

94. In the absence of language precluding investigating authorities from setting filing deadlines, investigating authorities are free 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.”⁹² Nothing in Anti-Dumping Agreement Article 11 limits that right with respect to revocation requests. Article 11.2 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.

95. Had the drafters of Article 11.2 sought to preclude investigating authorities’ ordinary ability under the Anti-Dumping Agreement to set deadlines, they would have said so. But Article 11.2 provides only that “[i]nterested parties shall have the right to request” revocation. It does not say that they “shall have the right to request” revocation “at any time.” The first sentence of Article 11.2 specifies the consequences of a properly submitted request. Particularly when read in light of the article as a whole, including the second sentence, it is clear that the first

⁹² *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 242.

sentence does not speak to whether an investigating authority can require the filing of revocation requests by a specified deadline.

96. In fact the text of Article 11.2 recognizes that an authority may impose limits on requests for revocation. It provides for consideration of revocation requests only if supported by positive information and made after a reasonable period of time, and only “where warranted”. The phrase “where warranted” explicitly contemplates that in some circumstances, initiation of a review may not be warranted even if a request has been made and supported by positive information and a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty. This could be, for instance, because recent dumping has made clear that continuation of the order is necessary to offset dumping, and thus no review is needed to ascertain the need for the order’s continuation. Likewise, in a retrospective system like that of the United States, it could be because the request was filed at a time that does not permit consideration in a procedurally orderly manner that respects the rights of other participants in the proceeding.

97. Viet Nam appears to acknowledge that Article 11 does not preclude the imposition of a deadline for filing a revocation request. At the first meeting of the Parties with the Panel, it made “clear that it does not reject the need for deadlines and schedules to allow authorities to complete a particular phase of a proceeding in a timely manner and to ensure the rights of all parties be observed.”⁹³ Moreover, Viet Nam frames its argument not as a challenge to the USDOC’s maintenance of a deadline *per se* but to the fact that the deadline was enforced here where it fell before Viet Nam knew the results of the sixth review.

98. With the Parties in agreement that an investigating authority may impose a deadline for a revocation request, the question for purposes of Viet Nam’s revocation claims – brought under Articles 11.1 and 11.2 – is whether Article 11.1 or Article 11.2 limit the deadlines that can be imposed in a manner inconsistent with the USDOC’s enforcement of its deadline with respect to Vinh Hoan. More specifically, the question is whether the “reasonableness” standard suggested by Viet Nam can somehow be identified in the text of Article 11.2. Article 11.1 and 11.2, however, do not discuss deadlines for revocation requests. They therefore impose no limitation on the kinds of deadlines that an investigating authority may employ for such requests.

99. In the absence of an actual limitation in Article 11 on deadlines for revocation requests, Viet Nam searches for a standard in other Anti-Dumping Agreement provisions on other subjects. Those standards apply in the contexts for which they are set out in the Anti-Dumping Agreement. Viet Nam’s request to apply them by analogy to deadlines for revocation requests amounts to an attempt to re-write the Anti-Dumping Agreement to create disciplines where none exist – as none were agreed to by the parties.

100. For this reason and others, Viet Nam’s attempt to import a reasonableness standard from Article 6 is unavailing. Contrary to Viet Nam’s argument,⁹⁴ Anti-Dumping Agreement Article 6 sheds no light on the consistency of the USDOC’s revocation request deadline with Article 11.

⁹³ Viet Nam Opening Statement at the First Substantive Meeting of the Panel, para. 32.

⁹⁴ Viet Nam First Written Submission, paras. 258 et seq.

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.”⁹⁵ Article 11.4 provides only that the “provisions of Article 6 regarding evidence and procedure” shall apply to reviews conducted under Article 11. Those rules apply to the submission of evidentiary information and the procedure by which a Member must accept that information or use other information available. Nothing in Article 6 addresses deadlines for initiation documents. Rather, the subject of initiation is covered in Anti-Dumping Agreement Article 5, entitled “Initiation and Subsequent Investigation.” Article 11.4 does not indicate that the provisions of Article 5 apply to reviews under Article 11.

101. Further, Article 6 provisions on the submission of evidence in an already-initiated proceeding apply to revocation proceedings in the same way that they apply to original investigations. In other words, they apply only with respect to the submission of evidentiary information in already-initiated revocation proceedings and the procedure by which, in such proceedings, a Member must accept that information or use other information available. But because the “provisions of Article 6 regarding evidence and procedure” do not cover initiation with respect to initial investigations, those provisions likewise do not discipline initiation with respect to a revocation review. The “reasonableness” standard that Viet Nam suggests exists in and should be imported from Article 6 is an example of this. That standard does not apply to initiation documents in original investigations. Rather, as Viet Nam itself concedes,⁹⁶ it relates to when a failure to provide information in an already-initiated investigation can result in determinations being made on the basis of the facts available.⁹⁷ Accordingly, it does not apply pursuant to Article 11.4 to the submission of a request for revocation.

102. Viet Nam’s proposed “reasonableness” standard for deadlines for the filing of revocation requests simply has no basis in the text of Anti-Dumping Agreement Article 11. Accordingly, Viet Nam is requesting a finding of a breach of a discipline that does not exist; that request must be denied.

2. Article 11 Does Not Require a Respondent Seeking Revocation to Produce Positive Information that was Not Solicited by the Investigating Authority

103. Viet Nam’s claims also appear to be driven by a misunderstanding of the “positive information” language in Anti-Dumping Agreement Article 11.2. In particular, Viet Nam’s arguments seem to presume a requirement that a party seeking revocation submit positive information substantiating the need for review, and in particular the results of prior reviews showing no margins.⁹⁸

104. Article 11.2 does not require interested parties seeking revocation to submit anything. Rather Article 11.2 provides that the investigating authority may require an interested party

⁹⁵ *US – Shrimp II (Viet Nam) (Panel)*, para. 7.388.

⁹⁶ Viet Nam First Written Submission, para. 259.

⁹⁷ Anti-Dumping Agreement, Art. 6.8.

⁹⁸ See Viet Nam’s Responses to the Panel’s First Set of Questions, paras. 70, 75-76.

submitting a revocation request to support the request with positive evidence. However, this provision, like the rest of the Anti-Dumping Agreement, does not impose any obligation on the interested party itself. Rather, Article 11.2 sets forth what the investigating authority can demand of the interested party.

105. As discussed further below, here, although the USDOC could have chosen, consistently with the Anti-Dumping Agreement, to demand positive information substantiating an absence of dumping during review periods before the one to be considered simultaneously with the revocation request, the USDOC chose not to require the submission of such information. There was no requirement – in U.S. regulations or the Anti-Dumping Agreement – that the information be submitted. The fact that the Anti-Dumping Agreement would permit the USDOC to require the submission of positive information – including the results of a past administrative review – does not mean that unavailability of this piece of information would require waiver of a filing deadline when the USDOC did not in fact demand that the information in question be submitted with the revocation request.

106. Viet Nam’s position boils down to the argument that it was unreasonable for the USDOC to enforce its filing deadline with respect to Vinh Hoan because Vinh Hoan could not have submitted the results of the sixth review by that filing deadline *even though there was no requirement for Vinh Hoan to submit or know the results of the sixth review*. While there is no requirement in the Anti-Dumping Agreement that filing deadlines for revocation requests be “reasonable,” enforcement of a filing deadline could not be unreasonable because the deadline fell before the filing party could obtain a piece of evidence that *it was not required to submit*.

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

107. As the United States has explained in its prior submissions,⁹⁹ Viet Nam’s contention¹⁰⁰ that the issuance of the final results of the sixth administrative review was a necessary predicate for Vinh Hoan to request a revocation review with the seventh administrative review is simply incorrect.

108. Under 19 CFR § 351.222 (2010), a request for company-specific revocation of an anti-dumping duty order could be submitted in writing “[d]uring the third and subsequent annual anniversary months of the publication of an antidumping order[.]” Under Section 351.222(e)(1) (2010) only three things needed to be submitted with a request:

- (i) The person’s certification that the person sold the subject merchandise at not less than normal value during the period of review described in §351.213(e)(1), and that in the future the person will not sell the merchandise at less than normal value; (ii) The person’s certification that, during each of the consecutive

⁹⁹ See U.S. First Submission, paras. 163-168; U.S. Responses to the Panel’s First Set of Questions, paras. 31-33.

¹⁰⁰ Viet Nam First Submission, para. 262; Viet Nam Response to the Panel’s First Set of Questions, paras. 68, 76, and 82.

years referred to in paragraph (b) of this section, the person sold the subject merchandise to the United States in commercial quantities; and (iii) If applicable, the agreement regarding reinstatement in the order or suspended investigation described in paragraph (b)(2)(iii) of this section.¹⁰¹

109. Thus, an interested party seeking revocation only needed to submit along with its revocation request: (1) a certification that it did not dump *in the one-year period* covered by the administrative review requested at the same time as the revocation request, (2) a certification that it sold goods in commercial quantities for three consecutive periods of review, and (3) an agreement to the reinstatement of the duty if it resumed dumping in the future.

110. Section 351.222(e)(1) (2010) contained no requirement that a party seeking revocation provide affirmative evidence that it did not engage in dumping during the three consecutive periods of review. In fact, section 351.222(d) (2010) provided that the USDOC *need not even have conducted an administrative review* of the party seeking revocation for the “intervening year,” *i.e.*, the second of the three consecutive review periods. No additional information or evidence outside of that outlined in section 351.222(e)(1) was required for the USDOC to accept Vinh Hoan’s revocation request.

111. Viet Nam speculates that “given the requirements for revocation – a demonstration of the absence of dumping in at least three consecutive reviews, it is unlikely that the USDOC would initiate a revocation review if the company had no ability to demonstrate the absence of dumping over a three year period.”¹⁰² This erroneous speculation is belied by both the text of Section 351.222 (2010) – which explained the requirements for a valid revocation request – and by the USDOC’s handling of timely revocation requests made during other segments of the review. Pursuant to the USDOC’s regulations and as described in response to the Panel’s written questions, the USDOC accepted revocation requests and initiated revocation reviews under section 351.222 without the results of the prior review in two different segments of the order on fish fillets from Viet Nam.¹⁰³ In the fifth administrative review of this order, QVD submitted a revocation request before the USDOC published the final results of the fourth review.¹⁰⁴ Likewise, in the eighth administrative review of this order, both QVD and Vinh Hoan submitted

¹⁰¹ 19 CFR § 351.222 (2010) (Exhibit VN-02).

¹⁰² See Viet Nam’s Responses to the Panel’s First Set of Questions, para. 69.

¹⁰³ *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 11,349 (Mar. 17, 2009) (Exhibit USA-12); *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review and Intent To Revoke Order in Part*, 77 Fed. Reg. 56,180 (Sept. 12, 2012) (Exhibit USA-13); see also U.S. Panel Response to Question 18 and 28, para 34 and 56.

¹⁰⁴ *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 11,349 (March 17, 2009) (Exhibit USA-12).

revocation requests before the USDOC published the final results of the seventh review.¹⁰⁵ The USDOC accepted and considered all three requests on their merits.¹⁰⁶

112. Under U.S. regulations, there was no penalty for submitting a request for revocation that was ultimately unsuccessful. Accordingly, there was simply no reason for Vinh Hoan not to have submitted a timely request for revocation. By contrast, as the United States has explained in detail in other submissions and as it explains further below, consideration of Viet Nam’s egregiously late revocation request would have imposed significant burdens on the USDOC and other participants in the review.

113. The absence of penalty for an ultimately unsuccessful revocation request makes clear that there is no reason why uncertainty about results of the prior administrative review would – as Viet Nam repeatedly argues – impede the filing of a timely revocation request. Indeed, when a timely revocation request is filed, there will always be uncertainty about the requesting party’s ultimate eligibility for revocation as the requesting party will not know with certainty the results of the administrative review requested at the same time as the revocation request. Accordingly, Viet Nam simply has no basis to suggest that uncertainty about the results of the prior review in situations, like the one at issue here, where that review has not been completed, is in any way relevant to the ability to submit a timely request for revocation.

E. Considering Viet Nam’s Egregiously Untimely Revocation Request Would Have Caused Significant Prejudice to the USDOC and Other Participants in the Proceeding

114. As the United States has previously explained, accepting an egregiously untimely revocation request would have imposed significant burdens on the USDOC and on other participants in the proceeding. This further highlights that – in addition to the Anti-Dumping Agreement not containing a “reasonableness” provision for Article 11 revocation requests – Viet Nam has not shown that the USDOC’s decision to reject Vinh Hoan’s request based on its untimeliness was in any way unreasonable or unwarranted.

115. Assessing whether to grant revocation requires consideration of factors not at issue in an ordinary administrative review. Specifically, not only did 19 CFR § 351.222 (2010)¹⁰⁷ provide

¹⁰⁵ *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review and Intent To Revoke Order in Part*, 77 Fed. Reg. 56,180 (Sept. 12, 2012) (Exhibit USA-13).

¹⁰⁶ *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 11,349 (March 17, 2009) (Exhibit USA-12); *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review and Intent To Revoke Order in Part*, 77 Fed. Reg. 56,180 (Sept. 12, 2012) (Exhibit USA-13). As previously noted, Vinh Hoan’s revocation request submitted in the eighth administrative review of this order was denied on the merits, as Vinh Hoan was found to have engaged in dumping during one of the three years at issue in the review of that request. *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results of the Eighth Administrative Review and Aligned New Shipper Reviews*, pp. 48-49 (March 13, 2013) (Exhibit USA-22).

¹⁰⁷ Exhibit VN-02.

for consideration of whether the requesting respondent sold merchandise at less than normal value during a three-year period, but section 351.222 (2010) also required consideration of whether the respondent had made sales in commercial quantities and, crucially, whether, even if the respondent had not made sales at less than normal value, continued application of the anti-dumping order was otherwise necessary to offset dumping. Accordingly, it is not the case that a belated revocation request would simply require consideration of factors already under consideration in the administrative review.

116. The USDOC has long required the filing of revocation requests at the beginning of an administrative review. The USDOC does so because of the nature of the revocation process and the interconnectedness of that process with the administrative review process. Perhaps in recognition of this fact, Viet Nam has made clear that it is not arguing that the USDOC should have to consider revocation requests outside of the context of annual reviews.¹⁰⁸

117. Under the applicable regulations at the time of the seventh administrative review, when a respondent requested revocation, the USDOC published notice of the request and allowed comments from interested parties. Other parties' interest in participation in the administrative review may have hinged on whether revocation had been requested, and whether revocation was thus a live possibility. The comments received from other interested parties in response to a notice indicating that revocation had been requested could shape follow-up questions from the USDOC, and the respondent's subsequent submissions – including with respect to whether, in the event the respondent had not engaged in dumping, continued application of the order was otherwise necessary to offset dumping.¹⁰⁹ If other interested parties had been alerted to a revocation request, their comments, and subsequent follow up questions by the USDOC to any interested party, could have been relevant to both the existence of dumping during the relevant administrative review period and the question of whether, in the absence of dumping during that period, continued application of the order was otherwise necessary to offset dumping.¹¹⁰

118. The USDOC, moreover, was required to conduct a verification after a revocation request.¹¹¹ The timing of the verification depended on the facts and circumstances of each case. Having previously verified Vinh Hoan,¹¹² USDOC did not do so in the seventh administrative

¹⁰⁸ Viet Nam Opening Statement at the First Substantive Meeting of the Panel, para. 32 (“Nor does Viet Nam claim that the U.S. should have alternative proceedings to annual reviews to determine whether to revoke an anti-dumping order as to an individual respondent.”).

¹⁰⁹ See Issues and Decisions Memorandum for the Final Results of the 17th Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea (2009-2010) (March 5, 2012) (Exhibit USA-15), pp. 24-26.

¹¹⁰ See Issues and Decisions Memorandum for the Final Results of the 17th Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea (2009-2010), pp. 24-26 (March 5, 2012) (Exhibit USA-15).

¹¹¹ See 19 CFR § 351.225(f)(2)(ii) (2010).

¹¹² See *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15, 941, 15,942 (March 22, 2011) (Exhibit VN-07-4 (BCI)); Issues and Decision Memorandum for the Final Results of the 5th Administrative Review and 4th New Shipper Review: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, Comment 4: Vinh Hoan (March 10, 2010), pp. 32-33 (Exhibit VN-06-4 (BCI)).

review. The USDOC would have been required by its regulations to conduct such a verification, however, in order to consider a request for revocation. 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.

119. The USDOC's process and inquiries were thus not the same regardless of whether revocation was requested, and parallel consideration of the administrative review and revocation request was important for protection of the procedural rights of other interested parties and efficient operation of the review processes. Accepting an egregiously late revocation request would have significantly burdened the USDOC and parties who relied on its processes to protect their procedural rights and to achieve accurate results.¹¹³

120. By the time of Vinh Hoan's untimely revocation request, not only had the deadline for submission of additional evidence in the seventh administrative review already passed,¹¹⁴ but the USDOC had already concluded that the seventh administrative review could not be completed within twelve months.¹¹⁵ In light of the procedural requirements for considering revocation – discussed in detail in the U.S. First Written Submission¹¹⁶ – to consider Vinh Hoan's request, the USDOC, having already found twelve months inadequate for an ordinary administrative review, would have needed to take numerous steps with less than eleven months remaining in the eighteen-month window for an extended review.¹¹⁷ The USDOC would have had to publish a notice of initiation including the request for revocation.¹¹⁸ Crucially, the USDOC also 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 in the three review periods at issue and whether continued application of the order to Vinh Hoan was otherwise necessary to offset dumping.¹¹⁹ If the USDOC concluded that the order should be revoked, it would have had to provide notice of intent to revoke the order with the *preliminary* results – thus well before the end of the window for an extended administrative review.¹²⁰ Additionally, the USDOC would have needed to conduct the verification of Vinh Hoan that it had not planned for in the seventh administrative review.¹²¹ In sum, Viet Nam's argument that the USDOC and the other parties in the proceeding would not

¹¹³ See U.S. First Written Submission, paras. 171-172.

¹¹⁴ 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).

¹¹⁵ *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 76 Fed. Reg. 55,872, 55,873 (September 9, 2011) (Exhibit VN-08-03) (BCI)

¹¹⁶ U.S. First Written Submission, paras. 171-172.

¹¹⁷ See Anti-Dumping Agreement, Art. 9.3.1.

¹¹⁸ See 19 C.F.R. § 351.222(f) (Exhibit VN-02).

¹¹⁹ See 19 C.F.R. § 351.222(b) (Exhibit VN-02).

¹²⁰ See 19 C.F.R. § 351.222(f) (Exhibit VN-02).

¹²¹ See 19 C.F.R. § 351.222(f) (Exhibit VN-02).

have been significantly prejudiced by assessment of Vinh Hoan’s egregiously untimely revocation request simply does not square with the facts.

121. Here, Vin Hoan simply missed a deadline to which it should have paid attention. It was a deadline that nothing in the Anti-Dumping Agreement precludes the USDOC from maintaining and enforcing. Viet Nam lacks a basis for blaming Vinh Hoan’s failure to meet the deadline on the USDOC’s timeframe for conducting the sixth review, just as Viet Nam lacks a basis for claiming that consideration of Vinh Hoan’s egregiously late revocation request would not have prejudiced the USDOC or other parties. Each of these reasons independently require rejection of Viet Nam’s revocation claims. Together, they show that Viet Nam’s claims are wildly off the mark.

VII. 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

A. The USDOC’s Treatment of the Viet Nam-Government Entity is Not Inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement

122. Viet Nam’s response to the U.S. explanation for USDOC’s treatment of the Viet Nam-Government entity is to assert that “there is no such entity as the ‘Viet Nam – wide entity’ to be individually examined.”¹²²

123. This argument is unavailing. There are no specific directives in Articles 6.10 or 9.2 that require a Member to treat nominally distinct exporters or producers independently, especially where an investigating authority has recognized a government entity as a known exporter or producer and the government entity is in a position to exercise control or materially influence over nominally distinct exporters or producers with respect to the pricing and output of products.¹²³ As the Appellate Body in *EC – Fasteners (China)* explained, “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.”¹²⁴ Therefore, as demonstrated in previous U.S. submissions and as will be shown again below, the USDOC’s recognition that the Viet Nam-government entity was a known exporter and producer of fish fillets from Viet Nam is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it.

124. The WTO agreements are premised on the operation of market principles under which enterprises make decisions based on commercial considerations.¹²⁵ Where a WTO Member’s

¹²² Viet Nam’s Responses to the Panel’s First Set of Questions, para. 126.

¹²³ See U.S. First Written Submission, paras. 202-216; U.S. Opening Statement at the First Panel Meeting, paras. 48-56.

¹²⁴ *EC – Fasteners (China) (AB)*, para. 376.

¹²⁵ See J. Jackson, *THE WORLD TRADING SYSTEM*, (2d ed. 1997), p. 325 (“The post-World War II international trading system is obviously based on rules and principles that more or less assume free market-oriented economies.

economy, or a sector of that economy, operates pursuant to government directives, basic rules on non-discrimination, market access, and fair trading set out in the covered agreements can be broken or evaded.¹²⁶ As noted in the discussions of the Working Party on China’s Status as a Contracting Party, “[e]xperience had shown that even if elements of centrally-planned systems could absorb significant market-oriented reforms, the nature of the system would continue to impede the operation of GATT Articles that ensured market access, i.e., to limit or negate the balance of rights and obligations contained in the Articles.”¹²⁷

125. Viet Nam is, from the standpoint of Article VI of the GATT 1994 and the Anti-Dumping Agreement, a nonmarket economy country for purposes of this dispute settlement proceeding.¹²⁸ Following an allegation by the U.S. industry,¹²⁹ the USDOC launched an inquiry during the original anti-dumping investigation of fish fillets from Viet Nam as to whether Viet Nam operates as a nonmarket economy.¹³⁰ As part of this inquiry, the USDOC examined the extent of government influence on the Vietnamese economy, including the extent of government ownership or control over the means of production, the allocation of resources, and the price and output decisions of state-owned enterprises.¹³¹ The USDOC found, in part, that:

- the stated objective of the Government of Viet Nam was the continued protection of, and investment in, state-owned enterprises

The rules of GATT certainly were constructed with that in mind.” (footnote omitted)); W. Zdouc, “Comments,” in STATE TRADING IN THE TWENTY-FIRST CENTURY, Ch. 7 (Cottier and Mavroidis eds. 1998), p. 151 (“GATT’s legal system presupposes a market economy and may be circumvented in a situation where governments intervene systematically in the market place.”).

¹²⁶ See W. Davey, “Article XVII GATT: An Overview,” in STATE TRADING IN THE TWENTY-FIRST CENTURY, Ch. 1 (Cottier and Mavroidis eds. 1998), pp. 21-22 (“In essence, GATT needs special rules on state trading enterprises because GATT rules often assume the existence of a market-based economy where enterprise make decisions on the basis of economic factors, not government directives. If one examines the basic GATT rules on non-discrimination, market access, and fair trade, it is clear that evasion of those rules would be easily possible if there were no controls on state trading enterprises” (footnote omitted)). Although the author is discussing state-trading enterprises, he notes that the discussion of the ability of state-trading enterprises to evade basic GATT rules applies equally to countries with non-market economies. See *ibid.*, p. 32.

¹²⁷ Working Party on China’s Status as a Contracting Party, Spec(88)13 (Mar. 29, 1988), para. 2.12.

¹²⁸ 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) (making a factual finding that Viet Nam is a nonmarket economy). Viet Nam does not challenge in this dispute the USDOC’s finding that the exports at issue originate from a nonmarket economy country.

¹²⁹ Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam – Determination of Market Economy Status (Nov. 8, 2002), p. 2 (Exhibit USA-1).

¹³⁰ Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam – Determination of Market Economy Status (Nov. 8, 2002), pp. 2-3 (Exhibit USA-1).

¹³¹ Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam – Determination of Market Economy Status (Nov. 8, 2002), pp. 22-39 (Exhibit USA-1).

to ensure that these enterprises retained a key role in what the government refers to as a socialist market economy;¹³²

- state-owned enterprises were not limited to traditional natural monopolies but extended to other industries, including the food industry;¹³³ and
- the Government of Viet Nam continued to exert influence throughout the Vietnamese economy.¹³⁴

As a result, the USDOC concluded that Viet Nam is a nonmarket economy country for the purposes of the anti-dumping duty investigation of fish fillets imported from Viet Nam. The USDOC further recognized the Viet Nam-government entity as a known exporter and producer of such goods.

126. Viet Nam in the original investigation did not challenge the USDOC's identification of the Viet Nam-government entity as a known exporter or producer of fish fillets from Viet Nam. Following its recognition of the Viet Nam-government entity as a known exporter or producer, the USDOC preliminarily assigned the entity its own anti-dumping duty rate. The Government of Viet Nam afterward filed a case brief in which it addressed the USDOC's preliminary finding. Although the Government of Viet Nam argued that the USDOC should lower the rate assigned to the entity,¹³⁵ it never argued that the Viet Nam-government entity was not a known exporter or producer.¹³⁶

127. Indeed, when asked by the USDOC to provide necessary information about the Viet Nam-government entity, Viet Nam refused to do so. The USDOC during the original investigation asked the Government of Viet Nam to provide information about quantity and value of sales, business structure and affiliations, etc., with respect to fish fillets produced and exported from Viet Nam,¹³⁷ as well as information about sales to the United States of this

¹³² Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam – Determination of Market Economy Status (Nov. 8, 2002), pp. 26, 43 (Exhibit USA-1).

¹³³ Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam – Determination of Market Economy Status (Nov. 8, 2002), pp. 26, 43 (Exhibit USA-1).

¹³⁴ Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam – Determination of Market Economy Status (Nov. 8, 2002), pp. 2, 42-43 (Exhibit USA-1).

¹³⁵ Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, Comment 9: Vietnam-Wide Rate (June 16, 2003), pp. 59-60 (Exhibit VN-05-2).

¹³⁶ Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, Comment 9: Vietnam-Wide Rate (June 16, 2003), pp. 59-61 (Exhibit VN-05-2). The Government of Viet Nam has never questioned in any of the challenged reviews, nor has it ever challenged in any U.S. anti-dumping proceeding, the identification of the Viet Nam-government entity as a known exporter or producer.

¹³⁷ Letter to Ministry of Trade, The Socialist Republic of Vietnam, Request for Information, Section A (General Information) (Sept. 16, 2002) (Exhibit USA-23); *see Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final*

product and factors associated with its production.¹³⁸ The latter request indicated “that if the Department determines that Vietnam is a non-market economy for anti-dumping duty purposes, the Government of Vietnam will also be a mandatory respondent.”¹³⁹ The Government of Viet Nam did not respond to the USDOC’s requests for information.¹⁴⁰ As a result, the USDOC was left with no choice but to use facts available to determine the Viet Nam-government entity’s anti-dumping duty rate.¹⁴¹

128. The negotiations of Viet Nam’s accession to the WTO took place in the context of, and reflected, the U.S. finding that Viet Nam is a nonmarket economy country and its treatment of the Viet Nam-government entity as a known exporter or producer of goods from Viet Nam. Viet Nam’s Accession Protocol repeatedly acknowledged that Viet Nam still needed to transition from a nonmarket economy to a market economy.¹⁴² The Accession Protocol further committed Viet Nam to alter its nonmarket behavior.¹⁴³ Viet Nam’s accession to the WTO therefore did not obligate the United States to forget that Viet Nam is a nonmarket economy country, or to overlook the past treatment of the Viet Nam-government entity as a known exporter or producer of goods from Viet Nam.

129. Viet Nam has yet to demonstrate in any U.S. anti-dumping duty proceeding that it is a market economy, or that market economy conditions prevail in a particular industry or sector in

Determination: Certain Frozen Fish Fillets From the Socialist Republic of Vietnam, 68 Fed. Reg. 4,987 (Jan. 31, 2003) (Exhibit VN-22).

¹³⁸ Letter to Ministry of Trade, The Socialist Republic of Vietnam, Request for Information, Sections C, D, & E (Sales to the United States, Factors of Production and Cost of Further Manufacturing Performed in the United States) (Sept. 23, 2002) (Exhibit USA-24); see *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 Vietnam*, 68 Fed. Reg. 4,987 (Jan. 31, 2003) (Exhibit VN-22).

¹³⁹ Letter to Ministry of Trade, The Socialist Republic of Vietnam, Request for Information, Sections C, D, & E (Sales to the United States, Factors of Production and Cost of Further Manufacturing Performed in the United States), letter p. 1, n.1 (Sept. 23, 2002) (Exhibit USA-24).

¹⁴⁰ *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 Vietnam*, 68 Fed. Reg. 4,987-89 (Jan. 31, 2003) (Exhibit VN-22).

¹⁴¹ Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, Comment 9: Vietnam-Wide Rate (June 16, 2003), p. 62 (Exhibit VN-05-2) (finding that the use of facts available was required because “certain exporters and the government of Vietnam failed to respond to our questionnaire, thereby withholding information necessary for reaching the applicable determination”); see *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 Vietnam*, 68 Fed. Reg. 4,991 (Jan. 31, 2003) (Exhibit VN-22) (“In this case, the government of Vietnam did not respond to the Department’s questionnaire, thereby necessitating the use of facts available to determine their rate.”). “Viet Nam agrees that USDOC can apply adverse facts available to individual companies found not to be cooperating because they did not respond to questionnaires.” Viet Nam’s Responses to the Panel’s First Set of Questions, para. 126.

¹⁴² Working Party Report, para. 52 (Exhibit USA-3); see also *ibid.*, paras. 4, 7, 80-81, 96, 104, 254-255 (Exhibit USA-3).

¹⁴³ See, e.g., Working Party Report, para. 78 (Exhibit USA-3).

Viet Nam.¹⁴⁴ Viet Nam also has yet to demonstrate in any U.S. anti-dumping duty proceeding that it has complied with its commitments to ensure that enterprises owned, controlled, or granted special or exclusive privileges by Viet Nam would make “sales in international trade ... based solely on commercial considerations ...” and its commitments “not [to] influence, directly or indirectly, commercial decisions on the part of [such] enterprises”¹⁴⁵ Articles 6.10 and 9.2 of the Anti-Dumping Agreement do not require an investigating authority to presume that every nominally distinct entity is a “known exporter or producer” entitled to an individual margin of dumping.¹⁴⁶ Therefore, the USDOC’s approach with respect to the Viet Nam-government entity was not inconsistent with Articles 6.10 and 9.2, “as such” or “as applied,” because it was entirely appropriate for the USDOC to consider all nominally distinct Vietnamese entities as part of the Viet Nam-government entity.

B. Viet Nam’s Claims under Articles 6.8 and Annex II of the Anti-Dumping Agreement, as Well as its Claims under Article 9.4, are Without Merit

130. Viet Nam’s responses to Panel questions underscore its fundamental misunderstanding of the obligations imposed under Article 6.8 and Annex II of the Anti-Dumping Agreement, as well as under Article 9.4, in circumstances where no one has asked a Member to conduct a duty assessment proceeding. Viet Nam acknowledges that “Article 6.8 and Annex II do **not** apply when the investigating authority does not make a determination based on facts available in the review at issue, but rather continues to apply a rate determined in the original investigation.”¹⁴⁷ Viet Nam also acknowledges that “[i]f an entity is not investigated and information has not been sought, there is **no basis** for the application of Article 6.8 to that entity.”¹⁴⁸ It is thus nonsensical for Viet Nam to continue to contend that Article 6.8 and Annex II, as well as Article 9.4, applied in the challenged reviews when no one asked the USDOC under Article 9.3 of the Anti-Dumping Agreement to examine, or seek information from, the Viet Nam-government entity during those reviews.¹⁴⁹

¹⁴⁴ See Working Party Report, para. 255(d) (Exhibit USA-3) (indicating that Viet Nam bears the responsibility of establishing, “under the national law of the importing WTO Member, that it is a market economy” and, “pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector”).

¹⁴⁵ Working Party Report, para. 78 (Exhibit USA-3).

¹⁴⁶ See U.S. First Written Submission, paras. 202-216. Even so, the USDOC streamlined the ability of the nominally distinct Vietnamese entities to demonstrate that they were not part of the Viet Nam-government entity. See U.S. First Written Submission, paras. 199-200; U.S. Responses to the Panel’s First Set of Questions, paras. 85-87; USDOC Separate Rate Certification for Producers/Exporters from Viet Nam (Blank) (Exhibit USA-16); USDOC Separate Rate Application for Producers/Exporters from Viet Nam (Blank) (Exhibit VN-19).

¹⁴⁷ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 132 (bold added).

¹⁴⁸ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 106 (bold added); see Viet Nam’s Responses to the Panel’s First Set of Questions, para. 107 (indicating that Article 9.4 supports this interpretation).

¹⁴⁹ See Viet Nam’s Responses to the Panel’s First Set of Questions, para. 133.

131. Article 9.3 of the Anti-Dumping Agreement establishes two types of procedures by which an importing Member – following a request by an interested party – is required to conduct a duty assessment proceeding:

- Article 9.3.2 establishes a “prospective” system.¹⁵⁰ The “prospective” system collects a definitive anti-dumping duty at the time of import entry and, if a duty assessment proceeding is conducted, refunds any overage.¹⁵¹ The definitive duty, however, never changes.
- Article 9.3.1 establishes a “retrospective” system.¹⁵² The “retrospective” system collects a security (*e.g.*, a cash deposit) for anti-dumping duties at the time of import entry and, if a duty assessment proceeding (*i.e.*, an administrative review) is conducted, refunds any overage (or collects any deficit).¹⁵³ Unlike the prospective system, the security collected in the retrospective system will change to reflect the anti-dumping calculated during the latest duty assessment proceeding.

Therefore, under either a prospective or retrospective system, a Member will **not** examine, or seek information about, the entries of goods sold by a particular exporter during a period of review if no one asks the Member to conduct a duty assessment proceeding with respect to such entries.¹⁵⁴ In such a circumstance, the Member instead will collect anti-dumping duties at the rate assigned such goods on their date of entry.

132. For example, under a prospective system, an investigating authority sets a definitive anti-dumping duty rate at the conclusion of the original investigation. As shown in Illustration A below, this rate remains the same throughout the life of the anti-dumping duty order, even if the investigating authority conducts a review (as in the case of Exporter B below).

¹⁵⁰ Anti-Dumping Agreement, Art. 9.3.2.

¹⁵¹ See Anti-Dumping Agreement, Art. 9.3.2; J. Czako, J. Human, and J. Miranda, A HANDBOOK ON ANTI-DUMPING INVESTIGATIONS, pp. 91-96 (WTO 2003).

¹⁵² Anti-Dumping Agreement, Art. 9.3.1.

¹⁵³ See Anti-Dumping Agreement, Art. 9.3.1; J. Czako, J. Human, and J. Miranda, A HANDBOOK ON ANTI-DUMPING INVESTIGATIONS, pp. 91-96 (WTO 2003).

¹⁵⁴ Anti-Dumping Agreement, Art. 9.3.2 (under the prospective system, an interested party needs to present a request “duly supported by evidence” to trigger a duty assessment proceeding) and Art. 9.3.1 (under the retrospective system, an interested party need only present a request to trigger a duty assessment proceeding); see Anti-Dumping Agreement, Art. 9.3.1; J. Czako, J. Human, and J. Miranda, A HANDBOOK ON ANTI-DUMPING INVESTIGATIONS, p. 92 n.109 (WTO 2003).

<u>Illustration A: Prospective Duty Assessment System</u>			
Investigation	1 st Review Period	2 nd Review Period	3 rd Review Period
Definitive duty set for Exporter A = 30%	No review requested Collect definitive duty = 30%	No review requested Collect definitive duty = 30%	No review requested Collect definitive duty = 30%
Definitive duty set for Exporter B = 30%	No review requested Collect definitive duty = 30%	Review requested Calculated rate = 10% Reimbursement = 20%	No review requested Collect definitive duty = 30%

133. A retrospective system differs from a prospective system in that an investigating authority sets a security (*e.g.*, a cash deposit) as opposed to a definitive anti-dumping duty rate at the conclusion of the original investigation. As shown in Illustration B below, this rate also can remain the same throughout the life of the anti-dumping duty order if no one requests that the investigating authority conduct a review. However, if an interested party does request a review, the cash deposit can change (as in the case of Exporter D below). But again, if no one ever requests a review of entries, the cash deposit – and the subsequent definitive duty collected based on that security – will not change (as in the case of Exporter C below).¹⁵⁵

<u>Illustration B: Retrospective Duty Assessment System</u>			
Investigation	1 st Review Period	2 nd Review Period	3 rd Review Period
Cash Deposit set for Exporter C = 30%	No review requested Collect cash deposit as definitive duty = 30%	No review requested Collect cash deposit as definitive duty = 30%	No review requested Collect cash deposit as definitive duty = 30%
Cash Deposit set for Exporter D = 30%	No review requested Collect cash deposit as definitive duty = 30%	Review requested Calculated rate = 10% Reimbursement = 20% New cash deposit rate = 10%	No review requested Collect cash deposit as definitive duty = 10%*
*This example is for illustration purposes only. Given time delays, it is probable that all entries during the third review period will not be at the cash deposit rate set during the second review period (<i>i.e.</i> , some entries may have been assigned the cash deposit rate set before that review). In such a situation, the definitive duty collected would be at the cash deposit rate set upon import entry.			

¹⁵⁵ See J. Czako, J. Human, and J. Miranda, A HANDBOOK ON ANTI-DUMPING INVESTIGATIONS, p. 93 n.111 (WTO 2003) (Under a retrospective assessment system, “[i]f no request for review were received for a given 12-month period, anti-dumping duties for that period would be definitively collected at a rate equal to the deposit rate, which would remain in effect for the subsequent period.”).

134. Therefore, as demonstrated in other U.S. submissions,¹⁵⁶ and as explained again below, the USDOC was not required to examine, or seek information from, the Viet Nam-government entity during the challenged duty assessment proceedings – specifically, the USDOC’s fifth (August 1, 2007 – July 31, 2008),¹⁵⁷ sixth (August 1, 2008 – July 31, 2009),¹⁵⁸ or seventh (August 1, 2009 – July 31, 2010)¹⁵⁹ periods of review – because no one requested that the USDOC do so under Article 9.3.1 of the Anti-Dumping Agreement. The USDOC also was not required to determine anew the Viet Nam-government entity rate, because the Anti-Dumping Agreement similarly does not require a Member to assess a definitive duty at a rate different from the posted security absent a request to do so under Article 9.3.1.

1. None of Viet Nam’s Arguments Establish that the USDOC Acted Inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement

135. As explained,¹⁶⁰ Article 6.8 and Annex II are not applicable with respect to the entries of goods sold by the Viet Nam-government entity during the periods covered by the challenged reviews because, as Viet Nam separately acknowledges, “[i]f an entity is not investigated and information has not been sought, there is no basis for the application of Article 6.8 to that entity.”¹⁶¹ Every exporter and producer has the right to request that the USDOC conduct a duty assessment proceeding to determine the final amount of duties owed on each import entry.¹⁶² However, an exporter or producer may elect **not** to exercise this right. The Viet Nam-government entity chose not to exercise this right with respect to the security (cash deposits) collected on import entries during the periods associated with the fifth, sixth, and seventh reviews. Therefore, because no one asked the USDOC to examine the entries in question, it is wrong for Viet Nam to assert that the USDOC is at fault because it did not consider so-called “new ‘first-best’ information.”¹⁶³

136. In sum, if the Viet Nam-government entity had wanted the USDOC to consider Viet Nam’s other information, the entity could have requested that the USDOC conduct a duty

¹⁵⁶ See U.S. First Written Submission, paras. 229-247; U.S. Opening Statement at the First Panel Meeting, paras. 57-70; U.S. Responses to the Panel’s First Set of Questions, paras. 99-106, 113, 116-117, 134-143.

¹⁵⁷ *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 73 Fed. Reg. 56,796 (Sept. 30, 2008) (Exhibit VN-06-1).

¹⁵⁸ *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 74 Fed. Reg. 48,225-26 (Sept. 22, 2009) (Exhibit VN-07-1).

¹⁵⁹ *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 75 Fed. Reg. 60,078 (Sept. 29, 2010) (Exhibit VN-08-1).

¹⁶⁰ See U.S. First Written Submission, paras. 229-237; U.S. Responses to the Panel’s First Set of Questions, paras. 105, 140, 143.

¹⁶¹ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 106; see *ibid.*, para. 107 (indicating that Article 9.4 of the Anti-Dumping Agreement supports this interpretation of Article 6.8).

¹⁶² See section 751(a) of the Act (19 U.S.C. § 1675(a)) (Exhibit VN-25); 19 CFR §§ 351.212, 351.213 (Exhibit USA-18).

¹⁶³ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 133.

assessment proceeding for one or more of the challenged review periods. It did not. Therefore, the USDOC’s approach with respect to the Viet Nam-government entity was not inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement, “as such” or “as applied,” because these provisions do not obligate the USDOC to examine, or seek information from, the Viet Nam-government entity absent a request to do so.¹⁶⁴

2. None of Viet Nam’s Arguments Establish that the USDOC Acted Inconsistent with Article 9.4 of the Anti-Dumping Agreement

137. Viet Nam similarly has not established a *prima facie* case for an “as such” inconsistency with Article 9.4 of the Anti-Dumping Agreement. By its own terms, Article 9.4 applies only to the exporters and producers for which a review was requested but are “not included in the examination” conducted by the investigating authority for that review because the authority “limited [its] examination in accordance with the second sentence of paragraph 10 of Article 6.”¹⁶⁵ Article 9.4 therefore does not apply to a known exporter or producer in situations where no one ever asks the investigating authority to examine the relevant entries of that exporter or producer in the first place. Article 9.4 also does not impose an obligation on an investigating authority to replace an existing rate of an exporter or producer as previously established in the original investigation, or perhaps in a prior administrative review, absent a request to do so.

138. Viet Nam’s “as applied” arguments are equally flawed because, as demonstrated again below, Viet Nam ignores key facts in the proceedings at issue that are fatal to this claim.

139. Fifth Review: No one asked the USDOC to review the Viet Nam-government entity for purposes of the fifth review.¹⁶⁶ As such, the USDOC did not conduct a review of the entity’s entries during the period covered by this review (August 1, 2007 – July 31, 2008). The USDOC thus did not, as alleged by Viet Nam, “set,” “apply,” or “assign”¹⁶⁷ the Viet Nam-government entity a rate in the fifth review.¹⁶⁸

140. Specifically, as explained above, under the retrospective system utilized by the United States, only those exporters for whom a review is requested are entitled to a change in the cash deposit and definitive duty. Because no one requested that the USDOC review the entries made by the Viet Nam-government entity during the fifth review, the United States collected the security deposit on those entries as the definitive duty and did not change the cash deposit rate for future entries by the entity. Reference to the Viet Nam-government entity rate in the final results (including reference to the cash deposit rate that had been previously established for the

¹⁶⁴ See *US – Shrimp II (Viet Nam) (Panel)*, para. 7.233 (“continuing to apply a rate determined in an earlier proceeding is not the same as making a determination in the later proceeding, and, therefore, does not give rise to a possible violation of Article 6.8”).

¹⁶⁵ Anti-Dumping Agreement, Art. 9.4.

¹⁶⁶ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 73 Fed. Reg. 56,796 (Sept. 30, 2008) (Exhibit VN-06-1).

¹⁶⁷ Viet Nam’s Responses to the Panel’s First Set of Questions, paras. 111-112, 121, 124, 127-128.

¹⁶⁸ See U.S. First Written Submission, paras. 29, 231; U.S. Responses to the Panel’s First Set of Questions, paras. 113-115.

entity) simply served as a continuing notification to interested parties and the public of this rate.¹⁶⁹

141. Sixth Review: No one asked the USDOC to review the Viet Nam-government entity for purposes of the sixth review.¹⁷⁰ As such, the USDOC did not conduct a review of the entity's entries during the period covered by this review (August 1, 2008 – July 31, 2009). The USDOC thus did not, as alleged by Viet Nam, “set,” “assign,” or “apply” the Viet Nam-government entity a rate in the sixth review.¹⁷¹

142. Indeed, as the Panel has appropriately noted,¹⁷² the USDOC did not set a rate for the Viet Nam-government entity in the sixth review because the entity was not under review.¹⁷³ Viet Nam thus is mistaken in its contention that the USDOC's mere reference to the previously-established cash deposit rate for the Viet Nam-government entity constitutes an “application” or “assignment” of the rate in the sixth review.¹⁷⁴ Again, Article 9.4 of the Anti-Dumping Agreement does not obligate investigating authorities to assign rates to exporters or producers that are not subject to review. The USDOC's published reminder of the rate applicable to the Viet Nam-government entity in the notice announcing the final results of the sixth review served as nothing more than a continuing notification to interested parties and the public of this rate.

143. Seventh Review: No one asked the USDOC to review the Viet Nam-government entity's rate in the seventh review.¹⁷⁵ Certain companies who were subject to review failed to demonstrate they were sufficiently independent of the Viet Nam-government entity with respect to their export activities so as to be entitled to an individual rate. As a result, the USDOC considered these companies to be part of the Viet Nam-government entity, which was assigned the rate it received when last examined.¹⁷⁶

144. In sum, like Article 6.8 and Annex II, Article 9.4 of the Anti-Dumping Agreement is only applicable where an interested party requests that the investigating authority conduct a duty assessment proceeding of a particular exporter or producer. No one ever requested that the USDOC complete a duty assessment proceeding with respect to the import entries of the Viet Nam-government entity. Therefore, none of Viet Nam's arguments establish that the USDOC's

¹⁶⁹ See U.S. Responses to the Panel's First Set of Questions, paras. 113, 115.

¹⁷⁰ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 74 Fed. Reg. 48,225-26 (Sept. 22, 2009) (Exhibit VN-07-1).

¹⁷¹ See U.S. First Written Submission, para. 31; U.S. Responses to the Panel's First Set of Questions, paras. 116-117.

¹⁷² See Questions to the Parties After the First Substantive Meeting, Question 44.

¹⁷³ See *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15,943 (Exhibit VN-07-4 (BCI)).

¹⁷⁴ See Viet Nam's Responses to the Panel's First Set of Questions, paras. 113-115, 121, 124, 127-128.

¹⁷⁵ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 75 Fed. Reg. 60,078 (Sept. 29, 2010) (Exhibit VN-08-1).

¹⁷⁶ *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 Fed. Reg. 15,040-41 (March 14, 2012) (Exhibit VN-08-4 (BCI)).

approach was inconsistent, “as such” or “as applied,” with Article 9.4 of the Anti-Dumping Agreement, because absent a request to do so, Article 9.4 did not obligate the USDOC to replace the Viet Nam-government entity’s existing WTO-consistent rate with a different rate.

VIII. CONCLUSION

145. For the reasons set forth above, and in other U.S. written submissions and oral statements, the United States respectfully requests that the Panel reject Viet Nam’s claims in their entirety.

**ANNEX I: ADDITIONAL U.S. COMMENTS ON VIET NAM’S ANSWERS TO THE PANEL’S
QUESTIONS FOLLOWING THE FIRST SUBSTANTIVE MEETING**

The U.S. Second Written Submission comments on many of the arguments contained in Viet Nam’s answers to the Panel’s questions following the first substantive meeting. In this Annex, the United States provides additional comments on Viet Nam’s answers. In particular, the United States addresses Viet Nam’s answers to Panel questions 30 and 31. The United States notes that the absence of a comment on any particular answer by Viet Nam should not be construed as agreement with Viet Nam’s arguments.

30. To Viet Nam: The United States characterizes at para. 189 of its first written submission the USDOC’s 2015 Antidumping Manual (Exhibit VN-01) as an internal training manual. Is the document currently publicly available?

Response:

1. Viet Nam is mistaken when it implies that the removal of the USDOC’s Antidumping Manual from the USDOC website may be related to this proceeding,¹⁷⁷ especially given that the USDOC often removes documents from its website when they become out of date. As the United States indicated during the first substantive meeting, the manual is currently not available on the USDOC’s website for reasons unrelated to this proceeding.

2. Viet Nam is also mistaken when it argues that the removal of the manual allowed “the USDOC to claim it was nothing more than an ‘internal’ training manual.”¹⁷⁸ The manual 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.”¹⁷⁹ The manual itself thus explicitly disclaims any suggestion that it is authoritative or controlling with respect to the USDOC’s policy or practice.

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

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

¹⁷⁷ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 91.

¹⁷⁸ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 91.

¹⁷⁹ Chapter 1, Department of Commerce Antidumping Manual, p. 1 (Exhibit USA-10) (bold added).

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

Response:

3. Viet Nam’s response to this question highlights its continuing failure to establish the existence of an unwritten measure involving the anti-dumping duty rate assigned to an entity controlled by the government. The Appellate Body noted in *US – Anti-Dumping Methodologies (China)* that “[t]he examination of whether a rule or norm has general and prospective application may vary from case to case.”¹⁸⁰ Although Viet Nam argues that the Antidumping Manual provides “**additional** supporting evidence establishing a pattern of **continued** used over an **extensive** period of time,”¹⁸¹ Viet Nam has failed – even as late as the date of its responses to the Panel’s questions following the first meeting – to provide evidence in this case of a pattern of general and prospective application.

4. Rule 5(1) of the Working Procedures of the Panel required Viet Nam to “submit all evidence [to establish a *prima facie* case of a pattern of general and prospective application] to the Panel no later than during the first substantive meeting.”¹⁸² As the Appellate Body has explained, “as part of their duties, under Article 11 of the DSU, to ‘make an objective assessment of the matter’ before them, panels must ensure that the due process rights of parties to a dispute are respected.”¹⁸³ Therefore, any effort by Viet Nam to add evidence to the record following the first substantive meeting should be considered inconsistent with Article 3.10 of the DSU, which anticipates that “all Member will engage in these procedures in good faith,” and highly prejudicial to the efforts of the United States to defend itself adequately against Viet Nam’s claims.

¹⁸⁰ *US – Anti-Dumping Methodologies (China) (AB)*, para. 5.133.

¹⁸¹ Viet Nam’s Responses to the Panel’s First Set of Questions, para. 93 (bold added).

¹⁸² See *Argentina – Textiles and Apparel (AB)*, para. 79 (observing that complaining parties should put forward their cases, “including a full presentation of the facts on the basis of submission of supporting evidence,” no later than the first substantive meeting of the panel).

¹⁸³ *US – Gambling (AB)*, para. 273 (citing *Chile – Price Band System (AB)*, paras. 174-177).