OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM
(DS404)

OCTOBER 20, 2010

Mr. Chairman, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you for agreeing to serve on this Panel.

2. We do not intend to repeat today all of the arguments made in the U.S. First Written Submission, which provides a detailed response to the arguments raised in Vietnam's First Written Submission. We would, however, like to highlight several important issues.

3. At the outset, it is important to have a clear understanding of exactly what Vietnam is asking the Panel to do in this dispute. Rather than advance an argument based on the plain meaning of the rules agreed among the Members of the WTO, and accepted by Vietnam when it acceded to the WTO in 2007, Vietnam asks this Panel to accept interpretations of those rules that have little connection with how they are properly understood in light of their ordinary meaning, read in context, and in light of the object and purpose of the agreements at issue. In numerous instances in this dispute, Vietnam asks the Panel to rewrite or ignore provisions of the WTO agreements and disregard key facts. For example:

- Vietnam asks the Panel to ignore the requirements of Article 6.2 of the DSU, and the Panel's own terms of reference, to overcome the shortcomings of Vietnam's panel request, urging the Panel to make findings with respect to a so-called "measure" that Vietnam did not identify until its First Written Submission;

- Vietnam asks the Panel to find that the United States breached its WTO obligations by employing the zeroing methodology in review proceedings, despite the absence of any language in the covered agreements imposing such a general prohibition of zeroing in reviews. Moreover, Vietnam has failed to demonstrate how it has been affected by any application of the "zeroing" methodology when, in fact, all calculated margins of dumping in the review proceedings subject to this dispute were zero or *de minimis*;

- Vietnam asks the Panel to disregard the non-market nature of Vietnam's economy and impose on WTO Members an obligation to calculate a dumping margin for <u>any</u> company that requests one, regardless of the company's business affiliations

or the government's influence over the company's export activities, when no such obligation exists in the AD Agreement;

- Vietnam invites the Panel to create a host of new obligations for WTO Members faced with large numbers of exporters or producers in antidumping proceedings, including a requirement to examine all companies without regard for the government's limited resources; a numerical cap on the frequency with which a WTO Member may exercise the right to limit the examination; an extremely narrow definition of what constitutes "necessary information"; and additional requirements for the calculation of a ceiling rate for non-examined companies that simply have no support whatsoever in the text of the AD Agreement;

- Vietnam argues that measures put into place prior to Vietnam's accession to the WTO – when, as Vietnam has recognized, the United States "had no obligation to Viet Nam"[1] – should retroactively be found inconsistent with the WTO Agreement because they continue to be applied, despite the AD Agreement's express exemption of such measures from its application;

- And Vietnam asks the Panel to find, with respect to the so-called "continued use measure," that the United States has violated, or is violating, or perhaps in the future will violate its WTO obligations, but Vietnam has failed to demonstrate, for any proceeding within the Panel's terms of reference, that the United States has acted inconsistently with any WTO obligations, and Vietnam certainly cannot establish a "string" of violations over an "extended period of time."

4. In sum, Vietnam is asking the Panel to impose on the United States obligations found nowhere in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") or the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). If accepted, Vietnam's interpretations would seriously undermine the ability of investigating authorities to conduct antidumping examinations, particularly when they are faced with incomplete information, uncooperative interested parties, and large numbers of respondent firms. The United States thus respectfully urges the Panel to reject Vietnam's claims.

I. Requests for Preliminary Rulings

5. I would like to begin this morning with a brief discussion of the three preliminary ruling requests presented in the U.S. First Written Submission, during which I will make some comments about Vietnam's written response to the U.S. requests. The U.S. preliminary ruling requests concern whether the original shrimp investigation, the first administrative review, and the so-called "continued use of the challenged practices" are measures at issue in this dispute.

A. The Investigation and the First Administrative Review

[1] Vietnam Response to U.S. Preliminary Ruling Request, para. 3.

6. The United States appreciates the clarification in Vietnam's written response to the U.S. requests that Vietnam is not alleging that the original investigation or first administrative review are within the Panel's terms of reference.[2] While Vietnam's First Written Submission does not include the investigation and the first administrative review in its description of the measures at issue, Vietnam's panel request does identify these proceedings as "measures at issue" in this dispute.[3] Given the inconsistency between the panel request and Vietnam's First Written Submission with regard to the measures at issue, it is important to clarify the matter in dispute at the outset of these proceedings.

7. Vietnam's written response to the U.S. preliminary ruling requests explains that "Viet Nam does not consider the investigation and the first administrative review to be within the Panel's terms of reference, insofar as Viet Nam is not claiming that the panel can find these measures inconsistent with U.S. obligations at the time the measures were applied."[4] However, Vietnam then appears to contradict this statement when it suggests that "to the extent that these measures served as the basis for measures applied after Viet Nam's accession to the WTO and are inconsistent with U.S. obligations under the Agreement at that time, the consistency of the measures in the investigation and first review with U.S. obligations after Viet Nam's accession are relevant to the panel's inquiry."[5]

8. Vietnam appears to formulate this issue incorrectly. As Vietnam has recognized, the Panel cannot find that the investigation and the first administrative review are inconsistent with the AD Agreement or the GATT 1994. Thus, "the consistency of the measures in the investigation and first review with U.S. obligations" is not relevant to the panel's inquiry, either "after Viet Nam's accession" or at any other time.[6] As Vietnam concedes, the United States "had no obligation to Viet Nam at the time it applied these measures."[7]

9. Furthermore, as explained in detail in the U.S. First Written Submission, Article 18.3 of the AD Agreement strictly limits the application of the AD Agreement "to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement." As the panel in *US – DRAMS* explained, "pre-WTO measures do not become subject to the AD Agreement simply because they continue to be applied on or after the date of entry into force of the WTO

[2] *See id.*

[3] Vietnam Panel Request, p. 2 (Exhibit Viet Nam-02).

[4] Vietnam Response to U.S. Preliminary Ruling Request, para. 5.

[5] *Id.* (emphasis added).

[6] *Id.*

[7] *Id.* at para. 3.

Agreement for the Member concerned."[8] Hence, this Panel is precluded from making a finding that the investigation and the first administrative review are inconsistent with U.S. WTO obligations.

10. The two measures subject to this dispute are the final determinations in the second and third administrative reviews. The consistency of these measures with U.S. WTO obligations is the only relevant subject of inquiry here. To the extent that dumping margins determined during the investigation and the first administrative review "served as the basis for measures applied after Viet Nam's accession to the WTO," as Vietnam suggests, it is Commerce's determinations to rely on, or to apply the previously determined dumping margins that are subject to scrutiny. The Panel must assess whether those determinations, made in the second and third administrative reviews – not the determinations made prior to Vietnam's WTO accession – are consistent with U.S. WTO obligations.

11. Contrary to Vietnam's suggestion, this is more than a mere "semantic" disagreement. Thus, the United States respectfully reiterates its request that the Panel find that the AD Agreement does not apply to the determinations made in the investigation and the first administrative review.

12. In addition, the U.S. First Written Submission explained that the investigation is not within the Panel's terms of reference because it was not a subject of consultations. The United States notes that Vietnam did not respond to the U.S. argument in this regard in its written response to the U.S. preliminary ruling requests. The Panel should therefore find that the investigation is not within its terms of reference.

B. The "Continued Use of Challenged Practices"

13. There is an additional inconsistency between Vietnam's panel request and Vietnam's First Written Submission with regard to the measures at issue in this dispute. Vietnam's First Written Submission identifies as one of the "measures at issue" in this dispute what it describes as "the continued use of the challenged practices in successive antidumping proceedings under this order."[9] However, as explained in the U.S. First Written Submission, this so-called "measure" was not identified in Vietnam's panel request, and thus it is not within the Panel's terms of reference.

14. Vietnam's arguments in its written response to the U.S. preliminary ruling requests are unavailing. First, Vietnam itself does not point to any identification of such a "measure" in its panel request, but rather appears to argue that it was implicit and the reader should infer such a measure from the identification of other, specific measures. However, as I will discuss further in a moment, the requirements of Article 6.2 of the DSU do not permit a complaining party to

[8] *US – DRAMS*, para. 6.14.

[9] Vietnam First Written Submission, para. 101; *see also id.*, para. 104.

require readers to make such an inference, but rather Article 6.2 requires a complaining party to "identify the specific measures at issue." Identifying certain specific measures does not mean that an additional, separate measure has also been identified.

15. In addition, Vietnam distorts the U.S. First Written Submission, suggesting that the United States has argued that Vietnam was required to use "in [its] panel request the precise language employed by the European Communities in a panel request made in an entirely different proceeding."[10] That is not the U.S. position. Of course, Vietnam may describe the measures it seeks to challenge in the manner and using the words that Vietnam chooses. However, under Article 6.2 of the DSU, the description Vietnam presents in its panel request – whatever words Vietnam chooses to use – must "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

16. Vietnam's panel request individually identified each proceeding related to shrimp antidumping duties that had at the time of the panel request been initiated – the investigation, each of the four periodic reviews, and the five-year sunset review. Vietnam asserts that this list served "to illustrate the continuous and ongoing nature of the challenged practices since imposition of the antidumping duty order."[11] Contrary to this assertion, however, the panel request expressly limits the measures at issue to the specific "determinations" identified in the list at the beginning of Section 2. Furthermore, while the panel request makes reference to an "as such" claim in connection with zeroing – although the "zeroing methodology" itself is not identified in the panel request as an "as such" measure, and Vietnam's First Written Submission presents no arguments to support an "as such" claim against zeroing – the panel request limits the other claims presented to "the anti-dumping proceedings at-issue,"[12] "the proceedings,"[13] and the "application of the above-mentioned laws and procedures in the original investigation and periodic reviews here at issue."[14] Throughout the document, Vietnam's panel request limits itself to the application of laws and procedures in the determinations individually identified. There is no indication in the panel request that Vietnam seeks to challenge a so-called "continued use" measure.

17. Vietnam itself draws distinctions between the "as applied," "as such," and "continued use" concepts, relying on the Appellate Body report in *US – Continued Zeroing* to argue that:

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[10] Vietnam Response to U.S. Preliminary Ruling Request, para. 19.

[11] Vietnam Response to U.S. Preliminary Ruling Request, para. 24.

[12] Vietnam Panel Request, p. 5 ("Country-Wide Rate Based on Adverse Facts Available") (Exhibit Viet Nam-02).

[13] Vietnam Panel Request, p. 6-7 ("Limiting the Number of Respondents Selected for Full Investigation or Review") (Exhibit Viet Nam-02).

[14] *Id.*

> The "as such" and "as applied" concepts are simply constructs of the dispute settlement system and have no basis in binding agreements. Thus, a measure may fall in the cross-section of these concepts, as is the case of practices that are ongoing and continuous through the course of one particular proceeding. Such a measure is certainly more broad than an "as applied" measure, but narrower than a generally applicable "as such" measure.[15]

Thus, to the extent that such a "continued use" measure can even be deemed to exist – and the United States strongly disagrees that it can – since it "may fall in the cross-section" of previously understood concepts, it is incumbent upon the complaining WTO Member to identify such a distinct measure with particularity in the panel request to ensure that proper notice is given. It is insufficient to identify a selection of "as applied" measures and expect that the respondent and potential third parties will understand that, through mere implication, a so-called "continuing measure" is also a subject of the dispute.

18. The only evidence to which Vietnam points in addition to the list of "as applied" measures is the discussion in the panel request of the legal basis for Vietnam's claim against the "initiation" of the sunset review. However, this simply serves to highlight the absence of any indication in the panel request that Vietnam intended to challenge a "continued use" measure. The incongruity of Vietnam identifying the "*Initiation of Five-Year ("Sunset") Review*" as an "as applied" measure and later explaining the legal basis for finding that the "sunset review [itself] is inconsistent with Articles 11.2 and 11.3 of the [AD] Agreement" only creates greater confusion about Vietnam's intentions with regard to the matter in dispute.[16]

19. The issue before the Panel is not whether Vietnam used the precise language adopted by the European Communities in *US – Continued Zeroing*. Rather, the issue is whether Vietnam's panel request met the requirements of Article 6.2 of the DSU to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" with respect to the "continued use" measure. As explained in the U.S. First Written Submission and here today, it did not. Consequently, the United States respectfully requests that the Panel find that the so-called "continued use" measure is outside its terms of reference.

20. On the separate question of whether "continued use" can constitute a measure, the United States recognizes that, in *US – Continued Zeroing*, "the Appellate Body held that the ongoing conduct constituted a measure with prospective effect."[17] We noted this in the U.S. First Written

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[15] Vietnam Response to U.S. Preliminary Ruling Request, para. 13 (emphasis added).

[16] Vietnam Panel Request, pp. 2 and 7 (Exhibit Viet Nam-02).

[17] Vietnam First Written Submission, para. 104.

Submission.[18] We explained there that the United States has concerns with the Appellate Body's reasoning in that dispute, but believes that the reasoning of the panel in *Upland Cotton* is sound.[19]

21. We also explained in the U.S. First Written Submission that the "continued use of challenged practices" appears to be composed of an indeterminate number of potential future measures that did not exist at the time of Vietnam's panel request (and may never exist). Thus, such so-called "continued use" could not be impairing any benefits accruing to Vietnam, and therefore cannot be subject to WTO dispute settlement.

22. Furthermore, to the extent that the "continued use" measure consists of proceedings that had not resulted in final action to levy definitive antidumping duties or accept price undertakings at the time of the consultations request, Article 17.4 of the AD Agreement precludes dispute settlement with respect to such a measure.

23. These are additional reasons for the Panel to find that Vietnam's claims concerning the "continued use of challenged practices," including the fourth administrative review, the fifth administrative review, and the sunset review, are not within its terms of reference.

II. Vietnam's Claims Regarding "Zeroing" Are Without Merit

24. The U.S. First Written Submission begins by stating that "[t]his is not merely another zeroing dispute."[20] It is not.

25. Unlike in other disputes, in the second and third administrative reviews, which are the only measures properly before this Panel, zeroing, as a factual matter, had no impact on the margins of dumping determined for individually examined exporters or producers, and the zeroing methodology was not used during the proceedings in order to determine the separate rates applied to companies not individually examined.

26. The prohibition of zeroing in administrative reviews, if one exists, is a prohibition against imposing antidumping duties in excess of the margin of dumping. That is the obligation in Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement. All the calculated dumping margins in the second and third administrative reviews were zero or *de minimis*. Thus, as a factual matter, Vietnam has failed to demonstrate that the United States has acted inconsistently with these provisions of the WTO Agreement.

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[18] U.S. First Written Submission, para. 91.

[19] *See US – Upland Cotton (Panel)*, paras. 7.158-7.160; *see also US – Continued Zeroing (Panel)*, para. 7.61 (finding that "the European Communities failed to identify the specific measure at issue in connection with its claims regarding the continued application of the 18 anti-dumping duties at issue.") (*reversed on appeal*).

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

27. It appears to the United States that the Panel can resolve this dispute based on these facts, and it is thus not necessary for the Panel to make any findings on the legal permissibility of zeroing generally.

28. On the question of the legal permissibility of zeroing, we have no doubt that all here are aware of the Appellate Body reports that have found zeroing in reviews inconsistent with the requirements of the covered agreements. The United States has serious concerns about these Appellate Body reports and believes that they are incorrect.

29. It is a fundamental principle of the customary rules of interpretation of public international law that any interpretation must address the text of the agreement and may not impute into the agreement words and obligations that are not there.[21] Relying upon these past Appellate Body reports, Vietnam asks the Panel to interpret the AD Agreement to include a general prohibition of zeroing that is based upon the concept of "product as a whole." That term cannot be found anywhere in the text of the AD Agreement or the GATT 1994. In contrast to the Appellate Body, all dispute settlement panels that have addressed this question have agreed with the United States that there is no prohibition of zeroing in proceedings beyond the original investigation.[22]

30. The rights and obligations of WTO Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements. Article 11 of the DSU plainly requires each panel to make its own objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. Further, in settling disputes among Members, WTO dispute settlement panels and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements."[23]

31. The United States will not repeat today all of our arguments concerning "zeroing," which we have explained in detail in the U.S. First Written Submission. Should the Panel reach the question of the legal permissibility of "zeroing," however, we reiterate our respectful request that this Panel make its own objective assessment of the matter before it and refrain from adopting Vietnam's incorrect interpretation of the covered agreements. We urge this Panel to remain faithful to the text of the AD Agreement and respectfully request that you find that the approach taken by the United States in the challenged proceedings rests upon a permissible interpretation in accordance with the customary rules of interpretation of public international law.

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[21] *India – Patents (AB)*, para. 45.

[22] *US – Stainless Steel (Mexico) (Panel)*, paras. 7.61, 7.149; *US – Zeroing (Japan) (Panel)*, paras. 7.216, 7.219, 7.222, 7.259; *US – Softwood Lumber V (Article 21.5) (Panel)*, paras. 5.65, 5.66, 5.77; *US – Zeroing (EC) (Panel)*, paras. 7.223, 7.284; *see also US – Continued Zeroing (Panel)*, paras. 7.169 and n.131 (explaining that the panel generally "found the reasoning of the earlier panels on these issues to be persuasive").

[23] DSU, Article 19.2.

III. Vietnam's Claims Regarding the "Country-Wide" Rate Are Without Merit

32. Vietnam's claims concerning the assessment rates Commerce determined for the Vietnam-wide entity in the second and third administrative reviews are without merit. This is yet another instance of Vietnam asking the Panel to create new rules and obligations that have no basis in the covered agreements.

33. As explained in the U.S. First Written Submission, the terms "exporter" and "producer" are not defined in the AD Agreement, and the agreement does not establish any criteria for an investigating authority to examine in order to determine whether a particular entity constitutes an "exporter" or "producer." As a threshold question in an antidumping proceeding, investigating authorities must identify the exporters and producers subject to examination. This question must be addressed in all antidumping proceedings, both those involving market economies and those involving non-market economies.

34. As the panel in *Korea – Certain Paper* found, depending on the facts of a given situation, an investigating authority may determine, consistent with Article 6.10 of the AD Agreement, that legally distinct companies should be treated as a single "exporter" or "producer" based upon their activities and relationships. Thus, affiliated companies, such as a parent company and its subsidiaries, may be collapsed and treated as a single entity. Likewise, companies subject to government influence, in particular over their export activities, may be treated as a single entity and subject to a single antidumping rate.

35. In this case, the evidence on the record demonstrated that the nature of Vietnam's economy, in particular the control exercised by the Government of Vietnam over its economy, including decisions concerning pricing and exportation, justified Commerce's determination that Vietnamese companies, in the absence of evidence demonstrating independence from such government control, were part of an entity that constitutes a single exporter or producer subject to a single assessment rate. This determination was consistent with the meaning of the terms "exporter" and "producer," as they are used in Article 6.10 of the AD Agreement. It is also consistent with the recognition by WTO Members at the time of Vietnam's accession to the WTO that Vietnam is continuing the process of transition towards a full market economy, and that more reforms are needed for Vietnam's economy to operate fully on market principles.[24]

36. After Commerce determined that the Vietnam-wide entity was an individual exporter or producer, Commerce treated that entity just like any other exporter or producer being examined under Article 9 of the AD Agreement. When the entity failed or refused to provide information requested, Commerce relied upon the facts available, consistent with Article 6.8 and Annex II of the AD Agreement. This is neither discriminatory treatment nor out of the ordinary, as Vietnam has suggested.

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[24] *Report of the Working Party on the Accession of Viet Nam*, WT/ACC/VNM/48 (October 27, 2006) ("Working Party Report"), para. 254.

37. Vietnam asks the Panel to create a new rule barring investigating authorities from taking into account the relationships between companies and the influence of the government when identifying exporters or producers. There is simply no textual basis for such a rule in the AD Agreement. Of additional concern, such a rule would undermine the effectiveness of antidumping remedies because related companies and companies influenced by the government could circumvent antidumping measures by routing exports through companies with the lowest dumping margins to avoid paying antidumping duties and to avoid posting security to guarantee payment. Imposing such a new rule would seriously alter the balance of rights and obligations established in the AD Agreement, and that simply is not permitted by the DSU.

38. Vietnam further attempts to limit the ability of investigating authorities to rely on facts available by asking the Panel to narrowly define the term "necessary information" such that it encompasses only that information used to calculate dumping margins. Again, there is no support in the text of the AD Agreement for Vietnam's position. As the panel in *Egypt – Steel Rebar* correctly found, "it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.) . . . ." In this case, the information that Commerce requested was necessary in order to define the pool from which Commerce selected the largest exporters, and the information also represented the data necessary for determining a company's export price, once selected for individual examination. Where companies failed or refused to provide this information, Commerce necessarily relied upon the facts available to complete its analysis. There is no justification for tying the hands of investigating authorities and preventing them from doing their work, which is what Vietnam is asking this Panel to do.

IV. Vietnam's Claims Regarding Limiting the Number of Respondents Selected Are Without Merit

39. Vietnam advances a number of claims concerning Commerce's determinations to limit its examination under Article 6.10 of the AD Agreement. Vietnam's claims amount to a broad-based attack on the right of WTO Members' investigating authorities to limit their examinations consistent with the AD Agreement. Once again, Vietnam invites this Panel to create new obligations, restrict the rights of WTO Members, and alter the balance of rights and obligations established by the AD Agreement. The Panel should decline Vietnam's invitation.

40. Article 6.10 of the AD Agreement allows Members to determine individual margins of dumping for a *reasonable* number of exporters and producers, and does not require the determination of an individual margin of dumping for *all* exporters and producers, where a large number of exporters and producers is involved. The only condition for limiting an examination is that the number of exporters or producers must be so large as to make a determination of individual margins of dumping for all exporters or producers "impracticable."

41. Article 6.10 does not define the term "impracticable." The ordinary meaning of the term "impracticable" is "unable to be carried out or done; impossible in practice," or "incapable of being performed or accomplished by the means employed or at command." Vietnam incorrectly

argues, contrary to the panel's findings in *EC – Salmon (Norway)*, that a determination to limit an examination must be based solely upon the number of companies involved in the proceeding, without regard to an investigating authority's resources. Article 6.10 permits an authority to limit its examination when it is impracticable to individually examine all parties involved in an investigation because the authority lacks the resources to do so.

42. Here, Commerce explained why it was necessary to limit the examination, noting the large number of companies involved, and providing an analysis of Commerce's available resources. Based upon this analysis, Commerce determined that it would be impracticable to individually examine all of the companies involved. There simply is no merit to Vietnam's claim that Commerce improperly limited its examination.

43. Vietnam also asks this Panel to add to the AD Agreement a new rule imposing a numerical limit on the right of WTO Members to limit the examination, and to find that Commerce has surpassed that numerical limit. Otherwise, in Vietnam's view, "the exception" would become "the rule." On its face, Article 6.10 of the AD Agreement contains no such numerical limitation. Any time the conditions in Article 6.10 are satisfied – that is, whenever the number of exporters, producers, importers or types of products involved is so large as to make individual dumping margin determinations for all companies "impracticable" – an authority may limit its examination. That is the rule to which the WTO Members, including Vietnam, agreed. The Panel should again decline Vietnam's invitation to establish a different rule.

44. Vietnam also alleges that Commerce acted inconsistently with Article 6.10.2 of the AD Agreement by not determining individual dumping margins for companies that voluntarily submitted necessary information. Article 6.10.2 requires an authority to determine an individual margin of dumping for such company only where the amount of companies involved is not so large as to make an individual determination for each company that voluntarily submits information "unduly burdensome." The investigating authority must determine, based on the number of companies involved and its own resources and capabilities, whether determining individual margins for voluntary respondents would be unduly burdensome or, in some instances, simply not possible.

45. Here again, though, as a factual matter, there cannot have been any violation. No company voluntarily provided the necessary information in the second and third administrative reviews. Thus, Commerce could not have acted inconsistently with Article 6.10.2.

46. Vietnam makes claims under a number of other provisions concerning Commerce's determinations to limit its examination. These are all addressed in detail in the U.S. First Written Submission. All of these other claims, though, are dependent on Vietnam's primary claim that the United States acted inconsistently with Article 6.10. As we have demonstrated, there is no merit to that claim.

V. Vietnam's Claims Regarding the Separate Rate Applied to Companies Not Individually Examined Are Without Merit

47. Vietnam also challenges the assessment rates Commerce applied to non-examined companies. Vietnam refers to these rates as the "all others rate," while Commerce refers to them as "separate rates" applied to exporters and producers that were not individually examined and that demonstrated independence from the Vietnam-wide entity.

48. When an investigating authority limits its examination pursuant to Article 6.10 of the AD Agreement, as Commerce properly did in the second and third administrative reviews, the question arises, what assessment rate is to be applied to the non-examined companies? On this question, Article 9.4 of the AD Agreement provides that the maximum antidumping duty that may be applied to non-examined companies is the weighted average margin of dumping determined for examined companies, excluding any zero and *de minimis* margins, and margins based on facts available.

49. However, as discussed in detail in Vietnam's First Written Submission and the U.S. First Written Submission, Article 9.4 does not specify what the maximum antidumping duty is that may be applied to non-examined companies when all the rates determined for examined companies fall into one of the three categories that, by rule, must be disregarded in the calculation of the ceiling rate. What is an investigating authority to do in that case?

50. Faced with this situation in the second and third administrative reviews – that is, in the absence of rates that could be used to calculate an applicable ceiling rate consistent with the requirements of Article 9.4 – Commerce determined that it would be appropriate to rely on either a weighted average of dumping margins calculated for exporters and producers individually examined in the most recently completed proceeding, excluding any zero and *de minimis* margins and margins based on facts available, or a company-specific rate from a more recently completed proceeding where such a rate had been determined for a company.

51. The question before the Panel is whether Commerce's approach was inconsistent with the AD Agreement. In the absence of any obligation, the separate rates Commerce applied to non-examined exporters and producers in the second and third administrative reviews cannot be deemed inconsistent with the Agreement.

52. Once again, however, Vietnam asks the Panel to create a new rule. Specifically, Vietnam asks the Panel to require Commerce to "recalculate the all-others rate using a weighted-average of the individually reviewed exporters/producers for the contemporaneous phase of the proceeding." There is simply nothing in the text of Article 9.4 to support any such requirement. In addition, Vietnam argues that the investigating authority should be required to exclude dumping margins based on facts available from the weighted average, but include zero or *de minimis* margins. The self-serving nature of Vietnam's proposal is obvious, and Vietnam's position simply is not credible.

53. Also not credible is Vietnam's assertion that, because the separate rates applied to non-examined companies had "no basis in the relevant period of review," Commerce's approach "unfairly prejudiced" the companies that were not individually examined. However, it is in the

nature of an antidumping duty determined pursuant to Article 9.4 for companies that were not individually examined that the rate applied will not be based on the actual commercial behavior of the non-examined companies. Certainly, where contemporaneous dumping margins are determined and those margins are not zero, *de minimis*, or based on facts available, such margins must be used to calculate a ceiling per the terms of Article 9.4. In the absence of such margins, Article 9.4 does not impose a ceiling, but Commerce nonetheless reasonably applied assessment rates by relying on margins from an earlier period that, like the margins specified in Article 9.4, were not zero, *de minimis*, or based on facts available.

54. Vietnam also argues that the separate rates Commerce applied to companies that were not individually examined were inconsistent with the covered agreements because the rates were calculated using the zeroing methodology. As with Vietnam's other zeroing-related claims, however, as a factual matter, the zeroing methodology was not employed during the second and third administrative reviews when Commerce applied the separate rates to companies that were not individually examined.

55. The calculations that Commerce performed in the investigation to determine the separate rates were not subject to any re-examination in the second and third administrative reviews. Commerce made no new comparisons between the export price and the normal value. Commerce simply applied a previously calculated rate to respondents that demonstrated sufficient independence from the government during the second and third administrative reviews. In short, Commerce did not employ the zeroing methodology during the second and third administrative reviews when it applied the separate rates to companies that were not individually examined.

56. Vietnam's argument is dependent upon its claim that Commerce acted inconsistently with the AD Agreement when it calculated margins of dumping based on the zeroing methodology in the original investigation. However, as we have explained, and as Vietnam has recognized, Commerce's determination of the separate rate for non-examined exporters and producers in the investigation was made prior to the entry into force of the WTO Agreement with respect to Vietnam. Thus, that determination was not subject to the AD Agreement and cannot have been inconsistent with the AD Agreement.

57. The separate rates determined in the original investigation did not become subject to the AD Agreement simply because they continued to be applied on or after the date of entry into force of the WTO Agreement for Vietnam. As we noted earlier, in *US – DRAMS*, the panel analyzed Article 18.3 of the AD Agreement and reasoned that "[P]re-WTO measures do not become subject to the AD Agreement simply because they continue to be applied on or after the date of entry into force of the WTO Agreement for the Member concerned."

58. Here again, Vietnam asks the Panel to ignore the text of the AD Agreement, specifically the limitation of the application of the AD Agreement in Article 18.3. Because Commerce simply continued to apply rates determined prior to the entry into force of the WTO Agreement for Vietnam, and did not utilize the zeroing methodology during second and third administrative

reviews in the application of those rates, the Panel should reject Vietnam's zeroing-related claims against the separate rates Commerce applied in the second and third administrative reviews.

VI. Vietnam's Claim with Respect to the Continued Use of Challenged Practices Is Without Merit

59. Finally, Vietnam argues that Commerce "has utilized the challenged practices in an original investigation, four consecutive administrative reviews, and in the preliminary results of the ongoing sunset review," and this "continued use" is inconsistent with various provisions of the AD Agreement and the GATT1994.

60. As we have explained this morning and in the U.S. First Written Submission, Vietnam did not identify the "continued use of the challenged practices" as a measure in its panel request, and thus no such measure is within the Panel's terms of reference. The United States also has serious concerns about the Appellate Body's finding in *US – Continued Zeroing* that "continued use" can constitute a measure subject to WTO dispute settlement. In any event, however, Vietnam's argument is premised on its assertion that such "continued use" constitutes an "ongoing conduct." Even were this a cognizable claim, once again the facts belie a conclusion that Vietnam has demonstrated the existence of such "ongoing conduct" in this dispute.

61. In *US – Continued Zeroing*, the Appellate Body found that the record supported findings of inconsistency in only four of the eighteen cases challenged. As a factual matter, in the fourteen other cases, the record did not reflect that "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time." In each of the four cases where the Appellate Body concluded that there was "a sufficient basis . . . to conclude that the zeroing methodology would likely continue to be applied in successive proceedings," the panel had found the following: (1) the use of the zeroing methodology in the initial less than fair value investigation; (2) the use of the zeroing methodology in four successive administrative reviews; and (3) reliance in a sunset review upon rates determined using the zeroing methodology.

62. In this dispute, Vietnam cannot demonstrate a string of determinations over an extended period of time. The original investigation, the first, fourth, and fifth administrative reviews, and the sunset review are not properly before the Panel and there can be no finding of inconsistency in connection with those proceedings.

63. As discussed previously, Article 18.3 of the AD Agreement states that, "the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement." Through its purported "continued use" measure, Vietnam is attempting to apply the provisions of the AD Agreement to the original investigation and first administrative review. Asserting that its panel request was sufficient to demonstrate a "continued use" measure, Vietnam states that its "panel request provided the United States and third parties with clear notice that Viet Nam *would challenge the USDOC's use of the defined practices in all*

proceedings related to the shrimp antidumping duty order."[25] The investigation and the first administrative review cannot be placed into a "continued use measure" and then challenged under the provisions of the AD Agreement.

64. On the other end of the purported "continued use" measure are other determinations that are likewise not properly before the Panel in this dispute. The inclusion of the fourth administrative review, the fifth administrative review, and the sunset review within the "continued use" measure described in Vietnam's first written submission expands the scope of those "measures" beyond their description in the panel request. Vietnam's panel request identifies as a "measure" the "Preliminary Results"[26] of the fourth administrative review, but Vietnam's First Written Submission attempts to expand the scope by referring to the fourth administrative review itself. Vietnam's panel request makes no reference to the fifth administrative review whatsoever. Finally, Vietnam's panel request identifies the "initiation" of the sunset review as a measure, but Vietnam's First Written Submission attempts to include the five year sunset review itself as part of a "continued use" measure.

65. Additionally, Vietnam has failed to establish that "zeroing" had any impact on the margins of dumping calculated in the second and third administrative reviews, and Vietnam has failed to establish as a factual matter that Commerce used the zeroing methodology in connection with the application of a dumping margin to separate rate respondents in those proceedings, or to the Vietnam-wide entity. Hence, with respect to Commerce's use of zeroing, Vietnam cannot establish "a string of determinations, made sequentially. . . over an extended period of time."

66. Vietnam also seeks to expand the Appellate Body's reasoning in *US – Continued Zeroing* beyond zeroing to encompass the other "challenged practices." As demonstrated above, though, Vietnam's claims regarding the other "challenged practices" are without merit, and thus Vietnam cannot establish "a string of determinations, made sequentially. . . over an extended period of time" with respect to those "challenged practices" either.

VII. Conclusion

67. As we demonstrated in the U.S. First Written Submission and again this morning, Vietnam has pursued claims that are not within the Panel's terms of reference, advanced arguments that lack factual support, and invited the Panel to invent new obligations that have no basis in the covered agreements. Consequently, for the reasons we have given, the United States respectfully requests that the Panel grant the U.S. preliminary ruling requests and reject Vietnam's claims that the United States has acted inconsistently with the covered agreements.

68. Mr. Chairman, members of the Panel, this concludes our opening statement. We thank you for your attention and would be pleased to respond to any questions you may have.

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[25] Vietnam Response to U.S. Preliminary Ruling Request, para. 24.

[26] Vietnam Panel Request, p. 2 (Exhibit Viet Nam-02).