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

WT/DS404

EXECUTIVE SUMMARY OF SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

November 23, 2010

I. INTRODUCTION

1. This dispute, like all WTO disputes, presents questions about the interpretation of the covered agreements, but Vietnam has largely failed to articulate what specific obligations contained in the covered agreements it believes the United States has violated. Vietnam has referenced multiple provisions of the AD Agreement and the GATT 1994, but has not provided a proper interpretive analysis of those provisions. Vietnam's arguments do not provide a basis on which the Panel could sustain Vietnam's allegations that the United States has acted inconsistently with any of its WTO obligations.

2. This submission will not repeat all of the arguments advanced in the U.S. First Written Submission, in oral statements during the first substantive panel meeting, and in the U.S. responses to the Panel's written questions, though we continue to rely on the arguments contained therein. For the reasons we have already given, together with those we provide in this submission, the United States respectfully submits that the only conclusion to be drawn is that Vietnam's claims are without merit and must be rejected.

II. VIETNAM'S CLAIMS OF INCONSISTENCY REGARDING "ZEROING" ARE WITHOUT MERIT

3. Vietnam has failed to demonstrate that any antidumping duties were applied in excess of the margins of dumping determined for individually examined exporters and producers in the second and third administrative reviews. Vietnam has not shown that zeroing had any impact on the calculated dumping margins for the individually examined exporters and producers in these reviews, all of which were determined to be zero or *de minimis*.

4. Vietnam continues to offer no relevant evidence in support of its claims against the margins of dumping calculated for individually examined exporters/producers in the second and third administrative reviews. Instead, Vietnam makes an unsubstantiated assertion about the impact of the use of "zeroing" on the behavior of exporters/producers. Even if Vietnam could provide evidence to support its assertion, there is no obligation in Article VI:2 of the GATT 1994 or Article 9.3 of the AD Agreement that addresses such an impact upon the behavior of exporters/producers.

5. Vietnam also argues that the Panel should find it "relevant" that the "zeroing" methodology was "embedded" in Commerce's determinations in the second and third administrative reviews. This appears to be no more than another attempt at a formulation that skirts the fact that the margins of dumping calculated for the individually examined companies were zero or *de minimis* and avoids the actual language of the provisions of the covered agreements that are at issue. To the extent that there is a prohibition on the use of a "zeroing" methodology in administrative reviews, such an obligation is found in Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. These provisions prohibit the imposition of antidumping duties in excess of the margin of dumping. The fact that the "zeroing" methodology is embedded in a proceeding is irrelevant unless it can be demonstrated that antidumping duties were applied in excess of the margin of dumping.

6. In response to the Panel's written questions, Vietnam, for the first time in this dispute, has advanced arguments in support of an "as such" challenge against the use of "zeroing" in

administrative reviews. However, Vietnam has advanced no arguments and pointed to no evidence that would support a finding by the Panel that any "zeroing methodology" exists as a measure that can be challenged "as such." Vietnam merely cites repeatedly to prior panel and Appellate Body reports. Consequently, with respect to the so-called "zeroing methodology," Vietnam has not provided a sufficient evidentiary basis for the Panel to make any findings regarding the precise content of any rule or norm, its nature as a measure of general and prospective application, and its attribution to the United States.

7. Contrary to Vietnam's argument, the obligation to make a "fair comparison" under Article 2.4 does not create an obligation to provide for offsets. Article 2.4 establishes an obligation that a fair comparison be made between normal value and export price and provides detailed guidance as to how that fair comparison is to be made. Article 2.4 recognizes that the normal value and export transactions to be compared may occur, *inter alia*, (a) with respect to models with differing physical characteristics, (b) at distinct levels of trade, (c) pursuant to different terms and conditions, and (d) in varying quantities. The focus of Article 2.4 is on how the authorities are to select transactions for comparison and make appropriate adjustments for differences that affect price comparability. Vietnam's proposed interpretation of Article 2.4 – to encompass the *aggregation* of comparisons between export price and normal value – is inconsistent with prior panel and Appellate Body interpretations, and it is erroneous. Article 2.4 does not apply to the *aggregation* of comparisons. The open-ended approach inherent in Vietnam's interpretation of Article 2.4 of the AD Agreement would result in disputes that are virtually impossible to resolve in any principled, text-based way.

8. Vietnam also argues that the Panel should find that the prohibition on the use of "zeroing" during investigations that the Appellate Body has identified in Article 2.4.2 of the AD Agreement applies in the context of administrative reviews. The text of the AD Agreement, as well as prior panel and Appellate Body reports, does not support Vietnam's argument. The Appellate Body and prior panels have recognized distinctions between investigations and other proceedings under the AD Agreement, consistently finding that the provisions in the AD Agreement with express limitations to investigations are, in fact, limited to the investigation phase of a proceeding. The repeated recognition by panels and the Appellate Body of the distinctions between investigations and review proceedings is consistent with the distinct function of the investigation phase, which is to establish as a threshold matter whether the imposition of an antidumping duty is warranted. Other phases (such as Article 9 assessment proceedings or Article 11 sunset reviews) have different functions. Whereas the function of an investigation is to determine whether a remedy against dumping should be provided, the function of an assessment proceeding is to determine the precise amount of that remedy.

9. The limited applicability of Article 2.4.2 could not be plainer. Article 2.4.2, by its very terms, is limited to the "investigation phase." Analyzing the text of Article 2.4.2, the panel in *Argentina – Poultry Anti-Dumping Duties* recognized that the application of that provision is expressly limited to the investigation phase of an antidumping proceeding. The express limitation of the obligations in Article 2.4.2 to the investigation phase is consistent with the differences in the antidumping systems applied by Members for purposes of the assessment phase. The different methods used by Members include the use of prospective normal values, retrospective normal values, and prospective *ad valorem* duties. If the obligations regarding comparison methodologies found in Article 2.4.2 were applied to the assessment of antidumping duties, this divergence of assessment systems would not be possible. For example, it is not

possible to reconcile the prospective normal value system used by some Members with a requirement to use either the average-to-average or transaction-to-transaction comparison methodology, because such systems compare weighted average normal values to individual export prices in order to assess antidumping duties on individual transactions. Thus, to retain the flexibility for Members to apply different assessment systems that is reflected in Article 9, it was necessary to limit the requirements of Article 2.4.2 to the investigation phase.

10. Contrary to Vietnam's argument, Article VI:1 of the GATT 1994 and Article 2.1 of the AD Agreement do not define the "concepts" of "dumping" and "margin of dumping" in relation to a "product as a whole". The term "product as a whole" is not found anywhere in the GATT 1994 or the AD Agreement, and Vietnam's purportedly "textual" argument is divorced from the actual text of the relevant provisions. Consistent with the customary rules of treaty interpretation, the precise meaning of the terms "dumping" and "margin of dumping" in a particular provision must be informed by the context in which the term is used. The terms "dumping" and "margin of dumping" are defined in relation to the term "product." The ordinary meaning of "product" may refer to a single transaction or multiple transactions. Article 2.1 defines "dumping" in relation to the terms "export price" and "normal value." These fundamental concepts have flexible meaning because "normal value" and "export price" could relate to either an individual transaction or multiple transactions depending upon the context. It would be illogical to conclude that the term "dumping," which is derived from these flexible terms, may not itself have a similarly flexible definition.

III. VIETNAM'S CLAIMS AGAINST THE RATES APPLIED TO COMPANIES NOT SELECTED FOR INDIVIDUAL EXAMINATION IN THE SECOND AND THIRD ADMINISTRATIVE REVIEWS ARE WITHOUT MERIT

11. Article 9.4 of the AD Agreement simply establishes the maximum antidumping duty that may be applied to companies not individually examined, in certain circumstances. Article 9.4 does not prescribe a methodology for assigning a rate to companies not individually examined in an assessment review, and Article 9.4 does not prescribe the *maximum* rate that may be applied to companies not individually examined in situations where the rates calculated for the individually examined companies are all zero, *de minimis*, or based on facts available. Contrary to Vietnam's argument, Article 9.4 does not require the application of zero or *de minimis* rates to companies not individually examined if all the rates determined for individually examined companies are also zero or *de minimis*. To invent further obligations under the circumstances presented here would be contrary to the DSU, which makes it clear that dispute settlement is not to add to or diminish Members' rights and obligations.

12. The text of Article 9.4 reflects the limited nature of the obligation related to the maximum antidumping duty that Members may apply, as well as the compromise that Members made in agreeing to this provision. Article 9.4 requires investigating authorities to disregard not only facts available margins (rates that would increase the maximum antidumping duty that may be applied), but also zero and *de minimis* margins as well (rates that would lower the ceiling). To interpret Article 9.4 as requiring Members to apply only zero or *de minimis* rates in instances in which only zero or *de minimis* rates have been calculated for individually examined companies would be inconsistent with the text and would upend the compromise evidenced by the text.

13. There is no basis in the AD Agreement for the contemporaneity requirement that Vietnam

asks the Panel to read into Article 9.4. Article 2.4, which Vietnam suggests informs the interpretation of Article 9.4, addresses the determination of margins of dumping, specifically the comparison of export price and normal value and adjustments that must be made to ensure a "fair comparison." The obligation in Article 2.4 that the export price and normal value comparison be made "in respect of sales made at as nearly as possible the same time" relates to the calculation underlying the determination of dumping. It does not relate to the calculation of the maximum antidumping duty that may be applied to companies not individually examined pursuant to Article 9.4, nor to the actual antidumping duty applied to such companies when the duty is based on a previously determined dumping margin. The obligations in Article 2.4 are of no relevance to the Panel's examination of Commerce's determinations.

14. Nothing in the text of the AD Agreement supports the linkage that Vietnam attempts to establish between Articles 2.4 and 9.4. It is particularly noteworthy that there are no cross references between these provisions. The Appellate Body has previously explained that the absence of cross references is of some consequence, as the drafters made "active use" of cross references in the covered agreements when they intended to apply obligations in different contexts. There are numerous cross references throughout the AD Agreement, but none that link Articles 2.4 and 9.4.

15. Vietnam also points to Article 9.3 of the AD Agreement as a basis for imputing a contemporaneity requirement into Article 9.4. Just as Article 9.4 does not cross reference Article 2.4, it makes no reference to Article 9.3. Additionally, while Article 9.3 establishes obligations with respect to the application of duties to individually examined companies, Article 9.4 establishes certain obligations with the respect to the maximum duty that may be applied to companies not individually examined in some situations. Unsurprisingly, the obligations are different. Article 9.4 does not impose any obligations on Members regarding the methodology to be used in determining what antidumping duty should be applied to companies not individually examined. Article 9.4 simply sets the maximum duty rate that may be applied in certain circumstances. When all the dumping margins calculated for individually examined companies, are zero, *de minimis*, or based on facts available, Article 9.4 does not specify a maximum duty.

16. Vietnam has also failed to demonstrate that Commere's determinations in the second and third administrative reviews are inconsistent with the "unbounded" discretion standard that the Appellate Body has said applies in a *lacuna* situation under Article 9.4. Commerce did not act with "unbounded" discretion. Rather, Commerce reasonably looked toward rates determined in recent proceedings as they would reflect the behavior of exporters of subject merchandise during a recent period of time.

17. Vietnam argues for the first time in response to the Panel's written questions that Commerce failed to make "an unbiased and objective evaluation of the facts" in assigning rates to companies not individually examined in the second and third administrative reviews. Vietnam did not raise any claims under Article 17.6(i) of the AD Agreement in its panel request, so no claims under this provision are within the panel's terms of reference. Furthermore, Article 17.6(i) establishes a general obligation in respect of a dispute settlement panel's assessment of the facts of the matter rather than imposing an obligation on *WTO Members*.

18. Additionally, Article 9.4 of the AD Agreement does not condition a Member's right to apply antidumping duties to companies that are not individually examined on a factual finding

that other companies continued to dump during a particular period. Furthermore, Vietnam's assertion that the "evidence indicates an industry that has ceased dumping" is wrong. In the second administrative review, numerous companies avoided any possibility of being selected for individual examination by refusing to respond to Commerce's request for information concerning the quantity and value of their shipments to the United States, and Commerce determined the margin of dumping for these companies based on facts available using an adverse inference. In the first administrative review (not a measure at issue in this dispute), not only did companies not respond to quantity and value questionnaires, but several companies *selected for individual examination* failed to respond to Commerce's full sales and cost questionnaire. These adverse findings with respect to dumping cannot be considered evidence that dumping in the industry had ceased. Vietnam asks the Panel to ignore these facts.

19. Vietnam argues that *US – DRAMS* is "incongruent" with the facts of this dispute because Commerce "fully considered the issue" of what rate to apply to companies not individually examined in the second and third administrative reviews before ultimately determining to apply the separate rates determined in the original investigation. Of course, Commerce "fully considered" what rates to apply 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. Commerce considered these rates to be reasonably reflective of commercial behavior during a recent period.

20. Vietnam has asked the Panel to find that the rates applied in the second and third administrative reviews to companies not individually examined are inconsistent with the covered agreements because they <u>were inconsistent</u> with the covered agreements <u>when they were originally calculated</u>. But the rates were <u>not</u> inconsistent with the covered agreements <u>when they were originally calculated</u>. The rates were not subject to the covered agreements when they were originally calculated – because the WTO Agreement did not apply between the United States and Vietnam at that time – and they cannot now be found to have been inconsistent with the covered agreements at the time they were originally calculated. Vietnam appears to be seeking to obtain the benefits of WTO Membership prior to its accession to the WTO.

21. The panel in *US – DRAMS* explained that "the AD Agreement only applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. Any aspects of a pre-WTO measure that are not covered by the scope of the post-WTO review do not become subject to the AD Agreement by virtue of Article 18.3 of the AD Agreement." The relevant question, then, is whether the rates calculated in the original investigation were subject to post-WTO review? The answer to this question is, "no." Commerce did not recalculate the rates that were calculated in the original investigation and Commerce did not make any new comparisons of export price and normal value. That is, Commerce did not conduct a "post-WTO review" of the rates such that they became subject to the AD Agreement by virtue of such review. The separate rates in question were determined once and only once in the original pre-WTO investigation – before the entry into force of the WTO Agreement for Vietnam – and were then applied in the final results for the second and third administrative reviews. The factual situation in this dispute is thus closely analogous to that in *US – DRAMS*.

IV. VIETNAM'S CLAIMS OF INCONSISTENCY REGARDING THE RATE APPLIED TO THE VIETNAM-WIDE ENTITY ARE WITHOUT MERIT

22. Vietnam agrees with the United States that, as a general matter, an authority may, consistent with Article 6.10 of the AD Agreement, treat more than one company as a single entity based upon the relationship between those companies. However, Vietnam suggests that, in the challenged proceedings, Commerce relied on an "unjustified and impermissible presumption that all exporters are owned or controlled by the government" and Commerce "lacks the affirmative evidence necessary to conclude that the entities it believes constitute the Vietnam-wide entity are affiliated . . . ." Pursuant to Article 17.6(i) of the AD Agreement, the issue is whether Commerce properly established the facts and evaluated such facts in an unbiased and objective manner in finding a relationship between the Government of Vietnam and certain companies that is sufficiently close to warrant treating multiple companies as a single entity. This question must be answered in the affirmative. Commerce had before it ample evidence of the influence exerted by the Government of Vietnam over its economy, including over exportation.

23. Vietnam also argues that an investigating authority may only make a finding of affiliation with respect to "companies that are subject to individual examination." There is no such limitation in the text of the Agreement. Vietnam is also incorrect that an investigating authority would not have the necessary information to make an affiliation determination with respect to companies that are not individually examined. Commerce had ample evidence to support a determination that the Vietnam-wide entity should be treated as a single exporter/producer, including information about the non-market nature of Vietnam's economy and the influence exerted over it by the Government of Vietnam, in particular with respect to exportation, as well as information provided by some companies regarding their independence from the government.

24. Contrary to Vietnam's argument, the opportunity Commerce provided to respondents in the second and third administrative reviews to demonstrate their independence from the government was not discriminatory. It was an information gathering exercise that permitted Commerce to determine whether particular companies should be considered individually or as part of another entity. Commerce collects similar information in market economy cases as well.

25. Vietnam asserts that the "assumption underlying the USDOC practice is that it can apply an adverse facts available rate to companies that do not demonstrate independence from government control." Vietnam is incorrect. Commerce did not apply a rate based upon the facts available to any interested party that cooperated in the proceedings. Vietnam mistakenly conflates Commerce's finding that the Vietnam-wide entity is a single exporter/producer and Commerce's separate determination in the second administrative review to apply to the Vietnam-wide entity an antidumping duty rate based upon facts available due to the failure of certain companies to provide requested information. Vietnam also mischaracterizes the basis for the antidumping duty rate applied to the Vietnam-wide entity in the third administrative review. In the third administrative review, Commerce did not apply to the Vietnam-wide entity a rate based upon facts available. Rather, Commerce applied to the Vietnam-wide entity the only rate that had ever been applied to it, which was similar to the methodology used for the other separate rate companies in the third administrative review.

26. The quantity and value data requested from all respondents under review in the second administrative review was "necessary information" within the meaning of Article 6.8 and Annex

II of the AD Agreement. The fact that Commerce obtained information regarding the quantity and value of companies' imports in the third administrative review from U.S. Customs and Border Protection data, as opposed to sending questionnaires to companies, does not demonstrate that the information was not necessary. On the contrary, Commerce's collection of quantity and value information in both the second and third administrative reviews, albeit from different sources, confirms that this information was required in order for Commerce to conduct the proceedings. Additionally, regardless of whether Commerce calculates dumping margins based upon individual sales, a company's aggregate quantity and value is the starting point of any dumping analysis. That Commerce later requires companies that are individually investigated to report each sale does not mean that the total quantity and value of a company's sales is not necessary information.

27. Contrary to Vietnam's argument in this dispute, the scope of "necessary information" is not limited to the information used to calculate margins of dumping. As the *Egypt – Steel Rebar* panel explained, "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.) . . . ." Vietnam's argument that an investigating authority cannot make an affiliation finding for a company not individually examined because, *inter alia*, "the authority does not have the information <u>necessary</u> to make such a determination" suggests that Vietnam agrees.

V. VIETNAM'S CLAIMS OF INCONSISTENCY REGARDING LIMITING THE NUMBER OF RESPONDENTS SELECTED ARE WITHOUT MERIT

28. Article 6.10 of the AD Agreement broadly provides that investigating authorities are not required to determine margins of dumping for every exporter or producer where the number of exporters or producers "is so large as to make such a determination impracticable." In the second and third administrative reviews, there were more than 100 exporters or producers under review. Vietnam has clarified that it is <u>not</u> arguing that Commerce "should have or could have investigated all the producers and exporters requesting reviews in each segment of the proceeding." Vietnam indicates that requiring Commerce to do so would not be "reasonable." Vietnam thus concedes that is was "impracticable" for Commerce to determine individual dumping margins for all exporters and producers. Furthermore, Vietnam has not alleged that the Commerce acted inconsistently with Article 6.10 by failing to individually examine the largest number of exporters or producers that "reasonably" could be examined, explaining that, "[f]or purposes of this dispute, the Panel does not need to determine the precise percentage of producers or production that the USDOC could reasonably investigate under Article 6.10." Hence, the United States cannot be found to have acted inconsistently with any of the obligations in Article 6.10 of the AD Agreement.

29. Vietnam's argument that the United States violated Articles 6.10 and 9.4 of the AD Agreement because Commerce "made no effort to explore alternatives" to examine more exporters and producers when it limited its examination is without merit. Nothing in Article 6.10, or any other provision of the AD Agreement, requires Commerce to "explore alternatives" as proposed by Vietnam. This is another instance of Vietnam inventing an obligation that has no basis in the text of the AD Agreement.

30. By its terms, Article 6.10.2 of the AD Agreement requires that companies not initially

selected who wish to have an individual margin of dumping calculated must "submit[] the necessary information in time for that information to be considered." The information Vietnam has put before the Panel demonstrates that the "necessary information" was never submitted in either the second or third administrative reviews and conclusively demonstrates that Commerce was under no obligation to determine individual dumping margins for "voluntary respondents" in those proceedings. For this reason, the United States cannot be found to have acted inconsistently with Article 6.10.2 of the AD Agreement.

31. In its responses to the Panel's written questions, Vietnam articulates its interpretation of Article 11 of the AD Agreement and ultimately concludes that Articles 11.1 and 11.3 "require that an authority permit revocation determinations on a company-specific basis." The Appellate Body, however, has confirmed that Article 11.1 does not impose any independent or additional obligations on Members. In addition, these claims are dependent on Vietnam's claims that Commerce's determinations to limit its examination are inconsistent with Article 6.10 of the AD Agreement. As we have shown, however, Commerce's determinations to limit its examination are not inconsistent with the AD Agreement. The United States cannot be found to have acted inconsistently with one provision of the AD Agreement due to the proper exercise of its rights under a separate provision of the AD Agreement.

32. Vietnam ignores the Appellate Body's unequivocal finding in *US – Corrosion-Resistant Steel Sunset Review* that "Article 11.3 does not require investigating authorities to make their likelihood determination on a company-specific basis." The Appellate Body also rejected the same arguments Vietnam makes now regarding Articles 6.10 and 11.4 of the AD Agreement, finding that "[t]he 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." Additionally, contrary to Vietnam's suggestion, it is evident that the Appellate Body was aware of Article 11.1 when it was analyzing Article 11.3.

33. Finally, Vietnam asserts that a U.S. regulation that provides for company-specific revocation of an antidumping duty order under certain circumstances is "the United States' chosen method for implementing Article 11.1. . . ." The United States does not agree with this statement. The United States considers that the regulatory provision at issue goes beyond any obligation contained in Article 11 of the AD Agreement.

VI. VIETNAM'S CLAIM WITH RESPECT TO THE "CONTINUED USE OF THE CHALLENGED PRACTICES" IS WITHOUT MERIT

34. The United States has demonstrated that no so-called "continued use" measure is within the Panel's terms of reference because Vietnam failed to specifically identify any such measure in its panel request, contrary to the obligation in Article 6.2 of the DSU. Vietnam asks the Panel to infer from the description of other "as applied" measures that a "continued use" measure is also identified in the panel request. Such an inference is not permissible. Rather, the Panel must determine whether, "on the face" of the panel request, read "as a whole," a "continued use" measure was specifically identified consistently with the requirement in Article 6.2. In short, as the United States has shown and will explain further below, it was not.

35. Vietnam suggests that the opening line of Section 2 of the panel request specifically

identified a "continued use" measure and "[t]he language of the Panel Request does not include limiting language that would restrict the measure's applicability to only those reviews already completed or initiated." Vietnam asks the Panel to ignore or erase the very next sentence of the panel request, which states that "[t]he following determinations constitute the measures at issue" and then lists six particular determinations that are specifically identified. Contrary to Vietnam's assertion, this sentence does indeed expressly "limit" the measures at issue in this dispute to the determinations identified. Other language in the panel request similarly limits the claims raised to the "as applied" measures identified in Section 2. Throughout the document, Vietnam's panel request limits itself to the application of the 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.

36. In the consultations request, Vietnam described its concern that the United States "will . . . continue to act inconsistent with its WTO obligations." Vietnam has asserted that this is a reference to a "continued use" measure. In its First Written Submission, Vietnam described the measure as the "continued use of the challenged practices." The words used in the consultations request and Vietnam's First Written Submission are similar to each other, and the language in the First Written Submission is similar to that used in *US – Continued Zeroing* by the EC in its panel request and by the Appellate Body in its report. Vietnam has offered no explanation for why the words in the consultations request and Vietnam's First Written Submission are so dissimilar from the words in Vietnam's panel request in this dispute. While previous panels have recognized that the DSU does not require that a request for consultations mirror a panel request, the principal conclusion to be drawn from the dissimilarity is that the panel request does not specifically identify any "continued use" measure, and thus no such measure is within the Panel's terms of reference.

37. Nothing in the text of Section 2(d) of Vietnam's panel request can be read as specifically identifying a "continued use" measure. The words in Section 2(d) merely allege that the "sunset review is inconsistent with Articles 11.2 and 11.3 of the Agreement," which would be an "as applied" claim if not for the fact that Commerce had not yet made a final determination in the sunset review at the time Vietnam made its panel request.

38. Vietnam argues that "the measures identified in the panel request are closely related to the 'continued use' measure," mistakenly relying on the panel reports in *Japan – Film* and *Argentina – Footwear*. The "measure" that Vietnam failed to "explicitly describe" in the panel request is a so-called "continued use" measure. A "continued use" measure is not "subsidiary or closely related to" the second and third administrative reviews – the only measures properly described in the panel request. If anything, the second and third administrative reviews would be subsidiary to, *i.e.*, part of a "continued use" measure; not the reverse. Additionally, the "continued use" measure does not modify or implement the second and third administrative reviews. It is significant that, in *Japan – Film* and *Argentina – Footwear*, the complaining Members could not have "explicitly described" the implementing measures in the panel request because the implementing measures were not put into place until after the panel request had been made. That is not the case in this dispute.

39. Article 6.2 of the DSU requires Vietnam to "identify the specific measures at issue" in its panel request. Vietnam would have the Panel look only at the "claims" and not the "measures" identified in its panel request. The logical conclusion of Vietnam's argument is that a

complaining party could identify just one measure in its panel request, and bring before a panel as many additional measures as it wished as long as the claims with respect to each measure were the same. This is not what the DSU requires. Furthermore, the basic premise of Vietnam's assertion that there is no "meaningful distinction substantively between the arguments" to be made in relation to "as applied" and "continued use" measures is flawed. The facts and legal arguments relevant to "as applied" claims related to a particular determination are substantially different from those relevant to claims related to a so-called "continued use" measure.

40. The "continued use of challenged practices" appears to be a fictional measure supposedly 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). Such so-called "continued use" cannot be subject to dispute settlement because it could not be impairing any benefits accruing to Vietnam, and it consists of proceedings that had not resulted in "final action" at the time of the consultations request, as required by Article 17.4 of the AD Agreement.

41. 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. Where there was "a lack of evidence showing that zeroing was used in one periodic review listed in the panel request" or "the sunset review determination was excluded from the Panel's terms of reference," the Appellate Body found that "the Panel made no finding confirming the use of the zeroing methodology in successive stages over an extended period of time whereby the duties are maintained." Consequently, the Appellate Body was "unable to complete the analysis on whether the use of the zeroing methodology exists as an ongoing conduct in successive proceedings . . . ."

42. In this dispute, the original investigation, the first, fourth, and fifth administrative reviews, and the sunset review are not within the Panel's terms of reference and there can be no finding that Commerce acted inconsistently with the AD Agreement or the GATT 1994 in connection with the "challenged practices" in those proceedings. Additionally, Vietnam has failed to establish that "zeroing" had any impact on the margins of dumping calculated for the individually examined respondents 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. Vietnam also seeks to expand the Appellate Body's reasoning in *US – Continued Zeroing* beyond zeroing to encompass the other "challenged practices", but Vietnam's claims regarding the other "challenged practices" are without merit. Vietnam cannot establish "a string of determinations, made sequentially. . . over an extended period of time" with respect to any of the "challenged practices."