ANNEX C

ORAL STATEMENTS OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL OR EXECUTIVE SUMMARIES THEREOF

ANNEX C-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF VIET NAM AT THE FIRST MEETING OF THE PANEL

I. OVERVIEW

1. This Panel proceeding is essentially about legal interpretations of various provisions of the Anti-Dumping Agreement.

2. First, it involves the question of whether the practice of zeroing as engaged in by the U.S. in determining the margins of dumping in repeated administrative reviews is consistent with U.S. obligations under Article VI:1 of the GATT 1994 and Articles 2.1, 2.4.2, and 9.3 of the Anti-Dumping Agreement. Second, it involves the question of whether a so-called "Vietnam-wide entity" rate based on adverse facts available is permitted under Articles 2, 6 and 9 of the Anti-Dumping Agreement. Third, it involves the question of whether an "all others" or "separate" rate applicable to non-reviewed respondents based on zeroing applied in a prior segment of an antidumping proceeding is consistent with Articles 2.4 and 9.4 of the Anti-Dumping Agreement. This question raises two related issues: one, is it reasonable to assume continued margins of dumping by non-reviewed respondents when the reviewed mandatory respondents have demonstrated the absence of dumping since imposition of the anti-dumping order. And two, if zeroing in periodic reviews is prohibited, then application of a rate based on zeroing for purposes of the "all others" or "separate rate" must also be prohibited. Fourth, this dispute involves the question of whether the exception provided in Article 6.10, which permits restricting the scope of an investigation or review to a sample of exporters/producers or those accounting for the largest volume of exports, allows authorities to continuously ignore other non-procedural obligations of the Anti-Dumping Agreement. Fifth, it involves the question of whether a five-year sunset review to determine whether dumping is continuing or likely to recur under Article 11.3 can be properly based on determinations in consecutive periodic reviews each of which is inconsistent with the Anti-Dumping Agreement in the multiple ways described above.

II. THE PANEL'S ANALYTIC FRAMEWORK MUST BE INFORMED BY APPELLATE BODY PRECEDENT, THE ACCEPTED RULES OF TREATY INTERPRETATION OF THE VIENNA CONVENTION, AND THE OBJECT AND PURPOSE OF SOVEREIGN ENTITIES IN ENTERING INTO AN INTERNATIONAL AGREEMENT OR TREATY

3. The WTO Agreements define a set of rights and obligations which the signatories have agreed to follow. The WTO Agreements define a rules based system of international trade with non-discrimination as the core principle. The dispute settlement system of the WTO "is a central element in providing security and predictability to the multilateral trading system" and "serves to preserve the rights and obligations of Members."

4. At paragraphs 67-70 of its First Written Submission, the United States suggests that the Panel in the instant proceeding is not bound by Appellate Body precedent and should conduct a *de novo* review of whether zeroing in periodic reviews is prohibited under the Anti-Dumping Agreement. The logical conclusion of the U.S. position is that identical factual scenarios raised under the same provision of an agreement can result in different treatment. Thus, zeroing can be applied to Viet Nam if this Panel disagrees with all Appellate Body precedent, but cannot be applied to another country

(or, indeed, in another dispute involving Viet Nam) if the Panel hearing that dispute agrees with Appellate Body precedent. This undermines both the non-discrimination principle of the WTO and the object and purpose of the Dispute Settlement Understanding to provide security and predictability.

III. THE "CONTINUED USE OF CHALLENGED PRACTICES" IS A MEASURE SUBJECT TO DISPUTE SETTLEMENT AND IS WITHIN THIS PANEL'S TERMS OF REFERENCE

A. NEITHER THE DSU NOR THE ANTI-DUMPING AGREEMENT PRECLUDE A MEMBER FROM CHALLENGING THE CONTINUED AND ONGOING USE OF A WTO-INCONSISTENT PRACTICE

5. With this measure, Viet Nam requests that the Panel consider the USDOC's use of certain practices at each segment of the shrimp antidumping proceeding since imposition of the antidumping duty order. Viet Nam's first written submission establishes a pattern of conduct by the USDOC that started with imposition of the antidumping duty order and continues to this moment. The USDOC has given no indication of its intentions to revise the conduct in future segments of this proceeding, necessitating inclusion of this measure.

6. The Appellate Body recently recognized a Panel's duty to consider measures that evaluate an authority's continued and ongoing use of certain practices in the context of a single antidumping duty order. Only through inclusion of this measure is the complaining Member able to ensure that the decision of the Panel will be respected for those determinations already completed and for future determinations. Failure to permit this measure would lead to a multiplicity of litigation where an authority, such as the USDOC, does not revise its practices in subsequent determinations to conform with a Panel's or the Appellate Body's findings.

B. VIET NAM PROPERLY PROVIDED NOTICE IN THE PANEL REQUEST OF THE "CONTINUED USE OF CHALLENGED PRACTICES" MEASURE

7. Viet Nam identified the "continued use of challenged practices" measure in its Panel request in a manner consistent with Article 6.2. Viet Nam included in the Panel request each segment of the proceeding that had at the time of the Panel request been initiated – the investigation, the four periodic reviews, and the initiation of the five-year sunset review – to illustrate the continuous and ongoing nature of the challenged practices since imposition of the antidumping duty order. Viet Nam provided in the list those determinations completed prior to Viet Nam's accession to the WTO and those segments not yet final to ensure that the Panel and Members understood Viet Nam's concerns with the continued use.

IV. THE USDOC'S RELIANCE ON MARGINS OF DUMPING CALCULATED USING THE ZEROING METHODOLOGY IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

8. We wish to provide for the Panel at the outset a clear description of the zeroing claims being made in this dispute. First, Viet Nam provided in its first written submission substantial factual documentation establishing that the USDOC utilized its zeroing methodology in the investigation and four completed periodic reviews. Viet Nam also advanced arguments based on the text of the Anti-Dumping Agreement – arguments that have been repeatedly adopted by the Appellate Body – establishing that the USDOC's model zeroing and simple zeroing methodologies are inconsistent with the Anti-Dumping Agreement.

9. Viet Nam also provided in its first written submission evidence that (1) the USDOC utilized the model zeroing methodology in the investigation to calculate margins of dumping for individually examined producers; (2) the USDOC relied on these margins of dumping for the purpose of

calculating the separate rate in the investigation; and (3) the USDOC relied on the separate rate calculated and applied in the investigation when assigning the separate rate in the second and third administrative reviews. Based on this series of indisputable facts, the USDOC's use of model zeroing in the investigation resulted in application of an impermissibly high separate rate in the second and third administrative reviews.

A. VIET NAM HAS SHOWN AS A MATTER OF FACT AND AS A MATTER OF LAW THAT THE USDOC'S CONTINUED AND ONGOING USE OF THE ZEROING METHODOLOGY IS INCONSISTENT WITH THE GATT 1994 AND THE ANTI-DUMPING AGREEMENT

1. As a Matter of Fact, the USDOC has Utilized the Zeroing Methodology at All Segments of the Shrimp Antidumping Proceeding

10. Viet Nam submits that the first written submission provided for the Panel overwhelming factual evidence on the USDOC's use of margins of dumping calculated using zeroing at each segment of the shrimp proceeding: the investigation, the four completed periodic reviews, and the preliminary results of the five-year sunset review.

2. As a Matter of Law, the USDOC's Continued and Ongoing Use of the Zeroing Methodology is Inconsistent with the United States' WTO Obligations

(a) The Use of Model Zeroing in Original Investigations is Inconsistent with the United States' WTO Obligations

11. The crux of the debate is the proper interpretation of the concepts of "dumping" and "margins of dumping." Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement define these concepts in relation to the product under examination as a whole. That is, "dumping" or a "margin of dumping" may only be found to exist for the product subject to investigation and not for a model, which is only a subset of the product under investigation. Although the USDOC may undertake multiple comparisons using averaging groups or models, the results of the multiple comparisons at the sub-product or intermediate level are not "margins of dumping." It is only on the basis of aggregating these "intermediate values" that an authority can establish margins of dumping for the product under investigation as a whole.

(b) The Use of Simple Zeroing in Periodic Reviews is Inconsistent with the United States' WTO Obligations

12. Viet Nam now turns to the legal arguments on the use of zeroing in periodic reviews – the assessment phase of an antidumping proceeding – which build upon the interpretations discussed above on the concepts of "dumping" and "margin of dumping." As in the case of model zeroing, Viet Nam is presenting to the Panel the exact legal reasoning that has been repeatedly adopted by the Appellate Body in multiple zeroing disputes. Article 9.3 of the Anti-Dumping Agreement governs the assessment of final antidumping duties in a retrospective system and mirrors the language of Article VI:2 of the GATT 1994. The article requires that "[t]he amount of the antidumping duty shall not exceed the margin of dumping as established under Article 2." Thus, the margin of dumping determined for an exporter or producer operates as a ceiling on the amount of antidumping duties that can be imposed on the entries of the subject merchandise. It is important to tie the term "margin of dumping" as used in Article 9.3 with the interpretation of this same phrase discussed above. As explained, Article 2.4.2 requires that the margin of dumping calculation take into consideration all transactions for the product as a whole, not merely a subset. It is only through aggregating all intermediate values that the authority can determine the margin of dumping for the product; systematically excluding transactions that produce negative dumping margins ignores this requirement. Viet Nam notes that the Appellate Body has recognized that this reasoning applies with

equal force in the context of simple zeroing, where comparisons are made at a transaction specific level (as opposed to a model specific level). Just as removing select models from the margin of dumping calculation produces a result that fails to account for all comparable export transactions, so too does removing particular transactions. Lastly, we observe that USDOC's assessment of zero or *de minimis* rates to the mandatory respondents in the second and third administrative reviews is irrelevant for purposes of the "continued use of challenged practices" claim.

13. Nevertheless, we believe that the United States' "no harm no foul" argument is simply wrong. An exporter/producer that wishes to avoid the payment of antidumping duties must price differently to obtain a zero margin if zeroing is applied. The application of zeroing puts a price constraint on respondents seeking to avoid or minimize antidumping duties.

B. VIET NAM HAS SHOWN AS A MATTER OF FACT AND AS A MATTER OF LAW THAT THE USDOC'S ASSESSMENT OF ALL-OTHERS RATES BASED ON MARGINS OF DUMPING CALCULATED USING ZEROING IN THE SECOND AND THIRD ADMINISTRATIVE REVIEWS IS INCONSISTENT WITH THE GATT 1994 AND THE ANTI-DUMPING AGREEMENT

14. As discussed in Viet Nam's first written submission, the USDOC's all-others assessment rate for the second and third administrative reviews are in actuality based on the final antidumping duty margins calculated in the original investigation, namely, the weighted average of the antidumping duty rates determined for investigated companies. Thus, as a matter of fact, the USDOC relied on margins of dumping calculated using zeroing to determine the all-others rate in the second and third administrative reviews. As a matter of law, for the reasons explained above, the zeroing methodology is inconsistent with the Anti-Dumping Agreement.

V. THE ALL-OTHERS RATES APPLIED IN THE SECOND AND THIRD ADMINISTRATIVE REVIEWS IMPERMISSIBLY RELY ON MARGINS OF DUMPING CALCULATED FROM A PREVIOUS SEGMENT OF THE PROCEEDING

15. Separate and apart from the claim described above, Viet Nam submits that the all-others rates used in the second and third administrative reviews impermissibly rely on rates calculated from a previous segment of the proceeding. Article 9.4, which guides authorities on the rate calculation for companies not individually examined, does not require use of a particular methodology. The Appellate Body has concluded, however, that the article does impose an obligation on authorities when calculating an all-others rate, even where all rates are zero, *de minimis*, or based on facts available. This obligation stems from the underlying purpose of the article, which demands that parties not individually examined not be prejudiced by the actions of other parties. Thus, when confronted with the situation that exists here, the USDOC has an obligation to adopt a reasonable practice that does not subject the non-examined companies to unfair prejudice. Viet Nam submits that the proper approach under Article 9.4 is reliance on the margins of dumping calculated in the contemporaneous proceeding. To rely on stale antidumping rates requires that the USDOC ignore all available evidence on the subject industry's response to the imposition of the antidumping order.

VI. THE USDOC'S CALCULATION OF A "VIETNAM-WIDE ENTITY" RATE HAS NO BASIS IN THE ANTI-DUMPING AGREEMENT OR VIET NAM'S PROTOCOL OF ACCESSION

A. THE USDOC HAS NO BASIS FOR APPLYING THE DISCRIMINATORY VIETNAM-WIDE ENTITY RATE TO CERTAIN VIETNAMESE PRODUCERS AND EXPORTERS

16. The USDOC's has assessed at each stage of this proceeding a highly punitive Vietnam-wide entity rate for producers or exporters that do not satisfy the USDOC's separate rate criteria. This rate

has no foundation in the Anti-Dumping Agreement or Viet Nam's Protocol of Accession. As an initial matter, Viet Nam does not dispute the general principle that an authority may assign a single antidumping rate to multiple entities. This issue is not before the Panel.

17. At the time of accession, Viet Nam understood that certain concessions would be necessary to assuage the concerns of market economy countries that Viet Nam's economy was not sufficiently market based to allow for application of the antidumping remedy. Accordingly, Viet Nam agreed to the specific instances in which an administering authority could treat Vietnamese entities differently than entities from other Member countries. These specific instances are detailed in paragraph 527 of the Working Party Report and in Viet Nam's Protocol of Accession. Neither document provides that an investigating authority may impose a rebuttable presumption that all exporters or producers operate under the control of the government. There is simply no basis by which the USDOC can impose additional commitments in the form of discriminatory and unjustified presumptions towards Vietnamese producers or exporters not likewise applied to the producers of other Member countries.

B. THE USDOC'S APPLICATION OF ADVERSE FACTS AVAILABLE TO THE VIETNAM-WIDE ENTITY RATE IS INCONSISTENT WITH ARTICLE 6.8 OF THE ANTI-DUMPING AGREEMENT

18. The USDOC has no basis for its reliance on a facts available rate pursuant to Article 6.8 for the Vietnam-wide entity in place of a properly calculated all-others rate pursuant to Article 9.4. Accordingly, the Vietnam-wide entity may only properly be assigned an all-others rate pursuant to Article 9.4.

19. We would like to note the important factual distinction between the second and third administrative reviews. In the second administrative review, the USDOC requested certain information from all exporters and producers on the quantity and value of U.S. exports of subject merchandise; the Vietnam-wide entity's failure to provide this information, which the United States identified as "necessary information," purportedly justified use of the punitive adverse facts available rate pursuant to Article 6.8. In the third administrative review, however, this information was never requested of any parties. Nevertheless, the USDOC continued to apply the punitive adverse facts available rate pursuant to Article 6.8, concluding that the companies (the Vietnam-wide entity) failed to establish their independence from government control. There is a disconnect and inconsistency with the USDOC's explanations on the basis for the application of adverse facts pursuant to Article 6.8, as the United States went to great lengths to explain that in the second administrative review, "Commerce did not punish parties for not meeting the criteria to receive an individual (or "separate") rate."[1] The results of the third administrative review directly contradict this claim, and raise questions about the United States' apparent post hoc rationalization for the application of adverse facts to the Vietnam-wide entity.

VII. THE USDOC'S LIMITED RESPONDENT SELECTION PRACTICE IS INCONSISTENT WITH ARTICLE 6.10 OF THE ANTI-DUMPING AGREEMENT

20. Finally, Viet Nam will briefly discuss the claims relating to the USDOC's practice of limiting the number of interested parties eligible for individual examination. Article 6.10 of the Anti-Dumping Agreement requires as a general rule that the administering authority shall determine the individual dumping margin for each known exporter or producer of the subject merchandise. The Article does, however, provide a limited exception where examining all known exporters or producers would be impracticable because of the large number of such parties. Viet Nam submits that the issue before the Panel is whether this exception can override and render superfluous other provisions of the Anti-Dumping Agreement. In creating a rule out of the exception, the USDOC has

[1] U.S. FWS at para. 162.

denied Vietnamese interested parties their rights under Articles 6.10, 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement.

21. The continued and ongoing limitations imposed by the USDOC on the number of respondents results in the nullification of other provisions and principles in the Anti-Dumping Agreement. This includes the protection of exporters and producers from paying an antidumping duty in excess of their margin of dumping pursuant to Article 9.3; the ability of exporters and producers to obtain revocation of an order upon demonstration that they are no longer dumping pursuant to Article 11.1; and the ability of exporters and producers to benefit from termination of an order based on a demonstration of no likelihood of recurrence or continuation of dumping pursuant to Article 11.3.

22. We would also like to comment on the USDOC's refusal in the shrimp antidumping proceeding to consider the submission of voluntary responses, contrary to the clear language of Article 6.10.2. That article requires that "[v]oluntary responses shall not be discouraged." The USDOC has acted in direct conflict with this clear statement, refusing to consider requests for voluntary respondent treatment and refusing to consider complete submissions made by parties hoping for voluntary treatment from the USDOC.

VIII. CONCLUSION

23. After years of being assessed duties in excess of the margins of dumping and being denied the opportunity to demonstrate the absence of dumping, the Vietnamese exporters and producers hope that this Panel will conclude that the U.S. has and continues to act in a manner inconsistent with its obligations under the Anti-Dumping Agreement and must bring its actions into consistency with those obligations.

24. Thank you for your patience and attention. I look forward to answering your questions.

ANNEX C-2

CLOSING STATEMENT OF VIET NAM AT THE FIRST MEETING OF THE PANEL

1. As we went through this first meeting with the Panel, I thought that the process worked very well and I think that we had a good dialogue, with the third parties adding to that dialogue this morning. What I want to come back to are just a few of the major points which I think are relevant.

2. First, we have been discussing the exception to the rule contained in Article 6.10. What I would like to make sure of is that we not miss the forest for the trees on this issue, because in these sessions we tend to get so deep into the tress. A couple of observations. First, the limitation on the number of respondents should not be looked at in isolation from the rest of the Anti-Dumping Agreement. There is an agreement, the agreement is affecting many foreign exporters, and the exception to the general rule has to be read in the context of the entire agreement, as well as the context of that rule. Our concern is whether the exception provided in article 6.10 can be implemented in a way that ignores other obligations in the agreement. We can talk about what are the constraints on the U.S. or whether they can take voluntary respondents. The relevant question, however, is who has responsibility at the end of the day to ensure there is compliance with the overall object and purpose of the agreement and the specific obligations of the Agreement outside of Article 6.10. The point we are trying to make is not that the U.S. is required to investigate every exporter or producer, but that if the U.S. chooses not to, it must determine how to do so while still fulfilling its other obligations under the agreement. The U.S. can not use this exception to justify actions which are otherwise inconsistent with the agreement.

3. The other issue to consider with regard to the exception to the general rule in Article 6.10 is the concern that if one reads the exception in isolation and do not put a burden on the authorities to meet its other obligations under the agreement, authorities could use the exception to essentially override other obligations, creating an enormous loophole for authorities to use to avoid the obligations of the agreement.

4. On the country-wide rate, the real issue is whether there is the authority in the agreement to apply an adverse facts available rate to companies simply because they are government controlled.

5. Going back to my earlier comment that justice delayed is justice denied, I want to give you a sense of what happens as a practical matter. The U.S., justifiably under the agreements, only applies panel reports or AB reports prospectively. When a review is completed, the U.S. immediately liquidates those entries; once those entries are liquidated, they are gone forever and cannot be retrieved, regardless of whether a WTO decision against the method of calculation of duties has been made. You can prevent liquidation only by appealing to the United States Court of International Trade (CIT). If you have an appeal pending, the CIT will enjoin liquidation of those entries pending resolution of the litigation, a process that generally takes one to three years, assuming an appeal from the CIT to the Court of Appeals for the Federal Circuit. There is no provision under U.S. law to enjoin the liquidation of entries pending a WTO appeal. So respondents have a one to three year window, if they are willing to go to U.S. courts and have a claim under U.S. law, to enforce a WTO report which disagrees with the action of the U.S. authorities. Our concern, which is why we look at the continued practices measure, is that often the WTO dispute settlement and implementation process is completed too late for foreign respondent to get their duties back. Thus, respondents have a

wonderful moral victory, but at the end of the day there is no actual benefit obtained from the WTO proceeding.

6. Finally, I want to mention Article 11 of the DSU. There must be some security and predictability in the system. When, as the EU expressed it, there is a practice embedded in a particular proceeding, producers and exporters have to make a decision: am I to assume that the practice will go on forever, or that somehow it will be changed. The issue is fundamental: how does a company know, if it wants to avoid payment of dumping duties, whether or not it is dumping. We need the provisions of the agreement interpreted so that all parties understand the rules of the game. This makes it extraordinarily important that when panels confront questions of interpretation, that the panels understand and articulate the interpretation in a manner which both the respondents and the authorities can understand and implement. I know that we have a number of complicated issues, such as the all others rate and the country-wide rate, and ask that the panel deal with each of these issues as thoroughly and completely as possible.

7. Viet Nam would like to again thank the panel and the Secretariat for its continuing work on the issues being presented to it.

ANNEX C-3

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

1. The U.S. First Written Submission provides a detailed response to the arguments raised in Vietnam's First Written Submission. Today we will highlight several important issues. 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 <u>all</u> 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" – 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."

2. 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

3. **Investigation and First Administrative Review**: 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. However, 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.

4. Vietnam's written response to the U.S. preliminary ruling requests suggests that, "to the extent that these measures [the investigation and first administrative review] served as the basis for measures applied after Vietnam'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 Vietnam's accession are relevant to the panel's inquiry." Vietnam appears to formulate this issue incorrectly. As Vietnam concedes, the United States "had no obligation to Viet Nam at the time it applied these measures." 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.

5. 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 Agreement for the Member concerned."[2]

6. The two measures subject to this dispute are the final determinations in the second and third administrative reviews. The Panel must assess whether those determinations – not the determinations made prior to Vietnam's WTO accession – are consistent with U.S. WTO obligations. 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.

7. 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.

[2] *US – DRAMS*, para. 6.14.

preliminary ruling requests. The Panel should therefore find that the investigation is not within its terms of reference.

8. **The "Continued Use of Challenged Practices"**: 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." 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.

9. 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. Article 6.2 of the DSU 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.

10. Vietnam may describe the measures it seeks to challenge in the manner and using the words that Vietnam chooses. However, the description Vietnam presents in its panel request 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."

11. 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." 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. 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.

12. Vietnam itself draws distinctions between the "as applied," "as such," and "continued use" concepts, asserting that a "[continued use] measure <u>is certainly more broad</u> than an 'as applied' measure, but narrower than a generally applicable 'as such' measure." 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 insufficient to identify a selection of "as applied" measures and expect that, through implication, a "continuing measure" will be understood to also be a subject of the dispute.

13. 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.

14. The issue before the Panel is not whether Vietnam used the precise language adopted by the European Communities in *US – Continued Zeroing*. The issue is whether Vietnam's panel request met the requirements of Article 6.2 of the DSU. 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.

15. 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." 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.[3]

16. 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. 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. 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

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

18. 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.

19. 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.

20. 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.

21. 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.

22. 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

[3] *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*).

agreement words and obligations that are not there.[4] 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.[5]

23. 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, pursuant to Articles 3.2 and 19.2 of the DSU, WTO dispute settlement panels and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements."

24. 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.

III. VIETNAM'S CLAIMS REGARDING THE "COUNTRY-WIDE" RATE ARE WITHOUT MERIT

25. 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.

26. 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.

27. 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.

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[4] *India – Patents (AB)*, para. 45.

[5] *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").

28. 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.

29. 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.

30. 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.

31. 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

32. 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.

33. 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."

34. 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. 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

40. 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.

41. 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.

42. Faced with this situation in the second and third administrative reviews, Commerce relied 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. 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.

43. Once again, however, Vietnam asks the Panel to create a new rule and 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." Nothing in the text of Article 9.4 supports 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.

44. 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 behaviour 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.

45. 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 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.

46. 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.

47. 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. As explained, that determination was not subject to the AD Agreement and cannot have been inconsistent with the AD Agreement.

48. 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

49. 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 GATT 1994.

50. 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.

51. 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.

52. 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.

53. 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."

54. Vietnam also seeks to expand the Appellate Body's reasoning in *US – Continued Zeroing* beyond zeroing to encompass the other "challenged practices." Vietnam's claims regarding the other

"challenged practices" are without merit, and Vietnam cannot establish "a string of determinations, made sequentially... over an extended period of time."

VII. CONCLUSION

55. 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.

ANNEX C-4

CLOSING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

1. The United States has only a few brief closing comments. This dispute, like all WTO disputes, is about the meaning of the covered agreements and the content of the obligations that WTO Members have accepted by joining the WTO. Vietnam seeks to alter the meaning of the covered agreements by departing from the accepted rules of treaty interpretation and by inventing obligations found nowhere in the text of any covered agreement. At the same time, Vietnam seeks to avoid its own obligations to identify the specific measures at issue in the panel request, to present factual evidence that supports its claims, and to have its exports subjected to the rules-based disciplines of the AD Agreement.

2. The Panel is charged with making an objective assessment of the matter before it and clarifying the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law. Correct application of the customary rules of interpretation ensures the security and predictability of the multilateral trading system.

3. At the beginning and at the end of this Panel's analysis is the text of the covered agreements. In its closing statement, Vietnam lamented that our discussion over the past two days got "bogged down by the text." Vietnam suggested that we "should not miss the forest for the trees." The "trees" here, though, is the text of the covered agreements. It is imperative that the Panel not miss these "trees."

4. The question before the Panel is: Does the text require what Vietnam contends the United States is obligated to do? For each claim Vietnam has made, the answer is no. Vietnam has failed to establish that the United States has acted inconsistently with any provision of any covered agreement. There simply is no support, either in fact or in the text of the covered agreements, for Vietnam's claims.

5. We would like to offer the Panel just two examples from this first meeting, which we believe shed light on what Vietnam is attempting to do in this dispute. First, Vietnam's discussion yesterday afternoon of the meaning of Article 9.4 of the AD Agreement is a clear example of its attempts to add to the AD Agreement new rules that are unsupported by the text and were never agreed by Members. Vietnam appears to agree with the United States that when all the margins of dumping determined for examined exporters or producers are zero, *de minimis*, or based on facts available, pursuant to the express terms of Article 9.4 it is not possible to calculate a maximum for the amount of duty that may be applied to non-examined entities. In such a case, however, Vietnam posits that Article 9.4 imposes the following specific obligations on Members:

- the antidumping duty applied must be based solely on *calculated* rates and may not be based upon or utilize the facts available;

- the antidumping duty applied must be a calculated rate *based on contemporaneous data* (though, Vietnam appeared later to have conceded that this was not required in all cases);

- if not contemporaneous, the rate applied must be *recalculated* and subject to scrutiny, even if at the time the prior rate was calculated, by rule it could not have been inconsistent with any obligation under the WTO agreements;

- the antidumping duty applied may only be applied to "individual," non-examined firms, and not groups of firms identified as a single exporter or producer; and

- the antidumping duty applied is subject to a reasonableness test, or an abuse of discretion test, or an "unbridled discretion" test, or possibly all of these tests simultaneously.

During the afternoon session yesterday, Vietnam, at one time or another, asserted that Article 9.4 of the AD Agreement requires all of these things. Not once, however, did Vietnam identify any text in Article 9.4 that establishes any of these requirements. The explanation for this is simple: there is no text in Article 9.4 that establishes any of these requirements. Indeed, Article 9.4 does not address the issue of how to calculate the rate to be applied. Article 9.4 simply provides for a ceiling on that rate.

6. Throughout Vietnam's First Written Submission, its opening statement at this hearing, and its responses to questions, Vietnam has presented arguments that simply are divorced from the text of the covered agreements. A second, striking example: at paragraph 74 of Vietnam's opening statement, Vietnam asserted, with respect to Article 6.10.2 of the AD Agreement, that "the 'undue burden' standard discussed by the United States has no basis in the Anti-Dumping Agreement." The best response we can offer to this is the text of Article 6.10.2 itself:

> In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be **unduly burdensome** to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged. (emphasis added)
>
> The words "unduly burdensome" are right there in the text.

7. Throughout its claims and arguments, Vietnam is asking the Panel to read into the AD Agreement words that are not there, and read out of the AD Agreement words that are there. This is wholly inconsistent with the rules of treaty interpretation. The text of the covered agreements, which Vietnam seeks to alter or avoid, is determinative of the issues in this dispute. If that text is properly interpreted, Vietnam's arguments must be rejected.

8. The United States recognizes that the Panel is only at the beginning of its work. We hope that the U.S. First Written Submission and our presentation over these past two days have been helpful for you. We look forward to receiving the Panel's written questions. Once again, the United States thanks the Panel members for their time and careful attention to this matter.