ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF VIET NAM

I. INTRODUCTION

1. Viet Nam's First Written Submission in *US – Anti-Dumping Measures on Certain Shrimp from Viet Nam* provides the factual context and legal arguments challenging certain practices used by the United States Department of Commerce ("USDOC") in the ongoing antidumping proceedings involving certain shrimp products from Viet Nam. Each of these practices limits the ability of Vietnamese exporters and producers to prove the absence of dumping, resulting in the continuation of an antidumping order for companies that have in fact gone to great lengths to alter their conduct to eliminate dumping.

2. Specifically, the four claims set forth in the First Written Submission challenges practices that, as applied, are inconsistent with United States obligations under Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Agreement*"): (1) the use of zeroing to calculate antidumping margins, (2) the application of a country-wide rate to certain respondents not individually investigated or reviewed, (3) the all-others rate calculated and applied to certain other uninvestigated or unreviewed respondents, and (4) the repeated refusal by the USDOC to review individual respondents requesting such a review and thus determining margins for only a limited selection of respondents. The USDOC has relied on, and continues to rely on, the above-listed practices for each stage of the antidumping proceeding.

II. THE MEASURES AT ISSUE

3. The three measures at issue in this dispute relate to the imposition by the United States of antidumping duties under the USDOC's antidumping duty order involving certain frozen and canned warmwater shrimp from Viet Nam (case number A-552-802). The USDOC issued its final determination of sales at less than fair value for the original investigation on 8 December 2004, and subsequently published an amended determination and antidumping duty order on 1 February 2005. Since imposition of the antidumping duty order, USDOC has completed four periodic reviews, issued a preliminary determination in the fifth periodic review, and issued a preliminary determination in a Five-Year ("Sunset") review.

4. Viet Nam's date of accession to the World Trade Organization is 11 January 2007. Two of the above-referenced determinations in the shrimp proceedings have been initiated and completed subsequent to Viet Nam's accession and prior to the request for consultations in this dispute. Thus, the measures at issue are the second and third administrative reviews made pursuant to the antidumping duty order, and the continued use of the challenged practices in successive antidumping proceedings under this order. The second administrative review of antidumping duties covered entries during the period from 1 February 2006 through 31 January 2007, and the final results were published on 9 September 2008. The third administrative review covered entries from 1 February 2007 to 31 January 2008, and the final results were published on 15 September 2009.

5. The third measure is the continued use of the practices challenged in the above-referenced claims in successive segments of the proceeding under the shrimp antidumping order. This includes the fourth administrative review, the fifth administrative review, and the five-year (sunset) review.

Consistent with the Appellate Body's interpretation of the *Agreement* and the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, the USDOC's actions in connection with these practices constitute "ongoing conduct" that is subject to consideration by the reviewing panel. Judicial economy and fundamental fairness require inclusion of this measure because the USDOC has given no indication that it intends to alter these practices in any future segment of this proceeding.

6. The particular factual situation of this dispute also makes relevant the USDOC's determination in the original investigation and the final results of the first administrative review. Although not measures, these determinations are important for the Panel to review and understand because of their impact on the measures that are at issue in this dispute.

III. FACTS

7. The claims raised for the three measures at issue involve four practices adopted and used by the USDOC at each stage of the proceeding: (1) the use of zeroing; (2) application of a country-wide rate; (3) the chosen calculation method for the all-others rate; and (4) the limited selection of respondents subject to individual review.

A. THE USDOC'S ZEROING METHODOLOGY

8. The USDOC calculates the margin of dumping based on a comparison of normal value and United States export price or constructed export price. Normal value in proceedings involving a nonmarket economy country is based on the producer's factors of production, which include individual inputs for raw materials, labor, and energy based on the actual production experience of the individual respondent. The USDOC relies on surrogate values to determine the price at which the factors of production would be acquired in a market setting, relying on a specific surrogate country for this exercise. In the case of Viet Nam, this surrogate country has been Bangladesh. The USDOC then applies ratios for overhead, selling, general and administrative expenses, and profit to the calculation. The resulting normal value is compared to the export price or constructed export, which is the price at which the product is first sold to an unaffiliated purchaser.

9. The comparison of normal value and price is made between products of similar characteristics. That is, within the broad category of subject merchandise – certain frozen and canned warmwater shrimp – are many sub-categories with differing key characteristics, as determined by the USDOC. Each of these sub-categories, or "models" under USDOC terminology, is assigned a control number ("CONNUM") by the USDOC.

10. In original investigations, the USDOC utilizes "model zeroing," where each sales transaction is weight-averaged by CONNUM, and each weighted-average model is compared to the normal value for that CONNUM; the results of these intermediate calculations for each CONNUM are then aggregated to determine the overall margin of dumping. Positive dumping in the intermediate calculation occurs when the normal value exceeds the average export price of an individual CONNUM; negative dumping occurs when the average export price exceeds normal value. Zeroing arises in instances of negative dumping, where the USDOC eliminates the results of that specific CONNUM before calculating the overall weighted dumping margin for the exporter: any instances of negative dumping are set to zero, as opposed to allowing the negative dumping to offset the positive dumping.

11. The overall margin is calculated using only the CONNUMs that produce a positive dumping margin. The USDOC creates a fraction to calculate the overall dumping margin, using as the numerator the total amount of dumping by model, based only on margins that were positive at the intermediate, model-specific stage of comparison. For models with negative dumping, the USDOC ignores the results, thereby inflating the numerator by an amount equal to the excluded negative

comparison results. The denominator of the fraction is the total value of all export transactions for all models under investigation. Expressing this fraction as a percentage results in the "weighted average dumping margin" for the investigation, which for companies selected for individual investigation serves as the cash deposit rate for entries made after publication of the antidumping order. For companies not individually investigated that satisfy the USDOC's separate rate criteria (further discussion below), the USDOC will generally take the weight-average of the weighted-average margins of the firms individually investigated, excluding margins that are zero, *de minimis*, or based on adverse facts available. Thus, the model zeroing methodology similarly impacts the antidumping margin for these companies.

12. It cannot be reasonably argued that the USDOC did not use model zeroing in the investigation at issue in this dispute. Viet Nam provides substantial documentation demonstrating that the USDOC used a methodology identical to the methodology previously considered by the Appellate Body in *US – Softwood Lumber V*. The USDOC's Issues and Decision Memorandum, which accompanies publication of the final determination, states in explicit terms that intermediate model comparisons that produced negative dumping margins were not permitted to offset model comparisons that produced positive dumping margins, effectively ignoring these sales made by the respondents, regardless of the amount of volume involved. Further, Viet Nam provides the actual computer program outputs and logs for two of the mandatory respondents in the investigation, pinpointing the exact lines in the programming that execute the zeroing methodology.

13. In administrative reviews, the USDOC engages in simple zeroing, which differs with the above method for calculating antidumping margins only in the comparison that is made at the intermediate step. In administrative reviews, individual export transactions are compared with a contemporaneous weighted-average normal value; the amount by which normal value exceeds the export price is the dumping margin for that export transaction. As with model zeroing, these intermediate comparisons may produce either positive or negative dumping margins; once again, comparisons that produce a negative dumping margin are ignored for purposes of calculating the overall dumping margin. Instead of zeroing by model, as with model zeroing, the USDOC here zeroes by individual export transaction. The result is similar, in that the total amount of dumping reflected in the numerator is inflated by an amount equal to the excluded negative differences.

14. As stated above, it cannot reasonably be disputed that the USDOC engaged in simple zeroing in the administrative reviews considered in this dispute. In each completed administrative review, the USDOC has confirmed in its Issues and Decision Memorandum that it did not permit the intermediate negative dumping margins to offset the intermediate positive dumping margins when calculating the overall antidumping margin. The computer program logs and outputs provided by Viet Nam, which are in fact the logs and outputs released by the USDOC following completion of the administrative reviews, further substantiate this fact.

B. THE USDOC'S COUNTRY-WIDE RATE PRACTICE

15. The USDOC practice for determining antidumping margins for Vietnamese companies not individually reviewed differs substantially from the practice for market economy countries. In the shrimp proceedings, the USDOC creates two categories of companies not individually reviewed: those assigned an "all-others" rate (in USDOC terminology this is called a "separate rate"), consistent with the *Agreement*; and those assigned what is called a "Vietnam-wide" rate.

16. Companies wanting to receive the all-others rate must satisfy the USDOC's separate rate criteria. This requires that companies not individually reviewed submit to the USDOC a "separate rate application" or a "separate rate certification", to establish the absence of government control, both in law and in fact, with respect to exports. Companies must present evidence to satisfy the criteria established by the USDOC to prove the absence of government control. Companies that satisfy the

criteria will typically receive a rate based on the weighted average of the rates individually calculated for the mandatory respondents, excluding rates that are zero, *de minimis*, or based on facts available. Companies that do not satisfy the USDOC's criteria receive the Vietnam-wide rate, a punitive rate based on adverse facts available. The result of this practice is grossly inflated margins for companies that are unable to satisfy the unjustified criteria established by the USDOC.

17. In these antidumping proceedings, companies that do not satisfy the separate rate criteria have been assigned a Vietnam-wide rate of 25.76 percent for the first, second, third, and fourth administrative reviews. In contrast, the rate for companies that satisfied the separate rate criteria was 4.57 percent for the first, second, and third administrative review, and 4.27 percent for the fourth administrative review.

C. USDOC'S LIMITED SELECTION OF MANDATORY RESPONDENTS AND APPLICATION OF THE "ALL-OTHERS" RATE TO RESPONDENTS NOT INDIVIDUALLY REVIEWED

18. The United States antidumping law sets forth the general requirement that all exporters seeking individual investigation or review have the opportunity to do so. The law provides a limited exception to this general rule where doing so would be impracticable because of the large number of exporters or producers requesting investigation or review.

19. At each segment of this antidumping proceeding, the USDOC has severely limited the number of companies that it individually reviews. Following initiation of the investigation and administrative reviews, the USDOC issues a respondent selection memorandum in which two determinations are made: whether it would be practicable to individually examine all companies and, if not, the number and specific identity of those companies for which examination will take place. The USDOC has individually examined between two and four companies at each phase of this antidumping proceeding, despite requests for review that consistently exceed 30 companies. In each memorandum, the USDOC provides the identical rationale for limiting the number of companies examined: that the office conducting the review has a significant workload, that the office does not anticipate receiving additional resources to conduct the review, and therefore, it would be impracticable to review more than the stated number of companies.

20. The non-selection of a company for individual review can have significant ramifications for that company. In the second and third administrative reviews, all companies selected for individual examination received rates that there were either zero or *de minimis*. Because the USDOC typically excludes from the all-others rate calculation zero and *de minimis* rates, the USDOC in both instances relied on the results of the first administrative review, which in turn relied on calculations from the original investigation. The USDOC relied on a prior phase of the proceeding to assign a margin for companies not individually reviewed in a subsequent review. The fact that in both cases the companies selected as mandatory respondents received a zero or *de minimis* margin was ignored in determining the rate for the non-individually reviewed companies eligible to receive the all-others rate.

21. The limited selection of respondents also adversely impacts a company's ability to prove the absence of dumping and have an antidumping duty order revoked. A company not afforded the opportunity to participate in administrative reviews likewise does not have the opportunity to establish that it no longer engages in dumping. United States law, consistent with Article 11.1 of the *Agreement*, provides for revocation of an antidumping duty order where a company has been found to not dump for three consecutive years. Yet, by refusing to individually examine all companies seeking review, the USDOC severely limits the number of companies that qualify for revocation under this provision, making the law irrelevant for most companies seeking revocation.

IV. CLAIMS AND ARGUMENTS

A. CLAIMS OF INCONSISTENCY REGARDING ZEROING

22. The Appellate Body has stated repeatedly and resoundingly that the issue of zeroing in antidumping proceedings is a settled matter: the zeroing methodology is inconsistent with the *Agreement* in both investigations and administrative reviews. In the interest of judicial economy and fairness, the Panel should adhere to the guidance of the Appellate Body and find the zeroing used in this proceeding by the USDOC, identical in substance to the zeroing previously considered by the Appellate Body, to violate United States obligations under the *Agreement*.

1. The Use of Zeroing in the Original Investigation of this Proceeding Is Inconsistent with United States WTO Obligations

(a) Article VI of the GATT 1994 and Article 2.1 of the *Agreement* define "dumping" and "margin of dumping" with regard to the product as a whole

23. The GATT 1994 and the *Agreement* both define the concepts of "dumping" and "margin of dumping" with regard to the product under investigation as a whole, not models or categories that are subsets of the product. First, Article VI:1 of the GATT 1994 defines dumping as when "products of one country are introduced into the commerce of another country at less than the normal value of the products," referring to the product as a whole, not subsets.

24. Second, Article 2.1 of the *Agreement*, which based on the terms of the provision applies to the entire *Agreement*, defines "dumping" for purposes of the *Agreement* with clear reference to the "product" that is subject to the proceeding. The Appellate Body has repeatedly understood this definition to preclude a finding of dumping for any subcategory of the product under review. Additional articles of the *Agreement* and GATT 1994 provide contextual support for this interpretation: Article 9.2 discusses the imposition of an antidumping duty with respect to a "product"; Article 6.10 states that the investigating authority shall calculate an "individual margin of dumping for each exporter or producer concerned of the product under investigation"; and Article VI:2 of the GATT 1994 provides that "in order to offset or prevent dumping, a contracting party may levy on any dumped product an antidumping duty not greater in amount than the margin of dumping in respect of that product."

25. Thus, although an investigating authority may undertake multiple comparisons using averaging groups or models, the results of the multiple comparisons at the sub-level are not "margins of dumping." Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation.

(b) Zeroing is Prohibited Under Article 2.4.2 of the *Agreement*

26. The model zeroing methodology is inconsistent with Article 2.4.2 of the *Agreement* because it fails to consider the results of all export transaction comparisons for purposes of calculating a final dumping margin. The Article requires that where the administering authority makes a weighted average to weighted average comparison for purposes of calculating the margin of dumping, as it did in the shrimp original investigation, the weighted average normal value is to be compared to "a weighted average of prices of all comparable export transactions." As shown above, the "margin of dumping" for which Article 2.4.2 provides the method of calculation refers to the margin of dumping for the *product as a whole*, not a subset of the product. The requirement of Article 2.4.2 that "all comparable export transactions" be compared necessarily means that all transactions for that product be factored into the final calculation, and is not merely a reference to the intermediate, model-based calculations.

27. By disregarding or treating as zero the intermediate comparisons for product models where the net export prices exceed normal value, the USDOC's use of zeroing in investigations necessarily fails to account for "all comparable export transactions." The zeroing methodology systematically excludes export transactions that Article 2.4.2 requires be included in the final margin calculation. The Appellate Body and numerous panels have repeatedly found this action to violate Article 2.4.2 of the *Agreement*.

2. The Use of Zeroing in Periodic Reviews is Inconsistent with United States WTO Obligations

28. As the discussion above illustrates, Article IV:1 of the GATT 1994 and Article 2.1 of the *Agreement* define "dumping" and "margin of dumping" with regard to the subject product as a whole. As recognized by the Appellate Body, this definition is applicable to the entire *Agreement*, per the opening line of Article 2.1.

29. Article 9.3 of the *Agreement* governs the assessment of final antidumping duties and thus bears on the USDOC's use of simple zeroing in administrative reviews. The Article does not mandate use of a particular methodology for calculation of final assessment, but does require that the "amount of the antidumping duty shall not exceed the margin of dumping as established under Article 2." Thus, the margin of dumping, calculated pursuant to Article 2, serves as a ceiling to the amount of antidumping duties that may be collected in the assessment phase. Additionally, as is clear from the reference to Article 2, the "margin of dumping" in Article 9.3 must likewise be calculated on the basis of all transactions for the product as a whole, not merely a subset of the transactions for that product.

30. The USDOC's model zeroing methodology does not take into consideration all transactions for the product, treating as zero and disregarding those intermediate comparisons where export price of an individual transaction exceeds normal value. By doing so, the calculation necessarily results in dumping margins that are higher than would be true if all export transactions were taken into account, *i.e.*, higher than the dumping margins would be for the product as a whole.

31. The GATT 1994 and the *Agreement* require that where the administering authority makes multiple comparisons at an intermediate stage, *all* intermediate comparisons must be aggregated, including comparisons that produce both negative and positive dumping margins. As has been repeatedly construed by the Appellate Body and prior panels, this action violates Article VI:2 of the GATT 1994 and Article 9.3 of the *Agreement*.

B. CLAIMS OF INCONSISTENCY REGARDING THE COUNTRY-WIDE RATE

32. As discussed above, the USDOC's practice for calculating the antidumping margins for companies not individually investigated or reviewed differentiates between companies that satisfy the USDOC's separate rate criteria and those that do not. Yet, the USDOC has no authority under the *Agreement* or Viet Nam's Accession Protocol to the WTO to assign the highly punitive Vietnam-wide rate to companies in this proceeding.

33. The *Agreement* contemplates that an administering authority may apply only three types of antidumping margins. An administering authority may not go beyond the types of margins provided for in the *Agreement*, as identification of the three types of margins in the *Agreement* necessarily limits the practices and methodologies available to an authority. To allow an authority to deviate beyond the provided methods for calculation would render meaningless the parameters set for application of those margins. Specifically, the express terms of Articles 2, 6, and 9 of the *Agreement* limit the types of margins to be applied.

34. Article 2 defines dumping and provides the framework for how an administering authority may determine the existence and extent to which an individually investigated company may be engaged in dumping.

35. Article 6.8 provides that an administering authority may calculate rates for individually examined companies on the basis of facts available. The plain language of Article 6.8, as interpreted by the Appellate Body, makes clear that a margin that is based on facts available may only be applied to companies individually examined by the administering authority. Article 6.8 provides that facts available may only be used where an "interested party" does not provide "necessary information" to the authority. The Appellate Body has explicitly clarified that non-examined companies are not "interested parties" within the context of Article 6.8, precluding application of that Article to those entities.

36. Furthermore, an administering authority does not, by definition, request "necessary information" from companies not individually examined. Necessary information is that which is necessary to calculate an antidumping margin. Although an administering authority may request information beyond this, only the failure to provide necessary information triggers the application of Article 6.8. This fact renders this provision inapplicable to companies not individually examined.

37. Article 9.4 is the final type of antidumping margin contemplated by the *Agreement* and provides for calculation of a single all-others rate for companies not individually examined. Article 9.4 sets the parameters for margins to be applied where examination has been limited pursuant to Article 6.10 of the *Agreement*. The Article is clear that an administering authority may not apply to non-examined companies an antidumping margin that exceeds the weighted average margin of dumping for companies individually reviewed, excluding margins that are zero, *de minimis* or based on facts available. Application of a margin beyond this limit violates the basic and clear terms of Article 9.4.

38. Viet Nam's Protocol of Accession ("Protocol") confirms that the USDOC has no basis for applying this discriminatory rate to Vietnamese producers and exporters. The Protocol, through reference to the Report of the Working Party on the Accession of Viet Nam, identifies the entire universe of situations in which an administering authority may deviate from the terms of the *Agreement*. While the Protocol provides certain special rules applicable to Viet Nam during a transition period, it contains no exception for the calculation of the margins of dumping for companies not individually investigated or reviewed.

39. The USDOC has no authority to deviate from the *Agreement* and apply the Vietnam-wide rate to certain Vietnamese companies. The Vietnam-wide rate does not comply with the requirements of Articles 2, 6.8, or 9.4, and is not otherwise contemplated by the *Agreement* or Viet Nam's Protocol.

C. CLAIMS OF INCONSISTENCY REGARDING THE ALL-OTHERS RATE

40. As discussed above, the USDOC impermissibly applied both an all-others rate and a Vietnam-wide rate to companies not individually examined. For purposes of the all-others rate, the USDOC generally calculates the all-others rate based on the weight-average of the weighted-average margins of the firms individually examined, excluding those margins that are zero, *de minimis*, or based on facts available. Two actions taken by the USDOC with regard to calculation of the all-others rate in the second and third administrative reviews are inconsistent with United States WTO obligations.

41. First, the USDOC's use of weighted average margins for individually examined companies that were calculated using the zeroing methodology is inconsistent with Articles 2.4 and 9.4 of the *Agreement*. Article 9.4 requires that antidumping margins, calculated in a manner consistent with

Article 2, serve as the basis for determining the ceiling antidumping margin for the all-others margin. As set forth above in paragraph 20 above, the all-others rate applied in the second and third administrative reviews was in fact based on the final antidumping margins of the original investigation. As discussed in paragraph 12 above, the USDOC utilized model zeroing to calculate the rates for individually investigated companies in the original investigation; as discussed in paragraphs 26 and 27 above, use of this methodology is inconsistent with Article 2.4 of the *Agreement*. Accordingly, the all-others rate applied in the second and third administrative reviews is inconsistent with Article 9.4 of the *Agreement*.

42. Furthermore, the USDOC's determination to base the all-others rate on the results of a previous proceeding is inconsistent with Article 9.4 of the *Agreement*. While Article 9.4 states that an administering authority may not use rates that are zero, *de minimis*, or based on facts available when calculating the ceiling of the all-others rate, the Appellate Body has made clear that an administering authority does not operate with complete discretion where the individually reviewed companies all receive an antidumping duty of zero, *de minimis*, or based on facts available.

43. The Appellate Body's interpretation comports with the purpose of this provision of the *Agreement*: companies not individually examined should not be prejudiced by the actions of others. Companies that have been denied the opportunity for individual examination should not be subjected to a higher rate when the ability to participate has been removed through no fault of their own. The administering authority has an obligation to adopt a reasonable practice that does not subject the non-investigated companies to unfair prejudice. Viet Nam submits that the USDOC's practice in the second and third administrative reviews is prejudicial to these companies, as it relies on results that have no basis in the relevant review.

44. Article 9.4 does not prohibit the use of zero or *de minimis* rates for purposes of calculating the all-others rate; the prohibition only extends to calculating the ceiling of the all-others rate. Consistent with this understanding, the USDOC must adopt a reasonable approach that both complies the ordinary meaning of Article 9.4 and the purpose of that provision.

D. CLAIMS OF INCONSISTENCY REGARDING LIMITING THE NUMBER OF RESPONDENTS SELECTED FOR FULL INVESTIGATION OR REVIEW

45. Article 6.10 of the *Agreement* requires as a general rule that the administering authority shall determine an individual dumping margin for each known exporter or producer of the subject merchandise. The Article goes on to provide a limited exception to this requirement where doing so would be impracticable because of the large number of producers or exporters. The issue before the Panel is whether this exception should override other provisions of the *Agreement* and the object and purpose of the *Agreement*. In creating a rule out of the exception, the USDOC has denied Vietnamese companies their rights available under Articles 6.10, 9.3, 11.1, and 11.3.

46. It is difficult to conceive that in entering into the *Agreement* the parties intended to include an exception to a general rule which ultimately would become the rule. Even more probative of the proper interpretation of the Article 6.10 exception is that its repeated and continued application essentially nullifies other provisions and principles in the *Agreement*. This includes: (1) the protection of exporters and producers from paying an antidumping duty in excess of their margin of dumping pursuant to Article 9.3; (2) the ability of exporters and producers to obtain revocation of an order upon a demonstration that they are no longer dumping pursuant to Article 11.1; and (3) 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 the dumping pursuant to Article 11.3.

47. Viet Nam submits that the object and purpose of the *Agreement* further supports this interpretation. Because antidumping measures are a mechanism by which the tariff benefits of WTO

Members can be nullified, the application of these procedures is disciplined by detailed rules intended to avoid jeopardizing the tariff benefits without an adequate basis. Thus, the *Agreement* puts specific limits on the form (Article 18.1), duration (Articles 11.1 and 11.3) and amount (Article 9.3) of antidumping measures, and provides a mechanism to both review the need for continuation of the duties (Article 11.2) and the amount of the duties (Article 9). Read in the context of the WTO Agreement and the GATT 1994, the *Agreement* would thus appear to have two broad objects and purposes, one being the establishment of precise limits on the form, duration, and amount of any antidumping duties imposed. Indeed, the *Agreement* specifically contemplates the possibility that companies subject to the antidumping measures will cease dumping. Yet, in refusing to provide individual exporters and producers the opportunity for review, the USDOC has frustrated one of the basic objects and purposes of the *Agreement*. It cannot be that the exception to an Article can trump not only the general rule contained in the provision, but also frustrate the functions of other Articles and the overall purpose of the *Agreement*.

V. CONSEQUENTIAL VIOLATIONS OF WTO OBLIGATIONS

48. As a result of the aforementioned practices, the USDOC has committed consequential violations that strike at the very core principles of antidumping measures. Namely, that antidumping duties are company-specific and should not be levied in excess of the amount of the margin of dumping of a particular exporter or producer, and that the duties should be terminated upon demonstration that dumping is no longer occurring.

49. The claims made by Viet Nam in this dispute relate to practices that have had very significant and very real effects on the Vietnamese companies impacted by the antidumping proceeding. These companies and this industry in Viet Nam serve as a model for adjusting sales practices to ensure compliance with the antidumping law in the United States. For the reasons set forth above, the USDOC's practices impermissibly foreclose the ability of these companies to benefit from these changes.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. This is not merely another zeroing dispute. Zeroing, as a factual matter, had no impact on the margins of dumping determined for individually examined exporters or producers in the challenged proceedings, and it was not used during the proceedings in order to determine any other assessment rates applied. Beyond its unfounded zeroing claims, Vietnam seeks to undermine the ability of investigating authorities to conduct antidumping examinations when faced with incomplete information, uncooperative interested parties, and large numbers of respondent firms. Ultimately, Vietnam asks this Panel to read obligations into the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), notwithstanding the fact that there is no textual basis for such obligations. This Panel should make an objective assessment of the matter before it and refrain from adopting Vietnam's interpretations.

2. Vietnam also challenges a number of "measures" that are not properly before the Panel. The United States requests that the Panel grant the requests for preliminary rulings with respect to these "measures."

II. GENERAL PRINCIPLES

3. The complaining party bears the burden of proving that a measure is inconsistent with the obligations in a covered agreement. In a dispute involving the AD Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) of the AD Agreement, which confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation." Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.

4. Article 11 of the Dispute Settlement Understanding ("DSU") requires a panel to make an 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. The Appellate Body has explained that the matter includes both the facts of the case (and the specific measures at issue in particular) and the legal claims raised.

5. Articles 3.2 and 19.2 of the DSU mandate that the findings and recommendations of a panel or the Appellate Body, and the recommendations and rulings of the Dispute Settlement Body ("DSB"), cannot add to or diminish the rights and obligations provided in the covered agreements. While prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members, the Panel is not bound to follow the reasoning set forth in any Appellate Body report. The rights and obligations of the Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements.

III. REQUESTS FOR PRELIMINARY RULINGS

6. **The Investigation**: Pursuant to Article 18.3 of the AD Agreement, the original antidumping investigation of shrimp from Vietnam is not subject to the AD Agreement. The investigation was

initiated pursuant to an application made before 11 January 2007, the date on which the WTO Agreement entered into force for Vietnam. Consequently, determinations made by Commerce in the course of the investigation are not subject to the provisions of the AD Agreement and may not be reviewed by this Panel.

7. In addition, the investigation was not included in Vietnam's request for consultations. Article 4.4 of the DSU provides that a request for consultations must state the reasons for the request, "including identification of the measure at issue and an indication of the legal basis for the complaint." Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if "the consultations fail to settle a dispute." Article 17.4 of the AD Agreement states that a Member may only refer "the matter" to the DSB following a failure of consultations to achieve a mutually agreed solution, and final action by the administering authorities of the importing Member to levy definitive antidumping duties or to accept price undertakings. Because Vietnam failed to include the investigation in its consultations request, the shrimp antidumping investigation is outside the Panel's terms of reference.

8. **The First Administrative Review**: Like the investigation, the first administrative review was initiated prior to Vietnam's accession to the WTO. Per the terms of Article 18.3 of the AD Agreement, the application of the AD Agreement is strictly limited "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" (emphasis added). Accordingly, for the same reasons given with respect to the investigation, the AD Agreement does not apply to Commerce's determination in the first administrative review.

9. **The "Continued Use of Challenged Practices"**: The "continued use of challenged practices" is not a "measure" within the Panel's terms of reference. Article 6.2 of the DSU requires that a panel request "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Vietnam's panel request limits the measures at issue to the particular determinations identified therein and fails to identify the "continued use of challenged practices" as a measure at issue in this dispute. Vietnam's panel request here is distinguishable from the EC's request in *US – Continued Zeroing*; Vietnam's panel request fails to identify the "continued use of challenged practices" at all. Because the panel request defines the jurisdiction of a panel, the "continued use of challenged practices" is outside the Panel's jurisdiction. The component proceedings of the "continued use" measure are outside the Panel's terms of reference as well, because Vietnam is attempting to expand the scope of the proceedings it identified in its panel request.

10. Additionally, this purported "measure" is not subject to WTO dispute settlement because it appears to be composed of an indeterminate number of potential future measures. It is impossible for Members to consult on a measure that does not exist, and a non-existent measure cannot meet the requirement of Article 4.2 of the DSU that the measure be "affecting" the operation of a covered agreement. In *US – Upland Cotton*, the panel found that a measure that had not yet been adopted could not form part of its terms of reference, noting that such a "measure" could not have been impairing any benefits because it was not in existence at the time of the panel request. Furthermore, Article 17.4 of the AD Agreement provides that a Member may refer "the matter" to dispute settlement only if consultations have failed to resolve the dispute and "final action" has been taken by the administering authorities of the importing Member to levy definitive antidumping duties or to accept price undertakings. At the time of Vietnam's panel request, the alleged "continued use of the challenged practices" did not involve a final action to levy definitive antidumping duties or accept price undertakings.

IV. VIETNAM'S CLAIMS REGARDING ZEROING ARE WITHOUT MERIT

11. Vietnam argues that Commerce's "use of zeroing" in the original investigation is inconsistent with U.S. WTO obligations. The investigation is not within the Panel's terms of reference and was not subject to the AD Agreement, so Commerce's determination therein cannot be found inconsistent with Article 2.4.2 of the AD Agreement. To the extent that Commerce relied on dumping margins calculated during the investigation in later assessment reviews, the use of such margins in an assessment review cannot result in a finding that the determination in the investigation is inconsistent with Article 2.4.2 of the AD Agreement. Furthermore, the use of dumping margins from the original investigation in later assessment proceedings cannot itself be found inconsistent with Article 2.4.2 of the AD Agreement, since Article 2.4.2 is limited by its terms to the "investigation phase."

12. Vietnam contends that the use of zeroing in the second and third administrative reviews to calculate dumping margins applied to individually examined respondents was inconsistent with the WTO Agreements. Vietnam has not explained how the margins of dumping calculated for the individually examined firms were affected by "zeroing." Commerce calculated either a zero or *de minimis* margin of dumping for every company individually examined in the second and third administrative reviews. Given the zero and *de minimis* dumping margins, and that no antidumping duties were assessed based on "zeroing," it is not possible that antidumping duties were imposed that exceeded the margins of dumping, so there can be no violation of the obligations in Article VI:2 of the GATT 1994 or Article 9.3 of the AD Agreement.

13. In addition, the text and context of the relevant provisions of the AD Agreement, interpreted in accordance with customary rules of interpretation of public international law, do not support a general prohibition of zeroing that would apply in the context of assessment proceedings. The methodology used by Commerce to calculate antidumping duties in the assessment proceedings in question rests on a permissible interpretation of the AD Agreement and is WTO-consistent.

14. In *US – Softwood Lumber V (AB)*, the Appellate Body found that the exclusive textual basis for an obligation to account for such non-dumping in calculating margins of dumping appears in connection with the obligation in Article 2.4.2 that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a *weighted average normal value with a weighted average of prices of all comparable export transactions* ...." This particular text of Article 2.4.2 applies only within the limited context of determining whether dumping exists in the investigation phase when using the average-to-average comparison methodology in Article 2.4.2.

15. If Vietnam is correct that there is a general prohibition of zeroing that applies in all proceedings and under all comparison methodologies, the meaning ascribed to "all comparable export transactions" by the Appellate Body in *US – Softwood Lumber V* would be redundant of the general prohibition of zeroing. The Appellate Body recognized the need to avoid such redundancy in *US – Zeroing (Japan)*. There, the Appellate Body reinterpreted "all comparable export transactions" to relate solely to all transactions within a model, and not across models of the product under investigation. However, this is inconsistent with the reasoning in *US – Softwood Lumber V (AB)*.

16. Subsequent to *US – Softwood Lumber V (AB)*, several panels examined whether the obligation not to "zero" when making average-to-average comparisons in an investigation extended beyond that context. In making an objective assessment of the matter, these panels determined that the customary rules of interpretation of public international law do not support a reading of the AD Agreement that expands the zeroing prohibition beyond average-to-average comparisons in an investigation. This Panel should likewise find that, at a minimum, it is permissible to interpret the AD Agreement as not prohibiting zeroing outside the context where the interpretation of "all comparable export transactions" articulated in the Appellate Body report in *US – Softwood Lumber V* is applicable.

17. Vietnam's claims depend on interpreting "margins of dumping" and "dumping" as relating exclusively to the "product as a whole." The term "product as a whole" does not appear in the text of the AD Agreement. The panel in *US – Zeroing (Japan)* explained, "'[T]here is nothing inherent in the word 'product[]' (as used in Article VI:1 of the GATT 1994 and Article 2.1 of AD Agreement) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis ....'" The panel in *US – Softwood Lumber V (Article 21.5)* explained, "an analysis of the use of the words product and products throughout the *GATT 1994*, indicates that there is no basis to equate product with 'product as a whole'.... Thus, for example, when Article VII:3 of the GATT refers to 'the value for customs purposes of any imported product', this can only be interpreted to refer to the value of a product in a particular import transaction."

18. Vietnam also has not demonstrated any inconsistency with Article 9.3 of the AD Agreement nor Article VI:2 of the GATT 1994. Vietnam argues that the antidumping duty has exceeded the margin of dumping established under Article 2. This argument depends entirely on a conclusion that Vietnam's preferred interpretation of the "margin of dumping," which precludes any possibility of transaction-specific margins of dumping, is the only permissible interpretation of this term as used in Article 9.3 of the AD Agreement. However, antidumping duties are assessed on individual entries resulting from those individual transactions. The obligation set forth in Article 9.3 – to assess no more in antidumping duties than the margin of dumping – is similarly applicable at the level of individual transactions. All panels that have examined this issue – in *US – Zeroing (EC)*, *US – Zeroing (Japan)*, and *US – Stainless Steel (Mexico)* – have agreed with this interpretation. These panels' understanding of Article 9.3 of the AD Agreement is, at a minimum, a permissible interpretation of the provision.

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

19. Vietnam argues that Commerce's assignment of a margin of dumping to the Vietnam-wide entity in the second and third administrative reviews was inconsistent with various obligations under the AD Agreement. Vietnam incorrectly refers to the assignment of an assessment rate to the Vietnam-wide entity as an assignment of a "country-wide" rate. The premise of Vietnam's argument is factually incorrect: Commerce did not assign a "country-wide" rate. The Vietnam-wide entity rate was assigned to those companies that had not established that they are free from government influence, particularly in their export activities, and thus are reasonably considered to be parts of one entity that Commerce has identified as an "exporter" or "producer" under Article 6.10 of the AD Agreement.

20. Article 6.10 requires an investigating authority to determine an individual margin of dumping for each known "exporter" or "producer" of the product under investigation, unless this is not practicable. Prior to assigning an individual dumping margin, however, the authority must identify whether an entity is an "exporter" or "producer." The AD Agreement does not define the terms "exporter" or "producer," nor does it establish criteria for an investigating authority to examine in order to determine whether a particular entity constitutes an "exporter" or "producer." Therefore, an authority is permitted to determine, based upon the facts on the record, whether a given entity constitutes an "exporter" or "producer" as a condition precedent to calculating an individual dumping margin for that entity. Depending on the facts of a given situation, an investigating authority may determine that legally distinct companies should be treated as a single "exporter" or "producer" based upon their activities and relationships. The reasoning of the panel in *Korea – Certain Paper* supports this interpretation of Article 6.10 of the AD Agreement.

21. An inquiry into the relationship between companies and the reality of their respective commercial activities is also relevant in the context of exporters from a non-market economy. As the term suggests, in a non-market economy, government influence on the economy interferes with the

full functioning of market principles. Due to this distortion, prices in a non-market economy cannot be used in antidumping calculations because they do not sufficiently reflect demand conditions or the relative scarcity of resources. In other words, there is an absence of the demand and supply elements that separately and collectively make a market-based price system work. During Vietnam's accession negotiations, Members expressed concern about the influence of the Government of Vietnam on its economy and how such influence could affect cost and price comparisons in antidumping duty proceedings.

22. Commerce's 2002 inquiry into the non-market nature of Vietnam's economy confirmed that the Government of Vietnam maintains significant control over the Vietnamese economy. During the antidumping duty investigation on frozen fish fillets from Vietnam, Commerce investigated and analyzed the extent of government influence on the Vietnamese economy for the purpose of determining whether Vietnam should be classified as a non-market economy in Commerce's antidumping proceedings. Commerce incorporated by reference and relied on the analysis in the fish fillets investigation when it determined that Vietnam continues to be a non-market economy for the purposes of the determinations challenged in this dispute. Thus, as one of the first steps in the administrative reviews at issue, Commerce determined whether the particular companies being examined were sufficiently free from government control so that, *inter alia*, their export prices were not being set by the government. In order to make this determination, Commerce required each company to submit information demonstrating the company's independence from government control regarding export activities. If Commerce had previously determined that a company was entitled to an individual rate, then that company needed only submit a certification that its status had not changed. However, if a company could not demonstrate that it was sufficiently free from government influence, Commerce considered that company ineligible for an individual (or "separate") rate. Instead, that company was identified as being part of the Vietnam-wide entity, *i.e.*, the entity that is presumed to control the export activities of the companies that compose it.

23. Contrary to Vietnam's claim, this is not a discriminatory practice. Commerce collects similar information in market economy cases to identify each company's affiliates, including information regarding percentage of ownership and ultimate decision making authority. If the data indicate that companies are affiliated and the relationships are sufficiently close so as to allow one company to influence another, Commerce treats the companies as a single entity.

24. The non-market economy entity is treated just like any other "exporter" or "producer" being examined under Article 9 of the AD Agreement. If the non-market economy entity does not provide information requested, the authority may rely upon the facts available pursuant to Article 6.8 and Annex II of the AD Agreement. In the second administrative review, numerous interested parties determined to be part of the Vietnam-wide entity failed to provide necessary information requested by Commerce. Thus, Commerce had to rely upon the facts available. Neither Article 6.8 nor Annex II requires investigating authorities to limit the application of facts available to "individually examined exporters/producers."

25. Vietnam further attempts to limit the ability of investigating authorities to rely on facts available by arguing that "necessary information" should be narrowly understood as only that information which is used to calculate dumping margins. There is no basis in the text of the AD Agreement for such a limitation. Vietnam's reliance on the panel report in *Argentina – Ceramic Tiles* is misplaced; that panel was not examining the definition of the term "necessary information" in Article 6.8. Vietnam also mischaracterizes the finding of the panel in *Egypt – Steel Rebar*. That panel found that "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.) ...." Regardless, 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.

26. It is important to emphasize that, in the second administrative review, the Vietnam-wide entity received a rate based upon the facts available because of the non-cooperation of several of the parties that make up that entity. In fact, every party under review that was identified as being part of the Vietnam-wide entity failed to cooperate by not responding to a request for necessary information, *i.e.*, the quantity and value questionnaires. As a result, the rate assigned to each of the companies that were identified as being part of the Vietnam-wide entity would also have been based upon the facts available even if they each had been assigned an individual rate. That is, consistent with Article 6.8 and Annex II of the AD Agreement, each of these companies would have been assigned a rate based entirely upon the facts available because they failed to cooperate with the investigation by refusing to provide necessary information.

27. In the third administrative review, many of the companies under review did not provide information to demonstrate that their export activities were independent of government control. Accordingly, Commerce determined that they were part of the single Vietnam-wide entity and determined an appropriate rate to apply to entries from this entity. Commerce applied to the Vietnam-wide entity the same rate applied to it in the most recently completed proceeding, because this was "the only rate ever determined for the Vietnam-wide entity in this proceeding."

VI. VIETNAM'S CLAIMS REGARDING THE "ALL OTHERS RATE" ARE WITHOUT MERIT

28. Vietnam claims that the separate rates applied by Commerce to certain exporters or producers in the challenged determinations are inconsistent with Articles 2.4 and 9.4 of the AD Agreement because 1) the rate was calculated using the zeroing methodology, and 2) the rate was a weighted average of dumping margins calculated during the original investigation rather than a weighted average of dumping margins calculated during the particular administrative reviews.

29. Vietnam's argument is dependent upon its claim that Commerce acted inconsistently with the AD Agreement when it employed the zeroing methodology in the original investigation. Commerce's determination of the separate rate for non-examined exporters and producers in the investigation, which Vietnam refers to as the "all-others rate," was made prior to the entry into force of the WTO Agreement with respect to Vietnam. Thus, that determination was not subject to the AD Agreement and cannot have been inconsistent with Article 2.4 of the AD Agreement.

30. In addition, the separate rates determined in the original investigation do not become subject to the AD Agreement simply because they continued to be applied on or after the date of entry into force of the WTO Agreement for Vietnam. Article 18.3 of the AD Agreement provides that "the provisions of this Agreement shall apply to investigations, and assessment proceedings 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." In *US – DRAMS*, the panel analyzed Article 18.3 of the AD Agreement, and reasoned that "[P]re-WTO measures do not become subject to the AD Agreement simply because they continue to be applied on or after the date of entry into force of the WTO Agreement for the Member concerned."

31. 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 assessment proceedings. Commerce made no new comparisons between the export price and the normal value. Commerce simply applied a previously calculated rate from the investigation, or a prior proceeding, to respondents that demonstrated sufficient independence from the government during the second and third administrative reviews. Therefore, as in *US – DRAMS*, the separate rates determined in the original investigation, and

applied in the second and third administrative reviews, did not become subject to the AD Agreement simply because they continued to be applied after the date of entry into force of the WTO Agreement for Vietnam.

32. In addition to its arguments related to zeroing, Vietnam asserts that the rate Commerce applied to companies that were not individually examined in the second and third administrative reviews "unfairly prejudiced" such companies, and for this reason was inconsistent with Article 9.4 of the AD Agreement. Vietnam misunderstands the requirements of Article 9.4 and has not substantiated its claim that Commerce acted inconsistently with that provision. The Appellate Body explained in *US – Hot-Rolled Steel* that, on its face, Article 9.4 expressly requires an investigating authority to disregard zero or *de minimis* margins, or margins based on facts available, when determining a dumping margin ceiling for non-examined exporters or producers based on the weighted average margin of dumping of the examined exporters or producers. Vietnam correctly notes the possibility that "[i]n certain situations, ... the individually examined exporters/producers may all receive an antidumping duty of zero, *de minimis*, or based on facts available, the three margins explicitly prohibited by Article 9.4 from calculation of the guiding ceiling." That is the case here. In the absence of rates that could be used to calculate a weighted average consistent with the requirements of Article 9.4, Commerce determined that it would be appropriate to rely on either a rate calculated during the original investigation, which was a weighted average of dumping margins calculated for exporters and producers individually examined in that 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.

33. In *US – Zeroing (EC) (21.5)*, while the Appellate Body recognized that Article 9.4 is silent regarding this situation, it nevertheless found that Article 9.4 includes some, notably undefined, obligation relating to the calculation of the rate for non-examined companies. Respectfully, the United States believes that the Appellate Body was incorrect. The Appellate Body did not opine on any "specific alternative methodologies to calculate the maximum allowable 'all others' rate in situations where all margins of dumping calculated for the examined exporters fall into the three categories to be disregarded ..." nor did it articulate a legal standard for assessing the consistency of an investigating authority's action with the "obligation" in Article 9.4 in such situations. Hence, the Appellate Body report in *US – Zeroing (EC) (21.5)* offers the Panel no guidance for its analysis of the consistency with Article 9.4 of the methodology applied by Commerce in the second and third administrative review.

34. In the absence of any legal standard or defined obligation, it is not clear how the separate rates Commerce applied to non-examined exporters and producers in the second and third administrative reviews could be deemed inconsistent with Article 9.4. Commerce applied a reasonable method of determining dumping margins that was reflective of the range of commercial behaviour demonstrated by exporters and producers of the subject merchandise during a very recent period and provided a reasonable security going forward for the payment of antidumping duties for those companies that were not individually examined.

35. Vietnam criticizes the "application of an antidumping margin that has no basis in the relevant period of review" and proposes that Commerce should be required to "recalculate the all-others rate using a weighted-average of the individually reviewed exporters/producers for the contemporaneous phase of the proceeding." Vietnam appears to be arguing that Commerce violated Article 9.4 of the AD Agreement by acting consistently with the explicit prohibition in Article 9.4 against using zero and *de minimis* margins to determine the ceiling for the dumping margin to be applied to non-examined exporters and producers. Vietnam's argument is internally incoherent and cannot be accepted.

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

36. Vietnam argues that Commerce's determinations to limit its examination in each of the proceedings at issue are inconsistent with the AD Agreement. Vietnam misconstrues the AD Agreement obligations. 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."

37. 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 the limiting of an examination when an authority does not have the resources to individually examine all parties involved in an investigation. 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.

38. Vietnam further suggests that there is a limit to the number of times an authority may limit its examination, and that Commerce has surpassed that limit and turned the exception into the rule. Article 6.10 of the AD Agreement contains no such limitation. Any time the Article 6.10 conditions are satisfied, an authority may limit its examination.

39. Vietnam asserts that, by limiting its examination in the proceedings at issue, Commerce denied particular companies the opportunity, pursuant to a U.S. regulation, to have the antidumping order revoked with respect to their exports. Vietnam argues that this violated Article 11.1 of the AD Agreement. This claim is entirely dependent on Vietnam's claim under Article 6.10 of the AD Agreement, which, as explained above, is without merit. Additionally, Vietnam misunderstands the meaning of Article 11.1. As the Appellate Body has confirmed, Article 11.1 does not impose any independent or additional obligations on Members, so Commerce's determinations cannot violate Article 11.1. Furthermore, the obligations in Article 11 apply to the antidumping duty order as a whole, not as applied to individual companies. As the Appellate Body found in U.S. — *Corrosion-Resistant Steel Sunset Review*, "the duty" referenced in Article 11.3 is imposed on a product-specific (*i.e.*, order-wide) basis, not a company-specific basis. To the extent that Vietnam's claim rests on an alleged obligation to revoke the antidumping duty order on shrimp with respect to certain individual companies, that claim must fail.

40. Vietnam argues that Commerce violated Article 11.3 of the AD Agreement because, in declining to individually examine all companies requesting review in every proceeding at issue, Commerce has prevented these companies from demonstrating an absence of dumping, which Vietnam contends is the basis for determining whether to continue the order. The sunset review of the shrimp antidumping order, *i.e.*, the Article 11.3 review, is not within the Panel's terms of reference. The sunset review has not yet been completed and, consequently, there is no determination for the Panel to review. In any event, Article 11.3 provides that a definitive antidumping duty must be terminated after five years unless the authorities determine that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The focus of a sunset review is on future behaviour, *i.e.*, whether dumping and injury are likely to continue or recur in the event of

expiry of the duty, not whether or to what extent dumping or injury currently exists. Contrary to Vietnam's assertion, Commerce's sunset review determination is not based solely upon the existence of dumping margins in administrative reviews. Parties are permitted to place any information they choose on the administrative record of the sunset review. Vietnam's argument relies on a mischaracterization of the analysis Commerce performs in a sunset review.

41. Vietnam 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. Commerce could not have acted inconsistently with Article 6.10.2 because no company voluntarily provided the necessary information in the second and third administrative reviews such that any obligation under that provision was triggered.

42. In the fourth administrative review, which is not within the Panel's terms of reference, two companies requested voluntary respondent status and submitted what they purported was the necessary information. Commerce determined that it could only individually examine two companies. This determination was made based upon the large number of companies involved in the proceeding, as well as Commerce's resource constraints. Article 6.10 permits the limitation of an examination when the number of companies involved is so large as to make an individual determination for each company impracticable. Article 6.10.2, on the other hand, requires an authority to determine an individual margin of dumping for each company that voluntarily submits necessary information, unless the amount of companies involved is so large as to make an individual determination for each company that voluntarily submits information "unduly burdensome." Commerce explained that it could individually examine only two companies, and, more than being "unduly burdensome," it was impossible to examine any more. Thus, Commerce's decision not to determine individual dumping margins for these two companies was consistent with Article 6.10.2.

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

43. Vietnam submits that "the USDOC has utilized the challenged practices in an original investigation, four consecutive administrative reviews, and in the preliminary results of the ongoing sunset review" and argues that this is inconsistent with various provisions of the AD Agreement and the GATT 1994. As explained above, the "continued use of the challenged practices" is not a measure within the Panel's terms of reference. In any event, Vietnam's argument is premised on its assertion that such "continued use" constitutes an "ongoing conduct." Even were this a cognizable claim, the facts belie a conclusion that any such "ongoing conduct" exists or is likely to continue.

44. The United States has serious concerns about the rationale articulated by the Appellate Body in the *US – Continued Zeroing* dispute. Vietnam incorrectly asserts that the facts of this case are "virtually identical" to the cases found to be inconsistent in that dispute. In *US – Continued Zeroing*, the Appellate Body found that the record supported findings of inconsistency in only four of the eighteen cases challenged, *i.e.*, where "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." Each of the four cases where the Appellate Body concluded that there was "a sufficient basis for [the Appellate Body] to conclude that the zeroing methodology would likely continue to be applied in successive proceedings" included: (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.

45. The facts in this dispute do not support a conclusion that the challenged practices "would likely continue to be applied in successive proceedings." 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 of inconsistency in connection with those proceedings. 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."

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

IX. CONCLUSION

47. The United States respectfully requests that the Panel grant the U.S. requests for preliminary rulings and reject Vietnam's claims that the United States has acted inconsistently with the covered agreements.

ANNEX A-3

RESPONSE OF VIET NAM TO THE UNITED STATES' REQUEST FOR PRELIMINARY RULINGS

I. INTRODUCTION

1. With this submission, Viet Nam respectfully provides its response to the requests for preliminary rulings asserted in the United States' first written submission, received on 13 September 2010. Viet Nam does so consistent with the communication received from the Panel on 22 September 2010, requesting that a response be filed by Viet Nam no later than 4 October 2010.

2. Viet Nam limits its discussion in this submission to the arguments raised in Section V.A of the United States' first written submission. Specifically, Viet Nam addresses the following requests for preliminary rulings:

- The investigation is not subject to the AD Agreement, nor is it within the Panel's terms of reference[1];
- The first administrative review is not subject to the AD Agreement because it was initiated pursuant to an application made prior to the entry into force of the WTO Agreement for Viet Nam[2];
- The "continued use of challenged practices" is not within the Panel's terms of reference.[3]

3. As an initial matter, Viet Nam does not allege that the original investigation or first administrative review are within the Panel's terms of reference, except to the extent that the results of these segments of the proceeding bear on the results of those segments of the proceeding which occurred after Viet Nam's accession to the WTO.[4] The issue here is one of semantics not substance. Whether or not the measures imposed as a result of the initial investigation and first administrative review were consistent with U.S. WTO obligations at the time the measures were applied is irrelevant in that the U.S. had no obligation to Viet Nam at the time it applied these measures. However, the measures and their consistency with U.S. WTO obligations are relevant to the extent that they were the basis of measures applied by the U.S. after Viet Nam's accession to the WTO. As such, whether one characterizes these measures as being within the terms of reference of the panel or as simply being the factual predicate to support the claims related to the second and subsequent periodic reviews which clearly are within the panel's terms of reference is a matter of semantics not substance. The panel's inquiry into the second and subsequent reviews necessarily has to include what was done in the original investigation and first review because these actions bear directly on what was done in the second and subsequent administrative reviews.

4. Viet Nam does take strong exception, however, to the United States' claim that the "continued use of challenged practices" measure is not within the Panel's terms of reference. Viet Nam submits

[1] First Written Submission of the United States of America at p. 16 (hereafter, "United States FWS").
[2] *Id*. at p. 20.
[3] *Id*. at p. 21.
[4] First Written Submission of the Socialist Republic of Viet Nam at para. 101 (hereafter, "Viet Nam's First Written Submission").

that the request made for a preliminary ruling on this issue is little more than strategic gamesmanship on the part of the United States and an effort to distract the Panel from the important substantive issues that are of concern in this dispute. Accordingly, Viet Nam respectfully requests that the Panel deny the request made by the United States and permit for resolution the "continued use of challenged practices" measure.

II. VIET NAM ASSERTS THAT THE FINAL RESULTS OF THE INVESTIGATION AN THE FIRST ADMINISTRATIVE REVIEW ARE WITHIN THE PANEL'S TERMS OF REFERENCE ONLY INSOFAR AS THE RESULTS OF THESE SEGMENTS OF THE PROCEEDING BEAR ON SUBSEQUENT REVIEWS AFTER VIET NAM'S ACCESSION TO THE WTO

5. The United States claims in its first written submission that the final results of neither the investigation nor the first administrative review are within the Panel's terms of reference.[5] Viet Nam stated at paragraph 101 of the first written submission that "the measures at issue are the second and third administrative reviews made pursuant to the *Shrimp* order, and the continued use of the challenged practices in successive antidumping proceedings under this order."[6] Accordingly, Viet Nam does not consider the investigation or the first administrative review to be within the Panel's terms of reference, insofar as Viet Nam is not claiming that the panel can find these measures inconsistent with U.S. obligations at the time the measures were applied. However, to the extent that these measures served as the basis for measures applied after Viet Nam's accession to the WTO and are inconsistent with U.S. obligations under the *Agreement* at that time, the consistency of the measures in the investigation and first review with U.S. obligations after Viet Nam's accession are relevant to the panel's inquiry.

6. Although not within the Panel's jurisdiction, the United States Department of Commerce's (hereafter, "USDOC") actions in the investigation and first administrative review segments of the ongoing shrimp proceeding are critical to the Panel's understanding and analysis of the measures at issue. As explained in Viet Nam's first written submission, the factual circumstances of this antidumping proceeding are unique because the USDOC's actions in the investigation directly impacted the results of the second and third administrative reviews, the measures at issue. Thus, the investigation is relevant to the extent that it illustrates how the USDOC calculated the separate rates assessed in the second and third administrative reviews.

7. Viet Nam refers the Panel to paragraphs 76, 87, and 88 of Viet Nam's FWS. To make clear the relevance of the investigation and the first administrative review to the measures at issue, we provide a concise timeline that focuses exclusively on the USDOC's method for assigning the separate rate at each segment of the shrimp proceeding:

- 1 February 2005: Final Determination of Investigation and Antidumping Order:

  Separate rate respondents assigned a rate of 4.57 percent based on the weight-average of the weighted-average margins for the firms individually investigated. The USDOC calculated the margins of dumping for the individually investigated producers using the model zeroing methodology.[7]

[5] United States FWS at paras. 76-86.
[6] Viet Nam's First Written Submission at para. 101.
[7] Viet Nam's First Written Submission at paras. 40-46 and Exhibits cited therein.

- 12 September 2007: Final Results of First Administrative Review:

  Because the individually reviewed companies received assessment rates that were zero or *de minimis*, for the separate rate the USDOC assigned the separate rate from the investigation, 4.57 percent.[8] Again, this rate was derived using margins of dumping calculated with the USDOC's model zeroing methodology.

- 9 September 2008: Final Results of Second Administrative Review:

  Because the individually reviewed companies received assessment rates that were zero or *de minimis*, for the separate rate the USDOC assigned the separate rate from the investigation. Thus, the separate rate was 4.57 percent.[9] Again, this rate was derived using margins of dumping calculated with the USDOC's model zeroing methodology.

- 15 September 2009: Final Results of Third Administrative Review:

  Because the individually reviewed companies received assessment rates that were zero or *de minimis*, for the separate rate the USDOC assigned the separate rate from the investigation. Once again, the separate rate was 4.57 percent, which was derived using margins of dumping calculated with the USDOC's model zeroing methodology.[10]

8. The above timeline illustrates (1) why Viet Nam includes in its first written submission extensive background and discussion on the investigation segment of the proceeding, and (2) why the Panel must closely evaluate the USDOC's use of the zeroing methodology in the investigation. Viet Nam provided substantial documentation in the first written submission demonstrating that the USDOC relied on the model zeroing methodology to calculate the margin of dumping for the individually investigated companies.[11] These calculated margins of dumping were the only basis for the USDOC's calculation of the separate rate in the investigation. Thus, use of the zeroing methodology directly impacted the separate rate assigned in the investigation.

9. The same separate rate assigned in the investigation and first administrative review was also assigned in the second and third administrative reviews, the measures at issue in this proceeding. As such, because the methodology for determining the separate rates assigned in the second and third administrative reviews was derived from the original investigation, understanding the calculation of the separate rate in the initial investigation is essential to understanding the basis of the separate rate assigned in the second and third administrative reviews.

10. In sum: Viet Nam does not challenge here the final determination of the investigation. Rather, Viet Nam challenges the final results of the second and third administrative reviews, which rely on the investigation's determination. The final results of the second and third administrative reviews were both initiated subsequent to Viet Nam's date of Accession and completed prior to Viet Nam's request for consultations in this dispute.

[8] Exhibit Viet Nam-11.
[9] Exhibit Viet Nam-15.
[10] Exhibit Viet Nam-19.
[11] Viet Nam's First Written Submission at paras 40-46; Exhibits Viet Nam -33, -42, and -43.

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

11. The Panel should deny the United States' request that the Panel make a preliminary ruling that the USDOC's continued use of the challenged practices does not constitute a measure in this dispute. The United States advances two arguments in support of this claim: that the measure purports to include future measures that are not subject to dispute settlement and that the measure was not identified in the Panel request. The United States' arguments should be dismissed.

A. THE APPELLATE BODY HAS RECENTLY CONSIDERED AND REJECTED THE UNITED STATES' ARGUMENT THAT A "CONTINUED USE OF CHALLENGED PRACTICES" MEASURE CANNOT BE CONSIDERED BY A PANEL

12. The United States contends that the "continued use of challenged practices" cannot be subject to dispute settlement. Citing a 2005 panel report, the United States claims that this measure encompasses future determinations and, as a result, these future determinations cannot be within the Panel's terms of reference under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereafter, "DSU").[12] The United States' interpretation of this exact issue was recently addressed and directly rejected by the Appellate Body.

13. As an initial matter, it has long been recognized that Article 3.3 of the DSU and Articles 17.3 and 17.4 of the *Agreement* allow for "not only measures consisting of acts that apply to particular situations, but also those consisting of acts setting forth rules or norms that have general and prospective application."[13] These measures are oftentimes referred to as "as such" claims. The Appellate Body's analysis in *US – Continued Zeroing* recognized the artificial distinction made between "as such" and "as applied" claims, refusing to accept the United States' interpretation that "as such" may be prospective in nature, while "as applied" may not.[14] The "as such" and "as applied" concepts are simply constructs of the dispute settlement system and have no basis in binding agreements. Thus, a measure may fall in the cross-section of these concepts, as is the case of practices that are ongoing and continuous through the course of one particular proceeding. Such a measure is certainly more broad than an "as applied" measure, but narrower than a generally applicable "as such" measure.[15] The continuing measure stems from a single antidumping duty order and encompasses the use of the challenged practice over a sustained period of time, across the imposition, assessment, and collection segments of the proceeding.[16] Although not of general application like an "as such" claim, a continuing measure ensures predictability and accountability with regard to the order at issue. The Appellate Body properly recognized that the inability to challenge the continued and ongoing use of a practice would lead to a multiplicity of litigation if authorities simply reverted to use of the WTO-inconsistent practices in segments of the proceeding occurring subsequent to resolution by the DSB.

14. The Appellate Body in *US – Continued Zeroing (EC)* concluded that "the continued use of the zeroing methodology in successive proceedings in which duties resulting from the 18 antidumping

[12] United States FWS at para. 96.

[13] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3 at para. 81.

[14] Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009 at para. 179.

[15] Appellate Body Report, *US – Continued Zeroing* at para. 180.

[16] *Id*. at para. 181.

duty orders are maintained, constitute 'measures' that can be challenged in WTO dispute settlement."[17] In considering the United States' arguments in that case with regard to Article 6.2 specifically, the Appellate Body discerned the following:

> The prospective nature of the remedy sought by the European Communities is congruent with the fact that the measures at issue are alleged to be ongoing, with prospective application and a life potentially stretching into the future. Moreover, it is not uncommon for remedies sought in WTO dispute settlement to have prospective effect, such as a finding against laws or regulations, as such, or a subsidy programme with regularly recurring payments.[18]

15. In reaching this conclusion, however, the Appellate Body placed important restrictions on the circumstances required to establish the "continued use" of a practice. The Appellate Body limited application of the "continued use" measure to only those proceedings "where the Panel ha[d] made clear findings of fact concerning the use of the zeroing methodology, *without interruption, in different types of proceedings over an extended period of time*."[19] The panel is to consider whether a "density of factual findings" exist to show that the practice has been used in successive proceedings under the same antidumping duty order.[20] Thus, continued use cannot be established where a practice is used in only a single segment of the proceeding; logically, this fails to establish that an authority has repeatedly and continuously relied on the practice throughout a particular proceeding.[21]

16. To exemplify this continued use, the Appellate Body identified a single antidumping proceeding in which (1) simple zeroing was used in four consecutive periodic reviews, and (2) the sunset review relied on the margin from the original investigation, which was calculated using zeroing. The Appellate Body concluded that "[t]his string of determinations demonstrates the continued use of the zeroing methodology in successive proceedings…"[22]

17. As was done in the *US – Continued Zeroing (EC)*, Viet Nam has shown a string of determinations demonstrating the continued use of the challenged practices in successive proceedings. Viet Nam has demonstrated the following:

- Zeroing: The USDOC utilized model zeroing in the investigation[23]; simple zeroing in the four completed periodic reviews[24]; and margins of dumping calculated using zeroing were used for purposes of the preliminary results of the ongoing sunset review.[25]

- Vietnam-wide rate: The USDOC assigned a rate to a "Vietnam-wide entity" in the investigation and in the four completed periodic reviews.[26]

- Limited Respondent selection: The USDOC impermissibly limited the section of individually examined respondents in the investigation and in the five periodic reviews for which mandatory respondents have been selected.[27]

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[17] *Id.* at para. 185.
[18] *Id*. at para. 171.
[19] *Id*. at para. 195 (emphasis added).
[20] *Id*. at para. 191.
[21] *Id*. at para. 193.
[22] *Id*. at para. 184.
[23] Viet Nam's First Written Submission at paras. 42-46 and exhibits cited therein.
[24] Viet Nam's First Written Submission at paras. 47-51 and exhibits cited therein.
[25] Exhibit Viet Nam-25.
[26] Viet Nam's First Written Submission at paras. 62-69 and exhibits cited therein.

18. Viet Nam acknowledges that the investigation and the first administrative review were completed prior to Viet Nam's accession. Viet Nam submits that this fact is irrelevant for purposes of this analysis. The concern in this instance is whether the USDOC has engaged in the above-discussed practices on an ongoing and continual basis across different segments of the proceeding. The USDOC continues to rely on these practices in all segments under the shrimp antidumping order and has shown zero inclination to alter course. To ensure predictability that future segments of the proceeding are conducted in a manner consistent with United States WTO obligations, Viet Nam respectfully requests that the Panel consider the "continued use of challenged practices" measure in this dispute.

B. VIET NAM IDENTIFIED THE "CONTINUED USE OF CHALLENGED PRACTICES" IN THE PANEL REQUEST

19. The United States claims that because Viet Nam did not include in the panel request the precise language employed by the European Communities in a panel request made in an entirely different proceeding, Viet Nam did not properly identify the "continued use of challenged practices" measure. Viet Nam submits that because the panel request identified the ongoing measure in a manner consistent with Article 6.2 of the DSU, the Panel should deny the United States' claims and accept the "continued use of challenged practices" as a measure in this dispute.

20. In relevant part, Article 6.2 of the DSU provides that "the request for establishment of a panel shall ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[28] Viet Nam understands the United States argument to be that Viet Nam's panel request did not identify the "continued use of challenged practices" measure, making no claim on the adequacy of the legal basis for the request.

21. The specificity requirement of Article 6.2 serves two purposes: it "forms the basis for the terms of reference of the panel" and "serves the due process objectives of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response."[29] Determining conformity with Article 6.2 and these general purposes must be based on the panel request "read as a whole."[30]

22. The general purposes of Article 6.2, and the lens through which they are considered, are necessarily informed by the context provided by related provisions of the DSU.[31] Article 3.3 of the DSU calls for the "prompt settlement" of disputes among Members, such that "the DSU must be interpreted so as to promote the prompt settlement of disputes, without adopting a reading of DSU provisions that would prolong disputes unnecessarily…"[32] Article 9 is also instructive, embodying "the DSU's philosophy of resolving all related issues together…." [33] It would contravene the clear intent of Articles 3 and 9 to require later resolution of an issue substantively identical to a matter presently before a panel.

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[27] Viet Nam's First Written Submission at paras. 78-86 and exhibits cited therein.

[28] Article 6.2, DSU.

[29] Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009 at para. 108.

[30] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257 at para. 169.

[31] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 695 at para. 7.32.

[32] Panel Report, *EC – Bananas III (Guatemala and Honduras)* at para. 7.32.

[33] Panel Report, *EC – Bananas III (Guatemala and Honduras)* at para. 7.32.

23. The Appellate Body and previous panels recognize these considerations when determining whether a panel request satisfies the due process objectives of Article 6.2. In *Argentina – Safeguard Measures on Imports of Footwear*, for example, the panel considered whether subsequent modifications of a definitive measure, which were not explicitly mentioned in the request, fall within the meaning of Article 6.2. Analyzing prior panel interpretations of Article 6.2, the panel agreed that "the requirements of Article 6.2 could be met in the case of a legal act that is subsidiary to or so closely related to a measure specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party."[34] The panel's reasoning, applied in a safeguard context, is of general application. The panel was cognizant of the danger in expanding a panel's terms of reference, but concluded that parties could reasonably assume that subsequent modifications of a definitive measure would necessarily be included within the panel's terms of reference given the logical connection.[35] This is particularly true where the substantive issues being considered remain the same in the subsequent actions.

24. Viet Nam's panel request provided the United States and third parties with clear notice that Viet Nam would challenge the USDOC's use of the defined practices in all proceedings related to the shrimp antidumping duty order. In the panel request, Viet Nam identified every segment of the proceeding that is a direct product of the shrimp antidumping duty order. Indeed, Viet Nam identified each segment of the shrimp proceeding that had at the time of the panel request been initiated – the investigation, each of 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. Inclusion of the determinations completed prior to Viet Nam's accession to the WTO (the investigation and the first administrative review) and those segments not yet final (the fourth administrative review and the five-year sunset review) provided clear notice that Viet Nam was concerned with the ongoing nature of these practices. Viet Nam specifically included the preliminary determination of the fourth administrative review and the initiation of the five-year sunset review to ensure that the Panel and Members understood Viet Nam's concerns with the continued use of the USDOC practices in those segments of the shrimp antidumping proceeding.[36]

25. If the balance of the *Request for the Establishment of a Panel by Viet Nam* provides insufficient notice of Viet Nam's concern about continued and ongoing practices by the USDOC, the portion of the request relating to the ongoing sunset review plainly establishes Viet Nam's concerns regarding continued and ongoing practices:

> Because of the circumstances described above with regard to the original investigation and the subsequent reviews, including USDOC's use of zeroing, the use of a country-wide rate, and the respondent selection methodology which prevented certain producers and exporters from having the opportunity to receive individual rates, the ongoing sunset review is inconsistent with the *Anti-Dumping Agreement*. Each of these practices has a substantial and possibly determinative impact on the USDOC's sunset review determination because of the effect on the dumping margins calculated during the administrative reviews. Accordingly, Viet Nam considers as a

[34] Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515 at para. 8.35, *citing* Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179 at para. 10.10.

[35] Panel Report, *Argentina – Footwear (EC)* at para. 8.45 ("… the subsequent resolutions do not constitute entirely new safeguard measures in the sense that they were based on a different safeguard investigation, but are instead modifications of the legal form of the original definitive measure, which remains in force in substance and which is the subject of the complaint.").

[36] Viet Nam notes that the fifth administrative review, discussed in Viet Nam's First Written Submission, had not been initiated at the time of Viet Nam's panel request.

consequence of the inconsistencies set forth in Sections a-c above that the USDOC sunset review is inconsistent with Articles 11.2 and 11.3 of the Agreement.

26. Thus, Viet Nam has expressed its concerns clearly about the complained of practices in each segment of the proceeding and the cumulative effect of these practices on the sunset review and ongoing reviews in addition to the effects on completed reviews.

27. It is not clear how Viet Nam could have more plainly identified its concern with the ongoing nature of these practices (by listing each segment of the proceeding) and the continued use of these practices (by identifying the segments that have not yet reached a final determination). Viet Nam acknowledges that it did not use the precise language adopted by the European Communities in *US – Continued Zeroing*, as noted repeatedly by the United States. This fact is irrelevant. The issue is whether Viet Nam's panel request provided the parties with notice of its concern with the continued use of these practices. As the panel reasoned in *Argentina – Safeguard Measures on Imports of Footwear*, Viet Nam's clear identification of the definitive antidumping duty places parties on notice for subsequent determinations made in connection with the antidumping duty. Each of the segments listed in Viet Nam's panel request – the periodic reviews and the five-year sunset review – are intimately connected with one another and the antidumping order; but for the antidumping order, these segments would not occur.

28. Of added importance is that the United States makes no argument that it did not have notice of the substantive claims associated with the "continued use of challenged practices" measure. The claims set forth in Viet Nam's panel request pertain to zeroing, application of a Vietnam-wide rate, calculation of the all-others rate, and the respondent selection process. The "continued use of challenged practices" measure does not expand upon these claims. There is no meaningful distinction substantively between the arguments set forth by Viet Nam, the United States, or third parties on the specified claims, whether in relation to the second and third administrative review or the "continued use of challenged practices" measure. Denial of the United States' request has negligible substantive impact on the issues considered in this dispute.

IV. CONCLUSION

29. On the basis of the above, Viet Nam submits as follows:

- Viet Nam makes no claim that the investigation or first administrative review are within the Panel's terms of reference other than as the factual predicate for its claim that zeroing was applied in the second and third administrative reviews, thus the United States' requests with regard to those segments are moot;

- Viet Nam properly and adequately identified the "continued use of challenged practices" measure in the panel request of this dispute; and

- The Appellate Body has recognized that the "continued use of challenged practices" measure is susceptible to DSB resolution.

30. Accordingly, Viet Nam respectfully requests that the Panel deny the request made by the United States with respect to the "continued use of challenged practices" measure and proceed to consider the merits of the claims raised.