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

(DS536)

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

May 9, 2019

I. INTRODUCTION

Mr. Chairman, members of the Panel,

1. The United States would like to thank once again the Panel, and the Secretariat assisting you, for your service in this dispute and their engagement during the first substantive meeting.

II. MATTERS RAISED BY VIET NAM RELATED TO SO-CALLED ZEROING

2. At nearly every stage of these proceedings Viet Nam has inappropriately sought to expand the scope of the matters in dispute. Viet Nam sought to expand the parameters of the consultation request through the panel request, and then sought to expand the panel request through the introduction of additional claims in its first written submission. Yesterday was no exception to what has become a consistent pattern of behavior.

3. We heard for the first time yesterday that Viet Nam is now challenging the so-called differential pricing methodology generally, and separate from its claim regarding alleged zeroing used in the context of the supposed methodology. A general claim regarding the purported methodology was not included in the panel request. The panel request does not contain any reference to a specific obligation alleged to have been breached in relation to the purported methodology, and certainly makes no connection to any of the three clauses contained in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. The United States and third parties have been left to guess the claims Viet Nam is advancing. This is made clear by the fact that certain third parties this morning commented on clauses of Article 2.4.2 of the Anti-Dumping Agreement that Viet Nam ultimately has not raised during the first substantive meeting.

4. Furthermore, with respect to the so-called differential pricing methodology, Viet Nam still has also not evidenced the precise contents of the purported methodology, notwithstanding its opportunity to do so during the first substantive meeting. After acknowledging in its opening statement that its first written submission "did not go into great detail" concerning the purported methodology, Viet Nam dedicated a considerable amount of time in its opening to providing a description of the purported methodology.

5. Viet Nam's statements, however, are just arguments. These statements are not evidence of the contents of the purported measure itself. At the close of these meetings, the record in the case remains devoid of any evidence regarding the contents of the purported methodology. As we have explained, this is fatal to Viet Nam's differential pricing claims, independent from the fact that these claims are outside of the Panel's terms of reference.

6. Paragraph 4(1) of the Panel's Working Procedures allow the Panel to issue a ruling on a preliminary ruling request raised by the parties before the issuance of the Panel's report. The United States has demonstrated that Viet Nam's claims regarding the so-called differential pricing methodology, among other claims, are outside the Panel's terms of reference. Many of the United States' arguments in this regard remain unrebutted and Viet Nam has made no attempt to harmonize its current position that it is pursing claims related to the so-called differential pricing methodology with the reality that it has not requested the Panel make any findings or conclusions concerning these claims.

7. We urge the Panel to exercise its discretion to issue a ruling on the United States' preliminary ruling request prior to the issuance of its report.

8. The United States would also take this opportunity to further underscore the purpose of dispute settlement as Viet Nam continues to advance claims that, even if accepted, would have no practical effect.

9. The purpose of the dispute settlement system is to assess the consistency of **actual** and **existing** measures with WTO obligations, and not to assess, as Viet Nam suggests, measures that no longer exist, or measures that have been withdrawn, or even hypothetical measures that might at some point in the future be applied. A panel's review of measures that no longer exist would not assist a panel in discharging its ultimate function, which is to make those findings that will assist the DSB in making recommendations.[1]

10. Viet Nam's written and oral statements admit that a simple zeroing measure no longer exists, and with that admission, there is simply no point to further consideration of an as such claim related to the non-existent measure.

III. MATTERS RAISED BY VIET NAM RELATED TO THE USDOC'S DENIAL OF VINH HOAN'S REQUEST FOR REVOCATION

11. Viet Nam's statements over the past two days have made clear that its claims regarding its untimely revocation request are grounded in its views of equity and not on actual Anti-Dumping Agreement obligations. Indeed, in the absence of such an obligation in the Agreement, Viet Nam would have the panel invent a requirement that initiation deadlines must be waived when it would be "reasonable" to do so, and of course would have reasonableness be a matter for WTO dispute settlement panels to consider.

12. Contrary to Viet Nam's view, the job of the Panel is not to invent obligations that might, or might not, be equitable.[2] Nor is it the Panel's job to search beyond Anti-Dumping Agreement Article 11 for obligations in other Anti-Dumping Agreement articles addressing non-initiation aspects of proceedings other than revocation proceedings, and apply them by inference to initiation in the context of revocation.

13. The Anti-Dumping Agreement contains a limited set of obligations that Members agreed to apply. Where Members agreed to an obligation, they said so. Where Members did not agree to an obligation governing an aspect of antidumping proceedings, the investigating authority is free under the Anti-Dumping Agreement to handle the issue in the manner that it considers appropriate.

[1] DSU Art. 7.1 (DSB establishes standard terms of reference for a panel to examine the matter set out in the panel request and to make such findings as will assist the DSB in making a recommendation), Art. 19.1 ("Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.").

[2] DSU Art. 19.2 ("In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.").

14. The USDOC considers it appropriate to require the submission of revocation requests during the period for seeking an administrative review. The maintenance of this requirement, and the USDOC's enforcement of the requirement with respect to Vinh Hoan after it missed the relevant deadline by months, was far from arbitrary. The deadline enables the USDOC to run an orderly process that respects the rights of the other participants in the proceeding. It enables the USDOC to seek and obtain information from those participants, and to follow-up on that information, including when the information bears on whether continued application of the order is necessary to offset dumping notwithstanding an absence of sales at less than normal value for three years. And it enables the USDOC to conduct verification.

15. Of course, all of Viet Nam's revocation arguments presume that the Anti-Dumping Agreement provides an obligation to offer company-specific revocation, for in the absence of such an obligation, denial of Vinh Hoan's request cannot be inconsistent with the Agreement. But this presumption too is contrary to the actual text of Article 11, particularly when read as a whole and giving consistent meaning to its terms. Viet Nam emphasizes the alleged effects of different readings on the operation of the U.S. trade remedies system. But impact on the system of a single Member is not relevant to the scope of Anti-Dumping Agreement obligations. Rather, the applicability or not of Article 11 to company-specific revocations must be decided based on the Anti-Dumping Agreement's actual text. And that text does not require company-specific revocation.

16. As the United States has explained, Viet Nam's revocation claims are outside of the Panel's terms of reference, and should not be assessed. But if the Panel does assess them, we urge the Panel to pay careful attention to what the Anti-Dumping Agreement actually says and to what that agreement does not say. Doing so makes clear that Viet Nam's revocation claims must be rejected.

IV. MATTERS RAISED BY VIET NAM RELATED TO THE VIET NAM-GOVERNMENT ENTITY

17. The USDOC's findings that Viet Nam is a nonmarket economy and is in a position to exercise control or material influence over entities located in Viet Nam with respect to the pricing and output of products destined for consumption in Viet Nam – together with Viet Nam's commitment in its Accession Protocol to alter its nonmarket behavior – provide the basis for the USDOC's treatment of Vietnamese companies as part of a single government entity, until (and unless) it is clearly demonstrated otherwise.

18. The United States treated the Viet Nam-government entity itself as a known exporter or producer and the appropriate supplier consistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. The Viet Nam-government entity received its own rate, as did exporters that were not part of the Viet Nam-government entity. This treatment is supported in light of the USDOC's 2002 determination that Viet Nam is a non-market economy, and Viet Nam's commitments in its Accession Protocol, which provide both a legal and factual predicate for treating multiple companies in Viet Nam as part of a Viet Nam-government entity.

19. Viet Nam otherwise has not established a *prima facie* case for an "as such" or "as applied" inconsistency with Article 9.4 of the Anti-Dumping Agreement. No one asked the USDOC to examine the anti-dumping duty rate for the Viet Nam-government entity in the three

administrative reviews challenged by Viet Nam. Where a rate has previously been assigned for an exporter's past entries, and where a Member collects security (in this case, a cash deposit) for the payment of antidumping duties pending final determination based on that rate, Article 9.4 does not require a Member to assess a duty at a different rate absent a request to do so.

20. Viet Nam also has not established a *prima facie* case for an "as such" or "as applied" inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement. The rate applied to the Viet Nam-government entity in each of the covered reviews is not a "facts available rate" as defined under Article 6.8. The rate is not based on the Viet Nam-government entity's refusal to give access to, or otherwise provide, necessary information about the review period in question, nor is it based on the entity's affirmative or negative acts to significantly impede the collection of information about the review period in question.

21. Viet Nam has failed to demonstrate the existence of a rule or norm of general and prospective application that is "as such" inconsistent with Article 6.8, 6.10, 9.2, 9.4, and Annex II of the Anti-Dumping Agreement and thus has failed to meet its burden. Viet Nam's "as applied" claims with respect to these provisions of the Anti-Dumping Agreement are also completely unfounded given that the record in this dispute fully supports the USDOC's treatment of Vietnamese companies as part of a single government entity.

V. CONCLUSION

22. In closing, the United States wishes to emphasize that the existence of past panel or Appellate Body reports does not alter a panel's function to make its own objective assessment of the meaning of the relevant covered agreement. As explained at page 14 of the Appellate Body's report in *Japan – Alcoholic Beverages II*:

> Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, **they are not binding, except with respect to resolving the particular dispute between the parties to that dispute**.

23. WTO panels and the Appellate Body ideally will apply the customary rules of interpretation correctly, and thus different adjudicators will consistently reach similar conclusions concerning the interpretation of the covered agreements. But every panel should first apply the customary rules of interpretation itself and reach its own preliminary conclusion concerning the interpretation of a covered agreement. After doing so, it is then appropriate for a panel to take into account the interpretive findings in prior panel and Appellate Body reports that have been adopted by the DSB.

24. Where a panel's preliminary interpretive conclusion accords with the conclusion in a prior report, the panel can have greater confidence in the correctness of its own conclusion and reflect that in its own report. However, where a panel's preliminary interpretive conclusion differs from the conclusion in a prior report, it may be appropriate for the panel to further

consider the matter, and assess whether the panel has erred in its own application of the customary rules of interpretation, or whether the panel considers that the interpretive finding in a prior report is erroneous. Such an approach would be consistent with the role of a WTO dispute settlement panel, as provided in the DSU,[3] while also taking appropriate account of prior reports adopted by the DSB.

25. Starting – as Viet Nam repeatedly has suggested to the Panel – a so-called "interpretive analysis" with prior reports adopted by the DSB is not what WTO dispute settlement panels are "expected" to do, per the terms of the DSU. Taking such an approach would constitute a failure by a panel to fulfill its role under the DSU.

26. Mr. Chairman, members of the Panel, this concludes our closing statement. We thank you for your attention.

[3] DSU, Art. 3.2 (WTO adjudicators to apply customary rules of interpretation of public international law), 7.1 (panel to examine a matter and make such findings as will assist the DSB in making recommendations), 11 (panel's function to make an objective assessment of the matter, including the applicability of and conformity with the covered agreements).