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

(DS536)

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

May 8, 2019

TABLE OF REPORTS

Short Title	Full Case Title and Citation
Korea – Diary (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
US – Continued Zeroing (AB)	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – Differential Pricing Methodology (Panel)	Panel Report, *United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, WT/DS534/R and Add.1, circulated 9 April 2019
US – DRAMS	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999
US – Oil Country Tubular Goods Sunset Reviews (AB)	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
US – Shrimp I (Viet Nam) (Panel)	Panel Report, *United States – Anti-Dumping Measure on Certain Shrimp from Viet Nam*, WT/DS404/R, adopted 2 September 2011
US – Shrimp II (Viet Nam) (Panel)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/R, adopted 17 November 2014
US – Shrimp II (Viet Nam) (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from Viet Nam*, WT/DS429/AB/R, adopted 22 April 2015
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

TABLE OF EXHIBITS

Exhibit No.	Description
USA-10	Chapter 1, Department of Commerce Antidumping Manual, p. 1 (2009)
USA-11	19 CFR § 351.107(d)
USA-12	*Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 11,349 (March 17, 2009)
USA-13	*Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review, and Intent To Revoke Order in Part*, 77 Fed. Reg. 56,180 (September 12, 2012)
USA-14	*Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results, and Final Results of No Shipments of the Antidumping Duty Review; 2016-2017*, 84 Fed. Reg. 18,007 (April, 29, 2019)
USA-15	Issues and Decisions for the Final Results of the 17th Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea (2009-2010) (March 5, 2012)

I. INTRODUCTION

Mr. Chairman, members of the Panel,

1. On behalf of the U.S. delegation, I would like to thank you for agreeing to serve on this Panel. I would also like to express our gratitude as well to the Secretariat staff assisting you with your work.

II. MATTERS RAISED BY VIET NAM RELATED TO ZEROING ARE OUTSIDE THE TERMS OF REFERENCE OF THIS DISPUTE

2. I will begin with a discussion of issues related to Viet Nam's zeroing claims. My remarks this morning will be limited to two points: first, regarding the United States' preliminary ruling request, the Panel should not consider any claims related to the so-called differential pricing methodology because Viet Nam failed to set forth the claim in its panel request; and second, Viet Nam has failed to demonstrate the United States maintains a zeroing methodology to which any "as such" challenge could apply.

3. Turning to the first point, the Panel should not consider Viet Nam's claim regarding the differential pricing methodology because the panel request failed to state a claim regarding the methodology.

4. Article 6.2 of the DSU requires a panel request to include a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Viet Nam's panel request is devoid of any reference to the legal basis of a purported differential pricing claim. Viet Nam's generic reference to "numerous WTO Appellate Body and panel decisions" does not suffice. As stated in the U.S. first written submission, the rights and obligations of WTO Members flow not from Appellate Body or panel decisions, but from the text of covered agreements, and Viet Nam has identified none in its panel request specific to the purported differential pricing claim. For this reason alone, Viet Nam's differential pricing claims, including claims whether advanced on an "as such" or "as applied" basis, are outside the terms of reference of this dispute.

5. The panel should reject Viet Nam's differential pricing claims entirely as they were not set forth in sufficient detail in the panel request.

6. Viet Nam does not include a claim related to differential pricing in the list of claims provided at paragraph 44 of its first written submission and Viet Nam has not even requested that the Panel make any findings or conclusions concerning the so-called methodology in its first written submission.[1]

III. THE U.S. APPLICATION OF A ZEROING METHODOLOGY "AS SUCH" AND "AS APPLIED" IS NOT INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT OR THE GATT 1994

7. The second issue I will discuss this morning are Viet Nam's "as such" and "as applied" claims regarding "simple zeroing." These claims are without merit and should be dismissed.

[1] Viet Nam First Written Submission, para. 277.

8. First, Viet Nam has not brought forward facts to establish its "as such" claim regarding "simple zeroing". In its submission, Viet Nam wholly relies on previous Appellate Body reports. Viet Nam's reliance on past findings represents a fundamental misunderstanding of the WTO dispute settlement process. Under Article 11 of the DSU, the function of a panel is to make an objective assessment of the matter before it. Indeed, with regard to the existence of an alleged unwritten measure involving zeroing, the Appellate Body has acknowledged that "the factual findings adopted by the DSB in prior cases regarding the existence of the zeroing methodology, as a rule or norm, are not binding in another dispute."[2]

9. Furthermore, Viet Nam has acknowledged in its first written submission that, "the USDOC terminated the practice of simple zeroing with respect to reviews" in 2012.[3] This alone is fatal to any "as such" claim.

10. Put simply, simple zeroing cannot be considered a rule or norm of general and prospective application because the USDOC now grants offsets for non-dumped transactions. Viet Nam even acknowledges this in its first written submission where it states that the USDOC did not apply simple zeroing in the eighth administrative review. Thus, the Panel should reach the same conclusion as the panel in *US – Shrimp II (Viet Nam)* that the United States maintains no statute, regulation, or other measure of general and prospective application that requires the use of a zeroing methodology in reviews.

11. Although the United States believes claims regarding the differential pricing methodology are outside the Panel's terms of reference, I would also make a few remarks regarding Viet Nam's claim that the so-called differential pricing methodology is WTO-inconsistent, "as such." This claim is also flawed in several respects. Here again, Viet Nam has not even attempted to put forth facts that would demonstrate the precise contents of the unwritten purported measure. Instead, Viet Nam again relies on conclusions of the Appellate Body, this time in *US – Washing Machines*, which rested on factual findings specific to that case.[4]

12. While relying on the Appellate Body report in *US – Washing Machines*, Viet Nam completely ignores the scope of information presented to the *US – Washing Machines* panel on which the panel relied in formulating its conclusions, while concurrently claiming that this Panel should reach similar conclusions absent similar foundation.

13. Second, to the extent that Viet Nam's submission contains any concrete arguments on the merits of using a zeroing approach in the context of a differential pricing approach, those arguments are fully rebutted in the Annex to the U.S. first written submission. Further, a recent panel report has persuasively explained, in detail, why the Appellate Body reached incorrect and unsupportable conclusions in *US – Washing Machines*.[5]

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[2] *US – Continued Zeroing (AB)*, para. 190.

[3] Viet Nam First Written Submission, para. 60.

[4] Viet Nam First Written Submission, paras. 95-99.

[5] *See US – Differential Pricing Methodology (Panel)*, paras. 7.101- 7.113.

14. We now turn to Viet Nam's claim that zeroing is WTO-inconsistent "as applied". As an initial matter, the United States would note that the "as applied" claim applies to simple zeroing, and not to zeroing in the context of differential pricing. On page 6 at paragraph 18, and again on page 19 at paragraph 44, of its first written submission, Viet Nam states that the fifth, sixth, and seventh reviews are the only reviews relevant to the "as applied" claims.

15. In its written response to the U.S. preliminary ruling request, Viet Nam writes that "the inclusion of zeroing pursuant to differential pricing was a claim separate from and in addition to the claim that the zeroing used in the fifth, sixth and seventh reviews of Fish Fillets from Viet Nam was WTO-inconsistent."[6] Viet Nam in effect concedes that zeroing in the context of differential pricing, and zeroing used in the fifth to seventh reviews, are distinct measures.

16. Viet Nam's claim that the USDOC's practice of simple zeroing in reviews is inconsistent with the GATT 1994 and Anti-Dumping agreement is without merit.

17. Viet Nam's basic claim is that this Panel should find the U.S. measures to be WTO-inconsistent "as applied" because the Appellate Body has found the Anti-Dumping Agreement to include a general prohibition of zeroing based on the concept of "product as whole" – a term and concept that cannot be found anywhere in the text of the Anti-Dumping Agreement or the GATT 1994.

18. In simply urging the Panel to follow the observations of the Appellate Body, Viet Nam asks this Panel to disregard its charge under Articles 7.1, 11, and 3.2 of the DSU to make its own objective assessment of the matter before it, including an objective assessment of the facts and the applicability and conformity with the relevant covered agreements, through application of customary rules of interpretation to the text of the covered agreements – not through application of prior adopted reports.

19. Other panels, each charged by the DSB to examine a matter and fulfilling the same "function" under the DSU to make an objective assessment, each examining the same agreements and applying the same customary rules of interpretation and standard of review found in Article 17.6 of the Anti-Dumping Agreement, have found that a general prohibition of zeroing based on the concept of "product as whole" to have no basis in the text of the Anti-Dumping Agreement or GATT 1994, and that zeroing is consistent with a permissible interpretation of the Anti-Dumping Agreement.

20. This concludes the U.S. opening statements regarding zeroing. I now will turn the floor over to my colleague who will discuss Viet Nam's claims related to revocation.

IV. The USDOC's Denial of Vinh Hoan's Request for Revocation was Fully Consistent with the Provisions of Article 11 of the Anti-Dumping Agreement

21. The U.S. first written submission sets out in detail why Viet Nam's claims with respect to its untimely revocation request have no merit. That submission also explained why the

[6] Viet Nam Response to U.S. Preliminary Ruling Request, para. 23.

revocation claims actually argued in this dispute by Viet Nam were not raised in its request for consultations and are thus outside the Panel's terms of reference.

22. We wish here to briefly emphasize a few key points bearing on two characteristics of Anti-Dumping Agreement Article 11: that it does not obligate Members to revoke an antidumping duty order with respect to individual companies; and that it does not obligate Members to accept untimely requests for revocation. Before doing so however, we note three preliminary points.

23. First, with respect to the preliminary ruling request, Viet Nam seems to think that the reason for its challenge to denial of the revocation request would have been obvious from Viet Nam's request for consultations had the United States put "one and one together."[7] Yet a request for consultations must actually set out an indication of the legal basis for the complaint instead of leaving it for the responding Member to deduce. Here, Viet Nam's request for consultations identified, as the basis for the revocation claim, only the status of the sixth and seventh administrative reviews; Viet Nam waited until its panel request to identify as a basis for its claim the USDOC's requirement that revocation requests be filed in the anniversary month of the order. Viet Nam thus improperly sought to expand the scope of the proceeding through its panel request.

24. Second, turning to the substance of Viet Nam's revocation claim, it is important to keep in mind that this claim is not about zeroing methodology. The United States did not deny Viet Nam's revocation request by applying a zeroing methodology. The United States denied the request because it was submitted long past the deadline for seeking revocation. Viet Nam is confusing the issue when it makes arguments about zeroing in the context of this claim.

25. Third, whether a respondent has engaged in dumping in the context of any particular administrative review period, or set of periods, is a completely separate question from whether there is a "need for continued imposition of the duty" for purposes of Article 11.2 of the Anti-Dumping Agreement. One question looks retrospectively and the other prospectively. Thus, whether continuation of an antidumping duty is necessary to offset dumping is not determined by an absence of dumping during past periods when the antidumping order was in place.[8] U.S. law recognizes this as well, providing for revocation requests to be considered in light of both whether there was an absence of dumping over a specified period and whether continuation of the order is "otherwise necessary to offset dumping."[9] The fact that administrative reviews and revocation requests look to different questions underscores that a revocation request cannot simply be tacked onto an already pending administrative review without real consequence for the scope of what needs to be considered. Requiring the revocation request to be filed in a timely manner permits the investigating authority to properly determine at the outset what it needs to consider and how it will do so.

[7] Viet Nam Response to U.S. Preliminary Ruling Request, para. 30.

[8] *US – DRAMS*, paras. 6.29-6.32, 6.34.

[9] 19 C.F.R. § 351.222 (Exhibit VN-02).

A. Articles 11.1 and 11.2 of the Anti-Dumping Agreement Do Not Obligate Members to Revoke an Antidumping Duty Order With Respect to Individual Companies

26. As explained in detail in our first written submission, and as I will summarize today, Article 11of the Anti-Dumping Agreement does not impose any obligation on Members to terminate antidumping orders with respect to individual respondents.

27. As explained in our first written submission, "the duty" and "the antidumping duty" to which Article 11.2 applies refers to a duty on a product, and not a duty on imports from a specific company. The Appellate Body has interpreted "the duty" in the same manner in the context of Article 11.3. Further, Articles 11.1 and 11.2 refer to assessments of injury, which in antidumping proceedings is not assessed on a producer-specific basis. Given that injury caused by individual producers is not assessed separately, the references to injury in 11.1 and 11.2 show that it would make little sense for "the duty" in those paragraphs to mean the duty applied to products of specific producers.

28. Context provided by Article 9 and Article 6 of the Anti-Dumping Agreement further confirms that "the duty" in Article 11.2 refers to the antidumping duty on a product and not multiple duties imposed on a company-specific basis. Specifically, reference to "the duty" in Article 11.1 and 11.2 contrasts with references to "individual duties" in Article 9.4 and the reference to "an individual margin of dumping for each exporter or producer" in Article 6.10. "Individual duties" and "an individual margin of dumping for each exporter or producer" must have a different meaning than "the duty." To read "the duty" in the context of Article 11 as a company-specific reference would render these distinctions a nullity.

29. Viet Nam relies on the panel finding in *US – Shrimp II*, but that conclusion was deeply flawed. As the United States explained in detail in its first written submission,[10] that conclusion was based on the illogical position that the "duty" in Article 11.2 has a different meaning than in the very next paragraph, Article 11.3. As the United States explained in its first written submission,[11] there is simply no basis for this understanding of the uses of the term "duty." Accordingly, there is simply no basis for Viet Nam's contention that Article 11 requires a Member to let respondents seek company-specific revocation of an AD order.

B. Articles 11.1 and 11.2 of the Anti-Dumping Agreement Do Not Obligate Members to Accept Untimely Requests for Revocation

30. Viet Nam's revocation claims also fail because nothing in Article 11 would require a Member to accept or consider an untimely request for revocation. Viet Nam's revocation claims amount to an attempt to use the WTO dispute settlement system to escape the consequences of the failure by Vinh Hoan to meet a basic procedural deadline.

31. It is important to keep in mind that an investigating authority does not need a grant of permission in the WTO Agreements to impose a procedural deadline. This authority is inherent

[10] U.S. First Written Submission, paras. 145-149.

[11] U.S. First Written Submission, paras. 145-149.

in any administrative system, subject only to specific obligations set out in a covered agreement. Indeed, the Appellate Body has acknowledged "the right of investigating authorities to rely on deadlines in the conduct of their investigations and reviews."[12] Nothing in Anti-Dumping Agreement Article 11 limits that right with respect to revocation requests.

32. Viet Nam, moreover, attempts to make much of Anti-Dumping Agreement Article 6. But Anti-Dumping Agreement Article 6 says absolutely nothing about the consistency of the USDOC's revocation-request deadline with Article 11. Article 11.4 provides only that the "provisions of Article 6 regarding evidence and procedure" shall apply to reviews conducted under Article 11. Article 11.4 does not import the requirements under Article 6 into Article 11 wholesale.[13] The provisions of Article 6 regarding evidence and procedure apply to the submission of evidentiary information and the procedure by which a Member must accept that information or use other information available. Nothing in Article 6 addresses deadlines for initiation documents. In fact, the subject of initiation is covered in an entirely separate article of the Anti-Dumping Agreement: Article 5.

33. The distinctions between initiation documents and subsequent submissions are significant. The Appellate Body recognized that it is not an unreasonable burden to impose a deadline for respondents to file a simple notice at the start of a sunset review, and that "if a respondent decides not to undertake the necessary initial steps to avail itself of the 'ample' and 'full' opportunities available for the defence of its interests, the fault lies with the respondent."[14] Indeed, initiation filings serve to provide notice to interested parties and frame the context of the review (much like a panel's terms of reference). "Thus, the initial submissions enable an investigating authority to conduct … reviews in a fair and orderly manner."[15]

34. Viet Nam also argues that the sixth administrative review had not concluded by the deadline for seeking revocation in the context of the seventh review. This consideration, however, does not excuse a late request for revocation. At the time of commencement of the seventh administrative review, there was one entity that knew the prices at which Vinh Hoan had sold goods during the sixth and seventh administrative review periods: Vinh Hoan. Vinh Hoan thus lacks any basis to claim that uncertainty about the eventual result of the sixth administrative review would have precluded it from making a timely revocation request.

35. Contrary to what Vinh Hoan appears to suggest,[16] there was no evidence of eligibility that it would have needed to submit with its revocation request that was unavailable to Vinh Hoan at the time of the deadline. Under the terms of 19 C.F.R. § 351.222, Vinh Hoan merely needed to certify: (a) that it had sold the subject merchandise into the United States in commercial quantities during each of the three years of the review period; (b) that it had sold the subject

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[12] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 242.

[13] *US – Shrimp II (Viet Nam) (Panel)*, para. 7.388 (citing *US – Corrosion Resistant Steel Sunset Review,* paras. 154-155).

[14] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 252.

[15] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 249.

[16] Viet Nam First Written Submission, para. 262.

merchandise at not less than normal value during the year at issue in the forthcoming administrative review; and (c) that in the future it would not sell the merchandise at less than normal value.[17] Requiring these certifications, and not the results of a prior review, is consistent with the practical realities of a retrospective system. Indeed, regardless of how quickly prior administrative reviews had been conducted, such results would, at the time of filing of a timely request for revocation, be impossible to obtain for at least the last year of the review period. In fact, in two instances in the *Fish Fillets* proceeding, a respondent sought revocation even though the USDOC had not yet issued a preliminary determination in the prior administrative review: QVD timely sought revocation in the fifth review even though the USDOC had not yet issued a preliminary determination in the fourth,[18] and both Vinh Hoan and QVD sought revocation in the eighth review even though, at the time they submitted their timely requests, the USDOC had not yet issued a preliminary determination in the seventh review.[19]

36. Under U.S. regulations, there is no penalty for submitting a request for revocation that is ultimately unsuccessful. Accordingly, there was simply no reason for Vinh Hoan not to have submitted a timely request for revocation. By contrast, as explained in detail in the U.S. first written submission, consideration of Viet Nam's egregiously late revocation request would have imposed significant burdens on the USDOC and other participants in the review.

37. Viet Nam's arguments to the contrary misunderstand the USDOC's process for considering whether continued application of the order to a respondent, in the absence of sales at less than normal value during the three-year review period, is otherwise necessary to offset dumping. When a respondent requests revocation, the USDOC publishes notice of the request and allows comments from interested parties. The comments received may shape follow-up questions from the USDOC, and the respondent's subsequent submissions, bearing on whether continued application of the order is otherwise necessary to offset dumping.[20] The USDOC, moreover, must conduct a verification after a revocation request.[21] The USDOC's process and inquiries are thus not the same regardless of whether revocation was requested. An egregiously late revocation request would significantly burden the USDOC and parties who rely on its processes to protect their procedural rights and to achieve accurate results.

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[17] 19 C.F.R. § 351.222 (Exhibit VN-02).

[18] *See* Preliminary Results for Fifth AR (28 August 2009) (BCI) (Exhibit VN-06-3), p. 45806 (noting the timing of QVD's revocation request); *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 11,349, 11,349 (March 17, 2009) (Exhibit USA-12) (noting date of notice of preliminary results in the fourth administrative review).

[19] USDOC's Preliminary Results for Seventh AR (August 31, 2011) (BCI) (Exhibit VN-08-03); USDOC's Final Results for Seventh AR (March 7, 2012) (BCI); *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review, and Intent To Revoke Order in Part*, 77 Fed. Reg. 56,180, 56,186 (September 12, 2012) (Exhibit USA-13) (noting the timing of the revocation requests).

[20] *See* Issues and Decisions Memorandum for the Final Results of the 17th Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea (2009-2010) (March 5, 2012) (Exhibit USA-15), pp. 24-26.

[21] *See* 19 C.F.R. § 351.225(f)(2)(ii).

38. The bottom line here is that Vin Hoan missed a deadline that it should have paid attention to. It was a deadline that nothing in the Anti-Dumping Agreement precludes the USDOC from maintaining and enforcing – including in the underlying proceedings at issue here.

39. I will now turn the floor over to my colleague to discuss the anti-dumping duty rate assigned to the Viet Nam-government entity.

V. VIET NAM FAILED TO ESTABLISH THAT THE UNITED STATES BREACHED THE ANTI-DUMPING AGREEMENT IN ASSIGNING THE VIET NAM-GOVERNMENT ENTITY A SINGLE ANTI-DUMPING DUTY RATE

40. Viet Nam claims that the United States breached Articles 6.8, 6.10, 9.2, 9.4, and Annex II of the Anti-Dumping Agreement because the USDOC determined an anti-dumping duty rate for the Viet Nam-government entity.

A. Viet Nam Failed to Establish the Existence of a Rule or Norm of General and Prospective Application, and Its "As Such" Challenge Fails on that Basis

41. Viet Nam's "as such" claim begins – and in our view ends – with the analysis of whether Viet Nam has properly established the existence of a "norm of general and prospective application." Viet Nam mischaracterizes the evidence it has put forward to support the existence of such a norm. When this purported evidence is critically and fairly considered, it is clear that Viet Nam has not satisfied the high evidentiary burden it must in order to establish the existence of the unwritten measure it seeks to challenge.

42. The USDOC's Antidumping Manual, on which Viet Nam largely relies, is a training manual. This manual explicitly disclaims any suggestion that it is authoritative or controlling with respect to the USDOC's policy or practice. In particular, the document stipulates that it:

> is for the internal training and guidance of … [USDOC] personnel only, and the practices set out herein are subject to change without notice. This manual cannot be cited to establish [US]DOC practice.[22]

Accordingly, by its own terms, this document does not establish a rule or norm of general and prospective application.

43. The three administrative reviews on which Viet Nam relies also do not establish either why the USDOC arrived at a certain outcome, or more critically, what the USDOC will determine if the same or similar situation occurs in the future. The outcomes of these reviews do not show whether there is some separate decision by the United States – that is, a written or unwritten measure – that accounts for the USDOC's behavior. In short, the only thing proven by consistent results is the fact of consistent results.

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[22] Chapter 1, Department of Commerce Antidumping Manual, p. 1 (Exhibit USA-10). The U.S. first written submission incorrectly understood that this part of the Manual was included in Exhibit VN-01.

44. The findings in other disputes do not mitigate Viet Nam's burden to demonstrate that an unwritten measure has general and prospective application. A WTO dispute settlement panel has no authority under the DSU or the covered agreements simply to apply findings in a report adopted by the DSB in a prior dispute.

45. Viet Nam otherwise notably fails to discuss the one instrument that is in fact authoritative under the U.S. legal system – 19 CFR § 351.107(d), a rule issued by the USDOC. This rule notes that "[i]n an antidumping proceeding involving imports from a nonmarket economy country, 'rates' **may** consist of a single dumping margin applicable to all exporters and producers."[23]

46. There is nothing binding, authoritative, compulsory, or otherwise indicative in this rule that creates expectations that the USDOC will assign a single rate to a Viet Nam-government entity in the future. Viet Nam has provided no evidentiary basis for concluding that this rule will automatically be applied in any particular manner in every U.S. anti-dumping proceeding.

47. In WTO dispute settlement proceedings, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[24] In this proceeding, Viet Nam has not established a *prima facie* case for an "as such" inconsistency with the Anti-Dumping Agreement given that it has not even brought forward evidence that what it describes as "practice" exists and is a measure.

B. The USDOC's Treatment of the Viet Nam-Government Entity is Not Inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement

48. The United States recalls the following key considerations with respect to the USDOC's treatment of the Viet Nam-government entity:

- First, when Viet Nam acceded to the WTO, Viet Nam acknowledged that it had not completed the transition from a nonmarket economy to a market economy but was in the midst of "shifting from a system of central planning to a market-based economy."[25]

- Second, when Viet Nam acceded to the WTO, Viet Nam committed to alter its nonmarket behavior, especially with respect to all enterprises owned by the Government of Viet Nam, controlled by the Government of Viet Nam, or granted special or exclusive privileges by the Government of Viet Nam.[26]

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[23] 19 CFR § 351.107 (bold added) (Exhibit USA-11).

[24] *US – Wool Shirts and Blouses (AB)*, p. 14.

[25] Working Party Report, para. 52 (Exhibit USA-3); *see also ibid.*, paras. 4, 7, 80-81, 96, 104, 254-255 (Exhibit USA-3).

[26] Working Party Report, para. 78 (Exhibit USA-3); *see ibid.*, para. 79.

- Third, when Viet Nam acceded to the WTO, Members specifically expressed concern about the influence of the Government of Viet Nam on its economy and how such influence could affect trade remedy proceedings, including cost and price comparisons in anti-dumping duty proceedings.[27]

- Finally, Viet Nam is, from the standpoint of Article VI of the GATT 1994 and the Anti-Dumping Agreement, a nonmarket economy country for purposes of this dispute settlement proceeding.[28]

49. Turning to the text of the Anti-Dumping Agreement, Article 2.4 provides for a comparison of the export price of the product under consideration to the normal value of the like product at the ex-factory level.[29] For the purpose of this comparison, both the product under consideration and the like product are understood to have originated from the same factory and moved into commerce through the same factory door.

50. With respect to the calculation of normal value, the undisputed fact that Viet Nam is a nonmarket economy country entails that Viet Nam is in a position to exercise restraint or direction over firms located in Viet Nam and can materially influence these firms' decisions about the price or cost of products destined for consumption in Viet Nam.

51. With respect to the calculation of export price, the USDOC's approach recognizes that Viet Nam is in the same position to exercise restraint or direction over the same firms with respect to their export activities. This approach correctly applies the Anti-Dumping Agreement, because Article 2.4 instructs importing Members for purposes of price comparability to compare the export price of the product under consideration to the normal value of the like product at the ex-factory level.

52. Or put another way, because the product exported from Viet Nam to the United States moves into commerce through the same factory door as the like product destined for consumption in Viet Nam, the firm that manufactures, produces, and sells the products destined for export to the United States must be, for purposes of price comparability, identical to the firm that manufactures, produces, and sells the like product destined for consumption in Viet Nam.

53. These considerations provide the basis for the USDOC's treatment of Vietnamese firms as part of a single government entity, because the Viet Nam-government entity is the only

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[27] *See, e.g.,* Working Party Report, paras. 254-255 (Exhibit USA-3).

[28] U.S. Department of Commerce, Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (Nov. 8, 2002) (Exhibit USA-1) (making a factual finding that Viet Nam is a nonmarket economy).

[29] *See* Anti-Dumping Agreement, Art. 2.4 (the comparison between the export price and the normal value shall normally be made "at the ex-factory level"). *See also* Anti-Dumping Agreement, Art. 2.6. (defining the "like product" referenced throughout the agreement "to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration).

exporter or producer known to the USDOC at the beginning of every anti-dumping proceeding involving imports of Vietnamese origin, until (and unless) it is clearly demonstrated otherwise.

54. Article 6.10 of the Anti-Dumping Agreement does not require the USDOC to have known that an exporter or producer is not controlled or materially influenced by the Government of Viet Nam because of its nominal status as a legally distinct firm.

55. Like Article 6.10, Article 9.2 of the Anti-Dumping Agreement does not prohibit the USDOC from imposing a single anti-dumping duty rate on a number of legally distinct firms.

56. The USDOC's recognition that Viet Nam exerts control or material influence over the pricing and output of products destined for export that are identical or similar to the like product when destined for consumption in Viet Nam is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it. None of Viet Nam's arguments establish that the USDOC's approach was inconsistent, "as such" or "as applied," with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

C. Viet Nam's "As Such" and "As Applied" Claims Relative to Article 9.4 of the Anti-Dumping Agreement are Without Merit

57. Article 9.4 applies just to the exporters and producers "not included in the examination."[30] Viet Nam's "as such" and "as applied" claims therefore turn on whether or not a request was made for the Viet Nam-government entity to be individually examined during the anti-dumping proceeding.[31]

58. The USDOC's initial investigation of fish fillets from Viet Nam took place before Viet Nam acceded to the WTO, so Article 9.4 does not apply to that proceeding. Still, if it did, the evidence demonstrates that the Viet Nam-government entity was included in the USDOC's investigation and selected for individual examination.[32]

59. Specifically, the USDOC sent a questionnaire to the Government of Viet Nam, and the government (and certain exporters) failed to respond to this questionnaire. As a result, the USDOC assigned the Viet Nam-government entity an anti-dumping duty rate based on facts available. Even assuming Viet Nam had been a WTO Member at the time, Viet Nam would have no basis to argue that the obligations set out in Article 9.4 applied to this situation, because the USDOC individually examined the Viet Nam-government entity during the initial investigation and assigned the entity its own rate.

60. In contrast, no one requested that the USDOC individually examine the Viet Nam-government entity in the challenged administrative reviews. Viet Nam has no basis then to argue

[30] Anti-Dumping Agreement, Art. 9.4.

[31] Viet Nam First Written Submission, para. 168 (recognizing "that Article 9.4 governs all companies not selected for individual examination"). *See also* Viet Nam First Written Submission, paras. 165, 167, 169.

[32] *Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Social Republic of Viet Nam*, 68 Fed. Reg. 37,116 (June 23, 2003), and accompanying Issues and Decision Memo, pp. 59-62 (Exhibit VN-05-02).

that the obligations set out in Article 9.4 applied to these reviews, because the Viet Nam-government entity was not individually examined during the fifth and sixth reviews and received its own rate in the seventh review because it had been individually examined during the initial investigation.

61. Viet Nam's efforts to rely on the USDOC Antidumping Manual are also misplaced. As already noted, this training manual does not establish any rules or norms. And the single sentence that Viet Nam highlights on page 7 of this manual says nothing about the circumstances under which the Viet Nam-government entity will be individually examined during an anti-dumping proceeding. The sentence just addresses how firms not eligible for a separate rate will receive the rate assigned to the NME-government entity.[33]

62. Neither the Government of Viet Nam, nor any firm that is part of the Viet Nam-government entity, asked the USDOC to examine the entity's anti-dumping duty rate in the fifth, sixth, or seventh administrative reviews. Article 9.4 does not require the USDOC to replace the Viet Nam-government entity's existing rate with an average of rates of other exporters or producers when it is not asked to do so. None of Viet Nam's arguments therefore establish that the USDOC's approach was inconsistent, "as such" or "as applied," with Article 9.4 of the Anti-Dumping Agreement.

D. Viet Nam's "As Such" and "As Applied" Claims Relative to Article 6.8 and Annex II of the Anti-Dumping Agreement are Also Without Merit

63. Article 6.8 of the Anti-Dumping Agreement allows an investigating authority to resort to facts available if "any interested party" does not respond to a request for "necessary information" or otherwise significantly impedes the proceeding.[34]

64. Again, the USDOC's Antidumping Manual on which Viet Nam largely relies does not establish any rules or norms.

65. The two sentences that Viet Nam extracts from this manual simply discuss the existence of the NME-government entity and the fact that firms not eligible for a separate rate will receive the rate assigned to that entity.[35] These sentences do not even remotely relate to how the USDOC goes about calculating an anti-dumping duty rate for the NME-government entity.

66. Viet Nam notably fails to consider two other sentences from the same page of the training manual that contradict its claims:

- "That [the NME-government] rate **may** be based on adverse facts available if, for example, some exporters that are part of

[33] Viet Nam First Written Submission, para. 175, quoting from Chapter 10, Non-Market Economies (NME), Department of Commerce Antidumping Manual, p. 7 (Exhibit VN-1).

[34] Anti-Dumping Agreement, Art. 6.8.

[35] Viet Nam First Written Submission, paras. 197-198, quoting from Chapter 10, Non-Market Economies (NME), Department of Commerce Antidumping Manual, p. 7 (Exhibit VN-1).

the NME-wide entity do not respond to the antidumping questionnaire";[36] and

- "In **many** [meaning not necessarily all] cases, the Department concludes that some part of the NME-wide entity has not cooperated in the proceeding because those that have responded do not account for all imports of subject merchandise."[37]

67. The first sentence refutes Viet Nam's characterization of the USDOC's so-called "practice" as it indicates that the USDOC **may** consider the use of facts available appropriate, but then again only when the NME-government entity does not respond to a request for information. There is nothing binding, authoritative, compulsory, or otherwise indicative in this sentence that creates expectations that the USDOC will always use facts available when it assigns a rate to a NME-government entity in the future, or that it will assign a rate based on facts available even when a NME-government entity responds to the USDOC's requests for information.[38]

68. The second sentence discusses the USDOC's past experience in such matters, not what the USDOC will determine in every instance in the future. Viet Nam therefore has failed to bring forward evidence that what it describes as "practice" exists and is a measure.

69. Viet Nam's "as applied" claims are likewise unfounded. Any party that was part of the Viet Nam-government entity could have requested that the USDOC review the Viet Nam-government entity during the fifth, sixth, or seventh administrative reviews. None did. As there were no requests to evaluate the anti-dumping duty rate assigned to the Viet Nam-government entity, the USDOC did not individually examine the entity in any of the challenged administrative reviews, nor did the USDOC find that the entity failed to cooperate in these reviews and assign it a rate on the basis of the facts available.

70. As a last point, we note that Viet Nam has failed to identify in its panel request or in its submissions the obligations of Annex II of the Anti-Dumping Agreement that it claims the United States has breached.[39] Annex II contains seven paragraphs and even more obligations. The Appellate Body has noted that where a provision establishes multiple obligations, simply listing the provision "may fall short of the standard of [DSU] Article 6.2."[40] The Panel should therefore consider Annex II outside the terms of reference of this dispute, because neither Viet

[36] Chapter 10, Non-Market Economies (NME), Department of Commerce Antidumping Manual, p. 7 (Exhibit VN-1) (bold added).

[37] Chapter 10, Non-Market Economies (NME), Department of Commerce Antidumping Manual, p. 7 (Exhibit VN-1) (bold added).

[38] *See also* Chapter 10, Non-Market Economies (NME), Department of Commerce Antidumping Manual, p. 8 ("Occasionally, the NME-wide rate may be changed through an administrative review." (footnote omitted)).

[39] *See* Viet Nam First Written Submission, paras. 185-195, 199-200 (no reference to any of the specific obligations set out in Annex II); Viet Nam Request for the Establishment of a Panel, p.6, para. 2.3.2(2) (Exhibit VN-04).

[40] *Korea – Dairy (AB)*, para. 124.

Nam's panel request, nor its submissions, identify with any specificity the obligations of Annex II that it claims the United States has breached.

VI. CONCLUSION

71. In closing, the United States would like to correct certain misstatements made by Viet Nam[41] about whether its course of action in this dispute is an appropriate use of the dispute settlement system.

72. First, the United States did not fail to implement, as Viet Nam argues,[42] the DSB's recommendations in *US – Shrimp I* (DS404) and in *US – Shrimp II* (DS429). The United States and Viet Nam reached a mutually agreed solution with respect to those disputes, which we jointly notified to the DSB.[43] As this solution resolved these disputes, it is disingenuous for Viet Nam to suggest that the United States somehow failed to implement the DSB's recommendations in these matters.

73. Second, the United States did not fail to observe, as Viet Nam argues,[44] the DSB's recommendations with respect to so-called "zeroing." Effectively in 2007 (with respect to investigations) and in 2012 (with respect to administrative reviews), the United States changed its approach to calculating dumping margins in response to certain reports. It is disingenuous, and contrary to fact, for Viet Nam to suggest that the United States somehow failed to implement the DSB's recommendations with respect to so-called "zeroing."

74. Finally, the United States did not fail to demonstrate, as Viet Nam argues,[45] that the mechanism it uses to implement DSB recommendations is not WTO-inconsistent. Viet Nam neglects to inform the Panel that the panel report in *US – Shrimp II* found that Viet Nam had **not** established that the U.S. mechanism is inconsistent "as such" with the Anti-Dumping Agreement.[46] Viet Nam pursued this issue in an appeal, and the Appellate Body report **upheld** the panel's finding.[47] It is baseless for Viet Nam to suggest that the U.S. method of implementation in DS429 somehow "proved false" these panel and Appellate Body reports.

75. The United States demonstrated in its first written submission and again today that Viet Nam has advanced claims that lack factual support and has made legal arguments based on supposed obligations that have no basis in the covered agreements. Consequently, for the reasons provided, the United States respectfully requests that the Panel reject Viet Nam's claims that the United States has acted inconsistently with the covered agreements.

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[41] Viet Nam Response to U.S. Preliminary Ruling Request, paras. 1-11.

[42] Viet Nam Response to U.S. Preliminary Ruling Request, paras. 4, 10.

[43] *US –Shrimp I (Viet Nam)*, Notification of a Mutually Agreed Solution, WT/DS404/12 (22 July 2016), and *US – Shrimp II (Viet Nam)*, Notification of a Mutually Agreed Solution, WT/DS429/16 (22 July 2016).

[44] Viet Nam Response to U.S. Preliminary Ruling Request, paras. 5, 7-9.

[45] Viet Nam Response to U.S. Preliminary Ruling Request, para. 6.

[46] *US – Shrimp II (Viet Nam) (Panel)*, para. 7.272.

[47] *US – Shrimp II (Viet Nam) (AB)*, para. 5.1.

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