WORLD TRADE ORGANIZATION

WT/DS536/2

12 June 2018

(18-3674)

Page: 1/8

Original: English

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

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY VIET NAM

The following communication, dated 8 June 2018, from the delegation of Viet Nam to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

Upon instruction from my authorities, I wish to convey the request of the Government of Viet Nam ("Viet Nam") to the Dispute Settlement Body (the "DSB") for the establishment of a panel pursuant to Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), Articles 4 and 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), and Article 17.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement") with respect to anti-dumping measures imposed by the United States on imports of fish fillets from Viet Nam (DS536).

At the outset, Viet Nam observes that this is the third dispute settlement proceeding brought by Viet Nam involving anti-dumping measures imposed by the United States. Many of the issues raised in the present request for the establishment of a panel were addressed by the panels in US – Anti-dumping Measures on Certain Shrimp from Viet Nam (DS404 and DS429). The DSB adopted the DS404 panel report on 2 September 2011; despite the United States' statement that it would implement the DSB's recommendations and rulings in a reasonable period of time set to expire on 2 July 2012, the recommendations and rulings have yet to be implemented as of the date of this request. The DSB adopted the panel and Appellate Body reports on 22 April 2015. The United States and Viet Nam reached a mutually agreed solution in DS429 notified the DSB of this on 18 July 2016. Notwithstanding the mutually agreed solution in DS429, a number of WTO inconsistencies with U.S anti-dumping practices and laws raised in either DS404 and/or DS429 remain. Although the factual issues differ between the shrimp cases and fish fillets, virtually every legal issue has already been decided in Viet Nam's favor.

1. CONSULTATIONS

Pursuant to Article 4 of the *Understanding on the Rules and Procedures Governing the Settlements of Disputes* (DSU) and Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* (GATT 1994), Viet Nam requested consultations with the United States (US) regarding certain anti-dumping measures imposed by the United States on imports of fish fillets from Viet Nam. Viet Nam requested consultations with the United States on 8 January 2018; the request was circulated on 12 January 2018 as document G/ADP/D122/1#G/L/1208#WT/DS536/1.

Viet Nam and the United States held consultations on March 1, 2018 in Geneva. Those consultations were held with the hope of reaching a mutually satisfactory solution. Viet Nam made it clear during the consultations that it would prefer to reach a mutually satisfactory solution in the context of consultations than through the Panel process and provided elements of what a such solution might involve. Notwithstanding three subsequent written communications from Viet Nam to the US, the US has chosen not to respond to Viet Nam's initiatives. No further consultations have been held and no resolution of the matter has been reached. Therefore, Viet Nam hereby requests that a panel be established pursuant to Article 6 of the DSU and Article XXIII of the GATT 1994.

2. SUMMARY OF FACTS AND LEGAL BASIS OF COMPLAINT

This request is, in particular but not exclusively, made with respect to:

(1) The imposition of anti-dumping duties and cash deposit requirements pursuant to the final results of the United States Department of Commerce's (hereafter, "USDOC") fifth administrative review for the period from August 1, 2007 to July 31, 2008 in Certain Frozen Fish Fillets From the Socialist Republic of Viet Nam: Final Results of the Antidumping Duty Administrative Review and New Shipper Review, 75 Fed. Reg. 12726 (March 17, 2010);

(2) The imposition of anti-dumping duties and cash deposit requirements pursuant to the final results of the USDOC's sixth administrative review for the period from August 1, 2008 to July 31, 2009, in Certain Frozen Fish Fillets from the Socialist Republic of Viet Nam: Final Results of the Sixth Administrative Review and Sixth New Shipper Review, 76 Fed. Reg. 15941 (March 22, 2011);

(3) The imposition of anti-dumping duties and cash deposit requirements pursuant to the final results of the USDOC's seventh administrative review for the period from August 1, 2009 to July 31, 2010, in Certain Frozen Fish Fillets from the Socialist Republic of Viet Nam: Final and Partial rescission of the Seventh Antidumping Administrative Review, 77 Fed. Reg. 15039 (March 14, 2012);

(4) The seventh administrative review of Certain Frozen Fish Fillets from the Socialist Republic of Viet Nam as referenced above insofar as it did not revoke the anti-dumping duty order with respect to certain respondents eligible for and requesting such revocation;

(5) Any other ongoing or future anti-dumping administrative reviews, and the preliminary and final results thereof, related to the imports of Certain Frozen Fish Fillets from the Socialist Republic of Viet Nam (DOC Case A-552-801), as well as any assessment instructions, cash deposit requirements, and revocation determinations issued pursuant to such reviews;

(6) Section 129 of the Uruguay Round Agreements Act ("URAA"), 19 U.S.C. §3538, as elaborated upon in the Statement of Administrative Action accompanying the URAA and as implemented by the relevant United States authorities;

(7) Any other legal authority claimed by the United States authorities to allow compliance with the treatment required by the WTO with respect to unliquidated entries which entered the U.S. prior to the implementation of any Section 129 proceeding.

The specific U.S. laws, practices, other guidance at issue are as follows:

(1) the Tariff Act of 1930, as amended, in particular Sections 731, 751, 752, 771(7), 771(35)(A), 771(35)(B), and 777A(d);

(2) Section 129 of the URAA, codified as 19 U.S.C. §3538;

(3) the United States Statement of Administrative Action that accompanied the Uruguay Round Agreements Act, H.R. Doc. No.1 03-316, vol. I;

(4) the implementing regulations of the United States Department of Commerce ("USDOC"), 19 C.F.R. Section 351, in particular 19 C.F.R. § 351.218 and 19 C.F.R. § 351.414;

(5) the Import Administration Antidumping Manual (2009 edition), including the computer programs to which it refers;

(6) the methodology of the United States for determining margins of dumping in administrative reviews;

(7) the practice of requiring submission of a separate rate application or certification in original investigations and periodic reviews involving Vietnamese producers in order to qualify for the all others or separate rate rather than the country-wide rate;

(8) the application of a so-called Viet Nam-wide entity rate based on adverse facts available to respondents not individually investigated who fail to provide a separate rate application or certification to demonstrate the absence of government control;

(9) the practice of implementing adverse Dispute Settlement Body rulings, pursuant to Section 129 of the URAA, or other legal authority, such that unliquidated entries entered or withdrawn from the warehouse for consumption prior to the date of implementation of a Section 129 determination remain subject to assessment of duties pursuant to the original anti-dumping duty determination or a rate higher than a WTO consistent rate.

2.1. Zeroing

2.1.1. Summary of Facts

In each of the administrative reviews at issue, the USDOC has made use of the zeroing methodology that has been repeatedly and consistently held by the Appellate Body to be in violation of US international obligations. Specifically, in making an average-to-average comparison of export price and normal value, the USDOC did not allow the margin above normal value on non-dumped sales to offset the margin of dumping on sales below with margins below normal value. The USDOC has acknowledged in each review use of its zeroing methodology in the administrative determinations. Therefore, the dumping margin determined by the USDOC is in excess of the actual dumping engaged in by the respondents.

These calculations and methodologies are applied pursuant, in particular, to the following United States laws and regulations:

(1) Tariff Act of 1930, as amended, Section 771(35)(A);

(2) Implementing regulations of the USDOC, 19 C.F.R. § 351.408 and 351.414.

The USDOC issued a "final modification" of its practice of zeroing in administrative reviews on February 14, 2012 (77 FR 8101), but this modification specifically excluded application of the new practice to any of the completed annual reviews, including reviews completed after that date. Thus, the margins of dumping calculated in the fifth, sixth and seventh administrative reviews of *Fish Fillets from the Socialist Republic of Viet Nam* were WTO inconsistent margins of dumping. This had the effect of the collection of duties based on WTO inconsistent margins of dumping, collection of cash deposits of estimated antidumping duties based on WTO inconsistent margins of dumping, and, in the case of Vinh Hoan, the finding of margins of dumping when no such margins in fact existed. With respect to Vinh Hoan, this WTO inconsistent methodology prevented it from demonstrating the absence of dumping necessary to obtain a revocation of the antidumping duties as to Vinh Hoan.

2.1.2. Legal Basis of Complaint

Viet Nam considers the above-mentioned laws and procedures by the USDOC to be, as such and as applied on a continued and ongoing basis, inconsistent with several provisions of the Anti-Dumping Agreement, GATT 1994, and the Marrakesh Agreement. In original investigations, periodic reviews, new shipper reviews, sunset reviews, and certain changed circumstances reviews, USDOC's use of zeroing is inconsistent with:

(1) Article 2 of the Anti-Dumping Agreement, including paragraphs 2.1, 2.4, and 2.4.2, because the comparison made by the USDOC is inconsistent with the requirements of Article 2 and those paragraphs of Article 2;

(2) Article 9 of the Anti-Dumping Agreement, including paragraphs 9.1 and 9.3, because the USDOC's use of the zeroing methodology results in the imposition of duties in excess of the amount of dumping as determined pursuant to Article 2;

(3) Paragraph 9.4 of Article 9 of the Anti-Dumping Agreement because the USDOC's use of the zeroing methodology results in the imposition of duties for the all-other rate in excess of the amount of dumping as determined pursuant to Article 2;

(4) Article 1 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994 to the extent that the imposition and collection of the duties is inconsistent with the Anti-Dumping Agreement;

(5) For sunset reviews only, Article 11 of the Anti-Dumping Agreement, including paragraphs 11.1, 11.2, 11.3 and 11.4 of the Anti-Dumping Agreement where likelihood of continued dumping determinations are made using the zeroing methodology inconsistent with Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement; and

(6) Part I:2 of the Protocol of Accession of the Socialist Republic of Viet Nam, WT/L/662, 15 November 2006 and Paragraphs 254 and 255 of the Report of the Working Party on Accession of Viet Nam, WT/ACC/VNM/48 , 26 October, 2006.

Viet Nam also considers that USDOC's application of the above-mentioned laws and procedures in the periodic reviews here at issue to be inconsistent with the following provisions of the Anti-Dumping Agreement, GATT 1994, and the Marrakesh Agreement for the same reasons set out above:

(1) Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.3, 11.1, and 11.3 of the Anti-Dumping Agreement;

(2) Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the Marrakesh Agreement;

(3) Articles VI:1 and VI:2 of the GATT 1994.

There are numerous WTO Appellate Body and Panel decisions finding the original U.S. practice of zeroing to be WTO inconsistent and its more recent application of zeroing in the context of targeted dumping and differential pricing to be similarly WTO inconsistent. Indeed, both the Panel and the Appellate Body found the practice of zeroing to be "as such" WTO inconsistent in *United States-Anti-Dumping Measures on Certain Shrimp from Viet Nam (DS429)*. There is no longer any question that zeroing in anti-dumping calculations is inconsistent with U.S. WTO obligations.

2.2. Timeliness of Vinh Hoan's Request for Revocation

2.2.1. Summary of Facts

Based on having received *de minimis* margins in the fifth and sixth administrative reviews, in the seventh review Vinh Hoan requested a revocation of the antidumping duties as to Vinh Hoan based on the expectation that after the seventh administrative review it would have demonstrated the absence of continued dumping in three consecutive reviews with *de minimis* margins of dumping. The US rejected Vinh Hoan's request based on it being untimely under Department of Commerce regulation 19 CFR 351.222(e) which states that such a request should be made during the anniversary month of the anti-dumping order. At the time of the anniversary month of the seventh review, the US had not issued even a preliminary determination with respect to the sixth administrative review. The anniversary month for the seventh review was August 2010 while the preliminary determination in the sixth review was not issued until 9 September 2011. The final determination in the seventh review was not made until 330 days after Vinh Hoan made its request for revocation.

2.2.2. Legal Basis of Complaint

Articles 11.1 and 11.2 of the Agreement on the Implementation of Article VI of the GATT 1994 permit the imposition of anti-dumping duties only "as long as and to the extent necessary to counteract dumping." A review of the need for the continued imposition of the duty may be initiated "upon request from any interested party." The only timing requirement is that "a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty." Under Article 11.2, a party may request a review at any time if it "submits positive information

substantiating the need for a review." Articles 11.1 and 11.2 do not link periodic reviews with reviews seeking revocation of anti-dumping duties by a party. While there is no prohibition on making a determination of whether or not it continues to be necessary to impose anti-dumping duties on a party in the context of a periodic review, there is no basis in the Agreement for rejecting as untimely a request to review whether it continues to be necessary to impose anti-dumping duties made during a periodic review. An authority may consider the request and make a determination in the context of a periodic review or it may conduct a separate review. Article 11.2 provides no basis for rejection of a request to review whether it continues to be necessary to impose anti-dumping duties based on such a request being untimely.

Article 11.4 specifies that "the provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article." Paragraphs 81-89 of the Report of the Appellate Body in *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* provides an elaborate analysis of what constitutes a timely submission of information under Article 6 and Annex II of Agreement on the Implementation of Article VI of the GATT 1994. A request for revocation made 330 days before the final determination in a periodic review is simply not an untimely request. It provided the US more than a reasonable period of time to examine and rule on the request.

The US action was taken pursuant to Commerce Department regulations 351.222 and 351.213 and *Samsung Electronics v. United States,* 946 F. Supp5 (CIT 1996).

2.3. Viet Nam-Wide Entity Rate Based on Adverse Facts Available

2.3.1. Summary of Facts

The USDOC has applied a Viet Nam-wide entity rate based on adverse facts available throughout the anti-dumping proceedings identified above. For countries identified as non-market economy countries, the USDOC requires that respondent companies apply for separate rates; those that fail to do so or do not meet the separate rate criteria are given the "Viet Nam-wide entity rate" as established by USDOC. Even a company that timely and fully responds to the questions posed by USDOC will be assigned this Viet Nam-wide entity rate if it does not meet the criteria for a separate rate established by the USDOC.

Companies that do not receive a separate rate are assigned the Viet Nam-wide entity rate. In the proceedings at issue, the USDOC assigned a Viet Nam-wide entity rate based entirely on adverse facts available, even where companies responded timely and fully to the questionnaires issued by USDOC. The effect of this action is to assign highly prejudicial and unjustifiable rates to companies that do everything in their control to comply with USDOC requests.

These calculations and methodologies are applied pursuant, in particular, to the following United States laws and measures:

(1) Tariff Act of 1930, as amended, Sections 771(18)(C)(i), 776(a)(2), and 776(b);

(2) Import Administration Antidumping Manual, Chapter 10, "Non-Market Economies."

2.3.2. Legal Basis of Complaint

In the anti-dumping proceedings at issue, the United States applied the laws and methodologies described above with regard to calculation of a Viet Nam-wide entity rate, which Viet Nam considers to be inconsistent, as such and as applied, on a continued and ongoing basis, with the obligations of the United States under the Anti-Dumping Agreement. Specifically, Viet Nam considers these measures to be inconsistent with the following provisions of the Anti-Dumping Agreement.

(1) Articles 2 and 9 of the Anti-Dumping Agreement because these Articles determine the basis for calculation of anti-dumping margins and the collection of anti-dumping duties and do not refer to the circumstances contemplated by the application of a Viet Nam-wide entity rate based on adverse facts available;

(2) Article 6.8 and Annex II of the Anti-Dumping Agreement because USDOC relied on adverse facts available for the calculation of the Viet Nam-wide entity rate for entities not granted a "separate rate." In so doing, the USDOC failed to adhere to the provisions of the Agreement governing the use of adverse facts available, as the presence of "state control" is not a relevant criteria for determining margins of dumping or the application of adverse facts available;

(3) Article 6.10 because the USDOC, in applying the Viet Nam-wide entity rate to multiple entities, failed in its obligation to determine individual margins of dumping. The only exception to this requirement is where the USDOC relies on sampling, per the second sentence of Article 6.10;

(4) Article 9, including paragraph 9.4, of the Anti-Dumping Agreement because the USDOC has created a category of producers not contemplated in the Agreement. The Agreement permits an authority to calculate a rate for individually investigated producers, a rate based on facts available for individually investigated producers that do not cooperate, and a separate, "all others" rate calculated based on the weighted average margin of the individually investigated producers. The "country-wide" rate applied by USDOC does not adhere to these limitations;

(5) Articles 6.10 and 9.2 which, in tandem, require calculation of individual dumping margins except where the USDOC relies on its sampling methodology or to do so would be impracticable. These provisions demonstrate that the USDOC has no basis for its presumption that multiple entities constitute a single, Viet Nam-wide entity;

(6) Part I.2 of the Protocol of Accession of the Socialist Republic of Viet Nam, WT/L/662 , 15 November 2006 and Paragraphs 527, 254 and 255 of the Report of the Working Party on Accession of Viet Nam, WT/ACC/VNM/48 , 27 October 2006 because the terms of Viet Nam's accession to the WTO do not permit the application of such a Viet Nam-wide entity rate unless otherwise provided for under the Anti-Dumping Agreement;

Viet Nam also considers that USDOC's application of the above-mentioned laws and procedures in the periodic reviews here at issue to be inconsistent with the following provisions of the Anti-Dumping Agreement*, GATT 1994*, and the *Marrakesh Agreement* for the same reasons set out above:

(7) Article 18, including paragraphs 18.1, 18.3 and 18.4, of the Anti-Dumping Agreement and Article XVI:4 of the Marrakesh Agreement;

(8) Articles VI:1 and VI:2 of the GATT 1994.

The USDOC separate rate practice has been found to be WTO inconsistent "as such" (DS429) and "as applied" (DS404).

2.4. Section 129 of the Uruguay Round Agreements Act ("URAA") and Other Statutory Authority to Implement Adverse Findings Against the US in a Manner Consistent With US WTO Obligations

2.4.1. Summary of Facts

Section 129 of the URAA is the mechanism by which the United States implements adverse findings by the DSB. The law assigns responsibility to the United States Trade Representative, the USDOC and the ITC for implementing adverse decisions in a manner consistent with US international obligations. However, neither section 129 nor any other provision of U.S. law permits US implementation consistent with its WTO obligations.

The law contains unambiguous language on the *effect* of a Section 129 determination. The statute requires that "Determinations….shall apply with respect to unliquidated entries of the subject merchandise that are entered or withdrawn from warehouse, for consumption on or after…the date on which the Trade Representative directs the administering authority…to implement that determination." This understanding is confirmed by the Statement of Administrative Action

("SAA"), which has been properly recognized as a definitive statement on operation of the URAA. Indeed, the URAA itself states that "[t]he statement of administrative action approved by the Congress under section 101(a) shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the {URAA} and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." The SAA is the most probative authority available for purposes of interpreting the language of the URAA. The statute, on its own, is quite clear on the limited effect of Section 129 determinations for entries made pursuant to a measure at issue. The SAA reinforces this limitation. The statute does not provide the Trade Representative, the USDOC or the CBP officials responsible for assessment, with the discretion to adjust all of the final duty liability on unliquidated entries pursuant to the results of a section 129 proceeding.

In the course of DS429, the US claimed it had other legal authority to adjust the final duty liability on unliquidated entries. However, in the settlement of the issue of duty refunds after the decision in DS429 the US was unable to find legal authority to allow it to fully refund the unliquidated entries as required by its WTO obligations. Rather, the "settlement" required a portion of the amount due to be refunded to be paid to both the US and to petitioners. US claims to the contrary, the US does not have authority to fully refund unliquidated entries as required by it WTO obligations.

This practice is applied pursuant, in particular, to the following United States laws and measures:

(1) Section 129 of the URAA, codified as 19 U.S.C. § 3538;

(2) the United States Statement of Administrative Action that accompanied the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. 1;

(3) notwithstanding its claims to the contrary in DS429, the absence of any legal authority under U.S. law to fully refund unliquidated entries in a WTO consistent manner, as illustrated by the settlement agreement in DS429.

2.4.2. Legal Basis of Complaint

Because the United States has acted in the manner just described, Viet Nam considers these provisions to be inconsistent, as such, with certain WTO obligations. Viet Nam considers these actions to be inconsistent with the following provisions of the *Anti-Dumping Agreement* and the GATT 1994:

(1) Article 1 of the Anti-Dumping Agreement, to the extent that an anti-dumping measure is applied despite imposition of the duty pursuant to an investigation conducted in violation of the GATT 1994 and the Anti-Dumping Agreement.

(2) Article 9.2 of the Anti-Dumping Agreement, to the extent that the USDOC and other relevant United States agencies continue to collect anti-dumping duties at a level known to be in excess of the appropriate amount.

(3) Article 9.3 of the Anti-Dumping Agreement, to the extent that the USDOC and other relevant United States agencies continue to collect anti-dumping duties at a level that exceeds the margin of dumping as established under Article 2.

(4) Article 11.1 of the Anti-Dumping Agreement, to the extent that the anti-dumping duty order remains in effect, and anti-dumping duties continue to be collected, beyond the period necessary to counteract dumping.

(5) Article 18.1 of the Anti-Dumping Agreement, to the extent that the continued collection of duties amounts to an action that is performed without the authority provided in the GATT 1994.

3. REQUEST

Viet Nam hereby respectfully requests that a panel be established, with the standard terms of reference, by the Dispute Settlement Body pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, and Article 17.4 of the Anti-Dumping Agreement.