UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN FROZEN WARMWATER SHRIMP FROM VIET NAM
(DS429)

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

December 18, 2013

1. In numerous instances in this dispute, Vietnam asks the Panel to rewrite or ignore provisions of the WTO agreements and disregard key facts applicable to the antidumping proceedings at issue. For example:

- Vietnam asks the Panel to prescribe the internal mechanisms by which Members may implement Dispute Settlement Body ("DSB") recommendations and rulings. Simply put, there is nothing in the *Understanding on Rules and Procedures for the Settlement of Disputes* ("DSU") that addresses what types of administrative or legislative frameworks Members need to adopt in order to be in a position to implement DSB recommendations and rulings. And, in any event, Vietnam does not raise any claims under the DSU, but rather focuses on provisions in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") that do not contain implementation obligations;

- Vietnam asserts that the alleged "Non-Market Economy ("NME")-wide entity rate practice" by the U.S. Department of Commerce ("Commerce") is a measure that may be challenged "as such" inconsistent with the AD Agreement. However, Vietnam has not put forward evidence that what it describes as "practice" is a measure.

- Similarly, Vietnam's "as such" claim with respect to Commerce's application of the zeroing methodology is without merit because the United States has already changed the practice for calculating dumping margins.

- As a final example, Vietnam asks the Panel to find that the United States must provide (1) company-specific revocation of an antidumping duty order, and (2) such a company-specific revocation based solely on the lack of dumping for three consecutive years. Neither of these two propositions finds support in the WTO agreements. Indeed, both have been rejected by previous panels.

2. In sum, Vietnam is asking the Panel to impose on the United States obligations found nowhere in the AD Agreement or the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and asking the Panel to do so without foundation in facts.

A. Vietnam's Claim Regarding Section 129(c)(1) of the Uruguay Rounds Agreement Act Lacks Merit

3. As the United States demonstrated in its First Written Submission, Vietnam's assertion that Section 129(c)(1) of the Uruguay Rounds Agreement Act ("URAA") is inconsistent with the AD Agreement is plagued by a number of fundamental flaws, any one of which is fatal to Vietnam's claim, and provides a sufficient basis for this Panel to reject Vietnam's argument.

4. First, Vietnam asserts that Section 129(c)(1) of the URAA prevents the United States from properly implementing the recommendations and rulings by the DSB. However, Vietnam's

panel request did not assert that Section 129(c)(1) was inconsistent with any provisions of the DSU – rather, it was based solely on the claim that Section 129(c)(1) is inconsistent with the AD Agreement.

5. In the context of the implementation of recommendations relating to antidumping measures, it is the DSU, and not the AD Agreement, that contains provisions addressing Members' commitments regarding the implementation of DSB recommendations and rulings and consequences for non-implementation. None of the provisions of the AD Agreement cited by Vietnam address the legal framework that a Member needs to adopt to respond to a finding of a breach of the AD Agreement.

6. Second, Vietnam's argument is based on a number of flawed premises that have no basis in the AD Agreement, the GATT 1994, or U.S. law. In particular, Vietnam's argument incorrectly assumes that Section 129 is the sole mechanism by which the United States can bring itself into compliance with the DSB recommendations and rulings.

7. This fundamental assumption in Vietnam's claim is at odds with basic tenets of the U.S. legal system and, presumably, the legal system of many other Members. Specifically, while Vietnam challenges the impact that Section 129(c)(1) may have on other administrative proceedings conducted by Commerce, a flawed argument which we will address shortly, Vietnam does not (and cannot) contest the fact that nothing in Section 129(c)(1) does – or could – limit the authority of the U.S. legislature to implement DSB recommendations and rulings through a legislative act.

8. Such legislative acts could impact what Vietnam classifies as "prior unliquidated entries" – in other words, entries that were not addressed through administrative action taken under Section 129. This legislative option available to the United States, and to other Members for that matter, is fatal to Vietnam's "as such" claim.

9. Put another way, Vietnam's argument is based on the flawed premise that the United States must have a pre-existing, administrative mechanism that covers "prior unliquidated entries." However, the United States, like other Members, is not obligated to enact any particular type of legal framework, whether administrative, legislative, or other, in order to facilitate a response to possible DSB recommendations and rulings.

10. Indeed, a Member may have no pre-established, administrative mechanism for addressing DSB recommendations and rulings. Rather, a Member might well choose to wait for an adverse DSB finding prior to adopting a legislative or administrative mechanism for facilitating compliance. Or a Member could choose to address adverse recommendations and rulings on an *ad hoc* basis.

11. Vietnam's arguments that the United States must have a pre-existing, administrative mechanism to address "prior unliquidated entries" constitute an attempt to impose additional obligations on the United States, and by extension all Members, which are not contained in the covered agreements, in direct contradiction to Article 3.2 of the DSU.

12. Moreover, regarding the impact that Section 129(c)(1) has on other administrative proceedings conducted by Commerce, Vietnam has ignored the fact that the United States has used other administrative mechanisms, such as Section 123 of the URAA, to impact the assessment of duties on "prior unliquidated entries."

13. This in fact was noted by the panel in *U.S. – Section 129(c)(1)* when it found that "section 129(c)(1) does not mandate or preclude any particular treatment of prior unliquidated entries or have the effect thereof."[1] The reasoning of the *U.S. – Section 129(c)(1)* is persuasive, supported by subsequent practice of Commerce, and is fatal to Vietnam's "as such" claim.

14. Lastly, Vietnam asserts that this Panel should disregard the panel report in *U.S.-Section 129(c)(1)* as a result of subsequent events, most notably the decision by the U.S. Court of International Trade ("CIT") in *Corus Staal, BV v. United States ("Corus Staal").* In particular, Vietnam misreads the effect of the CIT's decision in *Corus Staal.*

15. In that case, the CIT rejected the respondent's claim that Section 129 mandated the liquidation of prior unliquidated entries in a certain manner.[2] The CIT found that "[i]mplementation of the *Section 129 Determination* carries no legal significance" vis-à-vis prior unliquidated entries. That, of course, has been the position of the United States before, during, and after the panel's findings in *U.S.-Section 129(c)(1)* – i.e., that Section 129(c)(1), in the words of the panel, "does not require or preclude any particular actions with respect to {other entries} in a separate segment of the same proceeding."[3]

B. The Treatment of Multiple Companies in Vietnam as a Single Vietnam-Government Exporter/Producer was not Inconsistent with the AD Agreement

16. Vietnam requests that the Panel find that Commerce's NME-wide entity rate practice "as such" and "as applied" in the covered reviews gives rise to a breach of WTO obligations. Vietnam's "as such" and "as applied" claims both lack merit.

1. Vietnam's "As Such" Claim is Without Merit

17. First, Vietnam has failed to demonstrate the existence of a measure of general and prospective application that may be challenged "as such" inconsistent with the AD Agreement.

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[1] *U.S. – Section 129(c)(1)*, para. 6.54.

[2] Exhibit VN-36.

[3] *U.S. – Section 129(c)(1)*, para. 6.80.

18. Vietnam contends that it is challenging Commerce's "NME-wide entity rate practices as set forth in [Commerce's] Anti-Dumping Manual . . . ."[4] In the context of an unwritten measure that allegedly governs the administrative application of another measure (such as AD regulations or an AD statute), the Appellate Body has identified several criteria for evaluating whether a measure exists that can be challenged "as such," including whether the rule or norm has general and prospective applicability.[5]

19. Commerce's AD Manual specifically sets forth that it "is for the internal training and guidance of . . . personnel only, and the practices set out herein are subject to change without notice. This manual cannot be cited to establish [Commerce] practice."[6] Commerce thus has explicitly circumscribed the relevance of its AD Manual and has alerted both petitioners and respondents that the Manual cannot serve as a basis to argue that Commerce has adopted an approach that must be followed for any particular, future proceeding. For these reasons, the Manual cannot be considered as having general or prospective application.

20. The United States also notes that Commerce was under no obligation to develop the Manual, that Commerce does not need the Manual to have sufficient legal foundation under domestic law for its actions, and that Commerce was not required under the U.S. Administrative Procedure Act to publish the Manual in the *Federal Register*. In other words, use of the Manual, or the Policy Bulletin that Vietnam mentioned for the first time in its opening statement, are not required under domestic law or under the WTO Agreements. Vietnam thus is attacking the United States for taking a non-required step to promote transparency. Accordingly, an "as such" finding against the Manual accomplishes nothing except to discourage transparency.

21. Finally, Vietnam has not pointed to a principle of U.S. law that in any way supports the conclusion that the Manual or Policy Bulletin "requires" Commerce to do anything at all, or that following the same logic as that expressed in this non-binding document somehow makes the document binding. Indeed, Vietnam readily acknowledges that Commerce "retains broad discretion on the method for calculating the NME-wide entity rate . . . ."[7]

2. Vietnam's "As Applied" Claim Also is Without Merit

22. Vietnam has also failed to establish that Commerce's decisions in the covered reviews regarding the assignment of an individual margin of dumping and an individual antidumping duty to the Vietnam-government entity were inconsistent with the obligations of the United States under the AD Agreement.

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[4] Vietnam First Written Submission, para. 94.

[5] *U.S. – Zeroing (EC)(AB)*, para. 198.

[6] Chapter 1 Department of Commerce 2009 Antidumping Manual, p. 1 (Exhibit US-27).

[7] Vietnam First Written Submission, para. 104.

23. Both Vietnam and the United States have discussed extensively paragraph 255 of Vietnam's Accession Protocol to the WTO and the Appellate Body's consideration of a similar paragraph in *EC – Fasteners*.[8] As the Panel considers these arguments, it should keep in mind the following facts:

1. Vietnam is, from the standpoint of antidumping proceedings, a non-market economy country;

2. Vietnam confirmed upon accession to the WTO that subparagraph 255(a), "the non-market economy provisions," would apply to antidumping calculations made pursuant to the AD Agreement; and

3. Subparagraph 255(a) provides that the industry under investigation operates under non-market economy principles in all instances except where its members "clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product."

24. The Appellate Body in *EC – Fasteners* understood the impact of such non-market economy provisions on antidumping calculations. In particular, it recognized that the comparable provision of China's Accession Protocol "places the burden on the . . . producers clearly to show that market economy conditions prevail . . . ."[9]

25. It also recognized that in a non-market economy, the State has a pervading role in the overall economy (and it is notable here that Vietnam is not challenging Commerce's finding that Vietnam is a non-market economy country).

26. And with respect to the behaviour of ostensibly independent exporting entities, the Appellate Body explicitly found that "the criteria used for determining whether a single entity exists from a corporate perspective . . . will not necessarily capture all situations where the State controls or materially influences several exporters such that they could be considered as a single entity for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* and be assigned a single dumping margin and anti-dumping duty."[10]

27. But the United States considers that the Appellate Body in *EC – Fasteners* did not correctly interpret the comparable non-market economy provisions of China's Accession Protocol when it constructed a barrier that severs the effect of the non-market economy conditions as to certain products and presumes that market conditions prevail in the industry with

[8] U.S. First Written Submission, paras. 156-169.

[9] *EC – Fasteners (AB)*, para. 287.

[10] *EC – Fasteners (AB)*, para. 380.

respect to the manufacture, production and sale of products for export even though the producers and exporters in question have not shown this to be true.

28. For example, under the AD Agreement, the "like product" selected for comparison to the export product is often identical to the export product. Vietnam's Accession Protocol clearly places the burden on Vietnamese producers to show that market economy conditions prevail in the industry producing the like product without regard to market. If they fail to do so then the importing Member is permitted to presume that they manufacture this product in non-market economy conditions and disregard the prices and costs associated with the like product.

29. But what if the producer of the like product, just moments before the product exits the factory door, decides instead to include it in a shipment designated for export? Under the analysis set forth in *EC – Fasteners*, the non-market economy conditions with regard to the manufacture, production and sale of that product are irrelevant and, according to the Appellate Body, market economy conditions prevail in relation to that product as exported.

30. This makes no sense. It makes no sense that the importing Member is prohibited under the WTO Agreement, including the relevant provisions of Vietnam's Accession Protocol, from finding that the non-market economy forces that fundamentally distort prices and costs associated with the domestic like product also fundamentally distort that product's prices and costs upon export.

31. The Appellate Body recognized in *EC – Fasteners* that "if the State instructs or materially influences the behaviour of several exporters in respect of prices and output, they could be effectively regarded as one exporter for purposes of the Anti-Dumping Agreement and a single margin and duty could be assigned to that single exporter."[11] Commerce has found that the Government of Vietnam is in a position to exercise restraint or direction over entities located in Vietnam and can materially influence their decisions about the price or costs of products destined for consumption in Vietnam. It thus was logical and consistent with Vietnam's Accession Protocol that Commerce could also consider that the Government of Vietnam simultaneously exercised restraint or direction over the same entities with respect to the price or costs of the same or similar products destined for export to the United States. It further was logical and consistent with the Accession Protocol for Commerce to conclude that, absent evidence to the contrary, companies that had not claimed or established that they were free from this control with respect to their export activities are part of a single government entity.

C. The U.S. Application of its Zeroing Methodology "As Such" and "As Applied" Was Not Inconsistent with the AD Agreement and GATT 1994

32. Vietnam's "as such" claim with respect to the so-called "zeroing" methodology is without merit. The United States changed this practice in 2007 with respect to investigations and in 2012 with respect to administrative reviews. Thus by the time Vietnam requested the

[11] *EC – Fasteners (AB)*, para. 376.

establishment of this Panel, there was no "zeroing" measure as found in previous WTO reports and nothing that required the use of that methodology.

33. To the contrary, as pointed out in paragraph 208 of the U.S. First Written Submission, Commerce has issued numerous determinations in which it has offset dumping margins on dumped sales by the amount equal to the amount by which normal value is less than export price on non-dumped sales.

34. In fact, Commerce granted offsets for non-dumped transactions in the most recent administrative review of the antidumping duty order on shrimp from Vietnam. Vietnam's claim that an alleged U.S. zeroing measure is "as such" inconsistent with the AD Agreement thus is without any factual basis.

35. As to Vietnam's "as applied" claim, the United States continues to have serious concerns about past Appellate Body "zeroing" reports and continues to believe that they are incorrect. It is a fundamental principle of the customary rules of interpretation of public international law that any interpretation must address the text of the agreement and may not impute into the agreement words and obligations that are not there.[12]

36. Nonetheless, relying on past Appellate Body reports, Vietnam asks the Panel to interpret the AD Agreement to prohibit "zeroing" based on the concept of "product as a whole." That term, that concept, as we have pointed out numerous times, cannot be found anywhere in the text of the AD Agreement or the GATT 1994.

37. That said, the United States will not repeat today the detailed points regarding "zeroing" included in our First Written Submission, but will simply note that the rights and obligations of Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements. Article 11 of the DSU requires each panel to make its own objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. Further, in settling disputes among Members, WTO dispute settlement panels and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements."[13] We thus urge this Panel to remain faithful, as other panels have done before it, to the text of the AD Agreement and the DSU since the approach taken by the United States in the challenged proceedings rested on a permissible interpretation of that text.

D. Commerce's Sunset Review Determination Was Not Inconsistent with the AD Agreement

[12] *India – Patents (AB)*, para. 45.

[13] DSU, Article 19.2.

38. The Appellate Body has confirmed that "Article 11.3 does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review."[14] No other provisions of the AD Agreement set forth rules regarding the methodologies or analysis to be employed by investigating authorities in making a determination in a sunset review of whether dumping and injury is likely to continue or recur. Accordingly, Vietnam's efforts to read into Article 11.3 substantive methodological obligations of Vietnam's own choosing must be rejected.

39. There is no question that Commerce, in arriving at its Sunset Determination, conducted a thorough review of the history of the antidumping duty order on shrimp from Vietnam, from the original investigation through the last review relevant to that determination (the fourth review). There is also no question that Commerce, in arriving at its Sunset Determination, relied on positive antidumping duty rates applied to numerous exporters during the completed reviews. And there is no question that Commerce, in arriving at its Sunset Determination, relied on declining volumes of imports after the initiation of the original investigation that failed to return to pre-investigation levels in any of the individual years.

40. There thus is no question that Commerce had a sufficient evidentiary basis to conclude that revocation of the antidumping duty order on shrimp from Vietnam would likely lead to continuation or recurrence of dumping.

41. In this regard, the United States notes that the Appellate Body has found that if a sunset determination is based on a dumping margin calculated using a WTO-inconsistent methodology, the "defect taints" the sunset determination.[15] This finding, however, does not undermine Commerce's Sunset Determination.

42. As explained in detail in the U.S. First Written Submission, Commerce's Sunset Determination relies on multiple factors, including dumping margins that Vietnam does not dispute were calculated in a "WTO-consistent" way and declining import volumes. Thus the mere fact that other dumping margins examined by Commerce may have been calculated using the so-called "zeroing" methodology does not undermine that Sunset Determination. The determination continues to stand on its own, substantiated by evidence and fully consistent with Article 11.3.

E. The AD Agreement Does Not Obligate the United States to Provide Company-Specific Revocation After Three Years of No Dumping

43. As shown in detail in our First Written Submission, there is nothing in the AD Agreement that obligates the United States to provide for company-specific revocation, or to provide for such company-specific revocation based on the absence of dumping for three years.

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[14] *U.S. – Corrosion Resistant Steel Sunset Review (AB)*, para. 149.

[15] *U.S. – Corrosion Resistant Steel Sunset Review (AB)*, para. 149.

44. Vietnam's assertion, at its core, is based on Article 11.2 of the AD Agreement. Article 11.2 requires a review of the continuing need for "the duty." "The duty," read in context, refers to the application of the antidumping duty on a product, not as it is applied to exports by individual companies.

45. Simply put, nothing in Article 11.2 of the AD Agreement imposes an obligation to review and revoke a duty on a company-specific basis. This is demonstrated, for example, by the use of the "duty" in both Articles 11.2 and 11.3. The term "duty" is most logically interpreted as having the same meaning in Articles 11.2 and 11.3, especially given the fact that these two Articles provide the mechanisms to ensure that, per Article 11.1, an antidumping duty remains in place only as long as necessary to counteract injurious dumping.

46. 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 or, in U.S. terminology, an "order-wide" basis, not a company-specific basis. The Appellate Body thus rejected Japan's argument that Article 11.3 imposed obligations on a company-specific basis.[16] Vietnam has provided no reason, and cannot provide such a reason, as to why this Panel should find that "the duty" has a different meaning in Article 11.3 as opposed to Article 11.2.

47. Furthermore, even aside from the fact that Article 11.2 does not contemplate company-specific revocations, there is nothing in the AD Agreement that mandates automatic revocation in the absence of dumping for three years. As the panel in *U.S. – Anti-Dumping Measures on Oil Country Tubular Goods* ("*U.S. – OCTG*") found, "[b]y providing that, in certain circumstances, [Commerce] may revoke an antidumping duty order based in part on three years of no dumping, we consider the United States has gone beyond what is required by Article 11.2."[17] Vietnam cannot point to and does not point to any text that imposes an obligation to revoke a duty following three years of no dumping, and Vietnam has not explained how the finding of the panel in *U.S. – OCTG* is not persuasive.

[16] *U.S. – Corrosion-Resistant Steel Sunset Review (AB)*, para. 150.

[17] *U.S. – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 7.174.