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

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

December 11, 2013

Mr. Chairman, members of the Panel:

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

2. The United States would first like to underscore that, in WTO dispute settlement proceedings, the burden of proving that a measure is inconsistent with a covered agreement is, contrary to Vietnam's arguments to the contrary, on the complaining party.

3. First, regarding section 129(c)(1), we do not believe that this claim is within the Panel's terms of reference. When Members wanted to place implementation obligations in WTO Agreements, they clearly did so, as with Article 4.7 of the SCM Agreement. No such obligations are contained in the AD Agreement, and Vietnam did not cite to the DSU where such obligations are found.

4. Moreover, as the United States explained, Vietnam's central premise, that section 129(c)(1) is the exclusive mechanism by which the United States implements DSB recommendations and rulings, is simply false. That is what the panel found in *U.S. – Section 129(c)(1)* and, simply put, nothing has changed.

5. As a thought experiment, if the United States had one particular mechanism to address entries past a certain date and another particular mechanism to address entries before that date, having a time restriction dividing the application of the two mechanisms could not be WTO inconsistent.

6. That is exactly the case here. Section 129 addresses entries after USTR orders implementation. Other mechanisms, such as section 123 and the administrative review process impact entries before that date.

7. Vietnam has also failed to demonstrate any of its claims with respect to the Commerce Department's approach with respect to the Vietnam-government entity rate. First, Vietnam failed to put forth sufficient evidence in its First Written Submission and during this hearing showing that this alleged practice exists as a measure and is invariably applied by Commerce.

8. In addition, Vietnam has failed to demonstrate that Commerce's decision to treat related companies in the covered reviews as a single exporter or producer for the purpose of determining a dumping margin is inconsistent with Articles 6.10 and 9.2 of the AD Agreement. To the contrary, as noted by the Appellate Body in *EC – Fasteners*, Articles 6.10 and 9.2 definitely permit an investigating authority to treat multiple companies as a single entity where they are related operationally or legally.

9. Thus, here, where unlike *EC – Fasteners* Commerce has made a factual finding that non-market economy conditions in the export country – a finding which, by the way, Vietnam does not challenge – it was not inconsistent with the AD Agreement for Commerce to consider multiple companies as a single entity in light of the fact that paragraph 255 of Vietnam's Accession Protocol stipulates that the AD Agreement shall be applied in a manner consistent with the rules set forth in that paragraph. Contrary then to Vietnam's and China's statements, Commerce's methodology is not discriminatory because it flows from the Accession Protocol.

10. Commerce's treatment of the Vietnam-government entity was also fully consistent with Articles 6.8 and 9.4 of the AD Agreement. No party that is part of the Vietnam-government entity requested that Commerce review the entries of that entity during the fourth, fifth or sixth reviews. As such, the exporters subject to the Vietnam-government entity rate effectively expressed that the rate in effect that Commerce had calculated for this entity was preferable to the possible rate that might be calculated if Commerce were to conduct a review.

11. Thus Vietnam's claim that Commerce's decision to assigned this last rate to the Vietnam-government entity during the covered reviews was not inconsistent with Article 6.8 and Annex II of the AD Agreement. This was the "rate in effect" at the time, not a "new" rate that was based on facts available. And contrary to Vietnam's claim, Commerce's decision to continue applying the rate in effect to the Vietnam-government entity during the covered reviews was not inconsistent with Article 9.4 of the AD Agreement. The rate in effect applies to the group of companies whose export activities were determined to be materially influenced by the Government of Vietnam.

12. Next, on the subject of the so-called "zeroing" methodology, you heard earlier this morning from the European Union and Japan – two Members that are not normally aligned with the United States on this subject – that it was their understanding and experience that the "as such" zeroing measure from the prior disputes is gone.

13. The European Union further stated that if there are several examples that the U.S. approach offsets 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 then this is a strong indication that the alleged "as such" U.S. zeroing measure no longer exists. Such evidence is set forth at paragraph 208 of the U.S. First Written Submission and related exhibits.

14. Indeed, as the Panel has noted, Commerce granted offsets for non-dumped transactions in the seventh review of the antidumping duty order on shrimp from Vietnam. Vietnam does not dispute the evidence that the United States has set before the Panel. Thus the evidence clearly shows that Vietnam's claim that an alleged U.S. zeroing measure is "as such" inconsistent with the AD Agreement is without any factual basis.

15. On the issue of the sunset determination, I am just going to highlight a few points. First, Vietnam appears to have misunderstood the United States argument: The U.S. Department of Commerce relied on both the existence of dumping during the sunset review period as well as the decline in import volumes to support its determination, not on one or the other of these factors independently.

16. Next, with respect to the existence of dumping, in response to arguments made regarding the zeroing methodology, Commerce specifically noted the adverse facts available rate applied in the first review to two companies that failed to cooperate, a fact that Vietnam does not dispute. Vietnam acknowledges at paragraph 60 of its Opening Statement that "[t]he only evidence of dumping" included the failure of two respondents to cooperate. Vietnam speculates that these companies were "small" exporters but provides no evidence in support of that statement.

17. Thus the existence of dumping margins determined based on failures to cooperate and a significant decline in import volumes were expressly relied upon by Commerce to support its conclusion that dumping was likely to continue or recur. In light of these facts, and Commerce's analysis in this case, the Appellate Body decisions cited by Vietnam concerning reliance on WTO-inconsistent dumping margins simply do not compel the result Vietnam seeks here. The Panel may, and should, find this sunset determination to be WTO-consistent.

18. As to revocation based on the lack of dumping for three years, Vietnam's claim fails because, as a threshold matter, there is no requirement for company-specific revocation in Article 11.2.

19. Specifically, reference to "the duty" in Article 11.2 is an order-wide reference. This was the finding of the Appellate Body in *U.S. – Corrosion Resistant Steel Sunset Review* and it is persuasive based on the references to injury in Article 11.2 as well as the contrast between "the duty" and references to "individual duties" elsewhere in the AD Agreement.

20. Here, Vietnamese respondents did not make a request for order-wide revocation. Accordingly, the United States did not breach its obligations under Article 11.2.

21. In addition, <u>even if</u> company-specific revocation is an obligation under Article 11.2, the standard of three years of no dumping is not required under Article 11.2. That standard, as noted by the panel in *U.S. – OCTG*, is the result of a practice that operates in favor of the respondent and is not required under Article 11.2.

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