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

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING STATEMENTS OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

January 30, 2014

1. Vietnam is asking the Panel to impose on the United States obligations found nowhere in the Agreement on Implementation of *Article VI of the General Agreement on Tariffs and Trade 1994* ("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

2. 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.

3. 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.

4. 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.

5. Lastly, Vietnam asserts that this Panel should disregard the panel report in *US – 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.*

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

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

6. Vietnam contends that it is challenging Commerce's "NME-wide entity rate practices as set forth in [Commerce's] Anti-Dumping Manual . . . ." 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. 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.

7. 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." 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.

8. 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 Agreement. 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.

9. 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 . . . ."

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

10. 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. 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.

11. 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.

12. 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.

13. 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.

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

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

15. 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.

16. 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.

17. 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. 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.

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

18. 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." 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.

19. 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.

20. 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.

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

21. 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.

22. 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.

23. As the Appellate Body found in *US – 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. 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. This was the finding of the Appellate Body in *US – 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.

24. 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.