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

(WT/DS429)

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

January 30, 2014

I. INTRODUCTION

1. Throughout this dispute, Vietnam's arguments have consistently failed to meaningfully address the specific rights and obligations provided in the covered agreements and ignored relevant facts. The United States will not repeat all of its arguments related to these matters in this submission, but rather will focus on the flaws in arguments Vietnam made in its oral statements at the first substantive Panel meeting and in its answers to the Panel's questions following that meeting.

2. First, Vietnam's claim with respect to company-specific revocation based on the absence of dumping for three years fails because, as a threshold matter, there is no requirement for company-specific revocation in Article 11.2. Reference to "the duty" in Article 11 is an order-wide reference. 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 *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").

3. Next, Vietnam's claim with respect to section 129(c)(1) of the Uruguay Round Agreement Act ("URAA") also fails. When Members wanted to place implementation obligations in WTO agreements, they clearly did so, as with Article 4.7 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). No such obligations are contained in the AD Agreement, which is the covered agreement relied on by Vietnam to make its claim. In addition, Vietnam's central premise – that section 129(c)(1) is the exclusive mechanism by which the United States can implement DSB recommendations and rulings – is simply false. That is what the panel found in *US – Section 129(c)(1)* and, simply put, nothing has changed, and the Panel here should make the same finding.

4. Vietnam has also failed to demonstrate any of its claims with respect to Commerce's approach to the Vietnam-government entity rate. First, Vietnam still has failed to put forth sufficient evidence showing that this alleged practice exists as a measure and is invariably applied by Commerce. Second, 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. Finally, Commerce's treatment of the Vietnam-government entity was 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 covered reviews. Thus the companies subject to the Vietnam-government entity rate essentially expressed that the rate in effect was preferable to the rate that might be calculated if Commerce were to conduct a review.

5. Vietnam's "as such" claim with respect to Commerce's application of the so-called "zeroing" methodology is without merit because no such measure exists; the United States has already changed its approach for calculating dumping margins. Commerce has issued numerous determinations, including in the most recent administrative review of the antidumping duty order on shrimp from Vietnam, 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.

Commerce changed its approach to calculating dumping margins pursuant to section 123(g) of the URAA after extensive consultations with appropriate congressional committees, relevant private sector advisory committees, and public comment. Thus Vietnam's assertion that Commerce can easily re-impose an alleged U.S. zeroing measure is without merit.

6. Finally, on the issue of the Sunset Determination, 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. The determination relied 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 this Panel may consider other dumping margins examined by Commerce as "WTO-inconsistent" does not undermine Commerce's likelihood-of-dumping determination. That determination continues to stand on its own, substantiated by evidence and fully consistent with Article 11.3 of the AD Agreement.

II. ARGUMENT

A. The United States Did Not Act Inconsistently with Article 11.2 of the AD Agreement by Not Granting Company-Specific Revocation Based on the Absence of Company-Specific Dumping for Three Years

7. Vietnam argues that the ordinary meaning of Article 11.2 as well as context provided by other provisions of the AD Agreement support its interpretation that Article 11.2, in contrast to Article 11.3, mandates company-specific revocation. For the reasons set forth in the U.S. First Written Submission, Article 11.2 of the AD Agreement does not obligate Members to consider, much less provide, company-specific revocation of an antidumping duty order. But even aside from the fact that Article 11.2 does not provide for company-specific revocation, Article 11.2 does not contain a requirement that a Member revoke an order based on the absence of company-specific dumping for three years.

1. Article 11.2 of the AD Agreement Does Not Contain Obligations Vis-à-vis Company-Specific Revocation

8. The ordinary meaning of Article 11.2, as well as context provided by other provisions of the AD Agreement, makes clear that company-specific revocation is not an obligation. First, Article 11.2 requires a review of the continuing need for "the duty." 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 (*i.e.*, in U.S. terminology, "order-wide") basis, not a company-specific basis. 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.

2. Article 11.2 of the AD Agreement Does Not Require Revocation Based on the Absence of Dumping for Three Years

9. Even assuming, *arguendo*, that company-specific revocation is an obligation under Article 11.2 of the AD Agreement, there is nothing in Article 11.2 that obligates a Member to

adopt a standard that revocation must occur based on the absence of dumping for three years. This was the panel's observation in *US – Anti-Dumping Measures on Oil Country Tubular Goods* when it found that the standard of revocation based on three years of no dumping "operates in favour of foreign producers and exporters." As such, it goes "beyond what is required by Article 11.2" and, therefore, cannot serve as a basis for a breach of Article 11.2 of the AD Agreement by the United States.

3. The United States Did Not Act Inconsistently with Article 11.2 of the AD Agreement in Limiting the Number of Exporters for Individual Examination, Including Requests for Revocation

10. Even if Article 11.2 could be read to provide for company-specific revocations, Article 11.2 cannot be read as requiring administering authorities to initiate separate reviews of any company that makes a request for revocation. Vietnam's argument in this regard is based on the premise that the AD Agreement has an ambiguity in, and apparent conflict between, the limited examination provisions of Article 6.10 and the review contemplated under Article 11.2. However, Vietnam has no basis for the premise of its argument. A proper reading of the terms of these provisions, in light of their plain meaning, and in context and in light of the object and purpose of the AD Agreement, demonstrates that Members may limit the examination of requests made under Article 11.2. And indeed, it is Vietnam's proposed interpretation that would create a conflict between Articles 6.10 and 11.2.

B. Vietnam Has Failed to Establish that Section 129(c)(1) of the URAA is Inconsistent, As Such, with the AD Agreement

11. As set forth in both the U.S. First Written Submission and the panel's report in *US – Section 129(c)(1)*, section 129(c)(1) of the URAA does not mandate or preclude any particular treatment of "prior unliquidated" entries nor does it have "the effect" thereof. Indeed, "only determinations made and implemented under section 129 are within the scope of section 129(c)(1)" and "section 129(c)(1) only addresses the application of section 129 determinations. It does not require or preclude any particular actions with respect to {other entries} in a separate segment of the same proceeding." These DSB rulings remain as true today as they were when the panel examined the U.S. system for implementing DSB recommendations and rulings in *US – Section 129(c)(1).* Section 129 remains the same and has not been amended. Vietnam's arguments do not provide any reason for the Panel to make different findings from those previously adopted by the DSB.

1. The AD Agreement Does Not Address Implementation of DSB Recommendations and Rulings

12. As an initial matter, and as discussed in the U.S. First Written Submission, the DSU is the only WTO agreement that addresses Members' obligations in regards to implementation in the antidumping context. Vietnam has not pursued any claims *vis-à-vis* section 129(c)(1) of the URAA under the DSU. For this reason alone, Vietnam's claim as to section 129(c)(1) should be rejected.

2. The United States Implements DSB Recommendations and Rulings Through a Number of Mechanisms

13. At various points in its answers to Panel questions, Vietnam asserts that while the United States may have a number of mechanisms besides section 129 to implement DSB recommendations and rulings, those mechanisms are "irrelevant" because implementation through other means is not "automatic." Vietnam thus asks the Panel to ignore the existence of other avenues, both administrative and legislative, by which the United States can implement DSB recommendations and rulings to treat "prior unliquidated entries" in a WTO consistent manner.

14. These arguments should be rejected. Section 123 and congressional action are two mechanisms within a larger domestic scheme by which the United States maintains the discretion to bring itself into compliance with DSB recommendations and rulings. Vietnam's attempts to have the Panel analyze section 129(c)(1) in a vacuum that is isolated from the other parts of this domestic scheme should be rejected.

3. Vietnam Misconstrues the Statement of Administrative Action (SAA)

15. In an attempt to discredit the fact that the United States has used other administrative mechanisms (such as section 123) to accord WTO-consistent treatment to "prior unliquidated entries," Vietnam asserts that such administrative mechanisms could only be used in "size of margin" cases but could not be used in "revocation" cases. In support of this argument, Vietnam notes that the SAA states that section 129 determinations may not be necessary where the DSB recommendations and rulings "merely implicate[] the size of a dumping margin or countervailable subsidy rate [("size of margin")] (as opposed to whether a determination is affirmative or negative [("revocation")])."

16. The fact that the SAA distinguishes "size of margin" and "revocation" situations does not mean that prior unliquidated entries cannot be accorded WTO-consistent treatment pursuant to other mechanisms. The passage of the SAA relied upon by Vietnam establishes only that the implementation of DSB recommendations and rulings under section 129(c)(1) does not affect duties assessed on "prior unliquidated entries." To suggest that this passage, which pertains explicitly to section 129, dictates the application of other U.S. measures or the scope of potential congressional action is a conclusion unsupported by the text.

C. The Treatment of Multiple Companies in Vietnam as a Single Vietnam-Government Exporter/Producer Was Not Inconsistent with the AD Agreement

1. Vietnam Still Has Failed to Demonstrate the Existence of a Measure that May be Challenged "As Such" as Inconsistent with the AD Agreement

17. Vietnam in its first written submission contended that it is challenging Commerce's "NME-wide entity rate practice as set forth in the USDOC's Anti-Dumping Manual, which confirms the practice is applied on a generalized and prospective basis." As discussed in the

U.S. First Written Submission and elsewhere, Vietnam has not demonstrated the existence of a measure – based on an alleged "practice" – that may be challenged "as such" under the AD Agreement.

2. Commerce's Approach with Respect to the Government of Vietnam's Control over Multiple Companies is based on the Undisputed NME Conditions in Vietnam and is Not Inconsistent with Articles 6.10 and 9.2 of the AD Agreement

18. Vietnam states that it contests in this dispute "whether the covered agreements provide a legal – not a factual – basis for the presumption of government control that is central to the NME-wide entity policy." As an initial matter, the United States notes that the question presented is a **mixed question of fact and law**; namely, whether the U.S. approach for deciding what sets of exports from an NME are considered to be from one exporter or from separate exporters. The matter at issue – at least as Vietnam has presented it – does not involve a pure question of legal interpretation of any particular provision of the AD Agreement. Indeed, Vietnam cannot point to any provision of the AD Agreement that specifies exactly how an authority is to decide whether different sets of exports are considered to be from one exporter or multiple exporters. Rather, the question is whether Vietnam has demonstrated that the approach used by the United States to determine which exports from an NME are matched to particular exporters is inconsistent with the WTO Agreement.

a. Vietnam's Working Party Report Provides the Basis for Commerce's Presumption that Vietnam Controls Companies Involved in Exportation and Production of the Subject Merchandise until Demonstrated Otherwise

19. The Working Party Report reflects that Vietnam, in the course of its accession process, presented a range of reforms to the Working Party about prices, the banking sector, the role of state-owned enterprises (SOEs) and commercial activity and trade generally, all of which were aimed at establishing a multi-sector economy. At the same time, Vietnam also stated that its economy was still in the process of shifting from central planning to a market-based economy. Despite this statement, which itself indicates that Vietnam considered its reforms incomplete, the description of Vietnam's economy in the Working Party Report did not indicate a shift toward a true market-based economy. Rather, the description of Vietnam's economy in the Working Party Report indicated that Vietnam planned to develop a "socialist-oriented market economy" in which the state preserves a predominant role for SOEs.

20. In sum, the concerns expressed in the Working Party Report regarding the nature of Vietnam's economy and the provisions on antidumping clearly indicate that Members were not convinced that market economy conditions prevailed in Vietnam. Members thus insisted on, and received from Vietnam, discretion in determining under their own national laws when market economy conditions prevailed in Vietnam, with implications that necessarily extended beyond the calculation of normal value. The Working Party Report memorializes the concerns with the Vietnam government's influence and provides the basis for Commerce's presumption that the government may control companies in various industries until otherwise demonstrated.

b. Given the Working Party Report Provides a Basis for doing so, Commerce's Presumption that Companies in Vietnam are Part of a Vietnam-Government Entity Pending Contrary Evidence was Not Inconsistent with the AD Agreement

21. Paragraph 255(a) of the Working Party Report states that "an importing WTO Member shall use Vietnamese prices or costs for the industry under investigation in determining price comparability" where the producers "can clearly show that market economy conditions prevail." But where the producers do not make this showing, "[t]he importing WTO Member [in determining price comparability] may use a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product."

22. Therefore, contrary to Vietnam's argument, the introductory phrase to paragraph 255(a) of the Working Party Report – "[i]n determining the price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement" – and the associated language that permits importing Members to use a methodology for price comparability "not based on a strict comparison with domestic prices or costs in Viet Nam" together provide a legal basis for Members to treat Vietnam differently in antidumping proceedings with respect to the determination of a NME-government entity margin. Commerce's determination in the covered reviews that a Vietnam-government entity existed and that certain companies, while legally separate, were in fact part of this entity for purposes of ensuring appropriate price comparability between the normal value and the export price thus were not inconsistent with the AD Agreement and Article VI of the GATT 1994.

c. Commerce's Determination to Treat Related Companies in the Covered Reviews as a Single Exporter or Producer for the Purpose of Determining a Dumping Margin is Not Inconsistent with Articles 6.10 and 9.2 of the AD Agreement

23. As demonstrated in Section II.C.2.a., Commerce's presumption that all companies in the antidumping proceedings involving shrimp from Vietnam are part of the Vietnam-government entity until a company provides evidence to the contrary regarding its export activities is based on the Working Party Report (and Commerce's 2002 determination) that NME conditions prevail in Vietnam. As further demonstrated in Section II.C.2.b., Commerce's presumption and eventual determination in the covered reviews that a Vietnam-government entity existed because certain companies, while legally separate, were in fact part of the Vietnam-government entity, was not inconsistent with the AD Agreement and Article VI of the GATT 1994.

24. Finally, Vietnam indicated in a written response to a question from the Panel that it "does not contest here the general question of whether, under the covered agreements, the State and exporters can be considered a single entity." Therefore, given Vietnam's position plus the fact that Commerce's approach results in a reading of the AD Agreement that is consistent with paragraph 255, Commerce's conclusion in the covered reviews that multiple companies in Vietnam were part of the Vietnam-government entity and subsequent decision to assign that

entity an individual margin of dumping and an individual antidumping duty were not inconsistent with Articles 6.10 and 9.2 of the AD Agreement.

3. The Rate Applied to the Vietnam-Government Entity is Not Inconsistent with Articles 6.8 and 9.4 of the AD Agreement

25. Commerce's treatment of the Vietnam-government entity was 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 covered reviews. The companies subject to the Vietnam-government entity rate thus essentially expressed that the rate in effect that Commerce had calculated for this entity was preferable to the rate that might be calculated if Commerce were to conduct a review. Thus Commerce's decision to assign this last rate to the Vietnam-government entity during the covered reviews was not inconsistent with Articles 6.8 and 9.4 because this last rate was neither a "new" rate based on facts available nor an "all others" rate, but the "rate in effect" at the time.

a. Vietnam's Argument that the Investigating Authority May Not Apply Facts Available if the Government of Vietnam Refuses to Cooperate Is Unfounded

26. Although Commerce did not assign the Vietnam-government entity a rate based on facts available in the covered reviews, Vietnam nonetheless argues that facts available cannot be applied to this entity because the government of the exporting country plays a different role in antidumping cases than it does in countervailing duty cases. According to Vietnam, in antidumping cases, it "cannot foresee a situation in which an authority could apply facts available in case of a failure to cooperate by a government."

27. Vietnam's argument lacks any support in the text of the AD Agreement. The issue is not how AD proceedings compare to countervailing duty proceedings, or what Vietnam can or cannot "foresee." Rather, the issue is what the AD Agreement provides. And in the circumstances of this case, Commerce's application of facts available following the government of Vietnam's failure to cooperate is supported by the plain text of the AD Agreement. According to Article 6.8, preliminary and final determinations may be made on the basis of the facts available whenever "any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation" (emphasis added). Article 6.11 explicitly defines "interested parties" as including, *inter alia*, "the government of the exporting Member." Articles 6.8 and 6.11 thus expressly contemplate that an antidumping determination may be based on facts available whenever the government of an exporting Member does not cooperate during an investigation.

b. Commerce's Application of the Rate in Effect during the Covered Reviews is Not Inconsistent with the AD Agreement

28. Although prior panel reports are not binding on panels considering other disputes, Vietnam further argues that the Panel should look to the *US – Shrimp (Viet Nam)* (DS404) panel report for guidance as it considers whether the rate that Commerce's assigned to the Vietnam-government entity during the covered reviews was not inconsistent with the AD Agreement.

This panel report treated the rate applied to the Vietnam-government entity in the third administrative review as a "facts available" rate. As explained in the U.S. First Written Submission, however, it would be incorrect to apply the DS404 panel finding to the covered reviews because Commerce did not apply facts available (substantively or otherwise) to the Vietnam-government entity in those reviews. Again, the rate applied to the Vietnam-government entity in the covered reviews is not, and cannot be, a facts available rate because it is not based on the interested party's refusal to give access to, or otherwise provide, necessary information during the covered reviews. Instead, it was based on the fact that the Vietnam-government entity, and those Vietnamese parties who would be subject to the Vietnam-government entity's rate, did not seek a different rate but accepted the existing rate of the Vietnam-government entity. Accordingly, Commerce applied the existing rate of the Vietnam-government entity during the covered reviews and was under no obligation to change the existing rate for final assessment purposes.

D. Vietnam's Claim That the United States Maintains a Zeroing Measure That May Be Challenged "As Such" Under the AD Agreement is Without Merit

29. Commerce's so-called "zeroing" methodology does not exist today as a measure of general and prospective application. Commerce changed its approach for calculating dumping margins for investigations (effective early 2007) and for administrative reviews (effective early 2012) in response to the DSB's recommendations and rulings on this matter. The measure subject to the recommendations and rulings in prior disputes thus no longer exists.

30. In addition, it is wrong to conclude that Commerce can simply re-impose the so-called "zeroing" methodology that it changed in response to the DSB's recommendations and rulings just because it "is not explicitly required or prohibited by [U.S.] law." Commerce changed its approach for calculating dumping margins in both investigations and administrative reviews in accordance with U.S. law and, in particular, under the procedures outlined in section 123(g) of the URAA. Commerce's changes in methodology were made after extensive consultations with appropriate congressional committees, relevant private sector advisory committees, and public comment regarding its modifications. Vietnam has not provided a single example of the agency practice, which was found to be WTO inconsistent and changed pursuant to section 123(g), being subsequently "easily re-imposed."

E. Commerce's Sunset Review Determination is Not Inconsistent with Articles 11.3 of the AD Agreement

31. The AD Agreement does not prescribe specific methodologies that authorities must follow in determining whether to terminate definitive antidumping duties under Article 11.3. No other provisions of the AD Agreement set forth rules regarding the methodologies or analysis to be employed in making the determination of whether dumping and injury is likely to continue or recur. Accordingly, attempts to read into Article 11.3 substantive obligations allegedly contained in other provisions of the AD Agreement have been soundly rejected. Aside from the obligations contained in Article 11.3, the AD Agreement leaves the conduct of sunset reviews to the discretion of the Member concerned.

1. Notwithstanding its Statements to the Contrary, Vietnam Continues to Acknowledge that Commerce Relied on WTO-Consistent Margins of Dumping in the Sunset Review

32. In its Sunset Determination, Commerce conducted a thorough review of the history of the antidumping duty proceeding from the original investigation through the fourth review. In its likelihood determination, Commerce relied on positive antidumping duty margins applied to numerous companies during the four completed reviews. Nonetheless, Vietnam in its arguments elects to mischaracterize the margins relied on by Commerce in making its likelihood determination.

2. Vietnam Misunderstands the Relevance of Declining Volumes as Part of Commerce's Analysis

33. Vietnam in its arguments also elects to misread the U.S. position as arguing that Commerce either relied exclusively on WTO-inconsistent margins or exclusively on declining import volumes. Our first written submission and responses to Panel questions demonstrate that declining volumes were a part of the evidence relied on by Commerce and not the exclusive basis for finding likelihood. Specifically, in addition to evidence of continued dumping, Commerce also reviewed public U.S. import data as reported by the ITC Trade Database for 2003-2009 and found that import volumes fell from 56.3 million kilograms in the year preceding the investigation (2003) to 42.1, 35.9, 37.9, 46.7, 40.1 million kilograms in 2005-2009, respectively. As explained, this decline in import volumes suggests that the exporters were unable to sustain pre-investigation import levels without dumping. The Appellate Body has confirmed that the "'volume of dumped imports' and 'dumping margins', before and after the issuance of anti-dumping duty orders, are highly important factors for any determination of likelihood" and that they have "certain probative value." Thus "[t]he importance of the two underlying factors (import volumes and dumping margins) for a likelihood-of-dumping determination cannot be questioned."

34. Finally, Vietnam is incorrect in describing the change in import volumes as a "moderate" reduction. In fact, the average volume for years following the review was approximately 40.54 million kilograms – a decline of about 28 percent compared to the 56.3 million kilograms imported in the year preceding the investigation.

3. Vietnam's Remaining Arguments are Immaterial Because they Do Not Address the Facts at Issue in this Case

35. Vietnam's answers to the Panel's questions further highlight that Vietnam has no legitimate basis for questioning the outcome of the sunset review. Rather than responding to the Panel's questions regarding what evidence was submitted to Commerce, Vietnam asserts that further argument regarding dumping margins and import volume would have been futile, and that arguments to Commerce during the sunset review regarding WTO-consistency is not required in order for Vietnam to challenge the sunset determination.

36. To the extent Vietnam's arguments are to be considered, they fail to rebut Commerce's likelihood determination. Vietnam's arguments ignore indisputable evidence of dumping and

fail to provide any viable reason why Commerce should not have taken into account declining import volumes. In fact, a reduction in volume caused by application of an antidumping duty (pursuant to a permissible retrospective system) supports a conclusion that exporters were unable to maintain pre-order volumes without dumping. Vietnam's arguments about the uncertainty resulting from the imposition of trade remedy measures do not explain the relevance of the observed decline in import volumes as part of Commerce's reasonable conclusion that dumping was likely to continue absent the discipline of the order. For these reasons, Vietnam's remaining arguments are immaterial to the matter in dispute because they do not address the facts at issue before the Panel

III. CONCLUSION

37. The United States respectfully requests that the Panel reject Vietnam's claims that the United States has acted inconsistently with the covered agreements.