

*United States – Anti-Dumping Measures on Certain Shrimp from Vietnam:  
Recourse by Viet Nam to Arbitration under Article 21.3(c) of the DSU*

**(DS429)**

**Statement of the United States of America  
at the Oral Hearing**

November 10, 2015

1. Good morning. The United States would like to first thank Mr. Farbenbloom for agreeing to serve as the arbitrator in this proceeding. We are confident that your experience as Chair of the panel in this dispute, and experience both in Geneva and in capital, will assist you in reaching an appropriate award in this proceeding. We appreciate the opportunity to appear before you today to further explain why, in the specific circumstances of this dispute, at least 21 months is a reasonable period of time (RPT) to implement the recommendations and rulings of the Dispute Settlement Body (“DSB”) in this dispute.

**I. The United States Justified Its Proposal of At Least 21 Months.**

2. The United States outlined in its written submission why an RPT of at least 21 months is required. The 21-month period is based largely on our need to implement with respect to the recommendations and rulings of the DSB in three distinct phases, each of which must be completed sequentially, while following certain legal requirements and ensuring procedural fairness.

3. Briefly, as we note in our written submission, the United States in this dispute is implementing with respect to six matters. Some of these matters raise novel issues about the relationship between exporters and an NME government.

4. The United States is implementing with respect to the six matters by conducting three sequential proceedings, utilizing both Section 123 and Section 129 of the Uruguay Round Agreements Act (URAA). We are using the Section 123 proceeding to implement with respect to the Panel’s as such findings. We are using Section 129 determinations to implement with respect to the Panel’s as applied findings and any necessary changes following the Section 123 proceeding. We are also using a Section 129 proceeding to implement with respect to the

Panel's as applied findings regarding the five-year sunset review.

5. Commerce has been busy for months now in internal discussions as it prepares a preliminary Section 123 determination on the far-reaching issues involving the relationship between exporters and an NME government. Once Commerce announces its preliminary Section 123 determination, it expects to receive hundreds of pages of public comments about its preliminary determination. Commerce will then need to fully explain its findings and reasoning in what will almost certainly be a lengthy final Section 123 determination.

6. The Panel's associated findings regarding the fourth, fifth, and sixth administrative reviews as to the Vietnam-wide entity, and the possible application of a new duty rate, must await the conclusion of the Section 123 process. Commerce cannot make these determinations before it decides its approach for addressing the relationship among the Vietnamese producers/exporters that were considered part of the Vietnam-wide entity in the fourth, fifth, and sixth administrative reviews.

7. In addition, as any possible new duty rate should not, according to the Panel's finding, exceed the weighted average dumping margins calculated for the mandatory respondents, Commerce will also have to wait until the completion of the Section 123 process before it can make any new determinations implementing the Panel's associated finding regarding the use of a simple zeroing methodology in the fourth, fifth, and sixth administrative reviews.

8. The United States will conduct the review-specific proceedings that I have mentioned, as well as the request for revocation by Minh Phu, and the likelihood-of-dumping determination in the first sunset review, utilizing the procedures set forth in Section 129. The United States expects to conduct these Section 129 processes associated with these matters as quickly as

possible, often working on the implementation processes that will address these findings at the same time as it works on preparing its preliminary Section 123 determination.

9. The United States cannot issue preliminary Section 129 determinations for review-specific findings involving the Vietnam-wide entity or review-specific findings involving simple zeroing until after it issues a final Section 123 determination. And the United States cannot issue a preliminary Section 129 determination for the sunset review until after it issues the final Section 129 determinations for the review-specific findings.

10. To fulfill U.S. legal requirements, the United States' efforts to implement with respect to the six matters at issue thus requires the process of implementation be conducted in three, sequential phases, necessitating a total reasonable period of time of at least 21 months.

## **II. Vietnam's 6-Month Recommendation is Unreasonable and Unsupported.**

11. Before turning to address Vietnam's arguments, it is important to note that the parties agree on several key points. Both Vietnam and the United States agree that the implementing Member has the discretion to choose the means of implementation.<sup>1</sup> The Panel also recognized this point when it declined Vietnam's request for it to exercise discretion under Article 19.1 of the DSU and suggest that the United States implement by revoking the antidumping order in its totality, and with respect to Minh Phu.<sup>2</sup> In declining Vietnam's request, the panel noted that Article 21.3 of the DSU gives the authority to decide the means of implementation in the first instance to the Member found to be in breach.<sup>3</sup>

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<sup>1</sup> Submission of Vietnam, para. 9.

<sup>2</sup> Panel Report, para. 8.4.

<sup>3</sup> Panel Report, para. 8.6.

12. Both parties agree that a 15-month RPT is only a guideline provided in Article 21.3 that can be extended depending upon particular circumstances.<sup>4</sup>

13. Both parties also agree that implementation should involve sequential phases. Specifically, Vietnam acknowledges that Commerce must address the Panel's as such findings before addressing the as applied findings.<sup>5</sup>

14. Yet, despite mutual recognition of key elements and aspects of the underlying implementation, Vietnam seeks to convince you that a mere six months is sufficient to fully address the novel and multifaceted findings at issue. Vietnam's arguments, however, are unconvincing. One primary flaw in Vietnam's position is that Vietnam ignores the need for Commerce to conduct and apply a new analysis on the relationship between exporters and an NME government, an analysis that Vietnam sought and the DSB, in fact, recommended the United States to do.

15. It is particularly disappointing that Vietnam now seeks to claim that implementation with respect to the as such findings do not require a complicated change in policy, but rather simply putting the same ceiling on the country-wide rate as the current separate rate. Vietnam also fails to take into account the procedural requirements necessary for Commerce to change its policy and practice.

16. Throughout its submission Vietnam has made a series of inaccurate statements about U.S. law and Commerce's procedures. I would like to address the inaccurate statements by focusing on four erroneous claims.

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<sup>4</sup> Submission of Vietnam, para. 7.

<sup>5</sup> Submission of Vietnam, paras. 20 – 22, 24.

**A. Section 123 is Necessary to Implement With Respect to the Panel’s As Such Findings.**

17. First, Vietnam claims that since the country-wide rate practice at issue is not required by U.S. law or regulations, implementation is simple and would only involve an adoption of a practice which does not assign the anti-dumping duty rates to the country wide-entity in excess of the weighted average margins of the individual companies.<sup>6</sup> Vietnam’s statement demonstrates a misunderstanding of U.S. law and the complexity involved in redefining Commerce’s approach for addressing the relationship among producers/exporters and an NME Member government.

18. Vietnam dismisses the complexity involved in this process by simply stating, without any substantiation, that “[t]here is no legal reason requiring significant time to adopt the change in practice”<sup>7</sup>, and by ignoring the opportunity for congressional and public engagement as required by U.S. law.

19. As was recognized by both Vietnam and the United States, however, the standard for determining an RPT is what is reasonable within the implementing Member’s domestic legal system.<sup>8</sup> Here, the U.S. domestic legal system necessitates certain legal and procedural steps. As mentioned in our written submission, the United States is required to consult with Congress, seek advice from the relevant private sector advisory committees, provide an opportunity for public comment, reflect and address all comments received, publish the final notification in the Federal Register explaining its reasoning and findings, and submit a report to Congress

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<sup>6</sup> Submission of Vietnam, para. 20.

<sup>7</sup> Submission of Vietnam, para. 20.

<sup>8</sup> Submission of Vietnam, para. 4.

describing the reasons for the modification in the practice and a summary of the advice received from the private sector. In short, the procedure required for this implementation step is hardly simple.

20. Likewise, the substance involved in this implementation step is complex. As noted, this first step involves a change in Commerce's approach to the relationship among producers/exporters and an NME Member government. Vietnam's proposed timeline only addresses rate assignment, not the as such findings regarding the presumption of government control over Vietnamese exporters.<sup>9</sup> Vietnam proposes that the actions pertaining to the country-wide rate can take place in a 60-day period. This is unreasonable and not administrable.

21. Moreover, we note that following adoption of the Panel's and Appellate Body's reports in the *EC Fasteners* dispute, it took the European Union approximately 11 months to issue a modified regulation implementing similar as such findings regarding the presumption of government control in an NME government<sup>10</sup>. Thus, it is not unreasonable to expect that it would take the United States a similar time period to implement the Panel's as such findings. And, as we mentioned before, after implementing the as such findings the United States will implement the other issues involved in this dispute as reflected in our proposed timeline.

**B. Implementation Using Section 129 Would Not Result in a WTO Inconsistent Implementation.**

22. Second, Vietnam claims that Section 129 would not address determinations related to prior unliquidated entries and as a result a more appropriate implementation mechanism would

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<sup>9</sup> Exhibit VN-8.

<sup>10</sup> Status report by the EU, WT/DS397/15/Add.3, October 12, 2012.

be to negotiate a trade agreement. This is not only incorrect, but unrealistic.

23. The standard outlined in Article 21.3, and accepted by both parties, is that implementation, with respect to the Panel’s findings, should be completed in the shortest period of time possible in manner that is consistent with the DSB’s recommendation and rulings.<sup>11</sup> Further, since Vietnam advocates for a shorter period it bears the burden of producing evidence that the U.S. chosen method of implementation is not consistent with the DSB’s recommendations and rulings, and a shorter period of time is warranted.<sup>12</sup> Vietnam has not provided any evidence demonstrating that Section 129 is an inappropriate means to implement or that it cannot be implemented in the shortest period of time possible. Vietnam has also not provided any evidence demonstrating that its alternative implementation mechanism – a trade agreement – is an appropriate tool to bring the U.S. measures into conformity with its WTO obligations and can be implemented within the shortest period of time.

24. The United States has employed Section 129 in a number of prior disputes. The Panel found, and the Appellate Body upheld, that Section 129 is not as such inconsistent with U.S. obligations under the AD Agreement.<sup>13</sup> As found by both the original Panel and the Appellate Body, Vietnam has not pointed to any statement by U.S. courts or even prior WTO reports interpreting Section 129 in a way that precludes the United States from implementing DSB recommendations and rulings with respect to prior unliquidated entries.<sup>14</sup> Vietnam argued this point before the Appellate Body and lost, and its efforts to re-argue this point during this

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<sup>11</sup> Submission of Vietnam, para. 4; *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 53.

<sup>12</sup> *Colombia – Ports of Entry (Panama) (Article 21.3(c))*, para. 67.

<sup>13</sup> Appellate Body report, para. 4.51.

<sup>14</sup> Appellate Body report, paras. 4.45 – 4.48.



arbitration should be soundly rejected.

25. Further, Vietnam’s reliance on the U.S.-Canada Softwood Lumber Agreement only serves to demonstrate that its proposed trade agreement approach makes no sense.<sup>15</sup> First, no prior arbitral award supports Vietnam’s recommendation for implementation through a trade agreement. Second, the Softwood Lumber Agreement took well over 21 months to negotiate. Finally, assessing whether implementation is better achieved through the negotiation of a trade agreement than the implementation steps outlined by the United States runs counter to the role that Article 21.3(c) arbitrators have recognized in previous arbitration awards<sup>16</sup>.

26. Vietnam has not provided any evidence rebutting the U.S. position that Section 129 is an appropriate means to implement with respect to the DSB’s recommendations and rulings. Similarly, Vietnam has not demonstrated that its alternative mechanism is an appropriate tool to implement with respect to the Panel’s findings.

**C. Vietnam’s Assertion that the Margins in All Underlying Proceedings Could be Corrected in a Simple Five-Hour Process is a Gross Misrepresentation of the Implementation Process.**

27. Third, Vietnam claims that implementing the findings related to rates of individually investigated and separate rate respondents is a matter of a simple calculation that involves altering a few lines of computer code<sup>17</sup>. This is incorrect.

28. Vietnam attempts to support its claim by offering a so-called affidavit by a purported expert on Commerce’s calculation program. The so-called affidavit is nothing more than a self-

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<sup>15</sup> Submission of Vietnam, para. 27.

<sup>16</sup> *Colombia – Ports (Panama) (Article 21.3(c))*, para. 63.

<sup>17</sup> Submission of Vietnam, para. 22.

serving statement prepared by an employee of the law firm representing Vietnam, on behalf of Vietnam, for the sole purpose of assisting Vietnam in this dispute. The affiant is simply an extension of the Vietnamese delegation. Even if the affiant is as he says, knowledgeable about Commerce's calculation program, he certainly cannot be considered a disinterested party.

29. Further, the United States does not agree that recalculating margins is a simple 5-hour process as Vietnam claims. It is true that implementation for the zeroing issue involves changing the computer code used to run the margins; however, Commerce must consider the manner in which any changes should be implemented in the programming and review the programs and output to check for any errors and, as a general matter, has additional internal review processes to ensure that programs run correctly.

30. Commerce must ensure that it follows its proper procedures in the context of implementation. As with the other issues involved in implementation, Commerce will issue a preliminary determination for each review involved, allow parties to present arguments, issue a final determination, and allow for the correction of ministerial errors, if needed. The ministerial error process can be particularly important when changes are made to the programming.

31. The nature of implementation for each issue is different, some perhaps faster than others. In no case, however does Commerce plan to bypass its administrative procedures or shortcut parties' ability to meaningfully comment on its implementation actions. For this reason, the United States proposes a time frame of 4 to 5 months, which also includes addressing the as applied findings with respect to revocation, during which it will publish preliminary Section 129 determinations for the as applied claims, allow parties to submit case and rebuttal briefs, hold a hearing if one is requested, analyze and respond to parties' arguments, and issue final Section

129 determinations.

32. Accordingly, the Arbitrator should consider the 5-hour time frame proposed by Vietnam to be unsupported and unworkable.

**D. Implementation in Prior Disputes Does Not Undercut the Need for an RPT of At Least 21 Months.**

33. Finally, Vietnam inaccurately reflects the amount of time that Sections 123 and 129 proceedings have taken in prior disputes. Vietnam claims that the U.S. proposed RPT is unreasonable because in supposedly six<sup>18</sup> disputes the United States has taken less than six months to implement the Panel's findings.

34. Vietnam's submission presents only part of the picture. First, Vietnam does not provide the actual RPT time frame agreed upon by the parties to the dispute. Instead, it provides shorter time frames that it states are the periods in which the United States completed implementation activities. Moreover, Vietnam mischaracterizes the actual RPTs reached in those previous disputes.

35. Review of the cited disputes indicates that the RPT agreed upon by the parties was longer in each dispute and, of course, was based on the issues to be implemented. Vietnam states that in *US – DRAMS (Korea)* (DS99), implementation was completed in 3 months. It took 8 months.

36. Vietnam claims that in *US – Stainless Steel (Korea)* (DS179), implementation was completed in four months. It took 7 months.

37. In *US – Countervailing Measures (EC)* (DS212), Vietnam stated that implementation took 5 months to complete. It was completed in 10 months.

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<sup>18</sup> Submission of Vietnam, para. 32 (referencing the following disputes: DS99, DS179, DS212, DS402, and DS383).

38. Vietnam made similar inaccurate and misleading statements about *US – Zeroing (Korea)* (DS402). Vietnam claimed that it took only 39 days to implement those findings, but in actuality it took 9 months to implement findings that were only based on zeroing.

39. The same is true about *US – Anti-Dumping Measures on PET Bags (Thailand)* (DS383). In that case, the parties agreed to an RPT of 6 months, not 4 months, and implementation again was based solely on zeroing findings.

40. In every instance cited, Vietnam was wrong. The actual time frames of the disputes referenced in Vietnam’s submission are equal to or greater than Vietnam’s proposed 6 month RPT for this entire dispute.

41. Vietnam has misstated the facts in those disputes and presented an incomplete story to support its unreasonably low 6-month proposed RPT. Further, Vietnam has not explained why those disputes are relevant. Past arbitrators have dismissed the relevance of other RPTs with different facts as a particular circumstance for determining the time necessary for an implementing Member to come into compliance with respect to the DSB’s recommendations and rulings.<sup>19</sup> None of the disputes that Vietnam cites had the multiple, related steps that are necessary for implementation, like the present dispute. We recall that the purpose of this arbitration is to determine an RPT for implementation based on the particular facts of this case.

### **III. Conclusion**

42. In summary, the U.S. 21-month proposed RPT takes into account all of the Panel’s findings in a manner that respects WTO rules, while preserving the right of the United States to

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<sup>19</sup> *EC – Sugar (Australia, Brazil, Thailand)* (Article 21.3(c)), para. 97; *US – Stainless Steel (Mexico)* (Article 21.3(c)), paras. 63-64.

choose its own implementation method, in a manner that is consistent with U.S. law, Commerce procedures, and procedural requirements.

43. Mr. Farbenbloom, the United States respectfully requests that you award an RPT of at least 21 months. We thank you for your attention, and we look forward to answering any questions you may have.