



## UNITED STATES – CERTAIN METHODOLOGIES AND THEIR APPLICATION TO ANTI-DUMPING PROCEEDINGS INVOLVING CHINA

Arbitration  
under Article 21.3(c) of the  
Understanding on Rules and Procedures  
Governing the Settlement of Disputes

*Award of the Arbitrator  
Simon Farbenbloom*

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\* **NOTE CONCERNING DOCUMENT SYMBOL:** As of 13 April 2017, for ease of reference, awards of arbitrators under Article 21.3(c) of the DSU bear the symbol WT/DS[number]/RPT.

**TABLE OF CONTENTS**

<b>1 INTRODUCTION .....</b>	<b>6</b>
<b>2 ARGUMENTS OF THE PARTIES .....</b>	<b>7</b>
<b>3 REASONABLE PERIOD OF TIME .....</b>	<b>7</b>
3.1 Introduction.....	7
3.2 Mandate of the arbitrator under Article 21.3(c) of the DSU .....	8
3.3 Measures to be brought into conformity .....	10
3.4 Factors affecting the determination of the reasonable period of time.....	11
3.4.1 Steps in the implementation process.....	12
3.4.1.1 Implementation of the DSB's "as such" recommendations and rulings pertaining to the SRP.....	12
3.4.1.2 Implementation of the DSB's "as applied" recommendations and rulings pertaining to the 38 anti-dumping determinations at issue .....	18
3.4.2 Particular circumstances of this dispute .....	24
<b>4 AWARD.....</b>	<b>25</b>
<b>ANNEX A .....</b>	<b>27</b>
<b>ANNEX B .....</b>	<b>28</b>

**ABBREVIATIONS USED IN THIS AWARD**

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Appellate Body Report	Appellate Body Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , <a href="#">WT/DS471/AB/R</a>
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
NME	non-market economy
Panel Report	Panel Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , <a href="#">WT/DS471/R</a>
Section 123 of the URAA	Uruguay Round Agreements Act, Public Law No. 103-465, 108 Stat. 4838, codified as <i>United States Code</i> , Title 19, Section 3533 (Exhibit USA-1)
Section 129 of the URAA	Uruguay Round Agreements Act, Public Law No. 103-465, 108 Stat. 4838, codified as <i>United States Code</i> , Title 19, Section 3538 (Exhibit USA-2)
SRP	Single Rate Presumption
USDOC	United States Department of Commerce
USTR	United States Trade Representative
W-T	weighted average-to-transaction
WTO	World Trade Organization
URAA	Uruguay Round Agreements Act

**CASES CITED IN THIS AWARD**

Short title	Full case title and citation
<i>Brazil – Retreaded Tyres (Article 21.3(c))</i>	Award of the Arbitrator, <i>Brazil – Measures Affecting Imports of Retreaded Tyres – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS332/16</a> , 29 August 2008, DSR 2008:XX, p. 8581
<i>Canada – Pharmaceutical Patents (Article 21.3(c))</i>	Award of the Arbitrator, <i>Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS114/13</a> , 18 August 2000, DSR 2002:I, p. 3
<i>Chile – Price Band System (Article 21.3(c))</i>	Award of the Arbitrator, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS207/13</a> , 17 March 2003, DSR 2003:III, p. 1237
<i>China – GOES (Article 21.3(c))</i>	Award of the Arbitrator, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS414/12</a> , 3 May 2013, DSR 2013:IV, p. 1495
<i>Colombia – Ports of Entry (Article 21.3(c))</i>	Award of the Arbitrator, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS366/13</a> , 2 October 2009, DSR 2009:IX, p. 3819
<i>Colombia – Textiles (Article 21.3(c))</i>	Award of the Arbitrator, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS461/13</a> , 15 November 2016
<i>EC – Bananas III (Article 21.3(c))</i>	Award of the Arbitrator, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS27/15</a> , 7 January 1998, DSR 1998:I, p. 3
<i>EC – Chicken Cuts (Article 21.3(c))</i>	Award of the Arbitrator, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS269/13</a> , <a href="#">WT/DS286/15</a> , 20 February 2006
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , <a href="#">WT/DS397/AB/R</a> , adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Hormones (Article 21.3(c))</i>	Award of the Arbitrator, <i>EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS26/15</a> , <a href="#">WT/DS48/13</a> , 29 May 1998, DSR 1998:V, p. 1833
<i>EC – Tariff Preferences (Article 21.3(c))</i>	Award of the Arbitrator, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS246/14</a> , 20 September 2004, DSR 2004:IX, p. 4313
<i>Japan – DRAMs (Korea) (Article 21.3(c))</i>	Award of the Arbitrator, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS336/16</a> , 5 May 2008, DSR 2008:XX, p. 8553
<i>Peru – Agricultural Products (Article 21.3(c))</i>	Award of the Arbitrator, <i>Peru – Additional Duty on Imports of Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS457/15</a> , 16 December 2015
<i>US – 1916 Act (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS136/11</a> , <a href="#">WT/DS162/14</a> , 28 February 2001, DSR 2001:V, p. 2017
<i>US – COOL (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS384/24</a> , <a href="#">WT/DS386/23</a> , 4 December 2012, DSR 2012:XIII, p. 7173
<i>US – Countervailing Measures (China) (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Countervailing Duty Measures on Certain Products from China – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS437/16</a> , 9 October 2015
<i>US – Offset Act (Byrd Amendment) (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS217/14</a> , <a href="#">WT/DS234/22</a> , 13 June 2003, DSR 2003:III, p. 1163

Short title	Full case title and citation
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS268/12</a> , 7 June 2005, DSR 2005:XXIII, p. 11619
<i>US – Anti-Dumping Methodologies (China)</i>	Appellate Body Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , <a href="#">WT/DS471/AB/R</a> and Add.1, adopted 22 May 2017
<i>US – Anti-Dumping Methodologies (China)</i>	Panel Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , <a href="#">WT/DS471/R</a> and Add.1, adopted 22 May 2017, as modified by Appellate Body Report WT/DS471/AB/R
<i>US – Shrimp II (Viet Nam)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , <a href="#">WT/DS429/R</a> and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R
<i>US – Shrimp II (Viet Nam) (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS429/12</a> , 15 December 2015
<i>US – Shrimp and Sawblades</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China</i> , <a href="#">WT/DS422/R</a> and Add.1, adopted 23 July 2012, DSR 2012:XIII, p. 7109
<i>US – Stainless Steel (Mexico) (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS344/15</a> , 31 October 2008, DSR 2008:XX, p. 8619
<i>US – Washing Machines (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS464/RPT</a> , 13 April 2017

WORLD TRADE ORGANIZATION  
AWARD OF THE ARBITRATOR

**United States – Certain Methodologies and  
Their Application to Anti-Dumping  
Proceedings Involving China**

Arbitrator:

Simon Farbenbloom

Parties:

China  
United States

## 1 INTRODUCTION

1.1. On 22 May 2017, the Dispute Settlement Body (DSB) adopted the Appellate Body Report<sup>1</sup> and the Panel Report<sup>2</sup> in *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*. This dispute concerns China's challenge of certain methodologies used by the United States in anti-dumping investigations. The Panel found certain of the United States' measures at issue to be inconsistent "as such" or "as applied" with various provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994). These Panel findings were not appealed by the United States and, in ruling on China's appeal, the Appellate Body did not make any additional findings of inconsistency with the covered agreements.

1.2. At the meeting of the DSB held on 19 June 2017, the United States indicated its intention to implement the DSB's recommendations and rulings in this dispute, and stated that it would need a reasonable period of time in which to do so.<sup>3</sup> On 11 July 2017, the United States and China sent a joint letter to the Chairman of the DSB. In their letter, the United States and China indicated that, in order to allow sufficient time to discuss a mutually agreed period of time for implementation, they had agreed that, in the event that an arbitration was requested under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), it should be completed no later than 60 days after the date of the appointment of an arbitrator, unless the arbitrator, following consultation with the parties, were to consider that additional time was required. In the same letter, the parties also confirmed that any award of the arbitrator, including an award not made within 90 days after the date of the DSB's recommendations and rulings in this dispute, would be deemed to be an award of the arbitrator for purposes of Article 21.3(c) of the DSU in determining the reasonable period of time for the United States to implement the recommendations and rulings of the DSB.<sup>4</sup>

1.3. By letter dated 17 October 2017, China informed the DSB that it had engaged in consultations with the United States on the reasonable period of time for implementation pursuant to Article 21.3(b) of the DSU, but that those consultations had not resulted in an agreement. China therefore requested that the reasonable period of time be determined through binding arbitration pursuant to Article 21.3(c) of the DSU. China expressed its intention to begin discussions with the United States with a view to reaching agreement on an arbitrator.<sup>5</sup>

1.4. By letter dated 30 October 2017, China informed the Director-General of the World Trade Organization (WTO) that it had engaged in consultations with the United States but that those consultations had not led to mutual agreement on an arbitrator. China therefore requested the Director-General to appoint an arbitrator pursuant to footnote 12 to Article 21.3(c) of the DSU.

<sup>1</sup> WT/DS471/AB/R.

<sup>2</sup> WT/DS471/R.

<sup>3</sup> WT/DSB/M/398, para. 2.7.

<sup>4</sup> WT/DS471/13.

<sup>5</sup> WT/DS471/14.

1.5. After consulting with the parties, the Director-General appointed me as the Arbitrator on 7 November 2017.<sup>6</sup> On the same day, I informed the parties of my acceptance of the appointment as Arbitrator and transmitted to them a Working Schedule identifying the dates for the filing of the parties' written submissions and the date for the hearing.<sup>7</sup>

1.6. On 9 November 2017, the United States sent a letter requesting that the due date for its written submission be extended by one week, in light of pre-existing scheduling constraints affecting key members of its litigation team, as well as the need for cooperation between two federal agencies, namely, the United States Trade Representative (USTR) and the United States Department of Commerce (USDOC). On the same day, I invited China to comment on the United States' letter. On 10 November 2017, China sent a letter objecting to the United States' request. China argued that the reasons given by the United States did not justify the requested extension and that such extension would cause undue delay in this arbitration. However, in the event that an extension of the due date was granted for the United States' written submission, China requested that a similar extension be granted for its written submission.

1.7. Having taken account of the United States' request and China's comments, and in view of a number of meetings and other activities taking place in early December 2017, on 10 November 2017, I sent a revised Working Schedule to the parties. In accordance with the revised Working Schedule, the United States filed its written submission on 17 November 2017, and China filed its written submission on 27 November 2017. The parties elaborated on their positions and answered my questions at the hearing held on 8 December 2017. At the hearing, I indicated that every effort would be made to issue the Award in January 2018. The parties expressed no objection.

## 2 ARGUMENTS OF THE PARTIES

2.1. Annexes A and B to this Award contain the executive summaries of the parties' submissions. Certain details of the parties' arguments are further described below, insofar as they are relevant to my analysis.

## 3 REASONABLE PERIOD OF TIME

### 3.1 Introduction

3.1. I have been appointed by the Director-General, at the request of China, to determine the reasonable period of time for the United States to implement the recommendations and rulings of the DSB in *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*.

3.2. The United States considers that I should determine that 24 months is a reasonable period of time for the United States to implement the DSB's recommendations and rulings in this dispute.<sup>8</sup> In China's view, the United States' proposal for 24 months "far exceeds what is reasonable under the circumstances" of this dispute<sup>9</sup>, and submits that a period of 6 months is a reasonable period of time for implementation.<sup>10</sup>

3.3. In this section, I begin by setting out the mandate of an arbitrator under Article 21.3(c) of the DSU. I then identify the specific measures to be brought into conformity with the recommendations and rulings of the DSB. Finally, I examine the factors affecting the determination of the reasonable period of time in this dispute, including the steps in the implementation process, as well as circumstances particular to this dispute that the United States has asked me to take into account in reaching my determination.

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<sup>6</sup> WT/DS471/15.

<sup>7</sup> The Working Schedule of 7 November 2017 indicated that the written submission of the United States should be filed on 14 November 2017; the written submission of China should be filed on 21 November 2017; and the hearing would be held on 27 November 2017.

<sup>8</sup> United States' submission, paras. 9 and 55.

<sup>9</sup> China's submission, para. 7.

<sup>10</sup> China's submission, paras. 1 and 28.

### 3.2 Mandate of the arbitrator under Article 21.3(c) of the DSU

3.4. Article 21.3 of the DSU provides, in relevant part:

If it is impracticable to comply immediately with the recommendations and rulings [of the DSB], the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

...

- (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.<sup>11</sup>

3.5. The mandate of the arbitrator, pursuant to Article 21.3(c) of the DSU, is therefore to determine the time period within which the implementing Member must comply with the recommendations and rulings of the DSB.<sup>12</sup>

3.6. Article 21.3(c) provides a guideline for the arbitrator that the period of implementation should not exceed 15 months. According to the last sentence of Article 21.3(c), the "particular circumstances" of the dispute may affect the length of the reasonable period of time, making it "shorter or longer". Other provisions of the DSU also shed light on the mandate of an arbitrator. Article 21.1 states that "prompt compliance" with the DSB's recommendations and rulings "is essential in order to ensure effective resolution of disputes". Moreover, the introductory clause of Article 21.3 stipulates that a reasonable period of time for implementation shall be available only "[i]f it is impracticable to comply immediately with the [DSB's] recommendations and rulings". Article 21.2 directs an arbitrator to pay "particular attention ... to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement".

3.7. The means of implementation chosen by the Member concerned is relevant to the determination of the reasonable period of time. As noted in past awards, "*when* a Member must comply cannot be determined in isolation from the means used for implementation."<sup>13</sup> Therefore, "to determine *when* a Member must comply, it may be necessary to consider *how* a Member proposes to do so."<sup>14</sup> Consistent with previous awards of arbitrators under Article 21.3(c), the implementing Member has a measure of discretion in choosing the means of implementation that it deems most appropriate. This discretion, however, "is not an 'unfettered' right to choose any method of implementation".<sup>15</sup> Rather, it is relevant to consider, in particular, "whether the

<sup>11</sup> Footnotes 12-13 omitted.

<sup>12</sup> In response to questioning at the hearing in this arbitration, both the United States and China agreed that the following principles are relevant for the determination of the reasonable period of time for implementation:

The implementing Member has discretion to select the means of implementation that it deems most appropriate.

The implementing Member's discretion is not unfettered. Rather, the chosen method of implementation:

- must be such that it could be implemented within a reasonable period of time in accordance with the guidelines contained in Article 21.3(c);
- must be apt in form, nature, and content to effect compliance; and
- should otherwise be consistent with the covered agreements.

The "particular circumstances" of a dispute may affect the arbitrator's calculation of the reasonable period of time, and may make it "shorter or longer".

While a Member is not required to utilize extraordinary procedures to bring its measures into compliance, it must nevertheless utilize all the flexibilities and discretion available within its legal and administrative system in order to implement within the shortest period of time possible.

<sup>13</sup> Award of the Arbitrator, *US – COOL (Article 21.3(c))*, para. 68. (emphasis original)

<sup>14</sup> Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 26. (emphasis original) See also Awards of the Arbitrators, *US – COOL (Article 21.3(c))*, para. 68; *US – Washing Machines (Article 21.3(c))*, para. 3.8.

<sup>15</sup> Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 36.



implementing action falls within the range of permissible actions that can be taken in order to implement the DSB's recommendations and rulings".<sup>16</sup> Thus, the chosen method of implementation must be apt in form, nature, and content to bring the Member into compliance with its WTO obligations.<sup>17</sup>

3.8. Inasmuch as they elaborate on those aspects of the measure at issue that were found to be inconsistent with WTO obligations, the findings by the panel in the underlying dispute offer guidance for determining whether the proposed implementing measures are apt to achieve compliance, as well as how long is reasonably needed to do so.<sup>18</sup> It is nevertheless beyond the mandate of an arbitrator under Article 21.3(c) to determine the consistency with the covered agreements of the measure that the implementing Member envisages to adopt in order to comply with the DSB's recommendations and rulings. This question, should it arise, is to be addressed in proceedings conducted pursuant to Article 21.5 of the DSU.<sup>19</sup> Arbitration under Article 21.3(c) of the DSU is limited to determining the period of time within which implementation of the recommendations and rulings of the DSB is to occur.<sup>20</sup>

3.9. As regards the length of the reasonable period of time, as noted above, Article 21.3(c) of the DSU provides a guideline for the arbitrator that this "should not exceed 15 months from the date of adoption of a panel or Appellate Body report". As set out above, Article 21.1 of the DSU provides that "prompt compliance" is essential for the effective resolution of WTO disputes, and the first clause of Article 21.3 stipulates that a "reasonable period of time" for implementation shall be available only "[i]f it is impracticable to comply immediately with the recommendations and rulings" of the DSB. According to the last sentence of Article 21.3(c), the "particular circumstances" of a dispute may affect the length of the reasonable period of time, making it "shorter or longer". In this respect, previous arbitrators have considered that the reasonable period of time for implementation should, in principle, be the shortest period possible within the legal system of the implementing Member<sup>21</sup> that will enable it to achieve effective implementation of the DSB's recommendations and rulings<sup>22</sup>, taking account of the "particular circumstances" of the dispute.<sup>23</sup>

3.10. In considering the "particular circumstances" under Article 21.3(c), previous arbitrators have found that the complexity of the implementation process and the nature of the steps to be taken for implementation are relevant to the determination of the reasonable period of time.<sup>24</sup> Previous arbitrators have also highlighted that the objective of "prompt compliance" calls for the implementing Member to utilize the flexibilities available within its legal system in implementing the relevant recommendations and rulings of the DSB in the shortest period of time possible.<sup>25</sup> However, an implementing Member is not expected to utilize "extraordinary procedures" to bring

<sup>16</sup> Awards of the Arbitrators, *Brazil – Retreaded Tyres* (Article 21.3(c)), para. 48; *Japan – DRAMs* (Korea) (Article 21.3(c)), para. 27; *US – Stainless Steel* (Mexico) (Article 21.3(c)), para. 42.

<sup>17</sup> See Awards of the Arbitrators, *Colombia – Ports of Entry* (Article 21.3(c)), para. 64; *China – GOES* (Article 21.3(c)), para. 3.2; *US – Countervailing Measures* (China) (Article 21.3(c)), para. 3.3; *Colombia – Textiles* (Article 21.3(c)), para. 3.4; *US – Washing Machines* (Article 21.3(c)), para. 3.8.

<sup>18</sup> See Award of the Arbitrator, *Colombia – Textiles* (Article 21.3(c)), paras. 3.5 and 3.39-3.40.

<sup>19</sup> See Awards of the Arbitrators, *Japan – DRAMs* (Korea) (Article 21.3(c)), para. 27; *US – Countervailing Measures* (China) (Article 21.3(c)), para. 3.4; *Colombia – Textiles* (Article 21.3(c)), para. 3.6.

<sup>20</sup> See Awards of the Arbitrators, *China – GOES* (Article 21.3(c)), para. 3.2; *US – Countervailing Measures* (China) (Article 21.3(c)), para. 3.4; *Peru – Agricultural Products* (Article 21.3(c)), para. 3.6; *US – Washing Machines* (Article 21.3(c)), para. 3.8.

<sup>21</sup> See Awards of the Arbitrators, *EC – Hormones* (Article 21.3(c)), para. 26; *Japan – DRAMs* (Korea) (Article 21.3(c)), para. 25; *China – GOES* (Article 21.3(c)), para. 3.3; *US – Countervailing Measures* (China) (Article 21.3(c)), para. 3.5.

<sup>22</sup> See Award of the Arbitrator, *US – Stainless Steel* (Mexico) (Article 21.3(c)), para. 53.

<sup>23</sup> See Awards of the Arbitrators, *China – GOES* (Article 21.3(c)), para. 3.3; *US – Countervailing Measures* (China) (Article 21.3(c)), para. 3.5.

<sup>24</sup> See Awards of the Arbitrators, *EC – Bananas III* (Article 21.3(c)), para. 19; *EC – Tariff Preferences* (Article 21.3(c)), para. 53; *US – Oil Country Tubular Goods Sunset Reviews* (Article 21.3(c)), para. 26; *US – Countervailing Measures* (China) (Article 21.3(c)), para. 3.19.

<sup>25</sup> See Awards of the Arbitrators, *US – Offset Act* (Byrd Amendment) (Article 21.3(c)), para. 64; *Japan – DRAMs* (Korea) (Article 21.3(c)), para. 25; *Brazil – Retreaded Tyres* (Article 21.3(c)), para. 48; *US – Stainless Steel* (Mexico) (Article 21.3(c)), para. 42; *China – GOES* (Article 21.3(c)), para. 3.4; *US – Countervailing Measures* (China) (Article 21.3(c)), para. 3.5; *US – Shrimp II* (Viet Nam) (Article 21.3(c)), para. 3.5; *Colombia – Textiles* (Article 21.3(c)), paras. 3.51-3.53.

its measure into compliance<sup>26</sup>, and implementation "must be effected in a transparent and efficient manner that affords due process to all interested parties".<sup>27</sup>

3.11. With regard to the burden of proof, it is well established that the implementing Member bears the overall burden to prove that the time period requested for implementation constitutes a "reasonable period of time".<sup>28</sup> However, this does not "absolve" the complaining Member of its duty to provide evidence supporting why it disagrees with the period of time proposed by the implementing Member, and to substantiate its view that any shorter period of time for implementation that it proposes is reasonable.<sup>29</sup>

### 3.3 Measures to be brought into conformity

3.12. The dispute underlying this arbitration concerns China's challenge of certain methodologies and their use by the USDOC in a number of anti-dumping proceedings. At the hearing, the parties accepted that the United States' implementing obligations relate to the findings made by the Panel that are set forth in paragraphs 8.1.a through 8.1.c of the Panel Report, and that the measures at issue could generally be summarized as follows<sup>30</sup>:

- a. in respect of the Single Rate Presumption (SRP):
  - i. the USDOC's presumption that, in anti-dumping proceedings involving a non-market economy (NME), exporters form part of an NME-wide entity and are assigned a single anti-dumping duty rate unless each exporter demonstrates, through the fulfilment of the criteria set out in the "Separate Rate Test", an absence of *de jure* and *de facto* governmental control of its export activities<sup>31</sup>; and
  - ii. the USDOC's determinations to apply the SRP in the 38 anti-dumping determinations challenged by China (namely, 13 original investigations and 25 administrative reviews)<sup>32</sup>;
- b. in respect of the weighted average-to-transaction (W-T) methodology applied in three of the 38 anti-dumping determinations challenged by China (namely, three original investigations):
  - i. the USDOC's determinations to apply the W-T methodology on the basis of:
    - its identification of a pattern of export prices which differ significantly among different purchasers, regions or time periods<sup>33</sup>; and
    - its explanation as to why such differences could not be taken into account by the comparison methodologies that are normally to be used<sup>34</sup>;

<sup>26</sup> See Awards of the Arbitrators, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 74; *Japan – DRAMS (Korea) (Article 21.3(c))*, para. 25; *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48; *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 42; *US – COOL (Article 21.3(c))*, para. 70; *China – GOES (Article 21.3(c))*, para. 3.4; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.5; *US – Washing Machines (Article 21.3(c))*, para. 3.9.

<sup>27</sup> Award of the Arbitrator, *China – GOES (Article 21.3(c))*, para. 3.46. See also Awards of the Arbitrators, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, para. 51; *Japan – DRAMS (Korea) (Article 21.3(c))*, para. 51; *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.36.

<sup>28</sup> See Awards of the Arbitrators, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47; *US – 1916 Act (Article 21.3(c))*, para. 33; *EC – Tariff Preferences (Article 21.3(c))*, para. 27; *China – GOES (Article 21.3(c))*, para. 3.5; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.6; *US – Washing Machines (Article 21.3(c))*, para. 3.10.

<sup>29</sup> Awards of the Arbitrators, *Colombia – Ports of Entry (Article 21.3(c))*, para. 67; *US – Washing Machines (Article 21.3(c))*, para. 3.10.

<sup>30</sup> At the hearing, China also referred to paragraph 6.7 of the Appellate Body Report in this dispute, where the Appellate Body declared certain Panel statements moot. However, China accepted that this finding does not create an additional implementation obligation for the United States.

<sup>31</sup> Panel Report, paras. 7.311 and 8.1.c.ii.

<sup>32</sup> Panel Report, para. 8.1.c.iii.

<sup>33</sup> Panel Report, para. 8.1.a.i. I note that the Panel's finding on this point pertains to two of the three original investigations at issue.

- ii. the USDOC's application of the W-T methodology to all export transactions<sup>35</sup>; and
- iii. the USDOC's use of zeroing under the W-T methodology<sup>36</sup>; and
- c. the USDOC's use of zeroing under the W-T methodology in one of the 38 anti-dumping determinations challenged by China (namely, one administrative review).<sup>37</sup>

3.13. In ruling on the claims raised by China against these measures, the Panel found:

- a. the SRP to be inconsistent "as such" with Article 6.10 and Article 9.2 of the Anti-Dumping Agreement<sup>38</sup>;
- b. the United States to have acted inconsistently with Article 6.10 and Article 9.2 of the Anti-Dumping Agreement because the USDOC applied the SRP in the 38 anti-dumping determinations challenged by China<sup>39</sup>;
- c. the United States to have acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement because of certain steps taken by the USDOC in relation to the W-T methodology and its use of zeroing under the W-T methodology in three original anti-dumping investigations<sup>40</sup>; and
- d. the United States to have acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because of the USDOC's use of zeroing under the W-T methodology in one administrative review.<sup>41</sup>

3.14. Accordingly, for purposes of this arbitration, the United States' implementation obligations pertain to the recommendations and rulings of the DSB with respect to one finding of "as such" inconsistency pertaining to the SRP, as well as several findings of "as applied" inconsistency pertaining to the USDOC's use of the SRP in 38 anti-dumping determinations and the USDOC's use of the W-T methodology, including its use of zeroing under that methodology, in four of these 38 anti-dumping determinations.

#### 3.4 Factors affecting the determination of the reasonable period of time

3.15. The United States considers that I should determine that 24 months is a reasonable period of time for implementing the DSB's recommendations and rulings in this dispute, due to "the number and magnitude of modifications to the challenged measures, the procedural requirements under U.S. law, the complexity of the issues involved, and the current resource demands and constraints on the USDOC".<sup>42</sup> The United States highlights "the breadth and complexity of the DSB's recommendations", in particular in light of the "as applied" findings, which relate to 38 anti-dumping determinations, and "the significant additional analysis that the USDOC likely will be required to undertake".<sup>43</sup> Regarding the chosen means of implementation, the United States intends to undertake two distinct sets of proceedings: (i) one proceeding pursuant to Section 123(g) of the Uruguay Round Agreements Act (URAA)<sup>44</sup> to address the "as such" recommendations and rulings of the DSB pertaining to the SRP; and (ii) 38 separate proceedings pursuant to Section 129(b) of the URAA<sup>45</sup> to address the DSB's "as applied" recommendations and rulings relating to the USDOC's use of the SRP in 38 anti-dumping determinations, as well as its use of the W-T methodology, and zeroing under that methodology, in certain of those

<sup>34</sup> Panel Report, para. 8.1.a.ii.

<sup>35</sup> Panel Report, para. 8.1.a.iii.

<sup>36</sup> Panel Report, para. 8.1.a.iv.

<sup>37</sup> Panel Report, para. 8.1.b.

<sup>38</sup> Panel Report, para. 8.1.c.ii.

<sup>39</sup> Panel Report, para. 8.1.c.iii.

<sup>40</sup> Panel Report, paras. 8.1.a.i-8.1.a.iv.

<sup>41</sup> Panel Report, para. 8.1.b.

<sup>42</sup> United States' submission, para. 10.

<sup>43</sup> United States' submission, para. 9.

<sup>44</sup> Codified as *United States Code*, Title 19, Section 3533(g) (contained in Exhibit USA-1).

<sup>45</sup> Codified as *United States Code*, Title 19, Section 3538(b) (contained in Exhibit USA-2).

determinations.<sup>46</sup> According to the United States, while these two sets of proceedings must be undertaken sequentially, there can be "a small degree of overlap" between them.<sup>47</sup> In particular, the United States proposes to commence the Section 129 proceedings once the preliminary determination in the Section 123 proceeding has been issued.<sup>48</sup>

3.16. China does not question the USDOC's recourse to proceedings under Section 123 and Section 129 of the URAA for purposes of implementation in this dispute.<sup>49</sup> In particular, China does not question that a Section 123 proceeding is an appropriate way to implement the DSB's "as such" recommendations and rulings pertaining to the SRP. Nor does China object to the degree of overlap between these proceedings that the United States indicates would occur. Rather, China accepts as reasonable the United States' proposal to commence the proceedings pursuant to Section 129 once the preliminary determination pursuant to Section 123 has been issued.<sup>50</sup> China nevertheless argues that the amount of time sought by the United States, both for its Section 123 proceeding and for the multiple Section 129 proceedings, is "unreasonably long" in the circumstances of this case.<sup>51</sup>

3.17. In my analysis below, I first address the parties' arguments concerning the specific steps to be taken by the United States in proceedings under Section 123 and Section 129, as well as the period of time that is reasonably required to complete such steps. I then address the particular circumstances of this dispute alleged by the parties to be relevant to my determination of the reasonable period of time.

### **3.4.1 Steps in the implementation process**

3.18. As indicated above, the parties agree that the implementation of the DSB's "as such" recommendations and rulings can and should take place through a proceeding under Section 123 of the URAA and that the implementation of the DSB's "as applied" recommendations and rulings pertaining to the 38 anti-dumping determinations challenged by China can and should take place through separate proceedings under Section 129 of the URAA. The parties disagree, however, on the time period necessary to conduct such proceedings. The subsections below address, in turn, the implementation of the DSB's "as such" recommendations and rulings through a Section 123 proceeding concerning the SRP, and the implementation of the DSB's "as applied" recommendations and rulings concerning the 38 anti-dumping determinations at issue through separate Section 129 proceedings.

#### **3.4.1.1 Implementation of the DSB's "as such" recommendations and rulings pertaining to the SRP**

3.19. In order to implement the DSB's recommendations and rulings pertaining to the Panel's "as such" finding regarding the SRP, the United States intends to utilize the process set out in Section 123(g) of the URAA. In addition, the United States indicates that, prior to the commencement of this process, it needs time to conduct "inter-agency consultations" and related activity<sup>52</sup> so as to allow the USTR and the USDOC to consider the options available for implementation.<sup>53</sup> In considering the period of time required to complete both, the initial period of inter-agency consultations and related activity, and the Section 123 proceeding, the United States emphasizes the "complexity" of the issues involved and the "far-reaching impact" of the

<sup>46</sup> United States' submission, para. 30. The United States refers to the Section 123 proceeding and the Section 129 proceedings as "Phase I" and "Phase II" of the implementation process, respectively. (Ibid., paras. 7 and 18)

<sup>47</sup> United States' submission, para. 26. See also para. 49 (United States' proposed timetable).

<sup>48</sup> United States' submission, paras. 7 and 26.

<sup>49</sup> China's submission, paras. 35-36; opening statement and response to questioning at the hearing.

<sup>50</sup> China's submission, paras. 27, 36, and 38; opening statement and response to questioning at the hearing.

<sup>51</sup> China's submission, para. 36.

<sup>52</sup> In its proposed timetable, the United States explains that, during this period, the USTR and the USDOC consult, "pre-commencement analysis preparation" is undertaken, and the USDOC "begins devising methodologies to implement adverse findings in preparation for commencement of section 123 and section 129 proceedings". (United States' submission, para. 49)

<sup>53</sup> United States' submission, para. 32. In its proposed timetable, the United States indicates that this preliminary step took place from May to December 2017 (i.e. approximately 7 months following the adoption of the Panel and Appellate Body Reports on 22 May 2017). (Ibid., para. 49)

implementation process.<sup>54</sup> In total, the United States claims that 15 months are required to address the DSB's "as such" recommendations and rulings pertaining to the SRP.<sup>55</sup> According to the United States, this amount of time is to be allocated as follows: approximately 7 months for the initial inter-agency consultations and related activity; approximately 4 months to issue the preliminary determination once the Section 123 proceeding has commenced; and approximately 4 months to issue the final determination in the Section 123 proceeding.<sup>56</sup>

3.20. China disputes that the implementation of the DSB's "as such" recommendations and rulings is nearly as complicated as the United States suggests.<sup>57</sup> In this context, China contends that the reasonable period of time should not include any time after the adoption of the Panel and Appellate Body Reports for preparatory work because the USTR and the USDOC had at least 7 months prior to the adoption of those reports to undertake such work.<sup>58</sup> Moreover, China contests the amount of time that the United States claims it requires to issue the preliminary and the final determinations. China submits that, in the present dispute, the United States requires only 15 days to issue a preliminary determination<sup>59</sup> and that the additional time allocated for the United States to issue the final determination "should be brief".<sup>60</sup>

3.21. Section 123(g)(1) and (2) of the URAA reads<sup>61</sup>:

**(g) Requirements for agency action**

**(1) Changes in agency regulations or practice**

In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until—

- (A) the appropriate congressional committees have been consulted under subsection (f)<sup>62</sup>;
- (B) the Trade Representative has sought advice regarding the modification from relevant private sector advisory committees established under section 135 of the Trade Act of 1974 (19 U.S.C. 2155);
- (C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification;
- (D) the Trade Representative has submitted to the appropriate congressional committees a report describing the proposed modification, the reasons for

<sup>54</sup> United States' submission, para. 35. See also heading II:B of that submission, where the United States refers to the "legal and technical complexity of this matter".

<sup>55</sup> United States' submission, paras. 24 and 36.

<sup>56</sup> United States' submission, para. 49.

<sup>57</sup> China's submission, para. 34.

<sup>58</sup> China's submission, para. 25. See also para. 39.

<sup>59</sup> China's submission, paras. 44 and 46.

<sup>60</sup> China's submission, para. 47.

<sup>61</sup> Section 123(g)(1) and (2) of the URAA (contained in Exhibit USA-1).

<sup>62</sup> Subsection (f) refers to "[a]ctions upon circulation of reports" and requires that:

Promptly after the circulation of a report of a panel or of the Appellate Body to WTO members in a proceeding described in subsection (d) of this section, the Trade Representative shall—

(1) notify the appropriate congressional committees of the report;

(2) in the case of a report of a panel, consult with the appropriate congressional committees concerning the nature of any appeal that may be taken of the report; and

(3) if the report is adverse to the United States, consult with the appropriate congressional committees concerning whether to implement the report's recommendation and, if so, the manner of such implementation and the period of time needed for such implementation.

(Section 123(f) of the URAA (contained in Exhibit USA-1))

the modification, and a summary of the advice obtained under subparagraph (B) with respect to the modification;

- (E) the Trade Representative and the head of the relevant department or agency have consulted with the appropriate congressional committees on the proposed contents of the final rule or other modification; and
- (F) the final rule or other modification has been published in the Federal Register.

## **(2) Effective date of modification**

A final rule or other modification to which paragraph (1) applies may not go into effect before the end of the 60-day period beginning on the date on which consultations under paragraph (1)(E) begin, unless the president determines that an earlier effective date is in the national interest.

3.22. Pursuant to Section 123(g)(1), proceedings under that section are used to amend, rescind, or otherwise modify regulations or practices of a department or agency of the United States in response to a WTO dispute settlement panel or Appellate Body report. In the present dispute, the Panel found the SRP to be a norm of general and prospective application that could be challenged "as such" in WTO dispute settlement.<sup>63</sup> In reaching this conclusion, the Panel stressed, *inter alia*, the "consistent application" of the SRP since 1991, demonstrating "a pattern of conduct by the USDOC that one can reasonably expect will be followed in the future".<sup>64</sup> I understand the parties to agree that Section 123(g) can and should be used to address the Panel's "as such" finding of inconsistency pertaining to the SRP.<sup>65</sup>

3.23. The parties further agree that subparagraphs (A) through (F) of Section 123(g)(1) above identify the steps involved in a Section 123 proceeding.<sup>66</sup> I note that the only prescribed time period is found in Section 123(g)(2), which provides that, normally, the final rule or modification may not go into effect until at least 60 days after the USTR and the USDOC have consulted with the relevant congressional committees on the proposed modification. As confirmed by the United States at the hearing, there are no other prescribed time periods for a proceeding under Section 123 or for the individual steps involved. I understand from the parties' explanations at the hearing that some of the steps of a Section 123 proceeding can take place concurrently. According to the United States, whereas a necessary first step of the process is for the USTR to begin consulting with the appropriate congressional committees in line with the requirements of subparagraph (A), the USTR is able to seek advice from relevant private sector advisory committees at the same time that the public is afforded an opportunity to comment on the proposal, as provided for in steps (B) and (C).<sup>67</sup> The United States nevertheless stressed that step (D), which involves preparing a report for the relevant congressional committees, can take place only after steps (B) and (C) are completed, since the report in question must summarize the results of the private sector consultations and public comments on the proposed modification. It also seems logical that the consultations with congressional committees foreseen in step (E) could be expected to occur only after submission of the report referenced in step (D). I further understand that no public notice is given of the date of commencement of a Section 123 proceeding (step (A)), and that step (C), which involves publishing the proposed modification and the explanation for the modification in the Federal Register, corresponds to the "preliminary determination" referred to by the parties in their submissions.<sup>68</sup> I note that the date by which step (C) can reasonably be completed in the context of the present dispute is of particular significance since the parties agree that the implementation of the DSB's "as applied"

<sup>63</sup> Panel Report, paras. 7.339 and 8.1.c.ii.

<sup>64</sup> Panel Report, paras. 7.336 and 7.337, respectively.

<sup>65</sup> United States' submission, para. 7; China's submission, para. 36; parties' responses to questioning at the hearing.

<sup>66</sup> United States' submission, para. 31; China's submission, para. 37; parties' responses to questioning at the hearing.

<sup>67</sup> By contrast, China considers that all of the steps described in subparagraphs (A), (B), and (C) can be conducted concurrently. (China's response to questioning at the hearing)

<sup>68</sup> Similarly, I understand that step (F), which involves publishing the final rule or other modification in the Federal Register, corresponds to the "final determination" referred to by the parties in their submissions.

recommendations and rulings through proceedings under Section 129 of the URAA should commence upon issuance of the preliminary determination under Section 123.

3.24. The parties disagree on the time necessary to complete the process under Section 123 in implementing the DSB's "as such" recommendations and rulings in this dispute and, in particular, on the time that is required for preparatory work and until issuance of a preliminary determination under Section 123. As set out above, the United States indicates that it requires 7 months from the adoption of the Panel and Appellate Body Reports to conduct inter-agency consultations and related activity prior to commencing a Section 123 proceeding. Regarding the time required to issue the preliminary determination once the proceeding under Section 123 has commenced, the United States submits that approximately 4 months are required. In support of these proposed time periods, the United States highlights the complexity of the issues at hand in this dispute, in particular since it is the first time that the United States is required to conduct such a modification of the SRP.<sup>69</sup>

3.25. By contrast, China maintains that no time after the DSB's adoption of the Panel and Appellate Body Reports should be awarded for inter-agency consultations and related activity.<sup>70</sup> China argues that the United States had ample time to conduct inter-agency consultations and analysis preparation prior to the adoption of these reports.<sup>71</sup> Similarly, according to China, 15 days are sufficient to issue the preliminary determination in light of the United States' awareness of the WTO-inconsistency of the SRP prior to the adoption of the Panel and Appellate Body Reports.<sup>72</sup>

3.26. Thus, in setting out their respective positions as to the time periods required to conduct inter-agency consultations and related activity, and to issue the preliminary determination, the parties mainly disagree on the complexity of implementing the "as such" recommendations and rulings of the DSB and the steps that the United States could and should have undertaken prior to the adoption of the Panel and Appellate Body Reports.

3.27. I first address China's argument that the United States should have begun taking steps towards implementation prior to the adoption of the Panel and Appellate Body Reports, whether in the form of inter-agency consultations or other preparatory work prior to the commencement of the Section 123 process, or under Section 123 after the process had commenced.<sup>73</sup> In its written submission, China emphasizes that, although the reasonable period of time for implementation is measured as from the date of adoption of the panel and Appellate Body reports<sup>74</sup>, to date, the United States "has not commenced any proceedings to revise or repeal its WTO-inconsistent measures and does not intend to begin to do so until [December 2017]".<sup>75</sup> Yet, China points out that the United States has known that the SRP is WTO-inconsistent since November 2014, when the panel report in *US – Shrimp II (Viet Nam)* was circulated. China highlights that the panel in that dispute also found the SRP to be WTO-inconsistent, and the United States did not appeal that finding.<sup>76</sup> China adds that, at the latest, the United States has known that it would have to bring certain of its measures, including the SRP, into conformity with the WTO agreements since November 2016, when the United States decided not to appeal the findings of inconsistency contained in the Panel Report in this dispute.<sup>77</sup> China also relies on Section 123(f)(3) of the URAA, which requires the USTR to consult with the appropriate congressional committees as to the manner of implementation "promptly after the circulation" of a panel or Appellate Body report. According to China, the USTR was thus required to enter into such consultations after the United States' decision not to appeal the Panel Report in November 2016.<sup>78</sup>

<sup>69</sup> United States' response to questioning at the hearing.

<sup>70</sup> China's submission, para. 25.

<sup>71</sup> China's submission, paras. 39-40. See also para. 25.

<sup>72</sup> China's submission, para. 46; opening statement and response to questioning at the hearing.

<sup>73</sup> China's submission, paras. 42-43 and 46.

<sup>74</sup> China's submission, para. 3.

<sup>75</sup> China's submission, para. 5 (referring to United States' submission, para. 49 (United States' proposed timetable)). See also para. 22 and fn 28 thereto.

<sup>76</sup> China's submission, para. 4 (referring to Panel Report, *US – Shrimp II (Viet Nam)*, para. 8.1.c).

<sup>77</sup> China's submission, para. 4.

<sup>78</sup> China's submission, para. 42. The United States argued at the hearing that Section 123(f)(3) does not require it to start implementation upon circulation of the relevant reports, and reiterated that implementation obligations arise as of the date of the DSB's recommendations and rulings. The United States further explained that consultations with Congress that take place prior to the adoption of the relevant reports pertain mainly to

3.28. As an initial matter, I note that previous arbitrators have considered consultations within government agencies to be a typical aspect of "law-making", and that, regardless of whether they are mandated by law, the time needed to undertake such consultations should be taken into account in determining a reasonable period of time for implementation.<sup>79</sup> In the specific context of this dispute, taking appropriate time for preparatory work – whether in the form of inter-agency consultations, other preparatory work, or consultations with appropriate congressional committees under Section 123(g)(1)(A) – could serve a useful and important purpose in ensuring that the resulting methodology will be consistent with the covered agreements. In particular, such preparatory work could facilitate (and therefore reduce the time required to undertake) subsequent steps in the implementation process.

3.29. Like previous arbitrators, I consider that formal implementation steps need only be taken after the adoption of the relevant panel and Appellate Body reports.<sup>80</sup> By the time of the hearing in this arbitration, over 6 months had elapsed since the DSB's adoption of the Panel and Appellate Body Reports in this dispute. According to the United States, it has taken implementation steps in the form of inter-agency consultations during that time.<sup>81</sup> In addition, the United States indicated at the hearing that consultations with the relevant congressional committees required by Section 123(g)(1)(A) are ongoing.<sup>82</sup> The United States also clarified that there are no public records of these preliminary steps.<sup>83</sup> I accept that some degree of consultation among the USDOC, the USTR, and the relevant congressional committees has already occurred. Nonetheless, in the absence of specific information from the United States about these consultations, the nature and timing of this preparatory work is unclear.

3.30. Whereas implementation obligations arise as of the date of the DSB's recommendations and rulings, I consider that circumstances pre-dating the adoption of the relevant panel or Appellate Body reports may in some instances bear on the determination of the reasonable period of time.<sup>84</sup> I am aware that the United States did not appeal the Panel's finding of "as such" inconsistency pertaining to the SRP. Therefore, the United States was, at least to a certain extent, in a position to begin considering its options for implementation prior to the adoption of the Panel and Appellate Body Reports in this dispute.<sup>85</sup> Moreover, as I will explain below, I am not persuaded that the implementation options available to the United States are especially numerous or complex. Thus, while I accept that preparatory work in the form of "inter-agency consultations" between the USDOC and the USTR or consultations with "appropriate congressional committees" is justified and, indeed, may well contribute to expediting the remaining steps in the implementation process, I do not consider that as many months are needed for these initial steps as the United States contends. I understand, as well, that these consultations in any event continue while the Section 123 process is ongoing.<sup>86</sup> I further recall that Article 21.1 of the DSU expressly identifies prompt compliance with the recommendations and rulings of the DSB as "essential in order to ensure effective resolution of disputes to the benefit of all Members" and that

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whether the United States will declare its intention to implement the reports' findings. (United States' response to questioning at the hearing)

<sup>79</sup> Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 42. See Awards of the Arbitrators, *Chile – Alcoholic Beverages (Article 21.3(c))*, para. 43; *US – Hot-Rolled Steel*, para. 38.

<sup>80</sup> Award of the Arbitrator, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.44. The parties agree that the reasonable period of time for implementation is measured as from the date of adoption of the relevant panel and Appellate Body reports. (United States' submission, para. 49; China's submission, para. 3)

<sup>81</sup> United States' submission, para. 32. See also para. 49 (United States' proposed timetable).

<sup>82</sup> In this respect, I note that, pursuant to Section 123(f)(3) of the URAA, the USTR shall consult with the appropriate congressional committees as to the manner of implementation of the report "promptly after the circulation" of a panel or Appellate Body report. (See *supra*, fn 62)

<sup>83</sup> United States' response to questioning at the hearing.

<sup>84</sup> See also Awards of the Arbitrators, *US – COOL (Article 21.3(c))*, para. 84; *China – GOES (Article 21.3(c))*, para. 3.30.

<sup>85</sup> I also note that, in *US – Shrimp II (Viet Nam) (Article 21.3(c))*, the United States indicated that consultations and other preparatory work had been undertaken in relation to the panel's "as such" finding. (Award of the Arbitrator, *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.33) In that case, the panel's "as such" finding at issue equally related to the USDOC's rebuttable presumption that all companies within an NME country belong to a single, NME-wide entity and that a single rate is assigned to that entity. (Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.122)

<sup>86</sup> At the hearing, the United States explained that background substantive work continues throughout the Section 123 process. (United States' response to questioning at the hearing)



implementing Members are expected to use the flexibilities available to them within their domestic legal system to achieve such prompt compliance.

3.31. I now turn to the United States' argument that implementing the DSB's "as such" recommendations and rulings in this dispute is particularly complex.<sup>87</sup> In this context, the United States emphasizes that it has several options for implementing the DSB's "as such" recommendations and rulings. According to the United States, the USDOC may need to consider, *inter alia*: (i) the kind and quantity of evidence required to establish governmental control over the exporters' export activities; (ii) the bases for requesting information from examined exporters regarding government ownership and control; and (iii) procedural matters associated with the collection and examination of such information.<sup>88</sup> At the hearing, the United States further emphasized the importance of background work in considering these options during the Section 123 process.<sup>89</sup> China takes issue with the alleged complexity of the implementation of the DSB's "as such" recommendations and rulings regarding the SRP. China contends that implementation is "straightforward" given that the United States is merely required to withdraw its practice of applying the SRP.<sup>90</sup>

3.32. I recall that, in the present dispute, the DSB's "as such" recommendations and rulings pertain to one Panel finding regarding the SRP. I further recall that, under the SRP, the USDOC presumes that, in anti-dumping proceedings involving an NME, exporters form part of an NME-wide entity and are assigned a single anti-dumping duty rate unless each exporter demonstrates an absence of *de jure* and *de facto* governmental control of its export activities.<sup>91</sup> I am not convinced that implementation in this case is necessarily straightforward, as China contends. Although the Panel found the SRP to be inconsistent "as such" with Articles 6.10 and 9.2 of the Anti-Dumping Agreement, it also agreed with the Appellate Body in *EC – Fasteners (China)* that "an investigating authority may treat multiple exporters as a single entity if it finds, through an objective affirmative determination, that there exists a situation that would signal that two or more legally distinct exporters are in such a relationship that they should be treated as a single entity."<sup>92</sup> Importantly, as noted above, the implementing Member has discretion in choosing the means of implementation it deems most appropriate. Moreover, while Article 3.7 of the DSU refers to the "withdrawal" of an inconsistent measure, it is clear that the obligation to bring a measure into conformity can also be met through modification of the measure found to be WTO-inconsistent.<sup>93</sup>

3.33. At the same time, I do not consider that implementation will necessarily be as complicated as the United States suggests. The United States explained at the hearing that it is considering the numerous possible options available to address the DSB's "as such" recommendations and rulings.<sup>94</sup> The United States views the development of an alternative analysis for single-exporter treatment as a WTO-consistent option for implementation in this dispute, and adds that this might entail a move from a presumption to a fact-based, case-by-case analysis.<sup>95</sup> In my view, while there may be a number of factors to be considered under such an option, there is a limit to the possible parameters that may be identified as relevant to the conduct of a case-specific factual analysis of this nature.<sup>96</sup> I also recall that no specific time periods are prescribed for any of the

<sup>87</sup> In its written submission, the United States also refers to the "novelty" of the issues in the present dispute. (United States' submission, para. 35) However, at the hearing, the United States acknowledged that this was not the first time that a presumption similar to the SRP was found to be inconsistent "as such" with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. The United States further clarified that its argument regarding any alleged novelty was in fact one relating to the complexity of addressing its implementation obligations in this dispute given that this is the first time that the United States is required to revise the SRP. (United States' response to questioning at the hearing)

<sup>88</sup> United States' submission, paras. 23 and 32.

<sup>89</sup> United States' response to questioning at the hearing.

<sup>90</sup> China's submission, para. 47.

<sup>91</sup> See Panel Report, para. 7.311.

<sup>92</sup> Panel Report, para. 7.361 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 376).

<sup>93</sup> Awards of the Arbitrators, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 50; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27; *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 71; *US – COOL (Article 21.3(c))*, para. 77; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.18.

<sup>94</sup> United States' opening statement at the hearing. See also United States' submission, para. 23.

<sup>95</sup> United States' opening statement and response to questioning at the hearing.

<sup>96</sup> In this context, I also note the United States' use of the Separate Rate Test as part of the SRP. As set out by the Panel, in order to overcome the presumption of governmental control and be eligible for a separate dumping margin and duty rate, the SRP requires individual exporters to make a specific request to that effect

steps preceding the issuance of a preliminary determination under Section 123(g). Moreover, I note that Section 123 proceedings have been utilized by the United States in a number of prior disputes for purposes of implementing the DSB's recommendations and rulings and that, on some occasions, the United States indicated that a much shorter period of time would be sufficient to complete the entire process.<sup>97</sup>

3.34. On the basis of the foregoing, I consider that the United States could reasonably conduct the necessary preparatory work and issue the preliminary determination under Section 123 in respect of the DSB's "as such" recommendations and rulings concerning the SRP in significantly less time than the 11 months it claims are needed. As the same time, I do not consider that the United States can reasonably be expected to issue this preliminary determination within the 15 days proposed by China.

3.35. Finally, I recall that the parties disagree on the length of time that the United States requires to complete the Section 123 process through the issuance of a final determination. The United States' proposed timetable indicates that, once the preliminary determination is issued, it requires approximately 4 additional months to issue the final determination under Section 123.<sup>98</sup> The United States emphasized that this time period is necessary to, *inter alia*, consider and address all comments received in response to its proposal before it can publish a final modification in the Federal Register.<sup>99</sup> China disagrees and submits that the allocated time "should be brief and the process should consist mostly of formalities".<sup>100</sup> At the hearing, China explained that it had not proposed a particular length of time for this step given that both parties agree that the Section 129 proceedings to implement the DSB's "as applied" recommendations and rulings will commence as from the issuance of the preliminary determination in the Section 123 proceeding.<sup>101</sup>

3.36. As a general matter, the full timeframe within which a Section 123 proceeding can be completed is relevant to the determination of the reasonable period of time for implementation by the United States pursuant to that provision. In this dispute, however, as the final stage of the Section 123 proceeding will proceed in parallel with the Section 129 proceedings, the date by which the Section 123 proceeding may reasonably be completed is not relevant to the determination of the reasonable period of time. This is because of the overlap between the Section 123 and Section 129 proceedings. Both parties agree that the Section 129 proceedings should begin upon issuance of the preliminary Section 123 determination. Both parties also agree that the time reasonably needed to undertake the Section 129 proceedings will inevitably exceed the time needed between the preliminary and final Section 123 determinations. Put differently, it is clear that it is the end of the Section 129 proceedings that will determine the end of the reasonable period of time for implementation in this dispute, and it is also clear that the Section 123 proceeding will be completed before the end of the Section 129 proceedings. For these reasons, I do not consider it necessary to address further how much time should reasonably be allocated for the USDOC to issue the final determination in the Section 123 proceeding.

#### **3.4.1.2 Implementation of the DSB's "as applied" recommendations and rulings pertaining to the 38 anti-dumping determinations at issue**

3.37. As indicated above, the United States plans to address the DSB's recommendations and rulings regarding the Panel's "as applied" findings through multiple proceedings under Section 129

and to pass the Separate Rate Test, which contains certain conditions aimed to establish *de jure* and *de facto* independence from governmental control. With respect to *de jure* governmental control, the USDOC evaluates the relevant laws, regulations, and other enactments in order to ascertain whether there is: (a) an absence of restrictive stipulations associated with an individual exporter's business and export licences; (b) any legislative enactments decentralizing control of companies; and (c) any other formal measures by the central and/or local government decentralizing control of companies. As for *de facto* governmental control, the USDOC assesses whether: (a) the export prices are set by, or subject to the approval of, government authority; (b) the exporter has the authority to negotiate and sign contracts and other agreements; (c) the exporter has autonomy from the government in making decisions regarding the selection of management; and (d) the exporter retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses. (Panel Report, para. 7.361 and fn 587 to para. 7.311)

<sup>97</sup> See Awards of the Arbitrators, *US – Oil Country Tubular Goods Sunset Review (Article 21.3(c))*, para. 7; *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 56.

<sup>98</sup> United States' submission, para. 49.

<sup>99</sup> United States' submission, para. 35.

<sup>100</sup> China's submission, para. 47.

<sup>101</sup> China's response to questioning at the hearing.

of the URAA. These findings concern the USDOC's use of the SRP in 38 anti-dumping determinations, as well as its use of the W-T methodology, and zeroing under that methodology, in certain of those determinations.<sup>102</sup> The United States claims that it will need approximately 13 months to complete these proceedings<sup>103</sup>, as from the date of issuance of the preliminary determination in the proceeding under Section 123 of the URAA.

3.38. Section 129(b) and (d) of the URAA states<sup>104</sup>:

**(b) Action by administering authority**

**(1) Consultations with administering authority and congressional committees**

Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

**(2) Determination by administering authority**

Notwithstanding any provision of the Tariff Act of 1930, the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

**(3) Consultations before implementation**

Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

**(4) Implementation of recommendation**

The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).

...

**(d) Opportunity for comment by interested parties**

Prior to issuing a determination under this section, the administering authority or the Commission, as the case may be, shall provide interested parties with an opportunity to submit written comments and, in appropriate cases, may hold a hearing, with respect to the determination.

3.39. The parties agree that Section 129 proceedings, in which the USDOC will carry out "redeterminations", are an appropriate means under US law for implementing the DSB's "as applied" recommendations and rulings with respect to the 38 anti-dumping determinations.<sup>105</sup> They both also accept that subparagraphs (1) through (4) above identify the steps involved in a

<sup>102</sup> The United States refers to the Section 129 proceedings as "Phase II" of its implementation process. (United States' submission, paras. 7 and 18)

<sup>103</sup> United States' submission, para. 49.

<sup>104</sup> Section 129(b) and (d) of the URAA (contained in Exhibit USA-2).

<sup>105</sup> United States' submission, paras. 6-7; China's submission, para. 36; China's response to questioning at the hearing.

Section 129 proceeding<sup>106</sup> and that these four steps are carried out sequentially. I also understand both parties to accept that, in this dispute, the USDOC's "redeterminations" should commence once the preliminary determination in the Section 123 proceeding has been issued.<sup>107</sup> The parties' views, however, diverge on the extent to which the multiple redeterminations that are needed can be conducted concurrently, and on the time required for these steps, notably with respect to: (i) the significance of the reference to a period of 180 days in Section 129(b)(2); and (ii) whether my determination of the reasonable period of time for implementation should account for the time that may be needed for the USDOC to conduct hearings and verifications in the Section 129 proceedings.

3.40. The United States' proposed timetable for implementation indicates that the Section 129 proceedings will commence in April 2018, once the preliminary determination in the Section 123 proceedings has been issued.<sup>108</sup> The United States contends that a separate Section 129 proceeding will be needed for each of the 38 anti-dumping determinations found to be WTO-inconsistent.<sup>109</sup> Furthermore, given the number of redeterminations to be carried out pursuant to Section 129, the United States anticipates that the USDOC will need to divide these 38 proceedings into three distinct tranches. The United States explains that the rationale for this "staggered" approach is due to the administrative burden on the USDOC, as well as overlapping deadlines for interested parties and the USDOC.<sup>110</sup> The commencement of the three tranches is expected in April, May, and June of 2018, respectively. The United States' proposed timetable<sup>111</sup> suggests that, between April and November 2018, the USDOC will: (i) "finalize [its] staggered schedule, considering, for example, whether tranches are staggered by product or by type of determination, e.g., investigation rather than administrative review"; (ii) collect additional information through, *inter alia*, the development, finalization, and issuance of questionnaires and/or information requests, the receipt of comments upon the responses received, and the development and issuance of possible follow-up questions and comments<sup>112</sup>; and (iii) determine the approach to be used for the first tranche of preliminary Section 129 determinations. According to the United States, the USDOC will continue to work in tranches until December 2018, by when preliminary determinations in all three tranches will have been issued. The United States adds that, between October 2018 and March 2019, the USDOC will afford interested parties the opportunity to comment on these preliminary determinations; that the USDOC may need to hold hearings and/or conduct verifications; and that the USDOC will also analyse comments received. According to the United States, the USDOC will be able to complete its work on the three tranches, including issuance of the final Section 129 determinations and addressing any ministerial error allegations relating to them, in the 3-month period ending in May 2019. Also in May 2019, the United States expects the USTR and the USDOC to engage in consultations with congressional committees, and the USTR to direct the USDOC to implement the final determinations in all of the Section 129 proceedings. Based on these considerations, the United States indicates that it will need approximately 13 months – from the issuance of the preliminary Section 123 determination in April 2018 through May 2019 – to complete the Section 129 proceedings.<sup>113</sup>

<sup>106</sup> United States' submission, paras. 38-39; China's submission, para. 49; parties' responses to questioning at the hearing.

<sup>107</sup> United States' submission, paras. 7 and 26; China's submission, paras. 27, 36 and 38; China's response to questioning at the hearing.

<sup>108</sup> United States' submission, para. 49.

<sup>109</sup> United States' submission, para. 40; response to questioning at the hearing. In its submission, the United States notes that the Section 129 proceedings for each of the 38 determinations, including the 13 original investigations and 25 administrative reviews, "likely" would need to be separate. (United States' submission, para. 40) At the hearing, the United States clarified that the use of the term "likely" is to denote a future occurrence and is not meant to suggest that it is contemplating anything different.

<sup>110</sup> At the hearing, the United States clarified that these overlapping deadlines occur as interested parties often have the same private counsel. (United States' response to questioning at the hearing)

<sup>111</sup> United States' submission, para. 49.

<sup>112</sup> The United States explains that the USDOC will need to solicit this additional information so as to determine, based on positive evidence, whether the relevant exporters or producers are separate legal entities. (United States' submission, para. 27)

<sup>113</sup> I understand this 13-month period to be reflected in the United States' proposed timetable as follows: (i) approximately 6 months for the USDOC to issue preliminary determinations; (ii) approximately 3 months for interested parties to submit briefs to the USDOC and for the USDOC to hold hearings, conduct verifications, as well as analyse and prepare responses to comments from interested parties; (iii) approximately 2 months for the USDOC to issue final determinations and for the USTR to issue a letter directing the USDOC to implement the final determinations; and (iv) approximately 2 additional months due to

3.41. China contends that the United States should be able to complete the Section 129 proceedings within 5 and a half months.<sup>114</sup> In China's view, all of the Section 129 proceedings should be run in parallel. China highlights that, while this dispute technically concerns 38 anti-dumping determinations, it in fact concerns 13 anti-dumping cases, some of which consist of multiple-segment proceedings.<sup>115</sup> According to China, the redeterminations could be streamlined because the USDOC could concurrently conduct multiple determinations with respect to the same investigation, and the analysis required would be simpler and the time needed shorter with respect to subsequent administrative reviews that raise the same issue, for example with respect to the SRP.<sup>116</sup> China argues that the United States' proposal to undertake the implementation of the DSB's "as applied" recommendations and rulings in 13 months is in "gross violation" of Section 129 of the URAA given that this provision imposes a maximum of 180 days to issue a redetermination.<sup>117</sup> According to China, this period of 180 days includes all fact-finding, verifications, hearings, and preliminary determinations.<sup>118</sup> China also suggests that, in ascertaining the time period that would be reasonable for completion of the Section 129 redeterminations, I look for "guidance" from the provisions of US law that govern anti-dumping determinations. According to China, under the relevant regulations, the USDOC is permitted 215 days "to undertake an anti-dumping determination from scratch".<sup>119</sup> In this regard, China underlines that the nearly 400-day period proposed by the United States to conduct the Section 129 proceedings in this dispute is almost double the length prescribed for original investigations.<sup>120</sup> China adds that this goes against the reasoning of previous arbitrators under Article 21.3(c) of the DSU, who have recognized that a redetermination should be shorter than an original investigation because the implementing Member is "only required to conduct a re-determination to implement a limited number of DSB rulings of inconsistency."<sup>121</sup> China also argues that no additional time should be granted for on-site verifications given that such verifications are not required under Section 129 of the URAA and seldom carried out by the USDOC in redetermination processes.<sup>122</sup> In further support of its proposed 5 and a half month period for the Section 129 proceedings, China refers to information published in relation to the Section 129 proceedings undertaken in response to the DSB's recommendations and rulings in *US – Shrimp and Sawblades*, showing that the USDOC completed its redetermination in that dispute in 180 days and that the USTR directed implementation of that determination 18 days later.<sup>123</sup>

3.42. I begin by considering the United States' proposed approach to the various Section 129 proceedings, including whether these proceedings need to be staggered or conducted concurrently. As noted above, the United States identifies the large number of redeterminations needed, as well as the associated administrative workload and due process considerations, as key reasons for staggering the Section 129 proceedings in tranches.

3.43. China asserts that the United States' argument regarding the USDOC workload is not a relevant consideration in determining the reasonable period of time, and that, in any event, the USDOC is capable of handling a large number of investigations and reviews in parallel.<sup>124</sup> I recall

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the fact that the USDOC's conduct of the redeterminations will be staggered in three tranches. (United States' submission, para. 49)

<sup>114</sup> China's submission, para. 27. See also paras. 54-56. China highlights that a Section 129 proceeding involves three stages: (i) a consultation stage, which is to be conducted "'promptly' after the circulation of the report"; (ii) a determination stage, which is to take place within 180 days; and (iii) a final consultation stage. According to China, the first consultation stage should have taken place after the circulation of the Panel Report in this dispute. China further submits that the determination stage can be completed within 5 months, and that the final consultation stage can be completed within 15 days. (Ibid., paras. 51-56)

<sup>115</sup> China's submission, para. 61.

<sup>116</sup> China's submission, paras. 55 and 61; response to questioning at the hearing.

<sup>117</sup> China's submission, para. 57. See also paras. 52 and 55.

<sup>118</sup> China's response to questioning at the hearing.

<sup>119</sup> China's submission, para. 58. See also China's opening statement at the hearing. As explained at para. 3.46. and fn 135 below, the United States disputes that the USDOC is required by law to complete original investigations within 215 days.

<sup>120</sup> China's submission, para. 58.

<sup>121</sup> China's submission, para. 58 (quoting Awards of the Arbitrators, *Japan – DRAMS (Article 21.3(c))*, para. 48; *US – Washing Machines (Article 21.3(c))*, para. 3.50).

<sup>122</sup> According to China, the USDOC conducted verifications in only three of 20 recent Section 129 proceedings. (China's submission, para. 59 and fn 67 thereto)

<sup>123</sup> China's response to questioning at the hearing (referring to the dispute in *US – Shrimp and Sawblades* (DS422)).

<sup>124</sup> China's submission, para. 64.

that several previous arbitrators have considered that, in principle, the workload of the implementing authority is not relevant to the determination of the reasonable period of time for implementation of the DSB's recommendations and rulings.<sup>125</sup> I share that view. I further note that, in its submission, the United States sets out a possible division of the redeterminations into three tranches: one tranche for the redeterminations in respect of 13 investigations, a second tranche for the redeterminations in respect of 13 administrative reviews, and a third tranche for the redeterminations to be made in respect of the remaining 12 administrative reviews. At the same time, the United States explains that this proposed division of work is merely "illustrative", and that the USDOC expects to consider other possible ways of grouping redeterminations into tranches, for example by product or by type of determination (investigation or administrative review).<sup>126</sup> In my view, the proposed approach of addressing the redeterminations in tranches is a matter for the US authorities. In this regard, previous arbitrators have said that an implementing Member has a measure of discretion in choosing the means of implementation that it deems most appropriate.<sup>127</sup> Indeed, it is just this type of flexibility, within their respective legal systems, that Members are expected to utilize in order to achieve prompt compliance with DSB recommendations and rulings. I note that the commonality in the issues to be considered and the relationship between original investigations and subsequent administrative reviews for the same products are such that it may be possible for the USDOC to expedite its work for many of the redeterminations.

3.44. As regards the 180-day period referred to in Section 129(b)(2) of the URAA, the United States contests China's assertions that this provision constrains the USDOC to carry out all aspects of a redetermination within a maximum of 180 days and that, therefore, the 13-month period proposed by the United States is inconsistent with its own statute.<sup>128</sup> The United States explains that Section 129(b)(2) does not set any overall limit on the length of time that may be used to complete all of the steps involved in a redetermination, because the 180-day period to which it refers is triggered not when the USDOC begins its work pursuant to Section 129, but only when the USTR makes a written request to the USDOC relating to the redetermination. The United States adds that nothing in the statute precludes the USDOC from commencing a Section 129 proceeding prior to receipt of a written request from the USTR, and beginning, for example to issue questionnaires to parties prior to the receipt of such a request, as has been done in prior implementation proceedings. The United States recognizes that there have been cases where an entire Section 129 proceeding could be completed within 180 days; however, whether this can be done or not is decided on a case-by-case basis.<sup>129</sup> The United States rejects, therefore, China's invocation in this dispute of the time taken for the Section 129 proceedings undertaken in response to the DSB's recommendations and rulings in *US – Shrimp and Sawblades*. The United States explains that the implementation required in this case is very different from that in *US – Shrimp and Sawblades*, given that here the USDOC will be applying a new methodology and presumably gathering information about the relationship between importers and exporters.<sup>130</sup>

3.45. I note that the period of 180 days specified in the text of Section 129(b)(2) of the URAA refers to the period within which, following the receipt of a written request from the USTR, the USDOC must issue a determination implementing the recommendations and rulings of the DSB. As the United States points out, it is the USDOC's receipt of a written request from the USTR, rather than the commencement of a Section 129 proceeding, that triggers the start of the 180-day period. Such request could, in principle, be received before or after the USDOC begins its work on the redetermination. Moreover, subparagraphs (1), (3), and (4) of Section 129(b) set out other actions involving the USTR, the USDOC, and Congress that are to be carried out both before and after the written request has been made pursuant to Section 129(b)(2). I am therefore not persuaded by China's assertion that Section 129(b)(2) establishes a maximum time period within which all steps of a Section 129 redetermination must be completed. Instead, as previous

<sup>125</sup> Awards of the Arbitrators, *US – 1916 Act (Article 21.3(c))*, para. 38; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.49; *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.55; *US – Washing Machines (Article 21.3(c))*, para. 3.63.

<sup>126</sup> United States' submission, fn 10 to para. 7. See also para. 49.

<sup>127</sup> Awards of the Arbitrators, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48; *China – GOES (Article 21.3(c))*, para. 3.4; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.3; *US – Washing Machines (Article 21.3(c))*, para. 3.8.

<sup>128</sup> United States' response to questioning at the hearing.

<sup>129</sup> United States' response to questioning at the hearing.

<sup>130</sup> United States' response to questioning at the hearing.

arbitrators have done<sup>131</sup>, I accept the United States' explanations regarding the scope of this provision. This is, of course, without prejudice to the question of how much time is reasonably needed to conduct the Section 129 proceedings in this dispute.

3.46. I turn next to the question of the relevance, for the reasonable period of time for implementation, of the relative scope of original investigations and administrative reviews, on the one hand, and redeterminations, on the other hand. Relying on the reasoning of previous arbitrators, China argues that, since the scope of the redeterminations needed is much more limited, these proceedings require significantly less time than the time required in original proceedings.<sup>132</sup> I accept the logic of this proposition. At the same time, I am mindful that the length of time needed for original investigations under US law is contested. While China asserts that such proceedings may take a maximum of 215 days<sup>133</sup>, the United States contends that they may take up to 355 days.<sup>134</sup>

3.47. In considering the time that is reasonably necessary to conduct the requisite Section 129 proceedings in this dispute, I note that, as clarified by the United States at the hearing, there is no provision of US law that mandates that all steps taken in original investigations must also be taken in Section 129 redeterminations.<sup>135</sup> Moreover, the Section 129 redeterminations may well be more limited in scope than the proceedings in which the original, WTO-inconsistent determinations were made. Yet, as noted above, the United States views the development of an alternative analysis for single-exporter treatment as a WTO-consistent option for implementation in this dispute, and adds that this might entail a move from a presumption to a fact-based, case-by-case analysis.<sup>136</sup> I consider that this renders it less likely that the USDOC will be able to make all of the required re-determinations without re-opening its factual record in at least some of the relevant proceedings.

3.48. These considerations are also relevant to the disagreement between the parties on whether or not my determination of the reasonable period of time should account for the time that may be needed for the USDOC to hold hearings and conduct verifications as part of the Section 129 proceedings. It is undisputed that: (i) the USDOC is not required to conduct verifications in such proceedings; (ii) pursuant to Section 129(d), the USDOC may, "in appropriate cases", hold a hearing; and (iii) in practice, the USDOC often does not take either of these steps in a Section 129 proceeding. Nevertheless, bearing in mind the nature of the implementation that the United States proposes to undertake in these redeterminations, and mindful that investigated exporters and producers themselves benefit from the opportunity to defend their interests in hearings and through the process of verification, I would be reluctant to determine any period of time for implementation that would foreclose the possibility that such procedural steps could be taken if and when warranted. Lastly, with respect to the 1 month that the United States indicates is usually taken for correction of any ministerial errors<sup>137</sup>, the United States accepted at the hearing that the process of addressing ministerial errors can be conducted concurrently with the process of consulting Congress.<sup>138</sup>

3.49. On the basis of the foregoing, I consider that the United States could reasonably complete all of the Section 129 redeterminations in respect of the DSB's "as applied" recommendations and rulings concerning the 38 anti-dumping determinations found to be WTO-inconsistent in significantly less time than the 13-month period it has proposed. At the same time, I believe that the Section 129 redeterminations to be undertaken in this dispute will require more than the 5 and a half months proposed by China.

<sup>131</sup> Awards of the Arbitrators, *US – Countervailing Measures (China)* (Article 21.3(c)), para. 3.41; *US – Shrimp II (Viet Nam)* (Article 21.3(c)); para. 3.46; *US – Washing Machines* (Article 21.3(c)), para. 3.47.

<sup>132</sup> China's submission, para. 58 (referring to Awards of the Arbitrators, *Japan – DRAMS (Korea)* (Article 21.3(c)), para. 48; *US – Washing Machines* (Article 21.3(c)), para. 3.50).

<sup>133</sup> China's submission, para. 58; opening statement at the hearing.

<sup>134</sup> The United States explained at the hearing that US law allows for the possibility of extension of the deadlines for the issuance of the preliminary and final determinations in an anti-dumping investigation. The United States added that, when account is also taken of the time needed to deal with any potential ministerial errors, an entire investigation may take 355 days. (United States' opening statement at the hearing)

<sup>135</sup> United States' response to questioning at the hearing.

<sup>136</sup> United States' opening statement and response to questioning at the hearing.

<sup>137</sup> United States' submission, para. 46.

<sup>138</sup> United States' response to questioning at the hearing.

### 3.4.2 Particular circumstances of this dispute

3.50. The United States identifies the following as "particular circumstances" of this dispute that, in its view, weigh in favour of a longer period of time for implementation: (i) the number and magnitude of modifications to the challenged measures; (ii) the procedural requirements under its domestic law; (iii) the complexity and novelty of the issues involved; (iv) the current workload of the USDOC; and (v) the continuing formation of the US administration and the fact that many key positions at the USDOC have yet to be filled.<sup>139</sup> The United States also points to the agreement reached by China and the European Union in *EC – Fasteners (China)*, setting the reasonable period of time for implementation by the European Union at 14 months and 2 weeks.<sup>140</sup> The United States highlights the "similarity of one of the major substantive issues" in *EC – Fasteners (China)* and this dispute<sup>141</sup>, and adds that "the significantly larger number of administrative determinations" in the present dispute<sup>142</sup> warrants a substantially longer reasonable period of time.<sup>143</sup> In addition, the United States emphasizes that China made a "choice" to bring "as applied" claims against 38 distinct anti-dumping determinations.<sup>144</sup> For the United States, when a complaining Member chooses to bring a dispute of this magnitude, it must recognize that the responding Member will need more time to implement the DSB's recommendations and rulings.<sup>145</sup>

3.51. For its part, China contends that I should take account of what it alleges to be the United States' record of failing to meet previous reasonable period of time deadlines in reaching my determination of the reasonable period of time in this dispute.<sup>146</sup>

3.52. I have addressed several of these circumstances above. With respect to the remaining circumstances advanced by the United States, China argues that any additional workload arising from the DSB's recommendations and rulings in this dispute and practical challenges the USDOC may face in handling that workload are not relevant to the determination of the reasonable period of time for implementation of the DSB's recommendations and rulings.<sup>147</sup> China also disagrees that the reasonable period of time agreed by the parties in *EC – Fasteners (China)* is relevant to my determination of the reasonable period of time in this dispute. In particular, China argues that, contrary to the present dispute, the DSB's recommendations and rulings in *EC – Fasteners (China)* required implementation through legislative means, which is more time-consuming than the means of implementation proposed by the United States in this dispute. In addition, China contends that the USDOC is capable of conducting all relevant redeterminations in parallel and that China's "choice" to challenge 38 anti-dumping determinations reflects the USDOC's widespread use of WTO-inconsistent measures and does not warrant the grant of a longer period of time for implementation.<sup>148</sup>

3.53. With respect to the allegedly heavy workload of the USDOC, the United States argues that my determination of the reasonable period of time should account for the administrative burden associated with the addition of 38 implementation proceedings on top of the USDOC's existing heavy workload.<sup>149</sup> As I have noted above, previous arbitrators have declined to find that the

<sup>139</sup> United States' submission, paras. 10 and 50-54. With respect to the current workload of the USDOC, the United States argues that the USDOC recently experienced "a significant increase in new anti-dumping and countervailing duty petitions covering an array of different products and countries" and that, as of 8 November 2017, there were 77 ongoing anti-dumping and countervailing duty investigations, 129 ongoing periodic reviews, and seven ongoing new shipper reviews. (Ibid., paras. 51-52)

<sup>140</sup> United States' submission, para. 11.

<sup>141</sup> United States' submission, para. 12.

<sup>142</sup> The United States contends that the reasonable period of time should account for the need to conduct "significant additional analysis" on its part, owing to the 38 determinations that China chose to challenge in this dispute, as opposed to one determination in *EC – Fasteners (China)*. (United States' submission, paras. 9 and 12-13)

<sup>143</sup> United States' submission, para. 12.

<sup>144</sup> United States' submission, para. 13.

<sup>145</sup> Ibid.

<sup>146</sup> China's opening statement at the hearing. China also submits that I should take into account the United States' early awareness of its implementing obligations in my determination of the reasonable period of time. (China's submission, paras. 31, 40, 42 and 46) I have addressed this issue at paragraphs 3.27. - 3.30. above.

<sup>147</sup> China's submission, paras. 66-68. See also para. 64.

<sup>148</sup> China's submission, paras. 30-32 and 65.

<sup>149</sup> United States' submission, para. 52; response to questioning at the hearing.



workload of the implementing authority warranted a longer period of time for implementation.<sup>150</sup> In this dispute, the United States has neither demonstrated the impact that the implementation process would have on the USDOC's workload, nor explained how such workload should be taken into account in my determination of the reasonable period of time. Moreover, I recall that the implementing Member is expected to use all available flexibilities within its legal system to ensure "prompt compliance" with the DSB's recommendations and rulings in accordance with Article 21 of the DSU.<sup>151</sup> In my view, prioritizing compliance action in respect of the DSB's recommendations and rulings at issue in these proceedings would constitute an exercise of flexibility available to the USDOC, which it would be expected to utilize.<sup>152</sup> Accordingly, I do not consider the USDOC's workload to be relevant to my determination of the reasonable period of time for implementation in this dispute.

3.54. Regarding the continuing formation of the US administration and the fact that certain key positions at the USDOC remain vacant, the United States explained at the hearing that, even though an "extra month here or there" has not been added to its proposed schedule for this reason, this factor was nevertheless taken into account in developing that schedule.<sup>153</sup> The United States added that, while this "particular circumstance" affects both proceedings under Section 123 and Section 129 of the URAA, the former is affected relatively more, given that it is a policy process.<sup>154</sup> Although the United States has clarified, to some extent, the stages of the implementation process where this factor could have an impact, it has not persuaded me that the USDOC would not be able to use the flexibilities and the staff available to it to act with appropriate dispatch in achieving compliance with its WTO obligations in this dispute. Therefore, I do not consider this to be a particular circumstance relevant to the determination of the reasonable period of time for implementation in this dispute.

3.55. I am similarly unpersuaded that I should take account of the reasonable period of time agreed by the parties in *EC – Fasteners (China)*. The DSB recommendations and rulings in that dispute did not apply to the United States. Rather, they concerned a measure taken by another WTO Member, and implementation was undertaken in a different legal system.<sup>155</sup> For these reasons, I consider that the reasonable period of time agreed by China and the European Union in *EC – Fasteners (China)* is not relevant to my determination in this arbitration.

3.56. Finally, with respect to China's argument regarding the United States' alleged record of failing to comply within applicable reasonable periods of time in previous disputes, I note that the United States contests the existence of such a track-record.<sup>156</sup> I am also mindful that each dispute, and the implementation process that may follow the DSB's recommendations and rulings, embody their own set of facts and context. Thus, I do not consider any such alleged track-record to be a particular circumstance relevant to my determination of the reasonable period of time for implementation in this dispute.

## 4 AWARD

4.1. In light of the foregoing considerations, the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this dispute is 15 months, from 22 May 2017, that is, from the date on which the DSB adopted the Panel and Appellate Body Reports in this dispute. The reasonable period of time for implementation will expire on 22 August 2018.

<sup>150</sup> Awards of the Arbitrators, *US – 1916 Act (Article 21.3(c))*, para. 38; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.49; *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.55; *US – Washing Machines (Article 21.3(c))*, para. 3.63.

<sup>151</sup> See Awards of the Arbitrators, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 64; *Japan – DRAMS (Korea) (Article 21.3(c))*, para. 25; *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 73; *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 42; *China – GOES (Article 21.3(c))*, para. 3.4; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.49; *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.55; *Colombia – Textiles (Article 21.3(c))*, paras. 3.51-3.53; *US – Washing Machines (Article 21.3(c))*, para. 3.9.

<sup>152</sup> Award of the Arbitrator, *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.55.

<sup>153</sup> United States' response to questioning at the hearing.

<sup>154</sup> United States' response to questioning at the hearing.

<sup>155</sup> See Award of the Arbitrator, *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.38.

<sup>156</sup> United States' response to questioning at the hearing.

4.2. Signed in the original at Geneva this 15th day of December 2017 by:

A handwritten signature in black ink, appearing to read 'S. Farbenbloom', written over a horizontal line.

Simon Farbenbloom  
Arbitrator

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**ANNEX A****EXECUTIVE SUMMARY OF THE UNITED STATES' SUBMISSION**

1. The amount of time a Member requires for implementation of DSB recommendations depends on the particular facts and circumstances of the dispute, including the scope of the recommendations and the types of procedures required under the Member's laws to make the necessary changes in the measures at issue. Specific circumstances identified in previous awards as relevant to the Arbitrator's determination of the RPT include: (1) the legal form of implementation; (2) the technical complexity of the measure the Member must draft, adopt, and implement; and (3) the period of time in which the implementing Member can achieve that proposed legal form of implementation in accordance with its system of government.

2. The United States would draw the Arbitrator's attention to the reasonable period of time to which China agreed pursuant to Article 21.3(b) of the DSU in the *EC – Fasteners (China)* dispute. In that dispute, China reached agreement with the European Union on a reasonable period of time of 14 months and two weeks. While *EC – Fasteners (China)* involved an "as such" finding and "as applied" findings with respect to one antidumping determination, this dispute involves an "as such" finding on a very similar measure and "as applied" findings concerning 38 separate determinations. This dispute also involves "as applied findings" with respect to four of those 38 determinations concerning the use of the alternative, average-to-transaction comparison methodology and "zeroing". The similarity of one of the major substantive issues in these two disputes, coupled with the significantly larger number of administrative determinations involved here, warrants a substantially longer compliance period in this dispute, as China logically should agree. When choosing to bring a dispute of this magnitude, the complaining Member must recognize that it will take more time for the responding Member to implement any and all adverse findings.

3. Addressing the numerous findings in this dispute requires a multi-phase process. The most practical way under U.S. law to implement the recommendations of the DSB would be to conduct proceedings under both section 123 and section 129 of the *Uruguay Round Agreements Act* ("URAA"). First, the United States contemplates conducting a proceeding pursuant to section 123 of the URAA to address the Panel's "as such" findings under the AD Agreement. Second, the United States contemplates conducting proceedings pursuant to section 129 of the URAA to address the Panel's "as applied" findings as they relate to 13 original investigations and 25 administrative reviews. The United States anticipates that it will not be possible to commence the 38 section 129 proceedings (Phase II) until the section 123 proceeding (Phase I) has been mostly completed. The United States expects that any approach to address the DSB recommendations concerning the Panel's "as such" findings under the AD Agreement will need to be developed through the section 123 proceeding before it could be applied or adapted in the 38 section 129 proceedings concerning the challenged determinations. Therefore, Phases I and II must be undertaken sequentially, although there could be a small degree of overlap in the two phases.

4. Both parties, as well as the WTO dispute settlement system as a whole, have a strong interest in setting the RPT at a length that allows for an implementation process that takes account of all available information and uses a well-considered approach to implementing the findings in the Appellate Body and Panel reports. In this dispute, the RPT determined by the Arbitrator should be of sufficient length to allow the United States to address all of the various DSB recommendations in a manner consistent with relevant WTO obligations. Such a result would preserve the rights of the United States to have a reasonable time for compliance and to impose appropriate antidumping duties, while at the same time preserving China's rights to ensure that antidumping duties are imposed in accordance with WTO rules. If the RPT is too short to permit the United States to address the DSB's recommendations effectively, the likelihood of a "positive solution" to the dispute would be reduced.

5. The volume and complexity of the DSB's recommendations – in particular the "as applied" findings related to the 38 separate determinations that China chose to challenge together in this one dispute – and U.S. legal requirements should be considered in determining the appropriate reasonable period of time to secure a "positive solution" for this dispute. For the reasons outlined in this submission, a period of no less than 24 months is a reasonable period of time for implementation.

**ANNEX B****EXECUTIVE SUMMARY OF CHINA'S SUBMISSION**

1. The reasonable period of time ("RPT") for the United States to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in this dispute should be six months from the adoption of the Panel and Appellate body reports. Article 21 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") requires a Member to promptly comply with DSB recommendations, which, according to jurisprudence developed by arbitrators under Article 21.3(c), requires compliance within the shortest period possible within the legal system of the Member. The particular facts and circumstances of the dispute can bear on the arbitrator's finding of a reasonable period of time, but only to the extent they assist the arbitrator in determining the shortest period possible in which the Member can comply.

2. The United States' 24 month-request ignores the United States' long period of inactivity after it became aware it would have to implement the Panel's findings. The United States knew its implementation obligations no later than November 2016, when it chose not to appeal the Panel report. It should have been preparing for compliance since that time, and under no circumstances should it be granted an RPT that includes time *after* the DSB's recommendations and rulings were adopted for pre-commencement planning and analysis. This is particularly true considering that China requested consultations with the United States nearly four years ago now, and its exporters have suffered under USDOC's WTO-inconsistent anti-dumping duties for the entire intervening time.

3. The United States reliance on the reasonable period of time agreed to by China in *EC – Fasteners (China)* is misplaced. Contrary to the United States' contention, China believes that the RPT for this dispute should be substantially shorter than that in *EC – Fasteners (China)*. The jurisprudence makes clear that compliance action requiring legislative means will be more time consuming than implementation that can be conducted entirely administratively. The "as such" ruling in *EC – Fasteners (China)* concerned a statute, not an administrative measure, as here, suggesting the RPT in that dispute should be longer than here. Additionally, as the "as such" ruling in *EC – Fasteners (China)* was appealed, unlike here, the European Union had far less time to prepare for implementation prior to the issuance of the DSB's recommendations than the United States has had in this dispute, again suggesting the need for a longer RPT. Finally, the number of "as applied" determinations that must be addressed is a red herring, as the USDOC is capable of running its redeterminations in parallel.

4. The United States' request for 24 months overstates the complexity of compliance. China does not object to the United States' proposal to conduct a proceeding pursuant to section 123 of the *Uruguay Round Agreements Act* ("URAA") to address the Panel's "as such" findings under the *Anti-Dumping Agreement*, and then to conduct proceedings pursuant to section 129 of the URAA to address the Panel's "as applied" findings. Nor does China object to the United States waiting to commence its section 129 proceedings until the preliminary determination in the section 123 proceeding has been issued. China, does, however, object to the time the United States proposes each of these processes should take. The USDOC should have concluded any and all "pre-commencement" preparatory work *prior* to the adoption of the recommendations and rulings, and should have been able to produce a preliminary determination under Section 123 in *two weeks*. The DSB's "as applied" recommendations relating to 13 original investigations and 25 administrative reviews undertaken by the USDOC likewise will not require anywhere near the 13 months requested by the United States, which in any case is more than is permitted under United States' law. Rather, this aspect of the United States' compliance obligations can be completed in five-and-a-half months.

5. China's "choice" to challenge 38 separate USDOC determinations is a function of the widespread use of WTO-inconsistent measures by USDOC and should not be the basis for a longer RPT. To the extent the United States is arguing for a longer RPT on the basis that the supposedly large number of Section 129 proceedings will be work-intensive, previous arbitrators have consistently rejected the proposition that the workload faced by the implementing agency of the implementing Member is a relevant "particular circumstance" to be considered by the arbitrator in setting the RPT.

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