UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA

Recourse to Article 21.3(c) of the DSU

(DS464)

Statement of the United States of America at the Oral Hearing

March 9, 2017

1. Good morning. Ms. Orozco, the United States would like to first thank you for agreeing to serve as the Arbitrator in this proceeding. We appreciate the opportunity to appear before you today to explain further why at least 21 months is a reasonable period of time (RPT) to implement the recommendations and rulings of the Dispute Settlement Body (DSB) in this dispute.

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

2. The United States outlined in its written submission why we require an RPT of at least 21 months. The 21-month period is based on the need to implement with respect to the recommendations and rulings of the DSB in three separate phases, two of which must be completed sequentially, and in accordance with procedural requirements under U.S. law.

3. As we discuss in our written submission, the United States intends to implement with respect to the 17 separate findings by the Panel and the Appellate Body. Many of these findings raise novel issues that will require significant changes to the current approaches employed by the United States Department of Commerce (Commerce), especially the investigating authority's approach to identifying and addressing so-called "targeted" or "masked" dumping under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

4. The United States intends to implement with respect to these findings in three phases, utilizing both sections 123 and 129 of the Uruguay Round Agreements Act (URAA). First, we are taking steps consistent with section 123 to address the Appellate Body's and Panel's "as such" findings under the Anti-Dumping Agreement and the GATT 1994. We also intend to conduct two separate section 129 proceedings to address the Appellate Body's and Panel's "as applied" findings related to the washers antidumping and countervailing duty investigations.

5. The United States is making substantial progress in the implementation process. Approximately the first two months of the process has involved deliberations on the threshold analysis of whether findings related to Commerce's antidumping methodologies required an amendment to the U.S. statute governing Commerce's antidumping proceedings. This analysis was necessary for determining whether, in addition to administrative action under sections 123 and 129 of the URAA, legislative action would be required. This threshold analysis was completed in December 2016.

6. As explained in our submission, the United States plans to issue the proposed modification under section 123 in September 2017. To take this step, Commerce first must develop a revised approach to identifying and addressing "targeted" dumping in both original investigations and administrative reviews. As you know, this is the first dispute in which the DSB has made recommendations and rulings with regard to how to apply the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. Commerce has been conducting analysis, deliberating through many internal meetings, and vetting potential approaches. Due to the complexity of the issue, significant work remains.

7. Once Commerce announces its preliminary section 123 determination, in light of the novelty of the issues presented and the far-reaching impact of the section 123 determination, Commerce expects to receive substantial public comment. Commerce will then need to fully explain its reasoning and findings in what will almost certainly be a complex and lengthy final determination.

8. Regarding phase II, implementation to address the "as applied" antidumping findings, Commerce will not be in a position to commence the section 129 process until the section 123

proceeding is mostly completed. That is, Commerce intends to commence the section 129 proceeding once it issues its preliminary section 123 determination. Sequencing the proceedings is necessary in order to allow Commerce to apply aspects of the revised approaches and methodologies that will be developed in the section 123 determination in the washers antidumping section 129 proceeding.

9. In addition, in phase III, Commerce plans to conduct a section 129 proceeding concerning the "as applied" countervailing duty findings. This proceeding will occur independently of the antidumping proceedings but within the same RPT. Commerce is currently finalizing the approach it will take in phase III and expects to subsequently formally commence the section 129 proceeding. Once it commences, Commerce may have to conduct additional fact-finding and verification. In the course of this proceeding, Commerce will also need to consider the compatibility of its implementation determinations with U.S. law.

10. In sum, to fulfill U.S. legal requirements, the United States' efforts to implement with respect to the numerous matters at issue require implementation in three phases, two of which are sequential in nature, necessitating a total reasonable period of time of at least 21 months.

II. Korea's 6-8 Month Recommendation is Unreasonable and Unsupported.

11. Before addressing Korea's arguments, it is important to note that the parties agree on two key points. Both Korea and the United States agree that the implementing Member has the discretion to choose the means of implementation that it deems appropriate.[1]

12. Both parties also agree that a 15-month RPT is only a guideline provided in Article 21.3 of the Dispute Settlement Understanding (DSU), which can be extended depending on the

[1] Submission of Korea, paras. 11, 12.

particular circumstances of the dispute.[2]

13. Despite agreement on these key elements and aspects of the underlying implementation obligations, Korea argues that a mere six to eight months is sufficient to fully address the numerous and complex findings at issue. Korea's arguments, however, are untenable. For instance, despite agreeing that it is for the implementing Member to choose the means of implementation it deems appropriate, Korea argues that the Arbitrator should award an RPT that does not account for the section 123 process, which is a fundamental step the United States has explained that it must undertake to implement within the confines of U.S. law.

14. Throughout its submission, Korea assigns arbitrary and unreasonable time frames to the implementation steps the United States outlines. In doing so, Korea fails to take into account the procedural requirements necessary for implementation under U.S. law, as well as what, substantively, the United States must do to implement the DSB recommendations and rulings. We hope that we may assist the Arbitrator today by addressing several of Korea's arguments.

A. The United States has Proceeded Expeditiously with Implementation.

15. First, Korea argues that the United States should have begun taking implementation steps to address unappealed panel findings even before adoption of the Panel and Appellate Body reports by the DSB.[3] Korea also argues that the United States has not taken any concrete action in the five months since adoption of the Panel and Appellate Body reports in this dispute.[4] Both arguments are unfounded.

16. Korea's argument that the United States should have started implementation before

[2] Submission of Korea, paras. 7, 13.
[3] Submission of Korea, para. 24
[4] Submission of Korea, paras. 26-28.

adoption of the Panel and Appellate Body reports in this dispute is contrary to the text of the DSU. Article 21.3(c) of the DSU states that this arbitration process is focused on determining a period of time "after the date of adoption of the recommendations and rulings." Thus, the entire premise of this arbitration – and the RPT – is that the RPT starts with the adoption of reports by the DSB.

17. While Korea relies on the arbitrator's award in *US – Countervailing Measures (China)*, a review of that award shows that the arbitrator expressly acknowledged that "the text of the DSU makes it clear that formal steps for implementing the recommendations and rulings of the DSB need to be taken only after the adoption of the panel and Appellate Body reports."[5] The award, therefore, does not support Korea's assertion that the arbitrator found that the implementing Member should have begun implementation of unappealed findings prior to adoption.

18. Korea also argues that the United States has taken no meaningful steps towards implementation since adoption. Korea offers no evidence in support of this assertion, and, regardless, it is incorrect. As the United States explained in its submission, the United States spent the first several months of the implementation phase engaged in preparatory work.

19. Specifically, the United States spent approximately the first two months of the implementation period determining whether certain findings required amendments to Commerce's governing statute. Korea asks the Arbitrator to "disregard" this two-month period on the basis that time should not be allotted for deciding between WTO-consistent and -inconsistent alternatives.[6] Korea misunderstands what the United States was attempting to accomplish during this time period. The United States' efforts to determine whether legislative

[5] *US – Countervailing Measures (China) (Article 21.3(c))*.
[6] Submission of Korea, para. 27.

action was required, as opposed to administrative action under sections 123 and 129 of the URAA, do not reflect a choice between consistent and inconsistent alternatives but, rather, an analysis of the most appropriate procedure for implementation pursuant to U.S. law.

20. In addition, Commerce has been engaged in significant and in-depth analysis and deliberation, and has held many meetings internally with regard to how to identify and address "targeted" dumping in light of the DSB recommendations and rulings. Commerce currently aims to issue its proposed modification by September of this year. Although the United States has made significant progress, we need adequate time to develop a new methodology.

21. With respect to the section 129 proceeding to address the countervailing duty findings, Korea is incorrect that the United States has taken no steps. Prior to taking any public action, such as seeking more information from interested parties, Commerce must internally determine which actions to take. In that regard, Commerce has maintained a regular schedule of meetings to discuss potential approaches and what information gathering might be required in this proceeding. Commerce also has internally analyzed its countervailing duty practice to determine its implementation options in light of this practice. Of course, these pre-commencement deliberations are not public.

B. Section 123 is Necessary to Implement With Respect to the DSB's "As Such" Findings.

22. Second, Korea claims that the United States can implement the "as such" findings in this dispute through a section 129 proceeding and, therefore, a section 123 proceeding is not required.[7] Korea's argument demonstrates a misunderstanding of U.S. law as related to the

[7] Submission of Korea, para. 30.

complicated issue of redeveloping or replacing Commerce's approach to addressing potential "targeted" dumping in both original anti dumping investigations and administrative reviews.

23. Korea asserts that because the differential pricing methodology (DPM) is not part of Commerce's regulations adopted through formal rulemaking, but was originally adopted in the context of an anti dumping proceeding, this methodology "should be capable of being modified in the context of such kind of proceeding."[8]

24. As recognized by both Korea and the United States, however, the implementing Member has a measure of discretion in choosing the means of implementation that it deems most appropriate, as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements.[9] Korea nonetheless asks the Arbitrator to prescribe the method of implementation in this proceeding, asserting that the United States' right to choose is not "unfettered" and section 129 is a "flexibility" available to the United States.[10]

25. As the United States explained in its written submission, however, section 123 of the URAA is used to amend or modify an agency regulation or practice, while section 129 is used to amend or modify an action taken in a particular proceeding.[11] Section 123 is required here.

26. Section 123 refers to "[c]hanges in agency regulations or practice."[12] As evidenced by the Panel's finding that the DPM is a rule or norm of general and prospective application, it is appropriate to consider the DPM a "practice," which would require amendment under section 123. The fact that the DPM was originally introduced through anti dumping investigations does

[8] Submission of Korea, paras. 31-33.
[9] Submission of Korea, para. 11.
[10] Submission of Korea, para. 34.
[11] Submission of the United States, para. 36.
[12] *See* section 129(g) of the URAA (Exhibit USA-1).

not alter this conclusion because it is section 123 that governs how Commerce must change its practice in light of adverse DSB recommendations and rulings.[13] Furthermore, in light of the number and magnitude of the "as such" findings by the Panel and the Appellate Body, the United States has determined that section 123 is the most practical way to address the implementation obligations in this dispute. The United States recalls that this decision was taken after the United States first evaluated whether a lengthier legislative change was required to Commerce's municipal governing statute.

27. For these reasons, the U.S. decision to conduct a section 123 proceeding hardly demonstrates unfettered discretion or a lack of flexibility, as Korea suggests. The United States adds that invoking section 123 to address the DSB's "as such" findings in this dispute is consistent with how the United States has made other changes to its practice in prior disputes involving similar "as such" findings, including zeroing.[14]

28. Korea's references to prior arbitral awards also fail to demonstrate that the United States should implement via section 129 rather than section 123.[15] In *Argentina – Hides and Leather*, the arbitrator declined to take into account time for a broad legislative change where Argentina acknowledged that its implementation obligations were more narrow, and could be achieved

[13] *See* section 129(g)(1) of the URAA (Exhibit USA-1).

[14] *See, e.g., Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (Dep't of Commerce Mar. 6, 2006) (*Proposed Modification*); *see also Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation: Final Modification*, 71 Fed. Reg. 77,722 (Dep't of Commerce Dec. 27, 2006) (invoking section 123 of the URAA to change antidumping methodology to no longer make average-to-average comparisons in investigations with zeroing); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8101 (Dep't of Commerce Feb. 14, 2012) (invoking section 123 to change antidumping methodology to make average-to-average comparisons in administrative reviews without zeroing).

[15] Submission of Korea, para. 35.

through a regulatory change.[16] By contrast, the United States' intended use of section 123 in this dispute is strictly limited to its compliance obligations. And in *US – Stainless Steel (Mexico)*, the United States indicated that it was still deciding between two available options, one legislative and the other administrative, and acknowledged that the legislative option was not necessarily required.[17] That is unlike the present dispute, where the United States does not agree that section 129 is an alternative to section 123 under U.S. law with regard to the "as such" findings.

29. The United States would draw the Arbitrator's attention to another argument raised in *US – Stainless Steel (Mexico)* that is more pertinent. Specifically, Mexico argued that the RPT should be based on an administrative change under the U.S. Administrative Procedure Act instead of section 123 of the URAA, as proposed by the United States.[18] The arbitrator rejected Mexico's argument, finding that section 123 specifically addresses implementation of DSB recommendations and rulings and, therefore, the United States acted within its discretion in selecting section 123 as the means of implementation.[19] The same principle applies in the present dispute, where section 123 is the appropriate means under U.S. law.

30. Further, Korea's reliance on *US – Countervailing Measures (China)* fails to show that the United States can simply implement through a section 129 proceeding in this dispute.[20] In that case, the United States did not implement an "as such" finding through a section 129 proceeding. There was no need to do so. As Commerce explained, the approach at issue "was withdrawn

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[16] *Argentina – Hides and Leather (Article 21.3(c))*, paras. 43-47.
[17] *US – Stainless Steel (Mexico)*, paras. 49-53.
[18] *US – Stainless Steel (Mexico)*, para. 54.
[19] US – Stainless Steel (Mexico), para. 55.
[20] Submission of Korea, para. 37.

prior to [that] implementation," and Commerce had ceased to rely upon the approach "years ago."[21] The present dispute is a far different scenario because Commerce continues to apply the DPM. Commerce intends to alter or completely replace this current approach in response to multiple "as such" findings. For these reasons, section 123 is required in this implementation.

C. The Time Frames Proposed by Korea are Unrealistic and Plainly Downplay the Complexity of Implementation.

31. Finally, Korea proposes time frames for implementation that are unrealistic under U.S. procedures, and grossly underestimates the complexity of implementation in this dispute. In particular, Korea makes the unsupported assertion that the United States is capable of implementing in just eight months (and in as few as six months).[22]

32. Korea's proposal is completely unrealistic. First, Korea fails to take into account the necessary sequencing of the section 123 and section 129 proceedings to address the U.S. implementation obligations with respect to the antidumping findings. In its proposed timetables, Korea appears to propose that the United States complete phases I and II simultaneously.[23] Korea, however, fails to provide any support for its view that the section 129 proceeding can be completed in parallel with the section 123 proceeding. As the United States explained in its written submission, it will not be practicable to commence the section 129 proceeding for the antidumping investigation until aspects of the proposed modification for identifying and addressing "targeted" dumping have been developed – and announced – in the

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[21] *See* Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Preliminary Determination of Public Bodies and Input Specificity (Feb. 25, 2016), at 18 (Exhibit USA-3).
[22] Submission of Korea, para. 1.
[23] Submission of Korea, paras. 49, 58.

section 123 proceeding.[24]

33. Second, Korea erroneously downplays the substantive and procedural complexity of implementation in this dispute. With regard to phase I, Korea argues that section 123 contains no minimum time frames and, therefore, the United States has the flexibility to implement in eight months.[25] The problem with Korea's argument is that it focuses almost solely on the procedural considerations under section 123, and not on the time needed to substantively develop a revised methodology within those procedures. Thus, Korea is incorrect that the section 123 proceeding in this dispute can be completed in just a few months simply because that provision does not set out minimum time frames.

34. We also note that, although an implementing Member must use available flexibilities in its legal system to promptly comply, an implementing Member is not required to undertake "extraordinary" procedures.[26] In light of the requirements of section 123 and the U.S. implementation obligations, eight months would be an extraordinary period of time in which to complete phase I, let alone the entire implementation process.

35. In support of its claim that eight months is sufficient, Korea points to the U.S. request for seven months to complete a section 123 proceeding in *US – Stainless Steel (Mexico)*.[27] Korea's reliance on the U.S. timetable in a prior proceeding is misplaced. Past arbitrators, including the arbitrator in *US – Stainless Steel (Mexico)*, have found that implementation periods in different disputes with different facts are of limited relevance for determining the time necessary for an

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[24] Submission of the United States, para. 26.
[25] Submission of Korea, para. 42.
[26] *Colombia – Ports (21.3(c))*, para. 65.
[27] Submission of Korea, para. 48.

implementing Member to come into compliance.[28] We recall that the purpose of this arbitration is to determine an RPT for implementation based on the particular facts of *this* case.

36. Korea further argues that the Arbitrator should disregard the time requested by the United States for potentially issuing questionnaires, conducting on-the-spot verifications, and holding hearings in phases II and III concerning the antidumping and countervailing duty investigations.[29] With regard to collecting additional information, we cannot prejudge whether Commerce will need to reopen the investigation records in the section 129 proceedings. However, the solicitation of additional information from interested parties may ultimately prove necessary. Sufficient time must be included within the RPT for this possibility.

37. For instance, in the section 129 concerning the washers countervailing duty investigation, Korea asserts that Commerce does not need to collect additional data and, in the event that any fact-finding is required, it should be limited to information regarding the relevant benchmark for determining the expected distribution.[30] Contrary to Korea's claim, the Appellate Body's findings provide for new legal tests and frameworks that will require interpretation and application. At this stage, the United States cannot say that analysis will be limited to reconsidering existing evidence on the record. Accordingly, it would not be appropriate for the Arbitrator to disregard this step in determining the RPT in this dispute.

38. Finally, with regard to holding hearings, section 129(d) explicitly provides that hearings be held "in appropriate cases." If a hearing is requested in either section 129 proceeding, Commerce would hold one so that interested parties may adequately defend their interests, just

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[28] *EC – Sugar (Australia, Brazil, Thailand) (Article 21.3(c))*, para. 97; *US – Stainless Steel (Mexico) (Article 21.3(c))*, paras. 63-64.
[29] Submission of Korea, paras. 54, 61.
[30] Submission of Korea, para. 61.

as Commerce regulations allow for hearings in other administrative proceedings outside of section 129.[31]

III. Conclusion

39. In summary, the United States proposes an RPT that takes into account implementation of the findings by the Panel and the Appellate Body in a manner that respects WTO rules, while preserving the right of the United States to choose its own method of implementation, in a manner consistent with U.S. law. The parties and the WTO dispute settlement system have a strong interest in setting an RPT of sufficient length to allow for effective implementation.

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

[31] 19 C.F.R. § 351.310.