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

***Recourse to Article 21.3(c) of the DSU***

**(DS471)**

# WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

**November 17, 2017**

## TABLE OF CONTENTS

## TABLE OF REPORTS AND AWARDS

| Short Form | Full Citation |
|---|---|
| *Brazil – Tyres (Article 21.3(c))* | Arbitrator Award, *Brazil – Measures Affecting Imports of Retreaded Tyres – Recourse to Arbitration under DSU Article 21.3(c)*, WT/DS332/16, circulated 29 August 2008 |
| *Canada – Autos (Article 21.3(c))* | Arbitrator Award, *Canada – Certain Measures Affecting the Automotive Industry – Recourse to Arbitration under DSU Article 21.3(c)*, WT/DS139/12, WT/DS142/12, circulated 4 October 2000 |
| *Canada – Pharmaceutical Patents (Article 21.3(c))* | Arbitrator Award, *Canada – Patent Protection of Pharmaceutical Products – Recourse to Arbitration under DSU Article 21.3(c)*, WT/DS114/13, circulated 18 August 2000 |
| *Chile – Alcoholic Beverages (Article 21.3(c))* | Arbitrator Award, *Chile – Taxes on Alcoholic Beverages – Recourse to Arbitration under DSU Article 21.3(c)*, WT/DS87/15, WT/DS110/14, circulated 23 May 2000 |
| *EC – Fasteners (China) (AB)* | Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011 |
| *EC – Hormones (Article 21.3(c))* | Award of the Arbitrator, *EC – Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU*, WT/DS26/15, WT/DS48/13, circulated 29 May 1998 |
| *Korea – Alcoholic Beverages (Article 21.3(c))* | Award of the Arbitrator, *Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS75/16, WT/DS84/14, circulated 4 June 1999 |
| *US – Anti-Dumping Methodologies (China) (Panel)* | Panel Report, *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/R, adopted 22 May 2017, as modified by the Appellate Body Report WT/DS471/AB/R |
| *US – Anti-Dumping Methodologies (China) (AB)* | Appellate Body Report, *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/AB/R, adopted 22 May 2017 |
| *US – Countervailing Measures (China) (Article 21.3(c))* | Arbitrator Award, *United States – Countervailing Duty Measures on Certain Products from China – Recourse to Arbitration under DSU Article 21.3(c)*, WT/DS437/16, circulated 9 October 2015 |
| *US – Hot Rolled Steel (Article 21.3(c))* | Arbitrator Award, *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan – Recourse to Arbitration under DSU Article 21.3(c)*, WT/DS184/AB/13, circulated 19 February 2002 |

| Short Form | Full Citation |
|---|---|
| *US – Section 110(5) Copyright Act (Article 21.3(c))* | Arbitrator Award, *United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under DSU Article 21.3(c)*, WT/DS160/12, circulated 15 January 2001 |

## TABLE OF EXHIBITS

| Description | Exhibit No. |
|---|---|
| Section 123 (19 U.S.C. § 3533) | USA-1 |
| Section 129 (19 U.S.C. § 3538) | USA-2 |

## I. INTRODUCTION

1. At its meeting on May 22, 2017, the Dispute Settlement Body ("DSB") adopted recommendations and rulings in *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China* (DS471). Pursuant to Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the United States informed the DSB at its meeting on June 19, 2017, that the United States intends to comply with the DSB's recommendations in a manner that respects U.S. WTO obligations and that it would need a reasonable period of time to do so.

2. The United States engaged in discussions with China under Article 21.3(b) of the DSU in an effort to reach agreement on the length of the reasonable period of time. The parties were unable to reach agreement, and on October 17, 2017, China referred the matter to arbitration pursuant to Article 21.3(c) of the DSU.

3. The amount of time that 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 domestic laws to make the necessary changes in the measures at issue. Implementation of the findings in this dispute concerns the DSB's recommendations relating to the use by the U.S. Department of Commerce ("USDOC") of a rebuttable presumption that all producers and exporters in China comprise a single entity under common government control ("the China-government entity") to which a single antidumping margin is assigned (the Single Rate Presumption ("SRP")), as well as the USDOC's use in certain proceedings of an alternative, average-to-transaction comparison methodology, also referred to as a "targeted dumping" methodology, and "zeroing" in conjunction with that alternative comparison methodology.

4. With respect to the SRP, the DSB's recommendations relate both to an "as such"[1] finding as well as "as applied"[2] findings covering determinations made by the USDOC in 38 individual antidumping investigations and administrative reviews.[3] In particular, the Panel found that the SRP is inconsistent with two obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"): (1) the obligation in Article 6.10 to calculate individual dumping margins for each known exporter of the product under consideration; and (2) the obligation in Article 9.2 to specify individual antidumping duties and name the individual suppliers of the product concerned.[4] Based on the same reasoning that underlies its "as such" finding, the Panel also found the application of the SRP in 38 USDOC determinations to be inconsistent with these two provisions.[5]

---

[1] *See US – Anti-Dumping Methodologies (China) (Panel)*, para. 8.1.c.ii.

[2] *See US – Anti-Dumping Methodologies (China) (Panel)*, para. 8.1.c.iii.

[3] *See, e.g., US – Anti-Dumping Methodologies (China) (Panel)*, paras. 2.3 and 3.1.d, n. 20.

[4] *See US – Anti-Dumping Methodologies (China) (Panel)*, paras. 7.367-7.368.

[5] *See US – Anti-Dumping Methodologies (China) (Panel)*, para. 7.382.

5. The Panel also found certain aspects of the USDOC's dumping calculation related to the use of the alternative, average-to-transaction comparison methodology and the use of "zeroing" in conjunction with that alternative comparison methodology to be inconsistent with Article 2.4.2 of the AD Agreement, as applied in three antidumping investigations.[6] Additionally, the Panel found that the United States acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") in using an average-to-transaction comparison methodology with "zeroing" when calculating dumping margins in one antidumping administrative review.[7]

6. As will be explained in more detail below, the most practical way under U.S. law for the United States 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").[8] 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.[9]

7. As a result, to fulfill U.S. legal requirements pertaining to proceedings conducted pursuant to sections 123 and 129 of the URAA, the United States' efforts to address the DSB's recommendations with respect to the matters at issue would require a process conducted in the following phases:

Phase I: Address "as such" findings with respect to the SRP;

Phase II: Address "as applied" findings regarding the SRP in 38 USDOC determinations and address "as applied" findings regarding the use of the alternative, average-to-transaction comparison methodology and "zeroing" in four of those USDOC determinations; as explained below, the USDOC expects to undertake the 38 redeterminations in multiple tranches[10]:

---

[6] *See US – Anti-Dumping Methodologies (China) (Panel)*, n. 15.

[7] *See US – Anti-Dumping Methodologies (China) (Panel)*, para. 3.1.b.

[8] As explained further in section II.B.2 below, U.S. law provides that section 123(g) of the URAA is often used to amend or modify an agency regulation or practice, while section 129 of the URAA is used to amend or modify an action taken in a particular proceeding. *See* 19 U.S.C. § 3533(g) (Exhibit USA-1); 19 U.S.C. § 3538 (Exhibit USA-2).

[9] The Panel's "as applied" findings pertaining to the SRP relate to all 38 of the determinations that China challenged (13 original investigations and 25 administrative reviews), while the Panel's findings pertaining to the use of the alternative, average-to-transaction comparison methodology and "zeroing" relate to four of those 38 determinations (three original investigations and one administrative review).

[10] The division of determinations described here is illustrative of how the USDOC might divide the determinations into different tranches for purposes of staggering its work on each. In finalizing the staggered schedule, the USDOC

- Tranche 1: 13 Investigations;
- Tranche 2: 13 Administrative Reviews;
- Tranche 3: Remaining 12 Administrative Reviews.

8. Both parties, as well as the WTO dispute settlement system as a whole, have a strong interest in setting the reasonable period of time at a length that allows for an implementation process that takes account of all available information and uses a well-considered approach to addressing findings in Appellate Body and Panel reports.[11] In this dispute, the reasonable period of time 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. On the other hand, if the reasonable period of time 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.

9. Article 21.3(c) of the DSU provides that, in general, the reasonable period of time should not exceed 15 months, but "that time may be shorter or longer, depending on the particular circumstances" of the dispute. Here, 15 months would be insufficient to ensure that the United States is able to address fully the DSB's recommendations. Based on the breadth and complexity of the DSB's recommendations – in particular the "as applied" findings related to 38 separate determinations that China chose to challenge in this one dispute – and the significant additional analysis that the USDOC likely will be required to undertake, as described below in section II.B, it will take at least 24 months for the United States to complete all of the steps required to bring the measures at issue into compliance with the DSB's recommendations.

## II. A PERIOD OF NO LESS THAN 24 MONTHS IS A REASONABLE PERIOD OF TIME FOR THE UNITED STATES TO BRING ITS MEASURES INTO COMPLIANCE WITH U.S. WTO OBLIGATIONS

10. Given 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, the shortest period of time in which it will be possible to implement the DSB's recommendations is no less than 24 months. Section II.A below discusses the legal considerations of the Arbitrator in setting the reasonable period of time. Section II.B explains why addressing the various findings in this dispute would require

expects to consider, for example, whether tranches should be staggered by product or by type of determination, *e.g.*, investigation rather than administrative review.

[11] An arbitration under Article 21.3(c) of the DSU should "serve to preserve the rights and obligations of Members under the covered agreements" (DSU, Art. 3.2) and should contribute to a "positive solution to a dispute" (DSU, Art. 3.7).

sequencing in multiple different phases and necessitates a reasonable period of time of no less than 24 months.

11. Before turning to a discussion of the legal requirements and procedural steps involved here, the United States first 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.[12] In that dispute, China reached agreement with the European Union on a reasonable period of time of 14 months and two weeks. That amount of time for compliance, in China's view, per its joint notification with the European Union to the DSB, was reasonable. In *EC – Fasteners (China)*, the Appellate Body upheld the panel's findings that Article 9(5) of the European Union's Basic AD Regulation – providing for the application of a single antidumping rate to certain Chinese enterprises – was inconsistent with Articles 6.10 and 9.2 of the AD Agreement, both "as such" and as applied in one antidumping determination.[13] The Panel in this dispute found that the European Union measure examined by the Appellate Body in *EC – Fasteners (China)* "bore close resemblance to the Single Rate Presumption."[14]

12. 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. Given the time and resources that will be required to address the DSB's recommendations relating to 38 determinations concerning the SRP – as contrasted with just one determination in *EC – Fasteners (China)* – a compliance period of at least 24 months is reasonable here.

13. Furthermore, China, as the complaining party in this dispute, had choices with respect to how many "as applied" claims to bring in the same dispute. China's decision to bring "as applied" claims against 38 separate determinations – including 6 determinations that China identified for the first time at the first substantive meeting of the Panel and the parties – and China's decision to challenge as well the use of an alternative, average-to-transaction comparison methodology and "zeroing" in four of the challenged determinations, while within China's discretion, bears on the question of the reasonable period of time for implementation. 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. Here, once again, given the extreme size of the dispute that China chose to bring, the reasonable period of time for the United States to implement the DSB's recommendations should be at least 24 months.

[12] *See* WT/DS397/14.

[13] *See EC – Fasteners (China) (AB)*, paras. 385, 409.

[14] *US – Anti-Dumping Methodologies (China) (Panel)*, para. 7.349.

### A. Determining the "Reasonable Period of Time" Under Article 21.3(c) of the DSU Requires Consideration of All Particular Circumstances of the Case

14. Article 21.3(c) of the DSU provides for the Arbitrator to determine the reasonable period of time that a Member has to implement the DSB's recommendations. Article 21.3(c) provides that, in determining the reasonable period of time, "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," but this "time may be shorter or longer, depending on the particular circumstances." Moreover, the word "reasonable" in "reasonable period of time" indicates that the determination of the length of the period must involve consideration of all the circumstances of a particular case. What is "reasonable" in one set of circumstances may not be "reasonable" in different circumstances.[15] Therefore, what constitutes a reasonable period should be defined on a case-by-case basis, taking into account "considerations relating to the quantitative and qualitative aspects of implementation in the present case, and the margin of flexibility available to the implementing Member within its legal system."[16]

15. Specific circumstances that have been identified in previous awards as relevant to the Arbitrator's determination of the reasonable period of time 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.[17] In this context, an implementing Member is not required to resort to extraordinary procedures in achieving implementation, but rather the normal level required by law should be expected.[18]

16. Previous awards pursuant to Article 21.3(c) of the DSU have consistently recognized that an arbitrator's role is not to prescribe a particular method of implementation; for instance, it is not an arbitrator's role to determine whether implementation would be better achieved through legislative or regulatory action.[19] Instead, 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."[20] It is the role of the responding party to ensure that the means of implementation

---

[15] *See US – Hot-Rolled Steel (Article 21.3(c))*, para. 25.

[16] *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.50.

[17] *Canada – Pharmaceutical Patents (Article 21.3(c))*, paras. 48-51.

[18] *US – Section 110(5) Copyright Act (Article 21.3(c))*, para. 45 (quoting *Korea – Alcoholic Beverages (Article 21.3(c)*) (stating in para. 42 that "Although the reasonable period of time should be the shortest period possible within the legal system of the member to implement the recommendations and rulings of the DSB, this does not require a Member, in my view, to utilize *extraordinary* legislative procedure, rather the *normal* level of legislative procedure, in every case.").

[19] *Chile – Alcoholic Beverages (Article 21.3(c))*, para. 35; *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 41.

[20] *Brazil – Tyres (Article 21.3(c))*, para. 48 (quoting *EC – Hormones (Article 21.3(c))*, para. 38).

chosen is in a form, nature, and content that effectuates compliance and is consistent with the covered agreements.

17. Past arbitrators have consistently recognized that the preparatory phase is essential for successful compliance.[21] For example, the arbitrator in *Canada – Autos* allowed approximately 90 days for "identification and assessment of the problem and publication of a Notice of Intent in the *Canada Gazette*," as well as consultations among government departments and with domestic parties interested in the matter.[22] In *Canada – Pharmaceuticals*, the arbitrator accepted Canada's position that it required three months and two weeks for identification and assessment, drafting, and other preparatory steps.[23]

### B. The Legal and Technical Complexity of this Matter Will Require a Reasonable Period of Time of at Least 24 Months

18. Addressing the numerous findings in this dispute requires a multi-phase process. As discussed below, Phases I and II are expected to be sequential in nature. In Phase I, the USDOC would address the "as such" findings of the Panel. In Phase II, which is expected to include at least three tranches, the USDOC would address the findings of the Panel with respect to each of the 38 challenged determinations. Collectively, the multiple phases necessitate a total reasonable period of time of at least 24 months.

19. Below, the United States provides a brief overview of relevant Panel findings and the process to address these findings.

#### 1. Addressing the Various Findings in this Dispute Would Require Multiple Phases

##### a. Phase I – Addressing "As Such" Findings with Respect to the SRP

20. The Panel defined the precise content of the SRP as follows:

---

[21] *See, e.g., US – Hot-Rolled Steel (Article 21.3(c))*, para. 38 (the arbitrator found it "usefully noted" that such "'pre-legislative' consultations between the relevant executive and administrative officials and the pertinent congressional committees of the Congress of the United States are necessary in the effort to develop and organize the broad support necessary for the adoption by both Houses of Congress of a particular proposed WTO-compliance bill."); *Chile – Alcoholic Beverages (Article 21.3(c))*, para. 43 (the arbitrator found it "usefully noted" that "pre-legislative" consultations in Chile are meant to generate the broad support required for a bill's adoption by both Chambers of the National Congress).

[22] *See Canada – Autos (Article 21.3(c))*, paras. 18, 49-50, 56 (although the arbitrator did not award Canada the full 150 days of pre-drafting time that it requested, the 8-month award exceeded the timeframe the arbitrator found necessary to complete the remaining steps under Canada's regulatory process by between 60 and 120 days).

[23] *See Canada – Pharmaceutical Patents (Article 21.3(c))*, paras. 1, 14, and 62 (the arbitrator accepted Canada's estimated four months between adoption of the panel report and publication of the proposed regulatory change in the *Canada Gazette*, a time period which included the preparatory steps, without reduction).

> [I]n anti-dumping proceedings involving NME countries, exporters are presumed to 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* government control over its export activities.[24]

21. The Panel considered that the SRP is "inconsistent with the general rule to calculate an individual dumping margin for each known exporter or producer (Article 6.10) and to assign an individual anti-dumping duty to each supplier (Article 9.2)."[25] The Panel also considered that "presuming governmental control in the case of Chinese exporters and subjecting them to a single, country-wide dumping margin and anti-dumping duty rate, unless they demonstrate an absence of *de jure* and *de facto* governmental control over their export operations, does not find justification in the Anti-Dumping Agreement…"[26] According to the Panel, this is because the Separate Rate Test, through which respondents demonstrate a lack of *de jure* and *de facto* governmental control over their export activities, becomes relevant only *after* the USDOC applies the presumption of government control.[27]

22. The Panel also agreed with the Appellate Body report 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."[28] One such situation is where "one or more exporters have a relationship with the State such that they can be considered as a single entity."[29] The objective affirmative determination by the investigating authority is to be "conducted 'on the basis of the evidence that has been submitted or that [the investigating authority] has gathered in the investigation', on whether the subject exporters or producers are separate legal entities, as well as any other evidence that 'demonstrates that legally distinct exporters or producers are in a sufficiently close relationship

---

[24] *US – Anti-Dumping Methodologies (China) (Panel)*, para. 7.311 (footnotes omitted). The Panel further explained that "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." *US – Anti-Dumping Methodologies (China) (Panel)*, para. 7.311, n. 587 (citing Policy Bulletin 05.1 and the Antidumping Manual).

[25] *US – Anti-Dumping Methodologies (China) (Panel)*, para. 7.362.

[26] *US – Anti-Dumping Methodologies (China) (Panel)*, para. 7.362.

[27] *See US – Anti-Dumping Methodologies (China) (Panel)*, para. 7.364.

[28] *US – Anti-Dumping Methodologies (China) (Panel)*, para. 7.361 (citing *EC – Fasteners (China) (AB)*, para. 376).

[29] *US – Anti-Dumping Methodologies (China) (Panel)*, para. 7.351 (citing *EC – Fasteners (China) (AB)*, para. 363).

to constitute a single entity and should thus receive a single dumping margin and anti-dumping duty.'"[30]

23. Based on the above, numerous possible options are available for the United States to address the "as such" findings made by the Panel. Specifically, because the Panel did not foreclose the possibility that exporters and producers may be treated as a single entity – based on an objective affirmative determination – the USDOC need not necessarily treat each exporter *per se* as an individual exporter. Therefore, the USDOC is not limited to a single course of action and, accordingly, needs time to consider all available options to address the DSB's recommendations. For example, the USDOC may need to consider, *inter alia*: (1) the kind and quantity of evidence required to establish governmental control over exporters' export activities; (2) bases for requesting information from examined exporters regarding government ownership and control; and (3) procedural matters associated with the collection and examination of information in (1) and (2). By necessity, such considerations must contemplate the many different types of factual scenarios that might arise in the context of antidumping proceedings, including non-cooperation by examined respondents.

24. In sum, the United States anticipates that between all of the deliberation and development that the USDOC likely will need to undertake, coupled with the procedural requirements that the United States must follow to effectuate a change under section 123 of the URAA (discussed below), the process to address this portion of the DSB's recommendations and rulings will require no less than 15 months within the 24-month reasonable period of time for implementation.

### b. Phase II – Addressing "As Applied" Findings Concerning the 38 Challenged Determinations

25. For the same reasons that the Panel found the SRP to be inconsistent "as such" with Articles 6.10 and 9.2 of the AD Agreement, the Panel also found the application of the SRP in 38 USDOC determinations to be inconsistent with those two provisions. The United States contemplates addressing the "as applied" findings of the Panel by undertaking 38 separate proceedings pursuant to section 129 of the URAA.

26. 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) described above has been mostly completed. The United States expects that any approach to address the DSB recommendations concerning the SRP 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. As identified in the chart below, the United States expects to commence the section 129 proceedings following the issuance of the preliminary determination in the section 123 proceeding and undertake the section 129 proceedings in staggered tranches.

[30] *US – Anti-Dumping Methodologies (China) (Panel)*, para. 7.351 (citing *EC – Fasteners (China) (AB)*, para. 363).

27. In applying any new approach to the treatment of multiple exporters as a single entity, *i.e.*, any new approach to be considered and developed through a section 123 proceeding, and to comply with the Panel's finding that the USDOC's SRP is inconsistent with Articles 6.10 and 9.2 of the AD Agreement, the United States anticipates that the USDOC will need to reopen the record in each of the 38 challenged determinations. The USDOC likely will need to develop, prepare, and issue questionnaires to the respondents and/or solicit information from other interested parties in each of the 13 investigations and 25 administrative reviews subject to the Panel's findings to solicit information needed to examine whether the subject exporters or producers are separate legal entities based on positive evidence.[31]

28. As the Panel explained, such an analysis might require the USDOC to look at "evidence that 'demonstrates that legally distinct exporters or producers are in a sufficiently close relationship to constitute a single entity and should thus receive a single dumping margin and anti-dumping duty.'"[32] Each respondent will need sufficient time to consider the USDOC's questionnaires and provide responses to them. Consistent with the USDOC's regulations, other interested parties must be provided with an opportunity to comment upon the respondents' responses once they are received by the USDOC. The USDOC anticipates that follow-up questionnaires will be needed so that the investigating authority can collect all of the information needed to perform such an evidentiary analysis. Further, based on the questionnaire responses that might be received, the USDOC also will need to determine a framework within which to analyze the evidence on the USDOC's record.

29. Because, under such a revised approach, the United States believes that the USDOC would need to solicit further information from parties in each proceeding and related determinations, the United States also anticipates that the USDOC may need to conduct verification of the Chinese respondents in each of the thirteen investigations challenged to determine the accuracy and completeness of their additional reporting. Following any verifications, the USDOC will have to prepare and issue verification reports. Finally, as discussed in further detail below in section II.B.2, the USDOC would need to issue preliminary determinations in the 38 section 129 proceedings, allow for comment by interested parties on those determinations, analyze any comments received, and prepare final determinations in the 38 section 129 proceedings.

### 2. U.S. Legal Requirements Support a Reasonable Period of Time of at Least 24 Months

30. To accomplish the multiple implementation phases described above, the United States envisions employing two different statutory mechanisms. Both of these mechanisms provide for a multi-step process, involving the USDOC, the Office of the U.S. Trade Representative ("USTR"), congressional consultations, and opportunities for public input. As explained above, in Phase I, the United States contemplates undertaking a proceeding pursuant to section 123(g) of the URAA, which governs changes to agency practice made in response to DSB recommendations. In Phase II, to address "as applied" findings in 38 separate determinations,

[31] *See US – Anti-Dumping Methodologies (China) (Panel)*, para. 7.362.

[32] *See US – Anti-Dumping Methodologies (China) (Panel)*, para. 7.351 (citing *EC – Fasteners (China) (AB)*, para. 363).

the United States envisions undertaking 38 proceedings pursuant to section 129(b) of the URAA, which governs redeterminations in antidumping and countervailing duty proceedings conducted in response to DSB recommendations. Below, we describe the processes involved in section 123 and section 129 proceedings.

### a. Phase I – Section 123(g) Process

31. The United States expects to address the DSB's "as such" findings under the AD Agreement by commencing a proceeding pursuant to section 123(g) of the URAA. The text of section 123 (19 U.S.C. § 3533) is set out in full in Exhibit USA-1.

32. As an initial matter, USTR and the USDOC have been undertaking necessary inter-agency consultations concerning the DSB's recommendations and how to address them. As noted earlier, there are numerous possible options available for the United States to address the "as such" findings made by the Panel, which do not limit the USDOC to a single course of action with respect to the potential treatment of exporters and producers as a single entity – based on an objective affirmative determination. Accordingly, the USDOC needs time to consider all available options to address the DSB's recommendations. Again, for example, the USDOC may need to consider, *inter alia*: (1) the kind and quantity of evidence required to establish governmental control over exporters' export activities; (2) bases for requesting information from examined exporters regarding government ownership and control; and (3) procedural matters associated with the collection and examination of information in (1) and (2). By necessity, such considerations must contemplate the many different types of factual scenarios that might arise in the context of antidumping proceedings, including non-cooperation by examined respondents. The USDOC and USTR continue to discuss and consider these issues.

33. Once this initial inter-agency consultation process concludes, the United States anticipates commencing a proceeding under section 123 of the URAA to address the "as such" findings pertaining to Articles 6.10 and 9.2 of the AD Agreement. As required by section 123(g)(1)(A)-(B) of the URAA, USTR would consult Congress and seek advice from relevant private sector advisory committees about possible modifications to USDOC practice to address the relevant Panel findings.

34. Section 123(g)(1)(C) of the URAA then requires that the USDOC provide an opportunity for public comment by publishing in the U.S. *Federal Register* any proposed modification to the SRP. As explained above, the USDOC would need to undertake several analytical steps to derive a new methodology that fully addresses the DSB's recommendations.

35. The USDOC would then have to consider and address all comments received in response to its proposal before it can publish a final modification in the *Federal Register*. Given the novelty and complexity of the issues presented and the far-reaching impact of the expected section 123 determination, it is likely that the USDOC would receive hundreds of pages of comments from the public and would have to prepare a lengthy final section 123 determination addressing these comments, explaining its reasoning and findings.

36. Under section 123(g)(1)(D) of the URAA, USTR would have to submit a report to the appropriate congressional committees describing the reasons for the modification and a summary

of the advice received from the private sector advisory committees about the modification. Under section 123(g)(1)(E), USTR and the USDOC would then have to consult with Congress. After doing so, USTR would send a letter to the USDOC instructing the USDOC to implement the section 123 final determination, and under section 123(g)(1)(F), the final modification would be published in the *Federal Register*. The United States estimates that it would take no less than 15 months from the date of adoption of the Panel and Appellate Body reports to complete the entire section 123 process.

### b. Phase II – Section 129(b) Proceedings

37. To implement the Panel's findings relating to the 38 challenged determinations, the United States envisions undertaking 38 separate proceedings pursuant to section 129(b) of the URAA. The USDOC anticipates that it would be most efficient – and best ensure due process for interested parties – to commence the section 129 proceedings in at least three separate tranches. Doing so would help avoid, to the extent possible, the need to impose on interested parties simultaneous deadlines for the submission of responses to questionnaires, filing of comments, etc., in multiple section 129 proceedings, and would permit the USDOC to more effectively manage the immense workload associated with administering so many proceedings at the same time.

38. Section 129(b) of the URAA sets forth four required implementation steps:

- USTR shall consult with the USDOC and the relevant congressional committees on the matter at issue;
- Within 180 days after the receipt of a written request from USTR, the USDOC must issue a determination in connection with the particular proceeding that would render the agency's action not WTO-inconsistent;
- USTR then must consult again with the USDOC and the relevant congressional committees with respect to the USDOC's determination; and
- After such consultations, USTR may direct the USDOC to implement, in whole or in part, the agency's determination.

39. The text of section 129 of the URAA (19 U.S.C. § 3538) is set out in full in Exhibit USA-2.

40. The section 129 proceedings for each of the 38 determinations, including 13 original investigations and 25 administrative reviews, likely would need to be separate, given that each determination is a distinct segment of a proceeding before the investigating authority, based on different administrative records developed by the USDOC. Given the sequential nature of the section 123 proceeding and the section 129 proceedings, relevant decisional points in the section 129 proceedings likely would occur after those for the section 123 proceeding. The United States anticipates that the section 129 proceedings must also be staggered, taking place in at least three distinct tranches. Described below is the approximate amount of time it would take the USDOC, if implementing an option that examines whether certain exporters should be treated as

a single entity based on affirmative evidence, to complete section 129 proceedings for the investigations and reviews, from initiation to the preliminary determination, and the approximate amount of time between the preliminary determination and the final determination in each proceeding. However, completion of each section 129 proceeding will require similar periods of time within the overall reasonable period of time, as discussed below.

41. As explained above, the United States anticipates that the USDOC would apply approaches and methodologies developed in the section 123 proceeding (Phase I) when it commences the 38 section 129 proceedings (Phase II). By staggering the proceedings in this way, the USDOC can consider any changes it makes to the approaches and methodologies developed between the preliminary and final section 123 determinations in response to public comments when making the preliminary and final section 129 determinations pertaining to the 38 challenged determinations. From the date the section 129 process for the first tranche of determinations is commenced, the United States anticipates that, for each investigation and review within the first tranche, the USDOC would require approximately five to six months to collect information, analyze any information received, and issue a preliminary section 129 determination specific to the record of the investigation or review. It is anticipated that five to six months also would be required to carry out these steps with respect to redeterminations that would be made within the second and third tranches.

42. During this five-to-six-month period, the USDOC would prepare and issue questionnaires and/or requests for information, permit interested parties to comment on the questionnaires and information submitted, consider whether supplemental questionnaires are necessary, and analyze the record in light of the DSB recommendations to develop preliminary section 129 determinations for the challenged determinations.

43. Once the USDOC issues a preliminary section 129 determination for each challenged determination, the USDOC must ensure that interested parties have adequate opportunity to defend their interests by providing an opportunity for the submission of written comments.[33] Accordingly, the USDOC would issue preliminary section 129 determinations for each of the 38 challenged determinations, and would provide interested parties with the opportunity to comment on each of those preliminary determinations.

44. As noted, with respect to all proceedings undertaken pursuant to section 129 of the URAA, the USDOC is required to "provide interested parties with an opportunity to submit written comments" regarding its preliminary determinations. Furthermore, "in appropriate cases," the USDOC provides further opportunities for interested parties to provide input by "hold[ing] a hearing."[34] The interested parties would require time to analyze the preliminary determinations and file written arguments before the USDOC. Furthermore, if appropriate, the parties and the USDOC would need to prepare for and hold one or more hearings to discuss the preliminary determinations for the various issues in these implementation proceedings. These hearings typically are attended by Chinese exporters and producers as well as interested domestic parties, although separate hearings would need to be held given that they pertain to thirteen

[33] 19 U.S.C. § 3538(d) (Section 129(d) requires that Commerce issue a preliminary determination in each determination) (Exhibit USA-2).

[34] 19 U.S.C. § 3538(d) (Exhibit USA-2).

different products and different segments involved in these proceedings. Thus, inherently, the parties are different for each of the 13 proceedings and, potentially, each specific determination (administrative review or investigation within each case). The United States estimates that it would take approximately three months after the issuance of each of the above-mentioned preliminary determinations for interested parties to prepare and file written comments and for the USDOC to conduct hearings. This five-to-six-month period – taking into account all three tranches – is further justified by the potential need for the USDOC to conduct verifications in China of any additional information that might be solicited from and provided by the Chinese respondents in each of the 13 investigations.

45. Following any verifications, and after all written arguments are filed and any hearings are held, the USDOC would need time to prepare final determinations that address the interested parties' arguments and fully describe the USDOC's analysis and conclusions. Given the breadth of the findings and recommendations in this dispute, the United States estimates that the USDOC would need approximately two months from the receipt of the final tranche of written arguments to complete and issue these final section 129 determinations.

46. In addition, where appropriate, the USDOC would provide the interested parties with all relevant margins of dumping calculations so the parties can analyze the calculations and submit written comments relating to any possible ministerial errors. The USDOC must analyze the comments and, if necessary, issue determinations addressing these comments and correcting any ministerial errors. The ministerial error correction process normally takes the USDOC one month to complete.

47. After the completion of the above processes, section 129(b)(3) of the URAA requires that USTR consult with the USDOC and Congress on the final section 129 determinations. Section 129(b)(4) provides that, after such consultations, USTR may direct the USDOC "to implement in whole or in part" the section 129 determinations. Therefore, in addition to the time required for the USDOC to conduct its proceeding, USTR would need sufficient time after the USDOC issues its final section 129 determinations to conduct consultations and formulate its implementation determinations pertaining to Phase II of the implementation process.

48. As the final step in the Phase II process, the USDOC would issue a *Federal Register* notice in which it officially implements the final section 129 determinations.

### c. Timetable

49. Based on the legal requirements laid out above, and the complicated nature of addressing the DSB recommendations in this dispute, the approximate timetable appropriate for this dispute is as follows:

| **DS471 – Approximate 24-Month Case Calendar[35]** | |
|---|---|
| **Action** | **Approx. Time Period** |
| Panel and Appellate Body reports adopted by the DSB. | **May 22, 2017** |
| USTR and the USDOC consult; pre-commencement analysis preparation; USDOC begins devising methodologies to implement adverse findings in preparation for commencement of section 123 and section 129 proceedings. | **May 2017 – December 2017** |
| **Section 123 Proceeding:** The USDOC commences proceeding pursuant to section 123 of the URAA pertaining to "as such" findings concerning the SRP. During this timeframe, the USDOC expects to work to develop an approach to address the Panel's findings concerning the USDOC's separate rate methodology. | **December 2017 – April 2018** |
| **Section 123 Proceeding:** The USDOC issues preliminary determination in the section 123 proceeding. The USDOC solicits comments from the public. | **April 2018** |
| **Section 129 Proceedings:** The USDOC begins commencing section 129 proceedings with respect to the 38 challenged determinations. The USDOC anticipates it would be most efficient – and best ensure due process for interested parties – to stagger these section 129 proceedings and thus expects to undertake the 38 section 129 proceedings in three tranches. The USDOC contemplates commencing the first tranche following issuance of the preliminary determination in the section 123 proceeding, in April 2018; the second tranche may then be commenced in May 2018; and the third tranche may then be commenced in June 2018. In the five-to-sixth months following commencement of the section 129 proceedings, the USDOC expects to:<br>• finalize staggered schedule, considering, for example, whether tranches are staggered by product or by type of determination, *e.g.*, investigation rather than administrative review;<br>• develop, finalize, and issue questionnaires to respondents and/or information requests to interested parties to collect additional information;<br>• receive responses to questionnaires and/or requests for information and comments upon questionnaire responses and/or information received from other interested parties;<br>• develop, finalize, and issue follow-up questions and comments upon those questionnaires, and receive responses (if necessary); | **Tranche 1: April 2018 – September 2018**<br><br>**Tranche 2: May 2018 – October 2018**<br><br>**Tranche 3: June 2018 – November 2018** |

[35] These actions and dates are approximate and illustrative of the options available to address the DSB's recommendations. The necessity and length of time required for these actions would depend on, *inter alia*, the participation of the parties in the section 123 and section 129 proceedings, the volume of data obtained by the USDOC, the complexity of the analysis required, and other factors, which could vary considerably.

| | |
|---|---|
| • determine approach for first set of preliminary section 129 determinations. | |
| **Section 123 Proceeding:** USTR and the USDOC begin consultations with appropriate Congressional committees regarding any proposed modification pursuant to section 123. The USDOC receives and analyzes comments from the public on preliminary section 123 determination. | **April – August 2018** |
| **Section 123 Proceeding:** The USDOC issues final section 123 determination. USTR Consults with Congress before issuing a letter to the USDOC directing the USDOC to implement the final determination in the section 123 proceeding. | **August 2018** |
| **Section 129 Proceedings:** Continuing to work in tranches, the USDOC issues preliminary determinations in the 38 section 129 proceedings to address the 38 determinations for which the Panel made adverse findings concerning the SRP and the four determinations for which the Panel made adverse findings concerning the application of an alternative, average-to-transaction comparison methodology and use of zeroing. | **October – December 2018** |
| **Section 129 Proceedings:** Interested parties submit briefs to the USDOC; the USDOC holds hearings, if appropriate; the USDOC potentially conducts verifications in China for the 13 challenged investigations and issues verification reports. The USDOC analyzes and prepares responses to comments from interested parties. | **October 2018 – March 2019** |
| **Section 129 Proceedings:** The USDOC completes analysis of comments from interested parties regarding the preliminary determinations in the 38 section 129 proceedings and issues final section 129 determinations. The USDOC considers and addresses any ministerial error allegations arising out of the final determinations in the 38 section 129 proceedings, if necessary. | **February - May 2019** |
| **Section 129 Proceedings:** USTR and the USDOC engage in required consultations with Congress. USTR issues letter directing the USDOC to implement final determinations in the 38 section 129 proceedings. | **May 2019** |

### 3. Considerations of the USDOC's Current Workload and the Number of Investigations and Administrative Reviews for Which Redeterminations May Be Required Supports a Reasonable Period of Time of at Least 24 Months

50. In addition to conducting the section 123 and section 129 proceedings discussed in this submission, the USDOC also must continue to work on its numerous ongoing antidumping and countervailing duty proceedings.

51. Over the past two years, the USDOC experienced a significant increase in new antidumping and countervailing duty petitions covering an array of different products and countries. During fiscal year 2017 (October 2016 through September 2017), the USDOC initiated 73 antidumping and countervailing duty investigations, compared to 56 investigations in fiscal year 2016. Overall, during fiscal year 2017, the USDOC issued over 400 antidumping and

countervailing duty determinations.

52. As of November 8, 2017, the USDOC has 77 ongoing antidumping and countervailing duty investigations, in addition to the proceedings in this dispute. Also, as of November 8, 2017, the USDOC has 129 ongoing periodic reviews and 7 ongoing new shipper reviews. The proceedings associated with this dispute, and the complicated policy and legal questions they raise, are a significant addition to the USDOC's workload.

53. An additional challenge that likely will increase the time needed to address the DSB's recommendations in this dispute is the continuing formation of the new U.S. Administration. The positions of many key decision makers at the USDOC have yet to be filled pending completion of the confirmation process.

54. Considerations of the USDOC's workload and the practical ability of the USDOC to complete proceedings that would be necessary to address the DSB's recommendations should be included as part of the "particular circumstances" of this dispute as the Arbitrator considers the length of the reasonable period of time.

## III. CONCLUSION

55. 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.[36] For the reasons outlined in this submission, a period of no less than 24 months is a reasonable period of time for implementation in this dispute.

[36] DSU, Art.3.7.