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

Recourse to Article 21.3(c) of the DSU

(DS464)

WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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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/AB/R, WT/DS142/AB/R, circulated 4 October 2000
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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
US – Washing Machines (Panel)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R
US – Washing Machines (AB)	Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R, adopted 26 September 2016

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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 September 26, 2016, the Dispute Settlement Body ("DSB") adopted recommendations and rulings in *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* (DS464). 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 October 26, 2016, that the United States intends to comply with the DSB's recommendations and rulings in a manner that respects its WTO obligations and that it would need a reasonable period of time to do so.

2. The United States engaged in discussions with Korea 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 December 9, 2016, Korea 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 and rulings depends on the particular facts and circumstances of the dispute, including the scope of the recommendations and rulings and the types of procedures required under the Member's domestic laws to make the necessary changes in the measures at issue. In this dispute, the United States intends to comply with DSB recommendations and rulings with respect to numerous matters:

- With regard to the differential pricing methodology ("DPM") employed by the U.S. Department of Commerce ("USDOC"):
    - aggregating export sales which exhibit high and low prices when establishing a pattern of export prices which differ significantly among different purchasers, regions, or time periods, and aggregating across those three categories;[1]
    - establishing a pattern of export prices which differ significantly among different purchasers, regions, or time periods on the basis of purely quantitative criteria;[2]
    - focusing only on the difference between the margin of dumping calculated using the average-to-average comparison methodology and the margin calculated using the average-to-transaction comparison methodology and failing to consider the attendant factual circumstances surrounding the relevant price differences;[3]

[1] *US – Washing Machines (AB)*, para. 6.3.b; *US – Washing Machines (Panel)*, para. 8.1.a.ix.

[2] *US – Washing Machines (AB)*, para. 6.5.c.

[3] *US – Washing Machines (Panel)*, para. 8.1.a.vii.

- failing to explain why relevant price differences could not be taken into account appropriately by the transaction-to-transaction comparison methodology;[4]

- applying the average-to-transaction comparison methodology to non-pattern transactions when the aggregated value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test accounts for 66 percent or more of the total value of sales;[5] and

- combining of comparison methodologies under certain circumstances and the use of "systemic disregarding".[6]

- With regard to the washers antidumping investigation:

  - establishing a pattern of export prices which differ significantly among different purchasers, regions, or time periods on the basis of purely quantitative criteria;[7]

  - focusing only on the difference between the margin of dumping calculated using the average-to-average comparison methodology and the margin calculated using the average-to-transaction comparison methodology and failing to consider the attendant factual circumstances surrounding the relevant price differences;[8]

  - failing to explain why relevant price differences could not be taken into account appropriately by the transaction-to-transaction comparison methodology;[9]

  - application of the average-to-transaction comparison methodology to transactions other than those constituting the pattern of transactions that the USDOC had determined to exist;[10]

  - the use of zeroing when applying the average-to-transaction comparison methodology;[11]

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[4] *US – Washing Machines (AB)*, para. 6.6.b.

[5] *US – Washing Machines (AB)*, para. 6.4.c; *US – Washing Machines (Panel)*, para. 8.1.a.vi.

[6] *US – Washing Machines (AB)*, para. 6.7.

[7] *US – Washing Machines (AB)*, para. 6.5.b.

[8] *US – Washing Machines (Panel)*, para. 8.1.a.iii.

[9] *US – Washing Machines (AB)*, para. 6.6.a.

[10] *US – Washing Machines (AB)*, para. 6.4.b; *US – Washing Machines (Panel)*, para. 8.1.a.i.

[11] *US – Washing Machines (AB)*, paras. 6.9.a and 6.10.a; *US – Washing Machines (Panel)*, paras. 8.1.a.xiv and 8.1.a.xv.

- the use of zeroing when applying the alternative, average-to-transaction comparison methodology in investigations, "as such";[12] and

- the use of zeroing when applying the alternative, average-to-transaction comparison methodology in administrative reviews, "as such".[13]

- With regard to the washers countervailing duty investigation:

  - in determining disproportionality, failing to consider how the amount of subsidy received by Samsung relates to a benchmark indicative of the amount that Samsung would have been expected to receive, and failing to take account of the two mandatory factors referred to in the final sentence of Article 2.1(c) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement");[14]

  - applying a flawed tying test, whereby a subsidy is tied to a specific product only when the intended use of the subsidy is known to the granting authority and so acknowledged prior to or concurrent with the bestowal of the subsidy, and dismissing certain evidence submitted by Samsung that was potentially relevant to the assessment of whether a portion of the tax credits Samsung claimed under Article 10(1)(3) and Article 26 of the RSTA was tied to the products manufactured by its digital appliance business unit;[15] and

  - in attributing tax credits received by Samsung under RSTA Article 10(1)(3) exclusively to domestic production, failing to assess all of the arguments and evidence submitted by interested parties and other relevant facts surrounding the bestowal of the subsidy.[16]

4. As will be explained in more detail below, the most practical way under U.S. law for the United States to implement these matters is by conducting three proceedings, utilizing both section 123 and section 129 of the U.S. *Uruguay Round Agreements Act* ("URAA").[17] First, the United States intends to conduct a proceeding pursuant to section 123 of the URAA to address the Appellate Body's and Panel's "as such" findings under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the

[12] *US – Washing Machines (AB)*, paras. 6.9.a and 6.10.a; *US – Washing Machines (Panel)*, paras. 8.1.a.xii and 8.1.a.xiii.

[13] *US – Washing Machines (AB)*, para. 6.11.a; *US – Washing Machines (Panel)*, para. 8.1.a.xvi.

[14] *US – Washing Machines (Panel)*, paras. 7.244, 7.250-7.255, 8.1.b.i, 8.1.b.ii.

[15] *US – Washing Machines (AB)*, para. 6.14.a.

[16] *US – Washing Machines (AB)*, para. 6.16.a.

[17] 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).

General Agreement on Tariffs and Trade 1994 ("GATT 1994"). Second, the United States intends to conduct two separate proceedings pursuant to section 129 of the URAA to address the Appellate Body's and Panel's "as applied" findings as they relate to the washers antidumping and countervailing duty investigations.

5. As a result, to fulfill U.S. legal requirements, the United States' efforts to implement the DSB's recommendations and rulings with respect to the matters at issue require that the process of implementation be conducted in the following three phases:

Phase I: Implementation to address "as such" findings with respect to the DPM and application of the average-to-transaction comparison methodology in investigations and assessment proceedings;

Phase II: Implementation to address "as applied" findings regarding the washers antidumping investigation;

Phase III: Implementation to address "as applied" findings regarding the washers countervailing duty investigation.

6. 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 implementing the findings in the Appellate Body and Panel reports.[18] The reasonable period of time determined by the Arbitrator in this dispute thus should be of sufficient length to allow the United States to implement all of the various DSB recommendations and rulings 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 antidumping and countervailing duties where appropriate, while at the same time would preserve Korea's rights to ensure that antidumping and countervailing duties are imposed only in accordance with WTO rules. On the other hand, if the reasonable period of time is too short to allow for effective implementation, the likelihood of a "positive solution" to the dispute would be reduced.

7. Article 21.3(c) of the DSU states 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 fully implement the DSB recommendations and rulings. Based on the breadth of the findings in the Panel and Appellate Body reports and the significant additional analysis that the USDOC will be required to undertake, as described below in section II.B, it will take at least 21 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 and rulings.

[18] 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).

II. A PERIOD OF NO LESS THAN 21 MONTHS IS A REASONABLE PERIOD OF TIME FOR THE UNITED STATES TO BRING ITS MEASURES INTO COMPLIANCE WITH ITS WTO OBLIGATIONS

8. 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 and rulings is 21 months. Subsection A below discusses the legal considerations of the Arbitrator in setting the reasonable period of time. Subsection B explains why the nature of the different types of findings in this dispute requires that implementation must be accomplished in three phases, with a reasonable period of time of no less than 21 months.

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

9. 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 and rulings. 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.[19] 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."[20]

10. 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.[21] 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.[22]

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

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

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

[22] *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

11. 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.[23] 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."[24] It is the role of the responding party to ensure that the means of implementation chosen is in a form, nature, and content that effectuates compliance and is consistent with the covered agreements.

12. Past arbitrators have consistently recognized that the preparatory phase is essential for successful compliance.[25] 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.[26] 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.[27]

B. The Legal and Technical Complexity of this Matter Will Require a Reasonable Period of Time of at Least 21 Months

13. The need to implement the various types of findings in this dispute requires a three-phase process. As discussed below, Phases I and II, which will relate to the findings made by the Panel and the Appellate Body concerning the challenged antidumping measures, are expected to be sequential in nature. Phase III, which will relate to the findings made by the Panel and the Appellate Body concerning the challenged countervailing duty investigation, will be completed

require a Member, in my view, to utilize *extraordinary* legislative procedure, rather the *normal* level of legislative procedure, in every case.")

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

[24] *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48 (quoting Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 38).

[25] *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).

[26] *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).

[27] *See Canada – Pharmaceutical Patents (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).

separately but within the same reasonable period of time. Collectively, the three phases necessitate a total reasonable period of time of at least 21 months.

14. Below, the United States provides a brief overview of the Panel and Appellate Body findings that it must address, the process that will be followed to implement these findings, and a proceeding-specific discussion of the implementation obligations.

1. The USDOC Must Address the Various Findings in this Dispute in Three Separate Phases

a. Phase I – Implementation to Address "As Such" Findings with Respect to the USDOC's Differential Pricing Analysis and Application of the Average-to-Transaction Comparison Methodology in Investigations and Assessment Proceedings

15. Significantly, this is the first dispute involving a Member's application of the second sentence of Article 2.4.2 of the AD Agreement. Most of the Appellate Body's and Panel's findings and recommendations related to the second sentence of Article 2.4.2 represent a significant departure from how investigating authorities, including the USDOC, previously have understood this provision to operate. The United States' implementation will involve the consideration of novel and multifaceted issues with regard to how the United States can implement the DSB's recommendations and rulings within the confines of the municipal law governing the USDOC's antidumping proceedings.

16. The Appellate Body and Panel both made findings under the second sentence of Article 2.4.2 of the AD Agreement on an "as such" basis, which will require the USDOC to redevelop (and potentially completely replace) its approach to identifying and addressing potential masked dumping in both original investigations and assessment proceedings. In significant ways, the Appellate Body's findings reversed or mooted findings made by the Panel. Those "as such" findings by both the Appellate Body and the Panel pertain to key characteristics of the USDOC's differential pricing methodology, and also how an investigating authority may apply the average-to-transaction comparison methodology in investigations and assessment reviews. The United States intends to implement these "as such" findings by conducting a proceeding pursuant to section 123 of the URAA.

17. First, the USDOC must revisit how to identify a "pattern of export prices which differ significantly among different purchasers, regions or time periods" under the second sentence of Article 2.4.2 of the AD Agreement.[28] In recent proceedings, the USDOC has employed a differential pricing analysis to discern whether this requirement of the second sentence of Article 2.4.2 is satisfied. The Appellate Body's findings pertaining to the relevant "pattern" do not comport with certain important features of the differential pricing methodology. For example, the Appellate Body determined that "the words 'or' and 'among' as used in the phrase 'among different purchasers, regions or time periods' cannot be interpreted to mean that the three categories can be considered cumulatively to find one single pattern."[29] Looking to discern

[28] AD Agreement, Art. 2.4.2, second sentence.

[29] *US – Washing Machines (AB)*, paras. 5.30-5.36.

whether overall aspects of a foreign respondent's export pricing behavior show a pattern across purchasers, regions or time periods is a key attribute of the differential pricing methodology. As another example, the Appellate Body found that the "pattern" cannot comprise both low prices that are potentially being masked with higher prices that are potentially masking those low prices.[30] Finally, the Appellate Body explained that investigating authorities must consider both "quantitative" and "qualitative" aspects of any identified export price differences in discerning whether a "pattern" exists.[31]

18. All of these Appellate Body findings require the USDOC to reconsider key characteristics of the differential pricing methodology. This is likely to involve making significant changes to, or completely replacing, that methodology. As part of this process, the USDOC anticipates that it will need to make substantial revisions to the computer program it has previously used to perform a "quantitative" analysis of export prices. For example, the USDOC may need to entirely replace the "ratio test" aspect of the differential pricing analysis to implement the adverse findings pertaining to so-called "cross-category aggregation."[32]

19. The need to now consider "qualitative" aspects of export price differences will require the USDOC to determine exactly what such a "qualitative" analysis will entail, and what types of information it can and should seek from respondents across a multitude of industries. A "qualitative" analysis may not operate in the same way across all of the industries and products that are subject to the USDOC's antidumping proceedings, and the USDOC will need to consider what approach accounts for the many different types of factual situations that might arise, while remaining administrable.

20. Second, the USDOC needs to make substantial revisions to the margin calculation program used to apply the average-to-transaction comparison methodology. The Appellate Body's understanding of how the average-to-transaction comparison methodology can be applied in a WTO-consistent manner is considerably different from how the United States (or any other Member) has ever applied that comparison methodology where positive evidence establishes that "targeted" or "masked" dumping has occurred.[33] In light of the Appellate Body's findings, the USDOC will need to amend the programming language for the differential pricing methodology. For example, the USDOC will have to remove the features that apply the average-to-transaction comparison methodology to all sales, and will have to remove the so-called "mixed" comparison methodology entirely. Instead, the USDOC must develop programming language that isolates the "more limited" "universe of transactions" that comprises the relevant "pattern" for purposes of an average-to-transaction calculation,[34] and that does not apply the average-to-transaction comparison methodology to export prices outside of that relevant "pattern."[35]

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[30] *US – Washing Machines (AB)*, para. 5.29.

[31] *US – Washing Machines (AB)*, para. 5.63.

[32] *US – Washing Machines (AB)*, paras. 5.31-5.36.

[33] *See US – Washing Machines (AB)*, paras. 5.90-5.182.

[34] *See, e.g., US – Washing Machines (AB)*, paras. 5.105, 5.116.

[35] *See, e.g., US – Washing Machines (AB)*, para. 5.122.

21. The Appellate Body's "as such" findings under Article 9.3 of the AD Agreement introduce additional complications to the United States' implementation process. The Article 9.3 findings relate to how the average-to-transaction comparison methodology is to be applied in assessment proceedings conducted on a retrospective basis (*i.e.*, administrative reviews by the USDOC). Again, the Appellate Body's findings regarding how the average-to-transaction comparison methodology must be applied, collectively, differ fundamentally from the United States' prior understanding of how Members can apply that methodology in a WTO-consistent manner. Applying that methodology in the context of administrative reviews under municipal law and the United States' retrospective system of duty assessment, where the USDOC must calculate not just weighted-average margins of dumping but also assessment rates under governing municipal law, raises novel, complex policy questions that will require significant deliberation and testing within the USDOC.

22. Third, the USDOC must revisit how it will provide an "explanation . . . as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison" under the second sentence of Article 2.4.2 of the AD Agreement.[36] The Panel found that the USDOC must consider "attendant factual circumstances" in providing this explanation,[37] and the USDOC will need to develop an approach for how it will examine "attendant factual circumstances" under its revised methodology. Similar to the "qualitative" analysis of export prices that must be undertaken when discerning whether a "pattern" exists, discussed above, this consideration of "attendant factual circumstances" likely will involve developing an approach that can be applied across a multitude of different industries and products.

23. Additionally, as part of revisiting its approach to the "explanation clause" of the second sentence of Article 2.4.2, the USDOC also must consider how it will explain "why both the [average-to-average] and the [transaction-to-transaction] comparison methodologies cannot take into account appropriately the differences in export prices that form the pattern."[38] To the extent that the USDOC might determine it necessary to use the transaction-to-transaction comparison methodology in the context of the second sentence of Article 2.4.2, the United States emphasizes that the USDOC has no established practice to calculate a margin of dumping using the transaction-to-transaction comparison methodology. Such an approach would be respondent- and fact-specific. Given the USDOC's limited experience in applying the transaction-to-transaction comparison methodology in antidumping proceedings, *how* the USDOC would employ a transaction-to-transaction analysis will require significant practice development, internal analysis and deliberation, and decision-making by the USDOC.

24. In sum, the Appellate Body's and Panel's findings will require the USDOC to revise (or replace) the current differential pricing methodology and its approach to the application of the average-to-transaction comparison methodology, which the USDOC uses to identify and address potential "masked" or "targeted" dumping. The United States anticipates that between all of the deliberation, development, and testing that the USDOC will need to undertake to devise a WTO-

[36] AD Agreement, Art. 2.4.2, second sentence.

[37] *US – Washing Machines (Panel)*, paras. 7.71, 7.77, 7.118.b.

[38] *US – Washing Machines (AB)*, para. 5.76.

consistent methodology, coupled with the procedural requirements the United States must follow to implement this change under section 123 of the URAA (discussed below), this process to implement this portion of the DSB recommendations and rulings will require no less than 15 months.

b. Phase II – Implementation to Address "As Applied" Findings Regarding the Washers Antidumping Investigation

25. In addition to developing a revised methodology for identifying and addressing "masked" or "targeted" dumping that addresses the "as such" findings made by the Panel and the Appellate Body, the United States also must address the many "as applied" findings related to the washers antidumping investigation. The United States will do so by undertaking a proceeding pursuant to section 129 of the URAA.

26. The United States anticipates that it will not be possible to commence the section 129 proceeding (Phase II) until the section 123 proceeding (Phase I) described above has been mostly completed. Many of the Panel and Appellate Body findings regarding Korea's "as applied" challenges to the washers antidumping investigation mirror those pertaining to Korea's "as such" challenges. Consequently, the USDOC currently expects that, in the section 129 proceeding, it will apply a number of the revised approaches and methodologies that will be developed in the section 123 determination, including, for example: (1) the USDOC's revised approach to calculating a weighted-average margin of dumping under the average-to-transaction comparison methodology, (2) the USDOC's revised approach to explaining "why both the [average-to-average] and the [transaction-to-transaction] comparison methodologies cannot take into account appropriately the differences in export prices that form the pattern," and (3) the USDOC's revised approach to addressing potential "qualitative" aspects of export prices which differ significantly. Those approaches will be developed through the section 123 proceeding before potentially being applied or adapted in the section 129 proceeding for the washers antidumping investigation. Therefore, Phases I and II must be undertaken sequentially, although there will be a small degree of overlap in the two proceedings. As identified in the chart below, the United States intends to commence the section 129 proceeding for the washers antidumping investigation following the issuance of the preliminary determination in the section 123 proceeding.

27. In applying these revised approaches from the section 123 proceeding in the section 129 proceeding, and to comply with several Panel and Appellate Body findings, the United States anticipates that the USDOC will need to reopen the record in the washers antidumping investigation. The USDOC likely will need to develop, prepare, and issue questionnaires to respondents Samsung and LG to solicit the information needed to perform a "qualitative" analysis of their export prices. As the Appellate Body explained, a "qualitative" analysis might well require the USDOC to look at "the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue."[39] Both respondents will need sufficient time to consider the USDOC's questionnaires and provide responses to them. Pursuant to the USDOC's regulations, other interested parties must be provided with an opportunity to comment upon the respondents' responses once they are

[39] *US – Washing Machines (AB)*, para. 5.63.

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 a "qualitative" analysis. Based on the questionnaire responses that might be received, the USDOC will need to determine how to perform a "qualitative" analysis using the information on the USDOC's record in light of the industry and product at issue.

28. Similarly, to consider "attendant factual circumstances" in its "explanation . . . as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison,"[40] the United States anticipates that it may be necessary to develop and issue questionnaires to Samsung and LG. To the extent this step is deemed necessary, the USDOC will need to provide sufficient time for the respondents to respond to those questionnaires, for other interested parties to comment upon those responses, and for the USDOC to analyze those responses and comments and issue follow-up questionnaires.

29. Because the United States currently believes that the USDOC will need to solicit further information from both respondents in this investigation, the United States also anticipates that the USDOC may need to conduct verification of both Korean respondents to determine the accuracy and completeness of their additional reporting. Following any verification, the USDOC will have to prepare and issue verification reports. Finally, as discussed in further detail below in subsection 2, the USDOC will need to issue a preliminary section 129 determination, allow for comment by interested parties on that determination, analyze any comments received, and prepare a final section 129 determination.

c. Phase III – Implementation to Address "As Applied" Findings Regarding the Washers Countervailing Duty Investigation

30. With regard to the washers countervailing duty investigation, the United States will need to address the Panel and Appellate Body findings on specificity, product tying, and attribution to Samsung's overseas production. Similar to Phase II, the United States intends to undertake a proceeding pursuant to section 129 of the URAA to address these findings.

31. With respect to specificity, the Panel found that the USDOC failed to undertake a "relational" analysis that compared the benefits Samsung received to a benchmark indicative of the benefits it would have been expected to receive, taking account of all factors having a bearing on that benchmark, were the subsidy distributed proportionately.[41] The Panel also found that the USDOC failed to account for the extent of diversification of economic activities within Korea and the length of time the relevant subsidy program has been in operation.[42]

32. The United States anticipates that the USDOC will need to develop and prepare questionnaires to the Government of Korea and perhaps to Samsung to address the Panel's findings regarding specificity. Any entity receiving a questionnaire will need sufficient time to

[40] *US – Washing Machines (Panel)*, para. 7.71.

[41] *US – Washing Machines (Panel)*, paras. 7.244, 7.250.

[42] *US – Washing Machines (Panel)*, paras. 7.251-7.255.

consider the USDOC's questions and provide responses to them. Pursuant to the USDOC's regulations, other interested parties must be provided with an opportunity to comment on the questionnaire responses. Based on the information provided in the first questionnaire responses, supplemental questionnaires may also be required, to follow up on any issues raised by the responses to the first questionnaires.

33. With respect to product tying, the Appellate Body found that the USDOC's determination was inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, based on the USDOC's application of an "intended use" test.[43] The Appellate Body also faulted the USDOC for not reviewing certain evidence proffered by Samsung during the investigation.[44] Here, again, it may be necessary for the USDOC to solicit additional information from the Government of Korea or from Samsung. At a minimum, the USDOC will need to reconsider the voluminous evidence that Samsung submitted during the investigation.

34. With respect to the possible attribution of benefits to Samsung's overseas production, the Appellate Body found that the USDOC failed to assess all of the arguments and evidence submitted by interested parties and other relevant facts surrounding the bestowal of the tax credits received by Samsung.[45] Here, again, it may be necessary for the USDOC to solicit additional information from the Government of Korea or Samsung.

35. After completing the information-gathering phase of the section 129 proceeding and developing the factual record, the USDOC will need to evaluate the record information on all issues. Although the Panel's and Appellate Body's findings were fact-specific and limited to the circumstances of record in this case, they nonetheless involve important matters that intersect with the USDOC's CVD practice. The USDOC will be required to ensure compatibility of its implementation determinations with U.S. law and USDOC practice. Finally, and similar to Phase II, the USDOC will need to issue a preliminary section 129 determination, allow for comment by interested parties on that determination, analyze any comments received, and prepare a final section 129 determination. Those steps are detailed below in subsection 2. Depending upon the new information received during the section 129 proceeding, it may be necessary for the USDOC to conduct verification of this information.

2. U.S. Legal Requirements Support a Reasonable Period of Time of at Least 21 Months

36. To accomplish the three implementation phases described above, the United States will employ 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 will undertake a proceeding pursuant to section 123(g) of the URAA, which governs changes to agency practice made in response to DSB recommendations and rulings. In Phases II and III, the United States will undertake two separate proceedings pursuant to section

[43] *US – Washing Machines (AB)*, para. 6.14.a.

[44] *US – Washing Machines (AB)*, para. 6.14.a.

[45] *US – Washing Machines (AB)*, para. 6.16.a.

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

a. Phase I – Section 123(g) Process

37. The United States intends to implement the DSB's "as such" findings under the AD Agreement and the GATT 1994 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.

38. Before the United States could consider implementing these findings, the USDOC, as a threshold issue, had to determine whether certain Appellate Body findings related to the USDOC's antidumping methodologies required an amendment to its municipal governing statute. Analysis and consideration of that question took place during the first two months of the implementation period. In addition to that initial analysis, USTR and the USDOC have been undertaking necessary inter-agency consultations since the DSB adopted the Panel and Appellate Body reports. Those initial discussions continue.

39. Once this initial inter-agency consultations process concludes, the United States intends to commence a proceeding under section 123 to address the "as such" findings pertaining to the second sentence of Article 2.4.2 of the AD Agreement, Article 2.4 of the AD Agreement, Article 9.3 of the AD Agreement, and Article VI:2 of the GATT 1994. As required by section 123(g)(1)(A)-(B) of the URAA, USTR will consult Congress and seek advice from relevant private sector advisory committees about possible modifications to address the relevant Panel and Appellate Body findings.

40. 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 its methodology for discerning "targeted" or "masked" dumping and discussion of how it will apply the exceptional average-to-transaction comparison methodology in both investigations and administrative reviews. As explained above, the USDOC will need to undertake several analytical steps to derive a new methodology that fully implements the DSB's recommendations and rulings.

41. The USDOC will 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 of the issues presented and the far-reaching impact of the expected section 123 determination, it is likely that the USDOC will receive hundreds of pages of comments from the public and will have to prepare a lengthy final section 123 determination addressing these comments, explaining its reasoning and findings.

42. Under section 123(g)(1)(D) of the URAA, USTR will 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 modification. Under section 123(g)(1)(E), USTR and the USDOC will then have to consult with Congress. After doing so, USTR will 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 will be

published in the *Federal Register*. Upon its formal commencement, the United States estimates that it would take no less than 15 months to complete the entire section 123 process.

b. Phases II and III – Section 129(b) Process

43. To implement the Panel and Appellate Body findings relating to the washers antidumping and countervailing duty investigations, the United States will undertake two separate proceedings under the procedures set out in section 129(b) of the URAA.

44. 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.

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

46. The section 129 processes for each investigation will be separate, given that each of the investigations is a distinct proceeding before the investigating authority, based on different administrative records developed by the USDOC, and each involves different findings by the Panel and the Appellate Body under different covered agreements. Given the sequential nature of the section 123 proceeding on antidumping issues and the section 129 proceeding pertaining to the washers antidumping investigation, relevant decisional points in the section 129 proceeding for the washers countervailing duty investigation likely will occur before those for the washers antidumping investigation section 129 proceeding. The United States anticipates that the countervailing duty investigation section 129 proceeding will commence before the antidumping investigation section 129 proceeding is commenced. However, completion of both section 129 proceedings will require similar periods of time within the overall reasonable period of time, as discussed below.

47. As explained above, the United States anticipates that the USDOC will apply certain approaches and methodologies developed in the section 123 proceeding (Phase I) when it commences the washers antidumping investigation section 129 proceeding (Phase II). As also mentioned above, the United States intends that the USDOC will commence Phase II once the USDOC issues its preliminary section 123 determination in Phase I. Thus, there will likely be some degree of overlap between the two proceedings. 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 comment when making the preliminary and final section 129 determinations pertaining to the washers antidumping investigation. From the date the section 129 process for the washers antidumping investigation is commenced, the United States anticipates that the USDOC will require approximately five months to perform the additional analysis specific to the record in that investigation, to potentially solicit and collect additional information from the respondents, to analyze any information received, and to prepare and issue a preliminary section 129 determination.

48. With regard to the washers countervailing duty investigation, the United States anticipates that the USDOC will require approximately seven months from the time the section 129 proceeding is commenced to carry out the analytical steps enumerated above, and to prepare its preliminary section 129 determination. As noted, during this time, the USDOC will prepare and issue questionnaires, allow for comment by interested parties on those questionnaires, consider whether supplemental questionnaires are necessary, and analyze the record in light of the DSB recommendations and rulings to develop a preliminary section 129 determination.

49. Once the USDOC issues its preliminary determinations for each investigation, as part of both section 129 proceedings, it must ensure interested parties have adequate opportunities to defend their interests by providing an opportunity for the submission of written comments.[46] Accordingly, the USDOC will issue separate preliminary determinations for the washers antidumping and countervailing duty investigations, and will provide interested parties with an opportunity to comment on each of those preliminary determinations.

50. As noted, with respect to all proceedings undertaken pursuant to section 129 of the URAA, the USDOC will be required to "provide interested parties with an opportunity to submit written comments" regarding its preliminary determinations. Furthermore, "in appropriate cases," the USDOC will provide further opportunities for interested parties to provide input by "hold[ing] a hearing."[47] The interested parties will require time to analyze the preliminary determinations and file affirmative and rebuttal written arguments before the USDOC. Furthermore, if requested, the parties and the USDOC will 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 Korean exporters and producers as well as interested domestic parties, although separate hearings would need to be held given that they pertain to two different types of trade remedy investigations. The United States estimates that it will 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 three-month period is further justified by the potential need for the USDOC to conduct verifications in Korea of any additional information that might be solicited from and provided by the Korean respondents in each investigation.

[46] 19 U.S.C. § 3538(d) (Section 129(d) requires that Commerce issue a preliminary determination in each determination) (Exhibit USA-2).

[47] 19 U.S.C. § 3538(d) (Exhibit USA-2).

51. Following any necessary verifications, and after all written arguments are filed and any hearings are held, the USDOC will 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 will need at least two months from the receipt of affirmative and rebuttal arguments to complete and issue these final section 129 determinations.

52. In addition, the USDOC will provide the interested parties with all relevant weighted-average margin of dumping calculations and countervailable subsidy 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.

53. 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 will need sufficient time after the USDOC issues its final section 129 determinations to conduct consultations and formulate its implementation determinations pertaining to Phases II and III of the implementation process.

54. As the final step in the Phase II and Phase III processes, the USDOC will issue a *Federal Register* notice in which it officially implements the final section 129 determinations.

c. Phases I through III Timetable

55. Based on the legal requirements laid out above, and the complicated nature of implementing the various types of DSB rulings and recommendations in this dispute, the approximate timetable appropriate for this dispute is as follows:

DS464 – Approximate 21 Month Case Calendar[48]	
Action	**Approx. Time Period**
Panel and Appellate Body reports adopted by the DSB.	**September 26, 2016**
United States indicated its intent to comply with the DSB's recommendations and rulings in a manner that respects its WTO obligations and that the United States would need a reasonable period of time to do so.	**October 26, 2016**

[48] These actions and dates are approximate. The necessity and length of time required for these actions depends on, *inter alia*, the participation of interested parties in the section 123 and section 129 proceedings, the volume of data received by USDOC, the complexity of the analysis required, and other factors which could vary greatly by issue.

USDOC determined whether WTO-consistent approach to apply average-to-transaction comparison methodology in antidumping proceedings is possible under existing municipal law.	**October – December 2016**
USTR and USDOC consult; pre-commencement analysis preparation. USDOC begins devising methodologies to implement adverse findings on antidumping issues in preparation for commencement of section 123 and section 129 proceedings.	**October 2016 – February 2017**
<u>Section 123 Proceeding</u>: United States commences proceeding pursuant to section 123 of the URAA pertaining to "as such" findings on antidumping issues. During this timeframe, the USDOC intends to work, with some overlap in analyses, on the following aspects of developing a methodology for purposes of applying the second sentence of Article 2.4.2 of the AD Agreement: • Develops approach consistent with the "pattern clause" of the second sentence of Article 2.4.2 (4 months). As part of this stage, the USDOC develops and tests approach to considering "quantitative" aspects of export price differences. The USDOC also derives approach to considering "qualitative" aspects of export price differences; • Develops approach consistent with "methodology clause" of the second sentence of Article 2.4.2 (3 months). As part of this stage, the USDOC revises its application of the average-to-transaction comparison methodology in light of the Appellate Body's findings and also considers how that methodology will be applicable in assessment proceedings. The USDOC creates or amends computer programming, as necessary; • Develops approach consistent with "explanation clause" of the second sentence of Article 2.4.2 (3 months). As part of this stage, the USDOC determines how to consider "attendant factual circumstances" and, if necessary, the USDOC develops and completes testing of approach to transaction-to-transaction comparison methodology in light of Appellate Body's findings. **<u>Section 129 Proceeding (CVD)</u>:** The United States commences section 129 proceeding for washers countervailing duty investigation. Following commencement, the USDOC: • Develops, finalizes, and issues questionnaires to respondent to collect additional information, as necessary (February or March 2017); • Receives responses to these questionnaires and comments upon those questionnaires from other interested parties (March or April 2017);	**February-July 2017**

• Develops, finalizes, and issues follow-up questionnaires and receives responses (if necessary) (April or May 2017); • Determines approach for preliminary section 129 determination (May to July 2017).	
Section 129 Proceeding (CVD): The USDOC issues preliminary section 129 determination for washers countervailing duty investigation. **Section 123 Proceeding:** The USDOC issues proposed modification under section 123 announcing change in practice in antidumping investigations and administrative reviews. **Section 129 Proceeding (AD):** The United States commences section 129 proceeding for washers antidumping investigation.	**September 2017**
Section 129 Proceeding (CVD): The USDOC conducts verifications for purposes of preliminary section 129 determination for washers countervailing duty investigation and issues verification reports (if necessary).	**September – October 2017**
Section 123 Proceeding: USTR and the USDOC begin consultations with appropriate Congressional committees regarding proposed modification pursuant to section 123. **Section 129 Proceeding (AD):** The USDOC issues questionnaires to respondents to gather additional factual information (if necessary).	**October 2017**
Section 129 Proceeding (CVD): The USDOC receives comments and rebuttal comments regarding preliminary section 129 determination for washers countervailing duty investigation. Hearings held, if requested by interested parties. **Section 123 Proceeding:** The USDOC receives comments from public on proposed modification under section 123 pertaining to antidumping investigations and administrative reviews. **Section 129 Proceeding (AD):** The USDOC receives responses to questionnaires from respondents in the washers antidumping investigation section 129 proceeding and any comments upon those responses from other interested parties (if necessary).	**November 2017**
Section 123 Proceeding: USTR and the USDOC complete consultations regarding final modification under section 123. **Section 129 Proceeding (AD):** The USDOC issues follow-up questionnaires in washers antidumping investigation section 129 proceeding and receives responses from respondents, as well as any comments upon those responses from other interested parties (if necessary).	**December 2017**

Section 129 Proceeding (CVD): The USDOC completes analysis of comments and rebuttal comments regarding preliminary section 129 determination in countervailing duty investigation and issues final section 129 determination. **Section 129 Proceeding (AD):** The USDOC completes development of approach for preliminary section 129 determination and issues preliminary section 129 determination for washers antidumping investigation.	**January-February 2018**
Section 129 Proceeding (CVD): The USDOC considers and addresses any ministerial error allegations arising out of final section 129 determination for countervailing duty investigation. **Section 129 Proceeding (AD):** The USDOC conducts verifications for purposes of preliminary section 129 determination for washers antidumping investigation and issues verification reports (if necessary).	**March 2018**
Section 123 Proceeding: The USDOC completes analysis of comments from public on proposed modification under section 123 and issues final modification under section 123. **Section 129 Proceeding (AD):** The USDOC receives comments and rebuttal comments regarding preliminary section 129 determination for washers antidumping duty investigation. Hearings held, if requested by interested parties (if necessary).	**April 2018**
Section 129 Proceeding (AD): The USDOC completes analysis of comments and rebuttal comments regarding preliminary section 129 determination in washers antidumping investigation and issues final section 129 determination. The USDOC considers and addresses any ministerial error allegations arising out of the final section 129 determination for washers antidumping investigation (if necessary). **All Proceedings:** USTR and the USDOC engage in required consultations with Congress.	**May-June 2018**
All Proceedings: USTR issues letter directing the USDOC to implement final modification under section 123 and final section 129 determinations.	**June 2018**

3. Considerations of the USDOC's Current Workload Supports a Reasonable Period of Time of at Least 21 Months

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

57. Over the past two years, the USDOC experienced a significant increase of new antidumping and countervailing duty petitions covering an array of different products and countries. During fiscal year 2016 (October 2015 through September 2016), the USDOC completed 55 antidumping and countervailing duty investigations, compared to 36 investigations in fiscal year 2015. Overall, during the fiscal year 2016, the USDOC issued almost 400 antidumping and countervailing duty determinations.

58. As of February 1, 2017, the USDOC has 33 ongoing antidumping and countervailing duty investigations, in addition to the proceedings in this dispute. Also, as of February 1, 2017, the USDOC has 138 ongoing periodic reviews and 9 ongoing new shipper reviews.

59. The proceedings associated with this dispute, and the complicated policy and legal questions they raise, are a significant addition to the USDOC's historic and current workload. Adding to the complexity is the ongoing change in the U.S. Administration, resulting in the turnover of key decision makers at the USDOC or, in some cases, their absence pending completion of the nomination and confirmation process. The United States is fully committed to compliance within a reasonable period of time, but considerations of the USDOC's current workload 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

60. The United States is actively working on administrative actions to bring itself into compliance with the DSB's recommendations and rulings. The volume and complexity of the DSB's recommendations and rulings and U.S. legal requirements should be considered in determining the appropriate reasonable period of time to secure a "positive solution" for this dispute.[49] For the reasons outlined in this submission, 21 months is a reasonable period of time for implementation in this dispute.

[49] DSU, Art.3.7.