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

Recourse to Article 21.3(c) of the DSU

(DS471)

Statement of the United States of America at the Oral Hearing

December 8, 2017

1. Good morning. Mr. Farbenbloom, the United States would like to thank you for agreeing to serve as the Arbitrator in this proceeding. We appreciate the opportunity to appear before you today to explain further why no less than 24 months is a reasonable period of time (RPT) to implement the recommendations and rulings of the Dispute Settlement Body (DSB) in this dispute.

2. We will also address China's proposal that the RPT should be a mere six months. China's proposal is not serious. China fails to account for the particular circumstances of this dispute; including China's own decision to bring a dispute challenging 38 separate determinations, each with its own administrative record and each with differing sets of interested parties for which the United States must ensure due process.

I. The United States Justified Its Proposal of No Less Than 24 Months.

3. The United States outlined in its written submission why we require an RPT of no less than 24 months. The schedule we have described results in the shortest practicable implementation period that would comply with procedural requirements under U.S. law and ensure procedural fairness for all interested parties.

4. Briefly, as noted in our written submission, the DSB's recommendations include "as such" and "as applied" findings concerning the use by the U.S. Department of Commerce (Commerce) of the Single Rate Presumption (SRP) in antidumping proceedings involving China. These recommendations pertain to determinations by Commerce in 38 individual antidumping investigations and administrative reviews. In addition, the DSB's recommendations include "as applied" findings concerning the use of "zeroing" in conjunction with the "targeted dumping" methodology, which affect four of the 38 antidumping determinations concerned.

5. As mentioned, the U.S. schedule contemplates dividing implementation into two sequential phases conducted pursuant to sections 123 and 129 of the *Uruguay Round Agreements Act* (URAA). First, the United States expects to undertake a section 123 proceeding to address the "as such" findings with respect to the SRP. Second, we anticipate conducting 38 section 129 proceedings to address the "as applied" findings regarding the SRP in 13 original investigations and 25 administrative reviews, as well as the "as applied findings" regarding the use of "zeroing" in conjunction with the "targeted dumping" methodology in four of those 38 determinations. The U.S. proposal also reflects the need to stagger the 38 section 129 proceedings in three tranches.

6. As explained in our submission, the United States expects to issue the preliminary determination in the section 123 proceeding in April 2018. In preparation for this step, Commerce is developing a revised approach for addressing the relationship between producers and exporters and the government in China for both original investigations and administrative reviews. In particular, Commerce has been conducting internal analysis with respect to the numerous possible options available for the United States to address the "as such" findings in this dispute.

7. In light of the importance of the issue, the United States expects that Commerce will receive substantial public comment on the preliminary section 123 determination. Commerce will need to address comments received and fully explain its reasoning and findings in what will almost certainly be a complex and lengthy final determination. Under the U.S. timetable, this is expected in August 2018.

8. The second phase of implementation, which would begin after the section 123 process is

well advanced in addressing the "as such" findings, involves 38 section 129 proceedings to address the "as applied" findings. Sequencing the proceedings is necessary in order to allow Commerce to apply any revised approach to the SRP developed in the section 123 proceeding when making the 38 determinations subject to implementation pursuant to section 129. We note that China does not oppose this sequencing.

9. The United States expects that each of the 38 section 129 proceedings may involve a detailed, fact-intensive inquiry into the status of relevant exporters or producers based on positive evidence. In such a scenario, in accordance with U.S. legal requirements, the United States anticipates that Commerce would need to reopen the record in each of the 38 challenged determinations to gather and analyze information from respondents and other interested parties in each proceeding.

10. To undertake a careful, fact-intensive inquiry in each of the 38 proceedings as efficiently as possible, and in accordance with U.S. law, Commerce expects to commence the section 129 proceedings in three tranches. Staggering the 38 proceedings in this way would best allow Commerce to complete the section 129 proceedings in an efficient manner.

11. In sum, to fulfill U.S. legal requirements, implementation with respect to the measures at issue in two sequenced phases requires a total RPT of no less than 24 months.

II. China Failed to Establish that 6 Months is a Reasonable Period of Time.

12. China proposes that the RPT in this dispute should be six months. China's proposal is not serious.

13. Before addressing China's arguments, it is important to note that the parties agree on several key points. China agrees with the United States that the implementing Member has the

discretion to choose the means of implementation that it deems appropriate.[1]

14. Both parties also agree that a 15-month RPT is only a guideline provided in Article 21.3 of the DSU,[2] and that an RPT of more than 15 months is appropriate depending on the particular circumstances of the dispute.[3]

15. Further, as previously noted, China agrees that it is necessary for the United States to implement in two sequential phases pursuant to sections 123 and 129 of the URAA, with a partial overlap after the preliminary determination in the section 123 proceeding.[4]

16. Despite agreement on these key points and aspects of the underlying implementation obligations, China argues that a mere six months is sufficient to implement the DSB recommendations. China's position is untenable; it relies on arbitrary and unreasonable time frames for most of the implementation steps.

A. The Pre-Commencement Phase is an Integral Part of the U.S. Implementation Proposal.

17. First, China argues that the United States should have begun taking implementation steps to address panel findings that were not appealed even before DSB adoption of the Panel and Appellate Body reports.[5] China is incorrect.

18. China's argument that the United States should have started implementation before adoption of the Panel and Appellate Body reports in this dispute is contrary to the text of the DSU. Article 21.3(c) of the DSU provides that this arbitration proceeding is focused on determining "the reasonable period of time to implement panel or Appellate Body

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[1] Submission of China, para. 17.
[2] *Understanding on Rules and Procedures Governing the Settlement of Disputes*.
[3] Submission of China, para. 19.
[4] Submission of China, paras. 27, 36.
[5] Submission of China, para. 24.

recommendations", as measured "from the date of adoption of a panel or Appellate Body report". Thus, the entire premise of this arbitration – and the RPT – is that the RPT starts with the adoption of reports by the DSB.

19. China relies on the arbitrator's award in *US – Countervailing Measures (China)*. A review of that award, however, shows that the arbitrator there expressly acknowledged that "the text of the DSU makes it clear that formal steps for implementing the recommendations and rulings of the DSB need to be taken only after the adoption of the panel and Appellate Body reports."[6] That award, therefore, does not support China's assertion that the arbitrator found that the implementing Member should have begun implementation of non-appealed findings prior to adoption.

20. China also points to a provision in U.S. domestic law indicating that the USTR should consult with congressional committees promptly after circulation of an adverse WTO report. China's reliance is misplaced. The fact that the United States begins such consultations as soon as possible does not mean that the United States is entitled to a shorter RPT than a Member that waits until report adoption to begin discussing implementation with its legislative branch.

21. China's characterization of the preparatory phase outlined by the United States as an "extension" request is nothing more than argument by name-calling.[7] Indeed, China has no substantive response to our explanation that the pre-commencement phase comprises concrete steps towards implementation. As we have explained, the preparatory phase is an integral part of U.S. efforts to implement in this dispute.

22. Further, prior Article 21.3(c) awards have recognized that preparatory work is essential to

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[6] *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.44.
[7] Submission of China, para. 24.

achieving compliance. For example, the arbitrator in *US – Washing Machines* stated that this phase is a typical and legitimate aspect of law-making in the context of a section 123 proceeding and, accordingly, such consultation and preparatory work should be taken into account in determining an RPT for implementation.[8] The arbitrator in that dispute further recognized that pre-commencement work may serve the "double purpose" of (1) ensuring that the resulting methodology is WTO-consistent, and (2) reducing the time necessary to undertake subsequent implementation steps.[9] Such is the case here, where the internal deliberations and analysis that Commerce is undertaking prior to commencement of the section 123 proceeding will allow Commerce to address the findings in this dispute more efficiently.

23. China also incorrectly asserts that the United States has taken no steps towards implementation. As explained in the U.S. submission, the United States has spent the first several months of the implementation process engaged in preparatory work. Commerce has been engaged in significant and in-depth analysis and deliberation, specifically, with respect to the numerous possible options available to the United States to address the Panel's "as such" findings on the SRP.

B. China Is Incorrect that the United States Must Simply Withdraw the SRP in the Section 123 Proceeding to Implement the "As Such" Findings.

24. China's arguments with respect to the section 123 process are completely unconvincing. In particular, China has no basis for arguing that the United States must implement by withdrawing the SRP and without any replacement to address relationships between producers, exporters, and the government.

[8] Award of the Arbitrator, *US – Washing Machines (Article 21.3(c))*, para. 3.32.
[9] Award of the Arbitrator, *US – Washing Machines (Article 21.3(c))*, para. 3.32.

25. Contrary to what China contends, the means of implementation chosen by the United States is not limited to withdrawal of the SRP. Rather, the United States is fully within its WTO rights to develop an alternative approach consistent with the DSB's recommendations. Indeed, nothing in the adopted reports or the DSB recommendations provides any basis for contravening U.S. rights under the GATT 1994[10] and Antidumping Agreement[11] to impose appropriate antidumping duties.

26. The findings in this dispute allow for the possibility that, in appropriate circumstances, Commerce may treat certain exporters and producers in a combined fashion under Articles 6.10 and 9.2 of the Antidumping Agreement.[12] Indeed, the Panel referred to the Appellate Body Report in *EC – Fasteners (China)*, which explicitly allowed for the possibility that an investigating authority may establish the existence of a single exporter.[13] Specifically, in addressing the EU's measure, which resembled the SRP, the Appellate Body found:

> In our view, Articles 6.10 and 9.2 of the Anti-Dumping Agreement do not preclude an investigating authority from determining a single dumping margin and a single anti-dumping duty for a number of exporters if it establishes that they constitute a single exporter for purposes of Articles 6.10 and 9.2 of the Anti-Dumping Agreement. Whether determining a single dumping margin and a single anti-dumping duty for a number of exporters is inconsistent with Articles 6.10 and 9.2 will depend on the existence of a number of situations, which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity.[14]

The Appellate Body further outlined several criteria that may be relevant to undertaking a single-

[10] *General Agreement on Tariffs and Trade 1994*.
[11] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.
[12] Panel Report, *US – Anti-Dumping Methodologies (China)*, paras. 7.361 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 376).
[13] Appellate Body Report, *EC – Fasteners (China)*, paras. 376-382. We also note that the EU compliance measure explicitly allows for such treatment as a single entity. EU Reg. 765/2012 (June 13, 2012) (amending Art. 9(5) of the EU Basic Regulation). China did not challenge this aspect of the EU compliance measure in the Article 21.5 proceeding it subsequently initiated.
[14] Appellate Body Report, *EC – Fasteners (China)*, para. 376.

entity analysis, including corporate and structural links between exporters and producers and the State, and material influence by the State with respect to pricing behavior by producers and exporters.[15]

27. Accordingly, the development of an alternative analysis for single-exporter treatment remains a WTO-consistent option for implementation in this dispute. The United States intends to consider whether it may be appropriate to develop such an approach. That work is difficult, and requires careful consideration and analysis.

28. Moreover, we note that prior Article 21.3(c) awards have included time for an implementing Member not only to remove a measure found to be WTO-inconsistent, but to develop, or take time to consider developing, an alternative measure.[16] This is a sensible approach. An arbitration under Article 21.3(c) of the DSU should "serve to preserve the rights and obligations of Members under the covered agreements"[17] and should contribute to a "positive solution to a dispute".[18] In this dispute, the RPT determined by the Arbitrator should be of sufficient length to allow for an implementation process that takes account of all available information and uses a well-considered approach to address the DSB recommendations.

C. The Time Frames Proposed by China are Not Administrable and Ignore the Substantive Complexity of Implementation.

29. China proposes time frames for the section 123 proceeding and the 38 section 129 proceedings that are unrealistic under the U.S. legal system. In particular, China makes the

[15] Appellate Body Report, *EC – Fasteners (China)*, paras. 376-382.
[16] *See, e.g.*, Award of the Arbitrator, *US – Washing Machines (Article 21.3(c))*, para. 3.34. The arbitrator took into account time for Commerce to develop an alternative approach to replace the methodology found to be WTO-inconsistent pursuant to section 123 of the URAA.
[17] DSU, Article 3.2.
[18] DSU, Article 3.7.

extraordinary claim that the United States is capable of implementing in just six months, allotting a mere 15 days for the United States to issue a preliminary determination in the section 123 proceeding and 5.5 months to complete section 129 proceedings for all 38 challenged determinations.[19] China's proposal is completely unrealistic and ignores the substantive and procedural complexity of both phases.

a. Phase I – section 123 proceeding

30. With regard to phase I, China has no basis for arguing that 15 days is sufficient to issue a preliminary determination in the section 123 proceeding. China's argument is based solely on the proposition that the SRP must be withdrawn and that no replacement is possible. As we just discussed, this proposition is incorrect.

31. China also argues with respect to phase I that the time between publication of the preliminary and final determinations in the section 123 proceeding should be "brief" and "consist mostly of formalities".[20] The United States strongly disagrees that such an approach would afford the meaningful opportunity for public comment envisaged in section 123(g) of the URAA. We draw the Arbitrator's attention to the Award in *US – Washing Machines*, where the arbitrator stated with respect to section 123 that "while there is no statutorily prescribed minimum period for public comment, it must be highlighted that a shorter-than-normal period for public comment risks affecting the legitimacy of the modification".[21] We agree. We further note that, for the public comment period to be meaningful, the period for consideration of those comments must also be of sufficient length, as provided in our timetable. Accordingly, nothing in China's

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[19] Submission of China, para. 28.
[20] Submission of China, para. 47.
[21] Award of the Arbitrator, *US – Washing Machines (Article 21.3(c))*, para. 3.40.

argument calls into question the amount of time provided for this step in the U.S. schedule.

b. Phase II – 38 section 129 proceedings

32. With respect to phase II, China makes several erroneous assertions concerning U.S. legal requirements and downplays the substantive complexity involved in completing the 38 section 129 proceedings.

33. First, China argues that the 180-day period set out in section 129(b) of the URAA is a maximum period in which all factual development and analysis must take place for each redetermination.[22] This assertion is incorrect. As an initial matter, section 129 lays out a multi-step process for the implementation of DSB recommendations and provides no overall limit on the time that the U.S. Executive Branch may take to implement. This is logical, as section 129 was part of the legislative package that accepted and implemented the Uruguay Round agreements. And, the relevant Uruguay Round agreement – that is, the DSU – certainly contains no six-month time limit on the implementation period.

34. China focuses on the step that occurs between the formal request by the U.S. Trade Representative (USTR) for a new Commerce determination, and Commerce's issuance of that determination. China's focus is misplaced. The statute clearly contemplates Executive Branch activity both before and after this step. For instance, prior to receipt of a written request from the USTR, nothing in the statute precludes Commerce from commencing a section 129 proceeding and beginning, for example, to issue questionnaires to parties. Indeed, the United States has done so in prior implementation proceedings. Accordingly, China is incorrect that all factual development and analysis must take place within 180 days.

[22] Submission of China, paras. 52, 55, 57.

35. China also errs in arguing that, under Commerce regulations, an entire antidumping investigation is meant to take no more than 215 days.[23] Under U.S. law, an antidumping investigation may take 355 days.[24]

36. The details are as follows. By statute, the United States issues its preliminary determination within 140 days of initiation unless that period is extended to 190 days because, *e.g.* the petitioner requests an extension or "if the case is extraordinarily complicated."[25] U.S. law states that Commerce shall make a final determination 75 days after the date of its preliminary determination, unless Commerce extends the deadline until no later than the 135th day after the date on which it *published* notice of the preliminary determination.[26] Thus, to allow adequate time for Commerce to investigate, verify, and receive factual information and comments from interested parties, an investigation frequently takes the 325 days. Finally, interested parties have an opportunity to allege that Commerce made ministerial errors. Parties have 5 days after the release of disclosure documents to make such an allegation and Commerce has 30 days to issue a notice correcting its error, if any. Thus, an entire investigation, including any potential ministerial errors, may take <u>355 days</u>.

37. Further, China downplays the substantive and procedural complexity of the work Commerce would need to do in undertaking 38 separate redeterminations. In particular, China contends that "…implementing one determination is no different than implementing 38 section 129 proceedings."[27] This is fundamentally wrong, and indeed past awards have recognized that

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[23] Submission of China, para. 58.
[24] Sections 733(b)(1), 735(a) of the Tariff Act of 1930.
[25] Section 733(b)(1) of the Tariff Act of 1930; Section 735(a) of the Tariff Act of 1930.
[26] Section 735(a) of the Tariff Act of 1930.
[27] Submission of China, para. 32.

the number of issues or proceedings to be undertaken are a relevant factor with respect to the technical complexity of implementation. And the complexity is a particular circumstance for an arbitrator to take into account in determining an RPT.[28]

38. For all these reasons, China has failed to demonstrate that the time periods it proposes for particular implementation steps are realistic or compatible with the parameters of the U.S. legal system.

III. Conclusion

39. In summary, the United States proposes an RPT that would permit implementation of the DSB recommendations in a manner that respects WTO rules and U.S. legal requirements, while preserving the right of the United States to maintain appropriate antidumping duties. We reiterate that the parties and the WTO dispute settlement system have a strong interest in setting an RPT of sufficient length to secure a positive solution to this dispute.

40. Mr. Farbenbloom, the United States respectfully requests that you award an RPT of no less than 24 months. Thank you for your attention, and we look forward to answering any questions.

[28] Award of the Arbitrator, *Canada – Pharmaceuticals (Article 21.3(c))*, paras. 48-51.