United States – Countervailing Duty Measures on Certain Products from China: Recourse by China to Arbitration under Article 21.3(c) of the DSU

(WT/DS437)

Statement of the United States of America at the Oral Hearing

September 9, 2015

1. Good morning, Mr. Abi-Saab, members of the Secretariat, and members of the Chinese delegation. The United States would like to thank Mr. Abi-Saab for serving as the arbitrator in this proceeding requested by China under Article 21.3(c) of the DSU.[1] We appreciate the opportunity to appear before you today to further explain why nineteen months is the reasonable period of time (RPT) to implement the recommendations and rulings of the Dispute Settlement Body (DSB).

The United States Justified its Reasonable Period of Nineteen Months

2. The 19-month period put forward by the United States is based on a well-considered review and analysis of all the relevant factors. In particular, we have taken into account the past experience of the Department of Commerce (Commerce) in revising prior determinations, the complexity of the findings of the panel and the Appellate Body, the number of investigations at issue, the number of findings that must be addressed, the current Commerce workload, and the need to ensure that implementation is consistent with domestic law and WTO rules.

3. In our written submission, we explained that the panel and Appellate Body reports resulted in multiple implementation obligations for the United States, a number of which involve particularly complex factual and legal issues. Indeed, this case is unique in that China has chosen to bring one of the most far-reaching disputes in the history of the WTO, initially covering 10 broad issues over 22 different investigations. Although the panel and the Appellate Body concluded that the United States had met its WTO obligations with respect to many of the Commerce determinations challenged by China, several complicated findings, cutting across

[1] *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

many of the 15 investigations at issue, remain. Commerce is addressing these findings through proceedings under section 129 of the Uruguay Round Agreements Act (URAA). Accordingly, there will be a careful, fact-intensive inquiry into whether and how each of the investigations should be modified, and in some cases, Commerce must consider and apply an entirely new analysis that is different from any analysis Commerce has used in the past.

4. The parties agree that the arbitrator in Article 21.3(c) proceedings may take into account "particular circumstances" in determining the RPT, which may include (1) the legal form of implementation, (2) the technical complexity of the measure that the Member must draft, adopt, and implement, and (3) the period of time in which the implementing Member can achieve the proposed legal form of implementation in accordance with its system of government.[2] Presently, the disagreements between the parties are primarily over the last two elements: the technical complexity of implementation, and the period of time in which the Member can achieve the legal form of implementation.

5. Further, when comparing the timetables of the two parties, there are only a few phases of the RPT where there is substantial disagreement: the consultation and pre-commencement analysis phase, where the United States spent 3.5 months, and China believes one month is appropriate; the phase of seeking information from interested parties, where the United States expects to need six months total, while China believes a period of three months is sufficient; and the verification phase, where the United States expects a 2.5 month period to be sufficient, while China believes a period of two weeks is sufficient. With the exception of the verification

[2] China Submission, para. 18. *See also* Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, paras. 48-51.

period, much of this occurred in the past, and, for reasons that will be demonstrated below, the periods of time that the United States expended on these phases were reasonable.

6. China seeks to convince you that a mere ten months would be sufficient to fully address the issues raised by the panel and Appellate Body, partially because the recommendations and rulings require "little (if any) new information or analysis."[3] However, as China specifically and repeatedly requested throughout these proceedings, the findings by the panel and Appellate Body centered on a failure by Commerce to provide "reasoned and adequate explanations." In these circumstances, it is particularly galling for China to now claim that the United States can conduct these redeterminations in such a short period of time without taking into account the additional analysis and explanation necessary – analysis and explanation it consistently called for in its submissions in this dispute.

7. Moreover, China has provided to the arbitrator an inaccurate and confusing description of the statutory requirements in U.S. law. We hope that we may assist the arbitrator today by accurately describing both U.S. law and Commerce's procedures. For ease of reference, the United States will address China's arguments in the order in which they were presented in China's submission.

A. Section 129 of the URAA Does Not Create a Maximum Timeframe For The Implementation Process.

8. To begin, China mischaracterized section 129 of the URAA. In its submission, China asserts that the 180-day time period referred to in one subsection of section 129 is "the maximum

[3] China Submission para. 34.

timeframe" for redeterminations under the URAA.[4]

9. This assertion is incorrect. The United States has employed section 129 in a number of prior disputes, and Commerce in multiple instances has taken longer than six months to issue redeterminations.[5] Nor has China pointed to any statement by U.S. courts interpreting section 129 in the way it proposes. Indeed, as is evident from the plain language of the statute, 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 completely understandable, in that 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 has no six-month time limit on the implementation period.

10. China errs because it plucks one step from the entire multi-step process and considers that the length of time for that single step is equivalent to the length of time required for the entire process. In particular, 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. However, the statute is clear on its face that it contemplates Executive Branch activity before and after this step.

11. Subsection 129(b)(1) contemplates Executive Branch activity prior to that described in subsection 129(b)(2), and specifically requires both consultations within the Executive Branch, and between the Executive Branch and Congress. The statute provides no time limit on the

[4] China Submission, para. 24.
[5] For example, in the *U.S. – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* dispute, the redetermination took longer than a year.

action taken under subsection 129(b)(1). And, for example, in the current implementation process, the U.S. Executive Branch is currently within this initial phase, and has not yet entered into the 180-day phase contemplated under subsection 129(b)(2).

12. After the implementation period is finished, an additional consultation phase occurs in which the U.S. Trade Representative will consult with Commerce and Congress. In this dispute, this may include discussions with the relevant Congressional Committees about each one of the 15 investigations.

13. For all these reasons, China is incorrect in its arguments that 180 days is a "maximum timeframe" or otherwise suggests an outer limit for implementation under U.S. law.

14. Instead, the United States incorporates each of the steps required by the statute, including the 180-day time period, into its proposed RPT. As stated in the U.S. submission, USTR intends to issue the section 129(b)(2) letter, requesting a new Commerce determination in each proceeding, no later than February 2016. The final determinations will then be issued in May 2016.

B. A 19-month RPT is Consistent with the Timeframe for Countervailing Duty Investigations under U.S. Law.

15. China also inaccurately reflects the amount of time that CVD investigations take under U.S. law. China argues that the "total USDOC countervailing duty investigation is meant to take no more than 140 days, or 4.5 months."[6] This is a gross mischaracterization. As shown by past investigations by Commerce and Commerce's regulations, based on the plain text of the U.S. statute, the overall time provided for a CVD investigation will turn on the facts and

[6] China Submission, para. 25.

circumstances of each particular proceeding.

16. Under U.S. law, the timing for CVD investigations is broken into two phases: the time between initiation and the preliminary determination, and the time between the preliminary determination and the final determination. With respect to the first phase, the U.S. statute and Commerce's regulations provide that the timeframe Commerce can use to issue preliminary determinations can range from 65 to 310 days.[7] With respect to the period between the preliminary and final determinations, the amount of time can range from 75 to 165 days. Accordingly, under U.S. law, the total amount of time can be more than 475 days, or approximately 16 months.[8] Again, China has pointed to no statement by U.S. courts interpreting section 129 as imposing the time limitation it proposes.

C. The Period of Time Used for Pre-Commencement Analysis was Reasonable.

17. China posits that the United States should have only spent one month on consultation and pre-commencement analysis, as opposed to the 3.5 months that was actually spent by USTR and Commerce. In making this argument, China contends that the United States should have started this analysis immediately after the panel issued its report in May 2014. This contention is wrong as both a matter of law and fact.

[7] *See* 19 U.S.C. §§ 1671b(c), 1671b(g); 19 C.F.R. §§ 351.205(b)(2)-(3).
[8] *See* 19 U.S.C. §§ 1671b(g)(2), 1671d(a)(1); 19 C.F.R. §§ 351.210(b)(3)-(4).

18. First, under the plain language of Article 21.3(c), this arbitration process is focused on determining a period of time "after the date of adoption of the recommendations and rulings." Article 21.3(c) also states that the reasonable period of time to implement the panel or Appellate Body recommendations should not exceed 15 months *from the date of adoption.*[9] Thus, the entire premise of this arbitration – and the reasonable period of time – is that the RPT starts with the adoption of reports by the DSB.

19. In making its argument, China relies on the Arbitrator's award in *US – Section 110(5) Copyright Act (Article 21.3(c)).* China's reliance, however, is misplaced. A review of that award shows that the arbitrator was addressing actions to be taken after the DSB adoption: "Arbitrators will scrutinize very carefully the actions an implementing Member takes in respect of implementation during the period *after adoption of a panel and/or Appellate Body report and* prior to any arbitration proceeding."[10] It does not support China's contention that the RPT should, in essence, start prior to the time a report was adopted.

20. In any event, China falsely presumes that because the pre-commencement analysis took 3.5 months, no work had been done prior to that period. China offers zero evidence to support this assumption, and it is incorrect. After the panel report was issued, the United States began to assess the related questions of whether or not to appeal the various findings of the panel, and in the absence of a successful appeal, how implementation would need to occur. This planning stage allowed the United States to be in a better position to take action after adoption.

21. The most complicated area of implementation for the United States relates to when it may

[9] *See also* Articles 16, 17 and 21 of the DSU.
[10] Award of the Arbitrator, *US – Section 110(5) Copyright Act (Article 21.3(c))*, para. 46 (emphasis added).

rely on out-of-country benchmarks to determine the adequacy of remuneration when a government or entities related to the government provide a good. When the Appellate Body found that Commerce's analysis in determining when to use out-of-country benchmarks was inadequate in certain proceedings, the Appellate Body prescribed several new avenues of analysis. These include analysis of the "structure of the relevant market"[11]; "necessary market analysis"[12]; and the "conditions of competition in the relevant market."[13] These are new areas of analysis that require considerable preparation by Commerce.

22. Indeed, China also found this new area of inquiry to be complicated. China submitted benchmark questionnaire responses for the *Pressure Pipe*, *Line Pipe*, and *OCTG* investigations numbering 665, 1,432, and 1,032 pages, respectively.[14] Furthermore, in response to China's benchmark questionnaire responses concerning the *Line Pipe* and *OCTG* investigations, members of the U.S. domestic industry submitted rebuttal and new factual information filings that numbered approximately 1,800 and 1,700 pages, respectively.[15]

23. In fact, there are already over 17,000 pages of information currently on the proceedings pertaining to the public body and benchmark issues alone, a number the United States expects to grow as the proceedings continue. Thus, in addition to reviewing the Appellate Body's findings as they pertain to benchmarks and other issues, Commerce will also have to examine and weigh the arguments and information contained in the aforementioned submissions from China and

[11] *US – Countervailing Measures (China) (AB)*, para. 4.62 (emphasis in original).
[12] *US – Countervailing Measures (China) (AB)*, para. 4.61.
[13] *US – Countervailing Measures (China) (AB)*, para. 4.52.
[14] *See* China's July 17, 2015, respective submissions in the *Pressure Pipe*, *Line Pipe*, and *OCTG* investigations.
[15] Concerning the *Line Pipe* investigation, see U.S. Steel's July 17, 2015, submission and Maverick's August 3, 2015, submission. Concerning the *OCTG* investigation, see U.S. Steel's July 17, 2015, submission and Maverick's August 3, 2015, submission.

members of the U.S. industry. These lengthy submissions are evidence that the 3.5 month pre-commencement analysis period was reasonable.

D. A Period of Six Months is a Reasonable Amount of Time for Issuing Questionnaires and Analyzing Responses.

24. China also argues that Commerce should have only taken three months to issue questionnaires and analyze the responses to those questionnaires. China does not support the number of three months with any evidence, but instead simply alleges that any delays between questionnaires were "inexplicable."[16] China's claims ignore the fact that information responses are often incomplete, or provide investigating authorities with information which leads to the issuance of further questionnaires, as was the case in this dispute. Furthermore, domestic industry frequently may have comments on questionnaire responses, and when the domestic industry provides responses to questions, respondents and foreign governments may in turn provide comments in their submissions, as they did with regard to the benchmark and public body questionnaires. The U.S. written submission lays out the technical complexity of the measures and analysis as reasons supporting this aspect of the U.S. proposed RPT; accordingly we will focus here on a few errors in China's submission.

25. Many of China's claims at the panel and Appellate Body revolved around whether Commerce made reasoned and adequate explanations of its conclusions regarding, for example, public body determinations, benchmarks, and the identity of the granting authority. In response, the panel and the Appellate Body made numerous findings that require the United States to gather additional facts and undertake more analysis. And yet China now refuses to

[16] China Submission, para. 40.

acknowledge that the findings they argued for require more time than the original investigations that they found lacking.

26. China incorrectly refers to the timeline from the *OCTG* investigation to contend that Commerce typically completes investigations in seven months. This is an inapt comparison. In the *OCTG* investigation, Commerce had the benefit of being able to consider and apply analytical frameworks initially developed in other proceedings. For example, for the input LTAR programs, Commerce, at the time of the *OCTG* investigation, could consider approaches developed in prior proceedings to determine which input producers were government authorities and to determine which input prices were suitable for benchmark purposes. The same cannot be said in the proceedings at issue here, as Commerce must now devise a new approach to determine whether it can rely on in-country or out-of-country benchmarks to determine the adequacy of remuneration.

27. China also argues that the fact that it only selectively participated in many of the questionnaires means that the RPT should be shorter.[17] First, China informed the United States only one month ago that it would allegedly not be filing any additional responses in seven of the investigations. Second, the United States assumes that China is not now asserting that it controls and therefore can speak on behalf of all Chinese companies in all the redetermination proceedings; therefore, even were *China* not to file additional responses, further participation by Chinese companies cannot be excluded. In addition, Commerce is still required by statute to issue a preliminary determination and allow parties to comment on that determination, regardless

[17] China Submission, para. 36.

of whether or not they responded to the questionnaires.

28. In any event, thousands of pages of information have been filed on the records in the redeterminations in this dispute, including filings by China. Furthermore, to the extent that China elects not to cooperate to the best of its ability, and Commerce is thereby required to use facts available, Commerce will still need to do a substantial amount of analysis of the record, including, *inter alia*, the analysis needed to support any facts available determinations. Thus, China's decision not to fully participate in some of these cases with respect to some of these issues in no way results in a shorter period of time to address and complete implementation.

29. Overall, China makes an unconvincing and unsubstantiated argument that three months would be a reasonable period of time for the questionnaires in 15 proceedings to be issued and analyzed. In order to come up with its proposed three months, China minimized the volume of submissions that China itself filed, ignored key distinctions with respect to its "sample case," the *OCTG* investigation, and tried to use its own lack of cooperation to justify its case for a shorter RPT. There is simply no merit to such arguments.

E. A Period of 2.5 Months is Reasonable for Verification.

30. China's argument that two weeks is sufficient for the verification phase is similarly unconvincing. Verification is a vital part of ensuring that Commerce's CVD determinations are based on accurate information. Although verifications are not always required in every proceeding, Commerce still requires the time to verify new factual information if the circumstances warrant it. Furthermore, under Article 12.6 of the SCM Agreement[18], it is within

[18] *Agreement on Subsidies and Countervailing Measures*.

an investigating authority's discretion to determine if verification is necessary.

31. China's argument that Commerce could conduct its verifications in all the cases at issue in two weeks is not supported by any evidence. As the United States explained in paragraph 29 of its submission, verification procedures require first the preparation of verification outlines and questionnaires, which are sent to the parties before verification. Subsequently, Commerce officials must arrange for travel throughout China. Only then does the actual travel to China occur, which takes more than a few days, including the collection and analysis of data on-site.

32. Once Commerce officials return to the United States, they must prepare and issue verification reports, which are extensive documents to ensure that all information is correctly prepared and summarized. A two week period would not allow for all of these steps to occur.

F. Conclusion.

33. In summary, China's submission consistently underestimates the time required for the United States to properly implement the multiple DSB findings in all of the separate proceedings covered in this dispute. China's arguments should therefore not be relied upon as an accurate assessment of the technical complexity of the implementation or the U.S. regulatory process. In contrast, the 19-month RPT that was set forth in the U.S. submission is a reasonable period of time based on the particular circumstances of this dispute.

34. We thank the arbitrator for your attention, and we look forward to answering any questions you may have.