

***UNITED STATES – ANTI-DUMPING MEASURES  
ON CERTAIN SHRIMP FROM VIET NAM***

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

**(DS429)**

**WRITTEN SUBMISSION  
OF THE UNITED STATES OF AMERICA**

**October 15, 2015**

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**TABLE OF REPORTS AND AWARDS**

<b>Short Form</b>	<b>Full Citation</b>
<i>Brazil – Tyres (Article 21.3(c))</i>	Arbitrator Award, <i>Brazil – Measures Affecting Imports of Retreaded Tyres – Recourse to Arbitration under DSU Article 21.3(c)</i> , WT/DS332/16, circulated 29 August 2008
<i>Canada – Autos Article 21.3(c)</i>	Arbitrator Award, <i>Canada – Certain Measures Affecting the Automotive Industry – Recourse to Arbitration under DSU Article 21.3(c)</i> , WT/DS139/AB/R, WT/DS142/AB/R, circulated 4 October 2000.
<i>Canada – Pharmaceuticals (Article 21.3(c))</i>	Arbitrator Award, <i>Canada – Patent Protection of Pharmaceutical Products – Recourse to Arbitration under DSU Article 21.3(c)</i> , WT/DS114/13, circulated 18 August 2000.
<i>Chile – Alcohol (Article 21.3(c))</i>	Arbitrator Award, <i>Chile – Taxes on Alcoholic Beverages – Recourse to Arbitration under DSU Article 21.3(c)</i> , WT/DS87/15, WT/DS110/14, circulated 23 May 2000.
<i>US – Shrimp II (Viet Nam)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from Viet Nam (DS429)</i> , WT/DS429/R and Add. 1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R.
<i>US – Countervailing Measures (Article 21.3(c))</i>	Arbitrator Award, <i>United States – Countervailing Duty Measures on Certain Products from China – Recourse to Arbitration under DSU Article 21.3(c)</i> , WT/DS437/16, circulated 9 October 2015.
<i>US – Hot Rolled Steel (Article 21.3(c))</i>	Arbitrator Award, <i>United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan – Recourse to Arbitration under DSU Article 21.3(c)</i> , WT/DS184/AB/13, circulated 19 February 2002.
<i>US – Section 110(5) (Article 21.3(c))</i>	Arbitrator Award, <i>United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under DSU Article 21.3(c)</i> , WT/DS160/12, circulated 15 January 2001.
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS268/12, 7 June 2005

**TABLE OF EXHIBITS**

<b>Description</b>	<b>Exhibit No.</b>
Letter from the Permanent Mission of the Socialist Republic of Viet Nam (June 24, 2015)	USA-1
Section 123 (19 U.S.C. § 3533)	USA-2
Section 129 (19 U.S.C. § 3538)	USA-3
19 C.F.R. § 351.302	USA-4

## I. INTRODUCTION

1. At its meeting on April 22, 2015, the Dispute Settlement Body (DSB) adopted its recommendations and rulings in *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam* (DS429). 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 May 20, 2015, 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 (RPT) to do so.

2. The United States engaged in discussions with Vietnam under Article 21.3(b) of the DSU in an effort to reach agreement on the length of the RPT. The parties were unable to reach agreement and on September 17, 2015, Vietnam 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 is implementing DSB recommendations and rulings with respect to six matters:

- presumption that all producers/exporters in Vietnam belong to a single, Vietnam-wide entity and the assignment of a single rate to these producers/exporters;<sup>1</sup>
- presumption in the fourth, fifth, and sixth administrative reviews that all companies in Vietnam belong to a single, Vietnam-wide entity and the assignment of a single rate to these producers/exporters;<sup>2</sup>
- application to the Vietnam-wide entity of a duty rate exceeding the ceiling applicable under Article 9.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”) in the fourth, fifth, and sixth administrative reviews;<sup>3</sup>
- treatment of a request for revocation by Minh Phu;<sup>4</sup>

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<sup>1</sup> *US – Shrimp II (Vietnam)*, para. 8.1(c).

<sup>2</sup> *US – Shrimp II (Vietnam)*, para. 8.1(d).

<sup>3</sup> *US – Shrimp II (Vietnam)*, para. 8.1(f).

<sup>4</sup> *See US – Shrimp II (Vietnam)*, para. 8.1(k). Vietnam notified the United States that the following companies do not intend to pursue revocation of the *Shrimp* antidumping duty order in the context of the implementation of this dispute: Vietnam Fish One; Nha Trang Seafoods; Camimex; Phuong Nam Food Stuff; and Viet I Mei Frozen Foods. Letter from the Permanent Mission of the Socialist Republic of Viet Nam (June 24, 2015) (USA-1). Based on this notification, the United States intends to consider only Minh Phu’s request for revocation and does not need to take any further steps to implement the Panel’s conclusions that the United States acted inconsistently with Article 11.2

- application of the simple zeroing methodology to calculate the dumping margins of mandatory respondents in the fourth, fifth, and sixth administrative reviews;<sup>5</sup> and
- reliance on WTO-inconsistent margins of dumping in its likelihood-of-dumping determination in the first sunset review.<sup>6</sup>

4. As will be explained in more detail below, the most practical way under U.S. law for the United States to implement these six matters is by conducting three sequential proceedings, utilizing both Section 123 and Section 129 of the Uruguay Round Agreements Act (URAA).<sup>7</sup> First, the United States will employ Section 123 to address the Panel’s finding that the presumption that all producers and exporters in Vietnam belong to a single, Vietnam-wide entity is not consistent with the AD Agreement. The Section 123 process will need to be completed before any other determination regarding implementation can be finalized, because the United States (specifically, the U.S. Department of Commerce) will need to incorporate applicable findings made pursuant to the Section 123 process into certain subsequent determinations. Once all other determinations regarding implementation has been finalized, the United States will be able to reevaluate the results of the first five-year sunset review as it will need to study whether these determinations should play a role in its reconsideration of that sunset review to address the Panel’s finding that aspects of that review were not consistent with the AD Agreement.

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 six matters at issue requires that the process of implementation be conducted in the following three, sequential phases:

- Phase I: Implementation to Address As-Such Finding on Vietnam-wide Entity
- Phase II: Implementation to Address As-Applied Findings with respect to Three Administrative Reviews and Consideration of Request for Company-Specific Revocation
- Phase III: Reconsideration in the Five-Year Sunset Review

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of the AD Agreement regarding Camimex’s request for revocation or in the fourth and fifth administrative reviews regarding the requests for revocation made by certain Vietnamese producers/exporters. *US – Shrimp II (Vietnam)*, paras. 8.1(j)-8.1(k).

<sup>5</sup> *US – Shrimp II (Vietnam)*, para. 8.1(b).

<sup>6</sup> *US – Shrimp II (Vietnam)*, para. 8.1(i).

<sup>7</sup> As discussed in Section II.B.2, 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 often used to amend or modify an action taken in a particular proceeding. 19 U.S.C. § 3533(g) (USA-2); 19 U.S.C. § 3538 (USA-3).

The United States anticipates some overlap between the end of a phase and the start of the next phase,<sup>8</sup> but there exists no available approach that would allow all three of these separate phases to be accomplished simultaneously.

6. Both parties, as well as the WTO dispute settlement system as whole, have a strong interest in setting the RPT 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 Panel report.<sup>9</sup> The RPT 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 those recommendations and rulings. Such a result would preserve the rights of the United States to have a reasonable time for compliance and to impose antidumping duties where appropriate, while at the same time would preserve Vietnam's rights, and enforce obligations on the United States, to ensure that antidumping duties are imposed only in accordance with WTO rules. On the other hand, if the RPT 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 a 15 month RPT would be insufficient to ensure that the DSB recommendations and rulings may be fully implemented. As discussed below, it will take at least 21 months to complete the required steps and bring the measures at issue into compliance with the DSB's recommendations and rulings.

## **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 of modifications to the challenged measures, including the procedural requirements under U.S. law, the complexity of the issues involved, and the current resource demands and constraints on the U.S. Department of Commerce (Commerce), the shortest period of time in which it will be possible to implement the DSB's recommendations and rulings is 21 months. Section A discusses the legal considerations of the arbitrator in setting the RPT. Section B explains why the nature of the various different types of findings in this dispute requires that implementation must be accomplished sequentially in three separate phases, with an RPT of no less than 21 months.

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<sup>8</sup> As explained later, it may be possible for Commerce to issue the Phase II preliminary determination regarding the revocation request of Minh Phu around the same time it issues its Phase I preliminary determinations.

<sup>9</sup> An RPT arbitration should "serve to preserve the rights and obligations of Members under the covered agreements" (DSU, Article 3.2) and should contribute to a "positive solution to a dispute" (DSU, Article 3.7).

**A. “Reasonable Period of Time” Under Article 21.3(c) Requires Consideration of All Particular Circumstances of the Case**

9. Article 21.3(c) of the DSU provides for the arbitrator to determine the RPT a Member has to implement the DSB’s recommendations and rulings. In determining the RPT, Article 21.3(c) states that “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 that 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 prove to be less than “reasonable” in different circumstances.<sup>10</sup> 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.”<sup>11</sup>

10. Specific circumstances that have been identified in previous awards as relevant to the arbitrator’s determination of the RPT 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.<sup>12</sup> 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.<sup>13</sup>

11. Previous arbitration awards have consistently recognized that the arbitrator’s role is not to prescribe a particular method of implementation; for instance, it is not the arbitrator’s role to determine whether implementation would be better achieved through legislative or regulatory action.<sup>14</sup> 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.”<sup>15</sup> Instead, it is the role of the responding party to ensure that the means of implementation chosen is in a

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<sup>10</sup> See *US – Hot-Rolled Steel (Article 21.3(c))*, para. 25.

<sup>11</sup> *US – Countervailing Measures (Article 21.3(c))*, para. 3.50.

<sup>12</sup> *Canada – Pharmaceuticals (Article 21.3(c))*, paras. 48-51.

<sup>13</sup> *US – Section 110(5) (Article 21.3(c))*, para. 45 (quoting *Korea – Alcohol (Article 21.3(c))*, stating in para. 42 that “Although the reasonable period of time should be the shortest period possible within the legal system of the member to implement the recommendations and rulings of the DSB, this does not require a Member, in my view, to utilize *extraordinary* legislative procedure, rather the *normal* level of legislative procedure, in every case.”)

<sup>14</sup> *Chile – Alcohol (Article 21.3(c))*, para. 35; *Canada—Pharmaceuticals (Article 21.3(c))*, para. 41.

<sup>15</sup> *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48 (quoting Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 38).



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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

13. The application of the principles laid out above to this dispute demonstrates that an RPT of at least 21 months is both necessary and reasonable.

## **B. The Legal and Technical Complexity of this Matter Will Require an RPT of at Least 21 Months**

14. The need to implement the various types of findings in this dispute requires a three-phase, sequential process, necessitating a total reasonable period of time of at least 21 months. In this section, the United States will provide a brief overview of the findings that must be addressed, the process used to implement these findings, and a proceeding-specific discussion of the implementation obligations.

### **1. Commerce Must Address the Various Findings in this Dispute in Three Separate Phases**

#### **a. Phase I – Implementation to Address As-Such Finding on Vietnam-wide Entity**

15. The Panel concluded that the approach in which Commerce presumes that all producers and exporters in Vietnam belong to a single, Vietnam-wide entity is a measure that may be challenged “as such” and that this measure is inconsistent with the U.S. obligations under

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<sup>16</sup> 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 – Alcohol (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).

<sup>17</sup> 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).

<sup>18</sup> See *Canada – Pharmaceuticals (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).

Articles 6.10 and 9.2 of the AD Agreement.<sup>19</sup> This is the first dispute in which the WTO has made findings on an as-such basis about Commerce’s approach for addressing the relationship among producers/exporters and an NME Member government. Implementation of these findings will involve the consideration of novel and multifaceted issues about this relationship and, as explained next, is a required step before the United States can implement other DSB recommendations and rulings specific to the three administrative reviews covered in the dispute.

b. Phase II – Implementation to Address As-Applied Findings with respect to Three Administrative Reviews and Consideration of Request for Company-Specific Revocation

16. The Panel concluded that the United States acted inconsistently with its obligations under Articles 6.10 and 9.2 of the AD Agreement as a result of the application by Commerce in the fourth, fifth, and sixth administrative reviews of its approach for identifying the Vietnam-wide entity and the assignment of a single rate to that entity.<sup>20</sup> The Panel also concluded that the United States acted inconsistently with Article 9.4 of this Agreement as a result of the application to the Vietnam-wide entity of a duty rate exceeding the ceiling applicable under that provision in the fourth, fifth, and sixth administrative reviews.<sup>21</sup>

17. Determinations with respect to these findings are dependent on the implementation of the Phase I findings because the United States cannot make determinations specific to the fourth, fifth, and sixth administrative reviews regarding the Vietnam-wide entity, and the possible application of a new duty rate, before Commerce makes a determination about its approach for addressing the relationship among producers/exporters and an NME Member government. The United States thus will need to start the Phase I implementation process to address the Panel’s finding on the “presumption” and issue an appropriate modification to its approach before it can initiate any of the implementation processes needed to address these other findings.

18. In addition, the Panel otherwise concluded that United States acted inconsistently with: (1) Article 9.3 of the AD Agreement and Article VI:2 of the *General Agreement on Tariffs and Trade 1994* as a result of Commerce’s application of the simple zeroing methodology to calculate the dumping margins of mandatory respondents in the fourth, fifth, and sixth administrative reviews<sup>22</sup>; and (2) Article 11.2 of the AD Agreement as a result of Commerce’s reliance on WTO-inconsistent margins of dumping in its determination not to revoke the applicable anti-dumping order with respect to Minh Phu.<sup>23</sup> In an effort to comply with these recommendations and rulings as expeditiously as possible, Commerce plans to begin working on

<sup>19</sup> *US – Shrimp II (Vietnam)*, para. 8.1(c).

<sup>20</sup> *US – Shrimp II (Vietnam)*, para. 8.1(d).

<sup>21</sup> *US – Shrimp II (Vietnam)*, para. 8.1(f).

<sup>22</sup> *US – Shrimp II (Vietnam)*, para. 8.1(b).

<sup>23</sup> *US – Shrimp II (Vietnam)*, para. 8.1(k); see Letter from the Permanent Mission of the Socialist Republic of Viet Nam (June 24, 2015) (indicating that Vietnam Fish One, Nha Trang Seafoods, Camimex, Phuong Nam Food Stuff, and Viet I Mei Frozen Foods, intend to withdraw their requests for revocation) (USA-1).

the implementation processes that will address these findings as it works on preparing its preliminary determination for the Section 123 process. Therefore, with respect to these findings, there will be some overlap between the end of Phase I and the beginning of Phase II.

19. Even so, implementation of the Phase II findings generally cannot be completed prior to the final determination for the Section 123 process, because the revised manner in which the United States treats the Vietnam-wide entity may affect Commerce's decisions as to which entities should receive individual margins. Therefore, Commerce will be unable to issue preliminary determinations for the fourth, fifth, and sixth administrative reviews regarding the use of a simple zeroing methodology and the Vietnam-wide entity rate until after it issues a final determination for the Section 123 process to address the Panel's finding regarding the Vietnam-wide entity.

c. Phase III – Reconsideration in the Five-Year Sunset Review

20. In Phase III, the United States will implement the recommendations and rulings with respect to the finding that the United States acted inconsistently with Article 11.3 of the AD Agreement as a result of Commerce's reliance on WTO-inconsistent margins of dumping or rates in its likelihood-of-dumping determination in the first sunset review.<sup>24</sup> Because this sunset review will likely consider the results of Phase II covering imports during the five-year review period, the United States will need to conclude the implementation work in Phase II before engaging in Phase III.

**2. U.S. Legal Requirements Support an RPT of at Least 21 Months**

21. 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 Commerce, the Office of the U.S. Trade Representative (USTR), congressional consultations, and opportunities for public input. To address the findings subject to Phase I, the United States will make use of Section 123(g) of the URAA, which is directed to agency practice. To address the findings subject to Phase II and Phase III, the United States will make use of Section 129(b) of the URAA, which is directed to specific agency determinations.

a. Phase I – Section 123(g) Process

22. The United States will implement the Panel's finding on the "presumption" 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-2.

23. The United States will first initiate a process under Section 123 to address the Panel's finding with respect to the presumption that all producers and exporters in Vietnam belong to a single, Vietnam-wide entity. As required by Section 123(g)(1)(A)-(B), USTR will consult

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<sup>24</sup> *US – Shrimp II (Vietnam)*, para. 8.1(i).

Congress and seek advice from relevant private sector advisory committees about possible modifications to address the Panel’s finding.

24. Section 123(g)(1)(C) then requires that Commerce provide an opportunity for public comment by publishing any proposed modification to the presumption in the *Federal Register*. Commerce 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 possibly far-reaching impact of the expected Section 123 determination, it is likely that Commerce 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.

25. Under Section 123(g)(1)(D), 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 Commerce will then have to consult with Congress. After doing so, USTR will send a letter to Commerce instructing Commerce to implement the Section 123 final determination, and under Section 123(g)(1)(F), the final modification will be published in the *Federal Register*. The United States estimates that it would take no less than 12 months to complete the entire Section 123 process.

b. Phase II – Section 129(b) Process

26. To accomplish implementation with respect to the individual administrative reviews, the request for a company-specific revocation, and the five-year sunset review, the United States will make use of the procedure set out in Section 129(b) of the URAA.

27. There are four required Section 129(b) implementation steps:

- USTR shall consult with Commerce and the relevant congressional committees on the matter at issue;
- Within 180 days after the receipt of a written request from USTR, Commerce 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 Commerce and the relevant congressional committees with respect to Commerce’s determination; and
- After such consultations, USTR may direct Commerce to implement, in whole or in part, the agency’s determination.

The text of Section 129 (19 U.S.C. § 3538) is set out in full in Exhibit USA-3.

28. Given the above implementation steps, once the United States completes the Section 123 process, it will need to analyze and decide whether, and to what extent, it will need to make new determinations under a Section 129 process to apply the results of the Section 123 process (i.e., the presumption of control such that an entity exists and the possible application of a new duty rate). In addition, as this possible new duty rate according to the Panel’s finding should not exceed the weighted average dumping margins calculated for the mandatory respondents, the United States will have to wait until the completion of the Section 123 process before it can make any new determinations implementing the Panel’s associated finding regarding the use of a simple zeroing methodology in the fourth, fifth, and sixth administrative reviews.

29. As part of the Section 129 process, Commerce must ensure interested parties adequate opportunities to defend their interests by providing an opportunity for the submission of written comments.<sup>25</sup> Accordingly, Commerce will issue preliminary determinations for the fourth, fifth, and sixth administrative reviews to implement the Panel’s findings regarding the application of simple zeroing and will provide interested parties with an opportunity to comment on these preliminary determinations.

30. The United States estimates that it will take at least three months to draft the three preliminary Section 129 determinations needed to address the Panel’s findings with respect to the use of simple zeroing and to implement any changes to the Vietnam-wide entity practice.

31. Separately, Commerce will also issue a preliminary determination to address Minh Phu’s company-specific revocation request. Before doing so, Commerce will need to review data covering three periods of review and will consider whether additional record information and on-site verification is needed to implement the recommendations and rulings. During the information gathering process, interested parties typically submit several requests for additional time to file responses to Commerce’s requests. Commerce will need to consider whether to grant extensions in accordance with its regulations.<sup>26</sup> The granting of extensions necessarily increases the total amount of time required for implementation. With this in mind, the United States estimates that it will take at least three months to draft the preliminary Section 129 determination regarding Minh Phu’s revocation request.

32. As noted, with respect to all proceedings held pursuant to a Section 129 process, Commerce will be required to “provide interested parties with an opportunity to submit written comments” regarding its preliminary determinations. Furthermore, “in appropriate cases,” Commerce will provide further opportunities for interested parties to provide input by “hold[ing] a hearing.”<sup>27</sup> The interested parties will require time to analyze the preliminary determinations and file affirmative and rebuttal written arguments before Commerce. Furthermore, if requested, the parties and Commerce will need to prepare for and hold one or more hearings to discuss the

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<sup>25</sup> 19 U.S.C. § 3538(d) (Section 129(d) requires that Commerce issue a preliminary determination in each determination) (USA-2).

<sup>26</sup> See, e.g., 19 C.F.R. § 351.302(b) and (c) (USA-4).

<sup>27</sup> 19 U.S.C. § 3538(d) (USA-2).

preliminary determinations for the various issues in this implementation proceeding. These hearings are typically attended by Vietnamese exporters and producers as well as interested domestic parties. The United States estimates that it will take approximately three months after the issuance of the above-mentioned preliminary determinations for interested parties to prepare and file written comments and for Commerce to conduct hearings.

33. After all of the written arguments are filed and any hearings are held, Commerce will need time to prepare final determinations that will address the interested parties' arguments and fully describe Commerce's analysis and conclusions. The United States estimates that Commerce will need at least one month from the receipt of affirmative and rebuttal arguments to complete and issue these final determinations.

34. Next, Commerce will provide the interested parties with any relevant antidumping duty margin calculations so the parties can analyze the calculations and submit written comments relating to any possible ministerial errors. Commerce must analyze the comments and, if necessary, issue determinations addressing these comments and correcting any ministerial errors. The ministerial error correction process normally takes Commerce one month to complete.

35. After the completion of the above processes, Section 129(b)(3) requires that USTR consult with Commerce and Congress on the final Section 129 determinations. Section 129(b)(4) states that after such consultations, USTR may direct Commerce "to implement in whole or in part" the Section 129 determinations. Therefore, in addition to the time required for Commerce to conduct its proceeding, USTR will need sufficient time to conduct consultations and formulate its implementation determinations for each Phase-II, Section 129 proceeding.

36. As the final step in the Phase II process, Commerce will issue a *Federal Register* notice in which it officially implements the final Section 129 determinations.

c. Phase III – Section 129(b) Process

37. After Commerce concludes both the Section 123 process and Section 129 processes for the administrative reviews, Commerce will undertake a Section 129 determination for the five-year sunset review at issue in this implementation proceeding. Commerce will issue the preliminary Section 129 sunset determination and provide an opportunity for interested parties to submit written comments on the preliminary sunset determination. The interested parties will need time to analyze the preliminary sunset determination and file affirmative and rebuttal written arguments before Commerce. If requested, the parties and Commerce will need to prepare and hold a hearing to discuss the preliminary sunset determination. Commerce expects to issue the preliminary Section 129 sunset determination close in time to its final Section 129 Phase II determinations. The United States estimates that it will then take approximately one month after the issuance of the preliminary sunset determination for the parties to prepare and file written comments and for Commerce to conduct a hearing, if requested, on the preliminary sunset determination.

38. After all of the written arguments have been filed and any hearings have been held, Commerce will need time to prepare a final sunset determination to address the interested parties' arguments and fully describe Commerce's analysis and conclusions with respect to the sunset determination. The United States estimates that Commerce will need at least one month from the receipt of affirmative and rebuttal arguments to complete and issue the final sunset determination.

39. After the completion of the above processes, Section 129(b)(3) requires that USTR consult with Commerce and Congress on the final Section 129 determination. Section 129(b)(4) states that after such consultations, USTR may direct Commerce "to implement in whole or in part" the Section 129 determination. Therefore, in addition to the time required for Commerce to conduct its proceeding, USTR will also need sufficient time to conduct consultations and formulate its implementation determination for the final Section 129 sunset proceeding.

40. As the final step in the process, Commerce will issue a *Federal Register* notice in which it officially implements the final Section 129 sunset determination.

d. Phases I through III Timetable

41. 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:

<b>DS429 – Approximate 21 Month Case Calendar<sup>28</sup></b>	
<b>Action</b>	<b>Approx. Time Period</b>
Report Adopted by WTO Dispute Settlement Body	April 22, 2015
USTR and Commerce Consult; Pre-Commencement Analysis Preparation	April-June 2015

<sup>28</sup> These actions and dates are approximate. The necessity and length of time required for these actions depends on, *inter alia*, the participation of the parties in the Section 123 and Section 129 proceedings, the volume of the data acquired by Commerce, the complexity of the analysis required, and other factors which could vary greatly by issue.

Commerce Prepares to Issue Preliminary Section 123 Determination Announcing Change in Separate Rates Practice	June 2015- January 2016
Commerce Begins Working on Section 129 Determinations Regarding Revocation Request of Minh Phu and Zeroing in AR4-AR6	
Commerce Issues Preliminary Section 123 Determination and Solicits Comments from the Public	January- February 2016
Commerce Analyzes Comments Received on Preliminary Section 123 Determination	February- March 2016
Commerce Issues Final Section 123 Determination	April 2016
USTR Consults with Congress Before Issuing a Letter to Commerce to Implement Section 123 Findings	April 2016
USTR Issues Letter directing Commerce to Implement Section 123 Final Determination	May 2016
Commerce Issues Section 129 Preliminary Determinations for AR4-AR6 for Zeroing, Vietnam-wide Entity (as appropriate), and Revocation (if Not Previously Issued)	June 2016
Parties Submit Case & Rebuttal Briefs; Commerce Holds Hearings; Commerce Analyzes and Prepares Responses to Comments	July-September 2016
Commerce Issues Final Section 129 Determinations for Zeroing, Vietnam-wide Entity Rate (as appropriate), and Revocation Request of Minh Phu	October 2016
Commerce Issues Preliminary Section 129 Determination for the Sunset Review	October 2016
Parties Submit Comments on Preliminary Section 129 Determination for the Sunset Review	November 2016
Commerce Issues Final Section 129 Determination for the Sunset Review	December 2016
USTR Consults with Congress Before Issuing a Letter to Commerce to Implement the Section 129 Determinations	December 2016
USTR Issues Letter directing Commerce to Implement the final Determinations	January 2017



### **3. Considerations of Commerce’s Current Workload Supports an RPT of at Least 21 Months**

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

43. Commerce is currently experiencing a 12-year record high for original investigations. As perspective, in 2014, parties filed over two million pages of documents which Commerce’s employees considered, analyzed, and addressed. As of July 2015, parties had filed nearly 1.7 million pages of documents in 2015. This indicates an increase in workload as compared to 2014 of over 68 percent.

44. In the 2013-2014 fiscal year,<sup>29</sup> Commerce completed 70 original investigations. As of this filing, Commerce has 37 ongoing antidumping duty investigations and 23 countervailing duty investigations, in addition to the proceedings in this dispute. In the 2014-2015 fiscal year, Commerce has conducted 182 periodic reviews, 24 new shipper reviews, 47 expiry reviews, 42 scope inquiries, 17 changed circumstances reviews, and 2 anti-circumvention inquiries. This increase in workload has taken place absent the allocation of any additional resources to Commerce.

45. The proceedings associated with this dispute are a significant addition to Commerce’s workload. The United States is fully committed to compliance as quickly as possible, but considerations of Commerce’s current workload should be included as part of the “particular circumstances” of this dispute as the arbitrator considers the length of the RPT.

### **III. CONCLUSION**

46. The United States is taking the necessary 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 Commerce’s current workload should all be considered in determining the appropriate RPT to secure a “positive solution” for this dispute.<sup>30</sup> For the reasons outlined in this submission, an RPT of at least 21 months is a reasonable period of time for implementation in this dispute.

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<sup>29</sup> The fiscal year for the U.S. Government extends from October through September.

<sup>30</sup> DSU, Article 3.7.