



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

ARB-2015-2/29

Arbitration
under Article 21.3(c) of the
Understanding on Rules and Procedures
Governing the Settlement of Disputes

*Award of the Arbitrator
Simon Farbenbloom*

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ABBREVIATIONS USED IN THIS AWARD

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Appellate Body Report	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , WT/DS429/AB/R and Corr.1
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
NME	non-market economy
Panel Report	Panel Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , WT/DS429/R
RPT	reasonable period of time
<i>Shrimp</i>	USDOC anti-dumping proceedings in <i>Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam</i> , Case No. A-522-802
URAA	Uruguay Round Agreements Act, Public Law No. 103-465, 108 Stat. 4838, codified under <i>United States Code</i> , Title 19, Section 3538
US Case Calendar	"DS429 – Approximate 21-month Case Calendar", proposed timetable by the United States
USDOC	United States Department of Commerce
USTR	United States Trade Representative
Viet Nam's proposed timetable	"Vietnam's Proposed RPT with Sequencing" (Exhibit VNM-8)
WTO	World Trade Organization

CASES CITED IN THIS AWARD

Short Title	Full Case title and citation
<i>Brazil – Retreaded Tyres (Article 21.3(c))</i>	Award of the Arbitrator, <i>Brazil – Measures Affecting Imports of Retreaded Tyres – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS332/16, 29 August 2008, DSR 2008:XX, p. 8581
<i>Canada – Pharmaceutical Patents (Article 21.3(c))</i>	Award of the Arbitrator, <i>Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS114/13, 18 August 2000, DSR 2002:I, p. 3
<i>Chile – Price Band System (Article 21.3(c))</i>	Award of the Arbitrator, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS207/13, 17 March 2003, DSR 2003:III, p. 1237
<i>China – GOES (Article 21.3(c))</i>	Award of the Arbitrator, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States – Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes</i> , WT/DS414/12, 3 May 2013, DSR 2013:IV, p. 1495
<i>Colombia – Ports of Entry (Article 21.3(c))</i>	Award of the Arbitrator, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS366/13, 2 October 2009, DSR 2009:IX, p. 3819
<i>EC – Bananas III (Article 21.3(c))</i>	Award of the Arbitrator, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS27/15, 7 January 1998, DSR 1998:I, p. 3
<i>EC – Export Subsidies on Sugar (Article 21.3(c))</i>	Award of the Arbitrator, <i>European Communities – Export Subsidies on Sugar – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS265/33, WT/DS266/33, WT/DS283/14, 28 October 2005, DSR 2005:XXIII, p. 11581
<i>EC – Hormones (Article 21.3(c))</i>	Award of the Arbitrator, <i>EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, p. 1833
<i>EC – Tariff Preferences (Article 21.3(c))</i>	Award of the Arbitrator, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS246/14, 20 September 2004, DSR 2004:IX, p. 4313
<i>Japan – DRAMs (Korea) (Article 21.3(c))</i>	Award of the Arbitrator, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS336/16, 5 May 2008, DSR 2008:XX, p. 8553
<i>US – 1916 Act (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS136/11, WT/DS162/14, 28 February 2001, DSR 2001:V, p. 2017
<i>US – COOL (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS384/24, WT/DS386/23, 4 December 2012, DSR 2012:XIII, p. 7173
<i>US – Countervailing Measures (China) (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Countervailing Duty Measures on Certain Products from China – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS437/16, 9 October 2015
<i>US – Offset Act (Byrd Amendment) (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS217/14, WT/DS234/22, 13 June 2003, DSR 2003:III, p. 1163
<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, DSR 2005:XXIII, p. 11619
<i>US – Section 110(5) Copyright Act (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS160/12, 15 January 2001, DSR 2001:II, p. 657
<i>US – Shrimp II (Viet Nam)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , WT/DS429/AB/R, adopted 22 April 2015, and Corr.1

<i>US – Shrimp II (Viet Nam)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , WT/DS429/R and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R
<i>US – Stainless Steel (Mexico) (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS344/15, 31 October 2008, DSR 2008:XX, p. 8619

WORLD TRADE ORGANIZATION
AWARD OF THE ARBITRATOR

**United States – Anti-Dumping Measures on
Certain Shrimp from Viet Nam**

ARB-2015-2/29

Parties:

Arbitrator:

Viet Nam
United States

Simon Farbenbloom

1 INTRODUCTION

1.1. On 22 April 2015, the Dispute Settlement Body (DSB) adopted the Appellate Body Report¹ and the Panel Report², as upheld by the Appellate Body Report, in *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*.³ This dispute concerns Viet Nam's challenge of certain anti-dumping measures imposed by the United States in the context of the US anti-dumping proceedings in *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*⁴ (*Shrimp*), and of certain US laws, methodologies, and practices with respect to the imposition of anti-dumping duties.⁵ The Panel found the measures at issue to be inconsistent with several provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), as well as with Article VI:2 of the General Agreement on Tariffs and Trade 1994 (GATT 1994).⁶ Most of the Panel's findings were not subject to appeal. Viet Nam's appeal was limited to the issue of whether the Panel acted inconsistently with Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in finding that Viet Nam had not established that Section 129(c)(1) of the US Uruguay Round Agreements Act⁷ (URAA) is inconsistent "as such" with several provisions of the Anti-Dumping Agreement.⁸ At the meeting of the DSB held on 20 May 2015, the United States indicated its intention to implement the DSB's recommendations and rulings in this dispute in a manner that respects its World Trade Organization (WTO) obligations, and stated that it would need a reasonable period of time in which to do so.⁹

1.2. By letter dated 17 September 2015, Viet Nam informed the DSB that consultations with the United States had not resulted in an agreement on the reasonable period of time for implementation pursuant to Article 21.3(b) of the DSU. Viet Nam therefore requested that this period be determined through binding arbitration pursuant to Article 21.3(c).¹⁰ By joint letter dated 7 October 2015, Viet Nam and the United States agreed on the undersigned as the Arbitrator for this matter. I informed the parties of my acceptance of the appointment by letter dated 8 October 2015.¹¹

¹ WT/DS429/AB/R and Corr. 1.

² WT/DS429/R.

³ WT/DS429/8.

⁴ USDOC Case No. A-552-802.

⁵ Appellate Body Report, para. 1.1; Panel Report, para. 1.1.

⁶ See *infra*, para. 3.12.

⁷ Public Law No. 103-465, 108 Stat. 4838, codified under *United States Code*, Title 19, Section 3538.

⁸ More specifically, Viet Nam claimed that Section 129(c)(1) of the URAA is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement. The Appellate Body rejected Viet Nam's claim that the Panel acted inconsistently with Article 11 of the DSU and upheld the Panel's above finding. (See *infra*, para. 3.14; Appellate Body Report, paras. 3.1 and 5.1)

⁹ WT/DS429/9.

¹⁰ WT/DS429/10.

¹¹ WT/DS429/11.

1.3. The United States and Viet Nam filed their written submissions, together with the executive summaries thereof, on 15 and 22 October 2015, respectively.¹² A hearing was held on 10 November 2015.

2 ARGUMENTS OF THE PARTIES

2.1. Annexes A and B to this Award contain the executive summaries of the parties' submissions. Details of the parties' arguments are further described, as appropriate, in my analysis set out in this Award.

3 REASONABLE PERIOD OF TIME

3.1. This section begins by setting out the mandate of the arbitrator under Article 21.3(c) of the DSU, as defined in the text of the DSU and outlined in past awards under Article 21.3(c). It then addresses the measures to be brought into conformity with the recommendations and rulings of the DSB, before considering the parties' arguments on what constitutes a reasonable period of time for implementation in this dispute.

3.1 Mandate of the arbitrator under Article 21.3(c) of the DSU

3.2. Article 21.3 of the DSU provides, in relevant part:

If it is impracticable to comply immediately with the recommendations and rulings [of the DSB], the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

...

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, 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. However, that time may be shorter or longer, depending upon the particular circumstances. (fns omitted)

3.3. The mandate of an arbitrator under Article 21.3(c) is therefore to determine the time period within which the implementing Member must comply with the recommendations and rulings of the DSB in the dispute at issue.¹³ In making this determination, the means of implementation chosen by the Member concerned is a relevant consideration. As noted in past awards, "*when* a Member must comply cannot be determined in isolation from the means used for implementation."¹⁴ Therefore, in order "to determine *when* a Member must comply, it may be necessary to consider *how* a Member proposes to do so."¹⁵ Consistent with previous awards of arbitrators under Article 21.3(c), the implementing Member has a measure of discretion in choosing the means of implementation that it deems most appropriate. This discretion, however, "is not an 'unfettered' right to choose any method of implementation."¹⁶ Rather, it is relevant to consider, in particular, "whether the implementing action falls within the range of permissible actions that can be taken in order to implement the DSB recommendations and rulings."¹⁷ Thus, the chosen method of

¹² By letter dated 9 November 2015, the United States raised procedural concerns regarding certain portions of Viet Nam's written submission, and requested that I ask Viet Nam to withdraw the relevant portions of its submission. Having considered the factors affecting the reasonable period of time in this dispute (see section 3.3 of this Award), I do not find it necessary to take into account these portions of Viet Nam's submission in my determination. I therefore do not address this matter further in this Award.

¹³ The parties have agreed that this Award will be deemed an arbitration award under Article 21.3(c) of the DSU, notwithstanding the fact that more than 90 days have expired since the DSB adopted the Panel and Appellate Body Reports on 22 April 2015 (WT/DS429/9). I recall that this arbitration was initiated on 17 September 2015.

¹⁴ Award of the Arbitrator, *US – COOL (Article 21.3(c))*, para. 68. (emphasis original)

¹⁵ Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 26. (emphasis original) See also Award of the Arbitrator, *US – COOL (Article 21.3(c))*, para. 68.

¹⁶ Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 36.

¹⁷ Awards of the Arbitrators, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 42; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27.

implementation must be capable of bringing the Member into compliance with its WTO obligations within a reasonable period of time, in accordance with the guideline contained in Article 21.3(c) of the DSU.¹⁸ At the same time, it is beyond the arbitrator's mandate to determine the consistency with the covered agreements of the measure taken to comply. This question, should it arise, is to be addressed in proceedings conducted pursuant to Article 21.5 of the DSU.¹⁹

3.4. As regards the length of the reasonable period of time, Article 21.3(c) provides a guideline for the arbitrator that the period for implementation should not exceed 15 months from the date of adoption of the panel or Appellate Body report. It should be recalled that Article 21.1 of the DSU provides that "prompt compliance" is essential for the effective resolution of WTO disputes. Furthermore, the first clause of Article 21.3 stipulates that a "reasonable period of time" for implementation shall be available only "[i]f it is impracticable to comply immediately" with the recommendations and rulings of the DSB. According to the last sentence of Article 21.3(c), the "particular circumstances" of a dispute may affect the length of the reasonable period of time, making it "shorter or longer". In principle, therefore, the reasonable period of time for implementation should be the shortest period possible within the legal system of the implementing Member²⁰, in the light of the "particular circumstances" of a dispute.

3.5. In considering the "particular circumstances" under Article 21.3(c), arbitrators in past disputes have found that the complexity of the implementation process and the nature of the steps to be taken for implementation are relevant to the determination of the reasonable period of time.²¹ It has also been held in previous arbitration awards that the implementing Member must utilize all of the flexibilities available within its legal system in order to implement the relevant recommendations and rulings of the DSB in the shortest period of time possible.²² An implementing Member is not, however, expected to utilize "extraordinary procedures" to bring its measures into compliance.²³ Finally, Article 21.2 of the DSU directs an arbitrator to pay particular attention to matters affecting the interests of developing country Members.

3.6. With regard to the burden of proof, it is well established that the implementing Member bears the overall burden of proving that the time period requested for implementation constitutes the "shortest period possible" within its legal system to implement the recommendations and rulings of the DSB, and thus a "reasonable period of time".²⁴

3.7. In response to questioning at the hearing in this arbitration, both Viet Nam and the United States agreed that the principles set out above are relevant for the determination of the reasonable period of time for implementation in this dispute.²⁵

¹⁸ See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.3; *US – COOL (Article 21.3(c))*, para. 69; and *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69.

¹⁹ Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27.

²⁰ See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.5; *China – GOES (Article 21.3(c))*, para. 3.3; and *EC – Hormones (Article 21.3(c))*, para. 26.

²¹ See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.19; *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, para. 26; *EC – Tariff Preferences (Article 21.3(c))*, para. 53; and *EC – Bananas III (Article 21.3(c))*, para. 19.

²² See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.5; *China – GOES (Article 21.3(c))*, para. 3.4; *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 42; *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25; and *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 64.

²³ See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.5; *China – GOES (Article 21.3(c))*, para. 3.4; *US – COOL (Article 21.3(c))*, para. 70; *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 42; *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25; and *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 74.

²⁴ See Awards of the Arbitrators, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 44; *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 51; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.6; *China – GOES (Article 21.3(c))*, para. 3.5; *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47; *US – 1916 Act (Article 21.3(c))*, para. 33; and *EC – Tariff Preferences (Article 21.3(c))*, para. 27.

²⁵ I note that, in response to questioning at the hearing, the parties agreed that Article 21.2 of the DSU was not invoked in the present dispute.

3.2 Measures to be brought into conformity

3.8. The dispute underlying this arbitration concerns Viet Nam's challenge of certain US laws, methodologies, and practices with respect to the imposition of anti-dumping duties, and certain actions and determinations by the US Department of Commerce (USDOC) in the anti-dumping proceedings on *Shrimp*. The USDOC initiated the *Shrimp* investigation in January 2004 and issued an anti-dumping order in February 2005.²⁶ At the time of the Panel proceedings in the present dispute, the USDOC had completed seven administrative reviews and one sunset review in which it determined that the revocation of the anti-dumping duty order would likely lead to the continuation or recurrence of dumping.²⁷

3.9. In the *Shrimp* proceedings, the USDOC designated Viet Nam as a non-market economy (NME) and applied a rebuttable presumption that all producers/exporters in Viet Nam "are essentially operating units of a single government-wide entity"²⁸ and, thus, should receive a single anti-dumping duty rate. In the light of the large number of respondents involved in the original investigation and in each of the administrative reviews, the USDOC limited its examination and determined individual margins for a limited number of companies (mandatory respondents). In order to receive a separate rate, Vietnamese producers/exporters that were not individually examined had to pass a "separate rate test", i.e. to demonstrate sufficient independence from the government-wide entity. Those producers/exporters that did not establish that they were separate from the government-wide entity received the "Viet Nam-wide entity rate".²⁹

3.10. Before the Panel, Viet Nam made "as such" claims with respect to: (i) the USDOC's use of the "simple zeroing methodology" in administrative reviews³⁰; (ii) the USDOC's practice with respect to the rate that is assigned to certain producers/exporters who did not demonstrate sufficient independence from government control in anti-dumping proceedings involving imports from NMEs; and (iii) Section 129(c)(1) of the URAA.³¹

3.11. Viet Nam's "as applied" claims concerned certain aspects of the USDOC's determinations in the fourth, fifth, and sixth administrative reviews. In particular, Viet Nam challenged: (i) the USDOC's use of the simple zeroing methodology in the calculation of the dumping margins of mandatory respondents; (ii) the duty rate that was assigned by the USDOC to certain Vietnamese producers who did not demonstrate sufficient independence from government control and thus were deemed to be part of the Viet Nam-wide entity; and (iii) the USDOC's failure to revoke the anti-dumping order with respect to certain respondent Vietnamese producers/exporters. Viet Nam also made claims with respect to the USDOC's likelihood-of-dumping determination in the context of the sunset review.³²

3.12. The Panel made the following findings of inconsistency:

- a. the United States acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 as a result of the USDOC's application of the simple zeroing methodology to calculate the dumping margins of mandatory respondents in the fourth, fifth, and sixth administrative reviews under the *Shrimp* anti-dumping order³³;

²⁶ See Appellate Body Report, para. 1.2 (referring to USDOC, Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, *United States Federal Register*, Vol. 70, No. 20 (1 February 2005) (Panel Exhibit VNM-5)). See also Panel Report, para. 2.4.

²⁷ Panel Report, para. 2.4.

²⁸ Panel Report, para. 2.5.

²⁹ See Panel Report, paras. 2.5-2.6; and Appellate Body Report, para. 1.2.

³⁰ Viet Nam described the "simple zeroing methodology" as the methodology by which the USDOC, when calculating dumping margins on the basis of a comparison of a weighted-average normal value to individual export transactions, disregards negative comparison results. (Panel Report, fn 19 to para. 2.10 (referring to Viet Nam's first written submission to the Panel, para. 54))

³¹ Panel Report, para. 2.10.

³² Panel Report, para. 2.9.

³³ Panel Report, para. 8.1.b.

- b. the practice or policy whereby, in NME proceedings, the USDOC presumes that all producers/exporters in the NME country belong to a single, NME-wide entity and assigns a single rate to these producers/exporters is inconsistent "as such" with the United States' obligations under Articles 6.10 and 9.2 of the Anti-Dumping Agreement³⁴;
- c. the United States acted inconsistently with its obligations under Articles 6.10 and 9.2 of the Anti-Dumping Agreement as a result of the application by the USDOC, in the fourth, fifth and sixth administrative reviews under the *Shrimp* anti-dumping order, of a rebuttable presumption that all companies in Viet Nam belong to a single, Viet Nam-wide entity and assignment of a single rate to that entity³⁵;
- d. the United States acted inconsistently with Article 9.4 of the Anti-Dumping Agreement as a result of the application to the Viet Nam-wide entity of a duty rate exceeding the ceiling applicable under that provision in the fourth, fifth, and sixth administrative reviews under the *Shrimp* anti-dumping order³⁶;
- e. the United States acted inconsistently with Article 11.3 of the Anti-Dumping Agreement as a result of the USDOC's reliance on WTO-inconsistent margins of dumping or rates in its likelihood-of-dumping determination in the first sunset review³⁷;
- f. the United States acted inconsistently with Article 11.2 of the Anti-Dumping Agreement in the fourth and fifth administrative reviews as a result of its treatment of requests for revocation made by certain Vietnamese producers/exporters that were not being individually examined³⁸; and
- g. the United States acted inconsistently with Article 11.2 of the Anti-Dumping Agreement as a result of the USDOC's reliance on WTO-inconsistent margins of dumping in its determination, in the fourth administrative review, not to revoke the *Shrimp* anti-dumping order with respect to Minh Phu, and with respect to its determination, in the fifth administrative review, not to revoke the *Shrimp* anti-dumping order with respect to Camimex.³⁹

3.13. With regard to the remainder of Viet Nam's claims, the Panel found that:

- a. Viet Nam had failed to establish that the simple zeroing methodology as used by the USDOC in administrative reviews is a measure of general and prospective application that can be challenged "as such". Therefore, the Panel found that Viet Nam had not established that the USDOC's simple zeroing methodology in administrative reviews is inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994⁴⁰;
- b. Viet Nam had failed to establish the existence of a measure with respect to the manner in which the USDOC determines the NME-wide entity rate, in particular concerning the use of facts available. Therefore, the Panel found that Viet Nam had not established that the alleged measure is inconsistent "as such" with Articles 6.8 and 9.4, and Annex II to the Anti-Dumping Agreement⁴¹;

³⁴ Panel Report, para. 8.1.c. For purposes of this Award, and on the basis of the parties' submissions, I use the phrase "NME-wide entity practice" as shorthand for the presumption subject to the Panel's "as such" finding.

³⁵ Panel Report, para. 8.1.d.

³⁶ Panel Report, para. 8.1.f.

³⁷ Panel Report, para. 8.1.i.

³⁸ Panel Report, para. 8.1.j.

³⁹ Panel Report, para. 8.1.k.

⁴⁰ Panel Report, para. 8.1.a.

⁴¹ Panel Report, para. 8.1.e.

- c. Viet Nam had failed to establish that the rate applied to the Viet Nam-wide entity in the fourth, fifth, and sixth administrative reviews is inconsistent with Article 6.8 and Annex II to the Anti-Dumping Agreement⁴²; and
- d. Viet Nam had failed to establish that Section 129(c)(1) of the URAA precludes implementation, with respect to prior unliquidated entries, of DSB recommendations and rulings. Therefore, the Panel found that Viet Nam had not established that Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement.⁴³

3.14. Viet Nam appealed the Panel's finding that Viet Nam had failed to establish that Section 129(c)(1) of the URAA precludes implementation of recommendations and rulings of the DSB with respect to prior unliquidated entries, and the consequential finding that Viet Nam had not established that Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement.⁴⁴ Specifically, Viet Nam claimed that the Panel acted inconsistently with Article 11 of the DSU because its interpretation and analysis of Section 129(c)(1) was not based on an objective assessment of the provision and its broader statutory context.⁴⁵ The Appellate Body rejected Viet Nam's claim that the Panel acted inconsistently with Article 11 of the DSU⁴⁶, and upheld the Panel's finding that Viet Nam had not established that Section 129(c)(1) of the URAA is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement.⁴⁷ The Appellate Body, therefore, made no recommendation to the DSB pursuant to Article 19.1 of the DSU.⁴⁸ As noted, the Panel and Appellate Body Reports were adopted at the DSB meeting on 22 April 2015.

3.15. By letter dated 24 June 2015, Viet Nam notified the United States that certain Vietnamese producers/exporters did not intend to pursue revocation of the anti-dumping duty order in the context of the implementation of the DSB's recommendations and rulings in this dispute.⁴⁹ At the hearing in this arbitration, the parties agreed that the United States need not take any further steps to implement the Panel's findings that the United States acted inconsistently with Article 11.2 of the Anti-Dumping Agreement with regard to the requests for revocation made by these producers/exporters.

3.16. In the light of the above, in these arbitration proceedings, the parties agree that the reasonable period of time for implementation should be determined in relation to the following six findings of inconsistency by the Panel:

- a. the United States acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 as a result of the USDOC's application of the simple zeroing methodology to calculate the dumping margins of mandatory respondents in the fourth, fifth, and sixth administrative reviews under the *Shrimp* anti-dumping order⁵⁰;
- b. the practice or policy whereby, in NME proceedings, the USDOC presumes that all producers/exporters in the NME country belong to a single, NME-wide entity and assigns a single rate to these producers/exporters is inconsistent "as such" with the United States' obligations under Articles 6.10 and 9.2 of the Anti-Dumping Agreement⁵¹;

⁴² Panel Report, para. 8.1.g.

⁴³ Panel Report, para. 8.1.h.

⁴⁴ Appellate Body Report, para. 1.6.

⁴⁵ Appellate Body Report, para. 2.1.

⁴⁶ Appellate Body Report, para. 5.1.a.

⁴⁷ Appellate Body Report, para. 5.1.b.

⁴⁸ Appellate Body Report, para. 5.2.

⁴⁹ See United States' submission, fn 4 to para. 3 (referring to letter dated 24 June 2015 from Viet Nam to the United States, regarding "Implementation of the Panel Report in *United States – Anti-Dumping Measures on Certain Shrimp from Vietnam*" (Exhibit USA-1)). See also letters to the USDOC, regarding "Implementation of DS429: Certain Frozen Warmwater Shrimp from Vietnam (Case No. A-552-802)" (Exhibit VNM-2). These companies are: Viet Nam Fish One Co., Ltd, Nha Trang Seafoods, Phuong Nam Foodstuff Corp, Camau Frozen Seafood Processing Import Export Corporation (Camimex), and Viet I-Mei Frozen Foods Co., Ltd (former Grobest & I-Mei Industrial (Vietnam) Co., Ltd).

⁵⁰ Panel Report, paras. 7.81 and 8.1.b.

⁵¹ Panel Report, paras. 7.193 and 8.1.c.

- c. the United States acted inconsistently with its obligations under Articles 6.10 and 9.2 of the Anti-Dumping Agreement as a result of the application by the USDOC, in the fourth, fifth, and sixth administrative reviews under the *Shrimp* anti-dumping order, of a rebuttable presumption that all companies in Viet Nam belong to a single, Viet Nam-wide entity and assignment of a single rate to that entity⁵²;
- d. the United States acted inconsistently with Article 9.4 of the Anti-Dumping Agreement as a result of the application to the Viet Nam-wide entity of a duty rate exceeding the ceiling applicable under that provision in the fourth, fifth, and sixth administrative reviews under the *Shrimp* anti-dumping order⁵³;
- e. the United States acted inconsistently with Article 11.3 of the Anti-Dumping Agreement as a result of the USDOC's reliance on WTO-inconsistent margins of dumping or rates in its likelihood-of-dumping determination in the first sunset review⁵⁴; and
- f. the United States acted inconsistently with Article 11.2 of the Anti-Dumping Agreement as a result of the USDOC's reliance on WTO-inconsistent margins of dumping in its determination, in the fourth administrative review, not to revoke the *Shrimp* anti-dumping order with respect to Minh Phu.⁵⁵

3.3 Factors affecting the determination of the reasonable period of time

3.17. The United States submits that the reasonable period of time for implementing the DSB's recommendations and rulings in the present dispute should be "at least 21 months".⁵⁶ The United States argues that this is the shortest period of time in which it would be possible to implement the recommendations and rulings of the DSB, "[g]iven 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 [USDOC]".⁵⁷ Viet Nam contends that the time period requested by the United States is "extraordinarily long", and that there is no basis for a reasonable period of time longer than six months in this dispute.⁵⁸ In Viet Nam's view, the United States has flexibilities under US law to implement the recommendations and rulings of the DSB in a manner consistent with Articles 21.1 and 21.3(c) of the DSU.

3.18. This section begins by providing an overview of the means and steps of implementation chosen by the United States. Thereafter, I turn to analyse the parties' specific arguments concerning the factors relevant for the determination of the reasonable period of time to implement the DSB's recommendations and rulings in this dispute.

3.3.1 Overview of the chosen means of implementation

3.19. The United States claims that "the most practical way under U.S. law" is to implement the Panel's findings⁵⁹ in three, sequential phases, utilizing both Section 123(g)⁶⁰ and Section 129(b)⁶¹ of the URAA.⁶² The United States submits that, under US law, 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.⁶³

⁵² Panel Report, paras. 7.208 and 8.1.d.

⁵³ Panel Report, paras. 7.223 and 8.1.f.

⁵⁴ Panel Report, paras. 7.320 and 8.1.i.

⁵⁵ Panel Report, paras. 7.396 and 8.1.k.

⁵⁶ United States' submission, para. 7.

⁵⁷ United States' submission, para. 8.

⁵⁸ Viet Nam's submission, paras. 12-14.

⁵⁹ The United States indicates that it is implementing the DSB's recommendations and rulings with respect to six matters. (United States' submission, para. 3. See also *supra*, para. 3.16)

⁶⁰ Codified under *United States Code*, Title 19, Section 3533(g) (Exhibit USA-2).

⁶¹ Codified under *United States Code*, Title 19, Section 3538(b) (Exhibit USA-3).

⁶² United States' submission, paras. 4-5.

⁶³ United States' submission, fn 7 to para. 4.

3.20. The United States submits that, in Phase I⁶⁴, the United States will employ Section 123(g) to address the Panel's finding that the presumption that all producers and exporters in Viet Nam belong to a single, Viet Nam-wide entity is inconsistent with the Anti-Dumping Agreement.⁶⁵ Phase II⁶⁶ and Phase III⁶⁷ will both be conducted in accordance with Section 129(b) of the URAA. In Phase II, the United States will address the Panel's "as applied" findings regarding the NME-wide entity practice in the fourth, fifth, and sixth administrative reviews and the use of the simple zeroing methodology to calculate the dumping margins of mandatory respondents in these reviews.⁶⁸ In this phase, the United States will also address the Panel's finding regarding Minh Phu's revocation request in the fourth administrative review.⁶⁹ Finally, in Phase III, the United States will implement the Panel's finding regarding the USDOC's reliance on WTO-inconsistent margins of dumping in the first sunset review.⁷⁰ As further explained below⁷¹, the United States emphasizes that Phase I must be completed before Phase II, but anticipates a degree of overlap between these two phases.

3.21. With regard to the overall time frame, the United States contends that both Section 123 and Section 129 provide for a multi-step implementation process, and it will take at least 21 months to complete the entire process. The United States submits a proposed timetable of approximately 21 months (US Case Calendar) to describe in detail the steps and relevant time frames in the implementation process.⁷² According to the US Case Calendar, the Section 123 process in Phase I will take 13 months, from April 2015 to May 2016. The Section 129 proceedings in Phase II will commence by January 2016 at the latest, and the final determinations will be issued by October 2016. The Section 129 proceeding regarding the sunset review in Phase III will begin in October 2016, and the final determination will be issued in December 2016. Finally, in January 2017, the US Trade Representative (USTR) will direct the USDOC to implement the final Section 129 determinations, and the USDOC will issue a Federal Register notice in which it will officially implement the final Section 129 determinations.

3.22. For its part, Viet Nam contends that the United States' chosen means of implementation has "shortcomings".⁷³ Viet Nam highlights that Section 129 determinations apply only "to unliquidated entries of the subject merchandise ... that are entered, or withdrawn from warehouse ... on or after ... the date on which the [USTR] directs the administering authority under subsection (b)(4) [of Section 129] to implement that determination".⁷⁴ In Viet Nam's view, the Panel's findings, to the extent they concern such unliquidated entries, cannot be implemented by the means of implementation proposed by the United States. Viet Nam further submits that the United States has ignored the possibility of achieving "almost immediate implementation" by negotiating a trade agreement with Viet Nam, as it did in the softwood lumber dispute between the United States and Canada.⁷⁵ At the hearing, the United States reiterated that the implementing Member has discretion in choosing the means of implementation, and expressed the view that the means proposed by the United States is appropriate for implementing the DSB's recommendations and rulings in this dispute. The United States further noted that the negotiations in the US-Canada softwood lumber dispute took well over 21 months. Viet Nam reiterated its position that full compliance in respect of unliquidated entries cannot be achieved by the means proposed by the United States.

3.23. Viet Nam further submits that, even if Sections 123 and 129 are the only mechanisms for implementation in this dispute, the time frame proposed by the United States is "extraordinarily long"⁷⁶, and that "there is no basis for a longer period than 6 months for implementation" of the

⁶⁴ Phase I – Implementation to Address As-Such Finding on Vietnam-wide Entity. (United States' submission, para. 5)

⁶⁵ United States' submission, paras. 4-5. See also Panel Report, para. 8.1.c.

⁶⁶ Phase II – Implementation to Address As-Applied Findings with respect to Three Administrative Reviews and Consideration of Request for Company-Specific Revocation. (United States' submission, para. 5)

⁶⁷ Phase III – Reconsideration in the Five-Year Sunset Review. (United States' submission, para. 5)

⁶⁸ United States' submission, paras. 4-5. See also Panel Report, paras. 8.1.b, 8.1.d, and 8.1.f.

⁶⁹ United States' submission, paras. 4-5. See also Panel Report, para. 8.1.k.

⁷⁰ United States' submission, paras. 4-5. See also Panel Report, para. 8.1.i.

⁷¹ See section 3.3.2.1 of this Award.

⁷² See table entitled "DS429 – Approximate 21 Month Case Calendar" at United States' submission, para. 41.

⁷³ Viet Nam's submission, para. 26.

⁷⁴ Viet Nam's submission, para. 26 (quoting Section 129(c)(1) of the URAA).

⁷⁵ Viet Nam's submission, paras. 13 and 27.

⁷⁶ Viet Nam's submission, para. 15.

DSB's findings and recommendations.⁷⁷ Viet Nam maintains that neither Section 123 nor Section 129 prescribes minimum time periods for completing the overall process. According to Viet Nam, the Section 123 process can be completed in 60 days. At the hearing, Viet Nam further clarified that, in its view, the Section 129 determinations regarding both the administrative reviews and the sunset review at issue can be completed within a period of four to six months.⁷⁸ Moreover, although Viet Nam agreed in principle that the implementation of the Panel's "as such" and "as applied" findings will need to be conducted sequentially, it contended that the US legal system would allow for a greater degree of overlap between the different phases proposed by the United States.

3.3.2 Analysis

3.24. I recall that it is within my mandate to determine the reasonable period of time for the United States to implement the DSB's recommendations and rulings in this dispute. It has been well established that the implementing Member has a measure of discretion in choosing the means of implementation it deems most appropriate. At the same time, the chosen means of implementation must be capable of bringing the Member into compliance with its WTO obligations within a reasonable period of time, in accordance with the guideline contained in Article 21.3(c) of the DSU. Moreover, the implementing Member is expected to use the flexibilities within its legal system to achieve the shortest period of time possible for implementation. In determining the reasonable period of time, I should take into account the particular circumstances of the dispute, including the complexity of the implementation process and the nature of the steps to be taken. With these considerations in mind, I turn now to review the relevant factors for determining the reasonable period of time in this dispute in the light of the parties' arguments.

3.3.2.1 Sequence of the implementation process

3.25. The United States submits that the three phases of implementation are to be conducted sequentially, while noting a degree of overlap between the first two phases. According to the United States, while preparing a preliminary determination under Section 123(g) of the URAA, the USDOC will begin working on the implementation of the Panel's findings regarding the use of the simple zeroing methodology and Minh Phu's revocation request. Thus, with respect to these findings, there will be an overlap between the end of Phase I and the beginning of Phase II. The United States emphasizes, however, that Phase II cannot be completed prior to the final determination under the Section 123 process in Phase I. This is because the USDOC will need to incorporate any modification to the NME-wide entity practice into the Section 129 determinations on the administrative reviews. Specifically, the United States submits that the revised manner in which the United States treats the NME-wide entity may affect the USDOC's decisions as to which entities should receive individual margins in the administrative reviews at issue.⁷⁹ In Phase III, the United States will implement the Panel's finding regarding the sunset review, and will likely take into account the determinations made in Phase II on the administrative reviews.⁸⁰

3.26. In response to questioning at the hearing, Viet Nam acknowledged that the United States' implementation of the Panel's "as such" finding regarding the NME-wide entity practice would in principle precede the implementation of the "as applied" findings. Nonetheless, Viet Nam considered that the flexibilities under US law would allow for a greater degree of overlap among the different phases of implementation proposed by the United States. Specifically, Section 129 determinations regarding the recalculation of anti-dumping duty rates and the review of Minh Phu's revocation request can be completed concurrently with the Section 123 process. Moreover, the Section 129 proceeding regarding the Panel's finding on the sunset review can begin before the completion of the Section 129 proceedings on the other findings.⁸¹

3.27. Overall, the sequence of the implementation steps proposed by the United States appears reasonable in the context of the US legal system. Given that any modification to the NME-wide entity practice would need to be incorporated in the implementation of the Panel's "as applied"

⁷⁷ Viet Nam's submission, para. 12.

⁷⁸ See also Viet Nam's submission, paras. 19-31; and "Vietnam's Proposed RPT with Sequencing" (Viet Nam's proposed timetable) (Exhibit VNM-8).

⁷⁹ United States' submission, para. 19.

⁸⁰ United States' submission, para. 20.

⁸¹ See also Viet Nam's submission, paras. 19-25; and Viet Nam's proposed timetable (Exhibit VNM-8).

findings in the fourth, fifth, and sixth administrative reviews, it is logical that the implementation of the Panel's "as such" finding on the practice will need to be completed first. Furthermore, because the results of the Section 129 determinations on the administrative reviews may be considered for purposes of making a sunset review determination, it also seems logical to complete the implementation of the finding concerning the first sunset review in the last phase.

3.28. In addition, I note that there will be a degree of overlap between Phase I and Phase II of the implementation process proposed by the United States. As the United States confirms, the work on the implementation of the findings concerning the application of the simple zeroing methodology and Minh Phu's revocation request may take place concurrently with the work on the implementation of the "as such" finding concerning the NME-wide entity practice. Viet Nam's argument as to the degree of overlap that can be achieved will be further addressed in my analysis below.⁸²

3.3.2.2 The process under Section 123(g) of the URAA

3.29. In order to implement the Panel's "as such" finding regarding the NME-wide entity practice, the United States intends to utilize the process set out in Section 123(g) of the URAA. Section 123(g) of the URAA reads:

(g) REQUIREMENTS FOR AGENCY ACTION.—

(1) CHANGES IN AGENCY REGULATIONS OR PRACTICE.—In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until—

(A) the appropriate congressional committees have been consulted under subsection (f);

(B) the Trade Representative has sought advice regarding the modification from relevant private sector advisory committees established under section 135 of the Trade Act of 1974 (19 U.S.C. 2155);

(C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification;

(D) the Trade Representative has submitted to the appropriate congressional committees a report describing the proposed modification, the reasons for the modification, and a summary of the advice obtained under subparagraph (B) with respect to the modification;

(E) the Trade Representative and the head of the relevant department or agency have consulted with the appropriate congressional committees on the proposed contents of the final rule or other modification; and

(F) the final rule or other modification has been published in the Federal Register.

3.30. The United States estimates that the Section 123(g) process to implement the Panel's "as such" finding will take "no less than 12 months".⁸³ Viet Nam submits that "[t]here is no legal reason requiring significant time to adopt the change in practice", and that this can be done in 60 days.⁸⁴ The parties' arguments focus on the time needed for the preparatory stage of the Section 123 process, the need for soliciting and analysing public comments before changing the

⁸² See section 3.3.2.3 of this Award.

⁸³ United States' submission, para. 25.

⁸⁴ Viet Nam's submission, para. 20; Viet Nam's proposed timetable (Exhibit VNM-8).

practice, and, as a result, the overall time frame for completing the Section 123(g) process. The analysis below addresses each of these points of contention in turn.

3.31. At the outset, the United States emphasizes that this is the first time the USDOC's NME-wide entity practice was found to be inconsistent "as such" with the WTO covered agreements. As a result, implementation will involve considerations of "novel and multifaceted issues" about the relationship between an NME Member government and producers/exporters from that Member.⁸⁵ The United States submits that, as the first step in the Section 123(g) process, Sections 123(g)(1)(A) and (B) require the USTR to consult with appropriate congressional committees and seek advice from relevant private sector advisory committees regarding the implementation of the Panel's "as such" finding. According to the US Case Calendar, the consultations and pre-commencement analysis stage takes two to three months. Thereafter, the United States estimates that the preparation for the preliminary determination proposing any modification to the NME-wide entity practice will take 7-8 months, until January 2016.⁸⁶ In response to questioning at the hearing, the United States confirmed that the USTR had been engaged in consultations with the US Congress, and that the preparatory work with a view to implementing the Panel's "as such" finding was still under way.

3.32. Viet Nam contends that the United States has "prolonged" implementation by failing to "promptly commence compliance ... and continue concrete steps towards implementation".⁸⁷ In response to questioning at the hearing, Viet Nam noted that the United States would have been aware of its potential obligation to implement the Panel's findings when it decided not to appeal the Panel's findings in January 2015. Thus, it would be reasonable to expect that the consultations required under Section 123(g) would have been completed upon, or shortly after, the adoption of the Panel and Appellate Body Reports in this dispute.

3.33. I recall that Article 21.3(c) of the DSU makes clear that formal implementation steps need to be taken as of the adoption of the panel or Appellate Body report. In determining the reasonable period of time, arbitrators in past disputes have taken into account whether the implementing Member had taken action since the adoption of the DSB's recommendations and rulings.⁸⁸ In this regard, arbitrators in past disputes have found that preparatory work can be relevant in determining the reasonable period of time.⁸⁹ At the same time, it is worth noting that, in the present dispute, the United States did not appeal any of the Panel's findings. I note that seven months have passed since the adoption of the Panel and Appellate Body Reports in this dispute and, as such, it would be reasonable to assume that preparatory work of the implementation process under Section 123(g) had already commenced. In this respect, I note that, pursuant to Section 123(f)(3) of the URAA, "promptly after the circulation" of a panel or Appellate Body report, the USTR shall consult with the appropriate congressional committees as to the manner of implementation of the report.⁹⁰ At the hearing, the United States confirmed that consultations regarding the implementation of the Panel's "as such" finding had occurred and that other preparatory work relating to implementation had also been undertaken.

3.34. Turning to the next step in the process, the United States notes that Section 123(g)(1)(C) of the URAA requires the USDOC to provide an opportunity for public comment by publishing a proposed modification to an agency regulation or practice. The United States contends that implementing the Panel's "as such" finding will involve "novel and multifaceted issues".⁹¹ The United States considers it likely that, after issuing its preliminary determination, the USDOC will

⁸⁵ United States' submission, para. 15.

⁸⁶ US Case Calendar.

⁸⁷ Viet Nam's submission, para. 11.

⁸⁸ See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.44; and *US – Section 110(5) Copyright Act (Article 21.3(c))*, para. 46.

⁸⁹ See e.g. Awards of the Arbitrators, *US – COOL (Article 21.3(c))*, para. 83; and *China – GOES (Article 21.3(c))*, para. 3.37.

⁹⁰ Subsection (f) of Section 123 of the URAA provides:

Promptly after the circulation of a report of a panel or of the Appellate Body to WTO members in a proceeding described in subsection (d), the Trade Representative shall— (1) notify the appropriate congressional committees of the report; (2) in the case of a report of a panel, consult with the appropriate congressional committees concerning the nature of any appeal that may be taken of the report; and (3) if the report is adverse to the United States, consult with the appropriate congressional committees concerning whether to implement the report's recommendation and, if so, the manner of such implementation and the period of time needed for such implementation.

⁹¹ United States' submission, para. 15.

receive "hundreds of pages of comments from the public and will have to prepare a lengthy final Section 123 determination addressing these comments".⁹² The United States estimates that it will take the USDOC around two months to solicit and analyse such comments.

3.35. Viet Nam takes issue with the alleged complexity of the implementation of the "as such" finding regarding the NME-wide entity practice. In particular, Viet Nam notes that the practice regarding the NME-wide entity "is not required" by US law, "and has arisen only out of a consistent practice".⁹³ For Viet Nam, "implementation is not complex since it only involves the adoption of a practice which does not assign anti-dumping duty rates to the so-called country-wide entity in excess of the weighted average margins of the individually examined respondents."⁹⁴ Viet Nam adds that, "in a much more complicated situation" in a prior dispute, the United States concluded the process under Section 123(g) within a much shorter time frame than that proposed in this dispute.⁹⁵

3.36. I recall that the Panel's "as such" finding concerns "[t]he practice or policy whereby, in NME proceedings, the USDOC presumes that all producers/exporters in the NME country belong to a single, NME-wide, entity and assigns a single rate to these producers/exporters".⁹⁶ Thus, the implementation of the Panel's "as such" finding is not necessarily limited to the assignment of a single anti-dumping duty rate, but may encompass a change to the USDOC's presumption that producers/exporters from an NME country belong to a single, NME-wide entity. It cannot be excluded that any proposed modification of the NME-wide entity practice, once published, could trigger multiple views from the public that the USDOC will need to address in the final determination. At the same time, there must be a proper balance between the transparency and due process rights of interested parties, on the one hand, and the promptness required in implementing recommendations and rulings of the DSB, on the other hand.⁹⁷

3.37. As regards the overall time frame, I recall the United States' estimate that the completion of the entire Section 123(g) process will take "no less than 12 months".⁹⁸ As described above, this process will start with the consultations and pre-commencement stage, followed by the preparation and issuance of the preliminary determination. Thereafter, as the United States explains, there are several remaining steps in the process, the majority of which are mandated under Sections 123(g)(1)(D), (E) and (F).⁹⁹ Viet Nam reiterates that Section 123(g)(1) does not prescribe any time-limit for the steps listed therein. At the oral hearing, the United States noted that, in the *EC – Fasteners (China)* dispute, it took the European Union approximately 11 months to implement the findings that were similarly concerned with the treatment of producers/exporters from NME Members in anti-dumping proceedings. Therefore, the United States alleged that it would be reasonable to expect that the United States would need a similar amount of time for implementing the Panel's "as such" finding in the present dispute.

3.38. I note that the steps set out under Section 123(g)(1) are mandatory and must be complied with, although no specific time periods are prescribed for these steps. I also note that Section 123(g) has been utilized by the United States in a number of prior disputes for purposes of implementing the DSB's recommendations and rulings, and that, on some occasions, the United States indicated that a period of seven to nine months would be sufficient to complete the

⁹² United States' submission, para. 24.

⁹³ Viet Nam's submission, para. 20.

⁹⁴ Viet Nam's submission, para. 20.

⁹⁵ Viet Nam's submission, fn 9 to para. 20. Viet Nam submitted the Section 123 determination in the dispute in *US – Certain EC Products* and alleged that the Section 123 proceedings in that dispute were completed in 92 days. (USDOC, Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, Modification of agency practice regarding privatization, *United States Federal Register*, Vol. 68, No. 120 (23 June 2003), pp. 37125-37138 (Exhibit VNM-4)) According to that determination, the Section 123 process took 166 days, from the adoption of the panel and Appellate Body reports to the publication of the final determination.

⁹⁶ Panel Report, para. 8.1.c.

⁹⁷ Award of the Arbitrator, *Japan – DRAMS (Korea) (Article 21.3(c))*, para. 51.

⁹⁸ United States' submission, para. 25.

⁹⁹ These remaining steps are: (i) the USTR submits a report to the congressional committees on the proposed modification and a summary of advice received from the private sector advisory committees, pursuant to Section 123(g)(1)(D); (ii) the USTR and USDOC consult with the congressional committees regarding the content of the final rule, pursuant to Section 123(g)(1)(E); (iii) the USTR instructs the USDOC to implement the Section 123 final determination; and (iv) publication of the final determination pursuant to Section 123(g)(1)(F). (See United States' submission, para. 25; and US Case Calendar)

Section 123(g) process.¹⁰⁰ Finally, I note that the findings in the *EC – Fasteners (China)* dispute concerned a different measure taken by another WTO Member, and the implementation of those findings was conducted in a different legal system. I therefore do not find the alleged implementation period in *EC – Fasteners (China)* to be relevant to my determination of the reasonable period of time in the present dispute.

3.3.2.3 The process under Section 129(b) of the URAA

3.39. As noted above, the United States plans to utilize Section 129(b) of the URAA to conduct Phase II and Phase III of its implementation process. In Phase II, The United States intends to implement the Panel's findings regarding the fourth, fifth, and sixth administrative reviews, including: (i) the use of the simple zeroing methodology to calculate the dumping margins of mandatory respondents in these reviews¹⁰¹; (ii) the application of the NME-wide entity practice and the assignment of a duty rate exceeding the ceiling applicable under Article 9.4 of the Anti-Dumping Agreement in these reviews¹⁰²; and (iii) the treatment of Minh Phu's revocation request in the fourth administrative review.¹⁰³ In Phase III, the United States plans to implement the Panel's finding concerning the first sunset review.¹⁰⁴

3.40. Section 129(b) of the URAA provides:

(b) ACTION BY ADMINISTERING AUTHORITY.—

(1) CONSULTATIONS WITH ADMINISTERING AUTHORITY AND CONGRESSIONAL COMMITTEES.—Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

(2) DETERMINATION BY ADMINISTERING AUTHORITY.—Notwithstanding any provision of the Tariff Act of 1930, the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

(3) CONSULTATIONS BEFORE IMPLEMENTATION.—Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

(4) IMPLEMENTATION OF DETERMINATION.—The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).

¹⁰⁰ See Awards of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 56; and *US – Oil Country Tubular Goods Sunset Review (Article 21.3(c))*, para. 7.

¹⁰¹ Panel Report, para. 8.1.b.

¹⁰² Panel Report, paras. 8.1.d and 8.1.f.

¹⁰³ Panel Report, para. 8.1.k.

¹⁰⁴ Panel Report, para. 8.1.i.

3.41. In addition, the United States notes that, pursuant to Section 129(d) of the URAA, the USDOC is required to provide interested parties with an opportunity to submit written comments before issuing a final determination.¹⁰⁵

3.42. Both parties agree that, under Sections 129(b) and (d) of the URAA, the following five steps are required to implement the Panel's relevant findings: (i) the USTR consults with the USDOC and the relevant congressional committees; (ii) the USTR requests the USDOC to take implementation action; (iii) the USDOC issues preliminary determinations and provides an opportunity for interested parties to comment; (iv) the USTR consults with the USDOC and the relevant congressional committees with regard to the USDOC's determinations; and (v) the USTR directs the USDOC to implement the determinations, as well as the issuance of a US Federal Register notice in which the USDOC officially implements the determinations.¹⁰⁶ The parties' views diverge significantly, however, with respect to the time needed for these steps, and the need for additional information-gathering in the Section 129 proceedings. The parties also disagree as to whether there could be a greater degree of overlap among certain steps in the implementation process, so that the overall time frame for the Section 129 proceedings could be further reduced. Finally, the parties disagree as to whether the current workload of the USDOC should be a relevant consideration.¹⁰⁷ I turn now to review each of these points of contention.

3.43. First, with respect to the time needed for various steps in the Section 129 proceedings, the US Case Calendar indicates that, by January 2016 at the latest, the USDOC will begin its work to implement the Panel's findings on the use of the simple zeroing methodology and Minh Phu's revocation request in the administrative reviews at issue. The United States emphasizes that the Panel's findings regarding the application of the NME-wide entity practice in the administrative reviews cannot be implemented before the completion of the Section 123(g) process. Moreover, it will take at least three months to draft the preliminary Section 129 determinations to address the Panel's findings regarding the use of the simple zeroing methodology and to apply any change to the NME-wide entity practice in the three administrative reviews. It will also take at least three months to draft the preliminary Section 129 determination regarding Minh Phu's revocation request.¹⁰⁸ The United States anticipates that the preliminary Section 129 determinations covering the three administrative reviews will be issued by June 2016.¹⁰⁹

3.44. The United States submits that, subsequently, it will take approximately three months for the USDOC to provide the interested parties an opportunity to comment, in accordance with Section 129(d) of the URAA¹¹⁰, and to hold hearings if requested. It will then take an additional two-month period for the USDOC to analyse the comments received, issue the final determinations, and correct any ministerial errors identified by interested parties. The United States estimates, therefore, that it will issue the final Section 129 determinations on the three administrative reviews by October 2016.¹¹¹ The United States further submits that the USDOC expects to issue a preliminary Section 129 determination regarding the sunset review close in time to its final Section 129 determinations on the administrative reviews. Thereafter, the USDOC will need approximately one month in which to receive comments from interested parties and conduct a hearing if requested, and an additional month to prepare and issue a final sunset review determination.¹¹² Finally, after conducting consultations with the USDOC and relevant congressional committees, in January 2017, the USTR will direct the USDOC to implement the final

¹⁰⁵ United States' submission, para. 29 and fn 25 thereto. Section 129(d) provides: Prior to issuing a determination under [Section 129], the administering authority or the Commission, as the case may be, shall provide interested parties with an opportunity to submit written comments and, in appropriate cases, may hold a hearing, with respect to the determination.

¹⁰⁶ United States' submission, paras. 27 and 29-40; Viet Nam's submission, para. 29; parties' responses to questioning at the hearing.

¹⁰⁷ I note that the United States' arguments regarding the USDOC's workload are also applicable to the Section 123 process. (United States' submission, paras. 42-45) I address the parties' arguments relating to the USDOC's workload in this section of the Award.

¹⁰⁸ United States' submission, paras. 30-31.

¹⁰⁹ US Case Calendar.

¹¹⁰ See *supra*, fn 105.

¹¹¹ United States' submission, paras. 32-34; US Case Calendar.

¹¹² United States' submission, paras. 37-38.

Section 129 determinations, and the USDOC will issue a Federal Register notice in which it officially implements the final Section 129 determinations.¹¹³

3.45. Viet Nam maintains that Section 129(b)(2) of the URAA requires that the determination by the USDOC to implement the Panel's findings be made "within 180 days" from the USTR's request to the USDOC to take implementing actions.¹¹⁴ At the hearing, Viet Nam acknowledged that there are other steps before and after this 180-day period, but characterized them as "ministerial" steps that should not take much time. In Viet Nam's view, the substantive work for Section 129 proceedings should take place within the 180-day period. In this respect, Viet Nam takes issue with the time requested by the United States for correcting ministerial errors and for the USTR to conduct consultations regarding the final determinations. According to Viet Nam, in most cases, the effect of ministerial errors is very limited, and a period of several days would be sufficient to address them.¹¹⁵ In the same vein, Viet Nam contends that the USTR consultations regarding the final determinations "in fact occur in a single day".¹¹⁶ Finally, Viet Nam argues that the time frame proposed by the United States is "extraordinary and inappropriate", in the light of the duration of Section 129 proceedings in some other disputes.¹¹⁷

3.46. According to the text of Section 129(b)(2) of the URAA, the period of 180 days specified in that provision refers only to the period within which, following the receipt of a written request from the USTR, the USDOC must issue a determination implementing the recommendations and rulings of the DSB. In addition to this step, Sections 129(b)(1), (3), and (4) set out other actions involving the USTR, the USDOC, and the US Congress that have to be completed both before and after the step contemplated in Section 129(b)(2). It is thus clear that the 180-day time period specified in Section 129(b)(2) is not the maximum amount of time for the USDOC to issue a determination implementing the recommendations and rulings of the DSB in every case.¹¹⁸ I further note that both parties have provided evidence regarding the time periods for implementing the DSB's recommendations and rulings in certain disputes pursuant to Section 129(b) of the URAA.¹¹⁹ Such evidence shows that the duration of Section 129 proceedings varies from case to case, and that the period from the adoption of the panel or Appellate Body report to the publication of the final Section 129 determination may also be in practice longer than 180 days.

3.47. Second, the parties disagree as to whether, during the Section 129 proceedings, the USDOC may need to gather additional information for: (i) calculating the anti-dumping duty rates in the administrative reviews at issue; (ii) reviewing Minh Phu's revocation request; and (iii) the first sunset review. At the hearing, the United States emphasized that, because any modification of the USDOC's NME-wide entity practice could potentially affect the USDOC's decision as to which entities may receive individual dumping margins, it would be difficult to prejudge which information might be needed for calculating the duty rates. Furthermore, with respect to Minh Phu's revocation request, the United States maintains that the USDOC will need to review data covering three periods of review, and may need to collect additional information, conduct on-site verifications, and allow time for interested parties to file responses.¹²⁰

3.48. Viet Nam contends that it is "a matter of simple calculation" to implement the Panel's findings on the use of the simple zeroing methodology and the assignment of the Viet Nam-wide duty rate in the administrative reviews at issue.¹²¹ Specifically, it involves "altering a few lines of computer code" in the program for calculating margins and recalculating margins using the altered

¹¹³ United States' submission, paras. 35-36 and 39-40; US Case Calendar.

¹¹⁴ Viet Nam's submission, para. 30.

¹¹⁵ Viet Nam's response to questioning at the hearing.

¹¹⁶ Viet Nam's submission, para. 31.

¹¹⁷ Viet Nam's submission, para. 32.

¹¹⁸ See also Award of the Arbitrator, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.41.

¹¹⁹ Viet Nam's submission, para. 32; United States' oral statement at the hearing. I note that the parties submitted different figures for the duration of proceedings in the same disputes. Upon closer examination, it appears that, at least in some cases, the differences arose mainly from the fact that, whereas the United States counted the time periods from the adoption of the panel and Appellate Body reports to the publication of the final Section 129 determinations, Viet Nam focused on the time periods between the initiation of the Section 129 proceedings to the publication of the final determinations.

¹²⁰ United States' submission, para. 31.

¹²¹ Viet Nam's submission, para. 22.

program, and no additional information is required for this process.¹²² With regard to Minh Phu's revocation request, Viet Nam maintains that, according to the relevant practice, the USDOC should "automatically revoke" the anti-dumping duty because Minh Phu has demonstrated the absence of any margins of dumping in three consecutive reviews.¹²³ As regards the sunset review, Viet Nam argues that the need for any new information is also "minimal".¹²⁴

3.49. As noted above, both parties agree that the United States will implement the Panel's "as such" finding regarding the NME-wide entity practice before implementing the Panel's "as applied" findings regarding this practice. I recall that the NME-wide entity practice concerns the USDOC's approach in addressing the relationship between the NME Member government and producers/exporters from that Member. It cannot be excluded that, following implementation of the "as such" finding, the USDOC may need to gather more information regarding individual producers/exporters from Viet Nam in the administrative reviews. I also note the United States' argument at the hearing that, pursuant to the applicable regulation¹²⁵, the USDOC must evaluate two other criteria in examining Minh Phu's revocation request in addition to the existence or absence of dumping in three consecutive reviews, and the need for additional information cannot be excluded. At the same time, once relevant additional information is gathered, it appears that changing the computer program for recalculating dumping margins might not necessarily be time-consuming *in itself*. Finally, I recall that there must be a balance between the transparency and due process rights of interested parties, on the one hand, and the promptness required in implementing recommendations and rulings of the DSB, on the other hand.¹²⁶

3.50. Third, regarding the degree of overlap among certain steps, Viet Nam argued at the hearing that the USDOC's review of Minh Phu's revocation request would not depend on the implementation of the other findings made by the Panel. Thus, the USDOC could speed up the process by issuing a separate Section 129 determination on the revocation request while the Section 123(g) process is ongoing, thereby achieving compliance with regard to the revocation request earlier. In addition, Viet Nam contended that certain aspects of the sunset review, such as

¹²² Viet Nam's submission, para. 22. On the basis of an affidavit from a specialist familiar with the USDOC computer programs for calculating dumping margins, Viet Nam claims that recalculation of the dumping margins for purposes of implementing the Panel's above findings can be completed within five hours. (Viet Nam's submission, para. 22 (referring to Affidavit of Paul M. Casas, dated 21 October 2015 (Exhibit VNM-3), p. 3))

¹²³ Viet Nam's submission, para. 23. In support of its argument, Viet Nam submitted the Federal Register notice promulgating Section 351.222 of the USDOC Regulations that, according to Viet Nam, provided the authority to revoke anti-dumping duties for individual companies based on the absence of dumping. (USDOC, Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders, Final Rule, *United States Federal Register*, Vol. 64, No. 183 (22 September 1999), pp. 51236-51240 (Exhibit VNM-6)) In addition, Viet Nam submitted a Federal Register notice revoking anti-dumping duties for a company in an administrative review conducted pursuant to Section 351.222 of the USDOC Regulations in 2002. (USDOC, Notice of Final Results of Antidumping Duty Administrative Review, Rescission of Administrative Review in Part, and Final Determination to Revoke Order in Part: Canned Pineapple Fruit from Thailand, *United States Federal Register*, Vol. 67, No. 240 (13 December 2002), pp. 76718-76720 (Exhibit VNM-7))

¹²⁴ Viet Nam's submission, para. 24.

¹²⁵ The United States explained that, for purposes of implementing the Panel's finding concerning Minh Phu's revocation request, it would apply the regulation effective at the time of Minh Phu's revocation request in the fourth administrative review. According to the Panel Report, this regulation was Section 351.222(b) of the USDOC Regulations. Section 351.222(b) provided, in relevant part:

(2)(i) In determining whether to revoke an antidumping duty order in part, the Secretary will consider:

(A) Whether one or more exporters or producers covered by the order have sold the merchandise at not less than normal value for a period of at least three consecutive years;

(B) Whether, for any exporter or producer that the Secretary previously has determined to have sold the subject merchandise at less than normal value, the exporter or producer agrees in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Secretary concludes that the exporter or producer, subsequent to the revocation, sold the subject merchandise at less than normal value; and

(C) Whether the continued application of the antidumping duty order is otherwise necessary to offset dumping.

(ii) If the Secretary determines, based upon the criteria in paragraphs (b)(2)(i)(A) through (C) of this section, that the antidumping duty order as to those producers or exporters is no longer warranted, the Secretary will revoke the order as to those producers or exporters.

(Panel Report, para. 7.323 (quoting Section 351.222(b), Title 19 of the *United States Code of Federal Regulations* (Panel Exhibit VNM-58)))

¹²⁶ Award of the Arbitrator, *Japan – DRAMS (Korea) (Article 21.3(c))*, para. 51.

an examination of the import volumes, could already begin before the completion of the Section 129 proceedings regarding the administrative reviews.

3.51. In response, the United States recalled at the hearing its intention to begin working on implementing the Panel's finding regarding Minh Phu's revocation request as soon as possible, concurrently with the Section 123(g) process. The United States clarified that, in the light of the Panel's relevant findings and how reviews are conducted in the US legal system, the USDOC would issue final Section 129 determinations regarding the three administrative reviews and the sunset review at issue. These determinations would address the Panel's findings regarding various aspects of the reviews, including Minh Phu's revocation request in the fourth administrative review. In the United States' view, parsing out one element from an administrative review and making a separate final Section 129 determination on that element, as Viet Nam seemed to suggest, would not be conducive to the proper implementation of the Panel's relevant findings.

3.52. I recall that the implementing Member has a measure of discretion in choosing the means of implementation that it deems most appropriate, provided that the means chosen is capable of bringing it into compliance with its WTO obligations within a reasonable period of time. In this vein, the United States has a measure of discretion to decide how to structure its Section 129 determinations according to its normal practice, while at the same time utilizing all the flexibilities that are available under its legal system in order to achieve compliance in the shortest possible time. In this respect, I note that the USDOC's work on implementing the Panel's findings regarding the use of the simple zeroing methodology and Minh Phu's revocation request will both be conducted concurrently with the Section 123 process.

3.53. Furthermore, I recall that the USDOC may need to take into account relevant determinations in the administrative reviews for purposes of making the sunset review determination. Indeed, under both the US Case Calendar and Viet Nam's proposed timetable, the issuance of the final Section 129 determination on the sunset review would be the last step in the implementation process. I also note that, according to the US Case Calendar, the USDOC will issue the preliminary Section 129 sunset review determination in the same month as it issues the final Section 129 determinations on the administrative reviews.¹²⁷ Thus, regardless of whether, and the extent to which, the USDOC could begin its work on the sunset review before completing the administrative reviews, it appears that there should not be a significant time-lag between the end of the Section 129 proceedings on the administrative reviews and the beginning of the Section 129 sunset review proceeding.

3.54. Finally, the United States submits that, while working on the Section 123 and Section 129 determinations to implement the findings in the present dispute, the USDOC must also continue working on numerous ongoing anti-dumping and countervailing duty proceedings. The United States alleges that the USDOC "is currently experiencing a 12-year record high for original investigations".¹²⁸ Therefore, the United States contends that the current workload of the USDOC "should be included as part of the 'particular circumstances' of this dispute".¹²⁹ At the hearing, Viet Nam contended that the USDOC's current workload should not be taken into account, because the USDOC could have planned its workload in advance and prioritized the implementation of the relevant findings in this dispute.

3.55. I note that the United States raised the same argument in the recent arbitration in *US – Countervailing Measures (China)*. The arbitrator in that dispute found that, in the light of the fundamental obligations assumed by the Members of the WTO, the current workload of the USDOC should not be considered as relevant to the determination of the reasonable period of time for implementation.¹³⁰ That arbitrator also noted that the implementing Member is expected to use all available flexibilities within its legal system to ensure "prompt compliance" with the DSB's recommendations and rulings in accordance with Article 21 of the DSU.¹³¹ Prioritizing compliance action in respect of the DSB recommendations and rulings at issue in these proceedings would

¹²⁷ See also United States' submission, para. 37.

¹²⁸ United States' submission, para. 43.

¹²⁹ United States' submission, para. 45.

¹³⁰ Award of the Arbitrator, *US – Countervailing measure (China) (Article 21.3(c))*, para. 3.49 (referring to Award of the Arbitrator, *US – 1916 Act (Article 21.3(c))*, para. 38).

¹³¹ Award of the Arbitrator, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.49. (referring to Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 73).

constitute an exercise of flexibility available to the USDOC, which it would be expected to utilize.¹³² Similarly, I therefore do not find the workload claimed by the United States to be relevant to my determination of the reasonable period of time in this dispute.

4 AWARD

4.1. In the light of the foregoing considerations, the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this dispute is 15 months, from 22 April 2015, that is, from the date on which the DSB adopted the Panel and Appellate Body Reports in this dispute. The reasonable period of time will expire on 22 July 2016.

Signed in the original at Geneva this 27th day of November 2015 by:

Simon Farbenbloom
Arbitrator

¹³² Award of the Arbitrator, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.49.

ANNEX A**EXECUTIVE SUMMARY OF THE UNITED STATES' SUBMISSION**

1. At its meeting on April 22, 2015, the 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 DSU, the United States informed the DSB on May 20, 2015, that it intends to comply with the DSB's recommendations and rulings and that it would need a reasonable period of time (RPT) to do so. The United States engaged in discussions with Vietnam in an effort to agree on the RPT, but the parties were unable to reach agreement.

2. The amount of time 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 laws to make the necessary changes in the measures at issue. Specific circumstances 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.

3. In this dispute, the United States is implementing DSB recommendations and rulings with respect to six matters. The most practical way under U.S. law to implement these six matters is by conducting three sequential proceedings, utilizing Sections 123 and Section 129 of the Uruguay Round Agreements Act. 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 Vietnam-wide entity is inconsistent 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 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 inconsistent with the AD Agreement.

4. Both parties 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. The RPT determined by the arbitrator in this dispute thus should be of sufficient length to allow the United States to implement the DSB recommendations and rulings in a manner consistent with those recommendations and rulings. This would preserve the rights of the United States to have a reasonable time for compliance and ensure that antidumping duties are imposed only in accordance with WTO rules. If the RPT is too short to allow for effective implementation, the likelihood of a "positive solution" to the dispute would be reduced.

5. The United States is taking the necessary administrative actions to bring itself into compliance with the DSB's recommendations and rulings. For the reasons outlined in the U.S. submission, an RPT of at least 21 months is a reasonable period of time for implementation in this dispute.

ANNEX B

EXECUTIVE SUMMARY OF VIET NAM'S SUBMISSION

WTO JURISPRUDENCE

1. Under Article 21.1 and 21.3(c) of the DSU implementation must be prompt. WTO jurisprudence has established that "prompt" mean the shortest time possible.
2. Only circumstances resulting from the legal system of the implementing Member and the complexity of the implementation are relevant.
3. There have been virtually no arbitral awards which exceed the 15 month guideline provided in Article 21.3(c).

IMPLEMENTATION IN DS429 IS NOT COMPLEX

1. Each of the steps required for implementation can be accomplished in a short period of time and none are complex.
2. Revisions in margins in all of the underlying proceedings can be done in 5 hours.
3. The existing record allows the U.S. to make new determinations with respect to both the individual respondent revocation and the sunset review with minimal need to supplement the existing record and a short period comments on the U.S. proposed determination.

LEGAL, PROCEDURAL AND TIME LIMITS CONSTRAINTS ON IMPLEMENTATION DO NOT EXIST UNDER U.S. LAW

1. Neither of the proposed mechanisms for implementation, Sections 123 and 129, impose time constraints on implementation under these provisions of U.S. law.

PAST U.S. EXPERIENCE IN IMPLEMENTATION

1. Based on prior U.S. implementation in trade remedy WTO disputes, there is no precedent for the time proposed by the U.S. for implementation.

VIET NAM'S PROPOSAL FOR IMPLEMENTATION

1. Viet Nam's proposal for a six month RPT is consistent with WTO jurisprudence, the requirements of U.S. law, and the complexity, or lack thereof, of the actions required for implementation.
