



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

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

*Award of the Arbitrator  
Claudia Orozco*

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\* **NOTE CONCERNING DOCUMENT SYMBOL:** As of 13 April 2017, for ease of reference, awards of arbitrators under Article 21.3(c) of the DSU will bear the symbol WT/DS[number]/RPT.

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**ABBREVIATIONS USED IN THIS AWARD**

<b>Abbreviation</b>	<b>Description</b>
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 and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/AB/R
DPM	Differential Pricing Methodology
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
Panel Report	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/R
RSTA	Korea's Restriction of Special Taxation Act
Samsung	Samsung Electronics Co., Ltd
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Section 123 proceeding	Proceeding pursuant to Section 123(g) of the Uruguay Round Agreements Act, Public Law No. 103-465, 108 Stat. 4831, codified as <i>United States Code</i> , Title 19, Section 3533(g)
Section 129 proceeding	Proceeding pursuant to Section 129(b) of the Uruguay Round Agreements Act, Public Law No. 103-465, 108 Stat. 4837, codified as <i>United States Code</i> , Title 19, Section 3538(b)
T-T	transaction-to-transaction
URAA	Uruguay Round Agreements Act
USDOC	United States Department of Commerce
USTR	United States Trade Representative
<i>Washers</i> anti-dumping investigation	USDOC [A-580-868] Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea
<i>Washers</i> countervailing duty investigation	USDOC [C-580-869] Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea
W-T	weighted average-to-transaction
WTO	World Trade Organization
W-W	weighted average-to-weighted average

**CASES CITED IN THIS AWARD**

<b>Short Title</b>	<b>Full Case title and citation</b>
<i>Argentina – Hides and Leather (Article 21.3(c))</i>	Award of the Arbitrator, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS155/10, 31 August 2001, DSR 2001:XII, p. 6013
<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 DSU</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>Colombia – Textiles (Article 21.3(c))</i>	Award of the Arbitrator, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS461/13, 15 November 2016
<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 – 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 – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
<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 – Shrimp II (Viet Nam) (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS429/12, 15 December 2015
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, p. 5087

Short Title	Full Case title and citation
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
<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
<i>US – Washing Machines</i>	Appellate Body Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/AB/R and Add.1, adopted 26 September 2016
<i>US – Washing Machines</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/R and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3

WORLD TRADE ORGANIZATION  
AWARD OF THE ARBITRATOR**United States – Anti-Dumping and  
Countervailing Measures on  
Large Residential Washers from Korea**

Arbitrator:

Claudia Orozco

Parties:

Korea  
United States**1 INTRODUCTION**

1.1. On 26 September 2016, the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) adopted the Appellate Body Report<sup>1</sup> and the Panel Report<sup>2</sup> in *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*. This dispute concerns Korea's challenge of certain methodologies used by the United States in anti-dumping investigations and administrative reviews, as well as certain anti-dumping and countervailing measures imposed by the United States on imports of large residential washers from Korea. The Panel and the Appellate Body found the measures at issue to be inconsistent with various provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and the General Agreement on Tariffs and Trade 1994 (GATT 1994).

1.2. At the meeting of the DSB held on 26 October 2016, the United States indicated its intention to implement the DSB's recommendations and rulings in this dispute, and stated that it would need a reasonable period of time in which to do so.<sup>3</sup>

1.3. By letter dated 9 December 2016, Korea informed the DSB that its consultations with the United States on the reasonable period of time for implementation pursuant to Article 21.3(b) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) had not resulted in an agreement. Korea therefore requested that the reasonable period of time be determined through binding arbitration pursuant to Article 21.3(c) of the DSU.<sup>4</sup>

1.4. On 21 December 2016, the United States and Korea sent a joint communication to the Chairman of the DSB and requested that it be circulated to WTO Members.<sup>5</sup> In the communication, the United States and Korea indicated their agreement that, "in the event an arbitration under Article 21.3(c) of the DSU is requested, it shall be completed no later than 60 days after the date of the appointment of an arbitrator, unless the arbitrator, following consultation with the parties, considers that additional time is required."<sup>6</sup> The United States and Korea also confirmed that any award of the arbitrator, including an award not made within 90 days after the adoption of the recommendations and rulings of the DSB, would be deemed to be an award of the arbitrator for the purposes of Article 21.3(c) of the DSU.

1.5. By letter dated 22 December 2016, Korea informed the Director-General of the WTO that consultations with the United States had not led to mutual agreement on an arbitrator. Korea therefore requested the Director-General to appoint an arbitrator pursuant to footnote 12 to Article 21.3(c) of the DSU. After consulting with the parties, the Director-General appointed me as the Arbitrator on 12 January 2017.

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<sup>1</sup> WT/DS464/AB/R.

<sup>2</sup> WT/DS464/R.

<sup>3</sup> WT/DSB/M/387, para. 2.3.

<sup>4</sup> WT/DS464/13.

<sup>5</sup> WT/DS464/14.

<sup>6</sup> WT/DS464/14.

1.6. On 12 January 2017, the United States sent a letter requesting that the due date for the United States' submission be no earlier than 27 January 2017, in light of expected difficulties in preparing that written submission due to office closures relating to the United States Presidential Inauguration on 20 January 2017, as well as a federal public holiday on 16 January 2017.

1.7. On 16 January 2017, I informed the parties of my acceptance of the appointment as Arbitrator, and invited Korea to comment on the United States' letter of 12 January 2017. On 18 January 2017, Korea indicated that it did not intend to comment on the United States' letter and that it thereby expressed no objection to the United States' request. On 19 January 2017, I transmitted to the parties a Working Schedule identifying the dates for the filing of the parties' written submissions and the date for the hearing.<sup>7</sup>

1.8. On 20 January 2017, I received a letter from Korea requesting modification of the deadline for the filing of Korea's written submission from Friday, 3 February 2017 to Monday, 20 February 2017, and modification of the date of the hearing from 16 February 2017 to a few days later. Korea identified several reasons for its request in respect of its filing deadline. Korea pointed out that, in previous Article 21.3(c) arbitrations, the submissions of the implementing and complaining Members have been due 7 and 14 days, respectively, after the arbitrator's acceptance of the appointment. Korea expressed due process concerns arising from the fact that, under the Working Schedule, the United States had been given 11 days for its submission while Korea's submission was due 7 days thereafter. Korea added that its ability to prepare its submission was also reduced by virtue of Korea's national holidays for the Lunar New Year from 27-30 January 2017. Korea supported its request to postpone the date of the hearing with reference to its participation in expert sessions and panel meetings in the dispute *Korea - Import Bans, and Testing and Certification Requirements for Radionuclides* (DS495) in mid-February 2017.

1.9. On 20 January 2017, I invited the United States to comment on Korea's request. On 24 January 2017, the United States indicated that it had no objection to Korea's request to extend the deadline for the filing of its written submission, provided that the hearing date be extended in a corresponding way so as to preserve a period of at least two weeks between that deadline and the date of the hearing in order to allow the United States sufficient time to consider Korea's submission in preparing for the hearing. Accordingly, the United States requested that any extension of the date for the filing of Korea's written submission be accompanied by an extension of the date for the hearing until at least 6 March 2017.

1.10. On 24 January 2017, I sent the parties a revised Working Schedule, pursuant to which the United States filed its written submission on 2 February 2017, Korea filed its written submission on 20 February 2017, and the hearing was held on 9 March 2017. At the hearing, I indicated that, in light of the parties' requests to postpone the dates for the filing of their written submissions and for the hearing, the Award would be issued by 13 April 2017.

## **2 ARGUMENTS OF THE PARTIES**

2.1. Annexes A and B to this Award contain the executive summaries of the parties' submissions. Certain details of the parties' arguments are further described below, insofar as they are relevant to the analysis.

## **3 REASONABLE PERIOD OF TIME**

### **3.1 Introduction**

3.1. I have been appointed by the Director-General, at the request of Korea, to determine the "reasonable period of time" pursuant to Article 21.3(c) of the DSU for the United States to implement the recommendations and rulings of the DSB in *United States - Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*.

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<sup>7</sup> The Working Schedule of 19 January 2017 indicated that the written submission of the United States should be filed on 27 January 2017, the written submission of Korea should be filed on 3 February 2017, and the hearing would be held on 16 February 2017.

3.2. The United States requests 21 months as the reasonable period of time for implementation of the DSB's recommendations and rulings in this dispute.<sup>8</sup>

3.3. Korea requests that the reasonable period of time be either 6 or 8 months, depending on the precise means of implementation.<sup>9</sup>

3.4. This section sets out the mandate of the arbitrator under Article 21.3(c) of the DSU in light of the text of the DSU. It then identifies the specific measures that the United States is required to bring into conformity with the recommendations and rulings of the DSB. Finally, it analyses the factors affecting the determination of the reasonable period of time in this dispute, including the means of implementation, the steps in the implementation process, and circumstances particular to this dispute that the parties allege should be taken into account in reaching the determination.

### **3.2 Mandate of the arbitrator under Article 21.3(c) of the DSU**

3.5. 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)

3.6. Accordingly, the mandate of the arbitrator is to determine the time period within which the implementing Member is to comply with the recommendations and rulings of the DSB. Article 21.3(c) establishes as a guideline that such period should not exceed 15 months and recognizes that, "depending upon the particular circumstances" of the dispute, the period "may be shorter or longer".

3.7. In determining the period of time that is reasonable in light of the particular circumstances of a dispute, the arbitrator should bear in mind the provisions of the DSU that provide context to Article 21.3(c), in particular Article 21.1, which establishes that "prompt compliance" with the DSB's recommendations and rulings is essential "to ensure effective resolution of disputes", and the introductory clause of Article 21.3, which foresees a reasonable period of time for implementation when it is "impracticable to comply immediately". Both provisions indicate the importance of compliance in as short a period as possible when immediate compliance is not practicable.

3.8. Further, in determining the reasonable period of time, the means of implementation available to the Member concerned is a relevant factor. Determining this period of time thus requires consideration of how that Member proposes to implement under its municipal law.<sup>10</sup> Previous awards have indicated that, while the Member concerned has discretion in choosing the means of implementation that it deems most appropriate, the means of implementation chosen must be apt in form, nature, and content to bring the Member into compliance with its WTO obligations.<sup>11</sup> Previous awards have also indicated that, if the action that the implementing Member proposes to

<sup>8</sup> United States' submission, para. 8.

<sup>9</sup> Korea's submission, para. 8.

<sup>10</sup> Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 26. See also Award of the Arbitrator, *US – COOL (Article 21.3(c))*, para. 68.

<sup>11</sup> See Awards of the Arbitrators, *Colombia – Textiles (Article 21.3(c))*, para. 3.4; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.3; *China – GOES (Article 21.3(c))*, para. 3.2; and *Colombia – Ports of Entry (Article 21.3(c))*, para. 64.



take seeks to achieve objectives unrelated to the DSB's recommendations and rulings, or forms part of a wider reform of that Member's municipal law, then these considerations cannot justify a longer implementation period for the WTO dispute.<sup>12</sup> At the same time, the mandate under Article 21.3(c) of the DSU is limited to determining the period of time within which it would be reasonable to expect implementation of the recommendations and rulings of the DSB to occur, and does not involve deciding on the content of the implementation needed, nor a determination of the consistency with the covered agreements of the measure that the Member envisages to adopt in order to comply. The latter question, should it arise, is to be addressed in proceedings conducted pursuant to Article 21.5 of the DSU.<sup>13</sup>

3.9. Pursuant to the last sentence of Article 21.3(c), the "particular circumstances" of a dispute may affect the reasonable period of time, making it "shorter or longer". Previous arbitrators have observed that the objective of "prompt compliance" in Article 21.1 of the DSU calls for the implementing Member to utilize the flexibilities available within its legal system in implementing the relevant recommendations and rulings of the DSB.<sup>14</sup> An implementing Member is not, however, expected to utilize "extraordinary procedures" to bring its measure into compliance.<sup>15</sup>

3.10. Finally, 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 a "reasonable period of time".<sup>16</sup> However, this does not "absolve" the complaining Member of its duty to provide evidence supporting why it disagrees with the period of time proposed by the implementing Member, and to substantiate its view that a shorter period of time for implementation is reasonable.<sup>17</sup>

### 3.3 Measures to be brought into conformity

3.11. The parties agree that the scope of the United States' implementation obligations in this dispute is defined by the recommendations and rulings of the DSB, as set forth in section 6 of the Appellate Body Report, together with paragraph 8.1 of the Panel Report.<sup>18</sup> At the hearing, the parties agreed that the measures to be brought into conformity with the covered agreements could generally be summarized as follows<sup>19</sup>:

- a. In respect of certain methodologies used by the United States Department of Commerce (USDOC) in anti-dumping investigations:
  - i. aspects of the Differential Pricing Methodology (DPM) used to determine whether to apply the weighted average-to-transaction (W-T) methodology; and
  - ii. aspects of the methodologies used to calculate the margin of dumping when applying the W-T methodology.

<sup>12</sup> See Awards of the Arbitrators, *Colombia – Textiles (Article 21.3(c))*, paras. 3.36 and 3.41; *Colombia – Ports of Entry (Article 21.3(c))*, paras. 64 and 85; *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69; and *EC – Tariff Preferences (Article 21.3(c))*, para. 31.

<sup>13</sup> See Awards of the Arbitrators, *Colombia – Textiles (Article 21.3(c))*, para. 3.6; *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.3; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.4; and *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27.

<sup>14</sup> See Awards of the Arbitrators, *Colombia – Textiles (Article 21.3(c))*, paras. 3.51-3.53; *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.5; *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.

<sup>15</sup> 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.

<sup>16</sup> See Awards of the Arbitrators, *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.

<sup>17</sup> See Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 67.

<sup>18</sup> Parties' responses to questions at the hearing.

<sup>19</sup> See also United States' submission, para. 3 and Korea's submission, paras. 16-20.

- b. In respect of the *Washers* anti-dumping investigation<sup>20</sup>:
- i. the USDOC's determination to apply the W-T methodology on the basis of:
    - its identification of a pattern of export prices which differ significantly among different purchasers, regions or time periods; and
    - its explanation as to why such differences could not be taken into account by the methodologies that are normally to be used; and
  - ii. the USDOC's calculation of the margin of dumping.
- c. In respect of the *Washers* countervailing duty investigation<sup>21</sup>:
- i. the USDOC's determination that Article 10(1)(3) of Korea's Restriction of Special Taxation Act (RSTA) is *de facto* specific, in particular:
    - the original and remand determinations that Samsung Electronics Co., Ltd (Samsung) received subsidies in disproportionately large amounts; and
    - the USDOC's failure to take account of the duration and economic diversification factors referred to in the final sentence of Article 2.1(c) of the SCM Agreement; and
  - ii. the manner in which the USDOC calculated the *ad valorem* subsidization rate for Samsung, in particular:
    - the test applied to ascertain whether the tax credits bestowed under Articles 10(1)(3) and 26 of the RSTA were tied to particular products and the failure to take account of certain evidence submitted by Samsung that was potentially relevant to the assessment of a possible tie between the tax credits claimed by Samsung and the products manufactured by its digital appliance business unit; and
    - the presumptive attribution of tax credits received by Samsung under Article 10(1)(3) of the RSTA to Samsung's domestic production without assessing all the arguments and evidence submitted by interested parties and other relevant facts surrounding the bestowal of such tax credits.

3.12. With respect to the measures described above, the Panel and the Appellate Body found: (i) certain aspects of the USDOC's anti-dumping methodologies to be inconsistent "as such" with Articles 2.4.2, 2.4, and 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994; (ii) certain actions by the USDOC in the *Washers* anti-dumping investigation to be inconsistent "as applied" with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement; and (iii) certain actions by the USDOC in the *Washers* countervailing duty investigation to be inconsistent "as applied" with Articles 2.1(c) and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994.<sup>22</sup>

#### 3.4 Factors affecting the determination of the reasonable period of time

3.13. The United States indicates that a reasonable period of time to implement the DSB's recommendations and rulings in this dispute is 21 months.<sup>23</sup> The United States argues that this period is necessary due to the "number and magnitude of modifications to the challenged measures, the procedural requirements under U.S. law, the complexity of the issues involved, and the current resource demands and constraints on the USDOC".<sup>24</sup> According to the United States, it requires a three-phase process: one in respect of each of the three sets of measures identified in paragraph 3.11 above. The United States explains that it requires a proceeding pursuant to

<sup>20</sup> USDOC [A-580-868] Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea.

<sup>21</sup> USDOC [C-580-869] Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea.

<sup>22</sup> See Panel Report, para. 8.1; and Appellate Body Report, paras. 6.1-6.16.

<sup>23</sup> United States' submission, para. 13.

<sup>24</sup> United States' submission, para. 8.

Section 123(g) of the Uruguay Round Agreements Act (URAA)<sup>25</sup> to address the "as such" findings of inconsistency concerning the DPM and the use of the W-T methodology in investigations and assessment proceedings.<sup>26</sup> A second and a third proceeding, each pursuant to Section 129(b) of the URAA<sup>27</sup>, are needed to address the "as applied" findings relating to the *Washers* anti-dumping investigation and the *Washers* countervailing duty investigation, respectively.<sup>28</sup> In addition, the United States asserts that the Section 129 proceeding concerning the *Washers* anti-dumping investigation cannot be commenced until it has partially completed the Section 123 proceeding because the Section 123 proceeding will develop the revised approaches and methodologies to be applied in the Section 129 proceeding.<sup>29</sup>

3.14. Korea questions the time requested for preparatory work and the need to undertake a Section 123 procedure to address the "as such" findings. Korea contends that, taking into account "the number and complexity of the issues involved, and the administrative procedures that the United States must undergo in order to implement revisions to its measures", the United States should reasonably be able to implement all of the DSB's recommendations and rulings through proceedings under Section 129 within 6 months.<sup>30</sup> Even if a Section 123 proceeding were to be undertaken to implement the "as such" recommendations and rulings, Korea maintains that all three proceedings could be completed within a maximum of 8 months.<sup>31</sup>

3.15. The parties agree that, notwithstanding that the United States will conduct more than one proceeding, a single reasonable period of time should be determined. The parties also agree that two Section 129 proceedings are needed – one to implement the recommendations and rulings concerning the *Washers* anti-dumping investigation and one to implement the recommendations and rulings concerning the *Washers* countervailing duty investigation – and that they can be conducted separately and independently from each other. The parties disagree, however, on: (i) whether a Section 123 proceeding is necessary; and therefore whether any additional time that such a proceeding may entail should be taken into account in determining the reasonable period of time; (ii) the extent to which a Section 123 proceeding could be conducted simultaneously with the Section 129 anti-dumping proceeding; and (iii) the amount of time reasonably needed to conduct each of the three proceedings.

3.16. The analysis below first addresses the parties' disagreement with respect to the means of implementing the "as such" recommendations and rulings. Second, it examines the parties' arguments concerning the specific steps that must be taken by the United States under the different proceedings, including the extent to which a Section 123 proceeding could be conducted simultaneously with the Section 129 anti-dumping proceeding. Third, it analyses the particular circumstances of this dispute alleged by the parties to be relevant to the determination of the reasonable period of time.

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<sup>25</sup> Uruguay Round Agreements Act, Public Law No. 103-465, 108 Stat. 4831, codified as *United States Code*, Title 19, Section 3533(g).

<sup>26</sup> United States' submission, para. 4.

<sup>27</sup> Uruguay Round Agreements Act, Public Law No. 103-465, 108 Stat. 4837, codified as *United States Code*, Title 19, Section 3538(b).

<sup>28</sup> United States' submission, para. 4. Although the United States refers to these proceedings as "Phase I"; "Phase II"; and "Phase III", such categorization may be taken to imply that the phases are to be conducted sequentially. This, however, would be misleading, as the United States itself envisages that there would be some overlap in time among them. Accordingly, this Award refers to: (i) the proceeding pursuant to Section 123(g) of the URAA proposed to address the "as such" findings of inconsistency with the Anti-Dumping Agreement and the GATT 1994 as the "Section 123 proceeding"; (ii) the proceeding pursuant to Section 129(b) of the URAA proposed to address the "as applied" findings of inconsistency with the Anti-Dumping Agreement as the "Section 129 anti-dumping proceeding" or the "Section 129 anti-dumping redetermination"; and (iii) the proceeding pursuant to Section 129(b) of the URAA proposed to address the "as applied" findings of inconsistency with the SCM Agreement as the "Section 129 countervailing duty proceeding" or the "Section 129 countervailing duty redetermination".

<sup>29</sup> United States' submission, para. 26.

<sup>30</sup> Korea's submission, para. 8.

<sup>31</sup> Korea's submission, para. 8.

### 3.4.1 Means of implementation

3.17. While the parties agree that separate proceedings are required for implementing the DSB's recommendations and rulings relating to the anti-dumping measures and those relating to the *Washers* countervailing duty investigation, they disagree on the means to implement the "as such" recommendations and rulings relating to the DPM and the application of the W-T methodology. Korea argues that implementation can and should be undertaken through a Section 129 proceeding rather than a Section 123 proceeding.<sup>32</sup> Specifically, Korea states that modification of the relevant anti-dumping methodologies does not require "formal rulemaking or legislation" and can be achieved through a Section 129 proceeding.<sup>33</sup> Korea points out that the existing methodologies were developed within the framework of specific anti-dumping investigations.<sup>34</sup> Further, Korea maintains that a Section 129 proceeding is a "more efficient" means of implementation<sup>35</sup>, and refers to the awards of the arbitrators in *US – Stainless Steel (Mexico)* and *Argentina – Hides and Leather* for the proposition that, where multiple means of implementation are available, the reasonable period of time should be based on the shortest possible time period.<sup>36</sup> In Korea's view, Section 129 constitutes a flexibility available to the United States that should be exercised in order for the United States to implement its obligations in the shortest possible period of time.<sup>37</sup>

3.18. At the hearing, Korea indicated that, notwithstanding the views expressed in its submission, Korea has "no problem" with the United States pursuing a Section 123 proceeding. Korea nevertheless stressed that the amount of time sought by the United States is excessively long and unjustified, and that both the Section 123 and Section 129 anti-dumping proceedings could be undertaken simultaneously.

3.19. For its part, the United States asserts that a Section 123 proceeding is appropriate to address the "as such" findings concerning the anti-dumping measures. The United States indicates that "Section 123 is a legal instrument that generally governs changes in [the USDOC's] practice when a panel or the Appellate Body finds the practice to be inconsistent with the URAA" while Section 129 "sets out the procedures regarding individual proceedings".<sup>38</sup> The United States highlights that Korea challenged the DPM as a practice and that the Panel found that the DPM is a rule or norm of general and prospective application. For the United States, it is therefore appropriate to consider the DPM a practice.<sup>39</sup> The United States also argues that, taking account of the "number and magnitude" of the "as such" findings by the Panel and the Appellate Body, it has determined that a Section 123 proceeding, rather than legislative change, is the most practical way to implement these obligations.<sup>40</sup>

3.20. In addressing this issue, it is important to recall, from paragraph 3.8 above, that an implementing Member has discretion in choosing its means of implementation as long as the means chosen is apt in form, nature, and content to bring the Member into compliance with its WTO obligations.

3.21. In the current dispute, the Panel found the DPM and the USDOC's methodology for applying the W-T comparison to be measures that could be challenged "as such" in WTO dispute settlement on the basis of a finding that they are rules or norms of general and prospective application.<sup>41</sup> The Panel considered that the evidence before it demonstrated that the DPM "represents a policy

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<sup>32</sup> Korea's submission, paras. 30-38.

<sup>33</sup> Korea's submission, para. 33.

<sup>34</sup> Korea's submission, para. 32.

<sup>35</sup> Korea's submission, para. 36.

<sup>36</sup> Korea's submission, para. 35 (referring to Awards of the Arbitrators, *US – Stainless Steel (Mexico)* (Article 21.3(c)), para. 53; and *Argentina – Hides and Leather* (Article 21.3(c)), para. 47).

<sup>37</sup> Korea's submission, paras. 34 and 38.

<sup>38</sup> United States' response to questions at the hearing. Section 123 proceedings are "often used to amend or modify an agency regulation or practice" while Section 129 proceedings are "used to amend or modify an action taken in a particular proceeding". (United States' submission, fn 17 to para. 4)

<sup>39</sup> United States' response to questions at the hearing.

<sup>40</sup> United States' response to questions at the hearing.

<sup>41</sup> Panel Report, paras. 7.97-7.117 and fn 321 to para. 7.173.

choice [by the USDOC] that extends well beyond the mere repetition of the methodology in certain specific cases" and is thus applicable in all cases.<sup>42</sup>

3.22. Further, the text of Section 123(g)(1) explicitly indicates that, "[i]n 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" the relevant steps set forth under Section 123(g) have been followed.

3.23. On the basis of the foregoing, the United States has demonstrated that a Section 123 proceeding is an appropriate means to implement the DSB's "as such" recommendations and rulings in this dispute.

### 3.4.2 Steps in the implementation process

3.24. Turning to the implementation process, the subsections below address the steps required for: (i) implementation of the DSB's "as such" recommendations and rulings through a Section 123 proceeding; (ii) implementation of the DSB's "as applied" recommendations and rulings concerning the *Washers* anti-dumping investigation through a Section 129 anti-dumping proceeding; (iii) the sequencing of the Section 123 and Section 129 proceedings concerning the anti-dumping measures; and (iv) implementation of the DSB's "as applied" recommendations and rulings concerning the *Washers* countervailing duty investigation through a Section 129 proceeding.

#### 3.4.2.1 Implementation of the DSB's "as such" recommendations and rulings

3.25. With regard to implementation of the DSB's "as such" recommendations and rulings concerning the DPM and the W-T methodology, the United States argues that it needs 5 months to conduct internal deliberations prior to the commencement of the Section 123 proceeding, during which: the United States would determine whether a WTO-consistent approach to applying the W-T methodology in anti-dumping proceedings "is possible under existing municipal law"; the United States Trade Representative (USTR) and the USDOC would conduct preliminary consultations; these agencies would conduct "pre-commencement analysis preparation"; and the USDOC would begin devising anti-dumping methodologies in preparation for the commencement of Section 123 and Section 129 proceedings.<sup>43</sup> The United States maintains that, thereafter, it needs "no less than 15 months to complete the entire section 123 process".<sup>44</sup> In considering the period of time required to complete both the initial deliberations and the Section 123 proceeding, the United States emphasizes that implementation requires the United States to redesign, and perhaps replace entirely, its methodology for identifying and addressing potential masked dumping in original and assessment proceedings in a way that, to date, has not been applied by WTO Members.<sup>45</sup> Overall, the United States argues that compliance in this dispute requires a period of 21 months.<sup>46</sup>

3.26. Korea argues that the United States' proposed time period fails to account for available flexibilities and incorporates steps not required under the proposed Section 123 proceeding.<sup>47</sup> Korea also contends that the time periods requested for certain steps are longer than the time periods actually needed to complete those steps. In particular, Korea contests the amount of time required to: (i) conduct initial deliberations and preparatory work; (ii) develop proposed methodologies for determining when to apply the W-T methodology and for calculating the margin of dumping; and (iii) conduct consultations with Congress and the private sector (including time

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<sup>42</sup> Panel Report, para. 7.115. See also para. 7.110; and Appellate Body Report, paras. 6.3-6.4 and 6.7-6.11.

<sup>43</sup> United States' submission, para. 55.

<sup>44</sup> United States' submission, para. 42.

<sup>45</sup> United States' submission, paras. 15-24.

<sup>46</sup> In its proposed timetable, the United States indicates that the Section 123 proceeding will conclude in June 2018 (i.e. 21 months following the adoption of the Panel and Appellate Body Reports in September 2016). (United States' submission, para. 55)

<sup>47</sup> Korea's submission, paras. 42-47.

for analysis of public comments on the proposed methodologies).<sup>48</sup> Korea also contests the extent to which the "novelty" of the DSB's "as such" recommendations and rulings and the technical complexities of implementation are relevant factors in determining the reasonable period of time.<sup>49</sup> Furthermore, Korea highlights that in *US – Stainless Steel (Mexico)* the United States requested only 7 months to complete a Section 123 proceeding.<sup>50</sup> Korea submits that in the present dispute the United States requires no more than 8 months to complete the Section 123 proceeding.

3.27. Section 123(g) of the URAA provides, in relevant part:

**(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)<sup>51</sup>;
- (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 ...;
- (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.

**(2) Effective date of modification**

A final rule or other modification to which paragraph (1) applies may not go into effect before the end of the 60-day period beginning on the date on which consultations under paragraph (1)(E) begin, unless the President determines that an earlier effective date is in the national interest.

<sup>48</sup> Korea's submission, paras. 27 and 42-48.

<sup>49</sup> Korea's submission, paras. 67-71.

<sup>50</sup> Korea's submission, para. 48 (referring to Award of the Arbitrator, *US – Stainless Steel (Mexico)* (Article 21.3(c)), para. 56).

<sup>51</sup> Subsection (f) of Section 123 refers to "[a]ctions upon circulation of reports" and provides that: Promptly after the circulation of a report of a panel or of the Appellate Body to WTO members ..., 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.

3.28. The parties agree that subparagraphs (A) through (F) quoted above identify the steps involved in a Section 123 proceeding and that the only prescribed time period is found in Section 123(g)(2), which provides that the final rule or modification may not go into effect until at least 60 days after the USTR and the USDOC have begun consultations with the relevant congressional committees on the proposed modification.<sup>52</sup> From the language of Section 123 and the explanations by the United States it is clear that: (i) the USTR begins consulting with Congress promptly after the circulation of a panel or Appellate Body report to WTO Members<sup>53</sup> and is "constantly consulting from that point onwards"<sup>54</sup>; (ii) time is needed between the beginning of consultations and the time that the proposed modification is published in the Federal Register so as to enable the USDOC to elaborate its proposed modification; (iii) in practice, the USTR consults with relevant private sector advisory committees at the same time that the public is afforded an opportunity to comment on the proposal and both of these steps take place following the publication of the proposed modification in the Federal Register; and (iv) because the USTR's report to Congress must include a summary of the advice obtained from private sector advisory committees and also contains a summary of the comments from the public on the proposed rule, this report can be prepared only after the period for commenting on the proposed modification has elapsed. Consequently, while some steps can be performed at the same time, other steps must, as a matter of law and by necessary implication, occur sequentially. Korea does not disagree with the description and explanations provided by the United States.

3.29. The parties disagree as to the necessity of an initial period of internal deliberations and consultations by the USTR and the USDOC and as to the period of time that is required by the USTR and the USDOC to develop the proposed modification and publish it in the Federal Register.<sup>55</sup> In respect of these deliberative steps, the United States emphasizes the "novelty" of the Appellate Body's findings and highlights that this is the first dispute in which the DSB has made recommendations and rulings regarding the application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.<sup>56</sup> The United States further explains that there is significant technical "complexity" in implementing these "as such" recommendations and rulings because it will likely need to: (i) make significant changes to or replace the DPM, including revision of the computer program used to perform a "quantitative" analysis of export prices and the development of a means to perform a "qualitative" analysis<sup>57</sup>; (ii) make substantial revisions to its computer program for determining the margin of dumping under the W-T methodology, including for purposes of administrative reviews<sup>58</sup>; and (iii) revise its approach to explaining why the weighted average-to-weighted average (W-W) and transaction-to-transaction (T-T) methodologies cannot appropriately take into account differences in export prices, including "significant practice development, internal analysis and deliberation, and decision-making" to determine how the USDOC would employ a T-T analysis.<sup>59</sup> The United States indicates that it requires 12 months from adoption of the Panel and Appellate Body Reports until publication of the proposed modification in the Federal Register.<sup>60</sup>

3.30. For its part, Korea asserts that the implementation steps that the United States must carry out are neither novel nor particularly complex and "do not present significant burdens or complications compared to other proceedings".<sup>61</sup> Korea emphasizes that the United States has already undertaken "intense studying" of the issue of how to apply the second sentence of Article 2.4.2 of the Anti-Dumping Agreement over the last ten years and that, just as it was not difficult for the USDOC to modify the Nails II methodology<sup>62</sup> to identify differential pricing under the DPM, it would not be difficult to modify the DPM to implement the relevant recommendations and rulings of the DSB.<sup>63</sup> Korea adds that the United States does not need to conduct lengthy

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<sup>52</sup> Parties' responses to questions at the hearing.

<sup>53</sup> See Section 123(f) reproduced in fn 51 above.

<sup>54</sup> United States' response to questions at the hearing.

<sup>55</sup> United States' submission, paras. 12 and 16-24; Korea's submission, paras. 67-71.

<sup>56</sup> United States' submission, para. 15.

<sup>57</sup> United States' submission, paras. 18-19.

<sup>58</sup> United States' submission, paras. 20-21.

<sup>59</sup> United States' submission, para. 23.

<sup>60</sup> United States' submission, para. 55.

<sup>61</sup> Korea's submission, para. 71.

<sup>62</sup> For an explanation of the Nails II methodology previously used by the USDOC to determine the existence of "targeted dumping", see Panel Report, fn 54 to para. 7.10.

<sup>63</sup> Korea's opening statement at the hearing. See also Korea's submission, paras. 65-71.

procedures in order to develop a "qualitative test", make technical revisions to its dumping margin calculation computer program, or make significant revisions to the USDOC's policies or regulations. To Korea, the DSB's recommendations and rulings do not require the United States to "redo everything and rethink everything and do every contingency imaginable in every single case".<sup>64</sup> For Korea, it follows that the reasonable period of time should not encompass time for the United States to establish if it might want to use a T-T methodology, what that methodology would be, and how it would apply to all the different industries to which it might be applied. Korea considers that the United States could conduct its internal deliberations and consultations at the same time as it develops its methodology, all of which could have taken place within 90 days of the adoption of the Panel and Appellate Body Reports.<sup>65</sup>

3.31. The first point of disagreement between the United States and Korea relates to the need and the length of time that would be justified for preparatory work. The United States highlights that, following the findings of the Panel and the Appellate Body, "the landscape of how investigating authorities can apply the second sentence of Article 2.4.2 has significantly changed".<sup>66</sup> Korea argues that the United States has already undertaken "intense studying" of the issues involved over the past ten years.<sup>67</sup> Korea also emphasizes that the United States could have and should have begun taking steps towards implementation in this dispute earlier than it has, and that the United States has not demonstrated that it has taken any concrete action in the more than 5 months since adoption of the Panel and Appellate Body Reports.<sup>68</sup>

3.32. Concerning preparatory work, it is important to note that such work, including consultations within government agencies, is a typical and legitimate aspect of "law-making" and is reflected throughout the Section 123 process. Consequently, such consultation and preparatory work should be taken into account in determining a reasonable period of time for implementation. The length of time required for such preparatory work is affected by the number and complexity of the issues and the number of agencies involved. The alleged novelty and complexity involved in implementation in the current case is addressed below. At this stage, it is sufficient to highlight that an appropriate time for the preparatory steps as identified by the United States (reflection, debate, and the development, testing, and analysis of new approaches) serves the double purpose of ensuring that the resulting methodology is an appropriate means of addressing targeted dumping consistently with the Anti-Dumping Agreement and reducing the time needed to undertake subsequent steps in the implementation process.

3.33. Regarding the alleged "novelty" and "complexity" of the issues involved, it is noted that this is the first dispute in which a panel or the Appellate Body has interpreted the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.<sup>69</sup> Moreover, according to the United States, the interpretation by the Appellate Body requires an approach not yet developed by any WTO Member. In and of itself, the fact that a provision is interpreted for the first time in dispute settlement is not necessarily relevant to the determination of the reasonable period of time to come into conformity with that provision. A "new" interpretation of a provision may be relatively simple to implement depending on the nature of the obligation that it prescribes. Thus, the nature of the specific implementing obligation needs to be considered.

3.34. The current case relates to the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. The right established therein, to use an exceptional methodology to calculate the margin of dumping, is subject to several conditions, each requiring a number of analytical steps to fulfil the parameters of the provision. The scope of the DSB's recommendations and rulings refers to each element of the provision, namely, the manner of establishing the pattern, the explanation as to why the normal methodologies are not appropriate, and the manner of calculating the margin of dumping. Each of these elements has been interpreted for the first

<sup>64</sup> Korea's response to questions at the hearing.

<sup>65</sup> Korea's submission, paras. 44-45 and 49.

<sup>66</sup> United States' response to questions at the hearing.

<sup>67</sup> Korea's opening statement at the hearing. See also Korea's submission, para. 65.

<sup>68</sup> Korea's submission, paras. 24-28; response to questions at the hearing.

<sup>69</sup> Although previous panel and Appellate Body reports have referred to Article 2.4.2, second sentence, of the Anti-Dumping Agreement, this is the first dispute in which a panel or the Appellate Body has made a finding of inconsistency in respect of this provision. (See e.g. Appellate Body Reports, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 95-100; *US – Zeroing (Japan)*, paras. 130-136; *US – Stainless Steel (Mexico)*, paras. 122-127; and *US – Continued Zeroing*, paras. 296-298)



time in this dispute. Consequently, the nature of the obligations covered by the required implementation includes a number of interrelated issues with an aspect of novelty. Nevertheless, the novelty and complexity is limited to three elements, and for each the range of options that can be explored is limited by the parameters of what is WTO-compatible as interpreted by the Panel and the Appellate Body.

3.35. Turning to Korea's argument that the United States should have begun taking steps towards implementation earlier than it has, both parties agree that the reasonable period of time for implementation is measured as from the date of adoption of the Panel and Appellate Body Reports.<sup>70</sup> According to the United States, implementation steps in the form of internal deliberations and consultations were taken as from that date. However, the United States indicates that it is not in a position to provide evidence of such steps in light of the confidential nature of the internal deliberations and consultations that have occurred.<sup>71</sup> In Korea's view, absent evidence showing that specific actions have been taken, an arbitrator charged with determining the reasonable period of time cannot accept the mere assertion by a Member that it is taking steps towards implementation. Otherwise, explains Korea, "the possibility of abuse is too great" because that Member could make any assertion it wished in order to extend the reasonable period of time determined by an arbitrator.<sup>72</sup>

3.36. By the time of the hearing in this arbitration, over 5 months had elapsed since the DSB's adoption of the Panel and Appellate Body Reports in this dispute. It has been explained that details cannot be provided. Therefore it is not possible to assess how much has been accomplished in this period. Nevertheless, it is important to keep in mind that, in the meantime, measures found to be WTO-inconsistent have remained in place. It is also important to keep in mind that Article 21.1 of the DSU identifies prompt compliance with DSB recommendations and rulings as "essential in order to ensure effective resolution of disputes to the benefit of all Members".

3.37. For the reasons above, and in particular the number and complexity of the issues to be considered, a period of work that enables publication of a proposal only 12 months after adoption of the Panel and Appellate Body Reports is unjustifiably long.

3.38. A second point of disagreement concerns Korea's claim that the timeline proposed by the United States does not make use of possible flexibilities. As noted in paragraph 3.28 above, the United States explained at the hearing that in practice the consultations with the relevant private sector advisory committees foreseen in Section 123(g)(1)(B) take place simultaneously with the public consultation process foreseen in Section 123(g)(1)(C). The United States also explained that, because the report to Congress foreseen in Section 123(g)(1)(D) must include "a summary of the advice obtained" from private sector advisory committees and also contains a summary of the comments from the public on the proposed rule, the report cannot be done in parallel with those steps.

3.39. Lastly, the parties disagree on the length of time that must be afforded to the public to comment on the proposed methodology and the time to be afforded to the USDOC to complete its analysis of those comments. The United States indicates that it requires 2 months from publication in the Federal Register to allow the public to comment, followed by 5 months of analysis of those comments.<sup>73</sup> Korea submits that the USDOC can complete both of these steps within 60 days.<sup>74</sup>

3.40. In considering this issue, previous arbitrators have noted 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."<sup>75</sup> In the current case, while there is no statutorily prescribed minimum period for public comment, it must be highlighted that a shorter-than-normal period for public comment risks

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<sup>70</sup> United States' submission, para. 9; Korea's submission, para. 13.

<sup>71</sup> United States' response to questions at the hearing.

<sup>72</sup> Korea's response to questions at the hearing.

<sup>73</sup> United States' submission, para. 55.

<sup>74</sup> Korea's submission, para. 49.

<sup>75</sup> Award of the Arbitrator, *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.49 (referring to Award of the Arbitrator, *Japan – DRAMS (Korea) (Article 21.3(c))*, para. 51). See also Award of the Arbitrator, *China – GOES (Article 21.3(c))*, para. 3.46.

affecting the legitimacy of the modification. Turning to the period for consideration of the comments that may be received, as mentioned in paragraph 3.34 above, the number of issues covered and the options available within the parameters of the legal obligation are relatively limited. Consequently, 5 months from the end of the period for public comment to analyse the responses received seems unjustifiably long.

### **3.4.2.2 Implementation of the DSB's "as applied" recommendations and rulings concerning the *Washers* anti-dumping investigation**

3.41. The United States submits that it requires roughly 9 months to complete the Section 129 anti-dumping proceeding, as from the date of publication of the proposed modification developed in the context of the Section 123 proceeding.<sup>76</sup> The United States explains that the USDOC *may* need to prepare and issue questionnaires to the two respondents in the *Washers* anti-dumping investigation, allow them time to respond, allow interested parties to comment on the responses, issue follow-up questionnaires, and thereafter conduct verifications in respect of the responses.<sup>77</sup> The United States also indicates that it must afford interested parties the opportunity to comment on a preliminary determination in the Section 129 anti-dumping proceeding and potentially hold a hearing with interested parties.<sup>78</sup>

3.42. Korea submits that any additional fact-finding step in the Section 129 anti-dumping proceeding should not be taken into account in determining the reasonable period of time for implementation because the various steps mentioned by the United States are not required by law and are not normally taken in Section 129 proceedings.<sup>79</sup> Korea adds that it is unlikely that implementation of the relevant recommendations and rulings would require the USDOC to make new factual determinations, and that the USDOC should be able to "narrowly tailor" any information request it may make.<sup>80</sup> Korea also contends that the time periods requested by the United States for certain steps are longer than the time periods normally taken in Section 129 proceedings to complete these steps.<sup>81</sup> Korea submits that the United States requires only 6 months from the date of the adoption of the Panel and Appellate Body Reports to complete the Section 129 anti-dumping proceeding.<sup>82</sup>

3.43. Section 129(b) of the URAA states as follows:

#### **(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

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<sup>76</sup> United States' submission, para. 55.

<sup>77</sup> United States' submission, paras. 27-29.

<sup>78</sup> United States' submission, paras. 50-52.

<sup>79</sup> Korea's submission, paras. 54-57.

<sup>80</sup> Korea's submission, para. 55.

<sup>81</sup> Korea's submission, paras. 56-57 (noting in particular the time taken by the USDOC to perform certain steps in the Section 129 proceeding used to implement the DSB's recommendations and rulings in *US – Countervailing Measures (China)* (DS437)).

<sup>82</sup> Korea's submission, para. 58.

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 recommendation**

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).

3.44. In addition, Section 129(d) of the URAA provides:

#### **(d) Opportunity for comment by interested parties**

Prior to issuing a determination under this section, 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.

3.45. The parties agree that paragraphs (1) through (4) quoted above identify the steps involved in a Section 129 proceeding.<sup>83</sup> The parties' main points of disagreement, however, concern: (i) whether a Section 129 proceeding must be completed within a maximum of 180 days; (ii) whether the time needed for the Section 129 anti-dumping proceeding encompasses time for the USDOC to conduct additional fact-finding; and (iii) the time that the United States requires to address ministerial errors in the final determination. I address these issues below.<sup>84</sup>

3.46. First, the parties disagree on the import of the reference in Section 129(b)(2) to a maximum period of 180 days within which the USDOC is to issue its redetermination. According to Korea, this means that the entire Section 129 process can take no more than 180 days from the date of initiation.<sup>85</sup> The United States, however, stresses that the wording of Section 129(b)(2) explicitly identifies the receipt of a written request from the USTR as the action that triggers the commencement of the 180-day period. The United States explains that this action is decoupled from formal commencement of a Section 129 proceeding by the USDOC.<sup>86</sup> Since this means, according to the United States, that a Section 129 proceeding may be commenced before the letter is sent from the USTR, it follows that the 180-day period is not a maximum period within which to issue a Section 129 redetermination.

3.47. The text of Section 129(b)(2) clearly indicates that the 180-day time period is triggered following the USDOC's receipt of a written request from the USTR. From then on, the USDOC has a maximum of 180 days in which to issue its redetermination. Furthermore, Section 129(b)(1) mandates the USTR to consult with the USDOC and Congress "promptly" after circulation of a panel or Appellate Body report. Likewise, Section 129(b)(3) mandates the USTR to again consult with the USDOC and the congressional committees before the final determination is published in the Federal Register. Thus, the structure of Section 129 includes two consultation phases beyond the 180-day period. Time for each of them must be taken into account. It is clear, therefore, that the 180-day time period does not encompass the entirety of the Section 129 process. This is in line with the findings of previous arbitrators on this issue.<sup>87</sup>

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<sup>83</sup> Parties' responses to questions at the hearing.

<sup>84</sup> The parties also disagree over the issue of when the Section 129 anti-dumping redetermination can reasonably be expected to begin. This issue is addressed in the next subsection.

<sup>85</sup> Korea's opening statement at the hearing.

<sup>86</sup> United States' response to questions at the hearing.

<sup>87</sup> See Awards of the Arbitrators, *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.46; and *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.41.

3.48. The second main difference in the positions of the parties concerns whether the reasonable period of time should allow time for the USDOC to conduct additional fact-finding. The United States submits that, because it cannot yet "foreclose that" or "prejudge whether" it will be necessary to solicit additional factual information, conduct verifications, or hold a hearing in this Section 129 proceeding, time must be afforded to conduct such steps.<sup>88</sup> Korea highlights that the United States bears the burden of proving that these steps are necessary and argues that this burden cannot be met simply by making assertions that it "cannot prejudge whether [it] will need" further information, "potentially might need" such information, or, "depending" on the methodology to be developed in the Section 123 proceeding, whether further information may be needed.<sup>89</sup> Korea also points to previous Section 129 proceedings as evidence that the USDOC rarely engages in additional fact-finding or holds hearings during a redetermination proceeding.<sup>90</sup>

3.49. In light of the DSB's recommendations and rulings, the factual information that may be required by the USDOC would be information relevant for: (i) a "qualitative" assessment of export price differences in order to determine the existence of a pattern of significant price differences; and (ii) consideration of "attendant factual circumstances" in explaining why such price differences could not be taken into account through a W-W or T-T comparison.<sup>91</sup> Whether fact-finding and additional steps of verification, a hearing, or even a preliminary determination requires additional time seems an unnecessary question. The text of Section 129 seems to indicate that all steps necessary for a redetermination are to be completed within the 180-day period foreseen in Section 129(b)(2).

3.50. Although the United States draws analogies to the time periods for certain steps to be conducted in *original* anti-dumping investigations, it acknowledges that there is no provision of United States law that mandates that all steps in original investigations must also be taken in Section 129 redeterminations, or that imposes time-limits on the steps taken. Further, the text of Section 129 expressly refers only to an opportunity for comments and, "if appropriate", a hearing. Moreover, as noted in *Japan – DRAMs (Korea) (Article 21.3(c))*, reliance on time periods used in original investigations seems inappropriate, because the implementing Member "is only required to conduct a re-determination to implement a limited number of DSB rulings of inconsistency."<sup>92</sup>

3.51. Concerning the parties' disagreement over the time required to address any ministerial errors before publishing the final determination<sup>93</sup>, the United States indicated at the hearing that the process of addressing ministerial errors can be conducted concurrently with the process of consulting with Congress.<sup>94</sup>

3.52. Finally, it is noted that the overall timeframe to complete the Section 129 anti-dumping proceeding is affected by the date of commencement of the 180-day period. The United States has indicated that this cannot be done before publication in the Federal Register of the proposed modification to address the "as such" recommendations and rulings. This sequence is discussed in the subsection below.

#### **3.4.2.3 Sequencing of the Section 123 and Section 129 anti-dumping proceedings**

3.53. As described above, the parties disagree over whether the Section 123 and Section 129 proceedings in respect of the anti-dumping measures can take place simultaneously. Specifically, they differ on the extent to which the Section 123 proceeding can or should overlap with the Section 129 anti-dumping proceeding. For Korea, both proceedings should be conducted simultaneously, starting from the date of adoption of the Panel and Appellate Body Reports.<sup>95</sup> The United States, however, maintains that it must develop new methodologies for identifying

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<sup>88</sup> United States' response to questions at the hearing.

<sup>89</sup> Korea's response to questions at the hearing.

<sup>90</sup> Korea's response to questions at the hearing (referring to "Past USG Implementations of WTO Decisions Addressing AD-CVD Issues" (Exhibit KOR-3)).

<sup>91</sup> United States' submission, paras. 27-28 (referring to Appellate Body Report, para. 5.63; and Panel Report, para. 7.71).

<sup>92</sup> Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 48.

<sup>93</sup> United States' submission, para. 52; Korea's submission, para. 62.

<sup>94</sup> See also Award of the Arbitrator, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.46.

<sup>95</sup> Korea's submission, paras. 58 and 85.

so-called "targeted" dumping and for calculating the dumping margin using the W-T methodology before it can proceed to apply those methodologies in the *Washers* Section 129 anti-dumping redetermination. For this reason, the United States submits that the Section 129 anti-dumping redetermination could not be initiated immediately upon adoption by the DSB of the Panel and Appellate Body Reports.<sup>96</sup> At the same time, the United States does not contend that initiation of the Section 129 anti-dumping proceeding must await conclusion of the Section 123 anti-dumping proceeding. Rather, the United States submits that the USDOC would be in a position to commence the Section 129 anti-dumping redetermination once it publishes in the Federal Register the proposed modification for implementation of the DSB's "as such" recommendations and rulings.<sup>97</sup>

3.54. Paragraphs 3.21 to 3.23 above explained that the United States has established that a Section 123 proceeding is an appropriate means of implementing the DSB's "as such" recommendations and rulings in this dispute. That proceeding entails publication of a proposed modification after several months of deliberations. The United States has explained that it is on the basis of the proposed modification that the "as applied" recommendations and rulings concerning the anti-dumping investigation will be implemented through the Section 129 proceeding. Effectively, without the proposed modification, the USDOC would not have a methodology for the application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement different from the ones found to be inconsistent with that provision.

3.55. Consequently, while there is a necessary sequence between the Section 123 and Section 129 anti-dumping proceedings, there is also an overlap. The United States' proposed timetable indicates that the Section 129 anti-dumping proceeding can commence as soon as the proposed methodology is published in the Federal Register. The postponement of the triggering of the 180-day period is explained by the link between the two proceedings described above. At the same time, under the steps of the Section 129 proceeding as described in paragraph 3.43 above, the USTR is obliged to conduct consultations with the USDOC and with congressional committees "promptly" after circulation of a panel or Appellate Body report. While the initiation of the anti-dumping redetermination may need to be on hold until such time as the USDOC has published the proposed new methodology, there does not appear to be any reason why the USTR could not engage in its consultations with the USDOC and with Congress prior to that date.

#### **3.4.2.4 Implementation of the DSB's "as applied" recommendations and rulings concerning the *Washers* countervailing duty investigation**

3.56. The United States indicates that the Section 129 countervailing duty proceeding can commence before, or at the same time as, the Section 123 anti-dumping proceeding, following a period of internal consultations and deliberations.<sup>98</sup> The United States indicates that implementation of the DSB's recommendations and rulings in respect of the countervailing measures will take 21 months. The United States explains that this is because of the time requested for implementation in respect of the anti-dumping measures and that, if the United States only needed to implement the recommendations and rulings pertaining to the countervailing duty investigation, it would not request a 21-month implementation period.<sup>99</sup> The United States also notes that implementation of these recommendations and rulings may require the USDOC to solicit additional information from the Government of Korea or from Samsung.<sup>100</sup>

3.57. Korea argues that, in light of the nature of the DSB's recommendations and rulings concerning the *Washers* countervailing duty investigation, the USDOC does not need to collect additional information but simply to reconsider existing evidence.<sup>101</sup> Korea also points out that the United States has not explained why, under its proposed timetable, certain steps in the Section 129 countervailing duty proceeding would take longer than the same steps in the Section 129 anti-dumping proceeding, given that the United States' arguments about "complexity"

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<sup>96</sup> United States' submission, para. 47.

<sup>97</sup> See United States' submission, para. 55; and response to questions at the hearing.

<sup>98</sup> United States' submission, paras. 46 and 55.

<sup>99</sup> United States' response to questions at the hearing.

<sup>100</sup> United States' submission, paras. 31-34.

<sup>101</sup> Korea's submission, paras. 61 and 78-79.

relate to the anti-dumping measures and not the countervailing measures.<sup>102</sup> Additionally, Korea asserts that, unlike the Section 129 anti-dumping redetermination, in the Section 129 countervailing duty redetermination, the United States does not have to wait for the development of a methodology in a Section 123 proceeding. According to Korea, the United States could and should have already initiated the Section 129 countervailing duty proceeding. Instead, more than 5 months after the adoption of the Panel and Appellate Body Reports, the United States is unable to identify a single concrete step that it has taken, even though in its written submission it stated that it would initiate the Section 129 countervailing duty proceeding by February 2017.<sup>103</sup> Korea submits that the United States requires only 180 days from the adoption of the Panel and Appellate Body Reports to complete the Section 129 countervailing duty proceeding.<sup>104</sup>

3.58. The parties agree that the steps in a Section 129 proceeding, as described in connection with the anti-dumping redetermination in paragraph 3.43 above, are the same as those that would be used by the United States in implementing the DSB's recommendations and rulings pertaining to the *Washers* countervailing duty investigation.<sup>105</sup> They also concur that the Section 129 countervailing duty redetermination will be separate and independent from the proceedings needed to implement the DSB's recommendations and rulings pertaining to the anti-dumping measures. Both parties request determination of a single reasonable period of time for implementation in this dispute.

3.59. As discussed in paragraphs 3.52 to 3.54 above, the period reasonably needed for implementation is affected by a partial sequencing of the proceedings for implementing the DSB's recommendations and rulings concerning the anti-dumping measures. Consequently, the reasonable period of time for implementation in this dispute is necessarily longer than the time required for the Section 129 countervailing duty proceeding. At the same time, no reason has been presented to explain that implementation of the recommendations and rulings relating to the countervailing measures could not be completed before the expiration of that period. In this context, the principle of prompt compliance contemplated in Article 21.1 of the DSU is important.

### 3.4.3 Particular circumstances of this dispute

3.60. The United States points to three circumstances that weigh in favour of a longer period of time for implementation in this dispute, namely: (i) the novelty and complexity of the issues involved; (ii) the current workload of the USDOC; and (iii) the change in the United States' administration, including the turnover in and absence of senior officials at the USDOC.<sup>106</sup>

3.61. The novelty and complexity of the anti-dumping issues have been addressed in paragraphs 3.33 and 3.34 above.

3.62. Concerning the remaining two circumstances advanced by the United States, Korea disputes that either of these factors amounts to particular circumstances warranting a longer period of time for implementation.<sup>107</sup>

3.63. Regarding the workload of the USDOC, previous arbitrators have considered that the workload of the implementing authority is not relevant to the reasonable period of time.<sup>108</sup> Further, in light of Article 21.1 of the DSU, it would be inappropriate to prioritize new or ongoing investigations over corrective action vis-à-vis measures already in force and found to be WTO-inconsistent.

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<sup>102</sup> Korea's response to questions at the hearing.

<sup>103</sup> Korea's submission, paras. 59-63.

<sup>104</sup> Korea's response to questions at the hearing.

<sup>105</sup> Parties' responses to questions at the hearing.

<sup>106</sup> United States' submission, paras. 8, 10, 15 and 56-60.

<sup>107</sup> Korea's submission, paras. 81-84.

<sup>108</sup> See e.g. Awards of the Arbitrators, *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.55; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.49; and *US – 1916 Act (Article 21.3(c))*, para. 38.

3.64. Concerning recent changes in the United States' administration, the United States clarified at the hearing that, although it refers to the change in administration in its submission, this is not a factor built into its proposed timetable.

#### **3.4.4 Conclusion**

3.65. In conclusion, for the reasons explained above, the means of implementation proposed, including the flexibilities built into the relevant proceedings under United States law, the complexity and scope of certain issues concerning the anti-dumping measures, and the partial sequencing of the Section 123 and Section 129 anti-dumping proceedings, are the considerations to be given weight in determining the period of time reasonably needed to implement the DSB's recommendations and rulings in this dispute. Having taken account of these factors, 21 months is more than is reasonably needed for implementation. At the same time, 8 months would not be a sufficient period of time for the United States to bring itself into compliance with the recommendations and rulings of the DSB in this dispute.

#### **4 AWARD**

4.1. In 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 26 September 2016, 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 26 December 2017.

Signed in the original at Geneva this 28th day of March 2017 by:

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Claudia Orozco  
Arbitrator



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

1. At its meeting on September 26, 2016, the DSB adopted recommendations and rulings in *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* (DS464). Pursuant to Article 21.3 of the DSU, the United States informed the DSB at its meeting on October 26, 2016, that the United States intends to comply with the DSB's recommendations and rulings in a manner that respects its WTO obligations and that it would need a reasonable period of time to do so. The United States engaged in discussions with Korea 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 intends to comply with DSB recommendations and rulings with respect to numerous matters. The most practical way under U.S. law to implement these matters is by conducting three proceedings, utilizing both section 123 and section 129 of the Uruguay Round Agreements Act. First, the United States intends to conduct a proceeding pursuant to section 123 to address the Appellate Body's and Panel's "as such" findings under the AD Agreement and the GATT 1994. Second, the United States intends to conduct two separate proceedings pursuant to section 129 to address the Appellate Body's and the Panel's "as applied" findings as they relate to the washers antidumping and countervailing duty investigations. The United States anticipates that it will not be possible to commence the section 129 proceeding relating to the antidumping duty investigation until the section 123 proceeding has been mostly completed. Many of the Panel and Appellate Body findings regarding Korea's "as applied" challenges to the washers antidumping investigation mirror those pertaining to Korea's "as such" challenges. Consequently, the United States expects that, in the section 129 proceeding, the USDOC will apply a number of the revised approaches and methodologies that will be developed in the section 123 determination.

4. Both parties, as well as the WTO dispute settlement system as a 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 Appellate Body and Panel reports. 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 relevant WTO obligations. Such a result would preserve the rights of the United States to have a reasonable time for compliance and to impose antidumping and countervailing duties where appropriate, while at the same time would preserve Korea's rights to ensure that antidumping and countervailing duties are imposed only in accordance with WTO rules. 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 actively working on 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 KOREA'S SUBMISSION**

1. Korea requests that the Arbitrator determine a reasonable period of time of 6 months because implementation can be pursued exclusively through Section 129 proceedings, or 8 months if a Section 123 proceeding were to be considered as part of the implementation steps. This constitutes the shortest period of time possible within the legal system of the United States.

2. The United States has failed to explain why it requires "at least" 21 months for implementation. The requirements of the U.S. legal system, the complexities alleged by the United States, and the workload of the implementing agency do not justify such an extraordinarily lengthy implementation period.

3. Almost five months have passed since the Appellate Body and Panel reports were adopted and yet the United States has not taken any significant steps to bring its measures into conformity with the WTO Agreements. The United States should have begun implementation of the Panel's findings on disproportionality as soon as it was aware that these issues would not be appealed, and it should have begun implementation of the other findings immediately after the circulation of the Appellate Body report.

4. Contrary to the United States' proposal, there is no need to pursue implementation in three phases. The United States can implement the "as such" findings through Section 129 proceedings, and a prior Section 123 proceeding is unnecessary. The DPM is not reflected in the USDOC's regulations nor was it adopted by the USDOC through a formal rule-making process, but was reflected in various memoranda of the USDOC adopted in the context of specific proceedings.<sup>1</sup> Thus, the DPM should be capable of being modified in the context of such kind of proceeding. Similarly, implementation of the Appellate Body's findings with respect to the use of zeroing would require a revision in the USDOC's margin calculation program, which does not require a Section 123 proceeding.

5. In any case, the 16 months proposed by the United States to conduct a Section 123 proceeding are excessive. The time line proposed by the United States does not make use of the flexibilities inherent in the process, requesting several consecutive months to conduct steps that it could conduct concurrently. Moreover, contrary to the United States' assertions, the "as such" findings do not involve any particular complexities that would warrant additional time.

6. The time lines proposed by the United States to conduct two Section 129 proceedings to implement the "as applied" rulings in the anti-dumping and countervailing duty proceedings are also excessive. Section 129 contains no mandatory time lines for each step, and several of these steps can be conducted concurrently. The United States' proposed time line also contains steps that are not required under Section 129, such as collection and verification of additional factual data. Such non-mandatory steps should be given limited, if any, consideration.

7. Finally, it is well established that the workload of the implementing agency is not a relevant factor in determining a reasonable period of time.<sup>2</sup> Similarly, the "turnover of key decision makers at the USDOC or, in some cases, their absence pending completion of the nomination and confirmation process"<sup>3</sup> are also factors that have been rejected as constituting a "particular circumstance" that warrants additional time.<sup>4</sup>

8. In conclusion, Korea requests that the Arbitrator award a reasonable period of time of 6 months, ending March 26, 2017. This reasonable period of time reflects the following time line for the two Section 129 proceedings:

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<sup>1</sup> Panel Report, *US – Washing Machines*, para. 7.100.

<sup>2</sup> Award of the Arbitrator, *US – Countervailing Measures (China) (21.3(c))*, para. 3.49.

<sup>3</sup> U.S. Submission, para. 59.

<sup>4</sup> Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 62.

<b>Action Under Section 129</b>	<b>Approx. Time Period</b>
USTR consults with administering authority and congressional committees	<b>September 2016</b>
Prior to issuing a determination, the administering authority shall provide interested parties with an opportunity to submit written comments, and in appropriate cases, may hold a hearing.	<b>60 days</b>
Before rendering a determination, USTR shall consult with congressional committees (to continue throughout implementation period)	<b>30 months</b>
Within 180 days of receipt of a written request from the USTR, the administering authority shall issue a determination rendering the action consistent with WTO obligations.	<b>60 days</b>
The administering authority shall publish in the <i>Federal Register</i> notice of the implementation	<b>30 days</b>

9. Finally, if the Arbitrator were to consider a Section 123 proceeding as part of the implementation steps, Korea requests that the Arbitrator award a reasonable period of time of 8 months, ending May 26, 2017.

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