



WTO (WORLD TRADE ORGANIZATION)

WT/DS414

CHINA — COUNTERVAILING AND ANTI-DUMPING DUTIES ON GRAIN ORIENTED FLAT-ROLLED ELECTRICAL STEEL FROM THE UNITED STATES

ARB-2013-1/27 - ARBITRATION UNDER ARTICLE 21.3(C) OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES - AWARD OF THE ARBITRATOR

03 May 2013

Tribunal:

[Claus-Dieter Ehlermann](#) (Sole arbitrator)

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Arb-2013-1/27 - Arbitration under article 21.3(c) of the Understanding on rules and procedures governing the settlement of disputes - Award of the Arbitrator

CASES CITED IN THIS AWARD

Short Title	Full Case Title and Citation
<i>Argentina – Hides and Leather (Article 21.3(c))</i>	Award of the Arbitrator, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS155/10, 31 August 2001, DSR 2001:XII, 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, 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, 3
<i>Chile – Alcoholic Beverages (Article 21.3(c))</i>	Award of the Arbitrator, <i>Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V, 2583
<i>Chile – Price Band System (Article 21.3(c))</i>	Award of the Arbitrator, Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU, WT/DS207/13, 17 March 2003, DSR 2003:III, 1237
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
<i>China – Auto Parts</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R / WT/DS340/R / WT/DS342/R / and Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, 119-DSR 2009:II, p. 625
<i>China – GOES</i>	Appellate Body Report, China – Countervailing and Anti-Dumping Duties on

[Grain Oriented Flat-Rolled Electrical Steel from the United States, WT/DS414/AB/R, adopted 16 November 2012](#)

- China – GOES Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
- China – Intellectual Property Rights [Panel Report, China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R, adopted 20 March 2009, DSR 2009:V, 2097](#)
- China – Publications and Audiovisual Products Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, 3
- China – Publications and Audiovisual Products Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, 261
- China – Raw Materials [Appellate Body Reports, China – Measures Related to the Exportation of Various Raw Materials, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012](#)
- China – Raw Materials Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R / WT/DS395/R / WT/DS398/R / and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R
- Colombia – Ports of Entry (Article 21.3(c)) Award of the Arbitrator, *Colombia – Indicative Prices and Restrictions on Ports of Entry – Arbitration under Article 21.3(c) of the DSU*, WT/DS366/13, 2 October 2009, DSR 2009:IX, 3819
- EC – Chicken Cuts (Article 21.3(c)) Award of the Arbitrator, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) of the DSU*, WT/DS269/13, WT/DS286/15, 20 February 2006
- EC – Export Subsidies on Sugar (Article 21.3(c)) Award of the Arbitrator, *European Communities – Export Subsidies on Sugar – Arbitration under Article 21.3(c) of the DSU*, WT/DS265/33, WT/DS266/33, WT/DS283/14, 28 October 2005, DSR 2005:XXIII, p. 11581
- EC – Hormones (Article 21.3(c)) Award of the Arbitrator, *EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU*, WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, p. 1833

<i>EC – Tariff Preferences (Article 21.3(c))</i>	<i>Award of the Arbitrator, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries– Arbitration under Article 21.3(c) of the DSU, WT/DS246/14, 20 September 2004, DSR 2004:IX, p. 4313</i>
<i>Japan – DRAMs (Korea) (Article 21.3(c))</i>	<i>Award of the Arbitrator, Japan – Countervailing Duties on Dynamic Random Access Memories from Korea – Arbitration under Article 21.3(c) of the DSU, WT/DS336/16, 5 May 2008, DSR 2008:XX, 8553</i>
<i>Korea – Alcoholic Beverages (Article 21.3(c))</i>	<i>Award of the Arbitrator, Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU, WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937</i>
<i>US – 1916 Act (Article 21.3(c))</i>	<i>Award of the Arbitrator, United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU, WT/DS136/11, WT/DS162/14, 28 February 2001, DSR 2001:V, p. 2017</i>
<i>US – COOL (Article 21.3(c))</i>	<i>Award of the Arbitrator, United States – Certain Country of Origin Labelling (COOL) Requirements– Arbitration under Article 21.3(c) of the DSU, WT/DS384/24, WT/DS386/23, 4 December 2012</i>
<i>US – Gambling (Article 21.3(c))</i>	<u><i>Award of the Arbitrator, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Arbitration under Article 21.3(c) of the DSU, WT/DS285/13, 19 August 2005, DSR 2005:XXIII, p. 11639</i></u>
<i>US – Hot-Rolled Steel (Article 21.3(c))</i>	<u><i>Award of the Arbitrator, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Arbitration under Article 21.3(c) of the DSU, WT/DS184/13, 19 February 2002, DSR 2002:IV, 1389</i></u>
<i>US – Hot-Rolled Steel</i>	<i>Appellate Body Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697</i>
<i>US – Section 110(5) Copyright Act (Article 21.3(c))</i>	<i>Award of the Arbitrator, United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU, WT/DS160/12, 15 January 2001, DSR 2001:II, p. 657</i>
<i>US – Stainless Steel (Mexico) (Article 21.3(c))</i>	<i>Award of the Arbitrator, United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – Arbitration under Article 21.3(c) of the DSU, WT/DS344/15, 31 October 2008, DSR 2008:XX, 8619</i>
<i>US – Offset Act (Byrd Amendment) (Article 21.3(c))</i>	<u><i>Award of the Arbitrator, United States – Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU, WT/DS217/14, WT/DS234/22, 13 June 2003, DSR 2003:III, 1163</i></u>
<i>US – Oil</i>	<i>Award of the Arbitrator, United States – Sunset Reviews of Anti-Dumping</i>

Country

Tubular Goods *Measures on Oil Country Tubular Goods from Argentina – Arbitration under Sunset Reviews*
(Article 21.3(c)) *Article 21.3(c) of the DSU, WT/DS268/12, 7 June 2005, DSR 2005:XXIII, 11619*

ABBREVIATIONS

Abbreviation	Description
Administrative Reconsideration Law	Law of the People's Republic of China on Administrative Reconsideration, adopted at the 9th Meeting of the Standing Committee of the 9th National People's Congress on 29 April 1999 and promulgated by Order No. 16 of the President of the People's Republic of China on 29 April 1999 (English translation provided in Exhibit USA-6 and available at: [http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383562.htm])
AD Regulations	Regulations of the People's Republic of China on Anti-Dumping, promulgated by Decree No. 328 of the State Council on 26 November 2001, and revised in accordance with the Decision of the State Council on Amending the Regulations on Anti-Dumping promulgated on 31 March 2004 (see WTO document G/ADP/N/1/CHN/2/Suppl.3 (Exhibit USA-8))
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Appellate Body Report	<u>Appellate Body Report, China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States, WT/DS414/AB/R, adopted 16 November 2012</u>
BOFT	MOFCOM's Bureau of Fair Trade for Imports and Exports
CVD Regulations	Regulations of the People's Republic of China on Countervailing Measures, promulgated by Decree No. 329 of the State Council on 26 November 2001, and revised in accordance with the Decision of the State Council on Amending the Regulations on Countervailing Measures promulgated on 31 March 2004 (see WTO document G/SCM/N/1/CHN/1/Suppl.3 (Exhibit USA-3))
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
DTL	MOFCOM's Department of Treaty and Law
IBII	MOFCOM's Investigation Bureau for Industry Injury

Foreign Trade Law	Foreign Trade Law of the People's Republic of China, adopted as amended at the 8th Session of the Standing Committee of the 10th National People's Congress on 6 April 2004 (see WTO document G/ADP/N/1/CHN/2/Suppl.4)
GATT 1994	General Agreement on Tariffs and Trade 1994
GOES	grain oriented flat-rolled electrical steel
MOFCOM	Ministry of Commerce of the People's Republic of China
Panel Report	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
Regulations on Rules	Regulations of the People's Republic of China on Procedures for the Formulation of Rules, promulgated by Decree No. 322 of the State Council on 16 November 2001, and effective as of 1 January 2002 (English translation provided in Exhibit CHN-4)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Tariff Commission	Customs Tariff Commission of the State Council of the People's Republic of China
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

1 Introduction

- 1.1. On 16 November 2012, the Dispute Settlement Body (DSB) adopted the Appellate Body Report¹ and the Panel Report², as upheld by the Appellate Body Report, in *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*. This dispute concerns the United States' challenge of China's measures imposing anti-dumping and countervailing duties on grain oriented flat-rolled electrical steel (GOES) from the United States, as set forth in the Ministry of Commerce of the People's Republic of China (MOFCOM) Announcement No. 21 of 10 April 2010 and its annexes. The Panel and the Appellate Body found the measure 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) and the Agreement on Subsidies and Countervailing Measures (SCM Agreement).³ At the DSB meeting of 30 November 2012, China indicated its intention to implement the recommendations and rulings of the DSB in this dispute, and stated that it would require a reasonable period of time in which to do so.⁴

¹ WT/DS414/AB/R.

² WT/DS414/R.

³ See *infra*, section 3.1.3 of this Award.

- 1.2. On 8 February 2013, the United States informed the DSB that consultations with China had not resulted in an agreement on the reasonable period of time for implementation. The United States therefore requested that such period be determined through arbitration pursuant to Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).⁵
- 1.3. The United States and China were unable to agree on an arbitrator within 10 days of the referral of the matter to arbitration. Consequently, by letter dated 22 February 2013, the United States requested that the Director-General of the World Trade Organization (WTO) appoint an arbitrator pursuant to footnote 12 to Article 21.3(c) of the DSU. The Director-General appointed me as Arbitrator on 28 February 2013, after consulting with the parties. I informed the parties of my acceptance of the appointment by letter dated 4 March 2013⁶ and undertook to issue the award no later than 3 May 2013.
- 1.4. China filed a written submission on 11 March 2013, and the United States filed a written submission on 18 March 2013. An oral hearing was held on 4 April 2013. The parties have agreed that this Award will be deemed to be an arbitration award under Article 21.3(c) of the DSU, notwithstanding the expiry of the 90-day period stipulated in Article 21.3(c).⁷

2 ARGUMENTS OF THE PARTIES

2.1 China

- 2.1. China requests that I determine that the reasonable period of time for implementation in this dispute is 19 months from the date of adoption by the DSB of the Panel and Appellate Body Reports.⁸
- 2.2. China elaborates on the various administrative stages required to implement the recommendations and rulings of the DSB in this dispute. According to China, these stages include: (i) internal and inter-agency deliberations, as well as consultations with external legal experts and China's Legal Office of the State Council to clarify and consider the need for, and scope of, amendments to existing regulations to accommodate the implementation of DSB rulings in the trade remedy context; (ii) the adoption of new, specific rules to accommodate the implementation of DSB rulings and recommendations in disputes concerning trade remedies; and (iii) specific administrative action with respect to the underlying anti-dumping and countervailing duties at issue in this dispute.⁹
- 2.3. China submits that the technical complexity that confronted MOFCOM in addressing the question of whether legal authority for implementation existed under domestic law represents a "particular

⁴ See WT/DSB/M/326, para. 1.2.

⁵ WT/DS414/10.

⁶ See WT/DS414/11.

⁷ See WT/DS414/9. The 90-day period following the adoption of the Panel and Appellate Body Reports expired on 14 February 2013.

⁸ China's submission, paras. 5, 8, 9, and 90.

⁹ China's submission, para. 4.

circumstance" that is relevant to the determination of the reasonable period of time under Article 21.3(c) of the DSU. China adds that an inquiry into whether and how China may implement the DSB's recommendations and rulings within the context of its legal system is not unlike the type of "pre-legislative" consideration that previous arbitrators have found to be relevant as a "particular circumstance of implementation".¹⁰ According to China, another "particular circumstance" relevant to this dispute is the outcome of the internal and inter-agency deliberations that were conducted, namely, "the need for new rules".¹¹

2.1.1 Administrative rulemaking

- 2.4. With regard to the need to provide legal authority and a mechanism for specific implementation action in this dispute, China acknowledges that China's Foreign Trade Law¹² provides the "overarching legal basis" for trade remedy measures and that China's Regulations on Anti-Dumping¹³ (AD Regulations) and the Regulations on Countervailing Measures¹⁴ (CVD Regulations) provide "the more detailed framework" for anti-dumping and countervailing measures.¹⁵ China emphasizes, however, that these laws do not provide a basis for the implementation of WTO dispute settlement decisions.¹⁶
- 2.5. China further explains that Article 47 of the AD Regulations authorizes MOFCOM to adjust existing anti-dumping measures to account for "new exporters" that had not exported previously to China, and that Article 48 of the AD Regulations and Article 47 of the CVD Regulations authorize MOFCOM to conduct "sunset reviews".¹⁷ These provisions do not, however, provide broader authority to make changes to trade remedies for "other reasons".¹⁸ China adds that Article 49 of the AD Regulations and Article 48 of the CVD Regulations authorize MOFCOM to decide, "on justifiable grounds", to review the need for the continued imposition of anti-dumping and countervailing duties.¹⁹ While these provisions address the issue of interim reviews under Article 11.2 of the Anti-Dumping Agreement and Article 21.2 of the SCM Agreement, they do "not provide broader authority to make changes to trade remedies for other reasons".²⁰ The same is true with respect to Article 50 of the AD Regulations and Article 49 of the CVD Regulations, which provide China's Customs Tariff Commission of the State Council²¹ (Tariff Commission) with "specific legal

¹⁰ China's submission, para. 48 (referring to Awards of the Arbitrator, Chile – Alcoholic Beverages (Article 21.3(c)), para. 43; and US – Hot-Rolled Steel (Article 21.3(c)), para. 38).

¹¹ China's submission, para. 49.

¹² Foreign Trade Law of the People's Republic of China, adopted as amended at the 8th Session of the Standing Committee of the 10th National People's Congress on 6 April 2004 (see WTO document G/ADP/N/1/CHN/2/Suppl.4).

¹³ Regulations of the People's Republic of China on Anti-Dumping, promulgated by Decree No. 328 of the State Council on 26 November 2001, and revised in accordance with the Decision of the State Council on Amending the Regulations on Anti-Dumping promulgated on 31 March 2004 (see WTO document G/ADP/N/1/CHN/2/Suppl.3 (Exhibit USA-8)).

¹⁴ Regulations of the People's Republic of China on Countervailing Measures, promulgated by Decree No. 329 of the State Council on 26 November 2001, and revised in accordance with the Decision of the State Council on Amending the Regulations on Countervailing Measures promulgated on 31 March 2004 (see WTO document G/SCM/N/1/CHN/1/Suppl.3 (Exhibit USA-3)).

¹⁵ China's submission, paras. 17 and 18.

¹⁶ China's submission, para. 19.

¹⁷ China's submission, paras. 20 and 21.

¹⁸ China's submission, paras. 20 and 21.

¹⁹ China's submission, para. 22.

²⁰ China's submission, para. 22.

authority" to adopt any changes triggered by "new shipper" reviews, sunset reviews, or interim reviews, "but go no further".²² China notes that Article 57 of the AD Regulations and Article 56 of the CVD Regulations also provide MOFCOM with the responsibility for managing China's participation in WTO dispute settlement proceedings concerning trade remedies, but asserts that these provisions do not "directly and unambiguously" address the implementation of WTO dispute settlement decisions in this area.²³

- 2.6. China further explains that Article 58 of the AD Regulations and Article 57 of the CVD Regulations provide MOFCOM with discretion to formulate "implementing measures", but only if "in accordance with these Regulations".²⁴ Hence, although general authorization to implement could arguably be found within the AD Regulations and the CVD Regulations, such authority does not extend to modification or withdrawal of specific anti-dumping or countervailing measures. Moreover, the AD Regulations and the CVD Regulations lack any provisions dealing with the consequences of modification or withdrawal of anti-dumping or countervailing measures, such as whether these actions have retroactive or prospective effect.²⁵
- 2.7. China submits that the new rules to be adopted by MOFCOM will serve two important purposes. First, they will specifically state that MOFCOM can maintain, amend, or withdraw anti-dumping or countervailing measures through administrative actions such as reinvestigation, and will clarify the status of any anti-dumping and countervailing duties already collected. Second, they will establish the specific procedures to be followed when MOFCOM implements WTO dispute settlement decisions concerning trade remedies imposed by China.²⁶
- 2.8. China highlights that MOFCOM and related agencies began implementation efforts immediately after the DSB adopted the Panel and Appellate Body Reports in this dispute on 16 November 2012.²⁷ China expounds on its implementation efforts thus far, and details the implementation work that has been completed, as well as the implementation work that remains to be done.
- 2.9. According to China, 4 months have already been spent on internal and inter-agency deliberations, as well as consultations with external legal experts and the Legal Office of the State Council. These deliberations and consultations entailed: (i) discussing what, if any, authority exists for MOFCOM to engage in implementation under the current AD Regulations and CVD Regulations; (ii) reaching an understanding that the current regulations provide MOFCOM with only general authority to implement, without any specific authority regarding particular actions that might be taken; and (iii) determining what other steps and specific actions might be necessary to implement the DSB's recommendations and rulings in this dispute. These discussions were held from late November 2012 to early March 2013.²⁸

²¹ The Customs Tariff Commission of the State Council of the People's Republic of China is an inter-agency coordination body composed by the vice-ministers of the Ministry of Finance, the Ministry of Commerce (MOFCOM), and the General Administration on Customs.

²² China's submission, para. 24.

²³ China's submission, para. 26.

²⁴ China's submission, paras. 26-28.

²⁵ China's submission, para. 46.

²⁶ China's submission, para. 34.

²⁷ China's submission, para. 37.

²⁸ In late November and December 2012, MOFCOM's Department of Treaty and Law (DTL), conducted an internal analysis of the AD Regulations and the CVD Regulations, focusing on the question of MOFCOM's legal authority to implement the DSB's recommendations and rulings in the area of trade remedies. The result of this analysis was unclear as to whether MOFCOM in fact had legal authority

- 2.10. China notes that work has commenced on the drafting and examination of the new implementation rules. This process will take a total of 5.5 months. Work commenced in January 2013 with MOFCOM's Department of Treaty and Law (DTL) formulating the first draft of the proposed new rules, which was circulated for comment to other MOFCOM departments, experts, and lawyers. Comments were received by DTL in February 2013. Based on these comments, DTL revised the first draft and prepared a second draft.²⁹ China explains that DTL will circulate the second draft of the new rules, and seek additional comments from other MOFCOM departments and legal experts. Subsequently, another revised draft will be prepared. According to China, this process will take an additional 15 days³⁰, and is required by Article 14 of the Regulations on Procedures for the Formulation of Rules³¹ (Regulations on Rules).
- 2.11. After revising the draft text, DTL will, as required by Article 16 of the Regulations on Rules, seek comment from government agencies with an interest in the matter. In particular, China notes that MOFCOM will need to consult with the Tariff Commission and with the General Administration on Customs, and make any necessary revisions to the draft. China anticipates that this stage of the process will take 1 month.³²
- 2.12. Upon completion of the internal government review, the draft rules will, pursuant to Article 14 of the Regulations on Rules, be made available for public comment. China highlights that the minimum time period necessary for public comment is 30 days. After receiving any public comments, DTL will produce a revised draft, in a process that will take an additional 15 days to complete. The new revised draft will then be circulated by DTL among the other relevant MOFCOM departments, including the Bureau of Fair Trade for Imports and Exports (BOFT) and the Investigation Bureau for Industry Injury (IBII), so that they may review and co-sign the draft. This process will take 15 days.³³
- 2.13. The co-signed draft is then presented at the MOFCOM executive meeting for deliberation, as required by Chapter V of the Regulations on Rules. China highlights that MOFCOM executive meetings are held no more than once a month, and, because there are no intervening executive meetings, the time necessary for this action is expected to take 1 month. Next, DTL revises the draft and prepares the final draft for approval, in accordance with Article 29 of the Regulations on Rules. According to China, this step takes at least 7 days. DTL then submits the final draft to the MOFCOM minister to sign the decree to promulgate the new rules. This step also takes at least 7 days. Finally, in accordance with Article 32 of the Regulations on Rules, the rules become effective 30 days after

to implement, and how any such implementation could be conducted. Therefore, DTL began discussions with two other departments within MOFCOM with immediate jurisdiction over trade remedy matters, namely, the Bureau of Fair Trade for Imports and Exports (BOFT) and the Investigation Bureau for Industry Injury (IBII). These discussions confirmed the legal ambiguity in relation to the existence of a proper and sufficient legal basis for implementation. Under these circumstances, DTL determined that the process would benefit from consultation with external legal experts and academic experts. A similar conclusion was reached by the Legislative Affairs Office of the State Council. A "study meeting" with external law firms and academics was held in early February 2013. This meeting was followed by one attended by all government agencies involved in consideration of the issue. (China's submission, paras. 38-45)

²⁹ China's submission, para. 52.

³⁰ China's submission, para. 53.

³¹ Regulations of the People's Republic of China on Procedures for the Formulation of Rules, promulgated by Decree No. 322 of the State Council on 16 November 2001, and effective as of 1 January 2002 (English translation provided in Exhibit CHN-4).

³² According to China, the Tariff Commission's review is particularly important as it is responsible for the final determination to apply anti-dumping and countervailing measures. Moreover, the review of the General Administration on Customs is also important, as it is responsible for the implementation and collection of any anti-dumping and countervailing duties. (China's submission, para. 54)

³³ China's submission, paras. 55 and 56.

the date of promulgation.³⁴

- 2.14. In sum, China submits that it requires a minimum of 8 months to draft and promulgate new rules to address the specific procedures for implementation. This time period reflects: 2 months for "initial drafting", which has already been completed³⁵; 3.5 months to conduct the "final drafting and examination" stage³⁶; and 2.5 months to conduct the "decision and promulgation" stage.³⁷ This time period could begin only after the initial 1.5 months³⁸ during which the issues to be addressed in the new rules were studied.
- 2.15. China emphasizes that the timeframes for the "drafting" and "examination" of the implementation rules have been accelerated by having DTL conduct the examination process in parallel with the drafting process.³⁹ According to China, concluding the "decision and promulgation" stage within 2.5 months represents "extreme acceleration" of the process within China's legal system.⁴⁰ China adds that any shortening of the 5-month "drafting" period would "begin to call into question" the ability of MOFCOM to conclude the "decision and promulgation" stage within the 2.5-month period described above.⁴¹
- 2.16. China also points out that the 8-month period that it requires for rulemaking in this case is "relatively short, compared with similar implementation exercises" conducted by China in previous instances in which China was required to modify laws, regulations, or rules in order to implement WTO dispute settlement decisions.⁴² The average period of time in such cases was "closer to a year", with the reasonable period of time for implementation ranging from 7.7 months (in a dispute involving the termination of relevant rules, rather than the enactment of new rules)⁴³ to 14 months.⁴⁴

2.1.2 Administrative redetermination

- 2.17. China states that, once MOFCOM has clear legal authority to implement, and specific steps to follow, only then can it begin the administrative work to implement the DSB's recommendations and rulings in this dispute. China highlights, however, that MOFCOM has already commenced work on the specific actions necessary to implement the DSB's recommendations and rulings in this dispute. Immediately after adoption of the Panel and Appellate Body Reports, MOFCOM began preparations for the translation of the Reports into Chinese, which took 15 days, and then spent 30 days reading

³⁴ China's submission, paras. 59 and 60.

³⁵ 1 January–28 February 2013. See China's submission, para. 64.

³⁶ 1 March–15 June 2013. See China's submission, para. 64.

³⁷ 16 June–30 August 2013. See China's submission, para. 64.

³⁸ 16 November–30 December 2013. See China's submission, para. 64.

³⁹ China's submission, para. 58.

⁴⁰ China's submission, para. 61.

⁴¹ China's submission, para. 61.

⁴² China's submission, para. 63 and fn 22 thereto. China refers to the implementation of the DSB's recommendations and rulings in China – Auto Parts, China – Intellectual Property Rights, and China – Publications and Audiovisual Products. China further notes that, in China – Raw Materials, implementation of the DSB's recommendations and rulings involved administrative, rather than legislative, action.

⁴³ China's submission, para. 63 (referring to the dispute in China – Auto Parts).

⁴⁴ China's submission, para. 63 (referring to the dispute in China – Publications and Audiovisual Products).

and understanding the reasoning of the Reports, and engaging in internal discussions on the work and information that would be necessary to implement each of the individual recommendations and rulings.⁴⁵

- 2.18. China asserts that the administrative work to implement the DSB's recommendations and rulings in this dispute will involve several steps. First, upon the effective date of the new rules, MOFCOM will draft and obtain the necessary approval of the initiation notice, which will be published to provide public notice of the reinvestigation and redetermination processes that will take place. This will take 20 days.⁴⁶
- 2.19. Second, MOFCOM must consider the comments of interested parties on all procedural and substantive issues related to the initiation notice, as well as the injury, subsidy, and dumping issues raised by the DSB's recommendations and rulings. This step will require 30 days.⁴⁷
- 2.20. China asserts that, "[i]nitially", MOFCOM must reconsider a new version of the petition in relation to the underlying anti-dumping and countervailing duty investigations at issue in this dispute.⁴⁸ China considers that this "preliminary work" will address the DSB rulings concerning: (i) the initiation of countervailing duty investigations in respect of certain alleged government subsidy programmes; and (ii) the sufficiency of non-confidential summaries of information submitted by the petitioners in confidence. According to China, MOFCOM considers that "it is appropriate" for this work to take place in parallel with the 30-day period for comment mentioned above to ensure that the addressing of the other issues in this dispute is not delayed.⁴⁹
- 2.21. China considers that 30 days is the minimum time necessary to allow interested parties to present their views because of the range of substantive and procedural issues raised by the DSB's recommendations and rulings in this dispute. With regard to the Panel's finding that China acted inconsistently with Article 12.7 of the SCM Agreement, China points out that, although the Panel disagreed with the choice of "facts available" made by MOFCOM to calculate the subsidy margin for one of the respondents, the Panel did not provide any guidance as to which alternatives are possible, or which alternatives would be WTO-consistent. Next, with regard to the Panel's findings concerning MOFCOM's determination of the "all others rate" in respect of unknown companies, China highlights that, although the Panel found that China acted inconsistently with its WTO obligations, the Panel provided no guidance as to how an investigating authority may determine anti-dumping and countervailing duty margins that are WTO-consistent, and that create an incentive for unknown companies to cooperate with investigations. Finally, with regard to the Panel and Appellate Body findings relating to MOFCOM's injury determination, China asserts that, although the Panel and the Appellate Body found fault with certain aspects of MOFCOM's price effects analysis, neither provided a particularly clear or explicit set of directions in respect of what must be done.⁵⁰
- 2.22. China adds that, since this case will be the "first instance" of China implementing DSB

⁴⁵ China's submission, para. 66.

⁴⁶ China's submission, para. 67.

⁴⁷ China's submission, para. 68.

⁴⁸ China's submission, para. 70.

⁴⁹ China's submission, para. 70.

⁵⁰ China's submission, paras. 73-75.

recommendations and rulings on trade remedy measures, every issue will be "an issue of first impression".⁵¹ China argues, therefore, that it is necessary to grant the interested parties at least 30 days to prepare and submit their comments.⁵²

- 2.23. Third, after considering the initial comments, MOFCOM must also allow the submission of rebuttal comments from interested parties in response to affirmative comments filed on procedural and substantive issues. According to China, 30 days is the minimum time necessary for this step because parties will be reacting to new arguments and possibly new information.⁵³
- 2.24. Fourth, China argues that an additional 37 days must be allotted to accommodate the possibility of a request for a hearing being made by interested parties. At this hearing, parties with "adverse interests" can present information and arguments. Although it is not certain that a hearing would be requested or held in the event that there is no adverse party to meet, the time necessary for this stage must be accounted for in determining the reasonable period of time for implementation, in order to safeguard the procedural rights of the parties involved. China asserts that 37 days is the "normal time taken according to MOFCOM's rules", and that any shorter period would require taking "extraordinary measures" for implementation.⁵⁴
- 2.25. Fifth, MOFCOM must draft the documents describing any new determinations after receiving initial comments, rebuttal comments, and any information or argument presented at the hearing, should one be held. Under "standard procedures", 30 days is the normal period needed for drafting such documents. In the light of the Panel and Appellate Body findings on price effects and causation, MOFCOM will be required to undertake a substantial reconsideration of its prior injury determination, as well as drafting work on a scale comparable to its original investigation.⁵⁵
- 2.26. Sixth, MOFCOM must circulate its drafts of the relevant documents for internal comment. Under MOFCOM's "normal working procedures and practice", officials in charge of the investigation are allowed 30 days to circulate the draft documents among other divisions also responsible for anti-dumping and countervailing investigations, with time then allowed for any revisions in reaction to any comments from these divisions. China anticipates that at least 30 days is required for this step. The revised disclosures are then approved by BOFT and IBII.⁵⁶
- 2.27. Seventh, the approved documents must be submitted to DTL to examine whether they are consistent with the DSB's recommendations and rulings and China's WTO obligations. This review process will take 10 days.⁵⁷
- 2.28. Eighth, interested parties will be allowed to make comments on the documents during a period of normally 20 days. This time period takes into account the language needs of the interested parties in the United States, since they may need to first have the lengthy disclosure documents translated into English in order to start preparing their comments.⁵⁸

⁵¹ China's submission, para. 76.

⁵² China's submission, paras. 76 and 77.

⁵³ China's submission, paras. 78 and 79.

⁵⁴ China's submission, para. 80.

⁵⁵ China's submission, para. 81.

⁵⁶ China's submission, para. 82.

⁵⁷ China's submission, para. 83.

- 2.29. Ninth, the investigating authority will then draft the final determination, which will take into consideration any comments received from the interested parties on the disclosure documents. DTL will then be provided 10 days to examine and determine whether the final determination is consistent with the DSB's recommendations and rulings and China's WTO obligations. Subsequently, the final determination will be presented to the ministers for approval. In a normal investigation without DTL involvement, this stage would take 30 days. China submits that, given the need to add some time for the DTL examination – for which a minimum of 10 days is necessary – it is appropriate to allocate 40 days for this stage of the implementation procedure.⁵⁹
- 2.30. Tenth, 30 days will be provided for the Tariff Commission to approve the final determination. During this approval process, the Tariff Commission seeks comments from relevant ministries that are members of the Tariff Commission, such as the National Development and Reform Commission, the Ministry of Industry and Information Technology, the Ministry of Finance, and the Ministry of Agriculture. After receiving comments from all the relevant ministries, the Tariff Commission will present a report to the Chairman of the Tariff Commission for approval, and issue its decision on the final determination to MOFCOM and the General Administration on Customs.⁶⁰
- 2.31. Finally, 10 days will be provided for MOFCOM, after receiving the approval from the Tariff Commission, to publish the announcement and notice to implement the decision. With this final step, China will bring the revised measure, "if there is any", into legal effect.⁶¹
- 2.32. China underscores that many of the time periods that will apply to the specific steps that MOFCOM considers necessary for implementation are based on important procedural obligations under the Anti-Dumping Agreement and the SCM Agreement, including, for example: giving "all interested parties ... a full opportunity for the defense of their interests"⁶²; providing "timely opportunities" for interested parties to see information relevant to their cases and to prepare presentations based on that information⁶³; and giving public notice and explanation of preliminary and final determinations.⁶⁴ China submits that these obligations constitute a "particular circumstance", and will help minimize the risk of any possible violation of procedural obligations during the course of the implementation process.⁶⁵
- 2.33. In sum, China requires approximately 11 months to conduct the administrative work to implement the DSB's recommendations and rulings in this dispute. China notes that this time period consists of 45 days of preparatory work, which was completed in late 2012, and an additional 287 days that will begin on 1 September 2013 after new rules authorizing MOFCOM to conduct such proceedings have been adopted. China clarifies that this 287-day (9.5-month) period of actually conducting the administrative proceedings can begin only once the new rules have taken effect.⁶⁶

⁵⁸ China's submission, para. 84.

⁵⁹ China's submission, para. 86.

⁶⁰ China's submission, para. 87.

⁶¹ China's submission, para. 88.

⁶² China's submission, para. 85 and fn 25 thereto (referring to Article 6.2 of the Anti-Dumping Agreement).

⁶³ China's submission, para. 85 and fn 27 thereto (referring to Article 6.4 of the Anti-Dumping Agreement).

⁶⁴ China's submission, para. 85 and fn 28 thereto (referring to Article 12 of the Anti-Dumping Agreement).

⁶⁵ China's submission, para. 85.

⁶⁶ China's submission, para. 89.

2.2 United States

- 2.34. The United States requests that I determine the reasonable period of time for implementation to be either: (i) 1 month, if China revokes the relevant anti-dumping and countervailing duties in the absence of clear legal authority to revise these duties; or (ii) 4 months and 1 week, if China concedes that an existing administrative reconsideration procedure can be used to implement the recommendations and rulings of the DSB in this dispute.⁶⁷
- 2.35. The United States notes that the role of an arbitrator is to determine the shortest period of time for implementation within a Member's domestic legal system. The United States asserts that, if an administrative reconsideration procedure is not currently available within China's domestic legal system, then the reasonable period of time for implementation should be based on the time necessary for China to conduct a procedure that is currently available, namely, the immediate revocation of the anti-dumping and countervailing duties on imports of grain oriented flat-rolled electrical steel (GOES) from the United States.⁶⁸
- 2.36. The United States highlights that this is the first time that the reasonable period of time for China's implementation of DSB recommendations and rulings is being determined through arbitration. According to the United States, the time periods for China's implementation of the DSB's recommendations and rulings in the prior disputes referred to by China⁶⁹ were reached by agreement among the parties to those disputes, and are therefore not relevant to the determination of the reasonable period of time for implementation in this dispute.

2.2.1 Administrative rulemaking

- 2.37. The United States asserts that there is no basis for the reasonable period of time for implementation to be lengthened for the purpose of enabling China to adopt rules for implementing DSB recommendations and rulings concerning trade remedies.⁷⁰ The United States notes that the DSB did not make findings with respect to China's legislative regime for imposing anti-dumping and countervailing duties. Rather, the DSB's recommendations and rulings are limited to China's measures imposing anti-dumping and countervailing duties on GOES from the United States. Thus, at issue in this arbitration is the time necessary for China to bring those measures into conformity with the DSB's recommendations and rulings.⁷¹
- 2.38. The United States contends that, on several occasions, arbitrators have declined to lengthen the period of time for implementation in order to accommodate a proposed method of implementation that was not necessary to effect changes to the measure found to be in breach of a Member's WTO obligations. The United States notes, for example, that, in *Argentina – Hides and Leather (Article 21.3(c))*, the arbitrator was unconvinced by Argentina's argument that implementation would

⁶⁷ United States' submission, paras. 5, 7, 12, and 62.

⁶⁸ United States' submission, para. 4.

⁶⁹ See *supra*, para. 2.16 and fn 42 thereto of this Award. China refers to the following previous disputes: China – Auto Parts; China – Intellectual Property Rights; China – Publications and Audiovisual Products; and China – Raw Materials.

⁷⁰ United States' submission, para. 13.

⁷¹ United States' submission, para. 16.

require the adoption of new legislation in addition to a regulatory amendment.⁷² Drawing an analogy with that dispute, the United States submits that, in this case, nothing prevents China from undertaking a more ambitious legislative endeavour with respect to its trade remedy laws, either in parallel with, or separately from, its efforts to implement the DSB's recommendations and rulings in this dispute. China cannot, however, request that the reasonable period of time for implementation take into account the time necessary to undertake this endeavour.⁷³

- 2.39. The United States finds "surprising" China's apparent position that administrative authority was delegated to MOFCOM to apply anti-dumping and countervailing duties on imports, but not the authority to revise those duties when they are found to be inconsistent with China's WTO obligations.⁷⁴ The United States adds that, to the extent that China seeks clear legal authority for MOFCOM to revise measures in response to DSB recommendations and rulings, China does not offer any explanation as to why the purported gap in China's domestic administrative regime was not addressed when China acceded to the WTO or at any point during the intervening 12 years. The United States points, in particular, to the fact that China's trade remedy measures were first challenged by a WTO Member two and a half years ago; to March 2012, when the Panel issued its interim report in this dispute; and to July 2012, when China opted not to appeal many of the Panel's findings of inconsistency, and therefore knew that these findings would need to be addressed.⁷⁵
- 2.40. The United States submits that China has the ability in its domestic system to revoke the anti-dumping and countervailing duties at issue in this dispute. Moreover, revocation would be consistent with the principle of "prompt" compliance under Article 3.3 of the DSU, and, under Article 3.7, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measure.⁷⁶ The United States further notes that, under Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), China made a commitment to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements".⁷⁷
- 2.41. The United States contests China's assertion that it needs to develop new rules to implement the DSB's recommendations and rulings in this dispute. The United States asserts that, according to China's own legal analysis, "at worst", MOFCOM's legal authority to conduct an administrative redetermination for the purpose of implementation is not "perfectly clear".⁷⁸ According to the United States, the evidence suggests that MOFCOM does in fact have the ability to re-examine duties, including in response to DSB recommendations and rulings. The United States notes that China outlines a number of provisions in its AD Regulations and CVD Regulations, which do not appear to preclude a redetermination in response to DSB recommendations and rulings.⁷⁹
- 2.42. First, the United States notes that Article 49 of the AD Regulations and Article 48 of the CVD Regulations authorize MOFCOM to decide, "on justifiable grounds", to review the need for the

⁷² United States' submission, para. 17 (referring to Award of the Arbitrator, Argentina – Hides and Leather (Article 21.3(c)).

⁷³ United States' submission, para. 18.

⁷⁴ United States' submission, para. 24.

⁷⁵ United States' submission, para. 23.

⁷⁶ United States' submission, para. 21 (referring to Award of the Arbitrator, Brazil – Retreaded Tyres(Article 21.3(c)), para. 57).

⁷⁷ United States' submission, para. 22.

⁷⁸ United States' submission, para. 27.

⁷⁹ United States' submission, para. 26.

continued imposition of anti-dumping and countervailing duties. The United States argues that China has not persuasively explained why this language cannot be read to include the implementation of China's WTO commitments.⁸⁰ Second, the United States argues that it would seem "appropriate" for MOFCOM to take action under Article 57 of the AD Regulations and Article 56 of the CVD Regulations to implement the DSB's recommendations and rulings in this dispute considering that China accepts that these provisions provide MOFCOM with the authority to manage WTO dispute settlement with respect to trade remedies.⁸¹

- 2.43. Third, the United States notes that, although China points to Article 58 of the AD Regulations and Article 57 of the CVD Regulations as authorizing MOFCOM to formulate implementing measures, China expresses doubt as to whether these provisions permit specific administrative actions.⁸² In the United States' view, China's interpretation seems contrary to these provisions, which state that "[MOFCOM] may, in accordance with these Regulations, formulate *specific* implementing measures".⁸³
- 2.44. The United States further notes that China does not refer, in its submission, to the Law of the People's Republic of China on Administrative Reconsideration⁸⁴ (Administrative Reconsideration Law). According to the United States, the Administrative Reconsideration Law, together with provisions under the AD Regulations, has been used in the past by MOFCOM to conduct at least three administrative reviews: (i) Kraft Linerboard Administrative Reconsideration⁸⁵; (ii) Cold Rolled Steel Administrative Review⁸⁶; and (iii) Electrolytic Capacitor Paper (ECP) Administrative Reconsideration.⁸⁷ The United States notes that these proceedings were completed in less than 5 weeks, 4 months, and 2 months, respectively.⁸⁸ In the United States' view, based on these past cases, MOFCOM could indefinitely suspend or revoke the anti-dumping and countervailing duties at issue in this dispute, using its existing authority.

2.2.2 Administrative redetermination

- 2.45. The United States submits that, under China's existing laws, the reconsideration of an anti-dumping and countervailing duty determination involves five steps: (i) preparatory phase⁸⁹; (ii) initiation of

⁸⁰ United States' submission, para. 28 and fn 27 thereto (referring to China's submission, para. 22).

⁸¹ United States' submission, para. 29.

⁸² United States' submission, para. 30 (referring to China's submission, para. 28).

⁸³ United States' submission, para. 30 (quoting Article 58 of the AD Regulations and Article 57 of the CVD Regulations). (emphasis added by the United States)

⁸⁴ Law of the People's Republic of China on Administrative Reconsideration, adopted at the 9th Meeting of the Standing Committee of the 9th National People's Congress on 29 April 1999 and promulgated by Order No. 16 of the President of the People's Republic of China on 29 April 1999 (English translation provided in Exhibit USA-6 and available at: [http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383562.htm]).

⁸⁵ United States' submission, para. 33 (referring to Kraft Linerboard Administrative Reconsideration (2005) (Exhibit USA-10)).

⁸⁶ United States' submission, para. 34 (referring to Cold Rolled Steel Administrative Review (2004) (Exhibit USA-5)).

⁸⁷ United States' submission, para. 35 (referring to Electrolytic Capacitor Paper (ECP) Administrative Reconsideration (2007) (Exhibit USA-2)).

⁸⁸ United States' submission, paras. 33-35.

⁸⁹ United States' submission, para. 37 and fn 40 thereto (referring to Awards of the Arbitrator, US – COOL (Article 21.3(c)); US – Hot-Rolled Steel (Article 21.3(c)); and Chile – Alcoholic Beverages (Article 21.3(c))). The United States notes that this step is not a legal obligation under China's domestic system. The United States, however, includes this step in the light of the fact that previous arbitrators have recognized the need for preparatory work.

notification; (iii) collection of new evidence; (iv) disclosure of necessary facts; and (v) consultation with relevant agencies and promulgation of the tariff. The United States associates the following timeframes with each step.

- 2.46. First, the United States considers that the preparatory phase should take no more than 1 month.⁹⁰ Second, the initiation of the notification can take place before the preparatory phase is completed, and should take no more than 2 weeks.⁹¹ Third, the collection of new evidence should take no more than 2 months, taking into account the nature of the issues that would be under consideration.⁹² Fourth, the disclosure of necessary facts should take 1 week, consistent with MOFCOM's past practice.⁹³ Finally, the United States considers that consultations with relevant agencies and the subsequent promulgation of the tariff should take approximately 1 month, consistent with MOFCOM's past practice.⁹⁴
- 2.47. The United States highlights that there are no mandatory timeframes identified in the AD Regulations and the CVD Regulations with respect to any of these steps. Therefore, the United States considers the length of time that was necessary for previous reconsiderations to be "persuasive".⁹⁵ According to the United States, Members with systems that do not prescribe minimum mandatory timeframes have been characterized by previous arbitrators as having "a considerable degree of flexibility".⁹⁶ Moreover, these arbitrators have insisted that Members "make use of such flexibility in order to ensure prompt compliance with the recommendations and rulings of the DSB".⁹⁷ In the light of these considerations, the United States submits that the time period for reconsideration of the single anti-dumping and countervailing duty determination at issue in this dispute should be no more than 4 months and 1 week.
- 2.48. The United States considers that the component steps of the proposed procedure for implementation outlined by China are "grossly overstated".⁹⁸ There are significantly more steps in China's proposed procedure than those required under the current procedures of the AD Regulations and the CVD Regulations. Similarly, the United States considers the timeframes proposed by China for the various steps to be "overinflated".⁹⁹ The United States submits that China

⁹⁰ United States' submission, para. 37. The preparatory phase entails the internal review of the measures, consultations, and preparation for administrative action.

⁹¹ United States' submission, para. 37 and fn 41 thereto (referring to Articles 19 and 22 of the AD Regulations and the CVD Regulations). At this stage of the reconsideration process, MOFCOM is required to publish its decision to initiate a reconsideration and notify the interested parties and their government(s). This stage also includes the preparation of non-confidential summaries by the complainant and possible re-submission of comments on non-confidential summaries.

⁹² United States' submission, para. 37 and fn 42 thereto (referring to Article 20 of the AD Regulations and Articles 20 and 26 of the CVD Regulations).

⁹³ United States' submission, para. 37 and fn 43 thereto (referring to Article 25 of the AD Regulations and Articles 25 and 26 of the CVD Regulations). At this stage of the redetermination, MOFCOM will, prior to making a final determination, inform all interested parties and their government(s) of the essential facts on which the final determination is based.

⁹⁴ United States' submission, para. 37 and fn 44 thereto (referring to Article 25 of the AD Regulations and Articles 26 and 27 of the CVD Regulations). At this final stage of the reconsideration, MOFCOM will need to solicit comments from the Tariff Commission concerning the final determinations before promulgating the relevant tariff.

⁹⁵ United States' submission, para. 38.

⁹⁶ United States' submission, para. 38 (referring to Awards of the Arbitrator, US – 1916 Act (Article 21.3(c)), para. 39; and Colombia – Ports of Entry (Article 21.3(c)), para. 83).

⁹⁷ United States' submission, para. 38 (referring to Awards of the Arbitrator, US – 1916 Act (Article 21.3(c)), para. 39; and Colombia – Ports of Entry (Article 21.3(c)), para. 83).

⁹⁸ United States' submission, para. 39.

⁹⁹ United States' submission, para. 39.

offers no evidence to support these proposed timeframes, and no specific references to domestic regulations. Instead, according to the United States, China is now proposing a process that takes twice as long to complete as the longest administrative reconsideration to date, and four times as long as the average.

- 2.49. The United States adds that the original investigation and imposition of the anti-dumping and countervailing duties in this dispute took 10 months. Thus, China has proposed a review procedure that will take the same amount of time, notwithstanding the fact that most administrative reconsiderations are completed in less time than an original investigation. Moreover, although China states that it is "making a good faith effort to proceed along parallel tracks", China outlines an almost entirely sequential process, instead of "collapsing" steps where appropriate.¹⁰⁰ The United States submits that several of the steps proposed by China are "unnecessary"¹⁰¹, and that several should be collapsed.¹⁰²
- 2.50. The United States questions the need for 45 days for the translation and reading of the Panel and Appellate Body Reports. The majority of the findings in this dispute are contained in the Panel Report, which was circulated on 15 June 2012. The United States presumes that China would have needed to translate and read the Panel Report in order to prepare its appeal. Further, the Appellate Body Report was circulated on 18 October 2012, nearly a month prior to its adoption at the DSB meeting of 16 November 2012. China had more than 45 days to translate and review the majority of the findings prior to November 2012.¹⁰³
- 2.51. The United States contends that the "particular circumstances" of implementation in this dispute do not support a time period of 19 months for implementation. According to the United States, China has not established that "particular circumstances" require the adoption of new rules for implementation. Although the "particular circumstances" of implementation include consideration of the particular circumstances of the implementing Member's legal system, China's request for a reasonable period of time for implementation of 19 months is not based on its current legal system, but on the requirements of a hypothetical future legal system that it hopes to develop as part of the implementation process. In the United States' view, the "circularity" of China's argument highlights the difficulty of determining a reasonable period of time for implementation based on legal requirements that do not presently exist in an implementing Member's legal system. Moreover, in the United States' view, China's argument "invites Members to devise new procedures" that would result in a protracted timeframe for implementation.¹⁰⁴

¹⁰⁰ United States' submission, para. 41 (quoting China's submission, para. 65).

¹⁰¹ With respect to China's proposed step of a "hearing", the United States asserts that, in the three previous administrative reconsiderations conducted by MOFCOM, a hearing was not held. Moreover, the United States notes that China proposes a timeframe of 20 days for "comments by the parties" prior to the "drafting/review of the final determination". The United States asserts, however, that, under China's current system, MOFCOM has an obligation to inform interested parties and their government(s) of the essential facts on which the final determination is based, and that there is no additional opportunity for comment by parties. (United States' submission, para. 46)

¹⁰² For example, China proposes the following as separate steps, together with timeframes for each: "comments by parties"; "rebuttal comments by parties"; "hearing"; "initial draft determination"; "internal review"; and "review by DTL". According to the United States, these steps appear to be a single stage under China's current procedures for administrative reconsideration, namely, "the collection of evidence". In the United States' view, this stage can be completed within 2 months, as opposed to China's proposed 167 days. Moreover, China's proposed steps of "drafting and approval of the public notice" and "comments by the parties" can be conducted in parallel. Finally, the United States notes that China proposes separate steps of "drafting/reviewing the final determination"; "Tariff Commission review"; and "publication". According to the United States, these steps can, under China's current system, be completed in a single "final drafting and internal consultation step". No more than 1 month should be necessary for this step. (United States' submission, para. 45)

¹⁰³ United States' submission, para. 44.

- 2.52. The United States argues that China's explanation of the particular circumstances that warrant a time period of 19 months for implementation is also contradicted by the facts. The United States points out that China has not referred to any time periods set out in its domestic law, or to any previous examples of cases in which it has required the proposed amount of time to complete analogous steps.¹⁰⁵
- 2.53. The United States disagrees with China that the technical complexity of determining whether legal authority for implementation existed under China's laws constitutes a "particular circumstance" to be taken into account in determining the reasonable period of time for implementation. The United States highlights that the DSB's recommendations and rulings concern the anti-dumping and countervailing measures at issue, and do not concern China's broader legislative or regulatory system.¹⁰⁶ Therefore, according to the United States, China does not need to engage in a lengthy legal analysis to address the DSB's recommendations and rulings.¹⁰⁷
- 2.54. The United States further contends that, contrary to China's assertions, the DSB's recommendations and rulings in this dispute do not present "exceptional challenges" in relation to their implementation.¹⁰⁸ First, with regard to the Panel's finding that China acted inconsistently with Article 12.7 of the SCM Agreement, the United States recalls China's argument that, although the Panel disagreed with the choice of "facts available" made by MOFCOM to calculate the subsidy margin for one of the respondents, the Panel did not provide any guidance as to possible alternatives, or as to which alternatives would be WTO-consistent. According to the United States, the Panel examined record evidence that provides credible alternatives for China.¹⁰⁹ Second, with regard to the Panel's findings concerning MOFCOM's determination of the "all others rate" in respect of unknown companies, the United States contends that China does not explain why implementing this aspect of the DSB's recommendations and rulings would present challenges.¹¹⁰ Third, with regard to China's assertion that the DSB's rulings do not provide guidance on what must be done to correct defects in MOFCOM's injury analysis, the United States explains that the Appellate Body provided an exhaustive analysis of the obligations contained in Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement. For the United States, the Appellate Body's analysis provides concrete guidelines for China in respect of implementation in this dispute.¹¹¹
- 2.55. According to the United States, China has made no serious effort to implement the DSB's recommendations and rulings since the DSB's adoption of the Panel and Appellate Body Reports on 16 November 2012. Moreover, as the Panel issued its Report on 15 June 2012, China has had more than 9 months to address the unappealed sections of that Report – containing the largest share of the findings to be implemented in this dispute – and the question of whether MOFCOM has legal

¹⁰⁴ United States' submission, para. 48.

¹⁰⁵ United States' submission, para. 49.

¹⁰⁶ United States' submission, paras. 16 and 48.

¹⁰⁷ United States' submission, para. 51.

¹⁰⁸ United States' submission, para. 52.

¹⁰⁹ The United States notes, in particular, the Panel's statement that "MOFCOM's application of this rate was actually at odds with information on the record suggesting a lesser rate of utilization should be applied". Further, the Panel then examined record evidence that could have formed the basis of MOFCOM's rate of utilization finding, based on "facts available". (United States' submission, para. 52 (referring to Panel Report, paras. 7,303 and 7,305-7.309))

¹¹⁰ United States' submission, para. 52 (referring to China's submission, para. 74).

¹¹¹ United States' submission, para. 53 (referring to Appellate Body Report, paras. 125-221).

authority to implement these findings. The United States further recalls that previous arbitrators have taken account of implementation efforts made following the adoption of relevant reports.¹¹²

- 2.56. For these reasons, the United States considers that the "reasonable period of time" for implementation of the recommendations and rulings of the DSB should be either: (i) 1 month, if China revokes the relevant anti-dumping and countervailing duties in the absence of clear legal authority to revise these duties; or (ii) 4 months and 1 week, if China concedes that an existing administrative reconsideration procedure can be used to implement the recommendations and rulings of the DSB in this dispute.

3 Reasonable period of time

3.1 Preliminary matters

3.1.1 Introduction

- 3.1. The Panel and Appellate Body Reports in this dispute were adopted by the DSB on 16 November 2012. On 30 November 2012, China informed the DSB of its intention to comply with the DSB's recommendations and rulings, but stated that it would need a reasonable period of time in which to do so.¹¹³ As the parties failed to agree on a reasonable period of time for implementation, the United States requested that such period be determined through binding arbitration pursuant to Article 21.3(c) of the DSU.¹¹⁴ The Director-General, after consulting with the parties, appointed me as Arbitrator on 28 February 2013.

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

- 3.2. It is well established that my mandate as Arbitrator in these proceedings is to determine the time by when the implementing Member must achieve compliance with the recommendations and rulings of the DSB in the underlying dispute. In making this determination, the means of implementation available to the Member concerned is a relevant consideration.¹¹⁵ In particular, an implementing Member's chosen method of implementation must be capable of placing it into compliance with its WTO obligations within a reasonable period of time in accordance with the guidelines contained in Article 21.3(c) of the DSU.¹¹⁶ In other words, "the means of implementation chosen must be apt in form, nature, and content to effect compliance, and should otherwise be consistent with the covered agreements".¹¹⁷ It is beyond my mandate to determine, in this case, the

¹¹² See United States' submission, para. 54 (referring to Awards of the Arbitrator, US – Section 110(5) (Article 21.3(c)), para. 46; Chile – Price Band System (Article 21.3(c)), para. 43; and Colombia – Ports of Entry (Article 21.3(c)), para. 79).

¹¹³ See WT/DSB/M/326, para. 1.2.

¹¹⁴ WT/DS414/10.

¹¹⁵ Award of the Arbitrator, Japan – DRAMs (Korea) (Article 21.3(c)), para. 26.

¹¹⁶ See Award of the Arbitrator, Japan – DRAMs (Korea) (Article 21.3(c)), para. 27 (referring to Award of the Arbitrator, EC – Export Subsidies on Sugar (Article 21.3(c)), para. 69).

consistency with WTO law of implementing measures that are eventually chosen by China to achieve compliance with the recommendations and rulings of the DSB in this dispute. This can only be determined in proceedings under Article 21.5 of the DSU.

- 3.3. Certain provisions of the DSU guide me in executing my mandate. I note that Article 21.1 provides that "prompt compliance" is essential for the effective resolution of WTO disputes. Furthermore, the introductory paragraph of Article 21.3 indicates that a "reasonable period of time" for implementation shall be available only if "it is impracticable to comply immediately" with the recommendations and rulings of the DSB. I note further that, according to the last sentence of Article 21.3(c), the "particular circumstances" of a dispute may affect the calculation of the reasonable period of time for implementation, making it "shorter or longer".¹¹⁸ I therefore agree with previous arbitrators that the context of Article 21.3(c) makes clear that the reasonable period of time for implementation "should be the shortest period possible within the legal system of the [implementing] Member".¹¹⁹
- 3.4. I also note that the implementing Member has a measure of discretion in choosing the means of implementation that it deems most appropriate, "as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements".¹²⁰ In addition, I agree with previous arbitrators that, while the implementing Member is not required to utilize "extraordinary procedures" to bring its measures into compliance¹²¹, it must, nevertheless, utilize all the "flexibilities" available within its legal system in order to implement the relevant recommendations and rulings of the DSB in the shortest period of time possible.¹²² The use of such flexibilities is necessitated by the importance of fulfilling the obligation to comply immediately with recommendations and rulings of the DSB that certain measures of the implementing Member are inconsistent with its WTO obligations.¹²³
- 3.5. Finally, with regard to the burden of proof applicable in these proceedings, I agree with the principle that the implementing Member bears the burden of proving that the period it seeks for implementation constitutes a "reasonable period of time".¹²⁴ The longer the proposed period of implementation, the greater this burden will be. Ultimately, however, it is for the arbitrator to

¹¹⁷ Award of the Arbitrator, Colombia – Ports of Entry (Article 21.3(c)), para. 64.

¹¹⁸ Award of the Arbitrator, Japan – DRAMs (Korea) (Article 21.3(c)), para. 25 (referring to Award of the Arbitrator, EC – Chicken Cuts (Article 21.3(c)), para. 49).

¹¹⁹ Award of the Arbitrator, EC – Hormones (Article 21.3(c)), para. 26.

¹²⁰ Award of the Arbitrator, Brazil – Retreaded Tyres (Article 21.3(c)), para. 48 (quoting Award of the Arbitrator, EC – Hormones (Article 21.3(c)), para. 38). See also Awards of the Arbitrator, Japan – DRAMs (Korea) (Article 21.3(c)), para. 25; EC – Chicken Cuts (Article 21.3(c)), para. 49; Canada – Pharmaceutical Patents (Article 21.3(c)), paras. 41-43; Chile – Price Band System (Article 21.3(c)), para. 32; EC – Tariff Preferences (Article 21.3(c)), para. 30; US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c)), para. 26; US – Gambling (Article 21.3(c)), para. 33; and EC – Export Subsidies on Sugar (Article 21.3(c)), para. 69.

¹²¹ See Award of the Arbitrator, US – Stainless Steel (Mexico) (Article 21.3(c)), para. 42 (referring to Awards of the Arbitrator, Brazil – Retreaded Tyres (Article 21.3(c)), para. 48; Japan – DRAMs (Korea) (Article 21.3(c)), para. 25; EC – Chicken Cuts (Article 21.3(c)), para. 49; Korea – Alcoholic Beverages (Article 21.3(c)), para. 42; Chile – Price Band System (Article 21.3(c)), para. 51; and US – Offset Act (Byrd Amendment) (Article 21.3(c)), para. 74).

¹²² See Awards of the Arbitrator, US – Stainless Steel (Mexico) (Article 21.3(c)), para. 42; Brazil – Retreaded Tyres (Article 21.3(c)), para. 48; and Japan – DRAMs (Korea) (Article 21.3(c)), para. 25 (referring to Awards of the Arbitrator, EC – Chicken Cuts (Article 21.3(c)), para. 49; Chile – Price Band System (Article 21.3(c)), para. 39; EC – Tariff Preferences (Article 21.3(c)), para. 36; and US – Offset Act (Byrd Amendment) (Article 21.3(c)), para. 64).

¹²³ Award of the Arbitrator, US – COOL (Article 21.3(c)), para. 70.

¹²⁴ Awards of the Arbitrator, 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.

determine the "shortest period possible" for implementation within the legal system of the implementing Member, on the basis of the evidence presented by all parties.¹²⁵

- 3.6. At the oral hearing in this arbitration, China and the United States agreed that these principles set out in previous arbitration awards are relevant for the determination of the reasonable period of time for implementation.

3.1.3 Measures to be brought into conformity

- 3.7. The underlying dispute concerns the United States' challenge of China's measures imposing anti-dumping and countervailing duties on GOES from the United States, as set forth in MOFCOM's Announcement No. 21 of 10 April 2010 and its annexes. Before the Panel, the United States challenged several aspects of the investigations leading to the imposition of these duties, claiming that China acted inconsistently with provisions of the SCM Agreement, the Anti-Dumping Agreement, and the General Agreement on Tariffs and Trade 1994 (GATT 1994).

- 3.8. The Panel concluded that China acted inconsistently with:

(a) Article 11.3 of the SCM Agreement, on the basis that MOFCOM initiated countervailing duty investigations into each of the 11 programmes challenged before the Panel by the United States, without sufficient evidence to justify this;

(b) Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement, on the basis that MOFCOM did not require the applicants to furnish non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence;

(c) Article 12.7 of the SCM Agreement in connection with MOFCOM's use of a 100% utilization rate in calculating the subsidy rates for the two known respondents under certain procurement programmes;

(d) Articles 6.8, 6.9, 12.2, 12.2.2 and paragraph 1 of Annex II of the Anti-Dumping Agreement, in connection with the resort to facts available to calculate the "all others" dumping margin for unknown exporters and due to deficiencies in the related essential facts disclosure and public notice and explanation;

(e) Articles 12.7, 12.8, 22.3 and 22.5 of the SCM Agreement, in connection with the resort to facts available to calculate the "all others" subsidy rate for unknown exporters and due to deficiencies in the related essential facts disclosure and public notice and explanation;

(f) Articles 15.1, 15.2, 12.8 and 22.5 of the SCM Agreement and 3.1, 3.2, 6.9 and 12.2.2 of the Anti-Dumping Agreement, in connection with MOFCOM's findings regarding the price effects of subject imports and due to deficiencies in the related essential facts disclosure and public notice and explanation;

(g) Articles 15.1, 15.5, 12.8 and 22.5 of the SCM Agreement and 3.1, 3.5, 6.9 and 12.2.2 of the Anti-

¹²⁵ Award of the Arbitrator, Brazil – Retreaded Tyres (Article 21.3(c)), para. 51 (referring to Award of the Arbitrator, US – Offset Act (Byrd Amendment) (Article 21.3(c)), para. 44).

Dumping Agreement, in connection with MOFCOM's finding that subject imports caused material injury to the domestic industry and due to deficiencies in the related essential facts disclosure and public notice and explanation; and

(h) Article 10 of the SCM Agreement and Article 1 of the Anti-Dumping Agreement, as a consequence of the foregoing violations of these Agreements.¹²⁶

3.9. Although the United States made multiple claims before the Panel, many of which were upheld, the scope of China's appeal focused solely on the Panel's findings in respect of MOFCOM's price effects analysis and related disclosures. More specifically, China claimed on appeal that the Panel erred in its interpretation and application of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement in finding that MOFCOM's price effects analysis was inconsistent with these provisions.¹²⁷ China also claimed on appeal that the Panel erred in finding that China acted inconsistently with Articles 6.9 and 12.2.2 of the Anti-Dumping Agreement and Articles 12.8 and 22.5 of the SCM Agreement, because MOFCOM's final injury disclosure document and public notice of the final determination contained insufficient information regarding MOFCOM's price effects analysis.¹²⁸

3.10. The Appellate Body upheld, albeit for different reasons, the Panel's findings on appeal.

3.2 Factors affecting the determination of the reasonable period of time

3.11. China argues that implementation of the recommendations and rulings of the DSB in this dispute will require a reasonable period of time of 19 months.¹²⁹ This time period encompasses 9.5 months to complete the process of adopting rules that would serve as the legal basis for MOFCOM's implementation of DSB recommendations and rulings concerning trade remedies, plus another 9.5 months to conduct an administrative redetermination of the anti-dumping and countervailing duties at issue.¹³⁰

3.12. In response, the United States contends that China should be granted a reasonable period of time of 1 month to revoke the anti-dumping and countervailing duties at issue, if, as China argues, there is no clear legal basis for MOFCOM to revise such duties on the basis of an administrative redetermination. Alternatively, if China concedes that an existing administrative procedure can be used to implement the recommendations and rulings of the DSB in this dispute, then China should be granted a reasonable period of time of 4 months and 1 week to conduct such a procedure.¹³¹

3.13. The United States submits that, if China maintains that there is no clear legal basis pursuant to

¹²⁶ Panel Report, para. 8.1.

¹²⁷ China's Notice of Appeal (WT/DS414/5), paras. 5 and 6.

¹²⁸ China's Notice of Appeal (WT/DS414/5), para. 9.

¹²⁹ China's submission, paras. 5, 8, 9, and 90.

¹³⁰ China's submission, para. 90.

¹³¹ United States' submission, paras. 5, 7, 12, and 62.

which MOFCOM can modify the relevant duties through administrative means, the reasonable period of time for implementation should be based on the time necessary to withdraw the duties at issue. In support of its argument, the United States explains that revocation is consistent with the principle of "prompt" compliance under Article 3.3 of the DSU, and that, under Article 3.7, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measure at issue.¹³² The United States further refers to China's obligations under Article XVI:4 of the WTO Agreement "as evidence of China's ability to withdraw" the measures at issue.¹³³

- 3.14. The United States seems to suggest that the absence of a legal basis to modify a measure means, without more, that the implementing Member is necessarily required to revoke, or repeal, the relevant measure. I note, however, that an implementing Member retains the discretion to choose its preferred means of implementation, provided that this method of implementation falls within the range of permissible actions that can be taken in order to implement the recommendations and rulings of the DSB.¹³⁴ Moreover, although "withdrawal of an inconsistent measure is the *preferred* means of complying with the recommendations and rulings of the DSB in a violation case, it is not necessarily the *only* means of implementation consistent with the covered agreements."¹³⁵ In this respect, I recall that the arbitrator in *Japan – DRAMs (Korea)(Article 21.3(c))* found that "a Member whose measure has been found to be inconsistent with the covered agreements may generally choose between two courses of action: withdrawal of the measure; or modification of the measure by remedial action".¹³⁶ Thus, "[w]hile withdrawal may be the preferred option to secure 'prompt compliance', a Member may, where withdrawal is deemed impracticable, choose to modify the measure, provided that this is done in the shortest time possible, and that such modification is permissible under the DSB's recommendations and rulings."¹³⁷
- 3.15. Thus, even assuming that withdrawal were possible under China's *existing* legal system¹³⁸, it does not follow that the reasonable period of time for implementation must be based on that method of implementation, as opposed to modification of the measure through remedial action. I therefore disagree with the United States to the extent that it suggests that the absence of a legal basis to modify a measure means, without more, that the reasonable period of time for implementation must necessarily be based on the time required to revoke, or repeal, the relevant measure.
- 3.16. I now proceed to consider China's request for a reasonable period of time on the basis of the two stages of implementation that China envisages: (i) the adoption of rules for making changes to trade remedy measures for the purpose of implementing recommendations and rulings of the DSB; and (ii) an administrative redetermination of the anti-dumping and countervailing duties at issue in

¹³² United States' submission, paras. 21 and 22.

¹³³ United States' opening statement at the oral hearing. Article XVI:4 of the WTO Agreement provides: Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

¹³⁴ Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48 (quoting Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27).

¹³⁵ Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 38. (original emphasis; fn omitted)

¹³⁶ Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 37. Similarly, the arbitrator in *US – Offset Act (Byrd Amendment) (Article 21.3(c))* was of the view that "the United States may choose either to withdraw or modify the CDSOA so as to bring it into conformity with its obligations under the covered agreements." (Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 50 (original emphasis))

¹³⁷ Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 37. The arbitrator in *Colombia – Ports of Entry (Article 21.3(c))* was also of the view that "modification ... is within the 'range of permissible actions' available for Colombia to implement the recommendations and rulings of the DSB". (Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 77)

¹³⁸ I note that China contested this proposition at the oral hearing.

this dispute.¹³⁹ I will address the parties' arguments regarding each stage in turn below.

3.2.1 Administrative rulemaking

- 3.17. China and the United States disagree as to whether the reasonable period of time for implementation should include time for the adoption of legal authority and a mechanism allowing China to implement the DSB's recommendations and rulings in this dispute.¹⁴⁰ The United States asserts that "MOFCOM does in fact have the ability to re-examine duties, including in response to [DSB] recommendations and rulings".¹⁴¹ China counters that MOFCOM can begin formal administrative proceedings to implement the DSB's recommendations and rulings only after the adoption of "specific legal authority and a mechanism" clarifying the procedures for doing so.¹⁴² According to China, no such mechanism currently exists.¹⁴³ In response to questioning at the oral hearing, China explained that, because the AD Regulations and the CVD Regulations do not "clearly authorize" the implementation of DSB recommendations and rulings, MOFCOM cannot take such action while complying with the requirement to act "in accordance with" those regulations.¹⁴⁴
- 3.18. As I see it, the question of whether MOFCOM can conduct an administrative redetermination of the anti-dumping and countervailing duties at issue only after adopting specific rules authorizing such action hinges on the scope and meaning of China's laws. China characterizes this question as being "technically complex" and highlights that, after the adoption of the Panel and Appellate Body Reports, internal, inter-agency, and external consultations were held to determine what, if any, authority exists for MOFCOM to engage in implementation under China's current AD Regulations and CVD Regulations.¹⁴⁵
- 3.19. I recall that, in arbitrations under Article 21.3(c), the implementing Member bears the burden of establishing that the period it seeks for implementation constitutes a reasonable period of time, and the longer the proposed period of implementation, the greater this burden will be.¹⁴⁶ Thus, I cannot simply defer to China's assertion that the first stage of implementation in this case is required under Chinese law. Instead, I must examine whether China has established what it asserts.
- 3.20. In explaining why its existing laws and regulations do not provide a basis for an administrative redetermination to implement DSB recommendations and rulings, China explains that Article 47 of

¹³⁹ China's submission, para. 9.

¹⁴⁰ At para. 34 of China's submission, China states that the purpose of the new rules that it intends to adopt is two-fold. First, they will specifically state that MOFCOM can maintain, amend, or withdraw anti-dumping or countervailing measures through administrative actions such as re-investigation, and will clarify the status of any anti-dumping and countervailing duties already collected. Second, they will establish the specific procedures to be followed when MOFCOM implements WTO dispute settlement decisions concerning trade remedies imposed by China.

¹⁴¹ United States' submission, para. 25.

¹⁴² China's opening statement at the oral hearing.

¹⁴³ China's submission, para. 10.

¹⁴⁴ In response to questioning at the oral hearing, China further explained that the "ambiguity" of the provisions of its relevant laws creates the "gap" that exists within its legal system.

¹⁴⁵ See *supra*, fn 28 of this Award.

¹⁴⁶ Awards of the Arbitrator, 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.

the AD Regulations authorizes MOFCOM to adjust existing anti-dumping measures to account for "new exporters" that had not exported previously to China; and that Article 48 of the AD Regulations and Article 47 of the CVD Regulations authorize MOFCOM to conduct "sunset reviews". According to China, these provisions do not, however, provide broader authority to make changes to trade remedies for "other reasons".¹⁴⁷ China adds that Article 49 of the AD Regulations and Article 48 of the CVD Regulations authorize MOFCOM to decide, "on justifiable grounds", to review the need for the continued imposition of anti-dumping and countervailing duties. China asserts that, while these provisions address the issue of interim reviews under Article 11.2 of the Anti-Dumping Agreement and Article 21.2 of the SCM Agreement, they do "not provide broader authority to make changes to trade remedies for other reasons".¹⁴⁸ The same is true, according to China, with respect to Article 50 of the AD Regulations and Article 49 of the CVD Regulations, which provide China's Tariff Commission with "specific legal authority" to adopt "any changes triggered" by "new shipper" reviews, sunset reviews, or interim reviews, "but go no further".¹⁴⁹ China also emphasizes that Article 57 of the AD Regulations and Article 56 of the CVD Regulations provide MOFCOM with the authority to manage WTO dispute settlement with respect to trade remedies, but asserts that these provisions do not "directly and unambiguously" address the implementation of WTO dispute settlement decisions in this area.¹⁵⁰

- 3.21. China further explains that Article 58 of the AD Regulations and Article 57 of the CVD Regulations provide MOFCOM with discretion to formulate "implementing measures", but only if "in accordance with these Regulations".¹⁵¹ Hence, China considers that, although general authorization to implement could arguably be found within the AD Regulations and the CVD Regulations, this authority "refers to MOFCOM's ability to draft specific rules of general application, and does not refer to specific administrative actions".¹⁵²
- 3.22. The United States counters that the provisions outlined by China do not appear to preclude a redetermination to implement DSB recommendations and rulings.¹⁵³ For example, Article 49 of the AD Regulations and Article 48 of the CVD Regulations authorize MOFCOM to decide, "on justifiable grounds", to review the need for the continued imposition of anti-dumping and countervailing duties. Moreover, according to the United States, it would seem "appropriate" for MOFCOM to take action under Article 57 of the AD Regulations and Article 56 of the CVD Regulations, because, as China accepts, these provisions provide MOFCOM with the authority to take responsibility for managing WTO dispute settlement with respect to trade remedies.¹⁵⁴ The United States further asserts that the Administrative Reconsideration Law, together with provisions under the AD Regulations, has been used in the past by MOFCOM to conduct at least three "administrative reconsiderations". In the United States' view, based on these past cases, MOFCOM could, using its existing authority, indefinitely suspend or revoke the anti-dumping and countervailing duties at issue in this dispute.

¹⁴⁷ China's submission, paras. 20 and 21.

¹⁴⁸ China's submission, para. 22.

¹⁴⁹ China's submission, para. 24.

¹⁵⁰ China's submission, para. 26.

¹⁵¹ China's submission, paras. 26-28.

¹⁵² China's submission, para. 28.

¹⁵³ United States' submission, para. 26.

¹⁵⁴ United States' submission, para. 29 (referring to China's submission, para. 33).

- 3.23. At the oral hearing, China explained that the Administrative Reconsideration Law does not provide authority to implement DSB recommendations and rulings. First, China explained that only parties aggrieved by the action of an agency can initiate procedures under the Administrative Reconsideration Law. Second, China explained that the procedures under the Administrative Reconsideration Law are of a fundamentally different nature than an administrative redetermination to implement DSB recommendations and rulings. According to China, a procedure under the Administrative Reconsideration Law involves a narrow process of "correcting a mistake", and not the broader process of a redetermination. Moreover, a procedure under the Administrative Reconsideration Law "generally takes the form of written examination", and requires neither a hearing nor inter-agency consultations.¹⁵⁵
- 3.24. China explains that consultations among experts led it to conclude that Article 57 of the AD Regulations and Article 56 of the CVD Regulations provide "*general authorization* for MOFCOM to implement" recommendations and rulings of the DSB.¹⁵⁶ China adds, however, that there remained "significant legal uncertainty about what such general authorization actually meant" in the absence of any guidance in the AD Regulations and the CVD Regulations, together with the "legal requirement" that any changes to trade remedies take place in accordance with these regulations.¹⁵⁷
- 3.25. As I see it, a general authorization to act would *usually* encompass the authority to take specific measures on the basis of such authorization. At the oral hearing, I asked China to clarify why MOFCOM's general authorization to implement was not sufficient to implement the specific DSB recommendations and rulings in this dispute. China explained that MOFCOM's general authorization to implement "makes clear that MOFCOM is the responsible agency" for implementation, but that this does not empower MOFCOM to take specific implementing measures until its authority to implement has been "actualised" through the adoption of specific rules.¹⁵⁸
- 3.26. Having considered the arguments and evidence submitted by both parties, I accept China's assertion that, under China's existing laws, there is no legal authority and mechanism allowing China to implement the DSB's recommendations and rulings in this dispute.¹⁵⁹ In the light of this conclusion, the question becomes whether the reasonable period of time for implementation should take into account the time required by China to adopt rules authorizing MOFCOM to take specific implementation action in respect of DSB recommendations and rulings concerning trade remedies.
- 3.27. The United States points out that the DSB's recommendations and rulings are limited to China's measures imposing anti-dumping and countervailing duties on imports of GOES from the United States¹⁶⁰, and that the DSB did not adopt any findings with respect to China's "broader legislative or regulatory system".¹⁶¹ Thus, while "nothing prevents China from undertaking a more ambitious

¹⁵⁵ China's opening statement at the oral hearing.

¹⁵⁶ China's submission, para. 45. (original emphasis)

¹⁵⁷ China's submission, para. 45.

¹⁵⁸ China's response to questioning at the oral hearing.

¹⁵⁹ The underlying facts and circumstances of the present dispute differ from those at issue in *Argentina – Hides and Leather* (Article 21.3(c)). In that dispute, Argentina had itself acknowledged that the legislative enactment that it proposed was not, "as a matter of public or administrative law", necessary to implement the recommendations and rulings of the DSB. (Award of the Arbitrator, *Argentina – Hides and Leather* (Article 21.3(c)), para. 43) This is not the case here.

¹⁶⁰ United States' submission, para. 3.

legislative endeavour", the time necessary to undertake such an endeavour is, according to the United States, not relevant to the determination of the reasonable period of time for implementation in this dispute.¹⁶² China responds that the fact that its proposed new rules on implementation will apply to future cases does not mean that these rules are unnecessary for implementation in this dispute. According to China, its new rules are "indispensable to implementation in either context".¹⁶³

- 3.28. I do not exclude that there may be circumstances in which bringing a measure into conformity with the recommendations and rulings of the DSB may require, as a first step, legislative action or administrative rulemaking by the implementing Member. The amended laws or regulations would then be applied in a manner that remedies the inconsistency found in the original measure. Contrary to what the United States seems to suggest, the time required for an implementing Member to adopt or amend laws or regulations as a first step of its implementation process is not, necessarily, irrelevant to the determination of the reasonable period of time for implementation under Article 21.3(c) when such laws or regulations have not been the subject of recommendations and rulings of the DSB.
- 3.29. I recall that I have accepted China's assertion that, under its existing laws, there is no legal authority and mechanism allowing China to implement the DSB's recommendations and rulings in this dispute. I find it relevant nonetheless that China seeks now to fill a gap, the existence of which long pre-dates the DSB's recommendations and rulings in this dispute. At the oral hearing, China stated that it would be unreasonable to expect China, "as a developing country", to have addressed the issue in advance.¹⁶⁴ The United States responds that China has not persuasively explained why the purported gap in its domestic administrative regime was not addressed when China acceded to the WTO more than 10 years ago. The United States adds that China has also not explained why the issue was not addressed when China's trade remedy measures were first challenged two and a half years ago by a WTO Member. The United States further contends that China has not explained why the purported gap was not addressed in March 2012, when the Panel issued its interim report in this dispute, or in July 2012, when China appealed only some of the Panel's findings of inconsistency, and could therefore have been expected to have known that recommendations and rulings of the DSB might eventually have to be implemented.¹⁶⁵ At the oral hearing, China questioned "what, if any obligation" these events would have created for China.¹⁶⁶
- 3.30. It is well established that the duty to implement recommendations and rulings of the DSB begins when the relevant panel and/or Appellate Body reports are adopted. Article 21.3(c) of the DSU makes clear that the "reasonable period of time" for implementation is measured from the "date of adoption of a panel or Appellate Body report" by the DSB. However, at issue here is not the question of when the formal legal obligation to implement begins. Rather, the question is whether circumstances pre-dating the adoption of the relevant panel or Appellate Body reports may inform what is reasonable in a given case. In my view, such circumstances may indeed be relevant to the determination of the reasonable period of time for implementation. In this vein, I note that the

¹⁶¹ United States' submission, para. 16.

¹⁶² United States' submission, para. 18.

¹⁶³ China's opening statement at the oral hearing.

¹⁶⁴ China's opening statement at the oral hearing.

¹⁶⁵ United States' submission, para. 23.

¹⁶⁶ China's response to questioning at the oral hearing.

arbitrator in *US – COOL (Article 21.3(c))* took into account the United States' "awareness of the need to modify the COOL measure even before the DSB adoption of the Panel and Appellate Body Reports".¹⁶⁷

- 3.31. I note that the United States filed a request for the establishment of a panel on 11 February 2011.¹⁶⁸ As of that time, China was apprised that the measure at issue in this dispute would be subject to scrutiny by a WTO panel and that the range of possible outcomes of the panel proceedings included that the challenged measure might be found to be inconsistent with its WTO obligations. These circumstances served notice to China that its trade remedy system might have to accommodate adverse recommendations and rulings by the DSB. Had China been attentive to this prospect at the time of the panel request, it would have had well in excess of the 9.5 months that it now requests for the purpose of adopting legal authority and a mechanism for the implementation of DSB recommendations and rulings concerning trade remedies.
- 3.32. The circulation of the Panel Report on 15 June 2012 should also have alerted China to the possible need eventually to bring its measures into compliance with recommendations and rulings of the DSB. This is not, in my view, altered by the fact that China appealed certain aspects of the adverse findings contained in the Panel Report on 20 July 2012.
- 3.33. In the light of these facts, I cannot now accept China's argument that the need to evaluate whether its legal system can accommodate the implementation of DSB recommendations and rulings concerning trade remedies, and, if not, to take steps to enable such implementation to occur, constitute "particular circumstances" relevant to my determination of the reasonable period of time for implementation in this dispute. China should, in the circumstances of this case, have taken steps to ensure, in a timely manner, that it had a legal basis, if necessary, to implement DSB recommendations and rulings concerning trade remedies well before the adoption of the Panel and Appellate Body Reports in this dispute. I do not consider it reasonable to award China time for this purpose at this stage.
- 3.34. In the light of the above, I decline to award China time for the purpose of adopting rules to authorize MOFCOM to implement DSB recommendations and rulings concerning China's anti-dumping and countervailing duty measures.

3.2.2 Administrative action

- 3.35. I turn now to what China envisages as a second step of implementation, namely, conducting a redetermination of the anti-dumping and countervailing duties imposed on imports of GOES from the United States. China estimates that it will require a period of approximately 9.5 months for this purpose. In addition, China requests 45 days for "preparatory work", consisting of the translation and study of the Panel and Appellate Body Reports in this dispute. China's proposed 11-month period of implementation amounts to a total of 332 days.¹⁶⁹ I note that the original anti-dumping and countervailing duty investigation was conducted over a period of approximately 10 months.¹⁷⁰

¹⁶⁷ Award of the Arbitrator, *US – COOL (Article 21.3(c))*, para. 84.

¹⁶⁸ WT/DS414/2.

¹⁶⁹ China's submission, para. 89.

¹⁷⁰ Panel Report, paras. 2.2 and 2.5. MOFCOM initiated the anti-dumping and countervailing duty investigation on 1 June 2009, and issued

- 3.36. I will first address China's contention that 45 days for preparatory work should be factored into my determination of the reasonable period of time for implementation. China explains that, immediately after adoption of the Panel and Appellate Body Reports, MOFCOM began preparations for the translation of the Reports into Chinese, which took 15 days, and then spent 30 days reading and understanding the reasoning of the Reports, and engaging in internal discussions on the work and information that would be necessary to implement each of the individual recommendations and rulings.¹⁷¹
- 3.37. Like previous arbitrators, I consider that, in determining the reasonable period of time for implementation, time may be allocated for preparatory work.¹⁷² Further, I consider that an implementing Member's translation of panel and Appellate Body reports, as well as its study of these reports to assess how implementation might be achieved, can qualify as preparatory work that may be relevant in determining the reasonable period of time for implementation.¹⁷³ I am concerned, however, that China did not commence this preparatory work earlier. According to China, the preparatory phase commenced on 16 November 2012, that is, on the day when the DSB adopted the Panel and Appellate Body Reports in this dispute.¹⁷⁴ I note, however, that the Panel and Appellate Body Reports were circulated on 15 June 2012 and 18 October 2012, respectively. While Article 21.3(c) of the DSU makes clear that the "reasonable period of time" for implementation is measured from the "date of adoption of a panel or Appellate Body report" by the DSB, I consider that China could have commenced translation and study of the relevant Reports immediately after their circulation, rather than waiting for them to be adopted by the DSB. Indeed, in response to questioning at the oral hearing, China accepted that an implementing Member can reasonably be expected to begin translation and study of panel and Appellate Body reports after their circulation.
- 3.38. I turn now to address China's request for 9.5 months to conduct an administrative redetermination in respect of the anti-dumping and countervailing duties at issue. China requests time to conduct a redetermination procedure consisting of the following steps and associated timeframes: drafting and approval of the public notice of the redetermination (20 days); consideration of comments of interested parties (30 days); submission of rebuttal comments from interested parties (30 days); the holding of a hearing (37 days); drafting of the initial determination (30 days); internal review of the relevant documents and approval of the disclosure documents by BOFT and IBII (30 days); review of the approved documents by DTL (10 days); consideration of comments from interested parties on the documents (20 days); drafting and review of the final determination (40 days); approval of the final determination by the Tariff Commission (30 days); and publication of the announcement and notice (10 days).¹⁷⁵
- 3.39. The United States counters that there are significantly more steps in China's proposed procedure for redeterminations than there are for administrative reconsiderations¹⁷⁶ under the existing AD

its final determination imposing anti-dumping and countervailing duties on imports of GOES from the United States on 10 April 2010.

¹⁷¹ China's submission, para. 66.

¹⁷² See e.g. Awards of the Arbitrator, US – COOL (Article 21.3(c)), para. 83; US – Hot-Rolled Steel (Article 21.3(c)), para. 38; and Chile – Alcoholic Beverages (Article 21.3(c)), para. 43.

¹⁷³ See also Award of the Arbitrator, EC – Tariff Preferences (Article 21.3(c)), para. 53.

¹⁷⁴ See China's submission, para. 89.

¹⁷⁵ China's submission, para. 89.

¹⁷⁶ At the oral hearing, the United States clarified that the United States' submission uses the term "administrative reconsideration" to refer to any administrative procedures conducted by a Chinese administrative body to modify or repeal existing administrative decisions. Such procedures would include, but would not be limited to, "administrative reconsiderations" conducted pursuant to China's Administrative

Regulations and CVD Regulations. Moreover, the United States argues that the timeframes envisaged by China for the various steps are "overinflated"¹⁷⁷, and would result in a redetermination process that takes four times longer to complete than the average time in which MOFCOM completed three reviews under the AD Regulations and the Administrative Reconsideration Law thus far.

- 3.40. I do not agree with the United States to the extent that it suggests that I should determine the time within which MOFCOM should conduct a redetermination in this case on the basis of the average time in which MOFCOM has completed three previous reviews under the AD Regulations and the Administrative Reconsideration Law. The reviews to which the United States refers were conducted pursuant to procedures that are, by nature, distinct from a redetermination for the purpose of implementing DSB recommendations and rulings.¹⁷⁸ I note further that the component steps of China's proposed redetermination procedure would seem, for the most part, to be sequential steps that cannot be conducted in parallel.¹⁷⁹ I am therefore hesitant to simply accept that the average time period in which MOFCOM conducted these previous reviews is an appropriate measure of the time within which MOFCOM should conduct a redetermination in this case.
- 3.41. Turning to the component steps of China's proposed redetermination procedure, I note that, in response to questioning at the oral hearing, China clarified that only two steps of its proposed procedure have specific timeframes prescribed by law. First, a period of 37 days is required to conduct a hearing, and, second, a period of "at least" 10 days must be allowed for interested parties to comment on any disclosure documents. Thus, as China has explained, the vast majority of the timeframes that China has associated with the component steps of its proposed redetermination procedure are inspired by MOFCOM's "practice and experience" with original investigations.
- 3.42. China also argues that "many of the time periods" that will apply to the specific steps that MOFCOM considers necessary for implementation are based on important procedural obligations arising under the Anti-Dumping Agreement and the SCM Agreement, including, for example: giving "all interested parties ... a full opportunity for the defense of their interests"¹⁸⁰; providing "timely opportunities" for interested parties to see information relevant to their cases and to prepare presentations based on that information¹⁸¹; and giving public notice and explanation of preliminary and final determinations.¹⁸² China submits that these obligations constitute a "particular circumstance", and will help minimize the risk of any possible violation of procedural obligations during the course of the implementation process.¹⁸³
- 3.43. China adds that, given the Panel and Appellate Body findings on issues such as the choice of adverse "facts available", the determination of the "all others rates" for unknown companies, and the findings related to MOFCOM's injury determination, interested parties will certainly have

Reconsideration Law.

¹⁷⁷ United States' submission, para. 39.

¹⁷⁸ The United States refers to: (i) Cold Rolled Steel Administrative Review (2004) (Exhibit USA-5); (ii) Kraft Linerboard Administrative Reconsideration (2005) (Exhibit USA-10); and (iii) Electrolytic Capacitor Paper (ECP) Reconsideration (2007) (Exhibit USA-2).

¹⁷⁹ For example, drafting and approval of the public notice of the redetermination (20 days); consideration of comments of interested parties (30 days); submission of rebuttal comments from interested parties (30 days). (See China's submission, para. 89)

¹⁸⁰ China's submission, para. 85 and fn 25 thereto (referring to Article 6.2 of the Anti-Dumping Agreement).

¹⁸¹ China's submission, para. 85 and fn 27 thereto (referring to Article 6.4 of the Anti-Dumping Agreement).

¹⁸² China's submission, para. 85 and fn 28 thereto (referring to Article 12 of the Anti-Dumping Agreement).

¹⁸³ China's submission, para. 85.

views that MOFCOM will need to consider and address.¹⁸⁴

- 3.44. I see some merit in these arguments advanced by China. Indeed, even if some steps and time periods are not required by law, they may nonetheless be useful in ensuring that implementation is effected in a transparent and efficient manner, fully respecting due process for all parties involved.¹⁸⁵
- 3.45. In response to questioning at the oral hearing, the United States explained that it does not dispute the need to afford due process to interested parties.¹⁸⁶ The United States further accepts that some of the steps of China's proposed redetermination procedure stem from a "legitimate source", namely, the covered agreements.¹⁸⁷ The United States argues, however, that due process concerns must be balanced with the principle of prompt compliance under the DSU.¹⁸⁸
- 3.46. I consider that a determination of the reasonable period of time for implementation involves balancing various considerations. I agree with the arbitrator in *US – Hot-Rolled Steel (Article 21.3(c))*, who found that the term "reasonable" should be interpreted as including "the notions of flexibility and balance", in a manner that allows for account to be taken of the particular circumstances of each case.¹⁸⁹ Article 21.1 of the DSU indicates that implementation of the recommendations and rulings of the DSB must be prompt. To that end, all flexibilities within the legal system of an implementing Member must be employed in the implementation process.¹⁹⁰ At the same time, implementation must be effected in a transparent and efficient manner that affords due process to all interested parties.¹⁹¹ I do not consider that the imperatives of prompt compliance, on the one hand, and of ensuring the due process rights of interested parties, on the other hand, are mutually exclusive objectives. A reasonable period of time for the implementation of DSB recommendations and rulings is capable of accommodating both. This, however, requires striking "a balance between respecting due process rights of interested parties and the promptness required in implementation."¹⁹²
- 3.47. In sum, I consider that, while China has explained the extent to which its proposed redetermination procedure will be designed to respect the due process rights of interested parties, China has not persuasively explained how the various steps of its proposed redetermination procedure, and their associated timeframes, reflect the use of flexibility within its legal system. It seems to me that China has available to it a considerable degree of flexibility to conduct a redetermination in a shorter period of time than it proposes, as evidenced by inter alia the absence of mandatory timeframes in relation to the majority of the component steps of China's proposed redetermination procedure. I am not convinced that conducting a redetermination in a shorter period of time than China proposes would, in the circumstances of this dispute, infringe upon the due process rights of interested parties.

¹⁸⁴ China's submission, paras. 73-75.

¹⁸⁵ See Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, para. 51.

¹⁸⁶ United States' response to questioning at the oral hearing.

¹⁸⁷ United States' submission, para. 43.

¹⁸⁸ United States' response to questioning at the oral hearing.

¹⁸⁹ Award of the Arbitrator, *US – Hot-Rolled Steel (Article 21.3(c))*, para. 25 (quoting with approval Appellate Body Report, *US – Hot-Rolled Steel*, para. 85).

¹⁹⁰ See *supra*, para. 3.4 of this Award.

¹⁹¹ See Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, para. 51.

¹⁹² Award of the Arbitrator, *Japan – DRAMs (Article 21.3(c))*, para. 51.

4 Award

- 4.1. In the light of the foregoing considerations, I determine that the "reasonable period of time" for China to implement the recommendations and rulings of the DSB in this dispute is 8 months and 15 days from 16 November 2012, that is, from the date on which the DSB adopted the Panel and Appellate Body Reports in this dispute. Thus, the reasonable period of time will expire on 31 July 2013.