

WORLD
ORGANIZATION

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CASES CITED IN THIS AWARD

Short Title	Full Case Title and Citation
Argentina – Hides and Leather (Article 21.3(c))	Award of the Arbitrator, Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU , WT/DS155/10, 31 August 2001, DSR 2001:XII, 6013
Brazil – Retreaded Tyres (Article 21.3(c))	Award of the Arbitrator, Brazil – Measures Affecting Imports of Retreaded Tyres – Arbitration under Article 21.3(c) of the DSU , WT/DS332/16, 29 August 2008, DSR 2008:XX, 8581
Canada – Pharmaceutical Patents (Article 21.3(c))	Award of the Arbitrator, Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU , WT/DS114/13, 18 August 2000, DSR 2002:I, 3
Chile – Alcoholic Beverages (Article 21.3(c))	Award of the Arbitrator, Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU , WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V, 2583
Chile – Price Band System (Article 21.3(c))	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
China – Auto Parts	Appellate Body Reports, China – Measures Affecting Imports of Automobile Parts , WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – Auto Parts	Panel Reports, China – Measures Affecting Imports of Automobile Parts , 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
China – GOES	Appellate Body Report, China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States

Short Title	Full Case Title and Citation
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
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/DS26966.845578824 .a(WT/D)-4.4(S)-4.7(394/R 2-4.58)JTJ 6-4

Short Title	Full Case Title and Citation
US – Offset Act (Byrd Amendment) (Article 21.3(c))	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
US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))	Award of the Arbitrator, United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the DSU , WT/DS268/12, 7 June 2005, DSR 2005:XXIII, 11619

Abbreviation	Description
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

WORLD TRADE ORGANIZATION
AWARD OF THE ARBITRATOR

China – Countervailing and Anti-Dumping
Duties on Grain Oriented Flat-Rolled
Electrical Steel from the United States

Parties:

China
United States

ARB-2013-1/27

Arbitrator:

Claus-Dieter Ehlermann

1 INTRODUCTION

1.1. On 16 November 2012, the Dispute Settlement Body (DSB) adopted the Appellate Body Report ¹ and the Panel Report ²

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 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 Law provides the "overarching legal basis" for trade remedy measures and that China's Regulations on Anti-Dumping¹³ (AD Regulations) and the Regulations on Countervailing Measures (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

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

⁹ China's submission, para. 4.

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 *WT/DS414/12*).

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 Council (Tariff Commission) with "specific legal authority" to adopt any changes triggered by "new shipper" reviews, sunset reviews, or interim reviews, "but go no further".²¹ 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.²²

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

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.

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.

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the DSB's recommendations and rulings in this dispute. These discussions were held from late November 2012 to early March 2013.²⁸

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

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

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

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

⁵⁴ China's submission, para. 80.

⁵⁵ China's submission, para. 81.

⁵⁶ China's submission, para. 82.

⁵⁷ China's submission, para. 83.

⁵⁸ China's submission, para. 84.

⁵⁹ China's submission, para. 86.

⁶⁰ China's submission, para. 87.

⁶¹ China's submission, para. 88.

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 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 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.

⁸⁰ United States' submission, para

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.

2.54. 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

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 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

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).

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 P 1 Tf())1r3-.001 Tc .1cr-34(e)2.4(21..r)-10.8(t)14003 Tc 19 Tw [(Canad)-8.6(a)-1(())1r)2.9(. S4.4(c)3)6(w.7())]4[(9 Tw007 Tc .0011 Tw [(Sug)-9.3

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 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

- (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-Dumping Agreement, in connection

3.14. The United States seems to suggest that the absence of a legal basis to modify a measure

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 provisio

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 States ¹⁶⁰, 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

3.31. I note that the United States filed a request for the establishment of a panel on 11 February 2011.¹⁶⁸

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 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

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 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)

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 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 states that 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 at conducting a redetermination in a shorter