



**UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN  
PRODUCTS FROM CHINA**

ARB-2015-1/28

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

*Award of the Arbitrator  
Georges M. Abi-Saab*

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**ABBREVIATIONS USED IN THIS AWARD**

<b>Abbreviation</b>	<b>Description</b>
Appellate Body Report	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GOC	Government of China
OCTG	Oil country tubular goods
Panel Report	Panel Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/R, 14 July 2014
Preliminary Ruling	Preliminary Ruling by the Panel, WT/DS437/4, incorporated by reference into the Panel Report as Annex A-8, WT/DS437/R/Add.1, pp. A-34 to A-46
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SOEs	State-owned enterprises
USDOC	United States Department of Commerce
USTR	United States Trade Representative
URAA	Uruguay Round Agreements Act, Public Law No. 103-465, 108 Stat. 4809, codified under <i>United States Code</i> , Title 19, Chapter 22
WTO	World Trade Organization

**USDOC COUNTERVAILING DUTY INVESTIGATIONS CITED IN THIS AWARD**

<b>Short Title</b>	<b>USDOC Investigation No.</b>	<b>Full Title</b>
Thermal Paper	C-570-921	Lightweight Thermal Paper From the People's Republic of China
Pressure Pipe	C-570-931	Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China
Line Pipe	C-570-936	Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China
Citric Acid	C-570-938	Citric Acid and Certain Citrate Salts From the People's Republic of China
Lawn Groomers	C-570-940	Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China
Kitchen Shelving	C-570-942	Certain Kitchen Appliance Shelving and Racks from the People's Republic of China
OCTG	C-570-944	Certain Oil Country Tubular Goods from the People's Republic of China
Wire Strand	C-570-946	Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China
Magnesia Bricks	C-570-955	Certain Magnesia Carbon Bricks From the People's Republic of China
Seamless Pipe	C-570-957	Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China
Print Graphics	C-570-959	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China
Drill Pipe	C-570-966	Drill Pipe From the People's Republic of China
Aluminum Extrusions	C-570-968	Aluminum Extrusions From the People's Republic of China
Steel Cylinders	C-570-978	High Pressure Steel Cylinders From the People's Republic of China
Solar Panels	C-570-980	Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China
Wind Towers	C-570-982	Utility Scale Wind Towers From the People's Republic of China
Steel Sinks	C-570-984	Drawn Stainless Steel Sinks From the People's Republic of China

## WTO 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, p. 6013
<i>Australia – Salmon (Article 21.3(c))</i>	Award of the Arbitrator, <i>Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS18/9, 23 February 1999, DSR 1999:I, p. 267
<i>Brazil – Retreaded Tyres (Article 21.3(c))</i>	Award of the Arbitrator, <i>Brazil – Measures Affecting Imports of Retreaded Tyres – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS332/16, 29 August 2008, DSR 2008:XX, p. 8581
<i>Canada – Pharmaceuticals Patents (Article 21.3(c))</i>	Award of the Arbitrator, <i>Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS114/13, 18 August 2000, DSR 2002:I, p. 3
<i>Chile – Price Band System (Article 21.3(c))</i>	Award of the Arbitrator, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS207/13, 17 March 2003, DSR 2003:III, p. 1237
<i>China – GOES (Article 21.3(c))</i>	Award of the Arbitrator, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS414/12, 3 May 2013, DSR 2013:IV, p. 1495
<i>Colombia – Ports of Entry (Article 21.3(c))</i>	Award of the Arbitrator, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS366/13, 2 October 2009, DSR 2009:IX, p. 3819
<i>EC – Chicken Cuts (Article 21.3(c))</i>	Award of the Arbitrator, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS269/13, WT/DS286/15, 20 February 2006, DSR 2006:XII, p. 5441
<i>EC – Export Subsidies on Sugar (Article 21.3(c))</i>	Award of the Arbitrator, <i>European Communities – Export Subsidies on Sugar – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS265/33, WT/DS266/33, WT/DS283/14, 28 October 2005, DSR 2005:XXIII, p. 11581
<i>EC – Fasteners (China)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
<i>EC – Hormones (Article 21.3(c))</i>	Award of the Arbitrator, <i>EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, p. 1833
<i>EC – Tariff Preferences (Article 21.3(c))</i>	Award of the Arbitrator, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS246/14, 20 September 2004, DSR 2004:IX, p. 4313
<i>Japan – DRAMs (Korea) (Article 21.3(c))</i>	Award of the Arbitrator, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS336/16, 5 May 2008, DSR 2008:XX, p. 8553
<i>Korea – Alcoholic Beverages (Article 21.3(c))</i>	Award of the Arbitrator, <i>Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, p. 937
<i>US – 1916 Act (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS136/11, WT/DS162/14, 28 February 2001, DSR 2001:V, p. 2017
<i>US – COOL (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS384/24, WT/DS386/23, 4 December 2012, DSR 2012:XIII, p. 7173
<i>US – Gambling (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS285/13, 19 August 2005, DSR 2005:XXIII, p. 11639

Short Title	Full Case Title and Citation
<i>US – Offset Act (Byrd Amendment)</i> (Article 21.3(c))	Award of the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS217/14, WT/DS234/22, 13 June 2003, DSR 2003:III, p. 1163
<i>US – Oil Country Tubular Goods Sunset Reviews</i> (Article 21.3(c))	Award of the Arbitrator, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS268/12, 7 June 2005, DSR 2005:XXIII, p. 11619
<i>US – Section 110(5) Copyright Act</i> (Article 21.3(c))	Award of the Arbitrator, <i>United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS160/12, 15 January 2001, DSR 2001:II, p. 657
<i>US – Stainless Steel (Mexico)</i> (Article 21.3(c))	Award of the Arbitrator, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS344/15, 31 October 2008, DSR 2008:XX, p. 8619

WORLD TRADE ORGANIZATION  
AWARD OF THE ARBITRATOR**United States – Countervailing Duty  
Measures on Certain Products from China**

ARB-2015-1/28

Parties:

Arbitrator:

China  
United States

Georges M. Abi-Saab

**1 INTRODUCTION**

1.1. On 16 January 2015, the Dispute Settlement Body (DSB) adopted the Appellate Body Report<sup>1</sup> and the Panel Report<sup>2</sup>, as modified by the Appellate Body Report, in *United States – Countervailing Duty Measures on Certain Products from China*. This dispute concerns China's challenge of countervailing duties imposed by the United States on certain products from China following 17 countervailing duty investigations initiated by the US Department of Commerce (USDOC) between 2007 and 2012. The Panel and the Appellate Body found the measures at issue to be inconsistent with several provisions of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).<sup>3</sup> By a letter to the Chair of the DSB dated 13 February 2015, the United States indicated its intention to implement the recommendations and rulings of the DSB in this dispute in a manner that respects its WTO obligations, and stated that it would require a reasonable period of time within which to do so.<sup>4</sup>

1.2. On 26 June 2015, China informed the DSB that consultations with the United States had not resulted in an agreement on the reasonable period of time for implementation. China therefore requested that this period be determined through arbitration pursuant to Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).<sup>5</sup>

1.3. China and the United States were unable to agree on an arbitrator within 10 days of the referral of the matter to arbitration. Consequently, by letter dated 9 July 2015, China requested that the Director-General of the World Trade Organization (WTO) appoint an arbitrator pursuant to footnote 12 of Article 21.3(c) of the DSU. The Director-General appointed the undersigned as the Arbitrator on 17 July 2015, after consulting with the parties.<sup>6</sup> The parties were informed of the acceptance of the appointment by letter dated 22 July 2015.

1.4. The United States and China filed their written submissions, as well as executive summaries thereof, on 4 and 17 August 2015, respectively. A hearing was held on 9 September 2015. 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).<sup>7</sup>

**2 ARGUMENTS OF THE PARTIES**

2.1. The arguments of the parties are reflected in the executive summaries of their written submissions, which are contained in Annexes A and B to this Award.

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<sup>1</sup> WT/DS437/AB/R.

<sup>2</sup> WT/DS437/R.

<sup>3</sup> See section 3.2 of this Award.

<sup>4</sup> WT/DS437/12. See also WT/DSB/M/357, paras. 2.2-2.5.

<sup>5</sup> WT/DS437/14.

<sup>6</sup> WT/DS437/15.

<sup>7</sup> See WT/DS437/13.

### 3 REASONABLE PERIOD OF TIME

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

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

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

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

...

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.<sup>8</sup>

3.3. According to this provision, the mandate of the Arbitrator in the present proceeding is to determine the time period within which the implementing Member must comply with the recommendations and rulings of the DSB in this dispute. Consistent with previous arbitrations under Article 21.3(c), the implementing Member has a measure of discretion in choosing the means of implementation that it deems most appropriate. However, the implementing Member does not have an unfettered right to choose any method of implementation. Rather, the arbitrator "must consider, in particular, 'whether the implementing action falls within the range of permissible actions that can be taken in order to implement the DSB's recommendations and rulings'."<sup>9</sup> Thus, 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.<sup>10</sup> In that vein, an implementing Member's chosen method of implementation must be capable of bringing 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.<sup>11</sup>

3.4. The means of implementation available to the Member concerned is a relevant consideration for determining the reasonable period of time.<sup>12</sup> At the same time, there are certain limitations on the mandate of the arbitrator under Article 21.3(c). In particular, it is not for the arbitrator to determine the consistency with the covered agreements of the measure taken to comply. Rather, if this question is raised, it is to be answered by a compliance panel pursuant to Article 21.5 of the DSU. Arbitration under Article 21.3(c) is limited to determining the time period within which implementation of the recommendations and rulings of the DSB must occur.

3.5. It is to be noted that Article 21.1 of the DSU provides that "prompt compliance" is essential for the effective resolution of WTO disputes. Furthermore, the first clause of Article 21.3 stipulates that a "reasonable period of time" for implementation shall be available only "[i]f it is impracticable to comply immediately" with the recommendations and rulings of the DSB. According to the last

<sup>8</sup> Fns omitted.

<sup>9</sup> Award of the Arbitrator, *US – COOL (Article 21.3(c))*, para. 69 (quoting Awards of the Arbitrators, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48; and *Japan – DRAMS (Korea) (Article 21.3(c))*, para. 27).

<sup>10</sup> See Awards of the Arbitrators, *China – GOES (Article 21.3(c))*, para. 3.2; and *Colombia – Ports of Entry (Article 21.3(c))*, para. 64.

<sup>11</sup> See Awards of the Arbitrators, *Japan – DRAMS (Korea) (Article 21.3(c))*, para. 27; and *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69.

<sup>12</sup> See Awards of the Arbitrators, *Japan – DRAMS (Korea) (Article 21.3(c))*, para. 26; and *China – GOES (Article 21.3(c))*, para. 3.2.



sentence of Article 21.3(c), the "particular circumstances" of a dispute may affect the length of the reasonable period of time, making it "shorter or longer".<sup>13</sup> In principle, therefore, the reasonable period of time for implementation should be the shortest period possible within the legal system of the implementing Member<sup>14</sup>, in the light of the "particular circumstances" of a dispute. It has been held in previous arbitration awards that the implementing Member must 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.<sup>15</sup> At the same time, an implementing Member is not required to utilize "extraordinary procedures" to bring its measures into compliance.<sup>16</sup>

3.6. Finally, with regard to the burden of proof, it is well established that the implementing Member bears the overall burden to prove that the time period requested for implementation constitutes a "reasonable period of time".<sup>17</sup> In response to questioning at the hearing in this arbitration, both China and the United States agreed that the principles set out above are relevant for the determination of the reasonable period of time for implementation in this dispute.

### 3.2 Measures to be brought into conformity

3.7. The dispute underlying this arbitration concerns China's challenge of countervailing duties imposed by the United States following 17 countervailing duty investigations initiated by the USDOC between 2007 and 2012 with respect to a variety of products.<sup>18</sup> Before the Panel, China challenged several aspects of the investigations leading to the imposition of these duties, including their initiation, conduct, and preliminary and final determinations as being inconsistent with the United States' obligations under the SCM Agreement. In particular, with respect to 14 of these investigations, China's "as applied" claims related to the USDOC's determinations that: (i) Chinese state-owned enterprises (SOEs) are public bodies; (ii) the provision of certain inputs by Chinese SOEs conferred a benefit; (iii) subsidies arising from the provision of inputs for less than adequate remuneration are specific; and (iv) there was sufficient evidence with respect to the specificity of the alleged subsidies to justify the initiation of the underlying countervailing duty investigations.<sup>19</sup> With regard to seven investigations, China raised "as applied" claims relating to the USDOC's determinations that subsidies in the form of the provision of land-use rights are specific. With respect to 15 of the investigations, China's "as applied" claims concerned the USDOC's resort to the use of "adverse" facts available. Finally, with respect to two of the investigations, China's "as applied" claims related to the USDOC's initiation of investigations into export restraints and the determinations made by the USDOC that such export restraints are financial contributions.<sup>20</sup> China also challenged "as such" the USDOC's policy of using a "rebuttable presumption" to determine

<sup>13</sup> See Awards of the Arbitrators, *US – COOL (Article 21.3(c))*, para. 69; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25; and *EC – Chicken Cuts (Article 21.3(c))*, para. 49.

<sup>14</sup> See Awards of the Arbitrators, *China – GOES (Article 21.3(c))*, para. 3.3; and *EC – Hormones (Article 21.3(c))*, para. 26. See also Awards of the Arbitrators, *EC – Chicken Cuts (Article 21.3(c))*, para. 49; *Chile – Price Band System (Article 21.3(c))*, para. 34; *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47; *EC – Tariff Preferences (Article 21.3(c))*, para. 26; *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, para. 25; and *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 61.

<sup>15</sup> See Awards of the Arbitrators, *China – GOES (Article 21.3(c))*, para. 3.4; *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 42; *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25; *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.

<sup>16</sup> See Awards of the Arbitrators, *China – GOES (Article 21.3(c))*, para. 3.4; *US – COOL (Article 21.3(c))*, para. 70; *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 42; *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25; *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.

<sup>17</sup> See Awards of the Arbitrators, *China – GOES (Article 21.3(c))*, para. 3.5; *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47; *US – 1916 Act (Article 21.3(c))*, para. 33; and *EC – Tariff Preferences (Article 21.3(c))*, para. 27.

<sup>18</sup> The 17 countervailing duty investigations are listed on p. 4 of this Award and concern the following products: thermal paper; pressure pipe; line pipe; citric acid; lawn groomers; kitchen shelving; oil country tubular goods (OCTG); wire strand; magnesia bricks; seamless pipe; print graphics; drill pipe; aluminum extrusions; steel cylinders; solar panels; wind towers; and steel sinks.

<sup>19</sup> With respect to four of these 14 investigations, China also challenged the USDOC's treatment of Chinese SOEs as public bodies for the purposes of the initiation of the relevant investigation.

<sup>20</sup> See Appellate Body Report, para. 1.3; and Panel Report, paras. 3.1 and 3.2.

whether Chinese SOEs can be characterized as "public bodies" within the meaning of the SCM Agreement.<sup>21</sup>

3.8. The Panel found that the United States had acted inconsistently with:

- a. Article 1.1(a)(1) of the SCM Agreement in 12 countervailing duty investigations<sup>22</sup> because the USDOC found that Chinese SOEs are public bodies based solely on the grounds that these enterprises were (majority) owned, or otherwise controlled, by the Government of China<sup>23</sup>;
- b. Article 1.1(a)(1) of the SCM Agreement, on the basis that the USDOC's policy, articulated in the Kitchen Shelving investigation, to presume that a majority government-owned entity is a public body, is inconsistent, as such, with that provision<sup>24</sup>;
- c. the last sentence of Article 2.1(c) of the SCM Agreement in 12 countervailing duty investigations<sup>25</sup> because the USDOC failed to take account of the two factors listed therein<sup>26</sup>;
- d. Article 2.2 of the SCM Agreement in six countervailing duty investigations<sup>27</sup> because the USDOC made determinations of regional specificity while failing to establish that the alleged subsidy was limited to certain enterprises located in a designated geographical region within the jurisdiction of the granting authority<sup>28</sup>; and
- e. Article 11.3 of the SCM Agreement in two countervailing duty investigations<sup>29</sup> because the USDOC initiated investigations in respect of certain export restraints.<sup>30</sup>

3.9. The Panel found that China had failed to establish that the USDOC had acted inconsistently with the United States' obligations under:

- a. Article 11 of the SCM Agreement in four countervailing duty investigations<sup>31</sup> by initiating the challenged investigations without sufficient evidence of a financial contribution<sup>32</sup>;
- b. Article 14(d) or Article 1.1(b) of the SCM Agreement in 12 countervailing duty investigations<sup>33</sup> by rejecting in-country private prices in China<sup>34</sup>;
- c. Article 2.1 of the SCM Agreement in 12 countervailing duty investigations<sup>35</sup> by failing to apply the first of the "other factors" under Article 2.1(c) in the light of a prior "appearance of non-specificity" resulting from the application of subparagraphs (a) and (b); by failing to identify a "subsidy programme"; or by failing to identify a "granting authority"<sup>36</sup>;

<sup>21</sup> See Appellate Body Report, para. 1.2.

<sup>22</sup> Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels.

<sup>23</sup> Panel Report, paras. 7.75 and 8.1.i.

<sup>24</sup> Panel Report, para. 8.1.ii.

<sup>25</sup> Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels.

<sup>26</sup> Panel Report, para. 8.1.v.

<sup>27</sup> Line Pipe, Thermal Paper, Citric Acid, OCTG, Wire Strand, and Seamless Pipe.

<sup>28</sup> Panel Report, para. 8.1.viii.

<sup>29</sup> Magnesia Bricks and Seamless Pipe.

<sup>30</sup> Panel Report, para. 8.1.ix.

<sup>31</sup> Steel Cylinders, Solar Panels, Wind Towers, and Steel Sinks.

<sup>32</sup> Panel Report, para. 8.1.iii.

<sup>33</sup> Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels.

<sup>34</sup> Panel Report, para. 8.1.iv.

<sup>35</sup> Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels.

<sup>36</sup> Panel Report, para. 8.1.v.

- d. Article 11 of the SCM Agreement in 14 countervailing duty investigations<sup>37</sup> by initiating the challenged investigations without sufficient evidence of specificity<sup>38</sup>;
- e. Article 12.7 of the SCM Agreement in 13 countervailing duty investigations<sup>39</sup> by not relying on facts available on the record<sup>40</sup>; and
- f. Article 2.2 of the SCM Agreement in the Print Graphics investigation by making a positive determination of regional specificity while failing to establish that the alleged subsidy was limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority.<sup>41</sup>

3.10. China appealed the Panel's findings with respect to Articles 14(d) and 1.1(b) regarding benefit, Article 2.1 regarding specificity, and Article 12.7 regarding the use of "facts available". With respect to Articles 14(d) and 1.1(b), the Appellate Body reversed the Panel's finding<sup>42</sup> upholding the USDOC's rejection of private prices as potential benchmarks in the investigations at issue on the grounds that such prices were distorted. The Appellate Body also reversed the Panel's finding<sup>43</sup> that China had failed to establish that the USDOC had acted inconsistently with the obligations of the United States under Articles 14(d) or 1.1(b) by rejecting in-country private prices in China as benefit benchmarks in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations.<sup>44</sup> The Appellate Body completed the legal analysis and found that the USDOC had acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations, and consequently with Articles 10 and 32.1 of the SCM Agreement.<sup>45</sup>

3.11. With respect to the Panel's findings on the USDOC's determinations of *de facto* specificity under Article 2.1, the Appellate Body upheld the Panel's finding that the USDOC did not act inconsistently with the obligations of the United States under Article 2.1 by analysing specificity exclusively under Article 2.1(c).<sup>46</sup> However, the Appellate Body modified the Panel's interpretation of Article 2.1(c) and, in particular, its interpretation of the concepts of "subsidy programme" and "granting authority", and reversed the Panel's finding that China had not established that the USDOC had acted inconsistently with Article 2.1 by failing to identify a "subsidy programme"<sup>47</sup>, as well as the Panel's finding that China had not established that the USDOC had acted inconsistently with Article 2.1 by failing to identify a "granting authority".<sup>48</sup> The Appellate Body was unable to complete the legal analysis with respect to China's claims under Article 2.1.<sup>49</sup> Finally, with respect to the use of "facts available" by the USDOC, the Appellate Body reversed the Panel's finding that China had not established that the USDOC had acted inconsistently with Article 12.7 by not relying on facts available on the record, but it was unable to complete the analysis in this regard.<sup>50</sup>

3.12. For its part, the United States claimed that the Panel erred in finding that China's panel request, as it related to its claims under Article 12.7 of the SCM Agreement, failed to meet the requirements of Article 6.2 of the DSU. However, the Appellate Body upheld the Panel's finding<sup>51</sup> that China's claims under Article 12.7 were within the Panel's terms of reference.<sup>52</sup>

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<sup>37</sup> Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, Solar Panels, Wind Towers, and Steel Sinks.

<sup>38</sup> Panel Report, para. 8.1.vi.

<sup>39</sup> Pressure Pipe, Line Pipe, Citric Acid, Lawn Groomers, OCTG, Wire Strand, Magnesia Bricks, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels.

<sup>40</sup> Panel Report, para. 8.1.vii.

<sup>41</sup> Panel Report, para. 8.1.viii.

<sup>42</sup> Panel Report, para. 7.195.

<sup>43</sup> Panel Report, paras. 7.197 and 8.1.iv.

<sup>44</sup> Appellate Body Report, para. 5.1.b.ii.

<sup>45</sup> Appellate Body Report, para. 5.1.b.iii.

<sup>46</sup> Appellate Body Report, para. 5.1.c.i.

<sup>47</sup> Appellate Body Report, para. 5.1.c.ii.

<sup>48</sup> Appellate Body Report, para. 5.1.c.iii.

<sup>49</sup> Appellate Body Report, paras. 5.1.c.ii and 5.1.c.iii.

<sup>50</sup> Appellate Body Report, para. 5.1.d.

<sup>51</sup> Panel's Preliminary Ruling, para. 5.1; Panel Report, para. 1.16.

<sup>52</sup> Appellate Body Report, para. 4.28.

3.13. At the hearing in this arbitration, the parties agreed that the United States' implementation efforts must focus on:

- a. the five unappealed findings by the Panel that the United States had acted inconsistently with:
  - i. Article 1.1(a)(1) of the SCM Agreement in 12 countervailing duty investigations<sup>53</sup> because the USDOC found that Chinese SOEs are public bodies based solely on the grounds that these enterprises were (majority) owned, or otherwise controlled, by the Government of China<sup>54</sup>;
  - ii. Article 1.1(a)(1) of the SCM Agreement, on the basis that the USDOC's policy, articulated in the Kitchen Shelving investigation, to presume that a majority government-owned entity is a public body, is inconsistent, as such, with that provision<sup>55</sup>;
  - iii. the last sentence of Article 2.1(c) of the SCM Agreement in 12 countervailing duty investigations<sup>56</sup> because the USDOC failed to take account of the two factors listed therein<sup>57</sup>;
  - iv. Article 2.2 of the SCM Agreement in six countervailing duty investigations<sup>58</sup> because the USDOC made positive determinations of regional specificity while failing to establish that the alleged subsidy was limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority<sup>59</sup>; and
  - v. Article 11.3 of the SCM Agreement in two countervailing duty investigations<sup>60</sup> because the USDOC initiated investigations concerning certain export restraints<sup>61</sup>; and
- b. the Appellate Body's findings that the United States had acted inconsistently with Articles 14(d) and 1.1(b) of the SCM Agreement in four investigations<sup>62</sup> because the USDOC rejected in-country prices in China as benefit benchmarks.<sup>63</sup>

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

3.14. The United States argues that a reasonable period of time for implementation of the recommendations and rulings of the DSB in this dispute is 19 months. The United States asserts that this is the shortest period of time within which the USDOC can modify the 15 countervailing duty determinations at issue and bring them into compliance with the recommendations and rulings of the DSB, in the light of the procedural requirements under US law, the complexity of the issues involved, and the current workload of the USDOC.<sup>64</sup>

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<sup>53</sup> Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels.

<sup>54</sup> Panel Report, paras. 7.75 and 8.1.i.

<sup>55</sup> Panel Report, para. 8.1.ii.

<sup>56</sup> Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels.

<sup>57</sup> Panel Report, para. 8.1.v.

<sup>58</sup> Line Pipe, Thermal Paper, Citric Acid, OCTG, Wire Strand, and Seamless Pipe.

<sup>59</sup> Panel Report, para. 8.1.viii.

<sup>60</sup> Magnesia Bricks and Seamless Pipe.

<sup>61</sup> Panel Report, para. 8.1.ix.

<sup>62</sup> OCTG, Solar Panels, Pressure Pipe, and Line Pipe.

<sup>63</sup> In response to questioning at the hearing, the United States acknowledged that the Appellate Body's interpretation of certain other provisions of the SCM Agreement may also bear upon the implementation obligation in this dispute. See *supra*, para. 3.11 and *infra*, para. 3.45.

<sup>64</sup> United States' submission, paras. 12 and 63.

3.15. In response, China contends that the United States should be granted a period of 10 months to implement the recommendations and rulings of the DSB in this dispute. China argues that the United States has not discharged its burden of demonstrating that its proposed implementation period of 19 months is the "shortest period possible" to implement the recommendations and rulings of the DSB in this dispute.<sup>65</sup>

3.16. This section begins by noting the means of implementation in the present dispute, before considering the parties' arguments relating to certain steps in the implementation process specific to this dispute.

### 3.3.1 Means of implementation

3.17. The United States asserts that it is following the procedure set out in Section 129(b)(1) of the Uruguay Round Agreements Act<sup>66</sup> (URAA) to modify the countervailing duty determinations at issue so as to bring them into compliance with the recommendations and rulings of the DSB.<sup>67</sup> Thus, for the United States, its chosen means of implementation is modification of the measures found to be WTO-inconsistent by remedial administrative action. For all but two of the countervailing duty investigations at issue<sup>68</sup>, China agreed at the hearing that implementation of the recommendations and rulings of the DSB in this dispute can be achieved by modifying the measures at issue through administrative action, i.e. through the process set out in Section 129(b)(1) of the URAA.

3.18. Article 21.3(c) of the DSU states that a Member shall have a reasonable period of time to implement the recommendations and rulings of the DSB "[i]f it is impracticable to comply immediately". While withdrawal may therefore be the preferred means to secure prompt compliance<sup>69</sup>, modification of the inconsistent measure is within the range of permissible actions available to the implementing Member<sup>70</sup>, provided that this is done in the shortest time possible, and that such modification is permissible under the DSB's recommendations and rulings.<sup>71</sup> Thus, the withdrawal of a measure found to be WTO-inconsistent or the modification of such a measure by remedial action are both courses of action available to an implementing Member.<sup>72</sup>

3.19. In this respect, it is also to be noted that the nature of the steps to be taken for implementation has a bearing on the reasonable period of time required to implement the recommendations and rulings of the DSB.<sup>73</sup> Previous awards under Article 21.3(c) have recognized that, when implementation requires legislative action, the reasonable period of time required may be longer than in cases where only administrative action is required.<sup>74</sup> However, there may well be circumstances in which the administrative process may be lengthy and complex.<sup>75</sup> In the present case, the United States contends that, rather than pursuing legislative action, it will use an administrative procedure to modify the countervailing duty determinations at issue so as to bring them into compliance with the recommendations and rulings of the DSB. The reasonable period of time for implementation in this case must thus be determined in the light of the volume and complexity of the administrative action required.

<sup>65</sup> China's submission, paras. 2, 51, and 52; China's opening statement at the hearing.

<sup>66</sup> Public Law No. 103-465, 108 Stat. 4837, codified under *United States Code*, Title 19, Section 3538.

<sup>67</sup> United States' submission, para. 26.

<sup>68</sup> The parties disagree over the means for implementing the Panel's finding that the USDOC acted inconsistently with Article 11.3 of the SCM Agreement by initiating investigations concerning certain export restraints in the Magnesia Bricks and Seamless Pipes investigations. See *infra* paras. 3.21 and 3.47-3.48.

<sup>69</sup> See Awards of the Arbitrators, *Colombia – Ports of Entry (Article 21.3(c))*, para. 77; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 37; *Australia – Salmon (Article 21.3(c))*, para. 30; and *Argentina – Hides and Leather (Article 21.3(c))*, para. 40.

<sup>70</sup> See Awards of the Arbitrators, *Colombia – Ports of Entry (Article 21.3(c))*, para. 77; and *US – COOL (Article 21.3(c))*, para. 77.

<sup>71</sup> See Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 37.

<sup>72</sup> See Awards of the Arbitrators, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 50; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 37; and *US – COOL (Article 21.3(c))*, para. 77.

<sup>73</sup> See Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, para. 26.

<sup>74</sup> See Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, para. 26.

<sup>75</sup> See Awards of the Arbitrators, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 49; and *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 57.

3.20. With respect to the Panel's "as such" finding of inconsistency of the policy articulated in the Kitchen Shelving investigation to presume that a majority government-owned entity is a public body, China submits that implementation should be achievable by renouncing this policy.<sup>76</sup> At the hearing, the United States pointed out that it was still considering the means of implementing this finding by the Panel, and explained that it did not request additional time for the implementation of this "as such" finding beyond the time required for implementation of the "as applied" findings in respect of the USDOC's "public body" determinations. The United States thus clarified that the implementation of this "as such" finding should not be a separate factor in arriving at the reasonable period of time for implementation.<sup>77</sup> China, for its part, agreed that, as long as the implementation of this "as such" finding was not relevant to the determination of the reasonable period of time, as suggested by the United States, it did not take issue with the United States' chosen means of implementation for purposes of this arbitration proceeding. Accordingly, the means for implementing the Panel's "as such" finding of inconsistency with respect to the policy articulated in Kitchen Shelving investigation shall not be taken into account for determining the reasonable period of time in this arbitration. Needless to say, however, the implementation of this finding will have to be effected within the reasonable period of time determined by this Award.

3.21. As noted above, the parties disagree over the means of implementing the Panel's finding that the USDOC acted inconsistently with Article 11.3 of the SCM Agreement by initiating investigations concerning certain export restraints in the Magnesia Bricks and Seamless Pipes investigations. China considers that implementation of this finding can only be achieved by revocation of the relevant component of the countervailing duty margin that the USDOC attributed to those export restraints in its investigations.<sup>78</sup> China explains that, if the very *initiation* of a trade remedy proceeding is found to be WTO-inconsistent, "it must follow that compliance requires revocation of the offending measure, in whole or in part".<sup>79</sup> According to the United States, the Panel's finding of inconsistency concerns the lack of information or insufficient amount of evidence for initiation, and therefore the USDOC is considering its initiation of these investigations in the light of the new information supplied by the US domestic industry. If the USDOC determines that the new information meets the standard for initiation, an investigation will be initiated.<sup>80</sup> The implementation of the Panel's finding of inconsistency under Article 11.3 is considered in the analysis of the reasonable period of time below.

### 3.3.2 Steps of the implementation process

3.22. The implementation process for the countervailing duty investigations at issue in this dispute, as outlined by the United States, consists of the following specific administrative steps: (i) pre-commencement analysis and consultations; (ii) seeking information from interested parties and analysing that information; (iii) verification of the information received; (iv) issuing of preliminary determinations; (v) receipt of case and rebuttal briefs; (vi) issuing of final determinations; (vii) correction of ministerial errors; and (viii) consultations with the US Congress and implementation.<sup>81</sup> In response to questioning at the hearing, China confirmed that it considers that taking these steps is capable of placing the United States in compliance with its WTO obligations. Moreover, the parties agreed that, while the administrative process in principle comprises all of the above steps, the extent to which the investigating authority undertakes verification of the information received lies within its discretion.

3.23. As to the time period for each of these steps, China does not take issue with the time periods proposed by the United States for three actions: (i) issuing of preliminary determinations (2 months); (ii) receipt of case and rebuttal briefs (1 month); and (iii) issuing of final determinations (2 months).<sup>82</sup> China mainly disagrees with, and presents arguments and evidence in respect of, the time periods proposed by the United States for the remaining five steps, namely: (i) pre-commencement analysis and consultations; (ii) seeking information from interested parties

<sup>76</sup> China's submission, para. 9.

<sup>77</sup> United States' response to questioning at the hearing.

<sup>78</sup> China's submission, para. 9 and fn 41 thereto.

<sup>79</sup> China's submission, fn 41 to para. 9 (referring to Award of the Arbitrator, *Japan - DRAMS (Korea)* (Article 21.3(c)), para. 27; and Panel Report, *EC - Fasteners (China)*, para. 8.8).

<sup>80</sup> United States' submission, paras. 54 and 56.

<sup>81</sup> United States' submission, paras. 26-37.

<sup>82</sup> China's submission, para. 27.

and analysing that information; (iii) verification of the information received; (iv) correction of ministerial errors; and (v) consultations with the US Congress and implementation.<sup>83</sup>

3.24. China asserts that, although Sections 129(b)-(d) of the URAA do not impose minimum timeframes for the steps identified above, Section 129(b)(2) of the URAA<sup>84</sup> indicates that the maximum amount of time for the USDOC to issue a redetermination implementing the recommendations and rulings of the DSB in every case is 180 days.<sup>85</sup> The United States disagrees with China's reading of Section 129(b)(2), and asserts that the time period of 180 days specified in that provision refers only to the period between a formal request by the United States Trade Representative (USTR) to the USDOC to issue a new determination, and the issuing of such a determination by the USDOC. According to the United States, however, Sections 129(b)(1), (3), and (4) contemplate additional steps to be taken by the US Government both before and after the step set out in Section 129(b)(2). Accordingly, the 180-day period specified in that provision relates only to one step of a multi-step implementation process.<sup>86</sup>

3.25. China also argues that, under US law, the maximum timeframe for the conduct of an original countervailing duty investigation is 140 days, or 4.5 months, in standard cases, and 205 days, or 7 months, in "extraordinarily complicated" cases.<sup>87</sup> The United States asserts that, under its laws, an original countervailing duty investigation can take up to a maximum of 16 months.<sup>88</sup>

3.26. Turning to the parties' disagreement over the specific steps of the implementation process, it is to be noted, first, that, with respect to pre-commencement analysis and consultations necessary to implement the recommendations and rulings of the DSB, the United States proposes a period of 3.5 months from the date of adoption of the Panel and Appellate Body Reports.<sup>89</sup> China, however, considers that a period of 1 month would be sufficient for this step of the implementation process.<sup>90</sup> China points out that five of the six findings that require implementation action on the part of the United States were made by the Panel and were not appealed. China asserts that, once it was clear that five findings of the Panel would not be appealed, the United States could have begun its pre-commencement analysis and consultations with respect to the majority of the findings requiring implementation even before the simultaneous adoption of the Panel and the Appellate Body Reports by the DSB.<sup>91</sup>

3.27. In response, the United States contends that, pursuant to Article 21.3(c) of the DSU, the reasonable period of time for implementation begins after the adoption of the panel and Appellate Body reports by the DSB, and therefore the obligation to implement arises only after adoption.<sup>92</sup> The United States also asserts that, as a matter of fact, after the Panel Report was issued in this dispute, it began to assess whether or not to appeal the findings of the Panel, and how, in the absence of a successful appeal, implementation would occur.<sup>93</sup> Finally, the United States points out that the "most complicated area of implementation" relates to the Appellate Body's finding of benchmark distortion, as the Appellate Body prescribed a new and different analytical framework than that used by the USDOC in the original investigations. Given that the Appellate Body suggested analysing several new parameters concerning the relevant

<sup>83</sup> China's submission, para. 27.

<sup>84</sup> Section 129(b)(2) of the URAA reads as follows:

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

<sup>85</sup> China's submission, paras. 21-24.

<sup>86</sup> United States' opening statement at the hearing.

<sup>87</sup> China's submission, para. 25 (referring to *United States Code of Federal Regulations*, Title 19, Section 351, Annex 1, and Section 351.205(b)(2)).

<sup>88</sup> United States' opening statement at the hearing (referring to *United States Code*, Title 19, Sections 1671b(g)(2) and 1671d(a)(1); and *United States Code of Federal Regulations*, Title 19, Section 351.210(b)(3)-(4)).

<sup>89</sup> United States' submission, table at p. 12.

<sup>90</sup> China's submission, para. 31.

<sup>91</sup> China's submission, para. 30.

<sup>92</sup> United States' opening statement at the hearing.

<sup>93</sup> United States' opening statement at the hearing.

market, the United States asserts that implementation of this particular finding requires considerable preparation by the USDOC.<sup>94</sup>

3.28. China explained at the hearing that it was not suggesting that the USDOC needed to begin substantive work, such as issuing questionnaires and seeking information, in the investigations at issue prior to adoption of the Panel and Appellate Body Reports, but that the USDOC could have begun its pre-commencement analysis and consultations prior to adoption. In response, the United States acknowledged that Section 129(b)(1) of the URAA allows consultations between the USTR, the administering authority, and Congressional committees to begin "promptly" after a panel or Appellate Body report is issued, and not only after such reports are adopted by the DSB.

3.29. Second, the parties disagree over the time period for seeking information from interested parties and analysis of such information. The United States proposes a period of 6 months for this step of the implementation process in the light of the number of investigations at issue, the complexity of the findings by the Panel and the Appellate Body, as well as the incomplete responses to questionnaires issued by the USDOC.<sup>95</sup> China, on the other hand, submits that this step could be completed within a period of 3 months.<sup>96</sup>

3.30. China states that it has made clear to the United States that it will not be responding to the questionnaires issued by the USDOC in a majority of the investigations.<sup>97</sup> Noting that it is participating and providing information in only six of the investigations at issue, China highlights that all six investigations concern products in the steel industry and that, therefore, much of the information that China has submitted is identical across the investigations.<sup>98</sup> At the hearing, the parties confirmed that China submitted new information in six investigations and that this information was similar in all investigations. China also refers to the original OCTG countervailing duty investigation and points out that the time that the United States is seeking to complete the questionnaire process in the redetermination proceeding under Section 129 is essentially the same as the amount of time that the USDOC took to complete the entire OCTG investigation, even though redetermination proceedings concern only two of the 38 individual subsidy programmes that were at issue in the original investigation.<sup>99</sup> Finally, China asserts that the Government of China has sought only two extensions for responding to the USDOC's questionnaires, and that, therefore, the granting of extensions by the USDOC cannot be a reason for increasing the amount of time required to complete this step.<sup>100</sup>

3.31. For its part, the United States argues that the fact that China will be selectively participating in only six of the investigations at issue is not relevant for the determination of the reasonable period of time for implementation because, even if China were not to submit new information in other investigations, submission of further information by Chinese companies cannot be excluded.<sup>101</sup> The United States also takes issue with China's reliance on the time period for the original OCTG investigation, pointing out that, even though the scope of the redetermination proceedings may be narrower in terms of the subsidy programmes at issue, the analysis required in the redetermination proceedings would be more complex and novel in the light of the new analytical framework and parameters identified by the Appellate Body in arriving at its benchmark distortion finding.<sup>102</sup> At the hearing, the United States explained that, even though the information submitted by China may be the same or similar across the six investigations, the analysis that the USDOC would be required to undertake with respect to such information may be different in the

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<sup>94</sup> United States' opening statement at the hearing.

<sup>95</sup> United States' submission, table at p. 12; United States' opening statement at the hearing.

<sup>96</sup> China's submission, para. 43.

<sup>97</sup> China's submission, para. 35.

<sup>98</sup> China's submission, para. 35.

<sup>99</sup> China's submission, paras. 36-38.

<sup>100</sup> China's submission, paras. 40-41. China states that it has sought one extension in relation to the original public body questionnaire, and one extension for responding to the benchmark questionnaire. With respect to the public body questionnaire, the Government of China was originally given 1 week to respond in 12 investigations, and the USDOC subsequently gave an extension of 1 additional week for the Government of China to respond to the public body questionnaire. With respect to the benchmark questionnaire, the Government of China was given 2 weeks to respond in four investigations, and was subsequently granted a 2-week extension by the USDOC.

<sup>101</sup> United States' opening statement at the hearing.

<sup>102</sup> United States' opening statement at the hearing.



light of the context of each individual determination and issue. The United States further pointed out that, besides the Government of China, other interested parties also sought extensions for responding to the questionnaires issued by the USDOC. Finally, the United States noted that, to the extent that China chooses not to provide the information requested by the USDOC in the investigations at issue, the USDOC will have to rely on the "facts available" to fill any information gap. In response to questioning at the hearing, the United States referred to the Appellate Body's interpretation of Article 12.7 of the SCM Agreement in the underlying dispute and explained that a substantial amount of analysis would be required on the part of the USDOC in cases where China does not provide the requested information.

3.32. Third, the parties' positions with respect to the amount of time required for verification of information diverge substantially. The United States confirmed at the hearing that a period of 2.5 months is required for the verification phase in the investigations at issue. China argues that, because verification is a "discretionary" step under US law, and because the USDOC does not appear to have conducted verifications in the past in relation to the vast majority of its redeterminations under Section 129 of the URAA, time for verification should not be taken into account for determining the reasonable period of time for implementation.<sup>103</sup> Even if verification is considered in determining the reasonable period of time for implementation, China asserts that this phase should take no longer than 2 weeks, given that, in original investigations and administrative reviews conducted by the USDOC, a typical verification lasts between 1 and 2 weeks.<sup>104</sup> Moreover, China highlights that the Government of China has submitted factual information in only six of the 15 countervailing duty investigations at issue and, even for the information that it has submitted, verification is unnecessary as it consists overwhelmingly of laws and regulations of China.<sup>105</sup>

3.33. In response, the United States contends that, although verifications are not required in every investigation, the USDOC still requires time to verify new factual information if circumstances warrant it.<sup>106</sup> The United States highlights that, in the particular circumstances of this dispute, verification is necessary as new information and more complex analysis is required in the light of the complexity of the recommendations and rulings of the DSB.<sup>107</sup> The United States also points out that, under Article 12.6 of the SCM Agreement, an investigating authority possesses the discretion to determine whether verification is necessary.<sup>108</sup> According to the United States, the verification process in the investigations at issue cannot be completed in 2 weeks because it involves: the preparation of verification outlines and questionnaires, which are sent to the parties before verification; travel to China for collection and analysis of data on-site; and preparing and issuing verification reports after returning from China.<sup>109</sup>

3.34. Fourth, the parties disagree over the time period required for noting and correcting ministerial errors, and for consultations with the US Congress, before the final determinations are implemented. The United States proposes a period of 1 month to address ministerial errors in the final determinations, and a period of 1.5 months to consult with the US Congress and to implement the final determinations.<sup>110</sup> China considers that a period of 1.5 months would be sufficient to carry out all of these tasks.<sup>111</sup> Noting that ministerial errors are, by definition, non-substantive clerical errors, China contends that it should not be laborious or time-consuming for the USDOC to address them expeditiously.<sup>112</sup> China also submits that the consultation and implementation processes were consistently concluded less than 2 weeks after the USDOC issued its final determination, and that there is no reason that a comparable time would not suffice in this case.

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<sup>103</sup> China's submission, para. 44 (referring to Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 51).

<sup>104</sup> China's submission, para. 45.

<sup>105</sup> China's submission, para. 46.

<sup>106</sup> United States' opening statement at the hearing.

<sup>107</sup> United States' opening statement at the hearing.

<sup>108</sup> United States' opening statement at the hearing.

<sup>109</sup> United States' opening statement at the hearing.

<sup>110</sup> United States' submission, p. 13.

<sup>111</sup> China's submission, para. 48.

<sup>112</sup> China's submission, para. 48.

3.35. At the hearing, the United States asserted that, whilst not substantive, ministerial errors are more than mere clerical errors, as they also include arithmetic errors. Moreover, before such errors can be addressed and corrected, there may be threshold issues about whether something constitutes a clerical error or a methodological issue. The United States explained that, generally, ministerial errors are addressed within 30 days after a final determination, but that, in the present case, additional time is needed for consultations and implementation because of the number of investigations at issue.

3.36. Fifth, the parties also disagree whether the current workload of the USDOC is a factor that should be taken into account in determining the reasonable period of time for implementation. The United States points out that, in addition to conducting the redeterminations at issue here, the USDOC also needs to continue working on other ongoing anti-dumping and countervailing duty investigations, and that the USDOC is experiencing a 12-year "record high" for original investigations.<sup>113</sup> According to the United States, the 15 investigations at issue are a significant addition to the USDOC's workload, and, even though the USDOC is giving priority to the investigations at issue, statutory deadlines and other legal obligations that the USDOC has in other investigations should also be taken into account.

3.37. China contends that the high workload of the USDOC cannot be a reason for extending the period of time needed for implementation in the light of the fundamental obligations assumed by the Members of the WTO.<sup>114</sup> In this regard, China recalls that the arbitration award in *US – 1916 Act (Article 21.3(c))* considered that factors such as the volume of legislation proposed before the US Congress could not be a reason for extending the reasonable period of time for implementation in that dispute.<sup>115</sup>

### 3.3.3 Legal analysis

3.38. Article 21.3(c) of the DSU lays down the guideline for the arbitrator that the reasonable period of time for implementation should not exceed 15 months from the date of adoption of the panel and/or the Appellate Body reports. The text of Article 21.3(c) further provides that the reasonable period of time may be shorter or longer, depending on the particular circumstances. Having reviewed in the preceding section the positions of the parties concerning the particular circumstances invoked in the present case, it is necessary to assess their bearing, if any, on the reasonable period of time for implementation.

3.39. For the United States, a reasonable period of time of 19 months is justified in the present case on account of the number of countervailing duty investigations at issue, the number of findings by the Panel and the Appellate Body that must be addressed, the complexity of these findings, as well as the current workload of the USDOC.<sup>116</sup> China, for its part, submits that 10 months would be a reasonable period of time for the United States to implement the DSB's recommendations and rulings, arguing that several steps of the implementation process require less time than requested by the United States.<sup>117</sup>

3.40. The first point of contention concerns China's proposition that Section 129(b)(2) of the URAA imposes a maximum timeframe of 180 days for the USDOC to issue a redetermination implementing the recommendations and rulings of the DSB.<sup>118</sup> The parties agree that implementation of the recommendations and rulings of the DSB in the present case may be achieved through the process set out in Section 129 of the URAA. However, they disagree as to whether that provision prescribes a maximum timeframe for the implementation process. Section 129(b) of the URAA reads:

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<sup>113</sup> United States' submission, para. 59.

<sup>114</sup> China's submission, para. 49 (referring to Award of the Arbitrator, *US – 1916 Act (Article 21.3(c))*, para. 38).

<sup>115</sup> China's opening statement at the hearing (referring to Award of the Arbitrator, *US – 1916 Act (Article 21.3(c))*, para. 38).

<sup>116</sup> United States' opening statement at the hearing.

<sup>117</sup> China's submission, para. 27 and table thereto.

<sup>118</sup> China's submission, paras. 21-24.

(b) ACTION BY ADMINISTERING AUTHORITY.

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

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

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

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

3.41. China argues that Section 129(b)(2) of the URAA imposes a maximum timeframe of 180 days for the USDOC to issue a determination implementing the recommendations and rulings of the DSB. According to the text of the provision, the period of 180 days specified in Section 129(b)(2) refers to the period within which, following the receipt of a written request from the USTR, the USDOC shall issue a determination implementing the recommendations and rulings of the DSB. However, Sections 129(b)(1), (3), and (4) set out other actions involving the USTR, the USDOC, and the US Congress, both before and after the step contemplated in Section 129(b)(2). It has not been established, therefore, that the 180-day time period specified in Section 129(b)(2) is, as argued by China, the maximum amount of time for the USDOC to issue a determination implementing the recommendations and rulings of the DSB in every case.

3.42. Second, concerning the size of the dispute insofar as it may be relevant for the determination of the reasonable period of time for implementation, the parties agree that five findings by the Panel and one finding by the Appellate Body give rise to the implementation obligations in the present case. These six findings relate to different aspects of 15 countervailing duty investigations found to be WTO-inconsistent. While these numbers serve to highlight the size of the dispute and the extensive nature of the United States' implementation obligations, the United States clarified at the hearing that it does not seek additional time for the implementation of the Panel's "as such" finding of inconsistency concerning the policy articulated in the Kitchen Shelving investigation in addition to what it has requested for implementing the "as applied" rulings regarding the USDOC's "public body" determinations.<sup>119</sup> Therefore, the "as such" finding of inconsistency concerning the policy articulated in Kitchen Shelving should not be taken into consideration in arriving at the reasonable period of time for implementation. Effectively, therefore, five findings by the Panel and the Appellate Body are relevant for determining the reasonable period of time in this dispute.

3.43. Third, in addition to the number of findings and the investigations at issue, the complexity of several legal interpretations and findings made by the Panel and the Appellate Body are also relevant insofar as they bear upon the United States' implementation process. For example, with respect to the USDOC's "public body" determinations, the Panel found that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement when the USDOC treated SOEs as public bodies based solely on the grounds that these enterprises were (majority) owned, or

<sup>119</sup> United States' response to questioning at the hearing.

otherwise controlled by the Government of China.<sup>120</sup> Therefore, in implementing this finding, the USDOC would be required to consider additional factors and undertake "further inquiry"<sup>121</sup> compared to the original investigations. Similarly, as the parties agreed at the hearing, implementation of the Appellate Body's benchmark distortion finding in four of the investigations at issue would require the USDOC to consider factors other than those considered in the original proceedings when assessing whether the proposed benchmark prices are market determined or distorted by government intervention (e.g. the structure of the relevant market and the behaviour of the entities operating in that market).<sup>122</sup>

3.44. Fourth, regarding the time for pre-commencement analysis and consultations, the United States explained at the hearing that this phase concerns preparatory work by the USDOC, such as determining what information needs to be sought from the interested parties in the light of the recommendations and rulings of the DSB, as well as consultations between the USTR, USDOC, and the US Congress.<sup>123</sup> With respect to these actions, it is worth noting that the United States chose not to appeal five of the Panel's findings of inconsistency. Thus, as of the moment the United States filed its other appeal in this dispute on 27 August 2014, it became clear that these five findings by the Panel would not be appealed and that action to implement these findings would be required on the part of the United States once the Panel and the Appellate Body Reports were adopted.<sup>124</sup> Therefore, with respect to these five findings of inconsistency by the Panel, it seems reasonable to expect that the US authorities entrusted with implementation could begin their preparatory work and consultations once it became clear that the Panel's findings would not be appealed. Indeed, the United States confirmed at the hearing that some preparatory work for the implementation of these findings was undertaken prior to the adoption of the Panel and Appellate Body Reports by the DSB on 16 January 2015. At the same time, the text of the DSU makes it clear that formal steps for implementing the recommendations and rulings of the DSB need to be taken only after the adoption of the panel and Appellate Body reports.

3.45. Fifth, insofar as the time for seeking information from interested parties and analysing that information is concerned, China confirmed that it will be providing further information in only six countervailing duty investigations at issue, all concerning the steel industry. At the hearing, the parties agreed that the information submitted by the Government of China across the six investigations is similar, if not the same. On the one hand, the fact that the Government of China will be providing new information in only six investigations, as well as the similarity of the information submitted by it across these investigations, weighs in favour of a shorter period of time for analysing such information. On the other hand, there is merit in the United States' argument that, besides the Government of China, other interested parties may provide additional information; as well as in the point that, though the information submitted by the Government of China may be similar, the analysis of such information may be different in the light of the specific determination that needs to be made in each investigation. Furthermore, although China has stated that it had sought only two extensions to respond to the questionnaires issued by the USDOC, the United States confirmed at the hearing that other interested parties have also sought extensions of the deadlines for responding to the USDOC's questionnaires. Moreover, in the investigations where China will not be providing the information requested by the USDOC, the USDOC will have to rely on the "facts available" to fill any information gap. Though China argues that "past experience indicates that the USDOC's analysis when it resorts to 'facts available' will likely be limited"<sup>125</sup>, at the hearing, the United States explained that, in view of the Appellate Body's interpretation of Article 12.7 of the SCM Agreement, a substantial amount of additional analysis would be required on the part of the USDOC in cases where China does not provide the requested information.

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<sup>120</sup> Panel Report, para. 7.75.

<sup>121</sup> Panel Report, para. 7.72.

<sup>122</sup> Appellate Body Report, para. 4.62. Moreover, it is to be noted that, as acknowledged by the United States at the hearing, interpretations by the Appellate Body of certain other provisions of the SCM Agreement may also bear upon the implementation process and, consequently, upon the reasonable period of time for implementation. (See *supra*, fn 65 and *infra*, para. 3.45)

<sup>123</sup> See also United States' submission, para. 26.

<sup>124</sup> It is also to be noted in this regard that Section 129(b)(1) of the URAA states that consultations between the USTR, USDOC, and the US Congress should begin "promptly" after a panel or Appellate Body report is issued, and not just after the adoption of such reports by the DSB. The fact that US law provides for such flexibility was confirmed by the United States at the hearing.

<sup>125</sup> China's submission, fn 43 to para. 35.

3.46. Sixth, with respect to the time required for verification of the information received by the USDOC, and regardless of whether or not the USDOC is required under US law to conduct verification in all of the investigations at issue, Article 12.5 of the SCM Agreement requires that investigating authorities "*shall ... satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties*".<sup>126</sup> In the present dispute, given that the USDOC may have to examine factors other than those considered by it in its original analyses in the light of the findings by the Panel and the Appellate Body, it may seek and receive new information from the Government of China or other interested parties for which verification may be warranted. With respect to the time period for the identification and correction of ministerial errors, as well as consulting with the US Congress, these two steps could reasonably be carried out simultaneously for some investigations where the correction of the ministerial errors would not affect the substance of the determination.

3.47. Seventh, the parties also disagree over the means to implement the Panel's finding of inconsistency relating to the initiation of investigations concerning certain export restraints in the Magnesia Bricks and Seamless Pipe investigations. China asserts that withdrawal of the inconsistent measures is the only means to implement the Panel's finding, while the United States asserts that modification of the measure can also bring them into compliance with the Panel's finding. As a threshold matter, an arbitrator may consider whether the implementing action falls within the range of permissible actions that can be taken in order to implement the DSB's recommendations and rulings.<sup>127</sup> Although the arbitrator's mandate does not include reviewing the consistency with WTO law of the measure taken to comply with the recommendations and rulings of the DSB, in determining the reasonable period of time for implementation, the means of implementation available to the Member concerned is necessarily a relevant consideration.<sup>128</sup> Moreover, the task of the arbitrator includes scrutinizing the actions an implementing Member takes towards implementation during the period after the adoption of a panel and/or Appellate Body report, and prior to any arbitration proceeding.<sup>129</sup> If the arbitrator perceives that the implementing Member has not adequately begun implementation so as to effect "prompt compliance", as set out in Article 21.1 of the DSU, this must be taken into account in determining the reasonable period of time for implementation.

3.48. Even assuming that, as the United States asserts, modification of the determinations at issue falls within the range of permissible actions to implement the Panel's finding of inconsistency concerning export restraints, it is to be noted that the United States confirmed at the hearing that, at that time, the USDOC was still analysing the new information supplied by the United States' domestic industry to assess whether it meets the standard of initiation.<sup>130</sup> If the USDOC determines that the new information on the administrative record is sufficient for initiation, the United States submits that an investigation will be initiated, which will include all the component steps of the redetermination process identified in paragraph 3.22. above.<sup>131</sup> It has been more than 7 months since the adoption of the Panel and Appellate Body Reports in this dispute. In this period, the USDOC received new information from the US domestic industry on 11 May 2015.<sup>132</sup> Nearly 4 months after receiving this information, the USDOC has not reached a decision on whether modification of the measures at issue is possible. This shows that the implementation process in the Magnesia Bricks and Seamless Pipes investigations, as it relates to the Panel's finding concerning export restraints, could reasonably have proceeded further than it has. Consequently, the implementation process in these investigations should not be considered as a reason for extending the reasonable period of time for implementation.

3.49. Finally, with respect to the relevance of the workload of the USDOC, in view of the fundamental obligations assumed by the Members of the WTO<sup>133</sup>, the current workload of the USDOC should not be considered as relevant to the determination of the reasonable period of time for implementation in this dispute. While the United States' assertion that the USDOC is

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<sup>126</sup> Emphasis added.

<sup>127</sup> Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27.

<sup>128</sup> Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27.

<sup>129</sup> Award of the Arbitrator, *US–Section 110(5) Copyright Act (Article 21.3(c))*, para. 46.

<sup>130</sup> United States' submission, paras. 54 and 56.

<sup>131</sup> United States' submission, paras. 54 and 56.

<sup>132</sup> Exhibit USA-15.

<sup>133</sup> Award of the Arbitrator, *US – 1916 Act (Article 21.3(c))*, para. 38.

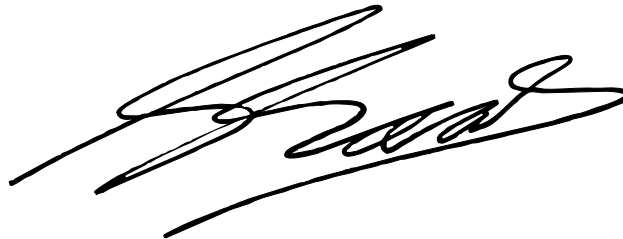
experiencing a 12-year "record high" for original investigations<sup>134</sup>, and that therefore the 15 investigations at issue are a significant addition to the USDOC's workload elicit sympathy, it is to be recalled that the implementing Member is expected to use all available flexibilities within its legal system to ensure "prompt compliance" with the DSB's recommendations and rulings in accordance with Article 21 of the DSU.<sup>135</sup> As the United States confirmed at the hearing, prioritizing these investigations reflects the exercise of a flexibility that is available to the USDOC, and which it is expected to utilize.

3.50. In conclusion, in the light of the above considerations relating to the quantitative and qualitative aspects of implementation in the present case, and the margin of flexibility available to the implementing Member within its legal system, the Arbitrator considers that the particular circumstances of this case justify a reasonable period of time for implementation close to the 15-month guideline laid down in Article 21.3(c) of the DSU, but do not justify a longer period.

#### 4 AWARD

4.1. In the light of the foregoing considerations, the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this dispute is 14 months and 16 days from 16 January 2015, 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 1 April 2016.

Signed in the original at Geneva this 7th day of October 2015 by:



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Georges M. Abi-Saab  
Arbitrator

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<sup>134</sup> United States' submission, para. 59.

<sup>135</sup> Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 73.

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

1. At its meeting on January 16, 2015, the Dispute Settlement Body (DSB) adopted its recommendations and rulings in United States – Countervailing Duty Measures on Certain Products from China (DS437). Pursuant to Article 21.3 of the DSU, the United States circulated a letter to the DSB on February 13, 2015, stating that it intends to comply with the DSB's recommendations and rulings in a manner that respects its WTO obligations, and that it would need a reasonable period of time (RPT) to do so. The United States engaged in discussions with China in an effort to reach agreement on the RPT, but the parties were unable to reach agreement and China requested arbitration pursuant to Article 21.3(b) of the DSU.

2. The amount of time that a Member requires for implementation of DSB recommendations and rulings depends on the particular facts and circumstances of the dispute, including the scope of the recommendations and rulings and the types of procedures required under the Member's domestic laws to make the necessary changes in the measures at issue. As a prior arbitrator found, "what constitutes a reasonable period ... should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation." Specific circumstances include: (1) the legal form of implementation; (2) the technical complexity of the measure the Member must draft, adopt, and implement; and (3) the period of time in which the implementing Member can achieve that proposed legal form of implementation in accordance with its system of government.

3. In this arbitration, a specific circumstance of overarching import is that this dispute is one of the most extensive in the history of the World Trade Organization. As the complaining party, China decided how to structure this dispute, including how many countervailing duty (CVD) investigations to include in this single dispute and which claims to file. China sought findings on multiple claims with respect to each of 22 separate investigations. The panel and Appellate Body appropriately rejected many of China's claims. Nonetheless, the findings in the panel and Appellate Body reports have resulted in an extensive, and arguably unprecedented, number of DSB recommendations and rulings.

4. As the Arbitrator considers the time required for the United States Department of Commerce (Commerce) to address these rulings, a key factor is that neither the Appellate Body nor the Panel found with respect to any of the CVD investigations at issue that the subject imports were not subsidized. Instead, a fact-intensive inquiry is necessary to determine whether and how the determinations in the 15 investigations need to be modified to implement the DSB recommendations and rulings with respect to each obligation at issue. In particular, implementation requires a reexamination of existing record evidence, the possible solicitation and review of new information, and re-examination of the disputed issues according to the guidance set out in the specific findings in the panel and Appellate Body reports.

5. The RPT determined by the arbitrator should be of sufficient length to allow the United States to implement all of the various DSB recommendations and rulings in a manner consistent with the DSB findings. This result would preserve the rights of the United States to have a reasonable time for compliance and to impose CVD duties where appropriate, while at the same time would preserve China's rights, and enforce obligations on the United States, to ensure that CVD duties are imposed only in accordance with WTO rules. On the other hand, if the RPT is too short to allow for effective implementation, the likelihood of a "positive solution" to the dispute would be reduced.

6. Any single investigation in this dispute requires a multi-step process to ensure that it meets both WTO rules and U.S. domestic legal obligations. The United States has already completed many of the necessary steps to bring these 15 measures into compliance. However, although the United States has made meaningful progress on implementation, the bulk of the work required for implementation remains to be completed. Questionnaire responses need to be reviewed, and supplementary questionnaires will need to be issued. Verifications of the data, as needed, will need to be completed and Commerce will need to reconsider, where appropriate, redo its calculations from the original final determinations. While any single investigation requires considerable time

and effort, coordinating the modification of 15 investigations, each with diverse fact patterns and parties will require a significant demand on the authority's time and resources.

7. Article 21.3(c) addresses situations such as this one where the implementation obligations require many steps and require an exceptional period of time for completion. Article 21.3(c) states that in general the reasonable period of time should not exceed 15 months, but "that time may be shorter or longer, depending on the particular circumstances" of the dispute.

8. The United States is taking the necessary administrative actions to bring these 15 investigations into compliance with the DSB's recommendations and rulings. The number of investigations in this dispute, the volume and complexity of the rulings and recommendations, and Commerce's current workload should all be considered in determining the appropriate RPT to secure a "positive solution" for this dispute. For the reasons outlined in this submission, an RPT of at least 19 months is a reasonable period of time for implementation in this dispute.



**ANNEX B****EXECUTIVE SUMMARY OF CHINA'S SUBMISSION**

1. The United States argues in its submission that the reasonable period of time for it to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in the dispute *US – Countervailing Measures (China)* should be 19 months from the adoption of the panel and Appellate Body reports. The United States maintains that this period, which is substantially longer than the recommended guideline in Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), is necessitated by domestic legal requirements, the alleged complexity of the issues involved, and the USDOC's current workload. In China's view, however, these are not "particular circumstances" that justify a reasonable period of time ("RPT") for implementation longer than the 15-month guideline provided in Article 21.3(c) of the DSU. The United States has failed to establish that a reasonable period of time longer than 10 months is required to implement the recommendations and rulings of the DSB in this dispute.

2. Based on the language in Article 21 of the DSU, it is well established that any "reasonable period of time" under Article 21.3(c) must be "the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB".<sup>1</sup> The implementing Member is expected to use whatever flexibility is available within its legal system to promptly implement those recommendations and rulings.<sup>2</sup>

3. In this dispute, the recommendations and rulings of the DSB are limited to particular aspects of the USDOC's analysis in specific countervailing duty determinations. Thus, at issue in this arbitration is the "shortest period possible" for the United States to modify the relevant determinations pursuant to the procedures outlined in Sections 129(b)-(d) of the Uruguay Round Agreements Act ("URAA").

4. China notes that pursuant to Sections 129(b)-(d) of the URAA, the USDOC has considerable flexibility to implement the recommendations and rulings of the DSB in a much shorter period than it has proposed. This is evident from the absence of mandatory minimum timeframes for any of the component steps for a redetermination.<sup>3</sup> In fact, the only timeframe that appears in Sections 129(b)-(d) of the URAA is the *maximum* timeframe in Section 129(b)(2), which provides that the administering authority "shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body."<sup>4</sup> This 180-day deadline in Section 129(b)(2) is undoubtedly an indication of the maximum amount of time that the *U.S. government* thought would be necessary for the USDOC *in every case* to issue a determination not inconsistent with the findings of a panel or the Appellate Body.

5. In its written submission, the United States explains that it needs 19 months in order to come into compliance with the recommendations and rulings of the DSB. This is more than three times the 180-day timeframe in Section 129(b)(2) of the URAA, and more than four times the normal timeframe for a standard USDOC countervailing duty investigation.<sup>5</sup> The United States seeks to justify the lengthy RPT that it proposes by reference to a breakdown of what it considers

<sup>1</sup> See, e.g. Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 26.

<sup>2</sup> See, e.g. Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 65.

<sup>3</sup> See, e.g. Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 83; Award of the Arbitrator, *China – GOES (Article 21.3(c))*, para. 3.47.

<sup>4</sup> See Award of the Arbitrator, *US – Hot Rolled Steel (Article 21.3(c))*, para. 34.

<sup>5</sup> See 19 CFR §§ 351.201-351.211.

to be the necessary steps in the Section 129 proceedings. In China's view, certain of the time periods proposed by the United States are both unsupported and unsupportable. For example:

- The United States maintains that 3.5 months is the "shortest period possible" for USTR to consult with Congress and the USDOC, and for "pre-commencement analysis preparation".<sup>6</sup> However, China notes that the final panel report in this dispute, containing five of the six relevant findings, was issued to the parties in May 2014. Accordingly, it is unclear to China why the United States needed an additional 3.5 months after the report was adopted by the DSB in January 2015 to engage in "pre-commencement analysis preparation".<sup>7</sup>
- The United States maintains that six months is the "shortest period possible" for the USDOC to collect and analyse the information from interested parties, arguing that this dispute is "one of the most extensive in the history of the World Trade Organization".<sup>8</sup> However, the United States fails to account for the fact that China has made clear that it will not be responding to the USDOC's questionnaires in the majority of the relevant investigations, meaning that there will be no new information for the USDOC to analyse. And while the United States devotes a substantial portion of its submission to the complexity of the analysis that the USDOC confronts in relation to each of the relevant issues, the United States fails to acknowledge that in an ordinary countervailing duty investigation, an examination of these issues would encompass a mere fraction of the USDOC's overall analysis.

6. The United States has the burden of proof as the implementing Member to demonstrate that its proposed RPT is the "shortest period possible" for it to implement the recommendations and rulings of the DSB. For the reasons discussed above, China does not believe that the United States has come close to meeting its burden in relation to its proposed RPT of 19 months.

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<sup>6</sup> See U.S. submission, paras. 26-27, 37.

<sup>7</sup> See, e.g. Award of the Arbitrator, *China – GOES (Article 21.3(c))*, para. 3.37.

<sup>8</sup> See U.S. submission, p. 12 ("DS437 – Approximate 19 Month Case Calendar") and para. 4