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

Recourse to Article 21.3(c) of the DSU

(DS414)

WRITTEN SUBMISSION OF
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I. INTRODUCTION

1. At its meeting on November 16, 2012, the Dispute Settlement Body ("DSB") adopted its recommendations and rulings in the dispute *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States* (DS414), finding that China's measures regarding antidumping and countervailing duties on grain oriented flat-rolled steel ("GOES") from the United States breached numerous provisions of the *Agreement on Subsidies and Countervailing Measures* ("the SCM Agreement") and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("the AD Agreement"). This arbitration concerns the reasonable period of time ("RPT") for China to bring its measures into conformity with China's obligations under the AD and SCM Agreements.[1]

2. In its written submission, China states that it plans to bring its measures into compliance by performing an administrative reconsideration of the order on imports of GOES from the United States but that currently, China's investigating authority, MOFCOM, does not have "clear" legal authority to do so. China states that it would like to create this legal authority by drafting and adopting a new administrative rule. Moreover, China argues that the RPT should take into account both the time necessary to engage in this lengthy administrative rulemaking procedure and the time necessary to subsequently perform an administrative reconsideration according to the procedural steps of this new yet-to-be-determined rule.

3. The United States fundamentally disagrees with China's characterization of its options for implementation. China's measures are administrative in nature; neither the Panel nor the Appellate Body examined, nor did the DSB make findings with respect to, China's legislative regime for imposing countervailing or antidumping duties. To comply, China may either make the necessary modifications to these measures (which the United States expects will demonstrate that neither antidumping nor countervailing duties are justified), or simply withdraw them immediately. It is not entitled to an additional period of time within the RPT for the purpose of making broader changes to its domestic legal regime, merely because it wishes to obtain greater legal certainty for its preferred compliance option under its domestic law.

4. The role of the arbitrator in awarding an RPT is to determine the shortest period of time for implementation within a Member's domestic system. If an administrative reconsideration procedure is not currently available under China's domestic system, the RPT should be determined based on the time necessary for China to perform a procedure that is: namely, the immediate revocation of the duties on imports of GOES from the United States.

5. In other words, the options presented as a result of China's explanations are either: (1) determine an RPT of up to one month, which is consistent with an immediate revocation of the measures, or (2) if China concedes that it has domestic legal authority for MOFCOM to redetermine and revise the existing duties, determine an RPT of four months and one week on the basis of a modification of the measures, consistent with examples of past administrative reconsiderations by MOFCOM.

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[1] Article 21.3(c) of the DSU provides that, in the absence of an agreement between the parties on a period of time, the reasonable period of time shall be determined "through binding arbitration within 90 days after the date of adoption of the recommendations and rulings."

6. The latter RPT of four months and one week is more than sufficient based on the shortest time possible for China to follow the procedures as currently set out under its antidumping and countervailing duty regulations. MOFCOM has performed administrative re-determinations in at least three previous instances, and it completed them in less than 5 weeks, 2 months, and 4 months, respectively and China has not provided any evidence to suggest that a redetermination should take longer in the facts and circumstances presented in this dispute.

7. The United States asks the arbitrator to find that the RPT would have been one month, consistent with China's assertion that it has no clear legal authority to revise the duties, and therefore its only existing option was revocation; or four months and one week, if China concedes that it could use an existing administrative reconsideration procedure.

II. A PERIOD OF NO MORE THAN 1 MONTH, OR IN THE ALTERNATIVE, 4 MONTHS AND 1 WEEK, IS A REASONABLE PERIOD OF TIME FOR CHINA TO COMPLY WITH ITS WTO OBLIGATIONS

A. "Reasonable Period of Time" Under Article 21.3(c) Requires Consideration of All Particular Circumstances of the Case

8. Article 21.3(c) of the DSU provides for the arbitrator to determine the reasonable period of time a Member has to implement the recommendations and rulings of the DSB.[2] As China notes in its written submission, Members have a "measure of discretion in choosing" the method of implementation.[3] However, the RPT's length cannot be determined in isolation from the intended means of implementation[4] and previous arbitrators have been clear: Members do not have an unfettered right to choose any method of implementation.[5] The RPT must relate to the period of time necessary to make changes to the measure subject to the DSB's recommendations and rulings. If a statute is involved, for instance, legislative change would be appropriate but where there are no recommendations and rulings concerning a statute, the period for legislative change in a Member's legal system is not relevant. In the instant dispute, China must take action

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[2] *Chile – Alcohol (Article 21.3(c))*, para. 35; *Canada – Pharmaceuticals (Article 21.3(c))*, para. 41.

[3] *Brazil – Tyres (Article 21.3(c))*, para. 47; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 69.

[4] *Id.*

[5] *Brazil – Tyres (Article 21.3(c))*, para. 48, quoting *EC – Sugar (Article 21.3(c))*, para. 69. ("In considering what actions a Member will take to bring its measures into compliance, an arbitrator must first 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." See also *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27 (*EC – Chicken Cuts (Article 21.3(c))*, para. 56).

to bring its anti-dumping and countervailing duties on imports of GOES from the United States into compliance. The findings of the DSB in this respect do not extend to China's broader legislative or legal authority for conducting administrative re-considerations.

9. Moreover, the chosen method "must be capable of placing the implementing Member in compliance within a reasonable period of time in accordance with the guidelines contained in Article 21.3(c)."[6] In determining the length of the RPT, DSU Article 21.3(c) states that "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" but that this "time may be shorter or longer, depending on the particular circumstances."[7]

10. "Particular circumstances" identified in previous awards as relevant to the arbitrator's determination of the reasonable period of time 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 the proposed legal form of implementation in accordance with its system of government.[8] In this context, it is also important to note that an implementing Member is expected to use the flexibility available within its domestic legal system to implement the recommendations and rulings of the DSB in the shortest time possible.[9] Read within the context of the agreement, including Articles 21.2, 21.3, and 3.3 of the DSU, previous arbitrators have stated that Article 21.3(c) also stands for the proposition that immediate compliance is to be preferred.[10]

11. The Member seeking the RPT has the burden of establishing that the proposed period is the "shortest possible" within its domestic legal system to implement the recommendations and

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[6] *U.S. – Zeroing II (Article 21.3(c))*, para. 42.

[7] Article 21.3(c) of the DSU.

[8] *Canada – Pharmaceuticals (Article 21.3(c))*, paras. 48-51.

[9] *Brazil – Tyres (Article 21.3(c))*, para. 48. *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25 (referring to *EC – Chicken Cuts (Article 21.3(c))*, para. 49, in turn referring to *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).

[10] *Canada – Pharmaceuticals (Article 21.3(c))*

rulings of the DSB.[11] Failing that, it is ultimately for the arbitrator to determine the "shortest period possible" for implementation, on the basis of evidence presented by all parties.[12]

12. In the instant situation, an examination of the specific circumstances favor an RPT of no more than one month for immediate revocation of the duties or, in the alternative, no more than 4 months and one week for China to modify its measures.

B. Proposed Changes to China's AD and CVD Regulations Are Not Relevant for Determining the RPT

13. While China claims that it should be allotted additional time to enable it to modify its AD and CVD rules in order to introduce a new process for reconsidering orders that are the subject of WTO findings, there is no basis for the arbitrator to lengthen the RPT for this purpose.

14. In this dispute, the Panel found that in initiating its investigation and applying antidumping and countervailing duties on imports of GOES from the United States, China breached:

- Article 11.3 of the SCM Agreement, as China initiated countervailing duty investigations with respect to several alleged programs based on insufficient evidence.
- Articles 6.5.1 of the AD Agreement, and 12.4.1 of the SCM Agreement, because China failed to provide non-confidential summaries of Chinese submissions containing confidential information.
- Article 12.7 of the SCM Agreement, because China applied facts available to U.S. companies in a manner unsupported by the facts.
- Articles 12.7 of the SCM Agreement and 6.8 of the AD Agreement, as well as Paragraph 1 of Annex II of the AD Agreement, because China applied facts available to "all other" U.S. companies without a factual basis.
- Articles 12.8 of the SCM Agreement and 6.9 of the AD Agreement, because China failed to disclose essential facts with respect its calculation of the "all others" subsidy rate and dumping margin.

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[11] *U.S. – Zeroing II (Article 21.3(c))*, para. 43.

[12] *Brazil – Tyres (Article 21.3(c))*, para. 51 (referring to *U.S. – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 44).

- Articles 12.2 and 12.2.2 of the AD Agreement, and 22.3 and 22.5 of the SCM Agreement, because China failed to explain its calculation of the "all others" subsidy rate and dumping margin.

- Articles 15.1, 15.2, 12.8 and 22.5 of the SCM Agreement and 3.1, 3.2, 6.9 and 12.2.2 of the AD Agreement, because China's findings regarding the price effects of subject imports were defective, and due to deficiencies in related to China's essential facts disclosure and public notice and explanation.

- Articles 15.1, 15.5, 12.8 and 22.5 of the SCM Agreement and 3.1, 3.5, 6.9 and 12.2.2 of the AD Agreement, as China's finding that subject imports caused material injury to its domestic industry was flawed, and due to deficiencies in China's essential facts disclosure and public notice and explanation.

- Article 10 of the SCM Agreement and Article 1 of the SD Agreement, as a consequence of the foregoing violations of these Agreements.

15. On July 20, 2012, China appealed certain aspects of the Panel's analysis related to injury but did not appeal the Panel's other findings. The Appellate Body rejected all of China's claims[13] and, on November 16, 2012, the DSB adopted the recommendations and rulings in this dispute, concluding that China breached its WTO commitments in connection with the initiation, investigation, and imposition of the antidumping and countervailing duties on imports of GOES from the United States.

16. The DSB did not adopt any findings with respect to China's broader legislative or regulatory system – the legal authority for China to modify its antidumping and countervailing duties in response to DSB recommendations and rulings simply was not at issue in this dispute. Rather, the DSB's recommendations and rulings were limited to the particular measures of China with respect to antidumping and countervailing duties on imports of GOES from the United States. Thus, at issue in this arbitration is the time necessary for China to conform those measures.

17. On several occasions, arbitrators have declined to determine a longer RPT in order to accommodate proposals by Members of a method of compliance not necessary to effect changes to the type of measure found to be in breach of that Member's WTO obligations.[14] In *Argentina – Hides*, for example, the arbitrator was unconvinced by Argentina's argument that implementation would require the adoption of new legislation in addition to regulatory amendment. The arbitrator found that the RPT should be based on the time necessary for regulatory amendment alone as the findings only pertained to Argentina's offending regulation.

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[13] *China – GOES (AB)*, para. 268.

[14] *Colombia – Ports (Article 21.3(c))*; *EC – Chicken Cuts (Article 21.3(c))*.

The arbitrator further noted that Argentina was free to pursue legislative change as well but that with respect to the calculation of the RPT, a legislative amendment fell outside the scope of the recommendations and rulings of the DSB; Argentina's obligation with respect to implementation was "much more modest and specific in scope."[15]

18. China itself acknowledges that the broad rulemaking it proposes goes far beyond addressing the particular measures at issue in this dispute, noting that "[a]ny administrative action pursuant to these rules necessary to implement the WTO decisions involved in [this] dispute *(and any future disputes)* can only start after the new MOFCOM rule specific to implementation have been published and have become effective in accordance with Chinese law" (emphasis added).[16] Here, as in *Argentina – Hides*, nothing prevents China from undertaking a more ambitious legislative endeavor with respect to its trade remedies laws either in parallel with or separate from its efforts to comply in the instant case. China, cannot, however, ask the arbitrator to take into account the time necessary to undertake this endeavor, where the recommendations and rulings of the DSB were specific to only the measures concerning a single product – imports of GOES.

C. The Particular Circumstances of this Case Support an RPT of 1 Month for Immediate Withrdrawal of the Duties or, At Most, 4 Months and 1 Week for Modification

19. Consistent with China's assertion that there is no clear legal authority for it to revise the duties, China should revoke the measures immediately to bring itself into compliance with the DSB's recommendations and rulings. If, however, China concedes that it could use an existing administrative reconsideration procedure, the RPT should be based on the period of time to perform such a procedure, no more than four months and one week.

1. China Can Revoke the Measures Immediately

20. China has the ability to bring itself into compliance immediately by revoking the offending order; it does not need to invent an entirely new procedure to do so. The United States notes that the crux of China's argument is its insistence that MOFCOM does not possess the specific legal authority to modify its measures as a result of adverse recommendations and rulings by the DSB.[17] It is notable, however, that China does not definitively assert that MOFCOM is proscribed from conducting a reexamination absent additional rules. It appears, instead, that China would prefer greater "clarity" on this subject before MOFCOM does so.

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[15] *Argentina – Hides (Article 21.3(c))*.

[16] China's written submission, para. 47 (emphasis added).

[17] *Id.* paras. 10, 47, etc.

China's desire to reduce its risk of domestic litigation is not the same thing as its authority to take action.

21. No elaborate administrative process is needed to revoke the duties immediately. Whether through administrative or other action under China's legal system, all that is needed is a termination of the imposition of the WTO-inconsistent duties on imports. In fact, revocation is consistent with the principle of "prompt" compliance under Article 3.3 of the DSU. Article 3.7 of the DSU further provides that the first objective of the dispute settlement mechanism is usually to secure the withdraw of the measure.[18] China has the ability in its domestic system to revoke the offending order; it does not need to invent an entirely new procedure to do so.

22. The United States notes that as part of its obligations under Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*, China committed to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." The annexed Agreements include the DSU and, in particular, the DSU provisions regarding prompt compliance with the recommendations and rulings of the DSB. The United States presumes that China is not indicating that it is barred under its domestic law from complying with DSB recommendations and rulings.[19] Since the United States understands that China is not stating that it considers itself to be in breach of Article XVI:4, the United States understands that China necessarily takes the view that to the extent it is unable to modify or revise its measures to comply with DSB recommendations and rulings, it is prepared to withdraw them. Indeed, under Article 3.7 of the DSU, where parties to a dispute are unable to reach a mutually acceptable solution, "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned."

23. To the extent China's concerns are that it would like more "clear" legal authority that it may modify or revise its measures through administrative action by MOFCOM in response to

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[18] Article 3.7 of the DSU; *Brazil – Tyres (Article 21.3(c))*, para. 57.

[19] Indeed, the United States notes that China, in other contexts, has argued that the failure to provide legal authority to act consistently with WTO obligations is itself a breach of a Member's WTO obligations. *See* China's Request for the establishment of a Panel in *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/2, where China states:

> "Finally, the measures at issue include, as an omission, the failure of the United States to provide the US Department of Commerce ("USDOC") with legal authority to identify and avoid the double remedies that are likely to result when the USDOC applies countervailing duties in conjunction with anti-dumping duties determined in accordance with the US non-market economy methodology (hereinafter, "double remedies"), in respect of investigations or periodic reviews initiated on or between 20 November 2006 and 13 March 2012."

DSB recommendations and rulings, not only does China offer no explanation for why it failed to correct or address this purported gap in its domestic administrative regime when it acceded to the WTO, China does not explain why it did not take steps to address it in the intervening 12 years, including two and one-half years ago, when China's trade remedy actions were first challenged by a WTO Member; in March 2012, when the interim findings were issued in the GOES dispute indicating that China's order was inconsistent with its obligations; or in July 2012 when China opted not to appeal many of those findings and therefore knew it would need to address them.

24. The United States finds surprising China's apparent position that it delegated administrative authority to MOFCOM to apply antidumping and countervailing duties on imports, but not the authority to modify or revise those duties on imports found to be WTO-inconsistent. If China cannot revoke the measures administratively via MOFCOM, it can do so using other authority. China may not delay implementation in this dispute merely because for 12 years it chose not to provide itself greater "clarity." Accordingly, if China considers that it lacks sufficient authority to revise MOFCOM's determination, the particular circumstances support an RPT of no more than one month to account for the immediate withdrawal of the duty on imports of GOES from the United States.

2. Administrative Reconsideration is Available Under China's Current Domestic System

25. In addition to failing to address the possibility of withdrawal, United States notes that China does not definitively assert that MOFCOM is proscribed from conducting a reexamination absent additional rules.[20] On the contrary, the evidence suggests that MOFCOM does in fact have the ability to reexamine duties, including in response to adverse WTO recommendations and rulings, and, as it has done several times in the past, four months and one week would be more than enough time in which to reexamine the offending order.

a. China's Existing Procedures Provide MOFCOM with the Regulatory Authority to Modify the Measures

26. While China argues that it is "difficult to find the clear legal authority for MOFCOM to take specific actions" because its regulations do not expressly address how to implement WTO recommendations and rulings,[21] China also outlines a number of provisions touching on administrative reconsideration in both its *Regulations of the People's Republic of China on Anti-Dumping ("AD Regulation"*) and *Regulations of the People's Republic of China on Countervailing Measures ("CVD Regulation")*, none of which appear to preclude it from reconsidering a determination based on adverse DSB recommendations and rulings.

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[20] It appears instead that China would prefer greater "clarity" on this subject before MOFCOM does so. *See* China's written submission, para. 34.

[21] China's written submission, para. 29.

27. Specifically, China states that its current *AD Regulation* and *CVD Regulation* "do not provide any specific implementation authority with respect to WTO decisions"[22] and that, "under these trade remedies regulations, an authority, such as MOFCOM has no legal right to begin a procedure or take some action unless it is authorized by the regulations themselves."[23] What China does not say, however, is that these provisions clearly prevent MOFCOM from performing an administrative reconsideration altogether. In fact, China itself admits that this is an open question. For example, in describing the results of the legal analysis carried out by MOFCOM's Department of Treaty and Law ("DTL"), China states that "the *AD Regulation* and the *CVD Regulation* were not clear, either with regard to whether MOFCOM in fact had legal authority to implement and how any such implementation could be conducted."[24] According to China's own legal analysis, at worst, MOFCOM's legal authority to perform an administrative reconsideration is not perfectly clear, which is different than a prohibition.[25]

28. Further, China claims that Articles 47 of the *AD Regulation* apply in the context of new shippers, Article 48 of the *AD Regulation* and Article 47 of the *CVD Regulation* address sunset reviews, Article 49 of the *AD Regulation* and Article 48 of *CVD Regulation* address interim reviews, and that Article 50 of the *AD Regulation* and Article 49 of the *CVD Regulation* provide MOFCOM and the Customs Tariff Commission of the State Council the authority to adopt changes triggered under Articles 47, 48 or 49, "but go no further."[26] China has not persuasively explained how a phrase as loose as "justifiable grounds" in Article 49 of the *AD Regulation* and Article 48 of the *CVD Regulation* cannot be read to include implementation of China's WTO commitments.[27]

29. Moreover, while China points to Article 57 of the *AD Regulation* and Article 56 of the *CVD Regulation* as providing MOFCOM with the authority to take responsibility for managing WTO dispute settlement with respect to trade remedies it also claims that they are ambiguous.[28]

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[22] China's written submission, para. 16.

[23] China's written submission, para. 29.

[24] China's written submission, para. 39.

[25] *Id.*

[26] China's written submission, paras. 20-24.

[27] In paragraph 22 of its written submission, China claims that "the phrase 'justifiable grounds' largely follows the language 'where warranted' in Article s11.2 and 21.2 [of the SCM Agreement]" and therefore "does not provide broader authority to make changes to trade remedies for other reasons." The United States does not find this a compelling argument.

[28] China's written submission, para. 33.

These Articles provide MOFCOM with broad responsibility for dispute settlement yet China seems to confuse broad delegation with ambiguity; the United States disagrees with this interpretation, as it would seem appropriate for MOFCOM to take action with respect to implementing the DSB's recommendations and rulings under these provisions.

30. China also refers to Article 58 of the *AD Regulation* and Article 57 of the *CVD Regulation* as giving MOFCOM the authority to formulate specific implementing measures, while expressing hesitation as to whether this discretion permits rules on specific administrative actions.[29] Such an interpretation seems contrary to the Articles themselves, which state that "the Ministry of Commerce may, in accordance with these Regulations, formulate *specific* implementing measures" (emphasis added).[30]

31. What is clear from MOFCOM's description of its regulations, however, is that the administrative reconsideration mechanism exists and can be used in some instances. Curiously, nowhere in its submission does China mention the *Law of the People's Republic of China on Administrative Reconsideration* ("*Administrative Reconsideration Law"*), which was enacted for the purpose of "preventing and setting right illegal or inappropriate specific administrative acts" and with provisions that broadly outline the rights, responsibilities, and legal obligations of citizens, legal persons, other organizations, and administrative organs with respect to administrative review under China's domestic system.[31] In fact, the Administrative Reconsideration Law, together with provisions under the *AD Regulation* have been used by MOFCOM to perform at least three administrative reconsiderations in the past.[32] It is unclear why there is insufficient express legal basis under China's domestic system to perform a reconsideration simply because it is in the context of adverse DSB recommendations and rulings.

b. MOFCOM's Past Practice Suggests That It Has the Necessary Legal Authority

32. MOFCOM's past practice, for example, demonstrates that the concerns China has expressed with respect to its lack of legal authority lack a basis under China's law. For example, in an antidumping investigation of another steel product, MOFCOM made a final determination

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[29] China's written submission, para. 28.

[30] Article 58, *AD Regulation* and Article 57, *CVD Regulation*.

[31] *Law of the People's Republic of China on Administrative Reconsideration* ("*Administrative Reconsideration Law"*), Chapter 1, Articles 1 and 3.

[32] Cold Rolled Steel took 4 months to complete (May 27, 2004 to September 10, 2004); Kraft Liner Board took 5 weeks (January 9, 2006 to February 13, 2006); ECPC took 2 months to complete (June 11, 2007 to August 3, 2007).

finding dumping, injury, and causation.[33] In that instance, MOFCOM apparently concluded – pursuant to no particular legal authority – that it was able to indefinitely postpone the implementation of duties: In particular, MOFCOM noted the following:

> "The implementation period of the antidumping measure is five years starting from September 23, 2003. Due to the special situations of this case, upon the approval by the Customs Tariff Commission of the State Council, the Ministry of Commerce will temporarily hold off the implementation of the antidumping measure on the subject merchandise. The implementation time will be announced with a separate notice depending on the situation."[34]

33. Moreover, China has performed administrative reconsiderations in at least three previous instances. In the Kraft Linerboard reconsideration, for example, the applicant was not satisfied with MOFCOM's investigation and filed an application for administrative reconsideration on November 29, 2005, requesting termination of antidumping duties on imported unbleached kraft linerboard from the United States.[35] According to the decision of administrative reconsideration, MOFCOM performed the reconsideration pursuant to the "relevant provisions and procedures of the *Administrative Reconsideration Law*."[36] MOFCOM found that basic facts had not been included in the disclosure before the Final Determination, in violation of Article 25 of the *AD Regulation*). On January 9, 2009, five weeks after the applicant filed an application for administrative reconsideration, in accordance with Article 28 of the *Administrative Reconsideration Law*, MOFCOM and the Customs Tariff Commission of the State Council decided to repeal the antidumping decision made on imports of unbleached kraft liner / linerboard.

34. In the Cold Rolled Steel reconsideration determination, quoted above, which was carried out under Articles 49, 50, and 53 of the *Antidumping Regulation*, MOFCOM itself decided to review whether it was necessary to continue the imposition of the antidumping duty on the subject merchandise, in light of material changes that occurred in the international cold rolled steel products market and in the supply-demand relationship in Mainland China.[37] Pursuant to Article 50 of the Antidumping Regulation and, in accordance with MOFCOM's proposal, the Customs Tariff Commission of the State Council decided to suspend the imposition of the

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[33] Cold Rolled Steel Administrative Reconsideration Decision (2004)

[34] Cold Rolled Steel Administrative Reconsideration Decision (2004)

[35] Kraft Linerboard Administrative Reconsideration Decision (2005).

[36] *Id.*

[37] Cold Rolled Steel Administrative Review Determination (2004).

antidumping duty. The entire process, from MOFCOM's public notice issued on May 17, 2004 to its decision to suspend issued on September 10, 2004, took less than 4 months.

35. In the Japanese-origin electrolytic capacitor paper counters ("ECPC") administrative reconsideration the Japanese applicant applied for administrative reconsideration on June 11, 2007.[38] Acting pursuant to Article 22 of the *Administrative Reconsideration Law*, MOFCOM performed an administrative reconsideration and upheld the final determination. MOFCOM completed the entire process on August 3, 2007, less than two months after the company's request.

36. Based on this past precedent, it would appear that here MOFCOM also could indefinitely suspend or revoke the duties at issue using its existing authority. The United States notes that if MOFCOM were to use this apparent authority to take administrative action to revoke the duties, the period of revocation should be consistent with the principle of prompt and immediate compliance, i.e., no more than one month, as discussed above. A longer RPT of no more than 4 months and one week would only be justified if MOFCOM were to perform an administrative reconsideration, even if that reconsideration ultimately led to the revocation of the duties.

3. Existing Administrative Steps for Reconsideration Support an RPT of No More Than 4 Months and 1 Week

37. Under China's existing legal authorities, the reconsideration of an antidumping and countervailing duty determination involves the following steps[39]:

(1) Preparatory phase: Internal review of the measures, consultations, and preparation for administrative action.[40] This process should take no more than one month (and should take considerably less time in any future case, as China will have experience with making modifications).

(2) Initiation of notification: MOFCOM is required to publish its decision to initiate a reconsideration and notify the interested parties and their government(s). This step also includes the preparation of non-confidential summaries by the complainant and possible re-submission of comments

[38] ECPC Administrative Reconsideration Determination, Press Release (2007).

[39] The timeframes identified in brackets are those that the United States associates with each step.

[40] This step is not a legal obligation under China's domestic system. However, as past arbitrators have recognized the need for preparatory work. *COOL (Cda, Mex) (Article 21.3(c))*, para. 83; *US – Hot-Rolled Steel (Article 21.3(c))*, para. 38; and *Chile – Alcoholic Beverages (Article 21.3(c))*, para. 43.

on the non-confidential summaries. [41] This step could be initiated before the preparatory phase is completed, and should take no more than two weeks.

(3) Collection of new evidence: MOFCOM will need to select relevant data or recollect evidence as necessary. With respect to the price effects analysis or the subsidy rate, MOFCOM could issue new questionnaires to the domestic industry and verify submitted figures. MOFCOM would then need to issue an initial draft determination. If the initial draft determination regarding subsidization (or dumping), injury, and the causal link between the two were affirmative, MOFCOM could also conduct further investigation on the amount of the subsidy (or margin of dumping) and degree of injury before issuing a final determination.[42] This step should take no more than two months, taking into account the nature of the issues that would be under consideration (discussed further below).

(4) Disclosure of necessary facts: Prior to making a final determination, MOFCOM will need to inform all interested parties and their government(s) of the essential facts on which the final determination is based.[43] If true, one week is consistent with MOFCOM's past practice.

(5) Consultation with relevant agencies and promulgation of tariff: MOFCOM also will need to solicit comments from the General Customs Administration and Tariff Commission of the State Council regarding the final countervailing duty determination before promulgating the tariff.[44] In previous cases, this has taken approximately one month.

38. There are no time frames identified in the *AD Regulation* and *CVD Regulation* with respect to each of the steps outlined above. Members with systems that do not prescribe such minimum mandatory timeframes have been characterized as having "a considerable degree of flexibility" by past arbitrators, who have insisted that Members "make use of such flexibility in

[41] *Countervailing Measures Regulations*, Articles 19 and 22; *Antidumping Regulations*, Articles 19 and 22.

[42] *Countervailing Measures Regulations*, Articles 20 and 26; Article 20

[43] *Countervailing Measures Regulations*, Articles 25 and 26; *Antidumping Regulations*, Article 25.

[44] *Countervailing Measures Regulations*, Articles 26 and 27; *Antidumping Regulations*, Article 25.

order to ensure prompt compliance with the recommendations and rulings of the DSB."[45] In light of the lack of specific time frames in China's relevant regulations, the length of time necessary for previous reconsiderations is persuasive, as well as the fact that steps (2) and (3) can be completed in parallel. Based on these considerations, the period of time for reconsideration of the single antidumping and countervailing duty determination at issue in this dispute should be no more than four months and one week (and it is notable that China has completed the process much more quickly in the past).

a. The Administrative Reconsideration Procedures Proposed By China are Grossly Overstated

39. Setting aside the fact that the United States disagrees with China's argument that it needs to develop both a new rule and set of procedures to come into compliance in this dispute, the United States observes that the proposed procedures, laid out by China in paragraphs 65 through 89 of its submission, are grossly overstated. China states that this yet-to-be-drafted process will be composed of steps adding up to 10 months. Not only are there significantly more steps in China's proposed procedure than those required under its current administrative reconsideration procedure pursuant to its *AD Regulation* and *CVD Regulation*, but the timeframes offered by China are overinflated.

40. China lists the following steps, totaling 332 days:[46]

- (1) Translate and study report – 45 days
- (2) Draft and approve public notice – 20 days
- (3) Comments by parties – 30 days
- (4) Rebuttal comments by parties – 30 days
- (5) Hearing – 37 days
- (6) Initial draft determination – 30 days
- (7) Internal review – 30 days
- (8) Review by DTL – 10 days
- (9) Comments by parties – 20 days

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[45] *US – 1916 Act (Article 21.3(c))*, para. 39; *Colombia – Ports (Article 21.3(c))*, para. 83.

[46] China's written submission, para. 89.

- (10) Draft/review final determination – 40 days
- (11) Tariff Commission Review – 30 days
- (12) Publication – 10 days

41. The United States notes that the original investigation and imposition of the antidumping and countervailing duty order on imports of GOES from the United States took 10 months. China has proposed a review procedure that will take the same amount of time, when, considering that the issues are necessarily more limited, most administrative reconsiderations are completed in less time than an original investigation. Moreover, in its written submission, China states that it is "making a good faith effort to proceed along parallel tracks," yet China outlines an almost entirely sequential process, instead of collapsing steps where appropriate.

42. China offers lengthy explanations for the reasons why the steps and corresponding timelines that it outlines are reasonable, but it offers no evidence to back up the long timeframes it proposes. Moreover, China does not provide specific citations or references to its domestic regulations to support any of these timeframes. Rather, China merely offers its opinion as to why each step should take as long as it does. For instance, in paragraphs 81 and 82 of its written submission, China states that "under standard procedures, 30 days is the normal period needed for drafting such documents" and that "under MOFCOM's normal working procedures and practice, officials in charge of the investigation are allowed 30 days to circulate the draft of documents . . ."[47] China provides no evidence to support these sweeping assertions, or how they comport with its obligations under the Dispute Settlement Understanding. China has provided no facts that the United States could rebut and it is not clear why *additional* steps are necessary under a new system. China is now proposing a process that takes twice as long as the most lengthy administrative reconsideration to date, and four times as long as the average.

43. In paragraph 85 of its written submission, China acknowledges as much when it notes that "many of the time periods specified above go to procedural obligations in the AD Agreement and CVD Agreement that are no less important in the implementation context" and that "these obligations must be respected as a particular circumstance . . ."[48] Some steps, such as public notice and giving parties a full opportunity for the defense of their interests, stem from a legitimate source: the covered agreements. These features are present under China's current procedure for performing administrative re-considerations. The United States express concern, however, with these steps and proposed timeframes that do no appear to have any basis.

44. In looking at the specific steps proposed, the United States questions why 45 days for the reading and translation of reports is necessary when the overwhelming majority of the findings

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[47] China's written submission, paras. 81 and 82.

[48] China's written submission, para. 85.

are contained in the un-appealed panel report, which was circulated 9 months ago, on June 15, 2012. Presumably China needed to translate and read the report in preparing its appeal. Further, the Appellate Body report was circulated on October 18, 2012, five months ago and nearly a month prior to its adoption at the November 16, 2012 DSB meeting. As the arbitrator found in the *U.S. – COOL* 21.3(c) award, an implementing Member is expected to begin working toward implementation immediately following the adoption of the reports.[49] China had more than 45 days to translate and review the majority of findings prior to November; China did not need any additional time, let alone 45 days to do so.

45. Several of the steps proposed by China should be collapsed. For example, steps (3), (4), (5), (6), (7), and (8) appear to be a single step under China's current step (3), the collection of evidence, which can be completed within 2 months, as opposed to China's proposed 167 days. Moreover, steps (2) and (3) of China's proposed procedure can be conducted in parallel. Further, steps (10), (11), and (12) can also be completed in a single final drafting and internal consultation step, as is the case under China's current system. No more than one month is necessary for this step.

46. Several of the steps proposed by China are unnecessary. With respect to step (5), the hearing, even China acknowledges that "it is not assured that such a hearing would be requested or held."[50] In the three previous reconsiderations a hearing was not held. Moreover, China's *Administrative Reconsideration Law* states that "in principle, administrative reconsideration shall take the form of written examination."[51] If China does not believe that a hearing is necessary, then it should not factor into the length of the RPT, which according to China would have meant an additional 37 days, in the slim event that one may occur. Further, step (9) envisions 20 days for comments by parties but under China's current system, MOFCOM has an obligation to inform interested parties and their government(s) of the essential facts on which the final determination is based, a process which can be completed in one week. There is no additional opportunity for comment by parties.

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[49] *See, U.S. – COOL (Article 21.3(c))*, para. 84 (stating "I note, in this regard, that an implementing Member 'must use the time after adoption of a panel and/or Appellate Body report to begin to implement the recommendations and rulings of the DSB'. It may also be recalled that the Appellate Body Reports were published on 29 June 2012, almost one month before their adoption by the DSB. Thus, it is reasonable to assume that, already by the end of June 2012, interested stakeholders in the United States were aware that some form of action would need to be taken with respect to the COOL measure").

[50] China's written submission, para. 80.

[51] *Administrative Reconsideration Law*, Article 22.

47. The United States recalls that the Member seeking the RPT has the burden of establishing that the proposed period is the "shortest possible" within its domestic legal system.[52] Failing that, it is ultimately for the arbitrator to determine the "shortest period possible" for implementation, on the basis of evidence presented by all parties.[53] Even if China opts to conduct a reconsideration, rather than simply revoke the order, China has not provided evidence to support an RPT of more than four months and one week.

b. Particular Circumstances Do Not Support an RPT of 19 Months

(i) China Has Not Established that "Particular Circumstances" Require that it Conduct a Rulemaking In Order to Comply

48. As a more fundamental point, while the "particular circumstances" of compliance include consideration of the particular circumstances of the Member's legal system, China's 19-month RPT request is based not on its present legal system, but on the requirements of a hypothetical future legal system that it hopes to develop as part of the implementation process. In addition to requesting 9.5 months to promulgate a rule, China states that it will need 9.5 additional months to follow procedures set forth in the new rule. In China's words, 19 months "is the shortest period of time within the Chinese legal system" for implementation. Yet the 19 month period China proposes is based on the time needed to develop a procedure that is not "within the Chinese legal system" already, and China's proposed 9.5 month reconsideration process is nowhere currently provided. The circularity of China's argument highlights the difficulty of determining an RPT based on legal requirements that do not presently exist in a Member's system — it invites Members to devise new procedures that would result in a protracted period for compliance.

49. China's explanation of the particular circumstances of the case that support an RPT of 19 months is unsupported by any evidence and contradicted by the facts. China cites to no time periods set out in its domestic law, or previous examples of cases in which it has required the proposed amount of time to complete analogous steps, and refers only to other WTO disputes that involve what it concedes were different legal instruments in a different context.

50. Moreover, for the last 12 years China has done nothing to address this alleged lack of clarity in its authority to implement. In fact, as discussed in greater detail above, the evidence suggests that MOFCOM has the ability to reexamine duties, including in response to adverse WTO recommendations and rulings.

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[52] *U.S. – Zeroing II (Article 21.3(c))*, para. 43.

[53] *Brazil – Tyres (Article 21.3(c))*, para. 51 (referring to *U.S. – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 44).

(ii) Implementation is Not Technically Complex

51. In paragraph 48 of its written submission China states that "[t]he technical complexity that confronted MOFCOM in terms of addressing the question of whether legal authority for implementation existed under domestic law represents a 'particular circumstance' given the perceived ambiguity among a wide range of internal and external experts who considered these issues." Once again, China misses the mark completely. The DSB recommendations and rulings concern antidumping and countervailing duties only with respect to imports of GOES from the United States. China does not need to engage in a lengthy legal analysis to identify the defects identified by the DSB.

52. Contrary to China's assertions, the DSB's recommendations and rulings do not present exceptional challenges for China with respect to implementation. On facts available, for example, the Panel upheld China's resort to facts available, but rejected China's choice of facts available, finding that no facts on the record supported China's choice of facts available. China contends that the Panel "provided no guidance at all as to what alternatives were possible."[54] But China's assertion is belied by the Panel report, as the Panel, in fact, did highlight alternatives for China. The Panel wrote "MOFCOM's application of this rate was actually at odds with information on the record suggesting a lesser rate of utilization should be applied."[55] The Panel then examined record evidence that could have formed the basis of China's choice of a facts available rate.[56] In short, the record evidence provides credible alternatives for China, thus, China should not have difficulty implementing this aspect of the DSB's recommendations and rulings. With respect to the DSB's recommendations and rulings on the all others rate, China merely rehashes the same arguments it made before the Panel – arguments the Panel rejected – and it makes no effort to explain why implementing this aspect of the DSB's recommendations and rulings will present challenges.[57]

53. On China's injury determination, China asserts that the DSB provided no explicit directions for China to cure its defective analysis. Even a cursory review of the DSB's recommendations and rulings, however, reveals that the DSB provided an exhaustive analysis of the obligations contained in Article 3 of the AD agreement, and Article 15 of the SCM Agreement. This analysis provides concrete guidelines for China in this dispute.[58] China's

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[54] China's written submission, para. 73.

[55] *China – GOES (Panel)*, para. 7.303.

[56] *China – GOES (Panel)*, paras. 7.305-309.

[57] China's written submission, para. 74.

[58] *China – GOES (AB)*, paras. 125-221.

claim that the DSB "did not provide a particularly clear or explicit set of directions for what must be done"[59] is not accurate.

4. Additional Considerations Supporting an RPT of No More Than 1 Month or, in the Alternative, 4 Months and 1 Week

a. China Has Made No Serious Efforts to Implement Since the DSB Adopted its Recommendations and Rulings

54. The actions that an implementing Member has taken in respect of compliance should be scrutinized very carefully by an Article 21.3(c) arbitrator.[60] In *U.S. – Section 110(5)*, the arbitrator observed that "if it is perceived by the arbitrator that an implementing Member has not adequately begun implementation after adoption so as to effect 'prompt compliance,' it is to be expected that the arbitrator will take this into account in determinating the reasonable period of time."[61] Similarly, in *Colombia – Ports*, the arbitrator, in quoting *Chile – Price Bands System* observed that "the implementing Member must 'at the very least' promptly take concrete steps toward implementation from the date of adoption of the panel or Appellate Body reports by the DSB" and that this work must exceed "mere 'internal discussions.'"[62] As previously noted, recent arbitrators have also found that Members have an obligation to begin implementation efforts immediately after circulation of the reports.[63]

55. The DSB adopted the Panel and Appellate Body reports on November 16, 2013, more than four months ago. Moreover, as the Panel issued its report on June 15, 2012, China has had more than nine months to address the un-appealed sections of the Panel's findings – the largest share of the findings – along with considering the legal authority of MOFCOM to implement these findings. Yet, in its written submission, China has not provided any evidence of any steps that it has taken to directly address the DSB's recommendations and rulings in this dispute as they relate to the duties actually at issue.

56. In its written submission, China states that it is proceeding "as quickly as it can under its domestic system" with respect to its decision to "adopt a new MOFCOM rule"[64] and that it

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[59] China's written submission, para. 75.

[60] *U.S. – Section 110(5)*, para. 46.

[61] *Id.*; *See also, Chile – Price Band System (Article 21.3(c))*, para. 43; *Colombia – Ports (Article 21.3(c))*, para. 79.

[62] *Id.*.

[63] *COOL (Cda, Mex) (Article 21.3(c))*, para. 84.

[64] China's written submission, para. 37.

began its implementation efforts "immediately" following the adoption of the reports by the DSB.[65] Specifically, China explains that it has spent the past four months: (1) discussing what if any [legal] authority existed under the current *AD Regulation* and *CVD Regulation*; (2) reaching the understanding that the current regulations provide only general authority without any specific authority regarding particular actions that might be taken, and (3) determining what other steps and specific actions might be necessary.[66] Notably, however, China has not produced a single piece of evidence to support these contentions.

57. Four months of mere discussion with respect to the legal aspects of a rule making exercise cannot be considered as concrete steps toward implementation. Indeed, the United States has difficulty understanding why China could not have read its own regulations and determined in a matter of days whether there was sufficiently clear authority to modify its measures, putting aside the 12 years that China had to consider this issue. The United States also fails to understand how consultations with external legal advisors would be necessary or useful.[67] After all, the regulations were written by the same agencies as were now being asked to understand their content.

58. It is also worth noting that the preparatory legal analysis China describes does not relate to the modification of the measures at issue, but instead relates to its broad rule making ambition. Indeed, the legal analysis China describes is unlike any "pre-legislative" considerations that prior arbitrators have found as a particular circumstance in the determination of an RPT.[68] Because the reports concern duties on a single product – imports of GOES from the United States – it would be useful to look at what China has done to address the substantive and procedural flaws with respect to the offending duties and not China's ambitions with respect to its broader regulatory regime. Accordingly, China's attempts to obtain a longer RPT based on such preparatory work should be rejected.

59. On the other hand, because the DSB's recommendations and rulings concern duties on a single product – imports of GOES from the United States – the relevant work to date with respect to this arbitration are the steps that China has actually taken to address the substantive and procedural flaws with respect to the offending duties. The fact that China has apparently not taken any action at all with respect to the measures at issue argues in fact of a shorter time frame than China suggests for its so-called preparatory work.

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[65] China's written submission, para. 35.

[66] China's written submission, para. 50.

[67] China's written submission, para. 41.

[68] China's written submission, para. 48.

b. The Periods of Time Agreed-to in Other Disputes Involving China are Not Relevant in the Context of this RPT

60. At several points in its submission, China attempts to draw the arbitrator's attention to RPTs agreed between China and the complaining party as instructive for establishing an RPT in the instant dispute.[69] The United States would note that this is the first time an arbitrator has been asked to make findings with respect to the shortest period of time for compliance in China's domestic system. The examples cited to by China were reached by agreement among the parties and are not relevant to the length of time necessary for compliance in this dispute.

III. CONCLUSION

61. China's 19-month RPT request is based not on its present legal system, but on the requirements of a hypothetical future legal system that it hopes to develop as part of the implementation process. In addition to 9.5 months to promulgate a rule, China states that it needs 9.5 additional months to follow procedures to be set forth in the new rule. Yet, the role of the arbitrator in awarding an RPT is to determine the shortest period of time for implementation within a Member's domestic system. The circularity of China's argument highlights both the difficulty and inappropriateness of determining an RPT based on legal requirements that do not presently exist in a Member's system. China has failed to establish that the proposed period is the shortest possible within its domestic legal system.

62. As the United States has explained in this submission, China's measures are administrative in nature. To comply, China may either make the necessary modifications to its measures or simply withdraw them immediately. Accordingly, the RPT should be no more than 1 month, which is consistent with an immediate revocation of the measures given that China alleges it currently has not provided MOFCOM with clear legal authority to take administrative action to modify or revise the measures; or, if China concedes that MOFCOM does currently have that administrative authority, 4 months and 1 week, on the basis of a modification of the measures through the existing administrative reconsideration procedure.

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[69] *See, e.g.*, China's written submission, para. 63 (stating: "China notes that this eight month period is relatively short, compared with similar implementation exercises conducted by China in connection with other WTO disputes. China has had three such experiences of needing to modify laws, regulations, or rules, all of which involved longer period of time. In fact, the norm has been closer to a year, with the other RPTs in these three cases being 7.7 months (involving only termination of relevant rules or certain articles of relevant rules, not enactment of new rules), 12 months, and 15 months for an average time period of 11.2 months.").