WORLD TRADE ORGANIZATION

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(02-0823)

UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN

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

Award of the Arbitrator
Florentino P. Feliciano

I. Introduction

1. On 23 August 2001, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report[1] and the Panel Report [2], as modified by the Appellate Body Report, in *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*").[3] At the DSB meeting of 10 September 2001, the United States informed the DSB, pursuant to Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that it would implement the recommendations and rulings of the DSB in this dispute and that it would require a "reasonable period of time" to do so, under the terms of Article 21.3 of the DSU.[4]

2. In view of its inability to reach an agreement with the United States on the period of time reasonably required for implementation of those recommendations and rulings, Japan requested that such period be determined by binding arbitration pursuant to Article 21.3(c) of the DSU.[5]

3. By joint letter of 6 December 2001, the United States and Japan notified the DSB that they had agreed that the duration of the "reasonable period of time" for implementation should be determined through binding arbitration, under the terms of Article 21.3(c) of the DSU, and that I should act as Arbitrator.[6] The parties had indicated in a previous letter that they had agreed to extend the time period for the arbitration to 19 February 2002.[7] Notwithstanding this extension of the time period, the parties stated that the arbitration award would be deemed to be an award made under Article 21.3(c) of the DSU. My acceptance of the designation as Arbitrator was conveyed to the parties by letter of 10 December 2001.[8]

4. Written submissions were received from the United States and Japan on 4 January 2002, and an oral hearing was held on 18 January 2002.

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[1]Appellate Body Report, WT/DS/184/AB/R.

[2]Panel Report, WT/DS184/R.

[3]WT/DS184/8.

[4]WT/DSB/M/109.

[5]WT/DS184/9.

[6]WT/DS184/11.

[7]WT/DS184/10.

[8]WT/DS184/12.

II. Arguments of the Parties

A. *The United States*

5. The United States requests me to fix the "reasonable period of time" at 18 months, so that that period will expire on 23 February 2003.

6. The United States submits that implementation will entail a multi-faceted process that may include extensive consultations with Congress, legislative action, internal analysis and revision of certain policies and practices, and a recalculation of the dumping margins. It anticipates that the process will require 14 months for the enactment of amending legislation and 4 additional months to apply this legislation to the anti-dumping investigation at issue.

7. In the present case, the United States argues that the legal forms of implementation and the technical complexity of the necessary measures constitute particular circumstances that justify a "reasonable period of time" in excess of 15 months under Article 21.3(c).

8. The United States explains that this case requires a sequential combination of forms of implementation. The first step involves the enactment of a statute amending Section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, which refers to the calculation of the "all others" rate. The "all others" rate is defined in this statute as the rate of dumping duty that is imposed on companies that were not individually investigated. Following the enactment of the amending statute, the Department of Commerce of the United States will be required to issue an amended determination in the anti-dumping investigation at issue. The United States maintains that this second step can be carried out only after enactment of this legislation, given that the administering authority must apply the amended statute.

9. The United States further states that, in addition to amending the statute relating to the "all others" rate and applying it, there are other recommendations and rulings to be implemented. These other recommendations and rulings are already in the process of being implemented and their implementation will be completed within the time period required to pass the legislative change mentioned earlier. As an example, the United States mentions the need to change the administrative practice with respect to the exclusion of home market sales on the basis of the "99.5 percent" or "arm's length" test. No additional time is separately sought to carry out such change of practice.

10. The United States submits that a period of 14 months to make the necessary legislative changes is reasonable in the light of the United States legal system and prior experience. The end of this period would correspond, according to the United States, to the end of the current (2002) session of the United States Congress when there is greater likelihood of enactment of the implementing legislation.

11. According to the United States, a period of 14 months for implementation of the necessary legislation is consistent with past arbitration awards under Article 21.3(c) of the DSU. The United States points, in this regard, to the time periods set by the arbitrators in several previous disputes.[9]

12. In describing the procedures for introduction and consideration of legislation in the United States Congress and the timeframe applicable to these procedures, the United States explains that the earliest date a bill can be introduced is during the month of January, when its Congress convenes. The process is complex and a bill must move through numerous stages, none of which has well-defined timetables. To illustrate the volume of its legislative business, the United States notes that a total of 5,514 bills were introduced during the First Session of the 106th Congress and only 170 of these bills became law. The United States points out that at every step of the process, legislators have the ability to control the progress of a bill or to seek additional time for its consideration. Most bills that do become law are not enacted until the last weeks or months of a legislative session. Fifteen of 25 major trade laws enacted since 1930 became law at the end or after a session of the United States Congress.

13. According to the United States, the actions that must be undertaken in the anti-dumping investigation at issue following enactment of the amending statute include: calculation of the "all others" rate based on the new methodology; preparation of a draft redetermination to provide to interested parties for comment as required under domestic law; issuance of a final redetermination; and, finally, correction of clerical errors.

14. The United States maintains that the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") contains a number of due process and transparency obligations that should be taken into account in determining the amount of time required to issue the dumping redetermination. Reference is made to, for example, Articles 6.2, 6.4 and 12 of the *Anti-Dumping Agreement*. The United States stresses that these due process safeguards are no less significant in the context of a redetermination based on the DSB's recommendations and rulings and argues, therefore, that the arbitrator's award should respect these safeguards as reflected in United States law and regulations.

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[9]The United States refers to Award of the Arbitrator, *Japan – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU* ("*Japan – Alcoholic Beverages II*"), WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 February 1997, DSR 1997:I, 3; Award of the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3(c) of the DSU* ("*EC – Bananas III*"), WT/DS27/15, 7 January 1998, DSR 1998:I, 3; Award of the Arbitrator, *EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU* ("*EC – Hormones*"), WT/DS26/15, WT/DS48/13, 29 May 1998; Award of the Arbitrator, *United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU* ("*US – 1916 Act*"), WT/DS136/11, WT/DS162/14, 28 February 2001; and, Award of the Arbitrator, *United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU* ("*US – Section 110(5) Copyright Act*"), WT/DS160/12, 15 January 2001.

15. The United States thus submits that the practical minimum to recalculate the "all others" rate and to make a draft redetermination available to interested parties is at least 30 days following the enactment of the amending legislation. This would be followed by a 30-day period to allow for comments from interested parties. Then, an additional time period of 30 days are required to produce a final redetermination. Finally, 30 days are added to make any necessary corrections. These time periods add up to 4 months following the 14 months required for the enactment of the amending legislation. The United States requests, therefore, that the "reasonable period of time" be set at 18 months.

B. *Japan*

16. Japan submits that a period of 10 months from the date of adoption of the Panel Report, as modified by the Appellate Body, and up to 23 June 2002, is a "reasonable period of time" for implementation by the United States of the recommendations and rulings of the DSB.

17. According to Japan, in order to implement the rulings and recommendations of the DSB, the United States must:

(i) amend the statutory provision on the "all others" rate to remove the requirement that these rates exclude only those margins based "entirely" on the facts available;

(ii) adopt an even-handed "arm's length" test for determining whether the home market sales to affiliates are made in the ordinary course of trade;

(iii) recalculate Kawasaki Steel Corporation's ("KSC") dumping margin incorporating the new "arm's length" test and not applying adverse facts available to KSC's United States sales through its affiliated company in the United States;

(iv) recalculate Nippon Steel Corporation’s ("NSC") dumping margin incorporating the new "arm's length" test and not applying facts available (i.e., using NSC's submitted weight conversion factor);

(v) recalculate NKK Corporation’s ("NKK") dumping margin incorporating the new "arm's length" test and not applying facts available (i.e., using NKK's submitted weight conversion factor);

(vi) recalculate the "all others" dumping margin incorporating the change in the statutory provision; and,

(vii) redetermine whether the domestic industry is materially injured by reason of subject imports while ensuring that the merchant and captive markets are examined in a like or comparable way, and that the proper standard is applied to avoid attributing the effects of other causes to imports.

18. Japan argues that Article 21.1 of the DSU requires "prompt compliance" with the recommendations and rulings of the DSB. It asserts further that the implementing Member bears the burden of proving that "prompt" or "immediate" compliance is "impracticable". Japan then refers to the arbitrator's award in *Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU* ("*Canada – Pharmaceutical Patents*") [10], and asserts that this burden increases with the length of the proposed period for implementation. Japan contends that the United States has failed to meet this burden.

19. Referring to the arbitrator's award in *Canada- Pharmaceutical Patents* [11], Japan argues that in an arbitration under Article 21.3(c) of the DSU, as a general rule, only factors relating to actual implementation within the Member's domestic legal system may be considered. In past arbitrations, arbitrators have considered as relevant such circumstances as the means of implementation, the complexity of the measures, and the existence of mandatory time limits for procedures under domestic law, while refusing to consider other circumstances, such as the "contentiousness" of the implementation, the ongoing structural adjustment or the adverse effects on domestic producers and consumers within the implementing Member. Relying on these considerations, Japan submits that any domestic hurdles of a non-legal nature that the United States' implementation efforts may face are irrelevant to the analysis under Article 21.3(c).

20. According to Japan, the maximum time period within which the United States should implement the DSB's recommendations and rulings is 10 months. The United States should be able to complete the amendment of its statute within a period of seven months from the date the DSB adopted the Panel Report as modified by the Appellate Body. Japan states that amendments to the "Foreign

[10]Award of the Arbitrator, WT/DS114/13, 18 August 2000.

[11]*Ibid.*

Sales Corporations" legislation were enacted in three and a half months from the date of introduction of the amending bill and that the Byrd Amendment was enacted in less than one month from the date it was attached to another bill. The amendment required in the present case to make the statute consistent with the *Anti-Dumping Agreement* is only the deletion of one word—"entirely". Japan additionally explains that in respect of the "arm's length" test, the United States does not need to amend its existing regulations, but rather needs only to correct its administrative practice. In the view of Japan, the United States should be able to complete this change in administrative practice within the seven months that Japan proposes be allocated for the enactment of the amending legislation.

21. Japan contends that once the statute is amended, the United States can complete the recalculations of all dumping margins within a period of one month. This period is similar to that used by the United States during the original less-than-fair-value investigation. Japan does not see why the United States needs to collect new information to perform the recalculations; the changes needed are simple changes to the pertinent programming code.

22. Japan also submits that the injury redetermination can be carried out within 45 days after the dumping recalculation is issued. The United States International Trade Commission (the "USITC"), the agency responsible for performing the injury analysis, can begin its work immediately, even while the other agencies are carrying out their own tasks. The facts and analysis necessary for this purpose have already been established. Forty-five days is the period normally given to the USITC to take the dumping margins into consideration.

23. Japan finally contends that the remaining procedures, including those required under United States law, can be completed within two weeks from the date the USITC completes its injury redetermination. These procedures include the consultations with the United States Congress required under the Uruguay Round Agreements Act and the publication of the redeterminations in the *Federal Register*. United States law does not provide any maximum or minimum time periods to carry out these procedures. Japan requests, therefore, that the "reasonable period of time" for implementation of the recommendations and rulings of the DSB by the United States be set at 10 months from the adoption of the Appellate Body Report.

III. Reasonable Period of Time

24. My task in this arbitration is to determine the "reasonable period of time", as that term is used in Article 21.3 of the DSU, for the implementation of the recommendations and rulings of the DSB in *US – Hot-Rolled Steel.*

25. It is useful to recall the essential principle and rule that WTO Members are committed to "prompt compliance" with DSB recommendations and rulings[12] and that "prompt compliance" translates into "immediate" compliance.[13] When, however, such "immediate" compliance is "*impracticable*," then the Member bound to comply becomes entitled to "a reasonable period of time" within which to comply.[14] It is similarly salutary to recall that the 15-month period mentioned in Article 21.3(c) of the DSU is expressly designated as "a *guideline* for the arbitrator" (emphasis added): the "reasonable period of time" to implement panel or Appellate Body recommendations "should not exceed 15 months" from the date of adoption of the panel or Appellate Body Report, which period may, however, be "shorter or longer", "depending upon the particular circumstances."[15] I do not see any basis for reading the 15-month guideline as establishing a fixed maximum or "*outer* limit" for "a reasonable period of time." Neither, of course, does the 15-month guideline constitute a *floor* or "*inner* limit" of "a reasonable period of time". In *US – Hot-Rolled Steel*, the implementation of which is involved here, the Appellate Body had occasion to interpret the phrase "reasonable period" found in Article 6.8 of the *Anti-Dumping Agreement* and "reasonable time" used in paragraph 1 of Annex II of that Agreement. "The word 'reasonable'", the Appellate Body stated:

> … implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is "reasonable" in one set of circumstances may prove to be less than "reasonable" in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time under Article 6.8 and Annex II of the *Anti-Dumping Agreement*, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation.
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> In sum, a "reasonable period" must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of "reasonableness", and in a manner that allows for account to be taken of the particular circumstances of each case.[16]

[12]Article 21.1 of the DSU.

[13]Article 21.3 of the DSU.

[14]*Ibid.*

[15]*Ibid.*

[16]Appellate Body Report, *supra*, footnote 1, paras. 84-85.

26. Although, in the above excerpt the Appellate Body dealt with the *Anti-Dumping Agreement*, and not the DSU, the essence of "reasonableness" so articulated is, in my view, equally pertinent for an arbitrator faced with the task of determining what constitutes "a reasonable period of time" in the context of the DSU.

27. As already noted, the DSB adopted the Panel's recommendations as modified by the Appellate Body in *US – Hot-Rolled Steel*. The overall recommendation was that the United States bring its measures found to be inconsistent with the *Anti-Dumping Agreement* and the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") into conformity with its obligations under those Agreements. The United States measures found to be WTO-inconsistent, pertinent for present purposes, were the following:

(a) the application of "facts available" to NSC, NKK and KSC in the determination of the dumping margins of NSC, NKK and KSC;

(b) Section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, and the United States' application of this provision in connection with the determination of the anti-dumping duty rate for exporters which were not individually investigated (the "all others" rate) in this case;

(c) the exclusion from the calculation of normal value, as outside "the ordinary course of trade", of certain home market sales to parties affiliated with an investigated exporter on the basis of the "99.5 percent" or "arm's length" test; and

(d) the application of Section 771(7)(C)(iv) of the United States Tariff Act of 1930, as amended, known as the captive production provision, in the determination in this case of injury sustained by the United States' hot-rolled steel industry.

28. In *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather: Arbitration under Article 21.3(c) of the DSU ("Argentina – Hides and Leather")*, the Arbitrator stated that:

> [T]he non-conforming measure is to be brought into a state of conformity with specified treaty provisions either by *withdrawing* such measure completely, or by *modifying* it by excising or correcting the offending portion of the measure involved. Where the non-conforming measure is a statute, a repealing or amendatory statute is commonly needed. Where the measure involved is an administrative regulation, a new statute may or may not be necessary, but a repealing or amendatory regulation is commonly required. [*]

> It thus appears that the concept of compliance or implementation prescribed in the DSU is a technical concept with a specific content: the withdrawal or modification of a measure, or part of a measure, the establishment or application of which by a Member of the WTO constituted the violation of a provision of a covered agreement. (original emphasis)[17]
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> *The non-conforming measure might also assume other forms: e.g., an executive or administrative practice actually carried out but not specifically mandated or authorized by statute or administrative regulation; or a "quasi-judicial" determination by an administrative body. Since the Argentine measures involved in this arbitration are not of these kinds, it is not necessary to examine the requirements of compliance where those other kinds of measures are concerned.

29. In the present case, both the United States and Japan are in agreement that a statute appropriately modifying Section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, would be necessary, both to put that (a) provision and (b) the application thereof in the determination of the "all others" anti-dumping duty rate in the present case, into a state of conformity with Article 9.4 of the *Anti-Dumping Agreement*.

30. There is, however, no agreement between the parties on what the amending statute should set forth. Japan submits that all the amending law needs to do is to excise one word—"entirely"—from the existing statute, that is, Section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended. The United States believes that Japan's view is oversimplified and that a more complex amending statute may well be necessary or appropriate. However, the United States has not, at this time, determined the proper scope and specific content of the necessary legislation. The United States also adverts to the presence of the *lacuna* identified by the Appellate Body in Article 9.4 of the *Anti-Dumping Agreement*, in effect suggesting, it appears to me, that the amending United States legislation might also address the matter of ensuring that the *lacuna* is filled in a WTO-consistent manner.[18] I do not believe that an arbitrator acting under Article 21.3(c) of the DSU is vested with jurisdiction to make any determination of the proper scope and content of implementing legislation, and hence do not propose to deal with it. The degree of complexity of the contemplated implementing legislation may be relevant for the arbitrator, to the extent that such complexity bears upon the length of time that may reasonably be allocated to the enactment of such legislation. But the proper scope and content of anticipated legislation are, in principle, left to the implementing WTO Member to determine.

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[17]Award of the Arbitrator, WT/DS155/10, 31 August 2001, paras. 40 and 41.

[18]Appellate Body Report, *US – Hot-Rolled Steel*, *supra*, footnote 1, para. 126. The Appellate Body noted that, "while Article 9.4 *prohibits* the use of certain margins in the calculation of the ceiling for the 'all others' rate, it does not expressly address the issue of *how* that ceiling should be calculated in the event that *all* margins are to be *excluded* from the calculation under the prohibitions". The Appellate Body did not address this matter, which had not been raised in the appeal.

31. There is also agreement between the United States and Japan that implementing action of an administrative nature is necessary in this case. It appears that such administrative implementation would not require the formulation and promulgation of some new administrative regulation to set aside or modify a pre-existing regulation. No pre-existing United States administrative regulation was found to be WTO-inconsistent by the Panel or the Appellate Body in *US – Hot Rolled Steel*. Rather, the corrective or implementing actions by administrative officials of the United States will include the revision of certain calculations or determinations made by such officials by excluding from or including in such determinations certain discrete data or transactions. Thus, in respect of the determination of the home value of the hot-rolled steel products here involved, certain sales transactions between an investigated exporter and its affiliated company, previously excluded under the "99.5 percent" or "arm's length" test applied by the United States administrative officials, would have to be factored in a redetermination of such home value. Again, the dumping margins of NSC, NKK and KSC would have to be recalculated or redetermined by, *inter alia*, replacing the "facts available" previously utilized with the data supplied by NSC, NKK and KSC. It may be that such redeterminations could result in consequential changes becoming necessary in "downstream" determinations by the same or other United States administrative officials or agencies.

32. The temporal relationship between the legislative and the administrative implementing actions is an important consideration in the present arbitration. The United States and Japan agree that the relationship is not necessarily a linear, sequential one and that some administrative actions may well be taken, or at least commenced, concurrently with the initiation of the legislative implementing effort.

33. There is, however, disagreement in respect of which administrative action or actions may be undertaken by the United States at the same time that its legislative amending process is set in motion. The United States argues that some of the administrative actions involved in implementation must be performed in a sequential order following the enactment of the amending statute. More specifically, the United States states that it cannot undertake, for instance, the recalculation of the "all others" anti-dumping duty rate before completion of the amendment of Section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended.[19] At the same time, the United States states that modification of the "99.5 percent" or "arm's length" test applied in practice by its administrative officials has already been commenced and will be completed even before the amendment of Section 735(c)(5)(A) is done.[20]

34. In support of its request for a period of 4 months to complete the administrative actions necessary for implementation, in addition to the period of 14 months for the legislative phase of such implementation, the United States adverts to certain requirements of the *Anti-Dumping Agreement*

[19]United States' response to questions at the oral hearing.

[20]*Ibid.*

relating to due process and transparency standards to be complied with in anti-dumping investigations carried out by the authorities of a WTO Member. These embrace, for instance, giving "all interested parties … a full opportunity for the defense of their interests" [21], including meeting "parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered" [22]; providing "timely opportunities" for interested parties to see information relevant to their cases and to prepare presentations based on that information;[23] and giving public notice and explanation of, e.g., preliminary and final determinations of the Member's authorities.[24] The United States stresses that the above standards are applicable in respect of a redetermination based on the DSB's recommendations and rulings, and adverts to provisions of its own laws and regulations said to reflect those treaty standards.[25]

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[21]Article 6.2 of the *Anti-Dumping Agreement*.

[22]*Ibid*.

[23]Article 6.4 of the *Anti-Dumping Agreement*.

[24]Article 12 of the *Anti-Dumping Agreement*.

[25]Sections 129(c) and (d) of the Uruguay Round Agreements Act in relevant part provide:

> (c) EFFECTS OF DETERMINATIONS; NOTICE OF IMPLEMENTATION.—
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> …
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> (2) NOTICE OF IMPLEMENTATION.—
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> (A) The administering authority shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title VII of the Tariff Act of 1930.
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> (B) The Trade Representative shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title II of the Trade Act of 1974.
>
> (d) OPPORTUNITY FOR COMMENT BY INTERESTED PARTIES — Prior to issuing a determination under this section, the administering authority or the Commission, as the case may be, shall provide interested parties with an opportunity to submit written comments and, in appropriate cases, may hold a hearing, with respect to the determination. (Exhibit 12 to the United States' submission)

See, further, Section 123(g) of the Uruguay Round Agreements Act, which provides in relevant part:

> (g) REQUIREMENTS FOR AGENCY ACTION.—
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> (1) CHANGES IN AGENCY REGULATIONS OR PRACTICE.— In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until —
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> …
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> (C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification;
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> …
>
> (F) the final rule or other modification has been published in the Federal Register. (Exhibit 1 to the United States' submission.)

In the light of the foregoing, "and the particular circumstances of this case where much work can be done prior to the enactment of any legislation", the United States submits the following breakdown of administrative activity it proposes to undertake following the passage of legislation:

> [A] minimum of 30 days following any legislation to make a "preliminary" redetermination available to the parties (compared to 140 days for a preliminary determination in a normal investigation), a further 30 days to provide an opportunity for interested parties to provide comments (compared to 50 days for a normal investigation), 30 days to produce a final redetermination (including rebuttal comments, a hearing, and consideration of comments and views in the final determination)(a total time of 60 days from "preliminary" to "final" determination, compared to 75 days in a normal investigation), and a final 30 days to make any necessary corrections (the same as in a normal investigation). This is a total of 120 days, or four months.[26]

35. Japan did not address the question whether the provisions of Articles 6.2, 6.4 and 12 of the *Anti-Dumping Agreement* are applicable in the context of redeterminations made in the course of implementing recommendations and rulings of the DSB. I do not consider it necessary to pass upon that question in this arbitration. It seems sufficient to note that, upon the assumption they are here applicable, Articles 6.2, 6.4 and 12 do not establish any minimum or maximum time periods for carrying out the steps respectively contemplated by those Articles. It may also be noted that Section 123(g) of the United States Uruguay Round Agreements Act establishes conditions or requirements for modification of an administrative practice found by a panel or the Appellate Body to be WTO-inconsistent, but not minimum or maximum time periods for each step.[27] Section 129 of the same United States statute, sets time limits for actions by the USITC and the United States Department of Commerce (as "administering authority") that would render previous actions or determinations

[26]United States' submission, para. 45.

[27]Section 123(g)(2) provides that the final rule or modification may not go into effect *before* the end of a *60-day period* beginning on the date on which consultations under paragraph (1)(E) begin, unless the President determines that an earlier effective date is in the United States' national interest. The consultations contemplated in (1)(E) are between the United States Trade Representative and the relevant department or agency head, and the appropriate congressional committees on the proposed contents of the modified practice. (Exhibit 1 to the United States' submission)

WTO-consistent.[28] For the USITC, the *time-limit* is 120 days; for the "administering authority", the *maximum* period is 180 days. In both cases, the *maximum* periods are reckoned from the time the

[28]Sections 129(a) and (b) provide in relevant part:

> (a) ACTION BY UNITED STATES INTERNATIONAL TRADE COMMISSION.—
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> …
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> (4) COMMISSION DETERMINATION.— Notwithstanding any provision of the Tariff Act of 1930 or title II of the Trade Act of 1974, if a majority of the Commissioners issues an affirmative report under paragraph (1), the Commission, upon the written request of the Trade Representative, shall issue a determination in connection with the particular proceeding that would render the Commission's action described in paragraph (1) not inconsistent with the findings of the panel or Appellate Body. The Commission shall issue its determination not later than 120 days after the request from the Trade Representative is made.
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> (5) CONSULTATIONS ON IMPLEMENTATION OF COMMISSION DETERMINATION.— The Trade Representative shall consult with the congressional committees before the Commission's determination under paragraph (4) is implemented.
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> (6) REVOCATION OF ORDER.— If, by virtue of the Commission's determination under paragraph (4), an antidumping or countervailing duty order with respect to some or all of the imports that are subject to the action of the Commission described in paragraph (1) is no longer supported by an affirmative Commission determination under title VII of the Tariff Act of 1930 or this subsection, the Trade Representative may, after consulting with the congressional committees under paragraph (5), direct the administering authority to revoke the antidumping or countervailing duty order in whole or in part.
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> …
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> (b) ACTION BY ADMINISTERING AUTHORITY.—
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> (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.
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> (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.
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> (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). (Exhibit 12 of the United States' submission)

United States Trade Representative (the "USTR") requests the USITC or the "administering authority" to render the WTO-consistent redetermination. In both cases, too, consultations with the appropriate congressional committees and provision of opportunity for comment are required by the statute.

36. The United States has not been specific on whether or not it would carry out a redetermination of the presence of "material injury" after factoring in the results of the recalculations carried out administratively, and re-evaluating the overall condition of the hot-rolled steel industry in the light of an appropriate analysis of both the "merchant" market and the "captive production" market in that industry. However, the United States has clearly stated that, should it undertake an injury redetermination, it will do so within the confines of the 18-month period it has requested for legislative *cum* administrative implementation.[29] One assumption that naturally suggests itself is that the United States, in its request for a total of 18 months for implementation measures, has built into that request whatever time it may need should it conclude that an injury redetermination is necessary or appropriate.

37. Japan believes that the time periods built into the four months requested by the United States for its administrative, post-legislative phase of implementation are too long and not really necessary considering the kind of operations involved in administrative recalculations of discrete data. It should be noted in this connection that the United States was not very clear as to which administrative acts (other than the recalculation of the "all others" anti-dumping duty rate) need to be postponed to the post-legislative phase, and why and to what extent. It appears that, in some instances, the matter of timing of the administrative redetermination could reflect, not United States legal requirements, but rather considerations of "efficiency" [30], in the sense of economy of effort, that is, doing several redeterminations at the same time, rather than separately and sequentially.

38. Turning to the legislative phase of the implementation of the pertinent recommendations and rulings of the DSB, two submissions of the United States may in particular be usefully noted. One is that "pre-legislative" consultations between the relevant executive and administrative officials and the pertinent congressional committees of the Congress of the United States are necessary in the effort to develop and organize the broad support necessary for the adoption by both Houses of Congress of a particular proposed WTO-compliance bill. According to the United States, these consultations are

[29]United States' response to questioning at the oral hearing.

[30]*Ibid.*

different from and do not replace or supersede the formal discussions that take place between the executive and administrative agencies concerned and the legislative committees to which a bill, once introduced, may be assigned.[31] Even so, it does not seem unreasonable to infer that the formal proceedings are likely to be carried out with more dispatch in view of the "pre-legislative", informal consultations already undertaken. In *Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU* ("*Chile – Alcoholic Beverages*"), the Arbitrator noted that the "pre-legislative" phase is "an important phase if the success of the legislative effort is important." [32]

39. The second submission of the United States worth particular note is that Japan's claim that "a reasonable period of time" in the present case consists of 10 months, ignores the fact that important trade bills commonly are approved towards or at the end of the regular session of the United States Congress. A 10-month period would end in June 2002, while the second session of the 107th Congress would probably end in October 2002.[33] Japan, for its part, argues that important bills have in fact been passed in the midst of a legislative session of the United States Congress. The United States also points out that, in two dispute settlement proceedings which reached the stage of arbitration under Article 21.3(c) of the DSU, *US – 1916 Act* and *US – Section 110(5) Copyright Act*, the arbitrators set the reasonable period at 10 months and 12 months, respectively.[34] The United States on 12 July 2001 asked the DSB to modify the reasonable period of time determined by the arbitrators in both cases, that were due to expire, respectively, on 26 July 2001 and 27 July 2001, so that the modified periods would instead end on 31 December 2001, or on the date on which the then current 2001 session of the United States Congress adjourned, whichever was earlier. At its meeting of 24 July 2001, the DSB noted and agreed to the United States' request. In both instances, the complaining parties—the European Communities and Japan in *US – 1916 Act*, and the European Communities in *US – Section 110(5) of the US Copyright Act*—having previously reached some understanding with the United States on the matter, did not oppose the requests of the United States.[35] It appears to me that whether the actions of the DSB in those two instances have any precedential value in respect of the present arbitration proceedings, is open to substantial debate. The present proceedings have been precipitated precisely by the failure of the parties to the dispute to reach an agreement on a reasonable period of time to comply under Article 21.3(b) of the DSU.

[31]United States' response to questioning at the oral hearing.

[32]Award of the Arbitrator, WT/DS87/15, WT/DS110/14, 23 May 2000, para. 43.

[33]United States' submission, para. 15.

[34]Award of the Arbitrator, *US – 1916 Act*, *supra*, footnote 9 and Award of the Arbitrator, *US – Section 110(5) Copyright Act*, *supra*, footnote 9.

[35]WT/DSB/M/107, paras. 64 and 69-70.

IV. The Award

40. Having regard to the written and oral submissions of the parties, the considerations indicated above and the circumstances constituting this case, my determination is that the reasonable period for the United States to comply with the recommendations and rulings of the DSB is a total of 15 months from 23 August 2001. This period, which covers both legislative and administrative phases of implementation, will accordingly expire on 23 November 2002.

Signed in the original at Geneva this 4th day of February 2002 by:

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Florentino P. Feliciano

Arbitrator