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JAPAN – COUNTERVAILING DUTIES ON DYNAMIC RANDOM ACCESS MEMORIES FROM KOREA

ARB-2008-1/22

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

Award of the Arbitrator
David Unterhalter

ABBREVIATIONS USED IN THIS AWARD

Abbreviation	Definition
Appellate Body Report	Appellate Body Report in *Japan – DRAMs (Korea)*
Bureau	Cabinet Legislation Bureau
Council	Council on Customs, Tariff, Foreign Exchange and other Transactions
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
Hynix	Hynix Semiconductor, Inc.
JIA	Japan's investigating authorities
Panel Report	Panel Report in *Japan – DRAMs (Korea)*
Restructurings	Debt-restructuring programmes entered into by Hynix and its creditors in October 2001 and December 2002
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*

CASES CITED IN THIS AWARD

Short Title	Full Case Title and Citation
Australia – Salmon	Award of the Arbitrator, *Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU*, WT/DS18/9, 23 February 1999, DSR 1999:I, 267
Canada – Autos	Award of the Arbitrator, *Canada – Certain Measures Affecting the Automotive Industry – Arbitration under Article 21.3(c) of the DSU*, WT/DS139/12, WT/DS142/12, 4 October 2000, DSR 2000:X, 5079
Canada – Patent Term	Award of the Arbitrator, *Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU*, WT/DS170/10, 28 February 2001, DSR 2001:V, 2031
Canada – Pharmaceutical Patents	Award of the Arbitrator, *Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS114/13, 18 August 2000, DSR 2002:I, 3
Chile – Alcoholic Beverages	Award of the Arbitrator, *Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V, 2583
Chile – Price Band System	Award of the Arbitrator, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS207/13, 17 March 2003, DSR 2003:III, 1237
EC – Chicken Cuts	Award of the Arbitrator, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) of the DSU*, WT/DS269/13, WT/DS286/15, 20 February 2006
EC – Export Subsidies on Sugar	Award of the Arbitrator, *European Communities – Export Subsidies on Sugar – Arbitration under Article 21.3(c) of the DSU*, WT/DS265/33, WT/DS266/33, WT/DS283/14, 28 October 2005, DSR 2005:XXIII, 11581
EC – Hormones	Award of the Arbitrator, *EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU*, WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833

Short Title	Full Case Title and Citation
EC – Tariff Preferences	Award of the Arbitrator, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries – Arbitration under Article 21.3(c) of the DSU*, WT/DS246/14, 20 September 2004, DSR 2004:IX, 4313
Indonesia – Autos	Award of the Arbitrator, *Indonesia – Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3(c) of the DSU*, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, DSR 1998:IX, 4029
Japan – DRAMs (Korea)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007
Japan – DRAMs (Korea)	Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report, WT/DS336/AB/R
Korea – Alcoholic Beverages	Award of the Arbitrator, *Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853
US – 1916 Act	Award of the Arbitrator, *United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU*, WT/DS136/11, WT/DS162/14, 28 February 2001, DSR 2001:V, 2017
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131
US – Gambling	Award of the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Arbitration under Article 21.3(c) of the DSU*, WT/DS285/13, 19 August 2005, DSR 2005:XXIII, 11639
US – Offset Act (Byrd Amendment)	Award of the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU*, WT/DS217/14, WT/DS234/22, 13 June 2003, DSR 2003:III, 1163
US – Oil Country Tubular Goods Sunset Reviews	Award of the Arbitrator, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the DSU*, WT/DS268/12, 7 June 2005, DSR 2005:XXIII, 11619
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, adopted 11 May 2007
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report, WT/DS268/AB/RW

WORLD TRADE ORGANIZATION
APPELLATE BODY

Japan – Countervailing Duties on Dynamic Random Access Memories from Korea

Parties:

Korea
Japan

ARB-2008-1/22

Arbitrator:

David Unterhalter

I. Introduction

1. On 17 December 2007, 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 *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*.[3] At the meeting of the DSB held on 15 January 2008, Japan stated that it intended to comply with the recommendations and rulings of the DSB in this dispute, and that it would need a reasonable period of time in which to do so.[4]

2. On 25 February 2008, Korea informed the DSB that consultations with Japan had not resulted in agreement on the reasonable period of time for implementation. Korea therefore requested that such period be determined through binding arbitration, pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").[5]

3. By joint letter of 4 March 2008, Korea and Japan requested me to act as Arbitrator, pursuant to Article 21.3(c) of the DSU, to determine the reasonable period of time for implementation of the recommendations and rulings of the DSB in this dispute.[6] As the 90-day period following adoption of the Panel and Appellate Body Reports was to expire on 17 March 2008, the parties, in their joint letter, confirmed that an award of the arbitrator issued no later than 60 days after the date of the acceptance of the appointment by the arbitrator will be deemed to be an award of the arbitrator for the purposes of Article 21.3(c).[7] I accepted the appointment on 5 March 2008[8] and undertook to issue the

[1]Appellate Body Report, WT/DS336/AB/R.
[2]Panel Report, WT/DS336/R.
[3]WT/DS336/12.
[4]See WT/DSB/M/244, para. 15.
[5]WT/DS336/13.
[6]WT/DS336/14.
[7]WT/DS336/15.
[8]WT/DS336/14.

Award no later than 5 May 2008. Neither party objected to the proposed date for circulation of the Award.

4. Japan filed its written submission on 17 March 2008. Korea filed its written submission on 25 March 2008. An oral hearing was held on 8 April 2008.

II. Arguments of the Parties

A. *Japan*

5. Japan requests that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this dispute to be 15 months from the date of adoption by the DSB of the Panel and Appellate Body Reports, that is, until 17 March 2009.

6. According to Japan, immediate compliance with the DSB's recommendations and rulings is "impracticable".[9] Japan explains that implementation in this case would require modification of the original countervailing duty order at issue in the underlying dispute through a new Cabinet Order replacing the original Cabinet Order[10] authorizing the original countervailing duty.[11] The procedure necessary under Japanese laws and regulations to replace a Cabinet Order includes a new countervailing duty investigation, in which Japan's investigating authorities (the "JIA") must follow certain "multiple, time-consuming and indispensable [procedural] steps"[12] designed to ensure the accuracy and transparency of the investigation and that the due process rights of interested parties are respected.[13] According to Japan, any failure to follow these steps could impinge on the due process rights of both domestic and Korean interested parties and lead to additional problems of consistency of Japan's domestic laws with its WTO obligations. Japan further contends that the 15-month period requested represents the shortest period of time possible to ensure that these due process rights are not jeopardized.

7. Japan recalls certain "key legal principles"[14] relevant to arbitration proceedings under Article 21.3(c) of the DSU which should "guide this arbitration".[15] In particular, Japan highlights the

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[9]Japan's submission, paras. 1 and 15.

[10]*Cabinet Order Relating to Countervailing Duty Levied on Dynamic Random Access Memory, Etc.*, (Cabinet Order No. 13), *Official Gazette*, Issue No. 4264, 27 January 2006 (Exhibit JPN-1 attached to Japan's submission).

[11]See Japan's submission, para. 14.

[12]*Ibid*., para. 58.

[13]See *ibid*., para. 2.

[14]*Ibid*., para. 4; see also paras. 5-13.

[15]*Ibid*., para. 13; see also paras. 5-12.

discretion that an implementing Member enjoys in selecting its preferred means of implementation[16]; that implementation is usually achieved by means entirely within the "lawmaking" procedures of the implementing Member[17]; that the shortest period of time for implementation does not necessarily entail recourse to extraordinary procedures[18]; that the "particular circumstances" of a case have included the legal form of implementation, the "technical complexity" of the measures to be drafted, adopted and implemented, and the period of time in which the Member can achieve the proposed form of implementation in the light of its system of government[19]; that procedural steps include procedural conventions or the standard practice of a Member, even if not explicitly mandated in laws and regulations[20]; that the due process rights of interested parties should be respected in conducting investigations to implement DSB recommendations and rulings[21]; and that implementation should be full and effective in the light of the "particular circumstances" of the case.[22]

8. Japan recalls that the countervailing duty measure at issue in the original proceedings was imposed pursuant to a Cabinet Order[23], as required by Article 7(1) of Japan's Customs Tariff Law.[24] Japan contends that, in order to conform to the recommendations and rulings of the DSB, that measure will need to be modified through a replacement Cabinet Order. Japan refers to Article 7(17) of the Customs Tariff Law, which, according to Japan, "provides only one mechanism" for the

[16]See Japan's submission, para. 13 and para. 6 (referring to Award of the Arbitrator, *EC – Chicken Cuts*, para. 49).

[17]*Ibid*., para. 13 (referring to Award of the Arbitrator, *EC – Chicken Cuts*, para. 51).

[18]*Ibid*., para. 13 and para. 6 (referring to Award of the Arbitrator, *EC – Chicken Cuts*, para. 49).

[19]*Ibid*., para. 13 (referring to Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 30).

[20]*Ibid*., para. 13 and para. 10 (referring to, *inter alia*, Award of the Arbitrator, *EC – Chicken Cuts*, para. 79).

[21]*Ibid*., para. 13 and footnote 16 to para. 11 (referring to Panel Report, *US – Oil Country Tubular Goods (Article 21.5 – Argentina)*, para. 7.115; and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 292).

[22]*Ibid*., para. 13 and para. 12 (referring to Award of the Arbitrator, *Chile – Alcoholic Beverages*, paras. 39-40).

[23]See *supra*, footnote 10.

[24]See Japan's submission, paras. 2 and 14 (referring to Article 7(1) of Japan's Customs Tariff Law (Law No. 54 of 1910, as amended) which provides as follows:

> Where there is a fact that the importation of product to which subsidies are granted, directly or indirectly, to production or export in any foreign country causes or threatens to cause material injury to domestic industry …, as may be prescribed by a Cabinet Order, … a duty may be imposed in addition to customs duty chargeable at an applicable rate in the Annexed Tariff, in an amount equal to or less than the amount of the subsidies … .)

Japan's Customs Tariff Law is reproduced in document G/ADP/N/1/JPN/2, G/SCM/N/1/JPN/2 (Exhibit JPN-2 attached to Japan's submission).

Japanese government to "modify or abolish the countervailing duty"[25], namely, through a new investigation. Japan also refers to the fact that the Japanese government may modify a countervailing duty order if it is "found"[26] necessary to do so (which, according to Japan, suggests that an investigation must be conducted); that Article 7(19) of the Customs Tariff Law requires the government to "initiate ... an investigation as to whether ... changes in circumstances exist"[27]; and further that Article 7(20) of the Customs Tariff Law requires the investigation to be concluded within one year. According to Japan, these provisions illustrate that Japan's Customs Tariff Law does not allow the modification of a countervailing duty Cabinet Order by "simply drafting" an amendment to the current order for presentation to the Cabinet.[28]

9. Japan contends that, since an investigation is required, the government is also required to comply with certain procedural steps under Japanese laws and regulations relating to investigations.[29] Japan contends that, "in addition to these mandatory procedural steps", there are "requirements inherent to trade remedy investigations" designed to ensure that the due process rights of interested parties are preserved and that "meaning" is given to investigative process[30], which the JIA does not have any "discretion to omit".[31] For Japan, it is these aspects of the procedures that constitute the "particular circumstances" of the case and which must be taken into account in determining the reasonable period of time for implementation. Japan highlights some of the procedural requirements, namely: that interested parties be allowed "meaningful and necessary opportunities" to participate in the investigative process[32] (through opportunities to submit evidence and opinions, view information submitted by other interested parties, review and comment on the "Essential Facts" determined as such by the JIA); and that the JIA request evidence and information, verify their accuracy, disclose

[25]Japan's submission, para. 14 and footnote 24 thereto. Article 7(17) of the Customs Tariff Law, *supra*, footnote 24, provides, in relevant part:

> Where there are some changes in circumstances with regard to the specified product as enumerated below, the Government may, if it is *found* to be necessary, as may be prescribed in a Cabinet Order, modify or abolish the countervailing duty imposed under the provision of paragraph 1. (emphasis added)

[26]Japan's submission, para. 15.

[27]*Supra*, footnote 24.

[28]See Japan's submission, para. 15.

[29]*Ibid*., para. 16. The relevant Japanese laws, notifications, and regulations are reproduced in documents G/ADP/N/1/JPN/2, G/SCM/N/1/JPN/2; and Corr.1; Corr.2; Suppl.1; Suppl.2; Suppl.3; Suppl.4; and Suppl.5 (Exhibit JPN-2 attached to Japan's submission).

[30]*Ibid*., para. 17 (referring to Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 51).

[31]*Ibid*., para. 19.

[32]See *ibid*., para. 19 and footnote 27 thereto (referring to Article 10(1) of *Cabinet Order Relating to Countervailing Duty* (Cabinet Order No. 416, December 1994), which Japan contends also requires the JIA to accept information from any "industrial user of the products under the investigation or any representative-consumer organizations of such products" (reproduced in document G/ADP/N/1/JPN/2, G/SCM/N/1/JPN/2 (Exhibit JPN-2 attached to Japan's submission)). Japan argues that this means that the requirements of Article 12.10 of the *SCM Agreement* are mandatory under Japanese domestic law.

the Essential Facts to the interested parties, and allow commentary before issuing the final decision. Japan also recalls that, in the original investigation, there were more than 2000 pieces of evidence, and a report spanning over 500 pages, and that certain items of evidence and findings were interlinked; therefore, reconsideration of existing evidence and of new evidence submitted by interested parties might require the JIA to examine how the new evidence interacts with the existing factual record. Further, Japan highlights that, under Japanese law, the JIA's determination must be examined and reviewed by relevant bodies before a new countervailing duty Cabinet Order can be issued.

10. Bearing these factors in mind, Japan provides a detailed account of the three phases of implementation it envisages: the first "preparatory" stage for the initiation of the investigation—which Japan notes has already been completed—(estimated at 45 days); the investigation stage (estimated at one year); and the third phase involving the preparation and promulgation of the new countervailing duty Cabinet Order (estimated at 45 days).

11. Japan explains that, in the first stage—which it has already completed—Japan examined the relevant procedures available for implementation under Japanese law (since this is the first trade remedy case requiring Japan to implement the DSB's recommendations and rulings). Pursuant to Article 7(19) of the Customs Tariff Law, which authorizes the initiation of investigations relating to changed circumstances[33], the government "moved expeditiously" to initiate the investigation by 30 January 2008, but was first required to follow certain steps (including consultations between the Minster of Finance and Ministry of Economy, Trade and Industry; formation of the investigating authorities; publication of the notice of initiation; provision of notice to interested parties and to members of relevant Councils; and preparation of the notice of initiation, summaries of matters subject to investigation, time-limits for submission of evidence in writing, and other relevant matters).[34] Japan submits that, due to the "best efforts"[35] of the Japanese government, it was able to complete the preparatory process within 45 days.

12. Japan contends that, during the (second) investigatory stage, the JIA must comply with the same due process and transparency procedures required in the original investigation and set out in the

[33]See Japan's submission, para. 24 (referring to Article 7(19) of the Customs Tariff Law, *supra*, footnote 24).

[34]See *ibid.*, paras. 24-26 and footnotes 29-37 thereto (referring to various provisions of the *Cabinet Order Relating to Countervailing* Duty, *supra*, footnote 32); the *Guidelines for Procedures Relating to Countervailing and Anti-Dumping Duties* (reproduced in documents G/ADP/N/1/JPN/2/Suppl.2, G/SCM/N/1/JPN/2/Suppl.2; and G/ADP/N/1/JPN/2/Suppl.4, G/SCM/N/1/JPN/2/Suppl.4 (Exhibit JPN-2 attached to Japan's submission); and the Notification of the Ministry of Finance No. 26 (Exhibit JPN-6 attached to Japan's submission).

[35]Japan's submission, para. 26.

Customs Tariff Law[36], the *Cabinet Order Relating to Countervailing Duty*[37], and the *Guidelines for Procedures Relating to Countervailing and Anti-Dumping Duties*.[38] Japan notes that, due to the complexity and length of the original investigation, 18 months would normally be required to complete a new investigation, but that, for purposes of implementation, the JIA would seek to complete the entire process within one year. Specifically, Japan contemplates the following time periods:

(a) 43 days for the acceptance of voluntary submissions of evidence and comments by interested parties (due by 13 March 2008);

(b) 30 days for the preparation and transmission of questionnaires to interested parties (based in part on submissions received by 13 March 2008);

(c) 44-day response period for questionnaires;

(d) 70 days for "on-the-spot" investigations;

(e) 120 days for the issuance and communication of "on-the-spot" investigation reports prepared for each investigated party; and analysis and preparation of the disclosure of the JIA's Essential Facts;

(f) 30 days for commentary on the JIA's Essential Facts;

(g) 30 days for preparation of the written determination by the JIA (taking due account of arguments raised by interested parties).[39]

13. Japan contemplates a 45-day period for the final stage of the implementation process. Japan highlights that this stage calls for "government-wide decision making"[40] involving various separate, additional steps by independent entities.[41] For instance, the Minister of Finance must refer determinations by the JIA to the Council on Customs, Tariff, Foreign Exchange and other Transactions[42] (the "Council"), whose function is, *inter alia*, to examine JIA determinations and

[36]*Supra*, footnote 24.
[37]*Supra*, footnote 32.
[38]*Supra*, footnote 34.
[39]See Japan's submission, paras. 29-52.
[40]*Ibid*., para. 53.
[41]See *ibid*., para. 57.
[42]Article 16 of the *Cabinet Order Relating to Countervailing Duty* provides: "The Minister shall, when it is deemed necessary as a result of an investigation, ... to vary or remove countervailing duty ... promptly refer the matter to the Customs Tariff Council." (*supra*, footnote 32) The function of this Council is to examine and deliberate on important issues related to, *inter alia*, customs and tariffs, including determinations by JIA, and provide an independent opinion to the Minister.

provide an independent determination to the Minister, before the Minister can take further actions necessary for the decision and promulgation by the Cabinet of a Cabinet Order.[43] Failing approval by the Council, the Minister of Finance is not permitted to take any further action, but if successfully reviewed, a draft Cabinet Order, prepared by the Ministry of Finance, will be drawn up and reviewed again by the Cabinet Legislation Bureau (the "Bureau") before it is presented to the Cabinet.[44] This review by the Bureau, similar to those used in the normal law-making process, entails a preliminary and final examination stage, is mandatory, and ensures that the proposed Cabinet Order is necessary and consistent with all Japanese laws and regulations. Japan explains that, to shorten the implementation period, the JIA will, if possible, initiate the Bureau's review of the proposed draft Order in parallel with the Council review, but notes that these processes can take place only after the investigative process has ended and the final determination actually made.[45] Once a Cabinet decision is taken, following the Council's approval, the Cabinet Order will then be promulgated upon its publication in the Official Gazette and become effective on the date designated in the Order.[46]

B. *Korea*

14. Korea considers that Japan should be awarded five months to comply with the recommendations and rulings of the DSB, but that if five months elapses before the Award in this case is issued, an additional two weeks should be granted from the date of the Award. Korea contends that this would be sufficient for Japan to exercise its available "executive discretion"[47] to implement the Panel and Appellate Body findings, which require immediate revocation of the measure.[48]

15. Korea recalls the relevant findings and conclusions made by the Panel, as upheld by the Appellate Body: in respect of the debt-restructuring programme entered into by Hynix and its creditors (the "Restructuring") in October 2001, that Japan acted inconsistently with Article 19.4 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") by levying

[43]See Japan's submission, para. 53. Japan explains that the Council is an independent body established under Articles 6 and 8 of the Law to Establish the Ministry of Finance (Law No. 95 of 1999) (Exhibit JPN-5 attached to Japan's submission) and the *Cabinet Order Relating to Council on Customs, Tariff, Foreign Exchange and other Transactions* (Cabinet Order No. 276, 7 June 2000, as amended) (Exhibit JPN-8 attached to Japan's submission) and is composed of professors and experts from the private sector with expertise in customs and tariffs and other relevant areas.

[44]See Japan's submission, para. 54 and footnote 63 thereto. Article 3(1) of the Law to Establish the Cabinet Legislation Bureau (Law No. 252 of 1952, 31 July 1951, as amended) (Exhibit JPN-9 attached to Japan's submission) provides that: "The Cabinet Legislation Bureau shall perform the following duties: (1) to examine legislative bills, draft Cabinet orders, and draft treaties, give their opinion thereof, and, report such to the Cabinet after adding any necessary revisions thereto."

[45]See Japan's submission, para. 55.

[46]See *ibid.*, para. 56.

[47]Korea's submission, para. 2.

[48]See *ibid.*, para. 3.

countervailing duties in 2006 in excess of the amount of subsidy found to exist[49]; and that the JIA acted inconsistently with Articles 1.1(b) and 14 of the *SCM Agreement* by determining that the December 2002 Restructuring programme conferred a "benefit" on the Korean manufacturing company of dynamic random access memories, Hynix Semiconductor, Inc.[50] According to Korea, the first finding cannot be remedied since the subsidy no longer existed at the time Japan imposed the countervailing duty measures in 2006; and, as regards the JIA's benefit determination, the programme was not countervailable since no "reasonable and objective" authority could have made a finding that a benefit had been conferred.

16. Korea recalls that the "prompt compliance" requirement under Article 21.1, as applied to Article 21.3 of the DSU, requires, first and foremost, immediate compliance, and that only where this is not practicable should recourse to arbitration be had in order to determine the "shortest period possible within the legal system of the Member".[51] Korea also recalls that it is Japan's burden to prove that immediate compliance is not possible, and further to explain why 15 months is required for implementation.[52] Korea also highlights previous arbitration awards where it was noted that administrative changes, especially those involving administrative decision-making, generally take less time than legislative changes.[53]

17. Korea submits that, in this case, Japan should implement through immediate withdrawal of the countervailing duty measure[54] since the violations found by the Panel and Appellate Body cannot be "fixed or explained".[55] Korea contends that there is no need for new facts, new arguments, a new determination, and a new elaborate investigation, in the light of the "unambiguous and clear"[56] findings of inconsistency by the Panel and the Appellate Body; rather, all that is needed is administrative action to revoke the original countervailing duty measure. For Korea, "[t]here is no legal or equitable basis for Japan to leave the illegal measure in place while a new investigation is initiated and pursued."[57] Korea also rejects Japan's reliance on *dicta* in the Award of the Arbitrator in

[49]See Korea's submission, paras. 17-21 (referring to Panel Report, para. 7.361; and Appellate Body Report, paras. 210 and 212-215).
[50]See *ibid*., paras. 22-25 (referring to Panel Report, para. 7.282; and Appellate Body Report, paras. 163-164).
[51]*Ibid*., para. 34 (referring to, *inter alia*, Award of the Arbitrator, *EC – Hormones*, paras. 26 and 28; Award of the Arbitrator, *Indonesia – Autos*, para. 22; Award of the Arbitrator, *Canada – Patent Term*, para. 47; and Award of the Arbitrator, *US – 1916 Act*, para. 32).
[52]See *ibid*., paras. 36-37 (referring to Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 59).
[53]See *ibid*., paras. 38-40 (referring to Award of the Arbitrator, *Canada – Pharmaceutical Patents*, paras. 49-51; and Award of the Arbitrator, *US – Gambling*, para. 35).
[54]See *ibid*., paras. 26-28.
[55]*Ibid*., para. 3.
[56]*Ibid*., para. 59 (referring to Award of the Arbitrator, *EC – Chicken Cuts*, paras. 57-63).
[57]*Ibid*., para. 28.

EC – Chicken Cuts, which, as Japan contends, establishes that an arbitrator is merely required to determine the *time for* implementation (as opposed to the *type of* implementation). In that case, the European Communities was not awarded time for seeking advice of the World Customs Organization, as this was outside the "unambiguous and clear" ruling of the panel and the Appellate Body.[58]

18. Failing immediate revocation, Korea argues that Japan is nonetheless required to implement in the shortest period possible. Korea refers to Japan's admission that there are implementing regulations in place, and argues that all that is required is for Japan to take administrative action.[59] Korea contends, therefore, that Japan simply needs to determine whether the exercise of discretion in applying the relevant regulations would "require anything beyond a minimal period of time".[60] Further, the burden is on Japan to show that it has used its discretion to ensure prompt compliance.[61] Korea submits that Japan has not demonstrated that it has exercised all of its available discretion to shorten the period of implementation, nor has it explained why it exercised its discretion to "add unnecessary, burdensome and delaying steps".[62] In response to Japan's reference to procedural steps that form part of Japan's "standard practice", Korea submits that this argument is misplaced, as Japan has never before taken implementation measures in a trade remedy case. Korea refers to the fact that the Minister of Finance "may" (as opposed to "shall") request the views and arguments of interested parties[63] in illustration that discretion exists and that due process requirements, referred to by Japan, are not always necessary in conducting investigations. Japan has put the "cart before the horse"[64] by justifying a *de novo* investigation and referring to the protection of due process rights associated with it, instead of identifying the proper implementation process and then choosing the appropriate due process requirements.[65]

19. Korea refers to Japan's claim that procedural conventions regarding the conduct of investigations constitute "particular circumstances".[66] Korea argues that Japan fails to explain the

[58]See Korea's submission, paras. 57-59 (referring to Award of the Arbitrator, *EC – Chicken Cuts*, paras. 57-63).

[59]See *ibid*., para. 48 (referring to Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 27).

[60]*Ibid*., para. 48.

[61]See *ibid*., para. 49 (referring to Award of the Arbitrator, *Canada – Autos*, para. 47).

[62]*Ibid*., para. 51 (referring, for instance, to Japan's submission, para. 31). Korea contends there that Japan itself admits that the Cabinet Order does not require a full new investigation with new evidence.

[63]See *ibid*., paras. 50 and 51 (referring to Articles 7(2) and 9(2) of the *Cabinet Order Relating to Countervailing Duty*, *supra*, footnote 32), which provide respectively that the Minister of Finance "may", if deemed necessary request interested parties to present evidence or testify; and "may", if necessary, request interested parties, industrial users and others to present their views in writing that are relevant to the investigation).

[64]*Ibid*., para. 54.

[65]See *ibid*. Further, Korea argues that even the interested parties, including Hynix, have stated that there is no need for the Japanese government to follow the procedural steps referred to by Japan (referring to the submission of Hynix Semiconductor, Inc. to the JIA, dated 13 March 2008, p. 20).

[66]See Korea's submission, paras. 44 and 65.

"particular circumstances" which hinder prompt compliance.[67] Korea rejects any argument that the absence of regulations specifically addressing implementation of adverse rulings constitutes a "particular circumstance" justifying delay; conversely, such an absence of regulations favours exercising maximum discretion to achieve prompt compliance. Korea submits that, since Japan, as a respondent, has never faced an adverse trade remedy ruling before, it would be inappropriate to refer to these as "procedural conventions"[68] regarding implementation. Further, Japan's claim of great "technical complexity"[69] in this case does not rise to the level of "particular circumstances", bearing in mind the fact that the circumstances and findings made in the present case call for quick implementation[70], and that far more constitutionally complex legislation was at issue in other Article 21.3(c) arbitrations.[71] For Korea, Japan's reference to "particular circumstances" is an excuse to "slow-walk"[72] through the process of implementation, whilst maintaining an illegal measure.

20. Finally, Korea submits that Japan's proposed implementation steps for its *de novo* investigation are "unjustified".[73] Japan fails to explain the reason for the delay of over six weeks following the adoption of the Panel and Appellate Body Reports for initiating its *de novo* investigation (that is, on 30 January 2008), and for taking additional evidentiary steps that are inconsistent with the Panel and Appellate Body findings. Korea requests that these delays be taken into account to shorten the time period of the Award. Korea also doubts that there could be any new relevant evidence obtained from questionnaires submitted by 13 March 2008. It submits that Japan's request for time for the distribution of new (and responses to) questionnaires and on-site verification should be rejected as "totally unreasonable"[74], especially in the light of the findings in this case.[75] Korea also contends that, instead of the 120 days requested for preparation of the verification report and a further 30 days for the statement of Essential Facts[76], the preparation of the statement of Essential Facts could be completed in one week, given that "all essential facts are known", and since Japan must have already studied the Panel and Appellate Body Reports. Korea submits that completion of the JIA determination, which will be largely redundant with the Essential Facts, could also be achieved in "less than a week".[77] Korea also considers "unacceptable"[78] the 45 days requested by

[67]See Korea's submission, para. 63.
[68]*Ibid*., para. 65.
[69]*Ibid*., para. 66 (referring to Japan's submission, para. 13, third bullet).
[70]See *ibid*., para. 66.
[71]*Ibid*., paras. 68-69 (referring to, *inter alia*, Award of the Arbitrator, *US – Gambling*, paras. 44 and 46-47, where the arbitrator referred to the overlapping federal and state jurisdictions, criminal and civil laws, as well as sensitive issues of public morals and order).
[72]*Ibid*., para. 44.
[73]*Ibid*., heading VI.B.3, p. 15.
[74]*Ibid*., para. 76.
[75]See *ibid*., paras. 75-78 (referring to Japan's submission, paras. 31-39).
[76]*Ibid*., para. 79 (referring to Japan's submission, paras. 40-47).
[77]*Ibid*., para. 80 (referring to Japan's submission, paras. 50-52).
[78]*Ibid*., para. 81.

Japan for the Council Review and Cabinet Order process, and submits that less than 10 days is sufficient since the Council can immediately review the DSB's recommendations and rulings, and since immediate final executive Cabinet action can thereafter be taken.[79] In the light of a 25-day precedent established by Japan in a previous anti-dumping duty dispute, Korea contends that the entire process could be completed by 7 April 2008.[80]

21. Korea argues that, through its request for a new investigation, Japan attempts to introduce "*ex post facto* rationalizations"[81], and create an entirely new evidentiary record for maintaining the illegal countervailing duty measure in place. Korea suggests that, just as the Appellate Body rejected a similar attempt by Japan in the original proceedings[82], Japan should not be allowed to "circumvent" the rules against allowing *ex post facto* rationalizations and the introduction of non-record new evidence, because, otherwise, the JIA would go on a "fishing expedition" to try to develop "just the sort of facts"[83] previously rejected by the Panel and Appellate Body.

22. In sum, Korea contends that Japan is obligated to comply immediately; that Japan fundamentally misunderstands its obligations; that Japan has already failed to exercise the necessary discretion to accelerate its processes; that Japan is attempting to take advantage of its alleged gap in administrative provisions as an excuse for unwarranted delay; that there is no administrative practice for Japan to rely on as an excuse; that Japan has failed to establish "particular circumstances"; that Japan's proposal fails to exercise all available executive discretion; and, that Japan has no right to continue to impose illegal duties while it initiates a wholly new investigation.[84] For these reasons, Korea believes that five months from the date of adoption is a reasonable period of time for Japan's implementation of the DSB's recommendations and rulings.

[79]See Korea's submission, para. 81 (referring to Japan's submission, paras. 53-57).

[80]*Ibid*., para. 82 (referring to an anti-dumping investigation of *Certain Polyester Staple Fibre Yarn from Korea and Chinese Taipei*). In that case, Japan took only 25 days from comments on Essential Facts to final approval by the Japanese Cabinet.

[81]*Ibid*., para. 85.

[82]*Ibid*., paras. 84-86 (referring to Appellate Body Report, para. 159). See also Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 175.

[83]*Ibid*., para. 87.

[84]See *ibid*., para. 8.

III. Reasonable Period of Time

A. *Scope of the Arbitrator's Mandate under Article 21.3(c) of the DSU*

23. The Panel and Appellate Body Reports[85] in this dispute were adopted by the DSB on 17 December 2007. On 15 January 2008, Japan informed the DSB of its intention to comply with the DSB's recommendations and rulings, but stated that it would need a reasonable period of time in which to do so.[86] As discussions between the parties failed to produce a mutually agreed period of time, the parties asked me to act as Arbitrator to determine the "reasonable period of time" for Japan to implement the recommendations and rulings of the DSB, pursuant to Article 21.3(c) of the DSU.

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

> If it is impracticable to comply immediately with the recommendations and rulings [of the DSB], the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:
>
> ...
>
> (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances. (footnotes omitted)

25. It is well accepted that my remit as Arbitrator in these Article 21.3(c) proceedings is limited[87]: it consists of determining what constitutes a "reasonable period of time" to implement the recommendations and rulings made by the DSB in the underlying WTO dispute. At the oral hearing in this arbitration, both Japan and Korea accepted that the principles articulated in the most recent arbitration award, *EC – Chicken Cuts*, should guide me in executing my mandate. Those principles include the following:

[85]Panel Report, WT/DS336/R; Appellate Body Report, WT/DS336/AB/R.
[86]See WT/DSB/M/244, para. 15.
[87]See, for instance, Award of the Arbitrator, *EC – Chicken Cuts*, para. 49; and Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 44.

- that an implementing Member has a measure of discretion in selecting the means of implementation that it deems most appropriate[88];

- that an arbitrator should base his or her determination on the shortest period of time permissible within the legal system of the implementing Member[89];

- that an arbitrator should bear in mind that the implementing Member is expected to use whatever flexibility is available within its legal system in its efforts to fulfil its WTO obligations.[90] Such flexibility, however, need not necessarily include recourse to "extraordinary" procedures[91]; and

- that the "particular circumstances" of a dispute may affect the calculation of the reasonable period of time, making it "shorter or longer".[92]

26. Whilst my task is to determine *by when* an implementing Member must comply, to do so requires that some consideration be given to the *means of implementation* chosen by the implementing Member. As one arbitrator has explained: "[t]urning to the question of what would constitute the 'reasonable period of time' for implementation in this case, I need to look first at the type of measure proposed to be used for implementation."[93] In other words, to determine *when* a Member must comply, it may be necessary to consider *how* a Member proposes to do so.

27. An implementing Member has a discretion in choosing the means of implementation, but this discretion is not unlimited[94]; the method chosen must be consistent with a Member's WTO obligations.[95] In that vein, even though Korea and Japan advance different arguments as to the means of implementation that could be taken in this case, they accept as a general premise that "an

[88]See Award of the Arbitrator, *EC – Chicken Cuts*, para. 49 (referring to Award of the Arbitrator, *Canada – Pharmaceutical Patents*, paras. 41-43; Award of the Arbitrator, *Chile – Price Band System*, para. 32; Award of the Arbitrator, *EC – Tariff Preferences*, para. 30; Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 26; Award of the Arbitrator, *US – Gambling*, para. 33; and Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 69).

[89]See Award of the Arbitrator, *EC – Chicken Cuts*, para. 49 (referring to Award of the Arbitrator, *Chile – Price Band System*, para. 34; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 47; Award of the Arbitrator, *EC – Tariff Preferences*, para. 26; Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 25; and Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 61).

[90]See Award of the Arbitrator, *EC – Chicken Cuts*, para. 49 (referring to Award of the Arbitrator, *Chile – Price Band System*, para. 39; Award of the Arbitrator, *EC – Tariff Preferences*, para. 36; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment*), para. 64).

[91]Award of the Arbitrator, *EC – Chicken Cuts*, para. 49 (referring to Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 42; Award of the Arbitrator, *Chile – Price Band System*, para. 51; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 74).

[92]Award of the Arbitrator, *EC – Chicken Cuts*, para. 49.

[93]Award of the Arbitrator, *US – 1916 Act*, para. 34.

[94]See Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 69; and Award of the Arbitrator, *EC – Chicken Cuts*, para. 56.

[95]See Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 69.

implementing Member ... has a measure of discretion in choosing the *means* of implementation, *as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements*".[96] In assessing whether the means chosen by the Member is consistent with the recommendations and rulings of the DSB, I must 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.[97] This does not mean that I am permitted to determine the consistency with WTO law of the *measure taken* to comply. This can only be judged in Article 21.5 proceedings. Article 21.3(c) arbitrations are distinct and concern *by when* implementation must take place. In making this determination, the means of implementation available to the Member concerned is a relevant consideration.

28. Finally, I am guided by previous arbitrators' awards which place the overall burden of proof on the implementing Member to prove that, if it contends that immediate compliance is impracticable, the period of time proposed constitutes a "reasonable period of time".[98] This burden was accepted by Japan at the oral hearing in this case.

B. *Factors Affecting the Determination of the Reasonable Period of Time*

1. Choice of Means of Implementation in the Light of the DSB's Recommendations and Rulings

29. The dispute in this case involves a challenge by Korea regarding a countervailing duty investigation conducted by the JIA on dynamic random access memories manufactured by the Korean company, Hynix Semiconductor, Inc. The critical issue in the case was whether the JIA properly found that Hynix had received countervailable subsidies, within the meaning of Part V of the *SCM Agreement*, as a result of two debt-restructuring programmes entered into by Hynix and its creditors in October 2001 and December 2002.

30. For the purposes of this Article 21.3(c) arbitration, I refer to the relevant findings of the Appellate Body, namely, that it:

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[96]Award of the Arbitrator, *EC – Hormones*, para. 38. (emphasis added) See also Award of the Arbitrator, *EC – Chicken Cuts*, para. 56.

[97]I find support for my interpretation in the wording of the provisions of Article 21 of the DSU. According to Article 21.1, "prompt compliance *with the recommendations and rulings of the DSB* is essential" (emphasis added); Article 21.3 provides that "[i]f it is impracticable to comply immediately *with the recommendations and rulings*", the Member shall have a reasonable period of time to do so (emphasis added); and Article 21.3(c) states that the "reasonable period of time to implement that panel and Appellate Body *recommendations* should not exceed 15 months ... " (emphasis added).

[98]See Award of the Arbitration, *Canada – Pharmaceutical Patents*, para. 47; Award of the Arbitrator, *US – 1916 Act*, para. 33.

- upheld the Panel's findings, in paragraphs 7.282 and 8.2(b) of the Panel Report, that the JIA acted inconsistently with Articles 1.1(b) and 14 of the *SCM Agreement* by determining that the December 2002 Restructuring conferred a "benefit" on Hynix;

- upheld, albeit for different reasons, the Panel's findings, in paragraphs 7.316 and 8.2(c) of the Panel Report, that the JIA calculated the amount of benefit conferred on Hynix by the October 2001 and December 2002 Restructurings inconsistently with Articles 1.1(b) and 14 of the *SCM Agreement*; and

- upheld the Panel's finding, in paragraphs 7.361 and 8.2(e) of the Panel Report, that Japan acted inconsistently with Article 19.4 of the *SCM Agreement* by levying countervailing duties on imports which the JIA itself had found were not subsidized at the time of duty imposition [with respect to the October 2001 Restructuring].[99]

31. Based on these and other findings, the Appellate Body "recommend[ed] that the DSB request Japan to bring its measure, found in [its] Report, and in the Panel Report as modified by [its] Report, to be inconsistent with the *SCM Agreement*, into conformity with its obligations under that Agreement."[100]

32. Japan requests a period of 15 months to bring its measure into conformity in this case. Korea, on the other hand, argues that a period of only 5 months is required for purposes of implementation, and that if these arbitration proceedings extend beyond that period of time, I should grant Japan a further two weeks from the date of the arbitration award to implement.

33. In its written submission, Korea argues that only two of the Appellate Body findings referred to above are "relevant"[101] for purposes of this arbitration. First, the finding that the JIA had allocated the useful life of a non-recurring subsidy provided in October 2001 to the years 2001 to 2005, but had inconsistently levied countervailing duties in 2006 (the "allocation finding") (referred to at paragraph 8, third bullet, above)[102]; and secondly, the finding that the JIA had determined that a benefit had been conferred as a result of the December 2002 Restructuring in a manner inconsistent with the requirements of Articles 1.1(b) and 14 of the *SCM Agreement* (referred to at paragraph 8, first bullet, above).[103] Korea also contends that, given their "unambiguous and clear" nature[104], the

[99]Appellate Body Report, para. 280(b), (c), and (e), respectively.
[100]*Ibid*., para. 281.
[101]Korea's submission, para. 16.
[102]*Ibid*., paras. 17-21.
[103]*Ibid*., paras. 22-25.
[104]*Ibid*., para. 59 (referring to Award of the Arbitrator, *EC – Chicken Cuts*, paras. 57-63).

Appellate Body findings made with respect to these aspects of the JIA's determination require that Japan implement by withdrawing the countervailing duties.[105]

34. At the oral hearing, Korea explained that, with regard to the "allocation finding" made in respect of the October 2001 Restructuring, Japan had made a determination that the useful life of the non-recurring subsidy ended in 2005 and that Japan, therefore, could not legally impose a countervailing duty measure with respect to the subsidies resulting from the October 2001 Restructuring. As regards the second finding, in Korea's view, the Appellate Body found that, "on substance", the Panel had conducted an objective appraisal of the JIA's determination regarding the Deutsche Bank Report (on which the JIA relied to make a finding that four of Hynix's financial creditors did not enter into the December 2002 Restructuring with Hynix on commercially reasonable terms), and confirmed the finding of the Panel that the JIA had acted inconsistently with Articles 1.1(b) and 14 of the *SCM Agreement* by finding that a benefit had been conferred by the December 2002 Restructuring. Korea explained that, since the existence of a benefit is indispensable in proving that a subsidy has been granted under the *SCM Agreement*, Japan has no legal basis to maintain the countervailing duty with regard to the December 2002 Restructuring.

35. Korea highlights that "prompt compliance" is required under Article 21.1 of the DSU; and that this principle informs Article 21.3 of the DSU. Where compliance is not "immediate" because it is judged impracticable[106], it should nonetheless be achieved in the shortest period of time possible.[107] Korea contends that Japan bears the burden of proving that anything beyond "immediate" compliance is required to implement the DSB's recommendations and rulings in this case.[108]

36. In addition to the two Appellate Body findings referred to by Korea, Japan considers relevant, as well, the finding of the Appellate Body that the JIA calculated the *amount* of benefit conferred by both Restructurings in a manner inconsistent with Articles 1.1(b) and 14 of the *SCM Agreement* (referred to at paragraph 8, second bullet, above).[109] According to Japan, all three findings are capable of being remedied through the implementing action it proposes for complying with the DSB's

[105]Korea's submission, paras. 28, 45, and 62.

[106]At the oral hearing, Korea explained that a period of five months was selected out of deference to these arbitration proceedings, as it represented the shortest possible time for revoking the countervailing duty order, taking into account the time taken from adoption of the Appellate Body and Panel Reports, as well as these proceedings.

[107]Korea's submission, para. 34 (referring to Award of the Arbitrator, *EC – Hormones*, paras. 26 and 38); see also para. 46.

[108]*Ibid*., para. 37.

[109]For Korea, this additional finding does not affect its argument that immediate compliance through revocation is the only way to implement in this case.

recommendations and rulings. In this regard, as I explain below[110], Japan contends that replacement of the Cabinet Order authorizing the imposition of the original countervailing duty order—which was the subject of the underlying dispute—by a new Cabinet Order is required under its laws and regulations to implement the DSB's recommendations and rulings. This new Cabinet Order may only be issued following an "investigation" conducted in conformity with various procedural requirements specified under Japan's laws and regulations (comprising the Customs Tariff Law[111]; the *Cabinet Order Relating to Countervailing Duty*[112]; and the *Guidelines for Procedures Relating to Countervailing and Anti-Dumping Duties*[113]). Japan further rejects Korea's argument that the nature of the Appellate Body's findings precludes modification of the countervailing duty order through an investigation. Japan notes that the Appellate Body's "allocation finding" was based on an "implicit" finding that the benefit had expired after a period of five years, ending in 2005[114]; and that both findings made with regard to the issue of "benefit" suggest that the JIA erred in the grounds selected and explanations provided in making these determinations.[115] Contrary to Korea's arguments, Japan contends that the nature of the specific findings of the Appellate Body require a new investigation to supplement the current factual record, as well as a re-examination of that factual record, in the light of the DSB's recommendations and rulings.[116]

37. In considering the parties' arguments as regards the permissible means of implementation, I recall that a Member whose measure has been found to be inconsistent with the covered agreements may generally choose between two courses of action: withdrawal of the measure; or modification of the measure by remedial action.[117] While withdrawal may be the preferred option to secure "prompt compliance", a Member may, where withdrawal is deemed impracticable, choose to modify the measure, provided that this is done in the shortest time possible, and that such modification is permissible under the DSB's recommendations and rulings.

[110]See *infra*, paras. 41 and 42.
[111]See *supra*, footnote 24.
[112]See *supra*, footnote 32.
[113]See *supra*, footnote 34.
[114]At the oral hearing, Japan referred to Appellate Body Report, para. 214.
[115]At the oral hearing, Japan referred to Appellate Body Report, para. 163, where the Appellate Body recalled with approval the Panel's finding that "an objective and impartial investigating authority could not have rejected the Deutsche Bank Report on the grounds selected by the JIA". Japan also referred to the Appellate Body's statement regarding the calculation of the amount of benefit conferred, in which the Appellate Body noted that "the JIA did not sufficiently explain, in its determination, how it reached the conclusion that the value of [Hynix's shares] was zero from the perspective of Hynix, the recipient." (*Ibid*., para. 178)
[116]For instance, Japan explained at the oral hearing that, as regards the finding on the Deutsche Bank Report, the JIA needed to conduct a review and reconsider the "grounds selected" by the JIA.
[117]See for instance, Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 50.

38. The Appellate Body has said, in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, that a Member's right to implement extends to conducting a re-determination relating to the initial period of investigation, and that this right does not exclude having recourse to new facts.[118] However, as Japan accepted at the oral hearing, any investigation should not amount to a *de novo* review by the JIA; and any new evidence must be confined to the period examined in the original countervailing duty investigation.[119] Within these parameters, Japan may choose to modify its determination based on the facts on record. It may also seek to gather additional facts relating to the initial investigation period to the extent, and only to the extent, that this is necessary to, and capable of, bringing the inconsistent elements of its original determination into compliance.

39. There are very real concerns as to how far the findings by the Appellate Body, as adopted by the DSB, lend themselves to remedial action through the new investigation proposed by Japan. In particular, as regards the "allocation finding", the subsidy was found to have been exhausted by 2005, and I find it difficult to conceive of new information that would allow the JIA to remedy this finding, short of withdrawal of the countervailing duty relating to the October 2001 Restructuring. Nor is this less so because the "allocation finding" is "implicit". However, in this case, I cannot say that all the recommendations and rulings of the DSB are not capable of implementation by modification; and hence I must make a determination as to the reasonable period of time that would facilitate such modifications. My questioning of Japan concerning the scope of the new evidence that it considered necessary, and which the JIA could reasonably be expected to gather, did not yield clear or conclusive answers. However, I am not required to be certain that Japan will actually be able to collect information which it contends to be necessary; rather, such considerations will inform my assessment of what period of time is reasonable for Japan to modify its measure.

2. The Specific Steps of Implementation

40. I turn now to consider what, in the light of the specific steps proposed by Japan, would constitute a "reasonable period of time" within which Japan could bring into compliance, through modification, its measure found to be inconsistent with the relevant provisions of the *SCM Agreement*. As mentioned above, the burden rests on Japan to prove that the period of 15 months that it requests constitutes such a "reasonable period of time".

41. Japan asserts that the only way under its law to modify a countervailing duty order that has been found to be inconsistent with the *SCM Agreement* is through replacement of the Cabinet Order

[118]See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 173.
[119]See for instance, Appellate Body Report, *US – Cotton Yarn*, paras. 76-79.

authorizing the original countervailing duty order, by a new Cabinet Order. To do so, Japan explains that the Japanese government must conduct a new investigation pursuant to Article 7(17) of Japan's Customs Tariff Law. According to that provision, "[w]here there are some changes in circumstances with regard to the specified product ... the Government may, if it is found to be necessary, as may be prescribed in a Cabinet Order, modify or abolish" the original countervailing duty.[120] Japan contends that this provision must be read in conjunction with Article 7(19) of the Customs Tariff Law, which empowers the Japanese government to initiate, if it is found to be necessary, an investigation as to whether these "changes in circumstances" exist.

42. Following questioning at the oral hearing, I accept Japan's submission that an investigation, conducted pursuant to the aforementioned provisions of the Customs Tariff Law, constitutes the only way to modify an original countervailing duty order found by the DSB to be inconsistent with the *SCM Agreement*[121], without having recourse to "extraordinary" means, which, in any event, Japan is not expected to do for purposes of implementation.[122] Japan conceded, at the oral hearing, that the *existence* of the "change in circumstances", as contemplated under Article 7(19), is evident on the facts of this case, as it arises from the DSB's recommendations and rulings and does not require a separate enquiry or investigation. However, Japan explained that a cumulative reading of Articles 7(17) and 7(19) leads to the conclusion that an investigation is required to ascertain the *manner* in which the original countervailing duty order should be modified.

43. I therefore focus my attention on the steps proposed by Japan in conducting such an investigation. Japan contends that I should allocate a period of approximately 13 months and 15 days (out of the 15-month period requested) for the JIA's investigation. This investigation, Japan alleges, requires a preparatory phase of 45 days that has already been completed.[123] Japan contends that the actual investigatory phase will take one year, and involves: the acceptance of submissions from interested parties; the issuance and collection of questionnaires to interested parties based on these submissions[124]; on-the-spot investigations conducted by the JIA; the issuance of reports based on these on-the-spot investigations; the writing up of the Essential Facts by the JIA and provision for

[120]*Supra*, footnote 24.

[121]At the oral hearing, I inquired into the relevance of Article 98(2) of Japan's Constitution (which provides that: "The treaties concluded by Japan and established laws of nations shall be faithfully observed"); as well as Article 7(33) of the Customs Tariff Law which provides that: "In addition to the matters as provided for in each preceding paragraph, any necessary matters on the application of countervailing duty shall be prescribed by a Cabinet Order". (See *supra*, footnote 24)

[122]See for instance, Award of the Arbitrator, *EC – Chicken Cuts*, para. 49; Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 42; Award of the Arbitrator, *Chile – Price Band System*, para. 51; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 74.

[123]See *supra*, para. 11.

[124]At the oral hearing, Japan explained that it was in the process of preparing and transmitting questionnaires based on comments it had received so far from interested parties that had voluntarily submitted evidence and comments after having been informed of the initiation of an investigation.

commentary by interested parties; and the preparation of the final written determination by the JIA to be reviewed by the Council and Bureau before presentation to, and decision-making by, the Cabinet in the final phase of implementation.[125]

44. Japan explains that it does not intend to conduct a *de novo* investigation in the sense of re-doing all aspects of the investigation[126], but that I should give due consideration to the fact that the predominant part of the evidence from the original investigation has to be reviewed[127] and that there is a chance that additional evidence collected may interact in a new way with the existing evidence on record.[128] Having regard to the requirements of promptness stipulated in Article 21.3 and in previous awards, Japan notes that the timeframes it has indicated for each of the various stages of the proposed "change of circumstances" investigation have been shortened from the original investigation, which in its entirety lasted 18 months.[129]

45. Finally, Japan contends that I should take into account as a "particular circumstance" of this case the due process rights of interested parties. Japan submits that interested parties play an important role in providing and verifying information, and respect for their rights by Japan has become a "standard practice" in Japan's trade remedy investigations.[130] Out of deference to these rights, the JIA must carry out all of the steps that are normally followed in original investigations, and it has no discretion to omit such procedural steps.[131]

46. In response to these arguments, Korea states that, "even if it could go along with"[132] Japan's contention that an investigation is in principle required, the time indicated by Japan in its submission is unjustified[133] and should be expedited. For Korea, a period of no more than five months would allow Japan to utilize fully its administrative discretion and comply with the recommendations and rulings of the DSB in this case. Korea further highlights that the procedural rules referred to by Japan that govern the conduct of investigations do not establish mandatory timeframes for the preparatory or investigatory steps requested by Japan[134], a point conceded by Japan at the oral hearing. For Korea,

[125]See *supra*, paras. 12 and 13.
[126]Japan explained at the oral hearing that it did not intend to conduct a full investigation (for instance, it would not engage in a causation and injury analysis). Japan contends that 80 per cent of the evidence on record has to be reviewed.
[127]Japan's statement at the oral hearing.
[128]See Japan's submission, para. 21.
[129]See *ibid*., para. 28.
[130]See *ibid*., para. 17.
[131]See *ibid*., paras. 19 and 27.
[132]Korea's statement at the oral hearing.
[133]See Korea's submission, Section 3, p. 15.
[134]See *ibid*., paras. 70-83.

it is also far from clear that all the procedural *steps* proposed by Japan are mandatory under Japanese law for the protection of due process rights of interested parties.[135]

47. I recall the requirement for promptness under Article 21.3, and the imperative to implement in the shortest time possible in the light of a Member's legal system. Previous arbitrators have explained that, compared to the other types of action generally taken to implement, such as legislative action or administrative rule-making, administrative action should be less time-consuming, and may not require the full 15-month guideline mentioned in Article 21.3(c).[136] Although Japan is hesitant to characterize its proposed action as one involving a purely "administrative action", I would be inclined to characterize it as such since no change of laws or subordinate legislation is required. However, nothing turns upon making a conclusive characterization, since, on Japan's own account of the legal process that is required to effect the modification of its measure, there is no legal impediment to using a shorter period to consider the limited number of DSB rulings of inconsistency. Further, prior awards have emphasized that an implementing Member is required to take full advantage of the flexibility inherent in its legal system in order to ensure that implementation takes place in accordance with the requirement for promptness in Article 21 of the DSU. The existence of this flexibility may manifest itself in, for instance, the absence of mandatory steps to be taken under that Member's laws and regulations in carrying out the proposed implementation; or similarly, in the absence of mandatory time periods within which such steps must be taken.[137]

48. Not all of the investigatory steps, or the timeframes for these steps, appear to be mandatory.[138] In my view, the flexibility in Japan's legal structure speaks in favour of a shorter period of time than that requested by Japan. Japan appears to justify the time-limits indicated in its submissions on its practice and experience in *original* investigations. In my view, reliance on time periods used in original investigations is inappropriate, because Japan is only required to conduct a re-determination

[135]See Korea's submission, paras. 50 and 51. Korea refers to Articles 7(2) and 9(2) of the *Cabinet Order*, which states that the Minister of Finance "*may*, if deemed to be necessary in the course of the investigation, request interested parties to present evidence or testify", and "*may*, if necessary, in the course of investigation, request interested parties, industrial users of such products under investigation or representative consumer-organizations of such product to present their view in writing which are relevant to the investigation". (*Supra*, footnote 32 (emphasis added))

[136]See for instance, Award of the Arbitrator, *Australia – Salmon*, para. 38 (quoting Award of the Arbitrator, *EC – Hormones*, para. 25: "when implementation can be effected by administrative means, the reasonable period of time should be 'considerably shorter than 15 months'").

[137]See for instance, Award of the Arbitrator, *US – 1916 Act*, para. 39; Award of the Arbitrator, *EC – Tariff Preferences*, para. 36; Award of the Arbitrator, *EC – Export Subsidies on Sugar*, paras. 76; and Award of the Arbitrator, *EC – Chicken Cuts*, paras. 79-80.

[138]At the oral hearing, Japan explained that, although not all of the steps are mandatory, certain others are, such as the initiation of an investigation and the preparatory phase. Further, once interested parties have submitted information, it is necessary to issue questionnaires, conduct the necessary "on-the-spot" verifications, and, finally, prepare the final written submission. I do not doubt, therefore, that certain steps taken by the JIA in conducting an investigation, even if themselves not mandatory, nevertheless require follow-up action by the JIA in order to ensure that information, albeit voluntarily submitted by interested parties, is verified.

to implement a limited number of DSB rulings of inconsistency. Further, the exigency of promptness requires that Japan utilize the flexibility in its legal system when making a re-determination in order to implement. Japan has not shown, for instance, that its current regulatory structure prevents it from acting with greater expedition, especially in respect of the non-mandatory steps and timeframes. Further, as explained above, given the limited range of findings to be implemented, the nature of the Appellate Body's findings, as well as the comprehensive, existing factual record[139], it does not appear to me that a replication of a complete investigation, with similar time periods for each stage of the investigation, is justified. In fact, allowing Japan as much time as it requests could raise the risk that an investigatory process might involve elements of *de novo* review, which is not the type of action permitted in the process of making a re-determination.

49. I acknowledge Japan's reference to awards of arbitrators in which it was stated that, even if some steps and time periods are not required by law, they can nonetheless be utilized in order to ensure that implementation is effected in a transparent and efficient manner, fully respecting due process for all parties involved.[140] Here, Japan justifies its reference to numerous investigatory steps, as well as time periods associated with these steps, on what it has termed its "standard practice" of respecting the due process rights of interested parties. The arbitrator in *EC – Chicken Cuts* recognized that, even if certain timeframes and procedures were not mandated, they were based on "standard practice", which the European Communities in that case had substantiated with evidence.[141]

50. The case before me is somewhat different. Japan has not shown the existence of any "standard practice" with respect to due process rights in investigations conducted for implementation purposes, since, by Japan's own admission, it has never had to implement DSB recommendations and rulings in a trade remedy dispute. As I have already explained above, Japan's reliance on "standard practice" followed in original investigations is not comparable, nor appropriate, in the light of the difference in the nature and scope of an investigation that may prove necessary in the process of modifying a determination for implementation purposes.

51. Nor has Japan explained sufficiently the specific investigatory steps that require the input and participation of interested parties to justify protracted time periods in order to ensure their due process rights, as opposed to the steps the JIA itself is required to take in the exercise of its own duties. Further, due process is a flexible concept to be applied to the specific requirements of the case—in this case, the process of implementing DSB rulings. A balance must be struck between respecting due

[139]Japan itself admits that the underlying determination at issue resulted from the JIA's consideration of over 2000 pieces of evidence and a report that spanned over 500 pages. (See Japan's submission, para. 21)

[140]See, for instance, Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 51.

[141]Award of the Arbitrator, *EC – Chicken Cuts*, para. 79.

process rights of interested parties and the promptness required in implementation. In determining that balance, I note that considerable opportunity was already afforded to interested parties to participate in the original investigation conducted by the JIA. It seems then that it would be appropriate to provide a shorter time to such interested parties in the context of an investigation that is far more limited in scope, and which has been initiated to implement DSB recommendations and rulings.

52. With regard to the final stage of implementation referred to by Japan—that is, the separate reviews by the Council and the Bureau, followed by decision-making by the Cabinet[142]—I recognize that these stages are mandatory under Japanese law in order for a countervailing duty order to take effect and enter into force.[143] I note as well that there are no specified time-limits in Japan's legislation for the steps in this process, and that Japan requests a period of 45 days for completion of this final stage. Japan has not explained how exactly it has allocated the time between the three independent processes that must take place at this stage. Korea has argued that the timeframe for review by the Council and Bureau should be shortened in the light of the "clear"[144] DSB recommendations and rulings which were adopted in mid-December 2007. I also note Korea's reference to a precedent involving an anti-dumping duty original investigation, where the time taken from commentary on the Essential Facts to final approval by the Japanese Cabinet took 25 days, rather than the 75 days requested by Japan.[145] Even though that case might represent an "extraordinary" instance of an accelerated procedure, and recourse to such extraordinary procedures is not required for purposes of implementation[146], the existence of such precedent nevertheless demonstrates that this process can be expedited.

IV. Award

53. Before concluding, I recall that Japan explained that, at the time of the oral hearing, the JIA had received submissions from interested parties and was in the process of preparing and distributing questionnaires to interested parties. Japan also noted that, as a result of these submissions from interested parties, it had collected certain additional pieces of evidence. Based on my analysis above, and in the light of the limited number of DSB rulings of inconsistency, the steps required to complete the investigation need not entail extensive further investigation.

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[142]See *supra*, para. 13.

[143]Japan's submission, paras. 53-56 (referring to, *inter alia*, Articles 13 and 16 of the *Cabinet Order*, *supra*, footnote 32). See also Article 3(1) of the Law to Establish the Cabinet Legislation Bureau, *supra*, footnote 44.

[144]See Korea's submission, paras. 5 and 59.

[145]See *ibid*., para. 82 (referring to the anti-dumping investigation of *Certain Polyester Staple Fibre Yarn from Korea and Chinese Taipei*).

[146]See for instance, Award of the Arbitrator, *EC – Chicken Cuts*, para. 56.

54. As approximately four months and three weeks will have elapsed from the adoption of the Panel and Appellate Body Reports by the time of circulation of this Award, and considering the further steps referred to by Japan—completion of its investigation, and review of the determination by the Council and Bureau before final decision-making by the Cabinet—I consider that a further four months is sufficient for Japan to complete implementation in this case, given the appropriate scope of what requires consideration by the JIA.

55. I therefore determine that the "reasonable period of time" for Japan to implement the recommendations and rulings of the DSB in this dispute is eight months and two weeks from 17 December 2007, which was the date on which the DSB adopted the Panel and Appellate Body Reports. The reasonable period of time will therefore expire on 1 September 2008.

Signed in the original at Geneva this 18th day of April 2008 by:

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David Unterhalter

Arbitrator