



## UKRAINE – ANTI-DUMPING MEASURES ON AMMONIUM NITRATE

ARB-2019-1

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

*Award of the Arbitrator  
Ricardo Ramírez-Hernández*

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\* **NOTE CONCERNING DOCUMENT SYMBOL:** As of 13 April 2017, for ease of reference, awards of arbitrators under Article 21.3(c) of the DSU bear the symbol WT/DS[number]/RPT.

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**ABBREVIATIONS USED IN THIS AWARD**

<b>Abbreviation</b>	<b>Description</b>
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Appellate Body Report	Appellate Body Report, <i>Ukraine – Anti-Dumping Measures on Ammonium Nitrate</i> , WT/DS493/AB/R and Add.1
Draft Law against Dumped Imports	Draft Law of Ukraine "On Protection against Dumped Imports" to replace the Law of Ukraine "On Protection of the National Producer against Dumped Imports" (22 December 1998)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EuroChem	JSC MCC EuroChem
GATT 1994	General Agreement on Tariffs and Trade 1994
Gazprom	JSC Gazprom
ICIT	Intergovernmental Commission on International Trade
Law against Dumped Imports	Law of Ukraine "On Protection of the National Producer against Dumped Imports" (22 December 1998)
Ministry	Ministry for Development of Economy, Trade and Agriculture of Ukraine (formerly the Ministry of Economic Development and Trade of Ukraine)
Panel Report	Panel Report, <i>Ukraine – Anti-Dumping Measures on Ammonium Nitrate</i> , WT/DS493/R, Add.1 and Corr.1
UN	United Nations
Ukrainian Safeguard Law	Law of Ukraine on the application of safeguard measures on imports to Ukraine
VRU	Verkhovna Rada of Ukraine
WTO	World Trade Organization

**EXHIBITS CITED IN THIS AWARD**

<b>Exhibit No.</b>	<b>Short title</b>	<b>Long title</b>
Exhibit RUS-1b	Law against Dumped Imports	Law of Ukraine "On Protection of the National Producer against Dumped Imports" (22 December 1998)
Exhibit RUS-2b	2010 amendment	ICIT, Decision implementing court orders regarding EuroChem (25 October 2010)
Exhibit RUS-6		ICIT, Decision on cancellation of special measures on import of passenger cars into Ukraine regardless of country of origin and export (10 September 2015)
Exhibit RUS-8		Comparison of the Ukrainian Safeguard Law with the Law against Dumped Imports
Exhibit RUS-10		WTO Statistics on Initiation of Dumping, Countervailing and Safeguard Investigations
Exhibit RUS-12b		ICIT, Notice on suspension of anti-dumping measures on imports of certain nitrogen fertilizers originating in Russia (18 February 2017)
Exhibit RUS-13b		ICIT, Notice on the resumption of anti-dumping measures on imports into Ukraine of certain nitrogen fertilizers originating in Russia (20 May 2017)
Exhibit RUS-14b		Decision of the Supreme Court of Ukraine in Case No. 826/7760/17 (18 December 2019)
Exhibit RUS-20b		Ministry, Notice regarding coronavirus SARS-CoV-2 (17 March 2020)
Exhibit RUS-21b		Ministry, Notice regarding submission of information (27 March 2020)
Exhibit RUS-22b		Ministry, Press release, "The Ministry for Development of Economy, Trade and Agriculture of Ukraine informs about the specifics of conducting trade investigations during the period of quarantine measures in Ukraine and the city of Kiev" (17 March 2020)
Exhibit UKR-2		Council Regulation (EC) No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters
Exhibit UKR-5		Statistics on duration of reviews of anti-dumping measures
Exhibit UKR-6		United Nations News, "Human cost of Ukraine conflict is growing, Security Council told" (16 July 2019)
Exhibit UKR-7		Office of the United Nations High Commissioner for Human Rights, Report on the human rights situation in Ukraine, 16 August to 15 November 2019
Exhibit UKR-8		United Nations General Assembly resolution 74/17, Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov (9 December 2019)
Exhibit UKR-10	Draft Law against Dumped Imports	Draft Law of Ukraine "On Protection against Dumped Imports" to replace the Law of Ukraine "On Protection of the National Producer against Dumped Imports" (22 December 1998)
Exhibit UKR-13		Laws adopted by the Verkhovna Rada of Ukraine of IX convocation concerning the emergency situation in Ukraine, until 14 February 2020

### CASES CITED IN THIS AWARD

Short title	Full case title and citation
<i>Argentina – Hides and Leather (Article 21.3(c))</i>	Award of the Arbitrator, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS155/10</a> , 31 August 2001, DSR 2001:XII, p. 6013
<i>Brazil – Retreaded Tyres (Article 21.3(c))</i>	Award of the Arbitrator, <i>Brazil – Measures Affecting Imports of Retreaded Tyres – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS332/16</a> , 29 August 2008, DSR 2008:XX, p. 8581
<i>Canada – Pharmaceutical Patents (Article 21.3(c))</i>	Award of the Arbitrator, <i>Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS114/13</a> , 18 August 2000, DSR 2002:I, p. 3
<i>China – GOES (Article 21.3(c))</i>	Award of the Arbitrator, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS414/12</a> , 3 May 2013, DSR 2013:IV, p. 1495
<i>Colombia – Ports of Entry (Article 21.3(c))</i>	Award of the Arbitrator, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS366/13</a> , 2 October 2009, DSR 2009:IX, p. 3819
<i>Colombia – Textiles (Article 21.3(c))</i>	Award of the Arbitrator, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS461/13</a> , 15 November 2016
<i>EC – Chicken Cuts (Article 21.3(c))</i>	Award of the Arbitrator, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS269/13</a> , <a href="#">WT/DS286/15</a> , 20 February 2006
<i>EC – Export Subsidies on Sugar (Article 21.3(c))</i>	Award of the Arbitrator, <i>European Communities – Export Subsidies on Sugar – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS265/33</a> , <a href="#">WT/DS266/33</a> , <a href="#">WT/DS283/14</a> , 28 October 2005, DSR 2005:XXIII, p. 11581
<i>EC – Hormones (Article 21.3(c))</i>	Award of the Arbitrator, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS26/15</a> , <a href="#">WT/DS48/13</a> , 29 May 1998, DSR 1998:V, p. 1833
<i>EC – Tariff Preferences (Article 21.3(c))</i>	Award of the Arbitrator, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS246/14</a> , 20 September 2004, DSR 2004:IX, p. 4313
<i>Indonesia – Autos (Article 21.3(c))</i>	Award of the Arbitrator, <i>Indonesia – Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS54/15</a> , <a href="#">WT/DS55/14</a> , <a href="#">WT/DS59/13</a> , <a href="#">WT/DS64/12</a> , 7 December 1998, DSR 1998:IX, p. 4029
<i>Japan – DRAMs (Korea) (Article 21.3(c))</i>	Award of the Arbitrator, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS336/16</a> , 5 May 2008, DSR 2008:XX, p. 8553
<i>Peru – Agricultural Products (Article 21.3(c))</i>	Award of the Arbitrator, <i>Peru – Additional Duty on Imports of Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS457/15</a> , 16 December 2015, DSR 2015:XI, p. 5845
<i>Russia – Traffic in Transit</i>	Panel Report, <i>Russia – Measures Concerning Traffic in Transit</i> , <a href="#">WT/DS512/R</a> and Add.1, adopted 26 April 2019
<i>Ukraine – Ammonium Nitrate</i>	Appellate Body Report, <i>Ukraine – Anti-Dumping Measures on Ammonium Nitrate</i> , <a href="#">WT/DS493/AB/R</a> and Add.1, adopted 30 September 2019
<i>Ukraine – Ammonium Nitrate</i>	Panel Report, <i>Ukraine – Anti-Dumping Measures on Ammonium Nitrate</i> , <a href="#">WT/DS493/R</a> , Add.1 and Corr.1, adopted 30 September 2019, as upheld by Appellate Body Report <a href="#">WT/DS493/AB/R</a>
<i>Ukraine – Passenger Cars</i>	Panel Report, <i>Ukraine – Definitive Safeguard Measures on Certain Passenger Cars</i> , <a href="#">WT/DS468/R</a> and Add.1, adopted 20 July 2015, DSR 2015:VI, p. 3117
<i>US – 1916 Act (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU</i> , <a href="#">WT/DS136/11</a> , <a href="#">WT/DS162/14</a> , 28 February 2001, DSR 2001:V, p. 2017

Short title	Full case title and citation
<p><i>US – Anti-Dumping Methodologies (China) (Article 21.3(c))</i></p> <p><i>US – COOL (Article 21.3(c))</i></p>	<p>Award of the Arbitrator, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China – Arbitration under Article 21.3(c) of the DSU</i>, <a href="#">WT/DS471/RPT</a>, 19 January 2018</p>
<p><i>US – Countervailing Measures (China) (Article 21.3(c))</i></p>	<p>Award of the Arbitrator, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Arbitration under Article 21.3(c) of the DSU</i>, <a href="#">WT/DS384/24</a>, <a href="#">WT/DS386/23</a>, 4 December 2012, DSR 2012:XIII, p. 7173</p>
<p><i>US – Countervailing Measures (China) (Article 21.3(c))</i></p>	<p>Award of the Arbitrator, <i>United States – Countervailing Duty Measures on Certain Products from China – Arbitration under Article 21.3(c) of the DSU</i>, <a href="#">WT/DS437/16</a>, 9 October 2015, DSR 2015:XI, p. 5775</p>
<p><i>US – Gambling (Article 21.3(c))</i></p>	<p>Award of the Arbitrator, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Arbitration under Article 21.3(c) of the DSU</i>, <a href="#">WT/DS285/13</a>, 19 August 2005, DSR 2005:XXIII, p. 11639</p>
<p><i>US – Offset Act (Byrd Amendment) (Article 21.3(c))</i></p>	<p>Award of the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU</i>, <a href="#">WT/DS217/14</a>, <a href="#">WT/DS234/22</a>, 13 June 2003, DSR 2003:III, p. 1163</p>
<p><i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))</i></p>	<p>Award of the Arbitrator, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the DSU</i>, <a href="#">WT/DS268/12</a>, 7 June 2005, DSR 2005:XXIII, p. 11619</p>
<p><i>US – Shrimp II (Viet Nam) (Article 21.3(c))</i></p>	<p>Award of the Arbitrator, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam – Arbitration under Article 21.3(c) of the DSU</i>, <a href="#">WT/DS429/12</a>, 15 December 2015, DSR 2015:XI, p. 5811</p>
<p><i>US – Stainless Steel (Mexico) (Article 21.3(c))</i></p>	<p>Award of the Arbitrator, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – Arbitration under Article 21.3(c) of the DSU</i>, <a href="#">WT/DS344/15</a>, 31 October 2008, DSR 2008:XX, p. 8619</p>
<p><i>US – Washing Machines (Article 21.3(c))</i></p>	<p>Award of the Arbitrator, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea – Arbitration under Article 21.3(c) of the DSU</i>, <a href="#">WT/DS464/RPT</a>, 13 April 2017, DSR 2017:VIII, p. 4309</p>

WORLD TRADE ORGANIZATION  
AWARD OF THE ARBITRATOR

<b>Ukraine – Anti-Dumping Measures on Ammonium Nitrate</b>	ARB-2019-1
Parties:	Arbitrator:
Russian Federation Ukraine	Ricardo Ramírez-Hernández

## 1 INTRODUCTION

1.1. On 30 September 2019, the Dispute Settlement Body (DSB) adopted the Appellate Body Report<sup>1</sup> and the Panel Report<sup>2</sup> in *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*. This dispute concerns certain anti-dumping measures imposed by Ukraine on imports of ammonium nitrate from the Russian Federation (Russia).<sup>3</sup> The Panel and the Appellate Body found the measures at issue to be inconsistent with various provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).

1.2. At the meeting of the DSB held on 28 October 2019, Ukraine indicated its intention to implement the recommendations and rulings of the DSB in this dispute and stated that it would need a reasonable period of time in which to do so.<sup>4</sup> By letter dated 21 November 2019, Russia informed the DSB that Russia and Ukraine had entered into consultations regarding the reasonable period of time for implementation pursuant to Article 21.3(b) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), but that these consultations had not resulted in an agreement. Russia therefore requested that the reasonable period of time be determined through binding arbitration pursuant to Article 21.3(c) of the DSU.<sup>5</sup>

1.3. By letter dated 2 December 2019, Russia informed the Director-General of the World Trade Organization (WTO) that consultations with Ukraine had not led to mutual agreement on an arbitrator. Russia therefore requested the Director-General to appoint an arbitrator pursuant to footnote 12 to Article 21.3(c) of the DSU.<sup>6</sup>

1.4. After consulting with the parties, the Director-General appointed me as the Arbitrator on 11 December 2019.<sup>7</sup> On 12 December 2019, I informed the parties of my acceptance of the appointment as Arbitrator and transmitted to them a Working Schedule identifying the dates for the filing of the parties' written submissions and the date of the hearing.<sup>8</sup>

1.5. On 13 December 2019, Ukraine sent a letter requesting that the due date for its written submission be extended and that the hearing be postponed. Ukraine identified several reasons for its request. Ukraine pointed to official holidays in Ukraine in late December 2019 and early January 2020 as well as to preparation work for the 50th annual meeting of the World Economic Forum to be held in Davos, Switzerland, on 21-24 January 2020.

<sup>1</sup> WT/DS493/AB/R and Add.1.

<sup>2</sup> WT/DS493/R, Add.1 and Corr.1.

<sup>3</sup> WT/DS493/10.

<sup>4</sup> WT/DSB/M/436, para. 2.3.

<sup>5</sup> WT/DS493/11.

<sup>6</sup> WT/DS493/12.

<sup>7</sup> WT/DS493/12.

<sup>8</sup> Considering the end of the year period, the Working Schedule of 12 December 2019 indicated that the written submission of Ukraine should be filed on 9 January 2020, the written submission of Russia should be filed on 23 January 2020, and the hearing would be held on 6 February 2020.

1.6. On 16 December 2019, I invited Russia to comment on Ukraine's letter. On 17 December 2019, Russia sent a letter stating that the reasons given by Ukraine did not justify the requested extension. Nevertheless, given the winter holidays and for the purposes of constructive engagement in this arbitration, Russia indicated that it would agree that the date for Ukraine's written submission be moved to 23 January 2020, the date for Russia's written submission be moved to 6 February 2020, and the date of the hearing be moved to 27 or 28 February 2020.

1.7. Having taken account of Ukraine's request and Russia's comments, on 18 December 2019, I sent a revised Working Schedule to the parties. In accordance with this revised Working Schedule, Ukraine filed its written submission on 23 January 2020, Russia filed its written submission on 6 February 2020<sup>9</sup>, and the hearing was held on 20 February 2020.

1.8. By letter dated 25 March 2020, I informed the parties that the award would be circulated no later than 31 March 2020. I also informed the parties that, given access restrictions to the WTO premises in light of developments related to the COVID-19 virus, circulation would be made by electronic means only. The parties did not object to circulation by electronic means. On 26 March 2020, Ukraine sent a letter requesting me to take into account, in my determination of the reasonable period of time, Ukraine's recent measures in response to the COVID-19 virus, as they may significantly affect implementation in this dispute. The next day, I invited Russia to comment on Ukraine's request. By letter dated 30 March 2020, Russia expressed its solidarity with the countries affected by the COVID-19 virus. Russia, however, stated that it was unclear that Ukraine's recent measures would affect implementation. On 31 March 2020, I informed the parties that the circulation of the award would be delayed in order to allow me to consider properly Ukraine's request as well as Russia's comments. By letter dated 7 April 2020, I informed the parties that the award would be circulated by electronic means no later than 8 April 2020.<sup>10</sup>

## **2 ARGUMENTS OF THE PARTIES**

2.1. Annexes A and B to this Award contain the executive summaries of the parties' submissions. Certain details of the parties' arguments are further described below, insofar as they are relevant to the analysis.

## **3 REASONABLE PERIOD OF TIME**

### **3.1 Introduction**

3.1. I have been appointed by the Director-General, at the request of Russia, to determine the reasonable period of time for Ukraine to implement the recommendations and rulings of the DSB in *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*.

3.2. In this section, I begin by setting out the mandate of an arbitrator under Article 21.3(c) of the DSU. I then identify the specific measures that Ukraine is required to bring into conformity with the recommendations and rulings of the DSB. Finally, I examine the factors affecting the determination of the reasonable period of time in this dispute, including the means of implementation, the relevant steps in the implementation process, as well as the particular circumstance that Ukraine has asked me to take into account in reaching my determination.

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

3.3. Article 21.3 of the DSU provides that "[i]f it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which

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<sup>9</sup> On 7 February 2020, Russia filed a revised written submission to correct the paragraph numbering and to include page numbering. By letter of 11 February 2020, given that certain footnotes had been inadvertently omitted in Russia's submission, I invited Russia to refile its written submission with these footnotes included, subject to Ukraine's comments. Accordingly, on 12 February 2020, Russia filed a revised written submission to include the missing footnotes. By letter of 14 February 2020, Ukraine confirmed that it had no objection.

<sup>10</sup> Ukraine and Russia agreed by email of 16 December 2019 and at the hearing, respectively, that an award not made within 90 days after the adoption of the recommendations and rulings of the DSB would be deemed to be an award of the arbitrator for the purposes of Article 21.3(c) of the DSU.



to do so." Where the reasonable period of time is determined through binding arbitration pursuant to Article 21.3(c), that provision stipulates that:

[A] guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.<sup>11</sup>

3.4. Pursuant to Article 21.3(c) of the DSU, my mandate in this arbitration is therefore to determine the "reasonable period of time" within which Ukraine must comply with the recommendations and rulings of the DSB in this dispute.

3.5. Article 21.3(c) establishes as a guideline that such period should not exceed 15 months and recognizes that, "depending upon the particular circumstances", the period "may be shorter or longer". Other provisions of the DSU further shed light on the mandate of an arbitrator. Article 21.1 of the DSU states the general principle that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." The second sentence of Article 21.3 of the DSU provides that a reasonable period of time for implementation shall be available only if it is "impracticable to comply immediately" with the recommendations and rulings of the DSB. The reasonable period of time for implementation should therefore, in principle, be the shortest period possible within the legal system of the implementing Member<sup>12</sup> that will enable it to achieve effective implementation of the recommendations and rulings of the DSB.<sup>13</sup> Moreover, as previous arbitrators have highlighted, the implementing Member is to utilize all of the flexibilities available within its legal system in implementing the relevant recommendations and rulings of the DSB in the shortest period of time possible.<sup>14</sup>

3.6. In determining the reasonable period of time, the means of implementation available to the Member concerned is a relevant factor. Previous awards under Article 21.3(c) have indicated that the implementing Member has a measure of discretion in choosing the means of implementation that it deems most appropriate.<sup>15</sup> The implementing Member's discretion, however, does not amount to "an unfettered right" to choose any means of implementation.<sup>16</sup> Rather, the proposed implementing action must "fall[] within the range of permissible actions that can be taken in order to implement the DSB's recommendations and rulings".<sup>17</sup> In particular, the means of implementation chosen must be apt in form, nature, and content to bring the Member into compliance with its WTO obligations.<sup>18</sup> Thus, the chosen method of implementation must be capable of bringing the Member into compliance with its WTO obligations within a reasonable period of time, in accordance

<sup>11</sup> Fn omitted.

<sup>12</sup> Awards of the Arbitrators, *EC – Hormones (Article 21.3(c))*, para. 26; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25; *China – GOES (Article 21.3(c))*, para. 3.3; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.5; *Peru – Agricultural Products (Article 21.3(c))*, para. 3.4.

<sup>13</sup> Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 53.

<sup>14</sup> Awards of the Arbitrators, *Colombia – Textiles (Article 21.3(c))*, paras. 3.51-3.53; *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.5; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.5; *China – GOES (Article 21.3(c))*, para. 3.4; *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 42; *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25; *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, paras. 64 and 74; *Peru – Agricultural Products (Article 21.3(c))*, para. 3.4. An implementing Member is not, however, expected to utilize "extraordinary procedures" to bring its measure into compliance, and implementation must be effected in a transparent and efficient manner that affords due process to all interested parties. (Awards of the Arbitrators, *China – GOES (Article 21.3(c))*, para. 3.46; *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, para. 51; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 51; *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.36; *US – Washing Machines (Article 21.3(c))*, para. 3.9)

<sup>15</sup> Awards of the Arbitrators, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27; *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69. See also Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.3; *China – GOES (Article 21.3(c))*, para. 3.4; *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48.

<sup>16</sup> Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69.

<sup>17</sup> Awards of the Arbitrators, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 42; *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27.

<sup>18</sup> Awards of the Arbitrators, *Colombia – Textiles (Article 21.3(c))*, para. 3.4; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.3; *China – GOES (Article 21.3(c))*, para. 3.2; *Colombia – Ports of Entry (Article 21.3(c))*, para. 64; *US – Washing Machines (Article 21.3(c))*, para. 3.8.

with the guideline contained in Article 21.3(c).<sup>19</sup> Previous awards have indicated that, inasmuch as they elaborate on those aspects of the measure at issue that were found to breach WTO obligations, the findings by the Panel in the underlying dispute offer guidance for determining whether the proposed implementing measures are apt to achieve compliance, as well as how long is reasonably needed to do so.<sup>20</sup> Previous awards have also indicated that, if the action that the implementing Member proposes to take seeks to achieve objectives unrelated to the recommendations and rulings of the DSB, or forms part of a wider reform of that Member's municipal law, then these considerations cannot justify a longer implementation period.<sup>21</sup>

3.7. At the same time, the mandate of an arbitrator under Article 21.3(c) is limited to determining the period of time within which it would be reasonable to expect implementation of the recommendations and rulings of the DSB to occur. Determining *when* the implementing Member must comply with the recommendations and rulings of the DSB may require some consideration of *how* the Member proposes to do so.<sup>22</sup> The mandate of an arbitrator, however, does not involve a determination of the consistency with the covered agreements of the measure that the Member envisages to adopt in order to comply.<sup>23</sup>

3.8. Finally, with regard to the burden of proof, it is well established that the implementing Member bears the overall burden to prove that the time period requested for implementation constitutes a "reasonable period of time".<sup>24</sup> The longer the proposed period of implementation, the greater this burden will be.<sup>25</sup> However, this does not "absolve" the complaining Member of its duty to provide evidence supporting why it disagrees with the period of time proposed by the implementing Member, and to substantiate its view that a shorter period of time for implementation is reasonable.<sup>26</sup>

### 3.3 Measures to be brought into conformity

3.9. The dispute underlying this arbitration concerns certain anti-dumping measures imposed by Ukraine on ammonium nitrate from Russia. Following an anti-dumping investigation conducted by the Ministry of Economic Development and Trade of Ukraine, now the Ministry for Development of Economy, Trade and Agriculture of Ukraine (Ministry), duties were originally imposed by Ukraine's Intergovernmental Commission on International Trade (ICIT) through its decision of 21 May 2008 (2008 original decision). Russian producer JSC MCC EuroChem (EuroChem) successfully challenged the 2008 original decision before domestic courts in Ukraine, following which ICIT issued an amendment (2010 amendment) to the 2008 original decision (as amended, 2008 amended decision). Subsequently, following interim and expiry reviews, ICIT issued a decision (2014 extension decision) imposing anti-dumping duties at modified rates, including with respect to EuroChem.<sup>27</sup>

3.10. At the hearing, the parties agreed that the scope of Ukraine's implementation obligations in this dispute relates to the findings made by the Panel and the Appellate Body that are set forth in

<sup>19</sup> Awards of the Arbitrators, *China – GOES (Article 21.3(c))*, para. 3.2; *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69; *Peru – Agricultural Products (Article 21.3(c))*, para. 3.5; *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.3; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.6.

<sup>20</sup> Award of the Arbitrator, *Colombia – Textiles (Article 21.3(c))*, paras. 3.5 and 3.39-3.40.

<sup>21</sup> Awards of the Arbitrators, *Colombia – Textiles (Article 21.3(c))*, paras. 3.36 and 3.41; *Colombia – Ports of Entry (Article 21.3(c))*, paras. 64 and 85; *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69; *EC – Tariff Preferences (Article 21.3(c))*, para. 31.

<sup>22</sup> Awards of the Arbitrators, *US – COOL (Article 21.3(c))*, para. 68; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 26; *Peru – Agricultural Products (Article 21.3(c))*, para. 3.6.

<sup>23</sup> Awards of the Arbitrators, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27; *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.4; *Colombia – Textiles (Article 21.3(c))*, para. 3.6; *US – Anti-Dumping Methodologies (China) (Article 21.3(c))*, para. 3.8.

<sup>24</sup> Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.6; *China – GOES (Article 21.3(c))*, para. 3.5; *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47; *US – 1916 Act (Article 21.3(c))*, para. 33; *EC – Tariff Preferences (Article 21.3(c))*, para. 26; *US – Washing Machines (Article 21.3(c))*, para. 3.10; *US – Anti-Dumping Methodologies (China) (Article 21.3(c))*, para. 3.11.

<sup>25</sup> Awards of the Arbitrators, *China – GOES (Article 21.3(c))*, para. 3.5; *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47; *Peru – Agricultural Products (Article 21.3(c))*, para. 3.8.

<sup>26</sup> Awards of the Arbitrators, *Colombia – Ports of Entry (Article 21.3(c))*, para. 67; *US – Washing Machines (Article 21.3(c))*, para. 3.10; *US – Anti-Dumping Methodologies (China) (Article 21.3(c))*, para. 3.11.

<sup>27</sup> Panel Report, paras. 2.1-2.2; Appellate Body Report, para. 1.2.

paragraphs 8.2, 8.3, and 8.5 of the Panel Report and paragraphs 7.1 through 7.8 of the Appellate Body Report.<sup>28</sup>

3.11. In ruling on the claims raised by Russia against the measures at issue, the Panel found that Ukraine acted inconsistently with:

- a. Article 5.8 of the Anti-Dumping Agreement by: (i) failing to exclude EuroChem from the scope of the original anti-dumping measures, specifically the 2008 amended decision; (ii) imposing a 0% anti-dumping duty on EuroChem through the 2010 amendment, instead of excluding it from the scope of the anti-dumping duty order; and (iii) including EuroChem within the scope of the interim and expiry review determinations, and imposing anti-dumping duties on it through the 2014 extension decision<sup>29</sup>;
- b. Article 2.2.1.1 of the Anti-Dumping Agreement by rejecting the gas cost that the investigated Russian producers reported in their records when constructing normal value in the interim and expiry reviews without providing an adequate basis under the second condition in the first sentence of Article 2.2.1.1<sup>30</sup>;
- c. Article 2.2 of the Anti-Dumping Agreement by using a cost for gas that did not reflect the cost of the product under consideration "in the country of origin" when constructing normal value in the interim and expiry reviews<sup>31</sup>;
- d. Article 2.2.1 of the Anti-Dumping Agreement by relying on costs that were calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement when conducting its ordinary-course-of-trade test in the interim and expiry reviews<sup>32</sup>;
- e. Articles 11.2-11.3 of the Anti-Dumping Agreement by relying on dumping margins calculated inconsistently with Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement to make its likelihood-of-dumping determinations in the interim and expiry reviews<sup>33</sup>; and
- f. Article 6.9 of the Anti-Dumping Agreement by failing to: (i) disclose the essential facts underlying its price effects analysis and dumping determinations; and (ii) give interested parties sufficient time to comment on its disclosure in the interim and expiry reviews.<sup>34</sup>

3.12. The Panel's findings under Article 5.8 as well as those under Articles 2.2, 2.2.1, and 2.2.1.1 were upheld by the Appellate Body<sup>35</sup>, and Ukraine did not appeal the Panel's findings under Articles 6.9 and 11.2-11.3. Accordingly, Ukraine's implementation obligations in this dispute pertain to: (i) the non-termination of the investigation against EuroChem, as reflected in the 2008 amended decision, the 2010 amendment, and the 2014 extension decision; (ii) dumping and likelihood-of-dumping determinations in the interim and expiry reviews, as reflected in the 2014 extension decision; and (iii) the disclosure of essential facts in these interim and expiry reviews.<sup>36</sup>

<sup>28</sup> Parties' responses to questioning at the hearing; Russia's submission, paras. 39-42; Ukraine's submission, paras. 15 and 17.

<sup>29</sup> Panel Report, para. 8.3.a. The Panel stated that the obligation under the second sentence of Article 5.8 of the Anti-Dumping Agreement to immediately terminate the investigation applies because EuroChem had a *de minimis* dumping margin. (Ibid., para. 7.151)

<sup>30</sup> Panel Report, para. 8.2.a.

<sup>31</sup> Panel Report, para. 8.2.b.

<sup>32</sup> Panel Report, para. 8.2.c.

<sup>33</sup> Panel Report, para. 8.2.d.

<sup>34</sup> Panel Report, para. 8.5.a-b.

<sup>35</sup> Appellate Body Report, paras. 7.4 and 7.6-7.8.

<sup>36</sup> At the hearing, the parties agreed with this description of the scope of Ukraine's implementation obligations.

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

3.13. Ukraine considers that I should determine that 27 months is a reasonable period of time for Ukraine to implement the recommendations and rulings of the DSB in this dispute.<sup>37</sup> Ukraine argues that this period is necessary given that implementation requires Ukraine to: (i) adopt first a "general legislative framework" to allow Ukrainian investigating authorities<sup>38</sup> to initiate and conduct review investigations for the purpose of complying with recommendations and rulings of the DSB; and (ii) subsequently conduct an administrative review to amend the anti-dumping measures at issue.<sup>39</sup> Ukraine also argues that it is currently facing a situation of "emergency in international relations" and that this is a relevant particular circumstance "affect[ing] daily life, disturb[ing] the economy and [leading] to extraordinary and unexpected delays in what normally should be straightforward actions".<sup>40</sup>

3.14. Russia objects to Ukraine's proposal for a reasonable period of time of 27 months, stating that it "exceeds the standard of 'prompt compliance'" embodied in Article 21.1 of the DSU.<sup>41</sup> Specifically, Russia questions the need to make legislative changes or conduct an administrative review to address the recommendations and rulings of the DSB in this dispute.<sup>42</sup> Russia contends that no reasonable period of time should be granted to implement the recommendations and rulings of the DSB pertaining to Article 5.8 of the Anti-Dumping Agreement, and that Ukraine should have been reasonably able to implement the remaining recommendations and rulings of the DSB through a decision by ICIT within two months.<sup>43</sup> Even if legislative changes and/or an administrative review were necessary to implement the recommendations and rulings of the DSB (*quod non*), Russia maintains that Ukraine has failed to meet its burden of proof in requesting a reasonable period of time of 27 months.<sup>44</sup>

3.15. At the outset, I observe that Russia distinguishes between: (i) the recommendations and rulings of the DSB pertaining to Article 5.8; and (ii) the remaining recommendations and rulings of the DSB.<sup>45</sup> With respect to Ukraine's implementation obligations under Article 5.8, Russia stated at the hearing that immediate compliance is not "impracticable" within the meaning of Article 21.3 of the DSU, and Ukraine should therefore not be granted a reasonable period of time for this aspect of its implementation obligations. Russia also emphasized that the second sentence of Article 5.8 requires the *immediate* termination of an investigation.<sup>46</sup>

3.16. As indicated above, pursuant to Article 21.3(c) of the DSU, my mandate in this arbitration is to determine the reasonable period of time within which Ukraine must comply with the recommendations and rulings of the DSB in this dispute.<sup>47</sup> In my view, my mandate does not extend to determining whether "it is impracticable to comply immediately with the recommendations and rulings" under the second sentence of Article 21.3 of the DSU. Moreover, in singling out the recommendations and rulings of the DSB pertaining to Article 5.8, Russia is essentially requesting me to consider separately what might be the reasonable period of time for Ukraine's remaining implementation obligations. In *US – Gambling*, the arbitrator suggested that he might not be limited, under Article 21.3(c) to determining one reasonable period of time, but had difficulty accepting that it may be possible to determine two separate reasonable periods of time with respect to the same measure.<sup>48</sup> In the current dispute, all of Ukraine's implementation obligations pertain to a single set of measures forming part of the same anti-dumping proceeding, namely, the 2008 amended decision, the 2010 amendment, and the 2014 extension decision. In particular, the 2014 extension decision is at the heart of all the recommendations and rulings of the DSB.<sup>49</sup> I have difficulty accepting that I should distinguish between the various recommendations and rulings of the

<sup>37</sup> Ukraine's submission, paras. 3 and 177.

<sup>38</sup> In this Award, I use the term "Ukrainian investigating authorities" to refer to ICIT and/or the Ministry.

<sup>39</sup> Ukraine's submission, paras. 2 and 28-31.

<sup>40</sup> Ukraine's submission, para. 127.

<sup>41</sup> Russia's submission, para. 7.

<sup>42</sup> Russia's submission, paras. 7, 53, and 58.

<sup>43</sup> Russia's submission, paras. 7-8, 119, and 164.

<sup>44</sup> Russia's submission, paras. 153 and 160.

<sup>45</sup> Russia's submission, paras. 29-30, 115, 119, and 164.

<sup>46</sup> Russia's responses to questioning at the hearing. See also Russia's submission, paras. 30, 119, and 164.

<sup>47</sup> See para. 3.4. above.

<sup>48</sup> Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, para. 41.

<sup>49</sup> See paras. 3.11. 3.12. above.

DSB pertaining to the same measure for the purpose of my determination. In light of the circumstances of this dispute, I consider it appropriate to determine one reasonable period of time with respect to all of Ukraine's implementation obligations.

3.17. With this consideration in mind, I turn to my analysis of the reasonable period of time for Ukraine to implement all the recommendations and rulings of the DSB in this dispute. Below, I first address the means of implementing the recommendations and rulings of the DSB at issue, before considering the relevant steps in the implementation process. Finally, I examine the particular circumstance alleged by Ukraine to be relevant to my determination.

### 3.4.1 Means of implementation

3.18. The parties disagree on whether legislative changes and an administrative review are necessary to implement the recommendations and rulings of the DSB in this dispute, and whether any additional time that such changes and review may entail should be taken into account in determining the reasonable period of time. Ukraine takes the view that implementation should be undertaken through legislative changes, followed by an administrative review of the anti-dumping measures at issue.<sup>50</sup> Russia in turn contends that ICIT can amend or terminate the anti-dumping measures at issue under the Law of Ukraine "On Protection of the National Producer against Dumped Imports" (22 December 1998) (Law against Dumped Imports), without legislative changes or an administrative review.<sup>51</sup>

3.19. As indicated above, Ukraine has a measure of discretion in choosing the means of implementation that it deems most appropriate. However, that discretion is not unfettered, and the chosen method of implementation must be capable of bringing Ukraine into compliance with its WTO obligations within a reasonable period of time.<sup>52</sup> A key determinant of the reasonable period of time for implementation is the nature of the implementing action that is to be taken.<sup>53</sup> A combination of legislative and administrative actions, like the ones proposed by Ukraine, will inevitably require more time than implementation that can be achieved by administrative means. Below, I consider available administrative means for implementation under the Law against Dumped Imports as well as Ukraine's proposed legislative changes.

#### 3.4.1.1 Administrative means under the Law against Dumped Imports

3.20. I begin my analysis with Russia's argument that Article 5.6 of the Law against Dumped Imports allows ICIT to take a summary decision, *inter alia*, on the application of anti-dumping measures, and that neither an administrative review nor legislative changes are thus required for the purpose of implementation in this dispute.<sup>54</sup> In that regard, Russia relies on prior decisions made by ICIT that did not require an administrative review.<sup>55</sup>

3.21. Article 5.6 of the Law against Dumped Imports lists, in general terms, the decisions that ICIT may take.<sup>56</sup> This provision does not specify the steps that need to be completed before ICIT can

<sup>50</sup> Ukraine's submission, para. 31.

<sup>51</sup> Russia's submission, para. 52. Russia argues that where the recommendations and rulings of the DSB can be implemented in a more expedited manner through specific administrative means, the reasonable period of time should be set by reference to these administrative means. (*Ibid.*, paras. 26-27)

<sup>52</sup> See paras. 3.5. 3.6. above. See also Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.3; *China – GOES (Article 21.3(c))*, para. 3.2; *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69; *Peru – Agricultural Products (Article 21.3(c))*, para. 3.5; *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.3.

<sup>53</sup> Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, para. 35.

<sup>54</sup> Russia's submission, paras. 58 and 115.

<sup>55</sup> Russia's submission, paras. 49-52 (referring to ICIT, Decision on cancellation of special measures on import of passenger cars into Ukraine regardless of country of origin and export (10 September 2015) (Exhibit RUS-6)), paras. 54-55 (referring to ICIT, Notice on suspension of anti-dumping measures on imports of certain nitrogen fertilizers originating in Russia (18 February 2017) (Exhibit RUS-12b)); ICIT, Notice on the resumption of anti-dumping measures on imports into Ukraine of certain nitrogen fertilizers originating in Russia (20 May 2017) (Exhibit RUS-13b)), para. 115 and fn 110 thereto (referring to ICIT, Decision implementing court orders regarding EuroChem (25 October 2010) (2010 amendment) (Exhibit RUS-2b)). In this Award, exhibit numbers that are followed by the letter "b" refer to the English version of the relevant document.

<sup>56</sup> Article 5.6 of the Law against Dumped Imports reads:

make such decisions; such steps and other requirements are set out in various other provisions of the Law against Dumped Imports. I therefore consider Article 5.6 of the Law against Dumped Imports, on its own, to be of limited guidance in determining whether the anti-dumping measures at issue could be amended simply through a decision by ICIT or whether an administrative review is warranted for the purpose of implementation in this dispute.

3.22. Moreover, the ICIT decisions on which Russia relies do not appear to be relevant to this dispute. First, Russia refers to a decision of 2015 made by ICIT under the Law of Ukraine on the application of safeguard measures on imports to Ukraine (Ukrainian Safeguard Law) to implement the recommendations and rulings of the DSB in *Ukraine – Passenger Cars*.<sup>57</sup> As Ukraine explained, that decision was based on a specific provision of Ukraine's Safeguard Law, which empowers ICIT to repeal or review safeguard measures if certain circumstances are met.<sup>58</sup> While Russia states that the Ukrainian Safeguard Law and the Law against Dumped Imports bear certain similarities<sup>59</sup>, Russia has not pointed to a corresponding provision in the Law against Dumped Imports that would allow ICIT to amend the anti-dumping measures at issue in this dispute without conducting an administrative review. In this respect, I am mindful of the fact that, as acknowledged by the parties at the hearing, implementing the recommendations and rulings of the DSB will require excluding EuroChem from the scope of the anti-dumping measures, calculating dumping margins, and complying with certain disclosure obligations.<sup>60</sup> Second, Russia refers to two decisions of 2017, whereby ICIT suspended and subsequently resumed anti-dumping measures.<sup>61</sup> Those decisions were based on Article 28.3 of the Law against Dumped Imports<sup>62</sup>, which deals with the collection of anti-dumping duties and sets out the circumstances in which anti-dumping measures may be suspended and resumed by a decision of ICIT.<sup>63</sup> There is nothing in the language of this provision to suggest that it could form the basis for ICIT to exclude EuroChem, calculate dumping margins, or comply with disclosure obligations. Finally, Russia refers to the 2010 amendment, whereby ICIT imposed a 0% duty on EuroChem.<sup>64</sup> I understand that this decision was made following domestic court decisions concluding that there was an absence of dumping by EuroChem in the original investigation.<sup>65</sup> Ukraine explained that, pursuant to Article 129 of its constitution, such court decisions are legally binding and are to be enforced by the State, which is why setting the

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At meetings of the Commission the following decisions shall be taken:

- 1) the initiation of an anti-dumping investigation;
- 2) the positive or negative conclusions regarding the existence of dumping and the methods they give the ability to determine the dumping margin;
- 3) positive or negative conclusions about the damage and its size;
- 4) to determine the causal link between dumped imports and injury;
- 5) the application of anti-dumping measures;
- 6) on other issues within the powers provided by this Law.

(Law of Ukraine "On Protection of the National Producer against Dumped Imports" (22 December 1998) (Law against Dumped Imports) (Exhibit RUS-1b), Article 5.6)

<sup>57</sup> Russia's submission, paras. 49-52 (referring to ICIT, Decision on cancellation of special measures on import of passenger cars into Ukraine regardless of country of origin and export (10 September 2015) (Exhibit RUS-6)).

<sup>58</sup> Ukraine's responses to questioning at the hearing; ICIT, Decision on cancellation of special measures on import of passenger cars into Ukraine regardless of country of origin and export (10 September 2015) (Exhibit RUS-6); Comparison of the Ukrainian Safeguard Law with the Law against Dumped Imports (Exhibit RUS-8), Article 19 of the Ukrainian Safeguard Law.

<sup>59</sup> Russia's submission, para. 51 (referring to Comparison of the Ukrainian Safeguard Law with the Law against Dumped Imports (Exhibit RUS-8)).

<sup>60</sup> Parties' responses to questioning at the hearing.

<sup>61</sup> Russia's submission, paras. 54-55 (referring to ICIT, Notice on suspension of anti-dumping measures on imports of certain nitrogen fertilizers originating in Russia (18 February 2017) (Exhibit RUS-12b); ICIT, Notice on the resumption of anti-dumping measures on imports into Ukraine of certain nitrogen fertilizers originating in Russia (20 May 2017) (Exhibit RUS-13b)). Russia highlights that the Supreme Court of Ukraine upheld the decision of ICIT of 20 May 2017, noting, by reference to Article 5.6 of the Law against Dumped Imports, that ICIT "has the authority to amend the adopted decisions". (Russia's submission, para. 57 (quoting Decision of the Supreme Court of Ukraine in Case No. 826/7760/17 (18 December 2019) (Exhibit RUS-14b))

<sup>62</sup> ICIT, Notice on suspension of anti-dumping measures on imports of certain nitrogen fertilizers originating in Russia (18 February 2017) (Exhibit RUS-12b); ICIT, Notice on the resumption of anti-dumping measures on imports into Ukraine of certain nitrogen fertilizers originating in Russia (20 May 2017) (Exhibit RUS-13b).

<sup>63</sup> Law against Dumped Imports (Exhibit RUS-1b), Article 28.3.

<sup>64</sup> Russia's submission, para. 115 and fn 110 thereto (referring to 2010 amendment (Exhibit RUS-2b)).

<sup>65</sup> Panel Report, para. 7.147.

anti-dumping duty to 0% for EuroChem could be achieved through an ICIT decision.<sup>66</sup> Russia did not offer a response or point to a similar provision concerning the recommendations and rulings of the DSB. For all these reasons, I am not convinced by Russia's argument that implementation in this dispute can be achieved through a decision by ICIT, without Ukrainian investigating authorities conducting an interim review.

3.23. Now, I turn to Ukraine's allegation that there is no legal basis for Ukrainian investigating authorities to review the anti-dumping measures at issue for the purpose of implementing the recommendations and rulings of the DSB under the Law against Dumped Imports. According to Ukraine, under the Law against Dumped Imports, an interim review cannot: (i) be initiated *ex officio* by the Ministry; (ii) be initiated on the basis that anti-dumping measures were found to be WTO-inconsistent; and (iii) focus on examining compliance with the recommendations and rulings of the DSB.<sup>67</sup> In light of the parties' submission and responses to questioning at the hearing, Ukraine has not shown that its investigating authorities could not reasonably review the anti-dumping measures at issue to implement the recommendations and rulings of the DSB under its current Law against Dumped Imports.

3.24. In that regard, I observe that, pursuant to Article 20.1 of the Law against Dumped Imports, an administrative review can be initiated at the request of "an executive authority in the country of import".<sup>68</sup> Ukraine has not put forward a definition of the term "executive authority" under its domestic legislation. Ukraine asserts only that the Ministry is not an executive authority of Ukraine for the purposes of that provision and that an interim review cannot be initiated at the request of the Ministry. Yet Ukraine has not advanced any reasons for or evidence in support of this assertion. At the hearing, Ukraine merely stated, without providing any supporting evidence, that the past practice of Ukrainian investigating authorities has been to consider that the Ministry is not an executive authority for the purposes of Article 20.1 of the Law against Dumped Imports.<sup>69</sup> Ukraine has not explained why any such past practice, if established, would necessarily prevent the same entity that conducts anti-dumping investigations and reviews from requesting the initiation of the administrative review necessary for implementation or, for that matter, prevent another executive authority of Ukraine from making such a request.

3.25. Moreover, pursuant to Article 20.2 of the Law against Dumped Imports, an interim review is initiated provided there is sufficient evidence that the continued imposition of the anti-dumping duties is no longer necessary to offset dumping.<sup>70</sup> Pursuant to Article 20.3 of that Law, once an interim review is initiated, the Ministry shall "in particular" examine "whether the circumstances relating to dumping and injury have changed significantly".<sup>71</sup> Ukraine argued that, at this stage, it is unclear whether the continued imposition of the anti-dumping duties is no longer necessary to offset dumping within the meaning of Article 20.2 and whether the circumstances relating to dumping changed significantly within the meaning of Article 20.3. This is because, according to Ukraine, until dumping margins are recalculated, Ukrainian investigating authorities cannot know whether and the extent to which there is a change in dumping margins.<sup>72</sup> I observe that some of Ukraine's implementation obligations directly concern its dumping calculations in the 2014 extension decision and necessarily require Ukraine to recalculate dumping margins.<sup>73</sup> Ukraine's implementation obligations also involve excluding EuroChem from the scope of the anti-dumping measures at issue

<sup>66</sup> Ukraine's responses to questioning at the hearing.

<sup>67</sup> Ukraine's submission, para. 37. I understand that Ukraine has taken steps to amend the Law against Dumped Imports. The Draft Law of Ukraine "On Protection against Dumped Imports" to replace the Law of Ukraine "On Protection of the National Producer against Dumped Imports" (22 December 1998) (Draft Law against Dumped Imports) contains a new Article 122 addressing specifically compliance with recommendations and rulings of the DSB. (Draft Law against Dumped Imports (Exhibit UKR-10), Article 122) At the time of the hearing in this arbitration, the Draft Law against Dumped Imports had gone through the first stages of Ukraine's legislative process. (Ukraine's responses to questioning at the hearing; submission, paras. 106, 157, and 161) I also understand that a previous version of the Draft Law against Dumped Imports was submitted to Ukraine's Parliament, the Verkhovna Rada of Ukraine (VRU), in 2018, but that, following parliamentary elections in July 2019 and the dissolution of the VRU, it was removed from consideration by the VRU. (Ukraine's submission, paras. 154-155)

<sup>68</sup> Ukraine's submission, para. 33. See also Law against Dumped Imports (Exhibit RUS-1b), Article 20.1.

<sup>69</sup> Ukraine's responses to questioning at the hearing.

<sup>70</sup> Ukraine's submission, para. 34. See also Law against Dumped Imports (Exhibit RUS-1b), Article 20.2.

<sup>71</sup> Law against Dumped Imports (Exhibit RUS-1b), Article 20.3. See also Ukraine's submission, para. 36.

<sup>72</sup> Ukraine's responses to questioning at the hearing.

<sup>73</sup> Parties' responses to questioning at the hearing. See also paras. 3.11. 3.12. above.

because EuroChem, one of the two main investigated Russian producers involved in the interim and expiry reviews, was found to have a *de minimis* dumping margin<sup>74</sup>, something that is already established at this stage. The continuation of anti-dumping measures is thus at the heart of Ukraine's implementation obligations. In light of these considerations and without any further explanation by Ukraine, I am not convinced that the circumstances of this dispute would not justify the initiation of an interim review under Article 20.2 of the Law against Dumped Imports. I am also not convinced that, once initiated, the Ministry could not focus this interim review on implementing the recommendations and rulings of the DSB under Article 20.3 of the Law against Dumped Imports. Ukraine has not explained why new dumping margin calculations and the exclusion of EuroChem would not qualify as a significant change in circumstances relating to dumping under that provision. I am not convinced by the general proposition that findings of inconsistency with Article 2 of the Anti-Dumping Agreement could not qualify as a "circumstance[] relating to dumping" that merits review. In any event, Article 20.3 directs the Ministry to examine "in particular" significant changes in circumstances relating to dumping. This suggests to me that the Ministry is free to examine other relevant aspects as part of an interim review.<sup>75</sup>

3.26. In light of the foregoing, Ukraine has not shown that, in the circumstances of this dispute, Ukraine could not reasonably initiate and conduct an administrative review of the anti-dumping measures at issue for the purposes of implementation under the Law against Dumped Imports.

#### 3.4.1.2 Legislative changes

3.27. Given the considerations above, the issue of the time needed for Ukraine's proposed legislative changes is moot. Ukraine enjoys a certain discretion in choosing the means and method of implementation. However, that discretion is not unfettered, and the chosen method of implementation must be capable of bringing Ukraine into compliance with its WTO obligations within a reasonable period of time.<sup>76</sup> In that regard, I recall that the reasonable period of time should be the shortest period possible within the legal system of the implementing Member, and the implementing Member should utilize all flexibilities available within its legal system in implementing the relevant recommendations and rulings of the DSB in the shortest period of time possible.<sup>77</sup> While I recognize that the legislative and administrative means of implementation proposed by Ukraine fall within the range of permissible means that are capable of achieving the implementation of the recommendations and rulings of the DSB, I consider that legislative action is not indispensably required to achieve compliance with the recommendations and rulings of the DSB in this dispute. This is because Ukraine has not shown that it could not review the anti-dumping measures at issue under its current Law against Dumped Imports. It is not my task as Arbitrator acting pursuant to Article 21.3(c) of the DSU to decide which method or type of measure should be chosen by an implementing Member for the purpose of implementation. However, it does fall within my mandate to assess what would be the shortest period possible within the legal system of the implementing Member for effective implementation of the recommendations and rulings of the DSB. In the particular circumstances of this case, given that Ukraine has not shown that implementation cannot be reasonably achieved through administrative means under the Law against Dumped Imports, I do not believe that my determination of the reasonable period of time needs to account for additional legislative actions, as Ukraine proposes.<sup>78</sup>

3.28. I note Ukraine's argument that its situation is akin to that of the European Union in *EC – Bed Linen*. Ukraine states that the reasonable period of time in that case allowed the European Union to modify its legal framework to include specifically the possibility to review anti-dumping measures to

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<sup>74</sup> Parties' responses to questioning at the hearing. See also paras. 3.11. 3.12. above.

<sup>75</sup> Ukraine has not offered another reading of Article 20.3 of the Law against Dumped Imports. (Ukraine's responses to questioning at the hearing)

<sup>76</sup> See para. 3.6. above. See also Awards of the Arbitrators, *US – Countervailing Measures (China)* (Article 21.3(c)), para. 3.3; *China – GOES (Article 21.3(c))*, para. 3.2; *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69; *Peru – Agricultural Products (Article 21.3(c))*, para. 3.5; *US – Shrimp II (Viet Nam)* (Article 21.3(c)), para. 3.3.

<sup>77</sup> See para. 3.5. above.

<sup>78</sup> In *US – Stainless Steel (Mexico)*, the arbitrator acknowledged the generally accepted principle that administrative means are faster than legislative means, and decided that the reasonable period of time would be determined based exclusively on available administrative means, in accordance with the principle that the reasonable period of time should be the shortest possible time period within the legal system of the implementing Member. (Award of the Arbitrator, *US – Stainless Steel (Mexico)* (Article 21.3(c)), para. 53)



implement recommendations and rulings of the DSB, before reviewing the anti-dumping measures at issue.<sup>79</sup> Since Ukrainian legislation does not set out a procedure aimed specifically at bringing anti-dumping measures into conformity with recommendations and rulings of the DSB, drawing on the processes for implementation in *EC – Bed Linen*, Ukraine contends that its general legislative framework has to be amended before it can initiate an administrative review.<sup>80</sup> Ukraine stresses that, like the European Union in *EC – Bed Linen*, this is the first time its anti-dumping measures have been found to be inconsistent with the Anti-Dumping Agreement.<sup>81</sup> I observe that the recommendations and rulings of the DSB in that dispute did not apply to Ukraine. Rather, they concerned a measure taken by another WTO Member, and implementation was undertaken in a different legal system. Crucially, the reasonable period of time in that dispute was agreed upon by the parties and the means for implementation and the associated timeframes for implementation were not considered by an arbitrator under Article 21.3(c) of the DSU. Therefore, I am of the view that the means for implementation adopted by the European Union in that dispute are of limited relevance to my determination in this arbitration.

3.29. For these reasons, I consider that my determination of the reasonable period of time should not account for the legislative changes that Ukraine proposes to undertake. In these circumstances, I turn to the period of time within which Ukraine's administrative process for implementation must be completed.

### 3.4.2 Steps of the implementation process

3.30. Turning to the steps of the implementation process relevant to this arbitration, Ukraine contends that it will need approximately 12 months to complete the administrative review of the anti-dumping measures at issue.<sup>82</sup> According to Ukraine, this time is to be allocated as follows: 15 days for the Ministry to prepare a proposal; 10 days for ICIT to consider this proposal and initiate the review; 30 days for interested parties to be notified and submit comments; 100 days to prepare and issue questionnaires, allow time for interested parties to respond, and for the Ministry to analyse the responses; 20 or 40 days to conduct verification visits, depending on whether they involve a domestic or a foreign company; 30 days to hold a hearing with interested parties and allow for written submissions; 90 days to draft the main facts and findings; and 35 days for the disclosure and final decision by ICIT.<sup>83</sup> At the hearing, Ukraine agreed that the recommendations and rulings of the DSB pertaining to Article 5.8 of the Anti-Dumping Agreement require Ukrainian investigating authorities to exclude EuroChem immediately from the scope of the anti-dumping measures.<sup>84</sup> Ukraine thus referred to a "pointed partial interim review" focusing on dumping determinations and due process rights.<sup>85</sup>

3.31. Russia contests the amount of time that Ukraine claims is required to review the anti-dumping measures at issue. Russia argues that the scope of the administrative review that Ukraine proposes to conduct will necessarily be limited and that a full-fledged review is not necessary for the purpose of implementation in this dispute.<sup>86</sup> In that regard, Russia states that the figures necessary for calculating dumping margins are already on the investigation record, and that Ukraine therefore does not need to collect any additional data.<sup>87</sup> Russia adds that Ukraine's proposed timeframes do not reflect mandatory time periods under its domestic law. Instead, they reflect "general time

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<sup>79</sup> Ukraine's submission, para. 49 (referring to Council Regulation (EC) No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters (Exhibit UKR-2)).

<sup>80</sup> Ukraine's submission, paras. 51-52.

<sup>81</sup> Ukraine's submission, paras. 48 and 52.

<sup>82</sup> Ukraine's submission, para. 174.

<sup>83</sup> Ukraine's submission, para. 174. Ukraine stated that these are the usual steps of an administrative review under the Law against Dumped Imports. (Ukraine's responses to questioning at the hearing)

<sup>84</sup> Ukraine's responses to questioning at the hearing.

<sup>85</sup> Ukraine's responses to questioning at the hearing.

<sup>86</sup> Russia's submission, paras. 160-161.

<sup>87</sup> Russia's submission, paras. 161 and 163-164.

periods that are relevant for original investigations".<sup>88</sup> In Russia's view, Ukraine should have reasonably been able to complete its administrative review within two months.<sup>89</sup>

3.32. I begin by observing that 12 months is the maximum amount of time foreseen under Ukraine's domestic legislation for an interim review.<sup>90</sup> It is also the time the interim and expiry reviews, in which WTO-inconsistent determinations were made, took to complete.<sup>91</sup> In setting out the various steps of its administrative review and corresponding timeframes, Ukraine refers to durations that are needed "in general", "normally", or "on average".<sup>92</sup> At the hearing, however, Ukraine stated that its proposed timeframes do not reflect average durations, but are based on the fastest full administrative review Ukrainian investigating authorities ever conducted under the Law against Dumped Imports, which took 11.5 months to complete.<sup>93</sup> Although Ukraine acknowledged that certain steps could arguably be completed in somewhat shorter timeframes than the ones it proposed, Ukraine did not know whether an administrative review could, overall, be conducted in a more expeditious manner.<sup>94</sup>

3.33. I cannot accept that the time period in which Ukrainian investigating authorities have been able to conduct previous full-fledged reviews is an appropriate measure of the time within which they should conduct an administrative review in this case. The 11.5-month review to which Ukraine refers was, by nature, distinct from a redetermination for the purpose of implementing recommendations and rulings of the DSB. I also do not agree that the administrative review necessary for implementation would require the same amount of time than the interim and expiry reviews in which WTO-inconsistent determinations were made. In my view, the administrative review to be conducted will necessarily be much more limited in scope. In that regard, I note that Ukraine's implementation obligations pertain only to the non-termination of the investigation against EuroChem, dumping and likelihood-of-dumping determinations, and the disclosure of essential facts.<sup>95</sup> Crucially, it became clear at the hearing that: (i) EuroChem, one of the two main investigated Russian producers involved in the interim and expiry reviews, will be excluded from the scope of the anti-dumping measures at issue, such that no new determination will need to be made for EuroChem; (ii) new analysis will be limited to recalculating normal value for the remaining investigated Russian producers, without considering afresh the export price or the injury analysis; and (iii) some data relevant to these normal value calculations are already on the record.<sup>96</sup> Ukraine specifically recognized that Ukrainian investigating authorities will not need to make a new injury determination, recalculate the export price, or deal with public interest concerns. Ukraine also acknowledged that some data are already on the investigation record to calculate normal value.<sup>97</sup>

3.34. In considering the time that is reasonably necessary to conduct the requisite administrative review in this dispute, I note that Ukraine has not argued or provided evidence that, under Ukrainian law, all the steps and timeframes it has put forward are mandatory. In this regard, I understand that the Ministry is not necessarily required to issue new questionnaires, conduct verification visits, or hold a hearing in the context of administrative reviews.<sup>98</sup>

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<sup>88</sup> Russia's submission, para. 162. Russia refers to the Award of the Arbitrator in *Japan – DRAMs (Korea)* as having clarified that "reliance on time periods used in original investigations seems inappropriate, because the implementing Member 'is only required to conduct a re-determination to implement a limited number of DSB rulings of inconsistency'." (Ibid., para. 160 (quoting Award of the Arbitrator, *Japan – DRAMs (Korea)* (Article 21.3(c)), para. 48))

<sup>89</sup> Russia's responses to questioning at the hearing.

<sup>90</sup> Pursuant to Article 18.4 of the Law against Dumped Imports, "[t]he review of the anti-dumping measures shall take place as soon as possible and shall end as a rule, not later than 12 months after the date of such review." (Law against Dumped Imports (Exhibit RUS-1b)) Ukraine acknowledged as much. (Ukraine's responses to questioning at the hearing)

<sup>91</sup> Statistics on duration of reviews of anti-dumping measures (Exhibit UKR-5).

<sup>92</sup> Ukraine's submission, paras. 79, 82, 85, 89, 92, 94, 96, and 103.

<sup>93</sup> Ukraine's responses to questioning at the hearing. Statistics provided by Ukraine show that the time needed to complete an interim review ranged from 11.5 months to 2 years. (Statistics on duration of reviews of anti-dumping measures (Exhibit UKR-5))

<sup>94</sup> Ukraine's responses to questioning at the hearing.

<sup>95</sup> See paras. 3.11. 3.12. above.

<sup>96</sup> Parties' responses to questioning at the hearing.

<sup>97</sup> Ukraine's responses to questioning at the hearing.

<sup>98</sup> Parties' responses to questioning at the hearing.

3.35. Yet, I am not convinced by Russia's argument that Ukraine simply needs to reconsider existing evidence on the investigation record for the purpose of recalculating normal value, and thus does not need to complete all of the usual steps of an administrative review.<sup>99</sup> According to Russia, to implement the recommendations and rulings of the DSB, Ukraine is, *inter alia*, required to construct normal value using the production costs of the investigated Russian producers as reported in their records, instead of using a surrogate cost for gas. Russia emphasized that these reported costs are already on the investigation record.<sup>100</sup> Ukraine in turn pointed to paragraph 7.90 of the Panel Report and footnote 159 thereto, as providing room for Ukraine to consider additional information and evidence, instead of engaging in a mathematical exercise of constructing normal value using production costs as reported in the records of the investigated Russian producers.<sup>101</sup>

3.36. As the Appellate Body observed, in paragraph 7.90 of the Panel Report and footnote 159 thereto, the Panel made several important factual findings underpinning its analysis under Article 2 of the Anti-Dumping Agreement. While Ukrainian investigating authorities had found that JSC Gazprom (Gazprom), a Russian supplier of gas, sells gas in the domestic Russian market below cost, the Panel found that no determination was made that Gazprom was the gas supplier of the investigated Russian producers or that Gazprom's prices affected other gas suppliers' prices.<sup>102</sup> In light of these findings, the Appellate Body agreed with the Panel that Gazprom's below-cost prices did not constitute a sufficient factual basis for the Ukrainian investigating authorities to conclude that the records of the investigated Russian producers did not reasonably reflect the costs associated with the production and sale of ammonium nitrate under the second condition of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. The Appellate Body ultimately upheld the Panel's finding that Ukraine acted inconsistently with Article 2.2.1.1 because Ukrainian investigating authorities did not provide an adequate basis under the second condition in the first sentence of that provision to reject the gas cost that the investigated Russian producers reported in their records when constructing normal value.<sup>103</sup>

3.37. Given the Panel and Appellate Body findings at issue, I do not exclude that the Ministry could collect additional information and data concerning relevant gas suppliers to construct normal value. Implementation in this dispute might therefore not be as straightforward as Russia suggests, and I consider that my determination should account some time for the Ministry to issue questionnaires and to collect and consider additional information and data. Moreover, bearing in mind the nature of the implementation that Ukraine proposes to undertake, and mindful that investigated exporters and producers benefit from the opportunity to defend their interests in hearings and through the process of verification, I would be reluctant to determine any period of time for implementation that would foreclose the possibility that such procedural steps could be taken if and when warranted. That being said, given the limited scope of Ukraine's administrative review discussed above, the time allocated for these steps should be reasonably reduced as compared to Ukraine's proposed timeframes.

3.38. Ukraine argues that some of the time periods that will apply to the specific steps that it considers necessary for implementation are based on important due process and transparency obligations arising under the Anti-Dumping Agreement, including, for example: giving "all interested parties ... a full opportunity for the defence of their interests"; providing "opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered"; providing "timely opportunities" for interested parties to see information relevant to their cases and to prepare presentations based on that information;

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<sup>99</sup> Russia's submission, paras. 87-89, 161, and 164; responses to questioning at the hearing.

<sup>100</sup> Russia's responses to questioning at the hearing.

<sup>101</sup> Ukraine also emphasized that the production costs at issue concern gas prices, which it sees as a complex and key aspect of this anti-dumping proceeding, potentially involving related parties. (Ukraine's responses to questioning at the hearing)

<sup>102</sup> Appellate Body Report, para. 6.103 (referring to Panel Report, para. 7.90 and fn 159 thereto). The Appellate Body highlighted "a key element of the Panel's analysis, namely, that while [Ukrainian investigating authorities] determined that Gazprom sells gas below cost, [they] did not make such a determination with respect to the actual gas suppliers of the two investigated Russian producers at issue, as [Ukrainian investigating authorities] did not inquire who supplied these producers with gas". (Ibid., para. 6.106)

<sup>103</sup> Appellate Body Report, para. 7.6. The Panel's finding of inconsistency with Article 2.2.1.1 of the Anti-Dumping Agreement, as upheld by the Appellate Body, in turn, was key to the findings of inconsistency with Articles 2.2, 2.2.1, and 11.2-11.3 of the Anti-Dumping Agreement. (Panel Report, paras. 7.101, 7.114, and 7.131; Appellate Body Report, paras. 7.7-7.8)

and giving public notices of final determinations detailing the "findings and conclusions reached on all issues of fact and law considered material".<sup>104</sup> I see some merit in these arguments advanced by Ukraine. Indeed, even if some steps and time periods are not required by law, they may nonetheless be useful in ensuring that implementation is effected in a transparent and efficient manner, fully respecting due process for all parties involved.<sup>105</sup> At the same time, I consider that due process concerns must be balanced with the principle of prompt compliance reflected in Article 21.1 of the DSU.<sup>106</sup> To that end, all flexibilities within the legal system of an implementing Member must be employed in the implementation process.<sup>107</sup> In this case, while it has referred to due process obligations, Ukraine has not explained how the timeframes associated with the various steps of its proposed administrative review reflect the use of flexibilities within its legal system. It seems to me that, given the limited scope of the administrative review at issue, Ukraine has available to it a considerable degree of flexibility to conduct that administrative review in a shorter period of time than it proposes, as evidenced by the absence of mandatory timeframes in relation to the majority of the component steps of Ukraine's proposed review.

3.39. In light of all of the considerations above, Ukraine has not satisfied its burden of proving that 12 months is the shortest period of time possible within its legal system to complete the administrative review at issue. I am of the view that Ukraine could complete this administrative review in reasonably less time. Relevant considerations include the required immediate exclusion of EuroChem and the fact that this administrative review will essentially focus on calculating normal value for the remaining investigated Russian producers and ensuring that certain disclosure obligations are met.<sup>108</sup> Given the limited scope of the administrative review at issue, I am not convinced that conducting it in a shorter period of time than Ukraine proposes would, in the circumstances of this dispute, infringe upon due process rights. At the same time, I believe that the review to be undertaken in this dispute will require more than the two months proposed by Russia. I indeed find it highly doubtful that a period of two months would allow Ukrainian investigating authorities to complete all the necessary steps for an administrative review. In that regard, I note that the component steps of Ukraine's proposed administrative review would seem to be sequential steps that cannot be conducted in parallel.<sup>109</sup>

3.40. A few days before the circulation of this Award, by letter dated 26 March 2020, Ukraine requested me to take into account Ukraine's recent measures in response to the COVID-19 virus, as they may significantly affect implementation in this dispute. Ukraine referred to the 30-day emergency situation regime introduced across Ukraine on 25 March 2020, specifically pointing to quarantine measures, the suspension of all commercial international passenger services to and from Ukraine, the closing of all non-essential services, and the ban on gatherings of more than 10 individuals. Ukraine indicated that, depending on how the situation evolves, these measures might be prolonged beyond 30 days.<sup>110</sup> By letter dated 30 March 2020, Russia expressed its solidarity with the countries affected by the COVID-19 virus. Russia stated, however, that it was unclear how Ukraine's recent measures would affect the Ministry's ability to conduct administrative reviews in short timeframes. Russia emphasized that, as per the Ministry itself, investigations would not be terminated or suspended. Russia also emphasized that, while the Ministry introduced certain mitigating measures dealing with on-site verifications and interactions with interested parties in

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<sup>104</sup> Ukraine's submission, para. 168 (quoting Articles 6.2, 6.4, and 12 of the Anti-Dumping Agreement).

<sup>105</sup> In that regard, I observe that Ukraine was found to have acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in the interim and expiry reviews leading up to the 2014 extension decision because Ukrainian investigating authorities had failed to give interested parties sufficient time to comment on its disclosure.

<sup>106</sup> In determining that balance, the arbitrator in *Japan – DRAMs (Korea)* noted that considerable opportunity had already been afforded to interested parties to participate in the original investigation. The arbitrator thus considered it appropriate to provide a shorter time to such interested parties in the context of an investigation that was far more limited in scope and had been initiated to implement the recommendations and rulings of the DSB. (Award of the Arbitrator, *Japan – DRAMs (Korea)* (Article 21.3(c)), para. 51)

<sup>107</sup> See para. 3.5. above.

<sup>108</sup> I also recall that, pursuant to the second sentence of Article 5.8 of the Anti-Dumping Agreement, "[t]here shall be immediate termination [of an investigation] in cases where the authorities determine that the margin of dumping is *de minimis*". The language "*immediate* termination", which applies to EuroChem in this dispute, is not without relevance to my determination of the reasonable period of time. (emphasis added)

<sup>109</sup> Ukraine's responses to questioning at the hearing.

<sup>110</sup> Letter from Ukraine dated 26 March 2020.

response to the recent developments in Ukraine pertaining to the COVID-19 virus, investigations were otherwise to be conducted "as usual".<sup>111</sup>

3.41. Ukraine has not explained in detail the extent to which its recent measures to address the COVID-19 virus affect its investigating authorities' ability to review the anti-dumping measures at issue in this dispute. At the same time, I am aware of the seriousness of Ukraine's recent measures, which were put in place as part of an emergency situation regime in response to a pandemic. The types of measures described by Ukraine may affect many aspects of a country's operation. Although investigations are not suspended, the documents put on the record by Russia confirm that Ukraine's recent measures affect the conduct of trade-defence investigations and that certain necessary adjustments are being made by the Ministry. For example, I understand that Ukraine's measures to prevent the spread of the COVID-19 virus affect the ability of interested parties to access materials of investigations, and that the Ministry has thus introduced remote access to certain information. The Ministry is also organizing hearings remotely, instead of holding face-to-face meetings. Moreover, as a result of the COVID-19 virus, on-site verifications are cancelled, which may lead to extending the deadlines for interested parties to provide answers to questionnaires.<sup>112</sup> While I see merit in Russia's argument that the COVID-19 pandemic is not "an overwhelming excuse for failures to comply with the WTO obligations"<sup>113</sup>, I cannot, in my determination of the reasonable period of time in this dispute, turn a blind eye to the recent developments in Ukraine and the rest of the world relating to the COVID-19 pandemic that affect the work of Ukrainian investigating authorities.<sup>114</sup> My determination also needs to take into account the recent developments in Ukraine relating to the COVID-19 pandemic.

### 3.4.3 Particular circumstances

3.42. Ukraine submits that, as recognized by the Panel in *Russia – Traffic in Transit*, it is currently in a situation of "emergency in international relations", which constitutes a particular circumstance that I should take into account in determining the reasonable period of time.<sup>115</sup> According to Ukraine, this situation has existed since 2014.<sup>116</sup> Since then, Ukraine has been prioritizing urgent legislative and regulatory actions to protect its territory and population, and maintain its law and public order internally, resulting in other initiatives experiencing significant delays.<sup>117</sup> Ukraine emphasizes that this particular circumstance "affects daily life, disturbs the economy and continues to lead to extraordinary and unexpected delays in what normally should be straightforward actions".<sup>118</sup> Consequently, Ukraine requests me to determine that a period of six months be added to the reasonable period of time that I would otherwise determine.<sup>119</sup> This additional time is to be allocated

<sup>111</sup> Letter from Russia dated 30 March 2020 (referring to Ministry, Notice regarding coronavirus SARS-CoV-2 (17 March 2020) (Exhibit RUS-20b); Ministry, Notice regarding submission of information (27 March 2020) (Exhibit RUS-21b); Ministry, Press release, "The Ministry for Development of Economy, Trade and Agriculture of Ukraine informs about the specifics of conducting trade investigations during the period of quarantine measures in Ukraine and the city of Kiev" (17 March 2020) (Exhibit RUS-22b)). These exhibits were attached to Russia's letter of 30 March 2020, and Ukraine did not object to these new exhibits.

<sup>112</sup> Ministry, Notice regarding coronavirus SARS-CoV-2 (17 March 2020) (Exhibit RUS-20b); Ministry, Notice regarding submission of information (27 March 2020) (Exhibit RUS-21b); Ministry, Press release, "The Ministry for Development of Economy, Trade and Agriculture of Ukraine informs about the specifics of conducting trade investigations during the period of quarantine measures in Ukraine and the city of Kiev" (17 March 2020) (Exhibit RUS-22b).

<sup>113</sup> Letter from Russia dated 30 March 2020.

<sup>114</sup> In its letter dated 30 March 2020, Russia also stated that it was unclear how Ukraine's recent measures would affect Ukraine's legislative process. Above, I considered that my determination of the reasonable period of time should not account for the legislative changes that Ukraine proposes to undertake. I therefore do not consider it necessary to address further Russia's arguments pertaining to Ukraine's COVID-19 measures as they relate to Ukraine's legislative process.

<sup>115</sup> Ukraine's submission, para. 121 (quoting Panel Report, *Russia – Traffic in Transit*, para. 7.123). Ukraine also identifies the need to amend the Law against Dumped Imports and review the anti-dumping measures at issue as a particular circumstance. (Ibid., para. 120) I have addressed this circumstance above.

<sup>116</sup> Ukraine's submission, para. 121.

<sup>117</sup> Ukraine's submission, paras. 134-135 and 137.

<sup>118</sup> Ukraine's submission, para. 127.

<sup>119</sup> Ukraine's submission, para. 137. In support of its request, Ukraine refers to previous awards under Article 21.3(c) of the DSU as having recognized "other, considerably less disruptive 'particular circumstances' ..., such as natural disasters or severe economic and financial problems". (Ukraine's submission, para. 128. See also paras. 129-133 (referring to Awards of the Arbitrators, *Peru – Agricultural Products (Article 21.3(c))*),

as follows: three months to complete its legislative process and three months to review the anti-dumping measures at issue.<sup>120</sup>

3.43. Russia responds that Ukraine attempts to "impermissibly expand[] the scope of [the particular] circumstances" under Article 21.3(c) of the DSU.<sup>121</sup> Russia argues in this respect that the particular circumstances are those "within the legal system of the implementing Member" that "make it 'impracticable to comply immediately with the recommendations and rulings of the DSB'".<sup>122</sup> To Russia, factors such as the state of international relations, the political situation between Members, or priorities and workload of implementing authorities are irrelevant in this context.<sup>123</sup> At the hearing, Russia nevertheless acknowledged that a situation of "emergency in international relations" may qualify as a particular circumstance within the meaning of Article 21.3(c).<sup>124</sup> In any event, Russia contends that "the allegations made by Ukraine have no impact whatsoever on the capacity of Ukraine to adopt laws and conduct investigations."<sup>125</sup> Specifically, Russia points out that, although the situation identified by Ukraine allegedly materialised in 2014, Ukrainian investigating authorities initiated more anti-dumping investigations in 2015-2019 than in 2010-2014.<sup>126</sup> Russia also observes that, in 2015, ICIT implemented the recommendations and rulings of the DSB in *Ukraine – Passenger Cars* within two months.<sup>127</sup>

3.44. I do not, in principle, rule out the possibility that a situation of "emergency in international relations" may qualify as a particular circumstance and may thus be relevant to my determination of the reasonable period of time.<sup>128</sup> I recognize that such a situation may affect a Member's capacity to implement the recommendations and rulings of the DSB. I recall, however, that Ukraine bears the overall burden of proving that the period of time requested for implementation constitutes a reasonable period of time.<sup>129</sup> In my view, Ukraine has not sufficiently substantiated that there is a situation of "emergency in international relations" that affects the reasonable period of time for implementation in this dispute.<sup>130</sup>

3.45. Ukraine has not clarified, in its written submission or during the course of the hearing, how or to what extent the period of time needed for implementation would be affected by the alleged situation of "emergency in international relations". Nor has Ukraine explained how it devises six months as the additional period of time needed in response to the impact entailed by the alleged situation, or how it devises the three additional months specifically requested to review the anti-dumping measures at issue.<sup>131</sup> Ukraine has not submitted any evidence in support of its allegation that the situation of "emergency in international relations" would result in delays in the

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para. 3.45; *Indonesia – Autos (Article 21.3(c))*, para. 24; *Argentina – Hides and Leather (Article 21.3(c))*, para. 51)

<sup>120</sup> Ukraine's responses to questioning at the hearing.

<sup>121</sup> Russia's submission, para. 32.

<sup>122</sup> Russia's submission, para. 34 (quoting Article 21.3 of the DSU).

<sup>123</sup> Russia's submission, para. 36.

<sup>124</sup> Russia's responses to questioning at the hearing.

<sup>125</sup> Russia's submission, para. 131.

<sup>126</sup> Russia's submission, para. 141 (referring to WTO Statistics on Initiation of Dumping, Countervailing and Safeguard Investigations (Exhibit RUS-10)).

<sup>127</sup> Russia's submission, para. 132 (referring to Communication from Ukraine, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/10 of 8 October 2015).

<sup>128</sup> Both parties agreed that a situation of "emergency in international relations" may qualify as a particular circumstance within the meaning of Article 21.3(c) of the DSU. (Parties' responses to questioning at the hearing)

<sup>129</sup> See para. 3.8. above.

<sup>130</sup> In *Peru – Agricultural Products*, the arbitrator did not exclude that a natural disaster may constitute a particular circumstance under Article 21.3(c) of the DSU. The relevant issue in that arbitration was how and to what extent Peru's activities to address and mitigate the effects of an anticipated natural disaster affected the period of time for implementation. (Award of the Arbitrator, *Peru – Agricultural Products (Article 21.3(c))* para. 3.45)

<sup>131</sup> Ukraine referred to the additional period of time of six months granted by the arbitrator in *Indonesia – Autos* as a benchmark. (Ukraine's responses to questioning at the hearing) In that case, the arbitrator considered that Indonesia is a developing country in a dire economic and financial situation. (Award of the Arbitrator, *Indonesia – Autos (Article 21.3(c))*, para. 24) The additional period of time awarded in that case is of limited relevance to my determination. That dispute did not concern Ukraine, but another WTO Member. Moreover, the arbitrator was guided by Article 21.2 of the DSU, which provides that "[p]articular attention should be paid to matters affecting the interests of developing country Members". (Ibid. (quoting Article 21.2 of the DSU))

conduct of anti-dumping investigations. At the hearing, Ukraine merely asserted, without more, that the Ministry has to devote manpower to urgent border issues, and therefore cannot focus on anti-dumping proceedings.<sup>132</sup> The exhibits relied on by Ukraine in the context of its "particular circumstances" arguments comprise: (i) a 2019 news item by the United Nations (UN); (ii) a 2019 report by the UN Office of the High Commissioner for Human Rights; (iii) UN General Assembly Resolution 74/17 of 9 December 2019; and (iv) a table listing 16 laws adopted in 2019 by Ukraine's Parliament.<sup>133</sup> None of these exhibits speaks to the alleged delays in anti-dumping investigations.<sup>134</sup>

3.46. For these reasons, I do not consider that there is a particular circumstance relevant to my determination of the reasonable period of time for implementation in this dispute.

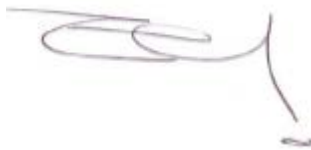
#### 3.4.4 Conclusion

3.47. In sum, Ukraine has not satisfied its burden of showing that 12 months is the shortest period of time possible within its legal system to complete the administrative review of the anti-dumping measures at issue or that there is a particular circumstance relevant to my determination of the reasonable period of time in this dispute. Given the limited scope of the contemplated administrative review, which will focus on calculating normal value and complying with certain disclosure requirements, 12 months is more than is reasonably needed for implementation in this dispute. In reaching this conclusion, I am also mindful of the recent developments in Ukraine relating to the COVID-19 pandemic.

## 4 AWARD

4.1. In light of the foregoing considerations, the "reasonable period of time" for Ukraine to implement the recommendations and rulings of the DSB in this dispute is 11 months and 15 days, from 30 September 2019, that is, from the date on which the DSB adopted the Panel and Appellate Body Reports in this dispute. The reasonable period of time for implementation will expire on 15 September 2020.

Signed in the original this 7th day of April 2020 by:



Ricardo Ramírez-Hernández  
Arbitrator

<sup>132</sup> Ukraine's responses to questioning at the hearing.

<sup>133</sup> United Nations News, "Human cost of Ukraine conflict is growing, Security Council told" (16 July 2019) (Exhibit UKR-6); Office of the United Nations High Commissioner for Human Rights, Report on the human rights situation in Ukraine, 16 August to 15 November 2019 (Exhibit UKR-7); United Nations General Assembly resolution 74/17, Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov (9 December 2019) (Exhibit UKR-8); Laws adopted by the Verkhovna Rada of Ukraine of IX convocation concerning the emergency situation in Ukraine, until 14 February 2020 (Exhibit UKR-13). Exhibit UKR-13 was distributed by Ukraine at the hearing, and Russia did not object to this new exhibit.

<sup>134</sup> Moreover, as Ukraine acknowledged, any delays resulting from the situation of "emergency in international relations" it claims to have existed since 2014 are, at least to a certain extent, already accounted for in its statistics on the duration of administrative reviews completed since 2014, which formed the basis for the requested 12 months for reviewing the anti-dumping measures at issue. (Ukraine's responses to questioning at the hearing. See also Statistics on duration of reviews of anti-dumping measures (Exhibit UKR-5))

**ANNEX A****EXECUTIVE SUMMARY OF UKRAINE'S SUBMISSION****1. INTRODUCTION**

1. The Dispute Settlement Body ('DSB') adopted the recommendations and rulings of the Panel and the Appellate Body in *Ukraine – Anti-Dumping Measures on Ammonium Nitrate (DS 493)* at its meeting of 30 September 2019. Immediately thereafter, at the DSB meeting of 28 October 2019, Ukraine informed the DSB that it intended to implement the DSB's recommendations and rulings, but that it would need a reasonable period of time to do so.

2. This is the first time Ukrainian anti-dumping measures have been found to be inconsistent with law of the World Trade Organization ('WTO') by the DSB. Consequently, Ukrainian legislation does not currently set out a procedure aimed specifically at bringing anti-dumping measures into conformity with DSB's recommendations and rulings. Therefore, the implementation process in this case will require two phases. First, Ukraine will have to adopt the required legislative framework to initiate and conduct a review of anti-dumping measures. More specifically, Ukraine will have to revise the Law of Ukraine "On Protection of the National Producer against Dumped Imports" of 22 December 1998 No. 330-XIV and adopt an updated version of it (Draft Law of Ukraine "On Protection against Dumped Imports" as further referred 'Draft Law against Dumped Imports'). In a second phase, Ukraine will conduct a review of the anti-dumping measures at issue. Ukraine will not be able to start this second phase until its legislation has been amended.

3. Ukraine intends to completely implement the DSB's recommendations and rulings as promptly as it can but anticipates that this will require no less than 27 months in total.

**2. FIRST STEP: ADOPTION OF THE DRAFT LAW AGAINST DUMPED IMPORTS**

4. In order to implement the DSB's recommendations and rulings in this case, as a first step, Ukraine will have to adopt the Draft Law against Dumped Imports, as currently the Law of Ukraine "On Protection of the National Producer against Dumped Imports" of 22 December 1998 No. 330-XIV does not foresee the possibility for a review proceeding of anti-dumping measures to be initiated as a way of complying with the DSB's recommendations and rulings.

5. Indeed, under the Law of Ukraine "On Protection of the National Producer against Dumped Imports" of 22 December 1998 No. 330-XIV:

- There is no possibility for the Ministry to initiate a review proceeding of anti-dumping measures *ex officio* on the basis of the DSB's recommendations and rulings or without a preliminary request in this regard;
- There is no possibility to initiate such a review based specifically on the fact that certain anti-dumping measures have been found to be inconsistent with Ukraine's obligations under WTO law; and
- Once a review has been initiated, there is no possibility for the *Ministry* to focus its examination on compliance of the anti-dumping measures concerned with the implementation of the DSB's recommendations and rulings in a specific case, as it is mandated by law to examine (i) whether the circumstances relating to dumping and injury have substantially changed and (ii) whether the anti-dumping measures have had the desired effect, namely, the prevention of injury.

6. In the Draft Law against Dumped Imports, provisions were therefore added in order to allow an interim review procedure: (i) to be initiated *ex officio* by the Ministry; (ii) specifically as way of complying with DSB's recommendations and rulings; and (iii) to allow the *Ministry* to focus on bringing the anti-dumping measures concerned into compliance with such recommendations and rulings.

7. In early 2018, the Draft Law against Dumped Imports was submitted for review to the Parliament of Ukraine. However, because of parliamentary elections in July 2019, the Parliament



was dissolved before the end of its 5-year term and before the Draft Law against Dumped Imports could be adopted. According to Ukraine's domestic legislation, all draft laws that were not adopted in the first reading by a previous convocation of the Parliament must be removed from consideration of the newly elected Parliament. Therefore, in order to be officially adopted, the Draft Law against Dumped Imports must go through the approval procedure again.

8. As can be seen from the table below, in order for all the mandatory procedural steps for the adoption of the Draft Law against Dumped Imports to be completed, Ukraine will need a period of 9 months in total.

Procedural step	Time needed
Legislative initiative	Completed
Drafting by the Ministry	Will be completed by the end of January 2020
Approval by other relevant Ministries and interested government services	1 month
Public consultations and submission to relevant associations for comments	10 days
Legal expertise by the Ministry of Justice	1 month
Review and approval by the Cabinet of Ministers of Ukraine	5 months (Exhibit 4)
Review and adoption by the Parliament of Ukraine	15 days
Signature by President and official publication	30 days
Entry into force	

### 3. SECOND STEP: REVIEW OF THE ANTI-DUMPING MEASURES AT ISSUE

9. Once Ukraine's legislative framework has been amended in order to allow an interim review proceeding of anti-dumping measures to be initiated with the specific aim of complying with the DSB's recommendations and rulings, the anti-dumping measures at issue will have to be reviewed in order to bring them into conformity with WTO law.

10. Such a review is a very thorough procedure and, in accordance with national legislation, it requires several mandatory procedural steps to be followed. As can be seen from the table below, in order for all these procedural steps required for the review of anti-dumping measures to be completed, Ukraine will need 12 months in total.

Procedural step	Time needed
Preparation of proposals by the Ministry	15 days
Consideration of the Ministry's proposals and decision to initiate by the ICIT	10 days
Interested parties are notified and may submit comments	30 days
Questionnaire replies are sent out and answers are provided and analysed by the Ministry	100 days
Verification visits	20 days for a domestic company and 40 days for a foreign company
Hearing and written submissions	30 days
Drafting main facts and findings	90 days
Disclosure and final decision	35 days

### 4. PARTICULAR CIRCUMSTANCE: EMERGENCY IN INTERNATIONAL RELATIONS

11. A particular circumstance that should be taken into account by the Arbitrator in this specific case, is the fact that Ukraine is currently in a situation qualified by the Panel in *Russia – Traffic in Transit* as an "emergency in international relations" within the meaning of Article XXI (b) of

the GATT.<sup>1</sup> According to the Panel in that case, such a situation allows WTO Members to "*depart from their GATT and WTO obligations*".<sup>2</sup>

12. This particular circumstance affects daily life, disturbs the economy and continues to lead to extraordinary and unexpected delays in what normally should be straightforward actions. Concretely, the above-specified actions and time frames are those that operate as a rule in a 'normal' situation, i.e. under ordinary conditions. Because, however, life is no longer normal since the uninvited disruptions started, this continuing emergency should be taken into account when determining a realistic time frame under surreal circumstances.

13. More specifically, since Ukraine needs to focus on issuing emergency laws and regulations to respond to the situation of "*emergency in international relations*" that currently exists in its territory, other regulatory or legislative initiatives will experience significant delays. Consequently, a specific flexibility of at least six *additional* months should be added *over and above* the reasonable period of time that would otherwise be determined, absent these crippling and highly particular circumstances from which Ukraine has been severely suffering during the last years.

## 5. CONCLUSION

14. In summary, in order to implement the DSB's recommendations and rulings, the two following steps will have to be completed:

- First, the Draft Law against Dumped Imports will need to be adopted in order to enable a review of anti-dumping measures to be initiated on the basis of the DSB's recommendations and rulings; and
- Secondly, a review of the anti-dumping duties will have to be conducted in accordance with domestic mandatory procedure and taking into account the ruling of the Panel and the Appellate Body in this case.

15. Ukraine's reasonable and realistic estimate is that it will take no less than 9 months to adopt the Draft Law against Dumped Imports and that it will take an additional 12 months to conduct a review of the anti-dumping duties at issue.

16. Therefore, Ukraine respectfully requests that the Arbitrator determine that 21 (= 9 + 12) months is a reasonable period of time in which to implement the DSB's recommendations and rulings under Article 21.3(c) of the DSU, had there been no particular circumstances present, as explained above. Because of the current armed conflict in Ukraine, recognized by WTO as situation of "emergency in international relations" that currently still exists in its territory, an additional 6 months should be added to this period of time. In sum, the total reasonable period of time in this case should therefore be determined at 27 months (= 21 + 6).

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<sup>1</sup> Panel Report, *Russia – Traffic in Transit (DS 512)*, para. 7.123.

<sup>2</sup> Panel Report, *Russia – Traffic in Transit (DS 512)*, para. 7.79.

**ANNEX B****EXECUTIVE SUMMARY OF RUSSIA'S SUBMISSION****I. INTRODUCTION**

1. On 30 September 2019, the DSB adopted its recommendations and rulings to bring Ukraine's anti-dumping measures on Russian ammonium nitrate in conformity with the ADA.<sup>1</sup> While Ukraine announced its intention to comply with these recommendations and rulings, the Russian Federation considers that the timetable it proposed to do so cannot be considered as representative of a RPT within the meaning of Article 21.3 of the DSU.

2. In particular, the Russian Federation considers that (i) Ukraine unduly seeks to limit the role of the arbitrator, (ii) no RPT should be afforded to implement the DSB's recommendations and rulings relating to Article 5.8 of the ADA, (iii) the DSB's recommendations and rulings can be implemented in a shorter period of time, without legislative changes or review and (iv) no particular circumstance justifies the extension of the RPT.

**II. UKRAINE UNDULY SEEKS TO LIMIT THE ROLE OF THE ARBITRATOR**

3. The Russian Federation considers that the role of the arbitrator is not limited to validating the timetable proposed by the implementing Member.

4. Where necessary, in order to ensure "prompt compliance" within the meaning of Article 21.1 of the DSU, the Arbitrator must establish the RPT as the shortest period of time possible within the legal system of the implementing Member, using all flexibility and discretion available within its system and taking into account the particular circumstances of the case.<sup>2</sup>

5. An implementing Member does not have an unfettered discretion when determining their means of implementation.<sup>3</sup> Arbitrators can consider such means of implementation as a relevant factor.<sup>4</sup> In particular, Arbitrators can review whether the implementing action falls within the range of permissible actions that can be taken in order to implement the DSB recommendations and rulings.<sup>5</sup> Similarly, Arbitrators can set the RPT by reference to available administrative means, if such way of implementation should be favored in order to comply promptly with the DSB's recommendations and rulings in accordance with Article 21 of the DSU.<sup>6</sup>

6. In any case, the implementing Member bears the burden of proving that the period it requests is the shortest possible within its legal system<sup>7</sup> and that the steps it proposes are required under its domestic laws to implement the recommendations and rulings.<sup>8</sup>

7. The Russian Federation therefore requests the Arbitrator to consider that a RPT should only be granted if permitted, without taking account of unnecessary legislative changes or reviews, based on the shortest period possible within Ukraine's legal system.

**III. NO RPT SHOULD BE AFFORDED FOR ARTICLE 5.8 RECOMMENDATIONS AND RULINGS**

8. The Panel and Appellate Body Reports make clear that the only way to comply with Article 5.8 of the ADA is to immediately exclude EuroChem from the scope of the anti-dumping measures and

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<sup>1</sup> Dispute Settlement Body, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, Appellate Body Report and Panel Report, Action by the Dispute Settlement Body, 3 October 2019, WT/DS493/10.

<sup>2</sup> See *inter alia* Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 61.

<sup>3</sup> Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 56.

<sup>4</sup> See *inter alia* Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 26.

<sup>5</sup> Award of the Arbitrator, *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.3. See also Awards of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69 and *EC – Chicken Cuts (Article 21.3(c))*, para. 55.

<sup>6</sup> Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 53. See also Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, paras. 48 and 52.

<sup>7</sup> Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 44.

<sup>8</sup> Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 56.

from the scope of any subsequent review. It is established in the WTO jurisprudence and undisputed by Ukraine that there is no other way to comply with Article 5.8 of the ADA. There is no other permissible range of actions that can be taken in order to implement the DSB recommendations and rulings and immediate compliance is practicable.

9. The exclusion of EuroChem from the scope of the anti-dumping measures and from the scope of any subsequent review only requires a decision by ICIT, pursuant to Article 5(6) of the Ukrainian Dumping Law. Ukraine should therefore immediately comply with the DSB's recommendations and rulings relating to Article 5.8 of the ADA.

10. If necessary, the implementation of the DSB's recommendations and rulings could be done in two steps, with the immediate exclusion of EuroChem, as a first step, and the implementation within a RPT of the remaining DSB's recommendations and rulings, as a second step.<sup>9</sup>

#### **IV. RECOMMENDATIONS AND RULINGS SHOULD BE IMPLEMENTED IN THE SHORTEST PERIOD OF TIME, WITHOUT LEGISLATIVE CHANGES**

11. **First**, the Russian Federation considers it is unnecessary to amend the Ukrainian Dumping Law to implement the DSB's recommendations and rulings. Implementation can already be done, without a review, under the existing provisions of the Ukrainian Dumping Law. Moreover, the Ukrainian Dumping Law includes provisions similar to those relied on in the Ukrainian Safeguard Law to implement within two months – without any legislative change or review – the DSB's recommendations and rulings in dispute *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars* (DS468).

12. Thus, the RPT should not include the time needed to implement any legislative change or conduct reviews and the RPT should have been two months from the adoption of the Panel and Appellate Body Reports, similar to what was done in DS468.

13. **Second**, assuming legislative changes would be needed (*quod non*), the timetable submitted by Ukraine for any legislative change is excessive. Ukraine nowhere explains how the "general" delays to which it refers would be mandatory, nor why such delays could not be shortened using all flexibility available within its legal system. In any event, the Russian Federation notes that average delays cannot be used as a benchmark when setting the RPT.<sup>10</sup> To the contrary, the Russian Federation considers that, insofar as only a single Article would be added to the Ukrainian Dumping Law, any delay relating to the adoption of such amendment should be minimal.

14. **Third**, Russia considers that the DSB's recommendations and rulings can be implemented in full without necessarily conducting a review, as illustrated by the past practice of the Ukrainian authorities confirmed by the Ukrainian Supreme Court.

15. However, even if a review was to be conducted (*quod non*), the Russian Federation disagrees that Ukraine should conduct a comprehensive 12-months review to implement the DSB's recommendations and rulings. Past arbitrators have emphasized that any review to implement the DSB's recommendations and rulings should not amount to a *de novo* review and that, using all flexibility available within their legal system, implementing Members can be expected to conduct these reviews in a shorter period of time as compared to time periods used in original investigations.<sup>11</sup> This position is not affected by the alleged need to respect due process rights in the context of the review implementing the DSB's recommendations and rulings.<sup>12</sup>

16. In light of the limited DSB's recommendations and rulings that must be complied with and the fact that Ukraine already has in its possession all the information it needs, and to the extent none of the delays raised by Ukraine are mandatory, the proposed 12-month period cannot be accepted for the conduct of the review.

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<sup>9</sup> Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, para. 41. See also Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 108.

<sup>10</sup> Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 71.

<sup>11</sup> Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, paras. 38, 47 and 48.

<sup>12</sup> Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, paras. 49-51.

**V. NO PARTICULAR CIRCUMSTANCE JUSTIFIES THE EXTENSION OF THE RPT**

17. Ukraine wrongfully attempts to refer to the "emergency in international relations" identified in the Panel Report in *Russia – Traffic in Transit* (DS 512). In referring to this dispute, Ukraine errs legally and factually. Any considerations relating to this dispute are irrelevant to the resolution of the present arbitration proceedings. In addition, an analysis of available facts shows that Ukraine has not incurred any delay when discussing and adopting laws or conducting trade defense investigations.

**VI. CONCLUSION**

18. The Russian Federation considers that no RPT can be granted to implement the DSB's recommendations and rulings in relation to Article 5.8 of the ADA. Ukraine should therefore take an immediate decision to exclude EuroChem from the scope of its anti-dumping measure and any subsequent review thereof.

19. With respect to obligations under Articles 2.2.1.1, 2.2, 2.2.1, 11.2, 11.3 and 6.9 of the ADA, Ukraine should implement the DSB's rulings and recommendations in a RPT, corresponding to the shortest period possible, using all flexibilities available. However, this requires neither legislative change, nor reviews and particularly nor full-fledged reviews. The Russian Federation considers that a decision to implement the DSB's recommendations and rulings could have been adopted within two months.

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