

UNITED STATES – ANTI-DUMPING ACT OF 1916

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

Award of the Arbitrator
A. V. Ganesan

I. Introduction

1. On 26 September 2000, the Dispute Settlement Body (the "DSB") adopted the Panel Reports in *United States – Anti-Dumping Act of 1916* (" *United States – 1916 Act* ").¹ On 23 October 2000, the United States informed the DSB, pursuant to Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that it would implement the recommendations and rulings of the DSB in this case.² The United States said that it would require a "reasonable period of time" for implementation, under the terms of Article 21.3 of the DSU, and that it would consult with the European Communities and Japan on the matter.³

2. On 17 November 2000, the European Communities and Japan submitted a joint letter to the Chairman of the DSB requesting, in view of the impossibility of reaching an agreement with the United States on the time required for the implementation of the DSB's recommendations and rulings in this case, that the "reasonable period of time" for such implementation be determined by binding arbitration pursuant to Article 21.3(c) of the DSU.⁴

3. By a joint letter of 19 December 2000, the European Communities, Japan and the United States notified the Director-General that they had agreed, under the terms of Article 21.3(c) of the DSU, that I act as Arbitrator in the binding arbitration to determine the "reasonable period of time" for implementation in this case.⁵ In that letter, the parties also stated that they had agreed to extend the period of time for the arbitration, fixed by Article 21.3(c) of the DSU at 90 days from the date of adoption by the DSB, until 28 February 2001.⁶ The parties further stated that they had agreed that, notwithstanding this extension of the time-period, the arbitration award shall be deemed to be the award for the purposes of Article 21.3(c) of the DSU. My acceptance to serve as Arbitrator was conveyed to the parties by a letter of 20 December 2000.

¹WT/DS136/R (the "EC Panel Report") and WT/DS162/R (the "Japan Panel Report"), as upheld by the Appellate Body Report, WT/DS136/AB/R and WT/DS162/AB/R. Two separate Panel Reports in these disputes were rendered by two Panels composed of the same three persons. The appeal of both Panel Reports was addressed in one Appellate Body Report. As the parties have treated the two disputes as a single case for purposes of determining the reasonable period of time under Article 21.3(c), I shall do the same for purposes of this Arbitration. Therefore, I will refer to the two disputes as "this case" and to the European Communities, Japan and the United States as the "parties to this dispute".

²WT/DSB/M/91, 30 November 2000, para. 55.

³*Ibid.*

⁴WT/DS136/9 and WT/DS162/12, 21 November 2000.

⁵WT/DS136/10 and WT/DS162/13, 19 December 2000.

⁶*Ibid.*

4. Written submissions were received from the European Communities, Japan and the United States on 10 January 2001, and an oral hearing was held on 7 February 2001.

II. Arguments of the Parties

A. *United States*

5. The United States submits that a "reasonable period of time" for implementation of the recommendations and rulings of the DSB in the present case is 15 months, taking account of the nature of the United States' legislative process, the recent changes in the United States Presidency, Administration, and Congress, the language of Article 21.3(c) of the DSU, and previous arbitration awards under this Article.

6. The United States considers that, in determining the "reasonable period of time" under Article 21.3(c), an arbitrator should first examine the particular circumstances which make immediate implementation impracticable. In this case the conclusion of the previous session of Congress in December 2000, and the fact that the current session of the new Congress has only just begun, mean that it is clearly impracticable for the United States to comply with the DSB recommendations and rulings immediately. The United States, therefore, needs a "reasonable period of time" in accordance with the 15 month guideline of Article 21.3(c), and the stipulation set out in that Article, that such "time may be shorter or longer, depending upon the particular circumstances".

7. The United States considers that the relevant "particular circumstances" for Article 21.3(c) are: the legal form of implementation (legislative or regulatory); the technical complexity of the measure that the Member needs to draft, adopt and implement; and the period of time in which the implementing Member can achieve the proposed form of implementation in accordance with *its own legal system* of government. Furthermore, while past arbitrators have stressed that the "reasonable period of time" for implementation is the shortest period possible within the law-making procedures of the implementing Member, they have also clearly acknowledged that this does not require a Member to use any *extraordinary* legislative procedures, as distinguished from its own *normal* legislative procedures.

8. The United States submits that it is not in dispute that implementation in this case requires legislative action. The United States emphasizes that securing the enactment of legislation in the United States Congress is a complex, nuanced and lengthy process, and that the reality is that the vast majority of bills that are approved are not acted upon until the closing weeks of a Congressional session, indicating the difficulty and length of time required to enact a piece of legislation in the

United States Congress. The current session of the 107th United States Congress is expected to be adjourned in December 2001, which would roughly correspond to a period of 15 months from the adoption of the Panel and Appellate Body Reports by the DSB on 26 September 2000. According to the United States, the period of 15 months is, thus, the shortest period possible for implementation within its normal law-making procedures.

9. The United States notes that the power to legislate is vested in the United States Congress, which has two chambers, the House of Representatives and the Senate. The Executive branch of the United States government has no control over the timetable and procedures of Congress. The first step in the legislative process is for a bill to be introduced in the House or the Senate by a member of Congress. When the Executive branch initiates legislation, it may transmit a proposal to the Speaker of the House of Representatives or the President of the Senate, and draft legislation may be introduced in either its original or revised version by a member of a relevant committee. Alternatively, the Executive branch may request that an individual member or members of Congress introduce proposed legislation.

10. After introduction, as a general rule, a bill is referred to a standing committee or committees having jurisdiction over the subject matter of that bill. In the House of Representatives, a bill may be referred to a number of committees simultaneously, while in the Senate a bill is more commonly referred to the committee with primary subject matter jurisdiction and then it may be sequentially referred to other committees. Most bills are referred by the committee with jurisdiction to a subcommittee for consideration.

11. In the House of Representatives, the subcommittee normally schedules public hearings to obtain the views of proponents and opponents of a bill, including government agencies, experts, interested organizations and individuals. There is no specified time frame for committee consideration. When the hearings are completed, the subcommittee usually meets to "mark-up" the bill, that is, to make changes and amendments prior to deciding whether to recommend the bill to the full committee. If the subcommittee votes to recommend, it is called "reporting". The subcommittee may also suggest that a bill be "tabled", that is, postponed indefinitely.

12. After receiving the subcommittee's report (recommendation), the full committee may conduct further study and hearings. There will again be a "mark-up" process. The full committee then votes whether to report the bill, either as originally introduced without amendment, or as revised, to the full House. If the full committee votes to report a bill to the House, a committee report is written by the committee's staff. An approved bill is "reported back" to the House.

13. The scheduling for consideration of legislation on the House floor is determined, as a general rule, by the Speaker of the House of Representatives and the majority political party leader, who may place the bill on the calendar for House debate. The House Rules Committee generally recommends the amount of time that will be allocated for debate and whether amendments may be offered. During the debate process, the bill is read in detail and members of Congress may offer further amendments. After voting on amendments, the House immediately votes on the bill itself with any adopted amendments. The bill can also be returned to the committee that reported it. If passed, the bill must be referred to the Senate, which may or may not have concurrent pending legislation.

14. While the Senate has similar procedures for consideration of legislation by relevant committees, there are significant differences in the way the Senate considers proposed legislation. The Senate functions in a less rule-driven manner than the House. The Senate does not have a Rules Committee, and scheduling and floor consideration are generally decided by consensus. Unlike the House, where debate is strictly controlled, debate is rarely restricted in the Senate.

15. The United States' legislative process also requires time for a conference committee to be organized to reconcile differences between the House and Senate versions of a bill, given the fact that most bills are not passed by the Senate exactly as referred by the House. Conference committee members are appointed by each chamber and given specific instructions, which may be revised every 21 days. If the conference committee cannot reach agreement, the bill expires. If the conference committee reaches agreement on a single bill, a conference report is prepared describing the committee members' rationale for changes. The conference report must be approved by both chambers, in identical form, or the revised legislation expires.

16. After the bill proposed by the conference committee is approved by both chambers, it is sent to the President for approval. Only after Presidential approval does a proposed piece of legislation become law.

17. Besides the complexity and length of its legislative process, the United States also emphasizes that there are "additional special circumstances" involved in this case that need to be considered in determining the "reasonable period of time" under Article 21.3(c). Elections took place in November 2000, and, as a result of these elections, the United States now has a new President, a new Administration, and a new Congress. Any legislation proposed by the Executive branch will have to be approved by the new Administration prior to its transmittal to the new Congress. The new Administration took office on 20 January 2001, and the process of appointing top level officials to that new Administration is ongoing. Given the processes involved in these appointments and the need for the new Administration to develop its proposal for the implementing measure in this case, it is

unrealistic to expect that legislation would be transmitted to Congress in this case before March or April 2001 at the earliest. It is also important to note that, although the new Congress was convened on 3 January 2001, members of Congress are only now beginning to conduct official business. In fact, the membership of Congressional committees was only recently finalised, and some of the relevant committees are not yet officially organized.

18. The United States also highlights a number of other factors that add complexity and uncertainty to its legislative process, such as: the large volume of legislation introduced at the beginning of every Congress; the many opportunities for individual members of Congress to delay the progress of bills; the fact that Congress often acts on comprehensive bills or legislative "packages", rather than on separate pieces of legislation; the fact that only a tiny proportion of bills introduced become law in the same session; and the fact that even bills that do become law are usually not acted upon until the last weeks or months of the legislative session.

19. The United States concludes from the above complexities of its legislative process that it is unrealistic to expect that implementing legislation in this case could be enacted earlier than the end of the first session of the 107th Congress, which is likely to adjourn in December 2001. For these reasons, the United States requests that it be given 15 months from the date of adoption of the Panel Reports on 26 September 2000 for implementation, that is, a period which would correspond to the end of the first session of the 107th Congress. According to the United States, this would be consistent with the provisions of Article 21.3(c) of the DSU, as well as with previous arbitration awards under this Article that involved implementation through legislative means. In this context, the United States also points out that the "positive resolution" of disputes is a basic objective of the dispute settlement mechanism of the WTO and that the grant of a lesser period of time would not "facilitate a positive resolution of this dispute".⁷

B. *European Communities*

20. The European Communities submits that the "reasonable period of time" for implementation by the United States of the recommendations and rulings of the DSB should not exceed 6 months and 10 days from 26 September 2000, the date of adoption of the Panel and Appellate Body Reports. The European Communities emphasizes that the United States bears the burden of proving that immediate compliance is impracticable, and of establishing the particular circumstances that need to be taken into account for the calculation of the "reasonable period of time" for implementation.

⁷United States' submission, para. 10.

21. The European Communities observes that, in order to assess the length of the "reasonable period of time", it is necessary for the Arbitrator to know the nature of the action required to implement the recommendations and rulings of the DSB in the domestic legal system of the WTO Member found to have acted inconsistently with its obligations under the covered agreements. Pointing to the fact that the findings of the Panel concerned Title VIII of the United States Revenue Act of 1916 (the "1916 Act")⁸ in its entirety, rather than specific provisions thereof, and to the stipulation in Article 3.7 of the DSU that the first objective of the dispute settlement mechanism is normally to secure the *withdrawal* of a measure found to be inconsistent with provisions of the covered agreements, the European Communities believes that, for the case at hand, the United States has to repeal the 1916 Act *in toto*. The European Communities understands that this can only be achieved through another legislative act, but adds that no replacement legislation is required since the United States already has "ordinary" anti-dumping legislation and, if the United States wants to adopt additional legislation, for example in the field of anti-trust, it can do so independently of the action it must take to comply with its WTO obligations in this case.

22. The European Communities submits that the only fixed time frames that apply in the legislative process of the United States are the rules according to which a draft bill may not be considered in the House of Representatives until the third calendar day after the committee report has been made available to the members, and a corresponding two-day rule in the Senate. Noting that even these rules may be waived, the European Communities concludes that, in the United States' legislative system, there are no fixed time frames for initiating and completing each stage of the legislative process, and no rule limiting the speed with which legislative action can be undertaken. For the European Communities, the absence of any established or mandatory time frames indicates that legislation can be passed expeditiously, if the will exists.

23. The European Communities refers to two recent examples demonstrating that legislative change can be accomplished expeditiously in the United States. First, the United States modified its anti-dumping legislation with the Continued Dumping and Subsidy Offset Act of 2000 (the "Byrd Amendment")⁹, which was introduced in Congress on 3 October 2000 and became law on 28 October 2000, that is, 25 calendar days later. Second, following the recommendations and rulings of the DSB in *United States – Tax Treatment of "Foreign Sales Corporations"* ("*United States –*

⁸Act of 8 September 1916, 39 Stat. 756 (1916); 15 U.S.C. § 72.

⁹The Byrd Amendment added a new Section 754 to the Tariff Act of 1930, and is contained in the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001, P.L. 106-387, 28 October 2000.

FSC)¹⁰, the United States adopted the FSC Repeal and Extraterritorial Income Exclusion Act of 2000¹¹ in less than 8 months after adoption of the panel and Appellate Body reports in that case. The European Communities also underlines the fact that, despite the complexity involved in the implementation, the period set in the panel report for implementation of the recommendations in the *United States – FSC* case was even shorter – 6 months and 10 days from adoption of the reports.¹²

24. The European Communities submits that implementation of the rulings and recommendations of the DSB in the present case should take no longer than the time taken to enact the legislation in the *United States – FSC* case, because the procedures to be followed are no more cumbersome, the implementing legislation needed – a simple repeal of the 1916 Act – is far less complex, and the 1916 Act has no links to other legislation. The European Communities adds that there are no other circumstances in this case that warrant a longer period of implementation. Specifically, the fact that there are ongoing civil proceedings under the 1916 Act is not a relevant circumstance to be taken into account to lengthen the "reasonable period of time" needed for implementation.

C. *Japan*

25. Japan argues that a period of six months from the date of adoption of the Panel Reports in this case is the "reasonable period of time" for implementation by the United States of the recommendations and rulings of the DSB. The DSU requires "prompt compliance" with DSB recommendations and rulings and, in Japan's view, the "particular circumstances" of this case demonstrate that the United States can and should achieve implementation in this case within a six month period. Japan highlights the fact that, in the Japan Panel Report, the Panel took the unusual step of suggesting, "that one way for the United States to bring the 1916 Act into conformity with its WTO obligations would be to *repeal* the 1916 Act".¹³ (emphasis added) According to Japan, this "unusual step" by a panel suggests a "concrete way" for implementation that should not be taken lightly, and the United States should not be allowed more time as this would involve "derogating from the suggestion of the Panel".¹⁴

26. For Japan, the references to "prompt settlement of disputes" in Article 3.3 of the DSU, and to "prompt compliance" in Article 21.1 of the DSU, make it clear that Members must implement DSB

¹⁰Panel Report, WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, WT/DS108/AB/R.

¹¹P.L. 106-519, 15 November 2000.

¹²Panel Report, *United States - FSC*, *supra*, footnote 10, para. 8.8.

¹³Japan Panel Report, para. 6.292.

¹⁴Japan's submission, para. 8.

rulings and recommendations as soon as they possibly can. Furthermore, the implementing Member bears the burden of proving that "prompt" or "immediate" compliance is "impracticable", and this burden increases with the length of the period proposed by the defaulting Member for implementation.¹⁵ In Japan's view, the United States has not satisfied its burden of proof with respect to the time proposed by it for implementation in this case.

27. Japan contends that only *legal requirements* that govern actual implementation within a Member's domestic legal system are relevant "particular circumstances" for the determination of a "reasonable period of time". In the present case, the circumstances almost uniformly point to the adequacy of a short implementation period. First, the nature of the legislative change required in this case is simple – a single sentence repealing the 1916 Act. Second, the legislative and executive steps which the United States must take to implement are not subject to mandatory time limits. Japan, therefore, argues that the length of the implementation period in this case depends only on the degree of good faith exercised by the United States.

28. Japan highlights, in this regard, the rapidity with which the United States passed the legislation for implementation of the DSB's recommendations and rulings in the *United States – FSC* case, where the entire legislative process took only three months, two weeks and six days from the date the bill was introduced in the United States House of Representatives until the date it was signed into law by the United States President. Japan explains that implementation could be even faster in the present case since the legislative change required – repeal of the 1916 Act – is far simpler than in the *United States – FSC* case. The United States could, in this case, introduce identical bills, simultaneously in both the House and the Senate, and, unlike in the *United States – FSC* case, the legislation at issue is unlikely to be the subject of a substantial domestic debate. Japan adds that the United States has demonstrated that it can legislate very quickly in trade-related matters when it passed the Byrd Amendment in less than two months.¹⁶

¹⁵Award of the Arbitrator under Article 21.3(c) of the DSU, *Canada – Patent Protection of Pharmaceutical Products* ("Canada – Pharmaceutical Patents"), WT/DS114/13, 18 August 2000, para. 47.

¹⁶Japan's submission, para. 25, referring to the Byrd Amendment, *supra*, footnote 9.

III. "Reasonable Period Of Time"

29. Pursuant to Article 21.3(c) of the DSU and the agreement of the parties, my task as Arbitrator in this case is:

... to determine the reasonable period of time for the United States of America to implement the recommendations and rulings of the Dispute Settlement Body (the "DSB") in the matter *United States - Anti-Dumping Act of 1916 - Request by Japan and the European Communities* (WT/DS136 and WT/DS162).¹⁷

The Panel and Appellate Body Reports relating to this matter were adopted by the DSB on 26 September 2000.

30. Article 21.3(c) of the DSU stipulates, in relevant part, 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.

31. Relevant context for the interpretation of Article 21.3(c) includes: the introductory language of Article 21.3, which recognizes that the question of a "reasonable period of time" for implementation only comes into play if "it is impracticable to comply immediately"; Article 21.1, which stresses that "[p]rompt compliance ... is essential in order to ensure effective resolution of disputes to the benefit of all Members"; and Article 3.3 of the DSU, which also recognizes that the "prompt settlement of situations ... is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

32. As previous arbitrators have held, it is clear that Article 21.3(c), read in the light of its context and in harmony with other provisions of the DSU, establishes that the "reasonable period of time" should be the shortest period possible within the legal system of the Member to implement the

¹⁷WT/DS136/10 and WT/DS162/13, 19 December 2000.

relevant recommendations and rulings of the DSB.¹⁸ Within the confines of this basic principle, as stated by the Arbitrator in *Canada – Pharmaceutical Patents*:

... it is ... for the implementing Member to bear the burden of proof in showing – "[i]f it is impracticable to comply immediately" – that the duration of any proposed period of implementation, including its supposed component steps, constitutes a "reasonable period of time".¹⁹

33. The parties do not dispute that "immediate" implementation is "impracticable" in this case. I, therefore, consider that the United States bears the burden of proof in showing that the period of 15 months proposed by it is the "shortest period possible" within its legislative system to implement the recommendations and rulings of the DSB in this particular case. I wish to emphasize that my task as an Arbitrator is to determine the "reasonable period of time" in light of the facts and circumstances of *this particular case*.

34. Turning to the question of what would constitute the "reasonable period of time" for implementation in this case, I need to look first at the type of measure proposed to be used for implementation. On this point, I note that the parties are agreed that implementation of the recommendations and rulings of the DSB in this case requires the enactment of legislation by the United States.²⁰

35. There is, however, some disagreement between the parties as to the scope and content of the legislation required in this case. The European Communities and Japan contend that implementation requires, and must consist of, a "simple repeal" of the 1916 Act. In this regard, at the oral hearing, both the European Communities and Japan urged me to attach significance to the following facts: in the Japan Panel Report, the Panel suggested that "one way for the United States to bring the 1916 Act into conformity with its WTO obligations would be to repeal the 1916 Act"²¹; and the United States had not appealed against this suggestion of the Panel. The United States responds that the precise means of implementation, that is the precise scope and content of the proposed legislation, is not a

¹⁸See, for example: Award of the Arbitrator under Article 21.3(c) of the DSU, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15, WT/DS48/13, 29 May 1998, para. 26; Award of the Arbitrator under Article 21.3(c) of the DSU, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, para. 22; Award of the Arbitrator under Article 21.3(c) of the DSU, *Canada – Pharmaceutical Patents*, *supra*, footnote 15, para. 47.

¹⁹Award of the Arbitrator under Article 21.3(c) of the DSU, *Canada – Pharmaceutical Patents*, *supra*, footnote 15, para. 47.

²⁰United States' submission, para. 4; European Communities' submission, para. 3; Japan's submission, para. 20.

²¹Japan Panel Report, para. 6.292.

matter within the mandate of an Arbitrator under Article 21.3(c) of the DSU.²² At the oral hearing, the United States argued that the Panel, in the Japan Panel Report, suggested repeal as only "one way" of implementation, without excluding that there may be other, equally valid, ways of bringing United States' legislation into conformity with its obligations under the covered agreements; and that, because this "suggestion" had no legal significance, it could not, in any event, have been appealed.

36. At the oral hearing, I enquired whether, although it is not within the mandate of an arbitrator to determine or suggest the precise means of implementation, it is necessary for the arbitrator to know the scope and complexity of the implementing measure, as distinguished from the complexity of the Member's legislative process, in order to assess the "reasonable period of time" required to put in place the proposed implementing measure. Specifically, I enquired whether it is sufficient for the Arbitrator to know that the implementing measure will be a piece of legislation, without knowing the broad scope, content or complexity of that piece of legislation. In response, the United States stated that a legislative proposal is yet to be developed by the new United States Administration and that, therefore, it is not possible for it at this stage to indicate which option will be followed, namely, repeal or any other valid option. The United States explained, however, that regardless of the complexity of the legislation required to implement the rulings and recommendations of the DSB, this would be taken care of through the normal legislative process, and the United States does not argue for or seek any additional time on the basis of the scope, content or complexity of the implementing legislation in this case. In view of the explicit acknowledgement of the United States that it is not relying on the complexity of the implementing legislation as a particular circumstance to justify or lengthen the period of time needed for implementation in this case, it is not necessary for me to examine this issue.

37. The United States makes two principal arguments in support of its proposed 15 month implementation period. First, the United States argues that "the enactment of legislation in the U.S. Congress involves a complex and lengthy process which the Executive Branch does not control"²³, and cites four important characteristics of this legislative process, namely: (i) the volume of legislation introduced in the United States Congress; (ii) the minute percentage of bills introduced that are ultimately enacted; (iii) the fact that the bulk of the bills that become law are enacted towards the end of the relevant Congressional session; and (iv) and the overall complexity of the process.

²²United States' oral statement, para. 13.

²³United States' submission, para. 10.

Second, the United States stresses the "additional special circumstances" involved in this case, namely, that, due to the recent election in the United States, a transition period of several months is needed before legislation proposed by the Executive branch can be approved by a new Administration, and before the new Congress will be sufficiently organized to consult with the Administration, and be able to begin "serious consideration of legislation".²⁴ I will address each of these arguments in turn.

38. In my view, factors such as the volume of legislation brought before the United States Congress, and the high percentage of bills that never become law, are not relevant to my determination of the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this case. Information of this nature may be of general interest in examining how a legislative system operates in practice, not only in the United States, but in many other countries as well. What is relevant for my determination in this case is the treaty obligations explicitly undertaken by Members pursuant to the covered agreements. Each WTO Member is *required*, under Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*, to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." More specifically, Article 21 of the DSU requires that Members comply "promptly" with the rulings and recommendations of the DSB in the event of a dispute with respect to their obligations under the covered agreements. In view of these fundamental obligations assumed by the Members of the WTO, factors such as the volume of legislation proposed, and the high percentage of bills that never become law, cannot be considered to extend the period of time needed for implementation. As for the argument that legislation passed by the United States Congress is usually passed at the end of the legislative session, this again may be the usual practice in the United States Congress, but it is not the outcome of a legal requirement. Where an international treaty obligation is required to be complied with in the shortest period of time possible, as in this case, this cannot be a relevant consideration for extending the period of implementation.

39. Turning to the complexity of the United States' legislative process, I note that the United States has explained, in sufficient detail, the multiple and time-consuming steps involved in the enactment of legislation within the specific context of the legislative system of the United States. It is generally accepted that certain of these steps are not required by law, and that the majority of these steps are not subject to compulsory minimum time limits. In other words, the United States' legislative process, while complex, is characterized by a considerable degree of flexibility. That this flexibility is exercised to achieve the prompt passage of legislation when this is considered necessary and appropriate is revealed by the fact that bills have been passed by the United States Congress

²⁴United States' submission, para. 32.

within short periods of time, using its "normal" legislative process. The United States has stated that it "will make every effort to promptly implement the DSB's recommendations and rulings" in this case.²⁵ Since this is a case where the United States has to enact a piece of legislation to bring it into compliance with its international treaty obligations under the covered agreements, the United States Congress may reasonably be expected to use all the flexibility available within its normal legislative procedures to enact the required legislation as speedily as possible.

40. The United States also urges me to take account of the "additional special circumstances" involved in this case, that is, the need for a period of transition to a new President, a new Administration, and a new Congress, and the accompanying shifts in the balance of power between the two principal political parties in the United States. Even allowing for these unusual circumstances, I note that what is significant for the case at hand is that the first session of the 107th United States Congress has been in progress since 3 January 2001. It is, therefore, possible for the United States to introduce a legislative proposal and have it passed by the Congress as speedily as possible, using, as I have stated earlier, all the flexibility available within its normal legislative procedures.

41. In light of the fact that all the parties in this case have, by a joint letter dated 19 December 2000, agreed to this binding arbitration, I do not consider it necessary to deal with the arguments that the United States could have enacted the required legislation by the close of the second session of the 106th Congress in December 2000. With respect to the action taken by the United States since 26 September 2000, to implement the recommendations and rulings of the DSB, I note, without comment, the statement of the United States at the oral hearing that it has been engaged in consultations and in the task of developing a suitable proposal for implementation, but that this work could not be carried over until the new Administration and new Congress were in place and available for consultations.

42. Lastly, I note that the United States cites, in support of its proposed 15 month period for implementation, a number of examples of relatively straightforward trade legislation that took several years to become law, for example the extension of Permanent Normal Trade Relations to Albania and Kyrgyzstan.²⁶ On the other hand, the European Communities and Japan have placed great reliance on the short periods of time in which the United States Congress enacted the Byrd Amendment²⁷ and the FSC Repeal and Extraterritorial Income Exclusion Act.²⁸ They draw my attention to the period of 6

²⁵United States' submission, para. 3.

²⁶*Ibid.*, para. 22, referring to the Trade and Development Act of 2000, P.L. 106-200, May 18, 2000.

²⁷*Supra*, footnote 9.

²⁸*Supra*, footnote 11.

months and 10 days that the panel allowed the United States to implement the rulings and recommendations of the DSB in the *United States – FSC* case.²⁹

43. Taken together, these examples simply illustrate that, in some cases Congress acts extremely rapidly, and, in others, rather slowly. As each case is influenced by its own facts and circumstances, the examples are not, to my mind, determinative one way or another, for my Award in this case. I find it, however, difficult to accept the argument of the European Communities and Japan that the period of 6 months and 10 days given to the United States to implement the rulings and recommendations of the DSB in the *United States – FSC* case should be the outer limit for the "reasonable period of time" at issue here. The *United States – FSC* case involved prohibited export subsidies which, under Article 4.7 of the *Agreement on Subsidies and Countervailing Measures*, must be withdrawn "without delay". The recommendation of the Panel in that case was, thus, based on a different legal standard. Nevertheless, I note that to comply with its treaty obligations under the covered agreements, the United States enacted the FSC Replacement Act in a period of less than eight months – within the ambit of its normal legislative process – showing the flexibility that is available in that process.³⁰

44. Having considered the particular and special circumstances relevant to this Arbitration, I am not persuaded that a period of 6 months, as suggested by Japan, or a period of 6 months and 10 days, as suggested by the European Communities, would constitute a "reasonable period of time" for implementation in this case. Given that the current session of the United States Congress began on 3 January 2001, neither such period would leave a reasonable time for the consideration and passage of the required legislation. In my view, the United States is reasonably entitled to a period of a few months beyond the time of introduction of such a bill to enable it to enact the required legislation within its normal legislative process. At the same time, I do not accept the argument of the United States that such a reasonable period must necessarily extend to the end of the current session of the United States Congress.

IV. The Award

45. For the reasons set out above, I determine that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this case is *10 months*

²⁹Panel Report, *United States – FSC*, *supra*, footnote 10, para. 8.8.

³⁰In *United States – FSC*, the DSB approved, at the request of the United States, a one month extension to the time-period recommended by the panel for compliance in that case. See WT/DS108/11, 2 October 2000 and WT/DSB/M/90, 31 October 2000, paras. 1-7.

from the date of adoption of the Panel and Appellate Body Reports by the DSB on 26 September 2000.
The "reasonable period of time" will thus expire on *26 July 2001*.

Signed in the original at Geneva this 15th day of February 2001 by:

A.V. Ganesan