WORLD TRADE ORGANIZATION

WT/DS217/14
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13 June 2003

(03-3072)

UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

ARB-2003-1/16

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

Award of the Arbitrator
Yasuhei Taniguchi

TABLE OF ARBITRATIONS CITED IN THIS AWARD

Short Title	Full Title and Citation of Arbitration
Argentina – Hides and Leather	Award of the Arbitrator, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU*, WT/DS155/10, 31 August 2001.
Australia – Salmon	Award of the Arbitrator, *Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU*, WT/DS18/9, 23 February 1999, DSR 1999:I, 267.
Canada – Patent Term	Award of the Arbitrator, *Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU*, WT/DS170/10, 28 February 2001.
Canada – Pharmaceutical Patents	Award of the Arbitrator, *Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS114/13, 18 August 2000.
Chile – Price Band System	Award of the Arbitrator, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS207/13, 17 March 2003.
EC – Bananas III	Award of the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3(c) of the DSU*, WT/DS27/15, 7 January 1998, DSR 1998:I, 3.
EC – Hormones	Award of the Arbitrator, *EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU*, WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833.
Japan – Alcoholic Beverages II	Award of the Arbitrator, *Japan – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 February 1997, DSR 1997:I, 3.
Korea – Alcoholic Beverages	Award of the Arbitrator, *Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937.
US – 1916 Act	Award of the Arbitrator, *United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU*, WT/DS136/11, WT/DS162/14, 28 February 2001.
US – Hot-Rolled Steel	Award of the Arbitrator, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Arbitration under Article 21.3(c) of the DSU*, WT/DS184/13, 19 February 2002.
US – Section 110(5) Copyright Act	Award of the Arbitrator, *United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU*, WT/DS160/12, 15 January 2001.

WORLD TRADE ORGANIZATION
AWARD OF THE ARBITRATOR

United States – Continued Dumping and Subsidy Offset Act of 2000

Parties:

Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico, Thailand and the United States

ARB-2003-1/16

Arbitrator:

Yasuhei Taniguchi

I. Introduction

1. On 27 January 2003, the Dispute Settlement Body ("DSB") adopted the Appellate Body Report [1] and the Panel Report [2], as modified by the Appellate Body Report, in *United States – Continued Dumping and Subsidy Offset Act of 2000* ("*US – Offset Act (Byrd Amendment)*").[3] At the DSB meeting of 27 January 2003, the United States stated that it intended to implement the recommendations and rulings of the DSB in a manner that respected the United States' WTO obligations.[4] The United States confirmed those intentions at the DSB meeting of 19 February 2003.[5] At the DSB meeting of 26 February 2003, the United States stated that it would require a "reasonable period of time", pursuant to the terms of Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), to implement the recommendations and rulings of the DSB in this dispute.[6]

2. On 14 March 2003, Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico, and Thailand (the "Complaining Parties") informed the DSB that consultations with the United States had not resulted in agreement on the reasonable period of time for implementation of the recommendations and rulings of the DSB. The Complaining Parties

[1]Appellate Body Report, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003.

[2]Panel Report, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by the Appellate Body Report, WT/DS217/AB/R, WT/DS234/AB/R.

[3]WT/DS217/11, WT/DS234/19, 3 February 2003.

[4]WT/DSB/M/142, 6 March 2003, para. 60.

[5]WT/DSB/M/143, 20 March 2003, para. 44.

[6]WT/DSB/M/144, 21 March 2003, para. 11.

therefore requested that such period be determined by binding arbitration, in accordance with Article 21.3(c) of the DSU.[7]

3. The United States and the Complaining Parties were unable to agree on the appointment of an arbitrator within a period of ten days following referral of the matter to arbitration. Therefore, the Complaining Parties, on 24 March 2003, requested that the arbitrator be appointed by the Director-General, pursuant to footnote 12 to Article 21.3(c). Following consultations with the United States and the Complaining Parties, the Director-General appointed me as arbitrator on 2 April 2003. The parties to the arbitration were informed of my acceptance of the appointment on 3 April 2003.

4. The United States and the Complaining Parties subsequently agreed to extend the deadline for completion of the arbitration. In their letters dated 16 April 2003, both the United States and the Complaining Parties, respectively, confirmed that, notwithstanding the 90-day time period stipulated in Article 21.3(c) of the DSU for the conduct of the arbitration to determine the reasonable period of time, the arbitration award to be issued no later than 13 June 2003 shall be deemed to be an award issued under Article 21.3(c) of the DSU.[8]

5. Written submissions were received from the United States and the Complaining Parties on 23 April 2003.[9] Further to my request, dated 30 April 2003, the United States provided, on 2 May 2003, additional written information to me and served a copy of the information on the Complaining Parties. The oral hearing was held on 6 and 7 May 2003.

II. Arguments of the Parties

A. *United States*

6. The United States requests that I determine the reasonable period of time for implementation of the recommendations and rulings of the DSB to be 15 months from the date of adoption by the DSB of the Panel and the Appellate Body Reports in this dispute, such that the period would expire on 27 April 2004.

[7]WT/DS217/12, WT/DS234/20, 19 March 2003.

[8]The United States, in its letter, stated furthermore that this confirmation was "without prejudice to the U.S. position on what rights each complaining party has in its dispute, given the fact that only Canada requested adoption of the Panel and Appellate Body reports".

[9]The Complaining Parties filed a single joint submission.

7. The United States asserts that the requested period of 15 months is consistent with previous arbitration awards under Article 21.3(c) of the DSU involving implementation by means of legislative measures. Specifically, the United States refers to the arbitration awards in *Japan – Alcoholic Beverages II*, *EC – Bananas III*, and *EC – Hormones*, in which the reasonable period of time for implementation was determined to be, respectively, 15 months, 15 months and 1 week, and 15 months from the date of adoption by the DSB of the panel and the Appellate Body reports.

8. The United States considers that the "particular circumstances" relevant to the arbitrator's determination of the reasonable period of time, pursuant to Article 21.3(c), are: the legal form of implementation (legislative versus administrative measures); the technical complexity of the implementing measures; and, finally, the period of time in which the implementing Member can achieve the proposed legal form of implementation in accordance with its system of government.

9. First, with respect to the legal form of implementation, the United States claims that implementation of the recommendations and rulings of the DSB in this dispute will require legislative, as opposed to administrative, action, because the Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA") is "mandatory legislation".[10]

10. Second, with respect to the technical complexity of the implementing measure, the United States notes that, shortly after the adoption of the Panel and Appellate Body Reports, the United States Executive branch proposed to the United States Congress that the CDSOA be repealed. Nevertheless, the United States submits that a "simple repeal of the measure" is not the only option for the United States to implement the recommendations and rulings of the DSB in this dispute.[11] The United States is of the view that the Appellate Body "expressly disavowed the notion that *any* expenditure of collected antidumping or countervailing duties would constitute a WTO violation".[12] Accordingly, the United States submits that, although a repeal of the CDSOA is one way for the United States to bring itself into compliance with the recommendations and rulings of the DSB[13], another possible option is to revise the CDSOA such that distributions of collected anti-dumping and countervailing duties are made in a WTO-consistent manner.

11. The United States explains that consultations between the Executive branch and the United States Congress revealed that Congress intends to examine the repeal of the CDSOA as well as "all options" for implementing the recommendations and rulings of the DSB, including other methods of

[10]United States' submission, para. 7.

[11]*Ibid.*, para. 8.

[12]*Ibid.* (original emphasis)

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

distribution of collected anti-dumping and countervailing duties to groups of recipients.[14] According to the United States, implementation of any of these options would require legislative action.

12. Third, with respect to its legislative process, the United States points out that the enactment of legislation in the United States Congress is a "complex and lengthy process", over which the Executive branch of the United States Government has "no control".[15] The first step in the legislative process is for a bill to be introduced in the House of Representatives (the "House") or the Senate. This may be done by a member of Congress or by the Executive branch. In the latter case, the Executive branch will act through the Speaker of the House or the President of the Senate, after which draft legislation will be introduced, in either the original or a revised version, by the chairman or a ranking member of the relevant committee. Alternatively, the Executive branch may request that an individual member or members of Congress introduce proposed legislation.

13. 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, a bill may be referred to a number of committees simultaneously; in contrast, in the Senate, a bill is more commonly referred first to the committee with primary subject matter jurisdiction, after which it may be sequentially referred to other committees. The relevant committee will then typically refer the bill to a subcommittee for consideration.

14. In the House, 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. No specified time frame for committee consideration exists. Upon completion of the hearings, the subcommittee will usually meet to make changes and amendments to the bill ("mark-up" the bill) prior to deciding whether to recommend the bill to the full committee. The subcommittee may subsequently either vote to recommend the bill to the full committee or, alternatively, suggest that a bill be postponed indefinitely.

15. 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 to the full House, either as originally introduced or as revised. 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.

[14]United States' submission, para. 14.

[15]*Ibid.*, para. 20.

16. The subsequent step is the consideration of the bill on the House floor. The scheduling of this step is determined, as a general rule, by the Speaker of the House and the leader of the political party with the majority of seats in the House. The House Rules Committee generally recommends the amount of time that will be allocated for debate and whether amendments may be proposed. During the debate process, the bill is read in detail, and members of the House may propose 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 for further consideration.

17. If passed, the bill must be referred to the Senate.[16] The United States explains that, although 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, in that the Senate does not have a Rules Committee and scheduling as well as floor consideration are generally decided by consensus. In addition, unlike in the House, where debate is strictly controlled, debate is rarely restricted in the Senate.

18. As most bills are not passed by the Senate exactly as referred by the House, a possible next step in the United States' legislative process is a so-called conference committee, in which differences between the House and the Senate versions of the bill are to be reconciled. Members of the conference committee 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 "dies".[17] If the conference committee reaches agreement on a single bill, a conference report is prepared describing the committee members' rationale for changes; this conference report must be approved by both chambers, in identical form, or, again, the revised legislation expires.

19. After the bill proposed by the conference committee is approved by both chambers, it is sent to the President for approval, which is the last step in the legislative process. Only after Presidential approval does a proposed piece of legislation become law.

20. According to the United States, except for Presidential approval, none of the steps in the legislative process is required by law, but they are required in practice. Furthermore, there are no prescribed time-lines for any of the steps described.[18] The United States also submits that, as the United States Congress is independent of the Executive branch and operates under its own procedures

[16]Under the United States' legislative system, it is possible to introduce proposed legislation on the same matter in both the House of Representatives and the Senate.

[17]United States' submission, para. 29.

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

and timetables, it is not feasible or even meaningful for the United States to estimate the time periods to be taken for each of these steps.[19] The United States adds that, in any event, its request for 15 months as the reasonable period of time for implementation in the present case is not based on estimates as to the time that may be required under each component step of the legislative process, but rather on an overall assessment of the time required based on previous experience with the legislative process, the complexity of the measure, as well as the number of steps which will be taken.[20]

21. The United States explains that another central factor in the legislative process is the Congressional schedule. A Congress lasts two years and meets in two sessions of one year each, each session beginning in January. The date of adjournment will vary; in an election year, Congress may adjourn in October; in a non-election year, it will typically adjourn in November or December. Furthermore, according to the United States, Congress is often only present and in session three days per week for three weeks per month, and goes into recess for the month of August. As for the Congressional recess, the United States has also identified a shorter recess period in late April 2004.

22. According to the United States, the earliest date a bill can be introduced is the month of January. If a bill is introduced in the first session of Congress but is not passed by the end of that session, it will be carried over to the second session, such that the process does not have to start again from the beginning; however, legislation not passed by the end of the second session of a Congress "dies".[21]

23. The United States points out that the 108th Congress is currently in its first session, which will allow it to "save" work done during the year 2003 and complete it in 2004.[22] Taking into account the "complexity of the legislative task in question"[23], the fact that Congressional committees will be considering the issue at hand for the first time, the need for sufficient time to design implementing legislation, as well as the fact that other matters will be under consideration during the remainder of the current Congressional session, the United States is of the view that legislation implementing the recommendations and rulings of the DSB in the present dispute will need to be carried over into the second session of the current Congress, that is, into 2004. Moreover, the United States is of the view that, even if the end of a Congressional session "spurs legislative activity", the "opportunity to pass legislation may be greater" before a Congressional recess.[24] As a result, the United States believes

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

[20]*Ibid.*

[21]United States' submission, para. 32.

[22]*Ibid.*, para. 34.

[23]*Ibid.*, para. 35.

[24]*Ibid.*

that the reasonable period of time for implementation should appropriately conclude at the time of the recess referred to as the Spring District Work Period in late April 2004.

24. Turning to the arguments of the Complaining Parties, the United States rejects the Complaining Parties' submission that the arbitration awards in *US – 1916 Act* and *US – Section 110(5) Copyright Act* support their request for six months as a reasonable period of time for implementation. The United States notes that, in these arbitration awards, the reasonable period of time was determined to be 10 and 12 months, respectively.[25]

25. The United States also rejects the argument of the Complaining Parties that the proposed repeal of the CDSOA in the President's Budget proposal to Congress for Fiscal Year 2004 implies that the United States Executive branch believes that the repeal of the CDSOA can reasonably be concluded by the end of the current Fiscal Year, that is, by 30 September 2003. In the United States' view, the inclusion of the repeal of the CDSOA in the proposed Budget says nothing about the timing of the implementing legislation; a repeal of the CDSOA is not linked to, and can occur later than, the adoption of the Budget proposal by 30 September 2003.[26]

26. Finally, the United States also rejects the Complaining Parties' submission that the prejudice caused to foreign exporters to the United States by another disbursement of collected anti-dumping or countervailing duties to United States' producers is a particular circumstance relevant to the determination of the reasonable period of time for implementation. The United States is of the view that any ongoing harm caused by the CDSOA must not impact on the determination of what constitutes the shortest period possible for implementation within the United States' legal system.[27]

B. *Complaining Parties*

27. The Complaining Parties request that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB to be six months from the date of adoption by the DSB of the Panel and the Appellate Body Reports in this dispute, such that the period would expire on 27 July 2003.[28]

28. The Complaining Parties recall that, according to Article 21.1 of the DSU, "[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 Complaining Parties also submit that a

[25]United States' statement at the oral hearing.

[26]*Ibid.*

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

[28]Complaining Parties' submission, para. 50.

Member is entitled to a reasonable period of time for implementation only where immediate withdrawal of the measure is "impracticable". Moreover, the Complaining Parties recall that arbitrators appointed to determine the reasonable period of time under Article 21.3(c) have stated that the reasonable period of time "should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB".[29] Finally, the Complaining Parties recall the statement of the arbitrator in *Canada – Pharmaceutical Patents* that the implementing Member bears the burden of proof in showing that the duration of any proposed period for implementation constitutes a reasonable period of time.[30]

29. The Complaining Parties recall that the Panel suggested that the United States should repeal the CDSOA. They "support the Panel's view" that the "only effective way" to comply with the recommendations and rulings of the DSB is to repeal the CDSOA.[31] In this context, the Complaining Parties also point out that the President of the United States has proposed that the CDSOA be repealed as part of the Budget for Fiscal Year 2004. Ten of the Complaining Parties[32] also state that deliberations in the United States Congress as to alternative uses and methods of distribution of the collected anti-dumping and countervailing duties should not be considered as part of the implementation of the recommendations and rulings of the DSB in this dispute.

30. In the Complaining Parties' view, past arbitrations reveal that the "particular circumstances" that may influence the determination of the reasonable period of time for implementation in any particular case are the following: the legal form of implementation (legislative or administrative action); the complexity of that new legislation or administrative action; whether the procedural steps toward implementation, including their respective duration, are legally binding or discretionary; and, finally, the integration of the WTO-inconsistent measure into the domestic system, that is, the length of time this measure has been in existence and the extent to which it depends on other legislation. The Complaining Parties recall that factors such as domestic "contentiousness" of implementing measures, as well as hardship of an economic and social nature, are not relevant for the determination of the reasonable period of time.

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[29]Complaining Parties' submission, para. 24, referring to Award of the Arbitrator, *EC – Hormones*, para. 26; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 47; and Award of the Arbitrator, *US – 1916 Act*, para. 32.

[30] Complaining Parties' submission, para. 25, referring to Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 47.

[31]Complaining Parties' submission, para. 18.

[32]Statements of Australia; Brazil; Canada; Chile; the European Communities, India, Indonesia, and Thailand jointly; Japan; and Mexico, respectively, at the oral hearing.

31. The Complaining Parties highlight five sets of particular circumstances in the present case which, in their view, make it "reasonably practicable" for the United States to implement the recommendations and rulings of the DSB within six months from the date of adoption of the Panel and Appellate Body Reports.[33]

32. First, the Complaining Parties state that the United States' legislative process is flexible and permits "expeditious implementation".[34] The Complaining Parties point out that there are no constitutionally fixed timeframes for any stage of the legislative process and no rules "limiting the speed at which a legislative action to comply with WTO obligations may be undertaken."[35] This absence of established timeframes, according to the Complaining Parties, indicates that legislation may be passed expeditiously, "if the will exists"[36]; by way of example, the Complaining Parties point out that the CDSOA was enacted in only 25 days. The flexibility of the United States' legislative process was also recognized by arbitrators in *US – 1916 Act* and *US – Section 110(5) Copyright Act*. The Complaining Parties submit that, "us[ing] in good faith all the flexibility available within [the United States] normal legislative procedures", a reasonable period of time of six months is "more than sufficient" to implement the recommendations and rulings of the DSB.[37]

33. Second, the Complaining Parties claim that the repeal of the CDSOA—which they claim is the "only effective way to comply with the DSB rulings and recommendations"—is not a "complicated process", but rather requires merely a "simple statement".[38] The Complaining Parties believe that this circumstance distinguishes the present case from the arbitration in *Chile – Price Band System*, in which the arbitrator noted that the measure in dispute in that case was "longstanding" and "fundamentally integrated into the policies of Chile".[39] In the Complaining Parties' view, the CDSOA, unlike the Chilean measure in *Chile – Price Band System*, is independent of other legislation, was an "add-on" to the existing anti-dumping and countervailing duty system, has no "complicated or complex system built around it" and has existed for a relatively short period of time.[40]

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[33]Complaining Parties' submission, para. 1.

[34]*Ibid.*, para. 3.

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

[36]*Ibid.*, para. 33.

[37]*Ibid.*, para. 36.

[38]*Ibid.*, paras. 18 and 37.

[39]*Ibid.*, para. 38, referring to Award of the Arbitrator, *Chile – Price Band System*, para. 48.

[40]Complaining Parties' submission, para. 39.

34. Third, the Complaining Parties believe that previous arbitral awards under Article 21.3(c) of the DSU concerning the adoption of United States legislation evidence that six months is a reasonable period of time. The Complaining Parties recall that in *US – 1916 Act* and *US – Section 110(5) Copyright Act*, the arbitrator granted the United States 10 and 12 months, respectively; the Complaining Parties explain that, in those cases, the new Congressional session was not to begin for a number of months and that a shorter period "would not have provided sufficient time" for implementation following the beginning of the then current Congressional session in early January.[41] In the Complaining Parties' view, this difficulty does not arise in the present case, since the Panel and Appellate Body Reports in the present dispute were adopted only a few weeks after the opening of the current Congressional session.

35. As a fourth relevant particular circumstance in this case, the Complaining Parties highlight that the President of the United States has proposed that the CDSOA be repealed as part of the Budget for Fiscal Year 2004, beginning on 1 October 2003. This proposal, in the view of the Complaining Parties, implies a recognition on the part of the United States Executive branch that it is possible to repeal the CDSOA within the current Fiscal Year, that is, by 30 September 2003.

36. As a final particular circumstance in this case, the Complaining Parties allege that a reasonable period of time for implementation extending beyond 30 September 2003 would "irreparably harm the rights" of the Complaining Parties because disbursements under the CDSOA for United States' Fiscal Year 2003 will be made no later than sixty days after the end of the Fiscal Year, that is, no later than 60 days after 30 September 2003.[42] Failure by the United States to bring itself into compliance with the recommendations and rulings of the DSB before 30 September 2003 would therefore "result in another illegal distribution of funds and additional irreparable harm".[43] The Complaining Parties point out that disbursements for the year 2001 totalled more than USD 231 million and, for the year 2002, currently total more than USD 329 million.

III. Reasonable Period of Time

37. Pursuant to Article 21.3(c) of the DSU and the agreement of the parties, it is my task as Arbitrator in this case to determine the reasonable period of time for the United States to implement the recommendations and rulings of the DSB in *US – Offset Act (Byrd Amendment)*.

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[41]Complaining Parties' submission, para. 42.

[42]*Ibid.*, para. 47.

[43]*Ibid.*, para. 49.

38. Article 21.3(c) of the DSU provides that when the "reasonable period of time" is to be determined through arbitration:

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

39. The meaning of Article 21.3(c) is elucidated by its context. Article 21.1 sets forth that "prompt compliance" with recommendations and rulings of the DSB is "essential in order to ensure effective resolution of disputes to the benefit of all Members." Furthermore, Article 3.3 of the DSU 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."

40. Article 21.3, furthermore, makes clear that "prompt compliance", in principle, implies "immediate[]" compliance. Thus, a "reasonable period of time" for implementation is not available unconditionally to an implementing Member. Rather, an implementing Member is entitled to a reasonable period of time for implementation only where, pursuant to Article 21.3, "it is impracticable to comply immediately with the recommendations and rulings" of the DSB.

41. The 15-month period set forth in Article 21.3(c) is a "guideline", expressed as a maximum period, and does not represent an average, or usual, period. Rather, as previous arbitrators have recognized, it is ultimately the relevant "particular circumstances" that influence what is a "reasonable period of time" for implementation.[44]

42. The final sentence of Article 21.3(c), moreover, makes clear that the "reasonable period of time" cannot be determined in the abstract, but rather has to be established on the basis of the particular circumstances of each case. I therefore agree, in principle, with the Arbitrator in *US – Hot-Rolled Steel*, who found that the term "reasonable" should be interpreted as including "the notions of flexibility and balance", in a manner which allows for account to be taken of the particular circumstances of each case.[45] At the same time, it is also clear to me that the term "reasonable period of time" must always be read together with the term "prompt compliance" contained in Article 21.1, as well as in the light of the systemic interest of all WTO Members in such "prompt compliance".

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[44]Award of the Arbitrator, *Canada – Patent Term*, para. 36; Award of the Arbitrator, *Chile – Price Band System*, para. 34.

[45]Award of the Arbitrator, *US – Hot Rolled Steel*, para. 25, quoting with approval the Appellate Body in *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 85.

I therefore agree with the view, expressed by previous arbitrators, that the reasonable period of time, to be determined under Article 21.3(c), should be "the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB." [46]

43. I recall that the "shortest period possible within the legal system of the Member" generally refers, in the case of implementation by legislative means, to normal legislative procedures. Therefore, I concur with the view of previous arbitrators that, when implementing recommendations and rulings of the DSB, a Member is not required to have recourse to extraordinary legislative procedures in every case. [47]

44. Moreover, I also agree with statements by previous arbitrators that it is for the implementing Member to establish that the duration of the implementation period it proposes constitutes the "shortest period possible" within its legal system to implement the recommendations and rulings of the DSB.[48] Where the implementing Member fails to establish that the period of time requested by it is indeed the shortest period possible within its legal system, the arbitrator must determine the "shortest period possible" for implementation, which will be shorter than proposed by the implementing Member, on the basis of the evidence presented by all parties in their submissions, and taking into account the 15-month guideline provided by Article 21.3(c).

45. With these principles in mind, I now turn to the case before me and to the question of what constitutes the reasonable period of time for the United States to implement the recommendations and rulings of the DSB in *US – Offset Act (Byrd Amendment)*. I note that the parties appear to agree that "immediate[ ]" compliance by the United States is "impracticable".

46. At the outset, I note that there is agreement among the parties that, in the present case, implementation of the recommendations and rulings of the DSB requires the enactment of legislation by the United States. There is, however, no agreement between the parties as to what constitutes, in the present case, the appropriate *specific* means of implementation.

47. The United States submits that the United States Congress intends to examine "all options" for implementation, that is, a repeal of the CDSOA as well as possible alternative methods for

[46] Award of the Arbitrator, *EC – Hormones*, para. 26; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 47; Award of the Arbitrator, *US – 1916 Act*, para. 32.

[47] Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 42; Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 32.

[48] Award of the Arbitrator, *Canada –Pharmaceutical Patents*, para. 47; Award of the Arbitrator, *US – 1916 Act*, para. 32.

distributing collected anti-dumping and countervailing duties.[49] The Complaining Parties, in contrast, argue that the "only effective way" for the United States to comply with the recommendations and rulings of the DSB is to repeal the CDSOA.[50] At the oral hearing, the Complaining Parties conceded that there may be, in fact, many potentially WTO-consistent ways in which the United States may decide to spend the collected anti-dumping and countervailing duties. However, ten of the Complaining Parties[51] also stated, at the oral hearing, that deliberations in the United States Congress as to alternative methods of distribution of the collected anti-dumping and countervailing duties are distinct from, and should not be considered as part of, the implementation of the recommendations and rulings of the DSB in this dispute.[52]

48. I recall that my mandate, under Article 21.3(c), is confined to the determination of the reasonable period of time for implementation of the recommendations and rulings of the DSB. I am particularly aware that it is *not* part of my mandate to determine or even to suggest the manner in which the United States is to implement the recommendations and rulings of the DSB.[53] As the Arbitrator in *EC – Hormones* stated:

> An implementing Member … has a measure of discretion in choosing the *means* of implementation, as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements.[54] (original emphasis)

49. I recall that both the Panel and the Appellate Body in *US – Offset Act (Byrd Amendment)* recommended "that the Dispute Settlement Body request the United States to bring the CDSOA into

[49]United States' submission, para. 14.

[50]Complaining Parties' submission, para. 18.

[51]Statements at the oral hearing of Australia; Brazil; Canada; Chile; the European Communities, India, Indonesia, and Thailand jointly; Japan; and Mexico.

[52]At the oral hearing, the Complaining Parties argued that the United States Congress could repeal the CDSOA within a short period of time and then continue to debate alternative uses of the collected duties. The Complaining Parties submitted that the recommendations and rulings of the DSB make clear how the United States may *not* spend the collected duties; thus, according to the Complaining Parties, the "answer" to the recommendations and rulings of the DSB is the removal of the offset payments as set forth in the CDSOA. The fact that the same funds as used under the CDSOA may be used for alternative financing purposes does not, in the view of the Complaining Parties, mean that a decision on these alternative financing purposes is a part of the implementation process.

[53]Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 45; Award of the Arbitrator, *Chile – Price Band System*, para. 32.

[54]Award of the Arbitrator, *EC – Hormones*, para. 38; Award of the Arbitrator, *Australia – Salmon*, para. 35; Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 45; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 40.

conformity" with its WTO obligations.[55] In this regard, I agree with the Arbitrator in *Argentina – Hides and Leather*, who stated:

> [T]he non-conforming measure is to be brought into a state of conformity with specified treaty provisions either by *withdrawing* such measure completely, or by *modifying* it by excising or correcting the offending portion of the measure involved.[56] (original emphasis)

50. Thus, in my view, the United States may choose either to *withdraw* or *modify* the CDSOA so as to bring it into conformity with its obligations under the covered agreements. I therefore do not see any basis for the claim of the Complaining Parties that deliberations as to different, WTO-consistent methods for distributing collected anti-dumping or countervailing duties should *not* be considered as part of the implementation process.

51. The Complaining Parties put forward two further arguments in support of their claim that the "only effective way" for the United States to comply with the recommendations and rulings of the DSB is to repeal the CDSOA. First, they point to the fact that the Panel in *US – Offset Act (Byrd Amendment)* made a suggestion, pursuant to Article 19.1 of the DSU, that the United States repeal the CDSOA. Second, they urge me to give consideration to the fact that the United States Executive branch itself, in its Budget proposal for Fiscal Year 2004, has proposed to the United States Congress that the CDSOA be repealed.

52. With respect to the suggestion of the Panel that the United States repeal the CDSOA, I note, first, that the Panel, in making its suggestion, also recognized that "there could potentially be a number of ways in which the United States could bring the CDSOA into conformity".[57] Moreover, although the suggestion by the Panel, as part of a panel report adopted by the DSB, could serve as a useful contribution to the decision-making process in the implementing Member, I do not believe that the existence of such a suggestion ultimately affects the well-established principle that "choosing the means of implementation is, and should be, the prerogative of the implementing Member".[58]

53. With respect to the proposal by the United States Executive branch to the United States Congress, I do not believe that it would be appropriate for an arbitrator acting under Article 21.3(c) to attach any particular weight to any individual proposal. As I and other arbitrators have said, it is

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[55]Panel Report, para. 8.5; Appellate Body Report, para. 319.

[56]Award of the Arbitrator, *Argentina – Hides and Leather*, para. 40.

[57]Panel Report, para. 8.6.

[58]Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 45; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 40; Award of the Arbitrator, *Chile – Price Band System*, para. 32.

not for the arbitrator acting under Article 21.3(c) to impose any particular means for implementing the recommendations and rulings of the DSB. The means of implementation is left to the discretion of the implementing Member, which is bound to implement the recommendations and rulings of the DSB within "the shortest period possible within the legal system of the Member." Thus, my task is not to look at *how* implementation will be carried out, but to determine *when* it is to be done. For this reason, individual proposals under consideration by the implementing Member cannot be determinative in my inquiry.[59]

54. For the above reasons, I do not accept the Complaining Parties' argument that my decision must be based on the fact that the "only effective way" for the United States to comply with the recommendations and rulings of the DSB is to repeal the CDSOA.

55. Having considered the issue of the means of implementation, I now turn to the central issue of this arbitration, namely the determination of the reasonable period of time for the United States to implement the recommendations and rulings of the DSB. The United States proposes that I determine the reasonable period of time to be 15 months from adoption of the Panel and Appellate Body Reports. In contrast, the Complaining Parties request that I determine the reasonable period of time to be six months from the date of adoption of the Panel and Appellate Body Reports. Recalling my view that it is for the implementing Member to establish that the time period it proposes is the shortest period possible within its legal system for implementation[60], I turn first to the arguments put forward by the United States in support of its request for an implementation period of 15 months.

56. The United States submits that the particular circumstances relevant to my determination of the reasonable period of time for implementation in this case are as follows: *first*, the United States highlights the need for implementation by legislative, as opposed to administrative, means. *Second*, the United States points to the technical complexity of the required legislation; specifically, the United States submits that "there would appear to be numerous WTO-consistent ways in which collected duties might be spent" and that choosing among the various existing options will involve the "complex question" of distinguishing between permissible and impermissible expenditures.[61] *Third*, the United States evokes the functioning of its legislative process and submits that the

[59]It is certainly true, as stated by the Arbitrator in *Chile – Price Band System*, that "the more information that is known about the details of the implementing measure, the greater the guidance to an arbitrator in selecting a reasonable period of time." (Award of the Arbitrator, *Chile – Price Band System*, para. 37) In this arbitration, I am unable to take any guidance from the nature of the implementing measure because the United States has not specified what form the implementing measure will take.

[60]See *supra*, para. 44.

[61]United States' submission, para. 9.

requested period of 15 months is reasonable "in light of the U.S. legal system and prior experience"[62]; in this regard, the United States adds that the reasonable period of time should extend beyond the end of the current Congressional session to the April 2004 Congressional recess, because "the opportunity to pass legislation may be greater prior to a Congressional recess".[63]

57. With respect to the need for implementation by legislative means, I concur with the Arbitrator in *Canada – Pharmaceutical Patents* that this is a relevant circumstance for my determination of the reasonable period of time.[64] As a general rule, absent evidence to the contrary, implementation by legislative measures will, more often than not, require a longer period of time than implementation by means of administrative measures. I note that the Complaining Parties do not dispute the need for implementation by legislative means in this dispute.

58. With respect to the technical complexity of the required legislation, the United States invokes, as sources of such complexity, the existence of numerous options to implement the recommendations and rulings of the DSB, as well as the fact that choosing among the various existing options will involve the "complex question" of distinguishing between permissible and impermissible expenditures.[65]

59. I do not consider the existence of numerous options to implement the recommendations and rulings of the DSB, as invoked by the United States, to be relevant to my determination of the "reasonable period of time" for implementation of the recommendations and rulings of the DSB.[66] The weighing and balancing of the respective merits of various legislative alternatives is one of the key functions and aspects of any legislative process. The mere fact that implementation of the recommendations and rulings of the DSB necessitates the choice between several, or even a large number of, alternative options is generally not, in my view, in and of itself, a particular circumstance that would inform my determination of the shortest period possible to implement the recommendations and rulings of the DSB in this case.

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[62]United States' submission, heading II.B.1.

[63]United States' submission, para. 35.

[64]Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 49.

[65]United States' submission, para. 9.

[66]I recall that the Arbitrator in *US – Section 110(5) Copyright Act* stated that, although it is an "important issue" whether a Member decides to "simply repeal" a measure or whether "some other approach will be utilized", he failed to see how this issue would

> … add any *additional time* to the legislative process, as the *content* of the legislation effecting implementation is precisely the issue that Congress will decide through its normal procedures. (original emphasis)

(Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 42)

60. Similarly, the need to distinguish, in the light of Panel and the Appellate Body findings in this dispute, between WTO-consistent and WTO-inconsistent implementation options would appear to be the typical content, and concomitant aspect, of every legislative process aiming at implementing recommendations and rulings of the DSB. I do agree with previous arbitrators that, in principle, the complex nature of implementing measures can be a relevant factor for the determination of the reasonable period of time.[67] Nevertheless, I do not believe that the need to take into account international treaty obligations in the process of drafting implementing legislation, in and of itself, gives rise to the kind of complexity that would warrant additional time for implementation. *Each and every* piece of legislation enacted with a view to implementing recommendations and rulings of the DSB must be designed and drafted in the light of the implementing Member's rights and obligations under the covered agreements. If the need to distinguish between WTO-consistent and WTO-inconsistent implementation options were to qualify, *per se*, as "complexity", and, therefore, were to give rise to "particular circumstances" relevant for the determination of the reasonable period of time, then *every* implementation measure under consideration in proceedings pursuant to Article 21.3(c) would have to be considered complex. In other words, "complexity" would not be a "particular circumstance"; rather, it would be a standard aspect of every implementation.

61. I do not mean to suggest that I am of the view that the dispute between the United States and the eleven Complaining Parties in *US – Offset Act (Byrd Amendment)* does not involve important questions under WTO law. Moreover, I am fully aware of the high level of economic and political interest in this particular dispute, as evidenced by the significant number of WTO Members involved in all stages of this dispute, including in these arbitration proceedings. Nevertheless, "complexity" of implementing legislation as a particular circumstance, within the meaning of Article 21.3(c), is a *legal* criterion, to be examined without regard for political contentiousness or other non-legal factors that may surround a measure at issue. I am precluded, by my mandate under Article 21.3(c), from giving consideration to these non-legal factors.

62. In the light of the above considerations, I therefore do not accept the United States' argument that implementation of the recommendations and rulings of the DSB in this dispute gives rise to complexity that would qualify as a particular circumstance within the meaning of Article 21.3(c).

63. As the third particular circumstance, the United States invokes "the period of time in which the implementing Member can achieve the proposed legal form of implementation in accordance with

[67]Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 50. I also agree with the example for "complexity" given by the Arbitrator in those proceedings, namely where "implementation is accomplished through extensive new regulations affecting many sectors of activity".

its system of government."[68] In doing so, the United States has provided me with a detailed description of its multiple-step legislative process. The United States confirmed that virtually none of these steps is required by law[69], and that the time periods required for the majority of these steps are equally not legally determined.[70] In other words, as recognized by previous arbitrators, the United States' legislative process appears to be characterized by a considerable degree of flexibility.[71]

64. I am aware that the component steps of the United States' legislative process, as pointed out by the United States, are numerous and potentially time-consuming. However, I note that legislative bills have been passed by the United States Congress within short periods of time; for instance, the CDSOA itself appears to have been passed in a period of only 25 days.[72] Moreover, the United States has described itself as a "strong advocate[ ] of prompt compliance".[73] Finally, I also agree with the arbitrators in *US – Section 110(5) Copyright Act* and in *US – 1916 Act*, respectively, who noted that, where the United States is obliged to enact a piece of legislation in order to bring itself into compliance with its obligations under an international treaty, the United States Congress may be expected to take advantage of the flexibility available within the legislative procedures to implement such legislation as speedily as possible.[74]

65. In order to improve my understanding of how the United States had calculated the requested 15 month period for implementation, I requested the United States, prior to the oral hearing, as well as at the oral hearing itself, to specify the time periods required for each of the individual component

[68]United States' submission, para. 6.

[69]The United States explains that the final step of the legislative process, that is, Presidential approval, is mandatory in the sense that the President must either sign an act or, failing that, the act would become law even in absence of his or her signature. (United States' response to questioning at the oral hearing) Moreover, in my view, voting on a bill, in the House and in the Senate, may also be described as a mandatory step in the legislative process.

[70]The United States, however, states that, although none of the steps in the legislative process is required by law, these steps are required in practice. (United States' response to questioning at the oral hearing)

[71]Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 38; Award of the Arbitrator, *US – 1916 Act*, para. 39.

[72]The United States submits that the United States Congress had deliberated various legislative projects similar to the CDSOA for a period of 12 years prior to the enactment of the CDSOA. According to the United States, it is therefore misleading to state that the CDSOA took only 25 days to enact. (United States' response to my written question, dated 30 April 2003)

[73]United States' statement at the oral hearing.

[74]Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 39; Award of the Arbitrator, *US – 1916 Act*, para. 39.

steps under its legislative process.[75] The United States responded to my request on 2 May 2003, explaining how the CDSOA was enacted and providing me with a copy of the schedule for the current Congress; however, in that response, the United States did not provide information on the specific time periods required for each of the component steps under its legislative process. At the oral hearing, the United States, in response to my renewed request, provided oral estimates of the required time periods for certain of the component steps under its legislative process; later, however, the United States explained that these estimates "were based on nothing more than speculation on [its] part", and declined to reduce these estimates to written form because it did not "believe it is appropriate to commit [this] speculation to writing". The United States further explained that, in any event, it was not basing its request for 15 months for the total process upon an accumulation of time estimates for the individual component steps; rather, the United States argued that the basis for its request of 15 months is a general estimate, based on factors such as the legal form and the complexity of implementing legislation, other matters that will be pending before the United States Congress at the same time, the United States' understanding of the legislative process, as well as the estimate that a period extending beyond the end of the current Congressional session will be needed in order to complete all the required work. [76]

66. I recognize that estimating the duration of the various steps involved in a domestic legislative process is not an exact science. It would be unrealistic to expect an implementing Member to provide, as the basis for its request for a reasonable period of time, a definitive day-by-day schedule of the prospective implementing legislative process. Some of the steps in a legislative process, such as pre-legislative consultations, by their very nature, may prove particularly difficult to estimate.[77] At the same time, however, I fail to see how it would be possible to arrive at a reasoned, and non-speculative, estimate of the total duration of a process without referring, at a minimum, to rough estimates of the time periods required for at least the key component steps of this process. Logically, the total time required for any process must be the sum of the time periods required for each of the component steps of this process. If the request for a total time period of 15 months, as argued by the United States, is

[75]The United States has identified, in its submission, the following steps under its legislative process: Transmission of legislative proposal to Congress (where Executive branch intends to initiate legislation); introduction of a bill into the House and/or the Senate by a Member of Congress; referral of bill to committee and committee action; referral of bill to sub-committee and sub-committee action; committee study, hearings, and mark-up; committee vote and report to full House and/or Senate; consideration and vote on legislation by full House and Senate; House/Senate conference committee (where there are differences between the House and Senate versions of the bill); consideration and approval of reconciliation bill; Presidential approval. (United States' submission, paras. 21-29)

[76]United States' response to questioning at the oral hearing. The schedule of the current United States Congress, submitted by the United States in response to my request, indicates 3 October 2003 as the prospective date of adjournment for the current Congressional session.

[77]See also Award of the Arbitrator, *Chile – Price Band System*, para. 45.

based on "logical" and "rigorous"[78] factors, such as the complexity of implementing legislation, or the general experience under the United States' legislative system, then I believe that such factors would necessarily provide the same relevant, and non-speculative, guidance with respect to at least some of the component steps of the legislative process. Put differently, I do not agree that an estimate of the total duration of the legislative process can be qualified as "logical" and "rigorous" if such an estimate is not based, at least to some extent, on an accumulation of the timeframes for the component steps. Moreover, if any possible estimates of the time periods required under the various component steps of the legislative process would be, as the United States stated at the oral hearing, mere "speculation", then it appears difficult to see how the total time period of 15 months, requested by the United States, would equally constitute anything other than "speculation".

67. As an additional relevant factor, the United States submits that the reasonable period of time should extend beyond the end of the current Congressional session to the April 2004 Congressional recess, because "the opportunity to pass legislation may be greater prior to a Congressional recess" than at the end of the Congressional session.[79] The United States believes that this "greater opportunity" to pass legislation is a particular circumstance, within Article 21.3(c), which should inform my determination of the reasonable period of time for implementation.[80]

68. I note that the calendar of the United States Congress is, generally speaking, not laid down in the United States Constitution or in a United States statute. I understand that the only exception in this regard is the requirement, contained in the United States Constitution, that Congress meet "at least once in every year" and that it convene on 3 January, unless another date is chosen.[81] Furthermore, I recall that the Arbitrator in *Canada – Patent Term* stated:

> Fixing the "reasonable period of time" to coincide with a date which is not determined by constitution or by statute, but which can easily be modified, would give the actual calendar of the House of Commons [of Canada] a legal value and significance that it simply does not have.[82]

69. I concur with this statement. The fact that at any given point in the Congressional schedule there would be a "greater opportunity" to pass legislation than at another point in time, is not a particular circumstance relevant for my determination of the reasonable period of time for

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

[79]United States' submission, para. 35.

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

[81]United States' submission, para. 30.

[82]Award of the Arbitrator, *Canada – Patent Term*, para. 66.

implementation in this case. The obligation to implement promptly and, if impracticable to do so immediately, then within a reasonable period of time, the recommendations and rulings of the DSB is an international treaty obligation of the United States; the specific content and meaning of this international legal obligation cannot be affected by non-legal considerations related to the United States Congressional schedule.

70. This is not to say that the schedule of the United States Congress (or any other legislative body of any implementing Member) can never be a relevant particular circumstance; for instance, previous arbitrators have given consideration, in their determination of the reasonable period of time for implementation, to circumstances where a draft bill could not be introduced into Congress for a number of months because a new Congress had not yet convened at the time when the arbitration was initiated.[83] However, these circumstances do not arise in the present proceedings. The United States has *not* argued that it would not be possible to pass the implementing legislation at another point in time, for instance at the end of the Congressional session when the majority of bills are enacted[84], or at any other time during the Congressional session.

71. I recall my view that it is for the United States to establish that the time period it proposes is the shortest period of time within its legal system to implement the recommendations and rulings of the DSB. In light of the above, I am of the view that the United States has failed to establish that 15 months is the shortest time possible within the United States' legal system to implement the recommendations and rulings of the DSB.

72. I turn now to the arguments submitted by the Complaining Parties in support of their request that I determine the reasonable period of time in these proceedings to be six months from adoption of the Panel and Appellate Body Reports. The Complaining Parties emphasize that: the repeal of the CDSOA is "not a complicated matter" and has been suggested in the United States Budget proposal[85]; the United States' legislative process is flexible and allows expeditious implementation; the request for a period of six months is in line with previous arbitration rulings concerning the adoption of legislative acts by the United States; and, finally, the reasonable period of time must expire before the next distribution of collected duties, because such distribution will cause further harm to the Complaining Parties and to the entire WTO system.

[83]Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 45; Award of the Arbitrator, *US – 1916 Act*, para. 44.

[84]United States' submission, para. 32.

[85]Complaining Parties' submission, para. 30.

73. With respect to the Complaining Parties' arguments concerning the repeal of the CDSOA as a means of implementation, I wish to recall my findings that it is for the United States to decide on the means of implementation of the recommendations and rulings of the DSB. [86]

74. As regards the United States' legislative process, I recall my finding that the United States Congress indeed has flexibility to act expeditiously, if it so chooses. [87] It is true that neither the component steps of the United States' legislative process nor their duration are legally required or determined and that, as a result, the United States Congress can be expected to use all available flexibility to expedite the implementation of the recommendations and rulings of the DSB. Nevertheless, it is also important to recall that an implementing Member, in principle, is to use its "normal" legislative procedure and should not be required to utilize "extraordinary legislative procedures" in every case. In the light of this principle, I confirm that I do not, in this case, propose the United States to utilize extraordinary legislative procedures. I also accept the United States' explanation that the legislative steps are generally required as a matter of practice and can be time-consuming, and that the entire legislative process is controlled exclusively by the United States Congress.

75. The Complaining Parties furthermore urge me to consider, as a relevant particular circumstance, that the President of the United States has proposed a repeal of the CDSOA as part of the Budget for 2004. The Complaining Parties argue that this proposal implies a recognition on the part of the United States Executive branch that it is possible to repeal the CDSOA within the current Fiscal Year, which will end on 30 September 2003. [88]

76. The United States does not contest that the President of the United States has proposed, as part of the Budget for 2004, a repeal of the CDSOA. However, the United States submits that there is no legal link between, on the one hand, the Budget and the prospective latest date of the passing of the Budget resolution [89], and, on the other hand, Congressional action concerning the CDSOA; as a consequence, the Budget resolution and proposals concerning the CDSOA will each follow a separate and distinct legislative process in Congress. [90] According to the United States, the Budget proposal is

[86]See *supra*, paras. 50, 52 and 53.

[87]See *supra*, paras. 63-64.

[88]Complaining Parties' submission, para. 46.

[89]30 September 2003.

[90]United States' statement at the oral hearing.

merely the "vehicle" by which the President of the United States made clear his wish to the United States Congress that the CDSOA be repealed.[91]

77. I understand that the President's suggestion to Congress to repeal the CDSOA did not include any draft legislative text to be introduced by a Member of Congress.[92] I also accept the United States' explanation that the Budget proposal and the proposal to repeal the CDSOA are not legally linked. Finally, the United States has stated that the proposed repeal of the CDSOA is *not* intended to be included in the so-called appropriations bills, which accompany the Budget and of which some are adopted by 1 October and some are adopted after 1 October of any given year. In the light of these explanations by the United States, I am unable to accept the Complaining Parties' argument that the inclusion of the proposal for repeal of the CDSOA in the Budget proposal to the United States Congress necessarily "implies a recognition" by the United States Executive branch that a repeal of the CDSOA is possible by the end of the current Fiscal Year.[93]

78. As another alleged particular circumstance, the Complaining Parties urge me to consider the economic harm that may be inflicted on their economic operators by another disbursement of collected anti-dumping and countervailing duties to United States' producers. The Complaining Parties submit that the reasonable period of time for implementation should expire before 30 September 2003 because:

> [f]ailure by the United States to bring itself into compliance with the rulings of the DSB before 30 September 2003 would … result in another illegal distribution of funds and additional irreparable harm to that already imposed on foreign exporters to the United States.[94]

79. In my view, economic harm suffered by foreign exporters does not, and cannot, by definition, impact on what is the "shortest period possible within the legal system of the Member to implement

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[91]United States' statement at the oral hearing.

[92]United States' statement at the oral hearing. I recall that under the United States' legal system, unlike in the legal systems of certain other WTO Members, the Executive branch has no authority to introduce legislation into Congress; rather, any legislative proposals originating with the Executive branch must be introduced, in either the original or modified version, by a Member of Congress. The remaining steps of the legislative process are also entirely in the hands of the United States Congress.

[93]In any event, *even if* I were to find that there *is* an implicit recognition by the United States Executive branch that a repeal *can* be accomplished by the end of September 2003, it is still important to recall, once again, that the United States, as the implementing party, remains free to choose the appropriate means of implementation of the recommendations and rulings of the DSB. The United States may therefore choose whether it will repeal or modify the CDSOA. In this regard, I note that the Complaining Parties have *not* argued that the United States Executive branch has also implicitly recognized that a *modification* of the CDSOA, as opposed to a *repeal*, is possible by the end of the September 2003.

[94]Complaining Parties' submission, para. 49.

the recommendations and rulings of the DSB".[95] The particular circumstances, within the meaning of Article 21.3(c), can only be of such nature as will influence the evolution and unfolding of the implementation process itself. Factors external to the legislative process itself are of no relevance for the determination of the reasonable period of time for implementation.

80. I do not wish to imply that economic harm, caused by the WTO-inconsistent measure, to economic agents of the Complaining Parties, or any other WTO Members, is irrelevant in the context of the implementation of the recommendations and rulings of the DSB. Many WTO-inconsistent measures will cause some form of economic harm to exporters of WTO Members.[96] However, the need, and urgency, to remove WTO-inconsistent measures, and to remove the harm to economic agents caused by such measures, is, in my view, already reflected in the principle of "prompt compliance" under Article 21.1. The same concern, in my view, underlies the well-established principle, under Article 21.3(c), that the reasonable period of time for implementation be the shortest time possible within the legal system of the Member. Thus, it would be supererogatory, and incongruous, to accord renewed consideration to the issue of economic harm when determining the shortest period possible for implementation within the legal system of the implementing Member.

81. As urged by some Complaining Parties[97], I am, furthermore, mindful of my obligation, pursuant to Article 21.2, to pay "[p]articular attention … to matters affecting the interests of developing country Members". I note that, by its wording, Article 21.2 does not distinguish between situations where the developing country Member concerned is an implementing or a complaining party. However, I also note that the Complaining Parties have not explained *specifically* how developing country Members' interests should affect my determination of the reasonable period of time for implementation. It is useful to recall, once again, that the term "reasonable period of time" has been consistently interpreted to signify the "shortest period possible within the legal system of the Member". Therefore, I have some difficulty in seeing how the fact that several Complaining Parties are developing country Members should have an effect on the determination of the shortest period possible within the legal system of the United States to implement the recommendations and rulings of the DSB in this case.

82. In the light of the above considerations, and weighing all the relevant factors, I do not find the Complaining Parties' proposal of six months to be a sufficient period within which the United States should implement the recommendations and rulings of the DSB in this case. At the same time, I

[95]See also Award of the Arbitrator, *Canada – Patent Term*, para. 48.

[96]See also Award of the Arbitrator, *Canada – Patent Term*, para. 48.

[97]Brazil's, Chile's and Mexico's statements at the oral hearing.

recall my finding that the United States has equally not established that 15 months represents the "shortest period possible" within its legal system to implement the recommendations and rulings of the DSB. [98]

IV. The Award

83. 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 11 months from the date of adoption of the Panel and Appellate Body Reports by the DSB, namely, 27 January 2003. The "reasonable period of time" will therefore expire on 27 December 2003.

[98]See *supra*, para. 71.

Signed in the original at Geneva this 28th day of May 2003 by:

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Yasuhei Taniguchi

Arbitrator