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***The Determination of the Reasonable Period of Time under Article
21.3(c) of the DSU: An “Arbitrary” Arbitration?***

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Abstract

Under the World Trade Organization (WTO) Dispute Settlement System, Members must promptly comply with rulings and recommendations of the Dispute Settlement Body (DSB). If immediate compliance is impracticable, the Member concerned shall have a “reasonable period of time” (RPT) to implement the recommendations and rulings.

In the absence of either a period of time proposed by the Member and approved by the DSB or a period of time mutually agreed to by the parties to a dispute, the RPT is determined through binding arbitration pursuant to Article 21.3 (c) of the Dispute Settlement Understanding (DSU). This provision also establishes a guideline of fifteen months for RPTs, but observes that this period of time can be shorter or longer, depending upon “particular circumstances .”

The arbitrators under Article 21.3 (c) have developed a large body of case law with regard to what may constitute a “particular circumstance” to be taken into account in the determination of the RPT. Nonetheless, with rare exceptions, the calculation of the RPT has remained essentially subjective. It seems that there is no connection between these “particular circumstances” and the final RPT fixed for each award. In this sense, arbitrations under Article 21.3 (c) of the DSU are “arbitrary.”

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List of Abbreviations

| | |
|---------------|---|
| ACP | African, Caribbean and Pacific Group of States |
| ASCM | Agreement on Subsidies and Countervailing Measures |
| DSB | Dispute Settlement Body |
| DSU | Understanding on Rules and Procedures Governing the Settlement of Disputes (also referred to as the Dispute Settlement Understanding) |
| EC | European Communities |
| ECJ | European Court of Justice |
| GATT | General Agreement on Tariffs and Trade |
| GATS | General Agreement on Trade in Services |
| RPT | Reasonable Period of Time |
| SPS Agreement | Agreement on the Application of Sanitary and Phytosanitary Measures |
| US | United States of America |
| WCO | World Customs Organization |
| WTO | World Trade Organization |

1 – Introduction

Despite the apparent lack of interest with regard to arbitration under Article 21.3 (c) of the Dispute Settlement Understanding (DSU), the determination of the “reasonable period of time” (RPT) plays an important role in the WTO dispute settlement system. According to the Article 21.1 of the DSU, prompt compliance with rulings and recommendations of the Dispute Settlement Body (DSB) is essential to the system. The task of the arbitrator under Article 21.3 (c) of the DSU is precisely to determine the length of the RPT and, therefore, to determine how prompt shall be the implementation of the rulings and recommendations of the DSB in a particular case.

The objective of this dissertation is to provide an assessment and critique of the case law with respect to the arbitrations under Article 21.3 (c) of the DSU to answer the following questions. How do arbitrators calculate the RPT? Is it important to calculate an accurate RPT? Is there a clear connection between the “particular circumstances” and the RPT fixed by arbitrators? What objective criteria have been used for the calculation of RPTs? Is subjectivity an inherent part of the determination of the RPT? In this sense, would the arbitration under Article 21.3 (c) of the DSU be “arbitrary”?

Article 21.3 (c) of the DSU calls attention to “particular circumstances,” the facts of which might determine a shorter or longer RPT in each case. However, it does not indicate the criteria to be followed for the calculation of the RPT. Arguably, it is not possible to determine in practice how the arbitrators determine the RPT in most cases. Consequently, one could claim that arbitrations under Article 21.3(c) of the DSU are “arbitrary.”

In order to address the central question proposed above, this dissertation proceeds as follows. Section 2 provides a brief overview of the WTO dispute settlement system, especially regarding the implementation mechanisms available to the parties to a dispute. Section 3 highlights the most relevant aspects of each of the twenty-one awards under Article 21.3 (c) issued thus far. Section 4 aims at identifying the “particular circumstances” taken into account in the case law as well as the connection between arbitrators’ reasoning and the RPT determined. Section 5 presents concluding remarks and offers suggestions.

2 – The WTO Dispute Settlement System

The WTO dispute settlement system represents an important step forward in the strengthening of a “rule-oriented” approach to the multilateral trading system, as opposed to a “power-oriented” approach used under the former GATT system.¹

Under the GATT dispute settlement system, the losing party was granted the option to “block” the ruling, which then could only be approved through consensus of all members of the GATT Council of Representatives, including the Member to implement the decision.

The new system, built on the WTO Dispute Settlement Understanding (DSU), innovated principally by inverting the rule of consensus, thereby removing the possibility of blocking rulings. Under the current system, a ruling can only fail to be adopted if all Members disapprove it, including the winning party to a dispute. Another highly significant development was the institution of the Appellate Body (AB), which was created to establish greater coherence in rulings emanating from the panels. Moreover, the AB is aimed at providing the system with greater predictability and security, which are fundamental goals enshrined in the DSU.²

The WTO dispute settlement can be divided into “four major phases”³: consultations; panel procedures; Appellate Body procedures; and implementation and enforcement of the decisions. The arbitration under Article 21.3 (c) of the DSU belongs to the latter, the implementation of rulings and recommendations of the DSB stage.

¹ Ernst-Ulrich Petersmann adds that: “The 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes has in many respects further strengthened the “rule -orientation” and “legal methods” in the WTO dispute settlement system[.] The economic, political and legal advantages of this progressive ‘judicialization’ of GATT dispute settlement procedures are obvious.” ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS, AND DISPUTE SETTLEMENT* 85 (1997).

² Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments -- Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU], available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm, art. 3.2: *The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.* The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements (emphasis added).

³ J. JACKSON ET AL., J., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT* 259 (4th ed. 2002).

2.1. Implementation of Rulings and Recommendations of the DSB

Following the adoption of a panel or the Appellate Body report, a Member is asked to comply with the rulings and recommendations of the DSB. The implementation stage of the dispute settlement system is contained in Article 19.1 of the DSU.⁴ The language used in this provision seems, on the one hand, to impose “*an obligation on all WTO adjudicating bodies to recommend that the WTO member...bring its measure into compliance*” and, on the other hand, to give these bodies “*the opportunity (but imposes no legal obligation to this effect) to suggest ways*” (emphasis added) for compliance.⁵

In addition, recommendations and suggestions produce distinct legal effects on their recipients. Whereas “a DSB decision adopting a panel/Appellate Body report...and its ensuing recommendation, is binding on its addressee,”⁶ the suggestions are not binding. It has been observed that “panel and Appellate Body reports do not generally recommend or suggest specific ways in which a WTO Member must bring its measures into compliance”.⁷

The next step is governed by Article 21 of the DSU, under the heading “Surveillance of Implementation of Recommendations and Rulings.” In this particular stage, “the DSB monitors whether or not its recommendations are implemented.”⁸ Here, the DSU establishes rules regarding the deadlines for the implementation of rulings and recommendations of the DSB “in order to ensure that losing parties would not have the open-ended timeframe to comply that they had under GATT.”⁹

Article 21.1 of the DSU first stipulates that: “*Prompt compliance* with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members” (emphasis added).

⁴ DSU art. 19.1: Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

⁵ P. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 Euro. J. Int'l L. 763, 778 (2000).

⁶ *Id.* at 783.

⁷ A. Shoyer et al, *Implementation and Enforcement of Dispute Settlement Decisions*, in 1 THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1351 (P. Macrory et al, eds. 2005).

⁸ JACKSON, *supra* note 3, at 266.

⁹ C. Gleason & P. Walther, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POL'Y INT'L BUS. 709, 714 (2000).

Article 21.3, recognizing that immediate compliance is not always possible, stipulates that: “At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. *If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so*” (emphasis added).

With respect to the definition of the RPT, Article 21.3 continues as follows: “The reasonable period of time shall be:

(a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

(c) *a period of time determined through binding arbitration* within 90 days after the date of adoption of the recommendations and rulings. *In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.*”

Therefore, there are three approaches to defining the RPT. Some scholars have classified the two first approaches as “bilateral definitions” of the RPT through an agreement between the parties to the dispute, representing subparagraph (a) a “tacit agreement,” whereas subparagraph (b) represents an “explicit agreement.”¹⁰ The third approach is classified as a “multilateral definition” of the RPT. In this case, an agreement is not possible and parties seek arbitration.¹¹ The most important aspects of each one of the arbitrations under Article 21.3 (c) of the DSU are the subject of the following section.

¹⁰ As far as 2005, Article 21.3 (a) had not been used. In its turn, Article 21.3 (b) has been applied more often than the arbitration under Article 21.3 (c). Moreover, in cases involving multiple complainants, some parties negotiated under subparagraph (b) whereas others decided to undergo the arbitration procedure under subparagraph (c). See W. Zdouc, *The Reasonable Period of Time for Compliance with the Rulings and Recommendations Adopted by the WTO Dispute Settlement Body*, in *KEY ISSUES IN WTO DISPUTE SETTLEMENT. THE FIRST TEN YEARS 89-90* (R. Yerxa and B. Wilson, eds. 2005).

¹¹ M. MATSUSHITA ET AL, *THE WORLD TRADE ORGANIZATION. LAW, PRACTICE, AND POLICY* 154-155 (2006).

3 – Arbitrations under Article 21.3 (c) of the DSU

There have been twenty-one awards under Article 21.3 (c) of the DSU until June 2007. In 4 cases, the parties reached an agreement on the RPT before the arbitrator's award was issued. These cases are: US - Line Pipe¹², US - Softwood Lumber V¹³, Dominican Republic - Import and Sale of Cigarettes¹⁴ and US - Zeroing (Japan)¹⁵. The other relevant 21 cases were divided below in 5 different groups, according to detected common features.¹⁶

3.1. Early Cases

In the first Article 21.3 (c) cases, arbitrators decided to adhere to the 15 months guideline provided for in the DSU, adopting therefore a narrow interpretation of this legal provision. However, many of the arguments raised by the parties would form the basis for future interpretation regarding what may constitute “particular circumstances” in the context of Article 21.3 (c) of the DSU.

3.1.1. Japan - Alcoholic Beverages II¹⁷ and EC - Bananas III¹⁸

In Japan - Alcoholic Beverages II, the United States, one of the complainants, argued that “the type (legislation, regulation, decree, etc.) and technical complexity” of the measures to be implemented should be relevant for the determination of the RPT¹⁹. The arbitrator recognized that the term “particular circumstances” is not defined in the DSU and should, therefore, be interpreted.

¹² Award of Arbitrator, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/17, (July 26, 2002).

¹³ Award of Arbitrator, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/13, (Dec. 13, 2004).

¹⁴ Award of Arbitrator, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/17, (Aug. 29, 2005).

¹⁵ Award of Arbitrator, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/21, (May 11, 2007).

¹⁶ See *infra* Annex 1 (Table of Disputes).

¹⁷ Award of Arbitrator, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/15, WT/DS10/15, WT/DS11/13, (Feb. 14, 1997).

¹⁸ Award of Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Banana*, WT/DS27/15, (Jan. 7, 1998).

¹⁹ *Japan – Taxes on Alcoholic Beverages*, *supra* note 17, ¶ 12.

In EC - Bananas III, the complaining parties for the first time required that: “special attention be paid to matters affecting the interests of developing countries Members with respect to measures that have been subject to dispute settlement,” according to Articles 21.2, 21.7 and 21.8 of the DSU.²⁰

As mentioned above, the arbitrators in these two early cases decided to adhere to the 15-month benchmark without providing any further reasoning. The respective awards similarly pointed out that the “particular circumstances” presented by the parties did not justify a “departure from the 15-month guideline.”²¹

3.1.2. EC - Hormones²²

The landscape started to change in the third case, although the arbitrator still adopted the 15-month guideline as the RPT. In EC - Hormones, the arbitrator noticed the importance of interpreting Article 21.3 (c) “in its context and in light of the object and purpose of the DSU” and concluded that: “*the reasonable period of time, as 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 DSU*” (emphasis added).²³

The arbitrator in EC - Hormones also addressed other important issues. In regard to the burden of proof, he stated that: “the party seeking to prove that there are “particular circumstances” justifying a shorter or a longer time has the burden of proof under Article 21.3 (c)”.²⁴ Another relevant contribution refers to the mandate of the arbitrators under Article 21.3 (c). He recognized that it was not within his mandate to suggest ways of implementation and declared that: “*An implementing Member, therefore, has a measure of discretion in choosing the means of*

²⁰ DSU art. 21.2: *Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement* (emphasis added).

DSU art. 21.7: If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

DSU art. 21.8: If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

²¹ *Japan – Taxes on Alcoholic Beverages*, supra note 17, ¶ 27.

²² Award of Arbitrator, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15, WT/DS48/13, (May 29, 1998).

²³ *Id.* ¶ 26.

²⁴ *Id.* ¶ 27.

*implementation, as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements” (emphasis added).*²⁵

Even though the arbitrator established an important standard regarding the interpretation of Article 21.3 (c), this decision resembles the earlier ones in which the arbitrators did not attribute any weight to the “particular circumstances” identified by the parties in the calculation of the RPT and adhered to the 15-month guideline.

3.2. A Broader Picture

Starting in the Indonesia - Autos case, the arbitrators began to provide a more comprehensive analysis of the “particular circumstances” identified by the parties to a dispute, which led to the establishment of RPTs different than the 15-month guideline provided for in Article 21.3 (c).

3.2.1. Indonesia - Autos²⁶

In a considerably more detailed award than the previous ones, the arbitrator in Indonesia - Autos first clarified his mandate, which “relates exclusively” to the determination of the RPT implementation under Article 21.3 (c) of the DSU.²⁷ The arbitrator here was the first to expressly adopt an interpretation given in a previous case. He quoted the EC - Hormones decision to state that the RPT should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB.

The arbitrator also determined that “structural adjustments” cannot be considered as “particular circumstances” to determine the RPT, arguing that: “In virtually every case...some degree of adjustment by the domestic industry of the Member concerned will be necessary”.²⁸

He also addressed the developing country status of the respondent in this case, according to Article 21.2 of the DSU. The arbitrator affirmed that: “Indonesia has indicated that in a “normal

²⁵ *Id.* ¶ 38.

²⁶ Award of Arbitrator, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, (Dec. 7, 1998).

²⁷ *Id.* ¶ 21.

²⁸ *Id.* ¶ 23.

situation", a measure such as the one required to implement the recommendations and rulings of the DSB in this case would become effective on the date of issuance. However, this is not a "normal situation". Indonesia is not only a developing country; it is a developing country that is currently in a dire economic and financial situation. Indonesia itself states that its economy is "near collapse". *In these very particular circumstances, I consider it appropriate to give full weight to matters affecting the interests of Indonesia as a developing country pursuant to the provisions of Article 21.2 of the DSU*" (emphasis added)²⁹. Therefore, the arbitrator decided to grant an additional period of six months for compliance, "over and above the six -month period required for the completion of Indonesia's domestic rule -making process."³⁰ However, he did not provide reasons for electing this 6-month period. The interpretation of Article 21.2 has been the object of further arbitrations and remains highly controversial, as addressed in section 4.1 below.³¹

Nonetheless, the Indonesia-Automobiles case not only represented a turning point to more elaborated decisions, but also brought up new questions to be answered by the subsequent arbitrators.

3.2.2. Australia – Salmon³²

In Australia-Salmon, the arbitrator established an important standard for disputes regarding the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). He relied on the decision in EC - Hormones to decide that the time needed to conduct risk assessments to demonstrate the consistency of the import prohibition already found to be inconsistent with the provisions of the SPS Agreement should not be taken into consideration in the determination of the RPT.

After that, the arbitrator turned to the calculation of the RPT, observing that: "Both parties also agree that the process involved in bringing the measure in dispute into conformity with Australia's obligations under the *SPS Agreement* is an administrative, not a legislative,

²⁹ *Id.* ¶ 24.

³⁰ *Id.*

³¹ See *infra* text 38-39.

³² Award of Arbitrator, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/9, (Feb. 23, 1999).

process....*When implementation can be effected by administrative means, the reasonable period of time should be "considerably shorter than 15 months"* (emphasis added).³³

In the end, the arbitrator determined that the RPT should be eight months without giving any further reasoning for it.

3.3. A Look Inside

The appropriateness of a further examination in the implementing Member's domestic legal procedures was first manifested in the Korea-Alcoholic Beverages case. In the following cases, both the parties and the arbitrator provided a detailed explanation of internal procedures needed in order to adopt the DSB decision. In some cases, the arbitrator's awards were entirely based on the implementing Member's legislation.

3.3.1. Korea-Alcoholic Beverages³⁴

In this case, the arbitrator first announced that: "Although 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, *this does not require a Member, in my view, to utilize an extraordinary legislative procedure, rather than the normal legislative procedure, in every case*" (emphasis added)³⁵. Since the parties agreed that a tax bill with budgetary implications should normally be submitted to the Korean National Assembly at a regular session, the arbitrator decided that this should be the route to be followed.

Korea also requested an additional period of five months to complete "follow-up measures", including amendments. The arbitrator affirmed that amendments could be prepared during the course of the legislative process instead of after the promulgation of the legislation. Therefore, he decided to grant Korea an additional period of thirty days as opposed to the five months requested by Korea before. Finally, he fixed the RPT at 11 months and 2 weeks.

³³ *Id.* ¶ 38.

³⁴ Award of Arbitrator, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/16, WT/DS84/14, (June 4, 1999).

³⁵ *Id.* ¶ 42.

Another relevant aspect of this decision was the Korea's argument that it should be accorded the same treatment given to Japan in the Japan-Alcoholic Beverages case. Since Japan's and Korea's liquor tax systems were very similar, the latter should be given no less than the 15 months the former was given. The arbitrator observed in the footnote 35 of his decision that: "I recognize that this period of time is shorter than the 15 month period granted by the arbitrator in *Japan – Alcoholic Beverages*. I would note, however, that the arbitration proceedings in these two cases took place at different times in the respective legislative and budgetary processes of Korea and Japan" (emphasis added).³⁶

3.3.2. Chile - Alcoholic Beverages³⁷

In Chile - Alcoholic Beverages, both the respondent and the complainant conducted a careful explanation of Chile's domestic legislation in order to verify the RPT for compliance.

The arbitrator first clarified that the "shortest period of time" is not the only criterion to guide his decision: "Article 21.3(c) evidently contemplates a case-specific approach and authorizes the consideration of the "particular circumstances" of a given case, which may warrant a longer or shorter period."³⁸

He then added an important contribution to the operation of Article 21.2 of the DSU by stating that: "Nevertheless, although cast in quite general terms, because Article 21.2 is in the DSU, *it is not simply to be disregarded*. As I read it, Article 21.2, whatever else it may signify, usefully enjoins, *inter alia*, an arbitrator functioning under Article 21.3(c) *to be generally mindful of the great difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and rulings of the DSB*" (emphasis added).³⁹ However, the arbitrator found that Chile failed to prove its particular interests as a developing country Member and how this would affect the length of RPT for implementation.⁴⁰

The arbitrator also observed two aspects of the Chilean legislative process to fix the RPT. First, he noticed that the "pre-legislative" phase, i.e. the discussions and negotiations regarding the

³⁶ *Id.* fn 35.

³⁷ Award of Arbitrator, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/15, WT/DS110/14, (May 23, 2000).

³⁸ *Id.* ¶ 39.

³⁹ *Id.* ¶ 45.

⁴⁰ *Id.* ¶ 44.

implementing legislation, was “clearly important” for the process. Secondly, there were no “fixed time frames for initiating and completing each stage of the legislative process .”⁴¹ Finally, the arbitrator defined the RPT at 14 months and 9 days.

3.3.3. Canada - Pharmaceutical Patents⁴²

The Canada – Pharmaceutical Patents arbitration introduced a new debate as the parties basically disagreed whether implementation should take place through regulatory or legislative means. Canada requested 11 months as the RPT whereas the EC requested 12 months.⁴³

The arbitrator first established an essential comparison between Articles 21.3 (c) and 21.5 of the DSU⁴⁴ by affirming that: “The proper concern of an arbitrator under Article 21.3 (c) is with *when*, not *what*” (emphasis in original).⁴⁵ He also clarified that: “If there is any question about whether *what* a Member chooses as a means of implementation is sufficient to comply with the recommendations and rulings of the DSB, as opposed to *when* that Member proposes to do it, then Article 21.5 applies, not Article 21.3” (emphasis in original).⁴⁶

The arbitrator invoked the decision in EC - Hormones to guarantee the implementing Member’s discretion in choosing the means of implementation and, therefore , did not dispute the means presented by Canada. However, he observed that: “certain of the time periods specified by Canada for certain steps toward implementation are not fixed by either law or regulation .”⁴⁷ He finally concluded that some steps could have been completed earlier and fixed the RPT at 6 months.

⁴¹ *Id.* ¶ 43.

⁴² Award of Arbitrator, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/13, (Aug. 18, 2000).

⁴³ It is interesting to notice here that because of the different views concerning the means of implementation, the complainant, whose general interest is to achieve compliance as soon as possible, requested a shorter RPT than the implementing Member.

⁴⁴ DSU art. 21.5: Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

⁴⁵ *Canada – Patent Protections of Pharmaceutical Products*, *supra* note 42, ¶ 41.

⁴⁶ *Id.* ¶ 42.

⁴⁷ *Id.* ¶ 55.

This case was also relevant for addressing other issues. First, the arbitrator established a different standard regarding the burden of proof. He stated that the implementing Member should bear the burden of proof in demonstrating that its proposed period constitutes a RPT. He finally added: “*And the longer the proposed period of implementation, the greater this burden will be*” (emphasis added).⁴⁸

The arbitrator also established that the domestic “contentiousness” of a measure taken to comply with a WTO ruling should not be taken into consideration to determine the RPT: “*All WTO disputes are "contentious" domestically at least to some extent ; if they were not, there would be no need for recourse by WTO Members to dispute settlement*” (emphasis added).⁴⁹

Finally, the arbitrator set three pillars for interpreting the relevance of “particular circumstances .” First, he compared legislative and administrative means, affirming that the RPT for the latter should be “normally shorter.”⁵⁰ Second, the complexity of the implementation measure should be taken into account. He drew a distinction between implementation “through extensive new regulations affecting many sectors of activity” and “the simple repeal of a single provision of perhaps a sentence or two,” the RPT for the latter being shorter.⁵¹ Third, the fact that domestic implementation steps might be either binding or discretionary should also be observed. He differentiated measures which have a “mandatory period of time” established in the implementing Member’s legislation and the ones that do not. He added that: “if there is no such mandate, then a Member asserting the need for a certain period of time must bear a much more imposing burden of proof.”⁵²

3.3.4. Canada - Autos⁵³

In Canada-Autos, the arbitrator first noticed that there were two aspects to be considered. The first referred to Canada’s obligations under Articles I:1 and III:4 of the GATT and Article XVII of the GATS. Here, the DSB recommended that Canada bring the inconsistent measures into

⁴⁸ *Id.* ¶ 47.

⁴⁹ *Id.* ¶ 60.

⁵⁰ *Id.* ¶ 49.

⁵¹ *Id.* ¶ 50.

⁵² *Id.* ¶ 52.

⁵³ Award of the Arbitrator, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/12, WT/DS142/12, (Oct. 4, 2000).

conformity with these obligations. The second referred to the findings, under Article 3.1 (a) of the WTO Agreement on Subsidies and Countervailing Measures, in which the DSB recommended that Canada withdraw the export subsidies within 90 days, according to Article 4.7 of the ASCM.⁵⁴ The arbitrator clarified that the issue to be resolved in the arbitration was to determine the RPT for the implementation of the first recommendation.

Having stated that, the arbitrator turned to analyze the steps required by Canada's legislation for implementation. He acknowledged the fact that some of the procedures proposed did not have time frames fixed to emphasize that: "it is *incumbent* upon the Government of Canada to *use its discretion to ensure that compliance with the DSB's recommendations at issue is 'prompt'*" (emphasis added).⁵⁵ He finally considered the periods requested for the "Pre-Drafting" and "Drafting/Approval" stages unnecessary and excessive.⁵⁶ Based on the above observations, the arbitrator determined that the RPT should be 8 months.

3.3.5. US-Section 110(5) Copyright Act⁵⁷

The arbitrator noticed that the means of implementation in this dispute was legislative, rather than administrative, highlighting that: "a legislative change is likely, absent evidence to the contrary, to be more time-consuming than an administrative change."⁵⁸ He next analyzed if the factors raised by the United States were relevant to the determination of the RPT. He did not see how the alleged "enormous volume of legislation introduced every year" would affect the obligation to implement the recommendations and rulings of the DSB.⁵⁹ As for the "controversy" surrounding the legislation and the "divergent views of stakeholders", he recalled the decision in Canada - Pharmaceutical Patents to state that domestic "contentiousness" of a measure shall not be taken into consideration to determine the RPT.⁶⁰

⁵⁴ ASCM art. 4.7: If the measure in question is found to be a *prohibited subsidy*, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. *In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn* (emphasis added).

⁵⁵ *Canada – Certain Measures Affecting the Automotive Industry*, *supra* note 53, ¶ 47.

⁵⁶ *Id.* ¶¶ 49-50.

⁵⁷ *United States – Section 110(5) of the US Copyright Act*, WT/DS160/12, (Jan. 15, 2001).

⁵⁸ *Id.* ¶ 34.

⁵⁹ *Id.* ¶ 40.

⁶⁰ *Id.* ¶ 41.

It was also noted that there were no mandatory time-frames for most steps in the US's legislative process.⁶¹ However, he observed that: "while it is true that the United States Congress has flexibility in the timing and management of its legislative procedures, it is clear that the process involves a number of time-consuming and complex steps."⁶² The arbitrator also noticed that the US's congressional schedule would begin only in January to conclude that a RPT of 10 months, as requested by the complainant, would not have been sufficient. He then ultimately fixed the RPT at 12 months.

There are two other important aspects of this decision. First, the arbitrator called attention to the necessity of implementing Members to begin implementation promptly after the adoption of the panel or Appellate Body report. He stressed that "[i]f it is perceived by an arbitrator that an implementing Member has not adequately begun implementation after adoption so as to effect "prompt compliance", it is to be expected that the arbitrator will take this into account in determining the "reasonable period of time."⁶³ Lastly, the arbitrator disregarded the EC's argument that the RPTs for implementation fixed in previous disputes involving legislative action should be taken into account for calculating the RPT in this particular case.⁶⁴

3.3.6. EC - Tariff Preferences⁶⁵

Although issued almost 4 years after the decision in US-Section 110(5) Copyright Act and separated in time by other 7 arbitrations under Article 21.3 (c), the award in EC - Tariff Preferences seems to belong to the group of cases characterized by a deep look inside the domestic legislation of the implementing Member and the final RPT established predominantly based on that analysis.

The arbitrator began by adopting a contrasting view to the standard adopted in Canada – Pharmaceutical Patents with regard to the burden of proof: "*I have found the evidence and arguments presented by both the European Communities and India very helpful* in determining whether, in the particular circumstances of this case, the period of time for implementation

⁶¹ *Id.* ¶ 38.

⁶² *Id.* ¶ 45.

⁶³ *Id.* ¶ 46.

⁶⁴ *Id.* ¶ 6.

⁶⁵ Award of the Arbitrator, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/14, (Sep. 20, 2004).

should be 15 months or a shorter or longer period” (emphasis added).⁶⁶ Therefore, it seems that both parties must provide evidence to support their requested periods.

With respect to which measure the EC must bring into conformity with the WTO, the arbitrator confirmed that the DSB had referred solely to the Drug Arrangements, rather than the whole review of the European Communities’ GSP scheme. Hence, the determination of the RPT is related to the “shortest period possible within the legal system of the European Communities to bring the Drug Arrangements into conformity with its WTO obligations .”⁶⁷

The arbitrator decided to take into account the enlargement of the European Communities and the consequent increase of time required to complete certain steps for implementation as relevant factors to determine the RPT.⁶⁸ He did not, however, consider the new Parliament or the new Commission as relevant for calculating the time for implementation.⁶⁹ With respect to the “political sensitivities” of the Drug Arrangements and the GSP, the arbitrator did not see how it could increase the RPT and decided to disregard this argument.⁷⁰

Although recognizing the EC’s legislative system’s flexibility as a relevant matter in determining the RPT, the arbitrator conducted a deep survey in to the necessary steps for implementation and decided that the RPT should be 14 months and 11 days.

3.4. Compromise Decisions

In the following decisions, the arbitrators seemed to adopt RPTs representing a compromise between the periods requested by the parties. The common feature in these awards is that the arbitrators argued that none of the periods proposed by the parties were reasonable given the circumstances of each case and in the end embraced a middle-ground RPT. Moreover, these decisions often lack further reasoning regarding the exact calculation of the RPTs.

⁶⁶ *Id.* ¶ 27.

⁶⁷ *Id.* ¶ 31.

⁶⁸ *Id.* ¶ 53.

⁶⁹ *Id.* ¶ 54.

⁷⁰ *Id.* ¶ 56.

3.4.1. US - 1916 Act⁷¹

In US - 1916 Act, the United States requested the establishment of a period of 15 months as the RPT, while the European Communities and Japan agreed that the RPT should be no more than 6 months.

The arbitrator noticed the disagreement between the parties over the scope of the legislation required, as the complainants insisted that a simple repeal of the 1916 Act was sufficient for implementation. He then decided to adopt the standard by which the implementing Member has discretion in choosing the means of implementation.

As to the United States' arguments in support of its proposed RPT, the arbitrator decided that the volume of legislation, the high percentage of bills that never become law and the fact that legislation is usually passed at the end of Congress's legislative session were not relevant to the determination of the RPT⁷². The arbitrator also noticed that the Congress was active at the time of the arbitration and could pass the legislative proposal as speedily as possible.⁷³

The arbitrator, in analysing the United States' legislative process to determine the RPT, concluded that some implementation steps were neither required by law nor subject to minimum time limits and, therefore, the US should use the flexibility available within its system to enact the required legislation promptly.⁷⁴ He also noticed examples given by both the complainants and the respondents of previous legislation enactments that either took several years or short periods of time. He then concluded that: "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" (emphasis added).⁷⁵

In the end, the arbitrator adopted a solution that represented an average between the 15-month and the 6-month RPT proposals presented by the parties. He stated that: "Given that the current session of the United States Congress began on 3 January 2001, neither such period (the period

⁷¹ Award of Arbitrator, *United States – Anti-Dumping Act of 1916*, WT/DS136/11, WT/DS162/14, (Feb. 28, 2001).

⁷² *Id.* ¶ 38.

⁷³ *Id.* ¶ 40.

⁷⁴ *Id.* ¶ 39.

⁷⁵ *Id.* ¶ 43.

proposed by the EC and Japan) would leave a reasonable time [.]”. However, he also declared that: “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 .”⁷⁶ The arbitrator ultimately set the RPT at 10 months.

3.4.2. *Canada - Patent Term*⁷⁷

The arbitrator in this case first examined the United States’ argument that if Canada did not urgently implement the recommendations and rulings of the DSB, patents would continue to expire, causing harm to patent owners. He decided that this argument had no relevance to the determination of the RPT, arguing that: “Measures taken by Members, which are inconsistent with one of the covered agreements will, naturally, or at least very often, cause irreparable harm to economic operators who are nationals of other Members .”⁷⁸ He also disregarded the United States’ argument that the Government of Canada controls the majority in the Parliament and could therefore pass any legislation it wished to. He observed that the evaluation of these political factors would “often be difficult and highly speculative.”⁷⁹

Canada had argued that the amendment would have an impact in its health care system, creating a “significant debate which is likely to be divisive.”⁸⁰ The arbitrator decided that the “likely divisiveness of the debate in the Canadian Parliament” was not a particular circumstance to be taken into account in determining the RPT.⁸¹

The arbitrator then turned to the analysis of Canada’s lawmaking process. He noted that although the process is structured and defined, it is also flexible and that Canada should “take advantage” of this flexibility.⁸² The arbitrator decided not to take into consideration the Parliament’s schedule. He justified this by arguing that this “would give the actual calendar of the House of the Commons a legal value and significance that it simply does not have .”⁸³ He finally decided

⁷⁶ *Id.* ¶ 44.

⁷⁷ Award of Arbitrator, *Canada – Term of Patent Protection*, WT/DS170/10, (Feb. 28, 2001).

⁷⁸ *Id.* ¶ 48.

⁷⁹ *Id.* ¶ 60.

⁸⁰ *Id.* ¶ 49.

⁸¹ *Id.* ¶ 58.

⁸² *Id.* ¶¶ 63-64.

⁸³ *Id.* ¶ 66.

that the RPT should be 10 months, once again adopting a middle-ground solution, considering the 6 months and 14 months respectively requested by the parties.

3.4.3. US - Hot-Rolled Steel⁸⁴

In this case, the United States asked the arbitrator to fix the RPT at 18 months, being “14 months for the enactment of amending legislation and 4 additional months to apply this legislation to the anti-dumping investigation at issue.”⁸⁵ Japan conducted a careful examination of the United States’ required domestic steps to argue that the RPT should be 10 months.

The arbitrator noted that the parties disagreed on the content of the amending statute. He first confirmed that the “proper scope and content” of the legislation are left to the implementing Member to determine.⁸⁶ The arbitrator also recalled the importance of the “pre-legislative” phase to the success of the legislative process, as decided in Chile - Alcoholic Beverages.

The United States had argued that “important trade bills commonly are approved towards or at the end of the regular session of the United States Congress.”⁸⁷ In order to prove it, the United States relied on two Article 21.3 (c) arbitrations in which it asked the DSB to change RPTs previously established by the arbitrators, so that the modified RPTs would expire at the end of the regular session of the Congress.⁸⁸ The arbitrator was not convinced of the relevance of the “actions of the DSB in those two instances” regarding that particular case.⁸⁹

Finally, the arbitrator fixed the RPT at 15 months, in between the 18 and 10 months initially requested by the parties, without providing any further reasoning .

⁸⁴ Award of Arbitrator, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/13, (Feb. 19, 2002).

⁸⁵ *Id.* ¶ 6.

⁸⁶ *Id.* ¶ 30.

⁸⁷ *Id.* ¶ 39.

⁸⁸ The two cases are US-Section 110(5) Copyright Act and US 1916 Act. On July 12, 2001, the United States asked the DSB to modify the 12-month and 10-months RPTs, respectively determined by the arbitrators. On July 24, 2001, the DSB noted and agreed to the United States’ request.

⁸⁹ *Id.*

3.4.4. Chile - Price Band System⁹⁰

The arbitrator in this case decided to accept the implementing Member's proposal to pass new legislation modifying the price band system, highlighting that "How it does this (implementation) is a matter for Chile."⁹¹ On the one hand, the arbitrator recognized the complexity of Chile's implementation process as relevant to the determination of the RPT. On the other hand, he observed that most steps in Chile's procedures are not subject to time limits and, therefore, Chile should be expected to utilize this in good faith to achieve implementation.⁹²

According to Chile, it had begun to implement the recommendations and rulings of the DSB since the adoption of the panel and appellate reports, a fact disputed by Argentina. The arbitrator recalled the observation made by the arbitrator in US – Section 110(5) Copyright Act and added that a Member: "must at the very least promptly *commence* and continue concrete steps towards implementation" (emphasis in original).⁹³ He then announced that: "I do not suggest that Chile's pre-legislative activities in this case should necessarily have concluded by this time; but, *in my view, this phase should reasonably have proceeded further than it has*" (emphasis added).⁹⁴

In verifying whether domestic political and industry opposition was a relevant issue, the arbitrator adopted a different view from previous arbitrators. He affirmed that, in fact, "simple contentiousness" may not be a sufficient reason for a longer RPT. However he sustained that this case did not reflect a "simply opposition by interest groups to the loss of protection." Therefore, the arbitrator decided that "[i]n the light of the longstanding nature of the PBS, its fundamental integration into the central agricultural policies of Chile, its price-determinative regulatory position in Chile's agricultural policy, and its intricacy, *I find its unique role and impact on Chilean society is a relevant factor in my determination of the "reasonable period of time" for implementation* (emphasis added)⁹⁵.

⁹⁰ Award of Arbitrator, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/13, (March 17, 2003).

⁹¹ *Id.* ¶ 37.

⁹² *Id.* ¶ 39.

⁹³ *Id.* ¶ 43.

⁹⁴ *Id.* ¶ 45.

⁹⁵ *Id.* ¶ 48.

With respect to the “urgency procedure” available in the Chilean system, the arbitrator considered it an “extraordinary means.”⁹⁶ Moreover, the fact that Chile had used the “urgent procedure” in previous cases did not mean that it should be expected to “employ the same means” when pursuing implementing in this case.⁹⁷

The arbitrator, in accessing the application of Article 21.2 of the DSU, recognized that: “*Chile may indeed face obstacles as a developing country* in its implementation of the recommendations and rulings of the DSB, and that *Argentina, likewise, faces continuing hardship as a developing country* so long as the WTO-inconsistent PBS is maintained” (emphasis added). Therefore, he could not decide for a longer or shorter period of time reflecting the interests of these developing countries Members.⁹⁸

The arbitrator ultimately decided to fix the RPT at 14 months by sustaining that: “I do not find Chile's proposal of 18 months to be necessary, nor do I find Argentina's proposal of nine months and six days to be a sufficiently ‘reasonable’ period within which Chile should complete implementation.”⁹⁹

3.4.5. US - Offset Act (Byrd Amendment)¹⁰⁰

In this case, the United States requested that the RPT be 15 months based on three particular circumstances, whereas the complaining parties in the dispute, after analysing five sets of particular circumstances, contended that the RPT should be 6 months.

The arbitrator first decided that the United States, the implementing Member, could choose either to withdraw or modify the relevant legislation as to bring it into conformity with its obligations under the WTO.¹⁰¹ He also addressed the panel’s suggestion, pursuant to Article 19.1 of the DSU, that the United States repeal the legislation rather than modify it. The arbitrator noticed that the same panel decision recognized that “there could potentially be a number of ways” of

⁹⁶ *Id.* ¶ 51.

⁹⁷ *Id.* ¶ 54.

⁹⁸ *Id.* ¶ 56.

⁹⁹ *Id.* ¶ 57.

¹⁰⁰ Award of Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/14, WT/DS234/22, (June 13, 2003).

¹⁰¹ *Id.* ¶ 50.

implementation. Finally, he declared that “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.’”¹⁰²

Afterwards, the arbitrator observed that the United States did not provide an explanation of how it had calculated the requested RPT, although it argued that this calculation was based on “logical and rigorous” factors. The arbitrator disagreed with this characterization since “such an estimate is not based, at least to some extent, on an accumulation of the timeframes for the component steps.”¹⁰³ He decided that the US Congressional schedule was not relevant. “The fact that any given point in the Congressional schedule would represent a “greater opportunity” to pass legislation than another point in time, is not a particular circumstance relevant [.]”¹⁰⁴

The arbitrator examined the economic harm suffered by foreign exporters and maintained that this cannot impact the determination of the RPT.¹⁰⁵ He decided that the particular attention to be paid to developing countries according to Article 21.2 of the DSU¹⁰⁶ should not be a relevant factor because the complainants had not explained “specifically” how their interests should affect his determination of the RPT.

Finally, the arbitrator determined that the RPT should be 11 months by simply affirming that neither the 6 months required by the complainants nor the 15 months requested by the respondent constitute a sufficient period for implementation.¹⁰⁷

3.4.6. US - Oil Country Tubular Goods Sunset Reviews¹⁰⁸

In this dispute, the United States claimed that two different phases of implementation would be necessary and these phases could not be completed in parallel. The first phase corresponded to

¹⁰² *Id.* ¶ 52. Although not expressly addressing this issue, the arbitrator seemed to have confirmed that a panel’s suggestion according to Article 19.1 of the DSU is not binding, as earlier addressed in this dissertation.

¹⁰³ *Id.* ¶ 66.

¹⁰⁴ *Id.* ¶ 69.

¹⁰⁵ *Id.* ¶ 79.

¹⁰⁶ Brazil, Chile and Mexico requested the arbitrator to consider Article 21.2 of the DSU during the oral hearing.

¹⁰⁷ *Id.* ¶ 82.

¹⁰⁸ Award of the Arbitrator, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/12, (June 7, 2005).

the publication of a new rule in the US Federal Register and would take 9 months.¹⁰⁹ The second phase referred to a new likelihood determination in the sunset review at issue and would take additional 6 months.¹¹⁰

With respect to the means of implementation, the arbitrator observed that Argentina did not dispute “what the United States considers to be the requirements of its legal system ,” but also that the US “bears the responsibility to exercise all flexibility and discretion available” to implement the rulings and recommendations of the DSB.¹¹¹

In regard to the implementation steps to be taken by the United States, the arbitrator added that “some of the steps and the time periods indicated for them in its implementation process are not required by law. But they are needed for the implementation to be carried out in a transparent and efficient manner. I also note that the United States agrees that some of the steps included in the two phases of implementation, such as consultations with Congress, can be carried out in a flexible or concurrent manner to save time [.]”¹¹² In the end, he decided that the RPT should be 12 months.

3.4.7. US - Gambling¹¹³

In this dispute, Antigua, the complaining party, asked the arbitrator to consider two different RPTs: “(i) as regards the provision of *non-sports related and horseracing gambling and betting services*, either immediately or not later than one month following the issuance of this award; and (ii) as regards the provision of *other sports-related gambling and betting services*, six months from the date of adoption by the DSB of the panel and Appellate Body Reports, ending on 20 September 2005” (emphasis added).¹¹⁴

¹⁰⁹ *Id.* ¶ 7.

¹¹⁰ *Id.* ¶ 8.

¹¹¹ *Id.* ¶ 50.

¹¹² *Id.* ¶ 51.

¹¹³ Award of the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/13, (Aug. 19, 2005).

¹¹⁴ *Id.* ¶ 18.

The arbitrator first observed that neither the panel nor the Appellate Body referred to the distinction made by Antigua.¹¹⁵ Therefore, he decided that it was not under his mandate to resolve the issue of determining more than one RPT.¹¹⁶

With regard to the complexity of the United States' legislative task, the arbitrator decided to: "*attach some significance to the fact that...the field of internet gambling is one that is highly regulated in the United States.*"¹¹⁷ He also recognized that questions of public morals and public order might be important for the determination of the RPT, but decided to disregard it in the absence of further information.¹¹⁸

The arbitrator stated that the Congressional schedule can be relevant depending on each particular case.¹¹⁹ However, he decided to "not attach much weight to this 'particular circumstance'" in the context of this dispute.¹²⁰ Antigua had also referred to other 15 measures speedily enacted in the United States to sustain its position that prompt compliance could be reached. The arbitrator observed that: "[t]aken in isolation, however, that fact is not probative of the average length of time that it takes to pass legislation, nor of the relationship between the content of specific legislation and the length of time that is required for it to be passed."¹²¹

He also added a significant contribution with respect to the interpretation of Article 21.2 of the DSU. He affirmed that: "*the text of Article 21.2 does not expressly limit its scope of application to developing country Members as implementing, rather than as complaining, parties to a dispute*" (emphasis added).¹²² However, he decided not to take Article 21.2 into account in this case because Antigua failed to satisfy "the criteria expressly mentioned in Article 21.2", that is, Antigua did not: "provide specific data in support of these arguments."¹²³ Nor did Antigua seek to demonstrate any clear relationship between the decline of its industry and the measures which

¹¹⁵ *Id.* ¶ 39.

¹¹⁶ *Id.* ¶ 40.

¹¹⁷ *Id.* ¶ 46.

¹¹⁸ *Id.* ¶ 47.

¹¹⁹ See US-Section 110(5) Copyright Act, *supra* note 57, Canada-Patent Term, *supra* note 77.

¹²⁰ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, *supra* note 113, ¶ 52.

¹²¹ *Id.* ¶ 54.

¹²² *Id.* ¶ 59.

¹²³ According to the arbitrator, Antigua emphasized: "the importance of a well-regulated cross-border gambling and betting service industry to the economic health and growth of Antigua, as well as the strain that this dispute has placed on Antigua's limited resources." *Id.* ¶ 26.

were subject to this dispute[.]”¹²⁴ In the end, the arbitrator fixed the RPT at 11 months and 2 weeks.

3.5. Closer to the Complainants

In the following disputes, the arbitrators’ awards, although still lacking a further explanation with respect to the calculation of the RPT, fixed periods considerably closer to the complainants’ initial request as opposed to the above cases in which the RPTs were constantly fixed at somewhere near the average between the complainants’ and respondents’ requests.

3.5.1. Argentina - Hides and Leather¹²⁵

In Argentina - Hides and Leather, Argentina explained the structure of its tax system in order to justify the 46 months and 15 days requested as the RPT. The European Communities disputed the respondent’s arguments to request that the RPT should be 8 months.

The arbitrator began his decision by noticing that: “Argentina is not arguing that it needs forty-six months to formulate, draft and put into effect one or more *Resoluciones Generales*... My understanding is that Argentina, in effect, is contending that it needs forty-six months to control and counter certain economic and financial consequences that it apprehends will follow from putting into legal effect an appropriate amendatory *Resolución General*[.]”¹²⁶ He then decided that Argentina should only revoke or modify its *Resoluciones Generales* rather than implement a reform of its entire tax system.¹²⁷

The arbitrator also disregarded the economic and social impacts raised by Argentina, because it failed to prove a causality link between those and the adoption of the implementing measure.¹²⁸ In regard to the Article 21.2 arguments, the arbitrator announced that Argentina was not “very

¹²⁴ *Id.* ¶ 62.

¹²⁵ Award of Arbitrator, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/10, (Aug. 31, 2001).

¹²⁶ *Id.* ¶ 45.

¹²⁷ *Id.* ¶ 47.

¹²⁸ *Id.* ¶ 46.

specific” about how its interests as a developing country Member would affect the duration of the RPT.¹²⁹

In any event, this award interrupted the sequence of middle-ground decisions that had been adopted previously;¹³⁰ the 12-month RPT established was considerably closer to the complainants’ request.

3.5.2. EC - Export Subsidies on Sugar¹³¹

In this case, the European Communities asked the arbitrator to determine the RPT at 19 months and 12 days based on seven sets of particular circumstances. The three complainants to this dispute raised different arguments and requested different RPTs. Australia provided three different scenarios in which the EC could implement the recommendations and rulings of the DSB requesting a RPT of 6 months and 6 days for the first two and 11 months and 2 days for the last one. Brazil and Thailand presented arguments somewhat similar. Both requested RPTs to be fixed at 6 months and 6 days, if implementation was to be achieved by administrative means or, 7 months and 8 days if legislative measures were needed.¹³²

The arbitrator, examining the scope of the implementation measures needed, recognized once again that the implementing Member might select the means of implementation, but stressed that it “*does not have an unfettered right to choose any method of implementation*” (emphasis added).¹³³ In the context of this case, he decided that the EC, by adopting its proposed legislative means, were “not pursuing extraneous objectives.”¹³⁴

With respect to the steps involved in the EC’s legislative process, the arbitrator recognized the need of consulting the ACP countries, as requested by the EC, but claimed not to have sufficient

¹²⁹ *Id.* ¶ 51.

¹³⁰ See US - 1916 Act, *supra* note 71, Canada - Patent Term, *supra* note 77. However, this trend would still persist afterwards, as addressed in the Section 3.4.

¹³¹ Award of Arbitrator, *European Communities – Export Subsidies on Sugar*, WT/DS265/33, WT/DS266/33, WT/DS283/14, (Oct. 28, 2005).

¹³² *Id.* ¶ 35.

¹³³ *Id.* ¶ 69.

¹³⁴ *Id.* ¶ 73.

information to conclude that these consultations would result in additional time for implementation.¹³⁵

The arbitrator then turned to analyse the particular circumstances alleged by the EC. First, he decided that the implementing measure was not complex enough to justify any additional time for implementation.¹³⁶ Second, he disagreed with the EC's arguments that the sugar regime is "essentially integrated" in its policies.¹³⁷ Third, the arbitrator also rejected the EC's argument that it would be costly or even impossible to reverse the sugar production already undertaken before the Appellate Body's report. He perceived that this in fact represented a request for a transitional period for "structural adjustment."¹³⁸ Fourth, he did not take into account the administrative practice that regulations that must be implemented by the customs authorities are published "at least six weeks before their entry into force and take effect from 1 January or, exceptionally, from 1 July." He relied on evidence submitted by the complainants that showed a number of cases which did not follow this practice before.¹³⁹ Lastly, he also disregarded the periods of time awarded in previous arbitrations concerning legislative measures of the EC by saying that "[a]lthough an arbitrator could derive some useful guidance from previous arbitration awards in this regard, the facts and circumstances of implementation in one dispute may, and in most instances will, differ from the facts and circumstances of implementation in another dispute."¹⁴⁰

Next, the arbitrator considered the arguments concerning the application of Article 21.2 of the DSU. He expressly recognized that Article 21.2 refers to both implementing and complaining developing country Members¹⁴¹. Moreover, he decided that both Brazil and Thailand submitted evidence in support of their claims and in fact demonstrated that their affected interests as developing countries pursuant to Article 21.2 were relevant to the determination of the RPT.¹⁴² Finally, the RPT was fixed at 12 months and 3 days.

¹³⁵ *Id.* ¶ 81.

¹³⁶ *Id.* ¶ 88.

¹³⁷ *Id.* ¶ 90.

¹³⁸ *Id.* ¶ 92.

¹³⁹ *Id.* ¶ 95.

¹⁴⁰ *Id.* ¶ 97.

¹⁴¹ *Id.* ¶ 99.

¹⁴² *Id.* ¶¶ 98-101. According to the arbitrator, Brazil argued that: "its sugar industry constitutes more than a fifth of its total agribusiness gross domestic product; that a study in 1997 concluded that the sugar industry was "responsible for creating more than 654,000 direct and 937,000 indirect jobs in Brazil" and directly employed 764,593 persons in Brazil197; that the sugar industry has added importance because it is often located in rural areas and has a tradition of socially responsible employment; and that the European Communities' exports of subsidized sugar have a 'detrimental effect on prices in the export market.'" In its turn, Thailand argued that: "the European Communities'

3.5.3. EC - Chicken Cuts¹⁴³

In order to justify the 26-month period requested as the RPT in this case, the European Communities explained the steps to be taken for implementation, which included first seeking a decision from the World Customs Organization.¹⁴⁴

Brazil, one of the complainants, requested that the RPT be 5 months and 10 days. Thailand, the other complaining party, requested that the RPT should be fixed at 6 months. They both argued that the simple adoption of a Commission Regulation would achieve implementation in this dispute. Seeking a decision from the WCO would be an “extraneous objective” to the recommendations and rulings of the DSB.¹⁴⁵ Brazil also requested the application of Article 21.2 of the DSU highlighting the effects of the challenged measures had in its interests as a developing country.¹⁴⁶

It is first important to note that the arbitrator in this case did not accept the applicability of Article 21.2 of the DSU raised by Brazil to this case. Although recognizing that this provision makes no distinction between developing countries as complainant or implementing Members in a dispute, he affirmed that “my determination of the reasonable period of time results from my understanding of the *shortest period of time possible* in the Community legal order for implementing the proposed Commission Regulation amending Additional Note 7 to heading 02.10. *Having arrived at the shortest period of time possible, I consider that the reasonable*

sugar exports have a "depressive effect...on the world market price for sugar." Moreover, Thailand referred to “adverse consequences flowing from continued subsidized exports from the European Communities on "1.5 million farmers' and sugar-related workers' households.” Finally, Thailand argued that “a large portion of its sugar-producing areas are located in parts of Thailand with annual incomes below the average annual income of Thailand.” *Id.* ¶ 100.

¹⁴³ Award of the Arbitrator, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/13, WT/DS286/15, (Feb. 20, 2006).

¹⁴⁴ *Id.* ¶ 7.

¹⁴⁵ *Id.* ¶ 25.

¹⁴⁶ According to the arbitrator, “Brazil refers to lost sales in the Community market, observing that, based on export growth in the three years preceding the adoption of challenged measures, the volume of exports to the European Communities was 170,000 metric tons below what could have been expected in the absence of those measures, representing a loss of €300 million. Brazil also submits that the poultry industry is a critical sector in the Brazilian economy, responsible for the creation of at least 180,000 jobs. The poultry industry, in particular several large firms, has been important in making investments and generating jobs in disadvantaged regions within Brazil. Certain poultry firms have also served their communities by providing social programs to address the needs of the poor. As a result, Brazil claims, this industry has been vital to the trade and social development of Brazil, thereby rendering particularly acute the impact of the European Communities' WTO-inconsistent measures in this dispute.” *Id.* ¶ 32.

*period of time for implementation is not additionally affected by the fact that Brazil, as a complaining Member in this dispute, is a developing country” (emphasis added).*¹⁴⁷

The arbitrator did not take into consideration the WCO decision in the calculation of the RPT by arguing that the time needed for another international organization to take a decision could hinder implementation in this case.¹⁴⁸ The arbitrator also disregarded two ECJ judgements considered relevant by the EC. He concluded that he could not contradict both the panel and the Appellate Body, which had expressed “scepticism” about the arguments of the EC concerning these judgements.¹⁴⁹

The arbitrator also examined the argument that the EC had failed to take sufficient steps towards implementation following the panel and the Appellate Body reports. He observed that “all that seems to have occurred thus far is internal discussions within the European Communities. *Mere discussion is not implementation*” (Emphasis added).¹⁵⁰ Therefore, he decided to take this into account into the determination of the RPT.

Finally, after undertaking “detailed consideration” of the steps required under Community law for passing a Commission Regulation, he clarified some criteria which oriented his determination and decided that the RPT should be fixed at 9 months.

¹⁴⁷ *Id.* ¶ 82.

¹⁴⁸ *Id.* ¶ 55.

¹⁴⁹ *Id.* ¶ 62.

¹⁵⁰ *Id.* ¶ 66.

4 – Assessment and Critique of the Case Law

4.1. *The Evolution of the Case Law*

The examination of the arbitration procedures under Article 21.3 (c) of the DSU shown in Section 3 confirms the strong influence of precedents in WTO dispute settlement. Although *stare decisis* is not officially part of the system, not only panels and the Appellate Body, but also arbitrations to determine the RPT heavily rely on prior decisions, especially regarding the interpretation of the “particular circumstances” in the latter case. It is important to highlight that arbitrators usually refer to, but are not legally bound to, these decisions.¹⁵¹ Some of the interpretations have become principles on which arbitrators have based their awards.

Since Article 21.3 (c) provides no criteria for the determination of the RPT, the first arbitrators decided to adhere to the 15-month guideline established in this provision. This narrow interpretation created concern that losing parties would be automatically entitled to a 15-month RPT, contradicting the “prompt compliance” goal stipulated in Article 21.1 of the DSU.¹⁵² When arbitrators finally started to depart from this interpretation, they naturally began to face a tension between focusing on the existing domestic processes of the implementing Members and the political and social factors that could affect these processes.¹⁵³ One of the first relevant standards to be adopted helped to clarify the issue in favor of the first alternative as the arbitrator affirmed that the “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 DSU.”¹⁵⁴ It seems that this standard “began to establish the analytical framework for shorter periods in future awards.”¹⁵⁵

Not surprisingly, the arbitrations under Article 21.3 (c) have followed a trend towards shorter implementation periods since then.¹⁵⁶ The impact of these arbitrations on the agreements under Article 21.3 (b) of the DSU is also noteworthy. The RPTs set by agreement before the decision in

¹⁵¹ Shoyer, *supra* note 7 at 1357.

¹⁵² Gleason, *supra* note 9, at 2.

¹⁵³ J. Waincymer, WTO Litigation. Procedural Aspects of Formal Dispute Settlement 650 (2002).

¹⁵⁴ See *EC – Hormones*, *supra* note 22.

¹⁵⁵ Gleason, *supra* note 9, at 3.

¹⁵⁶ It has been observed that “[i]n more recent arbitrations practice, the guideline of 15 months seems to have been regarded rather as the maximum permissible period.” See Zdouc, *supra* note 10, at 91.

EC-Hormones were fixed at 15 months. After the “shortest period possible within the legal system of the implementing Member” standard came into play, the agreements resulted in shorter RPTs. It seems that the complainants’ threats to resort to Article 21.3 (c) arbitration normally drive the implementing Member to accept a negotiated RPT rather than undergo arbitration procedures. Therefore, the Article 21.3 (c) awards can be seen as the “driving force” behind the general trend towards shorter implementation periods.¹⁵⁷

In that the standard is the shortest period possible *within the legal system of the implementing Member*, arbitrators progressively turned their eyes to the domestic legislative systems. In fact, the examination of internal legal procedures has become deeper and deeper with the advent of new cases. One logical consequence of this “look inside” is the rejection of periods of time awarded in previous arbitrations as relevant to the determination of the RPT in a particular case. This is due to the fact that circumstances of implementation in one dispute differ from the circumstances in another dispute, given that neither the measures to be implemented nor the domestic legislative systems are identical in each case.¹⁵⁸

It is also important to notice that arbitrators have always been aware of the limitation of their roles. The mandate of the arbitrators under Article 21.3 (c) of the DSU was clarified early by the award in *Canada - Pharmaceutical Products*: “The proper concern of an arbitrator under Article 21.3 (c) is with when, not what.” Consequently, the discretion of the implementing Member in choosing the means of implementation is a generally recognized standard. However, it is also clear that this right is not absolute. As one arbitrator observed, it must be such that it can be implemented within a reasonable period of time in accordance with Article 21.3 (c) of the DSU. Moreover, Members must act in good faith in selecting the implementation method.¹⁵⁹

In this context, arbitrators established a number of standards in regard to domestic legal procedures with a view to guaranteeing that the RPT is indeed the shortest possible. The case law distinguishes legislative from administrative measures; the RPT for the latter is normally shorter. In the same manner, it distinguishes complex implementation processes through extensive new

¹⁵⁷ See Gleason, *supra* note 9, at 3; Y. Guohua et al., *WTO Dispute Settlement Understanding: A Detailed Interpretation* 237-40 (2005); P. Monnier, *The Time to Comply with an Adverse WTO Ruling: Promptness with Reason*, 35 *J. World Trade* 825, 831 (2001).

¹⁵⁸ See *Korea - Alcoholic Beverages*, *supra* note 34; *US-Section 110(5) Copyright Act*, *supra* note 57; *EC - Export Subsidies on Sugar*, *supra* note 131.

¹⁵⁹ See *EC - Export Subsidies on Sugar*, *supra* note 131.

rules affecting many sectors to simple ones that merely require a repeal of a single provision.¹⁶⁰ Moreover, it is well recognized that Members are expected to use the flexibility available within its domestic procedures to achieve implementation.¹⁶¹ However, there are limits in the search for the shortest period. A member is not required to use an extraordinary legislative procedure rather than the normal legislative procedure one.¹⁶²

Furthermore, arbitrators have interpreted a number of other factors related to the determination of the RPT. “Extraneous objectives” such as the economic repercussions of the implementing measure¹⁶³ as well as structural adjustments to affected sectors¹⁶⁴ are not considered particular circumstances. If “domestic “contentiousness”¹⁶⁵ is not a relevant factor, a measure that does not reflect a “simply opposition by interest groups,” playing a “unique role and impact” in a society, can be relevant.¹⁶⁶ The distinction between the “contentiousness” and the “unique role and impact” of the measure seems to be pertinent. Some maintain that the latter approach takes “a more precise look at the role and place of the measure at issue in society. In essence, it is a more reliable way to assess the support for a measure (and therefore the degree of opposition to, and difficulty of, compliance).”¹⁶⁷

The volume of legislation introduced compared to the small percentage of legislation passed, the distribution of seats in the Parliament, the fact that a new President or a new Congress had recently taken over, among others factors, have been equally disregarded.¹⁶⁸ In contrast, the implementing Member’s failure in adequately beginning implementation after the panel and Appellate Body reports is negatively taken into account in the determination of the RPT.¹⁶⁹ It means that Members must take effective steps to start implementation. Altogether, it seems that the implementing Member “should not wait to see what happens in an Article 21.3(c) arbitration before taking action.”¹⁷⁰

¹⁶⁰ See Canada - Pharmaceutical Patents, *supra* note 41.

¹⁶¹ See US - 1916 Act, *supra* note 72.

¹⁶² See Korea - Alcoholic Beverages, *supra* note 34.

¹⁶³ See Canada - Patent Term, *supra* note 77.

¹⁶⁴ See *Indonesia – Autos*, *supra* note 26.

¹⁶⁵ See Canada - Pharmaceutical Patents, *supra* note 41.

¹⁶⁶ See Chile - Price Band System, *supra* note 90.

¹⁶⁷ WorldTradeLaw.net, Dispute Settlement Commentary, WTO Arbitrations. DSU Article 21.3(c) Arbitrations - "Reasonable Period of Time" <http://www.worldtradelaw.net/dsc/arbdsccpage.htm>; Chile – Agricultural Products, *supra* note 90.

¹⁶⁸ Monnier, *supra* note 157, at 837-38.

¹⁶⁹ See US-Section 110(5) Copyright Act, *supra* note 57.

¹⁷⁰ WorldTradeLaw.net, *supra* note 167. . US – Copyright *supra* note 57.

The burden of proof is also a decisive consideration for the calculation of the RPT. Regardless of its importance, it is pertinent to notice that in most Article 21.3(c) arbitrations, no explicit reference is made to this matter.¹⁷¹ The awards in EC - Hormones and U.S. - 1916 Act adopted the view that the party seeking to prove that there are “particular circumstances” has the burden of proof. The arbitrator in Canada - Pharmaceutical Patents decided that the burden of proof in showing that the proposed period constitutes a “reasonable period of time” rests with the implementing Member. He added that: “the longer the proposed period of implementation, the greater this burden will be.”¹⁷² In EC - Tariff Preferences, the arbitrator took into consideration the arguments presented by both the complainant and the implementing parties and expressly denied the fact that the implementing Member’s burden of proof should become greater if the period proposed by the Member is longer. The arbitrator seemed to have implied that both parties must provide evidence in support of their requested periods. Some would argue that this is the most appropriate approach in this type of arbitration, since there is no allegation of violation, but rather a simple dispute over the proper time period for implementation.¹⁷³

An important question still to be clarified is the possibility of the establishment of multiple RPTs. In US - Gambling, the arbitrator faced Antigua’s request of two different RPTs, being one related to the provision of non-sports-related and horseracing gambling and betting services; and the other related to the provision of other sports-related gambling and betting services. He decided that the issue was not under his mandate since this distinction had not been mentioned before neither by the panel nor by the Appellate Body. However, it seems that there is room for further debate given the following arbitrator’s statement: “I am not persuaded that the mere use of the indefinite article ‘a’ in the phrase ‘a reasonable period of time’ suffices, as the United States suggests, to establish definitively that an arbitrator is authorized only to determine a *single* reasonable period of time for implementation in a dispute. At the same time, conceptually, I have difficulty accepting that it may be possible to determine, as Antigua seems to request me to do, two separate reasonable periods of time in respect of the *same* measure.”¹⁷⁴ Consequently, the issue on whether different RPTs can be determined for different measures is open for future arbitrations under Article 21.3 (c).

¹⁷¹ WorldTradeLaw.net, *supra* note 167. US – 1916 Act, *supra* note 71.

¹⁷² *Canada - Pharmaceutical Patents*, *supra* note 41, ¶ 47.

¹⁷³ WorldTradeLaw.net, *supra* note 167. EC – Tariff Preferences, *supra* note 67.

¹⁷⁴ *US – Gambling*, *supra* note 113, ¶ 41.

Another common discussion in the case law concerns the controversial applicability of Article 21.2 of the DSU. Thus far, there is no secure standard for interpreting this provision. The arbitrator in *Indonesia - Autos* was the first to recognize this applicability in Article 21.3 (c) proceedings in which a developing country is the implementing Member. He decided to grant additional time to the implementation process. However, it seems that Article 21.2 was applied due to the fact that Indonesia was facing a difficult economic and financial situation rather than due to its developing country status *per se*. Therefore, one question that remained open is whether developing countries not facing economic and financial problems would have been granted the same treatment. It seems that the answer is negative.¹⁷⁵ A second question is how Article 21.2 of the DSU should be applicable. Due to its general terms, this provision seems to refer to all developing countries, regardless of their social, economic and financial situation.

The award in *Chile - Alcoholic Beverages* urged arbitrators to be “generally mindful of the great difficulties” developing countries face as implementing Members. However, Chile failed to prove how its interests as a developing country would have any bearing on the length of the RPT. In other words, the arbitrator recognized the applicability of Article 21.2 of the DSU, but made clear that the party requesting this application must demonstrate what its interests are and how they are affected by the length of the RPT.

Antigua, the complainant in *US – Gambling*, suggested that Article 21.2 should be used “to require the United States to be especially diligent and to use the flexibility inherent in its system to achieve rapid implementation.”¹⁷⁶ The arbitrator concluded that Article 21.2 can be also applicable to developing countries as complaining parties to a dispute. He also agreed with the award in *Chile - Alcoholic Beverages* to require a “demonstration of the adverse affects of such measures on the interests of the developing country Member(s) concerned .”¹⁷⁷ It is particularly

¹⁷⁵ See *Chile - Price Band System*, *supra* note 90. In this case, the arbitrator seemed to have recognized the standard set forth in *Indonesia – Autos* by affirming: “wherein Members have identified, *not simply their positions as developing countries, but also "severe" or "dire" economic and financial situations* existing at the time of the proposed period of implementation” (emphasis added). *Id.* ¶ 56. In other words, the developing country status is not sufficient *per se*, being the existence of “specific obstacles” or “concrete difficulties” also necessary. See also *Argentina - Hides and Leather*, *supra* note 125. Here, the arbitrator confirmed that “I agree that under Article 21.2 of the DSU in conjunction with Article 21.3(c), account may appropriately be taken of the circumstance that the WTO Member which must comply with the DSB recommendations and rulings is *a developing country confronted by severe economic and financial problems*” (emphasis added). *Id.* ¶ 51.

¹⁷⁶ *US – Gambling*, *supra* note 113, ¶ 26.

¹⁷⁷ *Id.* ¶ 60.

noteworthy that although the arbitrator suggested the need for more data and evidence, he was not clear enough on how much additional information was needed.¹⁷⁸

In *EC - Export Subsidies on Sugar*, the arbitrator decided that “particular attention” should be paid to the interests of both implementing and complaining developing country Members.¹⁷⁹ He accepted the evidence submitted by both Brazil and Thailand in support of their claims and took into consideration their affected interests as developing countries pursuant to Article 21.2 to determine the RPT. However, one issue remained unclear concerning the applicability of Article 21.2 to developing countries which are not parties to a particular arbitration proceeding under Article 21.3 (c). The arbitrator did not decide on this issue due to limited evidence in which specific manner the ACP countries would be affected by the implementation in this case.¹⁸⁰

The scenario above was rapidly changed with the advent of the award in *EC - Chicken Cuts* in which the arbitrator calculated the RPT regardless of the status of the complainant. In this case the arbitrator decided to focus on the “shortest period of time possible” rather than attributing some weight to the developing countries’ interests in accordance with Article 21.2 of the DSU. If future arbitrators follow the latter standard, Article 21.2 “may not have much impact where the developing country at issue is the complainant.”¹⁸¹

It is currently not evident which direction arbitrators will take in the future with respect to this issue due to the last conflictive decisions.¹⁸² In any event, it is clear that a party seeking the application of Article 21.2 of the DSU must provide sufficient evidence in support of its request, as well as establish a relationship between its interests as a developing country and the duration of the implementing measure.

The arbitrators have also examined other minor questions in regard to what may constitute a “particular circumstance” to a dispute under Article 21.3 (c) of the DSU. However, what is

¹⁷⁸ WorldTradeLaw.net, *supra* note 167; US – Gambling Services, *supra* note 113.

¹⁷⁹ *EC - Export Subsidies on Sugar*, *supra* note 131, ¶ 99.

¹⁸⁰ *Id.* ¶ 102.

¹⁸¹ WorldTradeLaw.net, *supra* note 167; *EC – Chicken Classification*, *supra* note 143.

¹⁸² For a comprehensive analysis of future arbitrations concerning developing countries complainants, see Alberto Alvarez-Jimenez, *An Operative Interpretation of the DSU to Calculate the Reasonable Period of Time for Implementation in Disputes involving Developing Countries Complainants*, 6 World Trade Rev. 451 (2007).

relevant here is that comprehensive case law is available to arbitrators in order to guide their determinations of the RPT.

4.2. The Calculation of the RPT

An analysis of the link between the case law examined above and the effective calculation of the RPT is decisive in determining whether Article 21.3 (c) arbitrations may be “arbitrary .”

In Section 3.1, it was made clear that arbitrators decided to adhere to the 15-month guideline provided for in Article 21.3 (c), which meant that a calculation of the RPT was not necessary. Even in the EC - Hormones dispute, in which the “shortest period possible within the implementing Member’s legal system” standard was established, the arbitrator decided to disregard the “particular circumstances” pointed out by the parties.

In later disputes, discussed in Section 3.2, the arbitrators examined the “particular circumstances” identified by the parties, but seemed to have failed in establishing a connection between these circumstances and the RPTs which were fixed. For example, in *Indonesia - Autos*, the arbitrator decided to take into account Indonesia’s status as a developing country in accordance with Article 21.2 of the DSU. By doing so, a longer period than the *shortest possible* one was naturally expected. The arbitrator decided upon an additional period of 6 months “over and above the six - month period required for the completion of Indonesia’s domestic rule -making process,”¹⁸³, but did not explain the reasons for electing this extra period. Since the adopted standard is that the RPT should be the shortest possible *within the legal system of the implementing Member*, it seems that this period should have had some relationship with the domestic legal procedures followed in Indonesia. Arguably, a careful assessment of Indonesia’s domestic legal procedures would have been needed to determine more precisely what additional time would be helpful for compliance in this case. For example, the arbitrator could have allowed Indonesia to choose the longer of two possible time periods for a particular procedural step stipulated in its domestic legislation.

¹⁸³ *Indonesia - Autos*, *supra* note 26, ¶ 21.

The Australia - Salmon case is an even more significant demonstration of the lack of connection between the “particular circumstances” and the RPT determined. After examining the arguments of the parties, the arbitrator concluded that the RPT should be “considerably shorter than 15 months.” He then simply established an 8-month period without taking into consideration the implementing Member’s domestic legal procedures to adopt the recommendations and rulings of the DSB. In this case, the arbitrator could have relied on the available information on Australia’s legal domestic steps. “In its written submission, Australia points out that *the AQIS Handbook details a series of steps to be taken in the course of an Import Risk Analysis procedure under Australian law*. Some of the steps are allocated a specific time -period, but others are not. *A total of 315 days, i.e., 10½ months, is required for the completion of the time -bound steps for scientific studies under the procedures of the AQIS Handbook*” (emphasis added).¹⁸⁴ In this case, Australia had requested 15 months for compliance, arguing that 10½ months were necessary for the carrying out of risk assessments. The arbitrator decided that this test was not pertinent to the determination of the RPT. Therefore, it would have been more appropriate to discount the 10½ - month period related to this step from the requested 15-month period in order to calculate the RPT. Australia, in its declaration, seemed to implicitly recognize that it was capable of conducting the other steps towards compliance in 4½ months. Therefore, it seems that this period would have represented an accurately determined RPT, as opposed to the 8 months determined.

Section 3.3 has provided examples of well-established connections between “particular circumstances” in the implementing Member and the RPTs defined.

In Korea - Alcoholic Beverages, Korea had requested a total time of 15 months to implement the recommendations and rulings of the DSB because five months were needed to complete “follow-up measures,” including amendments. The arbitrator affirmed that these amendments could be prepared during the course of the legislative process instead of after the promulgation of the legislation. The arbitrator then analyzed the Korean Act on the Promulgation of Acts and Decrees, which provides for a thirty -day grace period for enforcement of legal instruments. Based on this legislation, he decided to grant Korea additional thirty days instead of the five-months requested. The arbitrator did not explain his calculation. However, once he had decided that the additional period to complete “follow-up measures” should be 1 month instead of 5 months, he seemed to have discounted this 4-month difference from the total 15 months requested by Korea

¹⁸⁴ *Australia – Salmon, supra* note 32, ¶ 38.

and fixed the RPT at 11 months and two weeks. Overall, this decision shows a RPT calculated on the basis of the implementing Member's legal system.

The award in *Canada - Pharmaceutical Patents* also observed the Canadian domestic legislation process. By the time of the arbitration, the arbitrator noticed that the proposed regulatory change had already been published on August 5, 2000, in the form proposed by Canada in the proceedings. He acknowledged the required 30-day pre-publication period required by Canadian procedures. Thus, this period would expire on September 4, 2000. He then observed that: “[t]here is evidence on record in this proceeding that administrative agencies in Canada have acted quickly in cases where intellectual property rights have been known to be at risk.”¹⁸⁵ Therefore, the RPT should end “soon thereafter.”¹⁸⁶ He finally decided that the RPT would end on October 7, 2000. Although the arbitrator did not explicitly clarify how the RPT was calculated, this award seemed to represent a coherent decision because it observed the domestic legislation of the implementing Member and used a comparative approach with previous processes in Canada.

The award in *EC - Tariff Preferences* seems to be the most accurate one in terms of strict observance of the implementing Member's legislative process. It is therefore worth deeper examination. Implementation in this case would be achieved in two steps, according to the arbitrator's decision. The first step would be the adoption of a Regulation by the Council, estimated by the complainant and the respondent to take place in November 2004 or May 2005, respectively. This period was primarily dependent upon the date on which the Commission would be able to adopt a proposal. The arbitrator relied on a “press statement” by the Commission to accept that this could not be done until October 2004.¹⁸⁷ Afterwards, the arbitrator examined the necessity for participation of the European Parliament and the Economic and Social Committee. He decided that, although not explicitly mandated by legal instruments, the opinions of such bodies should be included in determining the RPT. Consequently, the Council would also need time to consider these opinions. However, the arbitrator observed that the Council could begin its examination of the Commission's proposal before receiving the opinions of the Parliament and the Economic and Social Committee. Therefore, he concluded that the Council could be

¹⁸⁵ *Canada - Pharmaceutical Patents*, *supra* note 42, ¶ 63.

¹⁸⁶ *Id.* ¶ 62.

¹⁸⁷ *EC - Tariff Preferences*, *supra* note 65, ¶¶ 38-40.

reasonably expected to adopt a regulation before May 2005, which was the date initially proposed by the respondent.¹⁸⁸

The second step toward implementation would be the adoption of a Regulation by the Commission. The EC argued that the regulation adopted would have to include criteria to govern the selection of beneficiaries to address development needs within the new GSP scheme and the Commission would need to select those beneficiaries.¹⁸⁹ Although recognizing that it is for the EC to decide how it should conduct the implementation, the arbitrator recalled that his task was to determine the RPT with respect to the Drug Arrangements and not to the whole GSP.¹⁹⁰ Hence, this additional period required by the EC was not taken into consideration. The final step would be the publication of the regulation and its entry into force. The arbitrator observed that: “pursuant to *“established practice under the [European Communities’] internal legislative procedure”* as reflected in a Council Resolution of 1974, *the regulation should enter into force on 1 January or “exceptionally” on 1 July*, and publication should normally take place at least six weeks before entry into force (emphasis added).¹⁹¹ The arbitrator decided to “regard the administrative practice of the European Communities, as it pertains to advance publication of tariff changes and the date on which such changes take effect, as a relevant factor in determining the reasonable period of time for implementation.”¹⁹²

In the end, the RPT fixed was accurately calculated and fundamentally based on the EC’s domestic legislative process. The arbitrator decided that it should be 14 months and 11 days, expiring on July 1, 2005. To make it clear that his decision took into account the abovementioned “administrative practice” of the European Communities, the arbitrator even included a footnote in his decision providing the following explanation: “I have calculated the reasonable period of time in the following manner. 14 calendar months from 20 April is 20 June 2004, plus 11 additional days brings us to 1 July 2005. Thus, the last day of the reasonable period of time is 1 July 2005 .” Altogether, the degree of elaboration of the award in EC - Preferences should be regarded as a model for calculation of the RPT in future arbitrations.

¹⁸⁸ *Id.*, ¶¶ 41-43.

¹⁸⁹ *Id.*, ¶ 44.

¹⁹⁰ *Id.*, ¶ 48.

¹⁹¹ *Id.*, ¶ 50.

¹⁹² *Id.*, ¶ 51.

If it is true that some cases discussed in Section 3.2 should be considered as good examples with respect to an accurate calculation of the RPT, the same cannot be said about Chile - Alcoholic Beverages and Canada - Autos. In these cases, likewise the aforementioned ones, the arbitrators did conduct a deep survey in the implementing Member's legislation and identified some steps that could have been accelerated. However, in the absence of time frames fixed by law, the decisions seemed to be somewhat subjective. In Canada - Autos, for example, the "Pre-Drafting" and "Drafting/Approval" stages, which were considered excessive, accounted for 210 days together. In order to quantify how excessive these stages actually were, the arbitrator could have relied on similar regulatory-making processes previously conducted in Canada. The European Communities provided two examples in which regulatory amendments were accomplished in three months to prove that Canada could implement the recommendations within this time period.¹⁹³ It is not clear in the award if such amendments had similar content in comparison with the implementation measure needed in this dispute. In case of a positive answer, they could have been useful to the determination of the RPT in this dispute and one could argue that the fixed RPT was somewhat overestimated.

In the awards addressed in the Section 3.4, the arbitrators uniformly argued that neither the complainant's nor the respondent's requested RPTs were reasonable. In the end, the RPT in these cases seemed to represent a middle-ground between the requested periods. In any event, the arbitrators do not provide any explanation with respect to their calculations.

An example of this pattern is the decision in Chile - Price Band System. Although it represents a very meticulous piece of legal work, containing a careful examination of the particular circumstances of the case, it is not clear how the fixed 14-month RPT reflected the issues raised by the parties and considered by the arbitrator. How much weight did the arbitrator give to the "unique role and impact" of the price band system on Chilean society? How did it regard the fact that Chile was found to have not taken sufficient steps towards implementation since the adoption of the panel and Appellate Body reports? It would have been more appropriate for the arbitrator to establish the relevance of each of these findings to his calculation, rather than merely affirming that: "I do not find Chile's proposal of 18 months to be necessary, nor do I find Argentina's

¹⁹³ *Canada – Autos*, *supra* note 53, ¶ 26.

proposal of nine months and six days to be a sufficiently "reasonable" period within which Chile should complete implementation.”¹⁹⁴

Although the decisions in Section 3.5 represented an interruption in the middle-ground decisions, the lack of reasoning in regard to the calculation of the RPT continued to be the rule.

In *EC - Export Subsidies on Sugar*, the reasons behind the arbitrator’s decision are not easily found. First, none of the particular circumstances alleged by the EC were accepted. Furthermore, Article 21.2 of the DSU was taken into account in the determination of the RPT. With respect to the EC’s law-making process, the arbitrator had observed that: “the average time for the adoption of a Council regulation and of implementing Commission regulations establishing a new CMO for agricultural products is 11.4 months, and the median figure is 9.2 months.” However, the final RPT is higher than these figures, even though the arbitrator decided that the European Communities should use the flexibility and discretion in its legal system to ensure that the relevant legislation is enacted more speedily. Arguably, these factors together should have been reflected in an even shorter RPT than the 12 months and 3 days fixed.

In *EC - Chicken Cuts*, the arbitrator expressly mentioned the criteria that oriented his determination of the RPT. In observing that not all the implementing Member’s steps were required by law, the arbitrator stated that: “In some instances, this may suggest that those actions not required by law are to be given less weight in my determination of the reasonable period of time. In other instances, however, the fact that a certain action is not mandated does not mean that such action is irrelevant to my determination.”¹⁹⁵ He also reaffirmed that the implementing Member should be expected to use the flexibility within its system to ensure compliance. Finally, he added that: “in certain instances, I have accepted the time claimed to be necessary by the European Communities, but have discounted that time for steps that, in my view, could reasonably be completed sooner, bearing in mind that implementation should occur in the shortest period of time possible within the legal system of the implementing Member.”¹⁹⁶

Even though the arbitrator explicitly described the criteria that guided his determination, he again failed to explain the weight of each factor to the 9-month RPT fixed. Arguably, he could have

¹⁹⁴ *Chile - Price Band System*, *supra* note 90, ¶ 57.

¹⁹⁵ *EC - Chicken Cuts*, *supra* note 143, ¶ 79.

¹⁹⁶ *Id.* ¶ 80.

established a closer link between the used criteria and the RPT by clarifying, *inter alia*, in which “instances” he accepted the time claimed to be necessary by the EC and which steps could have been completed sooner and were therefore discounted.

As demonstrated in this section, almost none of the awards under article 21.3 (c) of the DSU establish a coherent connection between the arbitrators’ reasoning and the RPT fixed. Out of the 21 cases studied, only the awards in Korea - Alcoholic Beverages, Canada - Pharmaceutical Patents and EC - Tariff Preferences can be considered exceptions to this rule. In the other cases, although the “particular circumstances” are comprehensively discussed, as seen in the previous section, there is no further explanation concerning the calculation of the RPT. In fact, one scholar noticed before that “although there are indications in the arbitration awards as to the circumstances that are or are not to be taken into account in determining the RPT, how the arbitrators arrive at the specific RPT in each case is less clear. In every award issued to date, the arbitrator simply pronounces a period at the end of his award, without explaining why that particular period was chosen.”¹⁹⁷ A considerable degree of subjectivity is therefore generally found in arbitrations under Article 21.3 (c) of the DSU. In this sense, the determination of the RPT can be regarded as “arbitrary”.

¹⁹⁷ V. Hughes, *Arbitration within WTO, in* The WTO Dispute Settlement System 1995-2003, at 84 (F. Ortino and E.U. Petersmann, eds. 2004).

5 - Concluding Remarks

One of the first questions raised in this dissertation concerned the importance of calculating an accurate RPT. Some argue that it is not only convenient but also fundamental that the determination of the RPT remains somewhat unclear. One scholar argued that “arguments about appropriate implementation periods enter into complex and sensitive questions of domestic politics and constitutional structure. *It is natural for arbitrators to be reluctant to make strict rulings about the likely time within which a particular country could deal with vested interest groups and legislative processes*” (emphasis added).¹⁹⁸ With respect to the weight of the application of Article 21.2 of the DSU to the calculation of the RPT in EC – Subsidies on Sugar, it has been observed that “the award was completely silent regarding how much of a role these circumstances played in the calculation. *This absence may have been convenient for the arbitrator. It permitted him to avoid debates regarding whether he had attached either too much or too little importance to the developing country complainants’ affected interests [.]*”¹⁹⁹ Others go even further to state that “[i]n fact, the determination of the RPT is not a purely mathematical process, and it has been administered in a more flexible manner...The effectiveness or the required accuracy of the arbitration should be assessed in the light of the overall long-term process required for the implementation...The flexible approach of the Article 21.3 (c) arbitration is also in line with the nature of the WTO dispute settlement system...The approximate setting of the RPT is certainly expected to facilitate interactions between the parties towards the settlement of a dispute. *A rigid and accurate RPT does not promote further interactions specifically because the implementation involves domestic as well as international political processes*” (emphasis added).²⁰⁰

If it is true that accuracy is a difficult task to be achieved in Article 21.3 (c) arbitrations, it also seems that a degree of objectivity is generally desirable. Arguably, the arbitrator in US - Offset Act (Byrd Amendment) involuntarily shed some light on this matter. In examining the RPT proposed by the implementing Member in this case, he stated that “*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*

¹⁹⁸ Waincymer, *supra* note 153, at 649

¹⁹⁹ Alvarez-Jimenez, *supra* note 182, at 16.

²⁰⁰ Y. Fukunaga, *Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations*, 9 J. Int'l Econ. L. 383, 403. (2006).

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. *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.”²⁰¹

In this passage, the arbitrator referred to the implementing Member’s obligation to demonstrate the logic behind its requested RPT. In the arbitrator’s opinion, the party should indicate estimates of the time periods required for the implementation steps. Otherwise, the RPT would be merely “speculative.” It seems that the same analysis can be applied to the RPT calculated in Article 21.3 (c) awards. By analogy, a RPT fixed without an explanation of how this time period is calculated would be also speculative.

In any event, in order to assess the relevance of an accurate RPT in Article 21.3 (c) arbitrations, this dissertation would rather sustain the recognized need for predictability in the WTO dispute settlement system. As earlier observed, arbitrations to determine the RPT have been following the example of panels and the Appellate Body and giving deference to prior decisions. It has been recognized that “[t]his reliance on prior cases, while not always determinative, and certainly not totally binding on subsequent panel cases, nevertheless provides a degree of consistency which, in turn, enhances the predictability of the whole system. That is called for the DSU, when it stresses the goal of providing “security and predictability.”²⁰²

The ultimate goal of the arbitration under Article 21.3 (c) of the DSU is to establish a RPT for the implementation of the rulings and recommendations of the DSB. *Time* itself is the object of these arbitrations. If the arbitrator fails to provide an explanation for the calculation of the RPT, that can only be detrimental to the predictability of the system. As shown in Section 4.1, arbitrators rely on an abundant case law regarding the “particular circumstances” that may affect the determination of the RPT. Based on previous awards, parties to a dispute can therefore

²⁰¹ *US – Offset Act*, *supra* note 100, ¶ 66.

²⁰² WORLD TRADE ORGANIZATION, *The Future of the WTO. Addressing INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM* 52 (2004).

reasonably expect that arbitrators take into account certain “particular circumstances .” However, parties cannot measure the practical implication of these circumstances to the definition of the RPT, since most awards do not describe this connection. Arguably, the lack of transparency in the determination of the RPT decreases predictability in Article 21.3 (c) arbitrations.

This is not to say that parties should be able to rely on a concrete RPT awarded in a previous case. It is of paramount importance to recall that specific periods of time will most probably be different in different situations as the circumstances of implementation in one dispute differ from the circumstances in another dispute.²⁰³ Rather, by knowing how arbitrators have considered certain particular circumstances in previous cases to calculate the RPT, parties can feasibly expect something more than mere speculation regarding the RPT to be fixed in a particular case.

To conclude, it is in fact possible to attach a high degree of objectivity to the calculation of the RPT, as observed in the awards in Korea - Alcoholic Beverages, Canada - Pharmaceutical Patents and, especially, EC - Tariff Preferences. These cases demonstrate that the hard task of establishing a transparent connection between the particular circumstances of each case and the reasonable period of time has been achieved before and can be achieved again in future arbitrations.

²⁰³ The arbitrators in US - Hot Rolled Steel, US - Offset Act (Byrd Amendment) and US - Gambling referred to the Appellate Body’s decision in US - Hot Rolled Steel (¶¶ 84-85), although the latter belongs in another context, to explain the case-by-case approach: “The word ‘reasonable’ implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is ‘reasonable’ in one set of circumstances may prove to be less than ‘reasonable’ in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time under Article 6.8 and Annex II of the *Anti-Dumping Agreement*, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation. In sum, a ‘reasonable period’ must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of ‘reasonableness,’ and in a manner that allows for account to be taken of the particular circumstances of each case.” The arbitrator in US - Hot Rolled Steel added that: “Although, in the above excerpt the Appellate Body dealt with the *Anti-Dumping Agreement*, and not the DSU, the essence of ‘reasonableness’ so articulated is, in my view, equally pertinent for an arbitrator faced with the task of determining what constitutes ‘a reasonable period of time’ in the context of the DSU” (¶ 26). See also Korea - Alcoholic Beverages, *supra* note 34; US-Section 110(5) Copyright Act, *supra* note 57; EC - Export Subsidies on Sugar, *supra* note 131.

Annex 1 (Table of Disputes)

| Disputes (chronologically) | Complainants | RPT requested by Complainants | RPT requested by Respodents | Award |
|--|--|--|--|--------------------------|
| Japan - Alcoholic Beverages II | <i>Canada, European Communities, United States</i> | Canada : not specified EC: 15 months US: 5 months | <i>23 months/ 5 years</i> | 15 months |
| EC - Bananas III | <i>Ecuador, Guatemala, Honduras, Mexico, United States</i> | 9 months | <i>15 months and 1 week</i> | 15 months and 1 week |
| EC - Hormones | <i>Canada, United States</i> | 10 months | <i>39 months</i> | 15 months |
| Indonesia – Autos | <i>European Communities, United States</i> | EC: 6 months US: 1 month | <i>15 months</i> | 12 months |
| Australia – Salmon | <i>Canada</i> | not specified | <i>15 months</i> | 8 months |
| Korea - Alcoholic Beverages | <i>European Communities, United States</i> | 6 months | <i>15 months</i> | 11 months and 2 weeks |
| Chile - Alcoholic Beverages | <i>European Communities</i> | 8 months and 9 days | <i>18 months</i> | 14 months and 9 days |
| Canada - Pharmaceutical Patents | <i>European Communities</i> | 12 months | <i>11 months</i> | 6 months |
| Canada - Autos | <i>European Communities, Japan</i> | 3 months | <i>11 months and 12 days</i> | 8 months |
| US – Section 110(5) Copyright Act | <i>European Communities</i> | 10 months | <i>15 months</i> | 12 months |
| US - 1916 Act | <i>European Communities, Japan</i> | EC: 6 months and 10 days Japan: 6 months | <i>15 months</i> | 10 months |
| Canada - Patent Term | <i>United States</i> | 6 months | <i>14 months and 2 days</i> | 10 months |
| Argentina - Hides and Laeather | <i>European Communities</i> | 8 months | <i>46 months and 15 days</i> | 12 months and 12 days |

| | | | | |
|--|---|---|------------------------------|-----------------------|
| US - Hot-Rolled Steel | <i>Japan</i> | 10 months | <i>18 months</i> | 15 months |
| Chile - Price Band System | <i>Argentina</i> | 9 months and 6 days | <i>18 months</i> | 14 months |
| US - Offset Act (Byrd Amendment) | <i>Australia, Brazil, Canada, Chile, European Communities, India, Indonesia, Japan, Korea, Mexico, Thailand</i> | 6 months | <i>15 months</i> | 11 months |
| EC - Tariff Preferences | <i>India</i> | 6 months and 2 weeks | <i>20 months and 10 days</i> | 14 months and 11 days |
| US - Oil Country Tubular Goods Sunset Reviews | <i>Argentina</i> | 7 months | <i>15 months</i> | 12 months |
| US - Gambling | <i>Antigua and Barbuda</i> | 1 month/ 6 months | <i>15 months</i> | 11 months and 2 weeks |
| EC - Export Subsidies on Sugar | <i>Australia, Brazil, Thailand</i> | Australia: 6 months and 6 days/ 11 months and 2 days Brazil and Thailand: 6 months and 6 days/ 7 months and 8 days | <i>19 months and 12 days</i> | 12 months and 3 days |
| EC - Chicken Cuts | <i>Brazil, Thailand</i> | Brazil: 5 months and 10 days Thailand: 6 months | <i>26 months</i> | 9 months |

References

Alvarez-Jimenez, A. (2007) *An Operative Interpretation of the DSU to Calculate the Reasonable Period of Time for Implementation in Disputes involving Developing Countries Complainants* . World Trade Review. Cambridge: Cambridge University Press. Fall 2007. Forthcoming.

Fukunaga, Y. (2006) *Securing Compliance through the WTO dispute settlement system: implementation of DSB recommendations* . In: Journal of International Economic Law 9(2), pp. 383-426. Oxford: Oxford University Press.

Gleason, C. Walther, P. (2000) *The WTO dispute settlement implementation procedures: A system in need of reform*. In: Law and Policy in International Business. Available at: <http://www.law.georgetown.edu/journals/gjil/symp00/documents/gleason.pdf> Last visited on: 4th of September 2007.

Guohua, Y. Mercurio, B. and Yongjie, L. (2005), *WTO Dispute Settlement Understanding: A Detailed Interpretation*. The Hague: Kluwer Law International.

Hughes, V. (2004) *Arbitration within WTO*. In: Ortino, F. and Petersmann, E.-U. (eds.) *The WTO Dispute Settlement System 1995-2003*. The Hague: Kluwer Law International.

Jackson, J., Davey, W. and Sykes, A. (2002) *Legal problems of international economic relations: cases, materials and text*. 4th ed. St. Paul, MN: West Group.

Matsushita, M. Schoenbaum, T. and Mavroidis, P. (2006) *The World Trade Organization. Law, Practice, and Policy*. Oxford: Oxford University Press.

Monnier, P. (2001) *The Time to Comply with an Adverse WTO Ruling: Promptness with Reas on*. In: Journal of World Trade 35(5), pp. 825 -845. The Hague: Kluwer Law International.

Mavroidis, P. (2000) *Remedies in the WTO legal system: between a rock and a hard place* . In: European Journal of International Law , 11 (4), p.763-813. Oxford: Oxford University Press.

Petersmann, E.-U. (1997) *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement* . London: Kluwer Law International.

Shoyer, A. Solovy, E. and Koff, A. (2005) *Implementation and Enforcement of Dispute Settlement Decisions* In: Macrory, P. Appleton, A. and Plummer, M. (eds.) (2005). *The World Trade Organization: Legal, Economic and Political Analysis* , vol. I. New York: Springer Science + Business Media.

Waincymer, J. (2002) *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*. London: Cameron May.

WTO (2004) *The future of the WTO: addressing institutional challenges in the new millennium* . Report by the Consultative Board to the Director-General Panitchpakdi, by P. Sutherland (Chairman), J. Bhagwati, K. Botchwey, N. FitzGerald, K. Hamada, J.H. Jackson, C. Lafer, T. de Montbrial. Geneva: WTO.

WorldTradeLaw.net *Dispute Settlement Commentary (DSC): WTO Arbitrations. DSU Article 21.3(c) Arbitrations - "Reasonable Period of Time"*. Available at: <http://www.worldtradelaw.net/dsc/arbdsccpage.htm> Last visited on: 10th of September 2007.

Zdouc, W. (2005) *The reasonable period of time for compliance with the rulings and recommendations adopted by the WTO Dispute Settlement Body*. In: Yerxa, R. and Wilson, B. (2005) *Key Issues in WTO Dispute Settlement. The First Ten Years*. Cambridge: Cambridge University Press.

WTO disputes (chronologically)

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.

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.

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.

Award of the Arbitrator, Indonesia – Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3(c) of the DSU, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998.

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.

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.

Award of the Arbitrator, Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU, WT/DS87/15, WT/DS110/14, 23 May 2000.

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.

Award of the Arbitrator, Canada – Certain Measures Affecting the Automotive Industry – Arbitration under Article 21.3(c) of the DSU, WT/DS139/12, WT/DS142/12, 4 October 2000.

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.

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.

Award of the Arbitrator, Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU, WT/DS170/10, 28 February 2001.

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.

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.

Award of the Arbitrator, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea – Arbitration under Article 21.3(c) of the DSU, WT/DS202/17, 26 July 2002.

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.

Award of the Arbitrator, United States – Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU, WT/DS217/14, WT/DS234/22, 13 June 2003.

Award of the Arbitrator, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries – Arbitration under Article 21.3(c) of the DSU, WT/DS246/14, 20 September 2004.

Award of the Arbitrator, United States – Final Dumping Determination on Softwood Lumber from Canada – Arbitration under Article 21.3(c) of the DSU, WT/DS264/13, 13 December 2004.

Award of the Arbitrator, United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the DSU, WT/DS268/12, 7 June 2005.

Award of the Arbitrator, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Arbitration under Article 21.3(c) of the DSU, WT/DS285/13, 19 August 2005.

Award of the Arbitrator, Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes – Arbitration under Article 21.3(c) of the DSU, WT/DS302/17, 29 August 2005.

Award of the Arbitrator, European Communities – Export Subsidies on Sugar – Arbitration under Article 21.3(c) of the DSU, WT/DS265/33, WT/DS266/33, WT/DS283/14, 28 October 2005.

Award of the Arbitrator, European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) of the DSU, WT/DS269/13, WT/DS286/15, 20 February 2006.

Award of the Arbitrator, United States – Measures Relating to Zeroing and Sunset Reviews – Arbitration under Article 21.3(c) of the DSU, WT/DS322/21, 11 May 2007.