

**UNITED STATES – MEASURES AFFECTING THE  
CROSS-BORDER SUPPLY OF  
GAMBLING AND BETTING SERVICES**

**ARB-2005-2/19**

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

Award of the Arbitrator  
Claus-Dieter Ehlermann



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<i>Australia – Salmon</i>	Award of the Arbitrator, <i>Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU</i> ("Australia – Salmon"), WT/DS18/9, 23 February 1999, DSR 1999:I, 267.
<i>Canada – Patent Term</i>	Award of the Arbitrator, <i>Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS170/10, 28 February 2001, DSR 2001:V, 2031
<i>Canada – Pharmaceutical Patents</i>	Award of the Arbitrator, <i>Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU</i> ("Canada – Pharmaceutical Patents"), WT/DS114/13, 18 August 2000, DSR 2002:I, 3.
<i>Chile – Price Band System</i>	Award of the Arbitrator, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU</i> ("Chile – Price Band System"), WT/DS207/13, 17 March 2003.
<i>EC – Bananas III</i>	Award of the Arbitrator, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS27/15, 7 January 1998, DSR 1998:I, 3.
<i>EC – Hormones</i>	Award of the Arbitrator, <i>EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833
<i>EC – Tariff Preferences</i>	Award of the Arbitrator, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries – Arbitration under Article 21.3(c) of the DSU</i> ("EC – Tariff Preferences"), WT/DS246/14, 20 September 2004.
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> ("Guatemala – Cement I"), WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767.
<i>Japan – Alcoholic Beverages II</i>	Award of the Arbitrator, <i>Japan – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 February 1997, DSR 1997:I, 3
<i>Korea – Alcoholic Beverages</i>	Award of the Arbitrator, <i>Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> ("Korea – Alcoholic Beverages"), WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937.
<i>US – 1916 Act</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU</i> ("US – 1916 Act"), WT/DS136/11, WT/DS162/14, 28 February 2001, DSR 2001:V, 2017.
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> ("US – Gambling"), WT/DS285/AB/R, adopted 20 April 2005.
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> ("US – Gambling"), WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report, WT/DS285/AB/R.
<i>US – Hot-Rolled Steel</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS184/13, 19 February 2002

<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan ("US – Hot-Rolled Steel")</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697.
<i>US – Offset Act (Byrd Amendment)</i>	Award of the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS217/14, WT/DS234/22, 13 June 2003.
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Award of the Arbitrator, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS268/12, 7 June 2005.
<i>US – Section 110(5) Copyright Act</i>	Award of the Arbitrator, <i>United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU</i> WT/DS160/12, 15 January 2001, DSR 2001:II, 657.



WORLD TRADE ORGANIZATION  
AWARD OF THE ARBITRATOR

**United States – Measures Affecting the Cross-Border  
Supply of Gambling and Betting Services**

ARB-2005-2/19

Parties:

Arbitrator:

*Antigua and Barbuda*  
*United States*

Claus-Dieter Ehlermann

**I. Introduction**

1. On 20 April 2005, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report<sup>1</sup> and the Panel Report<sup>2</sup>, as modified by the Appellate Body Report, in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*.<sup>3</sup> At the DSB meeting of 19 May 2005, the United States indicated its intention to implement the recommendations and rulings of the DSB in this dispute and stated that it would require a reasonable period of time in which to do so.<sup>4</sup>

2. On 6 June 2005, Antigua and Barbuda ("Antigua") informed the DSB that consultations with the United States had not resulted in an agreement on the reasonable period of time for implementation. Antigua therefore requested that such period be determined by binding arbitration, pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").<sup>5</sup>

3. Antigua and the United States were unable to agree on an arbitrator within 10 days of the matter being referred to arbitration. Therefore, by letter dated 17 June 2005<sup>6</sup>, Antigua requested that the Director-General appoint an arbitrator pursuant to footnote 12 to Article 21.3(c) of the DSU. The

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<sup>1</sup>Appellate Body Report, WT/DS285/AB/R.

<sup>2</sup>Panel Report, WT/DS285/R.

<sup>3</sup>WT/DS285/10.

<sup>4</sup>WT/DSB/M/189, para. 47.

<sup>5</sup>WT/DS285/11.

<sup>6</sup>Antigua's letter was received on 20 June 2005.

Director-General appointed me as arbitrator on 30 June 2005, after consulting the parties.<sup>7</sup> I informed the parties of my acceptance of the appointment by letter dated 30 June 2005.

4. Antigua and the United States have agreed that this award will be deemed to be an arbitration award under Article 21.3(c) of the DSU, notwithstanding the expiry of the 90 day period stipulated in Article 21.3(c).<sup>8</sup>

5. Antigua and the United States provided their written submissions to me on 12 July 2005. On 20 July 2005 I requested the United States, by letter, to provide me with a copy of the 2006 schedules for the House of Representatives and the Senate. An oral hearing was held on 21 July 2005. At the outset of that hearing, the United States informed me that the 2006 schedules for the United States Congress are not yet available, but that the recess periods in 2006 were likely to be similar to those in the 2005 schedules.<sup>9</sup> On 22 July 2005, in response to a question posed at the oral hearing, the United States informed me by letter that there is currently one bill under consideration by the United States Congress related to the subject of internet gambling.<sup>10</sup>

## **II. Arguments of the Parties**

### *A. United States*

6. The United States requests that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this dispute to be 15 months from the date of adoption by the DSB of the Panel and Appellate Body Reports, until the end of July 2006.<sup>11</sup>

7. The United States asserts that in the particular circumstances of this case, the legal form of implementation and the technical complexity of the measures require a reasonable period of time of at least 15 months. Such a period is consistent with the periods that have been determined in previous arbitrations under Article 21.3(c) of the DSU for implementation by legislative means, which is how the United States intends to implement the recommendations and rulings of the DSB in this case. The United States also explains that, since the date of adoption of the Panel and Appellate Body Reports in

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<sup>7</sup>WT/DS285/12.

<sup>8</sup>The 90 day period following adoption of the Panel and Appellate Body Reports expired on 19 July 2005.

<sup>9</sup>The United States included the 2005 schedules of both chambers of Congress as Exhibit US-9 to its submission.

<sup>10</sup>The United States referred to H.R. 1422, the Student Athlete Protection Act. The United States also conveyed its understanding that a Senator is in the process of preparing an internet gambling bill to strengthen penalties for illegal gambling and limit the use of financial instruments in connection with internet gambling.

<sup>11</sup>United States' submission, paras. 5, 8, 9, 14, 19, 35 and 36.

this dispute, the executive branch has been consulting internally with Congress and with domestic stakeholders on possible legislative action.

8. The United States contests Antigua's argument that, with respect to "non-sports" betting and gambling, the United States could implement through issuance of a presidential executive order. According to the United States, the issue of executive orders is not relevant to my determination of the reasonable period of time because Antigua accepts that implementation must, in any case, include some form of legislative action (if only with respect to "sports-related" betting and gambling). The text of Article 21.3(c) refers to "*a* reasonable period of time" (emphasis added). It follows that an arbitrator is to determine a *single* reasonable period of time, which in this case must be the reasonable period of time necessary for *legislation*. That there is no basis in the DSU for an arbitrator to assign multiple reasonable periods of time for different forms of implementation is confirmed, argues the United States, by the previous arbitral awards that have considered multiple proposed forms of implementation, namely the awards in *US – Hot-Rolled Steel* and *US – Oil Country Tubular Goods Sunset Reviews*.

9. The United States does not, in any event, accept Antigua's proposed distinction between "sports" and "non-sports" gambling and betting. The United States contends that no such distinction exists under any of the three federal statutes at issue in this dispute, namely the Wire Act, the Travel Act and the Illegal Gambling Business Act (the "IGBA"). For the same reason, the United States disputes that an executive order could be used in the manner suggested by Antigua, because an executive order may not contradict an existing statute. In addition, in this specific case, it is extremely unlikely that an executive order could achieve the necessary clarification of the relationship between the Interstate Horseracing Act ("IHA"), on the one hand, and the Wire Act, Travel Act and the IGBA, on the other hand. The United States points, in this regard, to the presidential statement on signing accompanying the bill enacting the December 2000 amendments to the IHA, which expressed the view that nothing in the IHA overrode previously enacted criminal laws. The Panel in this dispute found that this statement was not sufficient to resolve the ambiguity in the relationship, and the Appellate Body did not depart from this view.<sup>12</sup> The United States submits that if a presidential statement accompanying signature of a bill could not achieve the requisite clarity in the relationship between the relevant statutes, then a presidential executive order could not do so either.

10. The United States emphasizes that it will use legislative means to clarify the relationship between the IHA and the three pre-existing federal criminal statutes. Referring to the Appellate Body Report in this dispute, the United States observes that it must demonstrate "that—in the light of the

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<sup>12</sup>United States' submission, footnote 6 to para. 9, referring to Panel Report, para. 6.597, and Appellate Body Report, para. 373(D)(v)(c).

existence of the Interstate Horseracing Act—the Wire Act, the Travel Act, and the Illegal Gambling Business Act are applied consistently with the requirements of the chapeau"<sup>13</sup> to Article XIV of the GATS. Thus, "a reasonable legislative option would have the effect of clarifying that relevant U.S. federal laws entail no discrimination between foreign and domestic service suppliers in the application of measures prohibiting remote supply of gambling and betting services".<sup>14</sup> Taking account of this objective, and in the light of the "multifaceted nature of the obligation in the chapeau of Article XIV", there "will be ample room for reasonable and principled disagreements among legislators as to precisely how to achieve such a clarification in the context of Internet gambling".<sup>15</sup> The United States contrasts the complexities involved in implementation in this dispute with the simple legislative change—to the length of patent term—that was required in *Canada – Patent Term*, where the arbitrator determined the reasonable period of time for implementation to be 10 months.<sup>16</sup>

11. The United States adds that the legislative exercise will be further complicated by the fact that since 1997, the United States Congress has considered a wide range of legislative proposals aimed at internet gambling, none of which has been adopted. The existence of this complex, and as-yet unresolved legislative debate means that the task of adopting compliance legislation will take longer due to the need to assess the potential impact of each option on a variety of other proposed legislative changes.

12. The United States argues that a 15 month implementation period is consistent with previous arbitration awards under Article 21.3(c) of the DSU that have involved legislative change and refers, in particular, to the awards of the Arbitrators in *Japan – Alcoholic Beverages II*, *EC – Bananas III*, and *EC – Hormones*. Consistent with the approach taken in those arbitrations, the United States underlines that it is not for Antigua to determine what type of legislative option the United States should choose, or that a less complex option could be enacted in less than 15 months.

13. In support of its argument that a 15 month period is necessary in order to implement the recommendations and rulings of the DSB in this dispute, the United States explains the process by which the United States Congress passes legislation. Proposed legislation can only become law after it has been approved in identical form by both chambers of Congress—the House of Representatives and the Senate—and approved by the President of the United States. A bill passes through at least ten steps between the time that it is introduced and the time that it is approved by both chambers. The

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<sup>13</sup>United States' submission, para. 11, referring to Appellate Body Report, para. 373(D)(v)(c).

<sup>14</sup>United States' submission, para. 11.

<sup>15</sup>United States' submission, para. 12.

<sup>16</sup>United States' submission, para. 12, referring to Award of the Arbitrator, *Canada – Patent Term*, paras. 55-56.

first step is introduction of the bill in Congress. Generally, bills are referred to a committee, and possibly also to subcommittees, where public hearings will be conducted. Then the bill goes through a "mark-up" process where changes and amendments are made before the subcommittee "reports" the bill to the full committee. The committee may conduct further study and hearings, and another mark-up process follows before the relevant committee votes on whether to "report" the bill to the full House. If so, a detailed, section-by-section committee report is prepared and the bill is "reported back" to the House. The bill is debated and amendments may be offered before the House votes on the bill. The bill may be returned to the committee or, if passed by the House, must be referred to the Senate. The Senate may approve the bill as received, reject it, ignore it or change it. Most bills passed by the Senate are not precisely the same as the bill referred by the House and, in such circumstances, a conference committee is organized to reconcile differences between the House and Senate versions. If the conference committee is able to reach agreement on a single bill, a conference report is prepared, and this must be approved by both chambers, in identical form, before it can be sent to the President for approval.

14. The United States stresses that the executive branch has no control over the procedures and timetable followed by Congress. The United States declined, at the oral hearing, to estimate on a disaggregated basis the length of time that would be necessary in this case for each one of the steps in its legislative process, noting that such time periods vary widely and are, in many cases, determined on an *ad hoc* basis by the House of Representatives and/or the Senate. The United States also explained, in response to questioning at the oral hearing, that although the above procedure reflects, in practice, how Congress operates, the only two steps that are explicitly required under the United States Constitution are the approval of a bill by both chambers of Congress and the signature of the President.

15. The United States adds that an important determinant of when a bill becomes law is the Congressional schedule. Each Congress consists of two sessions of one year each, and the United States is currently in the first session of the 109th Congress. Sessions of Congress typically begin in January and end in October, November or December of the calendar year. At present, the first session of the 109th Congress is scheduled to end on 30 September 2005. The United States explains that most bills that become law are acted on only in the last weeks or months of the legislative session, and that a bill introduced in the first session of a Congress may be carried over to the second session. According to the United States, these reasons explain why I should not attach any significance to the 15 measures already passed by Congress in the 109th session, which Antigua cites as illustrative of how quickly the United States Congress can act. These 15 measures will represent only a tiny fraction of all the laws that will be passed in the 109th session. Moreover, of these 15 measures, four dealt with disaster relief or emergencies, three were legislative packages that had been thoroughly

considered in a previous Congress or Congresses, four dealt with the renewal of measures previously enacted but due to expire, and four involved the naming of buildings and museum regents.<sup>17</sup> Thus, explains the United States, the rapidity with which these measures were passed in the first half of the 109th session of Congress is not at all representative of the ordinary workings of the United States legislative process.

16. The United States argues that, given the complexity of the legislative task required in this case, the need to consider implementing legislation in a deliberate manner, and the other matters that will be under consideration during the remainder of the first session of the 109th Congress, the legislation implementing the recommendations and rulings of the DSB will not be completed in the first session of the current Congress, but will instead need to be carried over into the second session, in 2006. The United States suggests that, in the same way that Congress is often spurred to pass legislation prior to the end of a legislative session, so too is it prompted to pass legislation prior to a recess. In the light of the fact that Congress will adjourn for its August recess in late July 2006, the United States suggests that this would be an appropriate point at which to conclude the reasonable period of time for implementation in this dispute.

17. As regards the application of Article 21.2 of the DSU in this arbitration, the United States cautions me not to expand the scope of a proceeding under Article 21.3(c) of the DSU by acceding to Antigua's request to resolve any ambiguities in Antigua's favour and to ensure that the proposed method of compliance is consistent with the recommendations and rulings of the DSB and the provisions of the covered agreements. The United States emphasizes that my task is to determine the shortest period possible within the legal system of the United States, and that this determination cannot be affected by the fact that the complaining party in the dispute is a developing country Member.

B. *Antigua*

18. Antigua requests that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this dispute to be: (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.<sup>18</sup>

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<sup>17</sup>United States' statement at the oral hearing.

<sup>18</sup>Antigua's submission, para. 62.

19. With respect to "non-sports related and horse race gambling and betting services", Antigua observes that there is significant doubt that the Wire Act, the Travel Act or the IGBA apply to the provision to United States consumers of such services supplied from a foreign country in which such services are legal. Antigua points to the fact that no court has held any of these laws applicable to non-sports betting services supplied by remote means, and that the opinions of experts on this subject are "decidedly equivocal".<sup>19</sup> Moreover, according to Antigua, prior to March 1998 the United States Department of Justice publicly maintained that the provision of gambling and betting services into the United States from foreign jurisdictions was not subject to federal prosecution. Since this policy was shifted once, argues Antigua, it can be shifted back to the pre-March 1998 position again. Although such a shift could be effected on an informal basis within the Department of Justice and other agencies of the United States government, Antigua argues that it could be *definitively* accomplished through a presidential "executive order". Executive orders are orders or decrees given by the President of the United States to agencies of the federal government such as the Department of Justice. Antigua observes that the power to issue executive orders forms part of the general executive powers of the President under Article II of the United States Constitution, and that executive orders have been used by every President for a wide variety of subjects. Antigua refers to a study that has defined executive orders as "directives or actions by the President" that have the "force and effect of law" when "founded on the authority of the President derived from the Constitution or a statute."<sup>20</sup>

20. Thus, concludes Antigua, with respect to the provision of non-sports related and horseracing gambling and betting services, the United States should implement the recommendations and rulings of the DSB by issuing an executive order to the agencies of the United States government to the effect that: (i) these services may be lawfully offered by Antiguan operators to consumers in the United States; and (ii) all enforcement and related action to the contrary should immediately cease and desist. Antigua adds that executive orders can be promulgated in a simple and expedient manner, requiring only a matter of weeks, and that once signed by the President, an executive order becomes law in the United States upon its publication in the *Federal Register*. Given that executive orders are short and do not require the consent of anyone other than the President, Antigua submits that the

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<sup>19</sup>Antigua's submission, para. 13, referring in footnote 25 to: United States General Accounting Office, GAO/GCD – 96-28, *Internet Gambling: An Overview of the Issues* (December 2002) (Exhibit AB-17 submitted by Antigua to the Panel), pp. 12-16; J. Rodefer, "Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466", published on 18 March 2003 on the website of the Department of Justice of Nevada, <[www.ag.state.nv.us](http://www.ag.state.nv.us)> (Exhibit AB-54 submitted by Antigua to the Panel); and J. Kelly, R. Mignin, and S. Saxman, "US Policy" in M. Balestra and A. Cabot (eds.), *Internet Gambling Report: An Evolving Conflict Between Technology and Law*, 8th ed. (River City Group LLC Publisher, 2005), p. 217.

<sup>20</sup>Antigua's submission, para. 19, referring in footnote 37 to T.L. Branum, "President or King? The Use and Abuse of Executive Orders in Modern-Day America", *Journal of Legislation*, Vol. 28 (2002), p. 1 at 6, citing Commission on Government Operations, 85th Congress, "Executive Orders and Proclamations: A Study of the Use of Presidential Powers" 14 (Comm. Print 1957).

United States should be accorded only the briefest practical period of time to issue the necessary order, namely immediately or in any event no less than one month after the issuance of this award.

21. In response to questioning at the oral hearing on the issue of executive orders, Antigua accepted that, in principle, the United States, as the implementing Member, has discretion to decide how best to effect implementation. Antigua added, however, that if the United States chooses a more complicated and lengthy means of implementation, rather than a shorter one that has been shown to be available, then this choice should have as a consequence that the time period which the United States is afforded in order to pursue its legislative solution is shorter than it would otherwise be.

22. With respect to the application of the Wire Act, the Travel Act and the IGBA to the provision of sports-related gambling and betting services, Antigua accepts that legislative action will be necessary for the United States to implement the recommendations and rulings of the DSB. In this regard, Antigua again recognizes that the implementing Member may choose its method of implementation, but stresses that this choice is subject to the proviso that the means chosen must be consistent with the relevant recommendations and rulings. Antigua submits that an arbitrator under Article 21.3(c) faced with a proposed method of compliance that is not so consistent could take this factor into account in making his award.

23. Antigua submits that, in general, the burden of proof is on the implementing Member, and emphasizes that the political sensitivity or contentiousness of a particular course of action is irrelevant to the determination of the reasonable period of time.<sup>21</sup> Equally irrelevant, submits Antigua, are the consideration by the legislature of various legislative options, the volume of legislation considered by the legislature, and the high percentage of bills that do not become law.<sup>22</sup> On the other hand, Antigua urges me to take account of the flexibility that exists within the United States legislative system, as well as of the actions taken by the United States with respect to implementation since adoption by the DSB of the Reports in this dispute.

24. In response to questioning at the oral hearing, Antigua confirmed that it agrees, in principle, with the United States' description of the process by which legislation is enacted by the United States Congress. Antigua stresses, however, that except for obtaining Congressional approval, none of the specific steps identified by the United States is required by law and none is assigned a required time period. It follows that considerable flexibility is built into the United States legislative system. Antigua submits that the flexibility enjoyed by the United States Congress has been recognized by

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<sup>21</sup>Antigua's submission, paras. 30 and 31, referring in footnote 53 to Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 42; and Award of the Arbitrator, *Canada – Patent Term*, para. 58.

<sup>22</sup>Antigua's submission, para. 31, referring in footnotes 57 and 58 to Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, paras. 53 and 59; and Award of the Arbitrator, *US – 1916 Act*, para. 38.

previous arbitrators, and is also illustrated by a survey of legislation adopted during the current, 109th, session of Congress. According to Antigua, of the 15 measures enacted into law through 19 June 2005, two became law within a day of introduction, the longest period from introduction to adoption was 91 days, and the average number of days from introduction to adoption was 43.27 days.<sup>23</sup> Antigua also points out that the amendment to the IHA in 2000 took a mere five months to pass.<sup>24</sup>

25. According to Antigua, legislation to bring the Wire Act, the Travel Act and the IGBA into compliance with the recommendations and rulings of the DSB need not be complicated. Antigua draws a contrast between certain public pronouncements made by the United States to the effect that implementation will be very simple, and its position in this arbitration, namely that implementation will be "technically complex". In Antigua's view, the United States has failed to demonstrate any such complexity. Accordingly, Antigua submits that there are no compelling reasons why the United States would require more than six months to implement the recommendations and rulings of the DSB regarding the Wire Act, the Travel Act and the IGBA.

26. Finally, Antigua invokes Article 21.2 of the DSU, which provides for "particular attention" to be paid to "matters affecting the interests of developing country Members". Antigua underlines 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. Antigua submits that I should rely on Article 21.2 of the DSU to resolve any ambiguities or uncertainties related to compliance in this case in favour of Antigua, and in this regard asks that I carefully scrutinize the efficacy of the United States' proposed means of implementation. In response to questioning at the oral hearing, Antigua emphasized that the United States legislative process is very flexible and does not include fixed time periods for each step in the process. Accordingly, Antigua submits that in this case it would be proper for me to use Article 21.2 to require the United States to be especially diligent and to use the flexibility inherent in its system to achieve rapid implementation. In other words, Antigua asks me to use Article 21.2 of the DSU in order to determine a shorter reasonable period of time for implementation than I might otherwise do.

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<sup>23</sup>Antigua's submission, para. 54.

<sup>24</sup>Antigua's submission, para. 54, referring in footnotes 94 and 95 to Sections 3001-3007 of Title 15 of the United States Code, H.R. 4942.

### III. Reasonable Period of Time

#### A. *Preliminary Matters*

##### 1. Mandate

27. The Panel and Appellate Body Reports in this dispute were adopted by the DSB on 20 April 2005 and, pursuant to Article 21.3 of the DSU, the United States informed the DSB of its intentions with respect to implementation shortly thereafter.<sup>25</sup> Article 21.3 of the DSU establishes that, when it is "impracticable" for a Member to comply "immediately" with the recommendations and rulings of the DSB, then that Member "shall have a reasonable period of time in which to do so." The United States informed the DSB that it would require such a reasonable period of time in this dispute.

28. My task as arbitrator in this proceeding is to determine such reasonable period of time, taking due account of the relevant provisions of the DSU, and, specifically, of the following directions set forth in Article 21.3:

... The reasonable period of time shall be:

...

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

##### 2. The Measures to be Brought into Conformity

29. Both the Panel and Appellate Body Reports in this dispute contained findings that the United States had acted inconsistently with its obligations under the covered agreements. More specifically, the Appellate Body upheld the Panel's finding that, by maintaining the following three measures, the United States acts inconsistently with its obligations under Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2 of the GATS:

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<sup>25</sup>Minutes of the DSB meeting held on 19 May 2005, WT/DSB/M/189, para. 47.

- Section 1084 of Title 18 of the United States Code (the "Wire Act");
- Section 1952 of Title 18 of the United States Code (the "Travel Act"); and
- Section 1955 of Title 18 of the United States Code (the "Illegal Gambling Business Act", or the "IGBA").<sup>26</sup>

30. The Appellate Body also upheld, albeit for different reasons, the Panel's finding that the United States had not demonstrated that its measures, found to be inconsistent with Article XVI of the GATS, satisfy the requirements of Article XIV of the GATS.<sup>27</sup> Accordingly, the Appellate Body recommended that the DSB request the United States to bring its inconsistent measures into conformity with its obligations under the GATS.

B. *Factors Affecting the Determination of the Reasonable Period of Time under Article 21.3(c)*

1. Burden of Proof

31. Both of the parties to this dispute agree that the United States, as the implementing Member, bears the burden of establishing that its proposed implementation period is a "reasonable period of time".<sup>28</sup> I do not disagree with the principle that when an implementing Member seeks a reasonable period of time for implementation, then it is appropriate for that Member to carry the burden of demonstrating the reasonableness of its proposal.<sup>29</sup>

2. Choice of Method of Implementation

32. Both the Appellate Body and the Panel found that, due to ambiguity in the relationship between the Wire Act, the Travel Act and the IGBA, on the one hand, and a federal civil statute known as the Interstate Horseracing Act (the "IHA") on the other hand, the United States had not satisfied its burden of justifying the measures at issue under the chapeau to Article XIV of the GATS.<sup>30</sup> Referring to these findings, the United States indicates that it will seek to implement the recommendations and rulings of the DSB by further clarifying the relationship between these statutes. Antigua, on the other hand, believes that broader action is necessary. Antigua submits that the United States can properly implement the recommendations and rulings of the DSB only if, consistently with

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<sup>26</sup>Appellate Body Report, para. 373(C)(ii); Panel Report, para. 7.2(b)(i).

<sup>27</sup>Appellate Body Report, para. 373(D)(vi); Panel Report, para. 7.2(d).

<sup>28</sup>Antigua's submission, para. 30; United States' response to questioning at the oral hearing.

<sup>29</sup>Award of the Arbitrator, *US – 1916 Act*, para. 33. A similar sentiment was also expressed by the Arbitrator in *EC – Tariff Preferences*, at paragraph 27 of his award.

<sup>30</sup>Appellate Body Report, para. 373(D)(v)(c); Panel Report, paras. 6.599-6.600.

the requirements of the chapeau to Article XIV of the GATS, it removes any discrimination in the treatment of Antiguan suppliers of "remote" gambling and betting services, on the one hand, and the treatment of domestic suppliers of the same services, on the other.<sup>31</sup> To do so, argues Antigua, the United States will have to either grant market access to Antiguan service providers or prohibit the supply of all domestic remote gambling services.

33. It is not the role of an arbitrator under Article 21.3(c) to identify a particular method of implementation and to determine the "reasonable period of time" on the basis of that method. Rather, the implementing Member retains the discretion to choose its preferred method of implementation.<sup>32</sup> Nevertheless, it will be necessary for me to consider certain aspects of the means of implementation proposed by each of the parties, as explained in more detail below.

### 3. Particular Circumstances

34. Article 21.3(c) requires that I determine the "reasonable period of time for implementation", establishes a guideline that this period "should not exceed 15 months", and directs that in fixing the relevant period I should have regard to "the particular circumstances" of this case.

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<sup>31</sup>In this dispute, the Panel used the term "remote" supply to refer to:

"any situation where the supplier, *whether domestic or foreign*, and the consumer of gambling and betting services are not physically together". In other words, in situations of remote supply, the consumer of a service does not have to go to any type of outlet where the supply is supervised, be it a retail facility, a casino, a vending machine, etc. Instead, the remote supplier offers the service directly to the consumer through some means of distance communication. Hence, cross-border supply is necessarily remote, but remote supply amounts to "cross-border" supply only when the service supplier and the consumer are located in territories of different Members.

(Panel Report, para. 6.32; original emphasis, footnote omitted)

<sup>32</sup>See, for example, Award of the Arbitrator, *EC – Hormones*, para. 38; Award of the Arbitrator, *Australia – Salmon*, para. 35; Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 45; Award of the Arbitrator, *Chile – Price Band System*, para. 32; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 48; Award of the Arbitrator, *EC – Tariff Preferences*, para. 30; and Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 26.

35. It is by now well established that a key determinant of the reasonable period of time for implementation is the nature of the implementing action that is to be taken. Legislative action will, as a general rule, require more time than regulatory rule-making, which in turn will normally need more time than implementation that can be achieved by means of an administrative decision.<sup>33</sup>

36. In this arbitration, Antigua contends that the United States can implement, in part, through executive action, and in part through legislative action. With respect to what Antigua characterizes as the supply of "non-sports related and horseracing" gambling and betting services, Antigua argues that the United States can, and should, implement the recommendations and rulings of the DSB through the issuance of an executive order by the United States President that would clarify that the supply of such services from Antigua is not prohibited under the Wire Act, the Travel Act or the IGBA.<sup>34</sup> As regards the supply of "other sports-related" gambling and betting services, Antigua accepts that legislative change will be necessary in order to clarify whether and how the Wire Act, the Travel Act and the IGBA apply to these activities.

37. The United States maintains that I need not address Antigua's arguments concerning implementation by executive order for at least three reasons. First, and foremost, it is my role under Article 21.3(c) to determine a *single* reasonable period of time for implementation. Since both parties agree that implementation by legislative means is required in this case, Antigua's argument that partial implementation could be achieved in a shorter period of time is irrelevant. For the United States, the only reasonable period of time that I am to determine is the reasonable period of time for *legislative* implementation. The United States points, in this respect, to two previous arbitrations in which a single reasonable period of time for implementation was determined, notwithstanding that the parties

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<sup>33</sup>See, for example, Award of the Arbitrator, *Australia – Salmon*, para. 38; Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 34; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 49; Award of the Arbitrator, *Canada – Patent Term*, para. 41; Award of the Arbitrator, *Chile – Price Band System*, para. 38; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 57; and Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 26.

<sup>34</sup>Specifically, Antigua argues that:

... it is well within the power of the president to issue an executive order to the agencies of the United States government to the effect that (i) these services may be lawfully offered by Antiguan operators to consumers in the United States and (ii) all enforcement and related action to the contrary, including (A) asset forfeitures, (B) restrictions on money transfers and use of financial instruments, (C) threats of federal prosecution by the DOJ against service providers to these industries, including advertisers, banks and credit card companies and processors, and (D) current pending prosecutions against persons operating these businesses, should in each instance immediately cease and desist.

(Antigua's submission, para. 22; footnote omitted)

agreed that two different methods of implementation were required.<sup>35</sup> Secondly, the United States rejects Antigua's distinction between the supply of "non-sports related and horseracing" gambling and betting services, on the one hand, and the supply of "other sports-related" gambling and betting services, on the other. In the view of the United States, the three federal statutes at issue apply equally to, and prohibit, the supply of all forms of remote gambling and betting services. Thirdly, the United States contends that it is neither appropriate nor possible to achieve implementation in this dispute by means of a presidential executive order. The order that Antigua contends the United States President should issue could not properly form the subject of an executive order. Furthermore, the United States points out that it argued before the Panel that a presidential statement that accompanied the passage of the amendments to the IHA made clear that nothing in that Act, as amended, overrides the previously enacted criminal laws relating to gambling. Nevertheless, neither the Panel nor the Appellate Body considered that this presidential statement was sufficient to resolve the ambiguity in the relationship between the IHA, on the one hand, and the Wire Act, the Travel Act, and the IGBA, on the other. Given that the presidential statement was not considered by the Panel or the Appellate Body to provide sufficient clarity regarding this relationship, the United States submits that an executive order issued by the President would not do so either. For this reason, the United States emphasizes that the only means of implementation that will achieve the necessary clarification is legislative means.

38. As I understand it, although there is no express provision creating the power to issue executive orders, it is commonly accepted that the United States President has the authority to issue such orders, and that such authority derives from the general executive powers vested in the President by Article II of the United States Constitution.<sup>36</sup> In practice, United States presidents do issue executive orders. Nevertheless, the scope of the authority to issue such orders, and the types of matters that may be dealt with by executive order, appear to be matters of some debate. At the oral hearing, both parties agreed that the United States President may not issue an executive order that contradicts an existing statute. The parties disagree, however, on the issue of whether the Wire Act, the Travel Act and the IGBA, as they stand, prohibit the supply of "non-sports related and horseracing" gambling and betting services from Antigua to consumers in the United States.

39. Neither the Panel nor the Appellate Body referred to the distinction that Antigua now draws, namely between the United States' regulation of the supply of "non-sports related and horseracing" gambling and betting services, on the one hand, and its regulation of the supply of "other sports-related" gambling and betting services, on the other. In response to a question at the oral hearing,

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<sup>35</sup>Award of the Arbitrator, *US – Hot-Rolled Steel*; and Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*.

<sup>36</sup>Antigua's submission, para. 17.

Antigua acknowledged that neither report distinguishes between types of gambling. Moreover, it seems to me that the findings of both the Panel and the Appellate Body are based on the premise that each of the three statutes in question prohibits a broad category of gambling activities.<sup>37</sup>

40. In asking me to draw this distinction, therefore, Antigua is effectively asking me to make a ruling concerning the meaning and scope of application of United States municipal law. I do not consider that it forms part of my mandate to do so, given that the findings of the Panel and the Appellate Body make no such distinction.

41. Because I do not rule on whether the distinction asserted by Antigua exists, I need not, in this proceeding, resolve the issue of whether it is permissible for an arbitrator under Article 21.3(c) of the DSU to determine more than one reasonable period of time for implementation. 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.<sup>38</sup> I would not, however, want to exclude *a priori*, and without having carried out a thorough interpretative analysis of the relevant provisions of the DSU, the possibility that an arbitrator might be able to fix separate reasonable

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<sup>37</sup>The Panel's explanation of the three federal laws is set out in paragraphs 6.360 to 6.380 of the Panel Report, and the Appellate Body's treatment of the three statutes is found in paragraphs 257-265 of the Appellate Body Report. With respect to the Wire Act, the Panel observed that it prohibits "the use of a wire communication facility for, *inter alia*, the transmission in interstate or foreign commerce of bets or wagers". (Panel Report, para. 6.362. See also Appellate Body Report, para. 259) As for the Travel Act, the Panel stated that it prohibits:

... gambling activity that entails the supply of gambling and betting services by 'mail or any facility' to the extent that such supply is undertaken by a "business enterprise involving gambling" that is prohibited under state law and provided that the other requirements in subparagraph (a) of the Travel Act have been met.

(Panel Report, para. 6.370. See also Appellate Body Report, para. 261)

Lastly, the Panel explained that the IGBA prohibits:

... gambling activity that entails the conduct, finance, management, supervision, direction or ownership of all or part of such a business to the extent that such supply is undertaken by a "gambling business" that is prohibited under state law and provided that the other requirements in subparagraph (b)(1) of the Illegal Gambling Business Act have been met.

(Panel Report, para. 6.377. See also Appellate Body Report, para. 263)

<sup>38</sup>Essentially, Antigua is asking me to determine two separate reasonable periods of time for the United States to implement the DSB's recommendations and rulings regarding the Wire Act, two separate reasonable periods of time for the United States to implement the DSB's recommendations and rulings regarding the Travel Act, and two separate reasonable periods of time for the United States to implement the DSB's recommendations and rulings regarding the IGBA.

periods of time for separate measures. It is true that, to date, no arbitrator has done so.<sup>39</sup> Yet it is also true that, to date, no arbitrator has been asked to do so.

42. Having declined to rule on the distinction on which Antigua bases its assertion that the United States could undertake two separate methods of implementation, I need not consider the reasonable period of time that would be necessary for implementation by means of an executive order. I turn, instead, to the question of the reasonable period of time needed for the United States to implement by legislative means.

43. In response to a question at the oral hearing, Antigua suggested that even if I were to consider that the United States enjoys the discretion to decide to implement by legislative means, rather than by means of an executive order, then the United States should be required to "pay the price" for having chosen a "complicated, more lengthy way" of implementing rather than another available method that would be shorter. Thus, submits Antigua, I should reduce the reasonable period of time for legislative implementation. Given that I do not rule on the distinction on which Antigua bases its assertion that two separate means of implementation are possible in this case, I need not decide whether a Member's decision to opt for one means of implementation (legislative) notwithstanding that another, more rapid means of implementation has been demonstrated to be available, could affect the determination of the reasonable period of time for implementation under Article 21.3(c) of the DSU.

44. Antigua and the United States agree that, as previous arbitrators have stated, the "reasonable period of time" under Article 21.3(c) should be "the shortest period possible within the legal system of the Member to implement the relevant recommendations and rulings of the DSB", in the light of the "particular circumstances" of the dispute.<sup>40</sup> Yet, it is useful to recall that the DSU does not refer to the "shortest period possible for implementation within the legal system" of the implementing Member. Rather, this is a convenient phrase that has been used by previous arbitrators to describe their task. I do not, however, view this standard as one that stands in isolation from the text of the DSU. In my view, the determination of the "shortest period possible for implementation" can, and must, also take due account of the two principles that are expressly mentioned in Article 21 of the DSU, namely reasonableness and the need for prompt compliance. Moreover, as differences in previous awards involving legislative implementation by the United States have shown, and as the text of

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<sup>39</sup>In Award of the Arbitrator, *US – Hot-Rolled Steel*, the Arbitrator determined a single reasonable period of time of 15 months (para. 40); and in Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, the Arbitrator determined a single reasonable period of time for implementation of 12 months (para. 53).

<sup>40</sup>Award of the Arbitrator, *Chile – Price Band System*, para. 34 (quoting Award of the Arbitrator, *US – 1916 Act*, para. 32). See also Award of the Arbitrator, *EC – Hormones*, para. 26; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 47; Award of the Arbitrator, *EC – Tariff Preferences*, para. 26; and Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 25.

Article 21.3(c) prescribes, each arbitrator must take account of "particular circumstances" relevant to the case at hand. Strict insistence on the "shortest period possible for implementation within the legal system" of the implementing Member would, in my view, tie an arbitrator's hands and prevent him or her from properly identifying and weighing the particular circumstances that are determinative of "reasonableness" in each individual case.<sup>41</sup>

45. The United States raises, as a "particular circumstance" relevant to my determination, the complexity of the legislation that will be necessary in order to implement the recommendations and rulings of the DSB in this case. The United States contrasts the complexity of the task of eliminating discrimination in this case with the relative simplicity involved in amending the statutory term of patent protection in *Canada – Patent Term*.<sup>42</sup>

46. I agree with the United States that the legislative task faced by its Congress in this dispute is more complex than the one confronted by the Canadian Parliament in *Canada – Patent Term*. I attach some significance to the fact that, as the United States explained at the oral hearing, the field of internet gambling is one that is highly regulated in the United States. A myriad of interconnected and overlapping laws apply to these activities, including state and federal laws, and criminal and civil

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<sup>41</sup>With respect to the overriding principle of "reasonableness" I find it useful, like the Arbitrator in *US – Hot-Rolled Steel* (para. 25), to refer to the Appellate Body's elaboration of the meaning of the word "reasonable", albeit in another context. In its Report in *US – Hot-Rolled Steel*, the Appellate Body stated that 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.

(Appellate Body Report, paras. 84-85)

<sup>42</sup>In paragraph 12 of its submission, the United States quotes the following statement from paragraphs 55 and 56 of my award in *Canada – Patent Term*:

In prescribing a precise result, that is, the duration of the minimum period of patent protection, Article 33 of the TRIPS Agreement is quite different from provisions which limit only marginally the discretion of the legislator, *such as prohibitions of discrimination between imported and domestic goods or services*. Such discrimination can, of course, be eliminated in several ways, while a violation of Article 33 of the TRIPS Agreement can only be remedied through one action, that is, by providing for the required minimum period of patent protection.

Thus, with respect to the minimum period of patent protection, Article 33 of the TRIPS Agreement *leaves no room for any legislative discretion or legislative choices*. (emphasis added by the United States)

statutes. For this reason, a careful examination of how proposed legislation will impact the existing regulatory regime will be a necessary part of the process of adopting implementing legislation in this dispute.

47. I am also conscious of the fact that any legislation adopted by the United States will inevitably, as the Appellate Body Report demonstrates, bear on questions of public morals and public order.<sup>43</sup> It seems to me that, within the field of public morals and public order, only prohibitions are simple. In other words, to the extent that the United States may consider authorizing any form of internet gambling or wagering, this will increase the complexity of any legislative solution. The more such activities are authorized, the greater lengths the legislator will have to go to in order to ensure that sufficient safeguards are in place to make the system consistent with, and acceptable under, prevailing standards of public morals and public order. This is, in my view, separate from the question of contentiousness. However, the United States has not, in this proceeding, explained in any precise manner how it intends to implement the recommendations and rulings of the DSB. The few indications that it has given suggest that it is leaning more in the direction of "confirming" or "clarifying" the prohibitions on the remote supply of gambling and betting services, rather than in the direction of authorizing, even in part, the supply of such services. In the absence of any more specific information from the United States on this issue, I do not consider the fact that the legislative activity called for in this case will inevitably touch on questions of public morals and public order to be a "particular circumstance" affecting my determination of the reasonable period of time.

48. The United States also submits that I should take account of the fact that several previous Congresses have considered bills related to internet gambling, but that none of these bills has passed. The United States did not, however, provide me with any explanation as to the reasons why such bills have not been enacted into law. I am, therefore, unable to determine whether Congress' inability to pass previous bills was related to their complexity—a relevant particular circumstance—or to their contentiousness—something that would not constitute a relevant particular circumstance for purposes of my determination.<sup>44</sup>

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<sup>43</sup>Appellate Body Report, para. 373(D)(iii)(c).

<sup>44</sup>Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 60; Award of the Arbitrator, *US – Section 110(5) Copyright Act*, paras. 41-42; Award of the Arbitrator, *Canada – Patent Term*, para. 58; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 61.

49. As regards the specific details of the United States legislative process, the United States and Antigua agree on the basic steps involved.<sup>45</sup> They also agree that the only steps that are required by law are the approval of a bill by both chambers of Congress as well as presidential signature. Furthermore, both parties accept that there is no fixed time frame attached to any one of the steps involved in the United States legislative process. Finally, both parties accept that, as previous arbitrators have observed, there is a considerable degree of flexibility inherent in the United States legislative system.<sup>46</sup>

50. In my view, the need for prompt compliance means that it is incumbent upon the United States to use the flexibility available in its legislative process to ensure rapid implementation. The United States is not, however, obliged to have recourse to extraordinary legislative procedures.<sup>47</sup>

51. The United States suggests that another "particular circumstance" that has a strong influence on the passage of legislation within the United States and that should, therefore, influence my determination in this proceeding, is the Congressional schedule. The United States points out that the vast majority of legislation is passed near the end of a Congress. Each Congress lasts for two years and consists of two sessions, each of which runs over one calendar year. The United States Congress is currently in the first session of the 109th Congress. Although the United States submits that it would be impossible to pass the necessary implementing legislation by the end of the first session of the 109th Congress, currently scheduled to end on 30 September 2005, the United States does not request that I fix the reasonable period of time to coincide with the end of the second session of the 109th Congress, at the end of 2006. Rather, the United States argues that, "much as the end of a Congressional session spurs legislative activity, the opportunity to pass legislation may be greater prior to a Congressional recess."<sup>48</sup> Thus, reasons the United States, it would be appropriate for the reasonable period of time for implementation to expire just before Congress begins its August 2006 recess, as this would provide a concrete impetus for passage of the necessary legislation.

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<sup>45</sup>At the oral hearing Antigua indicated that it accepts the description of the process provided by the United States, which is summarized *supra*, para. 13.

<sup>46</sup>Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 45; Award of the Arbitrator, *US – 1916 Act*, para. 39; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, paras. 63-64 and 74.

<sup>47</sup>Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 42; Award of the Arbitrator, *US – Section 110(5) Copyright Act*, paras. 32 and 45; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 43; and Award of the Arbitrator, *EC – Tariff Preferences*, para. 42.

<sup>48</sup>United States' submission, para. 35.

52. I do not take the view that a legislature's schedule is totally irrelevant to the determination of the reasonable period of time for implementation of the recommendations and rulings of the DSB. Rather, it seems to me that this is a circumstance that may or may not be relevant depending on the particular case.<sup>49</sup> Thus, for example, in *Canada – Patent Term* I did not consider Canada's parliamentary schedule to be determinative of the reasonable period of time in the circumstances of that case.<sup>50</sup> In this case, I do not attach much weight to this "particular circumstance", for the reasons that follow. The United States has taken the position that it would be appropriate for the reasonable period of time to expire just before Congress begins its August 2006 recess. In response to a written request that I addressed to the United States prior to the oral hearing, the United States informed me that the tentative 2006 Congressional Schedule is not yet available. The United States nonetheless indicated that in all likelihood the recesses taken by Congress in 2006 will closely resemble those in the 2005 Schedule, which the United States has provided.<sup>51</sup> I note, in this respect, that in addition to its August recess (the "Summer District Work Period"), Congress takes a number of recesses of a week or more throughout the year. In 2005, these include: a "Presidents Day District Work Period" in February; a "Spring District Work Period" in March/April around the time of Easter; a "Memorial Day District Work Period" at the end of May/early June; and an "Independence Day District Work Period" around the time of the 4th of July. In my view, the United States' argument that a recess period spurs legislative action must apply in the same way to these recesses as it does to Congress' August recess and to the end of a session of Congress. Thus, Congress has, throughout the year, a number of breaks that could serve to push forward the legislative process.

53. Antigua emphasizes the speed with which the 109th Congress has passed legislation to date, pointing out that this Congress adopted 15 measures through 19 June 2005.<sup>52</sup> In Antigua's view, this illustrates why the United States needs no more than six months in order to achieve legislative implementation in this case. The United States, however, argues that the rapidity with which these measures were passed in the first half of the 109th session of Congress is not at all representative of the ordinary workings of the United States legislative process. According to the United States, these 15 measures represent only a tiny fraction of all the laws that will be passed in the 109th Congress. Moreover, of these 15 measures, four dealt with disaster relief or emergencies, three were legislative packages that had been thoroughly considered in a previous Congress or Congresses, four dealt with

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<sup>49</sup>Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, paras. 69-70.

<sup>50</sup>Award of the Arbitrator, *Canada – Patent Term*, paras. 65-66.

<sup>51</sup>Exhibit US-9 to the United States' submission.

<sup>52</sup>According to Antigua, of these 15 measures: "two became law within a day of introduction, the longest period from introduction to adoption was 91 days, and the average number of days from introduction to adoption was 43.27 days." (Antigua's submission, para. 54; footnotes omitted)

the renewal of measures previously enacted but due to expire, and four involved the naming of buildings and museum regents.<sup>53</sup>

54. I find the rebuttal arguments of the United States concerning the work of the 109th Congress to be persuasive. Given that the 109th Congress has only been in session for half a year, it follows that any law that it has adopted during that time must have been adopted in less than half a year. Taken 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. In the absence of any additional context that would allow me to evaluate the significance of the time taken to pass the 15 measures cited by Antigua, I do not consider this to be a particular circumstance relevant to my determination.

55. Antigua also points to the fact that the United States Congress took just five months to pass the 2000 amendments to the IHA. I take note of this fact. Given that these amendments relate to the same field as the one in which the United States intends to implement in this case, I consider it relevant that Congress was able to act so expeditiously on a prior occasion.

4. Article 21.2 of the DSU

56. Antigua requests that, in making my determination, I apply Article 21.2 of the DSU and pay particular attention to Antigua's interests as a developing country Member of the WTO. Antigua underlines the importance of the 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. Antigua suggests that I should rely upon Article 21.2 of the DSU in two ways. First, I should use Article 21.2 to examine the consistency of the United States' proposed means of implementation with the recommendations and rulings of the DSB and with the covered agreements generally. Secondly, Antigua submits that I should rely on Article 21.2 to require the United States to use the considerable flexibility that exists within its legislative system to achieve implementation in a shorter period of time than I might otherwise do.

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<sup>53</sup>United States' statement at the oral hearing.

57. The United States argues that Article 21.2 is not relevant to my determination in this proceeding. For the United States, Article 21.2 can be relevant in an arbitration to determine the reasonable period of time for implementation only when it is the *implementing* Member that is a developing country. This is because the task of an Article 21.3(c) arbitrator is to determine the shortest possible period of time for implementation within the legal system of the implementing Member. The fact that the *complaining* Member may be a developing country cannot, in the view of the United States, have any impact on such a determination.

58. Article 21.2 provides:

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.

59. On its face, this provision does not contain any limitation of the type suggested by the United States. In other words, 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. Any such limitation, if it exists, must therefore be found in the context and/or object and purpose of this provision.<sup>54</sup>

60. Before considering relevant context for the interpretation of Article 21.2 of the DSU, however, I consider it useful to examine in further detail the words that are used in this provision. The provision requires that "particular attention" be paid to: (i) matters; (ii) affecting the interests of developing country Members; (iii) with respect to the measures at issue. At first blush, it is not clear whether the word "matters" in Article 21.2 has the same meaning as elsewhere in the DSU<sup>55</sup>, or whether it refers simply to the subject matter covered by Article 21. In any event, it seems to me that Article 21.2 contemplates a clear nexus between the interests of the developing country invoking the provision and the measures at issue in the dispute, as well as a demonstration of the adverse affects of such measures on the interests of the developing country Member(s) concerned.

61. Turning briefly to the context in the light of which Article 21.2 must be interpreted, I note that the provision is located within Article 21, which is entitled "*Surveillance of Implementation of*

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<sup>54</sup>I note that the Arbitrator in *EC – Tariff Preferences* identified, but did not decide, the issue of whether Article 21.2 might apply to developing country Members whose interests are affected by measures at issue in the dispute but which are not parties to the arbitration. (Award of the Arbitrator, para. 59) No such issue arises in this arbitration.

<sup>55</sup>The Appellate Body has held, for example, that the "matter" referred to in Article 7 of the DSU "consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)."  
(Appellate Body Report, *Guatemala – Cement I*, para. 72; original emphasis)

*Recommendations and Rulings*". The second paragraph of Article 21, like the first<sup>56</sup>, sets out a broad principle that guides and informs the more specific paragraphs that follow, including Article 21.3. Given that Article 21 contains a number of additional paragraphs dealing with different aspects of surveillance and implementation, it seems likely that Article 21.2 informs each of the subsequent paragraphs in a different manner. Arguably, for example, Article 21.2 could constitute a legislative expression of a factor that is to constitute a "particular circumstance" to be taken into account under Article 21.3(c). The last two paragraphs of Article 21 are also, as Antigua pointed out at the oral hearing, of potential use in interpreting the scope and role of Article 21.2. Each of those provisions also deals with developing country Members of the WTO at the stage of surveillance and implementation of DSB recommendations and rulings.<sup>57</sup> Yet, contrary to Article 21.2, both Article 21.7 and Article 21.8 expressly apply to the developing country Members that brought the case, that is, to developing countries as *complaining* parties.

62. The significance to be attached to this context, and the precise nature of the relationship between Article 21.2 and Article 21.3(c), are not issues that need be resolved in this arbitration. This is because, in my view, Antigua has not satisfied the criteria expressly mentioned in Article 21.2. In its submission, Antigua pointed out that its population, as well as its gross domestic product per capita, are tiny fractions of those of the United States. Antigua also asserted that the "continuation and responsible further development of the well-regulated cross-border gambling and betting service industry in Antigua is critical to the economic health and growth of the country"<sup>58</sup>, and that the "prosecution of the Dispute has put considerable stress on the very limited resources available to Antigua."<sup>59</sup> In response to questioning at the oral hearing, Antigua explained that, prior to 1998, the cross-border gambling and betting industry employed a significant percentage of the Antiguan work force, but that the number of active firms and employees now involved in the sector has shrunk significantly. Antigua did not, however, provide specific data in support of these arguments. Nor did Antigua seek to demonstrate any clear relationship between the decline of its industry and the measures which were subject to this dispute, that is, the Wire Act, the Travel Act, and the IGBA.

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<sup>56</sup>Article 21.1 stipulates that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."

<sup>57</sup>Paragraphs 7 and 8 of Article 21 provide as follows:

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.

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.

<sup>58</sup>Antigua's submission, para. 58.

<sup>59</sup>Antigua's submission, para. 59.

63. In the absence of any more specific evidence or elaboration of the affected interests of Antigua and their relationship with the measures at issue, I am not persuaded that the criteria referred to in Article 21.2 have been satisfied. For this reason, I need not consider further the issue of the precise relationship between paragraphs 2 and 3 of Article 21, nor how I might apply Article 21.2 so as to pay "particular attention" to the interests of Antigua in fixing the reasonable period of time for implementation by the United States in this dispute.

5. Summary

64. The United States, as the implementing Member, bears the burden of persuading me that the 15 month period that it proposes would constitute a "reasonable period of time" within the meaning of Article 21.3(c). I accept as relevant "particular circumstances" the following considerations raised by the United States: (i) implementation will occur by legislative means; (ii) the task of implementing by legislation is complicated both by the objective of eliminating, or clarifying the absence of, discrimination in the treatment of Antiguan and domestic service suppliers, and by the highly regulated nature of the field of internet gambling and betting in which this objective must be achieved. I take note of, but attach little significance to, Congress' likely 2006 schedule. Taken together, these factors do not, in my view, suffice to discharge the United States' burden of persuading me that 15 months would be a reasonable period of time for implementation in this dispute, particularly given the acknowledged flexibility in the United States legislative process.

65. I also accept as a relevant "particular circumstance" the fact that, as Antigua points out, the United States Congress passed the 2000 amendments to the IHA in only five months.

66. I am not persuaded that several other factors invoked by the United States (to date, Congress has not been able to pass any of the bills relating to internet gambling that have been proposed) or Antigua (the asserted availability of partial implementation through a presidential executive order, the fact that the 109th Congress has already passed 15 laws in approximately 6 months of work, or Antigua's status as a developing country Member) are properly characterized as particular circumstances relevant to my determination in this case.

67. Lastly, I wish to observe that, in the four previous Arbitrations in which the issue of the reasonable period of time for implementation by *legislative* means within the United States system

arose, each arbitrator determined a different reasonable period of time, ranging from 10 to 15 months.<sup>60</sup>

#### **IV. The Award**

68. In the light of what has been stated above, I determine that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this dispute is 11 months and 2 weeks from 20 April 2005, which was the date on which the DSB adopted the Panel and Appellate Body Reports. The reasonable period of time will therefore expire on 3 April 2006.

Signed in the original at Geneva this 28th day of July 2005 by:

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Claus-Dieter Ehlermann  
Arbitrator

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<sup>60</sup>In *US – Section 110(5) Copyright Act*, the Arbitrator determined that 12 months would be a reasonable period of time (para. 47); in *US – 1916 Act*, the Arbitrator determined that 10 months would be a reasonable period of time (para. 45); in *US – Hot-Rolled Steel*, the Arbitrator determined that 15 months would be a reasonable period of time (para. 40); and in *US – Offset Act (Byrd Amendment)*, the Arbitrator determined that 11 months would be a reasonable period of time for the United States to implement the recommendations and rulings of the DSB in that dispute (para. 83).