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1 ARTICLE 21

1.1 Text of Article 21

Article 21

Surveillance of Implementation of Recommendations and Rulings

1. 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.
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.
3. At a DSB meeting held within 30 days¹¹ 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. The reasonable period of time shall be:

*(footnote original)*¹¹ If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose

- (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.¹² In such arbitration, a guideline for the arbitrator¹³ 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.

*(footnote original)*¹² If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.

*(footnote original)*¹³ The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

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.

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

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.

1.2 Article 21.1

1.2.1 "prompt compliance"

1.2.1.1 Concept of compliance: withdrawal or modification

1. The Arbitrator in *Argentina – Hides and Leather (Article 21.3(c))* defined the concept of "compliance" or "implementation" as a technical concept with a specific content: "the withdrawal or modification of a measure, or part of a measure, the establishment or application of which by a Member of the WTO constituted the violation of a provision of a covered agreement":

"[T]he non-conforming measure is to be brought into a state of conformity with specified treaty provisions either by *withdrawing* such measure completely, or by *modifying* it by excising or correcting the offending portion of the measure involved. Where the non-conforming measure is a statute, a repealing or amendatory statute is commonly needed. Where the measure involved is an administrative regulation, a new statute may or may not be necessary, but a repealing or amendatory regulation is commonly required."¹ *

It thus appears that the concept of compliance or implementation prescribed in the DSU is a technical concept with a specific content: The withdrawal or modification of a measure, or part of a measure, the establishment or application of which by a Member of the WTO constituted the violation of a provision of a covered agreement."²

2. In *Argentina – Hides and Leather (Article 21.3(c))*, the Arbitrator differentiated the concept of "compliance" within the meaning of the DSU from the removal or modification of the underlying economic/social/other conditions which may have caused the enactment or application of the WTO-inconsistent governmental measure:

"Compliance within the meaning of the DSU is distinguishable from the removal or modification of the underlying economic or social or other conditions the existence of which might well have caused or contributed to the enactment or application of the WTO-inconsistent governmental measure in the first place. Those economic or other conditions might, in certain situations, survive the removal or modification of the non-conforming measure; nevertheless, the WTO Member concerned will have complied with the DSB recommendations and rulings and with its obligations under the relevant covered agreement. To my mind, it is *inter alia* for the above reason that the need for structural adjustment of the industry or industries in respect of which the WTO-inconsistent measure was promulgated and applied, has generally been regarded, in prior arbitrations under Article 21.3(c) of the DSU, as *not* bearing upon the determination of a 'reasonable period of time' for implementation of DSB recommendations and rulings. "³

3. In *Japan – DRAMs (Korea) (Article 21.3(c))*, the Arbitrator recalled that:

"[A] Member whose measure has been found to be inconsistent with the covered agreements may generally choose between two courses of action: withdrawal of the measure; or modification of the measure by remedial action. While withdrawal may be the preferred option to secure 'prompt compliance', a Member may, where withdrawal is deemed impracticable, choose to modify the measure, provided that this

¹ (footnote original) The non-conforming measure might also assume other forms: e.g., an executive or administrative practice actually carried out but not specifically mandated or authorized by statute or administrative regulation; or a "quasi-judicial" determination by an administrative body. Since the Argentine measures involved in this arbitration are not of these kinds, it is not necessary to examine the requirements of compliance where those other kinds of measures are concerned.

² Award of the Arbitrator, *Argentina – Hides and Leather (Article 21.3(c))*, paras. 40-41. See also the Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 49.

³ Award of the Arbitrator, *Argentina – Hides and Leather (Article 21.3(c))*, para. 41.

is done in the shortest time possible, and that such modification is permissible under the DSB's recommendations and rulings."⁴

4. In *Colombia – Ports of Entry (Article 21.3(c))*, the Arbitrator observed that Article 3.7 of the DSU provides that the first objective of the dispute settlement mechanism is usually to secure withdrawal of the WTO-inconsistent measures, and therefore agreed with Panama that withdrawal of the inconsistent measures was the "preferred" means of implementation and certainly falls within the range of permissible actions. The Arbitrator stated:

"However, I do not exclude that Colombia could bring itself into conformity with the recommendations and rulings of the DSB by modifying both the indicative prices mechanism and the ports of entry measure in a manner that rectifies the particular WTO-inconsistencies identified by the Panel. In my view, modification of both the indicative prices mechanism and the ports of entry measure is within the 'range of permissible actions' available for Colombia to implement the recommendations and rulings of the DSB in this dispute."⁵

1.2.1.2 Promptness of compliance

1.2.1.2.1 Flexibility

5. In *Chile – Alcoholic Beverages (Article 21.3(c))*, the Arbitrator considered that the existence of a certain element of flexibility in respect of time in complying with the recommendations and rulings of the DSB "would appear to be essential if 'prompt' compliance, in a world of sovereign states, is to be a balanced conception and objective":

"The DSU clearly stressed the systemic interest of all WTO Members in the Member concerned complying 'immediately' with the recommendations and rulings of the DSB. Reading Articles 21.1 and 21.3 together, 'prompt' compliance is, in principle, 'immediate' compliance. At the same time, however, should 'immediate' compliance be 'impracticable' – it may be noted that the DSU does not use the far more rigorous term 'impossible' – the Member concerned becomes entitled to a 'reasonable period of time' to bring itself into a state of conformity with its WTO obligations. Clearly, a certain element of flexibility in respect of time is built into the notion of compliance with the recommendations and rulings of the DSB. That element would appear to be essential if 'prompt' compliance, in a world of sovereign states, is to be a balanced conception and objective."⁶

6. In *US – 1916 Act (Article 21.3(c))*, the Arbitrator further indicated that an implementing Member "may reasonably be expected to use all the flexibility available within its normal legislative procedures to enact the required legislation as speedily as possible."⁷

7. In *Colombia – Ports of Entry (Article 21.3(c))*, the Arbitrator considered that the implementing Member "is expected to use whatever flexibility is available within its legal system to promptly implement the recommendations and rulings of the DSB."⁸

⁴ Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 37.

⁵ Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 77.

⁶ Award of the Arbitrator, *Chile – Alcoholic Beverages (Article 21.3(c))*, para. 38. As regards the concept of "flexibility" when considering the reasonable period of time, see also Awards of the Arbitrator, *Canada – Patent Term*, para. 64; *US – 1916 Act*, para. 39; *US – Section 110(5) Copyright Act*, paras. 38–39 and *Chile – Price Band System (Article 21.3(c))*, para. 39.

⁷ Award of the Arbitrator, *US – 1916 Act (Article 21.3(c))*, para. 39. See also Awards of the Arbitrator on *US – Section 110(5) Copyright Act (Article 21.3(c))*, paras. 38–39; *Canada – Patent Term (Article 21.3(c))*, para. 64; and *Chile – Price Band System (Article 21.3(c))*, para. 49.

⁸ Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 65. See also: Awards of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 42; *Brazil Retreaded Tyres (Article 21.3(c))*, para. 48; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25 (referring to Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 49, in turn referring to Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 39; *EC – Tariff Preferences (Article 21.3(c))*, para. 36; and *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 64).

8. In *China – GOES (Article 21.3(c))*, the Arbitrator considered that "all flexibilities within the legal system of an implementing Member must be employed in the implementation process".⁹

1.2.1.2.2 Time after adoption of report(s)

9. In *US – Section 110(5) Copyright Act (Article 21.3(c))*, the Arbitrator further indicated that, in order to effect "prompt compliance", an implementing Member must use the time after adoption of a panel and/or Appellate Body report to begin to implement the recommendations and rulings of the DSB:

"[A]n implementing Member must use the time after adoption of a panel and/or Appellate Body report to begin to implement the recommendations and rulings of the DSB. Arbitrators will scrutinize very carefully the actions an implementing Member takes in respect of implementation during the period after adoption of a panel and/or Appellate Body report and prior to any arbitration proceeding. If 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'."¹⁰

10. In the same vein, the Arbitrator on *Chile – Price Band System (Article 21.3(c))* considered that a Member's obligation to implement the recommendations and rulings of the DSB is triggered by the adoption of the report(s) at issue and thus a Member "must at the very least promptly commence and continue concrete steps towards implementation":

"A Member's obligation to implement the recommendations and rulings of the DSB is triggered by the DSB's adoption of the relevant panel and/or Appellate Body reports. Although Article 21.3 acknowledges circumstances where *immediate* implementation is 'impracticable', in my view the implementation process should not be prolonged through a Member's inaction (or insufficient action) in the first months following adoption. In other words, whether or not a Member is able to *complete* implementation promptly, it must at the very least promptly *commence* and continue concrete steps towards implementation. Otherwise, inaction or dilatory conduct by the implementing Member would exacerbate the nullification or impairment of the rights of other Members caused by the inconsistent measure. It is for this reason that arbitral awards under Article 21.3(c) calculate 'reasonable period[s] of time' as from the date of adoption of panel and/or Appellate Body reports."¹¹

1.2.1.2.3 Due process rights of interested parties

11. In *China – GOES (Article 21.3(c))*, the Arbitrator considered that a reasonable period of time for the implementation of DSB recommendations and rulings can accommodate the imperatives of both "prompt compliance" and due process rights of interested parties:

"Implementation must be effected in a transparent and efficient manner that affords due process to all interested parties. I do not consider that the imperatives of prompt compliance, on the one hand, and of ensuring the due process rights of interested parties, on the other hand, are mutually exclusive objectives. A reasonable period of time for the implementation of DSB recommendations and rulings is capable of accommodating both. This, however, requires striking a 'balance between respecting due process rights of interested parties and the promptness required in implementation.'"¹²

1.2.1.2.4 Workload of implementing authority

12. In *US – Washing Machines*, the Arbitrator stated that the workload of the implementing authority is irrelevant to the reasonable period of time for compliance:

⁹ Award of the Arbitrator, *China – GOES (Article 21.3(c))*, para. 3.46.

¹⁰ Award of the Arbitrator, *US – Section 110(5) Copyright Act (Article 21.3(c))*, para. 46.

¹¹ Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 43.

¹² Award of the Arbitrator, *China – GOES (Article 21.3(c))*, para. 3.46). See also Award of the Arbitrator, *Japan – DRAMS (Article 21.3(c))*, para. 51.

"[I]n the light of Article 21.1 of the DSU, it would be inappropriate to prioritize new or ongoing investigations over corrective action vis-à-vis measures already in force and found to be WTO-inconsistent".¹³

1.2.2 "recommendations or rulings"

13. In *Thailand – Cigarettes (Philippines)*, the Panel had, in its interim report, declined to make a recommendation under Article 19.1 in respect of certain measures that were no longer in force. At the interim review stage, the Philippines requested that the Panel make a recommendation. While the Panel agreed to make a recommendation, it disagreed with the premise that the Philippines' right to pursue compliance proceedings under Article 21 was contingent upon the existence of a recommendation under Article 19.1. The Panel said the following about the terms "recommendations or rulings" in the context of Article 21.1:

"Before turning to the specific factual situation presented in this case based on our understanding of the nature of the panels' obligation under Article 19.1 as set out in the previous paragraph, we will first address the premise of the Philippines' position. The Philippines' request for the Panel's recommendation with respect to the three MRSP Notices found inconsistent with Article III:2 of the GATT 1994, appears to be based on the premise that the Philippines *needs* recommendations to pursue compliance proceedings, if necessary, under, *inter alia*, Articles 21.5 and 22.6 of the DSU as, in the absence of a recommendation under Article 19.1 of the DSU, the Philippines' right to pursue compliance proceedings under Articles 21.5 and 22 would be undermined. The Philippines submits that only recommendations by the DSB would impose positive obligations in relation to the subject measures.

We do not however find any language in the relevant provisions of Articles 21 and 22 of the DSU indicating that an implementing Member's compliance obligation arises only from panels' *recommendations*. Rather, most of the provisions relating to compliance obligations under Articles 21 and 22 of the DSU refer to both recommendations and *rulings*.¹⁴ For example, Article 21.1 provides, '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'. In our view, the scope of the compliance requirement under these provisions is therefore broader than just 'recommendations'. In any event, it is difficult to envision a situation where the Philippines will *a priori* be precluded from resorting to the compliance proceedings with respect to any future action taken by Thailand if it can be shown that such action is related to the Panel's findings on the inconsistency of the concerned MRSP Notices with Thailand's obligations under Article III:2 of the GATT 1994. As noted in paragraphs 7.42 and 7.43 of the Interim Panel Report, previous panels considered it necessary and important to make findings even with respect to measures that have expired at the time of making such findings in certain situations. Among those are situations where a measure was still impairing benefits accruing to a complaining Member or situations where there remained the prospect of reintroduction of the measure, and thus making findings with respect to expired measures would contribute to resolving a particular dispute. If only recommendations were to guarantee the complaining Member's right, as granted under the DSU, to seek compliance proceedings, there would be no meaning in even making *findings* for expired measures, which has not been the view of the Appellate Body and previous panels.¹⁵ We also do not believe that such an understanding would serve the spirit and purpose of the WTO dispute settlement mechanism."¹⁶

¹³ Award of the Arbitrator, *US – Washing Machines (Article 21.3(c))*, para. 3.63.

¹⁶ Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 6.16-6.17.

1.3 Article 21.2

1.3.1 "interests of developing country Members"

14. In *Indonesia – Autos (Article 21.3(c))*, the Arbitrator, in determining the "reasonable period of time" pursuant to Article 21.3(c) of the DSU, took into account not only Indonesia's status as a developing country, but also the fact that "it is a developing country that is currently in a dire economic and financial situation":

"Although the language of this provision is rather general and does not provide a great deal of guidance, it is a provision that forms part of the context for Article 21.3(c) of the DSU and which I believe is important to take into account here. Indonesia has indicated that in a 'normal 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. I, therefore, conclude that an additional period of six months over and above the six-month period required for the completion of Indonesia's domestic rule-making process constitutes a reasonable period of time for implementation of the recommendations and rulings of the DSB in this case."¹⁷

15. In *Chile – Alcoholic Beverages (Article 21.3(c))*, the Arbitrator held that taking into account the interests of developing countries in determining the "reasonable period of time" pursuant to Article 21.3(c), should not result in different "kinds of considerations that may be taken into account". However, the Arbitrator stressed that "because Article 21.2 is in the DSU, it is not simply to be disregarded" and that it "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":

"It is not necessary to assume that the operation of Article 21.2 will essentially result in the application of 'criteria' for the determination of 'the reasonable period of time' – understood as the *kinds* of considerations that may be taken into account – that would be 'qualitatively' different for developed and for developing country Members. I do not believe Chile is making such an assumption. 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."¹⁸

16. In *Chile – Price Band System (Article 21.3(c))*, the Arbitrator while agreeing with the Arbitrator in *Chile – Alcoholic Beverages (Article 21.3(c))* on the importance of being generally mindful of the difficulties that a developing country may face upon implementation of rulings and recommendations of the DSB, noted that the current case differed from the latter since this was the first arbitration where both the complainant and the defendant were developing country Members. The Arbitrator concluded that given the unusual circumstances of this case, he was "not swayed towards either a longer or shorter period of time by the '[p]articular attention' [to be paid] to the interests of developing countries":

"I agree with the following statement by the arbitrator in *Chile – Alcoholic Beverages* that 'an arbitrator functioning under Article 21.3(c) [must] be *generally mindful* of the great difficulties that a developing country Member may, in a particular case, face

¹⁷ Award of the Arbitrator, *Indonesia – Autos (Article 21.3(c))*, para. 24. See also Award of the Arbitrator, *Argentina – Hides and Leather (Article 21.3(c))*, para. 51.

¹⁸ Award of the Arbitrator, *Chile – Alcoholic Beverages (Article 21.3(c))*, para. 45.

as it proceeds to implement the recommendations and rulings of the DSB.¹⁹ This arbitration is, however, the first arbitration under Article 21.3(c) to include developing countries as both complainant *and* respondent. The period of time for implementation of the recommendations and rulings of the DSB in this case is thus a 'matter[] affecting the interests' of both Members: the general difficulties facing Chile as a developing country in revising its longstanding PBS, and the burden imposed on Argentina as a developing country whose access to the Chilean agricultural market is impeded by the PBS, contrary to WTO rules.

Furthermore, Chile has not pointed to additional *specific* obstacles that it faces *as a developing country* under present circumstances. This is a matter which I should take into account in evaluating whether a longer period of time may be needed for implementation. The absence of presently-existing, concrete difficulties in Chile's position as a developing country stands in contrast to previous arbitrations, wherein Members have identified, not simply their positions as developing countries, but also 'severe'²⁰ or 'dire'²¹ economic and financial situations existing at the time of the proposed period of implementation. In contrast, the acuteness of Argentina's burden as a developing country complainant that has been successful in establishing the WTO-inconsistency of a challenged measure, is amplified by Argentina's daunting financial woes at present. Accordingly, I recognize 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. In the unusual circumstances of this case, therefore, I am not swayed towards either a longer or shorter period of time by the '[p]articular attention'²² I pay to the interests of developing countries."²³

17. In *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, the Arbitrator had difficulty in comprehending how the fact that various complainants were developing country Members could affect the determination of the reasonable period of time for the developed country Member to implement the DSB recommendations:

"I am, furthermore, mindful of my obligation, pursuant to Article 21.2, to pay '[p]articular attention ... to matters affecting the interests of developing country Members'. I note that, by its wording, Article 21.2 does not distinguish between situations where the developing country Member concerned is an implementing or a complaining party. However, I also note that the Complaining Parties have not explained *specifically* how developing country Members' interests should affect my determination of the reasonable period of time for implementation. It is useful to recall, once again, that the term 'reasonable period of time' has been consistently interpreted to signify the 'shortest period possible within the legal system of the Member'. Therefore, I have some difficulty in seeing how the fact that several Complaining Parties are developing country Members should have an effect on the determination of the shortest period possible within the legal system of the United States to implement the recommendations and rulings of the DSB in this case."²⁴

18. In *EC – Tariff Preferences (Article 21.3(c))*, the European Communities requested the Arbitrator to take into account the interests of the developing countries which were at the time beneficiaries of measures found to be inconsistent with WTO law (the Drug Arrangements). The Arbitrator recalled that some arbitrators had taken Article 21.2 of the DSU into account in assessing the difficulties faced by an implementing Member that was a developing country²⁵, or

²² (footnote original) Article 21.2 of the DSU.

²³ Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, paras. 55-56.

²⁴ Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 81.

²⁵ See, for example, Award of the Arbitrator, *Indonesia – Autos (Article 21.3(c))*, para. 24; Award of the Arbitrator, *Chile – Alcoholic Beverages (Article 21.3(c))*, para. 45; and Award of the Arbitrator, *Argentina – Hides and Leather (Article 21.3(c))*, para. 51.

where both parties were developing countries.²⁶ The Arbitrator pointed out that until then no arbitrator had determined whether the reference to 'developing country Members' in Article 21.2 should be interpreted to include, in the context of an Article 21.3(c) arbitration, Members not party to the arbitration. The Arbitrator however decided that it was unnecessary for him to decide this issue.²⁷

19. In *US – Gambling (Article 21.3(c))*, the Arbitrator noted that, in absence of an express limitation, Article 21.2 may not be limited to *implementing* developing country Members. Further, the Arbitrator interpreted the context of Article 21.2 as requiring a clear demonstration of adverse effects of the measures at issue on the interests of developing countries invoking the article. The Arbitrator observed:

"[T]he 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."²⁸

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 measure at issue. At first blush, it is not clear whether the words 'matters' in Article 21.2 has the same meaning as elsewhere in the DSU²⁹, 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.

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 Recommendations and Rulings*'. The second paragraph of Article 21, like the first, 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. 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."³⁰

20. The Arbitrator in *EC – Export Subsidies on Sugar (Article 21.3(c))* considered that the phrase "developing country Members" in Article 21.2 includes both implementing and complaining developing country Members:

²⁶ Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, paras. 55 and 56. See also Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 81.

²⁷ Award of the Arbitrator in *EC – Tariff Preferences (Article 21.3(c))*, para. 59.

²⁸ (*footnote original*) 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.

²⁹ (*footnote original*) 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*)."³⁰ (Appellate Body Report, *Guatemala – Cement I*, para. 72; emphasis original).

³⁰ Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, paras. 59–61.

"I find that previous arbitrators have not explicitly resolved the question whether the phrase 'developing country Members' in Article 21.2 refers exclusively to the *implementing* Member, or whether it also applies to developing country Members *other* than the implementing member such as, for instance, the complaining Member, third parties to the dispute, or any developing country Member of the WTO. I consider that Article 21.2 is to be interpreted as directing an arbitrator to pay '[p]articular attention' to 'matters affecting the interests' of both an *implementing* and *complaining* developing country Member or Members. I note that Brazil, the European Communities and Thailand explicitly agree on this point. In arriving at this conclusion, I agree with the arbitrator in *US – Gambling* that the text of Article 21.2 does not limit its scope of application to an implementing developing country Member. I also note that Articles 21.7 and 21.8 refer to circumstances in which a 'matter ... has been raised by a developing country Member' or 'the case is one brought by a developing country member'; this suggests that, where the drafters of the DSU wished to limit the scope of provision to a particular category or group of developing country Members, they did so expressly."³¹

1.4 Article 21.3: period of time for compliance

1.4.1 General: no unconditional right to a period of time to comply

21. The Arbitrator in *Canada – Pharmaceutical Patents (Article 21.3(c))* considered that Members are not unconditionally entitled to a period of time to bring WTO-inconsistent measures into conformity:

"Further, and significantly, a 'reasonable period of time' is not available unconditionally. Article 21.3 makes it clear that a reasonable period of time is available for implementation only '[i]f it is impracticable to comply *immediately* with the recommendations and rulings' of the DSB. Implicit in the wording of Article 21.3 seems to me to be the assumption that, ordinarily, Members will comply with recommendations and rulings of the DSB 'immediately'. The 'reasonable period of time' to which Article 21.3 refers is, thus, a period of time in what is implicitly not the ordinary circumstance, but a circumstance in which 'it is impracticable to comply *immediately* ...'."³²

22. In *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, the Arbitrator indicated that Article 21.3 "makes clear that 'prompt compliance', in principle, implies 'immediate[]' compliance" and, accordingly deduced that a " 'reasonable period of time' for implementation is not available unconditionally to an implementing Member. Rather, an implementing Member is entitled to a reasonable period of time for implementation only where, pursuant to Article 21.3, 'it is impracticable to comply immediately with the recommendations and rulings' of the DSB".³³

"the Member concerned shall inform the DSB of its intentions"

23. In *US – Supercalendered Paper (Article 22.6 – US)*, the Arbitrator recalled that, after the Appellate Body Report in that dispute was circulated, the United States expressed the view at the DSB that the document WT/DS505/AB/R was not a valid Appellate Body report and objected to its adoption. The Arbitrator observed that:

"Article 21.3 of the DSU provides that, at a DSB meeting held within 30 days after the adoption of a panel or Appellate Body report, the Member concerned (in this dispute, the United States) shall inform the DSB of its intentions with respect to the implementation of the recommendations and rulings of the DSB. The United States did not provide any such statement of intentions to the DSB. There was thus no 'reasonable period of time' determined in this dispute specifying by when the

³¹ Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 99.

³² Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 45.

³³ Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 40.

United States was required to comply with the recommendations and rulings of the DSB."³⁴

1.4.2 Article 21.3(b)

1.4.2.1 Table of bilateral agreements pursuant to Article 21.3(b)

24. For a table providing information on agreements reached among the parties to a dispute regarding the reasonable period of time pursuant to Article 21.3(b), see the chapter of the Analytical Index on "DS Information Tables".

1.4.2.2 Precedential value of Article 21.3(b) agreements

25. In *US – Hot-Rolled Steel (Article 21.3(c))*, the United States referred to the extensions of the reasonable period of time agreed by the DSB in two previous disputes to take into account the adjournment of the United States Congress' legislative session, in order to support its position that the reasonable period of time should be longer than ten months. The Arbitrator noted that, on both occasions, the complaining parties had agreed to the extension and therefore did not consider that the actions of the DSB in those cases could have "any precedential value":

"It appears to me that whether the actions of the DSB in those two instances have any precedential value in respect of the present arbitration proceedings, is open to substantial debate. The present proceedings have been precipitated precisely by the failure of the parties to the dispute to reach an agreement on a reasonable period of time to comply under Article 21.3(b) of the DSU."³⁵

1.4.2.3 Parties' agreement after appointment of Arbitrator

26. Parties may enter into agreements under Article 21.3(b) following the appointment of an Arbitrator to determine the reasonable period of time under Article 21.3(c). For example, in *US – Zeroing (Japan) (Article 21.3(c))*, after the appointment of an Arbitrator under the procedures in Article 21.3(c), the parties reached an agreement on the reasonable period of time for implementation. Since Japan no longer sought to have the period at issue determined by binding arbitration, the Arbitrator decided not to issue an award in these proceedings.³⁶

27. During the interim review period in *Indonesia – Chicken (Article 21.5 – Brazil)*, the Panel agreed to Indonesia's request to include additional language in the panel report to note that Indonesia had provided Brazil with copies of two questionnaires. Brazil had opposed this request because it considered that including this additional language would result in the disclosure of confidential bilateral discussions concerning the reasonable period of time (RPT) for implementation.³⁷ The Panel drew parallels from Article 4.6 of the DSU to reach the conclusion that information submitted by a party during bilateral RPT discussions conducted pursuant to Article 21.3(b) is not subject to confidentiality:

"We see some parallels between Brazil's argument and the discussion on the confidentiality of consultations in Article 4.6 of the DSU which, in contrast to the provision relevant here, namely Article 21.3(b) of the DSU, contains an explicit requirement regarding confidentiality. Taking guidance from past panels regarding the confidentiality requirement in Article 4.6, we note that while the discussions between the parties may be subject to confidentiality, information submitted by the other side during the consultations is not, much less information submitted by the party itself. Therefore, even accepting Brazil's argument that the confidential nature of bilateral RPT discussions needs to be preserved, we see no grounds to treat as confidential information that Indonesia submitted in the context of such discussions and has now submitted in this proceeding as evidence of its own actions. We thus refer to this evidence and have added a slightly modified version of the text proposed by Indonesia

³⁴ Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, para. 1.8.

³⁵ Award of the Arbitrator, *US – Hot-Rolled Steel (Article 21.3(c))*, para. 39.

³⁶ Award of the Arbitrator, *US – Zeroing (Japan) (Article 21.3(c))*, para. 4.

³⁷ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 6.12.

in a new footnote. As we discuss further below, we have also included here additional text that Indonesia proposed for paragraph 7.59."³⁸

1.4.3 Article 21.3(c)

1.4.3.1 Table showing the reasonable period of time awarded in Article 21.3(c) arbitrations to date

28. For a table providing information on the reasonable period of time awarded in Article 21.3(c) arbitrations to date, see the chapter of the Analytical Index on "DS Information Tables".

1.4.3.2 Limited mandate of the arbitrator under Article 21.3(c)

1.4.3.2.1 Not the role of an arbitrator under Article 21.3(c) to identify a particular method of implementation

29. The Arbitrator in *EC – Hormones (Article 21.3(c))* defined his mandate as determining the reasonable period of time within which implementation must be completed and not as suggesting means of implementation. The Arbitrator stated:

"It is not within my mandate under Article 21.3(c) of the DSU, to suggest ways or means to the European Communities to implement the recommendations and rulings of the Appellate Body Report and Panel Reports. My task is to determine the reasonable period of time within which implementation must be completed. Article 3.7 of the DSU provides, in relevant part, that 'the first objective of the dispute settlement mechanism is *usually to secure the withdrawal of the measures concerned* if these are found to be inconsistent with the provisions of any of the covered agreements' (emphasis added). Although withdrawal of an inconsistent measure is the *preferred* means of complying with the recommendations and rulings of the DSB in a violation case³⁹, it is not necessarily the *only* means of implementation consistent with the covered agreements. An implementing Member, therefore, has a measure of discretion in choosing the *means* of implementation, as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements."⁴⁰

30. In *US – Hot-Rolled Steel (Article 21.3(c))*, the Arbitrator indicated that although it is for the implementing Member to determine the proper scope and content of anticipated legislation, the degree of complexity of the contemplated implementing legislation may be relevant for the arbitrator, to the extent that such complexity bears upon the length of time that may reasonably be allocated to the enactment of such legislation:

"I do not believe that an arbitrator acting under Article 21.3(c) of the DSU is vested with jurisdiction to make any determination of the proper scope and content of implementing legislation, and hence do not propose to deal with it. The degree of complexity of the contemplated implementing legislation may be relevant for the arbitrator, to the extent that such complexity bears upon the length of time that may reasonably be allocated to the enactment of such legislation. But the proper scope and

³⁸ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 6.13.

³⁹ (footnote original) By contrast, in a non-violation case, brought under Article XXIII:1(b) of the GATT 1994, Article 26.1(b) of the DSU states explicitly that "there is no obligation to withdraw".

⁴⁰ Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 38. See also the Awards of the Arbitrator, *Australia – Salmon (Article 21.3(c))*, para. 35; *Korea – Alcoholic Beverages (Article 21.3(c))*, para. 45, where the Arbitrator indicated that "choosing the means of implementation is, and should be, the prerogative of the implementing Member"; *Canada – Pharmaceutical Patents (Article 21.3(c))*, paras. 40; *Chile – Alcoholic Beverages (Article 21.3(c))*, para. 42, where the Arbitrator confirmed that "[t]he choice and the timing of the detailed operating steps in enacting a new law are properly left to the Member concerned"; *Chile – Price Band System (Article 21.3(c))*, para. 32; *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 48; *EC – Tariff Preferences (Article 21.3(c))*, para. 30; *US – Gambling (Article 21.3(c))*, para. 33.

content of anticipated legislation are, in principle, left to the implementing WTO Member to determine."⁴¹

31. In *Chile – Price Band System (Article 21.3(c))*, the Arbitrator further explained that, although the manner of implementation is up to the Member concerned, the more information provided on the details of the implementing measure, the greater the guidance to an Arbitrator in selecting a reasonable period of time:

"The fact that an Article 21.3(c) arbitration focuses on the period of time for implementation, however, does not render the substance of the implementation, that is, the precise means or manner of implementation, immaterial from the perspective of the arbitrator. In fact, the more information that is known about the details of the implementing measure, the greater the guidance to an arbitrator in selecting a reasonable period of time, and the more likely that such period of time will fairly balance the legitimate needs of the implementing Member against those of the complaining Member. Nevertheless, the arbitrator should still avoid deciding what a Member must do for proper implementation."⁴²⁴³

32. The Arbitrator in *EC – Chicken Cuts (Article 21.3(c))*, stressed that his mandate was limited to determining the reasonable period of time and that, therefore, his task was focused on the 'when' and not the 'what'. The Arbitrator further summarized previous awards regarding his mandate under Article 21.3(c):

"My role as arbitrator in this dispute is limited. My sole mandate under Article 21.3 of the DSU is to determine the 'reasonable period of time' needed for implementation of the recommendations and rulings of the DSB in this dispute. Thus, in fulfilling this limited mandate, I acknowledge that the implementing Member has a measure of discretion in selecting the means of implementation that it deems most appropriate; in other words, with respect to the implementing measure, my task focuses on the *when*, not the *what*.⁴⁴ My concern is with time, not technique. Furthermore, I agree with previous arbitrators who have carried out like mandates under Article 21.3 that I should base my determination on the shortest period of time possible within the legal system of the implementing Member⁴⁵, and that in doing so I should bear in mind that the implementing Member is expected to use whatever flexibility is available within its legal system in its efforts to fulfil its WTO obligations.⁴⁶ Such flexibility, however, need not necessarily include recourse to 'extraordinary' procedures.⁴⁷ As is made clear by Article 21.3(c), the particular circumstances of this dispute may also affect my calculation of the reasonable period of time, and may make it 'shorter or longer'. All three parties to this dispute agree that these general principles should guide me in making my determination."⁴⁸

33. In *US – Gambling (Article 21.3(c))*, the Arbitrator reiterated that the choice of the method of implementation was the implementing Member's right and not the arbitrator's. The Arbitrator stated:

"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.⁴⁹ 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."⁵⁰

⁴¹ Award of the Arbitrator, *US – Hot-Rolled Steel (Article 21.3(c))*, para. 30.

⁴³ Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 37.

⁴⁸ Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 49.

⁵⁰ Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, para. 33.

34. The Arbitrator in *Colombia – Ports of Entry (Article 21.3(c))* considered that it fell within an arbitrator's mandate to consider the WTO-consistency of proposed means of implementation:

"While an implementing Member has discretion in selecting the means of implementation, this discretion is not 'an unfettered right to choose any method of implementation'. In my view, implementation of the recommendations and rulings of the DSB in this case is an 'obligation of result', and therefore the means of implementation chosen must be apt in form, nature, and content to effect compliance, and should otherwise be consistent with the covered agreements. Thus, although I am mindful that it falls within the scope of Article 21.5 proceedings to assess whether the measures eventually taken to comply are WTO-consistent, in making my determination under Article 21.3(c) I must consider 'whether the implementing action falls within the range of permissible actions that can be taken in order to implement the DSB's recommendations and rulings.'"⁵¹

35. In *Japan – DRAMs (Korea) (Article 21.3(c))*, the Arbitrator pointed out that in order "to determine when a Member must comply, it may be necessary to consider how a Member proposes to do so."⁵²

36. In *Japan – DRAMs (Korea) (Article 21.3(c))*, the Arbitrator further considered that the wording of Article 21.1 and the introductory clause of Article 21.3 support the view that the examination of "whether the implementing action falls within the range of permissible actions that can be taken in order to implement the DSB's recommendations and rulings" falls within an arbitrator's mandate.⁵³ However, the Arbitrator stressed that "it is beyond [an Arbitrator's] mandate to determine the consistency with WTO law of the measure eventually taken to comply. This can only be judged in Article 21.5 proceedings."⁵⁴

1.4.3.2.2 Limits on the implementing Member's discretion to choose the means of implementation

37. In *EC – Export Subsidies on Sugar (Article 21.3(c))*, the Arbitrator reiterated that the implementing Member has a right to choose the means of implementation, but proceeded to highlight the limitations that applied to said right:

"[T]he choice of the method of implementation rests with the implementing Member. However, the implementing Member does not have an unfettered right to choose any method of implementation. Besides being consistent with the Member's WTO obligations, the chosen method must be such that it could be implemented within a reasonable period of time in accordance with guidelines contained in Article 21.3 (c). Objectives that are extraneous to the recommendations and rulings of the DSB in the dispute concerned may not be included in the method if such inclusion were to prolong the implementation period. Above all, it is assumed that the implementing Member will act in "good faith" in the selection of the method that it deems most appropriate for implementation of the recommendations and rulings of the DSB."⁵⁵

38. In *EC – Chicken Cuts (Article 21.3(c))*, the Arbitrator stated that an implementing Member does not have an unlimited right to choose its means of implementation and, under the circumstances of the dispute, required the implementing Member to demonstrate that its first step of implementation was a requirement under its domestic law:

⁵¹ Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 64.

⁵² Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 26. See also Awards of the Arbitrator, *US – COOL (Article 21.3 (c))*, para. 68; *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.3; *Peru – Agricultural Products (Article 21.3(c))*, para. 3.6.

⁵³ Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27 and footnote 97 to paragraph 27.

⁵⁴ Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 68. See also Awards of the Arbitrator, *US – COOL (Article 21.3(c))*, para. 68; *China – GOES (Article 21.3(c))*, para. 3.2; *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.3; *Colombia – Textiles (Article 21.3(c))*, para. 3.6.

⁵⁵ Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69. See also, the Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 55.

"Although Members generally have discretion to determine their means of implementation, this discretion is not without bounds.⁵⁶ Saying that selecting the means of implementing the recommendations and rulings of the DSB is the prerogative of the implementing member is not at all the same as saying that 'anything goes'. To declare otherwise would be to allow implementing Members the discretion also to pursue implementation measures that needlessly and unduly extend the reasonable period of time needed for implementation. And this would be contrary to the objective of Article 21.3 of the DSU. Therefore, under these specific circumstances, I cannot accept recourse to the WCO as an element of the European Communities' proposed implementation that I must factor into my calculation of the reasonable period of time simply because the European Communities has proposed it. Instead, the European Communities must demonstrate that this first step of implementation is a requirement under Community law. I cannot just take their word for it; the European Communities must establish that it is so."⁵⁷

1.4.3.2.3 Arbitrator bound by adopted factual and legal findings in the panel and Appellate Body Reports

39. In *EC – Chicken Cuts (Article 21.3(c))*, the Arbitrator stated that he was bound not only by Article 21.3 of the DSU, but also by the factual findings and the legal judgments that form the basis of the Panel and the Appellate Body Reports that have been adopted as recommendations and rulings by the DSB:

"In my limited role as arbitrator, I am bound not only by Article 21.3 of the DSU. I am bound also by the factual findings and the legal judgments that form the basis of the Panel and the Appellate Body Reports that have been adopted as recommendations and rulings by the DSB. So too are the parties to the dispute. To those I turn to assess this proposal by the European Communities as it relates to these two ECJ cases.

...

Where the Panel and the Appellate Body have expressed one view on issues relating to the substance of this dispute, I am not free, in fulfilling my limited mandate as arbitrator, to express another. I am certainly not free in this limited role to contradict the reasoning of the Panel and Appellate Body that led to the recommendations and rulings that have been adopted by the DSB. The purpose of an Article 21.3 arbitration is not to question the recommendations and rulings of the DSB; it is to establish the reasonable period of time a Member should have to implement them. The aim of implementation is implementation. Nothing less. And nothing more."⁵⁸

1.4.3.3 Prompt compliance: the shortest period possible

40. In *US – Washing Machines (Article 21.3(c))*, the Arbitrator considered "prompt compliance" in Article 21.1 and "reasonable period" under the chapeau of Article 21.3 to indicate that a Member shall comply in as short a period as possible:

"In determining the period of time that is reasonable in light of the particular circumstances of a dispute, the arbitrator should bear in mind the provisions of the DSU that provide context to Article 21.3(c), in particular Article 21.1, which establishes that 'prompt compliance' with the DSB's recommendations and rulings is essential 'to ensure effective resolution of disputes' and the introductory clause of Article 21.3, which foresees a reasonable period of time for implementation when it is 'impracticable to comply immediately'.

⁵⁷ Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 56.

⁵⁸ Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, paras. 59 and 62.

Both provisions indicate the importance of compliance in as short a period as possible when immediate compliance is not practicable."⁵⁹

41. The Arbitrator in *EC – Hormones (Article 21.3(c))* held, *inter alia*, that "when implementation can be effected by administrative means, the reasonable period of time should be considerably shorter than 15 months":

"The ordinary meaning of the terms of Article 21.3(c) indicates that 15 months is a 'guideline for the arbitrator', and not a rule. This guideline is stated expressly to be that 'the reasonable period of time ... *should not exceed* 15 months from the date of adoption of a panel or Appellate Body report' (emphasis added). In other words, the 15-month guideline is an outer limit or a maximum in the usual case. For example, when implementation can be effected by administrative means, the reasonable period of time should be considerably shorter than 15 months. However, the reasonable period of time could be shorter or longer, depending upon the particular circumstances, as specified in Article 21.3(c).

Article 21.3(c) also should be interpreted in its context and in light of the object and purpose of the DSU. Relevant considerations in this respect include other provisions of the DSU, including, in particular, Articles 21.1 and 3.3. Article 21.1 stipulates that: '*Prompt compliance* with recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members' (emphasis added). Article 3.3 states: 'The *prompt* settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members' (emphasis added). *The Concise Oxford Dictionary* defines the word, 'prompt', as meaning 'a. acting with alacrity; ready. b. made, done, etc. readily or at once'. Read in context, it is clear 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 DSB. In the usual case, this should not be greater than 15 months, but could also be less."⁶⁰

42. In *Canada – Pharmaceutical Patents (Article 21.3(c))*, the Arbitrator indicated that "the 'particular circumstances' ... do *not* include factors unrelated to an assessment of the shortest period possible for implementation within the legal system of a Member":

[T]he 'particular circumstances' mentioned in Article 21.3 do *not* include factors unrelated to an assessment of the shortest period possible for implementation within the legal system of a Member. Any such unrelated factors are irrelevant to determining the 'reasonable period of time' for implementation. The determination of a 'reasonable period of time' must be a legal judgement based on an examination of relevant legal requirements."⁶¹

43. The Arbitrator on *Argentina – Hides and Leather (Article 21.3(c))* warned about the negative implications for the multilateral trading system of an interpretation of reasonable period of time that took into account "time or opportunity to control and manage economic or social conditions which antedate or are contemporaneous with the adoption of the WTO-inconsistent governmental measure":

⁵⁹ Award of the Arbitrator, *US – Washing Machines (Article 21.3(c))*, para. 3.7.

⁶⁰ Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, paras. 25-26. See also the Awards of the Arbitrator, *Chile – Alcoholic Beverages (Article 21.3(c))*, para. 38; *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47; *US – 1916 Act (Article 21.3(c))*, para. 32; *Chile – Price Band System (Article 21.3(c))*, para. 34; *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 42; *EC – Tariff Preferences (Article 21.3(c))*, para. 26; *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, para. 25; *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 68; and *EC – Chicken Cuts (Article 21.3(c))*, para. 49; Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))* para. 46

⁶¹ Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 52.

"[T]o build into the concept of a 'reasonable period of time' to comply with DSB recommendations and rulings, time or opportunity to control and manage economic or social conditions which antedate or are contemporaneous with the adoption of the WTO-inconsistent governmental measure, may, in the generality of instances, be to defer to an indefinitely receding future the duty of compliance. The implications for the multilateral trading system as we know it today, of such an interpretation of 'reasonable period of time' for compliance are clear and far-reaching and ominous. Such an interpretation would tend to reduce the fundamental duty of 'immediate' or 'prompt' compliance to a figure of speech."⁶²

44. In *US – Gambling (Article 21.3(c))*, the Arbitrator expressed that for various reasons the "shortest period possible for implementation within the legal system" standard should not be applied in isolation from the text of the DSU:

"[I]t 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 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."⁶³

45. The Arbitrator in *EC – Export Subsidies on Sugar (Article 21.3(c))*, reiterated the three governing principles applicable to an arbitrator's determination of the reasonable period of time under Article 21.3 (c) of the DSU:

"These governing principles at issue are:

- the reasonable period of time should be the shortest period of time possible within the legal system of the implementing Member⁶⁴;
- the implementing Member must utilize all the flexibility and discretion available within its legal and administrative system in order to implement within the shortest period of time possible; and
- the 'particular circumstances' of the case must be taken into account in determining the reasonable period of time."⁶⁵

46. In *Brazil – Retreaded Tyres (Article 21.3(c))*, the Arbitrator noted that the "average time period" or a particular proceeding is inherently not the shortest period of time:

"I do not consider that the approach of calculating the average duration of a sample of proceedings from a past 5-year period under a different procedure than the one at issue in the present case provides an accurate and pertinent estimate of the time that the Federal Supreme Court will need to complete the pending [Allegation of Violation of Fundamental Precept] proceeding. ... previous arbitrators have refused to rely on average time periods in determining the reasonable period of time because an

⁶² Award of the Arbitrator, *Argentina – Hides and Leather (Article 21.3(c))*, para. 49.

⁶³ Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, para. 44.

⁶⁵ Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 61. See also Awards of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))* paras 48 and 71; *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 41

average figure 'inherently' represents more than the shortest possible period of time necessary within an implementing Member's legal system. For these reasons, I consider Brazil's estimate of the likely duration of the pending [Allegation of Violation of Fundamental Precept] proceeding on the basis of an average of a sample of [Direct Unconstitutionality Action] proceedings not appropriate."⁶⁶

1.4.3.4 Concept of "reasonableness"

47. In *US – Hot-Rolled Steel (Article 21.3(c))*, the Arbitrator considered that the essence of "reasonableness" as articulated by the Appellate Body in *US – Hot-Rolled Steel*, in the context of Article 6.8 of the Anti-Dumping Agreement, was equally pertinent in the context of Article 21.3(c) of the DSU:

"In *US – Hot-Rolled Steel*, the implementation of which is involved here, the Appellate Body had occasion to interpret the phrase 'reasonable period' found in Article 6.8 of the *Anti-Dumping Agreement* and 'reasonable time' used in paragraph 1 of Annex II of that Agreement. 'The word "reasonable" ', the Appellate Body stated:

... 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."⁶⁷

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."⁶⁸

48. Along the same lines, the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 21.3(c))* stated that:

"The final sentence of Article 21.3(c), moreover, makes clear that the 'reasonable period of time' cannot be determined in the abstract, but rather has to be established on the basis of the particular circumstances of each case. I therefore agree, in principle, with the Arbitrator in *US – Hot-Rolled Steel*, who found that the term 'reasonable' should be interpreted as including 'the notions of flexibility and balance', in a manner which allows for account to be taken of the particular circumstances of each case."⁶⁹

49. In *Chile – Alcoholic Beverages (Article 21.3(c))*, the Arbitrator pointed out that the shortest period of time *theoretically* possible for the completion of the legislative process is not the *sole* criterion that should be taken into account in determining the reasonable period of time. The Arbitrator further considered that Article 21.3(c) "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":

⁶⁶ Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 71.

⁶⁸ Award of the Arbitrator, *US – Hot-Rolled Steel (Article 21.3(c))*, paras. 25-26. See also the Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 42; and *US – Gambling (Article 21.3(c))*, para. 44.

⁶⁹ Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 42.

"The concept of reasonableness, which is, of course, built into the notion of 'a reasonable period of time' for implementation, inherently involves taking into account the relevant circumstances. In some cases these circumstances may be singular or few in number but in other cases they may be multiple. Determination of a 'reasonable period of time' is not, in principle, appropriately carried out by ascribing decisive or exclusive relevance to one single or even a few *a priori* factors and eschewing consideration of everything else as non-pertinent. Thus, the shortest period of time *theoretically* possible for the completion of the legislative process, even assuming the bill enjoys the necessary parliamentary majority from the beginning and is never the subject of serious debate, is not the *sole* criterion that I should take into account in determining the reasonable period. What Article 21.3(c) of the DSU provides arbitrators with is a 'guideline', not a fixed command, that the reasonable period should be not more than 15 months from the date of adoption by the DSB of the pertinent Panel and Appellate Body Reports. 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."⁷⁰

50. In *US – COOL (Article 21.3(c))*, the Arbitrator considered that, in determining the reasonable period of time for implementation, "some time may be granted to complete preparatory steps".⁷¹

51. In *US – Washing Machines (Article 21.3(c))*, the Arbitrator acknowledged one of the relevant factors to determine "reasonableness" to be the means of implementation available to the Member concerned:

"Further, in determining the reasonable period of time, the means of implementation available to the Member concerned is a relevant factor. Determining this period of time thus requires consideration of how that Member proposes to implement under its municipal law. Previous awards have indicated that, while the Member concerned has discretion in choosing the means of implementation that it deems most appropriate, the means of implementation chosen must be apt in form, nature, and content to bring the Member into compliance with its WTO obligations. Previous awards have also indicated that, if the action that the implementing Member proposes to take seeks to achieve objectives unrelated to the DSB's recommendations and rulings, or forms part of a wider reform of that Member's municipal law, then these considerations cannot justify a longer implementation period for the WTO dispute. At the same time, the mandate under Article 21.3(c) of the DSU is limited to determining the period of time within which it would be reasonable to expect implementation of the recommendations and rulings of the DSB to occur, and does not involve deciding on the content of the implementation needed, nor a determination of the consistency with the covered agreements of the measure that the Member envisages to adopt in order to comply. The latter question, should it arise, is to be addressed in proceedings conducted pursuant to Article 21.5 of the DSU."⁷²

1.4.3.5 The 15-month guideline

52. The Arbitrator in *EC – Hormones (Article 21.3(c))* considered that "the ordinary meaning of the terms of Article 21.3(c) indicates that 15 months is a 'guideline for the arbitrator', and not a rule".⁷³

53. In *Canada – Pharmaceutical Patents (Article 21.3(c))*, the Arbitrator noted that "the 15-month period is a 'guideline', and not an average, or usual, period. It is expressed also as a

⁷⁰ Award of the Arbitrator, *Chile – Alcoholic Beverages (Article 21.3(c))*, para. 39.

⁷¹ Award of the Arbitrator, *US – COOL (Article 21.3(c))*, para. 83. See also Award of the Arbitrator, *China – GOES (Article 21.3(c))*, para. 3.37; Award of the Arbitrator, *US – Shrimp II (Viet Nam) (Article 21.3(c))*, para. 3.33.

⁷² Award of the Arbitrator, *US – Washing Machines (Article 21.3(c))*, para. 3.8.

⁷³ Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 25.

maximum period, subject only to any 'particular circumstances' mentioned in the second sentence."⁷⁴

54. In *EC – Bananas III (Article 21.3(c))*, the European Communities requested a period of 15 months and one week based on the alleged complexity and difficulty of amending the then existing import regime for bananas. The Arbitrator confirmed that the 15-month period provided for in Article 21.3(c) is a guideline and that the "reasonable period of time" may be shorter or longer than 15 months, depending upon the "particular circumstances":

"When the 'reasonable period of time' is determined through binding arbitration, as provided for under Article 21.3(c) of the DSU, this provision states that a 'guideline' for the arbitrator should be that the 'reasonable period of time' should not exceed 15 months from the date of the adoption of a panel or Appellate Body report. Article 21.3(c) of the DSU also provides, however, that the 'reasonable period of time' may be shorter or longer than 15 months, depending upon the 'particular circumstances'."⁷⁵

55. In *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, the Arbitrator explained that:

"The 15-month period set forth in Article 21.3(c) is a 'guideline', expressed as a maximum period, and does not represent an average, or usual, period. Rather, as previous arbitrators have recognized, it is ultimately the relevant 'particular circumstances' that influence what is a 'reasonable period of time' for implementation."⁷⁶

1.4.3.6 "particular circumstances"

1.4.3.6.1 General

56. In *Japan – Alcoholic Beverages II (Article 21.3(c))*, the Arbitrator recalled that "Article 21(3)(c) of the DSU also stipulates, however, that the 'reasonable period of time' may be shorter or longer than 15 months, depending upon the 'particular circumstances'. The term, 'particular circumstances', is not defined in the *DSU*."⁷⁷

57. In *Canada – Pharmaceutical Patents (Article 21.3(c))*, the Arbitrator defined "particular circumstances" as those that can influence what the shortest period possible for implementation may be within the legal system of the implementing Member:

"The 'particular circumstances' mentioned in Article 21.3 are, therefore, those that can influence what the shortest period possible for implementation may be within the legal system of the implementing Member. Conceivably, several such 'particular circumstances', depending on the facts, could be relevant to a case such as the one before me.

...

There may well be other 'particular circumstances' that may be relevant to a particular case. However, in my view, the 'particular circumstances' mentioned in Article 21.3 do *not* include factors unrelated to an assessment of the shortest period possible for implementation within the legal system of a Member. Any such unrelated factors are

⁷⁴ Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 45. See also Award of the Arbitrator, *Chile – Alcoholic Beverages (Article 21.3(c))*, para. 39. In *US – Hot-Rolled Steel (Article 21.3(c))*, the Arbitrator further indicated that he "... d[id] not see any basis for reading the 15-month guideline as establishing a fixed maximum or 'outer limit' for 'a reasonable period of time'. Neither, of course, does the 15-month guideline constitute a floor or 'inner limit' of 'a reasonable period of time'". Award of the Arbitrator, *US – Hot-Rolled Steel (Article 21.3(c))*, para. 25. See also the Awards of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 33; and *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 41.

⁷⁵ Award of the Arbitrator, *EC – Bananas III (Article 21.3(c))*, para. 18. See also Awards of the Arbitrator, *Australia – Salmon (Article 21.3(c))*, para. 30; and *Canada – Auto Pact (Article 21.3(c))*, para. 39.

⁷⁶ Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 41.

⁷⁷ Award of the Arbitrator, *Japan – Alcoholic Beverages II (Article 21.3(c))*, para. 11.

irrelevant to determining the 'reasonable period of time' for implementation. For example, as others have ruled in previous Article 21.3 arbitrations, any proposed period intended to allow for the 'structural adjustment' of an affected domestic industry will not be relevant to an assessment of the legal process. The determination of a 'reasonable period of time' must be a legal judgement based on an examination of relevant legal requirements."⁷⁸

1.4.3.6.2 Failure to commence implementation

58. In *US – Section 110(5) Copyright Act (Article 21.3(c))*, the Arbitrator stated 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'".⁷⁹

59. In *Chile – Price Band System (Article 21.3(c))*, the Arbitrator stated that "whether or not a Member is able to *complete* implementation promptly, it must at the very least promptly *commence* and continue concrete steps towards implementation".⁸⁰

60. An implementing Member's failure to commence implementation of the DSB's recommendations and rulings was a factor taken into account by the Arbitrator in *EC – Chicken Cuts (Article 21.3(c))*, when determining the reasonable period of time for implementation. The Arbitrator stated:

"Mere discussion is not implementation. There must be something more to evidence that a Member is moving toward implementation. I therefore agree with Brazil and Thailand that this failure to commence implementation of the DSB's recommendations and rulings is a factor that I should take into account in determining the reasonable period of time for implementation."⁸¹

61. The Arbitrator in *Colombia – Ports of Entry (Article 21.3(c))* stated that "I should take into account any action or inaction by Colombia in the period of time comprised between the date of adoption of the Panel Report by the DSB and the initiation of these arbitration proceedings when determining the reasonable period of time for implementation".⁸²

1.4.3.6.3 Implementation through legislative action versus administrative decision

62. In *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, the Arbitrator stated that the nature of the steps taken for implementation, i.e. legislative or administrative, has a bearing on the 'reasonable period of time':

"[T]he nature of the steps to be taken for implementation has a bearing on the 'reasonable period of time' required to fully implement the recommendations and rulings of the DSB. The implementation may require amendments to administrative guidelines or procedures that may not involve such action. Implementation may also involve only the remedying of the deficiencies in a particular determination. Previous arbitration awards under Article 21.3(c) have recognized that when implementation requires legislative action, the 'reasonable period of time' required may be longer than in cases where only administrative action is required to amend guidelines or procedures or to remedy the deficiencies in particular determinations.⁸³ It is, however, not for the arbitrator under Article 21.3(c) to prescribe a particular method of implementation and to determine the "reasonable period of time" on the basis of that method⁸⁴."⁸⁵

⁷⁸ Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, paras. 48 and 52.

⁷⁹ Award of the Arbitrator, *US – Section 110(5) Copyright Act (Article 21.3(c))*, para. 46.

⁸⁰ Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 43.

⁸¹ Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 66.

⁸² Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 79,

⁸⁵ Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, para. 26.

63. In *US – Gambling (Article 21.3(c))*, the Arbitrator reiterated that the reasonable period of time for implementation will vary on whether the implementing action is legislative or administrative:

"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."⁸⁶⁸⁷

64. The Arbitrator in *EC – Chicken Cuts (Article 21.3(c))*, highlighted the important distinction between 'legislative' and 'administrative' means of implementation:

"Previous arbitrations have highlighted that implementation achieved through administrative processes generally requires less time than implementing legislation.⁸⁸ This distinction is premised on the fact that administrative action generally may be accomplished solely by one institution (often the Executive Branch) of the implementing Member, whereas legislative action generally requires the participation of additional institutions (typically at last the Legislative Branch – likely to have slower, more deliberative processes – possibly in conjunction with the Executive Branch as well).⁸⁹ The implementation steps proposed by the European Communities under Community law are expected to be accomplished exclusively by the Commission, without involvement by the Council or the European Parliament. I therefore do not consider these steps to be 'legislative' in the sense in which I believe that term has come to be understood in the context of arbitrations under Article 21.3(c). Accordingly, I must take into account in my determination the *administrative* nature of the proposed implementation process."⁹⁰

65. In *US – Stainless Steel (Mexico) (Article 21.3(c))* the Arbitrator stated that both legislative and administrative means of implementation proposed by the United States fell within the range of permissible means, that are capable of achieving WTO compliance in accordance to the DSB recommendations and rulings:

"It is widely accepted that implementation through administrative action usually takes a shorter period of time than implementation through legislative action. In the light of the parties' responses to questioning at the oral hearing, I am not persuaded that the United States is not in a position to eliminate the simple zeroing methodology in periodic reviews by administrative action, or that legislative implementation would necessarily be more effective than administrative implementation. In these circumstances, I turn to the period of time within which administrative action eliminating the methodology of simple zeroing in periodic reviews could be completed."⁹¹

⁸⁷ Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, para. 35.

⁸⁹ (footnote original) See, for example, Award of the Arbitrator, *Chile – Price Band System*, para. 38: I agree with the observation of previous arbitrators that implementation through legislation is likely to require a longer time for implementation than administrative rulemaking or *other exclusively Executive action*. (emphasis added) (footnote omitted).

⁹⁰ Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 67, See also Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))* para 78, where it was noted that an arbitrator under Article 21.3 (c) may reasonably expect that implementation would ordinarily be achieved by means entirely within the implementing Member's law making procedures. The Arbitrator found that the recommendations and rulings of the DSB were addressed specifically to Brazil and not to its MERCOSUR partners. Therefore the measure at issue, Portaria SECEX 14/2004, was found to be a domestic regulatory act adopted by a subdivision of the Brazilian Federal Ministry of Development, Industry and Foreign Trade and there was no need for consultation and negotiations with MERCOSUR partners in the process of adopting any new law.

⁹¹ Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 53. See also Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, paras. 48 and 52, where Japan contented that it needed to modify its laws to make them WTO consistent and this involved carrying out investigations. The Arbitrator was of the opinion that the only relevant action that needed to be taken was administrative, thereby determining that the reasonable time for implementation was eight months and two weeks, which period was

1.4.3.6.4 Requirement to comply with other WTO obligations or decisions of other international organizations

63. In *US – COOL (Article 21.3 (c))*, the Arbitrator noted that the requirement to comply with other WTO obligations may fall within the definition of the "particular circumstances", meaning that it may have to be taken into account when determining the reasonable period of time needed for implementation:

"Article 21 of the DSU does not exclude that the requirement to comply with another WTO obligation, which affects the time needed for implementation, may have to be taken into account in the determination of the reasonable period of time. Indeed, Article 21.3(c) states that the length of the reasonable period of time depends upon 'the particular circumstances'. I agree with the arbitrator in *EC – Hormones* that the reasonable period of time should be the shortest period possible within the legal system of the implementing Member. However, I am not convinced that this excludes that other international obligations like, notably, WTO obligations, could be relevant for implementation, and the period needed for it, in a given case.

I recall that the arbitrator in *US – Offset Act (Byrd Amendment)* stated that '[e]ach and every piece of legislation enacted with a view to implementing recommendations and rulings of the DSB must be designed and drafted in the light of the implementing Member's rights and obligations under the covered agreements.' I understand this statement to mean that a Member complying with DSB recommendations and rulings must ensure that its implementing measures not only comply with the WTO obligations that are the subject of the DSB's recommendations and rulings, but also with its other obligations under the covered agreements. I also note that the arbitrator in *Chile – Alcoholic Beverages* stated that '[t]he concept of reasonableness, which is, of course, built into the notion of 'a reasonable period of time' for implementation, inherently involves taking into account the relevant circumstances.' This in my view includes circumstances where a Member's implementing measure needs to conform to its other WTO obligations and this would affect the implementation process."⁹²

64. To support this view, the Arbitrator in *US – COOL (Article 21.3 (c))* recalled that other arbitrators in previous awards had treated the decisions of other international organizations as "particular circumstances" to be taken into account when determining the reasonable period of time:

"Thus, the arbitrators in *EC – Chicken Cuts* and in *Brazil – Retreaded Tyres* did not exclude that also external elements, such as decisions of other international organizations, may be relevant to the determination of the reasonable period of time if the implementing Member can show that these are indispensable for its full and effective compliance with its WTO obligations. I observe that, while in those arbitrations the relevance of non-WTO obligations was at issue, in the present case a WTO obligation is at issue, namely, Article 2.12 of the TBT Agreement. If non-WTO obligations may be relevant to the determination of a reasonable period of time, I consider that other WTO obligations would *a fortiori* be relevant for determining the length of the reasonable period."⁹³

1.4.3.6.5 Preparatory work

65. In *China – GOES (Article 21.3(c))*, the Arbitrator noted that one of the relevant factors in determining "reasonableness" is the time required for an implementing Member to adopt or amend laws or regulations as a first step of its implementation process when such laws or regulations have not been the subject of recommendations and rulings of the DSB:

shorter than that requested by Japan. The Arbitrator recognized that decision-making by the Cabinet was mandatory under Japanese law in order for a countervailing duty order to take effect and enter into force. He also noted that there are no specified time-limits in Japan's legislation for the steps in this process, however, the same could be expedited in relevant circumstances, like in this case.

⁹² Award of the Arbitrator, *US– COOL (Article 21.3(c))*, paras. 106-107.

⁹³ Award of the Arbitrator, *US– COOL (Article 21.3(c))*, para. 109.

"I do not exclude that there may be circumstances in which bringing a measure into conformity with the recommendations and rulings of the DSB may require, as a first step, legislative action or administrative rulemaking by the implementing Member. The amended laws or regulations would then be applied in a manner that remedies the inconsistency found in the original measure. Contrary to what the United States seems to suggest, the time required for an implementing Member to adopt or amend laws or regulations as a first step of its implementation process is not, necessarily, irrelevant to the determination of the reasonable period of time for implementation under Article 21.3(c) when such laws or regulations have not been the subject of recommendations and rulings of the DSB."⁹⁴

1.4.3.6.6 Natural disasters

66. In *Peru – Agricultural products (Article 21.3(c))*, the Arbitrator acknowledged that a natural disaster may constitute a "particular circumstance":

"I do not, in principle, rule out the possibility that a natural disaster may constitute a 'particular circumstance' and, hence, an element to be considered in the determination of the reasonable period of time. The prevention of natural disasters, such as those which could result from the El Niño phenomenon, and the mitigation of their effects may clearly affect the regulatory or legislative capacity of a Member to implement the recommendations and rulings of the DSB. In my opinion, the relevant issue in this arbitration is how and to what extent Peru's activities to address and mitigate the effects of the El Niño phenomenon affect the period of time for implementing the DSB's recommendations and rulings."⁹⁵

1.4.3.6.7 Complexity of implementation

67. In *Canada – Pharmaceutical Patents (Article 21.3(c))*, the Arbitrator mentioned the implementation by administrative or legislative means, the complexity of the proposed implementation and the legally binding force of the component steps leading to implementation as relevant criteria for determining the existence of "particular circumstances":

"[I]f implementation is by *administrative* means, such as through a regulation, then the 'reasonable period of time' will normally be shorter than for implementation through *legislative* means.

Likewise, the *complexity* of the proposed implementation can be a relevant factor. If implementation is accomplished through extensive new regulations affecting many sectors of activity, then adequate time will be required to draft the changes, consult affected parties, and make any consequent modifications as needed. On the other hand, if the proposed implementation is the simple repeal of a single provision of perhaps a sentence or two, then, obviously, less time will be needed for drafting, consulting, and finalizing the procedure. To be sure, complexity is not merely a matter of the number of pages in a proposed regulation; yet it seems reasonable to assume that, in most cases, the shorter a proposed regulation, the less its likely complexity.

In addition, the *legally binding*, as opposed to the discretionary, nature of the component steps leading to implementation should be taken into account. If the law of a Member dictates a mandatory period of time for a mandatory part of the process needed to make a regulatory change, then that portion of a proposed period will, unless proven otherwise due to unusual circumstances in a given case, be reasonable. On the other hand, 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. Something

⁹⁴ Award of the Arbitrator *China – GOES (Article 21.3(c))*, para. 3.28. See also Award of the Arbitrator, *US – COOL (Article 21.3(c))*, para. 84.

⁹⁵ Award of the Arbitrator, *Peru – Agricultural Products*, para. 3.45.

required by law must be done; something not required by law need not necessarily be done, depending on the facts and the circumstances in a particular case."⁹⁶

68. In *US – Gambling (Article 21.3(c))*, the Arbitrator attached some significance to the fact that the field of internet gambling is one that is highly regulated in the United States, and stated:

"A myriad of interconnected and overlapping laws apply to these activities, including state and federal laws, and criminal and civil 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."⁹⁷

69. In *US – Stainless Steel (Mexico) (Article 21.3(c))*, the Arbitrator considered compliance in that case to be complex and legitimately considered a particular circumstance:

"For the United States, compliance in this case is complex, mainly because terminating simple zeroing in periodic reviews would imply changes in its duty assessment methodology. ...

In principle, the elimination of simple zeroing in periodic reviews is distinct from the issue of the 'allocation of antidumping duties among the importers for assessment purposes'. The former can clearly be carried out by administrative means. In the real world, because it involves imposition of differing levels of financial liability among the importers, depending on the circumstances, the latter may be easier to bring about on a durable basis by a legislative enactment. In the real world too, however, the elimination of simple zeroing in periodic reviews is closely related to the issue of the allocation of final anti-dumping duties among importers; implementation of the former might well be tied to reaching satisfactory resolution of the complexities of allocation of anti-dumping duties among the importers. Accordingly, the technical complexities of allocation of duties among importers cannot casually be disregarded but, to the contrary, may legitimately be considered a particular circumstance affecting the determination of a reasonable time for abolition of the methodology of simple zeroing in periodic reviews."⁹⁸

70. In *US – Washing Machines (Article 21.3(c))*, the Arbitrator clarified that the fact that a provision is interpreted during the panel or Appellate Body proceedings for the first time does not in and of itself raise an issue of complexity:

"Regarding the alleged 'novelty' and 'complexity' of the issues involved, it is noted that this is the first dispute in which a panel or the Appellate Body has interpreted the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. Moreover, according to the United States, the interpretation by the Appellate Body requires an approach not yet developed by any WTO Member. In and of itself, the fact that a provision is interpreted for the first time in dispute settlement is not necessarily relevant to the determination of the reasonable period of time to come into conformity with that provision. A 'new' interpretation of a provision may be relatively simple to implement depending on the nature of the obligation that it prescribes. Thus, the nature of the specific implementing obligation needs to be considered."⁹⁹

1.4.3.6.8 Measure fundamentally integrated into other policies

71. In *Chile – Price Band System (Article 21.3(c))*, the Arbitrator considered that the unique role of the price band system in Chilean society was a relevant factor to take into account in his determination of the reasonable period of time:

⁹⁶ Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, paras. 49-51. See also the Awards of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 57; *US – Gambling (Article 21.3(c))*, paras. 45 – 48; and *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 88.

⁹⁷ Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, para. 46.

⁹⁸ Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, paras. 46-47.

⁹⁹ Award of the Arbitrator, *US – Washing Machines (Article 21.3(c))*, para. 3.33.

"I am of the view that the PBS is so fundamentally integrated into the policies of Chile, that domestic opposition to repeal or modification of those measures reflects, not simply opposition by interest groups to the loss of protection, but also reflects serious debate, within and outside the legislature of Chile, over the means of devising an implementation measure when confronted with a DSB ruling against the original law. In 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."¹⁰⁰

1.4.3.6.9 Workload of the implementing authority

72. In *US – Countervailing Measures (China)* (Article 21.3(c)), the Arbitrator stated that the workload of the implementing authority does not constitute a "particular circumstance" to be taken into account in determining a "reasonable period of time" for implementation:

"Finally, with respect to the relevance of the workload of the USDOC, in view of the fundamental obligations assumed by the Members of the WTO, the current workload of the USDOC should not be considered as relevant to the determination of the reasonable period of time for implementation in this dispute."¹⁰¹

1.4.3.6.10 Contentiousness / political sensitivity

73. The Arbitrator in *Canada – Pharmaceutical Patents* (Article 21.3(c)) stated that "I see nothing in Article 21.3 to indicate that the supposed domestic 'contentiousness' of a measure taken to comply with a WTO ruling should in any way be a factor to be considered in determining a 'reasonable period of time' for implementation."¹⁰²

74. In *US – Section 110(5) Copyright Act* (Article 21.3(c)), the United States referred to the "controversy" surrounding the legislation, and the "divergent views of stakeholders". The Arbitrator stated that:

"[A]ny argument as to the 'controversy', in the sense of domestic 'contentiousness', regarding the measure at issue is not relevant. ... While I agree that this is an important issue, I do not see how it will add any *additional* time to the legislative process, as the *content* of the legislation effecting implementation is precisely the issue that Congress will decide through its normal procedures."¹⁰³

75. The Arbitrator in *Canada – Patent Term* (Article 21.3(c)), stressed that, in that dispute, contentiousness or political sensitivity was not a "particular circumstance" which should be taken into account in determining the reasonable period of time. The Arbitrator stated:

"The treatment of existing patents which benefit from a longer period of protection than the period prescribed by Article 33 of the *TRIPS Agreement* may be highly controversial and closely connected politically with the amendment of Article 45 of the Canadian *Patent Act*. However, as I have already said, this issue is outside the strict boundaries of the implementation of the recommendations and rulings of the DSB. Consequently, the 'contentiousness' of this issue is certainly not a 'particular circumstance' which I should take into account in determining the 'reasonable period of time' in the present case. Therefore, Canada cannot invoke legislative choices and

¹⁰⁰ Award of the Arbitrator, *Chile – Price Band System* (Article 21.3(c)), para. 48. On most occasions, however, arbitrators have typically refused to treat mere contentiousness or political sensitivity as a factor warranting a longer period of time for implementation. See, for example, the Awards of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 60; *Canada – Patent Term*, para. 58; *US – Offset Act (Byrd Amendment)*, para. 61; *EC – Tariff Preferences* (Article 21.3(c)), para. 56.

¹⁰¹ Award of the Arbitrator, *US – Countervailing Measures (China)* (Article 21.3(c)), para. 3.49. See also Awards of the Arbitrator, *US – 1916 Act* (Article 21.3(c)), para. 38; *US – Shrimp II (Viet Nam)* (Article 21.3(c)), para. 3.55 and *US – Washing Machines* (Article 21.3(c)), para. 3.63.

¹⁰² Award of the Arbitrator, *Canada – Pharmaceutical Patents* (Article 21.3(c)), para. 60.

¹⁰³ Award of the Arbitrator, *US – Section 110(5) Copyright Act* (Article 21.3(c)), para. 42.

the likely divisiveness of the debate in the Canadian Parliament to justify its request for a 'reasonable period of time' of 14 months and two days."¹⁰⁴

76. In *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, the Arbitrator refused to take into account in his determination of the "reasonable period of time" both the existence of several legislative options and the need of the implementing Member to take into account international treaty obligations as not qualifying as particular circumstances within the meaning of Article 21.3(c):

"Moreover, I am fully aware of the high level of economic and political interest in this particular dispute, as evidenced by the significant number of WTO Members involved in all stages of this dispute, including in these arbitration proceedings. Nevertheless, 'complexity' of implementing legislation as a particular circumstance, within the meaning of Article 21.3(c), is a *legal* criterion, to be examined without regard for political contentiousness or other non-legal factors that may surround a measure at issue. I am precluded, by my mandate under Article 21.3(c), from giving consideration to these non-legal factors.

...

In the light of the above considerations, I therefore do not accept the United States' argument that implementation of the recommendations and rulings of the DSB in this dispute gives rise to complexity that would qualify as a particular circumstance within the meaning of Article 21.3(c)."¹⁰⁵

77. In *EC – Tariff Preferences (Article 21.3(c))*, the Arbitrator was not persuaded by the statements of the European Communities that the particular nature of the Drug Arrangements within the GSP scheme and the development policy of the European Communities warrants any increase in the reasonable period of time for implementation, and stated:

"Although a modification to the Drug Arrangements may well be described as 'politically sensitive', this factor does not distinguish the Drug Arrangements from any other measure that is likely to be the subject of a WTO dispute. The measure examined in *Chile – Price Band System* was quite different. That measure had a 'unique ... impact on Chilean society' (that is, the society of the *implementing* Member); 'domestic opposition' to its repeal or modification reflected 'serious debate, within and outside the legislature of Chile, over the means of devising an implementation measure' and 'not simply opposition by interest groups to the loss of protection'."¹⁰⁶

78. The Arbitrator in *EC – Export Subsidies on Sugar (Article 21.3(c))*, stated that "[p]revious arbitrators have consistently held that the 'contentiousness' or 'political sensitivity' of the measure to be implemented is not a 'particular circumstance[]' that is relevant under Article 21.3(c)."^{107, 108}

1.4.3.6.11 Structural adjustments of the implementing Member's affected industries

79. In *Indonesia – Autos (Article 21.3(c))*, the Arbitrator considered that "the structural adjustments of" a Member's "affected industries" was not "a 'particular circumstance' to be taken into account under Article 21.3(c):

"I do not view structural adjustments of Indonesia's affected industries as a 'particular circumstance' which may be taken into account under Article 21.3(c) of the DSU. In virtually every case in which a measure has been found to be inconsistent with a Member's obligations under the GATT 1994 or any other covered agreement, and therefore, must be brought into conformity with that agreement, some degree of

¹⁰⁴ Award of the Arbitrator, *Canada – Patent Terms (Article 21.3(c))*, para. 58.

¹⁰⁵ Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, paras. 60, 61 and 62.

¹⁰⁶ Award of the Arbitrator, *EC – Tariff Preferences (Article 21.3(c))*, para. 56.

¹⁰⁸ Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 90.

adjustment by the domestic industry of the Member concerned will be necessary. This will be the case regardless of whether the Member concerned is a developed or a developing country. Structural adjustment to the withdrawal or the modification of an inconsistent measure, therefore, is not a 'particular circumstance' that can be taken into account in determining the reasonable period of time under Article 21.3(c)."¹⁰⁹

80. The Arbitrator in *Canada – Pharmaceutical Patents (Article 21.3(c))* stated that:

"[T]he 'particular circumstances' mentioned in Article 21.3 do *not* include factors unrelated to an assessment of the shortest period possible for implementation within the legal system of a Member. Any such unrelated factors are irrelevant to determining the 'reasonable period of time' for implementation. For example, as others have ruled in previous Article 21.3 arbitrations, any proposed period intended to allow for the 'structural adjustment' of an affected domestic industry will not be relevant to an assessment of the legal process. The determination of a 'reasonable period of time' must be a legal judgement based on an examination of relevant legal requirements."¹¹⁰

1.4.3.6.12 Economic and financial collapse

81. In *Indonesia – Autos (Article 21.3(c))*, the Arbitrator took into account Indonesia's assertion that its economy was near collapse:

"Indonesia has indicated that in a 'normal 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. I, therefore, conclude that an additional period of six months over and above the six-month period required for the completion of Indonesia's domestic rule-making process constitutes a reasonable period of time for implementation of the recommendations and rulings of the DSB in this case."¹¹¹

82. In *Argentina – Hides and Leather (Article 21.3(c))*, Argentina had argued that it needed 46 months as the reasonable period of time for implementation. The Arbitrator stated 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. That those problems in the case of Argentina are real is not disputed, although there may be debate as to whether Argentina's economy is 'near collapse'.¹¹²"

1.4.3.6.13 Economic harm to the complainant's economic operators

83. In *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, the complaining parties urged the Arbitrator to consider the economic harm that might be inflicted on their economic operators by another disbursement of collected anti-dumping and countervailing duties to United States' producers. The Arbitrator considered that the economic harm suffered by foreign exporters should not have an impact on the determination of the reasonable period of time:

¹⁰⁹ Award of the Arbitrator, *Indonesia – Autos (Article 21.3(c))*, para. 23. See also Awards of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 52; *Argentina – Hides and Leather (Article 21.3(c))*, para. 41; and *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 92.

¹¹⁰ Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 52.

¹¹¹ Award of the Arbitrator, *Indonesia – Autos (Article 21.3(c))*, para. 24.

¹¹² Award of the Arbitrator, *Argentina – Hides and Leather (Article 21.3(c))*, para. 51.

"In my view, economic harm suffered by foreign exporters does not, and cannot, by definition, impact on what is the 'shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB'.¹¹³ The particular circumstances, within the meaning of Article 21.3(c), can only be of such nature as will influence the evolution and unfolding of the implementation process itself. Factors external to the legislative process itself are of no relevance for the determination of the reasonable period of time for implementation.

I do not wish to imply that economic harm, caused by the WTO-inconsistent measure, to economic agents of the Complaining Parties, or any other WTO Members, is irrelevant in the context of the implementation of the recommendations and rulings of the DSB. Many WTO-inconsistent measures will cause some form of economic harm to exporters of WTO Members.¹¹⁴ However, the need, and urgency, to remove WTO-inconsistent measures, and to remove the harm to economic agents caused by such measures, is, in my view, already reflected in the principle of 'prompt compliance' under Article 21.1. The same concern, in my view, underlies the well-established principle, under Article 21.3(c), that the reasonable period of time for implementation be the shortest time possible within the legal system of the Member. Thus, it would be supererogatory, and incongruous, to accord renewed consideration to the issue of economic harm when determining the shortest period possible for implementation within the legal system of the implementing Member."¹¹⁵

1.4.3.6.14 Interests of developing countries

84. In *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3)*, reference was made to Article 21.2 by Argentina to support the view that its status as a developing country should be taken into account in the determination of the reasonable period of time.¹¹⁶ The Arbitrator disagreed with this view and considered that the reasonable period of time for implementation is not affected by the fact that the complaining Member is a developing country and that instead the fundamental requirement is that the implementation process should be completed in the shortest period possible within the legal and administrative system of the implementing Member.¹¹⁷

85. On finding 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 effects of such measures on the interests of the developing country Member(s) concerned,"¹¹⁸ the Arbitrator in *US – Gambling (Article 21.3(c))* declined to consider the precise relationship between paragraphs 2 and 3 of Article 21 because the developing country Member concerned failed to provide specific evidence of affected interests and their relationship with the measures at issue.¹¹⁹

86. The Arbitrator in *EC – Export Subsidies on Sugar (Article 21.3(c))* agreed with the Arbitrator in *US – Gambling (Article 21.3(c))* that Article 21.2 enjoins arbitrators, when determining the reasonable period of time for implementation, to take into account the interests of developing country Members who have "demonstrated their interests as developing country Members for the purposes of Article 21.2."¹²⁰

87. In *EC – Chicken Cuts (Article 21.3(c))*, the Arbitrator paid particular attention to the demonstrated affected interests of the developing country Members pursuant to Article 21.2; however, the reasonable period of time for implementation, already being the shortest period of time possible, was not additionally affected by the fact that the complaining member was a developing country.¹²¹

¹¹⁵ Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, paras. 79-80.

48. ¹¹⁶ Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, paras. 47-48.

¹¹⁷ Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, para. 52.

¹¹⁸ Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, para. 60.

¹¹⁹ Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, paras. 62-63.

¹²⁰ Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, paras. 99-101.

¹²¹ Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))* paras. 81-82.

88. In a situation where both the implementing and the complaining Member are developing countries, the Arbitrator in *Colombia – Ports of Entry (Article 21.3(c))* stated "the requirement provided in Article 21.2 is of little relevance, except if one party success in demonstrating that it is more severely affected by problems related to its developing country status than other party."¹²²

1.4.3.6.15 Calendar / schedule of legislative body

89. In *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, the Arbitrator considered that the fact that at any given point in the Congressional schedule there would be a "greater opportunity" to pass legislation than at another point in time was not a particular circumstance relevant for the determination of the reasonable period of time for implementation in that case. However, the Arbitrator stated that:

"This is not to say that the schedule of the United States Congress (or any other legislative body of any implementing Member) can never be a relevant particular circumstance; for instance, previous arbitrators have given consideration, in their determination of the reasonable period of time for implementation, to circumstances where a draft bill could not be introduced into Congress for a number of months because a new Congress had not yet convened at the time when the arbitration was initiated."¹²³

90. With regard to a legislature's schedule, the Arbitrator in *US – Gambling (Article 21.3(c))*, stated that a legislature's schedule is not totally irrelevant to the determination of the reasonable period of time for implementation and may or may not be relevant depending on the particular case.¹²⁴

1.4.3.6.16 Rules on entry into force of legal instruments

91. The Arbitrator on *Korea – Alcoholic Beverages* determined that it was reasonable to include in the reasonable period of time the "thirty-day grace period for enforcement of certain ... instruments" provided in a Korean statute.¹²⁵

92. The Arbitrator on *EC – Bananas III* appeared to take into account the European Communities' statement that "any change in legislation which directly affects the customs treatment of products in connection with importation or exportation, enters into force either on 1 January or 1 July of the relevant year"¹²⁶ in determining the reasonable period of time in that dispute.¹²⁷

1.4.3.6.17 Institutional changes

93. In *EC – Tariff Preferences (Article 21.3(c))*, the European Communities argued that the reasonable period of time should be extended because of the enlargement of the European Union, the election of a new European Parliament and the designation of a new Commission. The Arbitrator agreed to consider as circumstances that might prolong the reasonable period of time: the time needed to translate certain instruments into 20 official languages as well as the time needed to respond to potential requests for verification by member States that the necessary qualified majority has been reached when adopting the implementing regulation. The Arbitrator

¹²² Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 106

¹²³ Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 69.

¹²⁴ Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, para. 52.

¹²⁵ Award of the Arbitrator, *Korea – Alcoholic Beverages (Article 21.3(c))*, para. 47.

¹²⁶ Award of the Arbitrator, *EC – Bananas III (Article 21.3(c))*, para. 9.

¹²⁷ Award of the Arbitrator, *EC – Bananas III (Article 21.3(c))*, para. 19. The Arbitrator concluded, in paragraph 20, that the reasonable period of time should be "from 25 September 1997 to 1 January 1999". In *EC – Tariff Preferences (Article 21.3(c))*, the Arbitrator, in reference to *EC – Bananas III (Article 21.3(c))*, regarded the administrative practice of the European Communities pertaining 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. Award of the Arbitrator, *EC – Tariff Preferences (Article 21.3(c))*, para. 51.

however did not take into account the fact that a new Parliament was to be elected and a new Commission designated.¹²⁸

1.4.3.6.18 Limited powers of the executive branch

94. In *Japan – Alcoholic Beverages II (Article 21.3(c))*, Japan claimed that the limited powers of the executive branch over tax matters and the need for a formal adoption of legislation by the parliament, the adverse effects of the tax increases on Japanese consumers of shochu, and the administrative constraints on the execution of taxation were "particular circumstances" justifying a 23-month period needed to implement the recommendations and rulings of the DSB. The Arbitrator was not persuaded that these circumstances were "particular circumstances" within the meaning of Article 21.3(c) and determined 15 months as the reasonable period of time.¹²⁹

1.4.3.6.19 Existence of potentially multiple alternative options for implementing DSB recommendations and rulings

95. In *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, the Arbitrator did not consider that the existence of numerous options to implement was relevant to the determination of the "reasonable period of time":

"I do not consider the existence of numerous options to implement the recommendations and rulings of the DSB, as invoked by the United States, to be relevant to my determination of the 'reasonable period of time' for implementation of the recommendations and rulings of the DSB.¹³⁰ The weighing and balancing of the respective merits of various legislative alternatives is one of the key functions and aspects of any legislative process. The mere fact that implementation of the recommendations and rulings of the DSB necessitates the choice between several, or even a large number of, alternative options is generally not, in my view, in and of itself, a particular circumstance that would inform my determination of the shortest period possible to implement the recommendations and rulings of the DSB in this case."¹³¹

1.4.3.6.20 Scientific studies or consultations

96. The Arbitrator on *EC – Hormones (Article 21.3(c))* indicated that, while scientific studies or consultations with experts may form part of the domestic implementation process, the time required to conduct such studies or consultations could not be included in the reasonable period of time:

"An implementing Member ... has a measure of discretion in choosing the *means* of implementation, as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements.

It would not be in keeping with the requirement of *prompt* compliance to include in the reasonable period of time, time to conduct studies or to consult experts to demonstrate the *consistency* of a measure already judged to be *inconsistent*. That cannot be considered as 'particular circumstances' justifying a longer period than the guideline suggested in Article 21.3(c). This is not to say that the commissioning of scientific studies or consultations with experts *cannot* form part of a domestic

¹²⁸ Award of the Arbitrator, *EC – Tariff Preferences (Article 21.3(c))*, paras. 52-54.

¹²⁹ Award of the Arbitrator, *Japan – Alcoholic Beverages II (Article 21.3(c))*, para. 27. See also the Award of the Arbitrator, *EC – Bananas III (Article 21.3(c))*, paras. 6-10.

¹³⁰ (footnote original) I recall that the Arbitrator in *US – Section 110(5) Copyright Act* stated that, although it is an "important issue" whether a Member decides to "simply repeal" a measure or whether "some other approach will be utilized", he failed to see how this issue would ... add any *additional time* to the legislative process, as the *content* of the legislation effecting implementation is precisely the issue that Congress will decide through its normal procedures. (original emphasis) (Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 42)

¹³¹ Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 59.

implementation process in a particular case. However, such considerations are not pertinent to the determination of the reasonable period of time."¹³²

1.4.3.6.21 Changes other than those necessary to implement the DSB recommendations

97. The Arbitrator on *Canada – Autos (Article 21.3(c))* declined to take into account the fact that "it might be more convenient for Canada to implement the DSB's recommendations in this case on the same timeline as it has planned for the reform of its customs administration regime".¹³³

98. In *EC – Tariff Preferences (Article 21.3(c))*, the Arbitrator confirmed that his determination on the reasonable period of time for implementation must have regard only to the shortest period possible within the legal system of the European Communities to bring its measures (the Drug Arrangements) into conformity with its WTO obligations. In the Arbitrator's view, "the mere fact that the European Communities has decided to incorporate the task of implementation within the larger objective of reforming its overall GSP scheme cannot lead to a determination of a shorter, or longer, period of time."¹³⁴

99. In *Colombia – Ports of Entry (Article 21.3(c))*, the Arbitrator stated that:

"In addition, while the implementing Member is free to initiate wider reforms of its municipal law in the process of implementing of the DSB's recommendations and rulings, such objectives do not justify a longer implementation period. My determination as to the reasonable period of time for implementation of these recommendations and rulings must focus on the shortest period possible within the legal system of the implementing Member to bring the particular measures found to be inconsistent into conformity with its WTO obligations."¹³⁵

1.4.3.6.22 Time for additional proceedings / decisions

100. In *EC – Chicken Cuts (Article 21.3(c))*, the European Communities states that it would not take any action internally until it receives a World Customs Organization decision. The Arbitrator considered that:

"Thus, conceivably, a finding of the WCO on tariff classification in response to a request for such a finding by the European Communities could have the effect of prolonging this dispute rather than contributing to its resolution through implementation of the recommendations and rulings of the DSB. In fulfilling my obligations as arbitrator under the DSU, I am naturally reluctant to take into account, in my determination of the reasonable period of time, the time needed to obtain from another international organization a decision that may not contribute to—or may possibly even hinder—the implementation of the recommendations and rulings of the DSB.

Therefore ... I cannot accept recourse to the WCO as an element of the European Communities' proposed implementation that I must factor into my calculation of the reasonable period of time simply because the European Communities has proposed it."¹³⁶

1.4.3.6.23 Distribution of seats among political parties

101. In *Canada – Patent Term (Article 21.3(c))*, the United States emphasized that under Canada's parliamentary system, the Government of Canada controlled the majority in both Houses of Parliament, the House of Commons and the Senate. According to the United States, with this majority, the government controlled the legislative process, and set the timetable for both Houses

¹³² Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, paras. 38-39. See also the Award of the Arbitrator, *Australia – Salmon*, para. 36.

¹³³ Award of the Arbitrator, *Canada – Autos (Article 21.3(c))*, para. 55.

¹³⁴ Award of the Arbitrator, *EC – Tariff Preferences (Article 21.3(c))*, para. 31.

¹³⁵ Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 64.

¹³⁶ Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, paras. 55-56.

of Parliament from start to finish; the Government of Canada could essentially pass any legislation it wishes in whatever time it liked. The Arbitrator stated that:

"It may well be possible that Canada's political system and the actual distribution of seats among the political parties in Canada's Parliament facilitate the passage of legislative initiatives taken by the present Canadian government. I am, however, very reluctant to take these factors into account in determining the 'reasonable period of time'. These factors vary from country to country, and from constitution to constitution. Even within a given country, they will change over time. In addition, their evaluation will often be difficult and highly speculative. I also note that such factors have never been considered as 'particular circumstances' in any of the earlier awards under Article 21.3(c) of the DSU. Thus, the political factors mentioned in the preceding paragraph, and invoked by the United States in support of its request for a 'reasonable period of time' of six months, are not relevant to my task."¹³⁷

Emergency in international relations

102. In *Ukraine – Ammonium Nitrate (Article 21.3(c))*, the Arbitrator acknowledged that a situation of "emergency in international relations" may qualify as a particular circumstance, although he did not consider that there was such a circumstance in the dispute at hand:

"I do not, in principle, rule out the possibility that a situation of 'emergency in international relations' may qualify as a particular circumstance and may thus be relevant to my determination of the reasonable period of time. I recognize that such a situation may affect a Member's capacity to implement the recommendations and rulings of the DSB. I recall, however, that Ukraine bears the overall burden of proving that the period of time requested for implementation constitutes a reasonable period of time. In my view, Ukraine has not sufficiently substantiated that there is a situation of 'emergency in international relations' that affects the reasonable period of time for implementation in this dispute."¹³⁸

Impact of the COVID-19 pandemic

103. In *Ukraine – Ammonium Nitrate (Article 21.3(c))*, the Arbitrator took the impact of the COVID-19 pandemic in Ukraine into account in determining the reasonable period of time:

"While I see merit in Russia's argument that the COVID-19 pandemic is not 'an overwhelming excuse for failures to comply with the WTO obligations', I cannot, in my determination of the reasonable period of time in this dispute, turn a blind eye to the recent developments in Ukraine and the rest of the world relating to the COVID-19 pandemic that affect the work of Ukrainian investigating authorities. My determination also needs to take into account the recent developments in Ukraine relating to the COVID-19 pandemic."¹³⁹

1.4.3.7 Burden of proof

104. The Arbitrator in *EC – Hormones (Article 21.3(c))* considered that:

"[T]he 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). In this arbitration, therefore, the onus is on the European Communities to demonstrate that there are particular circumstances which call for a reasonable period of time of 39 months, and it is likewise up to the United States and Canada to demonstrate that there are particular circumstances which lead to the conclusion that 10 months is reasonable."¹⁴⁰

¹³⁷ Award of the Arbitrator, *Canada – Patent Term (Article 21.3(c))*, para. 60.

¹³⁸ Award of the Arbitrator, *Ukraine – Ammonium Nitrate (Article 21.3(c))*, para. 3.44.

¹³⁹ Award of the Arbitrator, *Ukraine – Ammonium Nitrate (Article 21.3(c))*, para. 3.41.

¹⁴⁰ Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 27.

105. The Arbitrator on *Canada – Pharmaceutical Patents (Article 21.3(c))* held that it was for the implementing Member to bear the burden of proof in showing that the duration of any proposed period of implementation is a "reasonable period of time":

"Based on the wording of Articles 21.3, and on the context provided in Articles 3.3, 21.1 and 21.4 of the DSU, I agree with the arbitrator in *European Communities – Hormones* 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 DSB.'¹⁴¹ Moreover, as immediate compliance is clearly the preferred option under Article 21.3, it is, in my view, for the implementing Member to bear the burden of proof in showing – '[i]f it is impracticable to comply immediately' – that the duration of any proposed period of implementation, including its supposed component steps, constitutes a 'reasonable period of time'. And the longer the proposed period of implementation, the greater this burden will be."¹⁴²

106. In *EC – Tariff Preferences (Article 21.3(c))*, India argued that the implementing Member – in this case, the European Communities – bears the burden of demonstrating that the period it proposes is reasonable and that "the already great burden becomes even greater" if this period is more than 15 months. The Arbitrator disagreed and held that, in his view, the European Communities must demonstrate that the period it proposes is reasonable; "but I do not find it necessary in this arbitration to determine whether the burden of proof becomes greater if the period proposed is more than 15 months."¹⁴³

107. The Arbitrator in *EC – Chicken Cuts (Article 21.3(c))*, expressed the view that "an implementing Member seeking to go outside its domestic decision-making processes bears the burden of establishing that this external element of its proposed implementation is necessary for, and therefore indispensable to, that Member's full and effective compliance with its obligations under the covered agreements by implementing the recommendations and rulings of the DSB."¹⁴⁴

108. In *Colombia – Ports of Entry (Article 21.3(c))*, the Arbitrator stated that that:

"I am guided by previous arbitrators' awards that place the burden on the implementing Member to demonstrate that, if immediate compliance is impracticable, the period of time it proposes constitutes a 'reasonable period of time'. However, this does not absolve the other Member from producing evidence in support of its contention that the period of time requested by the implementing Member is not 'reasonable', and a shorter period of time for implementation is warranted."¹⁴⁵

1.4.3.8 Other issues

1.4.3.8.1 Relevance of time periods granted in previous arbitration awards

109. The Arbitrator in *EC – Export Subsidies on Sugar (Article 21.3(c))* found that although an arbitrator could derive some useful guidance from previous arbitration awards concerning legislative measures of the implementing Member, 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.¹⁴⁶

¹⁴² Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47. See also the Awards of the Arbitrator, *US – 1916 Act (Article 21.3(c))*, para. 32; *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 44; and *US – Gambling (Article 21.3(c))*, para. 31.

¹⁴³ Award of the Arbitrator, *EC – Tariff Preferences (Article 21.3(c))*, para. 27.

¹⁴⁴ Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 52.

¹⁴⁵ Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 67.

¹⁴⁶ Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 97.

1.4.3.8.2 Non-application to prohibited subsidies

110. In *Brazil – Aircraft*, the Appellate Body noted that the provisions of Article 21.3 of the DSU are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of the SCM Agreement:

"With respect to implementation of the recommendations or rulings of the DSB in a dispute brought under Article 4 of the *SCM Agreement*, there is a significant difference between the relevant rules and procedures of the DSU and the special or additional rules and procedures set forth in Article 4.7 of the *SCM Agreement*. Therefore, the provisions of Article 21.3 of the DSU are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of Part II of the *SCM Agreement*. Furthermore, we do not agree with Brazil that Article 4.12 of the *SCM Agreement* is applicable in this situation. In our view, the Panel was correct in its reasoning and conclusion on this issue. Article 4.7 of the *SCM Agreement*, which is applicable to this case, stipulates a time-period. It states that a subsidy must be withdrawn 'without delay'. That is the recommendation the Panel made."¹⁴⁷

111. In *Brazil – Taxation*, the Appellate Body further clarified the differences between prohibited cases and others with regard to the period of implementation:

"Article 4.7 is not used in the sense of requiring *immediate* compliance. Nor does the term 'without delay', combined with the requirement that the panel specify a time period, impose a single standard or time period applicable in all cases. Instead, Article 4.7 requires a panel to specify a time period that constitutes 'without delay' within the realm of possibilities in a given case and considering the domestic legal system of the implementing Member. In determining the time period under Article 4.7 that constitutes 'without delay', a panel should typically take into account the nature of the measure(s) to be revoked or modified and the domestic procedures available for such revocation or modification. These domestic procedures include any extraordinary procedures that may be available within the legal system of a WTO Member."¹⁴⁸

Finally, we consider it useful to contrast the text of Article 4.7 of the SCM Agreement with that of Article 21.3(c) of the DSU. Article 21.3 of the DSU specifies that, '[i]f it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so.' Article 21.3(c) of the DSU in turn provides that an arbitrator may be appointed where a reasonable time period cannot be agreed on, and that 'a guideline for the arbitrator should be that the reasonable period of time ... should not exceed 15 months from the date of adoption', although that time period 'may be shorter or longer, depending upon the particular circumstances'. By contrast, Article 4.7 of the SCM Agreement contains no reference to flexibilities depending on 'circumstances'. Article 4.7 simply mandates that 'the panel shall recommend that the subsidizing Member withdraw the subsidy without delay' and that 'the panel shall specify in its recommendation the time period within which the measure must be withdrawn.' Therefore, in contrast to Article 21.3(c) of the DSU, the use of the term 'without delay' in Article 4.7 constrains the latitude available to a panel in specifying the time period under that provision."¹⁴⁹

¹⁴⁷ Appellate Body Report, *Brazil – Aircraft*, para. 192.

¹⁴⁸ (footnote original) By contrast, we note that the existence of, and recourse to, extraordinary procedures within the domestic legal system of a WTO Member State is a factor that is generally not taken into account in determining the "reasonable period of time" under Article 21.3(c) of the DSU. See Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 49 (referring to Award of the Arbitrator, *Korea – Alcoholic Beverages (Article 21.3(c))*, para. 42; Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 51; Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 74).

¹⁴⁹ Appellate Body Report, *Brazil – Taxation*, paras. 5.446-5.447.

1.4.3.8.3 Participation by all the original parties

112. In *Japan – Alcoholic Beverages II (Article 21.3(c))*, it was agreed that all the original parties to the dispute could participate in the arbitration process even though only the United States had requested binding arbitration pursuant to Article 21.3.¹⁵⁰

1.4.3.8.4 More than one reasonable period of time for implementation

113. In *US – Gambling (Article 21.3(c))*, the Arbitrator did not exclude the possibility of determining different periods of time for bringing different measures into conformity:

"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... [I]t 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.

...

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. 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 periods of time for separate measures. It is true that, to date, no arbitrator has done so. Yet it is also true that, to date, no arbitrator has been asked to do so."¹⁵¹

114. In *Colombia – Ports of Entry (Article 21.3(c))*, the Arbitrator was also asked to determine two separate reasonable periods of time for bringing the indicative prices mechanism and the ports of entry measure into conformity. The Arbitrator then recalled that in *US – Gambling*, "the arbitrator did not exclude the possibility that an arbitrator might be able to establish separate reasonable periods of time for separate measure."¹⁵² However, the Arbitrator decided that it was not appropriate in this case.

1.4.3.8.5 The continued application of WTO-inconsistent measures during the reasonable period of time

115. In *US – Section 129(c)(1) URAA*, the Panel considered that nothing suggests that Members are obliged, during the course of the reasonable period of time, to suspend application of the offending measure or to provide relief for the past effects of such measure:

"Nothing in Article 21.3 suggests that Members are obliged, during the course of the reasonable period of time, to suspend application of the offending measure, much less to provide relief for past effects. Rather, in the case of antidumping and countervailing duty measures, entries that take place during the reasonable period of time may continue to be liable for the payment of duties.

...

¹⁵⁰ Award of the Arbitrator, *Japan – Alcoholic Beverages II (Article 21.3(c))*, para. 3.

¹⁵¹ Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, para. 41.

¹⁵² Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 108.

When panels and the Appellate Body have been asked to make recommendations for retroactive relief, they have rejected those requests, recognizing that a Member's obligation under the DSU is to provide prospective relief in the form of withdrawing a measure inconsistent with a WTO agreement, or bringing that measure into conformity with the agreement by the end of the reasonable period of time. In the six years of dispute settlement under the WTO agreements, no panel or the Appellate Body has ever suggested that bringing a WTO-inconsistent antidumping or countervailing duty measure into conformity with a Member's WTO obligations requires the refund of antidumping or countervailing duties collected on merchandise that entered prior to the date of implementation."¹⁵³

116. The Panel in *US – Section 129(c)(1) URAA* also added that Articles 22.1 and 22.2 of the DSU confirm not only that a Member may maintain the WTO-inconsistent measure until the end of the reasonable period of time for implementation, but also that neither compensation nor the suspension of concessions or other obligations are available to the complaining Member until the conclusion of that reasonable period of time.¹⁵⁴

1.4.4 Table showing the length of time taken in Article 21.3(c) proceedings to date

117. For a table providing information on the length of time taken in WTO proceedings to date from the date of the adoption of the panel report (and where applicable, the Appellate Body report) to circulation of the Article 21.3(c) award, see the chapter of the Analytical Index on "DS Information Tables".

1.5 Article 21.5

1.5.1 The "matter" in Article 21.5 proceedings

1.5.1.1 General

118. In *EC – Bed Linen (Article 21.5 – India)*, pursuant to its findings in *Guatemala – Cement I*, the Appellate Body emphasized that Article 21.5 proceedings are similar to the original proceedings and thus, the "matter" at issue consists of the same elements: (i) the specific measures at issue (in this case, the measures taken to comply) and (ii) the legal basis of the complaint, i.e. the claims.¹⁵⁵

1.5.1.2 "measures taken to comply"

1.5.1.2.1 General – scope of Article 21.5 proceedings limited to "measures taken to comply"

119. In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body held that proceedings under Article 21.5 concern only measures "taken to comply" with the recommendations and rulings of the DSB and interpreted this concept as referring to "measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB":

"Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB. In our view, the phrase 'measures taken to comply' refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In principle, a measure which has been 'taken to comply with the recommendations and rulings' of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures¹⁵⁶: the original measure which *gave rise* to the recommendations and rulings

¹⁵³ Panel Report, *US – Section 129(c)(1) URAA*, paras. 3.90 and 3.93.

¹⁵⁴ Panel Report, *US – Section 129(c)(1) URAA*, para. 3.91.

¹⁵⁵ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78.

¹⁵⁶ (*footnote original*) We recognize that, where it is alleged that there exist *no* "measures taken to comply", a panel may find that there is *no* new measure.

of the DSB, and the 'measures taken to comply' which are – or should be – adopted to *implement* those recommendations and rulings. In these Article 21.5 proceedings, the measure at issue is a new measure, the *revised* TPC programme, which became effective on 18 November 1999 and which Canada presents as a 'measure taken to comply with the recommendations and rulings' of the DSB."¹⁵⁷

120. The Appellate Body in *EC – Bed Linen (Article 21.5 – India)* reiterated that the "measures" at issue in an Article 21.5 proceeding can only be those "measures taken to comply". It further stated that "[i]f a *claim* challenges a *measure* which is not a 'measure taken to comply', that *claim* cannot properly be raised in Article 21.5 proceedings."¹⁵⁸

1.5.1.2.2 First category of measures taken to comply: those identified/declared by responding party as "measures taken to comply"

121. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, the Panel made the following observations with respect to the characterization of measures declared by the respondent to be "measures taken to comply":

"It is well established that a panel is entitled to consider the issue of its jurisdiction on its own initiative, and must satisfy itself of its jurisdiction in any dispute that comes before it. Therefore, even where the respondent declares that a measure is one taken to comply, we do not a priori exclude the possibility that there might be circumstances where a compliance panel would consider it necessary to conduct its own assessment of whether that 'declared' measure taken to comply falls within its jurisdiction. Having said this, we are not aware of any case to date in which a compliance panel has conducted its own assessment of whether a 'declared' measure taken to comply by the respondent falls within the scope of a compliance panel proceeding. Accordingly, where a respondent declares that a challenged measure is one 'taken to comply', and that measure is subsequently challenged by the complainant in an Article 21.5 compliance proceeding, a compliance panel may be expected to proceed on that shared understanding, unless there are extraordinary circumstances compelling a panel to conduct its own independent assessment."¹⁵⁹

122. In *US – Ripe Olives from Spain (Article 21.5 – EU)*, the Panel found that a member may comply with DSB recommendations and rulings by "re-interpreting", "re-evaluating" and "re-examining" a measure found to be "as such" inconsistent with the WTO Agreement. In this regard, the Panel emphasised that what matters is whether the member has achieved substantive compliance. The Panel also rejected the complainant's argument that "re-interpretation", "re-evaluation" or "re-examination" of a measure necessarily leads to re-litigating the findings of the original panel:

"In our view, it follows from the focus and subject matter of Article 21 that a 'measure taken to comply', regardless of its form, must achieve substantive compliance. Thus, in the case of an alleged compliance action taking the form of a 're-interpretation', 're-evaluation' or 're-examination' of a domestic law previously found to be 'as such' inconsistent with a Member's WTO obligations, such action must be shown to render the domestic law no longer 'as such' inconsistent with the relevant WTO rules. Accordingly, we are not convinced by the European Union's submission that the USDOC's 'revised understanding of Section 771B' could not even potentially constitute a 'measure taken to comply' for the purpose of Article 21.5 of the DSU.

Likewise, we are not persuaded by the European Union's contention that the USDOC's revised analysis and determinations concerning the applicability of Section 771B must be understood to constitute an attempt to 'revisit' or re-litigate issues that were fully resolved in the original proceeding. Recalling that Article 21.5 of the DSU does not define what may constitute a 'measure taken to comply', we do not see a legal basis to automatically equate a Member's 're-interpretation', 're-evaluation' or 're-examination' of an offending legal provision for the purpose of showing compliance

¹⁵⁷ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

¹⁵⁸ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78.

¹⁵⁹ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.6.

to 'revisiting', in the sense of re-litigating, the findings of the original panel. Indeed, such actions may simply reflect a Member's genuine attempt to comply with the findings of the original panel, which will likewise inform a compliance panel's examination of the 'measure taken to comply'."¹⁶⁰

123. The Panel in *US – Ripe Olives from Spain (Article 21.5 – EU)* accepted the notion that an investigating authority's interpretation of domestic law may have normative value, but found that the respondent in the case at hand had not demonstrated such value.¹⁶¹

Second category of measures taken to comply: those deemed to be so notwithstanding that the respondent maintains otherwise

1.5.1.2.2.1 Generally

124. In *US – Softwood Lumber IV (Article 21.5 – Canada)*, the United States requested a preliminary ruling that the results of the First Assessment Review of the countervailing duty order were not "measures taken to comply" and therefore the Panel lacked the jurisdiction to review them.¹⁶² The Panel rejected this request, finding that "Article 21.5 proceedings are not restricted to measures formally, or explicitly, taken by Members to implement DSB rulings and recommendations."¹⁶³ The Panel then went on to find:

"In our view, and taking into account previous dispute settlement decisions regarding DSU Article 21.5, the USDOC's treatment of pass-through in the First Assessment Review is also covered by these proceedings, because it is clearly connected to the panel and Appellate Body reports concerning the Final Determination, and because it is inextricably linked to the treatment of pass-through in the Section 129 Determination.

...

... [W]e consider that there is sufficient overlap in the timing, or temporal effect, and nature of the Final Determination, Section 129 Determination and First Assessment Review for the latter to fall within the scope of the present DSU Article 21.5 proceedings...

...

[I]f we exclude the pass-through analysis in the First Assessment Review from these proceedings, Canada and the United States will still dispute the same issue, i.e., pass-through of subsidy benefit, in respect of the same import entries, as they did in the original proceedings concerning the Final Determination. In our view, this would be wholly inconsistent with the object and purpose of the DSU which, as noted above, is to ensure the prompt settlement of disputes".¹⁶⁴

125. The Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* examined various dictionary meanings of the word "taken" and found that "measures taken to comply" refers to measures that have been taken in the direction of, or for the purpose of achieving, compliance. The Appellate Body stated:

"In examining the meaning of 'measures taken to comply' in Article 21.5, we begin with the word 'taken'. There is a wide range of dictionary meanings of the word 'taken', which is the past participle of the verb 'take'. The meanings of 'take' include, for example, '[b]ring into a specified position or relation'; '[s]elect or use for a particular purpose.' The preposition 'to' is '[u]sed in verbs ... in the sense of 'motion, direction, or addition to', or as the mark of the infinitive.' As the United States points

¹⁶⁰ Panel Report, *US – Ripe Olives from Spain (Article 21.5 – EU)*, paras. 7.16-7.17.

¹⁶¹ Panel Report, *US – Ripe Olives from Spain (Article 21.5 – EU)*, paras. 7.21. See also *ibid.* paras. 7.48, 7.51, 7.54-7.55, and 7.58.

¹⁶² Panel Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 4.2.

¹⁶³ Panel Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 4.38.

¹⁶⁴ Panel Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 4.41-4.42 and 4.48.

out, the word 'comply' is defined as 'accommodate oneself to (a person, circumstances, customs, etc.) ... Act in accordance with or *with* a request, command, etc.' The French and, in particular, Spanish versions of this phrase ('mesures prises pour se conformer' and 'medidas destinadas a cumplir', respectively) also imply that relevant measures are associated with the objective of complying. On its face, therefore, the phrase 'measures taken to comply' seems to refer to measures taken *in the direction of, or for the purpose of achieving, compliance*."¹⁶⁵

126. In *US – Softwood Lumber IV (Article 21.5 – Canada)* the Appellate Body nonetheless concurred with the Panel that a compliance panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be "taken to comply" and may include a review of other measures which have close relationship to the declared "measure taken to comply", and to the recommendations and rulings of the DSB. The Appellate Body stated:

"[A] panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be 'taken to comply'. Such a declaration will always be relevant, but there are additional criteria, identified above, that should be applied by a panel to determine whether or not it may also examine other measures. Some measures with a particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures. This also requires an Article 21.5 panel to examine the factual and legal background against which a declared 'measure taken to comply' is adopted. Only then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such another measure as one 'taken to comply' and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding."¹⁶⁶

127. In the context of reviewing prior panel and Appellate Body reports relating to the scope of Article 21.5 proceedings, the Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)* recalled that:

"[T]he scope of Article 21.5 is not limited to 'measures taken to comply' that the responding Member identifies as such: the scope of Article 21.5 proceedings extends beyond such 'declared' measures taken to comply to include other measures that share a sufficiently 'close nexus' with one or more declared measures taken to comply, or with the DSB's recommendations and rulings."¹⁶⁷

1.5.1.2.2.2 The "close nexus" test

128. The Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* endorsed the Panel's "nexus-based test" to determine whether a measure at issue, by virtue of its close relationship to the measure taken to comply, fell within the scope of the compliance panel's jurisdiction.¹⁶⁸ The Appellate Body saw no error in the Panel's examination of the "overlap in the timing, or temporal effect, and nature" of the measures at issue and those taken in compliance.¹⁶⁹

129. That test, as the Appellate Body in *US – Zeroing (EC) (Article 21.5 – EC)* explained, requires the compliance panel to examine the "timing, nature, and effects of the various measures."¹⁷⁰ During the original proceedings, the United States was found to act inconsistently with certain provisions of the Anti-Dumping Agreement, *inter alia*, by applying a "zeroing methodology" in specific original dumping investigations and in administrative reviews.

¹⁶⁵ Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 66.

¹⁶⁶ Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

¹⁶⁷ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.504.

¹⁶⁸ Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 79.

¹⁶⁹ Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 91. See also Panel Report, Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 4.42.

¹⁷⁰ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 207.

Subsequently, the United States undertook actions it claimed achieved compliance with the DSB recommendations and rulings. The Panel, during compliance proceedings, agreed with the European Communities that the United States' administrative review and sunset review determinations, which took effect after the date of adoption of the DSB recommendations and rulings, evinced a "sufficiently close nexus" so to fall within the Panel's purview.

130. The Appellate Body in *US – Zeroing (EC) (Article 21.5 – EC)* reviewed the European Communities' claim that the Panel "erred in excluding certain reviews ... on the basis that they *pre-dated* the adoption of the recommendations and rulings of the DSB".¹⁷¹ It faulted the Panel's "formalistic reliance on the date of issuance of the subsequent reviews in ascertaining whether these reviews had a close nexus with the recommendations and rulings of the DSB".¹⁷² While timing is a "relevant factor", "the relevant inquiry was whether the subsequent reviews, despite the fact that they were issued before the adoption of the recommendations and rulings of the DSB, still bore a sufficiently close nexus, in terms of *nature, effects, and timing*, with those recommendations and rulings, and with the declared measures 'taken to comply', so as to fall within the scope of Article 21.5 proceedings."¹⁷³ As such, the Appellate Body reversed the Panel's finding. The Appellate Body then considered the nature of the use of zeroing in the excluded subsequent reviews, the declared measures, and the DSB's recommendations and rulings, finding that all reviews "were issued under the same anti-dumping duty order as the measures challenged in the original proceedings, and therefore constituted 'connected stages'". These "pervasive links ... weigh in favour of a sufficiently close nexus, in terms of *nature*".¹⁷⁴ However, as to effects, the Appellate Body concluded that only those reviews that led to the continuation of anti-dumping orders, which provided the basis for the imposition of assessment rates and cash deposits calculated with zeroing, could have a sufficiently close link. Finally, the Appellate Body noted that "the fact that [the reviews] were issued before the adoption of the recommendations and rulings of the DSB [was not] determinative."¹⁷⁵ The timing, the Appellate Body concluded, was "not sufficient to sever the pervasive links that we have found to exist, in terms of *nature and effects*" and, on this basis, the Appellate Body found the reviews to fall within the Panel's terms of reference.¹⁷⁶

131. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* summarized the "close nexus" test but also noted that it is not the only means by which to determine the susceptibility of an undeclared measure to review by a compliance panel:

"Under the 'close nexus' test, as elucidated by the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*, any undeclared measure with a 'particularly close relationship' to the declared measure taken to comply, and to the recommendations and rulings of the DSB, may be susceptible to review by a compliance panel. Determining whether this is the case requires panels to 'scrutinize these relationships' in the context of the 'factual and legal background' against which a declared measure taken to comply is adopted, which may, depending on the particular facts, call for an examination of the timing, nature and effects of the various measures. A compliance panel must on this basis determine whether there are 'sufficiently close links' between the relevant measures and the DSB recommendations and rulings such that it would be appropriate to characterize the undeclared measure as a 'measure taken to comply' and, consequently, to assess its consistency with the covered agreements in a proceeding initiated under Article 21.5 of the DSU.

Although the close nexus test may not be the *only* basis for resolving the general question that is before us¹⁷⁷, we note that it has been the main focus of the parties' arguments."¹⁷⁸

¹⁷¹ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 217.

¹⁷² Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 226.

¹⁷³ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 226.

¹⁷⁴ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230.

¹⁷⁵ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 234.

¹⁷⁶ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 234.

¹⁷⁷ (footnote original) We do not exclude that there may be situations where the factual circumstances and legal provisions at issue in a particular compliance dispute call for a different approach to be taken.

¹⁷⁸ Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.83-6.84.

132. The Panel also addressed the European Union's argument that "an affirmative close nexus analysis and the existence of an overarching measure are two ways of showing that an undeclared measure may be found to be sufficiently connected with the 'measures taken to comply' and the recommendations and rulings of the DSB, such that it may be brought into the scope of a compliance dispute."¹⁷⁹ In the original dispute, the panel had determined that the United States had failed to demonstrate that the "LA/MSF" program existed by the time of the panel's establishment, and, as such, no findings were made and no recommendations and rulings were adopted as to this program. Subsequently, however, new measures were adopted, which in the original proceeding the United States contended were subsidies that caused an adverse effect. The United States accordingly argued, in the compliance proceeding, that the new LA/MSF measures were subsidies and, despite not being identified as a "measure taken to comply", fell within the Panel's terms of reference. The European Union countered that the fact that the original panel found that the United States had failed to demonstrate the existence of the LA/MSF program meant that there was no overarching measure and therefore no close nexus between the undeclared measures and the adopted recommendations and rulings of the DSB. Further, the European Union asserted that an "overarching measure" was present in several disputes. The Panel disagreed with the European Union's characterization of past disputes and held:

"Rather, as we see it, the existence of an overarching measure as conceived by the European Union may be one fact – one piece of evidence – that could be used to support the existence of a relationship between an undeclared measure, a 'measure taken to comply' and the recommendations and rulings of the DSB, that is sufficiently close to bring the undeclared measure into the scope of a compliance proceeding. Thus, ultimately, in our view, the appropriate place to consider the merits of the European Union's submissions concerning the non-existence of an overarching measure in this dispute ... is in the context of our analysis of the parties' arguments with respect to the application of the close nexus test."¹⁸⁰

133. In *EC and certain member States – Large Civil Aircraft (Article 21.5 - EU)*, while examining whether the United States was entitled to raise claims against the Eighth Framework Programme, an alleged subsidy programme which did not exist at the time of establishment of the first compliance panel, and was not declared as a measure "taken to comply" in the European Union's panel request, the Panel considered that the "close nexus" test should also apply in "reverse" compliance proceedings:

"[W]e recall that our analysis in this section proceeds on the basis of the premise that an original complainant in a 'reverse' compliance proceeding is entitled to raise claims against measures not specifically identified by the original respondent in its panel request. Given this premise, we believe it makes sense to apply the 'close nexus' test to determine whether a measure not identified by an original respondent in its panel request may fall within a 'reverse' compliance panel's terms of reference. In our view, such an approach would effectively define the types of measures that an original complainant may bring into a 'reverse' compliance dispute in the same way that measures that are not declared by an implementing Member to be 'measures taken to comply' can be brought within the scope of a normal compliance dispute – namely, when they have a particularly close relationship with the measures taken to comply and/or the recommendations and rulings of the DSB."¹⁸¹

134. Following the decision that the "close nexus" test should also apply in "reverse" compliance proceedings, the Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 - EU)* proceeded to determine whether the Eighth Framework Programme fell within the scope of its jurisdiction. Specifically, the Panel assessed the proximity of the Eighth Framework Programme, which the United States claimed was a "measure taken to comply" although it was not included in the European Union's panel request, with the European Union's declared measures taken to comply and the recommendations and rulings of the DSB in connection with LA/MSF measures. The Panel examined the timing, nature and effects of each relevant measure, and found that the

¹⁷⁹ Panel Report, *EC and certain member States (Article 21.5 - US)*, para. 6.87.

¹⁸⁰ Panel Report, *EC and certain member States (Article 21.5 - US)*, para. 6.108.

¹⁸¹ Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 - EU)*, paras. 7.98-7.99.

United States failed to establish "sufficiently close links", and therefore found the Programme outside its terms of reference.¹⁸²

135. The Panel in *US – Large Civil Aircraft (2nd Complaint)* (Article 21.5 – EU) had to determine whether the "JCATI" measure was within the scope of the compliance proceeding, although that measure was not declared taken to comply. The Panel noted this "depends upon whether [the JCATI measure] meets the requirements of the close nexus test and thus constitutes an 'undeclared' measure taken to comply." Accordingly, the Panel recalled the contents of the close nexus test:

"We recall that the close nexus test represents an attempt by panels and the Appellate Body to balance the competing interests of (a) providing a responding party with a reasonable period of time to bring its measures into conformity prior to authorization for retaliation, with (b) the efficient working of the dispute settlement system, and the importance of meaningful compliance. In striking this balance, the close nexus test looks to see whether 'undeclared' measures have a 'particularly close relationship' to the declared measure taken to comply, and to the DSB recommendations and rulings, such that they are susceptible to review by a compliance panel. Compliance panels 'scrutinize these relationships', which may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures, as well as an examination of the 'factual and legal background' against which a declared measure taken to comply is adopted. The task of a compliance panel is to determine whether there are 'sufficiently close links' to be able to characterize the 'undeclared' measure as being one 'taken to comply' and consequently, for the panel to assess its consistency with the covered agreements in an Article 21.5 proceeding. The focus or purpose of the exercise is to ascertain whether measures other than original measures, or the responding party's declared compliance actions, would in practical terms undermine or nullify the purported compliance actions with the result that a panel could not meaningfully undertake an assessment of whether there has been compliance without also considering those 'undeclared' measures.

This being so, the close nexus test is not satisfied by merely identifying any links at all between the 'undeclared' measure and the declared measures taken to comply or the DSB recommendations and rulings. For example, in the subsidies context, the close nexus test should not be applied in a manner that means that, once a Member is found to have granted a subsidy to a recipient that causes adverse effects, a complaining party can challenge in a compliance proceeding any subsequent financial contribution to that same recipient on the theory that it is a subsidy and will cause adverse effects.

...

[T]he close nexus test appears to be fundamentally directed to the question of whether, in the specific factual and legal context of the case, it would be feasible for a panel to undertake to determine whether the responding party has complied with the DSB recommendations and rulings *without* taking into account these 'undeclared' measures."¹⁸³

136. The Appellate Body in *US – Countervailing Measures (China)* (Article 21.5 – China) found no error in the Panel's treatment as measures taken to comply of reviews conducted subsequent to the measure taken to implement the DSB recommendations and rulings. In so finding, the Appellate Body pointed out that the Panel was not required to conduct a detailed examination of the facts of such reviews. The Appellate Body also distinguished the issue of whether the reviews fell within the Panel's terms of reference from whether they were WTO-consistent:

¹⁸² Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 - EU)*, para. 7.117. For the details of the Panel's assessment in this regard, see paras. 7.105, 7.108-7.110 and 7.114-7.115.

¹⁸³ Panel Report, *US – Large Civil Aircraft (2nd Complaint)* (Article 21.5 – EU), paras. 7.66-7.67, and 7.74.

"[I]n its analysis, the Panel relied on the fact that 'subsequent reviews and determinations [had been] issued under the same 'order' as measures challenged in original proceedings' and found that therefore they constituted 'connected stages ... involving the imposition, assessment and collection of duties'. As we see it, the extent to which a Panel should scrutinize the particular facts of each review and related earlier determination is informed by the purpose of this analysis, namely, to determine whether certain subsequent reviews bear a close relationship, in terms of nature, timing, and effects, to the United States' implementation. This does not require a detailed examination by a panel of the particular facts of the various reviews and related earlier determinations. In this respect, we note that the Appellate Body has not understood the nexus test to entail an analysis of the particular facts of the related measures, for instance, in its application of this test in *US – Softwood Lumber IV (Article 21.5 – Canada)* and in *US – Zeroing (EC) (Article 21.5 – EC)*.

Furthermore, the United States argues that China did not adduce sufficient evidence and arguments to show that the USDOC's findings in each of the administrative reviews and sunset reviews at issue are WTO-inconsistent, and that this also resulted in an insufficient basis for the compliance panel to conduct a close nexus analysis.

Whether China had made a *prima facie* case of WTO-inconsistency with respect to the reviews at issue has no bearing on whether these measures fell within the scope of these Article 21.5 proceedings. A measure may well fall within the Panel's terms of reference even if, ultimately, the complainant fails to make a *prima facie* case of inconsistency in that respect. Conversely, a measure may fall outside the scope of the proceedings, even if, in principle, the complainant might have been able to make a *prima facie* case of inconsistency regarding the measure. Accordingly, it was correct of the Panel to distinguish two distinct questions, namely, the question concerning the scope of the Article 21.5 proceedings and the question of whether the subsequent administrative and sunset reviews are themselves inconsistent with the provisions of the SCM Agreement, as claimed by China."¹⁸⁴

137. The Appellate Body in *US – Countervailing Measures (China) (Article 21.5 – China)* found no error in the Panel's treatment of the timing aspect of the nexus test along with its nature and effects aspects. According to the Appellate Body, "the mere fact that a measure was adopted before or after the expiration of the reasonable period of time for implementation is insufficient to determine whether that measure falls within the Panel's terms of reference."¹⁸⁵

138. The Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)* made the following observations on the "close nexus" test, with reference to prior panel and Appellate Body reports:

"A 'nexus' means 'a connection, bond or link', or 'a connected group or series; a network'. Similar notions are conveyed by other terms used interchangeably by the Appellate Body in this context, including its references to a 'close relationship' or 'closely connected' measures.¹⁸⁶ Thus, the notion of a 'close nexus' is inherently an examination of the degree of connection between two (or more) things, as opposed to a bright line or binary test in which decisive importance or formalistic reliance could be placed on any one similarity or difference. Indeed, by framing the analysis as an enquiry into the existence of a 'sufficiently close nexus'¹⁸⁷, involving the existence of 'sufficiently close links'¹⁸⁸, panels and the Appellate Body have reinforced that there is no bright-line or binary test.

¹⁸⁴ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, paras. 5.32-5.34.

¹⁸⁵ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.38.

¹⁸⁶ (footnote original) Initially panels referred to measures as "clearly connected" or "inextricably linked". (See, e.g. Panel Reports, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, sub-para. 22; and *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.5) The term "close nexus" was first used by the panel in *US – Upland Cotton (Article 21.5 – Brazil)*, para. 9.26.

In accordance with the case law developed on the 'close nexus' standard, a compliance panel typically reaches a conclusion on the basis of 'an examination of the timing, nature, and effects of the various measures'. In this case, the parties have both proceeded on that basis, and have accordingly focused their arguments on the timing, nature and effects of the Charges. However, we note that in articulating the analytical framework to be applied in a close nexus analysis, the Appellate Body has made clear that the analysis '*may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures*'. In our view, this language clearly and expressly envisages that there may be situations in which the factual circumstances and legal provisions at issue in a particular compliance proceeding call for a different approach to be taken, and that it is not always mandatory to consider each of these elements. Having said that, our own analysis in this case is naturally guided by the manner in which the parties have framed their arguments."¹⁸⁹

1.5.1.3 Claims in Article 21.5 proceedings

Article 21.5 proceedings not limited to claims in original proceedings

139. In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body examined whether an Article 21.5 panel could consider a *new* claim that challenged an aspect of the measure taken to comply that was not part of the original measure and had not been, and could not have been, previously raised before the panel in the original proceedings. The Appellate Body explained that an Article 21.5 panel is not limited solely to examining whether the Member had complied with the DSB recommendations and rulings, but rather must examine the consistency of the new measure with the relevant provisions of, *in casu*, the SCM Agreement. The Appellate Body considered that the utility of Article 21.5 proceedings would be hampered if the panel could only consider the new measure from the perspective of the claims raised during the original proceedings:

"We have already noted that these proceedings, under Article 21.5 of the DSU, concern the 'consistency' of the revised TPC programme with Article 3.1(a) of the *SCM Agreement*. Therefore, we disagree with the Article 21.5 Panel that the scope of these Article 21.5 dispute settlement proceedings is limited to 'the issue of whether or not Canada *has implemented the DSB recommendation*'. The recommendation of the DSB was that the measure found to be a prohibited export subsidy must be withdrawn within 90 days of the adoption of the Appellate Body Report and the original panel report, as modified – that is, by 18 November 1999. That recommendation to 'withdraw' the prohibited export subsidy did not, of course, cover the new measure – because the new measure did not exist when the DSB made its recommendation. It follows then that the task of the Article 21.5 Panel in this case is, in fact, to determine whether the new measure – the revised TPC programme – is consistent with Article 3.1(a) of the *SCM Agreement*.

Accordingly, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be

¹⁸⁹ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.506-7.507.

unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU."¹⁹⁰

140. In *US – FSC (Article 21.5 – EC)*, the Appellate Body upheld a ruling on a *new* claim challenging an aspect of the measure taken to comply that was a revision of the original measure.¹⁹¹

141. The Panel in *EC – Bed Linen (Article 21.5 – India)* voiced due process concerns about a situation where a complainant raises in the Article 21.5 proceeding new claims regarding unchanged aspects of the measures concerned that could have been raised during the original proceedings but were not for one reason or another:

"As an extreme example, assume a complaining Member challenges an anti-dumping duty in dispute settlement, and alleges violations only in connection with the investigating authorities' determination of injury. Assume the Panel concludes that the anti-dumping duty is inconsistent with the AD Agreement because of a violation of Article 3.4 in the determination of injury, and the DSB recommends that the defending Member 'bring the measure into conformity'. Assume the defending Member re-evaluates only the injury aspect of its original decision, makes a new determination of injury, and continues the imposition of the anti-dumping duty on the basis of the new finding of injury and the pre-existing finding of dumping and causal link. If that anti-dumping duty, and all aspects of the determinations underlying that duty, are considered the 'measure taken to comply', then the complaining Member could, in a subsequent Article 21.5 proceeding, allege a violation in connection with the dumping determination which had not been challenged in the original dispute. If the Article 21.5 panel found a violation of the AD Agreement in the determination of dumping, it would presumably conclude that the measure taken to comply is inconsistent with the AD Agreement. In this circumstance, the defending Member would have no opportunity to bring its measure into conformity with the AD Agreement with respect to the dumping calculation. Moreover, the defending Member would be subject to potential suspension of concessions as a result of a finding of violation with respect to the dumping aspect of the original determination which, because it was not the subject of any finding of violation in the original report, the Member was entitled to assume was consistent with its obligations under the relevant agreement. Such an outcome would not seem to be consistent with the overall object and purpose of the DSU to achieve satisfactory resolution of disputes, effective functioning of the WTO, to maintain a proper balance between the rights and obligations of Members, and to ensure that benefits accruing to any Member under covered agreements are not nullified or impaired."¹⁹²

142. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body further stressed that a complainant in Article 21.5 proceedings could raise new claims, meaning claims that it did not raise in the original proceedings:

"[T]he relevant facts bearing upon the 'measure taken to comply' may be different from the facts relevant to the measure at issue in the original proceedings. It is to be expected, therefore, that the claims, arguments, and factual circumstances relating to the 'measure taken to comply' will not, necessarily, be the same as those relating to the measure in the original dispute. Indeed, a complainant in Article 21.5 proceedings may well raise *new* claims, arguments, and factual circumstances different from those raised in the original proceedings, because a 'measure taken to comply' may be *inconsistent* with WTO obligations in ways different from the original measure. In our view, therefore, an Article 21.5 panel could not properly carry out its mandate to assess whether a 'measure taken to comply' is *fully consistent* with WTO obligations if it were precluded from examining claims additional to, and different from, the claims raised in the original proceedings."¹⁹³

¹⁹⁰ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 40-41.

¹⁹¹ Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 222.

¹⁹² Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.40.

¹⁹³ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 79.

143. The Panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* reiterated that "an Article 21.5 panel can consider a new claim on an aspect of the measure taken to comply that constitutes a new or revised element of the original measure, which claim could not have been raised in the original proceedings."¹⁹⁴ The Panel also recalled that "an Article 21.5 panel cannot consider the same claim on an aspect of the measure taken to comply that is an unchanged element of the original measure and was already challenged in the original proceedings and dismissed by an adopted report."¹⁹⁵ The Panel noted:

"The purpose of Article 21.5 is to provide an expeditious procedure to establish whether a Member has properly implemented the DSB recommendations and rulings. Admitting such a new claim would mean providing the European Communities with a second chance to raise a claim that it failed to raise in the original proceedings. The Appellate Body, however, has found that a party cannot cure the failure to include a claim in the panel request by raising the claim in subsequent submissions or statements.

Moreover, the Panel is concerned that allowing a new claim on the likelihood-of-injury in the current proceedings may jeopardize the principles of fundamental fairness and due process. In our view, it would be unfair to expose the United States to the possibility of a finding of violation on an aspect of the original measure that the United States was entitled to assume was consistent with its obligations under the relevant agreement given the absence of a finding of violation in the original report."¹⁹⁶

Article 21.5 proceedings not an opportunity to "re-litigate" issues that were addressed, or that could have been addressed, in the original proceeding

144. In *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body delineated the scope of the claims that may be raised in Article 21.5 proceedings:

"We agree with the United States that the scope of claims that may be raised in an Article 21.5 proceeding is not unbounded. As the Appellate Body found in *EC – Bed Linen (Article 21.5 – India)*, a complainant who had failed to make out a *prima facie* case in the original proceedings regarding an element of the measure that remained unchanged since the original proceedings may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings.¹⁹⁷ Similarly, a complainant may not reassert the same claim against an unchanged aspect of the measure that had been found to be *WTO-consistent* in the original proceedings.¹⁹⁸ Because adopted panel and Appellate Body reports must be accepted by the parties to a dispute, allowing a party in an Article 21.5 proceeding to re-argue a claim that has been decided in adopted reports would indeed provide an unfair 'second chance' to that party.

...

A complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not."¹⁹⁹

145. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body established that a complainant's failure to raise a *prima facie* case in the original proceedings impacts on the scope of the respondent's compliance obligation in an Article 21.5 dispute:

¹⁹⁴ Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.64.

¹⁹⁵ Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.64.

¹⁹⁶ Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.74-7.75.

¹⁹⁹ Appellate Body Report, *US – Upland Cotton*, paras. 210-211. See also Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.24.

"[T]he original panel ruled that India had failed to present a *prima facie* case in respect of its claim under Article 3.5 relating to 'other factors'. In our view, the effect, for the parties, of findings adopted by the DSB as part of a panel report is the same, regardless of whether a panel found that the complainant failed to establish a *prima facie* case that the measure is inconsistent with WTO obligations, that the Panel found that the measure is fully consistent with WTO obligations, or that the Panel found that the measure is not consistent with WTO obligations. A complainant that, in an original proceeding, fails to establish a *prima facie* case should not be given a 'second chance' in an Article 21.5 proceeding, and thus be treated more favourably than a complainant that did establish a *prima facie* case but, ultimately, failed to prevail before the original panel, with the result that the panel did not find the challenged measure to be inconsistent with WTO obligations. Nor should a defending party be subject to a second challenge of the measure found not to be inconsistent with WTO obligations, merely because the complainant failed to establish a *prima facie* case, as opposed to failing ultimately to persuade the original panel."²⁰⁰

146. The Appellate Body in *EC – Bed Linen (Article 21.5 – India)* upheld the Panel's findings as regards the claims not raised in the original proceedings:

"[A] claim which, as a legal and practical matter, could have been raised and pursued in the original dispute, but was not, cannot be raised on the same facts and legal premises in an Article 21.5 proceeding to determine the existence or consistency of measures taken to comply with the recommendation of the DSB in the original dispute."²⁰¹

147. In *US – COOL (Article 21.5 – Canada and Mexico)*, the United States argued that the complainants should not be allowed "an unfair second chance" to challenge unchanged aspects of the original measures (i.e., ground meat labelling scheme and trace-back prohibition) or to use compliance proceedings to re-raise claims and arguments of the original proceedings. The Panel agreed with the United States that compliance proceedings should not "allow a complainant to re-litigate a claim regarding unchanged aspects of an original measure" or "to use compliance claims to 're-open' issues decided in substance in the original proceedings." At the same time, the Panel noted that a compliance panel is "not confined" to examine measures taken to comply from the perspective of the claims, arguments, and circumstances of the measure subject to original proceedings.²⁰² The Panel then addressed the "important distinction" between *claims* and *arguments* regarding certain measures:

"The complainants confirm that they are not bringing claims against the unchanged ground meat labelling scheme and the trace-back prohibition, but rather are referencing these as arguments. Indeed, there is an important distinction to be made between claims, i.e. allegations of violation of the substantive provisions of the WTO covered agreements, and arguments, i.e. means whereby a party progressively develops and supports its claims. Our mandate is limited to reviewing the complainants' above-mentioned claims with regard to aspects of the amended COOL measure identified in the complainants' panel requests. In reviewing these claims, however, we are not precluded from considering the complainants' arguments concerning the ground meat rule and the trace-back prohibition."²⁰³

148. In *US – Large Civil Aircraft (2nd Complaint) (Article 21.5 – EU)*, the Panel considered whether there are limits on measures susceptible to review in compliance proceedings. The Panel noted it is "well settled that Appellate Body findings and unappealed panel findings that are adopted by the DSB must be regarded as a final resolution to a dispute between the parties in respect of the particular claim and the specific component of the measure that is the subject of that claim." However, in certain compliance proceedings, the Appellate Body has permitted complaining parties to reassert claims that were unsuccessfully asserted in the original proceeding, "where the finality of the DSB recommendations and rulings would not thereby be compromised." For example, a complaining party "in a compliance proceeding was able to reassert claims against

²⁰⁰ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 96.

²⁰¹ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 74.

²⁰² Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.46-7.48.

²⁰³ Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.49.

aspects of measures that were unchanged from those unsuccessfully challenged in the original proceedings, where the original panel had exercised judicial economy with respect to one challenged aspect of an original measure, that aspect had become an integral part of the measure taken to comply, and the challenge was to that same aspect of the measure taken to comply."²⁰⁴ The Panel concluded:

"[W]hile panels and the Appellate Body have been careful not to permit complaining parties to use Article 21.5 proceedings as an opportunity to re-litigate issues that were resolved adversely to them in the original proceeding, this does not apply where the failure to achieve a definitive resolution of a claim cannot reasonably, in the circumstances, be laid at the feet of the complaining party. The Appellate Body has no power to remand a decision back to a panel to apply a corrected interpretation of the law to the facts. Moreover, in certain situations, the Appellate Body may simply be unable to complete the analysis by applying that corrected interpretation to the panel's factual findings or undisputed factual material on the record. In these circumstances, while a complaining party may in some senses have been 'unsuccessful' in establishing its claims at the end of the compliance proceeding, it is more accurate to consider the claims unresolved. To permit a complaining party to seek resolution of those unresolved claims as part of a compliance proceeding does not necessarily afford it an unfair second chance."²⁰⁵

149. As such, the Panel in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* disagreed with the United States' argument that only original measures that were the subject of DSB-adopted recommendations and rulings and measures taken to comply with such recommendations and rulings were susceptible for review in compliance proceedings. Rather, "the relevant issue is not whether original measures are *per se* outside the scope of a compliance proceeding because original measures not the subject of DSB recommendations and rulings can never logically be measures taken to comply" but "in which circumstances a complaining party may, in a compliance proceeding, pursue claims against original measures that it had pursued in the original proceedings." The Panel explained:

"The answer depends on the way in which the claim against the particular original measure was resolved in the original proceeding. More specifically, ... a panel should consider whether the original measure was 'unsuccessfully' challenged on the merits in the original proceeding, such that it cannot be raised again without compromising the finality of the DSB recommendations and rulings."²⁰⁶

150. In *China – GOES*, the Panel addressed the scope of a panel's jurisdiction to address measures and claims in an Article 21.5 compliance proceeding:

"[I]t is now accepted that nothing in Article 21.5 limits a compliance panel to considering only certain issues, or certain aspects of a measure taken to comply. Panels have found that to satisfy the objective of prompt settlement of disputes, a complainant can challenge all aspects of a new measure taken to comply, not only those related to issues covered by the original proceedings.

Similarly, the Appellate Body has found that a panel is not limited, in conducting its review under Article 21.5, to examining the measures taken to comply from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. The Appellate Body has observed that if a compliance panel were restricted to examining the new measure from this limited perspective, it would be unable to examine fully, in accordance with Article 21.5, the consistency with a covered agreement of the measures taken to comply. The Appellate Body has also upheld compliance panels' rulings that new claims challenging a changed component of the measure taken to comply are admissible.

²⁰⁴ Panel Report, *US – Large Civil Aircraft (2nd Complaint) (Article 21.5 – EU)*, paras. 7.29-7.34.

²⁰⁵ Panel Report, *US – Large Civil Aircraft (2nd Complaint) (Article 21.5 – EU)*, para. 7.35.

²⁰⁶ Panel Report, *US – Large Civil Aircraft (2nd Complaint) (Article 21.5 – EU)*, para. 7.41.

However, the Appellate Body has also concluded that, in the context of a compliance proceeding, a Member may be precluded from bringing the same claim with respect to an aspect of another Member's redetermination that is unchanged from the determination at issue in the original dispute. An unchanged aspect of the original measure that a Member does not have to change, and does not change, in complying with the recommendations and rulings of the DSB thus should not be susceptible to challenge in a compliance proceeding. One panel, in applying these principles, distinguished between a new claim on an aspect of the measure taken to comply that constituted a new or revised element of the original measure, and which thus could not have been raised in the original proceedings, and another new claim that concerned aspects of the original measure that were unchanged. The panel found the former to be admissible, and the latter inadmissible."²⁰⁷

151. The Appellate Body in *US – Countervailing Measures (China)* (Article 21.5 – China) pointed out that "even when certain elements of a compliance measure remain unchanged from an original measure, the legal import and significance of such elements may be altered as a result of the modifications introduced in other parts of the compliance measure."²⁰⁸

152. Recalling prior panel and Appellate Body reports, the Panel in *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines I) summarized the applicable principles as follows:

"[A] compliance panel proceeding is not an opportunity to 're-litigate' issues that were addressed, or that could have been addressed, in the original proceeding. The Appellate Body has concluded that, in the context of a compliance proceeding, a complainant may be precluded from bringing the same claim with respect to an aspect of the respondent's measure that is unchanged from the original dispute. An unchanged aspect of the original measure that the respondent does not have to change, and does not change, in complying with the recommendations and rulings of the DSB thus should not be susceptible to challenge in a compliance proceeding. This limitation applies where a complainant: (i) could have challenged the unchanged measure (or unchanged aspect thereof) in the original proceeding but chose not to; or (ii) did challenge the unchanged measure (or aspect thereof) in the original proceeding, but failed to establish a *prima facie* case."²⁰⁹

Simultaneous Article 21.5 proceedings initiated by original respondent and complainant

Whether an original complainant is required to file a separate panel request in "reverse" Article 21.5 proceedings

153. The Panel in *EC and certain member States – Large Civil Aircraft* (Article 21.5 – EU) was faced with the question of whether, in "reverse" Article 21.5 proceedings, an original complainant has to file its own panel request under Article 21.5, where the measures that it wishes to challenge are not included in the panel request filed by the original respondent, or whether the Panel can examine the original complainant's claims against such measures without that complainant filing its own panel request. The Panel did not make findings on this issue for certain procedural reasons.²¹⁰ The Panel nevertheless noted earlier findings of the Appellate Body that in such a situation the original complainant could file its own panel request, and that, in the absence of such a request, the compliance panel could examine the original complainant's claims:

"[W]e see nothing in the Appellate Body's statements pointing to the existence of any *requirement* on a complainant to take this course of action. The Appellate Body report does not identify any specific obligation in the DSU, stating only that a complainant 'may' file its own request for establishment, adding that it would be 'expected' to do so expeditiously. Moreover, we note that in the same disputes, both the panels and the Appellate Body ruled that Canadian and United States' claims against the

²⁰⁷ Panel Report, *China – GOES* (Article 21.5 – US), paras. 7.12-7.14.

²⁰⁸ Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 5.118.

²⁰⁹ Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines I), para. 7.10.

European Communities' alleged compliance measure, that were *not* identified in the European Communities' request for establishment, *could be examined*."²¹¹

1.5.1.3.1 Claims raised in simultaneous Article 21.5 proceedings initiated by the original complainant and respondent

154. In *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, the two Panels, established to handle the separate proceedings initiated by the original complainant and the original respondent, considered that, in proceedings such as these, the original complainant could in its own panel request raise claims different from those raised in the original respondent's panel request. The Panels underlined that "the original respondent that has taken a 'measure taken to comply' cannot be expected to speculate as to the violations that could possibly be raised against its measure by other Members, and this is not what the original respondent is expected to do if it initiates Article 21.5 panel proceedings."²¹²

1.5.2 "recommendations and rulings"

1.5.2.1 General

155. The Panel in *US – FSC (Article 21.5 – EC II)* reiterated the importance of 'recommendations and rulings' and further noted that the obligation to implement DSB recommendations and rulings remains in effect until the measure taken to comply is fully consistent with a Member's WTO obligations. The Panel stated:

"'Recommendations and rulings' are at the core of WTO dispute settlement. As the title of Article 21 of the *DSU* makes clear, panel proceedings under Article 21.5 form part of the process of the 'Surveillance of Implementation of the Recommendations and Rulings'.

Article 21.5 compliance proceedings form part of a continuum of events flowing from the various steps in dispute settlement proceedings, with the operative recommendations and rulings for the purposes of Article 21.5 compliance proceedings being those adopted by the DSB in the original proceedings. These remain operative through compliance panel proceedings under Article 21.5 of the *DSU* until the 'problem' is entirely 'fixed'."²¹³

1.5.2.2 Concept of recommendations and rulings

156. The Panel in *US – FSC (Article 21.5 – EC II)* stated that the phrase "recommendations and rulings" referred to those recommendations and rulings by a panel and/or Appellate Body which become effective upon their adoption by the DSB:

"The text of Article 21.5 of the *DSU* does not itself indicate *which* are the relevant 'recommendations and rulings'. Several provisions of the covered agreements indicate that panels and/or the Appellate Body make 'recommendations'. We believe that, in its context, the text of Article 21.5 of the *DSU*, refers to 'recommendations and rulings' emanating from the DSB, as the authority to articulate operative WTO recommendations and rulings.

Recommendations by a panel and/or Appellate Body under Article 19 of the *DSU* (or Article 4.7 of the *SCM Agreement*) become effective only upon their adoption by the DSB. Once the DSB adopts a dispute settlement report, the findings and recommendations in that report become collective, operative DSB rulings and recommendations. The very notion of 'measures taken to comply with the recommendations and rulings' in the text of Article 21.5 of the *DSU* is predicated upon DSB adoption of a panel/Appellate Body report. No compliance obligation would arise

²¹² Panel Report, *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 7.121.

²¹³ Panel Report, *US – FSC (Article 21.5 – EC II)*, para. 7.36.

unless and until panel and Appellate Body recommendations and rulings are adopted by the DSB to become DSB recommendations and rulings."²¹⁴

1.5.2.3 A "new" recommendation

157. The Panel in *US – FSC (Article 21.5 – EC II)* observed that, upon finding that a measure taken to comply was inconsistent with the DSB recommendations and rulings, a panel was not required to make a 'new' recommendation that the Member concerned bring itself into conformity with the covered agreements:

"We note that the focus of Article 21.5 of the *DSU* is helping parties to resolve a dispute. Article 21.5 of the *DSU* does not contain the terms 'make recommendations'. Nor, beyond the reference to monitoring compliance with existing recommendations and rulings, does it contain an explicit reference to the 'recommendation' provisions of Article 19 of the *DSU*, or to Article 4.7 of the *SCM Agreement*. We see no express requirement in the text of Article 21.5 of the *DSU* that a compliance panel must formulate recommendations upon finding an inconsistency with a covered agreement, including a recommendation under Article 4.7 upon a finding of inconsistency with Article 3 of the *SCM Agreement*."²¹⁵

1.5.3 "through recourse to these dispute settlement procedures"

1.5.3.1 General

158. The parties to a dispute have often concluded *ad hoc* procedural agreements to solve the sequencing problem between compliance review procedures under Article 21.5 and the suspension of concessions and other obligation procedures under Article 22. These procedural agreements also tend to include procedural arrangements concerning the various stages of Article 21.5 compliance review procedures.

1.5.3.2 Application of Article 6.2 to Article 21.5 proceedings

159. The Appellate Body in *US – FSC (Article 21.5 – EC II)* expressed the view that the phrase "these dispute settlement procedures" encompasses Article 6.2 of the *DSU*, and that Article 6.2 is generally applicable to panel requests under Article 21.5. The Appellate Body further noted that "given that Article 21.5 deals with compliance proceedings, Article 6.2 needs to be interpreted in the light of Article 21.5. In other words, the requirements of Article 6.2, as they apply to an original panel request, need to be adapted to a panel request under Article 21.5."²¹⁶

160. In *Mexico – Corn Syrup (Article 21.5 US)*, with respect to its analysis on the effect of the absence of consultations on the Panel's authority, the Appellate Body stressed the link between the original proceedings and proceedings under Article 21.5 of the *DSU*. In this connection, the Appellate Body assumed *arguendo* that the same procedures apply in Article 21.5 proceedings as in original panel proceedings. In this regard, it hypothesized that "if, on this assumption", it finds that the failure of the United States' communication to indicate whether consultations were held would not deprive a panel of its authority to deal with and dispose of the matter before it", then the Appellate Body needs not inquire further into the procedures that are actually required in proceedings under Article 21.5 of the *DSU*.²¹⁷

161. The Panel in *Indonesia – Chicken (Article 21.5 – Brazil)* rejected Indonesia's arguments that two of Brazil's claims fell outside of the Panel's terms of reference.²¹⁸ Examining the parties' arguments, the Panel considered that the parties disagreed, not on whether the measures were properly identified, but on whether a compliance panel could review claims that had no link back to the DSB's recommendations and rulings from the original proceedings:

²¹⁴ Panel Report, *US – FSC (Article 21.5 – EC II)*, para. 7.34–7.35.

²¹⁵ Panel Report, *US – FSC (Article 21.5 – EC II)*, para. 7.40.

²¹⁶ Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 59.

²¹⁷ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 US)*, para. 67.

²¹⁸ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, Annex D-1, paras. 2.3 and 2.8.

"Indonesia does not dispute that the *measures* to which the claims in question relate have been properly identified in the panel request and are measures taken to comply. It is therefore not in dispute that the positive list requirement and the intended use requirement are within our terms of reference. Rather, Indonesia argues that the *claims* pertaining to these *measures*, cannot be subject to review because these *claims* do not link back to any of the DSB recommendations and rulings in the original proceedings."²¹⁹

162. The Panel considered that, while the proper identification of *measures* taken to comply in the panel request requires a link to the relevant rulings and recommendations, the proper provision of a legal basis, i.e. the proper presentation of *claims*, does not. The Panel also highlighted that a complainant in an Article 21.5 proceeding may thus raise claims, arguments, and factual circumstances different from those raised in the original proceeding:

"In our view, while the proper identification of *measures* taken to comply in the panel request requires a link to the relevant rulings and recommendations, the proper provision of a legal basis, i.e. the proper presentation of *claims*, does not. Such a requirement would effectively limit the scope of Article 21.5 proceedings to claims on which a panel made findings of violations in the original proceedings. However, it is well-settled that Article 21.5 panels are not merely called upon to examine whether measures taken to comply effectively implement specific recommendations and rulings adopted by the DSB in the original proceeding. Instead, the mandate of Article 21.5 panels, according to the terms of that provision, is to examine either the existence of measures taken to comply or their consistency with a covered agreement. As rightly pointed out by Brazil, a complaining party in an Article 21.5 proceeding may thus raise claims, arguments, and factual circumstances different from those raised in the original proceeding."²²⁰

163. Subsequently, the Panel in *Indonesia – Chicken (Article 21.5 – Brazil)* rejected Indonesia's argument that Brazil was barred from raising the same two claims because these claims were not assessed by the original panel.²²¹ The Panel stated that a complainant can raise claims in a compliance proceeding that were not decided on the merits in the original proceeding, including where the original panel had exercised judicial economy on such claims:

"The scope of claims that may be raised in an Article 21.5 proceeding is not limitless. In particular, a complaining party may not re-litigate claims that were decided on the merits in the original proceeding. Thus, a complaining party that failed to make a *prima facie* case in the original proceedings regarding a claim against an element of the measure that remained unchanged since the original proceedings may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings.

However, as Brazil rightly points out, a complaining party can raise claims that were *not* decided on the merits. In the original proceedings of this dispute Brazil did not obtain a decision on the merits of the two claims at issue. Rather the panel exercised judicial economy with regard to them. The limitations described above do not apply to claims where the panel exercised judicial economy, which has been confirmed in a number of cases. Consequently, a complainant is not barred from raising such claims again in Article 21.5 proceedings."²²²

1.5.3.3 Timing of the establishment of Article 21.5 panels

164. Article 21.5 panels are frequently established at the first DSB meeting at which the request for establishment was submitted.²²³ In most of the cases, the establishment at the first DSB

²¹⁹ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, Annex D-1, para. 2.6.

²²⁰ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, Annex D-1, para. 2.7.

²²¹ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, Annex D-1, paras. 2.9 and 2.13.

²²² Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, Annex D-1, paras. 2.11-2.12.

²²³ See e.g. *EC – Bananas III (Article 21.5 – European Communities and Ecuador)* (WT/DSB/M/53); *Canada – Aircraft (Article 21.5 – Brazil)* (WT/DSB/M/72); *US – DRAMS (Article 21.5 – Korea)* (WT/DSB/M/79); *Mexico – Corn Syrup (Article 21.5 – United States)* (WT/DSB/M/91); *US – Countervailing Measures on Certain*

meeting was a procedural requirement agreed by the parties in an ad hoc agreement regarding procedures under Articles 21 and 22 of the DSU applicable to the given dispute.

1.5.4 Waiving the right to Article 21.5 proceedings

165. In *EC – Bananas III (Article 21.5 – Ecuador II)* / *EC – Bananas III (Article 21.5 – US)*, the Appellate Body addressed the question of whether the Understandings on Bananas²²⁴, which the European Communities had concluded with the United States and with Ecuador, prevented the complainants from initiating compliance proceedings pursuant to Article 21.5 of the DSU with respect to the European Communities' regime for the importation of bananas introduced by Council Regulation (EC) No. 1964/2005 of 29 November 2005. Further to a preliminary objection raised by the European Communities and based on Articles 3.3, 3.4, and 3.7 of the DSU, the Panel had found that the Understandings on Bananas could prevent the complainants from initiating compliance proceedings pursuant to Article 21.5 *only if* these Understandings constituted a "positive solution and effective settlement to the dispute in question".²²⁵ The Panel had then found that the Understandings did not constitute a positive solution to the dispute because: (i) the Bananas Understanding provides only for a means, i.e. a series of future steps, for resolving and settling the dispute; (ii) the adoption of the Bananas Understanding was subsequent to recommendations, rulings and suggestions by the DSB; and (iii) parties had made conflicting communications to the WTO concerning the Bananas Understanding.²²⁶ The Appellate Body disagreed with the Panel's approach since it considered that the Panel should have commenced by analysing the text of the Understandings themselves in order to ascertain whether the parties had agreed to waive their right to compliance proceedings:

"With this in mind, we turn to analyze of the Understandings on Bananas at issue. We consider that the complainants could be precluded from initiating Article 21.5 proceedings by means of these Understandings only if the parties to these Understandings had, either explicitly or by necessary implication, agreed to waive their right to have recourse to Article 21.5. In our view, the relinquishment of rights granted by the DSU cannot be lightly assumed. Rather, the language in the Understandings must reveal clearly that the parties intended to relinquish their rights.

...

In the light of these considerations, we conclude that the Panel erred in placing the relevance it did on the conflicting statements of the parties at the meeting of the DSB, because, what the Panel was required to do was to provide an interpretation of the text of the Understandings. Only once it had done so, could it then consider conflicting statements to the DSB for the limited purpose of either seeking confirmation of the Panel's interpretation, or determining the meaning because the textual interpretation left the meaning ambiguous or led to manifestly absurd results. Having found, based on the interpretation of the text of the Understandings, that these Understandings did not contain a relinquishment of the right to initiate compliance proceedings, we arrive at the same conclusion as the Panel, in paragraph 7.136 of the Ecuador Panel Report

EC Products (*Article 21.5 – European Communities*) (WT/DSB/M/176); Compliance Panels with Establishment at First Meeting Pursuant to an Understanding Between the Parties Regarding Procedures under Articles 21 and 22 of the DSU: Australia – Salmon (*Article 21.5 – Canada*) (WT/DSB/M/66); Brazil – Aircraft (*Article 21.5 – Canada*) (WT/DSB/M/72); US – Shrimp (*Article 21.5 – Malaysia*) (WT/DSB/M/91 and WT/DS58/16); Canada – Dairy (*Article 21.5 – United States and New Zealand*) (WT/DSB/M/100, WT/DS103/14 and WT/DS113/14); Canada – Dairy (*Article 21.5 II – United States and New Zealand*) (WT/DSB/M/116, WT/DS103/24 and WT/DS113/24); US – FSC (*Article 21.5 – European Communities*) (WT/DSB/M/95 and WT/DS108/12); Australia – Automotive Leather II (*Article 21.5 – US*) (WT/DSB/M/69); EC – Bed Linen (*Article 21.5 – India*) (WT/DSB/M/124 and WT/DS141/11); Japan – Apples (*Article 21.5 – United States*) (WT/DSB/M/174 and WT/DS245/10); Compliance Panel established during second DSB meeting: Brazil – Aircraft (*Article 21.5 II – Canada*) (WT/DSB/M/98 and WT/DSB/M/99).

²²⁴ Understanding on Bananas between the European Communities and the United States signed on 11 April 2001 (WT/DS27/59, G/C/W/270; WT/DS27/58, Enclosure 1), and Understanding on Bananas between the European Communities and Ecuador signed on 30 April 2001 (WT/DS27/60, G/C/W/274; WT/DS27/58, Enclosure 2).

²²⁵ Panel Reports, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 7.75, and *EC – Bananas III (Article 21.5 – US)*, para. 7.105.

²²⁶ Panel Reports, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 7.76, and *EC – Bananas III (Article 21.5 – US)*, para. 7.107.

and in paragraph 7.165 of the US Panel Report, namely, that the complainants were not precluded from initiating these proceedings due to the Understandings on Bananas."²²⁷

1.5.5 Table showing the length of Article 21.5 proceedings to date

166. For a table providing information on the length of time taken in WTO proceedings to date from the date of the referral of the matter to the Article 21.5 panel to the date of the circulation of the report (Article 21.5 of the DSU), see the chapter of the Analytical Index on "DS Information Tables".

1.6 Ad hoc agreements on procedures under Articles 21 and 22 concluded by parties

1.6.1 The sequencing issue

167. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators indicated that they were "aware of the question of 'sequencing' recourses to Article 21.5 and Article 22.6 of the DSU". The Arbitrators noted that one of the effects of the bilateral agreement concluded by the parties "was to establish such a 'sequencing'". The Arbitrators thus considered that by issuing their report after the Appellate Body Article 21.5 report, they had respected the intention of the parties. The Arbitrators concluded that "the question of whether such a sequencing is actually required under the DSU is not part of the mandate of the Arbitrators".²²⁸

1.6.2 Panel's scope of review of procedural agreements

168. In *Brazil – Aircraft* and *Canada – Aircraft*, with regard to the two proceedings under Article 21.5 brought by Canada and Brazil against each other in relation to their respective aircraft export subsidies, Canada and Brazil reached two identical agreements (though the names of the parties were swapped) on the conduct of proceedings. Brazil however stated at a hearing during the Article 22.6 Arbitration proceedings that the recourse by Canada to Article 22.2 of the DSU before the completion of the Article 21.5 proceedings was a material breach of the bilateral agreement. Referring to Article 60 of the Vienna Convention, Brazil declared that it was terminating the bilateral agreement. Brazil thus stated that, pursuant to Article 22.7 of the DSU, the Arbitrators should determine that the proposed countermeasures are not allowed under the SCM Agreement on the grounds that the time within which they may be authorized has expired. Canada considered that the Arbitrators did not have authority to interpret the bilateral agreement.²²⁹ The Arbitrators considered that they did not need to discuss the question of whether they could interpret the bilateral agreement or whether it ceased to apply to the Arbitrators' tasks after Brazil's alleged application of Article 60 of the Vienna Convention.²³⁰

Table of bilateral sequencing agreements

169. For a table providing information on ad hoc agreements on sequencing procedures concluded by the parties to a dispute under Articles 21.5 and 22 of the DSU, see the chapter of the Analytical Index on "DS Information Tables".

1.7 Simultaneous Article 21.5 and 22.6 proceedings

170. In *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, Article 22.6 arbitration proceedings and two Article 21.5 compliance proceedings were held simultaneously. The parties did not sign a sequencing agreement. The Article 21.5 Panels noted the following agreement reached between the parties as to the sequence of the handling of these two sets of proceedings:

"On 24 July 2017, in the absence of a sequencing agreement, the WTO Secretariat met with the parties to ascertain their intentions with regard to the conduct of the two

²²⁷ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, paras. 217 and 222.

²²⁸ Decision by the Arbitrators, *Brazil – Aircraft (Article 22.6 – Brazil)*, fn 7.

²²⁹ Decision by the Arbitrators, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.6.

²³⁰ Decision by the Arbitrators, *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.7-3.8.

compliance proceedings and the arbitration provided for in Article 22.6 of the DSU. As a result of the meeting and subsequent exchanges, the parties separately expressed the following points of view:

a. Both compliance proceedings (including review by the Panels and possible subsequent appeal) would take place prior to the arbitration provided for in Article 22.6 of the DSU; a single harmonized timetable would be adopted, with uniform deadlines for the presentation of written submissions by the parties and third parties; a single joint substantive meeting would be held; and a single report would be issued;

b. Members that reserved their third-party rights solely in connection with the compliance proceeding initiated at Panama's request would also have access, for practical purposes, to the compliance proceeding initiated at Colombia's request."²³¹

1.8 Article 21.8

172. In *US – COOL (Article 22.6 – United States)*, the Arbitrator pointed out that Article 21.8 of the DSU does not address the level of nullification or impairment which is to be assessed under Article 22:

"Article 21.8 of the DSU applies to cases brought by developing country Members, and directs the DSB to 'take into account' the 'impact on the economy of developing country Members concerned'. This provision (which has not been raised in these proceedings as a basis for including domestic price suppression losses) does not address the level of nullification or impairment that it is our mandate to assess under Article 22 of the DSU. In particular, the text of this provision suggests that it relates to a requirement imposed on the DSB to take into account specific factors 'in considering what appropriate action might be taken'. This does not concern arbitration under Article 22.6, but rather the DSB's discharge of its functions in Article 2.1 of the DSU regarding 'the surveillance of implementation of DSB rulings and recommendations' that is the subject of Article 21 of the DSU."²³²

Current as of: December 2024

²³¹ Panel Report, *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 1.19.

²³² Decisions by the Arbitrator, *US – COOL (Article 22.6 – United States)*, para. 5.18.