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How Much Time Is Reasonable - The Arbitral Decisions under Article 21.3(c) of the DSU

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How Much Time is Reasonable? – The Arbitral Decisions under Article 21.3(c) of the DSU

By
Shin-yi Peng*

I.	INTRODUCTION: A “GRACE PERIOD” FOR WTO-INCONSISTENT MEASURES.....	324
II.	OVERVIEW OF THE ARBITRAL DECISIONS UNDER ARTICLE 21.3(C) OF THE DSU.....	327
	A. Where Prompt Compliance is “Impracticable” – The Implementation Plan and its “Deadline”	327
	B. Tug of War: Preliminary Findings of the Statistical Analysis.....	329
III.	HOW MUCH TIME IS “REASONABLE”? – INDICATING THE FACTORS.....	334
	A. Constitutional Reasons.....	334
	1. Congressional Schedule: Normal versus Extraordinary.....	334
	2. Legislative Procedure: Law-making versus Administrative Action	335
	B. Political Complexity.....	337
	1. Political Sensitivity, Controversy and Domestic Contentiousness.....	337
	2. Particular (Political) Circumstances of Events	339
	C. Economic Situations.....	340
	1. Financial Difficulty.....	340
	2. Developing Countries	341
	i. When the implementing party is a developing country and the complaining party is a developed country.....	341

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ii.	When both the implementing party and the complain- ing party are developing countries.....	342
iii.	When the implementing party is a developed country and the complaining party is a developing country	342
iv.	Developing country Members who are not parties to a dispute.....	343
D.	Other Factors.....	344
1.	Scientific Studies	344
2.	Other International Obligations	344
3.	“Punitive” Deadline	345
IV.	SHORTER OR LONGER: RETHINKING THE CRITERIA FOR DETERMINING A COMPLIANCE DEADLINE	346
A.	Mandate of the Arbitrator: Not “What” But “When”.....	346
B.	Special and Differential Treatment in the Implementation Pe- riod: Who Deserves Particular Attention?.....	347
C.	Political and Social Complexity: Totally Irrelevant?	349
V.	CONCLUDING REMARKS	349
TABLE 1	329
FIGURE 1	333
FIGURE 2	333

I.
INTRODUCTION:
A “GRACE PERIOD” FOR WTO-INCONSISTENT MEASURES

The Dispute Settlement Body (DSB) came into being during the extended Uruguay Round of negotiation on trade for the purpose of assisting governments to better manage problems of international economic interdependence.¹ Now the real test of these new World Trade Organization (WTO) rules is in their use in dispute settlement proceedings. For no matter how carefully and precisely negotiated, the rules in the WTO Agreements maintain their value only if a system for resolving disputes is in place to allow the expeditious application and reliable enforcement of rules.

Although justice delayed is better than justice denied, the delay must still be reasonable. In order to ensure that responding parties do not operate with an open-ended timeframe to comply with the recommendations and rulings of the DSB,² the Understanding on Rules and Procedures Governing Settlement of

1. Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negotiation, Apr. 15, 1994, 33 I.L.M. 1125 (1994).

2. Generally speaking, the WTO is a three-tiered organization headed by the Ministerial Conference, which consists of representative WTO members. The WTO Agreement provides that all decision-making powers shall be in this conference, which meets every two years. The Ministerial

Dispute (DSU)³ has established procedures for setting a deadline for responding parties to implement dispute settlement rulings and recommendations. Article 21.1 of the DSU requires prompt compliance with recommendations and rulings of the DSB in order to ensure an effective resolution of disputes for the benefit of all Members.⁴ After a Panel or Appellate Body issues a report finding that a Member's actions are inconsistent with its WTO obligations and nullifies or impairs benefits accrued to other Members, the Member has thirty days to notify the DSB of its plan for implementing the recommendations and rulings at a DSB meeting.⁵ Compliance includes withdrawal of the WTO-inconsistent measures by the responding party, usually achieved by changing laws, regulations or practices.⁶ Article 21.3 also provides that, where immediate compliance is "impracticable," implementation must be completed within a "reasonable" period of time, to be determined by a separate arbitration.⁷ Article 21.3 arbitrations are significant mechanisms for balancing the respondent's desire for an indefinite compliance period, and the petitioner's desire for immediate compliance.⁸

During the reasonable period of time determined in Article 21.3 arbitrations, responding parties may continue their WTO-inconsistent measures without further penalty.⁹ Thus, Article 21.3 proceedings have great practical significance. In *US- Section 129(c)(1) URAA*, the arbitration Panel noted that,

[n]othing 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. . . 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.¹⁰

Conference functions as the Dispute Settlement Body (DSB) and the Trade Policy Review Body. Therefore, the membership of the DSB is the same as that of the General Council, but it has a separate chairman, a separate staff, separate rules of procedure, and a separate document series.

3. Understanding on Rules and Procedures Governing the Settlement of Disputes, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments -- Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125, 1226 (1994). For background information on the DSU, see generally WTO Website, <http://www.wto.org>.

4. DSU Article 21.1.

5. *Id.*

6. DSU Article 22.

7. DSU Article 21.3.

8. Article 21.3(c) 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).

9. U.S. -- Section 129(c)(1) of the Uruguay Round Agreements Act, WT/DS221 (2002), ¶ 3.90, 3.93.

10. *Id.*

The Panel 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 the reasonable period of time.¹¹ Indeed, almost no interim requirements are imposed upon the implementing party between the time it informs the DSB of its intentions with respect to implementation of the DSB recommendations and rulings, and the expiration of the reasonable period.¹² The minimal requirements imposed upon the implementing party during the reasonable period thus, as a matter of logic, raise the question of whether implementing Members can legally use the reasonable period merely as a tool to continue violating their WTO obligations.

At the time of writing, the DSU has been in force for twelve years, and during this period, twenty-one arbitration awards have been issued under Article 21.3(c).¹³ Using different analytical methods, this paper attempts to explain how procedures function for establishing a compliance deadline under the WTO regime. It uses applications of statistical analysis, case-based reasoning, and a normative, theoretical review of Article 21.3 and other provisions of the DSU, for the purpose of discussing the effectiveness of the 21.3(c) proceeding. Furthermore, this paper provides an empirical review of the Article 21.3 arbitral decisions in order to demonstrate what occurs when parties to a dispute cannot agree on the length of a compliance period.¹⁴

The grace period for maintaining WTO-inconsistent measures has raised numerous legal questions that remain to be clarified.¹⁵ The goal of this paper is to construct an analytical framework to better understand the legal implications of the 21.3(c) proceeding. The body of this paper will therefore explore the factors used to determine the time allowed for implementation and will comment

11. *Id.* It should be noted, however, that there is an exception on prohibited subsidies. In *Brazil-Aircraft*, the Appellate Body concluded 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 Part II of the *SCM Agreement*.

12. Article 21 provides that six months into each losing Member's implementation period, the Member must begin providing regular "status reports" at all scheduled DSB meetings. Nothing more than these reports is required of the losing Member during its compliance period. See generally DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* 237 (1999) [hereinafter *Dispute Settlement*]. Although footnote 13 to article 21.3(c) provides that the arbitrator shall be interpreted as referring either to an individual or a group, in most cases a single arbitrator has been named, usually a member of the Appellate Body.

13. This number does not include the arbitrations in which no awards were made because the parties agreed on the "reasonable period of time" after Article 21.3(c) proceedings were initiated.

14. Although in quantitative research a statistical analysis of a large number of cases is the preferred methodology, only twenty-one cases involve the 21.3(c) proceeding. Therefore, a survey of all 21.3(c) cases completed through binding arbitration should be helpful in examining the system.

15. See generally WTO Website, Analytical Index, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_08_e.htm#article21B3.

on how awareness of the ensuing grace period affects arbitrators' decisions. This paper will then close with a critical analysis of the difficulty arbitrators face when determining a reasonable implementation period and establishing a compliance deadline that is fair to both sides.¹⁶

II.

OVERVIEW OF THE ARBITRAL DECISIONS UNDER ARTICLE 21.3(C) OF THE DSU

A. *When Prompt Compliance is "Impracticable" – The Implementation Plan and its "Deadline"*

There are three alternative methods to determine a reasonable period of time. The first option, under Article 21.3(a), is the period of time proposed by the Member concerned, provided that such period is approved by the DSB.¹⁷ Second, in the absence of such approval, Article 21.3(b) provides that a reasonable period of time is the period of time agreed to by the parties to the dispute within forty-five days after the date of adoption of the final report.¹⁸ Finally, in the absence of such agreement, Article 21.3(c) provides that a reasonable period of time will be determined through binding arbitration within ninety days after the date of adoption of the final report.¹⁹ Despite the ninety-day provision in Ar-

16. See generally WorldTradeLaw.net, <http://www.worldtradelaw.net/dsc/database/rptawards.asp> (last visited Feb. 15, 2007).

17. Article 21 of the DSU 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 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

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

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

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

18. *Id.*

19. *Id.*

ticle 21.3(c), however, actual practice indicates that an arbitrator will only have forty-five days to decide the deadline for implementation, if the first forty-five days under 21.3(b) are fully consumed by unsuccessful negotiations to try and reach an agreement on the issue.²⁰

While the reasonable period of time should not exceed fifteen months from the date of adoption of a panel or Appellate Body report, Article 21.3(c) indicates that the “time may be shorter or longer, depending upon the particular circumstances.”²¹ Since the DSU does not indicate the criteria to be addressed in determining the reasonable period, disputed issues usually pertain to the length of a reasonable period of time. A textual analysis of Article 21.3 would suggest that there is a very limited range of factors an arbitrator may use to determine a reasonable time for compliance, and indeed, the ambiguous language of the DSU led to several early WTO decisions embracing the 15-month standard.²² Also, early arbitration awards, such as *Japan-Alcohol*, *EC-Bananas* and *EC-Hormones*, followed the fifteen-month guideline set out in Article 21.3.²³ These early awards fostered widespread concern that implementing parties were automatically entitled to a compliance period of fifteen months, and this outcome struck many as both contrary to the “prompt compliance” standard of Article 21 and an unfair extension of the dispute settlement process.²⁴

The first of the arbitral decisions to award a reasonable period of less than fifteen months was the *Indonesia-Automobiles* case in 1998.²⁵ There, the arbitrator established a reasonable period of twelve months by applying the “shortest period possible”²⁶ standard to the special circumstances of Indonesia.²⁷ The award authoritatively defined the reasonable period of time as “the shortest period possible within the legal system of the Member to implement the recom-

20. See JEFF WAINCYMER, *WTO LITIGATION: PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT* 645-647 (2002).

21. Article 21, *supra* note 17.

22. Award, *Korea-Taxes on Alcoholic Beverages*, Arbitration under Article 21.3(c) of the DSU, WT/DS75/16, WT/DS84/14 (June 4, 1999) [hereinafter *Korea-Alcoholic Beverages*]; see also Award, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Arbitration under Article 21.3(c) of the DSU, WT/DS27/15 (Jan. 7, 1998) [hereinafter *EC-Bananas*]; see also Award, *EC Measures Concerning Meat and Meat Products (Hormones)*, Arbitration under Article 21.3(c) of the DSU, WT/DS26/15, WT/DS48/13 (May 29, 1998) [hereinafter *EC-Hormones*].

23. Award, *Japan-Taxes on Alcoholic Beverages*, Arbitration under Article 21.3(c) of the DSU, ¶ V WT/DS8/15, WT/DS10/15, WT/DS11/13 (Feb. 14, 1997). *EC-Hormones*, *id.* ¶ VI.

24. See generally Ernst-Ulrich Petersmann, *The Negotiations on Improvements of the WTO Dispute Settlement System*, 6 J. INT'L ECON. L. 237 (2003).

25. Award, *Indonesia – Certain Measures Affecting the Automobile Industry*, Arbitration under Article 21.3(c) of the DSU, ¶ 25, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12 (Dec. 7, 1998) [hereinafter *Indonesia-Automobiles*].

26. “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 DSU.” *EC-Hormones*, *supra* note 31, ¶ 26.

27. *Indonesia-Automobiles*, *supra* note 25, ¶ 24, 25.

mentations and rulings of the DSB.”²⁸

Since *Indonesia-Automobiles*, there has been a clear trend away from the 15-month standard.²⁹ Currently, the fifteen-month guideline is no longer read as establishing a fixed maximum or outerlimit for a reasonable period of time, nor does it constitute a floor or innerlimit for a reasonable period of time. In the most recent case where an award was issued, the *EC-Chicken Classification*, a period of nine months was set.³⁰

B. Tug of War: Preliminary Findings of the Statistical Analysis

To further demonstrate the trend of arbitral decisions, a summary of Article 21.3(c) arbitration awards since 1997 is compiled in Table 1. The summary is divided into several columns to allow more accurate interpretation of the arbitral awards. While the heaviest users of the 21.3(c) mechanism have been the United States and European Community, which were involved in nineteen cases as either an implementing or a complaining party, Table 1 also shows that a wide range of other WTO Members, including for example, Brazil and Canada, have been active in the 21.3(c) arbitration proceedings.

TABLE 1

(Source: Author's analysis based on the arbitration awards)

Arbitral Case Name	Dispute Settlement Number	RPT Proposed by Implementing Party	RPT Suggested by Complaining Party	Award
Japan – Alcohol Feb. 14, 1997	8, 10, 11	23 months	US - 5 months EC - 15 months CA – 15 months	15 months
EC – Bananas Jan. 07, 1998	27	15 months & 1 week	Ecuador, Guatemala, Honduras, Mexico, U.S. - 9 months	15 months & 1 week

28. *Id.* ¶ 12, 22.

29. *See* Table 1.

30. Award, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, Arbitration under Article 21.3(c) of the DSU, ¶ 84, WT/DS269/13, WT/DS286/15 (Feb. 20, 2006) [hereinafter *EC-Chicken Classification*].

EC – Hormones May 29, 1998	26, 48	39 months	US - 10 months CA - 10 months	15 months
Indonesia – Autos Dec. 07, 1998	54, 55, 59, 64	15 months	EC - 6 months US - 1 month JP - not explicitly proposed	12 months
Australia– Salmon Feb. 23, 1999	18	15 months	CA - much less than 15 months	8 months
Korea – Alcohol Jun. 04, 1999	75, 84	15 months	EC - 6 months US - 6 months	11 months & 2 weeks
Chile – Alcohol May 23, 2000	87, 110	18 months	EC - 8 months & 9 days	14 months & 9 days
Canada– Pharmaceuticals Aug. 18, 2000	114	11 months	EC - less than 12 months	6 months
Canada – Autos Oct. 04, 2000	139, 142	11 months & 12 days	EC - 90 days JP - 90 days	8 months
U.S. – Copy-right Jan. 15, 2001	160	15 months	EC - 10 months	12 months
U.S. - 1916 Act Feb. 28, 2001	136, 162	15 months	EC - 6 months JP - 6 month	10 months

Canada-Patent Term Feb. 28, 2001	170	14 months & 2 days	US - 6 months	10 months
Argentina- Bovine Hides Aug. 31, 2001	155	46 months & 15 days	EC - 8 months	12 months & 12 days
U.S. - Hot-Rolled Steel from Japan Feb. 19, 2002	184	18 months	JP -10 months	15 months
Chile- Agricultural Products Mar. 17, 2003	207	18 months	Argentina - 9 months & 6 days	14 months
U.S. - Offset Act ("Byrd Amendment") Jun. 13, 2003	217, 234	15 months	Australia, Brazil, Canada, Chile, EC, India, Indonesia, Japan, Korea, Mexico, Thailand - 6 months	11 months
EC-Tariff Preferences Sep. 20, 2004	246	20 months & 10 days	India - 6 months & 2 weeks	14 months & 11 days
U.S. – OCTG Sunset Reviews Jun. 07, 2005	268	15 months	Argentina - 7 months	12 months
U.S. - Gambling Services Aug. 19, 2005	285	15 months	Antigua & Barbuda - 6 months (sport related)	11 months & 2 weeks

			- 1 month (non-sport related)	
EC - Sugar Subsidies Oct. 28, 2005	265, 266, 283	19 months & 12 days	Australia, Brazil, Thailand - 6 months & 6 days	12 months & 3 days
EC - Chicken Classification Feb. 20, 2006	268, 286	26 months	Brazil - 5 months & 10 days Thailand - 6 months	9 months

A summary of Table 1 appears in Figure 1 below. Figure 1 shows that the average reasonable period of time proposed by the implementing party is much longer than that suggested by the complaining party. To better understand these decisions, this paper will further review the twenty-one arbitral decisions and examine the factors affecting the reasonable time allowed for implementation. As reflected in the decisions, the concept of reasonableness inherently involves taking into account relevant circumstances. In some cases these influential circumstances may be singular or few in number; in other cases, however, there are many relevant circumstances. Figure 2 below shows the factors most frequently raised by parties in dispute and considered by arbitrators when determining a reasonable period of time. They are as follows: (1) legislative procedures; (2) political sensitivity; (3) general economic matters; (4) congressional schedule; (5) developing country's special attention claim; (6) particular political events; (7) other international obligations; (8) fiscal difficulty; (9) scientific studies; and (10) punitive deadlines.

An overview of the arbitral decisions shows that, in all cases, the responding party raised arguments concerning domestic legislative procedures. Furthermore, in eighteen of the decisions, responding parties raised arguments regarding political sensitivities and domestic contentiousness. Factors such as fiscal difficulty and the need for scientific studies prior to legislation have also been strongly emphasized in some cases. Part III of this paper will more closely examine the factors raised by parties and their subsequent influence on arbitrators' decisions.

FIGURE 1

(Source: Author's calculations based on arbitration awards)

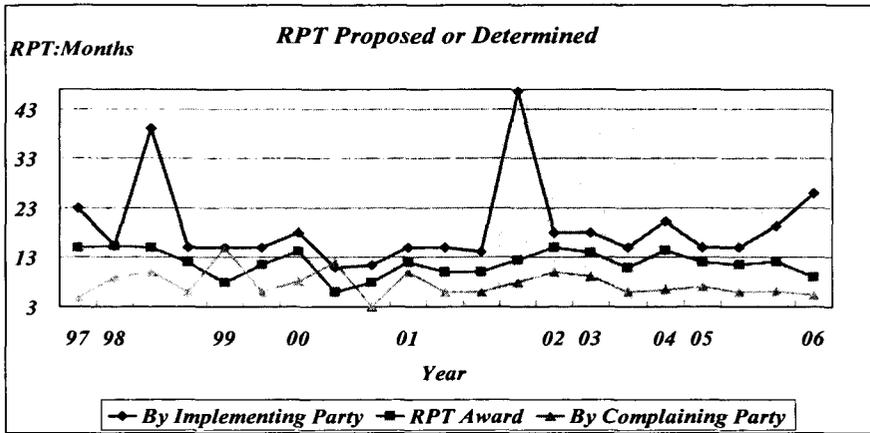
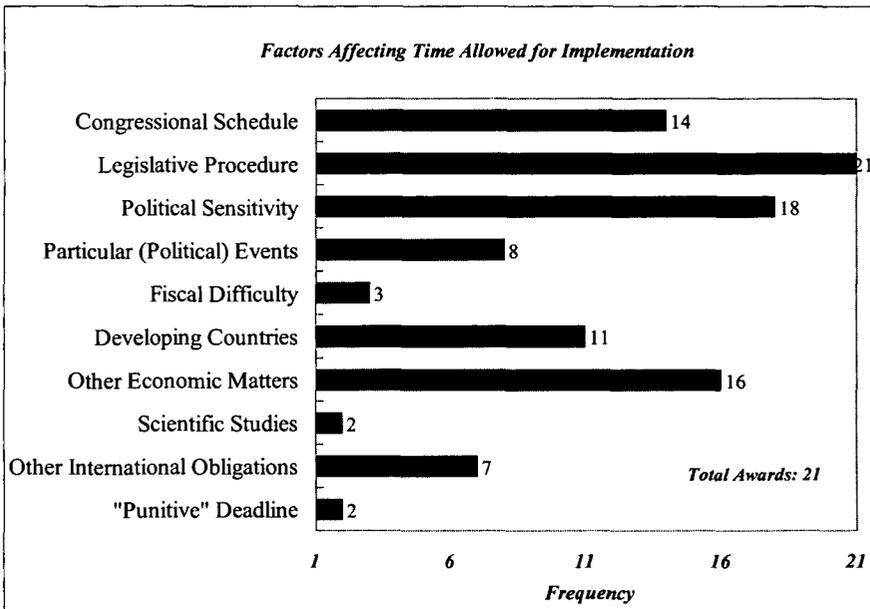


FIGURE 2

(Source: Author's calculations based on arbitration awards)



III. FACTORS AFFECTING HOW MUCH TIME IS “REASONABLE”? – INDICATING THE FACTORS

A. Constitutional Reasons

1. Congressional Schedule: Normal versus Extraordinary

Constitutional reasons for extending the grace period of enforcement have been a dominating factor set forth by parties in several disputes. For instance, in *Korea-Alcoholic Beverages*, Korea urged the arbitrator to grant fifteen months as the reasonable period of time for implementation, arguing that it intended to implement the DSB rulings and recommendations through an increase in tax rates applicable to the disputed product, “which require[d] an amendment of its Liquor Tax Act.”³¹ Korea stated that such a legislative amendment required at least fifteen months because it involved the National Assembly and other “administrative actions.”³² However, the EC argued that an amendment to the Liquor Tax Act could be completed much earlier if it was implemented via the extraordinary session of the National Assembly.³³ The EC contended that, under the Korean Constitution, the extraordinary session could convene at any time, and was a regularly invoked procedure.³⁴

In response, the arbitrator ruled that, while the reasonable period of time should be the shortest period possible within the legal system of the Member concerned, the Member in question should not be required to utilize “*extraordinary* legislative procedures” to comply with the recommendations and rulings of the DSB (emphasis in original).³⁵ Taking into account all of the particular circumstances of this case, the arbitrator believed that it was reasonable to allow Korea to follow its normal legislative procedure for the consideration and adoption of a tax bill with budgetary implications – that is, to submit the proposed amendments to the “next regular session” of the National Assembly.³⁶

In *EC-Sugar Subsidies*, the arbitrator reaffirmed the reasoning in *Korea-Alcoholic Beverages* and stated that “an implementing Member is not required to adopt ‘extraordinary legislative procedures’ in every case.”³⁷ The arbitrator agreed with the EC’s argument that requiring a Member to use “all flexibility

31. *Korea-Alcoholic Beverages*, *supra* note 22, ¶ 6.

32. *Id.*

33. *Id.* ¶19.

34. *Id.*

35. *Id.* ¶ 42.

36. *Id.*

37. Award, *European Communities-Export Subsidies on Sugar*, Arbitration under Article 21.3(c) of the DSU, ¶ 64, WT/DS265/33, WT/DS266/33, WT/DS283/14 (Oct. 28, 2005) [hereinafter *Europe-Sugar Subsidies*].

and discretion in its legal system” should not be interpreted to mean that an implementing Member is required to utilize an extraordinary procedure rather than a normal procedure.³⁸

2. *Legislative Procedure: Law-making versus Administrative Action*

Domestic legislative procedure is the most frequent factor addressed in the arbitral decisions. As indicated in Table 2, responding parties raised arguments regarding legislative procedure in twenty-one different decisions. For example, in *EC-Banana*, the EC requested a longer period of time and explained that the amendment of its banana import regime would require a “complex legislative procedure” involving the European Parliament, the European Commission, and the Council of European Union.³⁹ In response, the arbitrator recognized the demonstrated complexity of the implementation process and awarded a compliance period of fifteen months and one week.⁴⁰

Consistent with its arguments in *EC-Banana*, the EC, as one of the complaining parties in *Indonesia-Automobiles*, argued that in determining the reasonable period of time, the arbitrator should consider the legal nature of the required implementing act, as well as the procedures which are necessary to adopt the particular type of act under the domestic law of the Member concerned.⁴¹ In this context, the amendment of an act by the Indonesian Parliament is generally more time-consuming than the amendment of an act by the Indonesian Executive.⁴² The EC thus contended that the Indonesian measures could be amended within a relatively brief period of time because they were acts of the Indonesian Executive, and not acts of the Indonesian Parliament.⁴³ The arbitrator ultimately determined, based on the economic situation rather than the legislative process of Indonesia, that the reasonable period of time for Indonesia to implement the recommendations and rulings of the DSB should be twelve months from the date of adoption of the Panel Report by the DSB.⁴⁴ The decision demonstrated the reluctance by the arbitrator to shorten the time for implementation based on the executive/legislative dichotomy.

U.S. - Offset Act (Byrd Amendment) is also illustrative here. In this case, the U.S., as the implementing party, argued that the most significant factors for the arbitrator to consider were: “the legal form of implementation (legislative versus administrative measures),” the “technical complexity” of those measures, and the period of time necessary for implementation within the existing governmen-

38. *Id.* ¶ 85.

39. *EC-Bananas*, *supra* note 22, ¶ 7.

40. *Id.* ¶ 19-20.

41. *Indonesia-Automobiles*, *supra* note 25, ¶ 13.

42. *Id.* ¶ 14.

43. *Id.*

44. *Id.* ¶ 25.

tal system.⁴⁵ According to the U.S., since the Continued Dumping and Subsidy Offset Act was “mandatory legislation”, the implementation required legislative action and thus required more time.⁴⁶ The arbitrator acknowledged that the need for implementation by legislative means is a relevant circumstance for determination of the reasonable period of time.⁴⁷ By explicitly accepting the U.S. arguments that “the entire legislative process is controlled exclusively by the United States Congress”, the arbitrator seemed to affirm the idea that, as a general rule, implementation by legislative measures will, more often than not, require a longer period of time than implementation by means of administrative measures.⁴⁸ Since the complaining parties to the dispute did not dispute the need for implementation by legislative means, the arbitrator accepted the U.S.’s explanation that legislative steps were generally required as a matter of practice and could be time-consuming.⁴⁹

In the aforementioned proceedings, the arbitrators considered the legal nature as well as legal form of implementation in determining a reasonable period of time. The most recent dispute, *EC-Chicken Classification*, further elaborates on this line of reasoning. Here, the arbitrator ruled that the European Commission could exclusively accomplish the implementation steps proposed by the EC, without the involvement of the Council or the European Parliament, and therefore the steps were not “legislative” in the context of Article 21.3(c).⁵⁰ He further clarified the reasoning found in previous arbitral decisions and stated that:

[p]revious arbitrations have highlighted that implementation achieved through administrative processes generally requires less time than implementing legislation. 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 least the Legislative Branch—likely to have slower, more deliberative processes—possibly in conjunction with the Executive Branch as well).⁵¹

Indeed, administrative regulations and rules can usually be changed more quickly than statutes. Although there may be some variance with specific circumstances, the complexity of the legislative action would also be a relevant factor in the determination of time periods under Article 21.3(c) proceedings.

45. Award, *U.S.-Continued Dumping and Subsidy Offset Act of 2000*, Arbitration under Article 21.3(c) of the DSU, ¶ 8, WT/DS217/14, WT/DS234/22 (June 13, 2003) [hereinafter *U.S.-Offset Act*].

46. *Id.* ¶ 9.

47. *Id.* ¶ 74.

48. *Id.*

49. *Id.*

50. *EC-Chicken Classification*, *supra* note 30, ¶ 67.

51. *Id.*

B. Political Complexity

1. Political Sensitivity, Controversy and Domestic Contentiousness

Responding parties often argue that the time granted for implementation should be longer due to the complexity of the proposed implementation. They assert that complex implementation procedures qualify as “particular circumstances” under Article 21.3(c).⁵² These arguments, however, have been largely unsuccessful.⁵³ For instance, in *Canada-Pharmaceuticals*, Canada contended that the “revocation” of the relevant regulations would be a “very sensitive political matter in Canada.”⁵⁴ It further argued that an eleven-month period would be needed in order to conduct the necessary but extensive “consultations with stakeholders, interest groups and the general public.”⁵⁵ This argument proved unsuccessful, however, as the arbitrator ruled that, while the modification of the Canadian Patent Act might have a great impact on Canada’s health care system, the intensity of the political opposition and existence of domestic controversy were not relevant factors in determining a reasonable period of time.⁵⁶ Instead, the arbitrator noted that, “[a]ll WTO disputes are “contentious” domestically at least to some extent,” and, therefore, concluded that “contentiousness” should never be an issue.⁵⁷

In contrast to the arguments set forth by Canada above, the U.S. argued, as one of the complaining parties in *Japan-Alcohol*, that the question of “particular circumstances” should not “imply a policy judgement, but rather a technical inquiry” into the domestic system of the Member concerned.⁵⁸ The U.S. asserted that political tension is “inevitable whenever a government proposes to end its protection of a domestic industry.”⁵⁹ It further argued that taking into account such considerations would “threaten the integrity of the WTO dispute settlement system.”⁶⁰ Instead, it argued, the arbitrator’s task should be to determine the shortest period of time in which implementation can take place, rather than to determine if the particular length of time would make implementation “less burdensome” for

52. See WTO Analytical WTO Website, Analytical Index, <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_08_e.htm#article21B3>.

53. *Id.* See also JEFF WAINCYMER, WTO LITIGATION: PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT 653 (2002).

54. Award, *Canada-Patent Protection of Pharmaceutical Products*, Arbitration under Article 21.3(c) of the DSU, ¶ 21, WT/DS114/13 (Aug. 18, 2000) [hereinafter *Canada-Pharmaceuticals*].

55. *Id.*

56. *Id.* ¶ 60; see also Award, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, Arbitration under Article 21.3(c) of the DSU, ¶ 14-15, WT/DS207/13 (Mar. 17, 2003) [hereinafter *Chile-Agricultural Products*].

57. *Canada-Pharmaceuticals*, *supra* note 54, ¶ 60.

58. Award, *Japan-Taxes on Alcoholic Beverages*, Arbitration under Article 21.3(c) of the DSU, ¶ 13 WT/DS8/15, WT/DS10/15, WT/DS11/13 (Feb. 14, 1997).

59. *Id.*

60. *Id.*

the implementing Member.⁶¹ Ultimately, the arbitrator determined that Japan had not proved that any particular circumstances existed to “justify a departure from the 15-month ‘guideline’ either way.”⁶² He concluded, therefore, that a reasonable period of time for Japan to implement the recommendations and rulings of the DSB was fifteen months.⁶³

Similarly, in *U.S.-Copyright*, the EC, as the complaining party, argued against taking into account “domestic contentiousness” when determining a reasonable period of time.⁶⁴ The EC referred to a number of examples of intellectual property legislation to demonstrate “the normal time-period in which this type of legislation is enacted.”⁶⁵ In particular, the EC emphasized that the implementation of the recommendations and rulings in this dispute was “rather straight forward.”⁶⁶ The EC noted that “highly complex” pieces of legislation have been enacted in the United States in “very short periods of time, ranging from 28 to 113 days.”⁶⁷ The arbitrator quoted the decision in *Canada-Pharmaceuticals*, stating that “[n]othing in Article 21.3” indicates 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.’”⁶⁸ He agreed with the complaining party’s arguments that any claims as to domestic contentiousness were irrelevant.⁶⁹

Contrary to the arbitral outcomes of previous decisions, *Chile-Agricultural Products* is an outlier case where the arbitrator determined that the measures in dispute (the price band system, hereinafter the “PBS”) were “so fundamentally integrated into the policies of Chile, that domestic opposition to their repeal” might seriously impact Chile’s agricultural policy.⁷⁰ In the arbitral proceeding, Chile contended that the PBS was a “cornerstone” of its agricultural policy, and had been so for almost twenty years.⁷¹ And, in fact, Argentina, the complaining party, did not dispute the existence of significant opposition in Chile to repeal or reform the PBS.⁷² The arbitrator determined that, given its unique role and impact on Chilean society, the PBS was a “relevant factor in the determination of

61. *Id.*

62. *Id.* ¶ 27.

63. *Id.*

64. Award, *United States – Section 110(5) of the US Copyright Act*, Arbitration under Article 21.3(c) of the DSU, ¶ 8, WT/DS160/12 (Jan. 15, 2001) [hereinafter *U.S.-Copyright*].

65. *Id.*

66. *Id.* ¶ 9.

67. *Id.*

68. *Id.* ¶ 41.

69. *Id.* ¶ 42.

70. *Chile-Agricultural Products*, *supra* note 67, ¶ 48.

71. *Id.* ¶ 46.

72. *Id.* ¶ 47.

the 'reasonable period of time' for implementation."⁷³

2. Particular (Political) Circumstances or Events

Often central to the question of whether political complexity should be a determining factor is the existence of "particular circumstances." In *U.S.-Offset Act (Byrd Amendment)*, *U.S.-Copyright*, and *U.S.-1916 Act*, the U.S. consistently argued that an election year might have an effect on its ability to proceed with implementation.⁷⁴ For example, in *U.S.-1916 Act*, the U.S. emphasized that, as a result of the Presidential elections, bringing the 1916 Act into conformity with its WTO obligation would require the collaboration of a new President and Executive administration, as well as a new Congress.⁷⁵ For these reasons, the U.S. requested that it be granted a reasonable period of at least fifteen months from the date of adoption of the Panel Report for implementation of the DSB rulings.⁷⁶ Nevertheless, the arbitrator ruled that these reasons should not affect, in any substantial way, the obligations of the U.S. to implement the recommendations and rulings of the DSB in a particular dispute.⁷⁷ The arbitrator thus concluded that the U.S. had ten months to implement the DSB rulings.⁷⁸

In at least one instance, however, an arbitrator has found particular political circumstances determinative. In *EC-Tariff Preferences*, the enlargement of the European Union on May 1, 2004 became an issue of discussion during the proceedings.⁷⁹ The EC claimed that the decision-making process "has become more cumbersome and time consuming since the enlargement of the European Union from 15 to 25 Member States."⁸⁰ The EC further argued that considerable time would be needed to translate certain instruments connected with the implementation into the twenty official languages.⁸¹ The arbitrator agreed that these circumstances were likely to increase the period of time reasonably required to complete certain steps in the implementation process.⁸² The arbitrator determined that fourteen months and eleven days was a reasonable period of time for implementation.⁸³

73. *Id.* ¶ 48.

74. *U.S.-Offset Act*, *supra* note 57; *U.S.-Copyright*, *supra* note 76; Award, *United States-Anti-Dumping Act of 1916*, Arbitration under Article 21.3(c) of the DSU, WT/DS136/11, WT/DS162/14 (Feb. 18, 2001) [hereinafter *U.S.-1916 Act*].

75. *U.S.-1916 Act*, *supra* note 74, ¶ 19.

76. *Id.*

77. *U.S.-Copyright*, *supra* note 65, ¶ 40.

78. *Id.* ¶ 45.

79. Award, *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries* Arbitration under Article 21.3(c) of the DSU, ¶ 11, WT/DS246/14 (Sept. 20, 2004) [hereinafter *Tariff Preferences*].

80. *Id.*

81. *Id.* ¶ 53.

82. *Id.*

83. *Id.* ¶ 60.

The different reasoning and outcome in the previous proceedings demonstrated the arbitrator's discretionary power in taking into account the implications of the domestic/regional political circumstances. From these cases one can conclude that arbitrators consider the correlation between specific domestic political events and members' WTO obligations in reaching their decisions.

C. Economic Situations

1. Financial Difficulty

An implementing party's economic situation may also be relevant to the determination of the reasonable period of time. In *Indonesia-Automobiles*, Indonesia requested fifteen months to allow existing industries to make the necessary structural adjustment.⁸⁴ Indonesia emphasized that the "impracticability" of immediate compliance resulted "not from any particularly complex legislative procedure, but rather from its current economic difficulties."⁸⁵ Indonesia pointed out that its economy was "near collapse," unemployment had "reached unprecedented levels," and that the economic slump had pushed many companies into bankruptcy, with the automotive industry particularly affected.⁸⁶ Indonesia further argued that "comprehensive deliberations" were needed in order to bring the measure in dispute—the so-called 1993 Programme—into conformity with Indonesia's obligations under the WTO Agreement.⁸⁷ Indonesia emphasized that the 1993 Programme involved "190 labour-intensive companies/industries employing tens of thousands of Indonesian workers."⁸⁸ Thus, Indonesia argued that additional time was needed to prevent further unemployment and a further deepening of the economic crisis.⁸⁹

The arbitrator in the case, however, did not view these structural adjustments to Indonesia's affected industries as relevant "particular circumstances" under Article 21.3(c).⁹⁰ Instead, the arbitrator declared that "for virtually every case in which a measure has been found to be inconsistent" with a Member's WTO obligations, "some degree of adjustment by the domestic industry" will be necessary in order for the Member to come into compliance.⁹¹ Consequently, the arbitrator determined that difficult structural adjustments should not be relevant to the determination of a reasonable period of time under Article 21.3(c).⁹²

84. *Indonesia-Autos*, *supra* note 25, ¶ 7-8.

85. *Id.* ¶ 7.

86. *Id.* ¶ 8.

87. *Id.* ¶ 9.

88. *Id.*

89. *Id.*

90. *Id.* ¶ 23.

91. *Id.*

92. *Id.* In these very particular circumstances, the arbitrator concluded that an additional pe-

Argentina made a similar argument to that made by Indonesia as the implementing party in *Argentina-Bovine Hides*.⁹³ Argentina requested that the arbitrator grant forty-six months and fifteen days to implement changes, and stressed that its financial situation had “seriously deteriorated over the past years” due to a drop in “tax revenue brought about by an economic recession in the third quarter of 1998 in the wake of the 1997 ‘Asian crisis.’”⁹⁴ The arbitrator cited the ruling in *Indonesia-Autos*, and stated 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.’”⁹⁵

Proceedings have consistently ruled that financial difficulty is not in itself relevant to the determination of the implementing time. Although the implementing parties referred to economic difficulties that required a lengthier period, the arbitrators explicitly stated that structural adjustments should not be relevant to the determination of a reasonable period of time under Article 21.3(c).

2. *Developing Countries*

i. When the implementing party is a developing country and the complaining party is a developed country

Article 21.2 provides that “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.”⁹⁶ Several 21.3 proceedings have noted this requirement and resulted in a longer period of time in some cases.⁹⁷ For example, in *Argentina-Bovine Hides*, Argentina emphasized Article 21.2 of the DSU and argued that the arbitrator should take into account its status as a developing country Member.⁹⁸ The arbitrator agreed that under Article 21.2 of the DSU and Article 21.3(c), Argentina’s status as a developing country was a relevant circumstance.⁹⁹ The arbitrator cited the ruling in *Indonesia-Auto*, and agreed that, “under Article 21.2 of the DSU in conjunction with Article 21.3(c),

riod of six months over and above the six-month period required for the completion of Indonesia’s domestic rule-making process constituted a reasonable period of time for implementation of the recommendations and rulings of the DSB.

93. Award, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* Arbitration under Article 21.3(c) of the DSU, ¶ 8, WT/DS155/10 (Aug. 13, 2001) [hereinafter *Argentina-Bovine Hides*].

94. *Id.* ¶ 5, 7.

95. *Id.* ¶ 41.

96. DSU, art. 21.2.

97. See, e.g., *Argentina-Bovine Hide*, *supra* note 110.

98. *Argentina-Bovine Hides*, *supra* note 110, ¶ 51.

99. *Id.*

account may appropriately be taken of the circumstance that the WTO Member . . . is a developing country confronted by severe economic and financial problems.”¹⁰⁰

ii. When both the implementing party and the complaining party are developing countries

However, one further difficulty facing arbitrators is the situation in which both the implementing party and the complaining party are developing countries. The language of Article 21.2 is not entirely clear on whether the arbitrator should pay “equally” “particular attention” to the interests of (both implementing and complaining) developing country Members. *Chile-Agricultural Products* involved two developing countries as parties to the dispute, where Chile was the implementing party and Argentina was the complaining party. The arbitration raised the question of how to pay “particular attention” under Article 21.2 when both parties are developing countries.¹⁰¹ The arbitrator noted that Chile had not suggested that it faced any “additional *specific* obstacles” as a result of its status as a developing country (emphasis in original).¹⁰² In contrast, the arbitrator determined that the “acuteness” of Argentina’s daunting financial situation “amplified” its “burden as a developing country complainant.”¹⁰³ Ultimately, however, the arbitrator, took both parties’ interests as developing countries into account respectively, but declared that he was “not swayed towards [granting] either a longer or shorter period of time by the ‘particular attention’ [he paid] to the interests of developing countries.”¹⁰⁴

iii. When the implementing party is a developed country and the complaining party is a developing country

A logical next step is to ask whether Article 21.2 requires the arbitrator to determine a shorter reasonable period of time for implementation when the implementing party is a developed country. In *U.S.-Gambling Services*, the arbitrator directly addressed the issue of how to approach a case where the implementing party is a developed country and the complaining party is a developed country.¹⁰⁵ Antigua invoked Article 21.2 of the DSU, and argued the “importance of a well-regulated cross-border gambling and betting service industry” to its economic health.¹⁰⁶ It contended that Article 21.2 required the arbitrator to

100. *Id.*

101. *Chile-Agricultural Products*, *supra* note 67, ¶ 30.

102. *Id.* ¶ 56.

103. *Id.*

104. *Id.*

105. Award, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Arbitration under Article 21.3(c) of the DSU, WT/DS285/13 (Aug. 19, 2005) [hereinafter *U.S.-Gambling Services*].

106. *Id.* ¶ 26.

determine a shorter reasonable period of time for U.S. implementation.¹⁰⁷ The U.S., however, argued that Article 21.2 was not relevant to the proceeding because the provision is only relevant where the “*implementing* Member is a developing country” (emphasis in original).¹⁰⁸ The arbitrator disagreed and declared that Article 21.2 does not contain any such limitation.¹⁰⁹ The arbitrator found that the text of Article 21.2 did not “expressly limit its scope of application to developing country Members as *implementing*, rather than as complaining parties to a dispute” (emphasis in original).¹¹⁰

iv. Developing country Members who are not parties to a dispute

In *EC-Sugar Subsidies*, the complaining parties, Brazil and Thailand, argued that the arbitrator should pay particular attention to their respective interests as developing WTO Members.¹¹¹ However, the EC as the implementing party, contended that Article 21.2 is “also applicable to developing country Members who are not parties to a dispute.”¹¹² The EC argued that a shorter implementation period, combined with the suspension of sugar exportation, as advocated by the complaining parties, could result in an “increase in the world market price of sugar.”¹¹³ This, the EC argued, would “adversely affect sugar-importing developing countries.”¹¹⁴ While the arbitrator agreed with the view in *US-Gambling* that the text of Article 21.2 does not limit its scope of application to an implementing developing country Member,¹¹⁵ he did not directly address the question of whether the provision applies to developing country Members who are not parties to a dispute.¹¹⁶ As the arbitrator noted, the EC had not “identified such other developing country Members in its submission or at the oral hearing.”¹¹⁷ Accordingly, the arbitrator concluded that he need not decide whether Article 21.2 also applies to “developing country Members that are *not* party to the arbitration proceedings under Article 21.3(c)” (emphasis in original).¹¹⁸

As discussed, article 21.2 has been repeatedly examined by arbitrators acting under Article 21.3(c) of the DSU in the determination of the period of time for implementation. However, there are only a small and very limited number of

107. *Id.*

108. *Id.* ¶ 57.

109. *Id.* ¶ 59.

110. *Id.*

111. *EC-Sugar Subsidies*, *supra* note 37, ¶ 47, 56, 98.

112. *Id.* ¶ 98.

113. *Id.*

114. *Id.*

115. *U.S.-Gambling*, *supra* note 105, ¶ 59.

116. *EC-Sugar Subsidies*, *supra* note 37, ¶ 99.

117. *Id.* ¶ 103.

118. *Id.* ¶ 104.

situations in which an arbitrator relied solely on Article 21.2 in granting an additional period of time for implementation.

D. Other Factors

1. Scientific Studies

It is not clear how the reasonable time period would interact with scientific risk assessments. In *EC-Hormones*, the EC argued that the reasonable period of time for implementation should be four years: two years for risk assessment (that is, a scientific study) and two years for “any legislative action which might be necessary in light of the results of the risk assessment.”¹¹⁹ The arbitrator stated 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 should not be included in the reasonable period of time.¹²⁰ Similarly, in *Australia-Salmon*, Australia requested a significant period of time for scientific risk assessments.¹²¹ However, the arbitrator held that conducting risk assessments was not relevant to his determination of a reasonable period of time for implementation, and thus, determined that the reasonable period of time for Australia to implement the recommendations and rulings of the DSB was eight months from the date of adoption of the Appellate Body and Panel Reports by the DSB.¹²²

2. Other International Obligations

Several arbitrators have also considered other international treaty obligations when making determinations of a reasonable period of time. In *EC-Banana*, the EC requested that the arbitrator determine fifteen months and one week to be a reasonable period of time.¹²³ In justification of their request, the EC noted that amending the existing EC import regime for bananas, as required by the recommendations and rulings of the DSB, would be a difficult and complex task because it would “have to strike a difficult balance between the co-existing international obligations” under the WTO Agreement and the Lomé Convention.¹²⁴ The arbitrator, however, was not persuaded that these issues warranted a longer period of time.¹²⁵

119. *EC-Hormones*, *supra* note 31, ¶ 5.

120. *Id.* ¶ 39.

121. Award, *Australia - Measures Affecting Importation of Salmon*, Arbitration under Article 21.3(c) of the DSU, ¶ 18, WT/DS18/9 (Feb. 23, 1999) [hereinafter *Australia-Salmon*].

122. *Id.* ¶ 36, 39.

123. *EC-Banana*, *supra* note 22, ¶ 5.

124. *Id.* ¶ 6.

125. *Id.* ¶ 19.

3. "Punitive" Deadline

In some cases, a central question is whether the deadline set by the arbitrator can be a punitive one. In *EC-Chicken Classification*, Brazil and Thailand, as complaining parties, emphasized that since the adoption of the Panel and Appellate Body Reports in the dispute, the EC had failed to take sufficient steps towards implementation.¹²⁶ Brazil and Thailand urged that this failure to act should affect the arbitrator's determination of what constituted a reasonable period of time.¹²⁷ During oral hearings, the EC acknowledged that it had not yet taken any concrete steps toward implementation of the proposed Regulation.¹²⁸ From its submissions, it appeared that the only thing to have occurred were internal discussions within the EC.¹²⁹ Consequently, the arbitrator found that mere discussion did not constitute implementation.¹³⁰ The arbitrator explained "there must be something more to evidence that a Member is moving toward implementation."¹³¹ Therefore, ultimately the arbitrator agreed with Brazil and Thailand that the EC's "failure to commence implementation of the DSB's recommendations and rulings was a factor that [should be taken] into account in determining the reasonable period of time for implementation."¹³²

As the above discussion demonstrates, it is not only difficult for arbitrators to determine a reasonable implementation period, but also the criteria for determining when a reasonable period of time is not fully established. One arbitrator noted that "estimating the duration of the various factors involved in a domestic legislative process is not an exact science."¹³³ The arbitrator even admitted that it would be impossible to arrive at a "non-speculative" estimate.¹³⁴

Nevertheless, analysis of the arbitral decisions under Article 21.3(c) has important practical implications. While the legal status of WTO interpretations that underlie arbitral decisions remains controversial, and the question of whether we should formally recognize precedent as a source of law in the WTO remains debatable,¹³⁵ this author is of the view that a fundamental principle of the administration of justice is that like cases should be decided alike, and thus, previous arbitral rulings should have, to some degree, legal effect beyond the

126. *EC-Chicken Classification*, *supra* note 30, ¶ 22, 66.

127. *Id.*

128. *Id.* ¶ 66.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *U.S.-Offset Act*, *supra* note 45, ¶ 66.

134. *Id.*

135. See Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845-956 (1999); see also Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 FLA. ST. U. J. TRANSNAT'L L. & POL'Y 1-151 (1999); see also Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L REV. 873 (2001).

dispute in question.

IV.

SHORTER OR LONGER: RETHINKING THE CRITERIA FOR DETERMINING A COMPLIANCE DEADLINE

A. *Mandate for the Arbitrator: Not "What" but "When"*

In order to determine what criteria an arbitrator should consider in 21.3(c) proceedings, the scope of the arbitrator's jurisdiction must be clarified. As indicated above, it has been the practice of many arbitrators to interpret a reasonable period of time as the shortest period of time possible to effect implementation within the concerned Member's legal system. However, in determining the shortest period possible, arbitrators also face the difficulty of determining the scope of their mandate.¹³⁶ Among those who debate this issue, the dominant view is that the arbitrators' mandate relates exclusively to the determination of a reasonable period of time for implementation.¹³⁷ That is to say, "it is not within the arbitrators' mandate to suggest ways and means to implement the recommendations and rulings of the DSB."¹³⁸ Rather, while it is the responsibility of an arbitrator to examine the relevance and duration of the steps necessary for implementation, the arbitrator does not need to ensure the consistency of the proposed implementing measure with the recommendations and rulings of the DSB.¹³⁹ At least one arbitrator heeded this reasoning by rejecting the complaining parties' request to examine the nature of the implementation proposed by the responding parties and indicating that Article 21.5 procedures (that is, the compliance panel) are more suitable for assessing consistency.¹⁴⁰

There is, however, ongoing debate as to whether Articles 21.5 and 21.3(c) are mutually exclusive.¹⁴¹ As argued by one arbitrator, the fact that Article 21.3(c) arbitration focuses on the period of time for implementation does not render the substance of the implementation (that is, the precise means or manner of implementation) immaterial.¹⁴² In line with this argument, the more information an arbitrator has regarding the implementing measure, the more likely the reasonable period selected by the arbitrator will fairly balance the needs of the

136. JEFF WAINCYMER, *WTO LITIGATION: PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT* 654 (2002); see also *EC-Hormones*, ¶ XXIV, XXXVIII.

137. See generally WTO Website, Analytical Index, <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_08_e.htm#article21B3>.

138. *Korea-Alcoholic Beverages*, *supra* note 22, ¶ 45.

139. See generally *Dispute Settlement*, *supra* note 12, at 237-239 (1999); see e.g., *Korea - Alcoholic Beverages*, *supra* note 22, ¶ 45.

140. *Canada-Pharmaceuticals*, *supra* note 54, ¶ 27.

141. See generally WorldTradeLaw.net, <http://www.worldtradelaw.net/dsc/database/rptawards.asp> (last visited Feb. 15, 2007).

142. *Chile-Agricultural Products*, *supra* note 56, ¶ 37.

implementing Member with those of the complaining Member.¹⁴³ After all, it seems logical that a consideration of potential methods for implementation is necessary for an accurate determination of how much time is reasonable. For example, if there were five potential methods for implementation, arguably it would not be a wrong textual reading of Article 21.3(c) to view an arbitrator as being entitled to consider the compatibility of each, as any method which is compatible could give rise to a reasonable period of time.¹⁴⁴ Thus, it would seem difficult to determine what a reasonable period of implementation should be without considering the various options for implementation.

This debate also raises the question of whether the arbitrators must consider the shortest period of time within which the measure can be withdrawn or modified, or if they should instead consider the shortest period of time for implementation according to the means chosen. This paper agrees with the view that an arbitrator acting under Article 21.3(c) does not have the power to determine the proper scope and content of legislation necessary for implementation. Instead, the proper scope and content of anticipated legislation should be, in principle, left to the implementing WTO Member to determine.¹⁴⁵ Indeed, from a policy perspective, it is essential to make a distinction between “the duration of each necessary step leading to implementation” and “the consistency of the proposed implementing measures.” In other words, the implementing Member should determine the proper scope and content of anticipated legislation and only after such a determination is made, should an arbitrator consider whether the proposed period of time is the shortest period possible for the anticipated means of implementation. Thus, the proper concern of an arbitrator under Article 21.3(c) should be when, but not what.¹⁴⁶

B. Special and Differential Treatment in the Implementation Period: Who Deserves Particular Attention?

Another difficult question regarding an arbitrator’s task concerns the link

143. *Dispute Settlement*, *supra* note 12, at 237.

144. JEFF WAINCYMER, *WTO LITIGATION: PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT* 658 (2002).

145. See Award, *United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Arbitration under 21.3(c) of the DSU, ¶ 30, WT/DS/184/13 (Feb. 19, 2002). In this award, the arbitrator stated that “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 content of anticipated legislation are, in principle, left to the implementing WTO Member to determine” [hereinafter *U.S.-Hot-Rolled Steel from Japan*].

146. *Canada-Pharmaceuticals*, *supra* note 54, ¶ 41. If there is any question about whether “what” a Member chooses as a means of implementation is sufficient to comply with the recommendations and rulings of the DSB, as opposed to “when” that Member proposes to do it, then Article 21.5 applies, not Article 21.3.

between Articles 21.2 and 21.3(c). Article 21.2, which requires that particular attention be paid to matters affecting the interests of developing country Members, is a general provision that does not provide specific guidance.¹⁴⁷ As discussed earlier, it is not clear how the reasonable time period interacts with the special and differential treatment for developing countries. Previous arbitrations have raised the question of whether the phrase “developing country Members” refers exclusively to the implementing Member, or whether it also applies to developing country Members other than the implementing Member (for example, the complaining Member, third parties to the dispute, or any developing country Member of the WTO).¹⁴⁸ This question, however, remains unanswered.

The arbitrators in both *U.S.-Gambling* and *EC-Sugar Subsidies* left the precise nature of the relationship between Article 21.2 and Article 21.3(c) undetermined.¹⁴⁹ While they recognized that “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,” both arbitrators concluded that it was not necessary for them to decide this question, given the lack of sufficient evidence demonstrating how the interests of the developing countries in the case would be affected.¹⁵⁰ It remains to be seen how future arbitrators will deal with this issue.

The core issue is whether Article 21.2 is relevant to the determination of a reasonable period of time for implementation only when the implementing Member is a developing country. As noted above, in a literal sense, there is nothing in the plain meaning of the DSU that limits the scope of Article 21.2 to an implementing Member. However, economic harm suffered by foreign exporters does not, and cannot, impact a determination of the shortest period possible for implementation.¹⁵¹ 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 are of no relevance to the determination of the reasonable period of time for implementation. Otherwise, the phrase “developing country Members” in Article 21.2 would apply to any developing country Member of the WTO, which would render the provision overly broad. Thus, although Article 21.2 makes no explicit distinction between cases where a developing country Member is a complaining party, and those where a developing country Member is an implementing party, its scope should be limited to those disputes in which the implementing party is a developing country Member.

147. DSU, art. 21.2.

148. See III-C-2 of this paper.

149. *EC-Sugar Subsidies*, *supra* note 49, ¶ 23-24; *U.S.-Gambling*, *supra* note 105.

150. *EC-Sugar Subsidies*, *supra* note 49, ¶ 23-24. *U.S.-Gambling*, *supra* note 105, ¶ 63.

151. *Indonesia-Autos*, *supra* note 25, ¶ 23.

C. Political and Social Complexity: Totally Irrelevant?

As demonstrated in the previous section, different views have been expressed in past 21.3(c) arbitrations as to whether factors such as political instability, adjustment costs, and social unrest, should be relevant to the determination of a reasonable period of time for implementation. On the one hand, it is clear that a complex process may justify a lengthier time period. But, on the other hand, equity does not suggest that violating Members with more complex offending provisions deserve greater leeway than those with more simplistic offending measures. Thus, the relevance of political and social complexity is debatable.

This paper agrees with the majority view that the mere fact that the implementation of recommendations and rulings by the DSB necessitates complex domestic procedures should not, in and of itself, affect the determination of a reasonable period of time for implementation.¹⁵² Simple contentiousness should not be sufficient consideration for a longer period of time under Article 21.3(c), as every implementation measure could be considered complex. In other words, complexity does not constitute a relevant particular circumstance; rather, complexity is a standard aspect of every implementation. Social and political tension is inevitable whenever a government proposes to end its protection or carry out a structural reform of a domestic industry.¹⁵³ As aptly asserted by some Members in previous arbitrations, all WTO disputes are, to some extent, contentious domestically; if they were not, there would be no need for WTO Members to seek recourse in dispute settlement.¹⁵⁴ As argued in *Canada-Pharmaceuticals*, *Japan-Alcohol*, *U.S.-Copyright* and *Chile-Agricultural Products*, taking such considerations into account would threaten the integrity of the WTO, as well as have the paradoxical effect of maintaining the most protectionist measures for the longest period of time.¹⁵⁵

V.

CONCLUDING REMARKS

Over the decades since its inception, the dispute settlement system under GATT/WTO¹⁵⁶ has undergone a process of legalization, judicialization and adjudication. During the Uruguay Round negotiations, promoting the resolution of trade problems through multilaterally agreed upon procedures and, at the same

152. See III-B of this paper.

153. *Canada-Pharmaceuticals*, *supra* note 54, ¶ 60.

154. *Id.*

155. *Japan- Alcoholic Beverages*, *supra* note 23, ¶ XIII. If arbitrators considered such issues as domestic contentiousness, this would have the ironic, if not contradictory, result of keeping in place the most protectionist measures for the longest period of time, after they have been declared inconsistent with a Member's WTO obligations.

156. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A5, 55 U.N.T.S. 187 [entered into force Jan. 1 1948] [hereinafter GATT].

time, ensuring legal certainty and predictability in the operation of international trade, were the Members major concerns in supporting a more rule-based trading system. Certainty requires that panel decisions be implemented before they are too late to matter. Having said that, the arbitral decisions under Articles 21.3(c) of the DSU raise various legal questions that may threaten the certainty and predictability of the WTO regime.¹⁵⁷ This paper explores the potentially relevant factors for determining implementation periods, and performs a critical analysis of the difficulties arbitrators face when determining reasonable implementation periods. This paper also seeks to clarify what criteria should be relevant to the determination of a compliance deadline.

In addition, this paper highlights factors that arbitrators may find determinative in 21.3(c) proceedings. With regard to domestic constitutional issues surrounding implementation, most arbitral decisions take the position that the amendment of an act by a Parliament or Congress is generally more time-consuming than the amendment of an act by the Executive. With regard to social and political complexity, this paper concludes that simple contentiousness is not a sufficient consideration under Article 21.3(c) to justify a longer period of time. With regard to economic situations, it agrees with the view that economic harm suffered by foreign exporters should not have an impact on what is the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB. As for the mandate of the arbitrator, this paper concludes that it is up to the implementing Member to determine the proper scope and content of anticipated legislation, and that only after the Member has determined how it will implement the DSB's recommendations and rulings, should an arbitrator consider whether the proposed reasonable period of time is the shortest period possible for the anticipated means of implementation within the legal system of that Member. The proper concern of an arbitrator under Article 21.3(c) is "when," not "what."

This paper is of the view that a substantial improvement of Article 21.3(c) of the DSU, which would bring additional legal certainty and predictability to the dispute settlement system, is possible on these points. From a real world perspective, the ambiguous language of 21.3(c) has led to confusing decisions and has revealed unresolved technical issues. Indeed, there is a need to provide more detailed rules to ensure that a compliance deadline can be established that is fair to both sides. While the prevailing view of Members is that the DSU has functioned generally well to date, participants representing a large part of the WTO membership have submitted a large number of specific proposals for clarifica-

157. Generally speaking, the WTO is a three-tiered organization headed by the Ministerial Conference, which consists of representative WTO members. The WTO Agreement provides that all decision-making powers shall be in this conference, which meets every two years. The Ministerial Conference functions as the Dispute Settlement Body (DSB) and the Trade Policy Review Body. Therefore, the membership of the DSB is the same as that of the General Council, but it has a separate chairman, a separate staff, separate rules of procedure, and a separate document series.

tions and improvements.¹⁵⁸ Since January 2003, negotiations on improvements and clarifications to the DSU (for example, possible amendments to provisions concerning panel procedures, appellate review procedures, surveillance of implementation) have focused on specific draft legal texts proposed by Members. However, none of the negotiating papers provide a comprehensive review of Article 21.3(c) of the DSU.¹⁵⁹

Indeed, there is a need to clarify the provision so as to expressly limit the mandate of the arbitrator, the application of special and differential (“S & D”) treatment, and other technical issues. To be more specific, Articles 21.2, 21.5, 21.3(c), which are closely interconnected, require further legal refinement or need further substantive development. Members should make an overall assessment of the implications of the possible changes to these three provisions, and better make clear that Articles 21.5 and 21.3(c) are mutually exclusive. In addition, although S & D treatment for developing country Members has already been extensively discussed by the Special Session of the DSU negotiation,¹⁶⁰ the interpretation of Article 21.2 requires urgent attention and action. The scope of the provision must be limited to those disputes in which the implementing party is a developing country Member.

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. However, when prompt compliance is impracticable (or undesirable), Article 21.3 proceedings become a tug of war between the complaining party and the implementing party, and it becomes the arbitrator’s job to strike a balance between the competing arguments of “the longer the better” and “the shorter the better.” Thus, the choice of criteria for determining a compliance deadline has ongoing and important practical implications for the effectiveness of dispute resolution.

158. New negotiations on the Dispute Settlement Understanding, the WTO Website at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations.

159. SPECIAL SESSION OF THE DISPUTE SETTLEMENT BODY, REPORT BY THE CHAIRMAN, AMBASSADOR PÉTER BALÁS, THE TRADE NEGOTIATIONS COMMITTEE, TN/DS/9 (JUNE 6, 2003).

160. New negotiations on the Dispute Settlement Understanding, the WTO Website at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations.