

UNITED STATES – ANTI-DUMPING ACT OF 1916

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

Award of the Arbitrator
A.V. Ganesan

I. Introduction

1. On 26 September 2000, the Dispute Settlement Body (the "DSB") adopted the Panel Reports in *United States – Anti-Dumping Act of 1916* (" *United States – 1916 Act* ").¹ On 23 October 2000,

4. Written submissions were received from the European Communities, Japan and the United States on 10 January 2001, and an oral hearing was held on 7 February 2001.

II. Arguments of the Parties

A. United States

5. The United States submits that a "reasonable period of time" for implementation of the recommendations and rulings of the DSB in the present case is 15 months, taking account of the nature of the United States' legislative process, the recent changes in the United States Presidency, Administration, and Congress, the language of Article 21.3(c) of the DSU, and previous arbitration awards under this Article.

6. The United States considers that, in determining the "reasonable period of time" under Article 21.3(c), an arbitrator should first examine the particular circumstances which make immediate implementation impracticable. In this case the conclusion of the previous session of Congress in December 2000, and the fact that the current session of the new Congress has only just begun, mean that it is clearly impracticable for the United States to comply with the DSB recommendations and rulings immediately. The United States, therefore, needs a "reasonable period of time" in accordance with the 15 month guideline of Article 21.3(c), and the stipulation set out in that Article, that such "time may be shorter or longer, depending upon the particular circumstances".

7. The United States considers that the relevant "particular circumstances" for Article 21.3(c) are: the legal form of implementation (legislative or regulatory); the technical complexity of the measure that the Member needs to draft, adopt and implem e pae Ut so309t(211(so300.9(U)7.s A)17(rireb211(so30

13. The scheduling for consideration of legislation on the House floor is determined, as a general rule, by the Speaker of the House of Representatives and the majority political party leader, who may place the bill on the calendar for House debate. The House Rules Committee generally recommends the amount of time that will be allocated for debate and whether amendments may be offered. During the debate process, the bill is read in detail and members of Congress may offer further amendments. After voting on amendments, the House immediately votes on the bill itself with any adopted amendments. The bill can also be returned to the committee that reported it. If passed, the bill must be referred to the Senate, which may or may not have concurrent pending legislation.

14. While the Senate has similar procedures for consideration of legislation by relevant committees, there are significant differences in the way the Senate considers proposed legislation. The Senate functions in a less rule-driven manner than the House. The Senate does not have a Rules Committee, and scheduling and floor consideration are generally decided by consensus. Unlike the House, where debate is strictly controlled, debate is rarely restricted in the Senate.

15. The United States' legislative process also requires time for a conference committee to be organized to reconcile differences between the House and Senate versions of a bill, given the fact that most bills are not passed by the Senate exactly as referred by the House. Conference committee members are appointed by each chamber and given specific instructions, which may be revised every 21 days. If the conference committee cannot reach agreement, the bill expires. If the conference committee reaches agreement on a single bill, a conference report is prepared describing the committee members' rationale for changes. The conference report must be approved by both chambers, in identical form, or the revised legislation expires.

16. After the bill proposed by the conference committee is approved by both chambers, it is sent to the President for approval. Only after Presidential approval does a proposed piece of legislation become law.

17. Besides the complexity and length of its legislative process, the United States also emphasizes that there are "additional special circumstances" involved in this case that need to be considered in determining the "reasonable period of time" under Article 21.3(c). Elections took place in November 2000, and, as a result of these elections, the United States now has a new President, a new Administration, and a new Congress. Any legislation proposed by the Executive branch will have to be approved by the new Administration prior to its transmittal to the new Congress. The new Administration took office on 20 January 2001, and the process of appointing top level officials to that new Administration is ongoing. Given the processes involved in these appointments and the need for the new Administration to develop its proposal for the implementing measure in this case, it is

unrealistic to expect that legislation would be transmitted to Congress in this case before March or April 2001 at the earliest. It is also important to note that, although the new Congress was convened on 3 January 2001, members of Congress are only now beginning to conduct official business. In fact, the membership of Congressional committees was only recently finalised, and some of the relevant committees are not yet officially organized.

18. The United States also highlights a number of other factors that add complexity and uncertainty to its legislative process, such as: the large volume of legislation introduced at the beginning of every Congress; the many opportunities for individual members of Congress to delay the progress of bills; the fact that Congress often acts on comprehensive bills or legislative "packages", rather than on separate pieces of legislation; the fact that only a tiny proportion of bills introduced become law in the same session; and the fact that even bills that do become law are usually not acted upon until the last weeks or months of the legislative session.

19. The United States concludes from the above complexities of its legislative process that it is

FSC)¹⁰, the United States adopted the FSC Repeal and Extraterritorial Income Exclusion Act of 2000¹¹ in less than 8 months after adoption of the panel and Appellate Body reports in that case. The European Communities also underlines the fact that, despite the complexity involved in the implementation, the period set in the panel report for implementation of the recommendations in the *United States – FSC* case was even shorter – 6 months and 10 days from adoption of the reports.¹²

24. The European Communities submits that implementation of the rulings and recommendations of the DSB in the present case should take no longer than the time taken to enact the legislation in the *United States – FSC* case, because the procedures to be followed are no more cumbersome, the implementing legislation needed – a simple repeal of the 1916 Act – is far less complex, and the 1916 Act has no links to other legislation. The European Communities adds that there are no other circumstances in this case that warrant a longer period of implementation. Specifically, the fact that there are ongoing civil proceedings under the 1916 Act is not a relevant circumstance to be taken into account to lengthen the "reasonable period of time" needed for implementation.

C. *Japan*

25. Japan argues that a period of six months from the date of adoption of the Panel Reports in this case is the "reasonable period of time" for implementation by the United States of the recommendations and rulings of the DSB. The DSU requires "prompt compliance" with DSB recommendations and rulings and, in Japan's view, the "particular circumstances" of this case demonstrate that the United States can and should achieve implementation in this case within a six month period. Japan highlights the fact that, in the Japan Panel Report, the Panel took the unusual step of suggesting, "that one way for the United States to bring the 1916 Act into conformity with its WTO obligations would be to *repeal* the 1916 Act".¹³ (emphasis added) According to Japan, this "unusual step" by a panel suggests a "concrete way" for implementation that should not be taken lightly, and the United States should not be allowed more time as this would involve "derogating from the suggestion of the Panel".¹⁴

26. For Japan, the references to "prompt settlement of disputes" in Article 3.3 of the DSU, and to "prompt compliance" in Article 21.1 of the DSU, make it clear that Members must implement DSB

rulings and recommendations as soon as they possibly can. Furthermore, the implementing Member bears the burden of proving that "prompt" or "immediate" compliance is "impracticable", and this

III. "Reasonable Period Of Time"

29. Pursuant to Article 21.3(c) of the DSU and the agreement of the parties, my task as Arbitrator in this case is:

relevant recommendations and rulings of the DSB.¹⁸ Within the confines of this basic principle, as stated by the Arbitrator in *Canada – Pharmaceutical Patents*:

... it is ... 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".¹⁹

33. The parties do not dispute that "immediate" implementation is "impracticable" in this case. I, therefore, consider that the United States bears the burden of proof in showing that the period of 15 months proposed by it is the "shortest period possible" within its legislative system to implement the recommendations and rulings of the DSB in this particular case. I wish to emphasize that my task as an Arbitrator is to determine the "reasonable period of time" in light of the facts and circumstances of *this particular case*.

34. Turning to the question of what would constitute the "reasonable period of time" for implementation in this case, I need to look first at the type of measure proposed to be used for implementation^{0.9}

matter within the mandate of an Arbitrator under Article 21.3(c) of the DSU.²²

Second, the United States stresses the "additional special circumstances" involved in this case, namely, that, due to the recent election in the United States, a transition period of several months is needed before legislation proposed by the Executive branch can be approved by a new Administration, and before the new Congress will be sufficiently organized to consult with the Administration, and be able to begin "serious consideration of legislation".²⁴ I will address each of these arguments in turn.

38. In my view, factors such as the volume of legislation brought before the United States

FSC Repeal and Extraterritorial Income Exclusion Act.²⁸ They draw my attention to the period of 6 months and 10 days that the panel allowed the United States to implement the rulings and recommendations of the DSB in the *United States – FSC* case.²⁹

43. Taken together, these examples simply illustrate that, in some cases Congress acts extremely rapidly, and, in others, rather slowly. As each case is influenced by its own facts and circumstances, the examples are not, to my mind, determinative one way or another, for my Award in this case. I find it, however, difficult to accept the argument of the European Communities and Japan that the period of 6 months and 10 days given to the United States to implement the rulings and recommendations of the DSB in the *United States – FSC* case should be the outer limit for the "reasonable period of time" at issue here. The *United States – FSC* case involved prohibited export subsidies which, under Article 4.7 of the *Agreement on Subsidies and Countervailing Measures*, must be withdrawn "without delay". The recommendation of the Panel in that case was, thus, based on a different legal standard. Nevertheless, I note that to comply with its treaty obligations under the covered agreements, the United States enacted the FSC Replacement Act in a period of less than eight months – within the ambit of its normal legislative process – showing the flexibility that is available in that process.³⁰

44. Having considered the particular and special circumstances relevant to this Arbitration, I am not persuaded that a period of 6 months, as suggested by Japan, or a period of 6 months and 10 days, as suggested by the European Communities, would constitute a "reasonable period of time" for implementation in this case. Given that the current session of the United States Congress began on 3 January 2001, neither such period would leave a reasonable time for the consideration and passage of the required legislation. In my view, the United States is reasonably entitled to a period of a few months beyond the time of introduction of such a bill to enable it to enact the required legislation within its normal legislative process. At the same time, I do not accept the argument of the United States that such a reasonable period must necessarily extend to the end of the current session of the United States Congress.

²⁸*Supra*, footnote 11.

²⁹Panel Report, *United States – FSC*, *supra*, footnote 10, para. 8.8.

³⁰In *United States – FSC*, the DSB approved, at the request of the United States, a one month extension to the time-period recommended by the panel for compliance in that case. See WT/DS108/11, 2 October 2000 and WT/DSB/M/90, 31 October 2000, paras. 1-7.

IV.