United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (WT/DS285)*:*

Arbitration under Article 21.3(c) of the DSU

Submission of the United States of America

July 12, 2005

I. INTRODUCTION

1. Pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Antigua and Barbuda (hereinafter "Antigua") has requested arbitration to determine the "reasonable period of time" for the United States to implement the recommendations and rulings of the Dispute Settlement Body ("DSB"), adopted April 20, 2005, in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*. After stating its intention to implement the DSB recommendations and rulings in a manner consistent with its WTO obligations, the United States was prepared to engage in discussions pursuant to Article 21.3(b) in an effort to reach agreement on the reasonable period of time for U.S. implementation. No such agreement was achieved.

2. The United States intends to implement the recommendations and rulings of the DSB as promptly as it can, but anticipates that implementation will require no less than 15 months. Implementation can be achieved through legislative action.

3. This reasonable period of time is based on the particular circumstances of this dispute, as will be discussed below. As a reference point, however, the United States notes that in previous arbitrations under Article 21.3(c) involving legislation alone, the reasonable period of time awarded has ranged from 10 to 15 months.[1]

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[1] *Japan – Taxes on Alcoholic Beverages ("Japan – Alcoholic Beverages")*, WT/DS8/15, WT/DS10/15, WT/DS11/13, Award of the Arbitrator circulated 14 February 1997 (15 months); *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (*"EC – Bananas")*, WT/DS27/15, Award of the Arbitrator circulated 7 January 1998 (15 1/4 months); *EC - Measures Concerning Meat and Meat Products (Hormones) ("EC – Hormones")*, WT/DS26/15, WT/DS48/13, Award of the Arbitrator circulated 29 May 1998 (15 months); *Korea – Taxes on Alcoholic Beverages ("Korea – Alcoholic Beverages")*, WT/DS75/16, WT/DS84/14, Award of the Arbitrator circulated 4 June 1999 (11 ½ months); *Chile – Taxes on Alcoholic Beverages*, WT/DS87/15, WT/DS110/14, Award of the Arbitrator circulated 23 May 2000 (over 14 months); *United States – Section 110(5) of US Copyright Act*, WT/DS160/12, Award of the Arbitrator circulated 15 January 2001 (12 months); *Canada – Term of Patent Protection*, WT/DS170/10, Award of the Arbitrator circulated 28 February 2001 (10 months); *United States – Anti-Dumping Act of 1916*, WT/DS136/11, WT/DS162/14, Award of the Arbitrator circulated 28 February 2001 (10 months); *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*,

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II. FIFTEEN MONTHS IS A REASONABLE PERIOD OF TIME IN LIGHT OF THE CIRCUMSTANCES OF THIS DISPUTE

A. The WTO Legal Framework

4. The arbitrator's role under Article 21.3 of the DSU is limited to determining the reasonable period of time a Member has to implement the recommendations and rulings of the DSB. Article 21.3(c) sets forth guidance on making that determination. It establishes as a "guideline" that a reasonable period of time "should not exceed 15 months from the date of adoption of a panel or Appellate Body report." It also establishes that a reasonable period of time "may be shorter or longer, depending upon the particular circumstances."

5. The particular circumstances relevant to the arbitrator's determination of the reasonable period of time are: the legal form of implementation (*e.g.,* legislative or regulatory), the technical complexity of the measures to be prepared and implemented, and the period of time in which the implementing Member can achieve the legal form of implementation in accordance with its system of government.[2] In this dispute, both the legal form of implementation and the technical complexity of the measures, as described below, require a reasonable period of time of no less than 15 months.

6. Furthermore, as the arbitrator in *Korea – Alcoholic Beverages* determined, "although the reasonable period of time should be the shortest period possible within the legal system of the

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[1] (...continued)
WT/DS207/13, Award of the Arbitrator circulated 17 March 2003 (14 months); *United States – Continued Dumping and Subsidy Offset Act of 2000 ("US – CDSOA")*, WT/DS217/14, WT/DS234/22, Award of the Arbitrator circulated 13 June 2003 (11 months); *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries,* WT/DS246/14, Award of the Arbitrator circulated 20 September 2004 (14 months, 11 days).

[2] *Japan – Alcoholic Beverages*, para. 12.

Member to implement the recommendations and rulings of the DSB, this does not require a Member, in my view, to utilize an *extraordinary* legislative procedure, rather than the *normal* legislative procedure, in every case."[3] In that case, the arbitrator found that it was reasonable for Korea to follow its normal legislative procedure – the next regular session of the National Assembly – for the consideration and adoption of implementing legislation, even if that legislation could have been submitted during an extraordinary session.

7. Finally, previous arbitration awards have recognized consistently that the arbitrator's role under Article 21.3(c) is not to prescribe a particular method of implementation. It is the prerogative of the implementing Member to determine the most appropriate and effective method of implementing the recommendations and rulings of the DSB.[4] The means of implementation is for the Member to decide and is outside the scope of an Article 21.3(c) arbitration.[5]

8. Applying these standards, the arbitrator should conclude that 15 months is a reasonable period of time, as detailed further below.

B. Fifteen Months Would Be Required for Legislation

1. Fifteen Months Is Reasonable in Light of the U.S. Legal System and Prior Experience

9. In this dispute, both the legal form of implementation and the technical complexity of the contemplated measures require a reasonable period of time of no less than 15 months. With respect to the legal form of implementation, the Panel concluded that existing high-level administrative clarifications of the meaning of the Interstate Horseracing Act (IHA) were not

[3] *Korea – Alcoholic Beverages*, para. 42 (emphasis in original).
[4] *See, e.g., Australia – Salmon*, para. 35.
[5] *See United States – CDSOA*, para. 52.

sufficient to sustain the U.S. burden of proof under the chapeau of Article XIV of the *General Agreement on Trade in Services* (GATS).[6] Accordingly, U.S. authorities will seek to implement the recommendations and rulings of the DSB by further clarifying the relationship between the IHA and preexisting federal criminal law. U.S. authorities intend to seek further clarification through legislation.

10. The DSB adopted the recommendations and rulings of the Panel and the Appellate Body in this dispute at its meeting of April 20, 2005. At the next DSB meeting on May 19, 2005, the United States stated its intentions to implement the recommendations and rulings in a manner consistent with its WTO obligations. Since the date of adoption, the Executive branch of the U.S. government has been consulting internally, with the U.S. Congress, and with domestic stakeholders. Through those consultations, it has become clear that a variety of possible options exist for implementing the recommendations and rulings of the DSB through legislation, depending on how Congress chooses to clarify the law relating to Internet gambling on horseracing.

11. A legislative clarification will be technically complex. It requires consideration of the relationship between the IHA and three different federal criminal statutes – the Wire Act, the

[6] The United States argued before the Panel that the President of the United States, in his Presidential Statement on Signing accompanying the bill enacting the December 2000 amendments to the IHA, had already clarified that nothing in the IHA (a civil statute) overrides the previously enacted criminal laws applicable to Internet gambling, and the Department of Justice had further confirmed this view. *See United States – Gambling,* Panel Report, paras. 3.22-3.23, 6.597. The Panel found that this statement was not sufficient to resolve the "ambiguity as to the relationship between, on the one hand, the amendment to the IHA and, on the other, the Wire Act, the Travel Act and the Illegal Gambling Business Act." *Id.,* para. 6.599. The Appellate Body expressly modified the Panel's ultimate conclusion on this point (which appeared in paragraph 6.607 of the Panel Report) by finding that "the United States has not demonstrated that – in the light of the existence of the Interstate Horseracing Act – the Wire Act, the Travel Act, and the Illegal Gambling Business Act are applied consistently with the requirements of the chapeau." *United States – Gambling,* Appellate Body Report, para. 373(D)(v)(c).

Travel Act, and the Illegal Gambling Business statute. The Appellate Body has made no finding as to whether the activity that is prohibited by these statutes is permitted under the IHA. Instead, the Appellate Body has emphasized the need to "demonstrate[ ] that – in the light of the existence of the Interstate Horseracing Act – the Wire Act, the Travel Act, and the Illegal Gambling Business Act are applied consistently with the requirements of the [Article XIV] chapeau." [7] Accordingly, a reasonable legislative option would have the effect of clarifying that relevant U.S. federal laws entail no discrimination between foreign and domestic service suppliers in the application of measures prohibiting remote supply of gambling and betting services.

12. There will be ample room for reasonable and principled disagreements among legislators as to precisely how to achieve such a clarification in the context of Internet gambling. The situation presented in this arbitration is the reverse of *Canada – Patent Term*, where the Arbitrator contrasted a simple change in the length of a patent term to the greater complexities presented by disputes involving prohibitions on discrimination:

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

[7] *United States – Gambling,* Appellate Body Report, para. 373(D)(v)(c).

> Thus, with respect to the minimum period of patent protection, Article 33 of the TRIPS Agreement *leaves no room for any legislative discretion or legislative choices*.[8]

In this dispute, by contrast, compliance with the obligation to refrain from "arbitrary and unjustifiable discrimination" in the chapeau of Article XIV of the GATS is not simply a matter of changing a statutory time period (a task for which the Arbitrator in *Canada – Patent Term* granted 10 months). This dispute is more like the hypothetical case envisioned by the *Canada – Patent Term* Arbitrator: the recommendations and rulings adopted by the DSB require clarification that there is no discrimination between imported and domestic services with respect to certain forms of gambling on horse racing. Given the multifaceted nature of the obligation in the chapeau of Article XIV, this can be done in several ways. This leaves ample scope for "legislative discretion or legislative choices" that was lacking in *Canada – Patent Term.*

13. A legislative clarification will be further complicated by the fact that, starting in the 105th Congress (1997-98), and continuing in each subsequent Congress through the 108th Congress (2003-04), U.S. federal lawmakers have considered a wide range of proposals to address Internet gambling.[9] Members of Congress are actively considering introduction of Internet gambling bills

[8] *Canada – Patent Term*, paras. 55-56 (emphasis added).

[9] In the 105th Congress, the Senate approved an Internet gambling provision as part of the 1998 Commerce-Justice-State appropriations bill, but it did not survive in conference. The following year, the Senate passed the Internet Gambling Prohibition Act of 1999 (S. 692). A House member introduced H.R. 3125, a similar bill with the same name, but it failed to secure the necessary vote on the House floor. Other proposals at that time sought to limit use of financial instruments (H.R. 4419) or amend the Wire Act (H.R. 5020) in relation to Internet gambling. In the 107th Congress, the House Judiciary Committee approved a bill that would have amended the Wire Act and restricted use of credit cards in connection with Internet gambling (H.R. 3215), while House and Senate committees endorsed other bills relating to use of credit cards (H.R. 556, S. 718). Other proposals relating to use of credit cards and/or amendment of the Wire Act included H.R. 2579 and S. 3006. The House passed a modified version of H.R. 556 that included some amendments to the Wire Act. This proposal from the 107th Congress was essentially reintroduced in the 108th Congress as H.R. 21 in the House and S. 627 in the Senate. The House passed H.R. 2143 (a more limited version of H.R. 21), but Senate did not pass an Internet gambling bill in the 108th

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in the current 109th Congress (2005-06), and will undoubtedly find it necessary to consider the need for compliance with the DSB's recommendations and rulings in the context of this continuing debate, and the variety of broader proposals already supported by different groups of legislators. The issue of how to achieve compliance with the DSB's recommendations and rulings is thus further complicated by its potential to affect, and be affected by, elements of an already complex legislative debate that has gone unresolved over the past four Congresses.

14. In this context, the task of selecting one among many legislative options can be expected to take longer than would be the case where the options are fewer, the WTO Agreement provision in question eliminates or restricts discretion, and there is no need to assess the impact of each option on a variety of other proposed legislative changes. Thus, while the process of considering and weighing various options has been ongoing ever since April 20, it is apparent that the enactment of legislation to implement the DSB's recommendations and rulings will require at least 15 months.

15. A period of 15 months for legislation is consistent with previous arbitration awards under Article 21.3(c) that have involved legislation. The first arbitration on the reasonable period of time required for a legislative measure implementing the DSB's recommendations and rulings was *Japan – Alcoholic Beverages*, in which Japan requested as much as 5 years to amend certain provisions of its liquor tax laws, and 23 months to amend others.[10] The arbitrator concluded that

[9] (...continued)
Congress. The 108th Congress also considered a related study commission bill, H.R. 1223.

[10] *Japan – Alcoholic Beverages*, para. 8.

the 15-month guideline was justified and that the EC and the United States had not demonstrated particular circumstances to justify a shorter time frame.[11]

16. Similarly, in the award issued in *EC – Bananas*,[12] the arbitrator gave the EC 15 months and one week to implement the DSB's rulings and recommendations. The EC requested a reasonable period of time of 15 months and one week because, according to the EC, amending the EC import regime for bananas was going to be a "difficult and complex task for a number of reasons,"[13] one reason being the controversy among domestic political constituencies over implementation. The United States and the other complaining parties proposed 9 months as the reasonable period of time, arguing that the EC's legislative process did not require 15 months and that domestic political considerations did not form part of the examination of the shortest period of time within which implementation could be accomplished.[14] The arbitrator concluded that the arguments of the complaining parties – that there were particular circumstances that justified ignoring the 15-month guideline – were not persuasive given the complexity of the implementation process as outlined by the EC.[15] Accordingly, the arbitrator awarded the EC 15 months and one week – focusing on the reasonable date by which the EC implementation process could be concluded, rather than on an arbitrary period of time.[16]

[11] *Id.,* para. 27. In that case, the EC argued for a reasonable period of time of 15 months (para. 25).
[12] *EC – Bananas*, para. 18.
[13] *Id*., para. 5.
[14] *Id.,* paras. 14-15.
[15] *Id*., para. 19.
[16] *Id*., paras. 19-20.

17. In *EC – Hormones*, the EC requested a total of 39 to 40 months, including 15 months for legislative action, to implement the recommendations and rulings of the DSB.[17] The United States and Canada proposed, based on their understanding of the EC's legislative procedures, that only 10 months were needed to implement complying legislation.[18] The arbitrator was not convinced by U.S. and Canadian arguments that the proposed legal form of implementation (and indeed the particular legislative option) could be accomplished in a shorter time frame than the EC's proposal of 15 months.[19] Likewise, in this case, it is not for the complaining party to determine what type of legislative option the United States should choose, and that a "less" complex option could be accomplished in less than the 15-month guideline.

18. In the section that follows, the United States describes its legislative process, and presents empirical information showing it is reasonable to provide for a reasonable period of time of 15 months.

2. The U.S. Legislative Process

19. Under the United States system of constitutional government, any changes to a federal statute must be enacted by the U.S. Congress, which sets its own procedures and timetable. The Executive branch of the U.S. Government has no control over these procedures and timetable. Securing the enactment of legislation in the U.S. Congress is a complex and lengthy process. Moreover, only a small fraction of the thousands of bills introduced in each Congress ever

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[17] *EC – Hormones*, paras. 5 and 12. The EC first requested 40 months, then changed that to 39 months to complete a risk assessment study. Likewise the EC had first proposed 2 years to implement its legislative measure. *Id.*, para. 13.

[18] *Id.,* paras. 15, 18, 19.

[19] *Id.*, para. 48; *see also* paras. 44-47.

become law. This indicates that the process of obtaining the votes necessary to enact legislation is difficult and time-consuming. Viewed in this light, the U.S. position that this process will take 15 months is reasonable. To provide less time would be unreasonable and would not facilitate a positive resolution of this dispute.

a. Procedures for the Introduction and Consideration of Legislation in the U.S. Congress

20. The power to legislate is vested in the United States Congress, which has two chambers, the House of Representatives and the Senate. Both chambers must approve all legislation in identical form, before it is sent to the President of the United States for signature or other action.[20] Only after presidential approval does proposed legislation become law.[21] Proposed legislation that will become public law usually takes the form of a "bill." From the time that a bill is introduced in Congress to the time that it is approved by both chambers, it will have passed through at least ten steps.[22] Most bills that are introduced do not survive this process to become law, and those that do are likely to have been significantly amended along the way. What follows is an abbreviated discussion of the steps involved in enacting legislation in the U.S. Congress.

21. The first step in the legislative process is for a bill to be introduced in the House of Representatives ("the House") or the Senate by a member of Congress. When the Executive branch seeks to initiate legislation, it may transmit proposed draft legislation to the Speaker of

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[20] *See The Constitution of the United States*, Article I, Section 1 and Section 7 (Exhibit US-2); *How Our Laws are Made*, Charles W. Johnson, 2000 at 42 (Exhibit US-3).

[21] *Id*.

[22] The flowchart at Exhibit US-4 presents a general overview of the process.

the House of Representatives or the President of the Senate. The draft legislation will then typically be introduced in either its original or revised version by the chairman of the committee or ranking member of the committee with subject matter jurisdiction over the bill. Alternatively, the Executive branch may request that an individual member or members introduce proposed legislation.

22. After introduction, as a general rule, bills are referred to a standing committee or committees having jurisdiction over the subject matter of the bills.[23] These committees may also refer the proposed legislation to various subcommittees.[24] In the House, a bill may be referred to a number of committees,[25] while in the Senate a bill is more commonly referred to the committee with primary subject matter jurisdiction and then may be sequentially referred to other committees.[26]

23. Committee action is the key to the life of a proposed bill, since most bills "die" in committee, as a result of inaction. For those bills that survive, this is where the most intense consideration of their merits is given. Most bills are referred by the committee with jurisdiction to a subcommittee for consideration. Normally, the subcommittee schedules public hearings to hear from proponents and opponents of a bill, including government agencies, experts, interested

[23] There are 20 committees in the House and 17 in the Senate (*see* Exhibit US-5). These committees process and manage the thousands of bills that are introduced in each Congress every two years. Committees are chaired by a member of the majority political party in the relevant chamber. There is also a "ranking minority member," a member of the other political party, who leads the minority party members on a committee.

[24] There are approximately 200 subcommittees.

[25] This description, in the interest of economy, assumes that, like most bills, draft legislation would originate in the House and then move to the Senate to receive separate consideration.

[26] Johnson, at 5 (Exhibit US-3).

organizations and individuals.[27] Testimony is generally based on a written statement that will later be included in a committee report. There is no specified time frame for committee consideration, although the Speaker of the House will generally place time limits on a second committee's consideration of a bill at his or her discretion.[28]

24. The next step in the process is the "mark-up". When the hearings are completed, the subcommittee usually meets to "mark-up" the bill – make changes and amendments prior to deciding whether to recommend (or "report") the bill to the full committee. The subcommittee may also suggest that a bill be postponed indefinitely (or "tabled").[29] The House has a complicated "germaneness" rule which, in principle, requires that an amendment relate to the subject matter under consideration, have a fundamental purpose germane to that of the bill, and be within the jurisdiction of the committee considering the bill.[30] Nevertheless, once these basic factors are met, bills or amendments to bills can move together even if they have little else in common. In essence, a bill can become a magnet for amendments in committee, slowing down a bill's progress.

25. After receiving the subcommittee's report (recommendation), the full committee may conduct further study and hearings. There will again be a markup process. The full committee then votes whether to report the bill, either as originally introduced without amendment, or as

[27] *Id.,* at 12.
[28] *Id.,* at 10.
[29] *Id.,* at 13.
[30] *Congressional Deskbook 2000*, Michael L. Koempel and Judy Schneider, The Capitol.Net Inc. at 263 (Exhibit US-6).

revised, to the full House.[31] Once again, the bill may be tabled, or no action may be taken on it. If the full committee votes to report a bill to the House, a committee report is written by the committee's staff. The report supports the committee's recommendation and is generally a section-by-section analysis that describes the scope and purpose of the bill, its impact on existing laws and programs, the position of the executive branch, and amendments made by the committee.[32] Committee reports also include dissenting views and can be supplemented by any committee member. An approved bill is "reported back" to the house.

26. The timing of consideration of legislation on the House floor is determined as a general rule by the Speaker of the House and the majority leader (*i.e.*, the leader of the political party with the majority of seats in the House), 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. The Rules Committee recommends a rule which takes the form of a House resolution which is debated and voted on before the House considers the bill on its merits.[33] During the debate process, there is opportunity for members of Congress to offer further amendments.[34] After voting on amendments, the House immediately votes on the bill itself with any adopted amendments.[35] 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.

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[31] *Id.*, at 14. A "clean bill" receives a bill number.
[32] *Id.*
[33] Johnson, at 19 (Exhibit US-3).
[34] *Id.*, at 25.
[35] *Id.*

27. The Senate, following its own legislative process and consideration, may approve the bill as received, reject it, ignore it or change it. 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, and scheduling and floor consideration is generally decided by consensus.[36] Unlike the House, where debate time is strictly controlled, in the Senate debate is rarely restricted. The Senate does not have a Rules Committee to govern floor consideration. Rather, there are complex rules mandating unanimous consent for Senate floor consideration.[37] In addition, because of the privileges accorded to Senators, an individual Senator may "filibuster" (hold the floor and speak for a very long period of time),[38] or place a "hold" on legislation which can prevent it from being considered.[39] Filibusters can only be ended by a "cloture" procedure, a rule that requires the vote of sixty senators, which is very difficult to achieve. The other major difference between the House and the Senate is that an amendment in the Senate generally does not have to be "germane," i.e., relevant to the bill to which it is attached.[40]

28. Most bills are unlikely to be passed by the Senate exactly as referred by the House. The Senate may amend a bill or pass its own similar legislation. Therefore, a conference committee is organized to reconcile differences between the House and Senate versions. Conference

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[36] *Congressional Deskbook 2000* at 267 (Exhibit US-6).

[37] *Id.*

[38] *Id.*, at 274-279. *See also Congress and its Members,* Roger H. Davidson and Walter J. Oleszek, CQ Press (1997) at 251-255 (Exhibit US-7).

[39] *Congressional Deskbook* at 274-279 (Exhibit US-6); Davidson and Oleszek at 249-254 (Exhibit US-7).

[40] Johnson at 34 (Exhibit US-3); Davidson and Oleszek at 251 (Exhibit US-7); *Congressional Deskbook* at 280. Amendments that are not germane are often called "riders."

committee members are appointed by each Chamber and given specific instructions, which may be revised every 21 days.[41] If the conference committee cannot reach agreement, the bill dies. If the conference committee reaches agreement on a single bill, a conference report is prepared describing the committee members' rationale for changes.[42] The conference report must be approved by both chambers, in identical form, or the revised legislation dies. After the bill proposed by the conference committee is approved by both chambers, it can be sent to the President for approval.[43]

b. The Timetable for Consideration of Legislation in the U.S. Congress

29. The other central factor that determines when a bill becomes law is the Congressional schedule. The Constitution mandates only that Congress meet "at least once in every year"[44] and that it convene on January 3d, unless another date is chosen.[45] A Congress lasts two years, and meets in two sessions of one year each, beginning in January. The United States currently is in the first session of the 109th Congress.

30. The current target adjournment date for the first session of the 109th Congress is September 30, 2005.[46] In practice, the actual adjournment date varies, largely depending on whether it is an election year. In an election year, Congress may adjourn in October (though it may then also reconvene for a "lame duck" session after the November election), but in a

[41] Johnson at 36 (Exhibit US-3). House conferees are usually supporters of the House legislation, and members of the committee with jurisdiction over the bill. Senate conferees may be from either party and are chosen by unanimous consent.

[42] *See generally* Johnson at 35-40 (Exhibit US-3) and *The Legislative Process*, C-Span.org (Exhibit US-8).

[43] *See generally* Johnson at 41-42 (Exhibit US-3) and *The Legislative Process*, C-Span.org (Exhibit US-8).

[44] *U.S. Constitution*, Article I, Section 4 (capitalization omitted) (Exhibit US-2).

[45] *U.S. Constitution*, 20th Amendment (Exhibit US-2).

[46] *See* House Schedule (2005), United States Senate Tentative Schedule (2005) (Exhibit US-9).

non-election year it is typical for Congress to adjourn in November or December.[47] Moreover, Congress is not usually continuously "at work" during a session. Because of intricate schedules and calendars, as well as recesses, Congress is often only present and in session 3 days a week, 3 weeks per month and is in recess for the month of August.[48] Accordingly, the earliest date a bill can be introduced is January and if it is not acted upon before adjournment, it will die at the end of the Congress.

31. The length of time required for a bill to move through this complex process is a result not only of the numerous stages in the process and the lack of well-defined timetables for these stages, but also of the large volume of legislation that is proposed by members. Moreover, at almost every step of the process, especially in the Senate, members have the ability to control the progress – or seek additional time for consideration – of even non-complex legislation.

32. Most bills that do become law are not acted on until the last weeks or months of the legislative session. Also important, however, is whether a bill is introduced in the first or second session of a Congress. If a bill is introduced in the first session of a Congress but is not passed by the end of that session, the legislation is carried over to the second session; *i.e.*, the process does not have to start from the beginning. Legislation not passed by the end of the second session of a Congress dies.

33. Thus, for purposes of enacting legislation to implement the DSB's recommendations and rulings in this dispute, the 109th Congress has the ability to "save" the work that it does during

[47] *See* Session Dates of Congress (Exhibit US-1). The current year – 2005 – is not an election year.
[48] *See Congressional Deskbook,* at 242-243 (Exhibit US-6).

2005 and complete it in 2006. It is not forced at the end of this first session to vote on insufficiently considered legislation.

34. Taking into account the complexity of the legislative task in question, the need to consider implementing legislation in a deliberate – rather than a rushed – manner, and the other matters that will be under consideration during the remainder of the first session of the 109th Congress (not least of which is the time-consuming matter of Senate consideration of a replacement for a retiring Associate Justice of the U.S. Supreme Court), it is the judgment of the United States that legislation implementing the recommendations and rulings of the DSB will not be completed in the first session of the current Congress, but instead will need to be carried over into the second session. While the United States recognizes that it would be unreasonable to request that the reasonable period of time extend to the end of that second session, it is not unreasonable to allow sufficient time in the second session to complete the legislative task.

35. In particular, much as the end of a Congressional session spurs legislative activity, the opportunity to pass legislation may be greater prior to a Congressional recess. Congress will break for its August Recess in late July, 2006, and this would be an appropriate point at which to conclude the reasonable period of time.

III. CONCLUSION

36. In summary, U.S. authorities will seek to implement the recommendations and rulings of the DSB by further clarifying the relationship between the IHA and preexisting federal criminal law. U.S. authorities intend to seek further clarification through legislation. The United States' reasonable and realistic estimate is that it will take no less than 15 months to enact such legislation.

37. Therefore, the United States requests that the arbitrator determine that 15 months is a reasonable period of time in which to implement the DSB's recommendations and rulings under Article 21.3 of the DSU.

Table of Exhibits