

**ARGENTINA - MEASURES AFFECTING THE EXPORT OF  
BOVINE HIDES AND THE IMPORT OF FINISHED  
LEATHER**

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

Award of the Arbitrator  
Florentino P. Feliciano  
WT/DS155/10

*Circulated to Members on 31 August 2001*

**I. INTRODUCTION**

1. On 16 February 2001, the Dispute Settlement Body (the "DSB") adopted the Panel Report<sup>1</sup> in *Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* ("*Argentina - Hides and Leather*").<sup>2</sup> At the DSB meeting of 12 March 2001, Argentina informed the DSB, pursuant to Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that it would implement the recommendations and rulings of the DSB in this dispute and that it would require a "reasonable period of time" to do so, under the terms of Article 21.3 of the DSU.

2. In view of its inability to reach an agreement with Argentina on the period of time reasonably required for implementation of those recommendations and rulings, the European Communities requested that such period be determined by binding arbitration pursuant to Article 21.3(c) of the DSU.<sup>3</sup>

3. By joint letter of 12 June 2001, Argentina and the European Communities notified the DSB that they had agreed that the duration of the "reasonable period of time" for implementation should be determined through binding arbitration, under the terms of Article 21.3(c) of the DSU, and that I should act as Arbitrator.<sup>4</sup> The parties also indicated in that letter that they had agreed to extend the time-period for the arbitration, which shall be completed no later than 90 days after the date of the appointment of the arbitrator.<sup>5</sup> Notwithstanding this exten-

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<sup>1</sup> WT/DS155/R, WT/DS155/R/Corr.1.

<sup>2</sup> WT/DS155/5.

<sup>3</sup> WT/DS155/6.

<sup>4</sup> WT/DS155/8.

<sup>5</sup> *Ibid.*

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sion of the time-period, the parties stated that the arbitration award would be deemed to be an award made under Article 21.3(c) of the DSU. My acceptance of this designation as Arbitrator was conveyed to the parties by letter of 12 June 2001.

4. Written submissions were received from Argentina and the European Communities on 3 July 2001, and an oral hearing was held on 18 July 2001.

## II. ARGUMENTS OF THE PARTIES

### A. Argentina

5. Argentina requests the arbitrator to fix the "reasonable period of time" at forty-six months and fifteen days, so that that period of time will expire on 31 December 2004.

6. Argentina submits that the text of Article 21.3(c) of the DSU makes it clear that the 15-month period provided as a guideline is merely indicative. Article 21.3(c) speaks of the possibility of fixing a period of longer than 15 months for the implementation of the recommendations and rulings of the DSB. According to Argentina, the circumstances in this particular dispute warrant the granting of a period longer than 15 months for the implementation of the DSB recommendations and rulings.

7. Since 1992, Argentina has been working on a programme to combat tax evasion and reform its tax system. The cornerstone of this programme is the system of *percepciones* and *retenciones* applied to the *Impuesto al Valor Agregado* (the "IVA") and the *Impuesto de Ganancias* (the "IG"). This programme ties in, both economically and legally, with the objective of reducing the fiscal deficit. The programme has been explicitly backed by various international financial agencies, in particular, the International Monetary Fund (the "IMF"). The agreements concluded with the IMF set out a number of quantitative targets, notably for the levels of fiscal deficit, primary spending and public debt, that are monitored on a quarterly basis throughout the period covered by the programme. Failure of Argentina to achieve these targets would preclude disbursement of the funds otherwise available under the agreements.

8. Argentina stresses that its fiscal position has seriously deteriorated over the past years, essentially as a result of the fall in tax revenue brought about by the economic recession that began in the third quarter of 1998 in the wake of the 1997 "Asian crisis". In this context of economic recession, Argentina sought to reduce the deficit by increasing taxes, and reducing primary spending. These efforts must continue this year and over the next few years.

9. Under these circumstances, Argentina argues that legal and fiscal difficulties would result from eliminating the extra financial burden imposed on importers as a result of the advances on the IVA and IG at rates higher than those applied to domestic transactions, through a "downward equalization" of the rates applied to imports.

10. Argentina, at the same time, contends that although in theory it would be possible to comply with the findings of the Panel through an "upward equalization" of the rates of the said payments on account, that is, by increasing the rates for domestic transactions, the effects of such a measure on Argentina's current situation, when the country is trying to recover from recession, would make the measures politically and economically unfeasible. Similarly, the introduction of a system of refunding interests to importers, would involve setting up a very complex administrative mechanism to ensure accurate calculation of interest due. Moreover, it would open the door to complaints from the relevant domestic sectors, complicating further the fiscal situation.

11. Argentina submits that the structure of its tax system justifies the requested time-limit. Under Argentina law, there is a set of regulations governing the conditions and time-limits for action by the national authorities in the domestic sphere. In the external sphere, there is a set of payment obligations and commitments assumed by Argentina that can only be honoured by strict compliance with the laws in force: the National Budget Law No. 25,401 of 12 December 2000 and the Fiscal Solvency Law No. 25,152 of 15 September 1999.

12. Argentina describes the process by which its annual budget is enacted as follows. In September of each year, the Executive submits to the Congress of the Nation its draft budget for the following financial year, containing estimated income and expenditure authorizations. First, it is examined by the Budget and Finance Committee of the Chamber of Deputies. Once that Committee has issued its opinion, the draft budget is examined by the Chamber, and upon approval by the Chamber of Deputies, it is passed on to the Budget and Finance Committee of the Senate before final transmission to the Senate. When it has been approved by both Chambers, it is promulgated by the Executive, which has partial veto authority. Once this process has been completed, the National Budget becomes a Law of the Nation, and can be amended only by another national law.

13. The text of the law is accompanied, *inter alia*, by a number of annexed tables providing a breakdown of the budgetary information (income, expenditure, financing, etc.) according to the organization of the national administration and its decentralized bodies. The tax revenue forecast is broken down according to the different taxes (IG, IVA, Personal Property Tax, etc.) and set out in detail in the Executive's annual letter of submission to the National Congress.

14. The projected amounts are then incorporated in the final estimate of income that is ultimately approved by Congress. The specification of these amounts, once they are included in the budget, forms part of the Law and make up the estimate of income for the entire financial year; in other words, they can only be amended by another law, since any change would involve a consequential change in the expenditure/income equation and the deficit level already approved.

15. Argentina further explains that, at the same time, the tax system is tied to the Law on Fiscal Solvency which provides, *inter alia*, for the progressive reduction of the national public deficit with a view to balancing the budget by 2005.

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This Law establishes target deficit levels for each year, and any change in the deficit levels indicated would also require a legislative amendment. Because of the relationship between the Law on Fiscal Solvency and the Budget Law, estimated income and expenditure will have to be adjusted in order to reduce the deficit to attain the target prescribed. The procedure will have to be applied by law in each of the succeeding financial years until the process is completed in 2005.

16. The Law on Fiscal Solvency also lays down the obligation to include in the letter of submission of the annual budget a multi-year budget covering at least three years. In other words, the Executive must submit to the Congress, together with the budget for the coming year, a multi-year projection containing estimates of income on the basis of existing tax rates which means calculating the advances in the form of *retenciones* and *percepciones* needed in order to meet the objectives of the Law on Fiscal Solvency for 31 December 2004.

17. As a result, in the view of Argentina, it is not possible to amend the budget currently in force without altering its deficit target as well as the deficit target of the Law on Fiscal Solvency. Nor is it possible, in the current situation, to alter the system of customs levies. That system is not only linked to imports, but is also part of a comprehensive scheme to combat tax evasion which includes levies on purchases in the domestic market and the *retenciones* regime. The system makes it possible to maintain better monitoring of the obligations of taxpayers while providing them with adequate incentives to declare and regularize their operations.

18. Argentina believes that a single and immediate modification of this regime involving a reduction of the rates of levies on imports would clash with the objective of the Law on Fiscal Solvency, since it would involve a significant loss in tax revenue. Moreover, the agreement in force with the IMF provides for reduction in the deficit over the next few years in line with the Law on Fiscal Solvency. This agreement is binding on the Argentine Government, is currently in force, and specifically takes up the deficit reduction commitments contained in the Law on Fiscal Solvency. Any amendment to the IMF agreement would require renegotiation, and the fiscal targets are determined in compliance with the Law on Fiscal Solvency.

19. The Argentine public debt structure includes commitments for short, medium and long-term interest and capital payments. Argentina undertook a major debt equity swap in order to ease the burden imposed by the sequence of debt maturities. Having conducted this swap, it is particularly important in view of the rescheduling of maturities, involving a considerable medium-term fiscal cost, to ensure solvency during the stage covered by the Law on Fiscal Solvency extending up to 2005.

20. Argentina submits that Article 21.2 of the DSU, which speaks of "interests" of developing countries, ties in with the general provisions of Article 21.3(c). The "particular circumstances" of Argentina in this case are a combination of legal obligations that can only be amended through an act of the National

Congress, as in the case of the Budget Law and the Law on Fiscal Solvency, and of international obligations such as the IMF commitments.

21. Argentina recalls that according to past arbitral awards, Article 21.2 of the DSU "... enjoins, *inter alia*, an arbitrator [...] to be generally mindful of the great difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and rulings of the DSB."<sup>6</sup> In the present case, Argentina's economic interests as a developing country and its fiscal solvency are at stake. This is clearly reflected in the capital debt maturity schedule throughout the period requested as a reasonable period of time (up to 2005). Likewise, owing to the size of the debt involved, and in particular to the impact of any failure to comply with the IMF Agreement, Argentina would have great difficulty financing an increase in its budget deficit.

22. Argentina maintains that the impact of any change in the rates would be significant. The *retenciones* and *percepciones* are a fundamental element in maintaining an adequate tax collection level. Through this mechanism, \$1,600 million were collected in 2000, i.e. more than 18 per cent of the total taxes collected in connection with foreign trade. During the same year, IVA and IG collected at customs accounted for more than 7 per cent and 6 per cent respectively of the total amount collected for each tax. To cushion the impact of this loss of revenue, a procedure involving progressive equalization sector by sector is necessary. Argentina's "interest" as a developing country, therefore, consists in avoiding an abrupt implementation without a transition period, in the space of a single financial year, that would jeopardize the objective of reducing the deficit.

23. Against the foregoing background, Argentina, requests that consideration be given to its "interest" in being granted a period of time that would enable it to implement the recommendations and rulings of the DSB in this dispute "progressively", (i.e., by instalments, as it were) over a period of three financial years beginning in 2002 and ending on 31 December 2004.

#### B. The European Communities

24. The European Communities notes that the measures in dispute are contained in a series of *Resoluciones Generales* issued by the *Dirección General Impositiva* (the "DGI"). In 1997 the DGI was merged with the *Dirección General de Aduanas* in order to create the *Administración Federal de Ingresos Públicos* (the "AFIP"). The AFIP is an "autarchic entity", which operates autonomously, under the general supervision and control of the Minister of Economy. The Chief of the AFIP is empowered to issue new *Resoluciones Generales* and to amend existing ones.

<sup>6</sup> Award of the Arbitrator under Article 21.3(c) of the DSU, *Chile - Taxes on Alcoholic Beverages* ("*Chile - Alcoholic Beverages*"), WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V, 2583, para 45.

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25. The European Communities submits that in order to comply with the recommendations and rulings of the DSB, Argentina must take one of the following actions: equalize the rates applied to imports and to internal sales (including the zero rates); and/or provide for the refund to the importers of the additional costs imposed by the higher rates on imports, or establish a similar compensation system. The above actions will require, respectively, amending the existing *Resoluciones Generales* or adopting new ones.

26. The European Communities observes that the adoption or amendment of a *Resolución General* of the AFIP does not have to follow any pre-determined procedural steps, other than the prior consultation (*intervención*) of two administrative units of the AFIP. Nor are they subject to any deadlines, whether mandatory or voluntary. The *Resoluciones Generales* can be enacted or amended within a short time frame and, in practice, are issued very frequently.

27. The latest amendment of *Resolución General* No. 3431/91 is contained in *Resolución General* No. 1021/2001 of 7 June 2001, which lowers the rate of the advance IVA on imports of capital goods to 5 per cent. The reduction of the IVA rate on capital goods was decided for general reasons of economic policy. Nevertheless, according to the European Communities, the ensuing reduction of the advance IVA rate on imports of those products has had the incidental effect of partially removing one of the GATT inconsistent aspects of the measures in dispute. This shows that it is practicable for the AFIP to take the type of measures that would be required for complying with the other DSB's recommendations within an equally short time frame.

28. Article 21.1 of the DSU states the general principle that "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". This obligation is elaborated in Article 21.3 of the DSU, where it is stipulated that "[i]f it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so". Accordingly, Members should aim to comply "immediately" with the recommendations and rulings of the DSB. Only if it is "impracticable" to do so, is the Member concerned entitled to a "reasonable period of time" for implementation.

29. The European Communities submits that the 15-month period mentioned in Article 21.3(c) of the DSU is a "guideline" for the arbitrator, and not an average, or usual period. As stated in *Australia - Measures Affecting the Importation of Salmon* ("*Australia - Salmon*"), it "does not mean, however, that the Arbitrator is obliged to grant 15 months in all cases."<sup>7</sup> According to the award in *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities - Hormones*"), the "reasonable period of time" should be "the shortest period possible within the legal system of the Member to implement the recommenda-

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<sup>7</sup> Award of the Arbitrator under Article 21.3(c) of the DSU, WT/DS18/9, 23 February 1999, DSR 1999:I, 267, para. 30.

tions and rulings of the DSB".<sup>8</sup> Therefore, the "particular circumstances" mentioned in Article 21.3(c) of the DSU are those which can influence what the shortest period possible for implementation may be within the legal system of the implementing Member.

30. Referring to the award in *Canada - Patent Protection of Pharmaceutical Products* ("*Canada - Pharmaceutical Patents*"), the European Communities contends that such "particular circumstances" may include, for example: whether legislative or administrative measures are needed; the complexity of the measures to be adopted; and whether the procedural steps towards implementation, and their respective duration, are mandated by law or are discretionary.<sup>9</sup>

31. The European Communities maintains that the impact of the implementing measures on the domestic industry is not a relevant factor. As noted by the arbitrator in *Indonesia - Certain Measures Affecting the Automobile Industry* ("*Indonesia - Automobile Industry*"), "in virtually every case in which a measure has been found to be inconsistent with a Member's obligations under the GATT 1994 or any other covered agreement, and therefore must be brought into conformity with that agreement, some degree of adjustment by the domestic industry of the Member concerned will be necessary [...] Structural adjustment to the withdrawal or the modification of an inconsistent measure, therefore, is not a 'particular circumstance' that can be taken into account in determining the reasonable period of time under Article 21.3(c)".<sup>10</sup>

32. Similarly, the mere fact that the required implementing measures may be controversial and likely to raise opposition domestically is also not a relevant factor. As the arbitrator in *Canada - Pharmaceutical Patents* noted, there is nothing in Article 21.3(c) to indicate that the supposed domestic contentiousness of a measure taken to comply with a WTO ruling should in any way be a factor to be considered in determining a 'reasonable period of time' for implementation.<sup>11</sup>

33. The European Communities argues that though in accordance with Article 21.2 of the DSU, when assessing the "reasonable period of time" the arbitrator must take into account the "interests" of Argentina as a developing country, this does not mean that the arbitrator must take into account "circumstances" which are "qualitatively different" from those that would be relevant for a developed country. Rather, the arbitrator must apply the same kind of criteria to developing as to developed countries, but bearing in mind the greater difficulties which might be encountered by Argentina as a developing country.

<sup>8</sup> Award of the Arbitrator under Article 21.3(c) of the DSU, WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833, para. 26.

<sup>9</sup> Award of the Arbitrator under Article 21.3(c) of the DSU, WT/DS114/13, 18 August 2000.

<sup>10</sup> Award of the Arbitrator under Article 21.3(c) of the DSU, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, DSR 1998:IX, 4029, para. 23.

<sup>11</sup> *Supra*, footnote 9.

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34. The European Communities submits that in this case, the implementation of the recommendations and rulings of the DSB does not require any legislative action, but merely administrative measures at the sub-ministerial level, namely the adoption or amendment of *Resoluciones Generales* of the AFIP. Previous practice shows that it is practicable to adopt or amend a *Resolución General* of the AFIP within a matter of months, if not weeks or even days.

35. The European Communities asserts that the "reasonable period of time" proposed in its submission has been generously estimated so as to take into account the "interests" of Argentina as a developing country. Were Argentina a developed country, the "reasonable period of time" would have to be much shorter in the light of the above considerations.

36. The European Communities, therefore, for its part, requests the arbitrator to rule that the reasonable period of time for Argentina to implement the recommendations and rulings of the DSB in this case is eight months from the date of adoption by the DSB of the Panel report.

### III. REASONABLE PERIOD OF TIME

37. My task in this arbitration is to determine the "reasonable period of time", as that term is used in Article 21.3 of the DSU, for the implementation of the recommendations and rulings of the DSB in *Argentina - Hides and Leather*.

38. The DSB, as already noted, adopted the Panel's recommendation in *Argentina - Hides and Leather*. That recommendation was that Argentina should bring *Resolución* (ANA) No. 2235/96 and *Resoluciones Generales* (DGI) Nos. 3431/91 and 3543/92 into conformity with Argentina's obligations under Article X:3(a) of the General Agreement on Tariffs and Trade 1994 ("the GATT 1994"), and under Article III:2, first sentence, of the GATT 1994, respectively. At the DSB meeting of 12 March 2001, Argentina informed the DSB that it would require a "reasonable period of time" to implement the recommendations and rulings of the DSB, with respect to *Resoluciones Generales* (DGI) Nos. 3431/91 and 3543/92, and, at the same time, advised that it had already complied with the recommendations and rulings in respect of *Resolución* (ANA) No. 2235/96.<sup>12</sup> The request for arbitration by the European Communities, accordingly, did not include the measures already taken by Argentina to implement its obligations in respect of *Resolución* (ANA) No. 2235/96.<sup>13</sup>

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<sup>12</sup> Panel Report, para. 12.7.

<sup>13</sup> The European Communities has, however, stated that such exclusion did not mean an admission that the measures already taken by Argentina constituted "adequate implementation" of the DSB recommendations and rulings. The European Communities reserved their right to request recourse to panel proceedings under Article 21.5 of the DSU, should that become necessary. European Communities submission, para. 9.



39. Thus, the present arbitration relates only to the implementation of the DSB recommendations and rulings in respect of *Resoluciones Generales* Nos. 3431/91 and 3543/92.

40. It is useful to go back to basics and perhaps most basic of all considerations is the nature of the act(s) of compliance or implementation that a WTO Member like Argentina, which has engaged in dispute resolution proceedings, is obliged to carry out. Implementation, in essence, consists of bringing the measure held to be inconsistent with the obligations of the WTO Member concerned under particular provisions of a particular covered agreement, into conformity with those same provisions. Article 3.7 of the DSU stresses that "the *first objective* of the dispute settlement mechanism is usually to secure *withdrawal of the WTO-inconsistent measure*". (emphasis added) The DSU goes on to state that compensation may be resorted to only if "the immediate *withdrawal* of the measure is impracticable and then only as "a *temporary measure pending the withdrawal of the WTO-inconsistent measure*." (emphasis added) Suspension of concessions or other obligations under the covered agreements is explicitly designated as a "*last resort*" mode of compliance "subject to authorization by the DSB", but it too remains a "*temporary*" remedy allowed under Article 22.8 of the DSU only until the non-conforming measure is "*removed*" or a "*mutually satisfactory solution*" is achieved. Moreover, and at any rate, Article 22.1 of the DSU cautions that neither compensation nor suspension of concessions or other obligations is to be "preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements." Clearly, therefore, the non-conforming measure is to be brought into a state of conformity with specified treaty provisions either by *withdrawing* such measure completely, or by *modifying* it by excising or correcting the offending portion of the measure involved. Where the non-conforming measure is a statute, a repealing or amendatory statute is commonly needed. Where the measure involved is an administrative regulation, a new statute may or may not be necessary, but a repealing or amendatory regulation is commonly required.<sup>14</sup>

41. It thus appears that the concept of compliance or implementation prescribed in the DSU is a technical concept with a specific content: the withdrawal or modification of a measure, or part of a measure, the establishment or application of which by a Member of the WTO constituted the violation of a provision of a covered agreement. Compliance within the meaning of the DSU is distinguishable from the removal or modification of the underlying economic or social or other conditions the existence of which might well have caused or contributed to the enactment or application of the WTO-inconsistent governmental measure

<sup>14</sup> The non-conforming measure might also assume other forms: e.g., an executive or administrative practice actually carried out but not specifically mandated or authorized by statute or administrative regulation; or a "quasi-judicial" determination by an administrative body. Since the Argentine measures involved in this arbitration are not of these kinds, it is not necessary to examine the requirements of compliance where those other kinds of measures are concerned.

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in the first place. Those economic or other conditions might, in certain situations, survive the removal or modification of the non-conforming measure; nevertheless, the WTO Member concerned will have complied with the DSB recommendations and rulings and with its obligations under the relevant covered agreement. To my mind, it is *inter alia* for the above reason that the need for structural adjustment of the industry or industries in respect of which the WTO-inconsistent measure was promulgated and applied, has generally been regarded, in prior arbitrations under Article 21.3(c) of the DSU, as *not* bearing upon the determination of a "reasonable period of time" for implementation of DSB recommendations and rulings.<sup>15</sup>

42. In the present arbitration, some debate has been generated on the question whether compliance by Argentina with the DSB recommendations and rulings necessitate the enactment of a statute by the federal legislature of Argentina or whether a new *Resolución General* by the AFIP would be sufficient. The European Communities maintains that all that is needed is the adoption of a new *Resolución General* modifying the existing *Resoluciones Generales* (DGI) Nos. 3431/91 and 3543/92 (relating to the advance or withholding payments on IVA and IG on *imports*), or modifying the present *Resoluciones Generales* Nos. 3337/91, 18/97 and 2784/84 (relating to the advance or withholding payments on IVA and IG on *internal sales*). The new *Resolución General* could "equalize" the advance or withholding payment rates with respect to imports and with respect to internal sales, or provide for the refund to importers of the additional costs entailed by the higher rates on imports or for a similar "compensation" scheme. Whether the curative or remedial action adopted provides for "equalization" of rates or for a refund or "compensation" arrangement, the European Communities states that no new Argentine legislation is required.

43. The submissions of Argentina on this point are much more complex. Argentina seems to acknowledge that the *Resoluciones Generales* found to be WTO-inconsistent can be revoked or amended by another *Resolución General* that the AFIP is competent to issue, and that a new legislative enactment by the federal legislature is not, as a matter of public or administrative law, required for that specific purpose. At the oral hearing in this arbitration, Argentina confirmed this. At the same time, however, Argentina underscores its deep concern that so revoking or modifying the *Resoluciones Generales* here involved would set in motion a whole series of financial and fiscal *consequences* which would, in turn, require it to amend its National Budget Law No. 25,401 and its Fiscal Solvency Law, No. 25,152. The inter-relation of these two statutes is such, in the submission of Argentina, that any modification of estimated tax revenues would involve multi-year (at least three years) changes in the specific requirements of both stat-

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<sup>15</sup> Award of the Arbitrator under Article 21.3(c) of the DSU, *Indonesia - Automobile Industry*, WT/DS54/15, *supra*, footnote 10 para. 23; and Award of the Arbitrator under Article 21.3(c) of the DSU, *Canada - Pharmaceutical Patents*, *supra*, footnote 9 para. 52.