WORLD TRADE ORGANIZATION

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UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING (COOL) REQUIREMENTS

ARB-2012-1/26

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

Award of the Arbitrator
Giorgio Sacerdoti

CASES CITED IN THIS AWARD

Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Australia – Salmon (Article 21.3(c))	Award of the Arbitrator, *Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU*, WT/DS18/9, 23 February 1999, DSR 1999:I, 267
Brazil – Retreaded Tyres (Article 21.3(c))	Award of the Arbitrator, *Brazil – Measures Affecting Imports of Retreaded Tyres – Arbitration under Article 21.3(c) of the DSU*, WT/DS332/16, 29 August 2008, DSR 2008:XX, 8581
Canada – Autos (Article 21.3(c))	Award of the Arbitrator, *Canada – Certain Measures Affecting the Automotive Industry – Arbitration under Article 21.3(c) of the DSU*, WT/DS139/12, WT/DS142/12, 4 October 2000, DSR 2000:X, 5079
Canada – Patent Term (Article 21.3(c))	Award of the Arbitrator, *Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU*, WT/DS170/10, 28 February 2001, DSR 2001:V, 2031
Canada – Pharmaceutical Patents (Article 21.3(c))	Award of the Arbitrator, *Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS114/13, 18 August 2000, DSR 2002:I, 3
Chile – Alcoholic Beverages (Article 21.3(c))	Award of the Arbitrator, *Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V, 2583
Chile – Price Band System (Article 21.3(c))	Award of the Arbitrator, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS207/13, 17 March 2003, DSR 2003:III, 1237
Colombia – Ports of Entry (Article 21.3(c))	Award of the Arbitrator, *Colombia – Indicative Prices and Restrictions on Ports of Entry – Arbitration under Article 21.3(c) of the DSU*, WT/DS366/13, 2 October 2009, DSR 2009:IX, 3819
EC – Chicken Cuts (Article 21.3(c))	Award of the Arbitrator, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) of the DSU*, WT/DS269/13, WT/DS286/15, 20 February 2006
EC – Export Subsidies on Sugar (Article 21.3(c))	Award of the Arbitrator, *European Communities – Export Subsidies on Sugar – Arbitration under Article 21.3(c) of the DSU*, WT/DS265/33, WT/DS266/33, WT/DS283/14, 28 October 2005, DSR 2005:XXIII, 11581
EC – Hormones (Article 21.3(c))	Award of the Arbitrator, *EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU*, WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833
EC – Tariff Preferences (Article 21.3(c))	Award of the Arbitrator, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries – Arbitration under Article 21.3(c) of the DSU*, WT/DS246/14, 20 September 2004, DSR 2004:IX, 4313
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9

Short Title	Full Case Title and Citation
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Japan – DRAMs (Korea) (Article 21.3(c))	Award of the Arbitrator, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea – Arbitration under Article 21.3(c) of the DSU*, WT/DS336/16, 5 May 2008, DSR 2008:XX, 8553
Korea – Alcoholic Beverages (Article 21.3(c))	Award of the Arbitrator, *Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
US – 1916 Act (Article 21.3(c))	Award of the Arbitrator, *United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU*, WT/DS136/11, WT/DS162/14, 28 February 2001, DSR 2001:V, 2017
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012
US – COOL (Canada)	Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, adopted 23 July 2012
US – COOL (Mexico)	Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS386/AB/R, adopted 23 July 2012
US – COOL (Canada)	Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, adopted 23 July 2012, as modified by Appellate Body Report WT/DS384/AB/R
US – COOL (Mexico)	Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Report WT/DS386/AB/R
US – Gambling (Article 21.3(c))	Award of the Arbitrator, *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, 19 August 2005, DSR 2005:XXIII, 11639
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Hot-Rolled Steel (Article 21.3(c))	Award of the Arbitrator, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Arbitration under Article 21.3(c) of the DSU*, WT/DS184/13, 19 February 2002, DSR 2002:IV, 1389
US – Offset Act (Byrd Amendment) (Article 21.3(c))	Award of the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU*, WT/DS217/14, WT/DS234/22, 13 June 2003, DSR 2003:III, 1163
US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))	Award of the Arbitrator, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the DSU*, WT/DS268/12, 7 June 2005, DSR 2005:XXIII, 11619

Short Title	Full Case Title and Citation
US – Section 110(5) Copyright Act (Article 25)	Award of the Arbitrators, *United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under Article 25 of the DSU*, WT/DS160/ARB25/1, 9 November 2001, DSR 2001:II, 667
US – Stainless Steel (Mexico) (Article 21.3(c))	Award of the Arbitrator, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – Arbitration under Article 21.3(c) of the DSU*, WT/DS344/15, 31 October 2008, DSR 2008:XX, 8619
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3

ABBREVIATIONS CITED IN THIS AWARD

Abbreviation	**Description**
2002 Farm Bill	Farm Security and Rural Investment Act of 2002, Public Law No. 107-171, section 10816, 116 Stat. 134, 533-535 (Panel Exhibits CDA-1 and MEX-2)
2008 Farm Bill	Food, Conservation, and Energy Act of 2008, Public Law No. 110-234, section 11002, 122 Stat. 923, 1351-1354 (Panel Exhibits CDA-2 and MEX-3)
2012 Farm Bill	On 12 July 2012, the House Agricultural Committee approved HR 6083, the Federal Agriculture Reform and Risk Management Act of 2012, by a vote of 35-11 House Agricultural Committee, Press Release, "House Ag Committee Advances Farm Bill" (12 July 2012), available at: <http://agriculture.house.gov/press-release/house-ag-committee-advances-farm-bill> (Exhibit CDA-18)
2008 Interim Final Rule	Interim Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published in *United States Federal Register*, Vol. 73, No. 149 (1 August 2008) 45106 (Panel Exhibits CDA-3 and MEX-4)
2009 Final Rule	Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published in *United States Federal Register*, Vol. 74, No. 10 (15 January 2009) 2704-2707, codified as *United States Code of Federal Regulations*, Title 7, Part 65 – Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Macadamia Nuts, Pecans, Peanuts, and Ginseng (Panel Exhibits CDA-5 and MEX-7)
AMS	Agricultural Marketing Service
APA	Administrative Procedure Act, *United States Code*, Title 5, section 551 *et seq.* (Exhibits CDA-21 and MEX-1)
COOL	Country of origin labelling
COOL measure	COOL statute together with the 2009 Final Rule (AMS)
COOL statute	Agricultural Marketing Act of 1946, as amended by the 2002 Farm Bill and the 2008 Farm Bill
CRA	Congressional Review Act, *United States Code*, Title 5, section 801 *et seq.* (Exhibit US-4)
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*

Abbreviation	**Description**
GAO	General Accounting Office
GATT 1994	*General Agreement on Tariffs and Trade 1994*
House	House of Representatives
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
TBT Agreement	*Agreement on Technical Barriers to Trade*
USDA	US Department of Agriculture
URAA	Uruguay Round Agreements Act, Public Law No. 103-465, 108 Stat. 4809 (1994), *United States Code*, Title 19, section 3501 *et seq.* (Exhibit CDA-1)
WTO	World Trade Organization

TABLE OF EXHIBITS CITED IN THIS AWARD

Exhibit	**Description**
CDA-1	Uruguay Round Agreements Act, Public Law No. 103-465, 108 Stat. 4809 (1994), *United States Code*, Title 19, section 3501 *et seq.*
CDA-2	US Supreme Court, *Martin Stone v. Immigration and Naturalization Service*, 115 s.Ct. 1537, 514 U.S. 386 (1995)
CDA-3	US Court of Appeals, *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc. et al.*, 2d Cir. 2010, 596 F.3d 112
CDA-4	73 American Jurisprudence, 2nd edn, Statutes, section 245 *et seq.*
CDA-6	Statutes and Statutory Construction, section 31:2; 2 American Jurisprudence, 2nd edn, Administrative Law, section 225 (including reference to US Court of Appeals, *Caldera v. J.S. Alberici Const. Co., Inc.*, 153 F.3d 1381 (Fed. Cir. 1998), available at: <www.westlaw.com>)
CDA-8	John V. Sullivan, US House of Representatives, "How Our Laws Are Made" (revised and updated, 2007)
CDA-12	Food and Drug Administration Safety and Innovation Act, Public Law No. 112–144, 126 Stat. 993 (An Act to amend the Federal Food, Drug, and Cosmetic Act to revise and extend the user-fee programs for prescription drugs and medical devices, to establish userfee programs for generic drugs and biosimilars, and for other purposes)
CDA-13	Bill Summary & Status, 112th Congress (2011-1012), s. 3187
CDA-14	Temporary Surface Transportation Extension Act of 2012, Public Law No. 112-140, 126 Stat. 391 (2012)
CDA-15	Bill Summary & Status, 112th Congress (2011-1012), HR 6064
CDA-16	"Federal Agriculture Reform and Risk Management act of 2012", Report of the House Committee on Agriculture at the 112th Congress, H.R. Report 112-669 (2012), pp. 154 and 306
CDA-17	Bill Summary & Status, 112th Congress (2011-2012), s. 3240
CDA-18	House Agricultural Committee, Press Release, "House Ag Committee Advances Farm Bill" (12 July 2012), available at: <http://agriculture.house.gov/press-release/house-ag-committee-advances-farm-bill>
CDA-19	M. Asimow, "Interim-Final Rules: Making Haste Slowly" (1999) 51 *Administrative Law Review* 703
CDA-20	Curtis W. Copeland, "The Federal Rulemaking Process: An Overview", Congressional Research Service (2011)
CDA-21	Administrative Procedure Act, *United States Code*, Title 5, section 551 *et seq.*

Exhibit	Description
CDA-22	United States Government Accountability Office, "Federal Rulemaking: Past Reviews and Emerging Trends Suggest Issues that Merit Congressional Attention" (2005), available at: <http://www.gao.gov/assets/120/112501.pdf>
CDA-23	General Accounting Office, Report to Congressional Committees, "Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules", GAO/GGD-98-126, August 1998
CDA-25	Unfunded Mandates Reform Act of 1995, *United States Code*, Title 2, section 1501 *et seq.*
MEX-1	Administrative Procedure Act, *United States Code*, Title 5, section 551 *et seq.*
MEX-2	Executive Order 13563 of 18 January 2011, *United States Federal Register*, Vol. 76, No. 14, p. 3921, section 2(b)
MEX-3	US Government Accountability Office, Doc. GAO-06-228T (1 November 2005), Testimony, "Federal Rulemaking: Past Reviews and Emerging Trends Suggest Issues that Merit Congressional Attention", Statement of J. Christopher Mihm
MEX-4	Interim Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published in *United States Federal Register*, Vol. 73, No. 149 (1 August 2008) 45106, codified as *United States Code of Federal Regulations*, Title 7, Part 65
MEX-5	Office of Information and Regulatory Affairs, Economically Significant Executive Order Reviews between 1 January-31 December 2008, Interim Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Fish, Perishable Agricultural Commodities, and Peanuts, RIN. 0581-AC26
MEX-6	Office of Information and Regulatory Affairs, Economically Significant Executive Order Reviews between 1 January-31 December 2009, Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Fish, Perishable Agricultural Commodities, and Peanuts, RIN. 0581-AC26
MEX-7	Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published in *United States Federal Register*, Vol. 74, No. 10 (15 January 2009) 2568, codified as *United States Code of Federal Regulations*, Title 7, Parts 60 and 65
MEX-10	House Agricultural Committee, Press Release, "House Ag Committee Advances Farm Bill" (12 July 2012), available at: <http://agriculture.house.gov/press-release/house-ag-committee-advances-farm-bill>

Exhibit	Description
MEX-11	"Federal Agriculture Reform and Risk Management act of 2012", Report of the House Committee on Agriculture at the 112th Congress, H.R. Report 112-669 (2012), p. 154
MEX-12	US Court of Appeals, *Robert Charles and Lisa Jean Abell v. William R. Sothen et al., Internal Revenue Service*, 214 Fed. Appx. 743 (10th Cir. 2007)
MEX-13	US Supreme Court, *Sullivan, Secretary of Health and Human Services v. Zebley et al.*, 493 U.S. 521 (110 S. Ct. 885 1990)
MEX-14	Bill Summary & Status, 108th Congress (2003-2004), HR 4520
MEX-15	Bill Summary & Status, 111th Congress (2009-2010), HR 1
MEX-16	Bill Summary & Status, 111th Congress (2009-2010), HR 5623
MEX-17	Uruguay Round Agreements Act, HR Report 103-826, Part 1, 103rd Congress, 2nd Session
US-4	Congressional Review Act, *United States Code*, Title 5, section 801 *et seq.*
US-6	Regulatory Flexibility Act, *United States Code*, Title 5, sections 601-612
US-9	Small Business Regulatory Enforcement Fairness Act of 1996, Public Law No. 104-121, 110 Stat. 858 (1996), *United States Code*, Title 5, section 601
US-16	*The Constitution of the United States*, Article I, Sections 1 and 7
US-17	Charles W. Johnson, US House of Representatives, "How Our Laws Are Made" (revised and updated, 2000)
US-21	*The Legislative Process*, C-Span.org, available at: <http://congress.nw.dc.us/c-span/process.html>
US-22	US Court OF Appeals, the Connecticut Light and Power Company, et al. v. Nuclear Regulatory Commission, No. 81-1050, 673 F.2d 525 (DC Cir. F1982)
US-25	House Legislative Calendar, 112th Congress, 2nd Session
US-27	Executive Order 12866 of 30 September 1993, *United States Federal Register*, Vol. 58, No. 190
Panel Exhibit CDA-3	Interim Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published in *United States Federal Register*, Vol. 73, No. 149 (1 August 2008) 45106, codified as *United States Code of Federal Regulations*, Title 7, Part 65

Exhibit	Description
Panel Exhibit CDA-5	Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published in *United States Federal Register*, Vol. 74, No. 10 (15 January 2009) 2658, codified as *United States Code of Federal Regulations*, Title 7, Parts 60 and 65
Panel Exhibit MEX-4	Interim Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published in *United States Federal Register*, Vol. 73, No. 149 (1 August 2008) 45106, codified as *United States Code of Federal Regulations*, Title 7, Part 65
Panel Exhibit MEX-7	Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published in *United States Federal Register*, Vol. 74, No. 10 (15 January 2009) 2658, codified as *United States Code of Federal Regulations*, Title 7, Parts 60 and 65

WORLD TRADE ORGANIZATION
AWARD OF THE ARBITRATOR

United States – Certain Country of Origin Labelling (COOL) Requirements

Parties:

Canada
Mexico
United States

ARB-2012-1/26

Arbitrator:

Giorgio Sacerdoti

I. Introduction

1. This arbitration under Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") concerns the "reasonable period of time" for the implementation of the recommendations and rulings of the Dispute Settlement Body (the "DSB") in the disputes *United States – Certain Country of Origin Labelling (COOL) Requirements*.[1] These disputes concern certain US country of origin labelling ("COOL") requirements for beef and pork when sold at the retail level.

2. On 23 July 2012, the DSB adopted the Appellate Body Reports[2] and the Panel Reports[3], as modified by the Appellate Body Reports, in *United States – Certain Country of Origin Labelling (COOL) Requirements*.[4] The Panel and Appellate Body Reports found the "COOL measure" (comprising the "COOL statute"[5] passed by the US Congress, and its implementing regulation, the "2009 Final Rule"[6] issued by the US Department of Agriculture (the "USDA")), particularly in regard to the muscle cut meat labels, to be inconsistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*") because it accords less favourable treatment to imported

[1]WT/DS384 and WT/DS386.
[2]WT/DS384/AB/R and WT/DS386/AB/R, issued on 29 June 2012.
[3]WT/DS384/R and WT/DS386/R.
[4]WT/DSB/M/320.
[5]Agricultural Marketing Act of 1946, as amended by the "2002 Farm Bill" and the "2008 Farm Bill" (60 Stat. 1087, *United States Code*, Title 7, section 1621 *et seq*., as amended). (See Appellate Body Reports, *US – COOL*, para. 1(a) and footnote 4 thereto)
[6]Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published in *United States Federal Register*, Vol. 74, No. 10 (15 January 2009) 2704-2707, codified as *United States Code of Federal Regulations*, Title 7, Part 65 – Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Macadamia Nuts, Pecans, Peanuts, and Ginseng (Panel Exhibits CDA-5 and MEX-7). In its reports, the Appellate Body referred to the regulations as the "2009 Final Rule (AMS)". (See Appellate Body Reports, *US – COOL*, para. 1(b) and footnote 6 thereto)

livestock than to like domestic livestock.[7] The Panel found the Vilsack letter[8] to be inconsistent with Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").[9] The Panel and the Appellate Body recommended that the DSB request the United States to bring its measures into conformity with its WTO obligations.

3. In a letter addressed to the Chairman of the DSB, dated 21 August 2012[10], and at the meeting of the DSB held on 31 August 2012[11], the United States signalled its intention to implement the recommendations and rulings of the DSB, and stated that it would require a reasonable period of time to do so.

4. On 13 September 2012, Canada and Mexico informed the DSB that consultations with the United States had not resulted in an agreement on the reasonable period of time for implementation. Canada and Mexico therefore requested that such period be determined through arbitration pursuant to Article 21.3(c) of the DSU. Since the two disputes were examined by the same panel and by the same Division of the Appellate Body, both Canada and Mexico asked that their requests pursuant to Article 21.3(c) of the DSU be dealt with by the same arbitrator in joint proceedings.

5. Canada, Mexico, and the United States were unable to agree on an arbitrator within 10 days of the matter being referred to arbitration. Consequently, by letters dated 26 September 2012, Canada and Mexico requested that the Director-General of the World Trade Organization (the "WTO") appoint an arbitrator pursuant to footnote 12 to Article 21.3(c) of the DSU. The Director-General appointed me as arbitrator on 4 October 2012, after consulting with the parties.[12] I informed the parties of my acceptance of the appointment by letter dated 5 October 2012 and undertook to issue the award no later than 4 December 2012.

6. By letters dated 31 October 2012 (Canada and Mexico) and 2 November 2012 (the United States), the parties agreed that this award will be deemed to be an arbitration award under

[7]Canada Panel Report, *US – COOL*, paras. 7.548 and 8.3(b) and Mexico Panel Report, *US – COOL*, paras. 7548 and 8.3(b); Appellate Body Reports, *US – COOL*, para. 496(a)(iv).

[8]A letter dated 20 February 2009 from the US Secretary of Agriculture, Thomas J. Vilsack, to "Industry Representative[s]". (See Appellate Body Reports, *US – COOL*, para. 1(c))

[9]Canada Panel Report, *US – COOL*, paras. 7.864 and 8.4(b); Mexico Panel Report, *US – COOL*, paras. 7.864 and 8.4(b). This finding was not appealed. According to the United States, the Vilsack letter was withdrawn on 5 April 2012, while the appellate proceedings in these disputes were ongoing. (United States' submission, footnote 2 to para. 3 (referring to Appellate Body Reports, *US – COOL*, footnote 228 to para. 141, see also Appellate Body Reports, *US – COOL*, para. 251)).

[10]WT/DS/384/19 and WT/DS/386/18.

[11]WT/DSB/M/321.

[12]WT/DS384/21 and WT/DS386/20.

Article 21.3(c) of the DSU, notwithstanding the expiry of the 90-day period stipulated in Article 21.3(c).[13]

7. The United States filed its written submission on 12 October 2012. Canada and Mexico each filed a written submission on 19 October 2012. An oral hearing was held on 1 November 2012.

II. Arguments of the Parties

A. *United States*

8. The United States contends that a change to the COOL measure could involve legislative action followed by regulatory action, or could involve only regulatory action.[14] The United States requests that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in these disputes to be no less than 18 months from the date of adoption by the DSB of the Panel and Appellate Body Reports. Such a period is, according to the United States, the minimum required to make a regulatory modification to the 2009 Final Rule. The United States also outlines in its submission the necessary steps to make legislative changes to the COOL statute, noting that such a process would take "substantially more time" than the 18 months requested.[15]

9. The United States notes that, as previous arbitrators have observed, the 15-month guideline in Article 21.3(c) of the DSU is not "a fixed maximum or outer limit for a reasonable period of time", nor is it "a floor or inner limit".[16] The United States further asserts that the word "reasonable" implies a "degree of flexibility", which entails consideration of all the circumstances of a particular case.[17] This, in turn, suggests that the reasonable period of time should be defined "on a case-by-case basis, in the light of the specific circumstances of each investigation".[18] The United States points to the following specific circumstances that have been identified in previous awards as relevant to the arbitrator's determination of the reasonable period of time: (i) the legal form of implementation;

[13]WT/DS384/22; WT/DS386/21; WT/DS384/23 and WT/DS386/22. The 90-day period following adoption of the Panel and Appellate Body Reports expired on 21 October 2012. By letters dated 31 October 2012, Canada and Mexico each confirmed their agreement that an award issued later than 90 days after the date of adoption of the recommendations and rulings by the DSB will be deemed to be an award of the arbitrator for purposes of Article 21.3(c) of the DSU. By letter dated 2 November 2012, the United States also confirmed that it will deem the award in these proceedings to be an award circulated pursuant to Article 21.3(c) of the DSU.

[14]United States' submission, para. 5.

[15]United States' submission, para. 7.

[16]United States' submission, para. 9 (quoting Award of the Arbitrator, *US – Hot-Rolled Steel (Article 21.3(c))*, para. 25).

[17]United States' submission, para. 9 (quoting Award of the Arbitrator, *US – Hot-Rolled Steel (Article 21.3(c))*, para. 25).

[18]United States' submission, para. 9 (quoting Award of the Arbitrator, *US – Hot-Rolled Steel (Article 21.3(c))*, para. 25).

(ii) the technical complexity of the measure that must be drafted, adopted, and implemented; and (iii) the period of time in which the implementing Member can achieve the proposed legal form of implementation in accordance with its system of government.[19] In addition, the United States notes that an implementing Member is not required to resort to extraordinary procedures in achieving implementation.[20]

10. At the oral hearing, the United States noted that it seeks to modify the COOL regulations in a manner that comports with its WTO obligations, while still providing consumers valuable information about the origin of beef and pork products, an objective that the Appellate Body agreed is legitimate.[21]

1. Regulatory Change

(a) Regulatory Process in the United States

11. The United States explains that, because the findings of inconsistency relate to a measure comprising a statute and its implementing regulations[22], it will "at a minimum" be necessary for the USDA to issue new regulations, either as a stand-alone measure or as a result of statutory modifications.[23] It notes, in this regard, that rulemaking in the United States "generally consists of at least six specific steps"[24], and that delays are possible at each of them. It also adds that, in some

[19]United States' submission, para. 10 (referring to Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, paras. 48-51).

[20]United States' submission, para. 10 (referring to Award of the Arbitrator, *US – Section 110(5) (Article 21.3(c))*, para. 45, in turn quoting Award of the Arbitrator, *Korea – Alcoholic Beverages (Article 21.3(c))*, para. 42)).

[21]United States' oral statement, referring to Appellate Body Reports, *US – COOL*, para. 453.

[22]The Panel and the Appellate Body examined the COOL statute and the 2009 Final Rule together as one "COOL measure", but the reports did not specify whether the United States was required to modify one or both of these instruments in order to come into compliance. (United States' submission, para. 3)

[23]United States' submission, para. 12.

[24]United States' submission, para. 14. According to the United States, the six steps are the following:

> (1) at least five months for the United States to determine how to modify the regulations and for the USDA to draft and internally clear the proposed rule and conduct the regulatory impact and other analyses required by U.S. law and described by the Appellate Body in its report;
> (2) up to 90 days for Office of Management and Budget ("OMB") review and for interagency clearance of the proposed rule;
> (3) publication of a proposed rule in the Federal Register, followed by a 60 day notice and comment period;
> (4) at least two months for USDA to review the comments, determine how to respond to them, and revise the proposed rule, taking into account the comments received;
> (5) up to 90 days for OMB review and interagency clearance of the final rule; and
> (6) publication.

(*Ibid*, para. 15)

circumstances, it might be necessary to include additional steps, such as where comments received during the rulemaking process merit changes that in turn require additional public input.[25]

12. The United States notes that any new regulations will be issued by the USDA pursuant to, *inter alia*, the Administrative Procedure Act[26] (the "APA") and Executive Order 12866[27], which together require agencies to undertake a "lengthy and multifaceted rulemaking process" in order to modify federal regulations.[28] According to the United States, taking into account the requirements of the APA and Executive Order 12866, and the particular complexities of compliance in this case, the "quickest time-frame" within which the United States would normally be able to complete all of the necessary steps to publish a modified final rule would be at least 12 months.[29] The United States further submits, that because the COOL measure is a technical regulation within the meaning of Annex 1.1 to the *TBT Agreement*, the United States would be required to provide at least six months between the publication of the modified regulation and its entry into force, according to Article 2.12 of the *TBT Agreement*, as clarified by the Appellate Body in *US – Clove Cigarettes*.[30] The 18-month timetable suggested by the United States is summarized below.

13. First, the United States contends that it will need at least *12 months* to complete the US regulatory process. It notes, in this regard, that, given the technical complexities of the COOL measure, it will require, at the outset, a period of at least five months to conduct discussions and review options, to build and organize the broad support necessary for modifications to the COOL regulations, and to prepare a draft rule for internal clearance.[31] In this respect, the United States stresses that past Article 21.3(c) arbitral awards, such as in *Canada – Autos* or *Canada – Pharmaceutical Patents*, have consistently recognized that the preparatory phase is essential for successful compliance.[32]

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[25]United States' submission, para. 14.

[26]*United States Code*, Title 5, section 551 *et seq*. (See Exhibits CDA-21 and MEX-1)

[27]Executive Order 12866 of 30 September 1993, *United States Federal Register*, Vol. 58, No. 190. (Exhibit US-27).

[28]United States' submission, para. 13.

[29]United States' submission, para. 15.

[30]United States' submission, paras. 13 and 15 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 288).

[31]United States' submission, para. 16.

[32]United States' submission, para. 17 (referring to Award of the Arbitrator, *Canada – Autos (Article 21.3(c))*, paras. 18, 49, 50, and 56; and Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, paras. 1, 14, and 62). The United States also referred to Award of the Arbitrator, *US – Hot-Rolled Steel (Article 21.3(c))*, para. 38; Award of the Arbitrator, *Chile – Alcoholic Beverages (Article 21.3(c))*, para. 43.

14. Following the necessary preparatory work, the United States would then begin the process of modifying the 2009 Final Rule, which is governed by the APA and Executive Order 12866, among others.[33] The APA outlines the basic requirements that agencies must respect when engaging in rulemaking. It provides for the publication of *proposed* rules in the Federal Register and affords the public at least 60 days to present comments on such rules.[34] According to the United States, the USDA would require at least two months to review those comments, determine how to respond to them, and revise the proposed rule in the light of the comments received.[35] The APA also requires the agency to publish the *final* rule in the Federal Register, providing for at least 30 days between its publication and entry into force.[36]

15. The United States explains that, Executive Order 12866 governs the process of internal governmental review of all regulations that have a significant economic impact, requiring that certain steps be taken with respect to these regulations. For instance, Executive Order 12866 requires agencies to conduct a detailed regulatory impact analysis with regard to significant rules, and to include this analysis in both the proposed and final rule.[37] It also requires agencies to submit regulatory actions to the Office of Management and Budget (the "OMB") for review, classification, and/or clearance prior to their publication in the Federal Register. The OMB has up to 90 calendar days to review each proposed rule. Once OMB and interagency clearance is obtained, the rule is submitted for publication in the Federal Register.[38]

16. The United States further notes that agencies must also conduct a number of regulatory analyses when promulgating economically significant rules.[39] Under the Regulatory Flexibility Act[40], for example, agencies contemplating rulemaking must evaluate the impact of a potential regulation on small entities. The statute requires agencies to prepare highly detailed analyses and to make them available for public comment.[41] The United States also stresses that economically significant rules are subject to Congressional review under the Congressional Review Act[42] (the "CRA"). Indeed, the CRA requires that agencies submit all final rules to each House of Congress and the Comptroller

[33]United States' submission, para. 18.
[34]United States' submission, para. 19. This time period gives interested parties the opportunity to participate in the rulemaking process by providing written data, views, or arguments. (*Ibid*.)
[35]United States' submission, para. 15(4).
[36]United States' submission, para. 19 (referring to APA, section 553(d)).
[37]United States' submission, para. 21.
[38]United States' submission, para. 22.
[39]The United States notes that the COOL regulations were classified as "economically significant" because they have an annual effect on the economy of $100 million or more. (United States' submission, footnote 28 to para. 23)
[40]*United States Code*, Title 5, sections 601-612 (Exhibit US-6).
[41]United States' submission, para. 23 (referring to Regulatory Flexibility Act (Exhibit US-6)).
[42]*United States Code*, Title 5, section 801 *et seq*. (Exhibit US-4).

General in the General Accounting Office (the "GAO") for review before such rules can take effect.[43] Moreover, any major rule[44] may not enter into effect until 60 calendar days after its publication in the Federal Register in order to allow Congress sufficient time to review and potentially invalidate a regulation.[45]

17. During the oral hearing, the United States rejected Canada's and Mexico's argument that the United States could exercise the "good cause" exception under the APA and bring a regulation into effect immediately using an interim final rule. First, the United States contended that arbitration awards should not be based on extraordinary procedures. Second, it noted that the good cause exception is only available where public procedures are impracticable, unnecessary, or contrary to public interest[46], circumstances not present in this case. The United States also pointed out that the 2008 Interim Final Rule[47] for COOL was issued using the good cause exception because the COOL statute established a specific effective date, which, absent any rulemaking, created significant uncertainty that market participants could have been subject to potential sanctions despite the fact that they had no way of knowing how to comply with the law.[48]

18. In addition, the United States recalls that the COOL measure was found to be a technical regulation within the meaning of Annex 1.1 to the *TBT Agreement* and, hence, subject to the requirements set forth in Article 2 of the *TBT Agreement*.[49] In this regard, it notes that Article 2 of the *TBT Agreement* prescribes a number of obligations, notably in paragraphs 9.1, 9.2, 9.3, and 9.4. These provisions require Members adopting technical regulations where international standards do not exist or in cases where a proposed regulation is not in accordance with the technical contents of relevant international standards to do the following[50]: (i) publish a notice of the proposed regulation at an early appropriate stage[51]; (ii) provide notification to other Members through the Secretariat of the products to be covered, together with a brief indication of its objective and rationale[52]; (iii) upon

[43]United States' submission, para. 24 (referring to CRA Exhibit US-4)).
[44]The United States submits that the COOL regulations are both "economically significant" and "major". (United States' submission, footnote 33 to para. 24)
[45]United States' submission, para. 24 (referring to CRA, section 801(a)(3)(A)(ii) (Exhibit US-4)).
[46]United States' oral statement, referring to APA, section 553(b).
[47]In its reports, the Appellate Body referred to the interim final rule as the "2008 Interim Final Rule (AMS)".
[48]The United States added that interim final rules are not used, generally speaking, for *significant* rulemaking, which raises important legal and policy issues, unless there is a statutory deadline.
[49]United States' submission, para. 25 (referring to Appellate Body Reports, *US – COOL*, para. 239 and footnote 371 thereto; and Panel Reports, *US – COOL*, para. 7.216).
[50]Article 2.9 of the *TBT Agreement* further specifies that these requirements apply "if the technical regulation may have a significant effect on trade of other Members". (See United States' submission, footnote 36 to para. 25)
[51]Article 2.9.1 of the *TBT Agreement.*
[52]Article 2.9.2 of the *TBT Agreement.*

request, provide copies of the proposed regulation to other Members and, whenever possible, identify the parts which in substance deviate from relevant international standards[53]; and (iv) without discrimination, provide the opportunity for interested Members to make comments in writing and discuss them on request, as well as to take these written comments and the results of the discussions into account.[54] These requirements, the United States submits, generally complement US domestic requirements and "will be followed in the development of any regulation".[55]

19. Second, the United States observes that Article 2.12 of the *TBT Agreement* provides that, "[e]xcept in those urgent circumstances referred to in paragraph 10[*], Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member".[56] In this regard, the United States recalls that, in *US – Clove Cigarettes*, the Appellate Body found that paragraph 5.2 of the Doha Ministerial Decision of 14 November 2001[57] "provides interpretative clarification of the concept of a 'reasonable interval' within the meaning of Article 2.12 by establishing a rule that producers in exporting Members require a period *of at least six months* to adapt their products or production methods to the requirements of the importing Member's technical regulation".[58] Thus, the United States contends that, consistent with the Appellate Body's finding in *US – Clove Cigarettes*, it will have to allow for an additional period of at least six months between the publication and notification of the modified COOL regulations and their entry into force.[59]

20. In the light of the above, the United States contends that the legal form of implementation will require a reasonable period of time of at least 18 months, which encompasses 12 months to complete the US regulatory process in accordance with US law and the obligations under Article 2.9 of the *TBT Agreement*, plus another six months due to the procedural requirement in Article 2.12 of the *TBT Agreement*.

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[53]Article 2.9.3 of the *TBT Agreement.*
[54]Article 2.9.4 of the *TBT Agreement.*
[55]United States' submission, para. 25.
[56]United States' submission, para. 27 and [*] original footnote 42, which reads:
> Article 2.10 of the *TBT Agreement* provides that "… where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 9 as it finds necessary…". None of these urgent circumstances are relevant in the context of making modifications to the COOL regulations".

[57]Doha Ministerial Decision on Implementation-Related Issues and Concerns, Decision of 14 November 2001, WT/MIN(01)/17, para. 5.2.
[58]United States' submission, para. 27 (quoting Appellate Body Report, *US – Clove Cigarettes*, para. 288). (emphasis added by the United States)
[59]United States' submission, para. 28.

(b) Technical Complexity of the Measure

21. The United States further submits that the technical complexity of the measure that will be taken to comply also supports a reasonable period of time of at least 18 months. In this regard, it first stresses that the COOL implementing regulations "alone are 49 pages long" and contain "detailed rules" regarding when, where, and how to label covered commodities, including certain exceptions and flexibilities affecting entities throughout the entire supply chain.[60] The 2009 Final Rule also includes record-keeping requirements, enforcement provisions, and a rigorous regulatory impact analysis that examines the impact of the rule on various market actors and on the US economy as a whole.[61]

22. Further, the United States recalls that the Appellate Body found the COOL measure to modify the conditions of competition to the detriment of imported livestock.[62] The Appellate Body then concluded that such a detrimental impact reflected discrimination, noting that "the informational requirements imposed on upstream producers under the COOL measure are disproportionate as compared to the level of information communicated to consumers through the mandatory retail levels".[63] In making this determination, the Appellate Body cited numerous aspects of the COOL measure, including: (i) the fact that labels do not precisely specify where the animals were born, raised, and slaughtered; (ii) the commingling provisions included in the 2009 Final Rule; (iii) the flexibility provided between Category B and Category C labels; (iv) the record-keeping requirements; (v) the exceptions for processed foods, restaurants, and small retailers; and (vi) the fact that Category D labels must list only the country of import.[64] In the United States' view, a determination of whether and how to modify each of these different aspects is necessary in order to draft a modified measure, but it will be "a very difficult task requiring a significant amount of analysis".[65] In addition, the United States maintains that it will need time to develop an approach that accounts for the Appellate Body's "novel" test, which suggests that the USDA will need to consider the overall "evenhandedness" of any new measure, including whether the information requirements are "proportional".[66]

[60]United States' submission, para. 29 (referring to 2009 Final Rule (Panel Exhibits CDA-5 and MEX-7)).
[61]United States' submission, para. 29.
[62]United States' submission, para. 31 (referring to Appellate Body Reports, *US – COOL*, para. 292).
[63]United States' submission, para. 31 (quoting Appellate Body Reports, *US – COOL*, para. 347).
[64]United States' submission, para. 31 (referring to Appellate Body Reports, *US – COOL*, paras. 242-244, 246, 260, 292, and 336-338).
[65]United States' submission, para. 32.
[66]United States' submission, para. 33.

(c) Additional Considerations

23. In the United States' view, additional considerations support the granting of a reasonable period of time of at least 18 months. First, the United States submits that the significant interest in country of origin labelling that has historically been expressed—by, for instance, Members of Congress, industry groups, and non-governmental organizations such as consumer advocacy groups—"cannot be overstated".[67] It notes, in this respect, that the COOL measure was enacted after a long and involved legislative and regulatory process, which "spanned more than 10 years from the time that Congress began considering the measure".[68] Second, the United States adds that, even in the absence of legislation, the Administration will need to consult with Congress, which has a formal review role under the CRA and the ability to invalidate regulations adopted by the Executive Branch.[69] Finally, the United States contends that the elections to be held on 6 November 2012 may also affect the time needed to comply.[70] With respect to these three considerations, the United States notes that, while the suggested 18-month timetable takes into consideration the volume of comments expected in response to a proposed rule, it does not account for time needed to address actions that Congress may wish to take while a rule is being developed, or for any additional time that may be needed as a result of the elections.[71]

2. Legislative Change

24. The United States notes that, if it chooses to comply with the DSB's recommendations and rulings by modifying the COOL statute, it would also need to modify the 2009 Final Rule accordingly. Consequently, the overall time that it would need to comply would be "substantially longer than 18 months".[72] The United States explains that, as a general matter, the US Constitution confers the power to legislate on Congress, which is composed of the House of Representatives (the "House") 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.[73]

25. Turning to the legislative process, the United States explains that a bill, after its introduction in the House or the Senate by a member of Congress or by the Executive branch, is generally referred

[67]United States' submission, para. 35.
[68]United States' submission, para. 35 (referring to United States' first written submission to the Panel, paras. 26-33, 67, and 68).
[69]United States' submission, para. 36.
[70]United States' submission, para. 37.
[71]United States' submission, paras. 35-37.
[72]United States' submission, para. 38.
[73]United States' submission, para. 39 (referring to Exhibit US-16, sections 1 and 7, and Exhibit US-17, p. 42).

to the committee or committees of jurisdiction for consideration of the bill's merits.[74] Most bills are then referred to a subcommittee, which will schedule public hearings to hear the opinions of interested parties. If the subcommittee recommends that the legislation move forward, it will then be to the full committee for a vote on whether to report the bill to the full House.[75] A bill that is finally adopted by the full House must be referred to the Senate, a chamber that proceeds according to its own legislative process.[76] In the Senate, debate is "rarely restricted" and an individual Senator may "filibuster" or place a "hold" on legislation, which can prevent it from being considered.[77] The Senate will amend the bill or pass its own version of it, in which case a "conference committee" must reconcile the differences between the House and Senate versions. Once the bill proposed by the conference committee is approved by both chambers, it can be sent to the President for approval.[78]

26. With regard to the timeline for legislation, the United States notes that the US Congress sets its own procedures and timetable, over which the Executive branch has no control, and that the process of obtaining the votes necessary to enact legislation is "difficult and time consuming".[79] As a consequence, "only a small fraction of the thousands of bills introduced in each Congress become law", and for those bills that do become law, the time-frame "is generally very long".[80] The United States further notes that the Congressional schedule is a relevant factor determining when a bill becomes law. A Congress lasts two years, and meets in two sessions of one year each, beginning in January. However, the adjournment date varies.[81] Moreover, because of the "intricate schedules and calendars, as well as recesses", Congress is often present and in session only three days a week. In this regard, the United States refers to a past arbitrator's statement that, in the light of the Congressional schedule, a reasonable period of time of 10 months was not sufficient.[82] Finally, the United States highlights that the timing of a bill's introduction is also "critical". Indeed, legislation introduced in the second session of Congress without passage "dies at the end of that session" and a new bill will have to be reintroduced at the beginning of the next session. According to the United States, this would be the case for a bill introduced in the next few months. Unless the new bill

[74]United States' submission, paras. 40 and 41.
[75]United States' submission, para. 41.
[76]United States' submission, paras. 42 and 43.
[77]United States' submission, para. 43.
[78]United States' submission, para. 44.
[79]United States' submission, para. 45.
[80]United States' submission, para. 45.
[81]For this year, the Senate has not yet announced its adjournment date, while the House has set a tentative date of 14 December 2012. (United States' submission, para. 47 (referring to House Legislative Calendar, 112th Congress, 2nd Session (Exhibit US-25)))
[82]United States' submission, para. 47 (referring to Award of the Arbitrator, *US – Section 110(5) (Article 21.3(c))*, para. 45).

is passed before the end of December 2012, the United States contends that work will have to restart from the beginning, when the 113th Congress convenes in January 2013.[83]

3. Conclusion

27. The United States asserts that it intends to bring the COOL measure into compliance with the DSB's recommendations and rulings through either legislative action followed by regulatory action, or through regulatory action alone.[84] In the latter scenario, "the shortest period of time" in which the DSB's recommendations and rulings could be implemented is, according to the United States, 18 months. This is so in the light of the "legal form which modification will have to take, the technical complexity of the measure itself, and the added procedural requirements for adopting technical regulations".[85] In the United States' view, a shorter period would be "inadequate and unreasonable".[86] If the United States makes statutory changes to bring the COOL measure into compliance, the entire process would take "substantially longer than 18 months".[87]

B. *Canada*

28. Canada requests that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this dispute to be no more than six months from the date of adoption of the Panel and Appellate Body Reports by the DSB, comprising two months for preparatory work and four months to put the measure into force.[88]

29. Canada submits that Article 21.3(c) of the DSU must be interpreted in its context and in the light of the object and purpose of the DSU.[89] In this regard, Article 21.1 of the DSU states 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"; Article 3.7 of the DSU provides that "the first objective of the dispute settlement mechanism is usually to secure withdrawal" of WTO-inconsistent measures; and Article 3.3 of the DSU likewise underscores the importance of swift implementation for the settlement of WTO disputes.[90] Canada also notes that Article 21.3 of the DSU indicates that a "reasonable period of time" for implementation is available only if it is

[83]United States' submission, para. 48.
[84]United States' submission, para. 5.
[85]United States' submission, para. 49.
[86]United States' submission, para. 49.
[87]United States' submission, para. 6.
[88]Canada's submission, para. 3.
[89]Canada's submission, para. 4 (referring to Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 26).
[90]Canada's submission, paras. 4 and 5.

"impracticable" for a Member to comply immediately with the DSB's recommendations and rulings.[91] In Canada's view, the United States has failed to demonstrate why immediate compliance is impracticable in this case.[92]

30. Canada recalls that previous arbitral awards have clearly established that, where immediate compliance is impracticable, the implementing Member bears the burden of proving that its proposed time for implementation constitutes a "reasonable period of time"[93], and that "the longer the proposed period of implementation, the greater this burden will be".[94] Previous arbitrators have emphasized that the reasonable period of time should be the "shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB"[95], and that the implementing Member must use whatever flexibility is available within its legal system to implement promptly the DSB's recommendations and rulings.[96] Further, although it is up to the United States to select the means of implementation, Canada recalls that "this discretion is not unfettered".[97] Implementation means "must be apt in form, nature, and content to effect compliance"[98] and must "fall[] within the range of permissible actions that can be taken in order to implement the DSB's recommendations and rulings".[99] In addition, Canada notes that Article 21.3(c) of the DSU establishes that the reasonable period of time for implementation should not exceed 15-month from the date of adoption of a panel or Appellate Body report, and that it is therefore for the United States to show that the circumstances in the present case are "so extraordinary" that they justify a deviation from the 15 months guideline. In Canada's view, the circumstances of this dispute "do not justify the application of the maximum period of time, let alone a longer period".[100]

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[91]Canada's submission, para. 6 (quoting Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 62).

[92]Canada's submission, para. 6.

[93]Canada's submission, para. 7 (referring to Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 67, in turn quoting Award of Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 28, (in turn referring to Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47; and Award of the Arbitrator, *US – 1916 Act (Article 21.3(c))*, para. 33)).

[94]Canada's submission, para. 7 (quoting Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47).

[95]Canada's submission, para. 8 (quoting Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 26).

[96]Canada's submission, para. 8 (referring to Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 65).

[97]Canada's submission, para. 9 (referring to Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69).

[98]Canada's submission, para. 9 (quoting Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 64).

[99]Canada's submission, para. 9 (quoting Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27).

[100]Canada's submission, para. 10.

31. Canada notes that the United States is still considering whether to implement the DSB's recommendations and rulings through statutory or regulatory action, or through a combination of the two.[101] Although Canada is of the view that regulatory change alone is unlikely to suffice, it acknowledges that "this arbitration is not the procedure to determine whether regulatory change can end the violation" of Article 2.1 of the *TBT Agreement*. Canada considers, however, that the United States could end such violation by means of new legislation, which can be passed within six months and would make any regulatory change unnecessary under US law. Alternatively, if the United States were to make regulatory changes only, Canada submits that such changes "could also be accomplished within six months from 23 July 2012".[102]

1. Regulatory Change

(a) Regulatory Process in the United States

32. Canada asserts that a regulatory change can be implemented in the United States within six months, and that the United States' submission fails to mention relevant flexibilities that are available.[103] Canada considers that a five-month period for preparatory work is "unreasonable".[104] Canada contends that, contrary to the United States' assertion that the technical complexities of the COOL measure require a period of at least five months to conduct discussions and review options[105], "there is little complexity involved" in withdrawing the measure at issue, which is "the first objective of the [WTO's] dispute settlement mechanism".[106] Withdrawal would simply involve "removing muscle cuts of pork and beef from the commodities covered by the COOL measure".[107] Canada also submits that, since the five-month period for preparatory work is not fixed by either law or regulation, the United States "bears a greater burden of proof in demonstrating this period's accuracy and legitimacy".[108] In Canada's view, the United States has failed to meet such a burden. Moreover, according to Canada, the two arbitral awards relied upon by the United States in its submission do not support the United States' request of five months for preparatory work.[109] In Canada's view, it is appropriate to allot a period of 60 days from the date of adoption of the Panel and Appellate Body

[101]Canada's submission, para. 20 (referring to United States' submission, para. 5).
[102]Canada's submission, para. 20.
[103]Canada's submission, heading to section V.B.
[104]Canada's submission, heading to section III.A.
[105]Canada's submission, para. 11 (referring to United States' submission, para. 16).
[106]Canada's submission, para. 11 (quoting Article 3.7 of the DSU).
[107]Canada's submission, para. 11.
[108]Canada's submission, para. 12 (referring to Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 55).
[109]Canada's submission, paras. 13 and 14 (referring to United States' submission, para. 17 (in turn referring to Award of the Arbitrator, *Canada – Autos (Article 21.3(c))*, paras. 18, 49, 50, and 56; and Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, paras. 1, 14, and 62)).

Reports for preparatory work. After this period, the United States "is expected to speedily proceed with the legal process necessary to bring the measures found to be inconsistent into conformity".[110]

33. Canada notes that the United States describes the APA as "the primary source" governing the US rulemaking process, affording the public at least 60 days to provide comments on the rules.[111] However, the United States fails to mention the possibility of introducing any required regulatory change through an "interim final rule", which is also provided for in the APA. Canada contends that interim final rules are commonly adopted by federal agencies and become effective without prior notice or public comment. The public is invited to comment after the rules are published and become operative.[112] If the public comments persuade the agency that changes are needed, the agency may revise the interim final rule and publish a final rule reflecting those changes.[113] Canada observes that the APA establishes that a notice of proposed rulemaking is to be published in the Federal Register except "when the agency for good cause finds […] that notice and public procedure thereon are impracticable unnecessary, or contrary to the public interest".[114] According to Canada, although there is no explicit reference to interim final rulemaking in the APA, final rules are adopted under this "good cause" exception.[115] Canada emphasizes that the COOL regulations themselves initially entered into force through the publication of interim final rules pursuant to this exception.[116] Therefore, Canada contends that interim final rules, which are frequently used by US agencies, represent a "readily available means" through which regulatory action implementing the DSB's recommendations and rulings can be put in place.[117]

34. Canada recalls the United States' statement that "Executive Order 12866 is another primary source of domestic law governing the U.S. regulatory process", which sets forth various requirements that must be fulfilled.[118] Most of these "requirements", however, are only triggered if a regulation qualifies as "significant regulatory action".[119] Although the United States seems to imply that, because the regulations implementing the COOL measure were classified as "significant", a regulation that implements the DSB's recommendations and rulings will also be "significant", such reasoning is,

[110]Canada's submission, para. 14 (quoting Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 81).
[111]Canada's submission, para. 48 (quoting United States' submission, para. 19).
[112]Canada's submission, para. 49 (referring to Exhibit CDA-19, p. 704).
[113]Canada's submission, para. 49 (referring to Exhibit CDA-20, p. 7).
[114]Canada's submission, para. 50 (quoting APA, section 553(b)(3)(B) (Exhibit CDA-21)).
[115]Canada's submission, para. 50 (referring to Exhibit CDA-22).
[116]Canada's submission, para. 51 (referring to Panel Exhibit CDA-3).
[117]Canada's submission, para. 52.
[118]Canada's submission, para. 53 (quoting United States' submission, paras. 21 and 22).
[119]Canada's submission, para. 54 (quoting Executive Order 12866, section 6(a)(3)(B) (Exhibit US-27)).

in Canada's view, "illogical".[120] A regulatory change to implement the DSB's recommendations and rulings would only apply to rules on muscle cuts for beef and pork, hence "the scope of the rule would be a small fraction of those earlier rules".[121] Even assuming that in this case the implementing regulatory measure qualifies as a "significant rule" under Executive Order 12866, Canada stresses that the Order contains significant flexibilities that can facilitate prompt compliance by the United States.[122] Canada notes that Executive Order 12866 urges agencies to develop their regulatory actions in a timely manner[123], and explicitly authorizes the Administrator of the Office of Information and Regulatory Affairs (the "OIRA") of the OMB to waive the steps that the United States inaccurately describes as requirements.[124] Furthermore, the 90-day period that the OMB has to review each proposed rule is, according to Canada, *the maximum* period.[125] Therefore, these 90 days should be disregarded for the purpose of establishing the reasonable period of time.

35. Canada further recalls the United States' statement that under the CRA "any *major rule* may not go into effect for 60 calendar days after its publication in the Federal Register in order to allow Congress sufficient time to review and potentially invalidate a regulation".[126] However, according to Canada, the United States has not demonstrated that the implementing measure is likely to be a "major rule" under the CRA.[127] Even assuming that the implementing measure does qualify as a major rule, Canada contends that the CRA's requirement that 60 days must elapse between publication and entry into force does not warrant the addition of more than six months.[128] Further, Canada notes that interim final rules seem to be exempt from the Regulatory Flexibility Act's obligation to conduct an initial regulatory flexibility analysis.[129] In addition, Canada submits, the requirements of the Unfunded Mandates Reform Act of 1995[130] to make "qualitative and quantitative assessments of the anticipated costs and benefits to State, local, and tribal governments"[131] appear to apply only to rules

[120]Canada's submission, para. 54 (referring to United States' submission, footnote 28 to para. 23).
[121]Canada's submission, para. 54.
[122]Canada's submission, paras. 56 and 59.
[123]Canada's submission, para. 57 (quoting Executive Order 12866, section 6(3) (Exhibit US-27)).
[124]Canada's submission, para. 57.
[125]Canada's submission, para. 58 (referring to United States' submission, para. 15).
[126]Canada's submission, para. 60 (quoting United States' submission, para. 24). (emphasis added)
[127]Canada's submission, para. 62.
[128]Canada's submission, para. 64.
[129]Canada's submission, para. 66 (referring to Regulatory Flexibility Act (Exhibit US-6)).
[130]*United States Code*, Title 2, section 501 *et seq*. (Exhibit CDA-25).
[131]Canada's submission, para. 67 (quoting United States' submission, footnote 28 to para. 23).

that enter into force after the publication of a notice of a proposed rulemaking[132]—a requirement from which interim final rules are exempt.[133]

36. Finally, Canada notes that the Uruguay Round Agreements Act[134] (the "URAA") provides a legal framework that imposes obligations under US law on the United States Trade Representative to coordinate the implementation of WTO panel and Appellate Body reports that are adverse to the United States.[135] In this regard, Canada recalls that, in a previous arbitration, the United States itself argued that the process under Section 123 of the URAA would require approximately nine months, which would be reduced to seven months under normal circumstances, for example, in a year without elections.[136]

37. Canada submits that the *TBT Agreement* does not require that additional time be added to the reasonable period of time. According to Canada, "simply because part of the COOL measure was found to be a technical regulation does not mean that the United States will pursue compliance through a technical regulation". The preferred compliance means would be to repeal those elements of the COOL measure that violate Article 2.1 of the *TBT Agreement*.[137] Even assuming that the United States seeks implementation through a technical regulation, its reliance on Article 2 of the *TBT Agreement* to support the granting of an extended reasonable period of time is, in Canada's view, "misplaced".[138]

38. With respect to Article 2.9 of the *TBT Agreement*, Canada notes that this provision does not specify any minimum period of time required to comply with the notification and transparency obligations contained therein. Moreover, the United States has failed to show that the two criteria that trigger such obligations—namely: (i) that no relevant international standard exists or the technical regulation is not in accordance with the relevant international standard; and (ii) that the technical regulation may have a significant effect on trade of other Members—are likely to be met by the implementing measure.[139]

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[132]Canada's submission, para. 67 (referring to Unfunded Mandates Reform Act of 1995 (Exhibit CDA-25)).
[133]Canada's submission, para. 67 (referring to Exhibit CDA-19).
[134]Public Law No. 103-465, 108 Stat. 4809 (1994), *United Sates Code*, Title 19, section 3501 *et seq*. (Exhibit CDA-1).
[135]Canada's submission, para. 68 (referring to the Uruguay Round Agreements Act, sections 123(f) and 123(g) (Exhibit CDA-1)).
[136]Canada's submission, para. 68 (referring to Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 56).
[137]Canada's submission, para. 41.
[138]Canada's submission, para. 42.
[139]Canada's submission, para. 43.

39. As regards Article 2.12 of the *TBT Agreement*, Canada contends that the United States' position reveals "a deeply flawed understanding" of the Appellate Body report in *US – Clove Cigarettes*.[140] There is no obligation to allow for a period of six months between the publication and the entry into force of a technical regulation where, as the case is here, producers in exporting Members do not need to adapt their products or methods of production to the technical regulation's requirements.[141] In Canada's view, since the COOL measure applies to retail outlets within the United States, "any changes to the labelling requirements of meat derived from cattle and hogs will not require that producers adapt their production methods in foreign countries."[142] Lastly, Canada submits that the notion that Article 2 of the *TBT Agreement* can be relied upon to frustrate the prompt settlement of disputes required by Article 3.3 of the DSU may have "far reaching, systemic implications" and hence should be "greeted with scepticism".[143]

(b) Additional Considerations

40. In Canada's view, the United States' argument that stakeholders' significant interest in country of origin labelling supports a reasonable period of time of at least 18 months should be rejected.[144] Canada submits that the history of the COOL measure's enactment is irrelevant for determining the period of time for implementation, and adds that past arbitrators have not been persuaded that "contentiousness" should be considered when determining a reasonable period of time.[145] Therefore, Canada submits, the "interest in" or the "contentiousness of" the COOL measure should not factor into the assessment of a reasonable period of time for implementation in the present case.

41. Canada also contends that the United States' delay in implementing the DSB's recommendations and rulings to date favours a short reasonable period of time.[146] Canada notes that, according to previous arbitrators under Article 21.3(c) of the DSU, an implementing Member's inaction or insufficient action in the first months following adoption of the panel and/or Appellate Body report "bears on the analysis of the reasonable period of time".[147] In Canada's view, the lack of any details regarding preparatory work in the United States' submission "gives reason for

[140]Canada's submission, para. 40.
[141]Canada's submission, paras. 44 and 45 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 282).
[142]Canada's submission, footnote 81 to para. 45.
[143]Canada's submission, para. 46.
[144]Canada's submission, para. 17 (referring to United States' submission, para. 35).
[145]Canada's submission, para. 18 (referring to Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, para. 48).
[146]Canada's submission, heading to section III.B.
[147]Canada's submission, para. 16 (referring to Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 43).

doubt that adequate implementation efforts have been undertaken to date". This in turn suggests that a short reasonable period of time is appropriate in this case.[148]

2. Legislative Change

42. Canada contends that, contrary to what the United States argues, legislative and regulatory changes do not have to occur sequentially. An amendment to the COOL statute could be drafted to become effective immediately, and the amended statute would prevail over the conflicting COOL regulations.[149] Canada asserts that, under US law, statutory amendments "have real and substantial effect"[150] and become enforceable laws either immediately upon passage or at the time specified by Congress in the particular legislation.[151] Once enforceable or operational, the new statutory provisions will prevail in case of conflict between the statute and existing agency regulations.[152] Accordingly, Canada submits, the United States' insistence that any legislative change must be accompanied by a regulatory change "ignores the reality that an amended COOL statute would necessarily trump the existing COOL regulations".[153]

43. Canada also contends that the required legislative change can be implemented within six months. In its view, the United States' argument that the passage of any amendment would necessarily involve a complex and lengthy legislative process lacks any basis, because the US Congress can take the necessary legal steps within a short period of time.[154] Canada first notes that the draft Federal Agricultural Reform and Risk Management Act of 2012 (the "2012 Farm Bill") can serve as a suitable legislative vehicle to implement statutory changes to the COOL statute.[155] According to Canada, the US Congress faces tremendous pressure either to pass a new Farm Bill or to agree to extend the 2008 Farm Bill by the end of this year, and a failure to do either will create enormous repercussions in the market.[156] Irrespective of the route Congress chooses to take, Canada considers that "substantive modifications to the COOL statute could be included."[157]

44. Canada points to two recent examples showing that the US Congress can pass legislation in a short period of time. First, the legislation amending the Federal Food, Drug, and Cosmetic Act was

[148]Canada's submission, para. 16.
[149]Canada's submission, para. 21.
[150]Canada's submission, para. 22 (referring to Exhibit CDA-2, p. 397, and Exhibit CDA-3, p. 128).
[151]Canada's submission, para. 22 (referring to Exhibit CDA-4, sections 245 and 247).
[152]Canada's submission, para. 23 (referring to Exhibit CDA-6).
[153]Canada's submission, para. 24.
[154]Canada's submission, para. 27.
[155]Canada's submission, para. 28.
[156]Canada's submission, para. 29.
[157]Canada's submission, para. 29.

introduced in the Senate on 15 May 2012 and the President was able to sign it into law on 9 July 2012, which means that the bill was passed within two months.[158] Similarly, on 29 June 2012, the Temporary Surface Transportation Extension Act of 2012 was introduced in the House and Senate, passed by both chambers, and signed by the President all in the same day.[159] Canada recalls that, if Congress passes a Farm Bill with properly-drafted amendments to the COOL statute, the USDA does not need to modify the COOL regulations in order to comply with the recommendations and rulings of the DSB, and that, in any event, regulatory modifications can be made after the statutory amendments become effective.[160] In addition, Canada notes that previous arbitral awards have recognized that the US legislative process lacks stringent timelines and has "great flexibility to pass legislation in a rapid manner if there is political will to do so".[161] Bearing this in mind, Canada is of the view that the kind of simple legislation required to implement the DSB's recommendations and rulings in this dispute could be passed in November or December 2012, before the next session of Congress starts its work in January 2013.[162]

45. Finally, Canada asserts that the draft 2012 Farm Bill currently before the US Congress is "particularly suitable for the inclusion of statutory changes" required by the DSB's recommendations and rulings.[163] Canada recalls that the House and Senate must agree on one identical bill before the President is able to sign it into law. To resolve their differences, members from both chambers enter into a "conference", where they attempt to settle the "matter in disagreement between the two chambers".[164] Canada notes that Representative Randy Neugebauer added an amendment to the draft 2012 Farm Bill on 12 July 2012 regarding the COOL legislation (the "Neugebauer amendment"), just three days before the House Agricultural Committee voted to report the Bill back to the House.[165] The Neugebauer amendment—now Section 12104 of the House version of the draft 2012 Farm Bill—creates a source of disagreement between the Senate's version of the Bill (which does not contain any provision related to the COOL statute[166]) and the House version of the Bill (which calls for the USDA to submit a report detailing the steps to modify the COOL statute in

[158]This Act revised and extended user-fee programs for prescription drugs and medical devices. (Canada's submission, para. 30 (referring to Exhibits CDA-12 and CDA-13)).
[159]This Act kept student loan rates fixed at 3.4 per cent until 2013 and extended the federal funding for highways. (Canada's submission, para. 31 (referring to Exhibit CDA-15)).
[160]Canada's submission, para. 32.
[161]Canada's submission, para. 33 (referring to Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, paras. 49 and 50; and Award of the Arbitrator, *US – 1916 Act (Article 21.3(c))*, para. 39).
[162]Canada's submission, para. 34.
[163]Canada's submission, heading to section IV.C.
[164]Canada's submission, para. 35 (referring to Exhibit CDA-8).
[165]Canada's submission, para. 36.
[166]Canada's submission, para. 38 (referring to Exhibit CDA-17).

compliance with the DSB's recommendations and rulings).[167] Therefore, Canada submits, the inclusion of the Neugebauer amendment will allow the two chambers to adopt substantive modifications to the COOL statute during the conference, and, given the political pressure on Congress to adopt a new Farm Bill in 2012, the United States has the means, if it so chooses, to comply promptly with the recommendations and rulings of the DSB.[168]

3. Conclusion

46. Canada concludes that, since there is ample flexibility available to the United States to end promptly the discriminatory effects on Canadian cattle and hogs caused by the COOL measure, the United States can implement the DSB's recommendations and rulings within six months from the date of the DSB adoption of the Panel and Appellate Body Reports on 23 July 2012, regardless of whether it chooses to do so through legislative or regulatory means.[169]

C. *Mexico*

47. Mexico requests that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this dispute to be a maximum of eight months from the date of the adoption by the DSB of the Panel and Appellate Body Reports.[170] Mexico understands that Canada is asking for a shorter "reasonable period of time" and states that it would welcome that result.[171]

48. Mexico notes, at the outset, that I should consider Article 21.3 of the DSU in its context.[172] In this regard, Article 21.1 of the DSU provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members", and Article 3.3 of the DSU emphasizes that "prompt settlement … is essential to the effective functioning of the WTO". In Mexico's view, therefore, time is of the essence in determining the reasonable period of time for implementation.[173] Mexico also notes that past arbitral awards have identified several guidelines for determining the reasonable period of time. Such guidelines include: (i) that the reasonable period of time should be the "shortest period of time possible within the legal

[167]Canada's submission, para. 38.
[168]Canada's submission, para. 39.
[169]Canada's submission, para. 69.
[170]Mexico's submission, para. 10.
[171]Mexico's submission, para. 38.
[172]Mexico's submission, para. 24 (referring to Award of the Arbitrator, *Canada – Patent Term (Article 21.3(c))*, para. 37).
[173]Mexico's submission, para. 24.

system" of the implementing Member[174]; (ii) that the implementing Member "must utilize all the flexibility and discretion available within its legal and administrative system in order to implement within the shortest period possible"[175]; and (iii) that "the 'particular circumstances' of the case must be taken into account in determining the reasonable period of time".[176] In addition, Mexico contends, past decisions have held that the implementing Member bears the burden of proving that its proposed schedule constitutes a reasonable period of time in the circumstances of the case.[177] However, in Mexico's view, the United States has failed to meet its legal burden to demonstrate that it cannot reasonably implement the DSB's recommendations and rulings " in a much shorter period than the one it proposes".[178]

49. Mexico further considers that particular attention should be paid to the affected interest of Mexico as a developing country. Pursuant to Article 21.2 of the DSU, arbitrators acting under Article 21.3(c) must pay particular attention to matters affecting the interests of both an implementing and complaining developing country Member.[179] As a developing country, Mexico requests that I give special attention to how the reasonable period of time will affect its interests. In this respect, Mexico recalls that, as a result of the COOL measure, Mexican cattle has been discriminated, including through the discriminatory price reduction that US purchasers have been forcing on cattle born in Mexico .[180] In addition, according to Mexico, the COOL measure is specifically targeted at Mexican cattle—thus, cattle from a developing country—and not at imports in general. Consequently, the measure at issue has a "direct nexus to" and "directly affects" Mexico's interests.[181]

50. Mexico urges me to establish the shortest possible reasonable period of time in this case.[182] According to Mexico, eight months is a reasonable period of time for the United States to comply

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[174]Mexico's submission, para. 25 (quoting Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 51).

[175]Mexico's submission, para. 25 (quoting Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 61).

[176]Mexico's submission, para. 25 (quoting Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 61).

[177]Mexico's submission, para. 26 (referring to Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47).

[178]Mexico's submission, para. 26.

[179]Mexico's submission, para. 30 (quoting Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, paras. 104-106).

[180]Mexico's submission, para. 33 (referring to Panel Reports, *US – COOL*, paras. 7.356, 7.357, 7.360, 7.361, and 7.372-7.381; and Appellate Body Reports, *US – COOL*, paras. 263, 264, 289, 292, 319, and 348).

[181]Mexico's submission, para. 33. During the oral hearing, Mexico pointed out that a cattle market that is integrated with that of the United States is extremely important for the development of Mexico, and that this particular livestock sector is responsible for one million direct jobs and two million indirect jobs in Mexico. Mexico also noted that it sends very young cattle to the United States' grasslands because livestock cannot be fattened to the same extent domestically due to Mexican geographical conditions.

[182]Mexico's submission, paras. 38 and 39.

with its obligations in the present dispute.[183] Mexico recalls the United States' argument that the reasonable period of time should encompass the time required to issue new regulations[184], which, according to the United States, is 12 months, plus another six months to fulfil the United States' obligations under the *TBT Agreement*. According to Mexico, however, the reasonable period of time should be much shorter than 12 months and, "at the very greatest", no longer than eight months. Mexico further recalls that, although, according to the United States, legislative changes followed by regulatory changes would take longer than 18 months, the United States is not requesting that the reasonable period of time be extended to account for the possibility of potential legislation.[185] In this regard, while Mexico is "highly sceptical" that the COOL measure can be brought into compliance without amending the COOL statute, it "takes no position" as to whether the United States may be able to comply by issuing regulations without changing the statute.[186]

1. Regulatory Change

(a) Regulatory Process in the United States

51. Mexico recalls that the United States describes the steps involved in the issuance of new regulations as requiring a "lengthy and multifaceted rulemaking process".[187] Mexico contends, however, that the purported deadlines for actions listed by the United States are maximum, not minimum, requirements, and that US regulations are regularly published and implemented much more quickly.[188]

52. Mexico recalls the United States' argument that it needs five months for the preparatory phase in addition to the time needed to issue new regulations.[189] Mexico notes that the United States refers to examples in which past arbitrators granted approximately three months for preparatory work, but it offers no reason why it should be allowed five months for preparation in this dispute.[190] In Mexico's view, three months is more than sufficient for the United States to publish a proposed new regulation, should it choose to follow this course of action.[191]

[183]Mexico's submission, heading to section V.
[184]Mexico's submission, para. 35 (referring to United States' submission, paras. 5 and 6).
[185]Mexico's submission, para. 36.
[186]Mexico's submission, para. 37 and footnote 30 thereto.
[187]Mexico's submission, para. 40 (quoting United States' submission, para. 13).
[188]Mexico's submission, para. 40.
[189]Mexico's submission, para. 46 (quoting United States' submission, para. 16).
[190]Mexico's submission, para. 46 (referring to United States' submission, para. 17, in turn referring to Award of the Arbitrator, *Canada – Autos (Article 21.3(c))*; and Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*).
[191]Mexico's submission, para. 46.

53. Mexico also contends that, contrary to what the United States submits, the requirement to allow 60 days for comments on proposed regulations is not mandatory, but rather a guideline.[192] Under the APA, the requirement to provide time for public comments before a rule is implemented is optional.[193] According to Mexico, the procedure to implement regulations as "interim final rules", soliciting comments after implementation to determine whether the rule should be modified, is widespread in the United States.[194] Mexico emphasizes that the implementing regulations for the COOL measure itself were published as an interim final rule on 1 August 2008, just over two months after the 2008 Farm Bill became law on 22 May 2008.[195] Moreover, the OMB reviewed and approved the regulations in "far less time than the 90 days" the United States submits is necessary.[196]

54. Mexico further notes that the United States refers to the APA in support of its claim that a new regulation cannot enter into force prior than 30 days after its publication. But the provision referred to by the United States—Section 553(d) of the APA—establishes that publication shall occur not less than 30 days before its effective date "except … as otherwise provided by the agency for good cause found and published with the rule".[197] Thus, Mexico asserts, there is considerable flexibility for agencies to bring a new rule into force more quickly.[198]

55. Turning to Articles 2.9 and 2.12 of the *TBT Agreement*, Mexico contends that, assuming *arguendo* that Article 2.9 of the *TBT Agreement* is relevant in the present context, "the United States can provide notifications and opportunities for consultations with Mexico while the regulatory process is pending".[199] Mexico also characterizes as misplaced the United States' argument that the Appellate Body's findings with respect to Article 2.12 of the *TBT Agreement* in *US – Clove Cigarettes* allow the United States to postpone implementation of a revised regulation for an additional six months after its publication.[200] In Mexico's view, Article 2.12 of the *TBT Agreement* is "irrelevant" to my analysis.[201] Mexico submits that the meaning of the term "reasonable period of time" is the "shortest period of time possible within the legal system" of the implementing Member[202], and that the *TBT Agreement* is

[192]Mexico's submission, para. 42 (referring to Executive Order 12866, section 6(a) (Exhibit US-27)).
[193]Mexico's submission, para. 42 (referring to APA, section 553(b) (Exhibit MEX-1)).
[194]Mexico's submission, para. 42 (referring to Exhibit MEX-3).
[195]Mexico's submission, para. 43.
[196]Mexico's submission, para. 43 (referring to Exhibit MEX-5).
[197]Mexico's submission, para. 41 (quoting APA, section 553(d) (Exhibit MEX-1)).
[198]Mexico's submission, para. 41.
[199]Mexico's submission, para. 50.
[200]Mexico's submission, para. 59.
[201]Mexico's submission, para. 60.
[202]Mexico's submission, para. 61 (quoting Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 51). (underlining added by Mexico)

not within the legal system of the United States. Moreover, the URAA[203] excludes the possibility that any aspect of the WTO covered agreements or panel or Appellate Body findings could be treated as self-executing under US domestic law. Therefore, Mexico asserts, since Article 2.12 of the *TBT Agreement* is not within the US legal system, and does not have direct effect under US domestic law, it cannot provide a justification for granting the United States extra time to bring the COOL measure into compliance within the meaning of Article 21.3(c) of the DSU.[204]

56. Mexico further notes that the purpose of Article 2.12 of the *TBT Agreement* is to protect producers in exporting Members from potential adverse impacts caused by new technical regulations. In its view, the interpretation suggested by the United States would have the effect of prolonging a measure already found to adversely impact Mexican cattle in a discriminatory manner and to be inconsistent with Article 2.1 of the *TBT Agreement* . This would directly contradict the goal of Article 2.12.[205] Mexico also stresses that, the fact that the COOL measure is a technical regulation does not necessarily mean that compliance will be sought through another technical regulation, which is "yet another reason why there is no basis to ground the determination of the [reasonable period of time] on Article 2.12".[206] Finally, Mexico notes that, should the United States replace the COOL measure with a measure that creates new burdensome and discriminatory restrictions that perpetuate the disincentives for US producers to purchase Mexican cattle, the inconsistency of the new measure with Article 2.1 of the *TBT Agreement* would not be eliminated, in any event, by delaying implementation for an additional six months.[207]

57. According to Mexico, therefore, a reasonable timetable for regulatory implementation in the present case would be seven months, distributed in the following manner: (i) three months for preparation and publication of the proposed regulations; (ii) two months for comments; (iii) one month to review the comments and publish the final regulations; and (iv) one month for the regulations to enter into force.[208] In Mexico's view, this is a "very generous schedule", taking into account that the solutions available to the United States include making the rules simpler, less complex, and less burdensome, and that only a small part of the COOL regulations are at stake.[209] Mexico also highlights that the original COOL regulations were made effective just four months after the enactment of the authorizing statute, the 2008 Farm Bill, and before public comments were

[203]Mexico's submission, para. 61 (referring to Exhibit MEX-17, p. 25).
[204]Mexico's submission, para. 62.
[205]Mexico's submission, para. 63.
[206]Mexico's submission, para. 63.
[207]Mexico's submission, para. 64.
[208]Mexico's submission, para. 47.
[209]Mexico's submission, para. 48.

submitted. This means that the United States "[c]learly … has the ability under domestic law to issue regulations within a few months".[210] Furthermore, there is no identifiable standard practice under which the United States must take 12 months to issue new regulations. Mexico thus contends that, even providing for a "cushion", eight months is "totally reasonable".[211]

(b) Technical Complexity of the Measure

58. Contrary to the United States' argument that the COOL measure is "technical and complex"[212], Mexico contends that "[n]o scientific or engineering analysis or testing is required" to modify a requirement for country of origin labelling that affects a limited group of products, namely muscle cuts of beef.[213] Mexico notes that the aspects of the COOL statute and regulations relating to the labelling of beef products account for only a small part of the law. In this regard, Mexico contends that, when the United States submits that the COOL regulations are 49 pages long, it refers to the Federal Register notice[214], most of which is devoted to explaining the procedural background and the public comments, including with respect to the regulations affecting other covered commodities like chicken, goat meat, seafood, perishable agricultural products, and nuts.[215] According to Mexico, excluding a list of definitions, the regulations at issue in this case are contained in only two pages of the notice.[216] Therefore, the scope of the rules is much more limited than the United States argues, and hence much faster action should be expected in the issuance of regulations relating to beef products than in the promulgation of new COOL regulations as a whole.[217]

59. Mexico also notes that the United States attempts to justify the need for a longer period of time by arguing that it will have to evaluate the numerous aspects of the COOL measure discussed by the Appellate Body in finding that the measure lacked even-handedness and resulted in discrimination.[218] Mexico submits, however, that such an approach would have systemic consequences, since it would lead to the conclusion that "the more discriminatory and uneven-handed a measure is, the more time would be needed" to bring it into compliance.[219] Mexico adds that, if

[210]Mexico's submission, para. 49.
[211]Mexico's submission, para. 49.
[212]Mexico's submission, para. 68 (quoting United States' submission, para. 29).
[213]Mexico's submission, para. 68.
[214]The Federal Register notice is entitled "Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts; Final Rule" (Mexico's submission, para. 45 (referring to United States' submission, para. 29, and Exhibit MEX-7)).
[215]Mexico's submission, para. 45 (referring to Exhibit MEX-7).
[216]Mexico's submission, para. 45.
[217]Mexico's submission, para. 45.
[218]Mexico's submission, para. 70 (referring to United States' submission, paras. 31-33).
[219]Mexico's submission, para. 70.

what the United States suggests is that it needs more time because it has many options to consider, this would also be irrelevant to the determination of the reasonable period of time.[220]

(c) Additional Considerations

60. According to Mexico, the United States has failed to identify any special factors that would justify the granting of a longer reasonable period of time. The United States specifically claims that "[g]iven the … continued strong interest in this issue in the United States, the process of bringing the COOL measure into compliance will be a challenging and multifaceted endeavour."[221] In Mexico's view, however, it is neither unique to the COOL measure nor unusual for a law or regulation to be of "continued strong interest" for the affected sectors. Moreover, Mexico asserts, "contentiousness" is not relevant to the determination of a reasonable period of time.[222]

2. Legislative Change

61. Mexico recalls that, even though the United States submits that the reasonable period of time should be based on the time needed to implement revised regulations, it nonetheless provides comments on how long it would take to enact legislation. Contrary to what the United States argues, Mexico is of the view that the period of time required to amend the COOL statute could be even shorter than the time needed to issue new regulations.[223] In this respect, Mexico notes that, since the 2008 Farm Bill expired on 30 September 2012[224], it is widely expected that the US Congress will enact a new Farm Bill when it reconvenes after the US elections taking place in early November.[225] Mexico highlights, moreover, that the full Senate has already approved a version of the new 2012 Farm Bill legislation, whereas the House Committee on Agriculture has also approved its own draft version.[226] In Mexico's view, because the COOL measure relates to agricultural products, the amendment of the COOL measure as part of the new 2012 Farm Bill would be both procedurally possible and substantively appropriate.[227]

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[220]Mexico's submission, para. 70 (referring to Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 59).

[221]Mexico's submission, para. 67 (quoting United States' submission, para. 4).

[222]Mexico's submission, para. 67 (referring to Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 60).

[223]Mexico's submission, para. 51.

[224]Mexico's submission, para. 52. Mexico notes that the COOL measure itself did not expire, but a number of US agricultural programs lapsed on that date. (*Ibid*.)

[225]Mexico's submission, para. 53.

[226]Mexico's submission, para. 53 (referring to Exhibit MEX-10).

[227]Mexico's submission, para. 53.

62. Mexico notes that Section 12104 of the House version of the 2012 Farm Bill approved by the House Agriculture Committee on 12 July 2012 provides that "[n]ot later than 90 days after the date of enactment of this Act, the Secretary of Agriculture shall submit … a report detailing the steps the Secretary will take so that the United States is in compliance" with the WTO decision in the *US – COOL* disputes.[228] In Mexico's view this means that members of the US Congress consider the new 2012 Farm Bill as an "appropriate vehicle" for dealing with WTO compliance. Substantive changes to the COOL measure can now be added to the House version (which has not yet been voted on by the full House) and/or during the "conference committee" that would reconcile the differences between the House and Senate versions of the new legislation.[229] Further, Mexico contends that Congress has broad flexibility in determining how to implement changes to the COOL measure. It could, for instance, repeal the measure entirely or change the origin rules to conform to those used for customs purposes. In any event, if sufficient detail were provided in the statute, it would be unnecessary for the USDA to issue implementing regulations[230] and, at the same time, any regulations inconsistent with the amended statute would cease to be enforceable.[231] In Mexico's view, therefore, the COOL measure could be amended, with immediate effect, within five months, this is, by the end of December 2012 when the current session of the US Congress ends.[232]

63. Lastly, Mexico asserts that, even though the United States tries to make the legislative process seem highly complicated and drawn out, the US Congress is able to enact legislation on a faster schedule even in normal circumstances.[233] For instance, Mexico notes that the American Jobs Creation Act of 2004 was introduced in the House on 4 June 2004 and became law about five and a half months later.[234] Similarly, the American Recovery and Reinvestment Act of 2009 became law in three weeks[235], and the Homebuyer Assistance and Improvement Act of 2010 became law three days after being introduced in the House.[236] Therefore, according to Mexico, the United States would be able to enact new legislation revising the COOL measure even faster than it could promulgate revised regulations, and such legislation would not necessarily require immediate implementing regulations.[237]

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[228]Mexico's submission, para. 54 (referring to Exhibit MEX-11, p. 154).
[229]Mexico's submission, para. 54.
[230]Mexico's submission, para. 55 (referring to Exhibit MEX-12).
[231]Mexico's submission, para. 55 (referring to Exhibit MEX-13).
[232]Mexico's submission, para. 56.
[233]Mexico's submission, para. 57 (referring to United States' submission, paras. 40-48).
[234]Mexico's submission, para. 57 (referring to Exhibit MEX-14).
[235]Mexico's submission, para. 57 (referring to Exhibit MEX-15).
[236]Mexico's submission, para. 57 (referring to Exhibit MEX-16).
[237]Mexico's submission, para. 58.

3. Conclusion

64. For the above reasons, Mexico submits that a maximum of eight months as of the DSB adoption of the Panel and Appellate Body Reports provides a reasonable period of time for the United States to comply with the recommendations and rulings of the DSB in this dispute, and therefore requests that I award a period of time no greater than eight months, ending on 23 March 2013.[238]

III. Reasonable Period of Time

A. *Preliminary Matters*

1. Mandate of the Arbitrator

65. The Appellate Body and Panel Reports in these disputes were adopted by the DSB on 23 July 2012. On 31 August 2012, the United States informed the DSB of its intention to comply with the recommendations and rulings, but stated that it would need a reasonable period of time in which to do so.[239] As the parties failed to agree on a reasonable period of time for implementation, Canada and Mexico requested that such period be determined through arbitration pursuant to Article 21.3(c) of the DSU. Canada, Mexico, and the United States were unable to agree on an arbitrator, thus the Director-General, after consulting with the parties, appointed me as Arbitrator on 4 October 2012 to determine the reasonable period of time for implementation in these disputes. I accepted the appointment on 5 October 2012.

66. Article 21.3 of the DSU establishes that, if it is "impracticable" for a Member to comply "immediately" with the recommendations and rulings of the DSB, then that Member "shall have a reasonable period of time in which to do so". My task as Arbitrator in these proceedings is to determine such reasonable period of time, taking due account of the relevant provisions of the DSU and, specifically, of Article 21.3(c), which states that the "reasonable period of time" shall be:

> … 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. (footnotes omitted)

[238]Mexico's submission, para. 72.
[239]WT/DSB/M/321, para. 58.

67. I am mindful of the context in which Article 21.3(c) appears. Article 21.1 of the DSU provides that "prompt compliance" is essential for the effective resolution of WTO disputes. Furthermore, the introductory paragraph of Article 21.3 indicates that a "reasonable period of time" for implementation shall be available only if "it is impracticable to comply immediately" with the recommendations and rulings of the DSB. I agree with previous arbitrators that these contextual elements suggest that the "reasonable period of time" within the meaning of Article 21.3 of the DSU "should be the shortest period possible within the legal system of the [implementing] Member".[240] The implementing Member bears the burden of proving that the period it seeks for implementation is "the shortest period possible" within its legal system. It is ultimately for the arbitrator to determine the "shortest period possible" for implementation, on the basis of the evidence presented by all parties.[241]

68. My mandate in these Article 21.3(c) proceedings is limited to determining the "reasonable period of time" for implementation in the underlying WTO disputes. Like previous arbitrators, I consider that my mandate relates to the *time* by when the implementing Member must achieve compliance, not to the *manner* in which that Member achieves compliance.[242] I am mindful that it is beyond my mandate to determine the consistency with WTO law of the measure eventually *taken* to comply. Should a dispute arise concerning the consistency of an implementing measure with WTO law, this can only be assessed in proceedings pursuant to Article 21.5 of the DSU. Yet, *when* a Member must comply cannot be determined in isolation from the means used for implementation. In order "to determine *when* a Member must comply, it may be necessary to consider *how* a Member proposes to do so."[243] Thus, the means of implementation that are available to the Member concerned, and that this Member intends to use, are relevant for a determination under Article 21.3(c).[244]

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

[240]Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 26.
[241]Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 51 (referring to Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 44).
[242]See Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 63; Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 41; Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 47; Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 26; Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 49; and Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 41.
[243]Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 26. (original emphasis)
[244]Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27.

the DSB and with the covered agreements".[245] As stated by previous arbitrators, "the implementing Member does not have an unfettered right to choose any method of implementation."[246] I must consider, in particular, "whether the implementing action falls within the range of permissible actions that can be taken in order to implement the DSB's recommendations and rulings".[247] In other words, the chosen method must be capable of placing the implementing Member into compliance within a reasonable period of time in accordance with the guidelines contained in Article 21.3(c).[248] Moreover, according to the last sentence of Article 21.3(c), the "particular circumstances" of a dispute may affect the calculation of the reasonable period of time, making it "shorter or longer".[249]

70. As other arbitrators in the past, I also consider that the implementing Member is expected to use whatever flexibility is available within its legal system to implement promptly the recommendations and rulings of the DSB.[250] This is justified by the importance of fulfilling the obligation to comply immediately with the recommendations and rulings of the DSB, which will have established that certain measures are inconsistent with a Member's WTO obligations. However, this does not necessarily include recourse to "extraordinary" procedures.[251]

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[245]Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48 (original emphasis) (quoting Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 38). See also Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25 (referring to Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 49, in turn referring to Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, paras. 41-43; Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 32; Award of the Arbitrator, *EC – Tariff Preferences (Article 21.3(c))*, para. 30; Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, para. 26; Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, para. 33; and Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69.

[246]Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48 (quoting Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69).

[247]Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48 (quoting Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27).

[248]See Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27 (referring to Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69).

[249]Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25 (referring to Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 49).

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

[251]See Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 42 (referring to Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48, in turn referring to Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25; Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 49; Award of the Arbitrator, *Korea – Alcoholic Beverages (Article 21.3(c))*, para. 42; Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 51; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 74).

71. Finally, I am mindful that Article 21.2 of the DSU provides that "[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement." Moreover, it has been recognized in past arbitrations that Article 21.2 directs the arbitrator acting pursuant to Article 21.3(c) to pay particular attention "to 'matters affecting the interests' of *both an implementing* and *complaining* developing country Member or Members".[252] Therefore, as in the present case Mexico is a complaining developing country Member, the matters affecting its interests in this arbitration should be the object of my "particular attention".

72. At the oral hearing in this arbitration, Canada, Mexico, and the United States agreed that these principles set out in previous arbitration awards are relevant for the determination of the reasonable period of time in these disputes.

2. Measures to be Brought into Conformity

73. For the purposes of these Article 21.3(c) arbitration proceedings, I refer to the relevant findings of the Appellate Body and of the Panel. The Appellate Body upheld:

> … albeit for different reasons, the Panel's ultimate finding … that the COOL measure, in particular in regard to the muscle cut meat labels, is inconsistent with Article 2.1 of the *TBT Agreement* because it accords less favourable treatment to imported livestock than to like domestic livestock …[253]

74. The "COOL measure" comprises the COOL statute passed by the US Congress, and its implementing regulation, the "2009 Final Rule"[254] promulgated by the Secretary of Agriculture through the United States Department of Agriculture's (the "USDA") Agricultural Marketing Service ("AMS").[255]

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[252]Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 99. (original emphasis) Mexico submits that I should pay particular attention to the matters affecting its interests as a complaining developing country Member in this dispute. (Mexico's submission, para. 30)

[253]Appellate Body Report, *US – COOL (Canada)*, para. 496(a)(iv) and Appellate Body Report, *US – COOL (Mexico)*, para. 496(a)(iv).

[254]See Panel Exhibits CDA-5 and MEX-7.

[255]Appellate Body Reports, *US – COOL*, para. 239. The Panel had also found that "the Vilsack letter violates Article X:3(a) [of the GATT 1994] because it does not constitute a reasonable administration of the COOL measure." (Panel Reports, *US – COOL*, paras. 7.886 and 8.4(b)) This finding was not appealed. The "Vilsack letter" was a letter dated 20 February 2009 from the US Secretary of Agriculture, Thomas J. Vilsack, to industry representatives. (Appellate Body Reports, *US – COOL*, para. 1(c)) According to the United States, the Vilsack letter was withdrawn on 5 April 2012, while the appellate proceedings in these disputes were ongoing. (United States' submission, footnote 2 to para. 3 (referring to Appellate Body Reports, *US – COOL*, footnote 228 to para. 141)) See also Appellate Body Reports, *US – COOL*, para. 251.

75. I observe that the Appellate Body found that the COOL measure, which modifies the conditions of competition in the US market to the detriment of imported livestock, accords less favourable treatment within the meaning of Article 2.1 of the *TBT Agreement* to imported livestock than to domestic livestock because such detrimental impact "does not stem exclusively from a legitimate regulatory distinction but, instead, reflects discrimination".[256] In particular, the Appellate Body found that:

> … examination of the COOL measure under Article 2.1 reveals that its recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors, because the level of information conveyed to consumers through the mandatory labelling requirements is far less detailed and accurate than the information required to be tracked and transmitted by these producers and processors. It is these same recordkeeping and verification requirements that "necessitate" segregation, meaning that their associated compliance costs are higher for entities that process livestock of different origins. Given that the least costly way of complying with these requirements is to rely exclusively on domestic livestock, the COOL measure creates an incentive for US producers to use exclusively domestic livestock and thus has a detrimental impact on the competitive opportunities of imported livestock. Furthermore, the recordkeeping and verification requirements imposed on upstream producers and processors cannot be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered, because the detailed information required to be tracked and transmitted by those producers is not necessarily conveyed to consumers through the labels prescribed under the COOL measure. This is either because the prescribed labels do not expressly identify specific production steps and, in particular for Labels B and C, contain confusing or inaccurate origin information, or because the meat or meat products are exempt from the labelling requirements altogether. Therefore, the detrimental impact caused by the same recordkeeping and verification requirements under the COOL measure can also not be explained by the need to provide origin information to consumers. Based on these findings, we consider that the regulatory distinctions imposed by the COOL measure amount to arbitrary and unjustifiable discrimination against imported livestock, such that they cannot be said to be applied in an even-handed manner. Accordingly, we find that the detrimental impact on imported livestock does not stem exclusively from a legitimate regulatory distinction but, instead, reflects discrimination in violation of Article 2.1 of the *TBT Agreement*.[257]

[256]Appellate Body Reports, *US – COOL*, para. 349.
[257]Appellate Body Reports, *US – COOL*, para. 349.

B. *Factors Affecting the Determination of the Reasonable Period of Time*

76. The United States requests a period of time of 18 months to bring itself into compliance with the recommendations and rulings of the DSB. This 18-month period encompasses, according to the United States, 12 months to complete the US regulatory process, and six months to comply with the procedural requirement under Article 2.12 of the *TBT Agreement* to allow a "reasonable interval" between the publication of a modified COOL measure and its entry into force.[258] The United States highlights that the Appellate Body identified numerous aspects of the COOL measure in its description of why the measure was inconsistent with Article 2.1 of the *TBT Agreement*, namely: (i) the fact that the labels do not precisely identify the place of birth, raising, and slaughter of animals, even though entities throughout the supply chain may need to keep track of this information; (ii) the commingling provisions of the 2009 Final Rule; (iii) the flexibility provided between Category B and Category C labels; (iv) the recordkeeping requirements; (v) the exceptions for processed foods, restaurants, and small retailers; and (vi) the fact that Category D labels must only list the country of import.[259] According to the United States, these findings "underscore the complexity of designing a compliance measure in the instant case".[260]

77. Canada and Mexico contend that nothing makes the COOL measure distinctly complicated or complex to withdraw.[261] According to Canada, withdrawal would simply require removing muscle cuts of beef and pork from the commodities covered by the COOL measure.[262] In my view, withdrawal, in the sense of repealing, is not the only way to comply with the DSB's recommendations and rulings. I note that the arbitrator in *Colombia – Ports of Entry* observed that "withdrawal of the inconsistent measures is the 'preferred' means of implementation", but that "modification [of the inconsistent measure] is within the 'range of permissible actions' available" to the implementing Member.[263] I agree that a Member whose measure has been found to be inconsistent with the covered agreements may generally choose either to repeal or modify the inconsistent measure.[264] Therefore,

[258]United States' submission, para. 5. The United States notes that, in *US – Clove Cigarettes*, the Appellate Body found that "[p]aragraph 5.2 of the Doha Ministerial Decision provides interpretative clarification of the concept of a 'reasonable interval' within the meaning of Article 2.12 [of the *TBT Agreement*] by establishing a rule that producers in exporting Members require a period of at least six months to adapt their products or production methods to the requirements of the Member's technical regulation." (United States' submission, footnote 3 to para. 5 (quoting Appellate Body Report, *US – Clove Cigarettes*, para. 288))

[259]United States' submission, para. 31 (referring to Appellate Body Reports, *US – COOL*, paras. 341-350).

[260]United States' submission, para. 30.

[261]Canada's submission, para. 11; Mexico's submission, para. 66.

[262]Canada's submission, para. 11.

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

[264]Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 50; Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 37.

I consider that the reasonable period of time that I have to determine in this arbitration should allow the United States to comply with the DSB's recommendations and rulings either by modifying the COOL measure, or by repealing it with regard to muscle cuts of beef and pork.[265]

78. In any event, Canada contends that the reasonable period of time for the United States to implement the DSB's recommendations and rulings should not exceed six months from the date of adoption of the Panel and Appellate Body Reports, comprising two months for preparatory work and four months to make the implementing measure effective.[266] In Mexico's view, the United States should be granted a maximum of eight months for implementation in the present case.[267] Both Canada and Mexico consider that Article 2.12 of the *TBT Agreement* does not apply to the determination of a reasonable period of time under Article 21.3(c) of the DSU and that, in any case, it does not justify that the United States allows six months between the publication and the entry into force of the modified COOL measure.[268] In this regard, Canada and Mexico asserted at the oral hearing that, since they export livestock to the United States, their producers would not need any time to adapt their products—that is, cattle and/or hogs—or methods of production to the requirements of a modified COOL regulation.

79. I note that the United States' request for a period of 18 months is framed in two parts: (i) a request for a 12-month period to complete domestic implementation; and (ii) a request for a six-month period to comply with the requirement of Article 2.12 of the *TBT Agreement* to allow a "reasonable interval" between publication and entry into force of the modified COOL measure.[269] I will examine these two periods of time separately. First, I will address the reasonable period of time necessary for the United States to implement the COOL rulings within its legal system and according to the rules and principles applicable therein. Then, I will consider the issue of whether an additional six-month period is required for the United States to comply with Article 2.12 of the *TBT Agreement*.

[265]I note that, in the context of its analysis under Article 2.2 of the *TBT Agreement*, the Appellate Body upheld the Panel's finding regarding the legitimacy of the objective pursued by the United States through the COOL measure, namely, to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered. Accordingly, the Appellate Body found that the Panel did not err in finding that the provision of consumer information on origin is a legitimate objective within the meaning of Article 2.2 of the *TBT Agreement*. (Appellate Body Reports, *US – COOL*, para. 453)

[266]Canada's submission, para. 3.

[267]Mexico's submission, para. 38.

[268]Canada's submission, paras. 44-46; Mexico's submission, paras. 62, 63, and 65.

[269]United States' submission, para. 5.

1. Means of Implementation

80. The United States contends that a change to the COOL measure could involve either legislative action followed by regulatory action, or regulatory action only.[270] Although the United States submits that it has not yet decided which of these two means of implementation it will choose, it is asking me to determine the reasonable period of time for implementation based on the time it considers necessary to effect implementation through regulatory change.[271] In the United States' view, 12 months would be the minimum period required to complete all of the necessary steps to put in place a modified COOL regulation.[272] I note that Canada and Mexico consider that a regulatory change, without amending the COOL statute, is unlikely to suffice to bring the COOL measure into conformity with the DSB's recommendations and rulings.[273] I am mindful, however, that my mandate relates to the *time* by which compliance must be achieved, not to the *manner* in which the implementing Member achieves compliance.[274] Nevertheless, as I mentioned earlier, when a Member must comply cannot be determined in isolation from the chosen means of implementation. Therefore, I start by considering the period of time within which regulatory action could be completed in the United States. I will then address the period of time within which a legislative change could be accomplished.

(a) Regulatory Action

(i) *Regulatory Process*

81. The United States submits that any modified COOL regulation will be issued by the USDA pursuant to the Administrative Procedure Act[275] (the "APA") and Executive Order 12866[276], among

[270]United States' submission, para. 5. The United States never suggested, as potential means of implementation, a stand-alone statutory change.

[271]United States' submission, para. 7. The United States submits that it requires a reasonable period of time "of at least 18 months to make any necessary regulatory modifications to bring the COOL measure into compliance with the DSB's recommendations and rulings". (*Ibid.*, para. 5) In addition, the United States notes that, if it "makes statutory changes to bring the COOL measure into compliance, the entire process will take substantially longer than 18 months". (*Ibid.*, para. 6) In sum, the United States "focus[es] on explaining the shorter process and time required solely to make a regulatory modification to the 2009 Final Rule" and, although it "briefly outline[s] the steps necessary to make legislative changes to the COOL measure", it "is not asking for [a reasonable period of time] longer than 18 months." (*Ibid.*, para. 7)

[272]United States' submission, para. 15.

[273]Canada's submission, para. 20; Mexico's submission, footnote 30 to para. 37.

[274]Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 63; Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 41; Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 47; Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 26; Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 49; and Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 41.

[275]See Exhibits CDA-21 and MEX-1.

[276]See Exhibit US-27.

other legal instruments in US law.[277] Canada notes that the United States fails to mention Section 123 of the Uruguay Round Agreements Act[278] (the "URAA"), which establishes a specific legal framework imposing obligations on the United States Trade Representative to coordinate the implementation of panel and Appellate Body reports that are adverse to the United States.[279] At the oral hearing, the United States explained that it did not focus on the requirements set forth in Section 123 of the URAA in its written submission because these requirements can be satisfied as part of the process the United States described for regulatory action under the APA and Executive Order 12866. The United States further contends that the shortest timeframe in which it would normally be able to complete the regulatory process to publish a modified final rule would be 12 months. This timeframe encompasses the following steps: (i) five months for the preparatory phase to determine how to modify the regulation, to draft and internally clear the proposed rule, and to conduct regulatory impact analyses; (ii) 90 days for the Office of Management and Budget's (the "OMB") review and interagency clearance of the proposed rule; (iii) a 60-day notice and comment period after publication of the proposed rule in the Federal Register; (iv) two months for the USDA to review the comments and revise the rule accordingly; (v) 90 days for the OMB's review and interagency clearance of the final rule; and (vi) publication.[280] In addition, the United States explains that, while the APA requires at least 30 days between the publication of the final rule and its entry into force[281], the Congressional Review Act[282] (the "CRA") requires that Congress be provided at least 60 days to review the final rule before it enters into force.[283]

82. At the oral hearing, the United States stressed that, while all of the above steps are mandatory, it has shown a great deal of flexibility by reducing the time period normally required for some of

[277]United States' submission, para. 13.

[278]See Exhibit CDA-1.

[279]Canada's submission, para. 68 (referring to URAA, Sections 123(f)(3) and 123(g) (Exhibit CDA-1)) Canada also observes that in the arbitration in *US – Stainless Steel (Mexico)*, the United States argued that the process under Section 123 of the URAA would require approximately nine months, or seven months under normal circumstances (for instance, in a year without elections). (*Ibid*., para. 68 (referring to Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 56)).

[280]United States' submission, para. 15. I note that the United States does not request any period of time for the publication step alone. Furthermore, I note that the total of the time periods provided for each of the steps described by the United States does not amount to 12 months, but to 15 months. As explained below, however, at the oral hearing the United States acknowledged the existence of certain flexibilities, and clarified that it is requesting a total period of 90 days for the OMB's review and interagency clearance of both the proposed rule (45 days) and the final rule (45 days). In the light of this response, the timeframe set out by the United States indeed amounts to 12 months.

[281]United States' submission, para. 19 (referring to APA, section 553(d)).

[282]See Exhibit US-4.

[283]United States' submission, para. 24 (referring to CRA, section 801(a)(3)(A)(ii)). At the oral hearing, the United States clarified that it is asking for 60 days between the publication of the modified COOL regulation and its entry into force, and that this period is subsumed within the six months it is requesting pursuant to Article 2.12 of the *TBT Agreement*.

these steps, for instance, the OMB's review and interagency clearance.[284] Canada and Mexico consider, however, that the United States still omits relevant flexibilities that are available within its domestic legal system to facilitate expeditious regulatory changes. Moreover, they observe that US regulations are frequently published and implemented much quicker than in 12 months.[285] I will proceed to address each of the steps described by the United States, and, in the light of the existence of flexibilities or lack thereof, I will determine whether the amount of time the United States is requesting for each stage—and in total—is the "shortest period possible within its domestic legal system"[286] to implement the COOL rulings at stake.

83. To begin with, the United States requests five months to complete the preparatory phase, which, in its view, includes conducting discussions and reviewing options, building and organizing the broad support necessary for modifications to the COOL regulation, and preparing a draft rule for internal clearance.[287] I am mindful that "determin[ing] how to modify the regulations", "draft[ing] and internally clear[ing] the proposed rule", and "conduct[ing] the regulatory impact and other analyses"[288] are relevant to achieve successful compliance and can be time-consuming. Like past arbitrators, I also generally agree that some time may be granted to complete preparatory steps[289], and, in the particular case at issue, the complexity of the Appellate Body's rulings justifies, in my view, the need for some time to conduct preparatory work. As the United States recalls, in determining that the detrimental impact on imported livestock reflected discrimination in violation of Article 2.1 of the *TBT Agreement*, the Appellate Body pointed to several aspects of the COOL measure.[290] These are: (i) the fact that the labels do not precisely specify where animals were born, raised, and slaughtered; (ii) the commingling provisions of the 2009 Final Rule; (iii) the flexibility provided between Category B and Category C labels; (iv) the recordkeeping requirements; (v) the existence of various exceptions; and (vi) the fact that Category D labels must only list the country of import.[291] These different features identified by the Appellate Body should be considered by the United States when deciding how to achieve compliance. In this regard, I recognize that it is not self-evident from the Appellate Body's findings how such features should be addressed to make the COOL regulation

[284]The United States contended at the oral hearing that the time it has required for the OMB's review and interagency clearance is well below the OMB's average review time for rules issued by the USDA during the past 12 months, which has been 96 days.

[285]Canada's submission, heading to section V.B.; Mexico's submission, para. 40.

[286]Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 43.

[287]United States' submission, para. 16.

[288]United States' submission, para. 15(1).

[289]See, for instance, Award of the Arbitrator, *US – Hot-Rolled Steel (Article 21.3(c))*, para. 38; and Award of the Arbitrator, *Chile – Alcoholic Beverages (Article 21.3(c))*, para. 43.

[290]United States' submission, para. 31.

[291]United States' submission, para. 31 (referring to Appellate Body Reports, *US – COOL*, paras. 341-350).

consistent with the United States' WTO obligations, while still providing consumers with information on the origin of beef and pork products.[292]

84. The above notwithstanding, a period of five months for the preparatory phase, as requested by the United States, is, in my view, not required. Having examined the parties' arguments, I am not persuaded that the United States could not have completed all the necessary preliminary steps by the date of the oral hearing in this arbitration.[293] The United States submits that it has been conducting internal discussions and engaging with stakeholders and Members of Congress since the adoption of the DSB's recommendations and rulings on 23 July 2012.[294] In response to questioning at the oral hearing, the United States added that it has also been conducting an economic impact assessment.[295] However, the United States has not provided further details either on the outcome of those internal discussions or on the progress made so far. Such information would have been very useful for me to better understand and take into account the need for a longer preparatory phase. It would have also constituted evidence of the fact that the United States has not remained inactive during the more than three months that have now elapsed following adoption of the Panel and Appellate Body Reports on 23 July 2012. I note, in this regard, that an implementing Member "must use the time after adoption of a panel and/or Appellate Body report to begin to implement the recommendations and rulings of the DSB".[296] It may also be recalled that the Appellate Body Reports were published on 29 June 2012, almost one month before their adoption by the DSB. Thus, it is reasonable to assume that, already by the end of June 2012, interested stakeholders in the United States were aware that some form of action would need to be taken with respect to the COOL measure. Indeed, the introduction of an amendment to the draft Farm Bill on 12 July 2012 in the House of Representatives (the "House"), referring to compliance with the WTO decision in *US – COOL* (the "Neugebauer Amendment")[297],

[292]The United States emphasized at the oral hearing that it continues to have a strong interest in providing such information to its citizens and will continue to do so. In this regard, the United States highlighted that the Appellate Body agreed that this is a legitimate objective. (United States' oral statement (referring to Appellate Body Reports, *US – COOL*, para. 453)) See also *supra*, footnote 265.

[293]The oral hearing was held on 1 November 2012.

[294]United States' submission, para. 16.

[295]In response to questioning at the oral hearing, the United States contended that it had already taken the following steps: conducting an economic impact assessment, consulting with Congress under the URAA, and having discussions with stakeholders.

[296]Award of the Arbitrator, *US – Section 110(5) Copyright Act (Article 21.3(c))*, para. 46. The Arbitrator in *Chile – Price Band System* also noted that "the implementation process should not be prolonged through a Member's inaction (or insufficient action) in the first months following adoption. In other words, whether or not a Member is able to *complete* implementation promptly, it must at the very least promptly *commence* and continue concrete steps towards implementation." (Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 43 (original emphasis))

[297]On 12 July 2012, Representative Randy Neugebauer introduced an amendment to the 2012 Farm Bill in the House. The so-called "Neugebauer Amendment", now Section 12104 of the House version of the draft 2012 Farm Bill, provides as follows:

suggests that there was awareness of the need to modify the COOL measure even before the DSB adoption of the Panel and Appellate Body Reports on 23 July 2012. For the above reasons, I consider that the preparatory phase does not require five months, as suggested by the United States. Rather, in my view, it could have been completed within approximately three months from the adoption of the DSB's recommendations and rulings, that is, by the beginning of November 2012.

85. According to the United States, following the preparatory phase, the OMB has up to 90 days for review and interagency clearance of the *proposed* rule.[298] Further, before the publication of the *final* rule, the OMB has up to 90 days again to review that rule and conduct the interagency clearance.[299] In response to questioning at the oral hearing, the United States confirmed that the OMB's review and interagency clearance takes place in respect of both the proposed rules and final rules.[300] It recognized, however, that the review and interagency clearance at both stages could be done faster, particularly, within 60 or even 45 days.[301] My understanding is that, in the present case, the United States requests a total period of 90 days for the OMB's review and interagency clearance, which encompasses 45 days to review the proposed rule, and 45 days to review the final rule.

86. In my view, however, a period of approximately 30 days could suffice at each stage of the OMB's review for the following reasons. First, by recognizing that the original 90-day period could be reduced to 60 or even 45 days, the United States itself acknowledged that there are flexibilities available to make such review and interagency clearance happen faster. Notably, such flexibilities are apparent from the very language of Executive Order 12866, which provides for a review period of 45 days when the OMB's Office of Information and Regulatory Affairs (the "OIRA") has previously reviewed the rule.[302] Second, Canada notes, and the United States acknowledged at the hearing, that,

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> Not later than 90 days after the date of enactment of this Act, the Secretary of Agriculture shall submit to the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of representatives a report detailing the steps the Secretary will take so that the United States is in compliance with the decision of the World Trade Organization in *United States – Certain Country of Origin Labeling (COOL) Requirements* (DS384, DS386).

(See Canada's submission, para. 36 (referring to Exhibit CDA-16); Mexico's submission, para. 54 (referring to Exhibit MEX-11))

[298]United States' submission, para. 15(2).

[299]United States' submission, para. 15(5).

[300]In its written submission, the United States only developed arguments with respect to the OMB's review and interagency clearance of *proposed* rules. (United States' submission, para. 22)

[301]The United States acknowledged that, although Executive Order 12866 provides for 90 days, in some cases the OMB has completed its review faster and that, in the present case, it could be able to expedite the process to 60 or 45 days.

[302]Executive Order 12866, section 6(b)(2), provides:

> OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods: […] (B) … within 90 calendar

even in the case of *significant* rules[303], the Administrator of the OIRA may waive the review requirement.[304] However, the United States emphasized that a decision to waive the OMB's review would be exceptional, and it would take time in any event. Although, according to Executive Order 12866, the OIRA may indeed take time to issue such waiving decision,[305] nothing in the language of Executive Order 12866 suggests that such a decision is exceptional.[306] Third, I take note of Mexico's point that the OIRA completed its review and interagency clearance of the 2008 Interim Final Rule[307] for COOL in 50 days, whereas it took only 39 days for the review of the 2009 Final Rule.[308] This is 89 days in total. In my view, since a modified COOL regulation will have a limited scope[309], it is reasonable to assume that the OIRA may review it in less than the 89 days it took for the much longer and more comprehensive original regulations. For all the above reasons, I consider that the United States should be able to complete the OMB's review and interagency clearance of the proposed and final rule in no more than 60 days.

87. According to the United States, after the publication of the proposed rule in the Federal Register, a 60-day notice and comment period must be granted.[310] The United States explains that this time period provides interested parties with the opportunity to participate in the rulemaking process by providing written data, views, or arguments.[311] Although Mexico submits that this 60-day

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> days after the date of submission of the information …, unless OIRA has previously reviewed this information and, since that review there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days.

(See Exhibit US-27) (underlining added)

[303]The United States observes that the COOL regulations are economically "significant" because they have an annual effect on the economy of $100 million or more, in accordance with the definition provided in Executive Order 12866, section 3(f)(1). (See United States' submission, footnote 28 to para. 23 (referring to Exhibit US-27)) Canada submits that the United States seems to imply that, because the regulations implementing the COOL measure were classified as "significant", a regulation that implements the DSB's recommendations and rulings will also be "significant", a fact that, according to Canada, the United States has failed to prove. (Canada's submission, paras. 54 and 55)

[304]Canada's submission, para. 57 (referring to Exhibit US-27).

[305]See *supra*, footnote 302.

[306]Executive Order 12866, section 6(a)(3)(A) provides: "[t]he Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant …" (Canada's submission, para. 57 and footnote 101 thereto)

[307]See Panel Exhibits CDA-3 and MEX-4.

[308]Mexico's submission, para. 43 (referring to Exhibits MEX-5 and MEX-6).

[309]I recall that the modified COOL regulation would cover only *muscle cuts of beef and pork*, whereas the 2009 Final Rule includes a wider range of covered commodities.

[310]United States' submission, paras. 15(3) and 19 (referring to APA, section 553(c)).

[311]United States' submission, para. 19 (referring to APA, section 553(c)). See Exhibits CDA-21 and MEX-1.

requirement is not mandatory[312], it agrees that two months is an appropriate period for comments.[313] At the oral hearing, the United States stressed that it had received an average of 6,000 comments in response to each of the three previous COOL notices, and that it would almost certainly receive a request for an extension of the 60-day comment period in the present case. It further observed that such a 60-day period also serves the purpose of providing the United States' trading partners with sufficient notice and an opportunity to comment, in accordance with the obligations set forth in Article 2.9 of the *TBT Agreement*.[314] In this regard, my understanding of Canada's and Mexico's oral responses is that they agree that this 60-day interval could allow the United States to receive both "domestic" and "international" comments in parallel. Accordingly, I am satisfied that the importance of the comment period warrants the two months suggested by the United States.

88. After the comment period, the USDA needs, according to the United States, at least two months to review such comments, determine how to respond to them, and revise the proposed rule taking into account the comments received.[315] The APA also requires that agencies incorporate in the rules a "concise general statement" of their basis and purpose[316], which US courts have interpreted as providing detailed statements of reasons to justify agency action.[317] I observe that, in Mexico's view, one month should suffice to review comments and publish the final regulation.[318] However, at the oral hearing, the United States characterized as unreasonable any suggestion that this step could be expedited for a modified COOL regulation that will potentially generate thousands of comments.[319] I am not persuaded, however, that the USDA could not review the comments, and revise the modified regulation accordingly, in a shorter period of time. First, as a general matter, I note that the United States has provided neither a legal basis, nor evidence, supporting the assertion that two months are required for the USDA's review. Second, the fact that arguably only part of the original COOL regulation will be at issue suggests that the number of comments to be reviewed by

[312]I also note that the language of Executive Orders 12866 and 13563 is indeed quite flexible. Executive Order 12866, section 6(a)(1) reads: "… each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which *in most cases should* include a comment period of not less than 60 days". Executive Order 13563, section 2(b) reads: "… *[t]o the extent feasible* and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that *should generally* be at least 60 days". (Mexico's submission, footnote 34 to para. 42 (quoting Exhibits US-27 and MEX-2, respectively (emphasis added by Mexico))).

[313]Mexico's submission, para. 47.

[314]The United States observed, in particular, that Mexico said it would welcome an early opportunity to review the proposed new US measures in the context of the requirements under Article 2.9 of the *TBT Agreement*. (United States' oral statement, referring to Mexico's submission, para. 50)

[315]United States' submission, para. 15(4).

[316]United States' submission, para. 19 (referring to APA, section 553(c)).

[317]United States' submission, para. 20 (referring to Exhibit US-22).

[318]Mexico's submission, para. 47.

[319]The United States further contended that the USDA had actually asked for three or four months to conduct the revision of the COOL amendment.

the USDA will be also limited. This in turn should make revision of the modified regulation, taking into account the comments received, easier and less time consuming. Third, the "concise general statement" providing for the reasons justifying regulatory action could be similar to that of the 2009 Final Rule, which consisted of 50 pages of detailed background information and extensive cost-benefit analyses that might well apply also to the modified rule. For these reasons, I consider that the United States should allow approximately one month for the USDA to review the comments received, and take them into account when revising the modified COOL regulation.

89. In addition, the United States submits that, in accordance with US law, a certain period of time must elapse between the publication of a regulation and its entry into force. In this regard, the parties agreed at the oral hearing that, in determining the reasonable period of time, I should keep in mind that a Member can be considered to have complied with the DSB's recommendations and rulings only when the implementing measure enters into force, and not when it is adopted and published. The United States further explains that, while the APA requires at least 30 days between publication of a final rule and its entry into force[320], the CRA requires that Congress be provided at least 60 days to review a *major* rule before it enters into force.[321] Mexico argues that the APA contains considerable flexibility allowing a rule to be made effective more quickly[322], but that a one-month period between publication and entry into force is, in any event, appropriate.[323] I note, at this point, that the APA does not refer to *major* rules. At the oral hearing, the United States emphasized that a modification of the COOL measure will likely raise novel legal or policy issues and have an effect on the economy of more than $100 million, hence qualifying as a "significant rule" under Executive Order 12866 and as a "major rule" under the CRA.[324] Accordingly, the United States argued that the 60-day review period required by the CRA for major rules should be granted in the present case. Although I am aware of Canada's argument that it cannot be presumed that a

[320]United States' submission, para. 19 (referring to APA, section 553(d)).

[321]United States' submission, para. 24 (referring to CRA, section 801(a)(3)). The definition of "major" rule is set forth in the Small Business Regulatory Enforcement Fairness Act of 1996, section 804(2)(A). It provides for a definition essentially equivalent to that of "significant" rule in Executive Order 12866, section 3(f)(1), that is, having an annual effect on the economy of $100 million or more. (See United States' submission, footnote 33 to para. 24 (referring to Exhibit US-9)) (see also *supra*, footnote 303)

[322]Mexico notes that the APA provides that: "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date, <u>except</u> […] (3) as otherwise provided by the agency for good cause found and published with the rule". (Mexico's submission, para. 41 (quoting APA, section 553(d) (Exhibit MEX-1) (emphasis added by Mexico))).

[323]Mexico's submission, para. 47.

[324]United States' oral statement (referring to Executive Order 12866, section 3(f)(1) and (4)). Executive Order 12866 also qualifies as "significant" any regulatory action that is likely to result in a rule that may "[r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order". (Executive Order 12866, section 3(f)(4) (Exhibit US-27))

modification to the COOL measure will be, by definition, a major rule[325], I also take note of the United States' assertion at the oral hearing that, the COOL regulation being "a $2.6 billion rule", any modification will very likely exceed the $100 million threshold. On balance, there is a strong possibility that a modified COOL regulation may be considered a *major* rule. Should it be the case, I note that the CRA clearly establishes a 60-day period for Congressional review, with no flexibility. In the light of this, I consider that it is reasonable to grant the United States 60 days between the publication of the amended COOL regulation and its entry into force.

90. In sum, the United States submits that the regulatory process in the United States consists of several procedural steps[326] that normally take to 12 months.[327] In addition, the United States requests two months for Congressional review before a final rule enters into force. I have addressed each of the steps described by the United States and the flexibilities available within the US legal system throughout the normal rulemaking process. As other arbitrators in the past, I consider that the implementing Member is expected to use whatever flexibility is available within its legal system to implement promptly the recommendations and rulings of the DSB. In the light of the existence of such flexibilities, if the United States decides to modify the COOL regulation, I am confident that it can adopt a modified COOL regulation in a period of approximately eight months from the date of adoption of the DSB's recommendations and rulings. These eight months encompass: (i) three months for the preparatory phase; (ii) one month for the OMB's review and interagency clearance of the proposed rule; (iii) two months for comments; (iv) one month to review the comments and revise the rule accordingly; and (v) one month for the OMB's review and interagency clearance of the final rule before publication. In addition, I consider that two months should be allowed between the publication of the modified COOL regulation and its entry into force. At this juncture, I note that particular steps may take longer than the periods I have considered above. However, there are also flexibilities that would allow the United States to speed up the process in other stages so that the overall period of time does not become longer.

[325]Canada submits that, as with the United States' implication that any modified COOL regulation would constitute a "significant" rule for the purposes of Executive Order 12866, the United States' submission does not support the assertion that the implementing measure is likely to be a "major" rule under the CRA. (Canada's submission, para. 62) See also *supra*, footnote 303.

[326]United States' submission, para. 14.

[327]United States' submission, para. 15.

(ii) *Interim Final Rule*

91. Canada and Mexico submit that the most important flexibility available to the United States is the possibility of introducing regulatory changes through "interim final rules".[328] Interim final rules become effective without prior notice and a public comment period. Public comments are solicited after the rules are published and become operative. If the comments persuade the agency that changes are needed, the agency may revise the interim final rule and publish a final rule reflecting those changes.[329] The APA does not explicitly refer to interim final rules. However, Canada and Mexico highlight that, according to the APA, the standard rulemaking procedure will apply *except* "when the agency for good cause finds … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest".[330] Canada and Mexico submit that the United States routinely employs interim final rules using this "good cause" exception, and that, as a matter of fact, it did so for the initial COOL regulation.[331]

92. Although the United States did not discuss interim final rulemaking in its submission, it did respond to Canada's and Mexico's arguments in this regard at the oral hearing. The United States acknowledged that interim final rules speed up the rulemaking process, but argued that they deviate from the normal US regulatory course of action and, thus, constitute an extraordinary procedure. It also contended that the "good cause" exception is only available where standard regulatory procedures are "impractical, unnecessary, or contrary to the public interest"[332], and that the government's burden to show that such a good cause exists is a heavy one. According to the United States, in practice, the use of interim final rules is generally limited to those cases in which the statute establishes a specific date for entry into force. This was the case, the United States noted, for the 2008 Interim Final Rule implementing the COOL statute, which was issued using the "good cause" exception. The exception was justified by the fact that the COOL statute established a specific effective date and, absent any rulemaking, market participants could have been subject to potential sanctions despite the fact that they had no way of knowing how to comply with the law.

[328]Canada's submission, para. 48; Mexico's submission, para. 42.
[329]Canada's submission, para. 49 (referring to Exhibit CDA-19, p. 704 and Exhibit CDA-20, p. 7); Mexico's submission, para. 42.
[330]Canada's submission, para. 50 (quoting APA, section 553(b)(3)(B) (Exhibit CDA-21)); Mexico's submission, para. 42 (quoting APA, section 553(b)(3)(B) (Exhibit MEX-1)).
[331]Canada's submission, para. 51; Mexico's submission, para. 43.
[332]United States' oral statement (referring to APA, section 553(b)(3)(B)).

93. I am mindful of previous arbitrators' statements that recourse to "extraordinary" procedures cannot be expected.[333] However, in the light of the parties' arguments, I am not entirely persuaded that interim final rules constitute the extraordinary procedure that the United States argues it to be. In this regard, I find it illustrative that, in 1998, the General Accounting Office (the "GAO") reported that about half of the regulatory actions published in the Federal Register during 1997 were published without notice of proposed rulemaking[334], and that, in 2005, the GAO reported that "[d]irect and interim final rules appear to account for hundreds of the final regulatory actions published each year."[335] Moreover, I have not been directed to any legal basis providing that the use of interim final rules should be generally limited to those cases in which the statute establishes a specific effective date, as the United States suggests. In my view, given the fact that interim final rules enter into force without prior notice and public comments, the United States could bring itself into compliance with the DSB's recommendations and rulings through an interim final rule reasonably faster than through a rule adopted pursuant to the standard regulatory process.

(b) Legislative Action

94. The United States submits that if it made statutory changes to bring the COOL measure into compliance—a possibility that it has not ruled out[336]—the entire process would take substantially longer than 18 months, particularly considering that any such legislative changes would have to be followed, in the United States' view, by regulations adopted through the rulemaking process.[337] Canada asserts that legislative and regulatory changes do not have to occur sequentially, and that, in any event, an amended COOL statute would prevail over the conflicting COOL regulation.[338] Mexico is of the view that if sufficient detail were provided in the COOL statute, it would be unnecessary for the USDA to issue implementing regulations.[339] In addition, contrary to the United States' argument, Canada and Mexico suggest that legislative changes could be implemented within a relatively short

[333]Award of the Arbitrator, *EC – Chicken Cuts* (Article 21.3(c)), para. 49 (referring to Award of the Arbitrator, *Korea – Alcoholic Beverages (Article 21.3(c))*, para. 42; Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 51; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 74).

[334]Canada's submission, para. 50 (referring to US General Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126, 31 August 1998 (Exhibit CDA-23)).

[335]Mexico's submission, footnote 36 to para. 42 (referring to US Government Accountability Office; *Federal Rulemaking*, GAO-06-228T, 6 November 2005, p. 10 (Exhibit MEX-3)).

[336]United States' submission, footnote 4 to para. 6.

[337]United States' submission, para. 6 and footnote 4 thereto. The United States never suggested, as potential means of implementation, a stand-alone statutory change.

[338]Canada's submission, para. 21.

[339]Mexico's submission, para. 55 (referring to Exhibit MEX-12).

period of time.[340] They both consider that the draft 2012 Farm Bill can serve as a suitable legislative vehicle to implement statutory changes to the COOL statute[341], and argue that the Neugebauer Amendment[342] may allow the House and the Senate to adopt substantive modifications at the "conference committee".[343]

95. Previous arbitrators have noted that "implementation through administrative action usually takes a shorter period of time than implementation through legislative action."[344] However, past arbitrators have also noted that the United States' legislative process is characterized by a considerable degree of flexibility.[345] Canada and Mexico provide various examples of US legislation passed in short periods of time. For instance, Canada observes that the amendments to the Federal Food, Drug, and Cosmetic Act were passed within less than two months, and that the Temporary Surface Transportation Extension Act of 2010 was passed in one day.[346] Mexico highlights that the American Jobs Creation Act of 2004 was passed in five and one half months, the American Recovery and Reinvestment Act of 2009 became law in three weeks, and the Homebuyer Assistance and Improvement Act of 2012 was passed in three days.[347] At the oral hearing, the United States stressed that these statutes were mainly enacted either in response to the financial crisis, or as a result of a much longer process preceding the date in which the bill was introduced in Congress.[348] However, the evidence suggests, and the United States implicitly acknowledged when replying to Canada's and

[340]Canada's submission, para. 21; Mexico's submission, para. 51.
[341]Canada's submission, para. 28; Mexico's submission, paras. 52-54.
[342]See *supra*, footnote 297.
[343]Canada's submission, paras. 36-39; Mexico's submission, para. 54. The "conference committee" must reconcile the differences between the House version and the Senate version of a bill. "If the conference committee cannot reach agreement, the bill dies. If the conference committee reaches agreement, a conference report is prepared, which then must be approved by both chambers, in identical form. Once the bill proposed by the conference committee is approved by both chambers, it can be sent to the President for approval." (United States' submission, para. 44 (referring to Exhibits US-17 and US-21))
[344]Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 53 (referring to Award of the Arbitrator, *Australia – Salmon (Article 21.3(c))*, para. 38; Award of the Arbitrator, *US – Section 110(5) Copyright Act (Article 21.3(c))*, para. 34; Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 49; Award of the Arbitrator, *Canada – Patent Term (Article 21.3(c))*, para. 41; Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 38; Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 57; and Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, para. 26).
[345]Award of the Arbitrator, *US – 1916 Act (Article 21.3(c))*, para. 39; Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, para. 49.
[346]Canada's submission, paras. 30 and 31 (referring to Exhibits CDA-12, CDA-13, CDA-14, and CDA-15).
[347]Mexico's submission, para. 57 (referring to Exhibits MEX-14, MEX-15, and MEX-16).
[348]The United States contended at the oral hearing that Canada and Mexico simplistically use the date when a particular bill is introduced on the floor of the House or the Senate as the beginning of the legislative process. However, according to the United States, this date is often not a particularly accurate indicator of the actual start of the legislative process.

Mexico's examples, that the US Congress can indeed pass legislation within somewhat compressed timeframes if it needs to do so.

96. The United States asks me to determine the reasonable period of time for implementation through regulatory action, but it "has not ruled out the possibility of a statutory change as part of bringing its measure into compliance".[349] Although it is not for an arbitrator acting pursuant to Article 21.3(c) of the DSU to determine the manner in which a Member should achieve compliance, in the event that the United States chose to pursue compliance through legislative action, I am not persuaded that in the present case this should take longer than the period that is required for implementation by standard regulatory means, as set out above. I am not convinced that legislative action would have to be followed by a standard regulatory process, and I do not believe that the entire process would take longer than 18 months, as the United States suggests.[350] I first note that there appears to be enough flexibility in the US legislative process to allow for the approval of legislation within short timeframes. The examples provided by Canada and Mexico are illustrative in this respect. I also observe that, if a modified COOL statute established a specific effective date, the possibility to use an interim final rule would significantly speed up the implementing regulatory process. In this regard, I recall that the United States itself has acknowledged that interim final rules are used, in practice, when there is a statutory deadline. It has also submitted that this was the case for the 2008 Interim Final Rule implementing the COOL statute. For these reasons, I consider that the United States could bring itself into compliance with the DSB's recommendations and rulings through legislative action followed by regulatory action within the same period of time I have determined for standard regulatory action.

2. Conclusion

97. The United States has not yet decided whether it will seek compliance with the DSB's recommendations and rulings through legislative action followed by regulatory action, or through regulatory action alone, but has requested that I determine the reasonable period of time needed for implementation through regulatory action.[351] With this in mind, I have first considered the period of time within which *regulatory action* could be completed in the United States. Given the flexibilities available in respect of the rulemaking process, I have determined that eight months should suffice for the United States to adopt a modified COOL regulation. In addition, I have concluded that two months should be allowed between the publication of the regulation and its entry into force.

[349]United States' submission, footnote 4 to para. 6.
[350]United States' submission, para. 6.
[351]United States' submission, para. 7. See *supra*, footnote 271.

Further, I have addressed the possibility of using an *interim final rule*, which enters into force without prior notice and public comment. I have noted that, if the United States chooses to modify the COOL regulation through an interim final rule, it should be able to comply with the DSB's recommendations and rulings reasonably faster than if it chooses to follow the standard regulatory process. Finally, with respect to *legislative action*, I have observed that the flexibilities available in the US legislative process allow the passage of legislation in short timeframes, whenever required. Moreover, should regulatory action be needed in addition to legislative action, this could be done speedily through an interim final rule. Accordingly, I consider that the United States should be able to comply with the DSB's recommendations and rulings through legislative action followed by regulatory action within the same period of time in which it could complete standard regulatory action.

98. I am mindful that it is not for me to determine the manner in which the United States must achieve compliance, and I acknowledge that the United States has a measure of discretion in selecting the means of implementation that it deems most appropriate.[352] My mandate is limited to determining the "reasonable period of time" for implementation in the present WTO disputes. In this respect, I conclude that, regardless of whether the United States chooses to pursue implementation through standard regulatory action, through an interim final rule, or through legislative action followed by regulatory action, it can complete domestic implementation of the DSB's recommendations and rulings within 10 months from the date of adoption of the Panel and Appellate Body Reports in these disputes, that is, by 23 May 2013.

99. At this juncture, I recall Mexico's assertion that the determination of the reasonable period of time in this arbitration should be considered in the context of Article 21.2 of the DSU, which provides that "[p]articular attention should be paid to matters affecting interests of developing country Members."[353] In Mexico's view, considering that Mexican cattle are being discriminated as a result of the COOL measure, and that for every month that the United States delays implementation Mexican cattle producers are being economically harmed, I should give special attention to how the reasonable period of time will affect Mexico's interests.[354] Mexico also notes that it is the only developing country Member involved in the present case.[355] As I mentioned earlier, the text of Article 21.2 of the DSU requires consideration of the interests of both implementing and complaining developing country Members.

[352]Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 63.
[353]Mexico's submission, para. 29.
[354]Mexico's submission, para. 33.
[355]Mexico's submission, para. 30.

100. At the oral hearing, Canada contended that there was no differentiation made by either the Panel or the Appellate Body in terms of impact of the COOL measure on the Canadian cattle industry and the Mexican cattle industry. It also highlighted that the only difference between Canada and Mexico as to the impact of the COOL measure is the fact that, while Mexico does not have a hog industry, the Canadian hog industry is also affected by the COOL measure. I take note of Mexico's argument, at the oral hearing, that the cattle sector is extremely important for its development, and that it is responsible for one million direct jobs and two million indirect jobs in Mexico. However, I consider that the period of time I have granted the United States to complete domestic implementation of the DSB's recommendations and rulings is "the shortest period possible" within the US legal system.[356] Therefore, I am not persuaded that Mexico's status as a developing country, and the importance of the cattle sector to its economy, should change my final determination of the period of time within which the United States can complete domestic implementation of the recommendations and rulings adopted by the DSB.

3. Article 2.12 of the *TBT Agreement*

101. The United States recalls that the COOL measure was found by the Appellate Body and by the Panel to be a technical regulation within the meaning of Annex 1.1 to the *TBT Agreement*, and that, in *US – Clove Cigarettes*, the Appellate Body had found that Article 2.12 of the *TBT Agreement*, as clarified by paragraph 5.2 of the Doha Ministerial Decision[357], requires that Members allow a period *of at least six months* between the publication and the entry into force of technical regulations.[358] The United States contends that, consistent with the Appellate Body's finding in *US –*

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[356]Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 51 (referring to Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 44).

[357]Article 2.12 of the *TBT Agreement* provides:

> Except in those urgent circumstances referred to in paragraph 10, Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

Paragraph 5.2 of the Doha Ministerial Decision provides:

> Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.

(*Supra*, footnote 57)

[358]United States' submission, para. 27 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 288).

Clove Cigarettes, it will have to allow for an additional period of six months between the publication and notification of the modified COOL regulation and its entry into force.[359]

102. Mexico submits that Article 2.12 of the *TBT Agreement* is "irrelevant" for my analysis, considering that the meaning of the term "reasonable period of time" is the "shortest period of time possible within the legal system" of the implementing Member, and that the *TBT Agreement* is not within the legal system of the United States.[360] As such, Mexico argues, Article 2.12 of the *TBT Agreement* cannot provide a justification for granting the United States additional time to bring the COOL measure into compliance within the meaning of Article 21.3(c) of the DSU.[361] Canada and Mexico also contend that Article 2.12 of the *TBT Agreement* does not require a period of six months between the publication and the entry into force of a technical regulation where, as is the case here, producers in exporting Members do not need to adapt their products or methods of production to the technical regulation's requirements.[362]

103. The United States requests that, due to the requirement of Article 2.12 of the *TBT Agreement*, I add six months to the reasonable period of time that is necessary to publish an amended COOL technical regulation in the United States. I recall that I have already granted the United States two months between the publication of a modified COOL regulation and its entry into force, based on the US domestic regulatory process.[363] Here, however, I am addressing the United States' request that the time between publication and entry into force should be six months because of the requirement of Article 2.12 of the *TBT Agreement*.

104. I begin by observing that the adoption of a modified technical regulation seems to be within the range of possible means by which the United States could implement the DSB's recommendations and rulings. In this respect, unless the United States decides to repeal the COOL measure, a modification of the existing COOL regulation would most likely constitute a technical regulation. Thus, if the United States chooses to implement the DSB's recommendations and rulings by adopting a modified technical regulation, the request of the United States and the responses by Canada and Mexico raise two distinct questions that I need to answer in order to determine whether Article 2.12 of the *TBT Agreement* justifies the United States' request for six months in addition to the time required to adopt an amended COOL regulation. First, I should consider whether compliance with Article 2.12

[359]United States' submission, para. 28.
[360]Mexico's submission, paras. 60 and 61 (quoting Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 51).
[361]Mexico's submission, para. 62.
[362]Canada's submission, para. 45; Mexico's submission, para. 63.
[363]See *supra*, para. 89.

is a factor that I have to take into account in determining the reasonable period of time under Article 21.3(c) of the DSU, when compliance involves the issuance of a technical regulation. Second, assuming that compliance with another WTO obligation, such as Article 2.12 of the *TBT Agreement*, is a relevant consideration under Article 21.3(c) of the DSU, I should determine whether Article 2.12 applies in this case so that compliance with it requires that the United States be granted six months between the publication and the entry into force of the amended COOL regulation.

105. I shall turn first to the relevance of other WTO obligations, such as Article 2.12 of the *TBT Agreement*, to the determination of the reasonable period of time under Article 21.3(c) of the DSU. I recall that according to Article 21 of the DSU "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes." If it is impracticable to comply immediately, Members shall have a reasonable period of time to comply. The arbitrator in *EC – Hormones* found that the reasonable period of time "should be the shortest period possible within the legal system of the [implementing] Member".[364] Article 21.3(c) identifies a maximum of 15 months as a guideline for arbitrators acting under Article 21.3(c), but states that the reasonable period of time may be longer or shorter depending on "the particular circumstances".

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

107. I recall that the arbitrator in *US – Offset Act (Byrd Amendment)* stated that "*[e]ach and every* piece of legislation enacted with a view to implementing recommendations and rulings of the DSB must be designed and drafted in the light of the implementing Member's rights and obligations under the covered agreements."[365] I understand this statement to mean that a Member complying with DSB recommendations and rulings must ensure that its implementing measures not only comply with the WTO obligations that are the subject of the DSB's recommendations and rulings, but also with its other obligations under the covered agreements. I also note that the arbitrator in *Chile – Alcoholic*

[364]Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 26.
[365]Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 60. (original emphasis)

Beverages stated that "[t]he concept of reasonableness, which is, of course, built into the notion of 'a reasonable period of time' for implementation, inherently involves taking into account the relevant circumstances."[366] This in my view includes circumstances where a Member's implementing measure needs to conform to its other WTO obligations and this would affect the implementation process.

108. I note that the question of the relevance of other international obligations (even non-WTO obligations) to the determination of the reasonable period of time has already arisen in previous arbitrations. The arbitrators in *EC – Chicken Cuts* and in *Brazil – Retreaded Tyres* were asked to consider whether a decision to be taken by the World Customs Organization and the negotiation of a new import regime within MERCOSUR[367] respectively, should factor as "particular circumstances" in the determination of the reasonable period of time. In both instances, the arbitrators found that "an arbitrator under Article 21.3(c) may reasonably expect that implementation would ordinarily be achieved by means entirely within the implementing Member's lawmaking procedures"[368], while "[r]ecourse to such external processes will not ordinarily form part of the implementation of the recommendations and rulings of the DSB", and that recourse to external decision-making "is not entitled to the same deference as in the case of an implementation procedure that is entirely within that Member's domestic legal system".[369] These arbitrators considered moreover that "an implementing Member seeking to go outside its domestic decision-making processes bears the burden of establishing that 'this external element of its proposed implementation is necessary for, and therefore indispensable to, that Member's full and effective compliance with its obligations under the covered agreements'."[370]

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

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[366]Award of the Arbitrator, *Chile – Alcoholic Beverages (Article 21.3(c))*, para. 39.
[367]Mercado Común del Sur (Southern Common Market).
[368]Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 51.
[369]Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 80 (quoting Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 52).
[370]Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 80 (quoting Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 52).

110. In this respect, the Appellate Body has consistently upheld the principle that the provisions in the WTO covered agreements are all provisions of one treaty, the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") and that, therefore, they should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously. The Appellate Body also held that, since Members have entered into cumulative obligations under the covered agreements, they should be mindful of their actions under one agreement when taking action under another.[371] Thus, a Member that is implementing DSB recommendations and rulings pursuant to Article 21 of the DSU cannot ignore its other WTO obligations, even if taking into account these other WTO obligations may in certain cases result in a longer period of implementation.

111. Having established that Article 2.12 of the *TBT Agreement* cannot be disregarded as a matter of principle as a provision that may be relevant to the determination of the reasonable period of time under Article 21.3(c) of the DSU, I now turn to the merit of the requirement of Article 2.12, in order to determine if it justifies extending the reasonable period of time by six months, as the United States requests me to do.

112. Article 2.12 of the *TBT Agreement* provides:

> Except in those urgent circumstances referred to in paragraph 10, Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

113. Paragraph 5.2 of the Doha Ministerial Decision provides:

> Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.

114. In *US – Clove Cigarettes*, the Appellate Body upheld the Panel's finding that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the

[371] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 570; Appellate Body Report, *US – Upland Cotton*, paras. 549 and 550; Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 and footnote 72 thereto (referring, in turn, to Appellate Body Report, *Korea – Dairy*, para. 81; Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, at 21; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12, DSR 1996:I, 97, at 106).

meaning of Article 31(3)(a) of the *Vienna Convention on the Law of Treaties*[372], regarding the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*.[373] Accordingly, the Appellate Body considered that, "taking into account the interpretative clarification provided by paragraph 5.2 of the Doha Ministerial Decision, Article 2.12 of the *TBT Agreement* establishes a rule that 'normally' producers in exporting Members require a period of 'not less than 6 months' to adapt their products or production methods to the requirements of an importing Member's technical regulation."[374] The Appellate Body clarified that "the use of the term 'normally' in paragraph 5.2 indicates that the rule establishing that foreign producers require a minimum of 'not less than 6 months' to adapt to the requirements of a technical regulation admits of derogation under certain circumstances."[375]

115. The Appellate Body observed that "Article 2.12 expressly states that the rationale for providing a 'reasonable interval' between the publication and the entry into force of a technical regulation is 'to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production' to the requirements of the importing Member's technical regulation."[376] However, in cases where "producers can adapt their products or production methods to the requirements of an importing Member's technical regulation in less than six months, a period of six months or more cannot be considered to be a 'reasonable interval' within the meaning of Article 2.12".[377] The Appellate Body further noted that paragraph 5.2 of the Doha Ministerial Decision allows an importing Member to depart from the obligation to provide six months between publication and entry into force, if this interval would be "ineffective in fulfilling the legitimate objectives pursued".[378]

116. Thus, the Appellate Body did not consider that Article 2.12, as clarified by paragraph 5.2 of the Doha Ministerial Decision, contains a rigid rule that in all circumstances Members must allow six months between the publication of a technical regulation and its entry into force. Rather, the clarification in paragraph 5.2 of the Doha Ministerial Decision of the phrase "reasonable interval" in Article 2.12 as meaning "[n]ormally a period of no less than 6 months" is explicitly made subject to the conditions of Article 2.12, where the "reasonable interval" is meant to allow producers in exporting countries to adapt their products or methods of production to the requirements of the

[372]Done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155. p. 331.
[373]Appellate Body Report, *US – Clove Cigarettes*, para. 268.
[374]Appellate Body Report, *US – Clove Cigarettes*, para. 272.
[375]Appellate Body Report, *US – Clove Cigarettes*, para. 273.
[376]Appellate Body Report, *US – Clove Cigarettes*, para. 282.
[377]Appellate Body Report, *US – Clove Cigarettes*, para. 282.
[378]Appellate Body Report, *US – Clove Cigarettes*, para. 282.

importing Member. Accordingly, the "normal" period of six months may be reduced in situations where producers in exporting countries need less time or even no time at all to adapt to the technical regulation. Moreover, an importing country may reduce the six-month period if this period would be ineffective to fulfil the legitimate objectives pursued by the technical regulation.

117. I observe that, at the oral hearing in this arbitration, both Canada and Mexico stated that their producers would not need any time to adapt their products or methods of production to the requirements of a modified COOL regulation. In particular, they asserted that the products they export to the United States are livestock, that is, live animals that will be raised and/or slaughtered within the United States. Consequently, any adjustments required by the new COOL regulation would affect US processors and retailers, rather than Canadian and Mexican exporters. Canada and Mexico further noted that if the United States allowed six months between the publication of an amended COOL regulation and its entry into force—absent withdrawal of the existing COOL regulation—this would have the effect of extending the application of the existing COOL regulation, which was found to discriminate against imported livestock from Canada and Mexico. I fail to see how a provision such as Article 2.12 of the *TBT Agreement*, which is intended to protect producers in exporting countries, can be used to prolong the application of an existing measure that has been found to discriminate against the same producers.

118. In addition, I recall that, as the Appellate Body clarified in *US – Clove Cigarettes*, paragraph 5.2 of the Doha Ministerial Decision allows an importing Member to depart from the obligation to provide six months between publication and entry into force, if this interval would be "ineffective in fulfilling the legitimate objectives pursued".[379] If the United States chooses to implement the DSB's recommendations and rulings in *US – COOL* by adopting a modified technical regulation, such an implementing measure would be taken also with the objective to achieve prompt compliance with the DSB's recommendations and rulings. To allow six months between publication and entry into force of the modified technical regulation, as the United States proposes, could not be considered effective in fulfilling the legitimate objective of prompt compliance with the DSB's recommendations and rulings. Thus, the need to comply promptly with the DSB's recommendations and rulings would allow the United States to depart from the rule that "normally" six months should elapse between the publication and the entry into force of a technical regulation.

119. Finally, as I recalled above, the Appellate Body has consistently upheld the principle that the provisions of the WTO covered agreements are all provisions of one treaty, the *WTO Agreement*.

[379]Appellate Body Report, *US – Clove Cigarettes*, para. 282.

Therefore, they "should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously".[380] The Appellate Body has also held that "Members have entered into cumulative obligations under the covered agreements and should thus be mindful of their actions under one agreement when taking action under another."[381] In the light of this, I have already noted that a Member that is implementing DSB recommendations and rulings pursuant to Article 21 of the DSU cannot ignore its other WTO obligations, such as Article 2.12 of the *TBT Agreement*, even if taking into account these other WTO obligations may in certain cases delay implementation. By the same token, however, a Member that is under an obligation to comply should do so promptly, while taking into account the requirement of Article 2.12 of the *TBT Agreement*. Thus, a coherent and consistent interpretation of Article 21 of the DSU and of Article 2.12 of the *TBT Agreement* does not lead to the conclusion that the reasonable period of time should automatically be extended by six months if implementation involves passing or amending a technical regulation.

120. In the light of the above, I consider that the United States is not required in this case to wait for six months before putting into force a modified COOL regulation if it enacts a technical regulation in order to comply with the DSB's recommendations and rulings. Rather, Article 2.12 of the *TBT Agreement* does not prevent the United States from putting the modified COOL regulation into force within a shorter timeframe or even upon publication, considering that Canada and Mexico have stated that their producers would need no time to adapt their products and production methods to the modified COOL regulation.

121. I, therefore, conclude that Article 2.12 of the *TBT Agreement* does not justify in the circumstances of this case granting the additional period of time requested by the United States under that provision to implement the recommendations and rulings of the DSB in the *US – COOL* disputes.

IV. Award

122. In the light of the above considerations, I consider that the reasonable period of time should be the period of time necessary for the United States to implement the DSB's recommendations and rulings within its domestic legal system and that the requirement of Article 2.12 of the *TBT Agreement* does not justify granting additional time in this case.

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[380]Appellate Body Report, *US – Upland Cotton*, paras. 549 and 550; Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 and footnote 72 thereto (referring, in turn, to Appellate Body Report, *Korea – Dairy*, para. 81; Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, at 21; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12, DSR 1996:I, 97, at 106; and Appellate Body Report, *India – Patents (US)*, para. 45).

[381]Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 570.

123. I, therefore, determine that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB in these disputes is 10 months from the date of adoption of the Panel and Appellate Body Reports on 23 July 2012. The reasonable period of time will thus end on 23 May 2013. In reaching this conclusion, I have considered that this period of time should allow the United States to implement the recommendations and rulings of the DSB regardless of whether it decides to do so by regulatory action alone or by legislative action followed by regulatory action.

Signed in the original at Geneva this 22nd day of November 2012 by:

Giorgio Sacerdoti
Arbitrator