WORLD TRADE ORGANIZATION

WT/DS344/15
31 October 2008

(08-5272)

Original: English

UNITED STATES – FINAL ANTI-DUMPING MEASURES ON STAINLESS STEEL FROM MEXICO

ARB-2008-3/24

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

Award of the Arbitrator
Florentino P. Feliciano

CASES CITED IN THIS AWARD

Short Title	**Full case title and citation**
Australia – Salmon	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	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
Canada – Autos	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	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	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	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	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
EC – Chicken Cuts	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	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	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	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
Japan – DRAMs (Korea)	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
Korea – Alcoholic Beverages	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
US – 1916 Act	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 – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373

Short Title	Full case title and citation
US – Certain EC Products	Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R and Add.1, adopted 10 January 2001, as modified by Appellate Body Report, WT/DS165/AB/R, DSR 2001:II, 413
US – Gambling	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
US – Hot-Rolled Steel	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)	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	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
US – Section 110(5) Copyright Act	Award of the Arbitrator, *United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU*, WT/DS160/12, 15 January 2001, DSR 2001:II, 657
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008
US – Stainless Steel (Mexico)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report, WT/DS344/AB/R
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417
US – Zeroing (EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report, WT/DS294/AB/R, DSR 2006:II, 521
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report, WT/DS322/AB/R

ABBREVIATIONS USED IN THIS AWARD

Abbreviation	**Description**
Appellate Body Report	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
GATT 1994	*General Agreement on Tariffs and Trade 1994*
Panel Report	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R
URAA	Uruguay Round Agreements Act
USDOC	United States Department of Commerce
USTR	United States Trade Representative
WTO	World Trade Organization

WORLD TRADE ORGANIZATION
AWARD OF THE ARBITRATOR

United States – Final Anti-Dumping Measures on Stainless Steel from Mexico

Parties:

Mexico
United States

ARB-2008-3/24

Arbitrator:

Florentino P. Feliciano

I. Introduction

1. On 20 May 2008, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report[1] and the Panel Report[2], as modified by the Appellate Body Report, in *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*.[3] At the DSB meeting held on 2 June 2008, the United States indicated its intention to implement the recommendations and rulings of the DSB in this dispute, and stated that it would require a reasonable period of time in which to do so.[4]

2. On 11 August 2008, Mexico informed the DSB that consultations with the United States had not resulted in an agreement on the "reasonable period of time" for implementation. Mexico therefore requested that such period be determined through binding arbitration, pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").[5]

3. Mexico and the United States were unable to agree on an arbitrator within 10 days of the matter being referred to arbitration. Therefore, by letter dated 22 August 2008, Mexico requested the Director-General to appoint an arbitrator pursuant to footnote 12 to Article 21.3(c) of the DSU. The Director-General appointed me as Arbitrator on 29 August 2008, after consulting the parties.[6] I informed the parties of my acceptance of the appointment by letter dated 1 September 2008.

[1]Appellate Body Report, WT/DS344/AB/R.
[2]Panel Report, WT/DS344/R.
[3]WT/DS344/10.
[4]WT/DSB/M/251, para. 9.
[5]WT/DS344/13.
[6]WT/DS344/14.

4. Mexico and the United States have agreed that this Award will be deemed to be an arbitration award under Article 21.3(c) of the DSU, notwithstanding the expiry of the 90-day period stipulated in Article 21.3(c).[7]

5. The United States filed its written submission on 10 September 2008. Mexico filed its written submission on 19 September 2008. An oral hearing was held on 6 October 2008.

II. Arguments of the Parties

A. *United States*

6. The United States submits that the "reasonable period of time" necessary to comply with the recommendations and rulings of the DSB in the present case is 15 months, ending on 20 August 2009. The United States highlights the complex and lengthy legislative process, the administrative modifications necessary for compliance, the future changes in the United States Administration and Congress, the text of Article 21.3(c) of the DSU, and previous arbitration awards under this provision.

7. The United States points out that the task of the arbitrator under Article 21.3(c) of the DSU is to determine the "reasonable period of time" for a Member to bring itself into compliance with the recommendations and rulings of the DSB. The United States notes that it is not for the arbitrator to prescribe any particular method of implementation. Instead, it is the prerogative of the implementing Member to determine, by itself, the most appropriate means of implementation, including the timing and sequence of necessary steps.

8. The United States considers that Article 21.3(c) prescribes a "guideline" for the arbitrator to determine the reasonable period of time in that it "should not exceed 15 months". This guideline however, is not an "outer limit" or "a floor or inner limit"[8], but may vary depending upon the specific circumstances of a particular case. Thus, according to the United States, Article 21.3(c) provides for flexibility that should be defined on a case-by-case basis.

[7]The 90-day period following the adoption of the Panel and Appellate Body Reports expired on 18 August 2008. On 8 July 2008, the United States and Mexico mutually agreed that any awards of the arbitrator (including awards not made within 90 days after the date of adoption of the recommendations and rulings) should be deemed to be awards of the arbitrator for the purposes of Article 21.3(c) of the DSU. (See WT/DS344/13)

[8]United States' submission, para. 7 (referring to Award of the Arbitrator, *US – Hot-Rolled Steel*, para. 25).

9. The United States also notes that the specific circumstances, relevant to the determination of the reasonable period of time under Article 21.3(c) of the DSU, are the legal form of implementation; the technical complexity of the measures necessary for implementation; and the period of time required for implementation of such measures. The United States points to, as specific circumstances in the present case, the complexity of addressing zeroing in the context of administrative reviews, especially in the allocation of anti-dumping duties among the importers for assessment purposes. Moreover, the United States submits that it would require a pre-legislative phase for consultations and technical assessments and "building of support for the measure to occur", which is an important phase for the success of the proposed implementation action.[9] The United States underlines that the pre-legislative phase has been considered relevant by previous Article 21.3(c) arbitrators in *Canada – Autos* and *Canada – Pharmaceutical Patents.*[10]

10. Further, the United States points out that, in January 2009, a new Administration and a new Congress will take office, resulting in additional time required to put in place relevant staff and senior policymakers for the implementation of measures that would bring the United States into compliance with the recommendations and rulings of the DSB. The United States highlights that previous arbitrators under Article 21.3(c) of the DSU have held that an implementing Member is not expected to utilize extraordinary legislative procedures and that the normal legislative process is, generally, to be used.[11]

11. The United States indicates that its Administration is in the process of "consulting internally" on compliance and that two approaches are under consideration: legislative action, and administrative action.[12]

1. Legislative Action

12. With respect to legislative action, the United States stresses the particular difficulties that it faces under the current legislative calendar. According to the United States Constitution, Congress meets "at least once in every year", generally convening on 3 January.[13] Currently, the United States is nearing the end of the second session of the 110th Congress, and the expected adjournment date for

[9]United States' submission, para. 10.
[10]*Ibid*. (referring to Award of the Arbitrator, *Canada – Autos*, paras. 18, 49, and 56; and Award of the Arbitrator, *Canada – Pharmaceutical Patents*, paras. 1, 14, and 62).
[11]*Ibid*., para. 12 (quoting Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 45; and Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 42).
[12]*Ibid*., para. 14.
[13]*Ibid*., para. 15 (referring to *The Constitution of the United States* (Exhibit US-2 submitted by the United States to the Arbitrator), Article I, Section 4).

the House of Representatives is 26 September 2008.[14] The United States indicates that a legislation on simple zeroing introduced before Congress, if it is not acted upon before adjournment, will "die" at the end of the Congress, as "the 110th Congress does not have the ability to 'save' the work that it does during its second session in 2008 and complete it in 2009".[15]

13. The United States contends that, as any modification to the current anti-dumping system is complex, and as a period of time for public hearings and legislative consideration should be allowed, it would not be possible to complete the legislative work before the adjournment date, and the relevant proposed legislation would need to be addressed by the new Congress in 2009. The United States further points out that members of the new Congress will not begin to conduct official business and acts of legislation until late January or early February 2009. The United States adds that a new President will be sworn in on 20 January 2009, and therefore it will be some time after that date that new officials will be appointed who will have to vet and approve the new legislation. In these circumstances, the United States believes that a compliance legislation could not be introduced before April or May 2009, and at the very least four months would then be required to pass that legislation in the multi-stage, bicameral United States legislative system.

14. Turning to the legislative process, the United States notes that, as the power to legislate rests upon Congress (which consists of two chambers, the House of Representatives and the Senate), the Executive branch has no control over the timetable and procedures of Congress. In its description of the United States legislative process, the United States points out that a bill, after its introduction in the House or the Senate by a member of Congress, is usually referred to a standing committee or committees having jurisdiction over the subject matter of that bill. There is no specified timeframe for committee consideration. The United States adds that most bills are referred to by the committee with jurisdiction to a subcommittee for consideration. In the House of Representatives, the subcommittee normally schedules public hearings to obtain the views of stakeholders. When the hearings are completed, the subcommittee usually meets to "mark-up" the bill, that is, to make changes and amendments prior to deciding whether to recommend or report the bill to the full committee. The subcommittee may also suggest that a bill be "tabled", that is, postponed indefinitely. The United States points out that, after receiving the subcommittee's report, the full committee may conduct a further study and hearings, and may also make changes or amendments. The full committee then votes on whether to "report back" the bill to the plenary of the House.

[14]United States' submission, para. 16 (referring to *United States House and Senate Tentative Schedules (2008)* (Exhibit US-3 submitted by the United States to the Arbitrator)).
[15]*Ibid*., para. 16.

15. The United States explains that the scheduling for consideration of legislation on the House floor is determined, as a general rule, by the Speaker of the House of Representatives and the majority political party leader, who may place the bill on the calendar for House debate. The House Rules Committee generally recommends the amount of time that will be allocated for debate and whether amendments may be offered. During the debate process, the bill is read in detail and members of Congress may offer further amendments. After voting on amendments, the House immediately votes on the bill itself with any adopted amendments. The bill can also be returned to the committee that reported it. If passed, the bill must be referred to the Senate.

16. The Senate, in turn, has the power to approve, reject, or ignore the bill referred to by the House. While the Senate has similar procedures for consideration of legislation by relevant committees, there are significant differences in the way the Senate considers proposed legislation. The United States explains that the Senate functions in a less rules-driven manner than the House, and that scheduling and floor consideration are generally decided by consensus. The United States further observes that, unlike the House where debate is strictly controlled, debate is rarely restricted in the Senate. Individual Senators may "filibuster" a bill by taking the floor and speaking for extended periods of time. Filibustering could only be ended by a "*cloture*" procedure, requiring a vote by 60 Senators which is very difficult to achieve.[16]

17. The United States adds that differences between the House and Senate versions of a bill will be discussed for reconciliation in a conference committee. The members of this committee are appointed by each chamber and given specific instructions that may be revised every 21 days. If the conference committee cannot reach agreement, the bill expires. If the conference committee reaches agreement on a single bill, a report is prepared and must be approved by both chambers, in identical form, otherwise the revised legislation expires.

18. Finally, the United States indicates that, after the approval by both chambers of Congress, the bill is sent to the President for approval. Only after Presidential approval does a proposed piece of legislation become law.

2. Administrative Action taken pursuant to Section 123 of the URAA

19. The United States stresses, with respect to administrative action, that Section 123 of the Uruguay Round Agreements Act (the "URAA") sets forth the requirements for implementation of DSB recommendations and rulings regarding regulations or practice of the United States Department of Commerce (the "USDOC"). The United States observes that the administrative process

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

contemplated in this provision comprises six steps. First, the United States Trade Representative (the "USTR") is required to consult with committees of Congress with jurisdiction over relevant matters. The United States points out that, in respect of the measure at issue in this dispute, such consultations have already taken place. Secondly, the USTR is required to seek advice from private sector advisory committees. Thirdly, the USDOC must publish in the *Federal Register* the proposed modification and the explanation thereto, in order to provide for an opportunity to receive public comments. Fourthly, the USTR is required to report to relevant Congressional committees the proposed modification, the reasons for the modification, and a summary of the advice received from the private sector advisory committees. Fifthly, both the USTR and the USDOC must consult with relevant Congressional committees on the proposed content of the final rule. Finally, the USDOC is required to publish the final rule in the *Federal Register*. The United States indicates that a rule may not enter into force before the end of a 60-day period from the date on which consultations between the USTR, the USDOC, and committees in the Congress take place.

20. The United States underlines the unique difficulties posed by the impending elections as well as a new Administration and new Congress taking office, and notes that some of the steps required by Section 123 call for interaction between the Administration and Congress. The United States submits that key Administration officials will not be in place to make policy decisions regarding compliance until "some time after 20 January 2009".[17] The United States points out that, under normal conditions, the USDOC would require about three months to conduct consultations and to publish the proposed rule or practice, with an explanation, in the *Federal Register*. The United States adds that one additional month would be appropriate to allow for new officials to be appointed, to study the relevant matters, and to make changes and recommendations. For the United States, the earliest an administrative proposal could be circulated in this case is early May 2009. The United States considers that the USDOC would also need an additional three months to make possible modifications to address the public comments and to hold final consultations. According to the United States, under the best possible scenario, this administrative process would be completed in August 2009.

21. In the light of these considerations, the United States requests a reasonable period of time of 15 months, ending on 20 August 2009.

[17]United States' submission, para. 37.

B. *Mexico*

22. Mexico requests that I determine the "reasonable period of time" for the implementation of the recommendations and rulings of the DSB in this dispute to be seven months from the date of the adoption of the Appellate Body and Panel reports, that is, until 20 December 2008.

23. First, Mexico highlights that the mandate for the arbitrator under Article 21.3(c) of the DSU is to determine the reasonable period of time and not to analyze the consistency of the proposed implementation measure with World Trade Organization ("WTO") law. Mexico notes that, according to Articles 21.1 and 21.3 of the DSU, prompt compliance is essential for the resolution of disputes and that immediate compliance is the preferred option. Mexico explains that previous arbitration awards have identified guidelines regarding the determination of the reasonable period of time. First, the reasonable period of time should be the "shortest period of time possible within the legal system" of the implementing Member.[18] Secondly, Mexico states that, although an implementing Member is not required to use extraordinary procedures, it must utilize all the flexibility and discretion available within its legal system. Thirdly, Mexico points out that the particular circumstances of the dispute must be taken into consideration in calculating the reasonable period of time. In this respect, Mexico observes that the implementing Member bears the burden to demonstrate that its proposed schedule constitutes a reasonable period of time under the specific circumstances of the dispute.[19] In Mexico's view, the United States has not met its burden to show that it cannot implement the recommendations and rulings of the DSB in less than 15 months.

24. As to the particular circumstances of this case, Mexico emphasizes that model zeroing in original investigations and simple zeroing in periodic reviews have been challenged on a number of occasions over the last seven years, and that both practices have repeatedly been found to be inconsistent with Article VI of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), as well as with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"). Mexico further observes that the United States has been under an obligation to eliminate simple zeroing since at least 9 May 2006, when the DSB adopted its recommendations and rulings in *US – Zeroing (EC)*.[20] Mexico adds that the United States has also been under an obligation to eliminate simple zeroing "as such", when the DSB adopted its

[18]Mexico's submission., para. 10 (quoting Award of the Arbitrator, *Brazil – Retreaded Tyres*, para. 51; and referring to Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 44; and Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 61).

[19]*Ibid*., para. 11 (referring to Award of the Arbitrator, *US – 1916 Act*, para. 33).

[20]*Ibid*., para. 12, where Mexico indicates that the reasonable period of time for the United States to comply with the recommendations and rulings of the DSB in *US – Zeroing (EC)* expired on 9 April 2007.

recommendations and rulings in *US – Zeroing (Japan)* on 24 January 2007.[21] For Mexico, these disputes provide an important context for the determination of the reasonable period of time.

25. Mexico underlines that the United States has focused its arguments entirely on the reasonable period of time necessary to comply with its obligations in respect of simple zeroing "as such". Mexico notes that, as to its "as applied" obligations, the United States has not requested any additional time beyond what is requested for complying with its "as such" obligations.

26. Mexico notes that the United States has identified two possible paths of compliance: (i) administrative implementation under Section 123 of the URAA; and (ii) legislative action by which statutory provisions concerning calculation of dumping margins in administrative reviews would be amended. According to Mexico, the United States has failed to show that legislative action would lead to the shortest period of time for implementation. Rather, Mexico is of the view that administrative implementation may proceed with more efficiency and speed, and is thus the fastest path that should be the basis for the Award in this arbitration.

1. Legislative Action

27. Mexico submits that previous Article 21.3(c) arbitrations have recognized that legislative action is generally more time-consuming than administrative changes, and that the description of the domestic legislative process provided by the United States confirms that. Mexico underscores that, in its description of the legislative process, the United States concedes that the Executive branch has no control over Congress and that the voting process within Congress is complex and time-consuming. Mexico therefore considers that the description offered by the United States shows that legislative action is "inherently slower and less reliable than administrative action".[22]

28. Mexico considers that, in order to implement the recommendations and rulings of the DSB, legislative action is not required. Mexico points to United States domestic courts that have held that no change to the anti-dumping statutes is necessary in order to eliminate simple zeroing.[23] Mexico also refers to a USDOC statement acknowledging that zeroing is "not required by statute, but rather is

[21]Mexico's submission, para. 12, where Mexico notes that the reasonable period of time for the United States to comply with the recommendations and rulings of the DSB in *US – Zeroing (Japan)* expired on 24 December 2007.

[22]*Ibid*., para. 21.

[23]*Ibid*., para. 23 (referring to United States Court of Appeals for the Federal Circuit in *SKF, Inc. v. United States*, Ct. No. 2007-1502 (Fed. Cir. Aug. 25, 2008) (Exhibit MX-8 submitted by Mexico to the Arbitrator); also in *NSK v. United States*, 510 F. 3d 1375 (Fed. Cir. 2007) (Exhibit MX-9 submitted by Mexico to the Arbitrator); and in *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004) (Exhibit MX-10 submitted by Mexico to the Arbitrator)).

the result of an interpretation of the statute", thus showing, in Mexico's view, that the elimination of zeroing does not require legislative action.[24]

29. As for the allocation of anti-dumping duties among importers for assessment purposes, Mexico submits that the USDOC has the legal authority under United States Statutes to address this issue. A United States court has recognized that statutory language does not dictate how the USDOC must calculate the importer's specific assessment rates on the "basis of" the margin of dumping calculated in the review.[25] Therefore, Mexico argues, no enactment of legislation is required in order to deal with the allocation issue in a WTO-consistent manner.

30. In sum, Mexico submits that the USDOC has the necessary discretion to determine the method of calculation of anti-dumping duties. While the United States may opt for legislative action, this form of implementation is generally a slower option than administrative action. For Mexico, the legislative path would be inconsistent with the United States' obligation to choose the shortest possible means of implementation.

2. Administrative Action taken pursuant to Section 123 of the URAA

31. Mexico recalls the United States' position that administrative action must follow the procedure set forth in Section 123 of the URAA, and that this process would require a similar period of time as that associated to legislative change. According to Mexico, the United States has not substantiated this assertion and has not demonstrated the need for the period of time it requests.

32. Mexico contends that the United States could utilize a shorter and simpler administrative means of implementation than Section 123 of the URAA. According to Mexico, the Statement of Administrative Action accompanying the URAA sets out that Section 123 applies only to changes or modifications of administrative practice "consisting of written policy guidance of general application".[26] In Mexico's view, the United States is not required under its legal system to utilize the procedure under Section 123 of the URAA. Instead, Mexico opines that the United States could use the procedure set out in the Administrative Procedure Act governing administrative actions, which

[24]Mexico's submission, para. 24 (referring to USDOC, *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*; *Final Modification, United States Federal Register*, Vol. 71, No. 248 (27 December 2006) 77722 (Exhibit MX-11 submitted by Mexico to the Arbitrator)).

[25]*Ibid*., para. 42 (Exhibit MX-14 submitted by Mexico to the Arbitrator).

[26]*Ibid*., para. 29 (referring to Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, reprinted in 1994 USCCAN 4040 (Exhibit MX-17 submitted by Mexico to the Arbitrator)).

provides that formal rulemaking is not necessary for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice".[27]

33. Mexico maintains that, in using this alternative administrative procedure, the United States could change its administrative practice of simple zeroing in a less formal and less time-consuming manner. Mexico observes that unwritten interpretative rules and policies have been amended in the past by the USDOC without any formal public notice, whereas, in other cases relating to practices with wider applicability, policy changes have been instituted through publication in Import Administration "Policy Bulletins".[28] Mexico recognizes that the USDOC has the option of soliciting public comment in the course of instituting an informal policy change. However, Mexico argues that, even with a public comment period, the process of implementation under these procedures could be accomplished within a period of 60-90 days.

34. Mexico notes that the Section 123 implementation process involves two main stages: (i) internal deliberations, approval, and consultations with Congress and the private sector leading to the publication of a proposed rule in the *Federal Register*; and (ii) modifications to the rule as a result of public comments, final consultations with Congress, and publication of the final rule in the *Federal Register*. Mexico is of the view that the process of implementation under Section 123 could be completed in seven months from the date of adoption of the DSB's recommendations and rulings on 20 May 2008. Mexico also rejects the United States' contention that the first stage of the implementation process cannot begin until 20 January 2009, when the new President takes office. Mexico notes that the United States has already had four months to conduct consultations with Congress and the private sector, and that this period exceeds the 90 days the United States asserts is required for the first stage of the Section 123 procedure.

35. Mexico also contests the United States' request of 120 days to complete the second stage of the implementation process under Section 123 of the URAA. Mexico notes that, in previous disputes, the United States completed the second stage (from the publication of the proposed rule to the adoption of the final rule) in less than 120 days. Mexico also points out that implementation in this case concerns an issue that was already the subject of a prior WTO dispute settlement proceeding and implementation obligations, and that it has been the subject of notice and comment procedures.

[27]Mexico's submission, para. 30 (quoting Administrative Procedure Act, *United States Code*, Title 5, Section 553(b)(3)(A) (Exhibit MX-18 submitted by Mexico to the Arbitrator)).

[28]Mexico mentions automatic initiation of "Sales Below Cost Investigations" in new administrative reviews and certain interest provisions for new shipper reviews (Exhibits MX-20 and MX-21 submitted by Mexico to the Arbitrator).

Therefore, Mexico considers that 60 days would be a reasonable period of time for the United States to complete the second stage of the implementation process under Section 123 of the URAA. In sum, Mexico is of the view that a period of seven months constitutes a reasonable period of time within which administrative implementation under Section 123 could be accomplished. Mexico considers that such a period of time would allow for compliance to be completed before the new Administration takes office.

36. Regarding the United States' contention that a preparatory process is needed, Mexico recalls its position that the United States has been under an obligation to eliminate simple zeroing "as such" since 24 December 2007 when the reasonable period of time in *US – Zeroing (Japan)* expired, long before the DSB adopted its recommendations and rulings in this case. For Mexico, the need to engage in a preparatory process is not a factor that should carry any weight in the determination of the reasonable period of time in this case. Mexico emphasizes that the discretion of Members to determine their means of implementation is not without bounds.[29]

37. Finally, Mexico rejects the United States' position that the alleged complexity of the implementation process is a factor warranting an extended period for compliance. For Mexico, the complexity of the implementation process alleged by the United States is limited to one issue: how to allocate anti-dumping duties among individual importers in a periodic review proceeding for assessment purposes. Mexico submits that the normal Section 123 procedures and timeframe are already designed to accommodate such decision-making and that, in at least one previous case, a conceptually more complex issue has been addressed within a Section 123 implementation process that was completed within six months.[30] Furthermore, although Mexico appreciates that the question of zeroing is a contentious one, it considers that domestic contentiousness of implementation action must not be factored into the determination of the reasonable period of time.

38. In the light of these considerations, Mexico requests the reasonable period of time should be no longer than seven months as from the date of adoption of the Panel and Appellate Body Reports, ending on 20 December 2008.

[29]Mexico's submission, para. 39 (quoting Award of the Arbitrator, *EC – Chicken Cuts*, para. 56).

[30]*Ibid*., para. 53 (referring to USDOC, *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, *United States Federal Register*, Vol. 67, No. 221 (15 November 2002) 69186) (Exhibit MX-24 submitted by Mexico to the Arbitrator)).

III. Reasonable Period of Time

A. *Mandate of the Arbitrator*

39. This dispute is concerned with model zeroing in original anti-dumping investigations[31], as well as simple zeroing in periodic reviews.[32] The Appellate Body and Panel Reports in this dispute were adopted by the DSB on 20 May 2008. On 2 June 2008, the United States informed the DSB of its intention to comply with the recommendations and rulings of the DSB. Article 21.3 of the DSU stipulates that, when it is "impracticable" for a Member to comply "immediately" with the recommendations and rulings of the DSB, that Member "shall have a reasonable period of time in which to do so". As the parties failed to agree on the length of the reasonable period of time for compliance, the Director-General appointed me as arbitrator on 29 August 2008, and I accepted the appointment on 1 September 2008.

40. In keeping with my mandate, I must take due account of the relevant provisions of the DSU. Article 21.1 of the DSU sets out that "prompt compliance" is essential for the resolution of WTO disputes. More specifically, Article 21.3(c) reads:

> [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. (footnote omitted)

41. My mandate relates to the *time* by which the implementing Member must have achieved compliance, not to the *manner* in which that Member achieves compliance. I am mindful that it is beyond my mandate to determine the consistency with WTO law of the measure eventually *taken* to comply; this can only be assessed in Article 21.5 proceedings. Yet, I consider that *when* a Member must comply with the recommendations and rulings of the DSB cannot be determined in isolation from the chosen means of implementation. In order "to determine *when* a Member must comply, it

[31]"Model zeroing in investigations" refers to the "method under which the USDOC, in original investigations, makes a weighted average-to-weighted average comparison ... of export price and normal value for each 'model' of the product under investigation, and disregards the amount by which the weighted average export price exceeds the weighted average normal value for any model, when aggregating the results of model-specific comparisons to calculate a weighted average margin of dumping for the exporter or foreign producer investigated." (Appellate Body Report, para. 67)

[32]"Simple zeroing in periodic reviews" refers to "the method under which the USDOC, in periodic reviews for assessment of final liability for payment of anti-dumping duties, compares the prices of individual export transactions against monthly weighted average normal values, and disregards the amount by which the export price exceeds the monthly weighted average normal value for each model, when aggregating the results of the comparisons to calculate the margin of dumping for the exporter and the duty assessment rate for the importer concerned." (Appellate Body Report, para. 67)

may be necessary to consider *how* a Member proposes to do so."[33] In making my determination pursuant to Article 21.3(c), the means of implementation chosen by the Member concerned is, therefore, a relevant consideration.[34] As noted by previous arbitrators, 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 the DSB and with the covered agreements."[35] In exercising its discretion, the implementing Member will be expected to act in good faith in developing a measure capable of producing the desired result, that is, the implementation of the adopted Appellate Body and panel reports. However, this principle of good faith is not to be used by the implementing Member to delay implementation.

42. While the implementing Member enjoys a certain discretion in choosing the means and method of implementation, this discretion is not without bounds. As stated by previous arbitrators, "the implementing Member does not have an unfettered right to choose any method of implementation."[36] 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."[37] Put a little differently, the chosen method must be capable of placing the implementing Member in compliance within a reasonable period of time in accordance with the guidelines contained in Article 21.3(c).[38] 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".[39] Therefore, as other arbitrators in the past, I also consider that the implementing Member is expected to use all the flexibility available within its domestic legal system to implement the

[33]Award of the Arbitrator, *Japan – DRAMs (Korea)*, para. 26. (original emphasis)

[34]*Ibid*., para. 27.

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

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

[37]*Ibid*., para. 48 (quoting Award of the Arbitrator, *Japan – DRAMs (Korea)*, para. 27).

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

[39]*Ibid*., para. 25 (referring to Award of the Arbitrator, *EC – Chicken Cuts*, para. 49).

recommendations and rulings of the DSB[40]; however, this does not necessarily mean that the implementing Member is expected to utilize "extraordinary" means of compliance.[41]

43. Finally, it is incumbent upon the implementing Member seeking a reasonable period of time to establish that the proposed period is the "shortest period possible" within its domestic legal system to implement the recommendations and rulings of the DSB. Failing that, it is ultimately for the arbitrator to determine the "shortest period possible" for implementation, on the basis of the evidence presented by all parties."[42]

B. *Measures to be brought into Conformity*

44. The relevant findings and conclusions of both the Panel and the Appellate Body that have been adopted by the DSB in this dispute are summed up below. The Appellate Body found that:

(a) simple zeroing in periodic reviews is, as such, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*[43]; and

(b) the United States acted inconsistently with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* by applying simple zeroing in five specific periodic reviews.[44]

45. The Panel made the following findings (that were not appealed):

(a) model zeroing in investigations is, as such, inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*[45]; and

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

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

[42]*Ibid*., para. 51 (referring to Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 44).

[43]Appellate Body Report, para. 165(a). In this dispute, Mexico appealed the Panel's findings that determined that simple zeroing, both "as such" and "as applied", in periodic reviews is not inconsistent with the provisions of the *Anti-Dumping Agreement*, as claimed by Mexico.

[44]*Ibid*., para. 165(b).

[45]Panel Report, para. 8.1(a).

(b) the USDOC acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico* by using model zeroing.[46]

46. In sum, the Panel and the Appellate Body findings in this dispute included four findings of WTO-inconsistency: (i) the use of model zeroing in original investigations "as such"[47]; (ii) the application of model zeroing in the original investigation at issue before the Panel and the Appellate Body[48]; (iii) the use of simple zeroing in periodic reviews "as such"[49]; and (iv) the use of simple zeroing in specific periodic reviews at issue before the Panel and the Appellate Body.[50]

47. The United States emphasizes that it has discontinued the methodology of model zeroing in original investigations[51] and, thus, it does not request any specific period of time for implementing the Panel's findings in this dispute regarding model zeroing "as such" and "as applied" in original investigations. In other words, the elimination of model zeroing in *original investigations* is not at issue in this arbitration. Thus, my task is limited to the determination of a reasonable period of time for the United States to comply with the recommendations and rulings of the DSB relating to simple zeroing "as such" and "as applied" in periodic reviews.

48. Mexico observes that the United States has not requested a period of time for compliance with the DSB recommendations and rulings as to simple zeroing "as applied" "beyond what would be reasonable for complying with its WTO obligations concerning the 'as such' findings with respect to periodic reviews."[52] In response to questioning at the oral hearing, the United States confirmed that compliance with the DSB recommendations and rulings relating to simple zeroing "as applied" would not require a longer period of time than compliance with the DSB recommendations and rulings regarding simple zeroing "as such". Accordingly, my analysis will focus on the reasonable period of time needed by the United States to implement the recommendations and rulings of the DSB regarding simple zeroing "as such" in periodic reviews.

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[46]Panel Report, para. 8.1(b).

[47]*Ibid*., para. 8.1(a); USDOC, Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Mexico, *United States Federal Register*, Vol. 64, No. 109 (8 June 1999) 30790, subsequently amended as Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Stainless Steel Sheet and Strip in Coils From Mexico, *United States Federal Register*, Vol. 64, No. 143 (27 July 1999) 40560.

[48]Panel Report, para. 8.1(b).

[49]Appellate Body Report, para. 165(a).

[50]*Ibid*., para. 165(b); the five periodic reviews challenged by Mexico before the Panel are listed in Panel Report, para. 2.2.

[51]Panel Report, paras. 7.45 and 7.50; Appellate Body Report, footnote 158 to para. 68.

[52]Mexico's submission, para. 15.

C. *Legislative Action versus Administrative Action*

49. The United States requests a period of time of 15 months to bring itself into compliance with the recommendations and rulings of the DSB. The United States points out that two means of implementation are under consideration—(i) legislative action; or (ii) administrative action—and that whichever measure is chosen, the reasonable period of time would end on 20 August 2009. The United States indicates that internal consultations are currently taking place in order to decide how best to implement the recommendations and rulings of the DSB.[53] Should implementation by administrative means be chosen, the United States notes that the procedure set out in Section 123 of the URAA must be followed.

50. Mexico submits that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB should not exceed seven months from the adoption of the DSB recommendations and rulings in this dispute, ending on 20 December 2008.[54] According to Mexico, the United States has recognized that compliance can be achieved either through administrative or legislative action, and that administrative action is the shorter path for implementation.[55] At the oral hearing, Mexico argued that legislative action is not necessary to comply with the recommendations and rulings of the DSB.[56] Regarding administrative implementation, Mexico contends that the United States might resort to administrative action under the Administrative Procedure Act, and that such an action would allow implementation within a shorter period of time than action under Section 123 of the URAA.

51. From responses to questioning at the oral hearing, I understand that the United States does not dispute that the elimination of simple zeroing in periodic reviews, in and of itself, does not require a legislative action. However, the United States emphasizes that it has not as yet decided how it would change the periodic review methodology and, more specifically, how it would change its importer-specific system of assessment of final anti-dumping duties so as to ensure that all anti-dumping duties assessed on all importers that imported from the same exporter do not exceed that exporter's margin of dumping. The United States considers that, at this stage, it cannot be excluded that, in order to change the periodic review methodology, or to address what it calls the issue of the "allocation of

[53]United States' submission, para. 4.
[54]Mexico's submission, para. 56.
[55]Mexico's statement at the oral hearing.
[56]*Ibid*.

antidumping duties among the importers for assessment purposes"[57], legislative action could be more appropriate than an administrative action, depending on the nature of the policy choices that are made in this respect.

52. As noted earlier, the implementing Member enjoys a certain discretion in choosing the means and method of implementation, but it does "not have an unfettered right to choose any method of implementation".[58] I recognize that both the legislative and administrative means of implementation proposed by the United States fall within this range of permissible means that are capable of achieving the elimination of simple zeroing "as such" in periodic reviews. The United States itself recognizes that administrative means are available and that legislative action is not indispensably required to achieve compliance with the DSB recommendations and rulings. At the oral hearing, the United States did not put forward any argument that would suggest that a statutory provision needs to be amended or repealed to terminate simple zeroing in periodic reviews. Furthermore, I observe that the USDOC has discontinued model zeroing in original investigations through administrative action.[59]

53. It is not my task as Arbitrator acting pursuant to Article 21.3(c) to decide which method or type of measure should be chosen by an implementing Member to bring it into compliance with the recommendations and rulings of the DSB. However, it does fall within my mandate to assess what would be "the shortest period possible within the legal system of the [implementing] Member"[60] for effective implementation of the recommendations and rulings of the DSB. It is widely accepted that implementation through administrative action usually takes a shorter period of time than implementation through legislative action.[61] In the light of the parties' responses to questioning at the oral hearing, I am not persuaded that the United States is not in a position to eliminate the simple zeroing methodology in periodic reviews by administrative action, or that legislative implementation would necessarily be more effective than administrative implementation. In these circumstances, I turn to the period of time within which administrative action eliminating the methodology of simple zeroing in periodic reviews could be completed.

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[57]United States' submission, para. 9.

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

[59]Panel Report, paras. 7.43-7.45; Exhibit MX-10 submitted by Mexico to the Arbitrator. Mexico acknowledged before the Panel that, since 22 February 2007, the United States had changed its methodology regarding model zeroing in investigations and that it applied the new methodology in at least one investigation initiated subsequent to this date. Mexico contended, however, that "this change in policy only affect[ed] investigations ongoing as of, or initiated after, 22 February 2007." (Panel Report, para. 7.43)

[60]Award of the Arbitrator, *EC – Hormones*, para. 26.

[61]Award of the Arbitrator, *Australia – Salmon*, para. 38; Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 34; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 49; Award of the Arbitrator, *Canada – Patent Term*, para. 41; Award of the Arbitrator, *Chile – Price Band System*, para. 38; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 57; Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 26.

D. *The Administrative Procedure Act and Section 123 of the URAA*

54. Mexico has argued that the recommendations and rulings adopted by the DSB in this case could be implemented through administrative action under the Administrative Procedure Act faster than through administrative action under Section 123 of the URAA. Mexico recognizes, however, that the methodology of simple zeroing in periodic reviews may be terminated also by the administrative process set out in Section 123 of the URAA.

55. It may be observed that the Administrative Procedure Act is a statute that generally applies to the adoption and modification of administrative regulation. By contrast, Section 123 of the URAA is the *lex specialis* of implementation of recommendations and rulings of the DSB. It may be recalled that the implementing Member enjoys a certain degree of discretion in determining "the most appropriate, and probably effective, method of implementing the recommendations and rulings of the DSB".[62] Because Section 123 of the URAA addresses specifically the implementation of the recommendations and rulings of the DSB, it appears to me that the United States would not exceed the bounds of its discretion by having recourse to the procedures under Section 123 of the URAA instead of the procedures under the Administrative Procedure Act. Moreover, as previous arbitrators have stated, an implementing Member may use its "normal" internal procedures.[63] Therefore, I consider the timing and sequence of procedural steps provided for in Section 123 of the URAA as particularly relevant in the determination of the reasonable period for implementation in this case.

E. *Administrative Action and the Reasonable Period of Time*

56. The parties do not fully agree on the elements and structure of the implementation process under Section 123 of the URAA and the period of time needed for completing specific steps thereunder. For the United States, the process under Section 123 of the URAA comprises three distinct steps: (i) the initial preparatory process; (ii) the drafting and the publication of the proposed modification; and (iii) a further stage of consultations that may result in a revision of the proposed modification, and the issuance of the final rule.[64] According to the United States, the completion of this process requires approximately nine months.[65] I note, however, that, in its written submission, the United States argues that "under normal circumstances" (for example, in a year without elections) seven months would be sufficient to complete the process under Section 123 of the URAA.[66]

[62]Award of the Arbitrator, *Chile – Alcoholic Beverages*, para. 42.
[63]*Supra*, footnote 41.
[64]United States' statement at the oral hearing.
[65]At the oral hearing, the United States indicated that each of the three stages would require approximately three months.
[66]United States' submission, para. 36.

57. For its part, Mexico considers that the implementation process under Section 123 of the URAA consists of two key stages: (i) a period of "internal consultations and approval and consultations with Congress and the private sector leading to publication of a proposed rule in the *Federal Register*"; and (ii) a second phase involving "modifications of the rule as a result of public comments, final consultations with ... Congress, and publication of the final rule in the *Federal Register*."[67] Mexico submits that the process under Section 123 of the URAA would not require more than seven months in the circumstances of this dispute.[68]

F. *Particular Circumstances of This Case*

58. I turn to "particular circumstances" that the parties have asked me to take into account in determining the reasonable period of time, in accordance with the last sentence of Article 21.3(c) of the DSU, and which may make the reasonable period of time "shorter or longer".[69]

59. In this dispute, the parties advanced the following "particular circumstances" as pertinent for the determination of the reasonable period of time: (i) the technical complexity of eliminating the simple zeroing methodology in periodic reviews due to the import-specific assessment of final anti-dumping liability under the United States' retrospective system; (ii) the election of a new Congress and a new President in the United States and consequential changes in the Administration and the composition of Congressional committees; and (iii) the existence of similar DSB recommendations and rulings in previous disputes involving zeroing methodologies.

60. The United States contends that, in determining the reasonable period of time, I should take into account the technical complexity of the termination of the methodology of simple zeroing in periodic reviews. For the United States, compliance in this case is complex, mainly because terminating simple zeroing in periodic reviews would imply changes in its duty assessment methodology.[70] The United States recalls that, under its retrospective system, anti-dumping liability is assessed on an importer-specific basis. It notes that, when there are several importers importing from the same exporter or foreign producer subject to an anti-dumping order, the importer-specific assessment of final anti-dumping liability without simple zeroing may result in a scenario where, for some of those importers, the aggregation of the results of multiple comparisons of monthly weighted-average normal value and individual export prices may yield a negative value. The United States

[67]Mexico's submission, para. 34.
[68]*Ibid*., paras. 42 and 43.
[69]*Supra*, footnote 39.
[70]United States' submission, para. 9.

refers to the Appellate Body's findings that the total amount of the anti-dumping duties levied from all importers purchasing from an exporter or foreign producer must not exceed that exporter's or foreign producer's margin of dumping. The United States also notes the Appellate Body's statements that the importing Member is under no obligation to compensate importers for the negative value (that is, when export prices exceed normal value).[71] Accordingly, the termination of simple zeroing "as such" in periodic reviews implies, the United States argues, that it will need to address the complex issue of how anti-dumping duties are allocated among importers for assessment purposes when some of them have "negative" amounts of anti-dumping duties.[72] According to the United States, this will require the involvement of senior policy-makers at a time when a major reshuffle is likely to occur at this level as a result of the election of a new Administration and a new Congress.

61. In principle, the elimination of simple zeroing in periodic reviews is distinct from the issue of the "allocation of antidumping duties among the importers for assessment purposes".[73] The former can clearly be carried out by administrative means. In the real world, because it involves imposition of differing levels of financial liability among the importers, depending on the circumstances, the latter may be easier to bring about on a durable basis by a legislative enactment. In the real world too, however, the elimination of simple zeroing in periodic reviews is closely related to the issue of the allocation of final anti-dumping duties among importers; implementation of the former might well be tied to reaching satisfactory resolution of the complexities of allocation of anti-dumping duties among the importers. Accordingly, the technical complexities of allocation of duties among importers cannot casually be disregarded but, to the contrary, may legitimately be considered a particular circumstance affecting the determination of a reasonable time for abolition of the methodology of simple zeroing in periodic reviews. At the same time, however, this particular circumstance cannot justify a long delay in the implementation of elimination of simple zeroing in periodic reviews. Provisional administrative allocation rules might, perhaps, be devised and put into effect while the long-term administrative or legislative allocation standards are in process of establishment.

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[71]In its Report in this dispute, the Appellate Body noted that it "has consistently held that 'margin of dumping' is an exporter-specific concept, and that, whatever methodology is followed for assessment and collection of anti-dumping duties, the total amount of anti-dumping duties assessed and collected from all importers must not exceed the total amount of dumping found in all the sales made by the exporter concerned, calculated according to the margin of dumping established for that exporter without zeroing." (Appellate Body Report, para. 112) According to the Appellate Body, this interpretation "does not preclude a WTO Member applying a retrospective system from assessing an importer's final anti-dumping duty liability on the basis of its own transactions, subject, however, to the legal requirement that the prescribed overall margin of dumping for the exporter is respected." (*Ibid*., para. 113) Moreover, "if aggregation of the results of multiple comparisons yields a negative value for a particular importer, 'this would not mean that the authorities would be required ... to compensate an importer for the amount of that negative value (that is, when export prices exceed normal value)'." (*Ibid*., footnote 237 to para. 113 (referring to Appellate Body Report, *US – Zeroing (Japan)*, footnote 363 to para. 155; and Appellate Body Report, *US – Zeroing (EC)*, footnote 234 to para. 131)).

[72]United States' submission, para. 9.

[73]*Ibid*.

62. In addition, the United States submits that the impending Presidential and Congressional elections would lengthen the period for reaching implementation of the recommendations and rulings of the DSB, as a new Congress will be convened and a new President will take office in January 2009.[74] According to the United States, irrespective of the means of implementation chosen, the process would require the participation of the new Congress and the new Administration, so that the process could not begin before late January 2009. The elections may, of course, lead to changes in staff and senior policy-makers in the Administration and in Congress. However, I do not see why, because some policy decisions might be required as a result of compliance with the recommendations and rulings of the DSB, the implementation process (including the preparatory process, consultations with stakeholders, and work on possible solutions to technical complexities) could not be initiated and moved forward under the current Administration and then completed after January 2009. Issues relating to Presidential and Congressional elections and the transition to a new President, a new Administration, and a new Congress, or the controversial character of required changes in the domestic legal system, have arisen in previous arbitrations.[75] Like those arbitrators, I believe that the implementation process—particularly an administrative one—should begin forthwith upon adoption of the DSB recommendations and rulings and be completed after the new Administration and Congress take office.

63. Finally, Mexico points out that several WTO disputes resemble the present dispute in that they also concern the simple zeroing methodologies employed by the United States, and have led to DSB recommendations and rulings on this issue.[76] Specifically, Mexico notes that the reasonable period of time for the United States to comply with the DSB recommendations and rulings in *US – Zeroing (EC)* with respect to simple zeroing as applied in certain periodic reviews expired on 9 April 2007, and in *US – Zeroing (Japan)* with respect to simple zeroing in periodic reviews "as such", on 24 December 2007.[77] At the oral hearing, the United States argued that the measures in the disputes referred to by Mexico and the measures at issue in the present dispute are different, and that the DSB recommendations and rulings in the previous disputes cannot be considered in this arbitration.[78]

[74]United States' submission, para. 11.
[75]Award of the Arbitrator, *US – 1916 Act*, para. 40; Award of the Arbitrator, *Canada – Patent Term*, paras. 59-60.
[76]Mexico's submission, para. 12; Mexico's statement at the oral hearing.
[77]See WT/DS294/19 in *US – Zeroing (EC)*; and WT/DS322/20 in *US – Zeroing (Japan).*
[78]United States' response to questioning at the oral hearing.

64. The disputes to which Mexico refers are indeed distinct from the present one. Those disputes involved different complainants and were at different procedural stages of WTO dispute settlement, including proceedings under Article 21.5 of the DSU.[79] Given this context, I consider that the particular circumstances of those disputes should be attributed limited relevance to my determination of the reasonable period of time in this arbitration.

IV. Award

65. In the light of the above considerations, I determine that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB in this dispute is 11 months plus 10 days from the date of adoption of the Panel and Appellate Body Reports. The reasonable period of time will thus end on 30 April 2009.

Signed in the original at Manila this 20th day of October 2008 by:

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Florentino P. Feliciano

Arbitrator

[79]Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 42.