BEFORE THE WORLD TRADE ORGANIZATION

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

(WT/DS386)

ARBITRATION UNDER ARTICLE 21.3(C) OF THE DSU

WRITTEN SUBMISSION OF MEXICO

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Canada — Patent Term (Article 21.3 (c))	Arbitrator Award, *Canada — Term of Patent Protection — Recourse to Arbitration under DSU Article 21.3(c),* WT/DS170/10, circulated 28 February 2001.
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EC — Hormones (Article 21.3 (c))	Arbitrator Award, *European Communities — Measures Concerning Meat and Meat Products (Hormones)— Recourse to Arbitration under DSU Article 21.3(c),* WT/DS26/15 and WT/DS48/13, circulated 29 May 1998.
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US — 1916 Act (EC) (Article 21.3 (c))	Arbitrator Award, *United States — Anti-Dumping Act of 1916—Recourse to Arbitration under DSU Article 21.3(c),* WT/DS136/11 and WT/DS162/14, circulated 28 February 2001.
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 (AB)	Appellate Body Reports, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R and WT/DS386/AB/R, adopted 23 July 2012.
US — COOL (Panel)	Panel Reports, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R and

	WT/DS386/R, adopted 23 July 2012, as modified by the Appellate Body Reports, WT/DS384/AB/R and WT/DS386/AB/R, adopted 23 July 2012.
US – Gambling (Article 21.3 (c))	Arbitrator Award, *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services – Recourse to Arbitration under DSU Article 21.3(c),* WT/DS285/13, 19 August 2005.
US — Offset Act (Byrd Amendment) (Article 21.3 (c))	Arbitrator Award, *United States — Continued Dumping and Subsidy Offset Act of 2000—Recourse to Arbitration under DSU Article 21.3(c),* WT/DS217/14 and WT/DS234/22, circulated 13 June 2003.
US — Section 110(5) Copyright Act (Article 21.3 (c))	Arbitrator Award, *United States — Section 110(5) of US Copyright Act—Recourse to Arbitration under DSU Article 21.3(c),* WT/DS160/12, circulated 15 January 2001.
US — Stainless Steel (Mexico) (Article 21.3 (c))	Arbitrator Award, *United States — Final Anti-dumping Measures on Stainless Steel from Mexico - Recourse to Arbitration under DSU Article 21.3(c),* WT/DS344, circulated 31 October 2008.

TABLE OF ACRONYMS USED IN THIS SUBMISSION

Acronym	Full name
2002 Farm Bill	Farm Security and Rural Investment Act of 2002
2008 Farm Bill	Food, Conservation and Energy Act of 2008
2009 Final Rule	Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts
AB	Appellate Body
APA	Administrative Procedure Act
COOL	Country of Origin Labelling
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT	General Agreement on Tariffs and Trade
OMB	Office of Management and Budget
RPT	Reasonable Period of Time
TBT Agreement	Agreement on Technical Barriers to Trade
USDA	United States Department of Agriculture
Vilsack letter	Letter to "Industry Representative" from the United States Secretary of Agriculture, Thomas J. Vilsack, of 20 February 2009
WTO	World Trade Organization

I. INTRODUCTION

1. On 23 July, 2012, the Dispute Settlement Body ("DSB") adopted the recommendations and rulings in the disputes *United States – Certain Country of Origin Labelling (COOL) Requirements* (DS384/DS386).

2. By letter dated 21 August 2012 and at the DSB meeting of 31 August 2012, the United States stated that it intended "to implement the recommendations and rulings of the DSB in these disputes in a manner that respects its WTO obligations", but it also stated that it would need a reasonable period of time ("RPT") in which to do so.

3. Thereafter, Mexico and Canada engaged in consultation with the United States with a view to agreeing on the reasonable period of time for compliance, but failed to reach such agreement.

4. Therefore, pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), on 13 September 2012, Mexico requested a binding arbitration in order for an arbitrator to determine the RPT that the United States will have to implement the recommendations and rulings adopted by the DSB.

5. The measure that the United States must bring into compliance with its WTO obligation is the country of origin labelling ("COOL") requirements contained in the COOL statute and the 2009 Final Rule, which the Panel and Appellate Body ("AB") have referred to collectively as the "COOL measure."

6. The Panel concluded and the Appellate Body upheld that the COOL measure, in particular in regard to the muscle cut meat labels, violates Article 2.1 of the *Agreement on Technical Barriers to Trade* ("TBT Agreement") because it affords imported livestock treatment less favourable than that accorded to like domestic livestock. In finding so, the Panel and the Appellate Body recognized that the COOL measure modifies the conditions of competition in the U.S. market to the detriment of imported livestock by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against purchasing and processing imported livestock.[1]

7. Upon the adoption of the Panel and the Appellate Body Reports, the DSB recommended the United States to bring its measures found to be inconsistent with the TBT Agreement into conformity with its obligations under that Agreement.

8. The United States has requested 18 months to bring itself into compliance. The United States did not specifically identify how it will bring itself into compliance, but indicated that it may do so through the issuance of new regulations, without adopting legislation to modify the COOL statute. The United States states that even if a change to its legislation were required, it accepts that the reasonable period of time for compliance should be based on the time needed to adopt new regulations. The United States proposes to base the RPT on twelve months for

[1] *US — COOL (AB)*, para. 292.

issuing revised regulations, plus a six-month delay in implementation after finalization of the regulations that the United States declares is required by the TBT Agreement.

9. As Mexico will explain, the TBT Agreement cannot be interpreted to provide a Member an extra six months to bring itself into compliance. Further, the list of regulatory steps provided by the United States as justification for a longer period do not, in practice, actually require the extended timeline described by the United States. Mexico will also explain that legislation could be enacted relatively quickly and that there is not a firm requirement to adopt implementing regulations.

10. It is Mexico's position, as discussed below, that a maximum of eight months is a reasonable period of time for the United States to bring its measure into compliance with its WTO obligations.

II. FACTUAL AND PROCEDURAL BACKGROUND

11. On 17 December 2008, Mexico requested consultations with the United States, with respect to the measures and claims related to the COOL requirements. On 7 May 2009, Mexico requested supplemental consultations with the United States. These consultations did not lead to a mutually satisfactory solution with the United States.

12. On 9 October 2009, Mexico requested the establishment of a Panel. The Panel was established on 19 November 2009 and composed on 10 May 2010. The Panel issued its final Report on 18 November 2011.

13. Mexico and the United States appealed certain issues of law and legal interpretations developed in the Panel in its Report. The Appellate Body issued its Final Report on 29 June 2012.

14. At its meeting on 23 July 2012, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report.

15. The measures that the United States should subject to a modification process in order to bring the COOL measure into compliance with the WTO provisions are as follows:

a) the COOL statutory provisions, known as the Agricultural Marketing Act of 1946, as amended by the Farm Security and Rural Investment Act of 2002 ("2002 Farm Bill") and the Food, Conservation, and Energy Act of 2008 ("2008 Farm Bill");

b) the Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published by the U.S. Department of Agriculture ("USDA") on 15 January 2009 as 7 CFR Part 65 (the "2009 Final Rule (AMS)").

16. Other measures were at issue in the Panel proceedings, including the letter sent by the U.S. Secretary of Agriculture to "Industry Representatives" in 2009 (the "Vilsack letter"). This letter was found to be inconsistent with Article X3(a) of the GATT of 1994. The Appellate Body

found it unnecessary to make any finding with regard to the Vilsack letter as it was withdrawn on April 4, 2012.[2]

17. The Panel ruled and the Appellate Body confirmed that the COOL measure modifies the conditions of competition in the U.S. market to the detriment of imported livestock by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock.[3] In this regard, the Appellate Body accepted the Panel's factual conclusion that "for all practical purposes, the COOL measure necessitates segregation of meat and livestock according to origin, even though this segregation is subject to certain flexibilities."[4]

18. The Appellate Body also accepted the Panel's factual conclusion that the least costly way of complying with the COOL measure is to exclusively use domestic livestock, based on the existence of direct evidence of major slaughterhouses applying a considerable COOL discount. The discount showed that major processors are passing on at least some of the additional costs of the COOL measure upstream to suppliers of imported livestock —a discount that is not applied to suppliers of domestic livestock.[5]

19. The Appellate Body examined whether the circumstances of this case indicated that the detrimental impact to imported livestock stemmed exclusively from a legitimate regulatory distinction in the measure, or whether the COOL measure lacked even-handedness.[6] The Appellate Body noted the Panel's factual conclusions that the burden of the recordkeeping and verification requirements, the consequent need for segregation, and the associated compliance costs, are all lower when a given producer processes single origin livestock only, so the least costly way of complying with the COOL measure is to rely exclusively on domestic livestock. Use livestock of multiple origins makes compliance with the COOL measure not only be more costly but will requires the use of labels that were found to convey confusing information to consumers.[7]

20. Based on the above, the Appellate Body concluded that the informational requirements imposed on upstream producers under the COOL measure are disproportionate to the level of information communicated to consumers through the mandatory retail labels. The Appellate Body therefore concluded that the manner in which the COOL measure seeks to provide information to consumers on origin is arbitrary and unjustifiable.[8]

21. The Appellate Body summarized its conclusions as follows:

> [O]ur examination of the COOL measure under Article 2.1 reveals that its recordkeeping and verification requirements impose a disproportionate burden on

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2 *US — COOL (AB),* para. 495.

3 *US — COOL (AB),* para. 292 and 293.

4 *US — COOL (AB)*, para. 310.

5 *US — COOL (AB),* para. 314 - 326.

6 *US — COOL (AB),* para. 340.

7 *US — COOL (AB),* para. 345.

8 *US — COOL (AB),* para. 347.

> 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.[9]

III. PRINCIPLES GUIDING THE DETERMINATION IN THIS ARBITRATION

22. The mandate of the arbitrator in Article 21.3(c) arbitration is to determine the RPT for a Member to implement the recommendations and rulings of the DSB. It is not within the arbitrator's mandate to measure the consistency of the proposed implementation with WTO law, which is instead the subject of Article 21.5 proceedings.[10]

23. In determining the RPT, the arbitrator must follow Article 21.3 of the DSU, which provides that "[i]f it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so". This Article further provides as a "guideline" that the "reasonable period of time … should not exceed 15 months from the date of adoption of a panel or Appellate Body report." A further guideline is

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9 *US – COOL (AB)*, para. 349.

10 *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27. See also *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 41.

that "particular circumstances" should be considered in determining the "reasonable period of time."

24. The arbitrator should consider Article 21.3 in its treaty context.[11] DSU Article 21.1 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." Similarly, Article 3.3 of the DSU emphasizes that "prompt settlement … is essential to the effective functioning of the WTO." As stated in *Canada – Pharmaceutical Patents (Article 21.3(c)),* "immediate compliance is clearly the preferred option under Article 21.3"[12]. In other words, time is literally of the essence in determining an RPT.

25. Based upon the above considerations, past arbitration decisions have identified several legal guidelines for determining an RPT. First, the RPT should be the "shortest period of time possible within the legal system" of the implementing Member.[13] In this sense, the DSU explicitly emphasizes the importance of "prompt" compliance.[14] Second, while the DSU does not require the implementing Member to use "extraordinary" rather than "ordinary" procedures,[15] 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 of time possible."[16] Third, "the 'particular circumstances' of the case must be taken into account in determining the reasonable period of time."[17]

26. Past arbitration decisions have also held that the implementing party bears the burden of showing that its proposed schedule constitutes an RPT under the circumstances.[18] Indeed, as the arbitrator in the *U.S. – 1916 Act (EC)* case explained, the implementing Member bears the burden of showing that its proposed timeline is the "shortest period possible."[19] In this case, as will be further explained below, the United States has not met its legal burden to demonstrate that it cannot reasonably implement the decision of the DSB in a much shorter period than the one it proposes.

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11 *Canada – Patent Term (Article 21.3(c))*, para. 37.

12 *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47.

13 *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 51 ("I consider that it is for the Member seeking a reasonable period of time for implementation to establish that the proposed period indeed constitutes the 'shortest period possible' within its legal system to implement the recommendations and rulings of the DSB. Failing that, the arbitrator must determine the 'shortest period possible' for implementation, which will be "shorter than proposed by the implementing Member, on the basis of the evidence presented by all parties"") (citing *U.S. – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 44); *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 61).

14 *Canada – Patent Term (Article 21.3(c))*, paras. 37 and 38.

15 *Korea – Alcohol Beverages (Article 21.3(c))*, para. 42.

16 *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 61 (emphasis added). See also *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 42; *EC – Hormones (Article 21.3(c)),* para. 26.

17 *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 61.

18 *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47.

19 *US – 1916 Act (EC) (Article 21.3(c))*, para. 33.

27. Past Article 21.3(c) arbitration awards have analyzed situations in which the implementing measure involved a certain degree of "complexity". In previous awards it has been established the following:

> I see nothing in Article 21.3 to indicate that the supposed domestic "contentiousness" of a measure taken to comply with a WTO ruling should in any way be a factor to be considered in determining a "reasonable period of time" for implementation. All WTO disputes are "contentious" domestically at least to some extent; if they were not, there would be no need for recourse by WTO Members to dispute settlement.[20] (emphasis added)

28. Also relevant is the award in *US – Section 110(5) Copyright Act ,* in which the arbitrator, quoting from the earlier award in *Canada – Pharmaceutical Patents*, said that:

> … any argument as to the "controversy", in the sense of domestic "contentiousness", regarding the measure at issue is not relevant.[21]

IV. PARTICULAR ATTENTION SHOULD BE PAID TO THE AFFECTED INTEREST OF MEXICO AS A DEVELOPING COUNTRY IN TERMS OF ARTICLE 21.2

29. Mexico considers that the determination of the RTP in this arbitration should be considered in the context of Article 21.2 of the DSU, which states that "[p]articular attention should be paid to matters affecting interests of developing country Members".

30. It has been recognized that Article 21.2 of the DSU directs arbitrators acting under Article 21.3(c) to pay "[p]articular attention" to "matters affecting the interests" of both an implementing and complaining developing country Member.[22] In this dispute, Mexico is the complaining developing country Member, while there is no implementing developing country Member. Therefore, particular attention should be paid to matters affecting Mexico as a developing country.

31. In the Article 21.3 arbitration in *US – Gambling*, the Arbitrator found that Article 21.2 requires that "'particular attention' be paid to: (i) matters; (ii) affecting the interests of developing country Members; (iii) with respect to the measures at issue".[23] It was further noted that "Article 21.2 contemplates a clear nexus between the interests of the developing country invoking the provision and the measures at issue in the dispute, as well as a demonstration of the adverse effects of such measures on the interests of the developing country Member(s) concerned."[24]

32. This Award further stated that:

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[20] *Canada – Pharmaceutical Patents (Article 21.3(c)),* para. 60.

[21] *US – Section 110(5) Copyright Act (Article 21.3(c))*, para. 42.

[22] *Colombia –Ports of Entry (Article 21.3(c))*, paras. 104-106

[23] *US – Gambling (Article 21.3 (c))*, para. 59.

[24] Id.

> the second paragraph of Article 21, like the first, sets out a broad principle that guides and informs the more specific paragraphs that follow, including Article 21.3. Given that Article 21 contains a number of additional paragraphs dealing with different aspects of surveillance and implementation, it seems likely that Article 21.2 informs each of the subsequent paragraphs in a different manner. Arguably, for example, Article 21.2 could constitute a legislative expression of a factor that is to constitute a "particular circumstance" to be taken into account under Article 21.3(c).[25]

33. Mexico is a developing country and requests that the arbitrator give special attention to how the RPT will affect its interests. During the dispute, it was established that as a result of the COOL measure, Mexican cattle has been treated in various discriminatory ways, including that U.S. purchasers have been forcing a discriminatory price reduction on suppliers of cattle born in Mexico on a continuing basis.[26] Accordingly, Mexican cattle producers, and Mexico as a developing country, are being further economically harmed during every month in which the United States delays in bringing the COOL measure into compliance with WTO obligations. Further, the measure at issue is specifically targeted at Mexican cattle - that is, products of a developing country - and not imports in general.[27] For these reasons, the COOL measure has a direct nexus to the interests of Mexico and directly affects the interests of Mexico.

V. EIGHT MONTHS AT THE GREATEST IS A REASONABLE PERIOD OF TIME FOR THE UNITED STATES TO COMPLY WITH ITS OBLIGATIONS IN THIS DISPUTE

34. The DSU explicitly emphasizes the importance of "prompt" compliance and Article 21.3 arbitration awards have stated 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 of time possible."[28]

35. In its submission, the United States in effect indicates that the RPT should be based on the time required to issue new regulations. Specifically, the United States stated as follows:

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25 *US – Gambling (Article 21.3 (c))*, para. 60.

26 See *US – COOL (Panel Report),* paras. 7.356-7.357, 7.360-7.361, y 7.372-7.381. *US – COOL (AB)*, para. 263, 264, 289, 292, 319, 348. See also Mexico's First Written Submission, paras. 364 – 366. During the dispute, it was demonstrated that as a result of the COOL measure, the competitive opportunities of Mexican livestock have been reduced as the additional costs of compliance are passed on to suppliers of Mexican livestock. In this sense, there is evidence on the record of, *inter alia*, the reduction of U.S. plants willing to process imported livestock, limitations on the days in which those plants continue to process imported livestock, and a requirement of 14 days advance notice for supplies of Mexican cattle at various US processing facilities.

27 Imports of cattle into the United States, as a practical matter, are limited to countries that share borders with the United States (Mexico and Canada). See US – COOL (Panel Report), paras. 7.141-7.142, and US – COOL (AB), para. 252. The discriminatory measures are specifically targeted at Mexico.

28 *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 61.

> 5. A change to the COOL measure could potentially involve legislative action followed by regulatory action or could potentially involve only regulatory action. Whatever change is made to the COOL measure to bring it into compliance with the DSB's recommendations and rulings, however, the United States will need to take some type of regulatory action. The U.S. regulatory process involves a number of steps, including receiving and responding to comments by interested parties, including by Canada and Mexico, and potential revisions in light of the comments received. Overall, the United States will need at least 12 months to complete the regulatory process, including in light of the procedural requirements under the TBT Agreement. In addition, in light of the fact that the COOL measure is a technical regulation, the United States will need to provide at least six months between the issuance of any modified regulations and their effective date. Accordingly, the United States requires an RPT 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…..
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> 6. In addition, if the United States makes statutory changes to bring the COOL measure into compliance, the entire process will take substantially longer than 18 months, particularly when taking into account that any such legislative changes would have to be followed by regulations, adopted through the process noted above. This is consistent with the process that was undertaken in connection with the adoption of the 2002 COOL statute as well as the 2008 COOL statute. Despite this possibility, the United States is not requesting an RPT of longer than 18 months.[29]

36. Thus, the United States says that (i) a reasonable time to issue new regulations is twelve months, (ii) six months should be added to that time to fulfil U.S. obligations under the TBT Agreement, and (iii) although enacting legislative changes and then regulatory changes would take longer, the United States is not requesting that the RPT be extended to account for the possibility of potential legislation.

37. For purposes of this Article 21.3 arbitration proceeding, Mexico takes no position on whether the United States would be able to bring itself into compliance by issuing regulations without changing the COOL statute.[30] Whether or not a measure will achieve compliance can be evaluated only when there is an actual measure or proposed measure to review.

38. Mexico urges the Arbitrator to establish the shortest possible RPT. Mexico believes that the RPT, at the very greatest, should be no longer than eight months. Mexico understands that Canada is asking for a shorter RPT, and Mexico would welcome that result.

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[29] U.S. Submission, paras. 5 and 6 (footnotes omitted).

[30] Mexico is highly skeptical that sufficient changes can be made in the COOL measure to bring it into compliance without amending the statute. Nonetheless, for purposes of this proceeding, it is appropriate to presume the good faith of the United States. *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27 ("… it is assumed that the implementing Member will act in 'good faith' in the selection of the method that it deems most appropriate for implementation of the recommendations and rulings of the DSB.").

39. Below, Mexico reviews the normal procedural steps that could be taken by the United States to implement new regulations or enact new legislation in a much shorter time period than the twelve months the United States claims is required.

A. Potential Administrative Action

40. The United States lists a number of steps that are routinely involved in the issuance of a new regulation, and describes them as requiring a "lengthy and multifaceted rulemaking process" that is "time-consuming and involved".[31] However, the purported deadlines for actions listed by the United States are maximum, not minimum, requirements, and U.S. regulations are regularly published and implemented much more quickly.

41. The United States cites to the Administrative Procedure Act ("APA") in support of its claim that a regulation cannot be made effective less than 30 days after publication.[32] But the provision to which the United States cites, 5 U.S.C. § 553(d), states:

> (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—
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> > (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
> >
> > * * *
> >
> > (3) as otherwise provided by the agency for good cause found and published with the rule.[33]

There is therefore considerable flexibility allowing a rule to be made effective more quickly.

42. Similarly, contrary to the assertion in paragraph 19 of the U.S. submission, the requirement to allow 60 days for comments on proposed regulations is a guideline, and not mandatory.[34] In fact, the requirement to provide for public comments before a rule is implemented is made optional by the APA, which states that the obligation to publish a proposed regulation does not apply "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[35] The regulations are then implemented as an "interim final rule," while comments are solicited after implementation

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31 U.S. Submission, paras. 13 and 14.

32 U.S. Submission, para. 19.

33 Exhibit MEX-1.

34 See Executive Order 12866 (Sept. 30, 1993), Sec. 6(a) (Exhibit US-27) ("In addition, 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."(emphasis added)); Executive Order 13563 (Jan. 18, 2011), Sec. 2(b), Exhibit MEX-2 ("To 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.") (emphasis added)).

35 5 U.S.C. § 553(b). Exhibit MEX-1.

to determine whether the rule should be modified later. The use of this procedure is widespread in the United States.[36]

43. Indeed, this flexibility not to publish a proposed regulation was reflected in the initial implementing regulations for the COOL measure itself, which were published as an "interim final rule" on August 1, 2008, just over two months after the 2008 Farm Bill became law on May 22, 2008. USDA made the regulations effective as of September 20, while giving 30 days for post-adoption comments.[37] The regulations were submitted for review by Office of Management and Budget ("OMB") on June 12, 2008 – only 30 days after the 2008 Farm Bill was enacted, and OMB approved the regulations on July 25, 2008 – far less time than the 90 days the United States claims is necessary for OMB review.[38]

44. The final version of the regulations, which modified the interim final rule, was published on January 15, 2009. OMB had reviewed the regulations within 30 days.[39]

45. Mexico notes that the aspects of the COOL statute and regulations that relate to the labelling of beef products is only a small portion of the total law. The broader COOL measures address the labelling of seafood products, fruits and vegetables, nuts and other types of meats besides beef. Those other measures are not the subject of this proceeding. When the United States asserts that the COOL regulations are 49 pages long, it refers to a Federal Register notice 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".[40] Most of that notice is devoted to explaining the procedural background, describing public comments, etc., including with respect to the regulations affecting chicken, goat meat, seafood, perishable agricultural products and nuts. Excluding a list of definitions, the regulations at issue in this matter are actually contained on only two pages of the notice.[41] The scope of the rules is therefore much more limited than the

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[36] See, e.g., U.S. Government Accountability Office, "Federal Rulemaking", GAO-06-228T (Nov. 6, 2005), p. 10 ("Direct and interim final rules appear to account for hundreds of the final regulatory actions published each year. In our report on final rules without proposed rules, we identified 718 interim and direct final regulatory actions published by agencies during 1997. A quick search of recent Federal Register notices showed that agencies published over 550 notices in 2004 for which the subject rulemaking action was identified as a direct final, interim final, or interim rule. Through October 21 of this year, agencies had published nearly 400 such notices. Direct final rules accounted for almost 60 percent of these notices."). Exhibit MEX-3.

[37] Interim Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Gingseng, and Macadamia Nuts, 73 Fed. Reg. 45106 (Aug. 1, 2008). Exhibit MEX-4.

[38] Office of Information and Regulatory Affairs, Economically Significant Executive Order Reviews. Exhibit MEX-5.

[39] OMB received the regulations on December 8, 2008 and approved them on January 9, 2009. Office of Information and Regulatory Affairs. Economically Significant Executive Order Reviews. Exhibit MEX-6.

[40] U.S. Submission, para. 29, citing to Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Gingseng and Macadamia Nuts, 74 Fed. Reg. 2568 (Jan. 15, 2009). Exhibit MEX-7.

[41] 74 Fed. Reg. at 2706-07. Exhibit MEX-7.

United States claims, and much faster action should be expected in the promulgation of the regulations relating to beef products than for the COOL regulations as a whole.

46. In addition to the time needed to issue new regulations, the United States has claimed that it needs five months for a "preparatory phase."[42] In support of its argument, the United States cites to examples in which arbitrators allowed approximately three months for preparatory work prior to the publication of new regulations.[43] The United States offers no reason, however, why it should be granted five months for preparation. Three months is clearly more than sufficient for the United States to publish a proposed new regulation, if that is the course of action it has chosen.

47. In Mexico's view, therefore, a reasonable timetable for the United States to issue new regulations is as follows:

- three months for preparation and publication of the proposed regulations
- two months for comments (which is one more month than was allowed for the COOL interim final rule)
- one month to review comments and publish the final regulations
- one month for the regulations to take effect

This schedule totals to seven months for implementation. If the same one month were given for comments as was allowed for the current COOL regulations, the total would be six months. Moreover, as explained above, the United States has the legal discretion to publish the regulations as an interim final rule, in which case there would be no need to give time for comments or to evaluate comments before the regulations were made effective.

48. Mexico observes that the above is a very generous schedule, in light of the fact that (i) the solutions available to the United States include making the rules simpler, less complex and less burdensome, and (ii) only a small portion of the COOL regulations are at issue.

49. Other, unrelated regulations issued by the same governmental entity – USDA's Agricultural Marketing Service – have provided two weeks for public comments, and been made effective the day after publication of the final rule.[44] As discussed above, the original COOL regulations (the interim final rule) were made effective just four months after enactment of the authorizing statute, the Farm Bill 2008, and before public comments were submitted. Clearly the United States has the ability under domestic law to issue regulations within a few months. There

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42 U.S. Submission, para. 16.

43 U.S. Submission, para. 17, citing Arbitrator Award, *Canada – Certain Measures Affecting the Automotive Industry* – Recourse to Arbitration under DSU Article 21.3(c), WT/DS139/AB/R, WT/DS142/AB/R, circulated 4 October 2000, and *Canada – Pharmaceutical Patents*.

44 See, e.g., Tart Cherries Grown in the State of Michigan, et al.; Increasing the Primary Reserve Capacity and Revising Exemption Requirements, Proposed Rule, 77 Fed. Reg. 24640 (April 25, 2012); Final Rule, 77 Fed. Reg. 40250 (July 9, 2012). Exhibit MEX-8.

is no identifiable standard practice under which it must take twelve months – or even close to twelve months – to issue regulations. Even providing for a "cushion," therefore, eight months is totally reasonable.

50. In the context of discussing how long it will take to implement new regulations, the United States also cites to the obligations of TBT Article 2.9, but does not appear to request that any particular time be allocated for implementation on the basis of Article 2.9.[45] Assuming *arguendo* that Article 2.9 is relevant in this context, the United States can provide notifications and opportunities for consultations with Mexico while the regulatory process is pending. Mexico would welcome an early opportunity to review the proposed new U.S. measure.

B. Potential Legislative Action

51. The United States stated that the RPT should be based on the period of time it should take it to implement revised regulations. The United States nonetheless provided comments on how long it would take to enact legislation if it chooses to do so. Mexico observes that the period of time needed to amend the COOL statute could be relatively short, and in fact even shorter than the time needed to issue regulations.

52. The 2008 Farm Bill, which established the COOL measure, expired on September 30, 2012. The COOL measure itself did not expire, but a number of U.S. agricultural programs lapsed on that date. The Secretary of the U.S. Department of Agriculture made the following statement on October 1, 2012:

> Many programs and policies of the U.S. Department of Agriculture were authorized under the Food, Conservation and Energy Act of 2008 ("2008 Farm Bill") through September 30, 2012. These include a great number of critical programs impacting millions of Americans, including programs for farm commodity and price support, conservation, research, nutrition, food safety, and agricultural trade. As of today, USDA's authority or funding to deliver many of these programs has expired, leaving USDA with far fewer tools to help strengthen American agriculture and grow a rural economy that supports 1 in 12 American jobs. Authority and funding for additional programs is set to expire in the coming months. Without action by the House of Representatives on a multi-year Food, Farm and Jobs bill, rural communities are today being asked to shoulder additional burdens and additional uncertainty in a tough time.[46]

53. It is widely expected that the U.S. Congress will enact a new Farm Bill when it reconvenes after the U.S. elections in early November, especially because the full Senate has already approved a version of the new legislation and the House of Representatives Committee

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45 U.S. Submission, para. 25.

46 USDA, Statement of Agriculture Secretary Tom Vilsack on Expiration of Authority for 2008 Farm Bill Programs (Oct 1, 2012), available at http://www.usda.gov/wps/portal/usda/usdahome?contentid=2012/10/0314.xml&contentidonly=true. Exhibit MEX-9.

on Agriculture approved its own draft version.[47] Especially because the COOL measure relates to agriculture products, amending the COOL measure as part of the Farm Bill would be both procedurally possible and substantively appropriate.

54. In fact, Section 12104 of the House version of the 2012 Farm Bill approved by the House Agriculture Committee on July 12, 2012 states: "Not 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 decision of the World Trade Organization in *United States –Certain Country of Origin Labeling (COOL) Requirements* (DS384, DS386)."[48] Thus, members of the U.S. Congress have already indicated that they consider the Farm Bill as an appropriate vehicle for dealing with WTO compliance. Provisions that that make substantive changes to the COOL measure can be added to the House version (which has not yet been voted on by the full House of Representatives) and/or during the "conference committee" that would reconcile the differences between the House and Senate versions of the legislation.[49]

55. The Congress has broad flexibility in determining how to implement changes to the COOL measure. For example, it could repeal the measure entirely or change the rule of origin to conform to those used for customs law purposes. It could provide sufficient detail in the statute so that it would be unnecessary for USDA to issue regulations to implement the new statute.[50] The legislation could be made effective immediately, and/or require the Department of Agriculture to issue regulations by a short deadline. Any regulations that were inconsistent with the amended statute would cease to be enforceable.[51]

56. Under the current circumstances, therefore, the COOL measure could be amended by the U.S. Congress, with immediate effect, by the end of December when the current session of the Congress ends. That would be within five months of the adoption of the report.

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47 See House Agriculture Committee, Press Release, "House Ag Committee Advances Farm Bill" (July 12, 2102), available at http://agriculture.house.gov/press-release/house-ag-committee-advances-farm-bill; Senate Agriculture Committee, "Agriculture Reform, Food and Jobs Act of 2012: Issues"; available at http://www.ag.senate.gov/issues/farm-bill; Senate Agriculture Committee, Press Release, "Chairwoman Stabenow Statement on Expiration of the Farm Bill" (Oct. 1, 2012), available at http://www.ag.senate.gov/newsroom/press/release/chairwoman-stabenow-statement-on-expiration-of-the-farm-bill-house-leadership-refusal-to-act-on-bipartisan-reforms. Exhibit MEX-10.

48 H.R. 112-669 (Sept. 13, 2012), p. 154. Exhibit MEX-11.

49 The United States describes the conference committee procedure in paragraph 44 of its submission.

50 See, e.g., Abell v. Internal Revenue Service, 214 Fed. Appx. 743-757 (10th Cir. 2007) ("The plaintiffs' … argument that the tax laws are invalid because they are not supported by 'both statutes *and* implementing regulations,' also has been repeatedly rejected as lacking merit." (emphasis original)). Exhibit MEX-12.

51 See, e.g., Sullivan v. Zebley, 493 U.S. 521, 541 (1990), in which the U.S. Supreme Court held that regulations inconsistent with the governing statute could not be maintained ("We conclude that the Secretary's regulations and rulings implementing the child-disability statute simply do not carry out the statutory requirement .... For that reason, the Secretary's approach to child disability is 'manifestly contrary to the statute,' Chevron, 467 U.S. at 844, and exceeds his statutory authority."). Exhibit MEX-13.

57. The United States seeks to make the legislative process seem highly complicated and drawn out.[52] Nonetheless, even in normal circumstances the Congress is able to enact legislation on a faster schedule. For example, the legislation through which the United States repealed the Foreign Sales Corporation and Extraterritorial Income tax exemptions in order to bring itself into compliance with its WTO obligations (the American Jobs Creation Act of 2004) was introduced in the House of Representatives on June 4, 2004, and became law on October 22, 2004 – about five and one half months later.[53] The American Recovery and Reinvestment Act of 2009 was first introduced in the House of Representatives on January 26, 2009 and became law on February 17, 2009, after just three weeks.[54] The Homebuyer Assistance and Improvement Act of 2010 was introduced in the House of Representatives on June 29, 2010 and become law on July 2, 2010, three days later. [55] The U.S. legislative process has previously been characterized in an Article 21.3 proceeding as follows:

> [T]he United States' legislative process, while complex, is characterized by a considerable degree of flexibility. That this flexibility is exercised to achieve the prompt passage of legislation when this is considered necessary and appropriate is revealed by the fact that bills have been passed by the United States Congress within short periods of time, using its "normal" legislative process…[56]

58. In Mexico's view, therefore, the United States would be able to enact legislation to revise the COOL measure potentially even faster than it could issue revised regulations, and the legislation would not necessarily require regulations for immediate implementation.

C. The TBT Agreement Does Not Require That The United States Be Given An Additional Six Months For Implementation

59. The United States argues that TBT Article 2.12 should be interpreted to allow the United States to postpone implementation of a revised regulation for an additional six months beyond the time it takes the United States to publish the regulation. In support of this claim, the United States cites the Appellate Body's ruling in *US – Clove Cigarettes* that the United States acted inconsistently with TBT Article 2.12 by not allowing at least six months for foreign exporters to adjust to a new technical regulation.

60. As Mexico has explained above, the mandate of the arbitrator is limited to determine the reasonable period of time in terms of DSU Article 21.3(c). The United States seeks to extrapolate findings from the Appellate Body report in *US – Clove Cigarettes* to increase the RPT by six months. Article 2.12 of the TBT is irrelevant for the Arbitrator's analysis and the determination of the RPT in this dispute.[57]

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52 U.S. Submission, paras. 40-48.

53 U.S. Library of Congress Bill Summary, Exhibit MEX-14.

54 U.S. Library of Congress Bill Summary, Exhibit MEX-15.

55 U.S. Library of Congress Bill Summary, Exhibit MEX-16.

56 *US — 1916 Act (EC) (Article 21.3)*, para. 39.

57 U.S. Submission, paras. 24-28.

61. Mexico's view is supported by the meaning of "reasonable period of time" which is the "shortest period of time possible within the legal system" of the implementing Member (emphasis added)[58]. The TBT Agreement is not within the legal system of the United States. U.S. law specifically excludes the possibility that any aspect of the WTO agreements or panel or Appellate Body decisions could be treated as "self-executing" under U.S. domestic law. In this regard, the legislative history of the U.S. Uruguay Round Agreements Act states:

> Since the Uruguay Round agreements as approved by the Congress, or any subsequent amendments to those agreements, are non-self-executing, any dispute settlement findings that a U.S. statute is inconsistent with an agreement also cannot be implemented except by legislation approved by the Congress unless consistent implementation is permissible under the terms of the statute.[59]

62. Thus, TBT Article 2.12 is not within the U.S. legal system and has no effect under U.S. domestic law. It therefore cannot provide a justification for giving the United States extra time to bring the COOL measure into compliance within the meaning of Article 21.3(c) of the DSU.

63. Mexico adds that TBT Article 2.12 is intended to protect producers in exporting Members, and particularly in developing country Members such as Mexico, from adverse impacts that may potentially be caused by new technical regulations. To interpret Article 2.12 as the United States urges would have the effect of prolonging a measure already found to be inconsistent with TBT Article 2.1, in this case precisely because it causes adverse impacts in a discriminatory manner to Mexican cattle. That would be directly contrary to the goal of Article 2.12. Of course, the fact that the COOL measure is a technical regulation does not necessarily mean that the United States will bring the measure into compliance through the adoption of another technical regulation; which is yet another reason why there is no basis to ground the determination of the RPT on Article 2.12.

64. Mexico notes on the other hand that if the United States is planning to replace the COOL measure with a measure that creates new burdensome and discriminatory restrictions that perpetuate the disincentives for U.S. producers to purchase Mexican cattle, delaying implementation for an additional six months would not eliminate the inconsistency of the measure with TBT Article 2.1 in any event.

65. For the foregoing reasons, TBT Article 2.12 is irrelevant to the determination of the reasonable period of time in which the United States should bring its measure into compliance.

D. The United States Has Not Identified Any Special Factors That Would Require A Longer Period

66. The United States claims that there is a need for a longer period of time for compliance based on the purported complexity of the COOL measure. However, the United States is unable to identify any circumstances that actually make the COOL measure distinctly complicated to modify or withdraw.

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[58] See *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 51.

[59] H.Rept. 103-826 (Part 1), at 25. Exhibit MEX-17.

67. Specifically, the United States argues that "[g]iven the complexity of the COOL measure and 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"[60]. But it is not unusual for a law or regulation to be of "continued strong interest" for the affected and benefited sectors. That aspect is not unique to the COOL measure. Moreover, the existence of "contentiousness" is not a relevant issue to determine an RPT.[61]

68. The United States claims that the COOL measure is "technical and complex."[62] To be clear, the COOL measure at issue is a requirement for country of origin labelling of beef products. No scientific or engineering analysis or testing is required to modify the measure. The measure affects a limited scope of products – muscle cuts of beef. As noted above, the United States claimed that the regulations are 49 pages long, but the regulations at issue in this dispute are contained on only two pages. The COOL measure is certainly no more complex than most measures that are the subject of WTO disputes, and probably much less complex than most.

69. As Mexico discussed above, prior Article 21.3 awards have held that the "complexity" or "controversy" of the measure at issue, in the sense of domestic "contentiousness", is not relevant for the determination of an RPT.[63]

70. Finally, the United States tries to justify the need for a longer period of time for compliance by saying that it will have to evaluate the numerous aspects of the COOL measure that the Appellate Body discussed in finding that the measure resulted in discrimination and lack of even-handedness.[64] Accepting such reasoning would lead to a conclusion that the more discriminatory and uneven-handed a measure is, the more time would be needed to bring a measure into compliance. Such an approach would have systemic consequences, as it would reward the Members who adopt the most egregious measures by allowing them to maintain them for longer periods of time. If the United States is suggesting that it should be given more time because it has many options to consider, that would not also be relevant to the determination of the RPT.[65]

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60 U.S. Submission, para. 4.

61 *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 60.

62 U.S. Submission, para. 29.

63 *US – Section 110(5) Copyright Act (Article 21.3(c)),* para. 42.

64 U.S. Submission, paras. 31-33.

65 See *US — Offset Act (Byrd Amendment) (Article 21.3(c))* para. 59:

> "I do not consider the existence of numerous options to implement the recommendations and rulings of the DSB, as invoked by the United States, to be relevant to my determination of the "reasonable period of time" for implementation of the recommendations and rulings of the DSB. The weighing and balancing of the respective merits of various legislative alternatives is one of the key functions and aspects of any legislative process. The mere fact that implementation of the recommendations and rulings of the DSB necessitates the choice between several, or even a large number of, alternative options is generally not, in my view, in and of itself, a particular circumstance that would inform my determination of the shortest period possible to implement the recommendations and rulings of the DSB in this case."

71. If the United States is permitted to delay its implementation of the recommendations and rulings of the DSB in this dispute, U.S. importers will continue to suffer higher costs when using Mexican cattle than when using domestic cattle, which in turn discourages the purchase of Mexican cattle and force Mexican producers to accept a "COOL discount" from their sale prices. For Mexico and its cattle industry, this is an issue for which every day counts.

VI. CONCLUSION

72. For the reasons set forth above, Mexico submits that at the greatest a maximum of eight months provides a reasonable period of time for the United States to comply with the DSB's recommendations and rulings in this dispute. Mexico therefore respectfully requests that the arbitrator award a reasonable period of time no greater than eight months, ending on March 23, 2013.

LIST OF EXHIBITS

Exhibit Number	Description
MEX-1	5 U.S.C. § 553
MEX-2	Executive Order 13563 (Jan. 18, 2011), Sec. 2(b)
MEX-3	U.S. Government Accountability Office, "Federal Rulemaking", GAO-06-228T (Nov. 6, 2005)
MEX-4	Interim Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Gingseng, and Macadamia Nuts, 73 Fed. Reg. 45106 (Aug. 1, 2008)
MEX-5	Office of Information and Regulatory Affairs, Economically Significant Executive Order Reviews (Interim Final Rule)
MEX-6	Office of Information and Regulatory Affairs, Economically Significant Executive Order Reviews (Final Rule)
MEX-7	Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Gingseng and Macadamia Nuts, 74 Fed. Reg. 2568 (Jan. 15, 2009)
MEX-8	Tart Cherries Grown in the State of Michigan, et al.; Increasing the Primary Reserve Capacity and Revising Exemption Requirements, Proposed Rule, 77 Fed. Reg. 24640 (April 25, 2012); Final Rule, 77 Fed. Reg. 40250 (July 9, 2012)
MEX-9	USDA, Statement of Agriculture Secretary Tom Vilsack on Expiration of Authority for 2008 Farm Bill Programs (Oct 1, 2012)
MEX-10	House and Senate Agriculture Committees, Press Releases available at http://agriculture.house.gov/press-release/house-ag-committee-advances-farm-bill, http://www.ag.senate.gov/issues/farm-bill, and http://www.ag.senate.gov/newsroom/press/release/chairwoman-stabenow-statement-on-expiration-of-the-farm-bill-house-leadership-refusal-to-act-on-bipartisan-reforms
MEX-11	H.R. 112-669 (Sept. 13, 2012), p. 154.
MEX-12	Abell v. Internal Revenue Service, 214 Fed. Appx. 743 (10th Cir. 2007)
MEX-13	Sullivan v. Zebley, 493 U.S. 521 (1990)
MEX-14	U.S. Library of Congress Bill Summary (American Jobs Creation Act of 2004)
MEX-15	U.S. Library of Congress Bill Summary (American Recovery and Reinvestment Act of 2009)
MEX-16	U.S. Library of Congress Bill Summary (Homebuyer Assistance and Improvement Act of 2010)
MEX-17	H.Rept. 103-826 (Part 1), p. 25