**WORLD TRADE ORGANIZATION**

**WT/DS139/12**
**WT/DS142/12**
4 October 2000

(00-4001)

# CANADA – CERTAIN MEASURES AFFECTING THE AUTOMOTIVE INDUSTRY

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

Award of the Arbitrator
Julio Lacarte-Muró

## I. Introduction

1. On 19 June 2000, 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 *Canada – Certain Measures Affecting the Automotive Industry* ("*Canada – Automotive Industry*"). On 19 July 2000, Canada informed the DSB, pursuant to Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that it would implement the recommendations and rulings of the DSB in this dispute.[3] At the DSB meeting of 27 July 2000, Canada said that it would require a "reasonable period of time" to do so, under the terms of Article 21.3 of the DSU, with regard to certain aspects of the measures at issue in the dispute, in particular, the DSB's recommendations pursuant to Article I:1 and Article III:4 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article XVII of the General Agreement on Trade in Services ("GATS").[4]

2. In view of the impossibility to reach an agreement with Canada on the period of time required for the implementation of those recommendations and rulings, the European Communities and Japan requested that such period be determined by binding arbitration pursuant to Article 21.3(c) of the DSU.[5]

3. By joint letter of 23 August 2000, Canada, the European Communities and Japan notified the DSB that they had agreed that the duration of the "reasonable period of time" for implementation should be determined through binding arbitration, under the terms of Article 21.3(c) of the DSU, and that I should act as Arbitrator. The parties also indicated in that letter that they had agreed to extend the time period for the arbitration, fixed at 90 days by Article 21.3(c) of the DSU, until 6 October 2000. Notwithstanding this extension of the time period, the parties stated that the arbitration award would be deemed to be an award made under Article 21.3(c) of the DSU. My acceptance of this designation as Arbitrator was conveyed to the parties by letter of 24 August 2000.

4. Written submissions were received from Canada, the European Communities and Japan on 31 August 2000, and an oral hearing was held on 14 September 2000.

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[1]WT/DS139/AB/R, WT/DS142/AB/R.

[2]WT/DS139/R, WT/DS142/R.

[3]Communication from Canada, WT/DS139/9, WT/DS142/9, 19 July 2000.

[4]DSB Meeting of 27 July 2000, WT/DSB/M/86, para. 40. With respect to the findings under Article 3.1(a) of the *Agreement on Subsidies and Countervailing Measures*, the DSB recommended that Canada withdraw the export subsidy within 90 days. Accordingly, these findings are not at issue in this arbitration under Article 21.3(c) of the DSU.

[5]WT/DS139/10, WT/DS142/10, 8 August 2000.

## II. Arguments of the Parties

### A. *Canada*

5. Canada submits that the "reasonable period of time" needed for full compliance with the recommendations and rulings of the DSB relating to the Canadian value-added requirements (the "CVA requirements") and the duty exemption is "11 months, 12 days", that is, until 1 May 2001. In its written submission, Canada proposes to implement these recommendations and rulings through the repeal or amendment of the Motor Vehicles Tariff Order, 1998 (the "MVTO 1998")[6] and the Special Remission Orders (the "SROs")[7] promulgated by the Government of Canada.

6. Canada noted that it was on schedule to withdraw the export subsidy component of the measures, namely the production-to-sales ratio requirements, by 17 September 2000, as recommended by the DSB. However, to do so, Canada "drastically foreshortened" its normal law-making process. Canada's ability to withdraw the export subsidy component so quickly has no bearing on the "reasonable period of time" for implementing recommendations and rulings of the DSB relating to the CVA requirements and the duty exemption.

7. Canada argues that for these aspects of the measures at issue, the normal rules for determining a "reasonable period of time" under Article 21.3(c) arbitrations apply. According to Canada, past Arbitrators have recognized the sovereign prerogative of Members to determine the most appropriate and effective method of implementing the recommendations and rulings of the DSB, including the choice and timing of the steps necessary to do so. Canada states that the "reasonable period of time" which it has proposed is based on this rule.

8. Canada notes that it will implement the recommendations and rulings through administrative measures, and explains the regulation-making process in Canada as follows.

9. In Canada's legal system, the basic process to be followed for the making of regulations is prescribed by the Statutory Instruments Act and the Government of Canada Regulatory Policy (the "Regulatory Policy"). The Regulatory Policy imposes a succession of steps on authorities

[6]The MVTO 1998 is a regulation promulgated by the Governor-General-in-Council, on the recommendation of the Minister of Finance, under the authority of the Customs Tariff, S.C. 1997, c. 36, subsections 14(2) and 16. See Panel Report, *Canada – Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, footnote 24.

[7]The SROs are regulations promulgated by the Governor-General-in-Council, on the recommendation of the Minister of Finance and the Minister of Industry, under the authority of the Financial Administration Act, R.S.C. 1985, c. F-11, s. 23. *Ibid.*, footnote 25.

sponsoring regulations, as well as obligations of transparency and consultation. Canada explains that the length of time required for each of the steps in the regulatory process depends on both the nature and the consequences of the proposed regulation. The Federal Regulatory Process Guide (the "Process Guide") elaborates the process for obtaining approval for Governor-in-Council regulations.

10. Once the Canadian government has identified a problem, it is required to consult with all concerned stakeholders in order to determine the key elements of the issue, identify the best course of action for remedying the situation, and allow Canadians an opportunity to participate in developing or modifying regulations and regulatory programs. Consultation occurs prior to the drafting of the regulations and following "pre-publication" of the draft regulations.

11. In the normal course of events, the department with responsibility for the area in which the problem has arisen (in this case, Canada's Department of Finance) will include information about the problem in its Report on Plans and Priorities, a document which is tabled in Parliament. Where this is not possible, in order to ensure that the public is involved in isolating and defining the problem and selecting a solution, the department may use other forms of early notice. For example, the department may publish a "Notice of Intent" seeking public advice and comment.

12. The responsible department is then required to draft a proposed regulation. It must also prepare a Regulatory Impact Analysis Statement ("RIAS"), which describes the purpose of the draft regulation, the alternatives considered, a benefit-cost analysis, the results of consultations with interested parties, the department's response to the concerns raised, and how the regulation will be enforced. The RIAS is to be drafted both to provide concise information for decision-makers, and to give the public the information it needs to evaluate and comment upon a regulatory proposal.

13. Once the proposed regulation and supporting documentation, including the RIAS, have been prepared in both of Canada's official languages and approved by the responsible department's legal services and senior management, they must be sent to three central agencies. The Department of Justice must examine the regulation to ensure that it has a proper legal basis and is not inconsistent with the *Canadian Charter of Rights and Freedoms* or the *Canadian Bill of Rights*. The Clerk of the Privy Council Office ("PCO") must ensure that the proposal is consistent with the government's overall program, and that the responsible department has adequately considered the communications aspects of the proposed regulatory action. The Regulatory Affairs and Orders-in-Council Secretariat of the PCO must review the proposal in order to ensure that it is consistent with the Regulatory Policy and, in particular, that: the responsible department has considered alternatives; the benefits of the regulation or amendments clearly outweigh the costs; adequate consultation with the public has taken place; and the responsible department has cooperated with Canada's provincial governments.

14. Once the foregoing reviews have been completed, the Minister of the responsible department approves the regulation and supporting documentation and submits them to the PCO for consideration by the Cabinet's Special Committee of Council ("SCC"). The SCC is the Cabinet committee that gives Governor-in-Council approval for the pre-publication of a draft regulation and its accompanying RIAS.

15. The Regulatory Policy requires pre-publication of a regulation in order to provide the Canadian public at large with an opportunity to comment. Upon approval by the SCC ministers, the regulation and its RIAS are pre-published in the *Canada Gazette*, Part I, and are open for public comment for a minimum period of 30 days. This period will vary from case-to-case depending on the impact of the proposed regulatory changes and the extent of the consultation that occurred prior to drafting. Comments received from the public must be weighed on their merits and changes to the proposed regulation must be considered. If the proposed regulation is changed, the Department of Justice must again examine and approve the revised version before it is sent to the SCC for final approval by the ministers. If the proposed regulation is amended, its RIAS must also be changed to reflect the amendment.

16. If the ministers approve the regulation, it is registered under a statutory orders and regulations number within seven days. The regulation will come into force on a date specified or, where not so specified, on the day of registration.

17. The approved regulation and its RIAS are then forwarded for publication in the *Canada Gazette*, Part II. Pursuant to subsection 11(1) of the Statutory Instruments Act, publication must take place no later than 23 days after registration. Once published, the regulation becomes enforceable as law, since the public is deemed to have notice of the change in the regulatory regime.

18. Canada presents a chart in which it estimates the time needed for each stage of the implementation process. Canada submits the following estimated periods. First, Canada estimates 150 days for the "Pre-Drafting" process, including identification and assessment of the problem and publication of a Notice of Intent in the *Canada Gazette*. Then, Canada estimates 178 days for the "Drafting/Approval Process", which includes the following time periods: 60 days for drafting the proposed regulation and completing the RIAS, submission to central agencies, submission to PCO for SCC approval, and SCC decision, followed by pre-publication in the *Canada Gazette*; 30 days for receipt of questions and comments from the public; 30 days for a response to the public questions and comments; 30 days for the amendment of the regulation and the RIAS as required; 14 days for submission to PCO for SCC final approval; 7 days for SCC final approval and signature of the Governor General; and 7 days for registration of the regulations.

19. In addition, Canada submits that two other factors are relevant in determining the "reasonable period of time" in this dispute. First, the elimination of the customs duty exemption for motor vehicles has significant implications for the administration of Canada's customs regime. The Government of Canada is currently undertaking a major re-engineering of customs operations to develop enhanced processes available to all importers. A new customs system, known as "Customs Self-Assessment", or "CSA", will streamline the import process. Because qualifying manufacturers under the Agreement Concerning Automotive Products Between the Government of Canada and the Government of the United States of America (the "Auto Pact")[8], are the largest users of Canada's customs system, Canada's measures to comply with the recommendations and rulings of the DSB in this dispute must fully address the planned CSA system. In making the changes necessary to comply with the recommendations of the DSB, the Government of Canada has a responsibility to find ways to avoid administrative delays and other trade disruptions resulting from a change in tariff regimes and to ensure the earliest transition to the new CSA system. At the oral hearing, Canada cited previous arbitration awards as establishing a preference for full and effective implementation[9], and as allowing a period for transition to replacement measures as part of the "reasonable period of time".[10]

20. Second, Canada argues that its treaty obligations under the Auto Pact must be taken into account in determining the "reasonable period of time". Under the Auto Pact, Canada is required to accord duty-free treatment to motor vehicles from the United States, if they are imported by manufacturers that meet certain conditions. Since Canada will have to eliminate this duty-free treatment in order to comply with the recommendations of the DSB, Canada will have to strike a balance between its co-existing international obligations. To achieve this balance, Canada considers that it will need to consult with the United States. During the oral hearing, Canada clarified that it is not seeking to extend the "reasonable period of time" because of such consultations, as it believes that such consultations can be carried out simultaneously with the regulatory reform needed for implementation.

[8]See 4 International Legal Materials 302.

[9]Canada's Oral Statement, para. 23 (citing Award of the Arbitrator under Article 21.3(c) of the DSU, *Chile – Taxes on Alcoholic Beverages* ("*Chile – Alcoholic Beverages*"), WT/DS87/15, WT/DS110/14, 23 May 2000).

[10]Canada's Oral Statement, para. 26 (citing Award of the Arbitrator under Article 21.3(c) of the DSU, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/15, 7 January 1998; Award of the Arbitrator under Article 21.3(c) of the DSU, *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/9, 23 February 1999).

B. *European Communities*

21. The European Communities notes that the DSB's recommendations gave Canada 90 days to withdraw the export subsidy component of the measures found to be inconsistent with Canada's WTO obligations. With regard to the aspects of the measures that were found to be inconsistent with Article I:1 and Article III:4 of the GATT 1994 and Article XVII of the GATS, Canada's obligation was to brings its measures into conformity with its obligations under these provisions. The European Communities notes that Canada indicated that it would require a "reasonable period of time" for implementation of these aspects of the measures under Article 21.3(c), as Canada considered that it would be "impracticable" to comply with the recommendation "immediately".

22. The European Communities submits that the 15 month period mentioned in Article 21.3(c) for the "reasonable period of time" is a "guideline" for the arbitrator, not an "average" or "usual" period. The European Communities argues that past arbitrations make clear that the "reasonable period of time" should be the shortest period of time possible within the legal system of the Member to implement the recommendations and rulings of the DSB. Article 21.3(c) refers to the notion of "particular circumstances" that can influence the "reasonable period of time". The "particular circumstances" of each case determine the length of this period.

23. Examining the "particular circumstances" of this dispute, the European Communities considers that a period of three months from the adoption of the Panel and Appellate Body reports, that is, until 17 September 2000, is a "reasonable period of time" for implementation. The European Communities' assessment is based on the following "particular circumstances".

24. The European Communities first notes that the MVTO 1998 and the SROs are not legislative acts, but regulations in the form of Orders in Council, which can, therefore, be amended or repealed by means of another Order in Council. The European Communities further argues that most of the steps in Canada's regulation making process are not subject to any deadlines, either mandatory or indicative. As a result, there is a large measure of discretion for the Canadian administrative authorities to act promptly if they wish to do so.

25. Next, the European Communities submits that the "problem" requiring the adoption of a regulation has already been clearly identified by the DSB's recommendations, and the Government of Canada has stated that it has consulted with "stakeholders" throughout the WTO dispute process, so their views are well-known. The European Communities also states that the implementing options are limited since Canada has no choice but to repeal the MVTO 1998 and the SROs, and the drafting of

such a regulatory change is a simple task. Moreover, given that repeal is the only option, comments from the public cannot result in much alteration of the proposed regulatory text.

26. The European Communities raises two examples of regulatory amendments that were accomplished in only three months, as evidence that Canada could bring the measures at issue into conformity within this time-period. First, Canada will withdraw the export subsidy component of the measures at issue within three months. Second, in another WTO dispute, Canada accomplished a regulatory change within three months as well.

27. At the oral hearing, the European Communities challenged Canada's reliance on the reform of its customs regime, as well as its reliance upon the need to consult with the United States regarding the Auto Pact, as factors relevant to the determination of a "reasonable period of time" for implementation. In the view of the European Communities, Canada has provided no evidence in support of its assertions that massive and costly changes to its system will be necessary, that no alternative solutions can be put in place until the new customs system has begun operation, or that neither the "Big Three"[11] nor the Canada customs regime can quickly shift to the procedures used for importation under the NAFTA. As regards the alleged need for consultations with the United States regarding the Auto Pact, the European Communities notes that Canada does not argue that it needs to amend or terminate the Auto Pact in order to implement the DSB's recommendations and rulings. Furthermore, since the *Marrakesh Agreement Establishing the World Trade Organization* ("*WTO Agreement*") is a subsequent treaty to the Auto Pact, the rule set out in Article 30.3 of the *Vienna Convention on the Law of Treaties*[12] means that the Auto Pact continues to apply between the United States and Canada only to the extent that it is still "compatible" with the provisions of the *WTO Agreement*.

C. *Japan*

28. Japan believes that Canada should take all necessary steps to implement all of the recommendations of the DSB within 90 days of the date of the adoption of the Panel and Appellate Body reports.

29. Japan notes that Canada has accepted that the measures found to be inconsistent with the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*") will be brought into conformity within such a 90-day period, and emphasizes that all measures addressed by the Panel and

[11]DaimlerChrysler Canada Inc., Ford Motor Company of Canada Limited and General Motors of Canada Limited.

[12]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 33; 8 International Legal Materials 679.

the Appellate Body are administrative rather than legislative measures. For these reasons, Japan considers that all DSB recommendations and rulings should be implemented "immediately" by Canada, unless Canada can demonstrate that immediate implementation is impracticable. In Japan's view, the reference to "prompt compliance" in Article 21.1 of the DSU and previous arbitration awards establish that an implementing Member bears the burden of proving that immediate compliance is impracticable, and that the "reasonable period of time" it proposes for implementation is appropriate.

30. Japan recalls that a "reasonable period of time" is the shortest period of time required to amend the relevant laws and provisions in order to implement DSB recommendations and rulings. In determining a "reasonable period of time" relevant factors include whether implementation will occur by administrative or legislative means, the "complexity" of the measures required for implementation, and the extent to which specific procedures, such as opportunity for public comments, are legally required as part of the process for introducing implementing measures. In contrast, Japan argues that other factors, such as the domestic, social and economic impact of implementing measures, and any necessary structural adjustment, are irrelevant to the determination of a "reasonable period of time".

31. In this case, Japan stresses the "inseparable nature" of the measures at issue. The import duty exemption is granted only when qualifying manufacturers satisfy both the CVA requirements and the ratio requirements. The two requirements and the duty exemption are properly regarded as inseparable elements of one system, all of which should be simultaneously brought into conformity with the *WTO Agreement* in order to comply with the DSB's recommendations and rulings. Japan considers that the two-stage implementation proposed by Canada would effectively remove a quantitative limit on the number of motor vehicles imported duty-free, thereby allowing qualifying companies to benefit from the tariff exemption as long as they satisfy the CVA requirements, and effectively leading to an "aggravation" of Canada's violation of the *WTO Agreement* for as long as the remaining measures remain in force. Japan concludes that, in order for Canada to comply with the recommendations and rulings of the DSB, Canada must repeal both the ratio requirements and the CVA requirements simultaneously, within 90 days of the adoption of the Panel and Appellate Body reports.

32. At the oral hearing, Japan expressed "strong reservations" concerning the need for consultations prior to the various steps of regulatory reform proposed by Canada, as well as the length of time that Canada allocates to each step in the process. Canada has consulted with interested parties throughout these dispute settlement proceedings, and further consultations should not be necessary. Japan does not accept other Canadian estimates of the time needed for each step of the regulatory

process, in particular since most of these steps have no legally binding duration, and the fact that Canada will simply repeal the MVTO 1998 and the SROs means that the drafting of regulations and impact analysis statements should be easy.

33. Japan rejects Canada's reliance on the proposed reform of its customs procedures and on the need for consultations with corporations, such as the "Big Three", that may be affected by implementation. For Japan, neither the administrative burden nor the effect of implementation on concerned private corporations are relevant to the determination of a "reasonable period of time".

## III. Reasonable Period of Time

34. Canada has stated that it will comply with the recommendations and rulings of the DSB in *Canada – Automotive Industry*.[13] There are two aspects to these recommendations and rulings. First, the DSB recommended that Canada bring its measures found to be inconsistent with Canada's obligations under Article I:1 and Article III:4 of the GATT 1994 and Article XVII of the GATS into conformity with its obligations under those agreements. Second, with respect to the findings under Article 3.1(a) of the *SCM Agreement*, the DSB recommended that Canada withdraw the export subsidy within 90 days.

35. Canada has taken steps to comply with the latter aspect of the DSB's recommendations, that is, that Canada withdraw the export subsidy within 90 days.[14] Canada's actions relating to compliance with this recommendation of the DSB are not at issue in this arbitration under Article 21.3(c) of the DSU.

36. With respect to the DSB's recommendations relating to Article I:1 and Article III:4 of the GATT 1994 and Article XVII of the GATS, Canada has asserted that it is "impracticable to comply immediately with the recommendations and rulings" and, therefore, Canada requests a "reasonable period of time" in which to implement the DSB's recommendations under Article 21.3 of the DSU.

37. As the duration of the "reasonable period of time" in this case has not been agreed by the parties, they have requested that I determine this period of time through binding arbitration under Article 21.3(c) of the DSU. Thus, the issue to be resolved in this arbitration is the following: what is the "reasonable period of time" for implementation of the recommendations and rulings of the DSB

[13]Communication from Canada, WT/DS139/9, WT/DS142/9, 19 July 2000. Canada's submission, para. 5.

[14]Canada's submission, para. 5.

in *Canada – Automotive Industry* relating to Article I:1 and Article III:4 of the GATT 1994 and Article XVII of the GATS?

38. My mandate in this arbitration is governed by Article 21.3(c) of the DSU. Article 21.3(c) provides that when the "reasonable period of time" is determined through arbitration:

> … a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

39. Thus, when the "reasonable period of time" is determined through arbitration, the guideline for the arbitrator is that this period should not exceed 15 months from the date of adoption of the panel report and/or the Appellate Body report. This does not mean, however, that the arbitrator is obliged to grant 15 months in all cases. Article 21.3(c) makes clear that the "reasonable period of time" may be shorter or longer, depending upon the "particular circumstances". The "particular circumstances" of a dispute may influence the determination of what is a "reasonable period of time" for implementation, as has been stated by previous Arbitrators.[15]

40. The meaning of Article 21.3(c) is elucidated by its context. Paragraph 1 of Article 21 provides:

> *Prompt* compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members. (emphasis added)

41. Thus, the DSU explicitly recognizes the importance of "prompt" compliance. In recognition of this principle, previous Arbitrators have established that the most important factor in establishing the length of the "reasonable period of time" is the following:

> … it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the *shortest period possible within the legal system of the Member* to implement the recommendations and rulings of the DSB.[16] (emphasis added)

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[15]See, e.g., Award of the Arbitrator under Article 21.3(c) of the DSU, *Chile – Alcoholic Beverages*, *supra*, footnote 9, paras. 39, 41-45; Award of the Arbitrator under Article 21.3(c) of the DSU, *Canada – Patent Protection of Pharmaceutical Products* ("*Canada – Pharmaceutical Patents*"), WT/DS114/13, 18 August 2000, para. 48.

[16]Award of the Arbitrator under Article 21.3(c) of the DSU, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15, WT/DS48/13, 29 May 1998, para. 26; quoted with approval in Award of the Arbitrator under Article 21.3(c) of the DSU, *Korea – Taxes on Alcoholic Beverages*, WT/DS/75/16, WT/DS84/14, 4 June 1999, para. 37; and Award of the Arbitrator under Article 21.3(c) of the DSU, *Australia – Salmon*, *supra*, footnote 10, para. 38.

42. I now turn to an examination of the arguments made by Canada, the European Communities and Japan in order to determine what would be a "reasonable period of time" in the "particular circumstances" of this dispute.

43. In its written submission, Canada requested "11 months, 12 days" from the adoption of the Panel and Appellate Body Reports on 19 June 2000 for implementation, which, according to Canada, is until 1 May 2001.[17] I note that the period from 19 June 2000 to 1 May 2001 is actually 10 months and 12 days. However, since Canada has made reference to the date 1 May 2001 four times in its written submission and twice in its oral statement at the hearing, I consider that Canada's request is that the "reasonable period of time" expire on 1 May 2001.[18]

44. Canada has made arguments in its written submission and at the oral hearing in justification of the period it has proposed for the "reasonable period of time". First, Canada estimates 150 days for the "Pre-Drafting" process, including identification and assessment of the problem and publication of a Notice of Intent in the *Canada Gazette*. Then, Canada estimates 178 days for the "Drafting/Approval Process", which includes the following time periods: 60 days for drafting the proposed regulation and completing the Regulatory Impact Analysis Statement ("RIAS"), submission to central agencies, submission to the Privy Council Office ("PCO") for Special Committee of Council ("SCC") approval, and the SCC decision, followed by pre-publication in the *Canada Gazette*; 30 days for receipt of questions and comments from the public; 30 days for a response to the public questions and comments; 30 days for the amendment of the regulation and the RIAS as required; 14 days for submission to PCO for SCC final approval; 7 days for SCC final approval and signature of the Governor General; and 7 days for registration of the regulations.[19] Canada notes that these estimates will result in implementation by mid-May 2001, but Canada expects to be able to accomplish some of these steps in less time, and, therefore, Canada considers that it can achieve implementation by 1 May 2001.[20]

45. In response, the European Communities and Japan argue that Canada needs only 90 days to implement the DSB's recommendations, that is, until 17 September 2000. Both the European Communities and Japan argue that Canada was able to implement the other recommendation of the DSB, that it withdraw the export subsidy, within 90 days, and that Canada has provided insufficient

[17]Canada's submission, para. 9.

[18]*Ibid*., paras. 7, 9, 45 and 70; Canada's oral statement, paras. 36 and 38.

[19]Canada's submission, Annex.

[20]*Ibid*., para. 45.

justification as to why it cannot also implement the DSB's recommendations at issue here within 90 days.

46. In the present case, the parties agree that the measures at issue are certain regulations of the Government of Canada, namely the MVTO 1998 and the SROs. In the oral hearing, Canada stated that "in all likelihood" it would implement the DSB's recommendations through the repeal of these regulations, and would also make consequential amendments to other regulations.[21] I note that the specific implementation steps proposed by Canada are required under the Statutory Instruments Act [22] and/or prescribed in the Government of Canada Regulatory Policy (the "Regulatory Policy")[23] and the Federal Regulatory Process Guide (the "Process Guide").[24] I have taken both the steps required under the Statutory Instruments Act and the steps (and any durations specified) under the Regulatory Policy and the Process Guide into account in evaluating and calculating a "reasonable period of time".[25]

47. After examining Canada's arguments concerning the "reasonable period of time", it is clear that certain of the steps proposed by Canada for implementation of the DSB's recommendations and rulings in this dispute are not fixed either by law or by regulation. Rather, they are estimates made by the Government of Canada. The actual time taken to implement the DSB's recommendations and rulings in this case is subject to the discretion of the Government of Canada, and Canada has considerable flexibility in this regard. I recall the guidance provided by Article 21.1 of the DSU, which states 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." (emphasis added) Thus, it is incumbent upon the Government of Canada to use its discretion to ensure that compliance with the DSB's recommendations at issue is "prompt".

48. I am not persuaded that the implementation schedule proposed by Canada properly reflects the objective of "prompt" compliance. In particular, it appears that the Government of Canada could use the discretion inherent in its Regulatory Policy to implement the recommendations of the DSB in this case in a shorter period of time while still following the normal procedures for modifying

[21]Canada's response to questioning at the oral hearing.

[22]Statutory Instruments Act, R.S.C. 1985, c. S-22 (Exhibit 2 of Canada's submission).

[23]Government of Canada Regulatory Policy, November 1999 (Exhibit 3 of Canada's submission). The Regulatory Policy was approved by Cabinet in November 1999.

[24]Federal Regulatory Process Guide (Exhibit 4 of Canada's submission). The Process Guide sets out the steps required to develop, process and obtain approval of regulations.

[25]These same instruments were at issue before the Arbitrator in *Canada – Pharmaceutical Patents*. Like the Arbitrator in that dispute, I accept, for purposes of this arbitration, that the steps mandated under the Regulatory Policy, though not legally binding in the sense of a law or regulation, can nevertheless constitute part of the "reasonable period of time" for implementation. *Supra*, footnote 15, para. 54.

regulations. Two of the steps proposed by Canada illustrate the generous nature of the estimates provided by Canada.

49. First, Canada has proposed that it be given 150 days for what it terms "Pre-Drafting". Canada identifies two aspects of the "Pre-Drafting" process. The first aspect is "Identification and assessment of problem". The second aspect is "Publication of Notice of Intent in *Canada Gazette*, Part I." Canada notes that the explanation of this stage can be found in the Process Guide, at pages 3-4 and 38-39. However, nowhere in the Process Guide is a time period specified. In response to questioning at the oral hearing, Canada was not able to provide me with a sufficient justification for its request of 150 days for this stage of the implementation process. Canada's primary explanation appears to be the need for consultations between certain Canadian government departments, as well as consultations between the Canadian government and various "stakeholders". While I agree that such consultations are important, 150 days appears to be more than is reasonably necessary when "prompt compliance" is the objective. In my view, Canada did not provide a satisfactory explanation as to why these consultations should take 150 days. I note further that Canada, in its RIAS relating to its efforts to withdraw the export subsidy published in the *Canada Gazette* on 5 August 2000, indicates that it will "*continue consultations* with stakeholders and the provinces to determine how and when Canada will implement those findings."[26] (emphasis added) Moreover, in this same RIAS, Canada acknowledges that various Canadian government departments have been consulting with "stakeholders" throughout the WTO dispute settlement process.[27] Under these circumstances, Canada's request for 150 days for consultations in the "Pre-Drafting" stage appears excessive.

50. Second, in the "Drafting/Approval" stage, upon receipt of public questions and comments after pre-publication of draft regulations in the *Canada Gazette*, Canada has asked for 30 days so that it might prepare a "response to public comments" and another 30 days for "amendment of regulation and RIAS as required" in response to the public comments. However, I note that the regulations in question are likely to be very straightforward. In response to questioning at the oral hearing, Canada stated that "in all likelihood" it would simply repeal the MVTO 1998 and the SROs. Thus, 30 days to prepare a "response to public comments" and another 30 days for "amendment of regulation and RIAS as required" are unlikely to be necessary.

[26]See Exhibit 1 of Canada's submission.

[27]*Ibid.*

51. In my view, Canada's proposal does not make sufficient use of the discretion built into the Regulatory Policy to achieve the "prompt" compliance required by Article 21.1 of the DSU.

52. The European Communities and Japan have both argued that Canada should be able to implement the DSB's recommendations here at issue within 90 days. The European Communities and Japan argue that since Canada was able to implement the DSB's recommendations under Article 3.1(a) of the *SCM Agreement* within 90 days, it should be able to implement the DSB's recommendations relating to Article I:1 and Article III:4 of the GATT 1994 and Article XVII of the GATS within 90 days as well.

53. I agree with Canada, taking account of the normal process for adopting regulations in Canada, that 90 days does not constitute a "reasonable period of time" for implementation of the DSB's recommendations relating to Article I:1 and Article III:4 of the GATT 1994 and Article XVII of the GATS.[28] In its written submission, Canada confirmed that it intends to withdraw the export subsidy within 90 days.[29] However, Canada took this action in accordance with the DSB's recommendations and rulings relating to Article 3.1(a) of the *SCM Agreement*, made pursuant to the special dispute settlement procedures in Article 4 of that Agreement. Article 4.7 of the *SCM Agreement* requires that if a measure is found to be a prohibited subsidy, the panel *shall* recommend that the subsidizing Member "withdraw the subsidy without delay". To this end, the DSB recommended that Canada withdraw the export subsidy within 90 days. Canada has stated that it will comply with this recommendation, and in order to do so, will take, in its words, "extraordinary action".[30] In my view, Canada's ability to take "extraordinary action" to withdraw the export subsidy "without delay", in accordance with the provisions of Article 4.7 of the *SCM Agreement* and pursuant to the recommendation of the DSB, is not relevant for determining the "reasonable period of time" under Article 21.3(c) of the DSU for implementation of the recommendations of the DSB relating to Article I:1 and Article III:4 of the GATT 1994 and Article XVII of the GATS.

54. Canada has placed great emphasis on the "significant implications" that implementation of the DSB's recommendations in this case will have for the "administration of Canada's customs regime".[31] Canada has explained, in detail, how implementation will cause difficulties for the ongoing "major re-engineering" of its customs operations, under which it is establishing a new system known as

[28]For example, I note that Canada has highlighted the risk that regulations may be subject to judicial challenge by affected parties if there has not been sufficient opportunity for public consultation. Canada's submission, para. 25.

[29]*Ibid.*, para. 5.

[30]*Ibid.*

[31]*Ibid.*, paras. 46-66.

"Customs Self-Assessment".[32] This reform process was begun at the end of 1999, and the legislation necessary to effect it is scheduled to be introduced into Parliament this fall. This reform is a continuing process, with the final phase of implementation to begin in late April 2001, and the testing of the system with clients to continue through 2004.[33] The relevance of the implementation of this new customs administration system to Canada's argument on the "reasonable period of time" for implementation is not clear. In its written submission, Canada appears to be arguing that the establishment of the new customs system would require a *delay* in implementation of the DSB's recommendations in this case.[34] However, in response to questioning at the oral hearing, Canada stated that implementation of the DSB's recommendations would occur *sooner* as a result of the adoption of the new customs administration system, if I accept the "reasonable period of time" proposed by Canada.

55. Regardless of Canada's specific argument on this issue, I wish to emphasize that factors unrelated to an assessment of the shortest period of time possible for a Member to implement, within its legal system, the recommendations and rulings of the DSB in a particular case are irrelevant to determining the "reasonable period of time" under Article 21.3(c) of the DSU.[35] While it might be more convenient for Canada to implement the DSB's recommendations in this case on the same timeline as it has planned for the reform of its customs administration regime, this factor is not relevant in determining the "shortest period possible" within Canada's legal system for implementation of the DSB's recommendations.[36] As noted by the Arbitrator in *Canada – Pharmaceutical Patents*, the determination of the "reasonable period of time" for implementation must be a legal judgment based on an examination of relevant legal requirements.[37]

[32]Canada's submission, paras. 53, 55.

[33]See Exhibit 6 of Canada's submission.

[34]Canada's submission, paras. 56-58.

[35]See Award of the Arbitrator under Article 21.3(c) of the DSU, *Canada – Pharmaceutical Patents*, *supra*, footnote 15, para. 52. See also, Award of the Arbitrator under Article 21.3(c) of the DSU, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, para. 23; Award of the Arbitrator under Article 21.3(c) of the DSU, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 February 1997, paras. 19 and 27.

[36]I note further that, according to Canada, legislation relating to the proposed reform of Canada's customs regime is scheduled to be introduced into Parliament this fall. As with any legislative process, there is always an element of uncertainty in the specific timing for enactment of legislation. Therefore, it seems to me that Canada has placed undue reliance on its customs reform process as a factor in determining the "reasonable period of time" for implementation.

[37]*Supra*, footnote 15, para. 52.

## IV. The Award

56. I determine that the "reasonable period of time" for Canada to implement the recommendations and rulings of the DSB relating to Article I:1 and Article III:4 of the GATT 1994 and Article XVII of the GATS in this case is *8 months* from the date of adoption of the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, by the DSB on 19 June 2000. The "reasonable period of time" will thus expire on *19 February 2001*.

Signed in the original at Geneva this 18th day of September 2000 by:

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Julio Lacarte-Muró