WORLD TRADE ORGANIZATION

WT/DS384/R
WT/DS386/R
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UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING (COOL) REQUIREMENTS

Reports of the Panel

Note:

In the disputes WT/DS384 and WT/DS386, as explained in paragraph 2.11 of the Panel's Findings, the Panel decided to issue its Reports in the form of a single document constituting two Panel Reports, each of the Reports relating to each one of the two complainants in this dispute. The document comprises a common cover page, a common Descriptive Part and a common set of Findings in relation to the complainants' claims that the Panel decided to address. This document also contains Conclusions and Recommendations that, unlike the Descriptive Part and the Findings, are specific to each complainant. In the Conclusions and Recommendations, separate document numbers/symbols have been used for each complainant (WT/DS384 for Canada and WT/DS386 for Mexico).

TABLE OF CONTENTS

ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX B

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX C

THIRD PARTY SUBMISSIONS

ANNEX D

ORAL STATEMENTS OF THE PARTIES AT THE FIRST AND SECOND SUBSTANTIVE MEETINGS

ANNEX E

WORKING PROCEDURES FOR THE PANEL

ANNEX F

PROCEDURES FOR OPEN HEARINGS

TABLE OF WTO AND GATT CASES CITED IN THIS REPORT

Short Title	Full case title and citation
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
Brazil – Retreaded Tyres	Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, 1649
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry* , WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043
Canada – Pharmaceutical Patents	Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R, adopted 7 April 2000, DSR 2000:V, 2289
Chile – Alcoholic Beverages	Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009
Colombia – Ports of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367
Dominican Republic – Import and Sale of Cigarettes	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, 7425
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
EC – Approval and Marketing of Biotech Products	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1, and Add.1 to Add.9, adopted 21 November 2006, DSR 2006:III-VIII, 847
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591

EC – Bananas III (Article 21.5 – US)	Appellate Body Report , *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, 3791
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
EC – Sardines	Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R, DSR 2002:VIII, 3451
EC – Trademarks and Geographical Indications	Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R *(Australia)*, adopted 20 April 2005, DSR 2005:VIII, 3499 to DSR 2005: X, 4603
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
India – Quantitative Restrictions	Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, as upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, 1799
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179
Japan – Semi-Conductors	GATT Panel Report, *Japan – Trade in Semi-Conductors*, L/6309, adopted 4 May 1988, BISD 35S/116
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
Korea – Various Measures on Beef	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 59
Mexico – Taxes on Soft Drinks	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, 43
Turkey – Rice	Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, 2151
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619

US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
US – Stainless Steel (Korea)	Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, 1295
US – Superfund	GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, L/6175, adopted 17 June 1987, BISD 34S/136

TABLE OF ABBREVIATIONS

Abbreviation	Description
2002 Farm Bill	The Farm Security and Rural Investment Act of 2002
2008 Farm Bill	Food, Conservation, and Energy Act of 2008
2009 Final Rule (AMS)	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 on 15 January 2009 as 7 CFR Part 65
BCI procedures	Additional procedures for the protection of business confidential information
AMS	Agriculture Marketing Service (of the United States Department of Agriculture)
APA	Administrative Procedure Act
CBP	US Customs and Border Protection
C.F.R	Code of Federal Regulations
COOL	Country of Origin Labelling
CUSTA	Canada – United States Free Trade Agreement
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
FSIS	Food Safety and Inspection Service (of the United States Department of Agriculture)
GATT 1994	General Agreement on Tariffs and Trade 1994
HFCS	High-fructose corn syrup
Interim Final Rule (AMS)	Interim 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 on 1 August 2008 as 7 CFR Part 65
Interim Final Rule (FSIS)	Interim Final Rule on Mandatory Country of Origin Labelling of Muscle Cuts of Beef (including Veal), Lamb, Chicken, Goat, and Pork, Ground Beef, Ground Lamb, Ground Chicken, Ground Goat, and Ground Pork, published on 28 August 2008 as 9 CFR Parts 317 and 381
JBS	JBS USA, Inc.
NAFTA	North American Free Trade Agreement
PACA	Perishable Agricultural Commodities Act of 1930
R-CALF	Ranchers-Cattlemen Action Legal Fund
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
U.S.C.	United States Code

Abbreviation	Description
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

A. COMPLAINTS OF CANADA AND MEXICO

1.1 On 1 and 17 December 2008, respectively, Canada and Mexico independently requested consultations with the United States, pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade (GATT 1994), Article 14 of the Agreement on Technical Barriers to Trade (TBT Agreement), Article 11 of the Agreement of Sanitary and Phytosanitary Measures (SPS Agreement) and Article 7 of the Agreement on Rules of Origin, with respect to the measures and claims set out below.[1] On 7 May 2009, Canada and Mexico each requested supplemental consultations with the United States.[2]

1.2 Canada and Mexico requested, pursuant to Article 4.11 of the DSU, to join in each other's consultations.[3] Nicaragua and Peru requested to join in the consultations requested by Canada, and Peru also requested to join in the consultations requested by Mexico.[4] The United States informed the Dispute Settlement Body (DSB) that it accepted the requests of Canada and Mexico.[5]

1.3 Consultations were held between each complaining party and the United States. The United States and Canada held their consultations on 16 December 2008 and 5 June 2009. The United States and Mexico held their consultations on 27 February 2009 and on 5 June 2009. None of these consultations led to a mutually satisfactory resolution.[6]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 On 7 and 9 October 2009, respectively, Canada and Mexico each requested the establishment of a panel, pursuant to Article 6 of the DSU, with standard terms of reference.[7]

1.5 At its meeting on 19 November 2009, the DSB established a single panel, pursuant to the requests of Canada in document WT/DS384/8 and Mexico in document WT/DS386/7 and Corr.1, in accordance with Article 9.1 of the DSU.[8]

1.6 At that meeting, the parties to the dispute agreed that the Panel should have standard terms of reference. The Panel's terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Canada in document WT/DS384/8 and Mexico in document WT/DS386/7 and Corr.1, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[9]

1.7 On 30 April 2010, Canada and Mexico requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU.

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[1] WT/DS384/1 and WT/DS386/1.
[2] WT/DS384/1/Add. 1 and WT/DS386/1/Add. 1.
[3] WT/DS384/3, WT/DS384/5, WT/DS386/2 and WT/DS386/4.
[4] WT/DS384/2, WT/DS384/6 and WT/DS386/5.
[5] WT/DS384/4, WT/DS384/7, WT/DS386/3 and WT/DS386/6.
[6] WT/DS384/8, WT/DS386/7 and WT/DS386/7/Corr.1.
[7] WT/DS384/8, WT/DS386/7 and WT/DS386/7/Corr.1.
[8] WT/DSB/M/276, para. 60.
[9] WT/DS/384/9 and WT/DS/386/8.

1.8 On 10 May 2010, the Director-General composed the Panel as follows:

Chairman: Mr Christian Häberli

Members: Mr Manzoor Ahmad
Mr João Magalhães

1.9 Argentina, Australia, Brazil, Canada (for WT/DS386), China, Colombia, the European Union, Guatemala, India, Japan, Korea, Mexico (for WT/DS384), New Zealand, Peru, and Chinese Taipei reserved their rights to participate in the Panel proceedings as third parties.

C. PANEL PROCEEDINGS

1.10 The Panel held the first substantive meeting with the parties on 14-15 September 2010. The second substantive meeting with the parties was held on 1-2 December 2010. Enhanced third party rights granted by the Panel, after consultations with the parties, allowed the third parties to participate in both the first and second substantive meetings of the Panel. The sessions with third parties took place on 15 September 2010 and 2 December 2010. In light of the preference expressed by the parties during the organizational meeting with the Panel, and in accordance with the procedures adopted on 18 June 2010, the meetings with the parties were open to public viewing by means of simultaneous closed-circuit television broadcasting of the proceedings to a separate room.

1.11 On 14 January 2011, the Panel issued the descriptive part of its Panel Reports. The Panel issued its Interim Reports to the parties on 20 May 2011. The Panel issued its Final Reports to the parties on 29 July 2011.

II. FACTUAL ASPECTS

A. MEASURES AT ISSUE[10]

2.1 The claims brought by Canada and Mexico concern the United States' country of origin labelling (COOL) requirements for meat products.

2.2 Canada submits that the COOL measure consists of the following provisions:[11]

(a) 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 Interim 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 on 1 August 2008 as 7 CFR Part 65 ("Interim Final Rule (AMS)") and on Mandatory Country of Origin Labelling of Muscle Cuts of Beef (including Veal), Lamb, Chicken, Goat, and Pork, Ground Beef, Ground Lamb, Ground Chicken, Ground Goat, and Ground Pork, published on 28 August 2008 as 9 CFR Parts 317 and 381 ("Interim Final Rule (FSIS)");

[10] The Panel's adoption of the terminology – "measures at issue" – in its sub-headings of these Reports is for convenience only and does not prejudge any disputed factual or legal issues relating to that terminology.
[11] WT/DS384/8.

(c) 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 on 15 January 2009 as 7 CFR Part 65 (the "2009 Final Rule (AMS)");

(d) the letter to "Industry Representative" from the United States Secretary of Agriculture, Thomas J. Vilsack, of 20 February 2009 (the "Vilsack letter"); and

(e) any modifications, administrative guidance, directives or policy announcements issued in relation to items (a) through (d) above.

2.3 Mexico submits that the measures relating to the COOL provisions adopted by the United States include the following:[12]

(a) the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 et seq.), as amended by the Farm Security and Rural Investment Act of 2002 (Section 10816 of Public Law 107-171) and the Food, Conservation, and Energy Act of 2008 (Section 11002 of Public Law 110-246);

(b) Interim Final Rule – Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts (published in 73 Federal Register 45106, 1 August 2008);

(c) Final Rule – Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts (7 CFR Parts 60 and 65);

(d) Interim Final Rule – Mandatory Country of Origin Labelling of Muscle Cuts of Beef (including Veal), Lamb, Chicken, Goat and Pork, Ground Beef Ground Lamb, Ground Chicken, Ground Goat, and Ground Pork (9 CFR Parts 317 and 381, published in 73 Federal Register 50710, 28 August 2008);

(e) the letter from Thomas Vilsack, Secretary of Agriculture (United States Department of Agriculture, USDA), to Industry Representatives (20 February 2009), cited in USDA News Release No. 0045.09, "Vilsack Announces Implementation of Country of Origin Labelling Law" (20 February 2009); and

(f) any modification or amendment to measures (i) through (v) above, including any further implementing guidance, directives or policy announcements or any other document issued in relation to those measures.

B. PROCEDURAL HISTORY

1. Additional procedures for the protection of business confidential information ("BCI procedures")

2.4 At the organizational meeting held on 21 May 2010, Canada and Mexico mentioned the anticipated need for special working procedures to cover business confidential information. On

[12] WT/DS386/7 and WT/DS386/7/Corr.1.

16 and 17 June 2010, Canada, having consulted with Mexico and the United States, submitted the parties' proposed text for BCI procedures. After considering the proposed text, the Panel adopted BCI procedures on 18 June 2010, thereby creating rights and obligations for all parties in these proceedings, including third parties. These procedures were adopted according to, and are an integral part of, the Panel's working procedures of 18 June 2010 as attached in Annex E.

2. Procedures for open hearings

2.5 At the DSB meeting of 19 November 2009, the United States stated that it was the parties' agreed intention to have open hearings in these proceedings.[13] Mexico, at the same meeting, did not object to open hearings specifically for these proceedings, without prejudice to its systemic views on open hearings. At the organizational meeting held on 21 May 2010, Canada indicated that it would submit the parties' proposed procedures for open hearings to the Panel for its consideration. Having received comments from the United States, Canada submitted their proposed text on 17 June 2010. Based on the proposed text, the Panel adopted procedures for open hearings on 18 June 2010. Mexico had an opportunity to comment on the procedures and accepted the procedures without any changes. A copy of the procedures for open hearings is attached in Annex F.

3. Enhanced third party rights

2.6 On 12 May 2010, Australia sent a letter to the Panel requesting enhanced third party rights in these panel proceedings. At the organizational meeting of 21 May 2010, all parties commented on this request.

2.7 Having carefully considered Australia's request and the parties' comments thereon, the Panel decided to grant the following enhanced rights to all third parties in these panel proceedings:

(a) participation in the first and second substantive meetings of the Panel;

(b) access to the parties' first and second written submissions; and

(c) the right in both the first and second substantive meetings to ask questions to the parties and other third parties without any obligation to respond on the part of the parties and other third parties.

2.8 The Panel's working procedures and the procedures for open hearings reflect these enhanced third party rights. In addition to the above-listed enhanced third party rights adopted on 18 June 2010, the Panel, after having consulted the parties, allowed the third parties to receive copies of the parties' written responses to the Panel's questions following the first substantive meeting. The Panel considered that this would facilitate the third parties' participation in the second substantive meeting with the parties. The third parties were not, however, invited to submit a written submission prior to the second substantive meeting.

4. *Amicus curiae* briefs

2.9 On 22 November 2010, the Panel received an unsolicited *amicus curiae* brief. On 26 November 2010, the Panel forwarded the *amicus curiae* brief to the parties, with a copy to the third parties. The Panel noted the information contained in the letter and that it was cited in the United States' second written submission.

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[13] WT/DSB/M/276, para. 65.

2.10 The Panel gave the parties an opportunity to provide comments on the brief at the second substantive meeting, both with respect to whether or not the Panel should accept and consider the brief, as well as the content of the brief in terms of its relevance for the Panel in carrying out its duties in these proceedings. The parties and several third parties took the occasion to comment on the *amicus curiae* brief at the second substantive meeting. The Panel considered the information contained in the brief as necessary and to the extent that it was reflected in the written submissions and evidence submitted by the parties.

5. Request for separate reports

2.11 At the second substantive meeting on 1-2 December 2010, the United States requested, pursuant to paragraph 18 of the Panel's working procedures, that the Panel issue its findings in the form of a single document containing two separate reports with common sections on the Panel's findings and separate conclusions and recommendations for each complaining party. Canada agreed and Mexico did not object to the United States' request. The Panel has prepared its Reports accordingly.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. CANADA

3.1 Canada requests that the Panel find that:

(a) the COOL measure of the United States is inconsistent with its obligations under the TBT Agreement, in particular Articles 2.1 and 2.2; and

(b) the COOL measure of the United States is inconsistent with its obligations under the GATT 1994, in particular Articles III:4, X:3(a) and XXIII:1(b).

3.2 Canada therefore requests that the Panel recommend that the United States bring the COOL measure into conformity with its obligations under the TBT Agreement and the GATT 1994, subject to the provision of Article 26.1 of the DSU in respect of GATT Article XXIII:1(b).

B. MEXICO

3.3 Mexico requests that the Panel find that:

(a) the COOL measures are inconsistent with Articles III:4 and X:3 of the GATT 1994 and Articles 2.1, 2.2, 2.4 and 12 of the TBT Agreement; and

(b) the COOL measures nullify or impair benefits accruing to Mexico under the GATT 1994 within the meaning of Article XXIII:1(b) of the GATT 1994.

3.4 Mexico requests that the Panel make such recommendations that are necessary for the United States to bring itself into conformity with these provisions.

C. UNITED STATES

3.5 The United States requests that the Panel reject the claims made by Canada and Mexico in their entirety.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of Canada, Mexico and the United States, as set out in the executive summaries of their submissions provided to the Panel in accordance with paragraph 15 of the working procedures, are attached to these reports as annexes (see List of Annexes, pages vii-ix). They are also referred to later in these Reports in the context of the Panel's analysis of claims and defences.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 Argentina, Australia, Brazil, Canada (for WT/DS386), China, Colombia, the European Union, Guatemala, India, Japan, Korea, Mexico (for WT/DS384), New Zealand, Peru, and Chinese Taipei reserved their rights to participate in the Panel proceedings as third parties.

5.2 The arguments of those third parties that provided to the Panel submissions[14], executive summaries and oral statements are attached to these Reports as annexes (see List of Annexes, pages vi-viii). Argentina, India, Peru and Chinese Taipei did not present written submissions to the Panel. Argentina, India, and Chinese Taipei did not present oral statements at either substantive meeting of the Panel. Korea and China presented oral statements at the first and second substantive meetings respectively, but in closed session.

VI. INTERIM REVIEW

6.1 On 20 May 2011, the Panel submitted its Interim Panel Reports to the parties. On 17 June 2011, Canada, Mexico and the United States each submitted written requests for the review of precise aspects of the Interim Reports. On 30 June 2011, Canada, and on 1 July 2011, Mexico and the United States submitted comments on a number of requests for review presented by the other parties. None of the parties requested an interim review meeting.

6.2 In accordance with Article 15.3 of the DSU, this section of the Panel's reports sets out the Panel's response to the arguments made at the interim review stage, providing explanations where necessary. The Panel has modified aspects of its reports in the light of the parties' comments where it considered these appropriate, as explained below. The Panel has also made certain technical and editorial corrections and revisions to the Interim Panel Reports for the purposes of clarity and accuracy. References to sections, paragraph numbers and footnotes in this section relate to the Interim Panel Reports, except as otherwise noted.

A. MEASURES THAT FALL WITHIN THE PANEL'S TERMS OF REFERENCE

1. "USDA's clarification documents" (paragraphs 7.22, 7.23, and relevant parts of the Article X:3(a) section)

6.3 The **United States** points out that, in its second written submission, it objected to the inclusion of USDA's clarification documents (Exhibits CDA-29, 30, 31), referenced by Canada in its oral statement in the first panel meeting, within the Panel's terms of reference.[15] Accordingly, the United States submits that paragraph 7.22 is inaccurate in stating that the United States did not object to the inclusion of these clarification documents in the Panel's terms of reference.

[14] Third party written submissions were received from Australia, Brazil, Colombia, the European Union, Japan, Korea, and New Zealand.

[15] United States' comments on the Interim Panel Reports, para. 5, referring to its second written submission, para. 28.

6.4 Furthermore, the United States argues that these clarification documents were neither identified in nor in effect at the time of the complainants' panel requests because they were superseded when the 2009 Final Rule (AMS) was published and became effective. For example, the United States argues, Mexico did not mention these documents until its second written submission.[16] The United States also asserts that non-public pressure (Exhibits MEX-33, 55, 56, 57), as referenced by Mexico, is neither a measure nor within the Panel's terms of reference.

6.5 Based on the above, the United States requests the Panel to modify paragraphs 7.22 and 7.23 and to change the reference in footnote 40 so as to refer to paragraph 28 of the United States' second written submission instead of paragraph 9 of the United States' first written submission. Further, consistent with this suggested modification, the United States requests that references to non-public pressure, implying that this constitutes a measure, be removed from the discussions of Article X:3(a) of the GATT 1994 in the Interim Reports, including paragraphs 7.813, 7.823, 7.836, 7.837, 7.839, and 7.841.

6.6 **Canada** considers that these documents are covered by the terms "any modifications, administrative guidance, directives or policy announcements issued in relation to items (i) through (iv) above" in its panel request.

6.7 **Mexico** argues that the United States' comments above are inaccurate. Mexico considers that the terms "any further implementing guidance, directives or policy announcements" in its panel request sufficiently cover the associated guidelines as well as the non-public pressure, as identified by Mexico in its written submissions. This, according to Mexico, encompasses the clarification documents referenced by the United States. Regarding the non-public pressure, Mexico argues that this was part of the US government guidance associated with the COOL measure and thus an integral part of the COOL measure. Mexico submits that it was evidence of the administration of the measure within the meaning of Article X:3(a) of the GATT 1994.

6.8 The **Panel** considers that the United States' comments on the clarification documents referenced by Canada are moot as Canada did not pursue the position that "any modifications, administrative guidance, directives or policy announcements issued in relation to items (i) through (iv) above" form part of the COOL measure. Although Canada made a statement on the so-called "clarification documents" in its oral statement at the first substantive meeting, Canada, in response to a question from the Panel after that meeting, clarified its position by focusing only on the COOL statute, the 2008 Interim Final Rule (AMS), the 2009 Final Rule (AMS), and the Vilsack Letter, as instruments forming part of one single measure.[17]

6.9 Regarding the United States' comments in respect of these documents referred to by Mexico in the context of its claim under Article X:3(a) of the GATT 1994, they are *evidence* submitted to establish the USDA's acts of administering the COOL measure, but not the measure itself.[18] As such, documents provided as evidence to establish a claim need not be identified in the panel request. It is the measure at issue that needs to be identified in the panel request for it to fall properly within the Panel's terms of reference. Further, the so-called "non-public pressure" is simply Mexico's categorization of certain types of evidence submitted to prove the USDA's act of administering the measure at issue rather than the measure itself. To accept the United States' argument will result in conflating the underlying measure with the acts of administration of such underling measure. In light

[16] See Mexico's second written submission, para. 187, referring to Exhibit CDA-29.

[17] See Canada's response to Panel question No. 1.

[18] See paras. 7.836-7.847 for the Panel's discussion on whether Mexico has established based on evidence that USDA provided administrative guidance with respect to the COOL measure within the meaning of Article X:3(a).

of this, and as the United States' comments are premised on a mistaken understanding that these documents form a measure at issue that Mexico pursues separately from other identified measures at issue, we reject the United States' request and delete paragraphs 7.21-7.24 to avoid confusion as to the scope of the measures at issue that were properly identified and actually pursed by the complainants in the proceedings. We also added a footnote to the last sentence of paragraph 7.836 to clarify the nature of the non-public pressure referenced by Mexico in the context of its claim under Article X:3(a) of the GATT 1994.

2. Paragraph 7.24

6.10 **Mexico** suggests a modification to paragraph 7.24 of the Interim Panel Reports in order to avoid any further confusion regarding whether "any implementing guidance, directives or policy announcements" are within the Panel's terms of reference. The **United States** does not agree with Mexico's suggested modification to paragraph 7.24. The United States does not believe that "any further implementing guidance, directives, or policy announcements" are within the scope of the Panel's terms of reference for the reasons set forth above in paragraphs 6.3-6.5.

6.11 The **Panel** need not make the change suggested by Mexico as the Panel has already modified relevant parts of the Interim Panel Reports, including paragraph 7.24, in the context of the United States' comments on the USDA's clarification documents.

3. "USDA's implementing guidance" (paragraphs 7.26, 7.27-7.38)

6.12 The **United States** submits that, in addition to the 2008 Interim Final Rule (AMS) and the 2008 Interim Final Rule (FSIS), the USDA's guidance (also referred to as USDA's clarification documents) had expired at the time of the Panel's establishment. The United States suggests that the Panel modify paragraph 7.26 so as to include the implementing guidance as part of the expired measures; address this fact in paragraphs 7.27-7.38; and conclude that conducting a separate examination of these instruments would not contribute to resolving the current dispute between the parties. **Mexico** argues that the Panel should reject the United States' suggestion. Mexico takes the position that although some of the documents referred to by Mexico were issued before the Panel's establishment, this does not necessarily mean that they had already expired.

6.13 The **Panel** rejects the United States' request because, as explained above in paragraph 6.9, the so-called implementing guidance in this case is referred to as *evidence* of an act of administering the measure at issue (i.e. COOL measure) under Article X:3(a) of the GATT 1994.[19] According to the Appellate Body, evidence of acts of administration submitted in the context of a claim under Article X:3(a) is not subject to temporal limitations.[20] In the context of its claim under Article X:3(a) of the GATT 1994 during the panel proceedings, Mexico referred to the USDA's guidance as evidence of the United States' act of administration, which is reflected in, *inter alia*, the associated guidelines issued by USDA (Exhibits CDA-29; MEX-83) and the non-public pressure by the US government on individual companies (Exhibits MEX-33, 56-57). In other words, these documents that Mexico categorize as "associated guidelines" and "non-public pressure" are evidence of the United States' act of administering the COOL measure (measure at issue) within the meaning of Article X:3(a), but are not the measures at issue themselves.

[19] See footnote 18.

[20] Appellate Body Report in *EC – Selected Customs Matters*, para. 188. The Appellate Body underlined that the Panel in that dispute was entitled to rely on evidence of acts of administration, which may pre-date or post-date the establishment of the panel, to determine whether the measures at issue have been administered at the time of the Panel's establishment in a manner inconsistent with Article X:(a).

4. Other comments

(a) Paragraph 7.19

6.14 The **United States** submits that the 2009 Final Rule (FSIS) did not affirm the 2008 Interim Rule (FSIS). It therefore requests the Panel to modify the second sentence of paragraph 7.19 to more accurately describe the 2009 Final Rule (FSIS).

6.15 **Mexico** objects to the United States' suggestion. Mexico refers to the Federal Register publication of 20 March 2009 (i.e. the 2009 Final Rule (FSIS)), which explicitly describes its action as the "Affirmation of the interim final rule".

6.16 Taking into account the parties' comments, the **Panel** amended the text of the second sentence of paragraph 7.19 by directly citing the language of the Federal Register publication of 20 March 2009.

(b) Paragraph 7.28

6.17 The **United States** suggests a modification to the fourth sentence of paragraph 7.28 for greater accuracy. The United States highlights that the addition of commingling flexibility is only one change made to the 2008 Interim Final Rule (AMS). **Canada** and **Mexico** object to the United States' suggestion as the United States' position is already stated in the first sentence of the same paragraph and the suggested modification would confuse rather than increase the accuracy of the paragraph.

6.18 The **Panel** slightly modified the text of the fourth sentence of paragraph 7.28 in light of the parties' comments.

B. FACTUAL BACKGROUND

1. Paragraph 7.85

6.19 The **United States** requests a modification to the second sentence of paragraph 7.85 so as to add a phrase that the 2002 Farm Bill delegated to USDA the decision on how to define origin for meat products derived from mixed origin animals. **Mexico** objects to this suggestion because, in its view, this additional information is irrelevant to the content of the concerned paragraph.

6.20 The **Panel** agrees with Mexico's view and declines the United States' request.

2. Paragraph 7.93

6.21 **Canada** requests the Panel to modify the description of category D meat contained in paragraph 7.93 by deleting the words "born, raised, or" or to add a footnote to clarify the type of animal used to produce meat marked as Label D under the COOL measure. The **United States** objects to Canada's request as it believes the current language of paragraph 7.93, item (D) accurately reflects the COOL statute. Further, Canada's suggested footnote refers to the requirements of the 2009 Final Rule (AMS), which the United States does not understand to be within the intended scope of this paragraph.

6.22 The **Panel** declines Canada's request because paragraph 7.93 describes relevant part of the COOL statute as the United States submits. We added quotation marks in the relevant parts of paragraph 7.93 to indicate that the descriptions for the items listed are quoted directly from the text of the COOL statute.

3. Paragraph 7.94

6.23 The **United States** requests a modification to paragraph 7.94 to more accurately reflect the provisions of the COOL statute and USDA's task in the rulemaking process concerning the use of four categories of muscle cut labels.

6.24 **Canada** and **Mexico** objects to the United States' request.

6.25 The **Panel** declines the United States' request. As Canada points out, we consider that the description of the 2009 Final Rule (AMS) in paragraph 7.94, in combination with paragraphs 7.95 to 7.106, sufficiently explains the circumstances in which the labels can be interchangeably used.

4. Paragraph 101

6.26 The **United States** suggests that paragraph 7.101 be modified for greater accuracy regarding the description of the commingling permitted under the 2009 Final Rule (AMS) of meat derived from different categories. **Mexico** disagrees with this suggestion because, *inter alia*, the concerned paragraph addresses a different issue and the suggested modification is confusing.

6.27 The **Panel** rejects the United States' suggestion because, as Mexico points out, paragraph 7.101 addresses a different issue, and the United States' suggested change is already reflected in the chart provided in paragraph 7.104.

5. Paragraph 7.126 and footnote 179

6.28 **Mexico** requests the Panel to modify paragraph 7.126 and add a new sentence at the end of footnote 179 to fully reflect Mexico's arguments on the penalties with which the COOL measure can be enforced. The **United States** does not object to Mexico's request, but suggests that the United States' position on this issue also be added.

6.29 Taking into account the comments of Mexico and the United States, the **Panel** made slight adjustments to paragraph 7.126 and footnote 179.

6. Paragraphs 7.127-7.131

6.30 **Mexico** requests the addition of a new paragraph describing a relevant paragraph of the Vilsack letter.

6.31 Given that the requested additional paragraph is described in paragraph 7.182 of the Interim Panel Reports, the **Panel** declines Mexico's request.

C. CLAIMS UNDER THE TBT AGREEMENT

1. Technical regulation

(a) Paragraph 7.178

6.32 **Mexico** requests that the first sentence of paragraph 7.178 be modified so as to avoid stating that, on its face, the Vilsack letter is clearly not mandatory. The **United States** disagrees, arguing that the Vilsack letter explicitly describes its recommendations as voluntary.

6.33 The **Panel** rejects Mexico's request – both in light of the US arguments and given that the sentence in question starts with the phrase "[o]n its face".

(b) Paragraph 7.195

6.34 The **United States** suggests modifying paragraph 7.195 because the Canadian exhibits referenced in that paragraph merely refer to the Vilsack letter without explicitly mentioning any of the three specific suggestions contained in this letter. **Canada** objects to these changes suggested by the United States, noting that the exhibits in question show that certain industry participants have responded to the Vilsack letter in a way that resulted in the rejection of Canadian-born livestock. Canada adds that paragraph 7.195 uses the word "might".

6.35 In light of the arguments of the United States and Canada, the **Panel** has slightly modified paragraph 7.195, although to a lesser extent than requested by the United States.

2. Article 2.1

(a) Introduction and legal test under Article 2.1 of the TBT Agreement – Paragraph 7.223

6.36 The **United States** suggests inserting the phrase "as a minimum" into the *chapeau*, to make sure that the three criteria of the Article 2.1 legal test are only "minimum" criteria. **Canada** and **Mexico** disagree with this suggested modification. Canada emphasizes that the *chapeau* of paragraph 7.223 uses the word "includes", which does not exclude additional criteria. Mexico adds that the proposed change would describe an agreement that does not exist, for neither complainant agrees with the United States that the three criteria are only minimum criteria.

6.37 The **Panel** rejects the suggestion of the United States because the *chapeau* of paragraph 7.223 uses the word "includes", and it also reproduces the key term "essential" from the quote that follows in the same paragraph. Rather, the Panel has decided to extend footnote 294 to paragraph 7.223 to explain that, according to the United States, "[i]n addition to these three 'minimum' elements, the text of TBT Article 2.1 requires the complaining party to establish that such [less favourable] treatment is in respect of the technical regulation [at issue]."

(b) Whether the COOL measure is a technical regulation – Paragraph 7.242

6.38 The **United States** suggests modifying paragraph 7.242 to better reflect the relevant arguments in paragraphs 196-199 of the United States' first written submission. **Canada** and **Mexico** oppose this suggested modification, arguing that paragraph 7.242 properly summarises the arguments in paragraphs 196-199 of the United States' first written submission. Mexico adds that the United States has never withdrawn this argument. At the same time, Mexico concedes that the United States made an additional argument in its opening oral statement at the Panel's first substantive meeting. Accordingly, Mexico does not exclude adding, with minor modifications, part of the text that the United States would insert into paragraph 7.242.

6.39 The **Panel** has decided to follow largely the suggestion of Mexico, by inserting – with minor modifications – part of the text suggested by the United States at the end of paragraph 7.242.

(c) Whether imported products are accorded less favourable treatment than like domestic products

(i) Paragraph 7.264

6.40 **Canada** points out that it has never argued that the COOL measure does not involve *de jure* discrimination. The referenced portion of its first written submission noted that the COOL measure "does not explicitly require" less favourable treatment of imports. The **United States** argues that the phrase "does not explicitly require" covers *de jure* discrimination, and it adds that country of origin labelling may be origin-neutral.

6.41 Although the **Panel** does not consider it necessary to determine in the abstract whether country-of-origin labelling may be origin-neutral, it has decided to modify paragraph 7.264, to reflect Canada's arguments more faithfully.

(ii) Paragraph 7.267

6.42 The **United States** requests deleting part of the last sentence of paragraph 7.267 and replacing it with language that would reflect more faithfully an argument made by the United States at various points in the dispute, in particular in paragraph 143 of its first written submission. **Mexico** disagrees. It argues that the last sentence of paragraph 7.267 is almost identical to the relevant portion of paragraph 143 of the United States' first written submission. Mexico requests that if any changes are made to paragraph 7.267, the same language as paragraph 143 of the United States' first written submission should be used.

6.43 The **Panel** has modified paragraph 7.267 accordingly by keeping the original last sentence, and by adding a new sentence following the arguments referenced by the United States.

(iii) Paragraph 7.276

6.44 **Mexico** requests the Panel to modify paragraph 7.276 by adding a sentence summarizing Mexico's response to the US argument that it is possible to comply with the COOL measure without any segregation.

6.45 In light of the United States' silence on this Mexican request, the **Panel** has decided to introduce the language suggested by Mexico, although only at the end of paragraph 7.276 and with corrected paragraph numbers in the footnote inserted at the end of the new sentence.

(iv) Paragraph 7.290

6.46 The **United States** requests modifying paragraph 7.290 to indicate that Label A is the only label with no foreign element and further that Label D is the only label with no domestic element. **Canada** and **Mexico** object to these suggested modifications. Canada argues that the United States itself recognizes that Label D does not need to list when processing steps occur in more than one country. Thus, Label D could refer to muscle cuts from livestock that are born and raised in the United States and thus have some domestic element, but slaughtered abroad. As also reflected in paragraph 7.663 of the Interim Reports, Mexico argues that the suggested modifications are inaccurate because Label D could involve some domestic elements.

6.47 The **Panel** rejects the modification suggested by the United States as it would address an issue that is not indispensable for analysing the complainants' claims under Article 2.1 of the TBT Agreement.

(v) Paragraph 7.299

6.48 The **United States** suggests modifying paragraph 7.299, to reflect the full extent of the commingling provisions and the differences between the 2008 Interim Rule (AMS) and 2009 Final Rule (AMS) described in paragraphs 7.294-7.298 of the Interim Reports. **Canada** and **Mexico** disagree with this suggested modification. The complainants argue that it is the 2009 Final Rule (AMS) together with the COOL statute that imposes the requirements summarised in paragraph 7.299. Mexico adds that modifying the second sentence of paragraph 7.299, as suggested by the United States, would incorrectly indicate that the 2009 Final Rule (AMS) is the basis of the ineligibility of imported livestock for Label A, whereas the correct basis is the 2008 Farm Bill.

6.49 Although the **Panel** agrees with the complainants, it has decided to make one minor modification to paragraph 7.299 in light of one of the suggestions by the United States.

(vi) Paragraph 7.314

6.50 The **United States** requests modifying paragraph 7.314, to better reflect the US arguments on the Informa Report. **Canada** objects to these suggested modifications, arguing that paragraph 7.314 is sufficiently clear.

6.51 The **Panel** has slightly modified paragraph 7.314 in light of these comments.

(vii) Paragraph 7.329

6.52 The **United States** suggests modifying paragraph 7.329, arguing that "US sources" in the first sentence is used inappropriately to refer to the Congressional Research Service, which is not part of the US executive branch, and to the Food Marketing Institute, which is a private organization. **Canada** and **Mexico** object to this suggested modification. The complainants point out that CRS is part of the US government for the purposes of WTO law. Mexico adds that a private organization representing three quarters of all retail food sales in the United States is also undoubtedly a "US source". Further, Mexico disagrees with the US suggestion to delete the phrase that indicates that the COOL measure implies segregation.

6.53 The **Panel** has modified paragraph 7.329 along the lines of the language suggested by the United States. The Panel does not consider that this modification would alter the intended meaning of the relevant sentence, or of the paragraph as a whole.

(viii) Paragraph 7.340

6.54 The **United States** suggests modifying the first two sentences of paragraph 7.340. According to the United States, some plants may not accept both domestic and imported livestock. Further, muscle cuts processed in the United States are not eligible for Label D because they necessarily derive from animals slaughtered in the United States. **Canada** and **Mexico** disagree with the first modification suggested by the United States. Mexico argues that sourcing only domestic or imported livestock is a form of segregation. Canada adds that the first sentence of paragraph 7.340 starts with the word "[t]his", which is a reference to the preceding paragraph. As regards the suggested modification to the second sentence, Mexico is silent and Canada does not disagree.

6.55 The **Panel** agrees with Canada that the first modification suggested by the United States is redundant. Paragraph 7.340 starts with the word "[t]his", which refers to the phrase "processing domestic *and* imported livestock and meat solely according to the price and quality of the products" in paragraph 7.335 (emphasis added). This is also confirmed by the five scenarios outlined in paragraph 7.337. As regards the second modification suggested by the United States, in the absence of objections by the complainants, the Panel has decided to delete the phrase ", but possibly four" at the end of the second sentence in paragraph 7.340.

(ix) *Paragraph 7.348*

6.56 The **United States** requests the Panel to delete paragraph 7.348, arguing that commingling may take place already before the processing stage, e.g. at feedlots, as also illustrated by Exhibit US-101. **Canada** and **Mexico** disagree. The complainants argue that the commingling flexibility in the 2009 Final Rule (AMS) is limited to processing on a single production day. As regards Exhibit US-101, Canada argues that the affidavits signify that the feedlot somehow tracked the origin of each of its animals and ensured that on each processing day the processor received at least one Mexican-born or -raised, one Canadian-born or -raised, and one US-born or -raised animal. Canada refers to its explanation earlier in the dispute as to how this tracking would need to be accomplished. Mexico argues that the various affidavits contained in Exhibit US-101 do not provide the option to certify that livestock were of Mexican or Canadian origin.

6.57 The **Panel** agrees with the complainants that the 2009 Final Rule (AMS) does not provide an explicit legal basis for commingling before the processing stage. At the same time, although the Panel is not certain what conclusions it may draw from Exhibit US-101, the Panel considers it more appropriate to delete paragraph 7.348. Even without paragraph 7.348, paragraph 7.349 sufficiently justifies the statement made in paragraph 7.347.

(x) Paragraph 7.361

6.58 **Mexico** points out that the double square brackets marking the figure in paragraph 7.361 as BCI are redundant as the same figure is contained in paragraph 51 of the executive summary of Mexico's first written submission, which is attached to the Interim Reports as Annex A-2. The **United States** and **Canada** do not comment on this request by Mexico.

6.59 The **Panel** has removed the double square brackets from paragraph 7.361.

(xi) Paragraph 7.367

6.60 The **United States** suggests adding a sentence at the end of paragraph 7.367 to qualify this paragraph. The United States points out that a similar qualifier ends paragraph 7.370. **Canada** and **Mexico** object to this suggested addition. Canada notes that the statements referenced in paragraph 7.367 were made after the 2008 Interim Final Rule (AMS) entered into force. Mexico argues that this qualifier might reflect the United States' views but the Panel should not agree with it.

6.61 The **Panel** does not believe it is necessary to modify paragraph 7.367. Instead, the Panel has deleted the final sentence qualifying paragraph 7.370.

(xii) Paragraph 7.368

6.62 The **United States** suggests deleting paragraph 7.368 altogether, pointing out that it has never argued that the evidence referenced in that paragraph was anecdotal. The United States used the term "anecdotal" to describe other evidence submitted by the complainants. **Canada** and **Mexico** disagree with this suggested deletion. Mexico suggests deleting only the first sentence of paragraph 7.368 instead. Canada also believes that there is no need to delete the whole paragraph. Canada quotes the relevant section of the United States' second oral statement, noting that this statement used the word "anecdotal" with an unqualified reference to "evidence and economic studies that Canada and Mexico submit[ted]."

6.63 The **Panel** notes that, as footnote 513 to the word "anecdotal" in paragraph 7.368 indicates, the United States used this word four times in its opening oral statement at the second meeting. Further, as Canada points out, the United States used it rather vaguely. At the same time, the complainants' exhibits referenced in paragraph 7.368 are not specifically mentioned in the United States' second oral statement. Accordingly, the Panel has deleted the first sentence of paragraph 7.368 and kept the rest of the paragraph.

(xiii) Paragraph 7.368, footnote 515

6.64 **Mexico** asks the Panel to modify footnote 515 to paragraph 7.368 by adding a reference to Exhibit MEX-111, because this latter also includes the market share information marked as BCI in paragraph 7.368. **Canada** and the **United States** do not comment on this Mexican request.

6.65 The **Panel** notes that Exhibit MEX-111 includes the market share information marked as BCI in paragraph 7.368. Accordingly, the Panel has modified footnote 515 as requested by Mexico. In addition, the Panel has removed the brackets around the market share information in paragraph 7.368 as, in light of Exhibit MEX-111, it no longer qualifies as BCI.

(xiv) Paragraph 7.371

6.66 The **United States** suggests modifying paragraph 7.371, to reach the conclusion that a photo of a "Product of the US, Canada and Mexico" label (Exhibit US-95) actually proves that commingling has been taking place. **Canada** and **Mexico** disagree with the suggested changes, arguing that the resulting paragraph would make the Panel reverse its original conclusion about these photos. Mexico also argues that commingling applies to muscle cuts, not to livestock. Mexico adds that paragraph 7.371 addresses commingling of Label A and B meat, and the US comments bear no relation to this issue.

6.67 The **Panel** rejects the suggested changes. The suggested changes would add detailed arguments to paragraph 7.371 as to why photographs of Label B prove commingling. The Panel does not consider it appropriate to modify paragraph 7.371 to reach the opposite conclusion on the basis of arguments made by the United States only at the interim review stage.

(xv) Paragraph 7.373

6.68 The **United States** references Exhibit US-101, and suggests modifying paragraph 7.373 to reflect that commingling is possible at the feedlot level. **Canada** and **Mexico** object to this suggested modification. Canada argues that the first affidavit in Exhibit US-101 only attests to the origin of livestock when marketed to a slaughter house, rather than, as the United States suggests, that commingling is occurring in either a feedlot or a slaughter house. Mexico reiterates that the COOL measure does not explicitly provide for commingling prior to processing.

6.69 The **Panel** notes that paragraph 7.373 references paragraph 57 of the United States' second written submission. As Canada points out, it is not clear that Exhibit US-101 proves what the United States claims in paragraph 57 of its second written submission, in particular that commingling is in fact taking place at the feedlot stage. Accordingly, the Panel has decided to maintain the original text of paragraph 7.373.

(xvi) Paragraph 7.375

6.70 The **United States** suggests deleting the last sentence of paragraph 7.375, arguing that commingling involving up to 14% of category A beef and up to 20% of category A pork does not correspond to a relatively minor share of commingled meat. **Mexico** points out that the last sentence of paragraph 7.375 uses the words of the United States' response to Panel question No. 91.

6.71 In light of Mexico's comment, the **Panel** has decided to keep the last sentence of paragraph 7.375, although with certain modifications to better reflect the United States' relevant response.

(xvii) Paragraph 7.375, footnote 527

6.72 The **United States** suggests deleting the reference to Exhibit US-146 from footnote 527 for lack of relevance. According to the United States, this exhibit does not refer to the actual labels used in the market but to the US supply of meat.

6.73 The **Panel** notes that the sentence of paragraph 7.375 in question refers to arguments by the complainants. Accordingly, the Panel has decided to delete the reference to Exhibit US-146 from footnote 527 to paragraph 7.375.

(xviii) Paragraphs 7.385 and 7.415

6.74 The **United States** suggests deleting paragraphs 7.385 and 7.415, which address the exclusion of imported products from US premium beef programmes. According to the United States, at least two of the exhibits referenced in paragraph 7.385 pre-date the 2009 Final Rule (AMS). Further, the United States argues that none of the other Canadian and Mexican exhibits referenced in paragraph 7.385, support the claim that Canadian and Mexican beef are being excluded from US premium programmes. **Canada** and **Mexico** object to these suggested deletions. Canada argues that it is irrelevant that some exhibits pre-date the 2009 Final Rule (AMS) because the former flexibility permitted under the 2008 Interim Final Rule (AMS) was taken away by US governmental action at the end of September 2008. Canada also refers to Exhibit CDA-36, in which Tyson states that "[its] approach will be to use the 'U.S.' or Category A label on all of our premium beef programs beginning early 2009". According to Canada, the rest of the evidence referenced in paragraph 7.385 provides the basis for a reasonable inference that the producers in question were excluded from premium US programmes. Mexico, in turn, references Exhibit MEX-33, which is a brochure by Tyson dated April 2009, and which reproduces the October 2008 Tyson letter contained in Exhibit CDA-36.

6.75 In light of the complainants' comments, the **Panel** has decided to keep paragraphs 7.385 and 7.415 unchanged.

(xix) Paragraph 7.392

6.76 The **United States** suggests adding a sentence to the end of paragraph 7.392 to reflect that Canadian and Mexican livestock were discounted *vis-à-vis* US livestock even before the

COOL measure. **Canada** and **Mexico** disagree with the suggested new sentence. Canada argues that neither of the paragraphs that would be referenced in the new footnote supports the statement in the new sentence that there were consistent discounts for Canadian livestock "as a result of comparatively higher transport costs and currency fluctuations". The "basis" or "spread" referenced in Canada's first written submission applies to both Canadian and US cattle. The relevant chart in Exhibit US-30, cited to support the United States' position that "prices are generally lower" for Canadian cattle, is a bare chart with no indication of who prepared it or what data were used. Canada adds that both first written submissions refer, in relevant part, to Canadian cattle and not to hogs or to Mexican cattle. Mexico argues that this is the first time that the United States has argued that Mexican cattle received lower prices than US cattle. The relevant portions of the US and Canadian written submissions do not address Mexican cattle. Mexico refers to its submissions arguing that the price of Mexican cattle was freely determined before the COOL measure. Mexico also notes that the United States has not contested this argument. Further, Mexico argues that currency fluctuation is irrelevant as the price of Mexican livestock for export is negotiated in US dollars. In fact, as Exhibit MEX-48 demonstrates, at times before the COOL measure Mexican cattle received higher prices than US cattle. There is also no reason to consider that transportation costs are any different for Mexican cattle than for US-born cattle located near the US-Mexican border.

6.77 In light of the complainants' comments, the **Panel** has decided to keep paragraph 7.392 unchanged.

(xx) Paragraph 7.384, footnotes 556 and 557

6.78 **Mexico** argues that two Mexican Exhibits should be added to footnote 556 as evidence for the statement in paragraph 7.384 that "[s]everal suppliers reported that the price difference between imported and domestic livestock has become larger to the detriment of the latter". Further, Mexico requests that footnote 557 reference two additional Mexican Exhibits to support the phrase in the same sentence of paragraph 7.384 that "discounts for imported livestock appeared or existing ones increased as a result of the COOL measure".

6.79 The **Panel** notes that the sentence in question starts with "[s]everal suppliers reported that…"; however, none of the four exhibits mentioned by Mexico originate from "suppliers". Accordingly, the Panel has decided to reject Mexico's request for referencing these exhibits in footnotes 556 and 557.

(d) Actual trade effects

(i) Paragraph 7.443

6.80 The **United States** requests modifying paragraph 7.443 because numerous aspects of the Panel's Article 2.1 analysis preceding paragraph 7.443 involve looking at the trade effects of the COOL measure. **Canada** and **Mexico** object to this suggested modification. Canada argues that the evidence referenced by the United States is not evidence of trade effects but of the discriminatory impact of the COOL measure. Evidence that US industry changed their practices precisely because of the COOL measure demonstrates changes in the conditions of competition to the detriment of Canadian livestock – and not a neutral change in trade volumes that may be unconnected with the measure at issue. Mexico argues that it is important for the report to distinguish the analysis of competitive conditions from a *detailed* analysis of actual trade effects.

6.81 In light of the complainants' comments and the use of the term "in detail" in paragraph 7.443, the **Panel** has decided to keep paragraph 7.443 unchanged.

(ii) Paragraph 7.462, footnote 632

6.82 The **United States** proposes to indicate in footnote 632 that the figures of the table in Exhibit US-28 do not include breeding animals. **Canada** does not object to this additional phrase.

6.83 Accordingly, the **Panel** has changed footnote 632 to paragraph 7.462 as suggested by the United States.

(iii) Paragraphs 7.464 and 7.468

6.84 The **United States** requests including in the analysis 2010 data which covers the first nine months and which would suggest that Canadian feeder and slaughter cattle exports to the United States increased by 6.8% with respect to the same time period in 2009.[21] According to the United States this is line with data provided by Canada and indicating that average Canadian exports per month were higher in 2010 compared with 2009. Accordingly, the United States suggests modifying paragraphs 7.464 and 7.468. **Canada** opposes the proposed modifications for two reasons. First, conclusions based only on partial or extrapolated data are speculative. Second, drawing a conclusion based only on data submitted by the United States, as does the additional sentence proposed at the beginning of paragraph 7.464, would be inappropriate.

6.85 The **Panel** rejects the suggested modifications to paragraphs 7.464 and 7.468. Reaching a conclusion based on partial data would involve introducing additional assumptions, and would render the data comparison less objective.

(iv) Paragraph 7.478

6.86 With regard to the graph in paragraph 7.478, **Canada** points out that the legend does not clearly show a dotted line for imports of slaughter hogs, and that the reference to "Series 1" and "Series 2" is unclear.

6.87 The **Panel** has corrected the graph accordingly.

(v) Paragraph 7.480, footnote 669

6.88 The **United States** argues that since the parties did not dispute the fact that BSE restrictions in 2005 limited Canadian exports, the word "probably" should be deleted from footnote 669. **Canada** does not object to the suggested deletion.

6.89 The **Panel** has replaced "probably" with "mostly" in footnote 669 to paragraph 7.480, to reflect that other factors could have also affected imports of Canadian cattle.

(vi) Paragraphs 7.485-7.486

6.90 The **United States** suggests moving to paragraph 7.523 the discussion in paragraphs 7.485-7.486 on Canada's choice of denominator in the econometric model produced by Professor Sumner. **Canada** does not object to this suggestion.

6.91 The **Panel** notes that footnotes 704-705 to paragraph 7.523 already reference paragraphs 7.485-7.486. Accordingly, the Panel does not consider it necessary to move paragraphs 7.485-7.486 to paragraph 7.523.

[21] Exhibit US-143.

(vii) Paragraph 7.513

6.92 The **United States** suggests changing paragraph 7.513, arguing that the effects of the COOL measure did not start in 2008. The 2009 Final Rule entered into force in March 2009, and there is no mention of the COOL measure in Exhibit US-156, which is referenced in the footnote to paragraph 7.513. **Canada** disagrees with the suggested changes because the reference date is the end of September 2008, when the COOL legislation and the 2008 Interim Final Rule (AMS) came into effect.

6.93 The **Panel** rejects the suggested modification. The United States considered, in its own econometric study, September 2008 as the starting date for the COOL measure. In addition, the United States never raised this issue when criticizing the Sumner Econometric Study.

(viii) Paragraph 7.514

6.94 The **United States** suggests using the word "attempt" instead of "are able" in paragraph 7.514 to define the objective of econometric studies. According to the United States, econometric studies, such as the Sumner Econometric Study, frequently fail to isolate and quantify the factors at play. **Canada** opposes this change arguing that well-designed econometric studies, like the Sumner Econometric Study, are able to isolate and quantify the various factors.

6.95 The **Panel** notes that statistics tests may be used to assess whether an econometric model is flawed. Accordingly, the Panel rejects the change to paragraph 7.514 suggested by the United States.

(ix) Paragraph 7.517

6.96 The **United States** suggests modifying paragraph 7.517 to make clear that, unlike the Sumner Econometric Study, the USDA Econometric Study did not analyse the hog market. **Canada** recognizes that the USDA Econometric Study did not cover the hog market. However, Canada disagrees with the change suggested by the United States, which could imply that two econometric studies had been undertaken: one for cattle and another one for hogs. In Canada's view, any modification to paragraph 7.517 should reflect that Canada submitted only one econometric study, i.e. the Sumner Econometric Study.

6.97 The **Panel** has modified paragraph 7.517 in line with both parties' requests.

(x) Paragraph 7.522

6.98 The **United States** suggests modifying paragraph 7.522 to reflect that there was a COOL impact on the price effect only for fed cattle but not for all livestock. **Canada** opposes the additional wording on the ground that the current paragraph correctly reflects that none of the parties submitted evidence suggesting that there was no COOL impact on the price basis for feeder cattle or hogs.

6.99 The **Panel** has modified paragraph 7.522 to clarify its language, but only to the extent that the changes do not involve factual errors or unsubstantiated conclusions.

(xi) Paragraph 7.523

6.100 The **United States** suggests modifying paragraph 7.523 to reflect US concerns with Canada's econometric models. In particular, the United States questions whether it is appropriate to base a legal analysis under Article 2.1 of the TBT Agreement on the use of an econometric study that purports to show trade effects. The United States also wonders whether a reduced form model, such as Exhibit CDA-152, properly captures price and export effects in a highly complex market like the North American livestock market. **Canada** disagrees with the suggested changes. Canada argues *inter alia* that the objective of the Sumner Econometric Study is to assess the differential effect of the COOL measure and not its "trade effect".

6.101 The **Panel** has slightly modified paragraph 7.523 in light of the parties' comments.

(xii) Paragraph 7.530

6.102 The **United States** suggests deleting the last sentence of paragraph 7.530. The United States argues that it never proposed that Canada should use overall trade in agricultural commodities as a (continuous) measure of economic recession. **Canada** disagrees with this suggested deletion, pointing out that the United States did mention the use of overall trade in agricultural commodities in its comments on Canada's response to the Panel's questions following the second substantive meeting. Canada suggests including a footnote at the end of the paragraph with the proper reference.

6.103 The **Panel** has inserted such a footnote into paragraph 7.530, and kept the last sentence of this paragraph as is.

(xiii) Paragraph 7.532

6.104 The **United States** suggests modifying paragraph 7.532, to elaborate on its criticisms of the Sumner Econometric Study in line with its comment on paragraph 7.523. **Canada** disagrees with the suggested changes for the same reasons as the ones it raised in the context of paragraph 7.523.

6.105 The **Panel** has added a reference to paragraph 7.523 in footnote 717.

(xiv) Paragraph 7.539

6.106 The **United States** suggests changing a word in paragraph 7.539 because a reduced form model is obtained from a system of equations by "rewriting", not "solving" the system using algebra. **Canada** disagrees with the United States, and believes that the term "rewritten" would be less accurate than "solved".

6.107 The **Panel** considers that, in the circumstances of the dispute, it is more appropriate to leave paragraph 7.539 unchanged.

(xv) Paragraph 7.548

6.108 The **United States** suggests modifying the Panel's analysis of the econometric studies as regards the findings of the USDA Econometric Study. In particular, the United States suggests dropping the last sentence of paragraph 7.548, which explains that potential multicollinearity calls into question the validity of certain findings of the USDA Econometric Study. **Canada** disagrees with the proposed changes, arguing that these would make the paragraph less accurate.

6.109 The **Panel** has slightly modified, but has not deleted, the last sentence of paragraph 7.548.

3. Article 2.2

(a) Objective pursued by the United States through the COOL measure: paragraphs 7.593, 7.624, 7.625, and 7.676

6.110 The **United States** submits that the objective pursued through the COOL measure, as identified by the Panel in its Interim Report, has two aspects – providing as much information about origin as possible and reducing compliance costs. According to the United States, it did clarify these two aspects of the objective in the panel proceedings.[22] The United States therefore requests that both of these aspects of the objective be reflected in the Panel Report in order to accurately portray the United States' position throughout the dispute. Specifically, the United States suggests that the Panel add the fact that the United States took into account the reduction of compliance costs for the market participants as part of the objective in the above-mentioned paragraphs.

6.111 **Canada** disagrees with the changes proposed by the United States. Canada asserts that the United States repeatedly argued throughout the panel proceedings that its objective for purposes of Article 2.2 of the TBT Agreement was consumer information.[23] The United States, argues Canada, never referenced an objective related to costs on domestic industry participants. As a result, Canada was never in a position to address whether such an objective was legitimate under Article 2.2. Canada also points out that although the United States stated that the costs of compliance were taken into account "in deciding how to fulfil that objective", it failed to state that those costs of compliance formed part of the objective itself.

6.112 **Mexico** also objects to the United States' proposal. Mexico argues that the consideration of reducing compliance costs on market participants is only a way in which the United States purportedly intended to achieve the objective, but was not part of the objective itself. In Mexico's view, the United States is confusing the objective of the measure (i.e. providing as much clear and accurate origin information as possible to consumers) with the implementation of that measure (i.e. reduced compliance costs).

6.113 The **Panel** rejects the United States' request for the following reasons. Based on the United States' arguments in the panel proceedings, the Panel decided that the objective as identified by the United States was "to provide consumer information on origin".[24] The Panel was not presented with the argument from the United States that the reduction of compliance costs for market participants also formed part of the objective pursued by the United States through the COOL measure. As Mexico points out, the United States submitted that reducing compliance costs was one of the factors that it considered in *implementing* the COOL measure to achieve the objective of providing consumer information on origin.[25] Reducing compliance costs therefore cannot form part of the objective itself.

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[22] The United States refers to the following parts of its submissions: United States' responses to Panel question Nos. 24 (para. 43) 142(a) (para. 98); first written submission, paras, 2, 7.

[23] Canada refers to the following parts of the United States' submissions: United States' first written submission, heading 1, page 57, and para. 211; oral statement at the first substantive meeting, para. 37; second written submission, heading C, page 47, and para. 118; oral statement at the second substantive meeting, heading B, page 12, and para. 40. (Canada's comments on the United States' comments on Interim Panel Report, para. 40)

[24] See paragraphs 7.615-7.621.

[25] For example, the United States' argument relating to the reduction of compliance costs is included in paragraph 7.669 as part of the summary of the United States' argument as well as being addressed in the context of the Panel's analysis in paragraph 7.716.

(b) Legal interpretative approach under Article 2.2 – paragraphs 7.673 and 7.674

6.114 The **United States** submits that a discussion of the United States' position with regard to the relationship between Article 2.2 of the TBT Agreement and Article XX of the GATT 1994 should reflect its argument and evidence submitted in support of its position. The United States reiterates its arguments put forward in the panel proceedings that the Panel should apply the legal interpretative approach under Article 5.6 of the SPS Agreement, but not that of Article XX of the GATT 1994, to Article 2.2 of the TBT Agreement. The United States suggests that the Panel modify paragraphs 7.673 and 7. 674, and add a new footnote to paragraph 7.673.

6.115 **Canada** and **Mexico** do not consider it necessary to include the additional detail as suggested by the United States in paragraph 7.673, including the addition of a new footnote. Canada and Mexico submit that the paragraph accurately summarizes the United States' position.

6.116 The **Panel** considers that the current texts in paragraphs 7.673 and 7.674 and footnote 880 accurately summarize the United States' position. To further clarify the United States' position however, we made slight adjustments to the texts of the concerned paragraphs and moved footnote 880 to the end of the first sentence at paragraph 7.673. We also added a footnote to paragraph 7.675.

D. TYPOGRAPHICAL ERRORS AND CLERICAL OBSERVATIONS

6.117 The **Panel** has worked from the original version of the Interim Panel Reports. Further, as noted above, the Panel has incorporated all other comments by the parties on typographical errors in the Interim Panel Reports and has modified the Reports to the extent it deemed necessary.

VII. FINDINGS

A. OVERVIEW OF THE MATTERS BEFORE THE PANEL

7.1 In this dispute, Canada and Mexico advance claims against the United States' measures governing the country of origin labelling ("COOL") requirements with respect to meat products. The complainants claim that the measures are inconsistent with Articles 2.1 and 2.2 of the TBT Agreement, and Articles III:4 and X:3(a) of the GATT 1994. The complainants have also advanced a non-violation claim under Article XXIII:1(b) of the GATT 1994.

7.2 The complainants argue that the measures accord imported livestock treatment less favourable than that accorded to like domestic livestock inconsistently with Article 2.1 of the TBT Agreement, as well as Article III:4 of the GATT 1994. The complainants assert that this is because complying with the COOL requirements results in higher segregation costs for imported livestock, which in turn affects the competitive conditions of imported livestock in the market.

7.3 Furthermore, the complainants claim that the COOL requirements are inconsistent with Article 2.2 of the TBT Agreement. According to the complainants, the true objective of the COOL requirements is to protect domestic industry, not to provide consumer information on origin as stated by the United States, and that, in the circumstances of this dispute, the provision of consumer information is not legitimate. The complainants state that there are less trade restrictive alternatives and, in any event, the COOL requirements do not fulfil the objective of providing consumer information on origin because labels under the COOL requirements convey confusing and inaccurate information on the origin of meat products.

7.4 Finally, the complainants allege that the United States administered the COOL requirements in a manner inconsistent with Article X:3(a) of the GATT 1994. Canada claims that the United States administered the COOL requirements in an unreasonable manner by issuing the Vilsack letter. Mexico submits that an unreasonable, non-uniform, and partial administration of the COOL requirements is shown by in the shifts in the guidance provided by USDA on the COOL requirements, as reflected in the associated guidelines issued by USDA, non-public pressure by the US government on individual companies, and the Vilsack letter.

7.5 Separately, Mexico presents claims under Articles 2.4 and 12 of the TBT Agreement. Mexico submits that the COOL measure is inconsistent with Article 2.4 because the United States failed to base its regulation on the General Standard for the Labelling of Prepackaged Foods ("CODEX-STAN 1-1985"), which Mexico claims is an international standard that is an effective and appropriate means for the fulfilment of the legitimate objective pursued by the United States. Mexico also argues that the COOL measure is inconsistent with Articles 12.1 and 12.3 of the TBT Agreement. It claims that the United States did not take into account Mexico's special needs as a developing country when preparing and applying the COOL measure, with a view to ensuring that no unnecessary obstacles were created to Mexico's cattle exports to the United States.

B. PRELIMINARY MATTERS

1. Measures at issue

(a) Introduction

7.6 The parties agreed to the standard of review by the Panel pursuant to Article 7.1 of the DSU.[26] Accordingly, our terms of reference are defined by the complainants' respective requests for the establishment of a panel under Article 6.2 of the DSU. Canada[27] and Mexico[28] identified in their respective panel requests a number of measures allegedly pertaining to the mandatory country of origin labelling requirements imposed by the United States.[29]

7.7 Whilst not challenging the adequacy of the complainants' panel requests under Article 6.2, the United States questions the necessity for the Panel to examine expired measures. The parties also dispute how the Panel should treat the measures at issue in examining the complainants' claims, namely whether to treat them collectively as a single measure or separately as individual measures.

7.8 In light of the issues raised by the parties as well as the obligation imposed on us to make an objective assessment of the parties' claims based on the properly identified measures, we will examine in this section the following three matters:

- Which measures fall properly within the scope of our terms of reference;
- Whether we should examine the measures that were no longer in effect at the time of the Panel's establishment; and

[26] See para. 1.6.

[27] Canada defined the measures identified in its panel request as the provisions comprising the "COOL measure".

[28] Mexico refers to the measures identified in its panel request as the COOL measures (in plural). In subsequent written submissions, however, Mexico has taken the same position as Canada and argues that these instruments consistent one single "COOL measure".

[29] See paras. 2.1-2.3.

- How we should treat the measures at issue in examining the complainants' claims, namely, whether to treat them collectively as a single measure or separately as individual measures.

(b) Measures that fall within the scope of the Panel's terms of reference

7.9 We have already described the measures at issue as identified by the complainants in their panel requests.[30] In the course of the Panel proceedings, the complainants further elaborated on the measures that they challenge in this dispute.[31] The following are the "provisions"[32] that both Canada and Mexico claim constitute the "COOL measure":

- the Agricultural Marketing Act of 1946, as amended by the 2002 Farm Bill and 2008 Farm Bill;
- the Interim Final Rule[33] (AMS[34]);
- the 2009 Final Rule (AMS); and
- the Vilsack letter.

7.10 In addition to the above listed "provisions", Mexico refers to three other measures:

- the Interim Final Rule (FSIS)[35];
- the 2009 Final Rule (FSIS)[36]; and
- any further implementing guidance, directives or policy announcements.[37]

7.11 As the measures identified above consist of, *inter alia*, statutory and regulatory instruments pertaining to the mandatory country of origin labelling requirements, we will first briefly review the legislative and rulemaking process in the United States.

7.12 Under the United States' legal system, once a bill passes through Congress and becomes law, it is codified into the United States Code ("U.S.C."). An enacted statute then forms the legal authority

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[30] See paras. 2.1-2.3.

[31] Canada's and Mexico's responses to Panel question Nos. 1 and 2.

[32] As described in Section II above, Canada used the term "provisions" to refer to various measures that, in its view, collectively constitute one single COOL measure.

[33] See para. 7.84 for an explanation of the interim final rule in the context of the US legal system.

[34] The Agricultural Marketing Service ("AMS") was vested with authority over the COOL rulemaking process, complementing the work that the USDA's Food Safety and Inspection Service ("FSIS") had been performing in the past. The United States explains that the "FSIS ultimately discontinued its independent rulemaking after Congress passed the 2002 Farm Bill and the AMS took over primary responsibility for determining when meat covered commodities could be designated as "U.S. origin", or some derivative thereof". However, the FSIS still has the "authority within the US government for ensuring that meat food products are safe, wholesome and accurately labelled". (United States' first written submission, para. 31).

[35] In its response to Panel question No. 2, Canada states that it did not include the Interim Final Rule and the Final Rule that were adopted by the FSIS as part of the COOL measure.

[36] Canada clarified that it did not include the FSIS Final Rule as part of the "COOL measure" (Canada's responses to Panel question Nos. 1 and 2).

[37] Mexico's first written submission, paras. 9, 29, 33 and 34; response to Panel question No. 1; and second written submission, paras. 20 and 42.

and framework for a given subject matter. Subsequently, in order for the executive branch to implement the concerned statute, relevant government departments or agencies undertake, where necessary, the rulemaking process to introduce regulations. These regulations are codified into the Code of Federal Regulations ("C.F.R.").

7.13 The statutory provisions enacted through the 2002 Farm Bill and 2008 Farm Bill in relation to the COOL requirements were inserted into the Agricultural Marketing Act of 1946.[38] In other words, the Farm Bills introduced the COOL requirements in Congress, subsequently becoming part of the US statutes, codified in 7 U.S.C. 1621 *et seq*. For ease of reference, in our reports we will refer to the Agricultural Marketing Act of 1946, as amended by the 2002 Farm Bill and 2008 Farm Bill, as the "COOL statute".

7.14 Further, the regulatory provisions implementing the COOL statute were introduced by the 2009 Final Rule (AMS). Most of the provisions in the 2009 Final Rule (AMS) were carried forward from those in the Interim Final Rule (AMS).[39] These regulatory provisions are codified in 7 C.F.R. Parts 60 and 65. Our reference in these reports to the implementing regulations in relation to the COOL requirements means the 2009 Final Rule (AMS).

7.15 To determine the scope of our terms of reference, we address, in turn, the measures identified by both Canada and Mexico and the three additional measures referred to only by Mexico.[40]

7.16 Both Canada and Mexico presented <u>the COOL statute</u>, <u>the 2009 Final Rule (AMS)</u>, <u>the Interim Final Rule (AMS)</u> and <u>the Vilsack letter</u> as the measures at issue. The complainants properly identified these measures in their panel requests within the meaning of Article 6.2 of the DSU. In this connection, we note that the parties have not contested that all these measures, including the Vilsack letter, qualify as measures subject to WTO dispute settlement. The Appellate Body stated that, "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch".[41]

7.17 Accordingly, we conclude that the COOL statute, the 2009 Final Rule, the Interim Final Rule (AMS) and the Vilsack letter are properly within the Panel's terms of reference.

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[38] Mexico's first written submission, para. 10; United States' first written submission, para. 33. Mexico further states that the Agricultural Marketing Act of 1946 contains provisions regulating the system for distributing and marketing agricultural products in the United States.

[39] The 2009 Final Rule modified certain provisions of the Interim Final Rule (AMS). See paras. 7.90-7.100 for more detailed discussion in this regard.

[40] See paras. 7.9-7.10.

[41] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81. The panel in *US – Export Restraints* also stated,

> "[t]he Appellate Body [in *Guatemala – Cement I*] recalled the GATT Panel in *Japan – Semiconductors* that measures could consist of both binding and non-binding acts, including non-binding administrative guidance by a government. We agree, and in particular find no reason or basis to rule in the abstract that a given type of instrument or action cannot be subject of claims in WTO dispute settlement. This of course does not mean, however, that all measures are capable by themselves of giving rise to violations of WTO obligations."

(Panel Report, *US – Export Restraints*, paras. 8.80-8.81 (original footnote omitted), also referring to the Appellate Body Report, *Guatemala – Cement I*, footnote 47)

We observe that this is also consistent with the principle in the relevant provisions of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, as pointed out by the European Union, a third party participant in this dispute (European Union's third-party oral statement at the second substantive meeting of the Panel, paras. 3-4; parties' responses to Panel question No. 97). See also response of Canada and Mexico to Panel question No. 98.

7.18 Turning now to the additional measures challenged only by Mexico (i.e. the Interim Final Rule (FSIS), the 2009 Final Rule (FSIS), and any further implementing guidance, directives or policy announcements), we first find the Interim Final Rule (FSIS)[42] to be properly within the scope of our terms of reference as it *is* specifically identified in Mexico's panel request.

7.19 Mexico has also invoked the 2009 Final Rule (FSIS). Mexico, however, did *not* identify the 2009 Final Rule (FSIS) in its panel request[43], although Mexico mentions it in its first written submission as well as in its response to a question from the Panel.[44] Through the 2009 Final Rule (FSIS), the FSIS "[affirmed], without change, its interim final rule requiring a country of origin statement on the label of any meat or poultry product that is a covered commodity, as defined by the [AMS], and that is to be sold by a retailer …"[45] Mexico submitted its request for the establishment of a panel on 9 October 2009. As of the date of Mexico's panel request, therefore, the 2009 Final Rule (FSIS) had already been enacted (i.e. 15 January 2009). The 2009 Final Rule (FSIS) is therefore not a measure that was enacted subsequent to the date of Mexico's request for the establishment of a panel, which may have made it fall within the scope of the Panel's terms of reference should it be found, inter alia, sufficiently connected to the measures at issue identified in the panel request. We conclude that the 2009 Final Rule (FSIS) falls outside the scope of the Panel's terms of reference.[46]

7.20 In addition, Mexico identified "any further implementing guidance, directives or policy announcements" in its panel request.[47]

7.21 The table below summarizes the measures at issue that fall within the scope of the Panel's terms of reference for the disputes brought by Canada and Mexico, respectively:

CANADA	**MEXICO**
THE COOL STATUTE	
THE 2009 FINAL RULE (AMS)	
THE VILSACK LETTER	
THE INTERIM FINAL RULE (AMS)	
	THE INTERIM FINAL RULE (FSIS)
	ANY FURTHER IMPLEMENTING GUIDANCE, DIRECTIVES OR POLICY ANNOUNCEMENTS

7.22 Among these measures, the Interim Final Rule (AMS) and the Interim Final Rule (FSIS) had already expired at the time of the Panel's establishment. As explained in more detail below, the fact that a measure ceased to exist or expired at the time of the establishment of a panel does not a priori make that measure fall outside the scope of the panel's terms of reference, insofar as the measure is specifically identified within the meaning of Article 6.2 of the DSU. Nonetheless, the question

[42] Although Canada also identified the Interim Final Rule (FSIS) in its panel request, it subsequently submits that it "did not include the Interim Final Rule and the Final Rule that were adopted by the FSIS as part of the COOL measure" in its response to Panel question No. 2. We understand this statement to mean that it has decided not to pursue the Interim Final Rule (FSIS) as part of the measures at issue in this proceeding regardless of the fact that it *was* identified in its panel request.

[43] WT/DS386/7 and WT/DS386/7/Corr.1.

[44] Mexico's first written submission, para. 9, referring to Exhibit MEX-6; response to Panel question No. 1.

[45] Exhibit MEX-6.

[46] We note that the United States has not objected to Mexico's addressing the 2009 Final Rule (FSIS) in its submissions. This does not, however, cure the defect in Mexico's panel request that the concerned instrument was not identified as required by Article 6.2 of the DSU.

[47] Mexico's first written submission, paras. 9, 29, 33 and 34; response to Panel question No. 1; and second written submission, paras. 20 and 42.

remains whether it is even necessary for us to examine the expired measures in pursuing the objective of bringing prompt resolution to the current dispute. We consider this question in the following section.

(c) Measures that were no longer in force at the time of the establishment of the Panel – Interim Final Rule (AMS) and Interim Final Rule (FSIS)[48]

(i) Main arguments of the parties

7.23 The **United States** argues that both the Interim Final Rule (AMS) and the Interim Final Rule (FSIS) have no effect in US law because they were superseded by the 2009 Final Rule (AMS) on 16 March 2009 and the 2009 Final Rule (FSIS) on 20 March 2009, respectively, and did not exist at the time of the establishment of the Panel.[49]

7.24 The United States asserts that an examination of the Interim Final Rule (AMS), which did not exist at the time of the establishment of the Panel, would not help achieve a satisfactory settlement of the matter at issue.[50] The Interim Final Rule (AMS) does not provide evidence of the administration of the 2009 Final Rule (AMS) because of the substantive difference between these two instruments. Further, the United States submits that the differences between the 2009 Final Rule (AMS) and the Interim Final Rule (AMS) are significant. Among these differences, the United States highlights the flexibility provided under the 2009 Final Rule (AMS)[51] with regard to the use of B and C labels that did not exist under the Interim Final Rule (AMS): (i) a C label can be used on meat derived from a B animal in any circumstances; and (ii) B and C labels can be used when meat pertaining to category A, B, or C is commingled within a single production day in any combination.[52] The United States, however, agrees that the 2009 Final Rule (AMS) does not allow the use of B labels on category A meat when it is not commingled.[53]

7.25 Regarding the Interim Final Rule (FSIS), the United States argues that Mexico has failed to make a prima facie case.[54] The United States also reiterates that the Interim Final Rule (FSIS) is no longer in force.

7.26 **Canada** agrees that the Interim Final Rule (AMS) expired on 15 March 2009.[55] Canada underlines, however, that the contents of the Interim Final Rule (AMS) were carried forward, with minor modifications, into the 2009 Final Rule (AMS), which became effective on 16 March 2009. In Canada's view, both the Interim Final Rule (AMS) and the 2009 Final Rule (AMS) implement the

[48] The Interim Final Rule (FSIS) is relevant only for the dispute brought by Mexico.
[49] United States' first written submission, paras. 46 and 69-71.
[50] United States' second written submission, paras. 23-25.
[51] See Section VII.C.1(b)(i).
[52] Exhibit CDA-5, p. 2706. The United States also refers to other differences between the 2009 Final Rule (AMS) and the Interim Final Rule (AMS) in para. 25 of its second written submission (footnotes 34-38) (Exhibit CDA-5, p. 2659-2660).
[53] The United States explains in footnote 33 in its second written submission that this change was made at the request of consumer groups, among other interested parties, who believed that meat derived from animals born, raised, and slaughtered in the United States should largely be labelled as US-origin.
[54] Canada clarified that it did not include either the 2009 Final Rule (FSIS) or the Interim Final Rule (FSIS) as part of the measures at issue.

As for Mexico's claim in respect of the 2009 Final Rule (FSIS), we concluded above that it is not within the scope of our review in this dispute as that specific instrument was not identified in Mexico's panel request.
[55] Canada's response to Panel question No. 2.

COOL statute.[56] According to Canada, as the overall effect of the Interim Final Rule (AMS) was the same as that of the 2009 Final Rule (AMS), the Panel must take into account the effects of the Interim Final Rule (AMS) although it has expired.[57]

7.27 **Mexico** also agrees that both the Interim Final Rule (AMS) and the Interim Final Rule (FSIS) have been superseded by the 2009 Final Rule (AMS) and the 2009 Final Rule (FSIS) respectively and therefore have no legal effect under US law.[58] However, for the purposes of its challenge, Mexico submits that the Interim Final Rules are evidence of the implementation, operation and administration of the COOL measure in a manner that unjustifiably discriminates against and restricts imports of Mexican cattle into the United States. Specifically, Mexico refers to the decrease of Mexican feeder cattle imports into the United States[59] and the increase in the average price differential between Mexican and like US cattle after the issuance of the Interim Final Rule (AMS).[60] Mexico also points to announcements that were made at the end of 2008 concerning the reduction in plants accepting Mexican cattle.[61]

(ii) Analysis by the Panel

Interim Final Rule (AMS)

7.28 We recall that the Interim Final Rule (AMS) was specifically identified in the complainants' panel requests and thus falls within the scope of the Panel's terms of reference.[62] All parties also agree that the Interim Final Rule (AMS) had expired at the time of the establishment of the Panel and currently has no legal effect under US law.[63] The complainants are not requesting us to make a finding or recommendation with regard to the Interim Final Rule (AMS). The contention between the complainants and the United States concerning this instrument is, therefore, whether the Panel should even *examine* it for the purpose of this dispute.

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[56] Canada agrees that compared to the Interim Final Rule (AMS), the 2009 Final Rule (AMS) provides more flexibility with respect to the use of Label B on meat from animals imported directly for slaughter and commingled with US origin animals or mixed origin animals during a single production day (Canada's first written submission, para. 26; response to Panel question No. 2). At the same time, however, the 2009 Final Rule (AMS) removed the flexibility of labelling products from US origin animals as Label B, unless there is commingling with non-US origin animals during a single production day.

[57] Canada's response to Panel question No. 2.

[58] Mexico's response to Panel question No. 2. Mexico states that it "recognizes that these instruments are not currently nullifying or impairing benefits accruing to Mexico under the WTO Agreements since they have been superseded by the 2009 Final Rules".

[59] Mexico's first written submission, para. 163; response to Panel question No. 2, citing to the 24 February 2009 report by the Congressional Research Service (Exhibit MEX-53).

[60] Mexico's first written submission, para. 164; response to Panel question No. 2, citing to USDA price data contained in Exhibit MEX-47 and summarized in Exhibit MEX-48.

[61] Mexico's first written submission, para. 157; response to Panel question No. 2, citing to Tyson letter of 24 December 2008 (Exhibit MEX-42) and Affidavit (Exhibit MEX-37).

[62] We recall the Appellate Body's clarification in *US – Upland Cotton* that the text of Article 6.2 does not preclude a Member from making representations with respect to measures whose legislative basis has expired. The Appellate Body further stated that the fact that a measure has expired is not dispositive of the preliminary question of whether a panel can address claims in respect of that measure although it may affect whether, and if so, what recommendation a panel should make in respect of such a measure. (Appellate Body Report, *US – Upland Cotton*, para. 270) See also the Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.42-7.43.

[63] Canada's response to Panel question No. 2; Mexico's response to Panel question No. 2; United States' first written submission, paras. 13,46, 59.

7.29 Specifically, the complainants take the position that the Panel should consider the Interim Final Rule (AMS) regardless of its legal status under US law. In support of its position, Canada points to the similarities between the Interim Final Rule (AMS) and the 2009 Final Rule (AMS) in substance as well as in their overall effect: both sets of regulations implement the COOL legislation. Mexico alleges that the effect it had on imported livestock during the implementation period (i.e. September 2008–March 2009) forms evidence of its claim in respect of the COOL requirements.[64]

7.30 The fact that a measure has already expired or ceased to exist at the time of a panel's establishment does not make it fall a priori outside the scope of a panel's terms of reference.[65] Insofar as a measure is clearly identified in the complainant's panel request in accordance with Article 6.2 of the DSU, such a measure falls within the scope of the panel's terms of reference. It is another matter, however, whether the panel should *examine* a measure that, although procedurally properly before it, had already expired at the time of the panel's establishment. A panel is called upon to consider the nature of the dispute before it to determine whether an examination of such a measure, despite its expired status, would still be necessary to assist the resolution of the dispute. We also find relevant the Appellate Body's clarification in *EC – Selected Customs Matters* that "evidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel"[66] and that "a panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment".[67]

7.31 In these circumstances and given the legal and substantive connection between the Interim Final Rule (AMS) and the 2009 Final Rule (AMS)[68], as explained in paragraph 7.61, we will take into consideration the Interim Final Rule (AMS) in examining the measures at issue that are currently in force.

7.32 We note the United States' argument that the Interim Final Rule (AMS) does not provide evidence of the administration of the 2009 Final Rule (AMS) because of what the United States alleges to be significant substantive differences between these two instruments. In our view, the substantive differences between these two instruments do not necessarily affect the conclusion that the Interim Final Rule (AMS) can be examined in the context of the complainants' arguments in respect of the instruments that are currently in force. Particularly, the evolution of the COOL implementing regulations, shown through the rulemaking process, can assist us in understanding the overall operation of the COOL requirements. We will therefore take the Interim Final Rule (AMS) into consideration in our examination of the instruments that are currently in force, bearing in mind its substantive similarities to, as well as differences from, the 2009 Final Rule (AMS).

The Interim Final Rule (FSIS)

7.33 Our considerations above with respect to the Interim Final Rule (AMS) apply equally to the Interim Final Rule (FSIS). Therefore, we will consider the Interim Final Rule (FSIS), to the extent appropriate, in our examination of the COOL statute, the 2009 Final Rule (AMS), and the Vilsack letter.

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[64] Mexico's response to Panel question No. 2.

[65] See the Appellate Body Reports, *US – Upland Cotton*, paras. 271-272 and *EC – Selected Customs Matters*, paras. 134-135.

[66] Appellate Body Report, *EC – Selected Customs Matters*, para. 188.

[67] Appellate Body Report, *EC – Selected Customs Matters*, para. 188.

[68] The summary part of the 2009 Final Rule (AMS) explains the nature of the Interim Final Rule (AMS) as follows: "[i]n order to meet the September 30, 2008, implementation date [the date designated under the COOL statute] and to provide the newly affected industries the opportunity to provide comments prior to issuing a final rule, on August 1, 2008, the Department published an interim final rule with a request for comments for all of the covered commodities…" (74 FR 2658, Exhibits CDA-5 and MEX-7)

Conclusion

7.34 In light of the above considerations, among the five categories of measures that are within the scope of the Panel's terms of reference, namely the COOL statute, the 2009 Final Rule (AMS), the Vilsack letter, the Interim Final Rule (AMS), and the Interim Final Rule (FSIS), we will examine and make findings and recommendations with respect to the first three, namely the COOL statute, the 2009 Final Rule (AMS) and the Vilsack letter. We will not make findings or recommendations on the Interim Final Rule (AMS) and the Interim Final Rule (FSIS). However, we will consider them, where relevant, in the context of our examination of the parties' claims with regard to the measures that are currently in force. In the factual circumstances of this dispute, we do not consider that conducting a separate examination of these interim measures, or making a finding or recommendation with respect to such measures, would contribute to resolving the current dispute between the parties.

(d) Treatment of the measures at issue – as a single measure or as several distinct measures

(i) Main arguments of the parties

7.35 Canada and Mexico argue that the Panel must consider the instruments at issue that fall within the Panel's terms of reference as a single measure consisting of various components, rather than as a series of independent measures.[69]

7.36 **Canada** submits that, while the COOL statute, the 2009 Final Rule (AMS), and the Vilsack letter are separate instruments in US law that does not prevent the Panel from considering the different components, which operate in concert to achieve a common policy objective of the United States, as one measure. It would be a mistake to consider each component instrument as a separate measure.

7.37 **Mexico** also submits that the COOL statute, the 2009 Final Rule (AMS), the Vilsack letter, and the administrative guidance, directives and policy announcements are elements or components of a single measure (i.e. the COOL measure).[70] Mexico argues that the COOL measure comprises various closely connected instruments and that each instrument is dependent upon others, starting with the 2002 Farm Bill. It is the collection of instruments as a whole that creates the measure being challenged by Mexico. Mexico asserts that the Vilsack letter, administrative guidance, directives and policy announcements build on the 2009 Final Rules which in turn build on the relevant provisions of the 2008 and 2002 Farm Bills.[71]

[69] Canada's first written submission, footnote 1 to para. 1; response to Panel question Nos. 1 and 89. Mexico's response to Panel question Nos. 1 and 89. Canada refers to the Appellate Body Report, *EC – Asbestos*, para. 64; and the Panel Reports, *Japan – Apples*, para. 8.10-8.20 and *EC – IT Products*, para. 7.157.

As discussed in Section VII.B.1, both Canada and Mexico include the Interim Final Rule (AMS) as part of the elements comprising the COOL measure in this regard (complainants' responses to Panel question No. 1). Mexico additionally refers to the Interim Final Rule (FSIS). We concluded that we would consider, without making findings or recommendations, these Interim Final Rules, which had already expired at the time of the Panel's establishment, to the extent relevant and useful for our examination of and findings with respect to the instruments that are currently in force. Therefore, the question addressed in this section concerns only those instruments that are within the Panel's terms of reference and currently in force.

[70] Mexico also includes both the Interim Final Rule (FSIS) and the 2009 Final Rule (FSIS) as part of elements comprising the COOL measure. For the reasons that are explained in Section VII.B.1 and footnote 69 above, the question addressed in this section concerns only those instruments that are within the Panel's terms of reference and currently in force.

[71] Mexico's second written submission, para. 20; response to Panel question No. 1.

7.38 Mexico argues that *Japan – Film* and *Turkey – Rice* are not applicable to the facts of this dispute.[72] According to Mexico, this is because, unlike the various instruments at issue in this dispute, each of the measures at issue in *Japan – Film* and *Turkey – Rice* had an autonomous existence and independent effect.

7.39 The **United States** does not agree with Canada and Mexico that the various measures described above together form one single COOL measure. The United States submits that the Panel should reject the complainants' attempt to characterize all of the instruments at issue as a single COOL measure given, among other factors, the substantive differences between the various instruments challenged in this dispute.[73] Moreover, the United States argues that combining separate instruments in a single measure has important implications for Canada's and Mexico's legal claims. For example, neither party's arguments address how the COOL statute, apart from the 2009 Final Rule, is inconsistent with the United States' obligations. Therefore, the United States contends that "each document cited by Canada and Mexico should be assessed on its own merits in relation to each of Canada and Mexico's claims, consistent with the approach used by panels in previous disputes".[74]

7.40 In particular, concerning the Vilsack letter, the United States underlines that it is substantively different from the COOL statute and 2009 Final Rule (AMS). Further, unlike the COOL statute and 2009 Final Rule (AMS), the Vilsack letter, containing voluntary suggestions, is not mandatory and has no legal status under US law.[75] Any review of Canada's and Mexico's claims with respect to the Vilsack letter would therefore need to take into account these differences in its status under US law. The United States submits that this, together with the letter's lack of substantive content, argue in favour of a separate examination altogether.

7.41 The United States also points out that neither Canada nor Mexico attempt to explain how "the US instruments have operated and continue to operate in conjunction with each other".[76] The United States argues that the complainants ignore the Interim Final Rule (AMS), the Interim Final Rule (FSIS), and the 2009 Final Rule (FSIS) altogether, failing to substantively address these instruments in any of their submissions. The complainants also fail to explain how the COOL statute breaches United States' WTO obligations alone or in conjunction with the 2009 Final Rule (AMS). This is particularly in light of the fact that the implementing regulations could have been designed in a manner that, as Canada appears to concede, would be WTO-consistent. Thus, according to the United States, Canada's and Mexico's arguments essentially boil down to arguments against the 2009 Final Rule (AMS) and the Vilsack letter.

7.42 The United States further submits that the complainants have failed to demonstrate that the Vilsack letter operates in conjunction with the 2009 Final Rule (AMS). In light of this and given that the Vilsack letter has no operative effect at all, the 2009 Final Rule (AMS) and the Vilsack letter should be examined separately.[77] The United States further argues for a separate examination because the Vilsack letter does not fall within the scope of the WTO provisions under which Canada and Mexico challenge the so-called "COOL measure". The Vilsack letter is not a technical regulation within the meaning of the TBT Agreement and it is not a "law, regulation, or requirement" within the meaning of the GATT 1994. Therefore, according to the United States, it does not make sense to

[72] Mexico's response to Panel question No. 1.
[73] United States' second written submission, paras. 11-28; response to Panel question No. 89; and comments on each other's response to Panel question No. 89.
[74] United States' first written submission, paras. 129-130, referring to the Panel Reports on *Japan – Film*, paras. 10.88-10.89 and *Turkey – Rice*, paras. 7.279-7.281.
[75] United States' second written submission, para. 12.
[76] United States' comments on each other's responses to Panel question No. 89.
[77] United States' comments on each other's responses to Panel question No. 89.

examine this instrument under provisions that do not apply to it along with an instrument that falls within the scope of these provisions.

7.43 The United States argues that the facts in this dispute must be distinguished from the facts in *EC – Asbestos* and *Japan – Apples*. Unlike in *EC – Asbestos*, the so-called measures at issue in this dispute are not contained in a single instrument. Further, contrary to *Japan – Apples*, the facts and applicable obligations in this dispute are not identical for each instrument.

(ii) Analysis by the Panel

7.44 We concluded above that the measures at issue in this dispute comprise the COOL statute, the 2009 Final Rule (AMS), and the Vilsack letter. The parties disagree whether the Panel should treat and examine these measures collectively as one single measure or individually as separate measures.

7.45 Specifically, while not disputing that these measures are formally separate instruments, the complainants assert that they should be examined as a single measure because they operate together as components constituting one single COOL measure. The complainants do not argue, however, that these measures, if considered individually, are not capable of violating relevant provisions of the WTO Agreements. In our understanding, their argument is that it would be more appropriate for the Panel to approach the examination of the instruments at issue in their entirety as one measure. This is because the instruments operate in conjunction with each other to achieve certain policy objectives, and because they depend on each other as elements or components of a single measure.

7.46 The United States, however, emphasizes that the instruments must be considered as distinct measures because of their substantive and legal differences.

7.47 In considering whether to examine the instruments at issue as one single measure or several distinct measures, we recall the panel's statement in *Japan – Apples* regarding the *relevance* of the question of how to treat measures: the objective of findings by panels and the Appellate Body is to "assist the DSB in making sufficiently precise recommendations and rulings so as to allow for prompt compliance, in order to ensure effective resolution of the dispute".[78]

7.48 Our decision here will also affect how they are examined – as one single measure or individual separate measures – in respect of the parties' substantive claims under the TBT Agreement and the GATT 1994.[79] Therefore, a proper characterization of the measures at issue will enable us to make findings that can assist the DSB in making "sufficiently precise recommendations and rulings" to ensure effective resolution of the dispute.

7.49 Bearing the above in mind, we start our analysis by observing that questions relating to the characterization of measures have arisen in previous disputes. In particular, the complainants refer to disputes such as *Japan – Apples*, *EC – Asbestos*, and *US – Export Restraints*, where several legal requirements or legal provisions were treated as a single measure. The United States, on the other hand, refers to the disputes on *Japan – Film* and *Turkey – Rice* where several legal requirements were examined as separate individual measures.

7.50 Although the nature of the questions raised in these disputes was similar, namely whether to treat several requirements or provisions as a single or multiple measures, the facts specific to each dispute, examined in light of certain factors, led the panels and the Appellate Body to adopt different

[78] Panel Report, *Japan – Apples*, para. 8.10, referring to the Appellate Body's statement in *Australia – Salmon* (para. 223).

[79] Canada also points this out in its response to Panel question No. 89.

approaches to the examination of the measures.[80] Among the main factors considered by panels and the Appellate Body in relation to this question include the following: (i) the manner in which the complainant presented its claim(s) in respect of the concerned instruments[81]; (ii) the respondent's position; and (iii) the legal status of the requirements or instrument(s), including the operation of, and the relationship between, the requirements or instruments, namely whether a certain requirement or instrument has autonomous status.[82] We will consider the measures at issue in the present disputes in light of these factors.

7.51 In the current dispute, Canada and Mexico, as the complainants, argue that the instruments must be examined as one single measure, whereas the United States, as the respondent, argues that they must be examined separately. In contrast, the panel in *Japan – Apples* followed the approach suggested by Japan, the respondent, that the numerous phytosanitary requirements presented in that dispute should be examined as a single phytosanitary measure.[83] The panel noted, among other

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[80] For example, in *EC – Asbestos*, the issue before the Appellate Body was whether it was appropriate for the panel to consider the measure at issue in two parts (elements) in assessing the applicability of the TBT Agreement (i.e. technical regulations) to the measure. The Appellate Body found that "the proper character of the measure at issue [could not] be determined unless the measure [was] examined as a whole". (Appellate Body Report, *EC – Asbestos*, paras. 59-65). The facts of that dispute are slightly different from the current dispute in that the instruments at issue in this dispute are separate instruments, and not elements of the same instrument. See also Appellate Body Report, *Australia – Salmon*, paras. 103-104.

In *Turkey – Rice*, the United States claimed that the concerned measures were in violation of the covered agreements, both considered separately and in conjunction. As the panel found that the measures were each individually inconsistent with Turkey's obligations under covered agreements, it did not see the need to reach a separate conclusion on those measures considered jointly, for the resolution of that dispute. (Panel Report, *Turkey – Rice*, paras. 7.280-7.281).

[81] In *US – Export Restraints*, the panel describes Canada's, the complainant in that dispute, arguments as follows: "each of the elements that [Canada] cites (the statute, the SAA; the Preamble, and US practice) individually constitutes a measure that is susceptible to dispute settlement, and that, 'taken together' as well, these elements constitute a measure. Further, ... these measures individually *and* collectively require a particular treatment of export restraints". The United States, as the respondent, disagreed with Canada and argued that "it is dangerous for the Panel to seek to analyse an ill-defined 'measure' as a 'package'". In light of Canada's position, the Panel decided to first analyse each concerned measure separately and subsequently in light of other measures to the extent necessary. (Panel Report, *US – Export Restraints*, paras. 8.82-8.131)

In *Japan – Film*, the United States argued that Japan's application of the eight distribution "measures" encouraged and facilitated the creation of a market structure for photographic film and paper in Japan in which imports are excluded from traditional distribution channel. Japan was of the view that each measure must be examined on its own merit. The panel proceeded to examine each of the eight distribution measures individually. Regarding the United States' claim that certain measures in combination nullify or impair benefits accruing to the United States, the panel noted that for US theory to have factual relevance in that case, it must be based on a detailed justification and convincing evidence of record. But the panel considered that the United States failed to make such a showing. (Panel Report, *Japan – Film*, paras. 10.90-10.94, 10.350-10.367).

[82] Appellate Body Report, *EC – Asbestos*, para. 64; Panel Report, *US – Export Restraints*, para. 8.85. The panel in *US – Export Restraints* explains that "it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations". It then examined the status of each measure under US law to determine whether such measure is operational on its own.

[83] In contrast, in *Japan – Apples* (21.5), the United States "has requested that we treat each requirement imposed by Japan as a separate measure," and that Japan "also requests us to make specific findings on each of the requirements that it maintains". The panel, however, decided "to treat all the requirements imposed by Japan as elements of one measure" because "many elements of the compliance measure are interrelated and justified on the basis of the same scientific evidence". Thus, the panel said, "[t]reating them as separate measures could give the impression that they can apply independently of each other, which may not always be the case". The panel nonetheless noted, "we may make specific findings on the different elements of this measure if we believe this will assist in the prompt resolution of the dispute". (Panel Report, *Japan – Apples (Article 21.5 – US)*, paras. 8.28-8.30).

factors, that the United States, the complainant in that dispute, did not consider it inappropriate for the panel to treat the requirements the United States identified as one single measure, whereas Japan objected to the panel's reviewing each of these requirements separately.[84] The panel therefore considered that there was no legal, logical or factual obstacle to treating the requirements as one single phytosanitary measure. The parties' starkly contrasting views on this matter in the present dispute, on the other hand, require us to make a critical review of the nature of the measures at issue.

7.52 We will now examine whether and, if so, to what extent the measures operate, legally or substantively, in conjunction with each other or depend on each other. In doing so, we will not be addressing in detail the substantive country of origin requirements contained in these measures. Such an analysis is provided in Section VII.C.1.

7.53 First, the legal status of the COOL statute and the 2009 Final Rule (AMS) under US law is distinguishable from that of the Vilsack Letter: the former are the instruments of statutory and regulatory authorities respectively, whereas the latter does not have such legal status. The complainants do not contest this aspect of the Vilsack letter. The parties, however, disagree on whether the measures, in particular, the Vilsack letter, should be examined as part of a single measure together with the COOL statute and the 2009 Final Rule (AMS).

7.54 As explained in detail in paragraphs 7.83-7.86, the COOL statute forms the framework and foundation for the 2009 Final Rule (AMS). Following the completion of the legislative process for the COOL statute, the 2009 Final Rule (AMS) was subsequently adopted to *implement* the country of origin labelling requirements embodied in the COOL statute according to the authority granted to the Secretary of Agriculture.[85] Legally, therefore, the 2009 Final Rule (AMS) does not have autonomous status; it lays out the specificities pertaining to the country of origin labelling requirements that are necessary to implement the contents of the COOL statute. The COOL statute and the Final Rule are thus closely connected to each other in terms of legal status. This has not been contested by the United States.[86]

7.55 On the other hand, the Vilsack letter[87] does not have a formal legal link to either the COOL statute or the 2009 Final Rule (AMS). In stating this, we are aware of the disagreement between the parties regarding the existence of a factual link between the Vilsack letter, on the one hand, and the COOL statute and the 2009 Final Rule (AMS) on the other, particularly based on the impact of the letter on the industry.[88] The specific nature of the letter is examined in

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[84] Panel Report, *Japan – Apples*, para. 8.15. The panel also considered that the concerned requirements cumulatively constituted the measures *actually applied* by Japan to imported apple fruit. (para. 8.16) (emphasis in original).

[85] See paras. 7.83-7.86.

[86] United States' first written submission, para. 46.

[87] Letter from USDA Secretary Thomas Vilsack to Industry (20 February 2009) (Exhibits CDA-6 and MEX-8). On the same day, USDA also issued a press release indicating that the COOL regulations would be implemented as expected on 16 March 2009 (Exhibit MEX-23).

The parties do not dispute that the Vilsack letter falls within the scope of the Panel's terms of reference. The Vilsack letter was specifically identified in the complainants' panel requests and thus is subject to the Panel's review.

[88] In particular, the United States explained that "[u]nlike the Statute and the 2009 Final Rule, Secretary's Vilsack letter contains no requirements and has no legal status" (United States' first written submission, para. 84) and that even if the Vilsack letter were to qualify as a measure, it does not constitute a technical regulation (United States' first written submission, para. 129). The complainants emphasize the letter's practical impact on industry: Canada argues that "the Vilsack letter contributed to the market uncertainty that resulted in reduced demand for Canadian livestock from U.S. slaughterhouses and feeding operations" (Canada's first written submission, para. 138), whereas Mexico asserts that the Vilsack letter has had the effect of

Section VII.D.1(a) in the context of the parties' substantive claims. What is relevant for the question we are addressing here is that the Vilsack letter does not have the same statutory or regulatory status as the COOL statute or the 2009 Final Rule (AMS).

7.56 We now turn to the existence of a substantive connection among the instruments at issue. At the core of the complainants' cases are the United States' *mandatory country of origin labelling requirements* for meat products as contained in the framework of the COOL statute and the 2009 Final Rule (AMS).[89] As described in Section VII.C.1, the provisions in the COOL statute and the 2009 Final Rule (AMS) are closely linked in the operation of the specific COOL requirements. For example, the basic framework relating to the COOL requirements laid out in the statute, including the scope of the specific categories of labels applied to meat products, remains the same in the 2009 Final Rule (AMS). The 2009 Final Rule (AMS) then further expands the rules on how these different categories can be flexibly used by entities subject to the COOL requirements through the so-called commingling provisions.[90]

7.57 The panel's statement in *US – Section 301 Trade Act* is helpful in this relation:

> "[i]n evaluating the conformity of Sections 301-310 with the relevant WTO provisions we must, thus, be cognizant of this multi-layered character of the national law under consideration which includes statutory language as well as other institutional and administrative elements [including regulations and administrative procedures]. The elements of this type of national law are, as is the case here, often inseparable and should not be read independently from each other when evaluating the overall conformity of the law with WTO obligations."[91]

7.58 The panel further elaborated:

> "Accordingly, in examining the relevant provisions of Sections 301-310 we first look at the statutory language itself, severed from all other elements of the law. We then look at the other elements of Sections 301-310 which, in our view, constitute an integral part of the Measure in question and make our final evaluation based on all elements taken together."[92]

7.59 We consider the Panel's approach in *US – Section 301 Trade Act* to be equally applicable to the situation here. In our view, the COOL statute and the 2009 Final Interim Rule (AMS) are "inseparable and should not be read independently from each other" when evaluating the overall conformity of country of origin requirements, as applicable to meat products, with the United States' WTO obligations.

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encouraging US packing plants, backgrounders and feedlots to impose stricter conditions for purchasing Mexican cattle (Mexico's first written submission, paras. 221-225).

[89] See paras. 7.77-7.122.

[90] See paras. 7.87-7.100.

[91] Panel Report, *US – Section 301 Trade Act*, paras. 7.26 and 7.27. That Panel further stated, "For example, even though the statutory language granting specific powers to a government agency may be *prima facie* consistent with WTO rules, the agency responsible, within the discretion given to it, may adopt internal criteria or administrative procedures inconsistent with WTO obligations which would, as a result, render the overall law in violation. The opposite may be equally true: though the statutory language as such may be *prima facie* inconsistent, such inconsistency may be lawfully removed upon examination of other administrative or institutional elements of the same law". (para. 7.27)

[92] Panel Report, *US – Section 301 Trade Act*, para. 7.28.

7.60 We note that the United States emphasizes the differences in substance between the COOL statute and the 2009 Final Rule (AMS). In the United States' view, such differences necessitate an examination of the instruments as separate measures. The differences as pointed out by the United States, however, are those arising from their differing legal structure: one (the COOL statute) is the statutory legal authority and the other (the 2009 Final Rule (AMS)) is the regulation adopted to implement the statute. We do not find any significant difference between these two instruments in substance that could render them separate and distinct measures. They both pertain to the country of origin labelling requirements. The 2009 Final Rule (AMS) elaborates on the specific manner in which subject entities must comply with the labelling rules embodied in the COOL statute.

7.61 Given the above considerations, in particular the close legal and substantive link between the COOL statute and the 2009 Final Rule (AMS), we consider it appropriate to examine the relevant elements of both the COOL statute and the 2009 Final Rule (AMS) pertaining to the COOL requirements for meat products "as an integral part" of one single COOL measure. In reaching this conclusion, we find sufficient "legal, logical and factual" bases to treat the COOL statute and 2009 Final Rule (AMS) as the COOL measure.[93] In this connection, we observe the Appellate Body's statement in *US – Gambling* that "the 'total prohibition' described by Antigua does not, in itself, constitute a 'measure'. ... the 'total prohibition' is the collective effect of the operation of several state and federal laws of the United States. And it is the 'total prohibition' itself – as the effect of the underlying laws – that constitutes the alleged impairment of Antigua's benefits under the GATS".[94] Similarly, we consider that the so-called "COOL measure", although used as the term for referring to the COOL statute and 2009 Final Rule (AMS) in these reports, does not constitute a measure in itself, but reflects the collective effect of the operation of the COOL statute and the 2009 Final Rule (AMS) in respect of the country of origin labelling requirements contained in those instruments.

7.62 On the other hand, the Vilsack letter's substantive connection to the COOL statute and 2009 Final Rule (AMS) is not clear. The Vilsack letter starts with the statement that it pertains to the implementation of the Final Rule (AMS).[95] It also contains matters relating to the mandatory country of origin labelling requirements, including concerns of the Secretary of Agriculture himself regarding the contents of the Final Rule at issue. The fact that the letter was issued by the Secretary of Agriculture – the top authority heading the USDA – gives the letter a certain level of significance. There are therefore aspects of the letter, including its reference to implementation and the authority who issued the letter, that connect it to the COOL statute and 2009 Final Rule (AMS). However, we are not presented with any solid evidence showing that the Vilsack letter is connected to the COOL statute or the 2009 Final Rule (AMS) such that they, in combination, form the substantive legal basis for the country of origin labelling requirements as set out in the COOL measure.

7.63 In light of its distinct legal and substantive nature, we consider that the Vilsack letter should be considered as a separate measure distinguishable from the COOL statute and the 2009 Final Rule (AMS). Despite this conclusion, we will be referring to the Vilsack letter to the extent relevant and necessary for the examination of the COOL statute and the 2009 Final Rule (AMS), and *vice versa*. Further, we do not exclude at this stage of the analysis the possibility that when examined on its own, the Vilsack letter could fall within the scope of the TBT Agreement or the GATT 1994.

[93] Panel Report, *Japan – Apples*, para. 8.15.
[94] Appellate Body Report, *US – Gambling*, para. 124.
[95] See para. 7.123 and Section VII.D.1.

2. Products at issue

7.64 The complainants submit that the products at issue in this case are imported Canadian cattle and hogs and imported Mexican cattle, which are used in the United States to produce beef and pork, commodities covered by the COOL measure.

7.65 Specifically, Canada submits that its complaint concerns the application of the COOL measure to "beef and pork produced in the United States from cattle and hogs imported from Canada".[96] In response to a question from the Panel, Canada elaborates that this dispute concerns Canadian cattle and hogs, whether for immediate slaughter or for feeding in the United States, and not imports of Canadian beef or pork into the United States. Canada further defines the imported products at issue as cattle and hogs falling into one of the following categories: (i) born in Canada and raised in the United States; (ii) born and raised in Canada; or (iii) born in the United States and raised in Canada. Domestic cattle and hogs, argues Canada, are those born, raised and slaughtered in the United States.[97]

7.66 Mexico also specifies that its claims relate to exports of Mexican live feeder cattle (i.e. cattle born in Mexico, and then raised and slaughtered in the United States, including cattle partially fed in Mexico and subsequently raised and slaughtered in the United States).[98]

7.67 The fact that the COOL measure formally applies to commodities such as beef and pork, and not livestock (products at issue in this dispute) *per se*, is addressed in the context of our examination of the complainants' claim under Article 2.1 of the TBT Agreement.[99]

3. Order of analysis

7.68 As indicated above[100], Canada's and Mexico's claims relate to specific provisions of the TBT Agreement and the GATT 1994. In particular, both complainants make national treatment claims under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994. They have also brought claims under Article 2.2 of the TBT Agreement, as well as Articles X:3(a) and XXIII:1(b) of the GATT 1994. In addition, Mexico advances claims under Articles 2.4, 12.1 and 12.3(a) of the TBT Agreement.

7.69 In their first written submissions, the complainants addressed their claims in a slightly different sequence. Canada developed arguments for its claims in the sequential order of the relevant provisions of the TBT Agreement, followed by the GATT 1994. On the other hand, Mexico started with its claim under Article III:4 of the GATT 1994, followed by its claims under the relevant provisions of the TBT Agreement in sequential order, and by the remaining relevant provisions of the GATT 1994 also in sequential order. Mexico, however, stated in its first oral statement that it recognizes that it is accepted practice to first address claims under the TBT Agreement and then under the GATT 1994.[101]

7.70 In their second written submissions, both complainants dealt with their national treatment claims under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 jointly, followed

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[96] Canada's first written submission, para. 1 (emphasis added).
[97] Canada's response to Panel question No. 47.
[98] Mexico's first written submission, paras. 193, 199, 261 and 273.
[99] See para. 7.246.
[100] See Sections III and VII.A.
[101] Mexico's opening oral statement at the first substantive meeting of the Panel, para. 26. Mexico then addressed its national treatment claims under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 together in its first oral statement.

by their claims under the relevant provisions of the TBT Agreement and then the GATT 1994 in sequential order.

7.71 For the reasons explained below, we will first address their claims under the provisions of the TBT Agreement, followed by the claims under the GATT 1994.

7.72 In the appeals procedure in *US – Zeroing (EC) (Article 21.5 – EC)* the European Communities referenced the finding by the panel in *EC – Sardines*[102] as well as the Appellate Body report on *US – Shrimp*[103], arguing that the panel made an error by failing to analyse the European Communities' claims in the order set out in the European Communities' submissions. The Appellate Body, however, rejected the idea of panels having an obligation to follow the sequence in which complainants address their claims:

> "In our view, these decisions do not support the proposition that panels are 'bound' by the order of claims made by the complaining party. To the contrary, they confirm that, although panels may decide to follow the particular order of legal claims suggested by the complaining party, they may also follow a different order of analysis so as to apply the correct interpretation of the WTO law at issue. Indeed, we consider that, in fulfilling its duties under Article 11 of the DSU, a panel may depart from the sequential order suggested by the complaining party, in particular, when this is required by the correct interpretation or application of the legal provisions at issue."[104]

7.73 Furthermore, the Appellate Body established that a claim under the more specific and detailed agreement should be addressed first over a claim under a similar provision in the GATT 1994.[105] Based on the guidance from the Appellate Body, the panel in *EC – Sardines* considered that "if the [measure at issue] is a technical regulation, then the analysis under the TBT Agreement would precede any examination under the GATT 1994".[106]

7.74 We will start our analysis of the claims under the TBT Agreement with the question of whether the COOL measure and the Vilsack letter qualify as technical regulations.[107]

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[102] Panel Report, *EC – Sardines*, para. 7.18.

[103] Appellate Body Report, *US – Shrimp*, para. 120.

[104] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 277.

[105] The Appellate Body in *EC – Bananas III* stated:

> "Although Article X:3(a) of the GATT 1994 and Article 1.3 of the Licensing Agreement both apply, the Panel, in our view, should have applied the Licensing Agreement first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994". (Appellate Body Report, *EC – Bananas III*, para. 204)

See also Panel Report, *EC – Sardines*, paras. 7.15-7.16 and Panel Report, *EC – Asbestos*, paras. 8.16-8.17.

[106] Panel Report, *EC – Sardines*, para. 7.16. See also Panel Report, *EC – Asbestos*, paras. 8.16-8.17.

[107] This is also in line with *EC – Sardines* where the panel held that "only if it is established that the [measure at issue] constitutes a technical regulation within the meaning of Annex 1.1 of the TBT Agreement, will we then proceed to consider the consistency of the [measure at issue] with the substantive obligations set out in Articles 2.4, 2.2 and 2.1 of the TBT Agreement". (Panel Report, *EC – Sardines*, para. 7.20) In the words of the panel in *EC – Sardines*, "[a]s the drafters of the TBT Agreement intended to further the objective of the GATT 1994 with a specialized legal regime that applies only to a limited class of measures, it is necessary to commence our analysis by examining whether the EC Regulation constitutes a technical regulation within the meaning of the TBT Agreement".

C. FACTUAL BACKGROUND

7.75 Before commencing our review of the parties' claims, it is useful to recall the legislative history of the COOL measure (i.e. the COOL statute and the 2009 Final Rule (AMS)); the main obligations and features pertaining to the COOL requirements under the COOL measure; the Vilsack letter; and, the main features of the North American livestock and meat industries and trade.

1. The COOL measure

(a) Recent legislative history of the COOL measure

7.76 The following table summarizes the sequence of events relating to the COOL measure:

DATE	LAWS AND REGULATIONS	OTHERS
13 May 2002	2002 Farm Bill enacted	
22 May 2008	2008 Farm Bill enacted	
1 August 2008	Interim Final Rule (AMS) issued	
28 August 2008	Interim Final Rule (FSIS) issued	
11 September 2008		USDA Guidelines (FAQ)[108]
30 September 2008	Interim Final Rule (AMS) and Interim Final Rule (FSIS) entered into force	
October 2008		Industry letters to customers[109]
15 January 2009	2009 Final Rule (AMS) issued	
20 January 2009		Change of the administration in the United States
20 February 2009		Vilsack letter to industry
16 March 2009	2009 Final Rule (AMS) entered into force	
20 March 2009	2009 Final Rule (FSIS) issued and entered into force	

(i) The COOL statute

7.77 As explained above, the statutory provisions of the COOL measure are contained in section 1638 of the Agricultural Marketing Act of 1946. These provisions were introduced in the US Congress through the 2002 Farm Bill, which was subsequently amended by the 2008 Farm Bill. The legislative history of the COOL statute is briefly described below.

7.78 Congress introduced two main mandatory country of origin labelling requirements through the 2002 Farm Bill.[110] First, the obligation for retailers to provide country of origin information on the covered commodities, namely beef, pork, lamb, perishable agricultural commodities, peanuts, and wild and farm-raised fish and shellfish.[111] Second, the criteria that need to be met for the covered

[108] Exhibit CDA-29.
[109] Exhibit CDA-24 (BCI); CDA-36 to 39, CDA-107 (BCI); Exhibit MEX-33, MEX-57.
[110] Farm Security and Rural Investment Act of 2002 ("the 2002 Farm Bill") (Public Law 107-171) (Exhibits CDA-1 and MEX-2). The 2002 Farm Bill was enacted by the United States Congress on 13 May 2002 and amended the Agricultural Marketing Act of 1946.
[111] 7 U.S.C. 1638 (2)(A) and 1638a (a)(1) (Exhibits CDA-1 and MEX-2).

commodities to be labelled as US origin. In the case of beef and pork, the 2002 Farm Bill establishes the general rule that US origin can only be granted to meat derived from an animal that is exclusively *born*, *raised* and *slaughtered* in the United States.[112] The 2002 Farm Bill, however, does not stipulate how to label products derived from animals originating in countries other than the United States.[113]

7.79 The 2002 Farm Bill specifies that the country of origin labelling requirements would be applied at the retail level as of 30 September 2004.[114] Additionally, the Bill mandates the Secretary of Agriculture to promulgate, through the AMS[115], the regulations necessary to implement the requirements contained in the Bill. The deadline for issuing the implementing regulations was, however, delayed on two occasions.[116] First, on 23 January 2004, Section 749 of the Consolidated Appropriations Act of 2004[117] amended Section 285 of the Agricultural Marketing Act, extending the date of the implementation to 30 September 2006.[118] The second extension was inscribed in Section 792 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006[119], which set the new deadline for issuing the regulations on 30 September 2008.

7.80 The United States explains that "Congress determined that the best way to balance the concerns of interested parties while achieving the policy objective of providing consumer information was to revisit the COOL statute in the 2008 Farm Bill".[120] Accordingly, the 2008 Farm Bill was introduced by the United States on 22 May 2008, modifying certain aspects of the 2002 Farm Bill.

7.81 The 2008 Farm Bill sets out new rules for determining the origin of meat where animals from several countries are involved in the meat production process. Such rules were not contained in the 2002 Farm Bill. Specifically, the 2008 Farm Bill created four different labelling categories for muscle cut meat and also one for ground meat. In addition, the 2008 Farm Bill introduced the possibility of commingling meat of different origins, broadened the exemptions for processed foods, and lessened the record keeping requirements and enforcement fines. Finally, the 2008 Farm Bill added chicken to the list of covered commodities.[121]

7.82 Provisions pertaining to the COOL requirements introduced by the 2008 Farm Bill were subsequently codified into Subtitle D of the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*).[122]

(ii) Regulations implementing the COOL statute

7.83 As described above, the 2002 Farm Bill mandates the Secretary of Agriculture, through the AMS, to promulgate the regulations necessary to implement the COOL requirements contained in the Bill.[123]

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[112] 7 U.S.C. 1638a (a)(2) (Exhibits CDA-1 and MEX-2).
[113] Canada's first written submission, para. 14.
[114] 7 U.S.C. 1638d.
[115] See footnote 34 above.
[116] Mexico's first written submission, paras. 29-32; United States' first written submission, para. 67.
[117] Public Law 108-119, 118 Stat. 3 (23 January 2004).
[118] This extension, however, did not apply to "farm-raised fish" and "wild fish". Consequently, the implementing regulations for these two categories of products were enacted on 5 October 2004. (Mandatory Country of Origin Labeling of Fish and Shellfish; Interim Rule, 7 C.F.R. Part 60 (Exhibit MEX-17).
[119] Public Law 109-97, 119 Stat. 2120 (10 November 2005).
[120] United States' first written submission, para. 68.
[121] United States' first written submission, paras. 73-83.
[122] Food, Conservation and Energy Act of 2008 ("the 2008 Farm Bill") (Public Law 110-234) (Exhibits CDA-2 and MEX-3).

7.84 The rulemaking process in the United States generally involves the issuance of an interim final rule which is open for comments during a period usually lasting 60 days.[124] Accordingly, on 1 August 2008 the AMS published the Interim Final Rule, which entered into force on 30 September 2008.[125] The Interim Final Rule (AMS) sets out the rules governing the use of the four labelling categories of muscle cut meat.[126]

7.85 Subsequently, the 2009 Final Rule (AMS) was enacted on 15 January 2009 and entered into force on 16 March 2009.[127] The 2009 Final Rule (AMS) thus superseded the Interim Final Rule (AMS). Substantively, the 2009 Final Rule (AMS) contains provisions permitting the commingling of meat of different origin during a single production day and, thus, using certain labels interchangeably. On the other hand, it removes the possibility contained in the Interim Final Rule (AMS) of labelling meat derived exclusively from US-origin animals as meat of multiple origins without any commingling involved.[128]

7.86 To be in conformity with the Interim Final Rule (AMS), FSIS published on 28 August 2008 an interim final rule on mandatory country of origin labelling for the commodities covered by the 2008 Farm Bill. Subsequently, to be in accordance with the changes introduced by the 2009 Final Rule (AMS), FSIS enacted the 2009 Final Rule (FSIS) which entered into force on 20 March 2009.[129]

(b) Country of origin labelling requirements for meat products

(i) Main requirements

<u>The COOL statute</u>

7.87 Section 1638a (a)(1) of the COOL statute establishes the main obligation concerning country of origin information:

> "Except as provided in subsection (b) of this section, a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity".[130]

7.88 Thus, the main obligation to provide the country of origin of meat falls on the retailer. However, "any person engaged in the business of supplying a covered commodity to a retailer shall provide information to the retailer indicating the country of origin of the covered commodity".[131]

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[123] 7 U.S.C. 1638, 1638a (a)(1) and 1638d (b). United States' first written submission, paras. 30-31.

[124] U.S.C. Title 5, Part I, Chapter 5, Subchapter II, §553 (c).

[125] Exhibits CDA-3 and MEX-4.

[126] United States' first written submission, paras. 69-70. These four labelling categories for muscle cut meat products will be explained in detail in section (c)(*i*) which deals with the specific obligations set forth by the COOL Statute and the 2009 Final Rule (AMS).

[127] The 2009 Final Rule (AMS) was codified in the Code of Federal Regulations (C.F.R) in Title 7 (Agriculture), Chapter 1 (Agricultural Marketing Service, Department of Agriculture), Part 65 (Country of Origin Labelling of Beef, Lamb, Chicken, Goat Meat, Wild and Farm-raised Fish and Shellfish, Perishable Agricultural Commodities, Macadamia Nuts and Peanuts) (i.e. 7 C.F.R. Parts 60 and 65) (Exhibits CDA-5 and MEX-7).

[128] Canada's first written submission, para. 26.

[129] Mexico's first written submission, para. 43 (Exhibit MEX-6). According to para. 30 of the United States' first written submission, the "FSIS has primary authority within the U.S. government for ensuring that meat and meat food products are safe, wholesome, and accurately labelled".

[130] 7 U.S.C. 1638a (a)(1), (Exhibit MEX-9).

[131] 7 U.S.C. 1638a (e).

7.89 The COOL statute establishes *four* categories[132] to classify the products at issue (muscle cut meat) and *one* additional category for ground meat:[133]

(A) United States country of origin ("U.S. origin" – Category A[134]) – meat derived from animals:

(1) "exclusively born, raised, and slaughtered in the United States";

(2) "born and raised in Alaska or Hawaii and transported for a period not more than 60 days through Canada to the United States and slaughtered in the United States"; or

(3) "present in the United States on or before 15 June 2008".

(B) Multiple countries of origin (Category B[135]) – meat derived from animals:

(1) "not exclusively born, raised, and slaughtered in the United States"; or

(2) "born, raised, or slaughtered in the United States"; and

(3) "not imported into the United States for immediate slaughter".

The retailer may designate the country of origin as all of the countries in which the animal may have been born, raised, and slaughtered.

(C) Imported for immediate slaughter (Category C[136]) – meat derived from animals

– "imported into the United States for immediate slaughter".

(D) Foreign country origin (Category D[137]) – meat derived from animals

– "not born, raised, or slaughtered in the United States".

(E) Ground meat products (Category E[138]) – the notice of country of origin includes

(1) "a list of all countries of origin …"; or

(2) "a list of all 'reasonably possible' countries of origin …".

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[132] The parties refer to the categories as A, B, C, D and E, which corresponds to the literals used in the COOL Statute.

[133] The descriptions in this paragraph of the categories of meat for labelling purposes are based on the text of the COOL statute.

[134] 7 U.S.C. 1638a (2)(A).

[135] 7 U.S.C. 1638a (2)(B).

[136] 7 U.S.C. 1638a (2)(C).

[137] 7 U.S.C 1638a (2)(D).

[138] 7 U.S.C. 1638a(2)(E).

The 2009 Final Rule (AMS)

7.90 The 2009 Final Rule (AMS) first lays down rules governing how the labels under categories A, B and C can be interchangeably used when meat of different origins is commingled in the production process.

7.91 Section 65.125 of the 2009 Final Rule (AMS) defines the term "commingled covered commodities" as:

> "[C]overed commodities (of the same type) presented for retail sale in a consumer package that have been prepared from raw material sources having different origins."[139]

7.92 The 2009 Final Rule (AMS) also defines the terms "raised" and "imported for immediate slaughter".[140] Categories B and C are distinguished based on whether animals were raised in the United States (category B), instead of being imported right before slaughter (category C). The term "raised" is considered to be the "period of time from birth until slaughter or in the case of animals imported for immediate slaughter as defined in section 65.180, the period of time from birth until date of entry into the United States".[141] Further, section 65.180 refers to "imported for immediate slaughter" as "that term is defined in 9 C.F.R. §93.400, i.e. consignment directly from the port of entry to a recognized slaughtering establishment and slaughtered within 2 weeks from the date of entry".[142]

7.93 The 2009 Final Rule (AMS) sets forth two different provisions regulating the commingling of meat in a single production day, depending on the origin of animals from which the meat is derived.[143]

7.94 Section 65.300(e)(2) of the 2009 Final Rule (AMS) provides the following with regard to categories A and B:

> "For muscle cut covered commodities derived from animals born, raised, and slaughtered in the U.S. that are commingled during a production day with muscle cut covered commodities described in § 65.300(e)(1), the origin may be designated as Product of the United States, Country X, and (as applicable) Country Y."[144]

7.95 With regard to categories B and C, Section 65.300(e)(4) of the 2009 Final Rule (AMS) states:

> "For muscle cut covered commodities derived from animals that are born in Country X or Y, raised and slaughtered in the United States, that are commingled

[139] 2009 Final Rule (AMS), 7 C.F.R. §65.125 (Exhibits CDA-5 and MEX-7).

[140] The 2009 Final Rule (AMS) removes the possibility of using Label B for exclusively US-origin animals, as was initially foreseen in the Interim Final Rule (AMS). The Interim Final Rule (AMS) provided that category B would be applicable when an animal was born, raised, and/or slaughtered in the United States. Accordingly, the inclusion of the term *and/or* made it possible to conclude that an animal that was born, raised and slaughtered in the United States (and thus, would in principle be subject to category A) could also fall under category B.

[141] 7 C.F.R. §65.235.

[142] 7 C.F.R. §65.180.

[143] In response to Panel question No. 29 from the First Substantive Meeting, the United States explains that US meat processors tend to operate one or two production shifts each day followed by a clean up shift and thus, "a single production day" is generally understood in the industry as the period of production between the two clean up shifts.

[144] 7 C.F.R. §65.300 (e)(2).

> during a production day with muscle cut covered commodities that are derived from animals that are imported into the United States for immediate slaughter as defined in § 65.180, the origin may be designated as Product of the United States, Country X, and (as applicable) Country Y. ..."[145]

7.96 When meat falling under categories A, B or C is commingled on a single production day, the resulting meat might carry a different label from the one it should in principle be subject to under the categories set out in the COOL measure.[146] As shown in the above provisions, the first possibility is the commingling of meat under categories A and B, which allows the resulting meat to use Label B even if a particular piece of meat may have been derived from a category A animal. Under the second provision, when meat under categories B and C are commingled during a single production day, the meat derived therefrom may use Label B.[147]

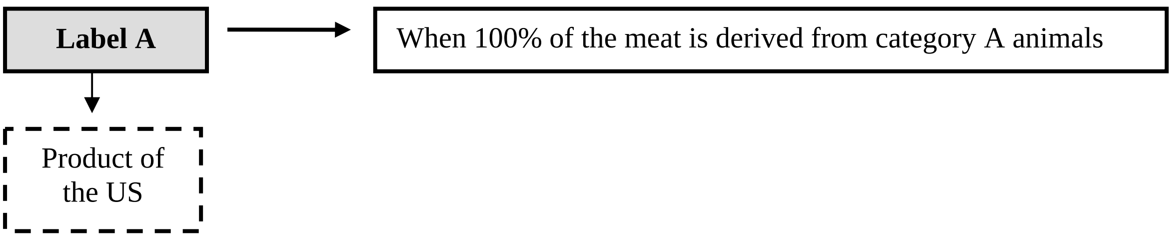
7.97 The 2009 Final Rule (AMS) further provides that the labelled countries may be listed *in any order* when the meat is derived from animals classified as category B, or when meat falling under categories A and B, as well as B and C, is commingled during a single production day.[148]

7.98 In essence, the 2009 Final Rule (AMS) allows the use of Label B or C when meat falling under category A, B, and/or C is commingled in a single production day.[149]

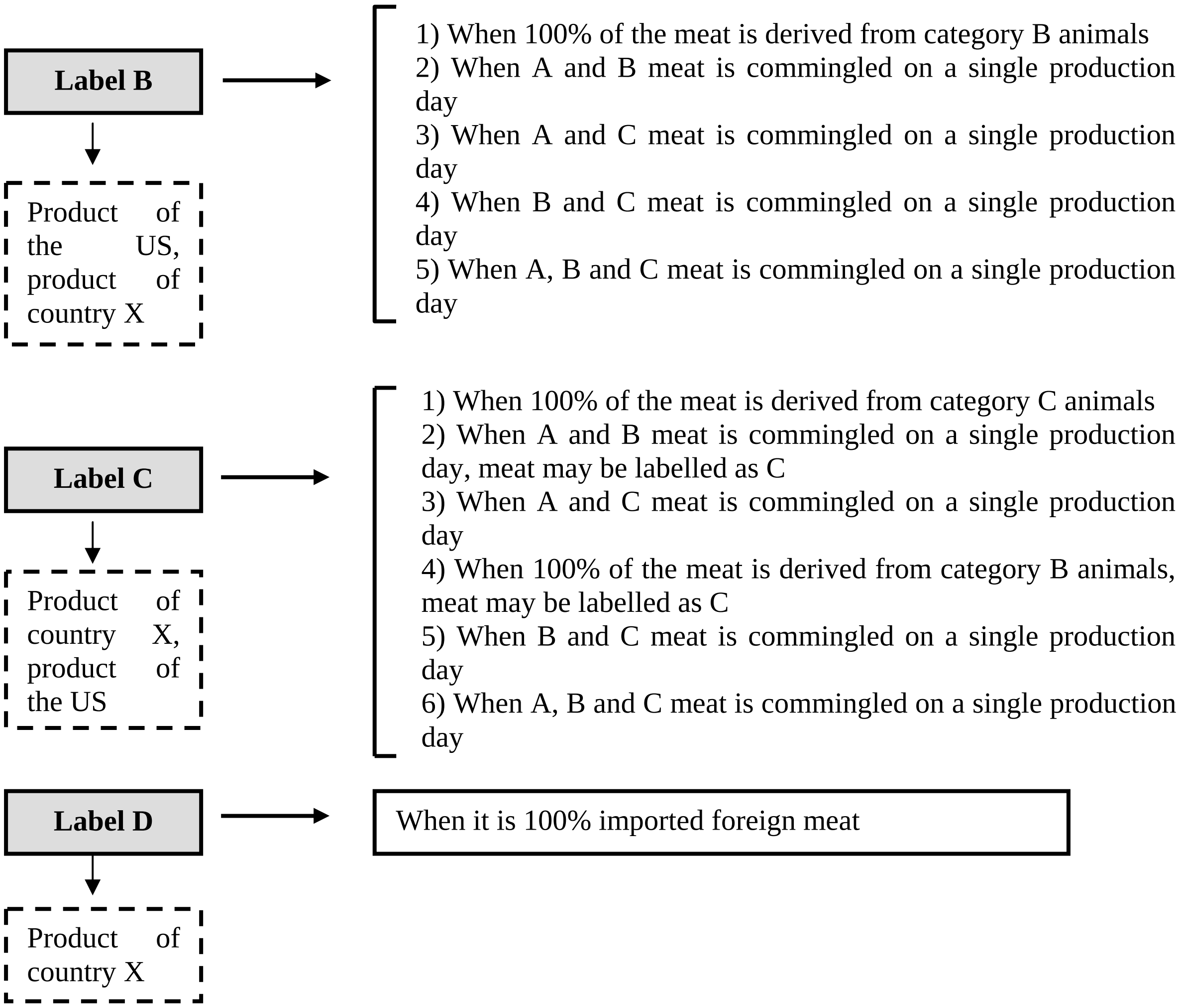
7.99 The United States[150] has provided the following table illustrating the requirements for each label with the respective country of origin notification in the right-hand column:

Category B	Meat from animals born in Country X and raised and slaughtered in the United States. (These animals were not exclusively born, raised and slaughtered in the United States or imported for immediate slaughter.)	*Product of the US, Country X, Country Y (if applicable)*
Category C	Meat from animals imported into the United States for immediate slaughter	*Product of Country X, US*
Category D	Foreign meat imported into the United States	*Product of Country X*

7.100 Based on the parties' submissions, we understand that the different labelling possibilities as prescribed under the 2009 Final Rule (AMS) are as follows:



[145] 7 C.F.R. §65.300 (e)(4).
[146] To illustrate, when meat classified under category A is commingled during a single production day with meat falling under category B, the resulting meat can use Label B.
[147] 7 C.F.R. §65.300 (e)(4).
[148] The text of this provision contained in the 2009 Final Rule (AMS). 7 C.F.R. §65.300 (e)(4) states the following: "In each case of paragraphs (e)(1), (e)(2), and (e)(4) of this section, the countries may be listed in any order".
[149] United States' first written submission, para. 77.
[150] United States' first written submission, para. 54. Canada and Mexico provided similar tables which do not differ substantially from the one presented by the United States.



(ii) Entities subject to the country of origin labelling requirements

7.101 Under both the COOL statute[151] and the 2009 Final Rule (AMS)[152], the entities subject to the COOL requirements are "retailers". Section 1(b) of the Perishable Agricultural Commodities Act of 1930 (the "PACA") defines "retailer" as "a person that is a dealer engaged in the business of selling any perishable agricultural commodity at retail".[153] The term "dealer" is limited since "no person buying any such commodity solely for sale at retail shall be considered as a 'dealer' until the invoice costs of his purchases of perishable agricultural commodities in any calendar year are in excess of US $230,000".[154] In sum, for the purposes of the COOL measure, a retailer means an entity selling perishable agricultural commodities (i.e. fruits and vegetables, including cherries in brine[155]) at a level above USD 230,000 per year.[156]

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[151] 7 U.S.C. 1638 (6).

[152] 7 C.F.R. §65.240.

[153] United States' first written submission, para. 34, referring to 7 U.S.C. 499a(b).

[154] United States' first written submission, para. 34, referring to 7 U.S.C. 499a(b)(6).

[155] 7 C.F.R. §65.205.

[156] Mexico's first written submission, paras. 7-10; United States first written submission, para. 49. According to Mexico, the PACA (7 U.S.C. 499a(b)(11)) defines a retailer as "a person that is a dealer engaged

7.102 Nevertheless, as mentioned above, any person that supplied a covered commodity to a retailer must provide information on the country of origin to the retailer.[157]

(iii) Exemptions from the scope of the COOL requirements

7.103 The COOL measure has certain exemptions in terms of the products and the entities covered.

Products exempted

7.104 The COOL statute[158] excludes from its scope any of the covered commodities that are an "ingredient in a processed food item".[159]

7.105 The 2009 Final Rule (AMS) adds that processing resulting in a change of the character of a covered commodity includes cooking, curing, smoking and restructuring.[160]

Entities exempted

7.106 The COOL statute also establishes that the obligation of providing country of origin information shall not apply to food service establishments:

> "if the covered commodity is –
>
> (1) prepared or served in a food service establishment; and
>
> (2) (A) offered for sale or sold at the food service establishment in normal retail quantities; or
>
> (B) served to consumers at the food service establishment."[161]

7.107 The COOL statute defines the term "food service establishment" as "a restaurant, cafeteria, lunch room, food stand, saloon, tavern, bar, lounge, or other similar facility operated as an enterprise engaged in the business of selling food to the public".[162]

7.108 The 2009 Final Rule (AMS) further develops that definition by adding that "[s]imilar food service facilities include salad bars, delicatessens, and other food enterprises located within retail

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in the business of selling any perishable agricultural commodity at retail". Mexico adds that 7 U.S.C. 499a(b)(6) provides in defining the term "dealer" that "(B) no person buying any such commodity solely for sale at retail shall be considered as a 'dealer' until the invoice costs of his purchases of perishable agricultural commodities in any calendar year are in excess of [US] $230,000".

[157] 7 U.S.C. §1638a (e).

[158] 7 U.S.C. §1638a (e).

[159] According to §65.220 of the 2009 Final Rule (AMS) a processed food item means: "a retail item derived from a covered commodity that has undergone specific processing resulting in a change in the character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component (e.g. chocolate, breading, tomato sauce), except that the addition of a component (such as water, salt, or sugar) that enhances or represents a further step in the preparation of the product for consumption, would not in itself result in a processed food item".

[160] 7 C.F.R. §65.220.

[161] 7 U.S.C. §1638a (b).

[162] 7 U.S.C. §1638 (4).

establishments that provide ready-to-eat foods that are consumed either on or outside of the retailer's premises".[163]

(iv) Other obligations

7.109 The COOL measure additionally sets forth obligations with respect to (a) the methods of notification of the country of origin information to the consumer; (b) the audit verification system to ensure compliance with the COOL requirements; (c) the certification of origin; and (d) the enforcement of the statute and regulation.

The methods of notification

7.110 The COOL requirements prescribe in detail the methods of notifying the country of origin information to the consumer. The COOL statute provides that the country of origin information may be conveyed to consumers "by means of a label, stamp, mark, placard, or other clear and visible sign on the covered commodity or on the package, display, holding unit, or bin containing the commodity at the final point of sale to consumers".[164] The 2009 Final Rule (AMS) additionally sets forth that the notification can be in "the form of a placard, sign, label, sticker, band, twist tie, pin tag, or other format that allows consumers to identify the country of origin".[165]

7.111 The 2009 Final Rule (AMS) prescribes that the declaration made in any of the mentioned forms can be "typed, printed or handwritten"[166] and "must be legible and placed in a conspicuous location, so as to render it likely to be read and understood by a customer under normal conditions of purchase".[167]

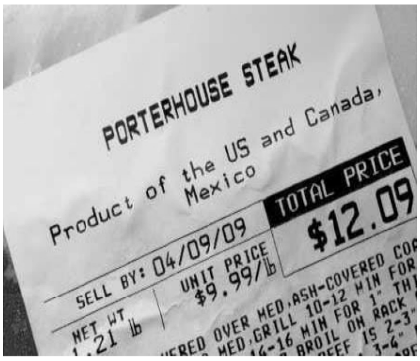
7.112 Furthermore, the 2009 Final Rule (AMS) establishes that the declaration of the country of origin may be in the form of a statement such as "product of USA", "produce of the USA", "grown in Mexico", or may only contain the name of the country (e.g. "USA" or "Mexico").[168] The 2009 Final Rule (AMS) also states that, as a general rule, country abbreviations are not acceptable. However, the abbreviations accepted under the US Customs and Border Protection (CBP) rules are deemed to comply with the COOL requirements (e.g. "U.K." for "The United Kingdom of Great Britain and Northern Ireland" or "U.S." and "USA" for the "United States of America").[169]

[163] 7 C.F.R. §65.140.
[164] 7 U.S.C. 1638a (c) (1).
[165] 7 C.F.R. § 65.400 (a).
[166] 7 C.F.R. § 65.400 (c).
[167] 7 C.F.R. § 65.400 (b).
[168] 7 C.F.R. § 65.400 (a).
[169] 7 C.F.R. § 65.400 (e).

7.113 In response to a question from the Panel, the parties submitted photographs of muscle cut labels taken in 2010.[170] For instance, Mexico and the United States submitted the following photographs of Label A[171]:

7.114 As regards mixed-origin labels, Canada submitted, for instance, a photograph containing the following label[172]:

7.115 Likewise, the United States submitted the following photographs as an example of Label B[173] and an example of Label C as affixed on a retail shelf[174]:



[170] See Canada's, Mexico's and the United States' responses to Panel question No. 23. See also Exhibits CDA–161, MEX–71 and US–67, US-94, US-95, US-96, US-97 and US-98.
[171] Exhibit MEX–71 and US-67.
[172] Exhibit CDA-161.
[173] Exhibit US-67.
[174] Exhibit US-67.

The audit verification system

7.116 With respect to the audit verification system, the COOL statute grants authority to the Secretary of Agriculture to "conduct an audit of any person that prepares, stores, handles, or distributes a covered commodity for retail sale to verify compliance"[175] with the COOL requirements.

7.117 This audit verification system imposes certain recordkeeping requirements for producers along the meat production chain. The COOL statute establishes that a person subject to an audit must provide to the Secretary country of origin records, including animal health papers, import or customs documents, or producer affidavits. The Secretary is prohibited from requiring any record other than those maintained in the course of the normal conduct of business of the audited person.[176]

7.118 The 2009 Final Rule (AMS) specifies that any person engaged in the business of supplying a covered commodity to a retailer, whether directly or indirectly, must maintain records to establish and identify the immediate previous source (if applicable) and immediate subsequent recipient of a covered commodity for a period of one year from the date of transaction.[177] In the case of beef and pork, the 2009 Final Rule (AMS) provides that the slaughterhouse is the supplier responsible for initiating a claim of country of origin. Therefore, such supplier must possess the records that are necessary to substantiate the country of origin claim for a period of one year from the date of the transaction.[178]

7.119 With respect to imported commodities that fall under category D (e.g. meat imported from Canada or Mexico)[179], the 2009 Final Rule (AMS) requires that records provide clear product tracking from the port of entry into the United States to the immediate subsequent recipient, and accurately reflect the country of origin as identified in relevant CBP entry documents. Such records must be maintained for a period of one year from the date of transaction.[180]

7.120 The 2009 Final Rule (AMS) further elaborates on the implementation details that such a verification system requires. Section 65.500(a)(1) provides that all records must be legible, and can be maintained in either electronic or hard-copy formats. Due to the variation in inventory and accounting documentary systems, various forms of documentation and records are acceptable. Moreover, Section 65.500(a)(2) establishes that origin-related records maintained in the normal course of business must be available to USDA representatives within five business days of the request.

The certification of origin

7.121 The COOL statute provides that the Secretary of Agriculture shall not use a mandatory identification system to verify the country of origin of a covered commodity. For the purpose of certifying the country of origin of a covered commodity, the Secretary can use, as a model,

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[175] Mexico's first written submission, para. 25, referring to 7 U.S.C. 1638a (d)(1) (Exhibit MEX-9).

[176] United States' first written submission, para. 81; Mexico's first written submission, para. 25, referring to 7 U.S.C. 1638a (d)(2).

[177] 7 C.F.R. § 65.500(b)(3).

[178] 7 C.F.R. § 65.500(b)(1).

[179] § 65.300(f) of the 2009 Final Rule (AMS) provides that category D meat shall be labelled in the following manner: "(f) *Labeling Imported Covered Commodities.* Imported covered commodities for which origin has already been established as defined by this law (e.g., born, raised, and slaughtered or produced) and for which no production steps have occurred in the United States, shall retain their origin, as declared to U.S. Customs and Border Protection at the time the product entered the United States, through retail sale".

[180] 7 C.F.R. § 65.500(b)(4).

certification programmes in existence on the date of enactment of the Agricultural Marketing Act of 1946 (e.g. the carcass grading and certification system effectuated under the Act, the voluntary country of origin beef labelling system contained in the Act, voluntary programmes established to certify certain premium beef cuts, the origin verification system established for the child and adult care food programme under Section 17 of the Richard B. Russell National School Lunch Act, or the origin verification system established for the market access program under Section 203 of the Agricultural Trade Act of 1978 (7 U.S.C. 5623)).[181]

The enforcement of the COOL requirements

7.122 In situations where a violation of the compliance with the COOL requirements is found, the COOL statute establishes a two-step approach for enforcing the COOL requirements. First, the Secretary of Agriculture notifies the retailer or supplier to a retailer found in violation and provides the retailer or supplier a thirty–day period for complying with the COOL statute and regulations.[182] Second, after that thirty–day period, if the retailer or supplier has not made a good faith effort to comply with the COOL requirements and continues to wilfully violate them, the Secretary may fine the retailer or supplier up to USD 1,000 per violation.[183] The United States explains that as part of the evolution of the COOL legislative process the fines decreased from USD 10,000 per violation in the 2002 Farm Bill to USD 1,000 per violation in the 2008 Farm Bill.[184] The United States explains that as of October 2010 no fines[185] for failure to comply with the 2009 Final Rule (AMS) had been imposed.[186]

2. The Vilsack letter

7.123 In Section VII.B.1(d)(ii) above, we briefly described the Vilsack letter, a letter sent to industry representatives by the US Secretary of Agriculture, Thomas J. Vilsack. The Vilsack letter, in relevant part, states:

> "This letter pertains to the *implementation* of the ... (COOL) Final Rule. ... I am suggesting ... that the industry *voluntarily* adopt the following practices to ensure that consumers are adequately informed about the source of food products: … processors should *voluntarily* include information about what production steps occurred in each country when multiple countries appear on each label. … Even if products [that are otherwise exempt] are subject to curing, smoking, broiling, grilling, or steaming, *voluntary* labeling would be appropriate. … Reducing the time allowance [during which a processor is allowed to reference all of the reasonable possible countries of

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[181] 7 U.S.C. 1638a(f).

[182] 7 U.S.C. 1638b(a).

[183] 7 U.S.C. 1638b(b).

[184] United States' first written submission, para. 82.

[185] According to the United States (response to Panel question No. 27) the USDA has identified a few violations at the retail level during its usual review period, but all of the retailers cited for non-compliance demonstrated to the USDA that they had addressed their violation within 30 days. Therefore, no fines were imposed. As a result, the USDA has not yet made a determination as to how to apply the fines related to the COOL requirements. In the event that USDA determines to impose a fine, submits the United States, the size of the fine would depend on the particular facts and circumstances of a violation, and in general, USDA does not intend to automatically apply the fine to each individual package that is not labelled or mis-labelled.

Mexico argued that because of the possibility that USDA could impose fines on a per-item basis, there is a perceived risk of very large fines that makes it rational for U.S. industry to attempt to avoid any possibilities of violations by limiting the use of Mexican and Canadian cattle (footnote 71 in Mexico's second written submission).

[186] United States' response to Panel question No. 27.

origin on its ground meat] to ten days would enhance the credibility of the label." (emphasis added)

7.124 The Vilsack letter thus suggests the industry voluntarily follow three practices.

7.125 First, the letter recommends that "processors should voluntarily include information about what production step occurred in each country when multiple countries appear on the label".[187] For instance this would imply informing on the label: "Born in country X, Raised and Slaughtered in Country Y". This goes beyond the above mentioned obligations contained in the 2009 Final Rule (AMS), where the production step is not explicitly mentioned in the label and the commingling flexibilities provide a leeway for interchanging the order in which the countries are listed.

7.126 Second, Secretary Vilsack takes the view that the definition of "processed foods", a category that is exempted from the COOL requirements, may be too broadly drafted. Therefore, he recommends that the industry voluntarily provide country of origin information when the products are subject to curing, smoking, broiling, grilling or steaming.

7.127 Finally, the 2009 Final Rule (AMS) provides that ground meat should bear the name of all the countries of origin of meat that may have reasonably been in a processor's inventory over a period of 60 days. In this regard, the Vilsack letter recommends that this period be reduced from 60 to 10 days. The alleged objective of such a recommendation is to enhance the credibility of the label.[188]

7.128 The specific aspects of the Vilsack letter, as described above, will be examined in more detail in Section VII.D.1(a) where we address whether the measures at issue in these disputes fall within the scope of the TBT Agreement.

3. The North American livestock and meat industries and trade

(a) Stages of livestock and meat production

(i) Cattle and beef

7.129 In general, the production process from cattle to beef consists of four stages: (i) the cow/calf stage; (ii) the backgrounding stage; (iii) the feeding stage; and (iv) the slaughtering, cutting and packing stage. The production of cattle covers the first three stages, and takes approximately 33 months from conception to slaughter weight.[189]

7.130 The production of cattle begins in the *cow/calf stage*. This stage involves the breeding of cows and the subsequent removal of the calves from the cow. A calf is a young bovine animal under one year of age.[190] At the end of the cow-calf stage, the calf weighs between 160 and 300 kilograms, and is sold for backgrounding or directly to feeding operations.[191]

7.131 *Backgrounding* involves feeding calves on a forage-based diet (e.g. grass, hay, clover, alfalfa) to increase their weight to 300-350 kilograms.[192] The length of time during which an animal is fed a forage-based diet is based on several factors, such as the cost of feed, the availability of pasture and

[187] Vilsack letter, page 1 (Exhibits CDA-6 and MEX-8).
[188] Vilsack letter, pages 1-2 (Exhibits CDA-6 and MEX-8).
[189] Canada's first written submission, para. 42 and Annex I (Exhibit CDA-51); Mexico's first written submission, paras. 116-148.
[190] Canada's first written submission, Annex III.
[191] Canada's first written submission, paras. 43-46; Mexico's first written submission, paras. 116-121.
[192] Canada's first written submission, para. 47; Mexico's first written submission, paras. 137-139.

the expected future price of fed cattle.[193] At the end of the backgrounding stage, calves are sold to feeding operations.

7.132 The *feeding stage* takes place in feeding operations or feedlots. Feeding operators purchase cattle at a weight of approximately 350 kilograms from backgrounders and cow/calf operations and feed them intensively on a grain-based diet until they reach slaughter weight (550-600 kilograms) and are then sold to slaughterhouses.[194]

7.133 The *slaughtering, cutting and packing* stage completes the meat production process. Once the animal is slaughtered, the carcass is obtained by separating the body from the head, the organs and the hide. The carcass is broken down into muscle cuts of meat, which are packed and then sold to wholesalers, retailers and others.[195]

(ii) Hogs and pork[196]

7.134 Unlike cattle, the production process of hogs is continuous. Hogs cannot be put out to pasture to slow down their growth rate. Once hogs reach slaughter weight, they cannot remain in the growing and feeding facilities for more than a few additional days due to animal welfare concerns.[197]

7.135 The production process from hogs to pork involves four stages: (i) the farrowing stage; (ii) the nursery stage; (iii) the feeding stage; and (iv) the slaughtering, cutting and packing stage. The production of hogs covers the first three stages, and takes approximately ten months from conception until slaughter weight.[198]

7.136 During the *farrowing* stage a sow gives birth to a litter of nine to eleven piglets, each weighing 1-2 kilograms.[199] The piglets are separated from the sow between 21 to 28 days after birth, when they weigh 6-8 kilograms.[200]

7.137 After the farrowing stage, piglets are moved to *nurseries* for nearly seven weeks until they reach the weight of a "feeder pig" (25-28 kilograms).[201]

7.138 During the *feeding* stage, feeder pigs are transferred to *feeder barns*, where they are fed a high-energy concentrated grain diet (e.g. corn, soybeans barley or wheat) until they become slaughter hogs with a slaughter weight of approximately 115 kilograms.[202]

7.139 The *slaughtering, cutting and packing* stage completes the pork production process. Once the hogs are slaughtered, they are turned into carcasses separated from the head and the organs.

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[193] Canada's first written submission, para. 48.

[194] Canada's first written submission, paras. 43-50 (Exhibit CDA-51); Mexico's first written submission, paras. 140-143.

[195] Canada's first written submission, para. 100; Mexico's first written submission, paras. 144-147.

[196] Hogs and pork are relevant only to the dispute by Canada.

[197] Canada's first written submission, paras. 64-66. The United States has not commented on this description presented by Canada.

[198] Canada's first written submission, paras. 59-68 and Annex II.

[199] Canada's first written submission, Annex III.

[200] Canada's first written submission, para. 60.

[201] Canada's first written submission, para. 61.

[202] Canada's first written submission, paras. 59-63 and Annex II; Exhibit CDA-61.

The carcasses are further processed into pork chops, which are packed and then sold to wholesalers, retailers and others.[203]

(b) Integrated nature of the North American livestock trade

7.140 The market for livestock and meat of Canada, Mexico and the United States is highly integrated. Different stages of the North American livestock and meat production are often performed in more than one country. Trade in livestock takes place between, on the one hand, the United States and Canada and, on the other hand, the United States and Mexico. Both Canada and Mexico export cattle to the United States to be processed into meat. Canada additionally exports hogs to the United States.[204] The United States also exports a very limited amount of livestock to Mexico and Canada[205], but this is not at issue in the current dispute.[206]

7.141 Livestock are classified as *fed* or *feeder* depending on whether they are ready for slaughter, or are still at the backgrounding or feeding operations stage. Most of the Canadian cattle exported to the United States are *fed cattle*: these usually go through the first three stages in Canada and are only exported to the United States for immediate slaughter. A smaller but considerable portion of Canadian cattle are *feeder cattle*: these are exported to the United States directly after the backgrounding stage.[207] Conversely, Mexico generally exports *feeder cattle* immediately after the cow/calf stage to US backgrounding and feeding operations[208], because of a lack of sufficient grasslands in Mexico and the general lack of well-developed feed grains and cattle-feedlot sectors.[209] As regards Canadian hog exports to the United States, these involve a larger proportion of *feeder* than *fed hogs*.[210]

7.142 The vast majority of Canadian and Mexican livestock exports are destined for the United States.[211] However, as specified further below livestock imports from Canada and Mexico only account for a small percentage of total livestock slaughter in the United States.[212]

D. CLAIMS UNDER THE TBT AGREEMENT

7.143 Both Canada and Mexico have brought claims under Articles 2.1 and 2.2 of the TBT Agreement. In addition, Mexico has advanced claims under Articles 2.4, 12.1 and 12.3(a) of this Agreement. As indicated above, we deal with these claims in sequential order.

7.144 We begin our analysis of the above-listed claims with an assessment of whether the COOL measure and the Vilsack letter qualify as technical regulations within the meaning of the TBT Agreement. As the Appellate Body explained, "if the measure ... is not a 'technical regulation',

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[203] Canada's first written submission, paras. 100-103.

[204] Canada's first written submission, para. 37; Mexico's first written submission, paras. 109 and 114; United States' first written submission, paras. 88, 115 and 107.

[205] Canada maintains a voluntary country of origin labelling scheme for the "Product of Canada" and "Made in Canada" claims (Exhibit CDA-163).

[206] Exhibits US-150 and 151.

[207] United States' first written submission, para. 89; Exhibit US-28, Table 3; Exhibit CDA-196.

[208] Mexico's first written submission, paras. 137-138; United States' first written submission, para. 107.

[209] Mexico's first written submission, paras. 120-121; Exhibit MEX-35.

[210] Exhibit CDA-196.

[211] Canada's first written submission, para. 35; Mexico's first written submission, paras. 109 and 120-121.

[212] Canada's first written submission, paras. 34 and 36; United States' first written submission, para. 89 (Exhibit US-86).

then it does not fall within the scope of the *TBT Agreement*".[213] Thus, the question of technical regulations is a threshold issue for all of the complainants' claims under the TBT Agreement.

7.145 Specifically, Articles 2.1, 2.2 and 2.4 of the TBT Agreement apply only to "technical regulations". In turn, Article 12.3 applies to "technical regulations, standards and conformity assessment procedures". Since Mexico has not contended that the COOL measure or the Vilsack letter would qualify as standards or conformity assessment procedures, the COOL measure and the Vilsack letter need to qualify as technical regulations for Mexico's Article 12.3 claim to potentially succeed in this dispute. Article 12.1 of the TBT Agreement does not specifically mention technical regulations; however, Mexico explains that it does not claim an independent breach of that provision by the United States, but rather a consequential violation through the breach of Article 12.3.[214] Hence, a successful Mexican claim under Article 12.1 of the TBT Agreement in this dispute also presupposes that the COOL requirements qualify as technical regulations.

1. Technical regulation

7.146 The term "technical regulation" is defined by Annex 1.1 to the TBT Agreement as follows:

> "Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." (explanatory note omitted)

7.147 Based on this definition, the Appellate Body developed the following three-pronged test to establish whether a document qualifies as a technical regulation:

> "[There are] *three criteria* that a document must meet to fall within the definition of 'technical regulation' in the *TBT Agreement*. *First*, the document must apply to an identifiable product or group of products. The *identifiable* product or group of products need not, however, be expressly *identified* in the document. *Second*, the document must lay down one or more characteristics of the product. These product characteristics may be intrinsic, or they may be related to the product. They may be prescribed or imposed in either a positive or a negative form. *Third*, compliance with the product characteristics must be mandatory. ... [T]hese three criteria are derived from the wording of the definition in Annex 1.1."[215] (emphasis original)

7.148 We apply this test in turn to the two categories of instruments potentially at issue in the context of the TBT Agreement: (i) the instruments we found constitute the COOL measure (i.e. the COOL statute and the 2009 Final Rule (AMS)); and (ii) the Vilsack letter. We concluded above that

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[213] Appellate Body Report, *EC – Sardines*, para. 175. See also Appellate Body Report, *EC – Asbestos*, para. 59 and Panel Report, *EC – Sardines*, para. 7.20.

[214] See Mexico's first written submission, para. 372.

[215] Appellate Body Report, *EC* – Sardines, para. 176. See also Appellate Body Report, *EC – Asbestos*, paras. 66-70. The parties refer to the definition of technical regulation contained in Annex 1.1 to the TBT Agreement. See Canada's first written submission, para. 69, Mexico's first written submission, para. 235 and United States' first written submission, para. 133). Further, Canada and Mexico argue that the COOL requirements, including the Vilsack letter, are "documents" within the definition developed by the Appellate Body. See Canada's first written submission, para. 74 and Mexico's first written submission, para. 236.

because of its distinctive nature, the Vilsack letter should be examined separately from the COOL measure.[216]

(a) Whether compliance with the COOL measure and the Vilsack letter is mandatory

7.149 We start our analysis with the last criterion of the above three-pronged test, namely whether compliance with the COOL measure and the Vilsack letter is mandatory. It is this criterion that is most vigorously disputed between the parties. Starting with this criterion does not jeopardize the objective assessment of the matter before us as the three criteria under the technical regulation test are cumulative and, therefore, need not be applied in any particular order.

7.150 As the panel in *EC – Trademarks and Geographical Indications (Australia)* noted, "[t]he ordinary meaning of the word 'mandatory' can be defined in the case of an action as 'obligatory in consequence of a command, compulsory. (Foll. by *upon*)'.[217]"[218] The Appellate Body in *EC – Asbestos* also clarified the concept "mandatory" within the meaning of Annex 1.1 of the TBT Agreement:

> "A 'technical regulation' must ... regulate the 'characteristics' of products in a binding or compulsory fashion. It follows that, with respect to products, a 'technical regulation' has the effect of *prescribing* or *imposing* one or more 'characteristics' – 'features', 'qualities', 'attributes', or other 'distinguishing mark'."[219] (emphasis original)

7.151 In light of the Appellate Body's interpretation of the term "mandatory", we examine whether the COOL measure and the Vilsack letter regulate the country of origin labelling requirement in a binding or compulsory manner or have the effect of prescribing or imposing country of origin labelling requirements.

(i) Whether compliance with the COOL measure is mandatory

<u>Main arguments of the parties</u>

7.152 The complainants argue that the COOL measure[220] is mandatory because, in the words of the Appellate Body in *EC – Asbestos*[221], it regulates the labelling of the covered commodities "in a binding or compulsory fashion".[222]

7.153 According to **Canada**, the COOL measure establishes labelling requirements for all covered commodities, and failure to comply with these requirements may lead to the imposition of a fine. Further, according to Canada, the United States has acknowledged that the COOL measure is a technical regulation through its notifications to the TBT Committee.[223]

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[216] See para. 7.55 above.
[217] *(footnote original) The New Shorter Oxford English Dictionary* (1993).
[218] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.453.
[219] Appellate Body Report, *EC – Asbestos*, para. 68.
[220] For the purpose of the sections on the main arguments of the parties in these reports, we use the term "the COOL measure" and "the COOL measures" as presented by the parties in their written submissions. The use of these terms in the parties' arguments section of the reports, therefore, does not reflect the Panel's conclusion above in Section VII.B.1 on the characterization of the instruments at issue.
[221] See Canada's first written submission, para. 73 and Mexico's first written submission, para. 246.
[222] Appellate Body Report, *EC – Asbestos*, para. 68.
[223] See Canada's first written submission, paras. 73-74.

7.154 Likewise, **Mexico** argues that it is clear from the statutory COOL provisions that the United States imposes a mandatory scheme, by requiring retailers to inform consumers about the country of origin of the covered commodities.[224] The Agricultural Marketing Act of 1946 prescribes this by using the word "shall". Mexico adds that the USDA itself refers to COOL as "MCOOL" or "Mandatory" COOL. Further, Mexico argues, there is an enforcement procedure applicable to retailers and any person engaged in supplying the covered commodity to a retailer. This procedure may lead to the imposition of a fine for those who wilfully violate the COOL provisions or who do not make a good faith effort to comply with them.

7.155 With respect to this element of the legal test, the **United States** limits its arguments to the Vilsack letter; it does not contest the mandatory nature of the COOL measure.[225]

Analysis by the Panel

7.156 As noted, the United States does not contest that compliance with the COOL measure is mandatory.

7.157 Indeed, the COOL measure is composed of classic legal instruments that are legally binding in US law. Moreover, the COOL statute sets out the core country of origin labelling requirement by using the word "shall":

> "Except as provided in subsection (b), a retailer of a covered commodity *shall* inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity".[226] (emphasis added)

7.158 The COOL statute also uses the word "shall" in laying down the requirement for "any person engaged in the business of supplying a covered commodity to a retailer" to provide country of origin information to retailers.[227]

7.159 Further, the COOL measure is supported by an "enforcement" mechanism.[228] In the case of a "violation" of the above obligations by a retailer or by any other person engaged in the business of supplying a covered commodity to a retailer, the enforcement mechanism of the COOL measure foresees the possibility of the Secretary of Agriculture imposing a "fine ... for each violation".[229]

7.160 The panel in *EC – Trademarks and Geographical Indications (Australia)* considered that the use of the word "shall" is indicative of mandatory compliance[230], and in *EC – Asbestos* the Appellate Body also found that enforceability through sanctions indicates mandatory compliance.[231] Both of these features are present in the COOL measure.

7.161 Further, the COOL statute refers to the core country of origin labelling requirement as "the *mandatory* country of origin requirement".[232] (emphasis added) Similarly, the 2009 Final Rule

[224] See Mexico's first written submission, paras. 247-250.
[225] See United States' first written submission, paras. 132-136.
[226] 7 U.S.C. § 1638a(a)(1).
[227] 7 U.S.C. § 1638a(e).
[228] 7 U.S.C. § 1638b. See also 74 FR 2664 (Exhibits CDA-5 and MEX-7).
[229] 7 U.S.C. § 1638b.
[230] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.453. See also Appellate Body Report, *EC – Sardines*, para. 194, footnote 111.
[231] Appellate Body Report, *EC – Asbestos*, para. 72.
[232] 7 U.S.C. § 1638a(a)(2)(B)(ii).

(AMS) contains the word "mandatory" in its very title, and consistently refers to the essence of the COOL measure as "mandatory COOL".

7.162 Accordingly, we find that compliance with the COOL measure is mandatory, and thus the COOL measure fulfils the third criterion of the legal test under Annex 1.1 to the TBT Agreement.

(ii) Whether compliance with the Vilsack letter is mandatory

Main arguments of the parties

7.163 As regards the Vilsack letter, **Canada** argues that its evidence in the form of witness statements, letters and econometric analyses shows a shift by US industry from Canadian-born livestock towards livestock born, raised and slaughtered in the United States. This demonstrates compliance with the instructions of Secretary Vilsack. The reference in the Vilsack letter to the "intent of Congress"[233], coupled with the threat to reopen the 2009 Final Rule (AMS), demonstrate that the letter is mandatory.[234]

7.164 Canada further submits that an instrument which is non-binding in the domestic legal system of a WTO Member may nevertheless be "mandatory" under the TBT Agreement. This is the case of the Vilsack letter, argues Canada, because it interprets the statutory COOL provisions, which are binding in US law, and as such derives its mandatory nature from the "core" instruments that make up the COOL measure.[235]

7.165 Canada argues that if the Panel were to decide that the Vilsack letter should be considered in isolation from other component parts of the COOL measure, it should in so doing take into account that the authorship of the Secretary of Agriculture lends great weight to ensure that the US industry will listen and be inclined to comply. Canada focuses on a particular element of the letter: the direction of the industry towards point-of-production labelling, i.e. the specification of where the animal was born, raised and slaughtered. As a result, Canada argues, the industry has shifted towards the production of Label A meat, which is an effective form of compliance with the Vilsack letter.[236] However, Canada clarifies that it does not have any data that would quantify the amount of the shift away from labels B and C towards an increased use of Label A.[237]

7.166 **Mexico** argues that the Vilsack letter has a mandatory nature in spite of the use of the word "voluntary".[238] However, whether the letter is mandatory or not, should not be decided according to the characterization given by the issuing authority to its own measure. According to Mexico, the last paragraph of the Vilsack letter makes possible restrictive modifications to the COOL measure contingent on whether the industry complies with the suggested practices. Mexico adds that the mandatory nature of the Vilsack letter and its related press release is evident from the "clear threat" implied therein. Mexico refers to a letter issued just prior to the issuance of the Vilsack letter by Tyson Foods and JBS, two US meat producers, to illustrate that "threats" like the one included in the Vilsack letter are taken seriously by US industry.[239]

[233] See Canada's response to Panel question No. 7 and Canada's second written submission, para. 107.
[234] See Canada's second written submission, paras. 106-107 and Canada's response to Panel question Nos. 7 and 8.
[235] See Canada's response to Panel question No. 95.
[236] See Canada's response to Panel question No. 95.
[237] See Canada's response to Panel question No. 99.
[238] See Mexico's first written submission, paras. 252-258.
[239] See para. 258.

7.167 Mexico contends that the Vilsack letter is not an isolated act of the US government but part of the COOL measure and mandatory as such.[240] In fact, the inconsistencies of the COOL measure are created by the wording of the statute and regulations as interpreted and applied by the administering authorities.[241] The Vilsack letter references the intent of Congress and it is signed by the head of the USDA. Thus, it reflects the viewpoint of the US executive branch on the correct implementation of the COOL measure.[242] At the very least, the Vilsack letter confirms the strict interpretation of the COOL measure that has been applied by the USDA.[243] Mexico adds, however, that it does not have any first-hand evidence demonstrating that the Vilsack letter resulted in a change in the proportion of meat eligible for Label A that actually carries Labels B or C due to the commingling flexibility.[244]

7.168 The **United States** submits that the Vilsack letter does not meet the definition of "technical regulation" in the TBT Agreement because, by its terms, compliance with it is not mandatory.[245] The letter does not contain binding obligations; it uses the word "voluntary" several times in describing the suggestions of Secretary Vilsack. Further, the Vilsack letter contains no requirements and has no legal status in the United States.[246] Thus, the letter does not meet the definition accorded to the term "mandatory" by the Appellate Body:[247] It does not regulate the characteristics of products in a binding or compulsory fashion.[248]

7.169 Further, the United States points out, the Vilsack letter lacks any enforcement mechanism to ensure that companies follow its suggestions. As the Vilsack letter was not adopted through the procedures established by the Administrative Procedure Act (APA), USDA could not enforce the letter as a matter of US law even if it wanted to do so. The last paragraph of the letter merely reflects the fact that USDA, like any other regulator, has the ability to revisit its rule-making.[249]

7.170 The United States rejects the argument presented by the complainants that the Vilsack letter derives its mandatory nature from being part of a broader COOL measure. According to the United States, as the Vilsack letter's recommendations are inconsistent with the 2009 Final Rule (AMS), a binding instrument, this precludes the possibility that the Vilsack letter derives the mandatory nature from it.[250]

7.171 The United States argues that the complainants have not offered any evidence demonstrating that the industry is following the letter's suggestions, even though 18 months have passed since the letter was issued. Rather, the United States alleges, there is hard evidence that US slaughterhouses continue to process Label B meat and US retailers continue to display Label B meat in grocery stores. According to the United States, Mexico submits two exhibits, MEX-33 and MEX-67, in an attempt to show that the US industry modified its practices in response to the Vilsack letter. However, the letter in exhibit MEX-33 precedes the Vilsack letter by nearly six months and concerns issues unrelated to the letter. The article in exhibit MEX-67, argues the United States, demonstrates that the industry

[240] See Mexico's response to Panel question No. 7.
[241] See Mexico's second written submission, para. 38.
[242] See Mexico's response to Panel question No. 8 and 96.
[243] See Mexico's second written submission, paras. 35, 37.
[244] See Mexico's response to Panel question No. 99.
[245] See United States' first written submission, para. 134.
[246] See United States' first written submission, para. 84.
[247] See Appellate Body Report, *EC – Asbestos*, para. 68.
[248] See United States' first written submission, para. 134-136 and United States' opening oral statement at the second substantive meeting of the Panel, paras. 16-17.
[249] See United States' first written submission, para. 135 and United States' comments on Canada's and Mexico's responses to Panel question No. 96.
[250] See United States' comments on Canada's and Mexico's responses to Panel question No. 96.

sees the Vilsack letter as voluntary. Moreover, none of the exhibits cited by Canada in this regard[251] actually prove the existence of a relationship between the Vilsack letter and any rejection of Canadian livestock by the US industry. Since the release of the letter, USDA has taken no action to revisit the COOL measures.[252]

7.172 Further, in response to a question from the Panel, the United States explains that USDA has been monitoring compliance with the 2009 Final Rule, while it has not done the same with regard to the Vilsack letter.[253]

Analysis by the Panel

7.173 As regards the Vilsack letter, the question of compliance is more complex than for the COOL measure.

7.174 On its face, the Vilsack letter is clearly not mandatory. Unlike the instruments composing the COOL measure, the Vilsack letter is not a piece of legislation or regulation legally binding in US law.[254] In outlining action by industry, the Vilsack letter uses permissive, hortatory terms such as "might", "should" and "would"; it mentions the word "voluntary" at least four times; and it notes that it contains "suggestions for voluntary action". It is also not followed up by a classic legal enforcement mechanism.

7.175 But the nature of compliance with the Vilsack letter is not a merely formalistic question. We agree with the complainants that this matter should not be decided purely on the basis of the language in the Vilsack letter, in particular the use of the word "voluntary". Adopting a formalistic interpretation of the phrase "with which compliance is mandatory" would allow Members to escape the coverage of large portions of the TBT Agreement merely by qualifying their own measures as non-mandatory, or compliance with such measures as voluntary. This would strip Annex 1.1 and ultimately large portions of the TBT Agreement of their *effet utile*.

7.176 It would also be contrary to the clarification made by the Appellate Body with respect to the mandatory compliance criterion of a technical regulation: a regulation that has the *effect* of prescribing or imposing one or more "characteristics" could also qualify as a technical regulation under Annex 1.1.[255] The question therefore remains whether compliance with the Vilsack letter may be considered *de facto* mandatory; namely, whether, in the words of the Appellate Body, "with respect to products" the Vilsack letter "has the *effect* of prescribing or imposing one or more 'characteristics' – 'features', 'qualities', 'attributes', or other 'distinguishing mark'".[256]

7.177 The complainants invoke various aspects of the Vilsack letter to demonstrate that this is the case. They argue that the Vilsack letter creates a link to the COOL statute by referencing the need "to achieve the intent of Congress". They also contend that the Vilsack letter creates a link to the 2009 Final Rule (AMS) by stating that it "pertains to the implementation of [the 2009 Final Rule]", and by using the phrase "after the effective date of the final rule" to link the letter's suggestions to the entry into force of the 2009 Final Rule (AMS).

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[251] The United States refers to Exhibits CDA-67, 83, 86, and 92 in this context.

[252] See United States' first written submission, para. 137, United States' opening oral statement at the first substantive meeting of the Panel, para. 19, United States' opening oral statement at the second substantive meeting of the Panel, para. 17, United States' response to Panel question No. 99 and United States' comments on Canada's and Mexico's responses to Panel question No. 99.

[253] See United States' response to Panel question No. 6.

[254] See para. 7.55 above.

[255] See Appellate Body Report, *EC – Asbestos*, para. 68. See para. 7.150 above.

[256] Appellate Body Report, *EC – Asbestos*, para. 68 (emphasis added).

7.178 Further, the complainants point out that the Vilsack letter was issued by the Secretary of Agriculture, who retains the power to modify the 2009 Final Rule (AMS) within the framework of the statutory elements of the COOL measure. According to the complainants, this is particularly relevant since the Vilsack letter is supported by the "threat" of the Secretary of Agriculture actually changing the 2009 Final Rule (AMS) along the lines of the suggestions contained in his letter. Indeed, Secretary Vilsack states in concluding his letter that:

> "[t]he Department of Agriculture will be closely reviewing industry compliance with the regulation and its performance in relation to these suggestions for voluntary action. Depending on this performance, I will carefully consider whether modifications to the rule will be necessary to achieve the intent of Congress."

7.179 For the reasons explained below, however, we do not find that these aspects of the Vilsack letter demonstrate that compliance with the letter is *de facto* mandatory within the meaning of Annex 1.1 to the TBT Agreement by having the effect of prescribing or imposing country of origin labelling requirements.

7.180 We agree that the Vilsack letter creates certain linkages to the COOL measure.[257] But this, in itself, is not sufficient to qualify compliance with the Vilsack letter as mandatory. As explained above[258], the Vilsack letter remains distinct from the COOL measure. The essence of the Vilsack letter is that, while Secretary Vilsack does not block the entry into force of the 2009 Final Rule (AMS) on the originally foreseen date of 16 March 2009, he suggests additional and more stringent industry action in three specific areas, based on "concerns" about the requirements set out in the COOL measure. The USDA news release accompanying the Vilsack letter states:

> "Agriculture Secretary Tom Vilsack today announced that the final rule for the Country of Origin Labeling (COOL) program will go into effect as scheduled on March 16th. He also released a letter[i.e. the Vilsack letter] inviting stakeholders to follow *additional* voluntary labelling requirements."[259] (emphasis added)

7.181 The complainants do not contest that the actions suggested by Secretary Vilsack are substantively different from, additional to, or more stringent than, the requirements in the COOL measure.[260]

7.182 Further, the complainants underline that the Vilsack letter was issued by a high-ranking United States government official. Yet, this in itself does not turn the Vilsack letter into an instrument requiring mandatory compliance. Not all communications by government officials involve mandatory compliance. In their relations with the general public and specific stakeholder groups, high-ranking government officials regularly issue non-mandatory oral and written communications.

7.183 It is undisputed that Secretary Vilsack has the power to promulgate regulations necessary to implement the country of origin labelling provisions of the COOL statute[261], which entails the power to modify the 2009 Final Rule (AMS) within the framework of the COOL statute. This, indeed, gives a certain weight to what the complainants described as the "threat" contained in the concluding section of the Vilsack letter.

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[257] See para. 7.177 above.
[258] See para. 7.55 above.
[259] Exhibits CDA-42 and MEX-23.
[260] See Canada's first written submission, para. 28 and Mexico's first written submission, para. 225.
[261] See 7 U.S.C. § 1638c(b).

7.184 However, there is no compelling evidence before us showing that this "threat" has materialized.

7.185 We have evidence before us showing that USDA conducted surveys on the implementation of the COOL requirements in March 2009 (i.e. around the entry into force of the 2009 Final Rule (AMS)), and in July 2009.[262] The March 2009 survey is, however, largely irrelevant to the question here, as it does not even refer to the Vilsack letter.

7.186 The July 2009 survey[263] shows that USDA did look into industry's "performance" of one of the suggestions contained in the Vilsack letter. However, this survey involved "152 randomly selected retail stores in seven [US] states"[264] and focussed on industry compliance with the 2009 Final Rule (AMS). In fact, it covered only one of the three specific suggestions of the Vilsack letter, namely "to assess whether labels included additional information about production steps for meat covered commodities as requested by the Secretary in a letter to the industry on February 20, 2009".[265] In this regard, the July 2009 survey found:

> "[O]nly four stores (all in California) marked veal items with production steps out of 53 stores that carried veal ('Born in Canada, Processed in the U.S.'). Production steps were not found on any other covered commodity.
>
> Retailers were – for the most part – labeling covered commodities for country of origin."[266]

7.187 Canada adds that "[t]he survey did not find any other meat commodities with voluntary labeling of production steps (born, raised, and slaughtered, or processed)".[267]

7.188 In essence, therefore, the two surveys before us fail to demonstrate industry's actual compliance with Secretary Vilsack's suggestion concerning "[l]abelling of product[s] from multiple countries of origin" by "includ[ing] information about what production step occurred in each country". Photos of the labels actually used by retailers under the COOL measure, submitted by the parties upon our request[268], also do not indicate any compliance with Secretary Vilsack's suggestion to "include information about what production step occurred in each country when multiple countries appear on the label". While multiple countries do appear on the labels on some of these photos, we cannot find any indication of where specific production steps took place.

7.189 We have no evidence before us showing compliance with Secretary Vilsack's other two suggestions either, namely in regard to "the definition of processed foods" and concerning less flexibility for "inventory allowance".

7.190 Furthermore, the rest of the exhibits submitted by the complainants in this respect do not make a convincing case. Some of the evidence submitted by the complainants pre-dates the Vilsack

[262] See Exhibits CDA-227 and US-145. See also United States' response to Panel question Nos. 6 and 90 and Canada's comments on the United States' response to Panel question No. 90.
[263] See Exhibit CDA-227. See also Exhibit US-145.
[264] Exhibit CDA-227.
[265] Exhibit CDA-227.
[266] Exhibit CDA-227.
[267] Exhibit CDA-227.
[268] See Exhibits CDA-161, MEX-71 and US-67.

letter, and thus cannot serve to demonstrate the nature of compliance with the letter.[269] One piece of evidence submitted by Mexico explicitly confirms the voluntary nature of any compliance by individual industry participants with Secretary Vilsack's suggestions.[270] Certain other exhibits submitted by Canada and Mexico do not reference the Vilsack letter at all or the specific suggestions contained therein.[271] A further piece of evidence submitted by Canada, dated a few days after the Vilsack letter, merely records the issuance of the letter, without addressing the nature of any compliance with the letter's suggestions.[272]

7.191 Testimonies by individuals active in the North American meat industry that do reference the Vilsack letter indicate that specific industry participants might have responded to Secretary Vilsack's suggestions.[273] However, these testimonies are not sufficient to establish that such behaviour amounted to more than voluntary compliance with the Vilsack letter. Hence, we cannot read these testimonies as proving the kind of across-the-board industry compliance that, taken together with other evidence, could demonstrate that compliance with the Vilsack letter is *de facto* mandatory.

7.192 Overall, these testimonies and the above-referenced evidence are insufficient to demonstrate mandatory compliance with the Vilsack letter. They are also insufficient to prove that the Vilsack letter would "regulate the 'characteristics' of products in a *binding* or *compulsory* fashion"[274], let alone have "the effect of *prescribing* or *imposing* one or more 'characteristics' – 'features', 'qualities', 'attributes', or other 'distinguishing mark'"[275] for the products at issue.

7.193 Canada invokes four notifications by the United States to the TBT Committee, arguing that the United States has thereby acknowledged that COOL requirements qualify as a technical regulation.[276] However, only one of these notifications actually follows the date of issuance of the Vilsack letter, and that notification does not relate or even refer specifically to the Vilsack letter.

7.194 In light of these considerations, we conclude that the complainants have not demonstrated that compliance with the Vilsack letter is mandatory within the meaning of Annex 1.1 to the TBT Agreement.

7.195 Given that the three criteria under the three-pronged test for "technical regulation" are cumulative, we need not assess the other two criteria of the test with regard to the Vilsack letter. In fact, the panel in *EC – Trademarks and Geographical Indications (Australia)* held that if one of the

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[269] See Exhibits CDA-32 to 34, MEX-55 and MEX-57. In fact, much of this evidence relates to the process leading to the obligations contained in the 2009 Final Rule, as opposed to the suggestions contained in the Vilsack letter.

[270] "*To the extent that companies are able and elect to go beyond these federal labeling requirements, as requested today by Agriculture Secretary Vilsack, is an individual company decision*, which will have to be made in collaboration with a company's retail grocery customers, which ultimately are the entities that provide country of origin information to their consumers". Exhibit MEX-67, emphasis added.

[271] See Exhibits CDA-92 and Exhibit MEX-33 (A copy of the Country of Original Labeling manual issued by Tyson Foods in April 2009 refers to a more frequent use of Label A for meat produced from livestock born, raised and slaughtered in the United States; however, it does not refer specifically to any of the three suggestions contained in the Vilsack letter); and Exhibit CDA-41 (The CANFAX Update issued in April 2009 summarizes "US procurement policies for Canadian cattle" without even referencing either the Vilsack letter or the specific suggestions contained therein).

[272] See Exhibit CDA-193.

[273] See Exhibits CDA-67, 83 and 86.

[274] Appellate Body Report, *EC – Asbestos*, para. 68 (emphasis added).

[275] Appellate Body Report, *EC – Asbestos*, para. 68 (emphasis original).

[276] See Canada's first written submission, para. 74, footnote 98.

three elements of the definition of "technical regulations" is found to be unfulfilled, there is no need to analyse the other two elements.[277]

7.196 We therefore find that the complainants have not demonstrated that the Vilsack letter qualifies as a technical regulation within the meaning of Annex 1.1. Accordingly, we refrain from reviewing the Vilsack letter under the provisions of the TBT Agreement invoked by the complainants in this dispute.[278]

7.197 We continue our analysis of the remaining two criteria of the technical regulation test only with regard to the COOL measure.

(b) Whether the COOL measure applies to an identifiable product or group of products

(i) Main arguments of the parties

7.198 According to **Canada** and **Mexico**, the COOL measure applies to an identifiable group of products: the "covered commodities".[279] Mexico adds that by referencing the 2009 Final Rule (AMS), which is part of the COOL measure, the Vilsack letter also applies to the same "covered commodities".[280] Thus, like other elements of the COOL measure, the Vilsack letter also applies to an identifiable group of products.[281]

7.199 The **United States** does not specifically address this element of the definition of "technical regulation" with regard to the COOL measure; instead, it focuses on the Vilsack letter and on the element addressed above, arguing that compliance with the Vilsack letter is not mandatory.

(ii) Analysis by the Panel

7.200 Whether the document at issue applies to an identifiable product or group of products is another essential criterion for determining if a document is a technical regulation.

7.201 In *EC – Asbestos*, the Appellate Body explained that "[a] 'technical regulation' must ... be applicable to an *identifiable* product, or group of products" because, "[o]therwise, enforcement of the regulation will, in practical terms, be impossible".[282] The Appellate Body added, however, that the *identifiable* product or group of products need not be expressly specified in the document: the identifiable product coverage of a measure can also be determined according to the substance of the measure at issue. The Appellate Body stated:

> "[T]here may be perfectly sound administrative reasons for formulating a 'technical regulation' in a way that does *not* expressly identify products by name, but simply makes them identifiable – for instance, through the 'characteristic' that is the subject of regulation."[283]

7.202 At first glance, the COOL measure appears to fulfil this requirement as it specifically identifies the products to which it applies. The COOL statute explicitly defines "covered commodity"

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[277] See Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.508.
[278] The Vilsack letter will be analysed subsequently in the context of the claims under the GATT 1994.
[279] See Canada's first written submission, para. 71 and Mexico's first written submission, para. 239.
[280] See Mexico's first written submission, para. 240.
[281] See Mexico's first written submission, para. 241.
[282] Appellate Body Report, *EC – Asbestos*, para. 70 (emphasis original).
[283] Appellate Body Report, *EC – Asbestos*, para. 70 (emphasis original, footnote omitted).

for country of origin labelling purposes as including "(i) muscle cuts of beef ... and pork" and "(ii) ground beef ... and ground pork".[284]

7.203 The question arises, however, whether the COOL measure still satisfies this criterion when the actual products at issue in this dispute are livestock, namely cattle and hogs from which meat is produced.

7.204 In *EC – Sardines* the Appellate Body noted that the measure at issue in that dispute referred to "preserved sardines", but not explicitly to *Sardinops sagax*, which was the product at issue in that dispute.[285] Yet, the Appellate Body reiterated that "a product need not be expressly identified in the document for it to be *identifiable*"[286] and that "the requirement that a 'technical regulation' be applicable to *identifiable* products relates to aspects of compliance and enforcement".[287] The Appellate Body concluded that *Sardinops sagax* was an identifiable product for the purposes of the measure since the measure at issue had been enforced against, and was thus also applicable to, *Sardinops sagax*.[288]

7.205 Similarly, the facts of the present dispute show that although the COOL measure identifies *inter alia* beef and pork as part of the covered commodities[289], the country of origin labelling requirement under the COOL measure is also applied to and thus enforceable against "[a]ny person engaged in the business of supplying a covered commodity to a retailer".[290] This obligation imposed on the upstream suppliers of meat products is indispensable for retailers' effective compliance with the main country of origin labelling obligation under the COOL measure.

7.206 Furthermore, the Agricultural Marketing Act of 1946 explicitly references livestock in defining "beef" as "meat produced from cattle"[291], and "pork" as "meat produced from hogs".[292]

7.207 In light of the above, we find that the COOL measure applies to an identifiable product or group of products within the meaning of Annex 1.1 to the TBT Agreement, namely (i) beef and pork, either as muscle cuts or in ground form; and (ii) livestock (i.e. cattle and hogs), which are the input products necessary to develop the beef and pork products explicitly covered by the COOL measure.

7.208 As explained above, we do not address whether the Vilsack letter applies to an identifiable product or group of products, since we have held that this letter is not mandatory within the meaning of Annex 1.1 to the TBT Agreement.

(c) Whether the COOL measure lays down one or more characteristics of the products

(i) Main arguments of the parties

7.209 **Canada** and **Mexico** argue that the COOL measure lays down product characteristics by requiring that labels be placed on covered commodities when they are sold at the retail level.[293]

[284] 7 U.S.C. § 1638(2).
[285] See Appellate Body Report, *EC – Sardines*, para. 182.
[286] Appellate Body Report, *EC – Sardines*, para. 183 (emphasis original).
[287] Appellate Body Report, *EC – Sardines*, para. 185 (emphasis original).
[288] Appellate Body Report, *EC – Sardines*, para. 186.
[289] See 7 U.S.C. § 1638a(a)(1).
[290] 7 U.S.C. § 1638a(e).
[291] 7 U.S.C. § 1638(1).
[292] 7 U.S.C. § 1638(7).
[293] See Canada's first written submission, para. 72 and Mexico's first written submission, paras. 244-245.

The complainants recall that in *EC – Asbestos*[294] the Appellate Body found that "product characteristics" can include characteristics that are used as a means of identification, presentation or the appearance of a product.[295]

7.210 The **United States** does not specifically address this element of the definition of "technical regulation" with regard to the COOL measure; instead, it focuses on the Vilsack letter and on the element addressed above, arguing that compliance with the Vilsack letter is not mandatory.

(ii) Analysis by the Panel

7.211 The final criterion for the technical regulation test is that a document must lay down one or more characteristics of the product.

7.212 There is no dispute among the parties that the COOL measure lays down a country of origin labelling requirement. We agree that country of origin labelling is the essence of the COOL measure. We also find that the obligations set out by the COOL measure, including the information requirement for "[a]ny person engaged in the business of supplying a covered commodity to a retailer"[296], are closely related to this essential function.

7.213 In *EC – Asbestos* the Appellate Body found, on the basis of the language of Annex 1.1 to the TBT Agreement, that labelling is a product characteristic.[297] The panel in *EC – Trademarks and Geographical Indications (Australia)* added that an explicit requirement to indicate country of origin on the label of the product is indeed a labelling requirement for the purposes of the definition of "technical regulation".[298] The panel held that this country of origin labelling requirement addresses a product characteristic and hence fulfils the second criterion of the "technical regulation" test under Annex 1.1 to the TBT Agreement.[299]

7.214 We therefore find that, by imposing a country of origin labelling requirement, the COOL measure fulfils the criterion of laying down one or more product characteristics.

7.215 As explained above, we do not discuss whether the Vilsack letter addresses a product characteristic since we have held that this letter is not mandatory within the meaning of Annex 1.1 to the TBT Agreement.

7.216 As we have found that the COOL measure fulfils all three criteria of the thee-pronged test under Annex 1.1 to the TBT Agreement, we conclude that the COOL measure is a technical regulation.

7.217 Accordingly, we turn to the complainants' claims under the provisions of the TBT Agreement, and assess these claims with regard to the COOL measure. We do not address these claims for the Vilsack letter, which we have concluded is not mandatory within the meaning of Annex 1.1 to the TBT Agreement, and is therefore not a technical regulation.

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[294] See Appellate Body Report, *EC – Asbestos*, para. 67.

[295] See Canada's first written submission, para. 72 and Mexico's first written submission, paras. 242-243.

[296] 7 U.S.C. § 1638a(e).

[297] See Appellate Body Report, *EC – Asbestos*, para. 67. See also Appellate Body Report, *EC – Sardines*, paras. 187-193.

[298] See Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.447-7.448.

[299] See Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.449-7.452.

2. Article 2.1

(a) Introduction

(i) Legal test under Article 2.1 of the TBT Agreement

7.218 Article 2.1 of the TBT Agreement provides:

> "With respect to their central government bodies:
>
> 2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country."

7.219 The parties agree[300] that the legal test under Article 2.1 includes the following three essential elements set out by the panel in *EC – Trademarks and Geographical Indications (Australia)*:

> "[T]he essential elements of an inconsistency with Article 2.1 of the TBT Agreement are, as a minimum, [i] that the measure at issue is a 'technical regulation'; [ii] that the imported and domestic products at issue are 'like products' within the meaning of that provision; and [iii] that the imported products are accorded 'less favourable' treatment than that accorded to like domestic products."[301]

7.220 We also consider that these three elements constitute the essence of the legal test under Article 2.1 of the TBT Agreement.

7.221 We address the parties' arguments on these elements in the order outlined by the panel in *EC – Trademarks and Geographical Indications (Australia)*. In the context of this analysis, we also address the issue raised by the United States concerning the function of the term "in respect of technical regulations" in Article 2.1 of the TBT Agreement.

7.222 Before turning to our analysis of the three essential elements of the legal test, we first assess whether Article III:4 of the GATT 1994 may serve as context for Article 2.1 of the TBT Agreement.

(ii) Relevant context for Article 2.1 of the TBT Agreement

<u>Main arguments of the parties</u>

7.223 **Canada** and **Mexico** note that neither the Appellate Body nor panels have interpreted the terms "like product" and "treatment no less favourable" in Article 2.1 of the TBT Agreement. The complainants argue that these terms, and Article 2.1 of the TBT Agreement in general, should be interpreted in light of Article III:4 of the GATT 1994.[302]

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[300] Canada's first written submission, para. 77, Mexico's first written submission, para. 264 and United States' first written submission, para. 138. We note that, according to the United States, "[i]n addition to these three 'minimum' elements, the text of TBT Article 2.1 requires the complaining party to establish that such [less favourable] treatment is in respect of the technical regulation [at issue]". (United States' first written submission, para. 139, footnote 166)

[301] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.444.

[302] Canada's first written submission, para. 78; and Mexico's first written submission, para. 266.

7.224 In particular, Canada invokes the finding of the Appellate Body in *EC – Asbestos* that "a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products".[303] Further, Mexico points out that the panel in *EC – Trademarks and Geographical Indications (Australia)* recognized that Article 2.1 of the TBT Agreement addresses the fundamental principle of national treatment:[304]

> "Article 2.1 of the TBT Agreement refers to 'treatment no less favourable'. An essential element of a claim under Article 2.1 is that, in respect of technical regulations, the treatment accorded to imported products is 'less favourable' than that accorded to like products of national origin."[305]

7.225 Mexico adds[306] that, in *US – Section 211 Appropriations Act*, the Appellate Body approved the panel's reliance on jurisprudence under Article III:4 of the GATT 1994 to interpret similar terms under Article 3.1 of the TRIPS Agreement, since the latter provision also deals with national treatment.[307]

7.226 Given that Article 2.1 of the TBT Agreement addresses both national and most-favoured-nation treatment, the complainants argue that the Panel could choose to take into account jurisprudence developed under similar terms in Article I:1 of the GATT 1994.[308] At the same time, both complainants contend that the outcome of such analysis will not be any different from an analysis which takes into account only jurisprudence developed under Article III:4 of the GATT 1994.

7.227 The **United States** submits that there are textual differences between Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement; for instance, the latter only prohibits less favourable treatment that is "in respect of" the technical regulation in question.[309] Further, the United States argues that the Panel is faced with a national treatment, not an MFN, claim so it should take into account only Article III:4 of the GATT 1994.[310]

Analysis by the Panel

7.228 As mentioned above, "likeness" and "treatment no less favourable" are two of the three elements of the legal test under Article 2.1 of the TBT Agreement. The specific meaning of these elements of Article 2.1 of the TBT Agreement has not been reviewed in previous disputes.

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[303] Canada's first written submission, para. 79, referencing Appellate Body Report, *EC – Asbestos*, para. 99.

[304] Mexico's first written submission, para. 263, in particular footnote 199.

[305] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.464.

[306] Mexico's first written submission, paras. 263, 266, in particular footnotes 199 and 204.

[307] The Appellate Body held that "the national treatment obligation is a fundamental principle underlying the TRIPS Agreement, just as it has been in what is now the GATT 1994. The Panel was correct in concluding that, as the language of Article 3.1 of the TRIPS Agreement, in particular, is similar to that of Article III:4 of the GATT 1994, the jurisprudence on Article III:4 of the GATT 1994 may be useful in interpreting the national treatment obligation in the TRIPS Agreement". Appellate Body Report, *US – Section 211 Appropriations Act*, para. 242.

[308] Canada's response to Panel question No. 42; and Mexico's response to Panel question No. 42.

[309] United States' response to Panel question No. 42.

[310] United States' response to Panel question No. 42.

The similar provision under the Tokyo Round Agreement on Technical Barriers to Trade has never been the subject of a ruling by any GATT panel either.[311]

7.229 The complainants suggest interpreting these terms in Article 2.1 of the TBT Agreement similarly to the meaning given to these terms under Article III:4 of the GATT 1994. This latter provision encompasses the following national treatment obligation:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. ..."

7.230 Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 both set out, in relevant part, a "national treatment obligation"[312] and have textual similarities.[313] They contain the same key phrase: "treatment no less favourable than that accorded to like products of national origin". Two parts of this phrase, "like products" and "treatment no less favourable", serve also as key elements of the legal test under both provisions. The above-quoted formulation of these two elements under the legal test for Article 2.1 of the TBT Agreement[314] is quite similar to relevant elements of the legal test under Article III:4 of the GATT 1994.[315]

7.231 As Mexico points out, in *US – Section 211 Appropriations Act* the Appellate Body found that, given the fundamental role of the national treatment principle for the TRIPS Agreement and the similarity in the language of the relevant provisions, "Article III:4 of the GATT 1994 may be useful in interpreting the national treatment obligation in the TRIPS Agreement".[316]

7.232 Further, the panel in *Japan – Film* noted that the term "no less favourable treatment" is "to be found throughout the General Agreement and later Agreements negotiated in the GATT framework as *an expression of the underlying principle of equality of treatment* of imported products as compared to

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[311] Appellate Body Report, *EC – Asbestos*, para. 81. Article 2.1 of the Tokyo Round Agreement on Technical Barriers to Trade provides:

> "With respect to their central government bodies:
>
> 2.1 Parties shall ensure that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade. Furthermore, *products imported from the territory of any Party shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country in relation to such technical regulations or standards.* They shall likewise ensure that neither technical regulations nor standards themselves nor their application have the effect of creating unnecessary obstacles to international trade." (emphasis added).

[312] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.469.

[313] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.464.

[314] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.444. See para. 7.219 above.

[315] The Appellate Body stated: "For a violation of Article III:4 to be established, three elements must be satisfied: [i] that the imported and domestic products at issue are 'like products'; [ii] that the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use'; and [iii] that the imported products are accorded 'less favourable' treatment than that accorded to like domestic products." (Appellate Body Report, *Korea – Various Measures on Beef*, para. 133).

[316] Appellate Body Report, *US – Section 211 Appropriations Act*, para. 242 (original emphasis).

the treatment given either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Article III.[317]"[318]

7.233 According to its preamble, the TBT Agreement serves "to further the objectives of GATT 1994".[319] Also, "no conflicting, i.e. mutually exclusive, obligations arise"[320] from Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 in the sense of the General Interpretive Note to Annex 1A to the WTO Agreement.

7.234 In light of the above similarities and linkages between the two provisions, and taking into account the above-quoted Appellate Body and panel reports, we conclude that Article III:4 of the GATT 1994 provides relevant context for interpreting Article 2.1 of the TBT Agreement, in particular for interpreting the term "no less favourable treatment than that accorded to like products of national origin".

(b) The COOL measure's consistency with Article 2.1

7.235 As explained above, we address the complainants' claims under Article 2.1 by assessing the following three elements: (i) whether the measure at issue is a "technical regulation"; (ii) whether the imported and domestic products at issue are "like products"; and (iii) whether the imported products are accorded "less favourable" treatment than that accorded to like domestic products.

(i) Whether the COOL measure is a technical regulation

7.236 We have already addressed above whether the measures at issue constitute technical regulations within the meaning of the definition contained in Annex 1.1 to the TBT Agreement. We concluded that only the COOL measure constitutes a technical regulation; the Vilsack letter does not.[321] Accordingly, our analysis of the complainants' Article 2.1 claims is limited to the COOL measure.

7.237 In this connection, the United States argues that the term "in respect of technical regulations" in Article 2.1 of the TBT Agreement has a specific function. We now turn to this argument.

Main arguments of the parties

7.238 The **United States** considers the three elements of the legal test argued by the complainants as "minimum" elements for showing a violation of Article 2.1 of the TBT Agreement. According to the United States, the text of Article 2.1 of the TBT Agreement requires the complainant to also establish that less favourable treatment is "in respect of" the technical regulation.[322] The United States contends that "the complaining party must show that the imported and domestic products in respect of which the measure applies are 'like' products".[323] According to the United States, the complainants have not demonstrated this, since they compare the treatment accorded to cattle and hogs (livestock), whilst the COOL measures apply to beef and pork (meat).[324] The United States contends that the term "in respect of technical regulations" in Article 2.1 of the TBT Agreement should be interpreted on the

[317] *(footnote original) US – Section 337*, BISD 36S/345, 386-387, paras. 5.11.
[318] Panel Report, *Japan – Film*, para. 10.379.
[319] See also Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.464.
[320] Panel Report, *EC – Bananas III*, para. 7.162.
[321] See paras. 7.196-7.216 above.
[322] United States' first written submission, footnote 166.
[323] United States' first written submission, para. 196.
[324] United States' first written submission, paras. 196-199.

basis of the dictionary meaning of the term "respect".[325] According to the United States, the COOL measures contain labelling requirements that "relate to" the labelling of meat, but are not "in respect of" livestock.[326] The United States also argues that the language "in respect of" in Article 2.1 of the TBT Agreement means that any less favourable treatment not directly attributable to a measure, such as that resulting from a private market actor's independent decision on how to comply, does not give rise to a breach of this provision.[327]

7.239 The complainants reject the argument put forward by the United States. **Canada** argues that Article 2.1 of the TBT Agreement does not establish that technical regulations shall accord national treatment to the products in respect of which the technical regulations have been imposed. Rather, the term "in respect of" contained in Article 2.1 refers to technical regulations, not to the products that are the subject of a discrimination claim. Further, Canada argues that if the US interpretation were accepted, a Member would be free under the TBT Agreement to discriminate, by means of a technical regulation, against imported products that are contents, inputs or ingredients of a final product as long as the technical regulation did not discriminate against the final product.[328]

7.240 Likewise, **Mexico** argues that the term "in respect of" simply clarifies that the non-discrimination obligation in Article 2.1 applies only to technical regulations. Further, the COOL measure explicitly applies to both livestock and the resulting meat since it links the labelling of meat to the country where the livestock was born, raised and slaughtered.[329]

Analysis by the Panel

7.241 We start our analysis with the term "in respect of". The panel in *US – Section 211 Appropriations Act* held that "the ordinary meaning of the term 'in respect of' is in 'relation [to], connection [with], reference [to]'[330]".[331]

7.242 The clause "in respect of technical regulations" is inserted into the rest of the sentence of Article 2.1 of the TBT Agreement. Hence, the clause "in respect of technical regulations" is a general qualifier for the rest of Article 2.1. In this regard, the clause "in respect of technical regulations" is similar to the qualifier contained in the *chapeau* of Article 2 ("[w]ith respect to their central government bodies"), which applies to Article 2 of the TBT Agreement as a whole.

7.243 That the phrase "in respect of technical regulations" is a general qualifier for the rest of Article 2.1 is confirmed by the French and Spanish versions of Article 2.1, which include "pour ce qui concerne les règlements techniques" and "con respecto a los reglamentos técnicos" between commas, thus visually and functionally separating that clause from the rest of Article 2.1.

7.244 The operative obligation laid down by the rest of Article 2.1 of the TBT Agreement establishes a clear link between "products" and "treatment no less favourable" by requiring that the latter be accorded to the former. This operative obligation does not, however, limit the scope of products covered by Article 2.1, which implies no specific limitation on the products falling within the scope of the provision.

[325] United States' first written submission, para. 197.
[326] United States' first written submission, para. 198.
[327] United States' opening oral statement at the first substantive meeting of the Panel, para. 34.
[328] Canada's second written submission, paras. 13-14.
[329] Mexico's second written submission, paras. 117 and 120.
[330] *(footnote original) The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), p. 2565.
[331] Panel Report, *US – Section 211 Appropriations Act*, para. 8.30.

7.245 Accordingly, we conclude that the term "in respect of technical regulations" in Article 2.1 of the TBT Agreement does not have the specific function suggested by the United States. This term merely clarifies that the obligation in Article 2.1 of the TBT Agreement applies to a specific type of measure: technical regulations. In particular, it does not serve to limit the relevance, for Article 2.1 of the TBT Agreement, of the "relatively broad product scope"[332] attached to the term "like products" under Article III:4 of the GATT 1994.

7.246 In any event, as we shall discuss below, the COOL measure applies not only to beef and pork but also to cattle and hogs. Formally speaking, the category of "covered commodities" under the COOL measure includes only beef and pork, not livestock[333], and the labelling requirements under the COOL measure apply to beef and pork only "at the final point of sale of the covered commodity to consumers".[334] As we explained above[335], however, without upstream livestock producers and processors providing the necessary information on origin as defined by the COOL measure, these retail labelling requirements are impossible to fulfil. The COOL measure recognizes this by creating obligations not only for retailers of beef and pork but also for the broad category of "any person engaged in the business of supplying [these] to a retailer".[336] The latter category of upstream market participants "shall provide information to the retailer indicating the country of origin of the covered commodity".[337] The COOL measure supports this obligation with an enforcement mechanism, including fines – again, applicable to both retailers and their suppliers.[338]

(ii) Whether imported and domestic products are "like"

7.247 The second essential element of the legal test under Article 2.1 of the TBT Agreement is whether the products at issue are "like".

<u>Main arguments of the parties</u>

7.248 As already indicated, **Canada** and **Mexico** argue that the Panel should interpret the term "like products" in Article 2.1 of the TBT Agreement in light of the similar term in Article III:4 of the GATT 1994.[339] In particular, according to the complainants, the Panel should apply the "like product" test under Article 2.1 of the TBT Agreement by assessing the four criteria of likeness confirmed by the Appellate Body in the context of Article III:4 of the GATT 1994[340], namely:

(a) the products' properties, nature and quality;

(b) the products' end-uses in a given market;

(c) consumer tastes and habits in respect of the products; and

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[332] Appellate Body Report, *EC – Asbestos*, para. 100.
[333] 7 U.S.C. § 1638.
[334] 7 U.S.C. § 1638a.
[335] See para. 7.205 above.
[336] 7 U.S.C. § 1638a.
[337] 7 U.S.C. § 1638a.
[338] 7 U.S.C. § 1638b.
[339] Canada's response to Panel question No. 42, Mexico's response to Panel question No. 42, United States' response to Panel question No. 42, Canada's opening oral statement at the first substantive meeting of the Panel, para. 11 and Mexico's opening oral statement at the first substantive meeting of the Panel, para. 29.
[340] Canada's first written submission, para. 79 and Mexico's first written submission, paras. 200 and 266.

(d) the tariff classification of the products.[341]

7.249 To demonstrate that Canadian cattle and hogs are like products to US cattle and hogs, Canada argues that: (i) cattle and hogs imported from Canada are physically indistinguishable from US-origin cattle and hogs, they belong to the same breeds and are raised in the same way; (ii) both Canadian and US cattle and hogs share the same end use of producing beef and pork; (iii) the consumers of cattle and hogs in the United States, i.e. feeding operations and slaughterhouses, view Canadian and US cattle and hogs as interchangeable and base their purchasing decisions on price, quality and availability; and (iv) under the harmonized system of tariff classification, both Canadian and US cattle are classified under subheading 0102.90. Canadian hogs are also classified under the same subheading as US hogs (0103.91 for live swine weighing less than 50kg and 0103.92 for live swine weighing more than 50kg).[342]

7.250 In addressing the four criteria of the likeness test, Mexico argues that: (i) the physical properties of Mexican feeder cattle are equivalent if not identical to US feeder cattle; (ii) feeder cattle, whether from Mexico or the United States, are used principally to produce beef; (iii) the consumers of feeder cattle (US backgrounders, feedlots and ultimately, slaughterhouses) perceived and treated Mexican and US cattle identically; and (iv) both Mexican and US cattle are classified under subheading 0102.90 of the Harmonized System.[343]

7.251 The **United States** invokes the same four elements of "likeness" as the complainants, but only in its arguments under Article III:4 of the GATT 1994[344], and without addressing the complainants' suggestion that these four elements should guide the Panel in assessing "likeness" under Article 2.1 of the TBT Agreement. The United States does not provide a detailed rebuttal of the complainants' arguments under the four criteria. The United States argues generally that the complainants have not demonstrated the "likeness" of US livestock and Canadian and Mexican livestock, let alone of US and Canadian/Mexican meat.[345]

Analysis by the Panel

7.252 Canada argues that for the purposes of Article 2.1 of the TBT Agreement, Canadian and US cattle are like products, and Canadian and US hogs are also like products,. Likewise, Mexico argues that Mexican cattle, in particular Mexican feeder cattle, and US cattle, in particular US feeder cattle, are also like products. In this regard, Canada recalled the findings of various panels to the effect that where the only alleged distinction under a measure at issue is based on the origin of imported and domestic products, such products should be considered "like products" for the purposes of Article III:4 of the GATT 1994.[346]

7.253 In response to a question from the Panel on whether it agrees with the complainants on the issue of "likeness" in general, the United States indicated that Canada and Mexico both addressed this issue in their first written submissions, and the United States has not contested the arguments put forward by the complainants.[347] Accordingly, we proceed on the understanding that the United States

[341] See Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 20-21 and Appellate Body Report, *EC – Asbestos*, para. 101.
[342] Canada's first written submission, paras. 81-84.
[343] Mexico's first written submission, paras. 199-205 and 266-267.
[344] United States' first written submission, para. 281.
[345] United States' first written submission, para. 282.
[346] Canada's first written submission, para. 85.
[347] United States' response to Panel question No. 117 (footnote omitted).

does not object to the contention that the only basis of distinction between the products at issue is that of origin.[348]

7.254 We recall that, in previous disputes, products that are distinguished solely on the basis of their origin were found to be like products within the meaning of Article III:4.[349] The guidance of these panels is also relevant for the complainants' claims under Article 2.1 of the TBT Agreement in this dispute.

7.255 Country of origin labelling, i.e. addressing and indicating "origin", is the essence and rationale of the COOL measure. In the context of ground meat, the COOL measure refers to the origin of the meat that has been ground. As regards muscle cuts, the COOL measure distinguishes the products at issue according to the country in which the birth, raising and slaughtering of the animal from which meat is derived took place. Also, under the COOL measure, the origin of meat does not change according to the length of time an animal was raised in a specific country.

7.256 Accordingly, and in the absence of counterarguments from the United States, we need not engage in any further analysis to conclude that the products at issue in this dispute are "like products" in the sense of Article 2.1 of the TBT Agreement. In particular, we find that Canadian and US cattle are like products; moreover, Canadian and US hogs are also like products. Further, Mexican cattle, in particular Mexican feeder cattle, and US cattle, in particular US feeder cattle, are also like products.

(iii) Whether the imported products are accorded less favourable treatment than that accorded to like domestic products

7.257 The third essential element of the legal test under Article 2.1 of the TBT Agreement is "treatment no less favourable", or less favourable treatment.

<u>Main arguments of the parties</u>

7.258 **Canada** argues that the COOL measure treats Canadian cattle and hogs less favourably than US cattle and hogs.[350] **Mexico** argues the same with regard to Mexican and US cattle.[351] The **United States** submits that Canada and Mexico have failed to show that the COOL measures provide less favourable treatment to the imported products at issue.[352]

Legal test

7.259 The parties suggest that the Panel interpret the term "less favourable treatment" contained in Article 2.1 of the TBT Agreement in light of Article III:4 of the GATT 1994.[353] The complainants argue[354] that "treatment no less favourable" should be assessed in light of whether the measure in question "modifies the conditions of competition in the relevant market to the detriment of imported

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[348] Canada's first written submission, para. 85.

[349] Panel Report, *Turkey – Rice*, para. 7. 214. See also ibid., para. 7.216, Panel Report, *Canada – Autos*, para. 10.74, Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.133, Panel Report, *India – Autos*, para. 7.174 and Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.164 and footnote 246.

[350] Canada's first written submission, para. 86.

[351] Mexico's first written submission, para. 219.

[352] United States' first written submission, para. 140.

[353] Canada's first written submission, para. 86, Mexico's first written submission, para. 268, Canada's Response to Panel question No. 42, Mexico's Response to Panel question No. 42, and United States' Response to Panel question No. 42.

[354] Canada's first written submission, para. 83 and Mexico's first written submission, para. 217.

products"[355], by addressing whether the measure "gives domestic products a competitive advantage in the market over imported like products".[356] Canada adds that, in the words of a GATT panel report, the objective of "treatment no less favourable" is to provide "equality of opportunities"[357] for imported products.[358] Also, Canada recalls that in *Korea – Various Measures on Beef*, the Appellate Body upheld the violation of Article III:4 of the GATT 1994 on the basis of a "drastic reduction of commercial opportunity"[359] for imported products.[360]

7.260 Mexico argues that the COOL measure does not *de jure* distinguish between imported and US livestock.[361] In turn, Canada contends that the COOL measure does not explicitly require that imported covered commodities be treated less favourably than domestic commodities, but has that effect.[362] Thus, the complainants seek to demonstrate that Canadian and Mexican livestock is accorded *de facto* less favourable treatment than US livestock.[363] Canada and Mexico argue that similarly to Article III:4 of the GATT 1994, Article 2.1 of the TBT Agreement should be interpreted as applying to both *de jure* and *de facto* discrimination.[364]

7.261 **Canada** argues that the COOL measure creates incentives for US industry to use exclusively US-origin animals.[365] Using the words of the Appellate Body in *Korea – Various Measures on Beef*, Canada contends that the COOL measure imposes the "necessity of making a choice"[366], and argues that "the 'intervention of some element of private choice' does not absolve the United States of the obligation to ensure that imported cattle and hogs are not subject to less favourable competitive conditions than their like domestic counterparts".[367]

7.262 **Mexico** argues that the COOL measure *de facto* discriminates against Mexican cattle. Mexico points out that a formal difference in treatment between imported and like domestic products is not necessary to show a violation; rather, the question is whether the measure modifies the conditions of competition.[368] Mexico submits that the following facts show the *de facto* discriminatory effect of the COOL measure: (i) feeder cattle are a commodity product in a market that is sensitive to increased costs; (ii) Mexican-born cattle are a small portion of the total US cattle slaughter; (iii) prior to the COOL measure the stocks of Mexican and US cattle were normally commingled at all stages of production; (iv) not all market participants handle both Mexican and US cattle; and (v) the costs of compliance are higher for participants who handle Mexican feeder cattle.[369]

7.263 The **United States** references the Appellate Body's report in *Dominican Republic – Import and Sale of Cigarettes* on the meaning of less favourable treatment in regard to competitive conditions, but contends that its application leads to the opposite conclusion from that advanced by

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[355] Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.
[356] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 93.
[357] GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.11.
[358] Canada's first written submission, para. 88.
[359] Appellate Body Report, *Korea – Various Measures on Beef*, para. 145.
[360] Canada's first written submission, para. 90.
[361] Mexico's first written submission, para. 218.
[362] Canada's first written submission, para. 89.
[363] Canada's first written submission, paras. 91-154 and Mexico's first written submission, paras. 220-232 and 269.
[364] Canada's response to Panel question No. 42 and Mexico's first written submission, para. 218.
[365] Canada's first written submission, para. 91.
[366] Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.
[367] Canada's first written submission, para. 91.
[368] Mexico's first written submission, para. 218.
[369] Mexico's first written submission, para. 220.

the complainants.[370] According to the United States, the COOL measures do not accord less favourable treatment to imports.[371] The United States refers to *EC – Trademarks and Geographical Indications (Australia)*[372], where the panel held that "the starting point for this analysis [of 'less favourable treatment'] must be whether the measure at issue accords any difference in treatment".[373] The United States argues that the COOL measures treat beef, pork and livestock identically, regardless of origin, since they do not explicitly require that imported commodities be treated less favourably than domestic ones. Further, the United States contends that the COOL measures are facially neutral since they require meat to be labelled with origin information regardless of where the livestock from which the meat was derived had been born, raised, or slaughtered.[374]

7.264 Further, the United States contends that it is not sufficient for the complainants to simply demonstrate that a measure has had some detrimental effect on imported products.[375] As the Appellate Body explained, there is no less favourable treatment "if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product".[376] According to the United States, the complainants seem to acknowledge that any decision by livestock and meat processors to change their production practices results in large part from the complainants' relatively small market share.[377] In this regard, the United States notes that in *Dominican Republic – Import and Sale of Cigarettes*, the Appellate Body found that a smaller market share of imported products does not turn an origin-neutral measure into one affording less favourable treatment in the legal sense.[378] The United States additionally refers to *Korea – Various Measures on Beef*[379], where the Appellate Body held that action by private actors not compelled by the measure at issue does not result in a violation of Article III:4 of the GATT 1994.[380]

Whether the COOL measure involves segregation and differential costs for imported livestock

7.265 **Canada** argues that the COOL measure has modified the conditions of competition to the detriment of Canadian cattle and hogs, because it imposes higher costs on the use and sale of imported livestock.[381] These higher costs are due mainly to the segregation of domestic and imported animals and meat based on origin throughout the production chain. The majority of animals in the US market are of domestic origin. Hence, US feeding operations and slaughterhouses relying only on US-origin livestock face much lower additional costs than feeding operations and slaughterhouses that produce both US and mixed-origin meat.[382] As they operate in a competitive market, market participants using both domestic and imported livestock cannot pass on the additional costs resulting from the COOL measure. Canada argues that the substantial additional costs for the use of Canadian livestock resulting from the COOL measure have reduced demand for such livestock by US feeding operations

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[370] United States' first written submission, para. 147, footnote 169.
[371] United States' first written submission, para. 142.
[372] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.464.
[373] United States' first written submission, para. 142.
[374] United States' first written submission, paras. 142-145.
[375] United States' first written submission, para. 147.
[376] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96.
[377] United States' first written submission, para. 174.
[378] United States' first written submission, para. 173. See also Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 9
[379] Appellate Body Report, *Korea – Various Measures on Beef*, para. 149.
[380] United States' second written submission, paras. 64-65.
[381] Canada's first written submission, para. 91.
[382] Canada's first written submission, paras. 92-94.

and slaughterhouses. The price basis between Canadian and US-fed cattle has widened, and US imports of Canadian livestock have dramatically decreased.[383]

7.266 Canada submits that the COOL measure imposes costly segregation requirements on the use of imported cattle and hogs by retailers and slaughterhouses. Retailers must track the country of origin of each piece of meat throughout retail operations. Slaughterhouses handling livestock of multiple origins must be able to identify the animals as they are processed into meat, which entails segregation.[384] This has resulted in a deterioration of the competitive opportunities for Canadian livestock. In particular, the COOL measure has: (i) reduced demand for Canadian cattle and hogs resulting from segregation costs[385]; (ii) reduced the number of US feeding operations and slaughterhouses accepting Canadian livestock[386]; and (iii) resulted in restrictions on the days and times that slaughterhouses accept Canadian animals.[387] Canada adds that there is limited consumer demand for the kind of information provided under the COOL measure.[388]

7.267 **Mexico** submits that even the 2009 Final Rule (AMS) recognizes that costs are likely to increase for processors handling products sourced from multiple countries, as they will probably choose to operate separate shifts for processing these products or to split processing within shifts.[389] Further, US packing plants have reduced the price paid for cattle born in Mexico and raised in the United States by applying an additional discount to the purchase price, which has been ultimately transferred to Mexican cow-calf operators.[390]

7.268 Mexico adds that USDA recognized that the COOL measure would necessarily lead to segregation during beef production[391], and acknowledged the likelihood of additional costs generated by segregation.[392] Mexico argues that the COOL measure has caused US packing plants to cease commingling cattle born in Mexico and raised in the United States with cattle born and raised in the United States and instead to segregate by: (i) reducing the number of backgrounders, feedlots and plants that raise and slaughter cattle born in Mexico and raised in the United States; (ii) reducing the number of days per week when such cattle are slaughtered and processed; (iii) reducing the overall number of such cattle that are slaughtered and processed; and (iv) requiring advance notice prior to accepting such cattle.[393] Mexico adds that USDA itself recognizes that consumers are not willing to bear the costs of providing the kind of information required under the COOL measure.[394]

7.269 The **United States** argues that any technical regulation, including the COOL measures, involve compliance costs, and compliance costs will necessarily vary for different market participants.[395] Likewise, the costs for market participants will rarely be constant over time; rather, these costs will be higher immediately following a regulatory change, and would decline with time.[396] The complainants' evidence on costs relates to a brief period following the implementation of the COOL measures. Further, even if certain costs of compliance with the COOL measures might not be

[383] Canada's first written submission, paras. 140-154.
[384] Canada's first written submission, paras. 95-106.
[385] Canada's first written submission, paras. 107-112.
[386] Canada's first written submission, paras. 113-117.
[387] Canada's first written submission, paras. 118-124.
[388] Canada's first written submission, paras. 193-195.
[389] Mexico's first written submission, para. 228.
[390] Mexico's first written submission, paras. 222-230.
[391] Mexico's first written submission, para. 228.
[392] Mexico's first written submission, para. 230.
[393] Mexico's first written submission, para. 221.
[394] Mexico's first written submission, para. 89.
[395] United States' first written submission, para. 193.
[396] United States' first written submission, para. 194.

shared equally among market players, this alone cannot support the conclusion that the measures effectively modify the conditions of competition. To the extent the COOL measures impose costs these are merely costs inherent to regulating.[397]

7.270 The United States adds that the complainants' arguments rest on a number of erroneous factual assertions regarding the operation of the COOL measures and their impact on the livestock market.[398] The COOL measures do not require US processors to segregate.[399] Rather, the COOL measures entail considerable flexibility, so feeding operations and slaughterhouses can meet the requirements in any way they choose.[400] The United States asserts that a specific slaughterhouse has at least five options that do not require segregation: (i) processing livestock of exclusively domestic origin; (ii) processing livestock of exclusively foreign origin; (iii) processing livestock of exclusively mixed origin and affixing the same label on all the resulting meat; (iv) using the commingling provisions to process domestic and mixed-origin livestock on the same production day; and (v) processing domestic and mixed-origin livestock on separate days.[401] In fact, argues the United States, the evidence referenced by the complainants shows that numerous producers continue processing domestic and foreign-origin livestock without segregating them or without limiting the days for foreign livestock supplies.[402] These processing plants have more than enough capacity to process all of the complainants' livestock exports.

7.271 According to the United States, to the extent that market players are segregating or demanding less foreign livestock, this results from their independent decisions, and is not attributable to the United States.[403] In fact, some processors had segregated their processing lines before the COOL measures existed – in order to qualify for premium marketing programs, to meet third-country import requirements and to comply with BSE-related restrictions. According to the United States, this pre-existing segregation shows that individual market players have reasons for segregating products that have nothing to do with the COOL measures and that, to the extent processors are segregating to comply with the COOL measures, the costs imposed by this practice are not as high as the complainants assert.[404]

7.272 **Canada** and **Mexico** reject this argument of the United States. The complainants argue that the limited segregation prior to the COOL measure was not origin-based, but it was rather for participating in voluntary premium programs concerning meat quality and for exporting beef through export verification programs.[405] Canada clarifies that there is no grade-labelling for pork. In any event, Canada submits that the expenses of those programs are offset by the premiums paid by the domestic or foreign consumer.[406] Moreover, any small-scale segregation to supply meat to niche markets is not comparable to the systematic segregation required by the COOL measure.[407] Further,

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[397] United States' first written submission, para. 191.
[398] United States' first written submission, para. 150.
[399] United States' first written submission, paras. 150, 152-159; and United States' second written submission, paras. 42-44.
[400] United States' first written submission, paras. 153-156 and 158.
[401] United States' first written submission, para. 158: and United States' second written submission, para. 43.
[402] United States' first written submission, paras. 164-167; and United States' second written submission, para. 57.
[403] United States' first written submission, paras. 150 and 168-189.
[404] United States' first written submission, paras. 168-170, United States' response to Panel question No. 43 and United States' second written submission, para. 59.
[405] Canada's second written submission, paras. 25-32, Canada's response to Panel question No. 120, Mexico's response to Panel question No. 43, Mexico's response to Panel question No. 120.
[406] Canada's second written submission, paras. 25-32.
[407] Canada's opening oral statement at the second substantive meeting of the Panel, para. 27.

Mexico argues that although segregation is not explicitly required by the COOL measure, in practice it is necessary for the industry to comply with the measure and that an analysis of the options put forth by the United States demonstrates that segregation in some form is required by the COOL measure.[408]

Whether there is any incentive to process domestic livestock

7.273 The complainants argue that the COOL measure creates incentives along the meat production chain for participants to handle exclusively US livestock.[409] **Canada** argues that the possibility to commingle does not eliminate segregation costs that create an economic disincentive to use Canadian-born livestock throughout the supply chain.[410] **Mexico** argues that the COOL measure is structured so that the most commercially rational means of compliance is to stop handling Mexican cattle or to segregate Mexican cattle in a way that restricts trade in those cattle.[411]

7.274 The **United States** contests the complainants' arguments about the COOL measures creating incentives for US industry to segregate and favour domestic livestock.[412] According to the United States, the Appellate Body report in *Korea – Various Measures on Beef* does not support these arguments. The dual retail system addressed in that dispute imposed "the legal necessity of making a choice"[413] between domestic and foreign products. By contrast, the complainants appear to argue that the COOL measures create a *commercial* necessity for some producers to segregate products. However, claims the United States, the fact that some processors choose not to segregate shows that segregation is not even a commercial necessity, let alone a legal one.[414]

Analysis by the Panel

Introduction

Relevance of Article III:4 of the GATT 1994

7.275 We have noted the similarities between the text and structure of the national treatment obligations under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, and that, according to its preamble, the TBT Agreement serves "to further the objectives of GATT 1994".[415] Hence, we have concluded that Article III:4 of the GATT 1994 provides relevant context for interpreting Article 2.1 of the TBT Agreement – in particular, for interpreting the term "treatment no less favourable than that accorded to like products of national origin".[416]

7.276 We recall that Article III:4 of the GATT 1994 ultimately serves to further the "equality of competitive conditions for imported products in relation to domestic products" or "the equal competitive relationship between imported and domestic products", rather than "expectations ... of any particular trade volume".[417] Further, in *Korea – Various Measures on Beef*, the Appellate Body held, in the context of Article III:4 of the GATT 1994, that "[a]ccording 'treatment no less favourable'

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[408] Mexico's opening oral statement at the second substantive meeting of the Panel, paras. 20-23.
[409] Canada's first written submission, para. 91 and Mexico's first written submission, para. 215.
[410] Canada's opening oral statement at the second substantive meeting of the Panel, para. 23.
[411] Mexico's second written submission, para. 135.
[412] United States' first written submission, para. 169.
[413] Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.
[414] United States' first written submission, para. 171.
[415] See para. 7.233 above.
[416] See para. 7.234 above.
[417] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16. See also Appellate Body Report, *EC – Asbestos*, para. 93.

means ... according *conditions of competition* no less favourable to the imported product than to the like domestic product".[418]

7.277 We bear this and the interpretation of Article III:4 of the GATT 1994 in mind in analysing whether the COOL measure involves less favourable treatment for imported livestock under Article 2.1 of the TBT Agreement.

Order of analysis

7.278 Our analysis of the complainants' claims of less favourable treatment starts with a review of the statutory definition of the relevant meat labels under the COOL measure, followed by an assessment of the country of origin labelling regimes applicable to muscle cuts and ground meat, respectively.

7.279 In the context of muscle cuts, we address the following issues to determine whether the COOL measure accords less favourable treatment to imported than to like domestic livestock:

(a) whether the different categories of labels under the COOL measure accord different treatment to imported livestock;

(b) whether the COOL measure involves segregation and, consequently, differential costs for imported livestock; and

(c) whether, through the compliance costs involved, the COOL measure creates any incentive to process domestic livestock, thus reducing the competitive opportunities of imported livestock.

7.280 We also address specific arguments by the United States regarding any incentive in favour of domestic livestock or any reduction in the competitive opportunities of imported livestock as a result of the COOL measure. We then briefly address whether the ground-meat label under the COOL measure accords less favourable treatment to imported livestock. Finally, we turn to the economic and econometric evidence submitted by the parties, to complete our analysis with regard to the complainants' claims under Article 2.1 of the TBT Agreement.

7.281 In analysing the complainants' claims under Article 2.1, we do not consider it necessary to address the country of origin labelling measures of other WTO Members referenced by the parties.[419] Our findings under Article 2.1 of the TBT Agreement address only the COOL measure of the United States as challenged by the complainants in the current proceedings.

Statutory definition of the relevant meat labels under the COOL measure

7.282 The COOL measure sets out labelling requirements at the retail stage, i.e. "at the final point of sale to consumers".[420] The labels at issue in this dispute must be affixed on muscle cuts of meat and on ground meat, namely beef and pork; however, there is no requirement to place labels on livestock from which meat is produced.

[418] Appellate Body Report, *Korea – Various Measures on Beef*, para. 135 (original emphasis). See also *ibid.*, paras. 136-137.
[419] See Canada's second written submission, paras. 17-23 and Mexico's response to Panel question No. 94.
[420] United States' first written submission, para. 33; 7 U.S.C. § 1638a(a)(1).

7.283 Nevertheless, the COOL measure and the COOL labels are difficult to dissociate from upstream stages of meat production. The labels are intended to convey information on the "origin" of meat. Under the COOL statute, the ground-meat label shall list "all of the countries of origin of ... ground beef [or] ... pork" or "all of the reasonably possible countries of origin of ... ground beef [or] ... pork".[421] According to the 2009 Final Rule (AMS), these terms refer to the origin of meat that has been ground: "if a country of origin is utilized as a raw material source in the production of ground meat, it must be listed on the label".[422]

7.284 For the four muscle cut labels, country of origin is determined by the country in which specific livestock production and processing steps, namely birth, raising and slaughtering, took place. All three of these steps precede the meat retail stage; indeed, they cover the period back to the birth of the animal from which meat is produced. The statutory definitions of the four muscle cut labels determine "origin" by explicit reference to the "animal" which the meat subject to COOL labelling is "derived from":

MUSCLE CUT LABEL	**REFERENCE IN THE COOL STATUTE**[423]	**STATUTORY DEFINITION**[424]
Label A	"United States Country of Origin"	"beef [or] ... pork ... derived from an animal that was ... exclusively born, raised, and slaughtered in the United States"
Label B	"Multiple Countries of Origin"	"beef [or] ... pork ... derived from an animal that is – (i) not exclusively born, raised and slaughtered in the United States; (ii) born, raised or slaughtered in the United States; and (iii) not imported into the United States for immediate slaughter"
Label C	"Imported for Immediate Slaughter"	"beef [or] ... pork ... derived from an animal that is imported into the United States for immediate slaughter"
Label D	"Foreign Country of Origin"	"beef [or] ... pork ... derived from an animal ... not born, raised, or slaughtered in the United States"

7.285 Given the distinction under the COOL measure between the labelling regimes applicable to muscle cuts and ground meat, we address these two labelling regimes separately.

Muscle cut labels

The relationship among the muscle cut labels under the COOL measure

7.286 The definitions of the four muscle cut labels under the COOL measure are mutually exclusive, and they distinguish between Label A and the rest of the muscle cut labels (Labels B-D) as regards the origin of livestock. Label A refers to muscle cuts from livestock born, raised and

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[421] 7 U.S.C. § 1638a(a)(2)(E).
[422] 74 FR 2671.
[423] 7 U.S.C. §§ 1638a(a)(2)(A)-(D).
[424] 7 U.S.C. §§ 1638a(a)(2)(A)-(D).

slaughtered in the United States; in other words, livestock with no imported element. Conversely, the other three muscle cut labels, Labels B-D, all identify livestock with some imported element. Under these three labels, at least one (for Labels B-C) but possibly all three (for Label D) livestock processing steps determining origin (i.e. birth, raising and slaughtering), as defined by the United States, have taken place outside of the United States.

7.287 The COOL measure provides some – albeit limited – flexibility between the use of Label A and the rest of the labels. First, Label A cannot be used for meat eligible for the other three labels (Labels B-D), i.e. for meat from livestock for which at least one of the three processing steps determining origin under the COOL measure has taken place outside the United States. In other words, there is no flexibility under the COOL measure allowing for meat from imported livestock to carry Label A. This is underscored by the word "exclusively" in the statutory definition of Label A.

7.288 As regards the other three labels, Label D is not interchangeable with any other muscle cut labels, whereas the COOL measure allows for certain flexibilities between Labels B and C. Specifically, the 2009 Final Rule (AMS) explicitly allows for affixing Label B on Labels B and C meat commingled on a single production day.[425] Further, Labels B and C may overlap in practice since "the countries of origin may be listed in any order"[426] on Label B. Thus, specific Labels B and C may look the same, provided that the countries involved in the production of the Label B and C muscle cuts in question are the same.

7.289 In any event, flexibilities between Labels B and C have limited relevance for the complainants' claims under Article 2.1 of the TBT Agreement. In the context of these claims, the focus of our analysis is the distinction between Label A, defined as "United States Country of Origin" in the COOL statute, and the rest of the labels, which all involve livestock with an imported element.

7.290 In this regard, we note that there was a major flexibility in that, prior to the 2009 Final Rule (AMS), it was possible to use Label B for muscle cuts eligible for Label A (but not *vice versa*) – even without commingling. By using "and/or", the Interim Final Rule (AMS) of August 2008 explicitly allowed using Label B for Label A meat without limitations:

> "If an animal was born, raised *and/or* slaughtered in the United States and was not imported for immediate slaughter as defined in § 65.180, the origin of the resulting meat products derived from that animal may be designated as Product of the United States, Country X, and/or (as applicable) Country Y, where Country X and Y represent the actual or possible countries of origin."[427] (emphasis added)

7.291 In fact, at least two major US meat processors declared in 2008 that they would be complying with the COOL requirements by "offering the majority of [their] beef and pork cuts under the multi-country Category B label"[428], with one of them pointing out that "the complexity, costs, and

[425] 74 FR 2659.

[426] 74 FR 2659.

[427] 73 C.F.R. § 65.300(e)(1)(i) (Exhibits CDA-3 and MEX-4). This was also possible in part because the COOL statute uses the word "may" in regard to designating products with Labels A and B. Under the COOL statute, "[a] retailer of a covered commodity *may* designate the covered commodity as exclusively having a United States country of origin only if the covered commodity is derived from an animal that [fulfils the requirements for Label A]." Further, "a retailer of a covered commodity that [fulfils the requirements for Label B] *may* designate the country of origin of such covered commodity as *all* of the countries in which the animal was born, raised or slaughtered." 7 U.S.C. §§ 1638a (a)(2)(A) and 1638a(a)(2)(B)(i) (emphasis added).

[428] Exhibits CDA-36 and 38, MEX-33. See also Exhibits CDA-21 to 23, 39, 77 (BCI), MEX-55, 57 and 83.

incremental record keeping associated with sorting livestock and finished product into both categories #1 [Label A] and #2 [Label B] [would be] extremely costly".[429]

7.292 This predominantly Label-B approach involved a significant proportion of meat that would have been otherwise only eligible for Label A. As the US Congressional Research Service explained:

> "[a]fter issuance of the interim rules in August 2008, many retailers and meat processors reportedly had planned to use the 'catch-all' label ... [i.e. Label B] on as much meat as possible – even products that would qualify for the U.S.-only label, because it was both permitted and the easiest requirement to meet."[430]

7.293 This flexibility, however, ended with the 2009 Final Rule (AMS). The 2009 Final Rule (AMS) recorded "extensive feedback from livestock producers, members of Congress, and other interested parties expressing concern about the provision in the [I]nterim [F]inal [R]ule [(AMS) of August 2008] that allowed U.S. origin [i.e. Label A] product to be labeled with a mixed origin label [i.e. Label B]".[431] The 2009 Final Rule (AMS) added that "[i]t was never the intent of the Agency [i.e. USDA] for the majority of product eligible to bear a U.S. origin declaration to bear a multiple origin designation".[432]

7.294 Thus, the 2009 Final Rule (AMS) removed the unlimited possibility of using Label B for Label A muscle cuts, and allowed such use only when the two types of meat are commingled on a single production day:

> "For muscle cut covered commodities derived from animals born, raised, and slaughtered in the U.S. that are commingled during a production day with muscle cut covered commodities derived from animals that were raised and slaughtered in the United States, and were not derived from animals imported for immediate slaughter as defined in § 65.300(e)(1), the origin may be designated as Product of the United States, Country X, and (as applicable) Country Y."[433]

7.295 In other words, under the COOL measure, in particular the 2009 Final Rule (AMS), Label B may be used for Label A meat but only in the case of commingling on a single production day. Under the COOL measure, therefore, imported livestock is ineligible for the label reserved for meat from

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[429] Exhibit CDA-21.

[430] Exhibits CDA-117, 199 and MEX-53.

[431] 74 FR 2659.

[432] 74 FR 2659.

[433] 74 C.F.R. § 65.300(e)(2). See also 74 FR 2659. This is also confirmed by the industry guidance provided by USDA. In dealing with Frequently Asked Questions on COOL, USDA issued three publications on 11 (Exhibit CDA-29), 19 (Exhibit CDA-30) and 26 September 2008 (Exhibit CDA-31), respectively. The first two publications posed the question whether "a retailer, like a meat packer, [can] label meat products derived from livestock born, raised, and slaughtered in the United States (i.e. Product of USA) as having a mixed origin (e.g., Product of the United States, Canada, and Mexico)?", and responded without reservations in the affirmative: "Yes. Retailers are permitted to market U.S. produced meat products under a mixed origin label declaration." (Exhibits CDA-29 and 30)

Conversely, in response to the same question, the third publication, dated 26 September 2008, reduced this possibility to Label A and B meat commingled on a single production day:

> "Similar to packers and intermediary suppliers, retailers are permitted to market U.S. produced meat products under a mixed origin label (e.g., Product of U.S., Canada and Mexico) if they are commingled with meat of mixed origin. That is, if a retailer further processes meat at the store and the resulting package includes meat of both U.S. origin and mixed origin (e.g., Product of U.S., Canada and Mexico), the origin declaration can read Product of U.S., Canada and Mexico." (Exhibit CDA-31)

exclusively US-origin livestock, whereas in certain circumstances meat from domestic livestock is eligible for a label that involves imported livestock.

7.296 We consider this difference only as "the starting point"[434] of our analysis of the complainants' national treatment claims under Article 2.1 of the TBT Agreement. Indeed, in *Korea – Various Measures on Beef,* the Appellate Body held that differential treatment does not necessarily violate Article III:4 of the GATT 1994: "[a] measure that provides treatment to imported products that is *different* from that accorded to like domestic products is not necessarily inconsistent with Article III:4, as long as the treatment provided by the measure is 'no less favourable'".[435]

7.297 Further, the complainants are not contesting any formal difference in the treatment accorded to domestic and imported livestock *per se,* nor the existence or extent of the flexibility of commingling domestic with imported livestock. Instead, they argue that the COOL measure accords *de facto* less favourable treatment to imported livestock.[436] This raises the threshold question whether Article 2.1 of the TBT Agreement covers both *de jure* and *de facto* discrimination.

De jure *versus* de facto *discrimination*

7.298 In *Canada – Autos,* the Appellate Body held that "Article III:4 of the GATT 1994 covers both *de jure* and *de facto* inconsistency.[437]"[438] In *Korea – Various Measures on Beef,* the Appellate Body added that:

> "A formal difference in treatment between imported and like domestic products is ... neither necessary, nor sufficient to show a violation of Article III:4. Whether or not imported products are treated 'less favourably' than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products."[439]

7.299 Similarly, we read Article 2.1 of the TBT Agreement as prohibiting both *de jure* and *de facto* less favourable treatment for like imported products. In fact, like Article III:4 of the GATT 1994, Article 2.1 of the TBT Agreement lays down the national treatment obligation with language that is silent on any distinction between *de jure* and *de facto* discrimination. In *EC – Bananas III,* the Appellate Body held that Article II of the GATS covers both *de jure* and *de facto* discrimination since that provision, in particular the phrase "treatment no less favourable", is silent on such a distinction:

> "The obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude *de facto* discrimination."[440]

7.300 To effectively ensure equality of competitive conditions, Article 2.1 of the TBT Agreement cannot exclude measures that discriminate in effect. Limiting Article 2.1 of the TBT Agreement to

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[434] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.464.

[435] Appellate Body Report, *Korea – Various Measures on Beef*, para. 135 (original emphasis). See also ibid., paras. 136-137.

[436] See Canada's response to Panel question Nos. 42 and 46 and Mexico's first written submission, paras. 218, 220 and 263.

[437] *(footnote original)* See, e.g. Panel Report, *Italian Discrimination against Imported Agricultural Machinery*, L/833, BISD 7S/60, adopted 23 October 1958, para. 12.

[438] Panel Report, *Canada – Autos*, para. 140.

[439] Appellate Body Report, *Korea – Various Measures on Beef*, para. 137 (original emphasis).

[440] Appellate Body Report, *EC – Bananas III*, para. 233. See also Appellate Body Report, *Canada – Autos*, para. 141.

de jure discrimination would facilitate circumvention.[441] As the Appellate Body explained in *EC – Bananas III* with regard to Article II of the GATS:

> "[I]f Article II was not applicable to *de facto* discrimination, it would not be difficult – and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods – to devise discriminatory measures aimed at circumventing the basic purpose of that Article."[442]

7.301 As the TBT Agreement serves "to further the objectives of GATT 1994", it would be incongruous to interpret Article 2.1 of the TBT Agreement as excluding *de facto* discriminatory treatment, while the corresponding national treatment provision in Article III:4 of the GATT 1994 covers that type of discrimination.

7.302 Accordingly, we continue our analysis by addressing whether the muscle cut labels under the COOL measure accord *de facto* less favourable treatment to imported than to domestic livestock and *de facto* modify the *conditions of competition* in the US market to the detriment of imported livestock.[443] The complainants allege this is the case because in general the COOL measure entails higher costs for handling imported than domestic livestock. We now turn to this issue.

Costs of compliance with the COOL measure

7.303 The complainants argue, and the United States does not contest, that the COOL measure involves compliance costs. In fact, in the 2009 Final Rule (AMS), USDA indicated that the COOL measure entails compliance costs for all participants in the livestock and meat sector:

> "[F]irms and establishments throughout the supply chain for affected commodities will incur costs associated with the implementation of COOL. This includes producers, intermediaries, and retailers."[444]

7.304 The 2009 Final Rule (AMS) includes a dedicated section analysing the benefits and costs of the COOL measure for various stages of the meat supply chain.[445] As regards cattle and beef, for "retail stores", the USDA cost analysis identifies the following as "cost drivers": "individual package labels or other point-of-sale materials", potential "additional labor and personnel training", "modification of existing recordkeeping systems", possibly involving "software programming and ... additional computer hardware".[446]

7.305 The analysis then turns to "distribution centers or warehouses", explaining that "[d]irect store deliveries (such as when a local truck farmer delivers fresh produce directly to a retail store) are an exception". For the distribution segment, the USDA cost analysis identifies the following as cost drivers: the "modification of existing recordkeeping processes", "additional labor and training" and "new processes and procedures needed to maintain the flow of country of origin ... information through the distribution system". Moreover, according to the USDA cost analysis, "[t]here may be a

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[441] See Appellate Body, *Canada – Autos*, para. 142 and Appellate Body Report, *EC – Bananas III*, para. 233.

[442] Appellate Body Report, *EC – Bananas III*, para. 233.

[443] In light of the complainants' arguments, we refrain from addressing whether the COOL measure involves *de jure* less favourable treatment for imported Canadian and Mexican livestock.

[444] 74 FR 2680. See also Exhibits CDA-72 (BCI) and US-18.

[445] See 74 FR 2682 *et seq*.

[446] 74 FR 2684-2685.

need to further separate products within the warehouse, add storage slots, and alter product stocking, sorting, and picking procedures".[447]

7.306 Turning to beef "packers and processors", the USDA cost analysis points out that "[t]he efficiency of operations may be affected as products move through the receiving, storage, processing, and shipping operations".[448] Finally, at "the production level", according to the USDA cost analysis, "additional producer costs include the cost of modifying and maintaining a recordkeeping system for country of origin information, animal or product identification, and labor and training". The USDA cost analysis adds that:

> "[T]o estimate the direct cost of this rule, the focus is on those units of production that are affected ... For livestock, the relevant unit of production is an animal because there will be costs associated with maintaining country of origin information on each animal. These costs may include recordkeeping, ear tagging, and other related means of identification on either an individual animal or lot basis."[449]

7.307 The USDA cost analysis of the COOL measure points to increasing costs as livestock and meat move downstream in the supply and marketing chain, based on "the expectation of relatively small implementation costs at the cow-calf level of production, but relatively higher costs each time cattle are resold". As regards intermediaries, the 2009 Final Rule (AMS) expects "increased costs associated with tracking cattle and the covered beef commodities produced from these animals and then providing this information to subsequent purchasers, which may be other intermediaries or covered retailers". According to the 2009 Final Rule (AMS), "[i]ncremental costs for beef packers may include additional capital and labor expenditures to enable cattle from different origins to be tracked for slaughter, fabrication and processing". For retailers, the 2009 Final Rule (AMS) takes into account specific:

> "[C]osts for individual package labels, meat case segmentation, record keeping and information technology changes, labor, training, and auditing. In addition, there likely will be increased costs for in-store butcher department operations related to cutting, repackaging, and grinding operations."[450]

7.308 For hogs, the 2009 Final Rule (AMS) depicts a similar situation. It estimates that "[c]osts for all pork sector intermediaries (including handlers, processors, and wholesalers) should be similar to costs for beef sector intermediaries". As regards pork retailers, the 2009 Final Rule (AMS) estimates costs being "lower than for beef" retailers but this difference is primarily due to "higher costs incurred by in-store grinding operations to produce ground beef", whereas "most ground pork is processed into sausage and other products not covered by the [2009 Final R]ule [(AMS)]".[451]

7.309 Canada submitted a cost assessment of the COOL requirements prepared by a consultancy, Sparks Companies Inc., in 2003.[452] Further, both complainants submitted an updated version of this cost assessment prepared by Informa Economics, the successor to Sparks Companies Inc., in 2010 on the basis of 2009 data.[453]

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[447] 74 FR 2685.
[448] 74 FR 2685.
[449] 74 FR 2685.
[450] 74 FR 2687.
[451] 74 FR 2687.
[452] See Exhibit CDA-70.
[453] See Exhibits CDA-64 and MEX-24.

7.310 Although the United States has called into question the underlying data and methodology of these studies, these criticisms relate primarily to the specific cost estimates in the studies and the comparison between the costs incurred by handling only US-origin versus handling both domestic and imported livestock and meat.[454] The United States has not contested the findings of the Sparks and Informa reports regarding the existence of the costs incurred as a result of the country of origin labelling requirements at the various livestock and meat processing stages. Like the cost analysis of the 2009 Final Rule (AMS), the Informa Report finds that, in general, costs of compliance with the requirements arise at every stage of the livestock and meat supply chain, and that these costs increase as livestock and meat move downstream in the chain. The United States has not contested these aspects of the Informa Report. In fact, as Canada points out[455], already the 2003 Proposed Rule relied on the Sparks Report to assess the costs associated with the adoption of country of origin labelling requirements.[456] Accordingly, we consider that these reports confirm the general observations of the 2009 Final Rule (AMS) with regard to the existence of costs involved in the COOL measure.[457]

7.311 The United States argues that any regulation potentially involves costs. But it is not the costs of the COOL measure in itself that the complainants contest in this dispute. Rather, they argue that the compliance costs of the COOL measure are distributed differentially between domestic and like imported livestock, to the detriment of the latter.

7.312 The United States also argues that any regulation may involve differential costs for different types of market participants.[458] In support of this contention, the United States references the OECD Council Recommendation on Improving the Quality of Government Regulation[459] and the OECD Guiding Principles for Regulatory Quality and Performance.[460]

7.313 As we explained[461], like Article III:4 of the GATT 1994, Article 2.1 is concerned with the equality of competitive conditions between domestic and imported products. This has been interpreted as meaning that "a measure accords less favourable treatment to imported products if it gives domestic like products a competitive advantage in the market over imported like products".[462] The flip side of this is that, under Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement, no competitive disadvantage shall be accorded to imported products as compared to like domestic products. A cost resulting from a (technical) regulation may qualify as a competitive disadvantage if it is incurred only by imported and not like domestic products. The OECD Recommendation and Guiding Principles referenced by the United States do not suggest that higher costs for foreign products are an attribute or acceptable effect of sound regulation.

7.314 Accordingly, we turn to whether the costs of the COOL measure are higher for imported than for domestic livestock, and result in less favourable treatment for imported livestock. In light of the complainants' arguments, we first assess whether the COOL measure involves segregation of meat and livestock according to origin.

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[454] See Exhibit US-43.
[455] See Canada's opening oral statement at the first substantive meeting of the Panel, para. 41.
[456] See 68 FR 61962 (Exhibit CDA-11).
[457] For a more detailed summary and analysis of the Informa Report, see paras. 7.489-7.499 below.
[458] See United States' first written submission, paras. 193-194.
[459] See Exhibit US-45. See also Exhibit US-66.
[460] See Exhibit US-44.
[461] See para. 7.276 above.
[462] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 93. See also Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.117.

Segregation

7.315 Turning to whether the COOL measure requires segregation according to origin, we note that the COOL measure does not explicitly require segregation, let alone the segregation of domestic and imported livestock. In relevant part, it sets out labelling requirements for muscle cuts of meat, namely beef and pork, at the retail stage, i.e. "at the final point of sale to consumers".[463] However, as we explained above, the COOL measure requires labelling of meat based on the origin of an animal from which meat is derived, and upstream stages of livestock and meat production are directly relevant for determining the origin of meat.

7.316 To accurately label muscle cuts under the COOL measure, a covered retailer needs to possess information on where livestock processing steps determining origin under the COOL measure have taken place with regard to each muscle cut. This information can be obtained only from the upstream livestock and meat supply chain. This is why, as explained above[464], the COOL measure establishes recordkeeping requirements – as well as sanctions for violating these – for both retailers and any "person engaged in the business of supplying a covered commodity to a retailer". In fact, the 2009 Final Rule (AMS) elaborates on the "Responsibilities of Retailers *and Suppliers*" and references a "recordkeeping provision concerning *livestock*".[465] In addition, the COOL measure requires "[a]ny person engaged in the business of supplying a covered commodity to a retailer [to] provide information to the retailer indicating the country of origin of the covered commodity".[466]

7.317 Hence, as a matter of principle, the COOL measure prescribes an unbroken chain of reliable country of origin information with regard to every animal and muscle cut. In other words, to comply with the COOL measure, livestock and meat processors need to possess, at each and every stage of the supply and distribution chain, the kind of origin information required by the various COOL labels for which each animal or portion of meat is eligible, and they need to transmit such information to the next processing stage. The 2009 Final Rule (AMS) stresses that "it is necessary to ensure information accurately reflects the origin of any group, lot, box, or package in accordance with the intent of the statute ...".[467] Further, under the 2009 Final Rule (AMS), as a general rule, "[l]abeling of covered commodities offered for sale whether individually, in a bulk bin, carton, crate, barrel, cluster, or consumer package must contain country of origin as set forth in this regulation".[468]

7.318 Further, in its analysis of the costs and benefits of the COOL measure, the 2009 Final Rule (AMS) points out that the COOL measure creates costs throughout the supply chain by requiring an unbroken chain of reliable country of origin information:

> "[T]his [Final R]ule directly regulates the activities of retailers (as defined by the law) and their suppliers. Retailers are required by the rule to provide country of origin information for the covered commodities that they sell, and firms that supply covered commodities to these retailers must provide them with this information. In addition, virtually all other firms in the supply chain for the covered commodities are potentially affected by the rule because country of origin information will need to be maintained and transferred along the entire supply chain."[469]

[463] 7 U.S.C. § 1638a(a)(1).
[464] See paras. 7.116-7.122 above.
[465] 74 FR 2660 (emphasis added).
[466] 7 U.S.C. § 1638a(e).
[467] 74 FR 2684.
[468] 74 C.F.R § 65.300(a).
[469] 74 FR 2684.

7.319 As regards ensuring this unbroken chain of reliable country of origin information, the 2009 Final Rule (AMS) explains that "the COOL program is ... [not] a traceability program"[470], and the COOL statute prohibits USDA from imposing "a mandatory identification system to verify the country of origin of a covered commodity".[471] Further, the recordkeeping obligations for retailers and their suppliers under the COOL statute are limited to "records maintained in the normal conduct of the business of such person, including animal health papers, import or customs documents, or producer affidavits"[472], and the COOL statute explicitly prohibits USDA from requiring retailers and suppliers to maintain any "additional records".[473] For instance, the COOL measure allows the use of established identification numbers or ear tags to identify the origin of live animals.[474]

7.320 Accordingly, a practical way to ensure that the chain of reliable information on country of origin required by the COOL measure remains unbroken is the segregation of meat and livestock according to origin as defined by the COOL measure.

7.321 This is confirmed by the Country of Origin Labeling Compliance Guide revised by USDA in May 2009, which was issued after the entry into force of the 2009 Final Rule (AMS). This USDA Compliance Guide mentions a "segregation plan" as one of the "examples of records and activities that may be useful" to comply with the COOL measure.[475]

7.322 In regard to "Cattle, Beef, Muscle Cuts of Beef, Ground Beef", the same USDA Compliance Guide references a "segregation plan" specifically for each type of participant in the meat supply chain from "[s]eed [s]tock/[c]ow [c]alf" all the way to "[d]istributor".[476] Further, it refers to the "[r]esponsibility" of each type of participant for identifying the origin of all products processed, including meat and animals, and segregating or at least providing or maintaining origin information:

TYPE OF PARTICIPANT	**RESPONSIBILITY**
"Seed Stock/Cow Calf"	"Provide enough information for an auditor to verify the origin and ownership of the animals identified and to verify the stated designation. Properly *identify and record all animals* according to the designation."
"Stocker/Backgrounder"	"*Identify and segregate animals as to the origin designation*. Properly *identify all animals* sold. *Maintain the integrity of the identification*. Maintain ownership transfer."
"Preconditioning/Feedlot"	"Upon receipt *properly identify animals* according to their designation. *Segregate* and control *animals*. Properly *identify all animals* sold. Maintain ownership records."

[470] 74 FR 2679.
[471] 7 U.S.C. § 1638a(f)(1). See also Exhibit MEX-101.
[472] 7 U.S.C. § 1638a(d)(2)(A).
[473] 7 U.S.C. § 1638a(d)(2)(B).
[474] See 74 FR 2660.
[475] Exhibits CDA-65 and MEX-41.
[476] Exhibits CDA-65 and MEX-41.

TYPE OF PARTICIPANT	RESPONSIBILITY
"Slaughter/Fabricator"	"*Segregate animals according to the country designation. Segregate and control carcasses throughout the system and properly label product according to the country designation. Document origin of all products*."
"Fabricator/Processor"	"*Transfer labels and identification of all products processed.* Operate under a labeling program. *Inventory all products according the origin*."
"Distributor"	"*Maintain the integrity of labeled product. If repackaged, transfer the original identification.*"[477]

7.323 For "Hogs, Pork, Muscle Cuts of Pork, Ground Pork", the USDA Compliance Guide similarly refers to "segregation plans" in regard to participants in the meat supply chain from "Feeder/Finish" onward. In addition, the USDA Compliance Guide lists the following as the "[r]esponsibility" of each type of participant:

TYPE OF PARTICIPANT	RESPONSIBILITY
"Nursery"	"Identify animals as to the sow/farrow origin. *Maintain the integrity of the identification system. Document all movements* of animals."
"Feeder/Finish"	"Upon receipt properly identify animals according to their designation. *Segregate* and control animals. Properly *identify all animals* sold. Maintain ownership records."
"Slaughter/Processor"	"*Segregate animals according to the country designation. Segregate and control carcasses throughout the system and properly label product according to the country designation. Document origin of all products.*"
"Processor"	"*Transfer labels and identification of all products processed.* Operate under a SOP the [*sic*] addresses labeling. *Inventory all products according to the origin.*"
"Distributor"	"*Maintain the integrity of the product. If repackaged, transfer the original identification.*"[478]

7.324 These passages also underscore that the COOL measure involves not only initial adjustment costs but also regular costs that participants in the supply and distribution chain will incur in their daily operations. As the 2009 Final Rule (AMS) explains, "[t]he costs of production for directly affected firms increase due to the costs of implementing the COOL programme"[479], and "[t]he rule increases the operating costs for the supply chains of the covered commodities".[480]

[477] Exhibits CDA-65 and MEX-41 (emphasis added).
[478] Exhibit CDA-65 (emphasis added).
[479] 74 FR 2683.
[480] 74 FR 2691.

7.325 Various entities in the United States have expressed the view that the COOL measure will necessarily lead to segregation in the meat supply chain. The US Congressional Research Service explained that among the various commodities covered by the COOL measure, "[t]he meat labeling requirements have proven to be among the most complex and controversial areas of rulemaking, in large part because of the steps that U.S. feeding operations and packing plants *must* adopt to segregate, hold, and slaughter foreign-origin livestock from U.S. livestock".[481] Further, a backgrounder on the COOL measure by the Food Marketing Institute (FMI), whose members represent "three-quarters of all retail food store sales in the United States", explains that "[t]he law *requires* the entire supply chain — from the farm to the retail store — to segregate, track and document the origin of hundreds of foods, including those produced in the U.S. and imported from more than 50 countries".[482] The same FMI backgrounder adds that "[the] labeling and segregation systems [entailed in the COOL measure] will be extremely costly and complex for the large quantities of beef and produce that are multinational in their origin, processing and packaging".[483]

7.326 Under the provisions of the COOL statute, the COOL requirements are enforced by USDA, which can eventually also impose a fine "for each violation" on a retailer or a person engaged in the business of supplying the covered commodity to a retailer.[484] Lack of segregation is not identified as a violation of the COOL measure subject to a fine. Yet, the COOL measure does set out the possibility of USDA imposing a fine on a retailer or supplier breaching the recordkeeping requirements (which may be complied with, for instance, by means of a "segregation plan") or on a supplier breaching the requirement to provide accurate information on country of origin.[485]

7.327 In light of these considerations, we conclude 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, which we have described above, and the cost implications of which we address in more detail further below.

7.328 In any event, the complainants are not arguing, and we do not find, that segregation *per se* would be a violation of Article 2.1 of the TBT Agreement. As the Appellate Body held in *Korea – Various Measures on Beef*, the "separation [of imported and domestic products], *in and of itself*, does not necessarily compel the conclusion that the treatment thus accorded to imported [products] is less favourable than the treatment accorded to domestic [products]".[486] Rather, the question is whether such separation "modifies the *conditions of competition* ... to the disadvantage of the imported product"[487] by imposing higher costs on imported than on domestic livestock.

7.329 We therefore turn to whether the segregation of livestock – to the extent it is necessitated by the COOL measure, and taking also into consideration the commingling flexibility – imposes higher costs on imported livestock than on like domestic livestock.

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[481] Exhibits CDA-117, CDA-199 and MEX-53 (emphasis added).

[482] Exhibit CDA-192 (emphasis added). See also Exhibits CDA-69, 75, 76, 81, 90 (all BCI), MEX-37 and 97 (both BCI).

[483] Exhibit CDA-192. See also Exhibits CDA-69, 75, 76, 81, 90 (all BCI). Exhibits MEX-33 and 55. See also Exhibits, MEX-37, 42 and 97 (all BCI).

[484] See 7 U.S.C. § 1638b(b).

[485] See also the USDA Compliance Guide, which explicitly identifies "Failure to Maintain Records" and "Failure to Provide COOL Information" as violations, and explicitly references the table listing "segregation plans" as one of the "examples of the types of records that may be useful to comply with the record keeping requirements for County of Origin labeling." (Exhibit CDA-65).

[486] Appellate Body Report, *Korea – Various Measures on Beef*, para. 144 (original emphasis).

[487] Appellate Body Report, *Korea – Various Measures on Beef*, para. 144 (original emphasis).

Whether segregation entails higher costs for imported livestock

7.330 The segregation involved in the COOL measure does not necessarily impose differential implementation costs on imported and domestic products. If imported and domestic livestock are being processed, in principle, these need to be equally segregated from each other according to origin. In principle, the resulting implementation costs are the same for both imported and domestic products.

7.331 Yet, it is evident that the more origins and the more types of muscle cut labels involved, the more intensive the need for segregation throughout the livestock and meat supply and distribution chain. In turn, more intensive segregation leads to higher compliance costs with the COOL measure.

7.332 As the Chief Economist of USDA explained in his statement to the Committee on Agriculture of the US House of Representatives:

> "Regarding the costs of country of origin labeling, they depend on the extent to which firms have to implement new control and verification systems including recordkeeping, reconfiguring processing and handling, producing signage and labels and training and educating their staff.
>
> ...
>
> Several studies have estimated the costs for the cattle/beef and hog/pork sectors at up to several billion dollars annually, after examining all costs for the entire supply chain, including segregation and identity preservation."[488]

Segregation costs under five business scenarios

7.333 In the context of the COOL measure, there are five possible business scenarios in terms of whether the livestock being processed has domestic or imported origin:

(a) processing domestic and imported livestock and meat irrespective of origin and solely according to price and quality;

(b) processing meat from exclusively domestic livestock;

(c) processing meat from exclusively imported livestock;

(d) processing exclusively domestic and exclusively imported livestock at different times; or

(e) processing both domestic and imported meat by commingling the two on the same production day.

7.334 These business scenarios involve different levels of segregation and, accordingly, different relative compliance costs.

[488] Exhibit MEX-51.

Processing domestic and imported livestock and meat solely according to price and quality

7.335 The COOL measure does not prohibit processing domestic and imported livestock and meat solely according to the price and quality of the products, i.e. based on purely competitive considerations and irrespective of the origin of livestock.

7.336 This, however, seems a rather costly way of complying with the COOL measure. Muscle cuts processed under this scenario are eligible for at least two different labels. To ensure the unbroken chain of reliable country of origin information required under the COOL measure, this business scenario involves the identification by origin of each and every livestock and piece of meat throughout the supply and distribution chain. This entails extensive segregation, and relatively high compliance costs at every stage.

Processing exclusively domestic or exclusively imported livestock

7.337 The United States argues that segregation for muscle cuts may be avoided by processing livestock of either exclusively domestic or exclusively foreign origin.[489] Yet, these two scenarios are forms of separating imported and domestic products. Indeed, either scenario involves an absolute form of segregation in that it reflects a choice of not processing any domestic or foreign livestock at all.

7.338 Undoubtedly, these two business scenarios involve lower costs of compliance with the COOL measure, since there are fewer origins involved, and thus less intensive segregation is necessary throughout the operation of the market participant in question. Further reductions of compliance costs may be realized if entire supply chains switch to processing livestock and meat of exclusively domestic or exclusively foreign origin.

Processing exclusively domestic and exclusively imported livestock at different times

7.339 Market participants might also choose to segregate imported and domestic livestock according to time, namely by processing exclusively domestic livestock at certain times, and processing exclusively imported livestock at other times. Under this scenario, segregation takes place by shifts or days.

7.340 This approach, however, appears more costly than processing either exclusively foreign or domestic livestock. Overall, this scenario still involves processing more than one origin by the same market participant. Further, while segregation by time might reduce COOL compliance costs for individual market participants, e.g. a slaughterhouse, it does not reduce costs for suppliers, who need to segregate livestock by origin to allow meaningful segregation by time at a later stage. In fact, one US hogs processor procuring imported hogs on specific days of the week indicated to its livestock suppliers that "[t]o clarify these limited delivery times, if you have Canadian born hogs, they must be segregated, therefore we can only accept them certain times during the week as listed".[490]

7.341 This business scenario involves additional costs for livestock suppliers as they can only supply specific origin meat at specific times. As explained further below[491], the complainants have

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[489] See United States' first written submission, para. 159.
[490] Exhibit CDA-105. See also Exhibit MEX-106 (BCI).
[491] See paras. 7.345-7.372 below.

submitted extensive evidence of the negative impacts of segregating imported livestock by time under the COOL measure.

7.342 Nor is this scenario less costly for downstream market participants, e.g. distributors and retailers, who need to segregate if they choose to handle the different origin meat processed at different times and carrying different labels.

Commingling domestic and imported livestock and meat on the same production day

7.343 Market participants might also benefit from the above-mentioned commingling flexibility. This, however, allows the reduction of segregation costs only to a certain extent.

7.344 Even at the stage where commingling takes place, it is limited to a single production day. Any commingled meat carrying, for instance, Label B still needs to be segregated at the processing stage and further downstream from Label A meat that was processed by the same slaughterhouse on another day. Also, commingling still requires keeping "accurate records" as well as maintaining the accuracy of country of origin information on mixed-origin labels. As the 2009 Final Rule (AMS) explains:

> "[t]he initiator may elect to segregate and specifically classify each different category within a production day or mix different sources and provide a mixed label *as long as accurate records are kept*. Likewise, if a retailer wants to mix product from multiple categories, it can only be done in multi-product packages and then only when product from the different categories is represented in each package in order to correctly label the product."[492]

Overall assessment of the costs of segregation under the different business scenarios

Incentive to process domestic livestock

7.345 The above five business scenarios involve segregation of livestock and meat of domestic and imported origin at different levels of intensity and at different compliance costs. Three of the five scenarios involve processing meat from both domestic and imported livestock; one involves meat from exclusively domestic livestock; and another involves meat from exclusively imported livestock.

7.346 As noted above, the more origins and labels involved, the more intensive the segregation and the higher the compliance costs with the COOL measure throughout the livestock and meat supply chain. Commingling might reduce these costs at specific stages, but overall it still involves higher costs than processing single origin livestock only.

7.347 Accordingly, as a direct result of the COOL measure, business scenarios involving more than one origin or muscle cut label result in generally higher costs than scenarios involving only one origin. The relatively less costly business scenarios are the ones that involve processing meat from either exclusively domestic or exclusively foreign livestock at all times.

7.348 As the 2009 Final Rule (AMS) explained:

[492] 74 FR 2670.

> "[I]n the case where products of different origins are segregated, our analysis indicates costs are likely to increase. The rule requires that records be maintained to ensure that accurate country of origin information is retained throughout the process and available to permit compliance and enforcement reviews.
>
> Processors handling only domestic origin products or products from a single country of origin may have lower implementation costs compared with processors handling products from multiple origins, although such costs would likely be mitigated in those cases where firms are only using covered commodities which are multiple-origin labeled."[493]

7.349 Turning to the scenarios involving either exclusively domestic or exclusively imported livestock, it seems logical that the scenario of processing exclusively domestic livestock and meat is in general less costly and more viable than processing exclusively imported livestock. Livestock imports have been and remain small compared to overall US livestock production and demand, and US livestock demand cannot be fulfilled with exclusively foreign livestock.[494] And even if it could be, in light of the evidence before us, it appears that this scenario would in all likelihood involve more than one foreign origin, and thus in general more segregation and higher compliance costs than processing exclusively domestic livestock, which by definition has one single origin. Also, in general, US livestock is often geographically closer to most if not all US domestic markets, so processing exclusively imported livestock and meat remains a relatively less competitive option.

7.350 As a result, overall, the least costly way of complying with the COOL measure is to rely on exclusively domestic livestock. Thus, in general, business scenarios involving imported livestock, including the scenario involving exclusively imported products, are overall more costly than the exclusively Label A approach.

7.351 Livestock and muscle cuts are agricultural commodity products, and the various business scenarios are in competition with each other. The compliance costs of the COOL measure, in particular the higher costs arising from the use of imported livestock, are at least in part passed on to upstream or downstream market participants, or both. As a major US meat processor explained, when moving from a predominantly Label B to a mostly Label A approach:

> "[I]ncreased costs will result from these changes. Ultimately, we believe these additional expenses will have to be passed on through higher finished product prices or reduced prices for livestock."[495]

7.352 In other words, under the COOL measure and all other things being equal, either consumers pay more or livestock producers receive less for the livestock they sell to processors.

7.353 Indeed, it appears that the additional costs of the COOL measure cannot be fully passed on to consumers.[496] As the 2009 Final Rule (AMS) explains, at least some of the compliance costs of the COOL measure will arise at the level of suppliers of covered commodities: "[w]hile some of the increase in their costs will be offset by reduced production and higher prices over the longer term, the suppliers of the covered commodities will still bear direct implementation costs".[497]

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[493] 74 FR 2685.
[494] See 74 FR 2690.
[495] Exhibits CDA-36 to 38, CDA-24 (BCI), MEX-33, 35, 55, 56 and 57.
[496] See, for instance, Exhibits MEX-58, 70 and 101.
[497] 74 FR 2690.

7.354 The fact that consumers are not ready to bear all the costs of country of origin labelling of beef and pork is also demonstrated by the lack of interest in a voluntary COOL regime. This is acknowledged by USDA itself in the 2009 Final Rule (AMS):

> "While USDA recognizes that there appears to be consumer interest in knowing the origin of food based on the comments received, USDA finds little evidence that private firms are unable to provide consumers with country of origin labeling (COOL) consistent with this regulation, if consumers are willing to pay a price premium for it. USDA also finds little evidence that consumers are likely to increase their purchase of food items bearing the United States origin label as a result of this rulemaking. Current evidence does not suggest that United States producers will receive sufficiently higher prices for United States-labeled products to cover the labeling, recordkeeping, and other related costs. The lack of widespread participation in voluntary programs for labeling products of United States origin provides evidence that consumers do not have strong enough preferences for products of United States origin to support price premiums sufficient to recoup the costs of labeling."[498]

7.355 In his statement to the Committee on Agriculture of the US House of Representatives, the Chief Economist of USDA offered a similar explanation on the lack of consumer interest in voluntary country of origin labelling.[499] He pointed out that at least some of the compliance costs of the COOL measure would be borne by livestock producers:

> "Generally, when there is an increase in marketing costs like this rule would require, those costs would get passed on to consumers, and they would get passed back to suppliers – passed back to suppliers in the form of decreased demand for their product. That is one possible consequence livestock producers face, decreased demand because of increased marketing costs. Then they have their own direct increase in costs themselves that will be forced on them by suppliers. The prospect is that livestock prices would be the same or decline and profits probably decline. The only thing that would overcome that is demand in retail expands far out to overcome these effects, and as I stated, I think the prospects of that are low."[500]

7.356 In fact, there is direct evidence of major slaughterhouses applying a considerable COOL discount of USD 40-60 per head for imported livestock.[501] This proves that major processors are passing on at least some of the additional costs of the COOL measure upstream to suppliers of imported livestock.[502] We have no evidence of a similar discount being applied to suppliers of domestic livestock, nor has the United States responded to the evidence submitted by Canada and Mexico in this respect.

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[498] 74 FR 2682.

[499] The Chief Economist of USDA stated that "there is evidence that consumer preference for domestic product is weak. This evidence is the lack of voluntary programs that provide products labeled as domestic origin. USDA has been offering the opportunity for a U.S.-origin meat labeling program for years and there have been no takers.
If consumers distinguish goods depending on their country of origin, market incentives exist for suppliers to act without Government intervention, just as they do under voluntary certification programs such as for organic foods. There, consumers willing to pay a premium sufficient to cover the additional costs of the program. [*sic*] While the market has given us evidence that consumers would be willing to pay for organic, if [*sic*] has not done so for U.S. origin." Exhibit MEX-51.

[500] Exhibit MEX-51.

[501] See Exhibits CDA-57 and 81 (both BCI), MEX-37, 46, 64, 97 and 105 (all BCI).

[502] See Exhibits MEX-37, 46, 97 and 105 (all BCI). See also Exhibit MEX-101.

7.357 The COOL measure creates an incentive for participants to process domestic rather than imported livestock because, under the COOL measure, processing meat from exclusively domestic livestock is less costly than other business scenarios. Passing on these costs at least in part to imported livestock in turn creates a reduction in the competitive opportunities of imported livestock, relative to domestic livestock.

7.358 In previous disputes, government measures creating an incentive to use domestic over imported input products were found inconsistent with Article III:4 of the GATT 1994. In *US – FSC (Article 21.5 – EC)*, for example, the Appellate Body reviewed a "beneficial tax exemption" under a government measure "provid[ing] a considerable impetus, and, in some circumstances, in effect, a requirement, for manufacturers to use domestic input products, rather than like imported ones". The Appellate Body concluded that this measure "treats imported products less favourably than like domestic products".[503] Likewise, in *China – Auto Parts*, the Appellate Body held that a government measure that created an incentive for automobile manufacturers to use exclusively domestic auto parts was inconsistent with Article III:4 of the GATT 1994.[504] Further, the panel in *Mexico – Taxes on Soft Drinks* reviewed a government measure "creating an economic incentive for producers to use cane sugar as a sweetener in the production of soft drinks and syrups, instead of other non-cane sugar sweeteners such as beet sugar or HFCS".[505] Since "[d]omestically produced sweeteners in Mexico consist overwhelmingly of cane sugar", that panel concluded that, "although on their face the challenged measures do not distinguish between imported and domestic sweeteners, the distinction they make between the use of cane sugar and non-cane sugar sweeteners is, in fact, one that distinguishes between imported and domestic sweeteners".[506]

7.359 A similar incentive to use domestic input exists under the COOL measure, as explained above.

7.360 The existence of such an incentive is confirmed by evidence on the relative use of the muscle cut labels under the COOL measure. As described below[507], several leading cattle and hog processors in the United States decided to affix exclusively Label A on their meat products as a result of the labelling requirements under the COOL measure, despite the limited commingling flexibility. This appears to have been the case particularly after the unqualified flexibility to use Label B for Label A meat, originally contained in the Interim Final Rule (AMS) of August 2008, was removed.

7.361 In fact, several major US meat processors indicated that they would move to using Label A for the vast majority of their beef and pork products, given the end of the previous unqualified

[503] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220.
[504] The Appellate Body held that "[t]he use by an automobile manufacturer, in a given vehicle model, of certain key assemblies or combinations of assemblies that are imported means that a higher (25%) charge will be payable on *all* imported parts than would be the case if those combinations of imported assemblies were *not* used and the thresholds were *not* met, in which case any imported parts used in the vehicle model would be subject to only a 10% duty. This creates an incentive for manufacturers to *limit* their use of imported parts relative to domestic parts. In addition, the measures at issue in this dispute impose administrative procedures, and associated delays, on automobile manufacturers using imported parts, which could be avoided entirely if a manufacturer were to use exclusively domestic auto parts. These incentives 'affect' the conditions of competition for imported auto parts on the Chinese internal market." Appellate Body Report, *China – Auto Parts*, para. 195 (original emphasis; footnote omitted).
[505] Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.117.
[506] Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.119.
[507] See paras. 7.361-7.363 below.

flexibility to use Label B for Label A meat and its replacement with the commingling flexibility.[508] For instance, Tyson notified its fresh meats hog and cattle suppliers that "[its] goal is to label substantially all beef and pork from livestock born, raised and processed in the U.S. with the Category A label by the middle of 2009", and "estimate[d] around 90% of all of the fresh, retail beef and pork cuts produced in the U.S. would qualify for the Category A label".[509] Cargill was reported as moving in the same direction, with around 70% of its meat carrying Label A.[510] JBS indicated in a standard letter addressed to its customers that it would "transition[] to a 'Product of U.S.A.' label [i.e. Label A] on the majority of [its] beef products", and that "[t]he majority of [its] pork products will continue to be produced as 'Product of U.S.A'".[511] Smithfield, a major pork processor, even announced that "effective April 2009 [it] intends to procure only hogs born and raised in the U.S. for processing at its U.S. fresh meat facilities and will label fresh pork for retail as born, raised and processed in the USA".[512]

7.362 Whilst most of these major US meat processors indicated that they would continue processing "some" Label B and C meat, they are silent on any intention of commingling. Rather, the chief executives of these three US meat producers are reported to have expressed at the annual convention of the Texas Cattle Feeders' Association held in November 2008 that their "chief concern was the ability to ensure that cattle coming into their plants are properly segregated".[513] The chief executive of the meat processor with the highest market share among the three top US beef packers[514] expressed in the press release of the Texas Cattle Feeders' Association that in order "to avoid passing higher costs [of the COOL measure] onto consumers", the three beef packers in question "[we]re going to ask your (cattlemen's) help to make sure that cattle are not commingled when they get to us".[515] The same chief executive added that "[w]hen they get to the plants, we have to make sure that we can keep them separate, so that we can run the cattle as cheaply as we can to get (product) to the consumers".[516] The chief executive of the second biggest US beef packer[517] explained that the major outstanding question was whether segregation under the COOL law would happen in terms of place or time. He is reported as having said that one of the uncertainties associated with the COOL law, is whether the effort to minimize costs will "require segmentation of plants or days to harvest".[518]

7.363 Even by the United States' own indication, Cargill, JBS and Tyson were the three top beef packers in 2009[519], representing a total market share of above 65% in 2008.[520] Further, Smithfield described itself as "the leading processor and marketer of fresh pork and packaged meats in the United States, as well as the largest producer of hogs"[521], and the United States identified Smithfield,

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[508] This commingling flexibility was mentioned for the first time in the above-mentioned USDA FAQ Publication of 26 September 2008. See Exhibit CDA-31.
[509] See Exhibits CDA-36 to 38 and CDA-24 (BCI). See also Exhibits CDA-71 (BCI), MEX-33, 55 and 64 (BCI).
[510] See Exhibits CDA-41 and CDA-77 (BCI).
[511] Exhibits CDA-39 and MEX-57.
[512] Exhibit CDA-40.
[513] Exhibit CDA-71.
[514] See Exhibit US-37. See also Exhibit US-152 (BCI).
[515] Exhibit CDA-71.
[516] Exhibit CDA-71.
[517] See Exhibit US-37. See also Exhibit US-152 (BCI).
[518] Exhibit CDA-71.
[519] See Exhibit US-37. See also Exhibit US-152 (BCI).
[520] See Exhibits US-152 (BCI) and MEX-111. See also Exhibit MEX-55.
[521] Exhibit CDA-40. See also Exhibit CDA-215.

Tyson, JBS, and Cargill as the top four commercial hog packers for most of the period between 2002 and 2008.[522]

7.364 Although it appears that some commingling is taking place, it is difficult to establish its precise extent. The United States submitted an affidavit from a person working in the US meat industry indicating that at least one major US processor is commingling Canadian, Mexican and US origin meat at one of its facilities.[523] We accept this as showing that commingling has been taking place, although we note that this piece of evidence does not specify the extent of commingling either at the facility in question, let alone by the US processor concerned or in the US meat industry at large.

7.365 All three parties reference a letter from the American Meat Institute (AMI) anticipating that "[w]hen the final rule becomes effective, ... almost 95% of beef and pork products eligible to bear a 'Product of the USA' label will bear such labeling".[524] This AMI letter indicates that even by the US meat industry's calculations, only some 5% of domestic meat might actually be commingled with imported meat. However, this evidence is silent on whether in practice less than 5% of domestic meat ends up being commingled. It does not specify either in what proportion such domestic meat might be commingled with imported meat, i.e. the quantities and share of non-US origin meat involved in any commingling.

7.366 The United States submitted photographs of Label B suggesting that these labels had been affixed on commingled meat.[525] However, photographs of Label B merely demonstrate that there are muscle cuts carrying Label B. Label B, and in particular the photos of such labels submitted by the United States, provide no information on whether the muscle cuts in question result from commingling Label A and B meat on a single production day.

7.367 Further, the United States references an exhibit submitted by Canada to demonstrate that one of the complainants even recognizes that commingling is actually taking place.[526] However, the Canadian exhibit in question only indicates that some US processing plants are accepting Label B meat, but not that these plants are necessarily commingling it with Label A meat. As regards commingling proper, this Canadian exhibit refers only to the commingling "flexibility" between meat eligible for Labels B and C, but not for Label A meat.

7.368 Finally, the United States submitted a producer affidavit declaring that livestock supplied to a major US meat processor is eligible for Label B.[527] This affidavit, however, is silent on whether such Label B livestock ends up being commingled, or whether livestock eligible for Labels A and B are being processed on separate production days.

7.369 The above relative proportions of the use of the various labels are largely confirmed by the United States, as well. In response to a question from the Panel, the United States explained that "approximately 71 percent of the beef sold at the retail level is being labeled as Category A", and "70 percent of the pork sold at the retail level is being labeled as Category A".[528] The United States

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[522] See Exhibit US-38. See also Exhibits MEX-43, 44 and 45.

[523] See United States' second written submission, para. 57 and Exhibit US-102 (BCI).

[524] Exhibit MEX-67. See also United States' second written submission, para. 57, Canada's response to Panel question No. 91, Mexico's response to Panel question No. 91 and United States' response to Panel question No. 91.

[525] See Exhibits US-95, 96 and 98.

[526] See Exhibit CDA-41.

[527] See United States' second written submission, para. 57 and Exhibit US-101 (BCI).

[528] United States' response to Panel question No. 91. See also United States' response to Panel question No. 90.

added that "up to 14 percent of Category A beef muscle cuts might be labeled as Category B or C beef and up to 20 percent of Category A muscle cuts might be labeled as Category B or C pork".[529]

7.370 The complainants contest the US figures arguing that the US estimates on the use of Label A are too low and that those on commingling are exaggerated.[530] According to the complainants, the proportion of meat that carries Label A is closer to 90%.[531] Indeed, several major US meat processors indicated that, with the entry into force of the 2009 Final Rule (AMS), "around 90 percent of all of the fresh, retail beef and pork cuts produced in the U.S. would qualify for the Category A label".[532] Nonetheless, the complainants do not contest the US argument that, despite commingling, the use of Label A affects the vast majority of meat labelled under the COOL requirements.[533]

7.371 Likewise, the complainants do not contest the US argument that the use of category C and D labels remains "small".[534] Rather, Mexico contests the justification advanced by the United States for the limited use of Label D.[535]

7.372 In light of the foregoing, we preliminarily conclude that the COOL measure creates an incentive to use domestic livestock – and a disincentive to handle imported livestock – by imposing higher segregation costs on imported livestock than on domestic livestock. Consequently, the COOL measure affects competitive conditions in the US market to the detriment of imported livestock.

Reduction in the competitive opportunities of imported livestock

7.373 As noted above, in *Korea – Various Measures on Beef*, the Appellate Body found a "reduction of competitive opportunit[ies]"[536] for imported products relative to domestic like products.

7.374 We are faced with the same situation in the current dispute. The competitive opportunities of imported livestock are reduced as the additional costs of compliance with the COOL measure incurred when handling imported livestock are, at least in part, passed on to suppliers of imported livestock. We referenced in this regard direct evidence of a considerable COOL discount being applied by several major processors to imported livestock and the absence of evidence of a similar discount being applied to domestic livestock.[537]

7.375 Further evidence of the reduction of competitive opportunities for imported livestock includes statements by imported livestock suppliers that some plants and companies are simply refusing to process any imported livestock any more.[538] For instance, a major US hog processor informed its

[529] United States' response to Panel question No. 91. See also United States' response to Panel question No. 90.
[530] See Mexico's comments on United States' response to Panel question Nos. 90 and 91 and Canada's comments on United States' response to Panel question Nos. 90 and 91.
[531] See Canada's response to Panel question No. 90 and Mexico's response to Panel question No. 90. See also Exhibits CDA-198 (BCI) and CDA-211.
[532] Exhibits CDA-36 to 38 and CDA-24 (BCI). See also Exhibit MEX-33.
[533] United States' response to Panel question No. 91.
[534] United States' response to Panel question No. 90. See also Exhibit US-146.
[535] Mexico's comments on United States' response to Panel question No. 90.
[536] Appellate Body Report, *Korea – Various Measures on Beef*, para. 147. See also ibid., para. 146.
[537] See para. 7.363 above.
[538] See Exhibits CDA-56 (non-BCI), CDA-57, 66 to 69, 76, 81, 88 (all BCI). See also Exhibit CDA-89.

Canadian livestock suppliers that "[d]ue to Country of Origin Labeling (COOL)", it will only process US-born, raised and slaughtered hogs.[539]

7.376 Moreover, as a result of the COOL measure, fewer US processing plants are accepting imported livestock than before.[540] The complainants have submitted maps and lists of US processing facilities showing how US processing plants have become less accessible for imported cattle and hogs under the COOL measure.[541] Although the United States contests the specific figures submitted by the complainants in this regard[542], it does not call into question the complainants' case on the overall reduction in the number of plants processing imported livestock as a result of the COOL measure.

7.377 We also have evidence before us showing that, as a result of the reduction of available processing plants, certain suppliers had to transport imported livestock longer distances than before the COOL measure.[543] Further, several plants that continue to process imported livestock do so at specific, limited times[544], namely only on specific days of the week (typically at most one or two days per week)[545], or only after specific hours of the day.[546] Processing imported livestock only at specific times as a result of the COOL measure has created logistical problems and additional costs for certain imported livestock suppliers.[547] Due to the congestion resulting from limited specific-time deliveries, certain imported livestock suppliers find it more difficult to obtain trucks for their deliveries or to use their trucks in an efficient way.[548] Congestion has also increased waiting time for imported livestock crossing the border, and thus created transportation delays for certain suppliers of imported livestock.[549] In turn, these have increased the transportation costs of certain suppliers of imported livestock[550], and have had a negative impact on the welfare and quality of imported livestock as a result of long waiting times in extreme temperatures and shrinkage[551], sometimes leading even to increased mortality.[552] Also, transportation of imported livestock has become less efficient in that certain suppliers can make fewer deliveries due to longer distance transport and less turn-around time.[553] Further, certain slaughterhouses accepting imported livestock only on Monday has resulted in increased costs for veterinary checks of imported livestock on Sunday.[554]

7.378 Contractual terms for suppliers of imported livestock have also changed as a result of the COOL measure. We have evidence that several major processors introduced a COOL opt-out clause allowing them to unilaterally terminate or amend their contracts with suppliers of imported livestock.[555] In certain other situations, supply contracts for imported livestock have been cancelled or terminated[556], or simply not renewed.[557] Sometimes, the contractual relationship has survived the

[539] See Exhibit CDA-92. See also Exhibits CDA-107 (BCI) and CDA-109.
[540] See Exhibits CDA-56 (non-BCI), CDA-57, 72, 75, 80, 81 and 94 (all BCI), MEX-37, 42, 97 and 106 (all BCI). See also Exhibit CDA-90 (BCI).
[541] See Exhibits CDA-95 to 103 and MEX-98.
[542] See Exhibits CDA-41, US-102 and 152 (both BCI).
[543] See Exhibits CDA-57, 66, 67, 69, 81, and 85 to 87 (all BCI).
[544] See Exhibits CDA-77, 87 and 88 (all BCI).
[545] See Exhibits CDA-55, 57, 66, 75, 80, 84, 90 (all BCI) and CDA-105 (non-BCI), MEX-97 and 106 (both BCI).
[546] See Exhibit CDA-85 (BCI).
[547] See Exhibit CDA-57 (BCI).
[548] See Exhibits CDA-55 to 57 and 80 (all BCI).
[549] See Exhibits CDA-55, 57, 66, 80 and 85 (all BCI).
[550] See Exhibits CDA-57, 67, 68, 75, 80, 81, 85 and 87 (all BCI).
[551] See Exhibits CDA-55, 66 and 85 (all BCI). See also Exhibits CDA-93 and CDA-106.
[552] See Exhibit CDA-85 (BCI).
[553] See Exhibit CDA-68 (BCI).
[554] See Exhibit CDA-80 (BCI).
[555] See Exhibits CDA-67 and CDA-108 (both BCI).
[556] See Exhibits CDA-86, 88 (BCI) and 108 (all BCI).

COOL measure, although at terms less favourable for imported livestock suppliers.[558] For instance, in certain cases, former long-term contracts have been replaced with spot contracts at lower purchase prices.[559] In at least one case, a former automatically renewed, "evergreen" contract was replaced with a contract involving less favourable terms.[560] Further, we have evidence of 14 days' advance notice being required for supplies of Mexican cattle at various US processing facilities.[561]

7.379 Certain suppliers of imported livestock have also suffered significant financial disadvantages resulting from the COOL measure. Several suppliers reported that the price difference between imported and domestic livestock has become larger to the detriment of domestic livestock[562], and that discounts for imported livestock appeared or existing ones increased as a result of the COOL measure.[563] Further, in several cases, financial institutions are reported to have refused to provide credits and loans to Canadian livestock producers due to the risks resulting from the COOL measure.[564]

7.380 Finally, we have evidence before us – undisputed by the United States – that imported cattle have been excluded from premium beef programmes, such as the Certified Angus Beef programme and other programmes, as a result of the COOL measure.[565] In general, these premium programmes are particularly profitable for operators in the supply chain, including livestock suppliers.

7.381 In light of the above considerations, we preliminarily conclude that the COOL measure reduces the competitive opportunities of imported livestock relative to domestic livestock. Before making a definitive finding on this matter, though, we need to address the counterarguments advanced by the United States in this regard.

Arguments by the United States

7.382 The United States argues that various phenomena prevent the COOL measure from creating the above-described negative incentives and from reducing the competitive opportunities of imported livestock. We have already addressed some of these arguments, e.g. the United States' arguments that any (technical) regulation creates costs and that costs might be distributed differently among market participants. We now turn to the additional arguments raised by the United States, namely:

(a) the continued processing of imported livestock;

(b) the lack of a legal necessity for private market participants to choose Label A;

(c) the influence of factors distinct from the COOL measure;

(d) pre-existing segregation programmes; and

(e) exceptions from the COOL measure.

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[557] See Exhibits CDA-67 and 88 (both BCI).
[558] See Exhibit CDA-56 (BCI).
[559] See Exhibits CDA-68, 69, 82, 88 (all BCI). See also Exhibit CDA-66 (BCI).
[560] See Exhibit CDA-86 (BCI).
[561] See Exhibits MEX-37, 46 , 97 and 105 (all BCI).
[562] See Exhibits CDA-55 and 94 (both BCI).
[563] See Exhibits CDA-55 to 57, 66 to 69, 75, 80, 83, 84, 86, 87, 89, 94, 108, 198 (all BCI), MEX-37, 97 and 105 (all BCI).
[564] See Exhibits CDA-67, 69, 83, 85 and 86 (all BCI).
[565] See Exhibits CDA-36 and 38 and MEX-33. See also Exhibits CDA-41, 55 to 57, 81 (all BCI), MEX-57 and 64 (both BCI).

The continued processing of imported livestock

7.383 The United States argues that not all beef and pork covered by the COOL measure carries Label A, as there is continued processing of imported livestock. We do not see the need to assess whether this contention is in fact supported by the evidence, for even if the US argument is correct, it would not change our preliminary conclusion that the COOL measure creates an incentive to process exclusively domestic livestock and reduces the competitive opportunities of imported livestock.

7.384 As the Appellate Body explained in *US – FSC (Article 21.5 – EC)*, less favourable treatment of imported products may exist even if a measure "will not give rise to less favourable treatment for like imported products in each and every case".[566] Further, like Article III:4 of the GATT 1994, Article 2.1 of the TBT Agreement does not serve to protect "expectations ... of any particular trade volume".[567]

7.385 The United States also argues that even if the number of US plants processing Canadian and Mexican livestock has diminished, these plants have the capacity to process all the livestock that Canada and Mexico export to the United States.[568] We do not consider that the capacity of the US plants in question is particularly relevant. As the Appellate Body held in *Korea – Various Measures on Beef*, "the reduction of competitive opportunity through the restriction of access to consumers .... is not a function of the limited volume of foreign [products] actually imported": "the fact the that the WTO-consistent quota ... has ... been fully utilized does not detract from the lack of equality of competitive conditions entailed by the [measure]".[569]

The legal necessity of making a choice

7.386 The United States argues that the COOL measure does not create a legal necessity for differential and less favourable treatment; if individual market participants happen to process predominantly Label A meat, that is due to their private business decisions.[570]

7.387 We note that the United States does not contest the complainants' description of the situation preceding the COOL measure. According to the complainants, prior to the COOL measure, conditions of competition were the same for imported and domestic products:[571] there was an integrated NAFTA livestock and meat market, in which livestock and meat products were processed together, without any major segregation due to origin but purely on the basis of considerations of price and quality.[572]

7.388 The US Congressional Research Service described the pre-COOL North American livestock and meat market as follows:

> "The animal products industries have become increasingly integrated across all three North American countries in recent years, particularly after the onset in 1994 of the North American Free Trade Agreement (NAFTA) and, before that, the Canada-U.S. Free Trade Agreement in 1988. *These agreements*, along with the global Uruguay Round Agreements under the World Trade Organization (WTO), by helping to

[566] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 221.
[567] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16. See also Appellate Body Report, *EC – Asbestos*, para. 93.
[568] See United States' opening oral statement at the first substantive meeting of the Panel, para. 25.
[569] Appellate Body Report, *Korea – Various Measures on Beef*, para. 147.
[570] See United States' first written submission, paras. 147 and 150.
[571] See Appellate Body Report, *Korea – Various Measures on Beef*, para. 145.
[572] See Exhibit CDA-50, p. 20. See also See Exhibits CDA-192, MEX-35, and 37 (BCI).

> reduce tariff and nontariff barriers to trade, *have enabled animals or their products to move across borders more freely, based on market demands.*"[573] (emphasis added)

7.389 Likewise, a backgrounder on the COOL measure by the Food Marketing Institute, whose members represent "three-quarters of all retail food store sales in the United States", explained that "[e]ver since the North American Free Trade Agreement was ratified in 1993, cattle and produce have moved freely among Canada, Mexico and the U.S".[574]

7.390 It is the COOL measure, and not solely the private decisions of market participants, that has had a decisive impact in changing this pattern, by creating an economic incentive to process exclusively domestic livestock. In this regard, the COOL measure is similar to the dual beef retail distribution system reviewed in *Korea – Various Measures on Beef*. In that dispute, the Appellate Body made a distinction between the "legal necessity of making the choice imposed by the measure itself" and differential treatment that is "solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits of differentiated distribution systems":

> "We are aware that the dramatic reduction in number of retail outlets for imported beef followed from the decisions of individual retailers who could choose freely to sell the domestic product or the imported product. The legal necessity of making a choice was, however, imposed by the measure itself. The restricted nature of that choice should be noted. The choice given to the meat retailers was *not* an option between remaining with the pre-existing unified distribution set-up or going to a dual retail system. The choice was limited to selling domestic beef only or imported beef only. Thus, the reduction of access to normal retail channels is, in legal contemplation, the effect of that measure. In these circumstances, the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product.
>
> ...
>
> We are *not* holding that a dual or parallel distribution system that is *not* imposed directly or indirectly by law or governmental regulation, but is rather solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits of differentiated distribution systems, is unlawful under Article III:4 of the GATT 1994. What is addressed by Article III:4 is merely the *governmental* intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory."[575]

7.391 Indeed in the dispute before us, like in *Korea – Various Measures on Beef*, the COOL measure does not allow non-compliance. Although, as explained above, the COOL measure does not prohibit the processing of domestic and imported livestock irrespective of origin, the COOL measure itself makes this business scenario more costly than other business scenarios.[576] Further, in the dispute before us, like in *Korea – Various Measures on Beef*, any decisions by private market participants are not "solely" the result of their independent business calculations, but are attributable in large part to the economic incentive and disincentive created by the provisions of the COOL measure.

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[573] Exhibits CDA-117, 199 and MEX-53.
[574] Exhibit CDA-192. See also Exhibits CDA-69, 75, 76, 81, 90 (all BCI), MEX-37 and 97 (both BCI).
[575] Appellate Body Report, *Korea – Various Measures on Beef*, paras. 146 and 149 (original emphasis).
[576] See para. 7.333.

7.392 In particular, we disagree with the United States that the distinction under *Korea – Various Measures on Beef* is between legal and economic aspects of a measure. We have already noted that the complainants argue *de facto* discrimination in this dispute. In the context of such a claim of *de facto* discrimination, contrary to what the United States suggests, the distinction should be made between (i) a measure of a WTO Member creating a sufficiently strong incentive, including possibly an economic incentive, for private market participants to act in a particular way; and (ii) business decisions of private market participants based "solely" on private economic considerations.[577]

Factors distinct from the COOL measure

7.393 The United States argues, referencing the Appellate Body report in *Dominican Republic – Import and Sale of Cigarettes*, that the COOL measure does not involve less favourable treatment because any detrimental effects on imported livestock are attributable to economic factors, and not to the foreign origin of such livestock *per se*.[578]

7.394 Unlike in *Dominican Republic – Import and Sale of Cigarettes*, the current dispute does not focus on the unit costs entailed by the contested measure for imported and domestic products. The complainants do not claim less favourable treatment due to increased unit costs for imported livestock. Likewise, our analysis concentrates on the relative overall costs of the different business scenarios that market participants may choose in order to comply with the COOL measure. Further, unlike the bond requirement reviewed in the Appellate Body report in *Dominican Republic – Import and Sale of Cigarettes*, the COOL measure is directly concerned with the origin of meat and livestock. Thus, the incentive created by the COOL measure in favour of processing domestic-origin meat is clearly related to the origin of livestock.

7.395 We agree that this incentive is partly due to the relatively small market share of imported livestock compared to domestic livestock. In fact, as we explained above, faced with the choice between the two business scenarios of absolute segregation, namely the scenario involving exclusively domestic livestock and the scenario involving exclusively imported livestock, one reason for choosing the former scenario is that in most cases the latter is not viable due to the smaller proportion of imported livestock.

7.396 It is appropriate to consider this economic factor in determining whether the COOL measure has a *de facto* negative impact on the competitive conditions of imported livestock. The dictionary defines "*de facto*" by creating a link to factual circumstances: "in fact, in reality, in actual existence, force, or possession, whether by right or not".[579] Likewise, the Appellate Body defined *de facto*

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[577] See Panel Report, *Mexico – Taxes on Soft Drinks*, paras. 8.116-8.117.

[578] United States' first written submission, para. 146. In *Dominican Republic – Import and Sale of Cigarettes* the Appellate Body stated:

> "The Appellate Body indicated in *Korea – Various Measures on Beef* that imported products are treated less favourably than like products if a measure modifies the conditions of competition in the relevant market *to the detriment of imported products*. However, the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case." (Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96 (footnote omitted; original emphasis)).

[579] *The Shorter Oxford English Dictionary*, (Sixth Edition) Oxford University Press, Vol. I, p. 626 (2007).

discrimination under Article III:4 of the GATT 1994 by referring to conditions "in the relevant market".[580]

7.397 The very essence of the *de jure* / *de facto* dichotomy is that the first involves an analysis focussing on the language of the measure at issue, whereas the second entails assessing how a measure with language that is not discriminatory on its face plays out in actual circumstances. In the context of Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement, assessing whether a measure has actual discriminatory effects cannot be dissociated from the circumstances prevailing in the market at issue. Indeed, taking into account the circumstances in which the measure in question is applied is essential for an objective assessment of a claim of *de facto* discrimination.

7.398 The COOL measure creates a *de facto* incentive in favour of domestic, and to the detriment of imported, livestock in the particular circumstances of the US livestock and meat market. The small market share of imported livestock is an element of these market circumstances.

7.399 As explained, before the COOL measure, the North American livestock and meat market was highly integrated. In the US market, domestic and imported livestock were processed according to competitive considerations of price and quality, irrespective of origin.

7.400 The Interim Final Rule (AMS) of August 2008 did not completely disrupt this pattern, even if it introduced certain compliance costs. This is because, under the Interim Final Rule (AMS), it remained possible to process domestic and imported livestock together on a large scale and to affix one single label, Label B, on these products. As regards the magnitude of this flexibility, it is telling that the National Farmers Union criticised it as "a loophole big enough to drive a truck through".[581] Since a single-label approach is in general less costly than business scenarios involving more labels, as explained above[582], industry chose to follow a predominantly Label B approach for all livestock, including both imported livestock and the majority of livestock that would have otherwise qualified for Label A.

7.401 The 2009 Final Rule (AMS) changed this by reducing the unqualified possibility of affixing Label B on meat otherwise eligible for Label A to the limited flexibility of commingling on a single production day. Indeed, the 2009 Final Rule (AMS) indicates that the majority of meat eligible for Label A should be carrying that label: "[i]t was never the intent of the Agency for the majority of product eligible to bear a U.S. origin declaration to bear a multiple origin designation".[583]

7.402 As a result of the 2009 Final Rule (AMS), the meat supply chain is faced with the requirement to affix Label A on the majority of meat eligible for that label, which involves a significant reduction in the amount of domestic meat and livestock being processed together with imported meat and livestock. This, in turn, creates the necessity for the supply chain to choose between a single-origin, Label A business scenario and the scenario of processing both Label A and imported meat and livestock. A single-origin approach is less costly, and given the high market share of domestic livestock, it is also generally viable.

7.403 It is the result of the COOL measure, in particular the 2009 Final Rule (AMS), that in the circumstances of the US market, market participants, when faced with the choice between a scenario involving exclusively domestic livestock and a scenario involving both domestic and imported

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[580] Appellate Body Report, *Korea – Various Measures on Beef*, para. 137. See also Panel Report, *Canada – Pharmaceutical Patents*, para. 7.101.

[581] Exhibit CDA-28.

[582] See para. 7.357 above.

[583] 74 FR 2659.

livestock, opted predominantly for the former. While the small market share of imported livestock influenced this choice, that very choice was made necessary by the COOL measure. Indeed, as the history of the COOL measure shows, market participants would not have opted this way, and the small market share of imported livestock *per se* did not dictate such an option either.

7.404 Thus, in the circumstances of the US market, the COOL measure, in particular the 2009 Final Rule (AMS), creates an incentive in favour of domestic livestock and negatively affects the competitive conditions of imported livestock. Hence, we disagree with the United States that this effect is attributable exclusively to factors distinct from the COOL measure.

Pre-existing segregation

7.405 The United States argues that various pre-existing segregation programmes preceded the COOL measure, namely USDA grade labels, private premium label programmes, animal production and raising label programmes, and export market requirements. According to the United States, these programmes allowed market participants to gain experience with segregation, and their continued existence reduces the costs of any additional segregation under the COOL measure.[584]

7.406 While pre-existing segregation might have allowed certain market participants to gain experience with segregation, we observe that not all market participants are necessarily involved in all of the pre-existing segregation programmes evoked by the United States. Whereas USDA grade labels are affixed on the majority of beef slaughtered in the United States, private premium labels and animal production and raising labels affect a smaller proportion of beef marketed in the United States. Likewise, given the small proportion of US exports relative to US beef consumption[585], export programmes do not involve the majority of beef marketed in the United States.

7.407 More importantly, most pre-existing segregation programmes are not concerned with country of origin but rather with quality or production processes. Even among the export programmes, which involve some segregation according to origin, not all are foreclosed for Canadian or Mexican livestock and beef. In fact, some export programmes allow Canadian or Mexican-origin beef to be exported along with US beef[586], whereas some other export programmes cover cattle that spent at least 100 days before slaughter in the United States, including feeder cattle born in Canada and Mexico.[587]

7.408 As most pre-existing programmes do not necessarily entail segregation of Canadian and Mexican beef from US beef, the COOL measure adds an additional layer of segregation to pre-existing segregation programmes. In practice, after the COOL measure, beef that qualifies, for instance, for a specific premium programme needs to be additionally segregated according to origin as defined by the COOL measure. This involves additional segregation and costs specific to the COOL measure.

7.409 The 2009 Final Rule (AMS) explains that:

> "[I]n [certain] cases ... firms may need to revamp current operating processes to implement the rule. For example, a processing or packing plant may need to sort incoming products by country of origin and, if applicable, method of production, in

[584] See United States' first written submission, para. 169, United States' second written submission, paras. 59-60, and United States' response to Panel question No. 46. See also Exhibit US-43.

[585] See Exhibits US-28 and 71. See also Exhibits CDA-207 and 209, Canada's response to Panel question No. 109, Exhibit MEX-104, Mexico's response to Panel question No. 109, Exhibits US-150 and 151, United States' response to Panel question Nos. 30 and 109.

[586] See Exhibits MEX-75 and US-81.

[587] See Exhibits MEX-76, 77 and US-82.

> addition to weight, grade, color, or other quality factors. This may require adjustments to plant operations, line processing, product handling, and storage."[588]

7.410 Several major US beef processors declined to bear such additional costs, and informed their suppliers that, due to the entry into force of the COOL measure[589], they would not include Canadian and Mexican beef in their Certified Angus Beef and other premium beef programmes. For instance, Tyson issued a standard letter to its fresh meat cattle suppliers informing them that "[o]ur approach will be to use the 'U.S.' or Category A label on all of our premium beef programs beginning early 2009", following the replacement of the former unqualified possibility of affixing Label B on Label A meat with the more restrictive commingling flexibility.[590]

7.411 Further, unlike the COOL measure, the pre-existing segregation programmes evoked by the United States are voluntary and exist to the extent that they meet consumer demand, i.e. they are also contingent upon consumers' willingness to pay for the type and quality of beef covered by such programmes.

7.412 Finally, as Canada points out, none of the pre-existing segregation programmes evoked by the United States relates to hogs.[591]

7.413 Accordingly, we are not persuaded by the argument that the pre-existence of segregation programmes reduces the costs of any additional origin-based segregation under the COOL measure. Thus, we maintain our view that the COOL measure involves costs that are apportioned differently between the business scenario involving only domestic livestock and the scenarios involving imported livestock.

Exceptions under the COOL measure

7.414 The United States argues that it had narrowed the originally envisaged coverage of the COOL measure to reduce compliance costs.[592]

7.415 The COOL measure requires "retailers" to affix labels on the "covered commodity"[593], which in relevant part is defined as "muscle cuts of beef... and pork" and "ground beef ... and ground pork".[594] However, as the United States points out, the COOL measure excludes from its scope any otherwise covered commodities that serve as an "ingredient to a processed food item".[595]

7.416 Further, not all actors selling beef and pork at retail level are subject to the COOL measure. As described above[596], in the context of the COOL measure, an individual "retailer" is covered only when the invoice cost of all of its purchases of perishable agricultural commodities exceeds $230,000 during a calendar year.[597] "Food service establishments" are also exempt from the COOL measure.[598]

[588] 74 FR 2689.
[589] See CDA-56 (BCI).
[590] See Exhibits CDA-36, 38 and MEX-33. See also Exhibits CDA-41, 55, 56, 57 and 81 (all BCI), MEX-57 and 64 (both BCI).
[591] See Canada's response to Panel question No. 43. See also Exhibit CDA-179.
[592] See United States' second written submission, para. 153. See also United States' first written submission, para. 185; United States' second written submission, para. 89; and Exhibit US-43.
[593] 7 U.S.C. §§ 1638(2) and 1638a(a)(1).
[594] 7 U.S.C. §§ 1638(2)(A)(i) and (ii).
[595] 7 U.S.C. § 1638(2)(B) and 74 C.F.R § 65.135(b).
[596] See paras. 7.101, 7.106 above.
[597] See Exhibit CDA-7. See also 74 C.F.R. § 65.240.

7.417 Evidence submitted by the parties indicates that, as a result of these exceptions, a considerable proportion of beef and pork is exempted from the COOL measure.[599] The exact proportion or magnitude of the exceptions and exclusions is irrelevant for our review of the complainants' claims under Article 2.1 of the TBT Agreement. In fact, when asked about the relevance of these exceptions in terms of practical compliance with the COOL measure, the United States indicated that:

> "[It] is not aware of any evidence to suggest that meat producers in the distribution chain – feed lot operators and slaughterhouses – are systematically separating source animals or meat products depending on whether the ultimate meat products derived from those animals are subject to the 2009 Final Rule. This is due to the fact that the ultimate disposition of a meat product is often not known at any particular stage of the production chain."[600]

7.418 The complainants' answers to the same question confirm that there is no systematic differentiation based on the ultimate destination of the meat produced.[601]

7.419 Accordingly, we conclude that the exceptions to the coverage of the COOL measure do not alter the distribution of compliance costs for livestock and meat producers and processors in a way that would modify the incentives created by the COOL measure.

Conclusion with regard to the muscle cut labels

7.420 In light of our analysis of the parties' arguments, we find that, in the context of the muscle cut labels, the COOL measure creates an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock. Accordingly, we also find that, in the context of muscle cut labels, the COOL measure *de facto* discriminates against imported livestock by according less favourable treatment to Canadian cattle and hogs, and to Mexican cattle, especially Mexican feeder cattle, than to like domestic livestock.

Ground meat label

7.421 Unlike for muscle cuts, there is one single label for ground meat under the COOL measure. This label applies equally to ground meat of imported and domestic origin.

7.422 Pursuant to the COOL measure, the ground meat label must list "all of the countries of origin of ... ground beef [or] ... pork".[602] According to the 2009 Final Rule (AMS), this means that "if a country of origin is utilized as a raw material source in the production of ground meat, it must be listed on the label".[603]

7.423 To ensure that the ground meat label carries this information, the meat which has been ground needs to be segregated according to origin. In fact, the above-quoted COOL Compliance Guide issued by USDA references "segregation" and a "segregation plan" not just for muscle cuts, but also in the context of ground meat. Like for muscle cuts, this segregation involves costs and, as a matter

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[598] 7 U.S.C. § 1638a(b).

[599] See Canada's response to Panel question No. 92, Exhibit CDA-199, Mexico's response to Panel question No. 92, Exhibits MEX-99, MEX-100 and MEX-101, United States' response to Panel question Nos. 92-101, Exhibits US-147 and 148.

[600] United States' response to Panel question No. 93.

[601] See Canada's response to Panel question No. 93 and Mexico's response to Panel question No. 93.

[602] 7 U.S.C. § 1638a(a)(2)(E).

[603] 74 FR 2671.

of logic, the fewer origins involved, the less costly compliance with the COOL measure is in the context of ground meat.

7.424 The United States explains that in its final form, the COOL measure does not prescribe any order for listing the countries of origin of ground meat.[604] The complainants have not contested this. In fact, evidence from Canada confirms this.[605]

7.425 Further, the ground meat label might list "all of the reasonably possible countries of origin of ... ground beef [or] ... pork".[606] The 2009 Final Rule (AMS) defines this as follows: "when a raw material from a specific origin is not in a processor's inventory for more than 60 days, that country shall no longer be included as a possible country of origin".[607]

7.426 The 2009 Final Rule (AMS) explains that:

> "[t]he 60-day in inventory allowance speaks only to when countries may no longer be listed. The 60-day inventory allowance is an allowance for the Agency' enforcement purposes for when the Agency would deem ground meat products as no longer accurately labeled."[608]

7.427 This 60-day "inventory allowance" allows flexibility from the segregation involved in the ground meat label under the COOL measure. In effect, it allows a processor to reference a country of origin on its ground meat label even if the processor has not had ground meat from that particular country in its inventory for the last 60 days or less. Thus, a processor may use the same label for all of its ground meat, provided that the label lists all countries of origin of the meat ground by the processor, and that the processor has had in its inventory meat for grinding of each origin at least every 60 days.

7.428 In fact, comments on the 60-day "inventory allowance" under the Interim Final Rule (AMS) of August 2008 included the following:

> "The commenters stated that in practical terms, this provision appears to allow a processor to have 60 days to correct the label of a product to delete specific country(s), even though that country's product may no longer exist in its inventory. The commenters provided the example that a processor on day one could have product from the U.S. and Canada, and then on day 7 run out of product from the U.S., and yet could continue using the 'Product of U.S. and Canada' label for another 53 days. Commenters feared this provision could be easily abused by meat processors."[609]

7.429 In response, USDA did not deny this possibility or that the provision might be "abused" in specific instances. USDA merely indicated that "it does not believe *widespread* abuses of this provision will occur and will address any issues with this provision during routine compliance reviews".[610] There is no indication in the evidence placed before us of USDA having addressed any potential "abuses" of the 60-day "inventory allowance" in any routine compliance reviews it might have conducted.

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[604] See United States' first written submission, para. 78.
[605] See Exhibit CDA-41.
[606] 7 U.S.C. § 1638a(a)(2)(E).
[607] 74 C.F.R. § 65.300(h).
[608] 74 FR 2671.
[609] 74 FR 2670.
[610] 74 FR 2671 (emphasis added).

7.430 The flexibility under the 60-day "inventory allowance" was also confirmed by Secretary Vilsack, who explained in his letter that:

> "[t]he language in the Final Rule allows a label for ground meat product to bear the name of a country, even if product from that country was not present in a processor's inventory, for up to 60 days. This provision allows for labels to be used in a way that does not clearly indicate the product's country of origin."[611]

7.431 Another commenter on the Interim Final Rule (AMS) of August 2008 argued that the 60-day "inventory allowance" "was intended to reflect the sourcing processes of commercial grinders and not to require them to change their labels simply because the market had changed and source product was more expensive from one country than another".[612] USDA essentially confirmed this:

> "The Agency arrived at the 60-day allowance during its analysis of the ground meat industry. In this analysis, the Agency determined that in the ground beef industry a common practice is to purchase lean beef trimmings from foreign countries and mix those with domestic beef trimmings before grinding into a final product. Often those imported beef trimmings are not purchased with any particular regard to the foreign country, but the cost of the trimmings due to currency exchange rates or availability due to production output capacity of that foreign market at any particular time. Because of that, over a period of time, the imported beef trimmings being utilized in the manufacture of ground beef can and does change between various foreign countries.
>
> As large scale beef grinders can have in inventory at any one time, several days' worth of beef trimmings (materials to be processed into ground beef) from several different countries and have orders from yet other foreign markets, or from domestic importers, trimmings from several foreign countries that will fulfill several weeks' worth of ground beef production, *the Agency determined that it was reasonable to allow the industry to utilize labels representing that mix of countries that were commonly coming through their inventory during what was determined to be a 60-day product inventory and on order supply*."[613] (emphasis added)

7.432 Further, USDA explained that it did not consider it necessary to change the existing "normal business practices" in the grinding industry:

> "To require beef grinders to completely change their production system into grinding beef based on specific batches was determined to be overly burdensome and not conducive to normal business practices, which the Agency believes was not the intent of the statute."[614]

7.433 USDA added that it did not intend to modify the grinding industry's pre-existing bulk labelling policies:

> "[B]ecause beef grinders often purchase their labeling material in bulk, if a given foreign market that a beef grinder is sourcing from is no longer capable of supplying

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[611] Vilsack letter, pages 1-2.
[612] 74 FR 2671.
[613] 74 FR 2671.
[614] 74 FR 2671.

> product, the interim final rule allowed that grinder a period of time to obtain new labels with that given country of origin removed from the label."[615]

7.434 Finally, in response to another comment, USDA confirmed that the 60-day "inventory allowance" flexibility is available not only for meat grinders, but for market participants at every stage of meat supply and distribution:

> "With regard to if this 60-day inventory allowance is made for retailers or for suppliers of covered commodities, the Agency has made no distinction in this final rule and, as such, the same requirements would apply."[616]

7.435 Thus, the 60-day "inventory allowance" provides for significant flexibility with respect to the segregation entailed by the ground meat label under the COOL measure. This flexibility appears to us to render redundant certain aspects of ground meat segregation, and thus limits any additional costs of implementing the COOL measure with regard to ground meat.

7.436 The complainants have not made specific arguments in response to the United States' contentions regarding this flexibility, nor as to how any remaining costs would affect imported livestock less favourably in the context of ground meat.[617]

7.437 Accordingly, we find that the complainants have not demonstrated that the ground meat label under the COOL measure results in less favourable treatment for imported livestock.

(c) Actual trade effects

7.438 We have reached our conclusions on less favourable treatment under Article 2.1 of the TBT Agreement without examining in detail the actual trade effects of the muscle cuts and ground meat labels under the COOL measure. Instead, by assessing segregation and the resulting cost implications of the COOL measure, we have followed the Appellate Body's approach in *Korea – Various Measures on Beef*. As suggested by the Appellate Body in that dispute, there is a "more direct, and perhaps simpler approach" to assessing a national treatment claim by "focus[sing] on what appears ... to be the fundamental thrust and effect of the measure itself".[618]

7.439 As the Appellate Body explained in *US – FSC (Article 21.5 – EC)* this examination does not involve the actual effects of the measure in the marketplace:

> "This examination cannot rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace. At the same time, however, the examination need not be based on the *actual effects* of the contested measure in the marketplace."[619]

7.440 Further, the Appellate Body noted in *EC – Bananas III (Article 21.5 – US)* that the absence of "actual trade effects" of a measure does not prevent a Member from bringing a successful claim of

[615] 74 FR 2671.
[616] 74 FR 2671.
[617] See United States' first written submission, paras. 78 and 159.
[618] Appellate Body Report, *Korea – Various Measures on Beef*, para. 142.
[619] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215 (footnote omitted).

violation under the covered agreements.[620] Likewise, the GATT panel in *US – Superfund* held in regard to the national treatment provision of the first sentence of Article III:2 of the GATT that:

> "[It] cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement."[621]

7.441 The GATT panel based this finding on the fact that "[u]nlike some other provisions in the General Agreement, [the first sentence of Article III:2] does not refer to trade effects".[622] This is equally valid for Article III:4 of the GATT and Article 2.1 of the TBT Agreement. In fact, in the context of Article III:4 of the GATT, the panel in *Korea – Various Measures on Beef* held that "the jurisprudence on Article III makes it clear that no consideration needs to be given to the effects of any less favourable treatment or the impact of such discriminatory regulation on trade volume".[623]

7.442 The parties agree that we do not need to verify the actual trade effects of the COOL measure in assessing the complainants' claims under Article 2.1 of the TBT Agreement.[624]

7.443 Yet, the parties have extensively argued the alleged actual economic and trade effects of the COOL measure, and whether such effects are attributable to the COOL measure or to other factors. For this purpose, they have submitted economic figures and analyses as well as econometric studies, which we consider relevant factual evidence in this dispute.

7.444 Whether the COOL measure has negative trade and economic effects is an important factual matter in this dispute. It is linked to the conclusions of our above analysis in regard to a violation of Article 2.1 of the TBT Agreement.

7.445 Accordingly, we consider it important to make findings on the actual trade effects of the COOL measure, even if, under the legal standard we have identified for Article 2.1 of the TBT Agreement, these findings are not indispensable for the analysis of the complainants' claims.

7.446 Indeed in *Korea – Dairy,* the Appellate Body emphasised the unique role of panels in making factual findings by reviewing the totality of the evidence in the panel record:

> "[U]nder Article 11 of the DSU, a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof.
>
> In *European Communities – Hormones,* we had occasion to stress that:

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[620] Appellate Body Report, *EC – Bananas III (Article 21.5 – US)*, para. 469. See also Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 469.

[621] GATT Panel Report, *US – Superfund*, para. 5.1.9.

[622] GATT Panel Report, *US – Superfund*, para. 5.1.9.

[623] Panel Report, *Korea – Various Measures on Beef*, para. 637.

[624] See Canada's opening oral statement at the first substantive meeting of the Panel, para. 19, Mexico's response to Panel question No. 21 and United States' response to the Panel's second set of questions to the parties, para. 34.

> 'The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts.[625]' "[626]

7.447 Importantly, this review of the factual evidence does not mean that "panels ... are ... required to accord factual evidence the same meaning and weight as do the parties".[627] Further, as the Appellate Body explained in *EC – Hormones,* "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings".[628]

7.448 The United States contends that our review of the econometric studies submitted by Canada raises systemic concerns, as traditionally econometric analysis has been employed in arbitrations under Article 22.6 of the DSU to determine the level of nullification or impairment of benefits as a result of a WTO-inconsistent measure. According to the United States, Canada's approach risks conflating these two different inquiries and processes. In particular, the United States questions whether panel findings with respect to such an econometric model might prejudice any findings by the same persons possibly acting as arbitrators under Article 22.6 of the DSU.[629]

7.449 Clearly, panels are not arbitrators and arbitrators are not panels, even if in a given dispute these bodies might comprise the same persons. Panels and Article 22.6 arbitrators operate on the basis of different procedures and legal provisions, and at different stages of WTO dispute settlement. Their roles and mandates are also different. As the arbitrator in *EC – Hormones (Article 22.6 – EC)* pointed out, panels and arbitrators have different tasks:

> "There is ... a difference between our task here and the task given to a panel. In the event we decide that the [original complainant's] proposal [concerning the level of suspension of concessions or other obligations] is *not* WTO consistent, i.e. that the suggested amount is too high, we should not end our examination the way panels do, namely by requesting the DSB to recommend that the measure be brought into conformity with WTO obligations. Following the approach of the arbitrators in the *Bananas* case – where the proposed amount of US$ 520 million was reduced to US$ 191.4 million – we would be called upon to go further. In pursuit of the basic DSU objectives of prompt and positive settlement of disputes, we would have to estimate the level of suspension we consider to be equivalent to the impairment suffered. This is the essential task and responsibility conferred on the arbitrators in order to settle the dispute. In our view, such approach is implicitly called for in Article 22.7."[630]

7.450 In light of the above-quoted interpretation of Article 11 of the DSU, entitled "Function of Panels", we consider that we have the right, and in fact the duty, to make the factual findings necessary to carry out an objective analysis of the dispute and all of the evidence before us.

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[625] *(footnote original)* Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 133.

[626] Appellate Body Report, *Korea – Dairy*, para. 137.

[627] Appellate Body Report, *Australia – Salmon*, para. 267.

[628] Appellate Body Report, *EC – Hormones*, para. 135.

[629] See United States' response to the Panel's second set of questions to the parties, para. 33.

[630] Decision by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 12 (footnotes omitted) and Decision by the Arbitrators, *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 12 (footnotes omitted).

7.451 In doing so, we certainly do not intend to usurp the role of arbitrators under Article 22.6 of the DSU. We are not assessing any level of nullification or impairment, let alone whether there is any equivalence with any suggested level of suspension of concessions or other obligations. We have no mandate to do so – either under the DSU, or according to our own specific terms of reference.[631] These matters are left to be decided by an eventual arbitration under Article 22.6 of the DSU and on the basis of evidence submitted in the context of such arbitration – provided such arbitration actually becomes necessary.

7.452 Also, there is no reason to consider economic or econometric evidence inappropriate *per se*, let alone exempt from panels' review. The ultimate role of panels is to conduct the necessary factual and legal review of the arguments and evidence advanced by the parties, and thus to carry out an objective assessment of the matter brought before the panel. This basic function of panels does not exclude – and may, in fact, necessitate – the review of economic and econometric evidence and arguments.

7.453 Accordingly, in the following sections we examine the basic trade flows in livestock between Canada and the United States, and Mexico and the United States. In particular, we cover fluctuations in import volumes and shares between 2000 and 2010, with particular emphasis on the second half of this period. Subsequently, we examine the costs involved in the COOL measure in light of the economic studies submitted by the parties. Finally, we assess whether, in light of the econometric studies submitted by Canada and the United States, the COOL measure had a negative and significant impact on the price and volume of imported livestock.

(i) Trade volumes in the North American livestock market

<u>Cattle</u>

7.454 The parties provide figures on the import volume of Canadian and Mexican cattle into the United States during the last five to ten years. Despite certain divergences among some of these figures, it is possible to establish the main trends of overall US cattle imports from Canada and Mexico.

Imports of Canadian cattle into the United States

Overall imports from 2000 to 2009

7.455 Between 2000 and 2009, Canada exported to the United States an annual average of about 950,000[632] or 1,000,000[633] head of cattle, according to the United States and Canada, respectively. There were significant fluctuations in annual export figures. In particular, in 2004 overall imports of Canadian cattle dipped to a few thousand[634] or a few hundred[635] head of cattle, according to the United States and Canada, respectively. This was mainly due to the discovery of Bovine Spongiform Encephalopathy ("BSE") in Canada, which resulted in significant US import restrictions for Canadian cattle from 2003 to 2005.[636]

7.456 Canada and the United States provide figures of US imports of Canadian cattle using statistics from the Animal and Plant Health Inspection Service ("US APHIS") and the US Bureau of the Census

[631] See para. 1.6 above.
[632] United States' first written submission, para. 89 (Exhibit US-28, table 3).
[633] Exhibit CDA-208.
[634] See Exhibit US-28, table 3.
[635] See Exhibit CDA-208.
[636] United States' first written submission, paras. 99-105 (Exhibit US-28, table 3; Exhibit CDA-208).

("US Census Bureau") for the period starting in 2005. The parties' figures from the two sources, and in certain cases even from the same source, are not identical. However, the figures show similar overall patterns in the development of the imports of Canadian cattle into the United States.

7.457 Both parties' statistics show an increase in imports of Canadian cattle between 2005 and 2007 and a considerable decrease in 2009 *vis-à-vis* 2008. The main difference is that the data submitted by Canada show a decline in the number of cattle imports starting already in 2008, whereas the data submitted by the United States point to a decrease only for 2009.

Imports of Canadian cattle ***Source: US APHIS***	**2005**	**2006**	**2007**	**2008**	**2009**
Data submitted by Canada[637]	518,287	1,025,522	1,379,105	1,252,279	797,638
Data submitted by the United States[638]	518,287	993,620	1,397,156	1,407,081	999,045

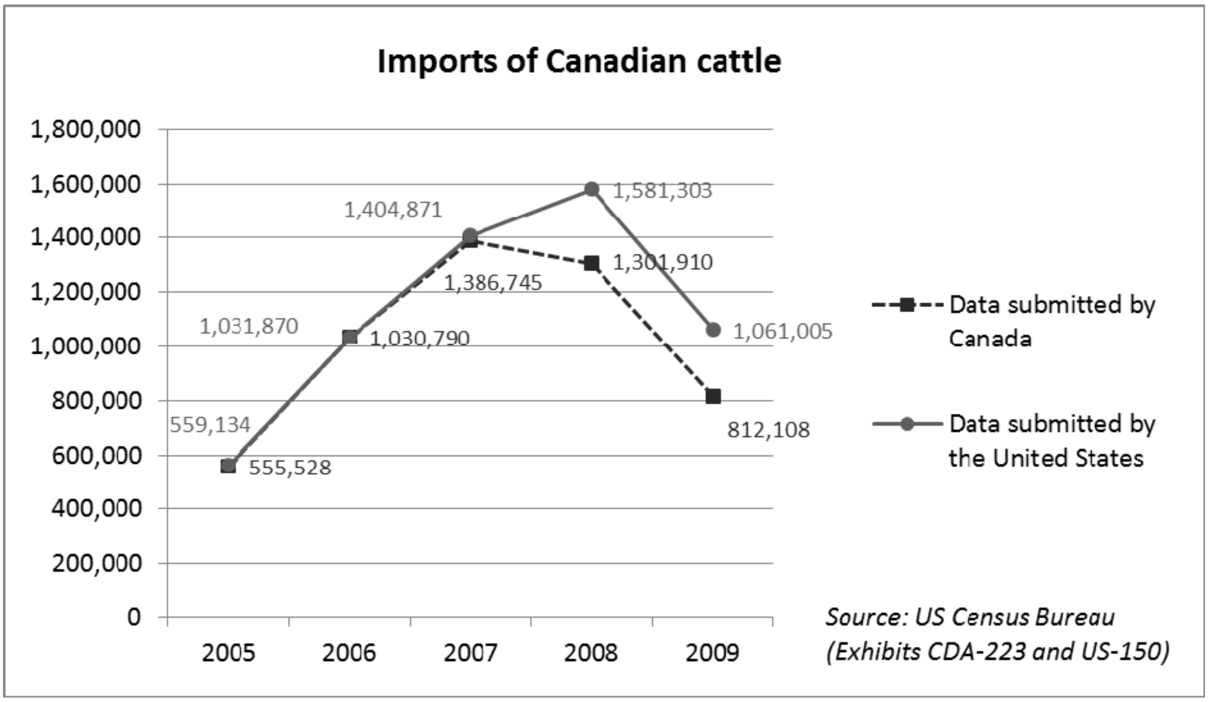
Imports of Canadian cattle ***Source: US Census Bureau***	**2005**	**2006**	**2007**	**2008**	**2009**
Data submitted by Canada[639]	555,528	1,030,790	1,386,745	1,301,910	812,108
Data submitted by the United States[640]	559,134	1,031,870	1,404,871	1,581,303	1,061,005

[637] Exhibit CDA-223. This information presented by Canada excludes cows, bulls and breeding animals.

[638] Exhibit US-28, Table 3. This information presented by the United States excludes breeding animals.

[639] Exhibit CDA-223. This information presented by Canada excludes cows, bulls and breeding animals.

[640] Exhibit US-150.



Overall imports during 2010

7.458 Canada and the United States have only submitted partial import volume figures for the year 2010 as this period partly coincided with the proceedings of this dispute. The United States compares the import volume of Canadian cattle from January to September 2010 with figures for the corresponding period of 2009. This comparison shows that the number of imported Canadian cattle increased from 809,513 head between January and September 2009 to 864,579 in the same period of 2010.[641] There is, however, no evidence before us on whether this upward trend continued in the remaining months of 2010.

7.459 In the absence of data for the corresponding period of 2009, no similar comparison is possible for the other partial import figures submitted by Canada and the United States for specific periods of 2010. Canada has submitted US APHIS statistics showing 765,248 heads of imported Canadian cattle in the first 11 months of 2010.[642] Further, on the basis of data from the US Census Bureau, Canada submits that imports of Canadian cattle from January to October 2010 reached 756,275 animals, whereas the United States argues that from January to September 2010 Canadian cattle imports were 864,579.[643] All these partial data for 2010 show that in the first 11 months of 2010 imports of Canadian cattle did not surpass the import levels for 2009 as a whole.

Further data

7.460 Canada also presents more detailed data specifying the import volume depending on the category of animal examined, i.e. feeder or fed cattle, cows, bulls and, in general, animals for breeding purposes. This is because Canada and the United States disagree whether certain categories of cattle should be excluded from the data set used to measure import volume fluctuations. Canada argues that its economic evidence appropriately excludes cows and bulls from the data set

[641] Exhibit US-150.
[642] Exhibit CDA-223.
[643] Exhibit US-150.

because these animals are used primarily for breeding, rather than for producing muscle cuts of meat subject to the COOL measure.[644] The United States submits that cows and bulls over 30 months of age account for a large portion of Canada's exports to the United States.[645]

7.461 Canada files evidence from Agriculture and Agri-Food Canada[646] showing that the number of Canadian animals imported into the United States, excluding animals for breeding, from 2006 to 2009 gradually increased until 2008, followed by a significant reduction in 2009.

	2006	**2007**	**2008**	**2009**
Imports of Canadian cattle excluding animals for breeding *(Source: Agriculture and Agri-Food Canada)*[647]	1,031,767	1,402,172	1,557,910	1,054,596

7.462 Canada also submits statistics from US APHIS and the US Census Bureau to compare data including and excluding cows and bulls. For that purpose, the information is subdivided into slaughter cattle, a category potentially including cows and bulls over 30 months of age, and feeder cattle imports:[648]

	2007	**2008**	**2009**	**2010 (Jan.-Aug.)**
Imports of Canadian slaughter cattle not including cows and bulls *(US APHIS)*	840,015	644,360	523,635	418,864
Imports of Canadian slaughter cattle not including cows and bulls *(US Census Bureau)*	838,495	661,028	523,474	437,375
Imports of Canadian slaughter cattle including cows and bulls *(US APHIS)*	858,060	844,667	755,817	565,305
Imports of Canadian slaughter cattle including cows and bulls *(US Census Bureau)*	849,315	895,643	763,145	588,810
Imports of Canadian feeder cattle *(US APHIS)*	539,090	607,919	274,003	158,785
Imports of Canadian feeder cattle *(US Census Bureau)*	548,250	640,882	288,634	180,779

7.463 Based on the above data, we find that the main trend of imports of Canadian cattle is not affected by whether cows and bulls are included or not. In fact, imports of slaughter and feeder cattle, whether cows and bulls are included or excluded, follow the same general trend from year to year under the US APHIS and US Census Bureau data. The only exception in the comparison is the data on slaughter cattle including cows and bulls in 2007 and 2008; APHIS figures, which follow the trend shown in the other slaughter cattle data, decrease during that period, whereas US Census Bureau data show an increase. Importantly, all the sources and data in the above table show a substantial decrease in imports of Canadian cattle in 2009, whether it involves feeder or slaughter cattle, and

644 Canada's opening oral statement at the second substantive meeting of the Panel, para. 43.
645 United States' second written submission, para. 95.
646 Exhibit CDA-110.
647 Exhibit CDA-110.
648 Exhibit CDA-196.

whether or not the latter excludes cows and bulls. Being limited to the first eight months, the data for 2010 do not show a clear trend in the absence of data for the same period of previous years.

Imports of Mexican cattle into the United States

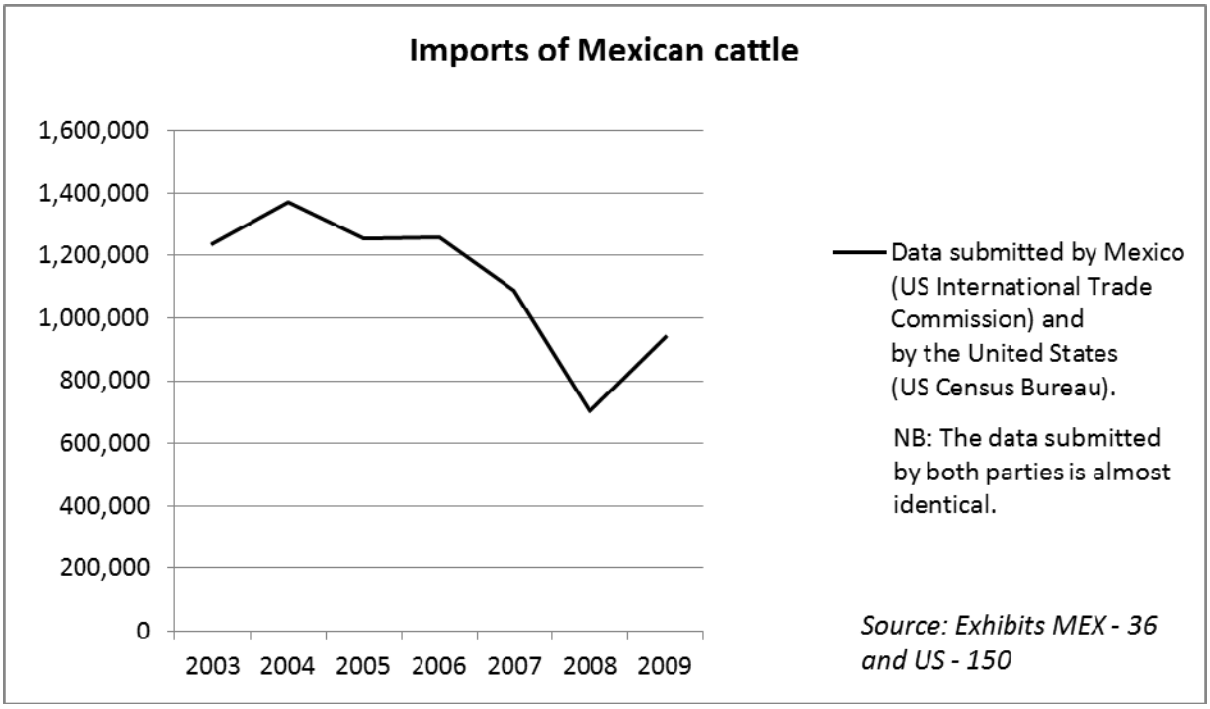
Overall imports from 2000 to 2009

7.464 From 2000 to 2009, Mexico exported to the United States an average of approximately 1.1-1.2 million head of cattle per year.[649]

7.465 The data presented by Mexico and the United States for the period starting in 2003 show a similar trend in the development of import volumes of Mexican cattle into the United States. Imports of Mexican cattle fluctuated between approximately 1,239,000 and 1,370,000 head during the 2003-2006 period.[650] In 2007 the import volume decreased below 1,100,000 head of Mexican cattle, with a further drop to 700,000 head in 2008. In 2009 the number of Mexican cattle imported into the United States increased to 940,000.[651]

Imports of Mexican cattle	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**
Data submitted by Mexico *(US International Trade Commission)*[652]	1,239,220	1,370,259	1,256,351	1,256,996	1,090,094	702,651	940,851
Data submitted by the US *(US Census Bureau)*[653]	1,239,531	1,370,476	1,256,404	1,256,973	1,090,094	702,661	940,869

[649] Mexico's first written submission, para. 114 and United States' first written submission, para. 108 (Exhibits MEX-36, 79, 104; US-28, table 13, US-150).
[650] Exhibits MEX-36 and US-150.
[651] Exhibits MEX-36 and US-150.
[652] Exhibit MEX-36.
[653] Exhibit US-150.



Imports during 2010

7.466 Mexico and the United States compare import volumes of Mexican cattle during the first seven months of 2009 and 2010 on the basis of data from the Mexican *Secretaría de Hacienda y Crédito Público* and the US Census Bureau, respectively. These figures show an increase in the import volume of Mexican cattle between January and July 2010 with respect to the same period in 2009.

7.467 Mexico provides January-July data since 2007, which allows for a more thorough comparison with the figures for the same period in 2010. This comparison shows that Mexican cattle imports have increased during the first seven months of 2010 *vis-à-vis* the same period in all three previous years.

Imports of Mexican cattle	**2007 (Jan.-Jul.)**	**2008 (Jan.-Jul.)**	**2009 (Jan.-Jul.)**	**2010 (Jan.-Jul.)**
Data submitted by Mexico[654]	583,829	421,266	496,214	648,143
Data submitted by the United States[655]			478,694	628,817

7.468 The United States also provides US Census Bureau data comparing the number of Mexican cattle head imports from January to September of 2009 and 2010. According to this data, import volumes increased from 569,405 in the first nine months of 2009 to 737,644 in the same period of

[654] Exhibit MEX-79.
[655] Exhibit US-71.

2010.[656] This confirms the above upward trend from the relevant period of 2009 to the same period in 2010.

Canadian hogs

Overall imports from 2000 to 2009

7.469 Imports of Canadian hogs into the United States increased from 4.2 million head in 2000 to approximately 4.7 million head in the first ten months of 2010[657], peaking at approximately 10 million head in 2007[658], with a continuous increase from 2000 to 2007. Imports of Canadian hogs slightly dropped in 2008 and further declined in 2009.

7.470 Canada's statistics from Agriculture and Agri-Food[659] and data submitted by the United States from US APHIS and the US Census Bureau for the period starting in 2005 provide further detail on the evolution of imports of Canadian hogs. Although the data are not identical, they show an increase in imports of Canadian hogs between 2005 and 2007, followed by a two-year decrease in 2008 and 2009.

Imports of Canadian hogs	2005	2006	2007	2008	2009
Canada's Agriculture and Agri-food[660]		8,647,391	9,894,930	9,270,268	6,306,919
US APHIS[661]	7,911,137	8,494,939	9,907,316	9,072,783	6,169,537
US Census Bureau[662]	8,190,467	8,763,378	10,004,317	9,347,951	6,364,553

Imports during 2010

7.471 Evidence submitted by the United States shows that imports of Canadian hogs from January to September 2010 remain slightly below the levels of the same period in 2009. Specifically, the number of Canadian hogs imported into the United States from January to September in 2009 was 4,892,846, compared to 4,332,342 during the same period of 2010.[663]

7.472 Canada provides further evidence showing that during the January-October period, imports of Canadian hog reached 4,788,520.[664] However, Canada has not submitted comparable data for the same ten-month period of calendar years preceding 2010.

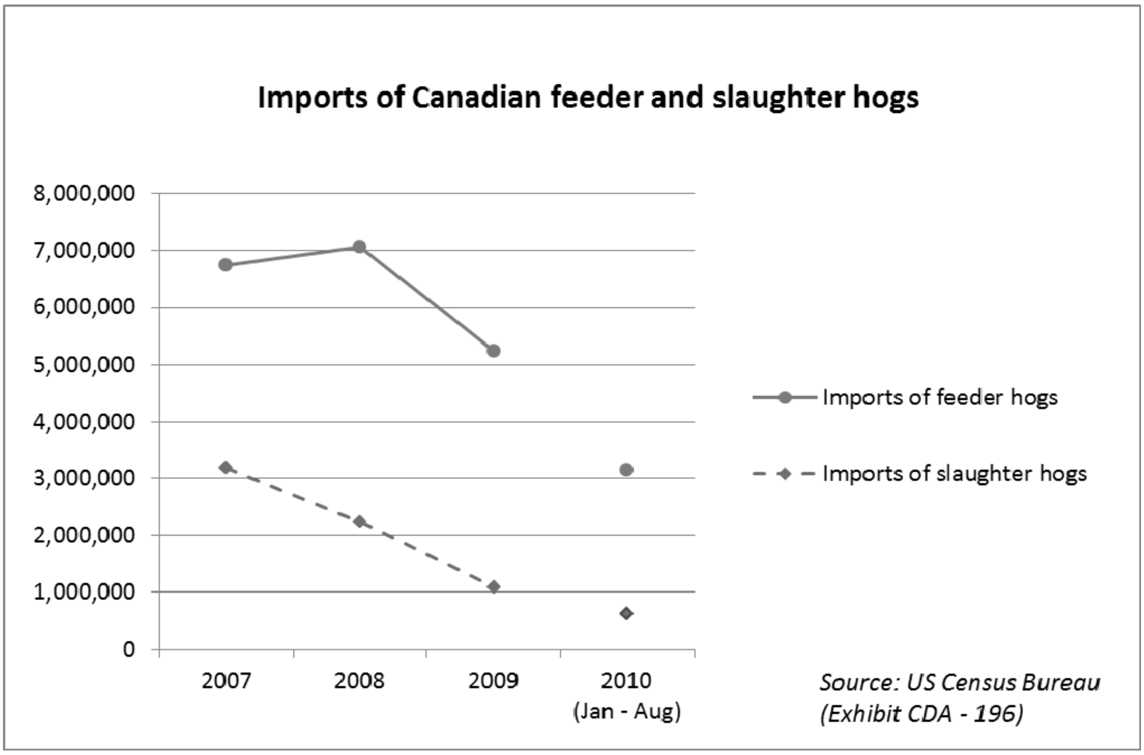
Further data

7.473 Canada also submits data including figures for slaughter hog[665] and feeder hog imports, and comparable data from US APHIS and the US Census Bureau.[666] This comparison shows that

[656] Exhibit US-150.
[657] Exhibits CDA-210 and US-151.
[658] Canada's first written submission, para. 34 and United States' first written submission, para. 116 (Exhibits CDA-47, 49 and 111; US-28, table 10 and US-72).
[659] The figures from Agriculture and Agri-Food Canada exclude Canadian breeding hogs imported into the United States.
[660] Exhibit CDA-111.
[661] Exhibit US-28, Table 10.
[662] Exhibit US-151.
[663] Exhibit US-151.
[664] Exhibit CDA-210.
[665] The slaughter hog category includes sows and boars.

slaughter hog imports started decreasing in 2008, whereas feeder hog imports only dropped in 2009. Being limited to the first eight months, the data for 2010 do not show a clear trend in the absence of data for the same period in previous years.

	2007	**2008**	**2009**	**2010 (Jan-Aug.)**
Imports of Canadian slaughter hogs *(US APHIS)*[667]	3,292,100	2,334,367	1,191,944	673,250
Imports of Canadian slaughter hogs *(US Census Bureau)*[668]	3,174,415	2,234,238	1,085,480	641,126
Imports of Canadian feeder hogs *(US APHIS)*[669]	6,602,321	7,065,734	5,099,259	2,962,822
Imports of Canadian feeder hogs *(US Census Bureau)*[670]	6,736,221	7,055,529	5,246,057	3,143,804



(ii) Share of imported livestock in the United States

7.474 Overall, the share of Canadian and Mexican livestock in the United States has been small between 2005 and 2010. Canadian cattle imports as a share of US cattle slaughter[671] and Mexican

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[666] Exhibit CDA-196.
[667] Exhibit CDA-196.
[668] Exhibit CDA-196.
[669] Exhibit CDA-196. US APHIS provides statistics both with and without an eight-week lag. The figures provided in the table are the ones without an eight-week lag.
[670] Exhibit CDA-196.
[671] Exhibit CDA-46.

cattle imports as a share of US feed placements[672] during that period have been below 5% for each category. Canadian hogs imported into the United States never exceeded a 10% share of US hog slaughter between 2005 and 2009.[673]

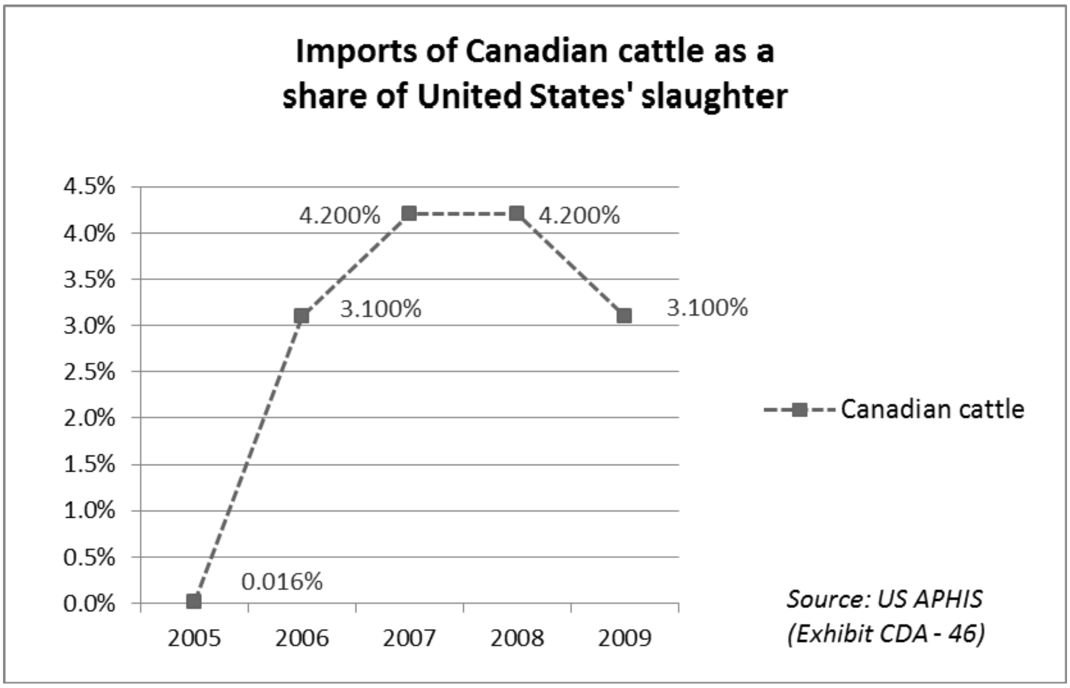
Cattle

Share of Canadian cattle imports in the United States

Overall share of Canadian cattle imports

7.475 The share of Canadian cattle imports to the United States has been small over the past decade. On the basis of APHIS statistics, Canada submits information on the total imports of Canadian cattle as a share of US cattle slaughter, showing an upward trend from 2005 to 2008, followed by a drop in 2009.[674]

Source: US APHIS	**2005[675]**	**2006**	**2007**	**2008**	**2009**
Total imports of Canadian cattle as a share of US slaughter[676]	0.016%	3.1%	4.2%	4.2%	3.1%



[672] Exhibit US-86. This exhibit contains a chart showing the monthly fluctuations on imports of Mexican feeder cattle as a share of US feed placements. The Panel calculates the annual average from 2007 to 2009 on the basis of this information.

[673] Exhibit US-86. This exhibit contains a chart showing the monthly fluctuations on imports of Mexican feeder cattle as a share of US feed placements. The Panel calculates the annual average from 2007 to 2009 on the basis of this information.

[674] Exhibit CDA-46.

[675] The low figure for 2005 is mostly due to the import restrictions of Canadian cattle imposed by the United States between 2003 and 2005 because of Bovine Spongiform Encephalopathy (BSE) being detected in Canada.

[676] Exhibit CDA-46.

7.476 Canada and the United States have also submitted figures on feeder and fed cattle as a share of US feed placements and US slaughter placements, respectively. The data show that the share of imports of Canadian feeder cattle compared to US feed placements increased from 2007 to 2008, but dropped considerably in 2009.

Source: USDA/USDC	**2007**	**2008**	**2009**	**2010 (Jan.-Aug.)**
Imports of Canadian feeder cattle as a share of US feed placements (Canada)[677]	2.29%	2.71%	1.22%	1.14%
Imports of Canadian feeder cattle as a share of US feed placements (US)[678]	2.65%	3%	1.41%	

7.477 The share of Canadian fed cattle compared to US cattle slaughter placements has steadily decreased since at least 2008.

Source: USDA/USDC	**2007**	**2008**	**2009**	**2010 (Jan.-Aug.)**
Imports of Canadian fed cattle as a share of US slaughter (Canada)[679]	3.1%	2.4%	2%	2.4%
Imports of Canadian fed cattle as a share of US slaughter (US)[680]	2.54%	1.86%	1.73%	

7.478 As regards the first eight months of 2010, data submitted by Canada indicates that the share of Canadian feeder cattle dropped *vis-à-vis* 2009, while the share of Canadian fed cattle recouped to the level of 2008.

Concerns raised by the parties

7.479 Canada and the United States disagree on two aspects of the methodological approach for calculating the share of Canadian cattle and hog imports in the US livestock market: the choice of the denominator and the unit of time.

7.480 As regards the denominator, the United States argues that "the import ratio that Canada uses to illustrate market share uses the amount of U.S. slaughter or placements in any given year as the

[677] Exhibit CDA-159.

[678] Exhibit US-86. This exhibit contains two charts showing the monthly fluctuations on imports of Canadian feeder and fed cattle as a share of US feed placements and US cattle slaughter, respectively. The Panel calculates the annual average from 2007 to 2009 on the basis of this information.

[679] Exhibit CDA-159.

[680] Exhibit US-86. This exhibit contains two charts showing the monthly fluctuations on imports of Canadian feeder and fed cattle as a share of US feed placements and US cattle slaughter, respectively. The Panel calculates the annual average from 2007 to 2009 on the basis of this information.

denominator, and thus, captures larger trends in the U.S. market that have nothing to do with Canadian imports".[681] Canada justifies this with the need to disregard market factors that do not have a differential impact on imported livestock, such as a general increase in grain prices.[682] We note that the United States did not provide any alternative methodology for calculating the shares, and its own evidence uses the same denominator as Canada's. In any event, given the use of the same numerator and denominator, the data allow for a useful comparison, irrespective of the parties' disagreement on the denominator.

7.481 As regards the unit of time, the United States submits that the data presented by Canada "is inappropriate because of the significant 'noise' associated with using weekly data instead of monthly data".[683] Accordingly, the United States presents estimates on the basis of monthly data. Canada replies that "[b]y using monthly observations rather than weekly data from the U.S.-APHIS, the United States reduces the size of the available data set and reduces the precision with which the effects of the COOL measure may be measured".[684] Canada further submits that the statistics prepared by US APHIS and the US Census Bureau are similar, with an expected variation attributable to weekly data not aligning exactly with monthly data.[685] As explained above, the general trend shown by both parties' data is quite similar, irrespective of the unit of time chosen.

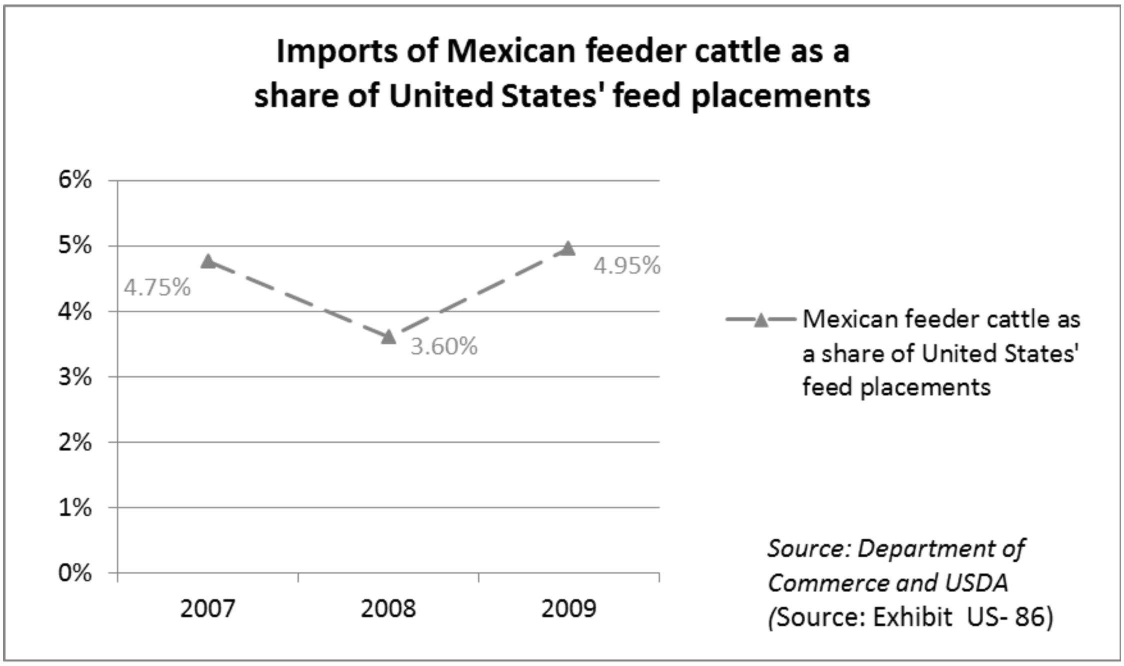
Share of Mexican cattle imports in the United States

7.482 The share of Mexican cattle imports in the United States has remained small over the past decade. According to the United States, imports of Mexican cattle as a share of US slaughter have represented between 3% and 5% from 2000 to 2009.[686]

7.483 Data submitted by the United States for the period between 2007 and 2009 show that imports of Mexican feeder cattle as a share of US feed placements have fluctuated in the same range:[687]

Source: Department of Commerce and USDA	**2007**	**2008**	**2009**
Imports of Mexican feeder cattle as a share of US feed placements	4.75%	3.6%	4.95%

[681] United States' second written submission, para. 73.
[682] Canada's opening oral statement at the second substantive meeting of the Panel, para. 49.
[683] United States' second written submission, para. 74.
[684] Canada's second written submission, para. 42.
[685] Canada's opening oral statement at the second substantive meeting of the Panel, para. 43.
[686] United States' first written submission, para. 108 (Exhibit US-28, Tables 5 and 13).
[687] Exhibit US-86. This exhibit contains a chart showing the monthly fluctuations on imports of Mexican feeder cattle as a share of US feed placements. The Panel calculates the annual average from 2007 to 2009 on the basis of this information.

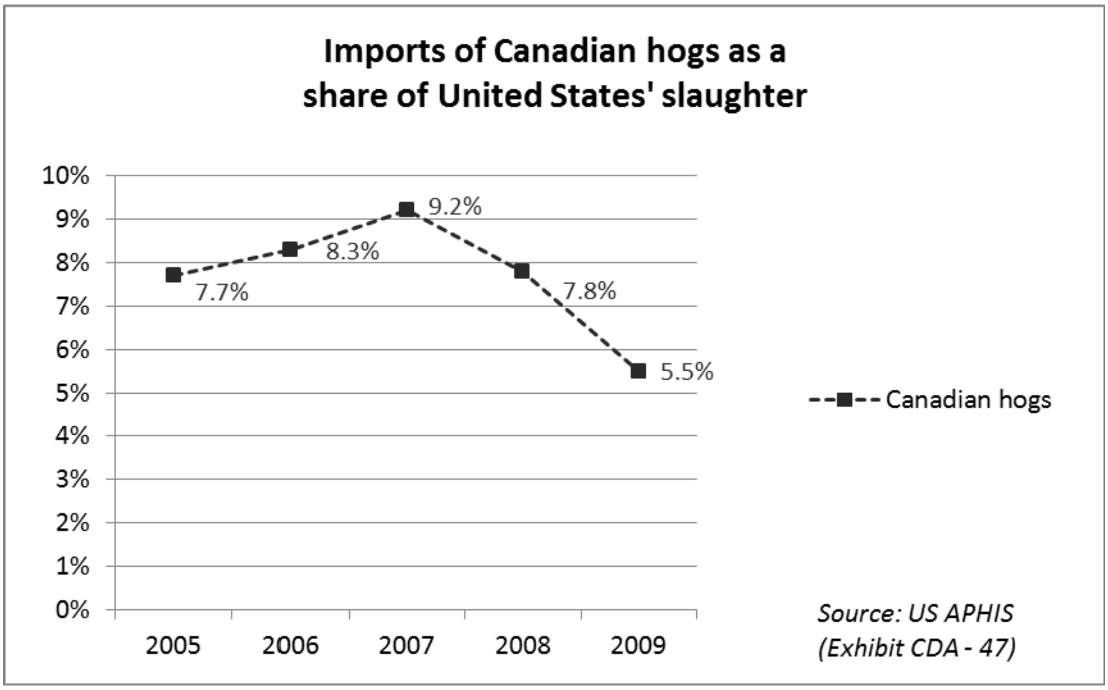


Canadian hogs

7.484 Canada provides data showing that total imports of Canadian hogs as a share of US hog slaughter increased continuously between 2005 and 2007, followed by two consecutive years of reduction:[688]

Source: US APHIS	**2005**	**2006**	**2007**	**2008**	**2009**
Total imports of Canadian hogs as a share of US slaughter	7.7%	8.3%	9.2%	7.8%	5.5%

[688] Exhibit CDA-47.



7.485 Canada also submits more detailed data showing that Canadian feeder hogs as a share of US hog production[689] declined in 2009 and in the first eight months of 2010, and that the number of Canadian slaughter hogs as a share of US hog slaughter has been steadily decreasing since at least 2008:[690]

Source: USDA	**2007**	**2008**	**2009**	**2010 (Jan.-Aug.)**
Imports of Canadian feeder hogs as a share of US hog production	4.9%	5%	3.6%	3%
Imports of Canadian slaughter hogs as a share of US hog slaughter	3.1%	2%	1.1%	1%

(iii) Costs of the COOL measure

7.486 As explained above, the COOL measure entails compliance costs, including segregation costs.[691] In fact, all parties agree on the existence of compliance costs associated with the introduction of the COOL measure. However, parties' views differ on the extent of these costs. While Canada and Mexico argue that the costs of segregation are significant, the United States claims they remain small thanks to the flexibilities contained in the COOL requirements.

[689] Canada provides this information with and without an eight-week lag between the imports of Canadian hog and total US hog production. According to Canada's response to Panel question No. 21, Canadian hogs are approximately eight weeks older than the US pig crop as a whole. Therefore, argues Canada, in order to compare the two groups of hogs with greater accuracy, it is necessary to use the eight-week lag. As an example, Canada states that under this scenario Canadian hog exports to the United States in week 9 are compared to the US hog crop in week 1.

[690] Exhibit CDA-159.

[691] See paras. 7.330-7.372 above.

7.487 The structure of segregation costs can be complex depending on whether the structure of the supply chain is highly integrated and on consumers' willingness to pay a premium for country of origin labelling. These costs have to be covered by some participants along the supply chain either by setting a higher sale price or by imposing a discounted purchasing price. As a result, prices and quantities are likely to be affected.

7.488 Besides affidavits indicating price discounts for imported animal and meat as a result of the COOL requirements[692], Canada provides two economic studies on the segregation costs of the COOL measure. The first one, prepared by Informa Economics[693] ("Informa Report") in June 2010, assesses the implementation costs of the supply chain in the United States. The second one is an economic simulation model by Professor Sumner ("Sumner Simulation Study") published in June 2010, which measures the impact of the COOL measure on the willingness of operators along the supply chain to pay for imported Canadian animals based on the estimated segregation costs provided by the Informa Report.

Informa Report

Summary of the study

7.489 The Informa Report provides a descriptive assessment of the costs associated with the implementation of the 2009 Final Rule (AMS). It updates a previous assessment of the country of origin labelling as established in the 2002 Farm Bill published in April 2003.[694] The report analyses the US cattle and beef supply chain as well as the hog and pork supply chain, by comparing two supply chain configurations: production processes involving only US-origin animals or mixed-origin animals.

7.490 The Informa Report identifies various types of compliance costs of the COOL measure and it provides figures suggesting that the costs under the mixed origin configuration are substantially higher than the ones associated with the supply chain configured to handle only US-origin products. These costs flow from the adaptations which operators in the supply chain need to make to comply with the COOL measure.

7.491 The Informa Report explains that the magnitude of these costs depends on the stage of the supply chain and whether mixed-origin products are being processed. The segregation costs are particularly high at the packer/processing and distribution/retail level for operators accepting mixed-origin livestock and meat.

7.492 The Informa Report compares the estimated costs under the 2002 Farm Bill and the costs under the 2009 Final Rule (AMS) and finds that despite the flexibilities under the latter instrument, e.g. the possibility of commingling and the interchangeable use of Labels B and C, operators processing animals and products with mixed origin continue to bear additional costs of segregation and compliance compared with a supply chain configured to process only US-origin animals.

7.493 Based on an industry survey and an analysis of the retail meat sector, the Informa Report concludes that the COOL measure had different cost impacts in the beef and pork sectors.

7.494 In the supply chain of cattle and beef, a large number of operators adopted a configuration that can handle one or more of the labels despite high segregation costs associated with the use of

[692] See para. 7.356 above.
[693] Exhibit CDA-64.
[694] Exhibit CDA-70.

animals and products of mixed origin. Concerns over long-term supply availability explain why operators decided to bear the segregation costs. Slaughterhouses were aware that there might not be enough US-born animals to satisfy a high utilization rate necessary to ensure minimum production costs and, thus, decided to handle both domestic and foreign-born cattle.

7.495 The Informa Report indicates that, unlike the beef sector, the costs of segregation in the hog industry are particularly complex and depend on the type of production configuration and the degree of vertical integration. In fact, the Informa Report distinguishes between integrated hog production and packer/processor, large scale production not integrated into the packer/processor, and small independent hog producers. The report concludes that many operators in the hog and pork supply chain opted to handle only US-origin hogs to avoid large and complex segregation costs and, thus, remain competitive.

Criticisms by the United States

7.496 The United States argues that the lack of transparency of the methodology of the Informa Report calls into question the validity of the estimated costs presented by the report.[695] Further, according to the United States, the Informa Report failed to account for previously occurring segregation and for the flexibilities provided by the 2009 Final Rule (AMS). The Informa Report suggests that no livestock imports should occur but this is rebutted by actual market trends. Accordingly, the United States argues, the Informa Report overestimates the costs of compliance with the COOL requirements.

7.497 In response, Canada submits a follow-up letter from the Vice President of Informa Economics, explaining that the Informa Report is based on information gathered from interviews and firm-level cost data.[696] The sensitive nature of the data and the confidentiality agreements with survey participants explain why the sources cannot be disclosed. According to the follow-up letter, the Informa Report was able to distinguish between the costs associated with the COOL measure and those occurring for other reasons like the BSE, other labels or export requirements. The flexibilities provided for in the 2009 Final Rule (AMS) were also included in the cost estimates and explain why some compliance costs decreased.

Analysis by the Panel

7.498 The Informa Report provides insights on how the different types of compliance and segregation costs are allocated in the supply chain. The Report demonstrates that compliance costs of the COOL measure faced by operators depend on a large number of determinants, including the decision to process only US-origin or mixed-origin products, the stage of the supply chain, the size of the firm, the geographical location of operators and the time of the year. The Report also shows that, in general, COOL costs arise at every stage of the livestock and meat supply chain, and that these costs increase as livestock and meat move downstream on the chain.

7.499 However, the Informa Report is silent on its methodology and the sample considered (i.e. time period, geographical zone, number of firms surveyed). Accordingly, we cannot assess with sufficient certainty whether the Informa Report is reliable and precise as regards its exact quantification of the costs of the COOL measure.

[695] Exhibit US-43.
[696] Exhibit CDA-174.

Sumner Simulation Study

Summary of the Study

7.500 The economic simulation study undertaken by Professor Daniel A. Sumner[697] applies economic reasoning to explain some of the descriptive facts on segregation costs highlighted in the Informa Report. In particular, Professor Sumner compares the situations with and without the COOL measure, and develops an economic model of the US livestock sector (feeder pigs, fed hogs and pork, feeder cattle, fed cattle and beef) to illustrate how the differential implementation costs of the COOL measure are distributed among market participants through market forces. Like the Informa Report, the Sumner Simulation Study considers operators that process either only US-origin or mixed-origin animals. The Study presents the results of the economic model simulation which assesses the reduction in the demand for Canadian livestock, in terms of willingness to pay, following the implementation of the COOL measure.

7.501 The Sumner Simulation Study lays down the economic competitive mechanism that explains how the implementation of the COOL measure affects Canadian cattle and hogs compared with US domestic production. According to the Study, the competitive market pressure of the COOL requirements starts at the end of the supply chain. Retailers who propose mixed-origin meat need to sell this meat at a price at least equal or lower than the price of US-origin meat in order to remain competitive with other retailers selling only US-origin meat. Yet, retailers selling mixed-origin meat face additional labelling costs related to segregation by origin. According to the Study, these additional costs cannot be passed on to customers, who can buy US-origin meat that does not face segregation costs. Thus, the Study considers that the only option for these retailers is to pay to their suppliers, i.e. feeding operators and packers, a price for mixed-origin meat below the price paid for US-origin meat. Faced with this market pressure, the Study considers that feeding operators and packers processing Canadian cattle and hogs are unable to pass their additional segregation and compliance costs on to the retailers or the suppliers of US cattle and hogs. In order to remain competitive, the Study concludes that the only option for these operators is to either avoid using imported feeder and fed animals or to request a lower import price for Canadian livestock and meat in order to offset additional segregation and compliance costs. In both cases, strong market pressure leads most implementation costs of the COOL measure to be borne by livestock and meat importers/suppliers through a reduction of Canadian imports and/or price. Since Canadian livestock already represented a small share in the US market before the implementation of the COOL measure, and the switch to only US-origin products can be done at little or no cost, the Study expects the reduction of Canadian imports and/or price to be significant.[698]

7.502 The Sumner Simulation Study proceeds with the derivation of a mathematical representation of the economic competitive mechanisms. In order for the model to remain tractable and to limit the number of equations involved, Professor Sumner introduces several assumptions to define the relationship of market forces in the supply chain and to isolate the changes caused by the implementation of the COOL requirements. Ultimately, the economic model depends on a set of parameters representing the market shares, the technical mark-up (i.e. difference between the cost and the selling price of the product) and the costs of segregation. To quantify the impacts of the

[697] Professor Daniel A. Sumner is Director of the University of California Agricultural Issues Center and the Frank H. Buck Jr. Professor in the Department of Agricultural and Resource Economics, University of California, Davis.

[698] Similar economic reasoning is described in a spring 2003 economic study provided by Mexico (cf. Exhibit MEX-88). This study assesses the implementation costs associated with the 2002 Farm Bill based on two methods of implementation: a "certification with an audit" or a "traceback" system. We are not reviewing this study.

COOL measure at each stage of the supply chain, the model is then simulated by introducing data from the Informa Report, USDA and Statistics Canada. The results of the Study show how the implementation of the COOL requirements, through market forces, leads to a reduction of the willingness to pay by the operators along the supply chain for given quantities of Canadian cattle and hogs

Criticisms by the United States

7.503 The United States questions the accuracy of the simulated figures of the Study, since it relies extensively on data from the Informa Report, which, according to the United States, lacks transparency and relies on a model based on too restrictive and unrealistic assumptions.[699] For instance, according to the United States, the Sumner Simulation Study failed to account for the increase in the cost of procuring cattle resulting from the switch to a US-only process.[700] Further, according to recent trade data, the United States continues to import Canadian and Mexican livestock, which suggests that the additional costs resulting from the COOL measure are being absorbed.[701]

7.504 The US criticisms relating to the use of the Informa Report are addressed by Canada in the follow-up letter from the Vice President of Informa Economics.[702] However, Canada does not address in detail the United States' criticisms relating to the assumptions of the model in the Sumner Simulation Study.

Analysis by the Panel

7.505 As explained in the Sumner Simulation Study, the simulation results cannot be viewed as projections of market price outcomes. Rather, the study provides an example of how demand for imported products compared to demand for US-origin products could be affected by the COOL measure at each stage of the supply chain. Although it is reasonable to expect that operators processing only US-origin products face lower compliance costs of COOL, it is extremely difficult to draw reliable conclusions from the Sumner Simulation Study as regards the precise level of segregation costs and their specific impact on price and quantities. In fact, the economic model derived by Professor Sumner is a simplification to illustrate the complex economic mechanism underlying the impact of the COOL measure, which by definition introduces additional uncertainty into the estimated figures.

<u>Conclusion on the Informa Report and the Sumner Simulation Study</u>

7.506 Although we cannot rely directly on the figures included in the Informa Report and the Sumner Simulation Study, both studies shed some light on the different types of segregation and compliance costs encountered at different stages of the supply chain. Given that these costs have to be borne somewhere in the system, it all comes down to economic competition pressure. The Sumner Simulation Study shows how market-force mechanisms allocate these costs along the supply chain. In the absence of a large share of US consumers willing to pay a price premium for country of origin labelling, the cheapest way to comply with the COOL measure is to process only US-origin livestock, all other things being equal. The other possibility is to continue processing imported livestock through segregation, which entails additional costs in virtually all cases. Either process configuration is likely to cause a decrease in the volume and price of imported livestock.

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[699] See Exhibit US-43; United States' first written submission, para. 188; and United States' second written submission, para. 91.
[700] See Exhibit US-43.
[701] See Exhibit US-43.
[702] See Exhibit CDA-174.

(iv) Whether the COOL measure had a negative and significant impact on imported Canadian livestock volumes and prices

Introduction

7.507 Canada and the United States also submit econometric analyses to determine if the implementation of the COOL measure affected prices and shares of imported livestock.

7.508 As discussed above, the economic analyses submitted by Canada and the United States cannot be relied upon exclusively in order to establish whether any negative trade and economic effects are attributable specifically to the COOL measure. We have found that these descriptive analyses have shortcomings both in terms of the reliability of the underlying data and in the methodological approach. Although tables and graphs provide some insights, making an inference of the impact of the COOL measure based solely on this type of information can be misleading or inaccurate. This is because, as the United States argues, many factors can explain the evolution of market shares and prices, including the general economic situation, a specific event (e.g. BSE), seasonal effects, changes in transportation costs, fuel prices and livestock inventories, and exchange rate fluctuations. Failing to consider and give proper weight to these factors would invalidate any conclusions with regard to whether any negative effects on the price and share of imported livestock are attributable to the COOL measure. This is particularly important because the COOL measure started to develop its effect in 2008, shortly after the US economic recession started in December 2007.[703]

7.509 Unlike descriptive analyses, econometric studies are able to isolate and quantify the different factors at play. Specifically, the econometric approach permits a distinction and assessment of the impact of the COOL measure, economic recession and other determinants on the quantity and price of imported livestock. To be accurate, the assessment of the estimated causal relationship between two given variables should rely on the level of statistical significance. Statistical significance provides information on the degree of confidence and reliability of the estimated value of each parameter.

7.510 The level of significance is important because the sign of the estimated coefficient of the variable is not sufficient to interpret the empirical results. Technically speaking, statistical significance is a mathematical tool to assess the probability that the relationship between specific variables (for instance the impact of the COOL measure on the import share or price basis) is the result of chance.[704] Typically, a variable is said to be statistically significant when there is a 95% probability that the coefficient of a given variable (for instance the COOL measure) is different from zero. Conversely, there is only a 5% probability that the value of the estimated coefficient is due to chance or random error. The 95% probability has been widely adopted to accept or reject the reliability of estimates.[705]

7.511 In order to infer any conclusion on the empirical estimates, the results should also remain qualitatively similar to a series of robustness checks, such as the inclusion of additional explanatory variables or the extension of the time period.

General observations on the econometric studies submitted by Canada and the United States

7.512 Both Canada and the United States submitted an econometric study to assess the impact of the COOL measure on the imports of Canadian cattle as a share of US feed or slaughter placements and on the price difference between imported Canadian and US livestock (also known as the "price

[703] Exhibit US-156.
[704] R.A. Fisher, *Statistical Methods for Research Workers*, 1st ed. (Oliver & Boyd, 1925).
[705] R.A. Fisher, *Statistical Methods for Research Workers*, 1st ed. (Oliver & Boyd, 1925).

basis"). In addition, the econometric study submitted by Canada also analyses the impact of the COOL measure on the imports of Canadian hogs as a share of US feed or slaughter placements. Both econometric studies are based on an equation, where the dependent variable, namely the import ratio or the price difference, is a function of several explanatory variables and an error term. The error term reflects the fact that the model does not fully represent the actual relationship between the dependent variables and the explanatory variables. In other words, all the factors not explicitly controlled in the model specification are included in what is called the error term. The estimation in the two econometric studies submitted by Canada and the United States consists of minimizing such error term.

7.513 Although the econometric studies submitted by Canada and the United States estimate the same types of impact of the COOL measure, they reach different conclusions. Since both studies rely on the same standard estimation method (i.e. so-called "ordinary least squares method"[706]), these opposite estimates result from the use of different types of data (weekly or monthly), time period and model specifications. It is not our task to establish a unified econometric report or to conduct our own econometric assessment; instead we will assess the robustness of each study.

Summary of the Sumner Econometric Study submitted by Canada

Main findings of the Sumner Econometric Study

7.514 The econometric study prepared by Professor Sumner on behalf of Canada ("Sumner Econometric Study") is composed of two elements: a theoretical economic model and an empirical econometric study.[707]

7.515 The theoretical economic model part of the Sumner Econometric Study derives a partial equilibrium model of the impact of the COOL measure on the US market for Canadian fed cattle, feeder cattle, fed hogs and feeder pigs. The partial equilibrium nature of the model implies that the impact of the COOL measure in a given market, in this case the US market, is analysed independently from prices and quantities demanded and supplied in other markets, e.g. the Canadian market. The model suggests that, under perfect competition, the impact of the implementation of the COOL measure will depend on the price elasticity of Canadian import supply, which corresponds to the responsiveness of the import quantity to a change in the import price. Based on the actual market conditions determining the price elasticity of the cattle and hog sectors, the Sumner Econometric Study concludes that the implementation of the COOL measure is more likely to lead to a decrease in Canadian imports than to a price reduction. The Sumner Econometric Study expects a significant price reduction only in the US fed cattle market. These theoretical findings are used by Professor Sumner to interpret the empirical findings of the econometric model.

7.516 The second part of the Sumner Econometric Study estimates empirically the impact of the COOL measure on the share of Canadian cattle and hogs relative to US feed or slaughter placements and price basis based on weekly data. Unlike a theoretical model, this econometric model does not rely on any specific assumptions on market structure and consumer or producer behaviour. The study performs its econometric estimations separately for the US fed cattle, feeder cattle, fed hogs and feeder pigs markets for the period between September 2005 and September 2009. The impact of the COOL measure is represented by a so-called dummy variable, which is an indicator variable that takes the value of zero before the implementation of the COOL measure and one afterwards to represent its existence in the model.

[706] William H. Greene, *Econometric Analysis*, 5th ed. (Prentice Hall, 2000), pp. 19-38.
[707] Exhibits CDA-64, 174.

7.517 The empirical findings suggest that the COOL measure did have a negative and significant impact on the import share of Canadian livestock and the price basis of Canadian fed cattle. In other words, the introduction of the COOL measure seems to have reduced significantly the share of imports of Canadian cattle and hogs as well as the price of Canadian fed cattle with respect to the US livestock. These results suggest that in the absence of the COOL measure and all other things being equal, the price basis for Canadian fed cattle would have been smaller and the import share of Canadian cattle and hogs would have been higher. The evidence of a negative impact of the COOL measure on the price basis is partially in line with the empirical findings provided by another econometric study from CanFax submitted by Canada.[708]

Criticisms by the United States

7.518 The United States raised some concerns relating to certain aspects of the Sumner Econometric Study, which in their view invalidate the study's main findings.[709] Besides the issues related to the choice of the denominator of the import share[710] and the unit of time (monthly instead of weekly)[711], the United States questioned the use of a reduced form model to determine whether the COOL measure had price and export effects given the complexity of the North American livestock market. In particular, the United States argued that the Study yields misleading results because it fails to account for important factors unrelated to the COOL measure, such as exchange rate fluctuations, changes in livestock inventories, transport costs and fuel prices. Further, the United States argued that the negative impact established by the Study is attributable to economic recession and not to the COOL measure. The United States added that the Study fails to address the BSE period between 2003 and 2005 and the long-term structural change until November 2007, when imports of Canadian cattle over 30 months were allowed again. As a result, according to the United States, the conclusions reached by the Sumner Econometric Study are unreliable and misleading.

Canada's response

7.519 Although Canada argues that the US criticisms are unfounded, in response to these criticisms, Canada updates its econometric analysis to include more recent data and account for transport costs.[712] Since these updated empirical results remain qualitatively similar to the initial estimates, Canada argues that the impact of the COOL measure continues to be negatively significant on import share and price basis.[713] Canada further claims that the Sumner Econometric Study already takes into account pre-existing trends relating to inventories.[714] More generally, Canada argues that the inclusion in the model specification of variables that are affected by the COOL measure/requirements (i.e. endogenous variables) would be a mistake.[715]

7.520 Regarding the impact of economic recession, Canada agrees that this can have an effect on livestock demand in North America. Canada claims, however, that the United States failed to provide any arguments to explain why economic recession would affect differentially Canadian imports with respect to US production.[716]

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[708] Exhibit CDA-114.
[709] Exhibit US-43.
[710] United States' second written submission, para. 73. See para. 7.480 above.
[711] United States' response to Panel questions following the second substantive meeting, paras. 45-46. See para. 7.481 above.
[712] Exhibit CDA-152.
[713] Canada's opening oral statement at the first substantive meeting of the Panel, para. 37.
[714] Canada's opening oral statement at the second substantive meeting of the Panel, para. 36.
[715] Canada's opening oral statement at the second substantive meeting of the Panel, para. 52.
[716] Canada's opening oral statement at the first substantive meeting of the Panel, para. 44.

7.521 Canada explains that the Sumner Econometric Study deliberately does not consider the BSE period (2003-2005), because the integration of the Canada-US cattle market temporarily suffered structural disruption during that period. However, Canada points out, the Study takes into account the effects of BSE through a 0-1 indicator variable for the fact that between July 16, 2005 and November 19, 2007 imports of Canadian cattle over 30 months were banned.[717]

Further updates of the Sumner Econometric Study

7.522 Canada submits a further updated version of the Sumner Econometric Study which addresses economic recession and BSE more extensively.[718] The period analysis was accordingly extended from December 2003 to November 2010 to include the 2003-2005 BSE period and more recent data, explicitly including a dummy variable equal to one until November 2007 and zero afterwards to account for the import ban on cattle over 30 months. Economic recession is also included in the updated model specification either through a 0-1 indicator variable or the relative unemployment ratio between Canada and the United States.

7.523 Canada argues that these further updated results are robust and qualitatively similar to the estimates of the original Sumner Econometric Study. In particular, the impact of the COOL measure remains negative and significant after controlling for economic recession that started a few months prior to the entry into force of the COOL measure. Although not always significant, BSE reduced the Canadian import share and increased the price basis. More generally, despite economic recession, the updated results suggest that prices and quantities of imported Canadian livestock would have been higher in the absence of the COOL measure.

7.524 Canada subsequently provides another set of estimates, where the import shares and price basis are based on monthly data.[719] In most specifications, the impact of the COOL measure on price and import quantities of Canadian livestock is negative and significant. According to Canada, these findings confirm that the COOL measure affected the conditions of competition for Canadian livestock in the US market in a negative and significant manner.

7.525 According to the United States, the adjustments undertaken in these further updates of the Sumner Econometric Study do not address the flaws of the econometric model contained in the original Sumner Econometric Study. In particular, the use of the unemployment ratio is not adequate, because it does not capture the impact of the economic recession on the labour market[720]; in addition, it is often a lagging indicator of the economic activity. The United States also questions how weekly unemployment rates were computed by these further updates. Instead, the United States proposes to consider overall trade in agriculture commodities as a measure of economic recession.[721]

7.526 Regarding BSE, the United States argues that the period during the BSE-related US import ban cannot be considered as normal or representative to undertake any analysis of the trade effects of the COOL measure on the US market.[722] Consequently, the United States rejects these new results.[723]

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[717] Canada's opening oral statement at the first substantive meeting of the Panel, para. 45.
[718] Exhibit CDA-174.
[719] Exhibit CDA-228
[720] United States' comments on Canada's response to Panel questions following the second substantive meeting, paras. 28-30.
[721] United States' comments on Canada's response to Panel questions following the second substantive meeting, para. 30.
[722] United States' comments on Canada's response to Panel questions following the second substantive meeting, paras. 32-33.

Summary of the USDA Econometric Study submitted by the United States

Main findings of the USDA Econometric Study

7.527 The United States argues that, as the respondent, it need not develop a competing econometric model.[724] Yet, the United States submits an alternative econometric study prepared by the Office of the Chief Economist of USDA ("USDA Econometric Study").[725] Unlike the Sumner Econometric Study, the USDA Econometric Study only focuses on the Canadian and Mexican fed and feeder cattle import markets. The period of analysis covers July 2003 to April and May 2010 for import shares and for price difference, respectively. Further, the USDA Econometric Study provides estimates using data between January 1997 and April/May 2010. Although the USDA Econometric Study considers the same definition of the import share and price basis as the Sumner Econometric Study, it calculates the import quantity share and price basis on monthly, not weekly data. Further, the USDA Econometric Study includes additional explanatory variables (e.g. gasoline prices) in the model specification not present in the initial Sumner Econometric Study. Nonetheless, the United States follows the same approach as the Sumner Econometric Study and also represents the impact of the COOL measure as a 0-1 indicator variable.

7.528 Nonetheless, the USDA Econometric Study reaches different conclusions from the Sumner Econometric Study regarding the impact of the COOL measure on the import ratio and the price basis between imported Canadian and domestic US livestock. On the one hand, the USDA Econometric Study finds that in some specifications the impact of the COOL measure on the price basis is positive and significant. This suggests that the COOL measure reduced the price gap between the Canadian and US livestock. The United States attributes this to the substitution effect in the US market from more expensive high-grade US meat (Choice) to low-grade Canadian meat (Select) resulting from the economic recession.[726] The higher demand for Canadian livestock led to an increase in its price and a decrease in the price of US cattle. As a result, according to the USDA Econometric Study, the price difference between Canadian and the US livestock decreased following the implementation of the COOL measure.

7.529 The empirical results of the USDA Econometric Study indicate that there is a negative but not significant impact of the COOL measure on the import ratio of Canadian livestock. Since this impact is not significantly different from zero, the United States infers that the COOL measure had no impact on Canadian imports. In addition, the United States argues that when the COOL variable is replaced by an economic recession dummy variable in the model specification, economic recession has a significant negative impact on the import share in some specifications. This result, argues the United States, corroborates its claim that the economic recession was the main determinant in any decline in import shares.

7.530 With respect to the hogs sector, the USDA Econometric Study concludes, without providing an econometric analysis, that the main factor explaining the reduction in Canadian imports is the decline in Canadian hog inventories which began before the implementation of the COOL measure. The United States claims that this factor is so strong that no econometric analysis is needed to explain the drop in Canadian hog imports.

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[723] United States' comments on Canada's response to Panel questions following the second substantive meeting, para. 34.

[724] United States' response to Panel questions following the second substantive meeting, para. 35. See also para. 7.518 above.

[725] Exhibits US-42 and 149.

[726] United States' response to Panel questions following the second substantive meeting, para. 49.

Canada's criticisms

7.531 Canada argues that the USDA Econometric Study has failed to address the criticisms formulated by the United States against the Sumner Econometric Study.[727] In particular, the use of a constant measure of economic recession, such as the dummy variable, in the USDA Econometric Study is not appropriate, because the economic recession and its recovery fluctuate over time.[728] In addition, Canada claims that the USDA Econometric Study relies on a misdefined recession dummy variable, which continues to take the value of one after the end of the economic recession in June 2009. With respect to BSE, Canada claims that including the BSE period in the USDA Econometric Study is inappropriate because the structural disruptions are associated with a large price basis and zero import shares.[729] Canada also criticises the use of a single variable to account for the full range of structural changes resulting from the BSE-related import ban.[730]

7.532 Further, Canada argues that the USDA Econometric Study relies on the wrong index to measure transport costs. Instead of representing the transport costs faced by producers with the "Producer Price Index for Trucking", the United States considers the "Consumer Price Index for Transportation", which includes amounts paid by consumers for new cars, parking fees, airline fares and tickets for public transport. Accordingly, Canada argues that the USDA Econometric Study applies a wrong economic analysis.[731]

7.533 Turning to the hog analysis in the USDA Econometric Study, Canada rejects the gradual decline in hog inventories in Canada as the sole explanation of the drop in Canadian hog imports.[732] Canada notes that while the decline in hog inventories began in 2005, Canadian hog imports increased before the implementation of the COOL measure. In fact, the drop in Canadian hog imports in levels and as a percentage of US slaughter began in 2008, at the same time as hog inventories in the United States started to decrease.

The United States' response

7.534 The United States responds that the aim of the USDA Econometric Study was not to address the flaws of the Sumner Econometric Study, but rather to demonstrate how the inclusion of more relevant variables produced contradictory results.[733] More generally, the United States claims, the estimation of a "reduced form model", where a system of equations (i.e. demand and supply) is solved to express the endogenous variable (import share or price basis) as a function of explanatory variables, is not appropriate, because the results associated with the "reduced form model" depend mostly on the variables chosen. Moreover, a large number of variables are necessary to quantify any potential effects with a sufficient level of confidence.

7.535 The United States argues that the decision to omit the empirical econometric analysis of the hog sector from the USDA Econometric Study is based on the specific characteristics of the Canadian hog sector. Besides the decline in Canadian hog inventories, the United States notes that the Canadian hog price is based on the US price, thus there is not a unique "Canadian hog price" *per se*.[734]

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[727] Canada's opening oral statement at the second substantive meeting of the Panel, para. 39.
[728] Canada's opening oral statement at the first substantive meeting of the Panel, para. 44.
[729] Canada's comments on the United States' response to Panel questions following the second substantive meeting, para. 15.
[730] Canada's opening oral statement at the first substantive meeting of the Panel, paras. 45-46.
[731] Canada's opening oral statement at the first substantive meeting of the Panel, para. 47.
[732] Canada's opening oral statement at the second substantive meeting of the Panel, para. 35.
[733] United States' response to Panel question No. 106.
[734] United States' response to Panel questions following the second substantive meeting, para. 51.

Updated USDA Econometric Study

7.536 The United States provided an updated version of the USDA Econometric Study in response to questions from the Panel.[735] In the updated study the United States considers the same period of analysis and specification but includes the COOL and economic recession variables at the same time.

7.537 In this modified specification, the impact of the COOL measure and economic recession are no longer significant when both variables are included at the same time in the model specification. The United States explains that it initially did not introduce both variables in the same specification because the overlap between the COOL measure and the period of economic recession would lead to multicollinearity.[736] (Multicollinearity arises when two or more explanatory variables convey the same information.) According to the United States, although economic recession and COOL variables represent two different events, both variables are expressed as a 0-1 indicator. The economic recession variable takes a value of 1 after December 2007, while the COOL variable is equal to 1 after August 2008. Therefore, argues the United States, the only difference between the two variables is the value of 1 taken by the economic recession variable between January and August 2008. In the presence of multicollinearity, the predictive power of the model remains unchanged, but the confidence interval of the estimated coefficients of the variables subject to multicollinearity becomes larger. As a consequence, the United States contends, the estimation of the impact of the COOL measure and economic recession variables become less accurate.

7.538 According to Canada, multicollinearity is not a significant issue because the dates of the economic recession and the implementation of the COOL measure do not match exactly. Further, the Sumner Econometric Study did not suffer from any multicollinearity with respect to the two dummy variables.[737]

Analysis by the Panel

7.539 As already explained, the econometric studies submitted by Canada and the United States rely on different data and methodology, and it is not our task to establish a unified econometric report or to conduct our own econometric assessment. Instead, we examine the robustness of each study separately.

7.540 We consider that the Sumner Econometric Study is sufficiently robust for several reasons. First, the empirical evidence of a significant negative impact of the COOL measure is robust due to the inclusion of additional explanatory variables such as transport costs, the BSE import ban and economic recession. Second, the use of a dummy variable and the unemployment ratio for measuring the economic recession confirms that the findings are independent of the definition of the economic recession variable. Third, the dynamic specification of the model through the inclusion of the lagged dependent variable (i.e. import shares or price basis) reduces any variable omission bias, such as changes in inventories. Fourth, the use of weekly data increases the sample size and thus reduces any multicollinearity between the COOL and the economic recession variables. Fifth, the inclusion of the BSE period and the recovery period from economic recession confirms that the evidence of the impact of the COOL measure is not specific to a given analysis period.

7.541 Overall, the updates to the Sumner Econometric Study and Canada's responses to questions from the Panel and to criticisms by the United States improve the soundness of the Study's findings,

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[735] Exhibit US-149.

[736] United States' response to Panel questions following the second substantive meeting, para. 42.

[737] Canada's comments on the United States' response to Panel questions following the second substantive meeting, para. 14.

namely that the COOL measure had a negative and significant impact on Canadian import shares and price basis. In fact, the vast majority of the 103 estimated equations provided in the Sumner Econometric Study indicate a negative and significant coefficient of the COOL variable. Therefore, the impact of the COOL measure has been properly defined. As a result, the COOL measure still has a negative and significant impact even if other, distinct factors may positively affect Canadian imports and prices.

7.542 Accordingly, the Sumner Econometric Study makes a prima facie case that the COOL measure negatively and significantly affected the import shares and price basis of Canadian livestock.

7.543 Conversely, the USDA Econometric Study lacks sufficient robustness both taken on its own and in comparison with the Sumner Econometric Study. In fact, the 13 estimated equations for the cattle analysis do not show sufficient consistency to reach a robust conclusion. According to the USDA Econometric study, the COOL variable and its impact are never significant. However, the impact of economic recession is only negative and significant in a limited number of specifications and even in those cases only at a relatively low level of precision, i.e. at a 90% instead of the usual 95% level of confidence. This means that the USDA Econometric Study does not provide a sufficiently robust explanation that any negative impact is attributable to economic recession rather than to the COOL measure. In addition, any finding of the USDA Econometric Study with regard to the economic recession variable and its impact is called into question by potential multicollinearity, which the study failed to address.

7.544 As regards hogs, the USDA Econometric Study merely refers to certain features of the hog market, i.e. US-based pricing and Canadian hog's inventory decline, but this cannot substitute for a proper and robust econometric analysis.

7.545 Hence, the USDA Econometric Study does not rebut the prima facie case for a negative and significant COOL impact established by the Sumner Econometric Study.

7.546 This significant and negative impact of the COOL measure demonstrated by the Sumner Econometric Study, and not refuted by the USDA Econometric Study, concurs with our finding that the COOL measure, in particular in regard to muscle cuts, accords less favourable treatment within the meaning of Article 2.1 of the TBT Agreement.

(d) Conclusion on the complainants' claims under Article 2.1 of the TBT Agreement

7.547 We have found above that the complainants have demonstrated that the COOL measure fulfils all three elements of the legal test under Article 2.1 of the TBT Agreement.

7.548 Accordingly, we conclude that the COOL measure, in particular in regard to muscle cuts, violates Article 2.1 of the TBT Agreement.

3. Article 2.2

(a) Legal framework for the analysis of the complainants' claim under Article 2.2

7.549 Article 2 sets out certain obligations that the WTO Members must respect in preparing, adopting or applying technical regulations. Article 2.2 provides:

> "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international

> trade. *For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create*. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products." (emphasis added)

7.550 The complainants' claim under Article 2.2 raises an initial question on the legal test to be applied in assessing the COOL measure's compliance with the specific obligations therein. We observe that we do not have the benefit of prior panels' or the Appellate Body's analysis on this question.[738]

7.551 We understand, and the parties agree, that the first sentence of Article 2.2 sets out a general principle, namely not to create unnecessary obstacles to international trade. The Preamble of the TBT Agreement confirms this understanding: The 5th recital in the Preamble states, "Desiring however to ensure that technical regulations ... marking and labelling requirements, ... *do not create unnecessary obstacles to trade"*. This principle is also reflected in Article 2.5: "[W]henever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed *not to create an unnecessary obstacle to international trade*".[739]

7.552 We consider, and the parties further agree, that the conformity of a measure with the general principle reflected in the first sentence of Article 2.2 must be established based on the elements of the second sentence.[740] In other words, the second sentence explains what the first sentence means. As the parties observe, the phrase "[f]or this purpose" introducing the second sentence indicates that the second sentence explains the meaning of the general principle reflected in the first sentence by laying down the specific obligation that Members must observe.[741] We will therefore focus on the content of

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[738] Although Article 2.2 of the TBT Agreement was presented as a claim in several previous disputes, neither those panels nor the Appellate Body had the opportunity to provide a substantive analysis of the provision. For example, the panel in *EC – Trademarks and Geographical Indications (Australia)* was presented with a claim under Article 2.2, but did not proceed with a substantive analysis of the claim because the measure in question was found *not* to be a technical regulation within the meaning of Annex I.1 of the TBT Agreement. See also *EC – Asbestos*, *EC – Sardines*, and *EC – Approval and Marketing of Biotech Products.*

[739] The fact that Article 2.5 refers only to the language in the first sentence of Article 2.2 supports our understanding that the first sentence embodies the general principle of the obligation under Article 2.2. In our view, interpreting the first sentence of Article 2.2 as embodying a separate obligation would be incongruous with Article 2.5, which serves as context, for it would mean that the rebuttable presumption of compliance prescribed under Article 2.5 is applicable only with respect to the first sentence of Article 2.2. We do not consider this to be a reasonable interpretation, especially given that the second sentence starts with the words "For this purpose", referring back to the objective in the first sentence of not creating unnecessary obstacles to international trade.

Article 12.3 also contains a clause reflecting this general principle under Article 2.2: "Members shall, ... take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures *do not create unnecessary obstacles* to exports from developing country Members." (emphasis added)

[740] Parties' responses to the Panel question No. 51.

[741] The European Union considers that there is a connection between the first and the second sentences of Article 2.2 of the TBT Agreement by the use of the term "[f]or this purpose" (European Union's third party written submission, para.54). Australia also considers that the second sentence of Article 2.2 explains what the first sentence means (Australia's third party written submission, para. 66).

the second sentence to derive a legal framework necessary for the analysis of the complainants' claim under Article 2.2.

7.553 The second sentence of Article 2.2 reads as follows: "[f]or this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create". The text of the second sentence sets out an obligation that can be parsed into several elements, each of which we discuss below. Our approach to reviewing the COOL measure's compliance with the obligation under the second sentence of Article 2.2, as outlined below, reflects to a certain extent the manner in which the parties framed their arguments in light of the facts peculiar to this dispute. While the obligation contained in the second sentence of Article 2.2 remains the same in all cases, we do not consider that the analysis of these elements needs to be structured and organized in the same manner for every situation.

7.554 In this case, all parties agree that a complainant must first demonstrate that a given technical regulation is trade-restrictive.[742] We agree. It is self-evident that a measure must be "trade-restrictive" in some way in order to be "more trade-restrictive than necessary".

7.555 If the technical regulation is found to be trade-restrictive within the meaning of Article 2.2, logically, the next step of the analysis under the second sentence will be to identify the objective pursued by the technical regulation in question and examine its legitimacy within the meaning of Article 2.2.

7.556 Subsequently, if we determine that the objective of that technical regulation is legitimate within the meaning of Article 2.2, we will address the question whether the technical regulation fulfils the identified objective.[743]

7.557 If the answer is in the affirmative, we would then proceed with an examination of whether the technical regulation in question is not more trade-restrictive than necessary to fulfil the objective concerned. This would entail an analysis of the availability of less trade-restrictive alternative measures that can equally fulfil the objective, taking into account the risks non-fulfilment would create.

7.558 In the present dispute, the complainants argue that the COOL measure is inconsistent with Article 2.2 because it fails to meet the requirements under the second sentence. As confirmed by the Appellate Body in *EC – Sardines*, the burden of establishing a prima facie case for a measure's inconsistency with Article 2.2 rests with the complainants.[744] Therefore, based on the elements of the

[742] In response to Panel question No. 52, the United States emphasizes that the trade-restrictiveness of the measures at issue is a threshold matter that the complainants must first establish and that if the measures are not trade-restrictive, they will not breach a Member's obligations under Article 2.2.

[743] The parties agree that the starting point is whether the technical regulation at issue fulfils a legitimate objective, which is an analytical step required to examine whether that technical regulation is more trade-restrictive than necessary. The United States in particular explains that it is appropriate to analyse whether the measure in question fulfils a legitimate objective first because an analysis of "more trade-restrictive than necessary", which often includes a consideration of the existence of alternative measures, would not be possible without first establishing the responding party's objective. Further, according to the United States, "taking account of the risks non-fulfilment would create" in Article 2.2 is an element considered by Members in determining the appropriate level for the particular legitimate objective at issue.

[744] The Appellate Body confirmed that the same principle on the burden of proof that applies under other WTO covered agreements is equally applicable in the context of the TBT Agreement. See the Appellate Body Report, *EC – Sardines*, para. 275.

second sentence of Article 2.2 as highlighted above, we will review in this section whether the complainants have established the following:[745]

- The COOL measure is trade-restrictive within the meaning of Article 2.2;
- The objective pursued by the United States through the COOL measure is not legitimate; and
- If the objective is legitimate, the COOL measure is more trade-restrictive than necessary to fulfil a legitimate objective(s).

(b) Whether the COOL measure is trade-restrictive within the meaning of Article 2.2

(i) Main arguments of the parties

7.559 **Canada** submits that technical regulations are not by definition trade-restrictive and that if a technical regulation imposes any restriction on international trade, it meets this element of the test.[746] If a technical regulation does not restrict international trade, however, it cannot violate Article 2.2 since such a measure would never create "unnecessary obstacles to international trade" or be "more trade-restrictive than necessary".

7.560 In the case of the COOL measure, there is evidence that it has restricted international trade by reducing the possibility of livestock born in Canada to be exported to the United States. The evidence provided by the complainants to establish that the conditions of competition were modified by the COOL measure shows that the COOL measure restricts international trade for purposes of the first step of the Article 2.2 analysis.[747] That same evidence is also relevant in assessing whether alternative measures are available that would be less trade-restrictive, taking into account the risks of non-fulfilment.

7.561 **Mexico** also submits that technical regulations are not by definition "trade-restrictive" under Article 2.2 of the TBT Agreement.[748] According to Mexico, certain technical regulations could in fact facilitate trade. The COOL measure is, however, a technical regulation that restricts trade. Trade restriction could be reflected in a reduction of competitive opportunities for imported products as well as in restrictions on trade flows. This is consistent with the view that the GATT disciplines on the use of restrictions are meant to protect the competitive opportunities of imported products.

7.562 Mexico is therefore of the view that the arguments and evidence raised by the complainants in the context of their claims under Article 2.1 also demonstrate the trade-restrictiveness of the COOL measure.[749] Specifically, the COOL measure has altered US beef production so as to restrict Mexican feeder cattle access to the US market and deny competitive opportunities to Mexican feeder cattle in that market.

7.563 The **United States** agrees that, to establish the inconsistency of the COOL measures with Article 2.2, the complainants must first show that the COOL measures restrict trade.[750]

[745] Parties' responses to Panel question No. 52.
[746] Canada's response to Panel question No. 66; second written submission, paras. 48-49.
[747] Canada's response to Panel question No. 60.
[748] Mexico's response to Panel question No. 66.
[749] Mexico's response to Panel question No. 60.
[750] United States' second written submission, para. 103.

7.564 The United States submits that the complainants' arguments in this regard rest on their erroneous assertions that the COOL measures require segregation and that high costs associated with that practice have forced US processors to completely reject foreign livestock. Additionally, the complainants ignore recent trade data that illustrate a significant increase in Canadian and Mexican livestock exports in 2010 and thereby directly undermine their arguments. Thus, the complainants have not substantiated their claims about the COOL measures' impact on trade, much less demonstrated that any such impact restricts trade more than is necessary.[751]

(ii) Analysis by the Panel

7.565 The complainants assert that the arguments and evidence submitted with regard to their claim under Article 2.1, namely a reduction of competitive opportunities for imported products compared to like domestic products as well as restrictions on trade flows, equally establish that the COOL measure is trade-restrictive within the meaning of Article 2.2.[752]

7.566 To determine whether the COOL measure is trade-restrictive, we will first examine the ordinary meaning of the term "restrictive" and how the term has been understood in previous disputes.

7.567 The ordinary meaning of the term "restrictive" is "[i]mplying, conveying, or expressing restriction or limitation" and "[h]aving the nature or effect of a restriction; imposing a restriction".[753] The term "restriction" in turn is defined as "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation".

7.568 As evidenced above, the dictionary defines "restrictive" and "restriction" broadly. There are no specific thresholds to be met in order to characterize a certain measure as a "restriction" or qualify it as "restrictive". A "restriction" can also be anything which restricts something, any limitation on action, or a limiting condition. Furthermore, based on the meaning of "restrictive", a measure "having the *nature or effect* of a restriction" can be considered as a "restrictive" measure.

7.569 The broad scope of the terms "restrictive" or "restriction" is confirmed by the findings of the panels in previous disputes.

7.570 The panel in *India – Quantitative Restrictions* concluded in the context of Article XI of the GATT 1994 that "[t]he scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'".[754] Subsequently, the panel in *India – Autos* endorsed this view in the context of the same provision.[755] More recently, in *Colombia – Ports of Entry*, the panel agreed with the interpretation of the term "restriction" given by previous panels.[756]

7.571 As highlighted by the panel in *Colombia – Ports of Entry*, previous WTO and GATT panels also determined a measure's restrictiveness based on the impact of the measure on the competitive opportunities available to imported products.[757] In particular, the panel in *Argentina – Hides and*

[751] United States' opening oral statement at the first substantive meeting of the Panel, para. 49.

[752] Australia agrees with the complaining parties that trade-restrictive measures include those that impose any form of limitation of imports, discriminate against imports or deny competitive opportunities to imported product (Australia's third party written submission, para. 71).

[753] *The Shorter Oxford English Dictionary*, (Sixth Edition) Oxford University Press, Vol. I, p. 2553 (2007).

[754] Panel Report, *India – Quantitative Restrictions*, para. 5.128.

[755] Panel Report, *India – Autos*, paras. 7.269-2.270.

[756] Panel Report, *Colombia – Ports of Entry*, para. 7.241.

[757] Panel Report, *Colombia – Ports of Entry*, para. 7.236.

Leather found that, in determining whether a measure makes effective a restriction in the context of Articles I, II, III and XI:1 of the GATT 1994, the focus is on the competitive opportunities of imported products, not the trade effects. That panel therefore considered that the complaining party claiming the existence of a restriction need not prove actual trade effects.[758]

7.572 Based on the foregoing, we conclude that the scope of the term "trade-restrictive" is broad. We also understand that the concept of "trade-restrictiveness" under provisions of the GATT 1994 does not require the demonstration of any actual trade effects, as the focus is on the competitive opportunities available to imported products. We see no reason to depart from this understanding in the context of reviewing the "trade-restrictiveness" of the technical regulation at issue in this dispute under Article 2.2 of the TBT Agreement.

7.573 Having reached this conclusion, we do not find it necessary to define the exact scope of the term "trade-restrictive" under the second sentence of Article 2.2. Particularly, we are aware that the question remains whether a technical regulation's non-conformity with Article 2.1 has any bearing on the trade-restrictiveness element of Article 2.2. For the purpose of this dispute, we will proceed with our analysis of the COOL measure under Article 2.2 on the assumption that a technical regulation's non-conformity with Article 2.1 is not *per se* an issue for that technical regulation's conformity with Article 2.2 in general, or the "trade-restrictive" element in particular.

7.574 Turning to the technical regulation in question in the current dispute, we found in the previous section that the COOL measure negatively affects imported livestock's conditions of competition in the US market in relation to like domestic livestock by imposing higher segregation costs on imported livestock.[759]

7.575 We therefore conclude that the complainants have demonstrated that the COOL measure is "trade-restrictive" within the meaning of Article 2.2 by affecting the competitive conditions of imported livestock. In reaching this conclusion, we are not making a finding on the level of trade-restrictiveness of the COOL measure. This question will be addressed, if necessary, in an analysis of whether the COOL measure is more trade-restrictive than necessary.

(c) Whether the objective pursued by the United States through the COOL measure is legitimate

7.576 Canada and Mexico argue that the true objective of the COOL measure is to protect domestic industry.

7.577 The United States identifies providing consumer information on origin[760] as the objective that it seeks to achieve through the COOL measure.

7.578 Canada submits that, even if the US stated objective were accepted as the true objective, the United States has failed to prove why that objective is legitimate within the meaning of Article 2.2. Mexico asserts that, in the factual circumstances of this dispute, the declared objective by the United States is not legitimate.

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[758] Panel Report, *Argentina – Hides and Leather*, para. 11.20.

[759] See Section VII.D.2. Further, we observed in Section VII.D.2(c)(iv) that the COOL measure brought about actual negative trade effects on imported livestock as shown by a significant and negative impact on import shares and prices.

[760] See para. 7.617.

7.579 To address the issue before us, we will first examine whether the complainants are correct in identifying that protection of the domestic industry is the objective pursued by the United States through the COOL measure. We will then review the legitimacy of the identified objective.

(i) Identification of the objective pursued by the United States through the COOL measure

Main arguments of the parties

7.580 **Canada** and **Mexico** allege that the objective of the COOL requirements is trade protectionism.[761]

7.581 The **United States** submits that the objective it pursues through the COOL measure is to "provide consumer information about origin".[762] The United States confirms that human health and safety are not part of the objectives pursued by the COOL measure.[763]

7.582 **Canada** submits that the Panel should determine the objective of a measure by focusing on the "design, the architecture and the structure" of that measure, supplemented as necessary with additional information, including its legislative history.[764] According to Canada, the design, the architecture and the structure of the COOL measure reveal that its objective is protectionist in nature. Canada submits that this is also confirmed by the intent of legislators. Canada argues that the Panel should consider evidence that speaks to the motivations of the main legislative designers and promoters of the legislation. Unlike in the context of Article III:2 of the GATT 1994, intent is important in the context of Article 2.2 of the TBT Agreement because Article 2.2 requires an assessment not only of the effect of a measure, but also its "objective" – something not required in Article III:2.[765]

7.583 If however the Panel were to accept the objectives as identified by the United States, Canada submits that the Panel should begin its analysis with the idea that the objective of the COOL measure is to "provide information to consumers about where livestock used to produce meat in the United States was born, raised, and slaughtered so that consumers may [make decision X]". Canada argues that the reasons for providing the information are important.[766] All evidence adduced to this point in the current dispute shows that the few consumers who supported the COOL measure did so because of its protectionist objectives or because of objectives not addressed by the COOL measure.

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[761] Canada's first written submission, paras. 158-175; second written submission, paras. 57-68; Mexico's first written submission, paras. 279-283.

[762] United States' first written submission, paras. 206-225; second written submission, para. 106; opening oral statement at the second substantive meeting of the Panel, para. 38. See para. 7.616-7.617.

[763] United States' response to Panel question No. 17; Exhibit CDA-5, p.2677.

[764] Canada's second written submission, paras. 50-54, 57-68.

[765] Canada's second written submission, para. 52; response to Panel question No. 126. In light of this, Canada contests the United States' proposition based on the Appellate Body's findings in *Chile – Alcoholic Beverages* and *Japan – Alcoholic Beverages* that statements of intent by legislators and regulators should be ignored in determining the objective in this dispute. Further, in response to the United States' reference to certain decisions from US courts for the proposition that domestic tribunals refuse to look to statements of legislators in interpreting statutes, Canada asserts that use of legislative history in statutory interpretation is not the same as using legislative history to determine the objective of a measure for purposes of Article 2.2. To the extent that there is an analogy, the use of legislative history, Canada argues, is in keeping with the modern practice of statutory interpretation of many domestic tribunals as well as the interpretation of treaty obligations in international law (Canada's second written submission, para. 53).

[766] Canada's opening oral statement at the first substantive meeting of the Panel, paras. 49-53; second written submission, para. 69.

7.584 **Mexico** asserts that an objective of a Member in the context of Article 2.2 is not self judging and is part of a Panel's objective assessment of facts.[767] Accordingly, the Panel must determine all relevant details of the objectives of the technical regulation, not just its stated objective, as reflected in the design and structure of the measure and corroborated by other evidence. While Mexico acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations, this does not mean that another Member cannot question the "stated" or "acknowledged" objectives or challenge those stated or acknowledged objectives before a panel and request an objective assessment of the relevant facts.[768]

7.585 Mexico argues that the design, architecture and structure of the COOL measure show that its objective is not to provide consumer information, but rather to protect the US cattle producers by altering the operation of the US beef industry in favour of US feeder cattle. Its protectionist purpose is reflected in the limitation to certain commodities, the targeting of the principal downstream products and distribution networks, the exclusion of small retailers and the US processed food industry, and the departure from the established system for regulating consumer information.[769]

7.586 In the **United States**' view, the objective and the measure are distinct, as one is the objective or goal that is sought to be achieved and the other is the means for doing so. The United States therefore argues that the Panel should first assess whether the Member's legitimate objective is what the Member asserts it is and then whether the technical regulation fulfils that objective.[770]

7.587 The United States submits that the text, design, architecture, and structure of the statute, along with the 2009 Final Rule (AMS), all clearly indicate that the objective is to provide consumer information about the country of origin of the covered commodities at the retail level and to prevent consumer confusion regarding the origin of meat.[771]

7.588 Specifically, the objective of the measure is to provide consumers with as much clear and accurate information as possible about the country or countries origin of the meat products that they buy at the retail level.[772] This includes information on the countries, where the animal from which the meat was derived was born, raised, and slaughtered.

7.589 Regarding prevention of consumer confusion, the United States points to two types of consumer confusion.[773] First, many consumers in the United States mistakenly believed that meat products affixed with a USDA grade label were derived from animals born, raised, and slaughtered in the United States when this was not the case.[774] Second, many US consumers may also have been misled by the FSIS "Product of the U.S.A." labelling system, which allowed producers to voluntarily use this label if the meat products received minimal processing in the United States.[775] To further explain the confusion caused by the FSIS "Product of the U.S.A." labelling system, the United States

[767] Mexico's response to Panel question No. 54; second written submission, paras. 155-157.
[768] Mexico's response to Panel question No. 54; second written submission, paras. 149-150.
[769] Mexico's first written submission, paras. 168-176; second written submission, para. 61.
[770] United States' response to Panel question No. 126. See paras. 7.582-7.585 for the complainants' contrasting view in this regard.
[771] United States' response to Panel question No. 3.
[772] United States' responses to Panel question Nos. 24, 58.
[773] United States' response to Panel question No. 56.
[774] United States' first written submission, para. 29; United States' response to Panel question No. 56; Exhibit CDA-10, p.p. 24, 71.
[775] United States' first written submission, paras. 30-31; United States' response to Panel question No. 56; Exhibits US-17, MEX-32.

refers to a letter from the Consumers Federation of America of the 17 September 2001 to USDA during the FSIS rule making on "Product of U.S.A.".[776]

Analysis by the Panel

7.590 In this dispute, the complainants contest the existence of a "legitimate objective" pursued by the United States through the COOL measure. The complainants argue that trade protectionism is the objective pursued by the United States through the COOL measure, which cannot be a legitimate objective within the meaning of Article 2.2.

7.591 The United States, on the other hand, submits that its objective is to provide consumer information on origin.[777]

7.592 As recognized by the panel in *EC – Sardines*, a Member implementing a certain measure would normally be in a position to identify and elaborate the objective it pursues through the measure adopted.[778] However, given the allocation of the burden of proof under Article 2.2 as further clarified by the Appellate Body in *EC – Sardines*, Canada and Mexico must identify the objective pursued by the United States based on the information obtained prior to or during the dispute settlement proceeding.

7.593 Specifically, the Appellate Body in *EC – Sardines* stated:

> "The *TBT Agreement* acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations while affording every other Member adequate opportunities to obtain information about these objectives. That said, part of the reason why the Panel concluded that the burden of proof under Article 2.4 is on the respondent is because, in the Panel's view, the complainant cannot 'spell out' the 'legitimate objectives' of the technical regulation. ...
>
> In our opinion, these two concerns are not justified. The *TBT Agreement* affords a complainant adequate opportunities to obtain information about the objectives of technical regulations or the specific considerations that may be relevant to the assessment of their appropriateness."[779]

7.594 In light of the parties' contrasting views on the objective pursued by the United States through the COOL measure, we must first determine the "objective" that the United States pursues through the COOL measure.[780]

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[776] United States' second written submission, para. 131; Exhibit US-84.

[777] United States' first written submission, paras. 68, 201, [heading above para. 227], 228; response to Panel question No. 17; second written submission, paras. 97, 106, 107, 147.

[778] We agree with the panel's statement in *EC – Sardines* that "only the Member pursuing the legitimate objective is in a position to elaborate the objective it is trying to accomplish." (Panel Report, *EC – Sardines*, para. 7.121)

[779] Appellate Body Report, *EC – Sardines*, paras. 276-277.

[780] The parties generally agree that the Panel should determine the objective of a measure. See Canada's second written submission, para. 50, footnote 61; Mexico's first written submission, para. 279; United States' opening oral statement at the first substantive meeting of the Panel, para. 39; response to Panel question No. 3. See also the European Union's third-party oral statement at the first substantive meeting of the Panel, paras. 19-22; response to Panel question No. 10.

Nature of a legitimate "objective" under Article 2.2

7.595 To determine the objective that the United States pursues through the COOL measure, we find it useful to start with a review of what is meant by a "legitimate objective" in the context of Article 2.2.

7.596 The complainants' position is that the text as well as the design, architecture, and structure of the COOL measure reveal its protectionist intent. We consider the complainants' argument to be misplaced on several grounds.

7.597 First, in advancing this argument, the complainants appear to conflate the objective pursued by a technical regulation and the technical regulation itself. In fact, in response to a question from the Panel, the complainants state that the term "objective" in Article 2.2 refers to the objective of the technical regulation and not to any "general policy objective" that a Member may have.[781] For the following reasons, we consider that a legitimate "objective" under Article 2.2 needs to be distinguished from a specific technical regulation adopted by a Member to pursue the objective.

7.598 The distinction is important because it is the objective that leads to a Member's determination to adopt a technical regulation, not *vice versa*.

7.599 A policy objective pursued by a government would normally precede the establishment of a technical regulation to be introduced or maintained. Article 2.3 of the TBT Agreement provides contextual guidance for this understanding: "[t]echnical regulations shall not be maintained if the circumstances or objectives *giving rise to* their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner". The phrase "circumstances or objectives *giving rise to* [technical regulations'] adoption" indicates that "circumstances" or "objective(s)" are not identical to technical regulations and logically precede the adoption of technical regulations.

7.600 The text of the preamble of the TBT Agreement also expresses the Members' right to adopt technical regulations to achieve their policy objectives.[782] The Appellate Body in *EC – Sardines* also confirmed that "the TBT Agreement acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations".[783]

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[781] Canada's response to Panel question No. 126; Mexico's response to Panel question No. 126.

[782] The 6th preambular recital states, "no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate. ..."

The panel in *EC – Sardines* stated:

> "Article 2.2 and this preambular text affirm that it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them. At the same time, these provisions impose some limits on the regulatory autonomy of Members that decide to adopt technical regulations: ... Thus, the TBT Agreement, like the GATT 1994, whose objective is to further, accords a degree of deference with respect to the domestic policy objectives which Members wish to pursue. At the same time, however, the TBT Agreement, like the GATT 1994, shows less deference to the means which Members choose to employ to achieve their domestic policy goals. We consider that it is incumbent upon the respondent to advance the objectives of its technical regulation which it considers legitimate." (Panel Report, *EC – Sardines*, para. 7.120).

[783] Appellate Body Report, *EC – Sardines*, para. 276.

7.601 The complainants do not contest either that the United States has the right, in principle, to establish for itself certain policy objectives.[784] To that extent, what the complainants actually argue is that the United States adopted the COOL measure with the intent to protect the US domestic livestock industry, not for consumer information.[785]

7.602 As noted above, a technical regulation, including the alleged intent behind the enactment of the particular technical regulation, however must be distinguished from a policy objective that is pursued by a Member. Whether a Member pursues a "legitimate objective" within the meaning of Article 2.2 is a separate issue from whether the measure in question was in fact adopted to fulfil and does fulfil that objective.

7.603 What needs to be identified as an objective within the meaning of Article 2.2, therefore, is the objective that preceded and led to the adoption by the United States of the COOL measure.

7.604 We find support for our view in this regard in the clarification by the Appellate Body of the relationship between the "appropriate level of protection" and the SPS measure in *Australia – Salmon*. In that dispute, the Appellate Body stated that "to imply the appropriate level of protection from the existing SPS measure would be to assume that the measure always achieves the appropriate level of protection determined by the Member".[786] Similarly, in our view, the objective pursued through a technical regulation cannot be necessarily implied from that technical regulation itself.

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[784] The panel in *Brazil – Retreaded Tyres* stated in para. 7.97:

> "[W]e note that we are not, in our view, required to examine the desirability of the declared policy goal as such. In other words, we are not required to assess the policy choice declared by Brazil to protect human, animal or plant life or health against certain risks, nor the level of protection that Brazil wishes to achieve."

We also recall in this respect that in the *EC – Asbestos* case, the Appellate Body asserted clearly that it was each WTO Member's "... right to determine the level of protection of health that [it] consider[s] appropriate in a given situation." (Panel Report, *Brazil – Retreaded Tyres,* para. 7.97, citing to the Appellate Body Report, *EC – Asbestos,* para. 168.) The Appellate Body stated:

> "[A]s to Canada's third argument, relating to the level of protection, we note that it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined, and the Panel accepted, that the chosen level of health protection by France is a "halt" to the spread of *asbestos*-related health risks. By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is clearly designed and apt to achieve that level of health protection. ...".

[785] Canada's first written submission, paras. 160-161; Mexico's first written submission, paras. 279-283.

[786] The Appellate Body in *Australia – Salmon* states:

> "The correlation between the "appropriate level of protection" and the "SPS measure" is perhaps shown most clearly in Article 5.6 of the *SPS Agreement* which reads: ... *when establishing or maintaining* sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection ... (emphasis added) The words of Article 5.6, in particular the terms "*when establishing or maintaining* sanitary ... protection", demonstrate that the determination of the level of protection is an element in the decisionmaking process which logically *precedes* and is *separate* from the establishment or maintenance of the SPS measure. It is the appropriate level of protection which determines the SPS measure to be introduced or maintained, not the SPS measure introduced or maintained which determines the appropriate level of protection. To imply the appropriate level of protection from the existing SPS measure would be to assume that the measure always achieves the appropriate level of protection determined by the Member. That clearly cannot be the case. (para. 203)"

7.605 Second, the complainants' argument implies that what the United States has expressly identified as the objective pursued in its official WTO notification of the COOL measure is not true. The United States' notification to the TBT Committee of the COOL measure indicates "consumer information" as the objective.[787] While we are not saying that this constitutes definite and determinative evidence that the objective pursued through the COOL measure is not trade protectionism, we do consider that it is one of the objective circumstances that will inform the complainants of the objective of the COOL measure. Moreover, according to the Appellate Body, under the principle of good faith under general international law as embodied in Article 26 of the Vienna Convention on the Law of Treaties, parties to an international agreement enjoy a presumption that they will perform their treaty obligations in good faith, including their WTO obligations.[788] Thus, the United States must be presumed to have truthfully notified the TBT Committee of the objective it was seeking to pursue through its COOL measure. The presumption of good faith can, of course, be rebutted by solid evidence, in this case demonstrating that trade protectionism is indeed the objective pursued by the United States through the COOL measure. However, we have not been presented with such evidence.

7.606 In addition to considerations of good faith, the Appellate Body recalled in *EC – Sardines* that the TBT Agreement "affords a complainant adequate opportunities to obtain information about the objectives of technical regulations" and made specific reference to certain provisions of the TBT Agreement requiring Members to supply information about their technical regulations to other Members. Official notifications made pursuant to Article 2.9 of the TBT Agreement (which must contain a brief indication of the technical regulation's "objective") fall into the category of provisions referenced by the Appellate Body.

7.607 Third, the complainants' argument regarding the protectionist intent of the COOL measure relates to the general principle contained in the first sentence of Article 2.2, read in isolation from the second sentence of Article 2.2. The first sentence reads, "[M]embers shall ensure that technical regulations are *not prepared, adopted or applied with a view to* or with the effect of creating unnecessary obstacles to international trade". As we clarified above, and as the parties agree, the first sentence of Article 2.2 sets out a general principle, a separate violation of which is not required. The second sentence of Article 2.2 sets out the specific elements of the obligations that must be respected in order to comply with the general principle set out in the first sentence. The complainants' arguments based on the "design, architecture, and structure" of the COOL measure do not have a particular bearing on our analysis of the identification of the objective that gave rise to the COOL measure.

7.608 In our view, the characteristics of the measure, including its design, architecture, and structure, and legislative history such as legislators' statements, may be more properly addressed in the context of whether the COOL measure fulfils the identified objectives. For example, Canada also clarified that it is not challenging country of origin information generally, but it is challenging the COOL measure because of its *particular characteristics* including its structure and objective and the limited information it provides.[789] As explained above, a technical regulation, including its specific characteristics and features, must be distinguished from the objective pursued by the technical regulation itself. In this respect, we note that the Appellate Body, in addressing a claim under Article XIV(a) of the GATS in *US – Gambling*, also stated:

> "[A] Member's characterization of a measure's objectives and of the effectiveness of its regulatory approach – as evidenced, for example, by texts of statutes, legislative

[787] G/TBT/N/USA/281 and G/TBT/N/USA/281/Add.1.
[788] Appellate Body Report, *EC – Sardines*, para. 278.
[789] Canada's opening oral statement at the second substantive meeting of the Panel, para. 68.

> history, and pronouncements of government agencies or officials – will be relevant in determining whether the measure is, objectively, 'necessary'. A panel is not bound by these characterizations [footnote omitted], however, and may also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party. In any event, a panel must, on the basis of the evidence in the record, independently and objectively assess the 'necessity' of the measure before it."[790]

7.609 The European Union in *Brazil – Retreaded Tyres* made a similar argument as the complainants in this dispute that the real objective of Brazil's import ban, the measure at issue in that dispute, was to protect Brazil's domestic industry, and not to achieve the objectives declared by Brazil under Article XX(b) of the GATT 1994 (i.e. to protect human, animal or plant life or health). The panel in that dispute did not find it necessary to consider the European Union's argument "in determining under paragraph (b) of Article XX whether the declared policy objective of a measure falls within the range of policies under that paragraph".[791] We agree with the *Brazil – Retreaded Tyres* panel and take the same approach in this case. Thus we are of the view that in identifying the objective of the COOL measure under Article 2.2, we need not consider the alleged intent behind the implementation of the COOL measure.

7.610 We therefore consider it inapposite to address at this stage of our analysis the complainants' arguments in support of their position that trade protectionism is the objective of the COOL measure.[792] We will address these arguments, to the extent necessary, in the context of our analysis of whether the COOL measure fulfils the identified objective.[793]

7.611 Fourth, the complainants' argument appears to be based on an overly liberal interpretation of the requirement, found in Article 11 of the DSU, that the Panel conduct an "objective assessment" of the facts of the case. The complainants emphasize the obligation imposed on WTO dispute panels under Article 11 to make an objective assessment of the facts of the case, including the "objective" set by the responding Member. To the extent that the complainants are challenging the objective(s) that the United States has set for itself, which is separate from its legitimacy, we find no support for such an approach in Article 11. In this regard, the Appellate Body observed in *Australia – Salmon*:

> "We do not believe that Article 11 of the DSU, or any other provision of the DSU or of the *SPS Agreement*, entitles the Panel or the Appellate Body, for the purpose of applying Article 5.6 in the present case, to substitute its own reasoning about the implied level of protection for that expressed consistently by Australia. The determination of the appropriate level of protection, a notion defined in paragraph 5 of Annex A, as 'the level of protection deemed appropriate by the Member establishing a sanitary … measure', is a *prerogative* of the Member concerned and not of a panel or of the Appellate Body.

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[790] Appellate Body Report, *US – Gambling*, para. 304. The United States claimed in that dispute that the measures at issue were necessary to protect public morals or maintain public order under Article XIV(a) of the GATS.

[791] Panel Report, *Brazil – Retreaded Tyres*, para. 7.101 (original footnote omitted). The panel stated, "In the Panel's view, what is relevant at this stage of the analysis is the existence of a risk and whether the policy objective to reduce such a risk, as declared by the Member taking the measure, falls within the scope of policies to protect human, animal or plant life or health."

[792] The parties do not dispute that trade protectionism, if proved to be the objective pursued through a technical regulation, cannot be a legitimate objective within the meaning of Article 2.2.

[793] See paras. 7.692-7.719.

> The 'appropriate level of protection' established by a Member and the 'SPS measure' have to be clearly distinguished. They are not one and the same thing. The first is an *objective*, the second is an *instrument* chosen to attain or implement that objective."[794]

7.612 Although addressed in the context of the SPS Agreement, the Appellate Body's statement has a bearing on the question before us. The objective pursued through a technical regulation, clearly distinguished from the technical regulation chosen to attain that objective, is a prerogative of the Member concerned and not of a panel. The importance of recognizing the prerogative of the Members to pursue their own policy goals has also been observed by the Appellate Body in the context of the obligations under the GATT 1994.[795]

7.613 We find no basis to deviate from the above approach developed by the Appellate Body in determining the objective pursued by the United States through the COOL measure within the meaning of Article 2.2. The TBT Agreement purports to further the objectives of the GATT 1994. The WTO Members are just as free to adopt technical regulations as they are free to set the appropriate level of protection through an SPS measure or to legislate on internal taxation or regulation.[796] Accordingly, the identification of the objective pursued through a technical regulation must be based on the information provided by the Member implementing the technical regulation concerned.[797] However, as the panel in *EC – Sardines* noted, the *legitimacy* of the objectives pursued by a Member must be determined by panels.[798]

7.614 That said, we must identify the objective that the United States pursues through the COOL measure.

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[794] Appellate Body Report, *Australia – Salmon*, paras. 199-200.

[795] The Appellate Body in *Japan – Alcoholic Beverages* observed:

> "Members of the WTO are *free to pursue their own domestic goals through internal taxation or regulation* so long as they do not do so in a way that violates Article III or any of the other commitments they have made in the *WTO Agreement*" (emphasis added)

Moreover, the Appellate Body further stated in *Chile – Alcoholic Beverages*:

> "Members of the WTO have sovereign authority to determine the basis or bases on which they will tax goods, such as, for example, distilled alcoholic beverages, and to classify such goods accordingly, provided of course that the Members respect their WTO commitments. The reference in *Ad* Article III:2, second sentence, of the GATT 1994 to "not similarly taxed" is not in itself a prohibition against classifying goods *for revenue and regulatory purposes that Members set for themselves as legitimate and desirable*. Members of the WTO are free to tax distilled alcoholic beverages on the basis of their alcohol content and price, as long as the tax classification is not applied so as to protect domestic production over imports. Alcohol content, like any other basis or criterion of taxation, *is subject to the legal standard* embodied in Article III:2 of the GATT 1994." (para. 60) (emphasis added)

[796] Several third parties submit that WTO Members are free to decide which policy objectives they wish to pursue. For example, Australia states: "It is Australia's view that ... it is up to the United States to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them..."; (Australia's third-party oral statement at the second substantive meeting of the Panel, para. 22); Brazil establishes that "[a] Member imposing a technical regulation is entitled to define its objective or objectives." (Brazil's third party written submission, para. 12); and New Zealand submits that "[a]s the list in Article 2.2 is non-exhaustive, New Zealand recognises that a Member may demonstrate that other legitimate objectives also justify technical regulations." (New Zealand's third party written submission, para. 32).

[797] The European Union is of the view that in the present dispute the Panel should not find that the objective is something other than the provision of consumer information (European Union's third party oral statement at the second substantive meeting of the Panel, para. 10).

[798] See footnote 825 for the panel's statement in this regard in *EC – Sardines*.

Identification of the objective pursued by the United States through the COOL measure

7.615 In light of our decision to accept the objective as identified by the United States, we continue our analysis on that basis.

7.616 In the course of this proceeding, the United States has variously identified its objective as follows: "to provide consumer information [on origin]"[799]; "to achieve the legitimate objective of providing consumer information, information that, among other things, helps prevent consumer confusion related to the use of USDA grade labels"[800]; "providing consumer information and preventing consumer confusion"[801]; "to provide information to consumers about the origin of the covered commodities they buy at the retail level, which for meat products includes listing the names of the countries in which the animal was born, raised, and slaughtered. In doing so, the COOL measures also help prevent consumer confusion"[802].

7.617 As shown in the references above, the United States' formulation of its objective has varied somewhat throughout its written submissions. We observe, however, that the main element that the United States has consistently highlighted is "to provide consumer information on origin". Accordingly, we will proceed on the understanding that this is the objective pursued by the United States through the COOL measure.

7.618 In this regard, the United States further elaborated on the identified objective with respect to meat products. Regarding the exact information on origin that it wants to provide to consumers, the United States points to "information on the countries, where the animal from which the meat was derived was born, raised, and slaughtered".[803] Through this information, the United States also purports to prevent confusion relating to a USDA grade label, which led consumers to mistakenly believe that meat products affixed with a USDA grade label were derived from animals born, raised, and slaughtered in the United States, and the previous FSIS "Product of the U.S.A." labelling system, which allowed this label on meat products if such products received minimal processes in the United States.[804]

7.619 The United States used the following descriptions to indicate the level at which it aims to achieve the identified objective: "providing as much consumer information as possible"[805]; "to provide consumers with as much clear and accurate information as possible about the origin of the meat products"[806]; "to provide as much information as possible to consumers about the country of origin of the food products that they buy at the retail level and to minimize confusion about the origin of meat products to the maximum extent possible".[807]

7.620 Based on these references, we conclude that the objective pursued by the United States through the COOL measure is to provide as much clear and accurate origin information as possible to consumers.

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[799] United States' first written submission, paras. 68, 201, [heading above para. 227], 228; response to Panel question No. 17; second written submission, paras. 97, 106, 107, 147.
[800] United States' first written submission, para. 201.
[801] United States' opening oral statement at the first substantive meeting of the Panel, para. 41.
[802] United States' response to Panel question No. 74.
[803] United States' response to Panel question No. 58.
[804] United States' response to Panel question No. 56(a).
[805] United States' first written submission, para. 7.
[806] United States' response to Panel question No. 24.
[807] United States' response to Panel question No. 142(a).

7.621 The complainants argue that, if we were to accept the objective as declared by the United States ("consumer information on origin"), such objective is *not* legitimate. We examine the legitimacy of the objective as identified by the United States in the next section.

(ii) Legitimacy of the identified objective within the meaning of Article 2.2

Main arguments of the parties

7.622 **Canada** submits that since the alleged objective of the COOL measure is not listed in Article 2.2, the United States must prove based on clear and compelling evidence that the concerned objective is legitimate.[808] This proof cannot be based on mere assertion and must include evidence of a wider intent to implement a particular policy goal.[809] Canada argues that it is therefore necessary to look to the specifically listed legitimate objectives in Article 2.2 to determine whether an objective not specifically listed in Article 2.2 is a legitimate objective. Canada points out that, as the objectives listed in Article 2.2 are reflected in general exceptions in other covered agreements, it would be reasonable to conclude that the type of items listed covers objectives set out as general exceptions or other similar situations in the covered agreements.[810]

7.623 Canada alleges that the United States has not demonstrated that providing "information about country of origin as defined by COOL" is a legitimate objective. Canada clarifies that it is not challenging country of origin information on meat generally; rather, it is challenging the COOL measure because of its particular characteristics including its structure and objective, and the limited information it provides.[811] Specifically, Canada argues that the United States has not explained why the information provided by the COOL measure is important for consumers to have or why consumers need that information. Canada considers that there are some potential purposes for providing information to consumers that are, or could be, legitimate when the objective is sufficiently specific, such as to allow consumers to make decisions and choices based on food safety or environmental protection considerations, objectives closely linked to the listed objectives.[812] Canada contests the assertion by the United States that the reasons why consumers want information about origin are not relevant to determine the legitimacy of the measure's objective.[813] Rather, consumers' desire to purchase food produced in their own country, without evidence that consumers perceive a qualitative difference due to that fact, cannot form the basis of a legitimate objective within the meaning of Article 2.2 of the TBT Agreement.[814]

7.624 **Mexico** argues that the provision of consumer information can be a legitimate objective, but not in all circumstances.[815] Whether the objective is legitimate will depend on the specific type of information being provided to consumers and whether the provision of that information is "justifiable"

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[808] Canada's second written submission, paras. 70-76. We note that Canada initially argued that it did not take a stance on whether providing information to consumers is legitimate and that it was unnecessary for the Panel to determine whether consumer information is legitimate for the purpose of examining its claim under Article 2.2, because the measure does not satisfy other elements of that provision. (Canada's first written submission, para. 176)

[809] Canada refers to New Zealand's third party written submission (para. 32) and its response to Panel question No. 24.

[810] Canada's second written submission, para. 72, footnote 124. Canada refers to Colombia's third party written submission, paras. 43-47. Colombia suggests GATT, GATS, and TRIPS as potential sources of reference for determining whether an objective is legitimate.

[811] Canada's opening oral statement at the second substantive meeting of the Panel, para. 68.

[812] Canada's second written submission, para. 76.

[813] Canada's comments on United States' response to question No. 136.

[814] Canada's response to Panel question No. 136.

[815] Mexico's first written submission, paras. 284-295; response to Panel question No. 55.

in the light of all relevant circumstances relating to that information. This will require an assessment of the character and the intrinsic value of the information given to the consumers. According to Mexico, the objective of consumer protection is not legitimate in the circumstances of this dispute.[816] The *character* of the information given to consumers under the COOL requirements (i.e. US origin beef is produced from cattle that are "born, raised, slaughtered and processed" in the United States) has only one purpose, which is inherently protectionist. To support its position, Mexico distinguishes the nature of the information provided under the COOL measure from the type of information required, for example, for health or safety purposes or for making choices according to cultural or religious beliefs or dietary choices.[817]

7.625 Mexico argues that the COOL measure is applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail and it is a disguised restriction on international trade, in line with the preamble to the TBT Agreement. According to Mexico, such objectives cannot be "legitimate" within the meaning of Article 2.2 because they go against the fundamental object and purpose of the WTO Agreements. Further, Mexico submits that consumer demand for the specific type of information provided by the COOL measure is relevant to the circumstances in which the measure was introduced and, therefore, to the protectionist intent of the measure.[818]

7.626 The **United States** submits that providing consumer information about origin and preventing consumer confusion are legitimate objectives within the meaning of Article 2.2.[819] Specifically, the United States asserts that providing consumers with country of origin information about the food products they buy so as to help them make informed purchasing decisions is always a legitimate objective within the meaning of Article 2.2.[820] As this provision contains a non-exhaustive list of legitimate objectives, objectives not explicitly listed in the list may also be legitimate. Furthermore, the legitimacy of providing consumer information about origin and preventing consumer confusion as objectives are supported by their connection to an objective listed in TBT Article 2.2 – the prevention of deceptive practices.[821] The United States also points out that the complaining parties have not directly challenged the United States' argument that providing consumer information about origin and preventing consumer confusion are legitimate objectives.[822] Neither Canada nor Mexico argues that country of origin labelling is *per se* inconsistent with the WTO Agreements.

7.627 The United States further submits that the strong consumer support for country of origin labelling in the United States, as well as the fact that many WTO Members have notified their country of origin labelling requirements to the TBT Committee identifying their objective as consumer information, also support the conclusion that providing consumer information about origin and preventing consumer confusion are legitimate objectives within the meaning of Article 2.2. The United States refers to examples of comments expressed by certain consumer organizations in the United States regarding country of origin information on the food products.[823] The United States therefore contests that it attempted to "shape consumer perception through regulatory intervention", a concern raised by the panel in *EC – Sardines*.[824] On the contrary, the design of the measures

[816] Mexico's first written submission, para. 287; response to Panel question No. 55.
[817] Mexico's first written submission, paras. 287-289; response to Panel question No. 55.
[818] Mexico's second written submission, paras. 67-69;response to Panel question No. 135.
[819] United States' second written submission, paras. 106-117; opening oral statement at the second substantive meeting of the Panel, para. 38; Exhibit US-69.
[820] United States' response to Panel question No. 132.
[821] United States' first written submission, para. 229.
[822] United States' second written submission, para. 107.
[823] United States' second written submission, para. 110; response to Panel question Nos. 129 and 132; Exhibits US-17, 49, 61, 85, 113 to 115, 119 to 125.
[824] Panel Report, *EC – Sardines*, paras. 7.127-7.129; United States' first written submission, para. 234.

themselves and the role of consumer advocacy groups in urging their adoption reveal that the regulatory intervention was a response to consumer perception and misperception.

Analysis by the Panel

7.628 Having determined the objective pursued by the United States, we proceed to examine its legitimacy.[825] We recall that the object of our review in this context is the identified objective (providing consumer information on origin) pursued through the technical regulation, not the technical regulation itself (the COOL measure).

7.629 As a party challenging the legitimacy of the identified objective, the complainants bear the burden to establish that the objective concerned is not legitimate within the meaning of Article 2.2.

7.630 The word "legitimate" is defined as "2. a. Conformable to, sanctioned by or authorized by, law or principle; lawful; justifiable; proper. b. Normal, regular; conformable to a recognized standard type"[826] Based on the ordinary meaning, therefore, we need to assess whether "providing consumer information on origin " is "conformable to law or principle", "justifiable and proper", or "conformable to a recognized standard type".

7.631 This understanding is supported by the panel's analysis in this respect in *EC – Sardines*. Touching upon the meaning of the term "legitimate" in the context of a legitimate objective as referred to in Articles 2.2 and 2.4, the panel in *EC – Sardines* suggested that the term "legitimate" refers to the genuine nature of the objective.[827] It further noted the statement of the panel in *Canada – Pharmaceutical Patents*, in defining the term "legitimate interests" in the context of Article 30 of the TRIPS Agreement, that it must be defined "as a normative claim calling for protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms".[828]

7.632 The third sentence of Article 2.2 provides a non-exhaustive list of legitimate objectives under Article 2.2: national security requirements; the prevention of deceptive practices; protection of human health or safety; animal or plant life or health; or the environment. The use of the term "*inter alia*" in Article 2.2 of the TBT Agreement indicates that the objectives covered extend beyond the objectives specifically mentioned in Article 2.2.[829] The type of objectives explicitly listed in Article 2.2 nonetheless demonstrates that the legitimacy of a given objective must be found in the *"genuine nature"* of the objective, which is "justifiable" and "supported by relevant public policies or other social norms".

[825] We note that there is no dispute that panels are required to determine the *legitimacy* of an objective pursued by a Member under Article 2.2 of the TBT Agreement. The panel in *EC – Sardines* stated that "panels are ... required to determine the legitimacy of those objectives" (Panel Report, *EC – Sardines*, para. 7.121).

Australia and Peru also agree that the Panel should examine the legitimacy of the objective pursued by the United States through the COOL measure. (Australia's third party written submission, paras. 58, 60; Peru's third-party oral statement at the first substantive meeting of the Panel, para.7)

[826] *The Shorter Oxford English Dictionary*, (Sixth Edition) Oxford University Press, Vol. I, p. 1577 (2007).

[827] Panel Report on *EC – Sardines*, para. 7.121.

[828] Panel Report on *EC – Sardines*, para. 7.121, referring to Panel Report on *Canada – Pharmaceutical Patents*, para. 7.69. The Panel also refers to the Panel in *US – Section 110(5) Copyright Act*, which stated that the term has "the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive right" (para. 6.224).

[829] Appellate Body Report, *EC – Sardines*, para. 286.

7.633 As noted by the United States, the complainants do not contest that "consumer information" on country of origin at a general level can constitute a legitimate objective under Article 2.2.[830] Canada, however, considers that there are some potential purposes for providing information to consumers that are, or could be, legitimate when the objective is sufficiently specific as to the purpose of having the information, such as to allow consumers to make decisions and choices based on food safety or environmental protection considerations, objectives closely linked to the listed objectives. Mexico also agrees that the nature (character and intrinsic value) of the information that the United States purports to convey to consumers must be distinguished from the type of information required, for example, for health or safety purposes or for making choices according to cultural or religious beliefs or dietary choices.

7.634 In addressing the complainants' position on this issue, we must bear in mind, as pointed out above, that Article 2.2 of the TBT Agreement provides a non-exhaustive, open list of legitimate objectives. This can be contrasted, for instance, with the specific categories of policy objectives stipulated in the subparagraphs of Article XX of the GATT 1994. In our view, the fact that Article 2.2 refers to an open list of objectives without any modifying language initially indicates that a wide range of objectives could potentially fall within the scope of legitimate objectives under Article 2.2. We do not find in the text of Article 2.2 or any other provision of the TBT Agreement an explicit requirement that a policy objective pursued by a technical regulation must be specifically linked in nature to those objectives explicitly listed in Article 2.2.

7.635 Canada submits, on the basis of the *ejusdem generis* principle, that, in order to be legitimate, the objective pursued by the United States must be of the type of items specifically listed in Article 2.2 of the TBT Agreement. Canada argues that, according to this principle, when a general term such as "*inter alia*" is followed by specific terms (i.e. the list of legitimate objectives), such term must be limited to the type of items listed in the specific terms.[831] Based on the *ejusdem generis* principle, Canada further argues that the objective pursued by the United States is expressed in a level of generality that is not as specific as the explicitly listed objectives in Article 2.2.[832] According to the evidence submitted by Canada, this principle establishes that when general words follow special words, the general words are limited by the *genus* (class) indicated by the special words. For example, in the phrase "any nuclear weapon test explosion *or any other nuclear explosion*", the scope of the italicised words is limited by the preceding words.[833]

[830] See, for example, Canada's opening oral statement at the second substantive meeting of the Panel, paras. 58-59 ("...Canada's challenge pertains specifically to the COOL measure and its discriminatory impacts on Canadian-born livestock. ... But a country of origin labelling measure may well be consistent with the TBT Agreement and the GATT 1994 if ... it fulfils a legitimate objective in the least trade-restrictive way. ..."); 62, 68 ("...Canada is challenging the COOL measure under *TBT* Article 2.2 because of its particular characteristics including its structure, its objective, and the limited information it provides. ..."; Mexico's first written submission, paras. 284-285 ("...Mexico is of the view that while in certain circumstances providing consumer information can be a legitimate objective within the meaning of the provision, it is not a legitimate objective in *all* circumstances".); Mexico's response to Panel question No. 55 ("It is not Mexico's position that consumer information is never a legitimate objective when the information supplied pertains to origin"). We also note the comments of third parties. Australia's third-party oral statement at the first substantive meeting of the Panel, para. 22 ("In Australia's view, the United States, through the COOL measure, is seeking to provide consumers with additional useful information. Australia considers that such an objective is a legitimate objective, and accepts the US view that this objective is "closely related" to preventing deceptive practices"); European Union's third-party oral statement at the second substantive meeting of the Panel, para. 12 ("We consider that the objective of providing consumer information about origin is a legitimate one").

[831] Canada's second written submission, paras. 71-72.

[832] Canada's response to Panel question No. 127.

[833] Exhibit CDA-186, 190-191.

7.636 In the present dispute, we do not find that the principle of *ejusdem generis* is helpful for determining whether the objective pursued by the United States is legitimate. While the term "legitimate objectives" might be regarded as a genus (or superordinate) and the list of objectives specifically mentioned in the provision as examples (or hyponyms), all of the listed examples are expressed at a high level of generality. Thus, assuming for the sake of argument that the *ejusdem generis* principle has a bearing on the level of specificity that an objective must have in the context of Article 2.2 of the TBT Agreement – a position the Panel doubts – it is difficult to see how the application of this principle advances Canada's argument.

7.637 Given that legitimate objectives under Article 2.2 are *not* confined to those explicitly listed in the provision. In our view, therefore, the fact that the objective of the COOL measure is not related to health, safety or environmental objectives, does not in itself provide a sufficient basis for finding the objective in question to be not legitimate. In this connection, the United States points out that nearly 70 other WTO Members maintain some form of mandatory country of origin labelling for food and other products intended for human consumption.[834] Many of these mandatory labelling systems apply to food products at the retail level.[835] According to the United States, among the WTO Members with mandatory labelling systems, many explicitly identified consumer information as the objective of their labelling requirements in their TBT notifications.[836] The United States also notes that many other WTO Members have also indicated that their mandatory country of origin labelling requirements for food products were adopted to prevent deceptive practices or prevent consumers from being misled or confused.[837] The United States considers that to conclude that consumer information and preventing consumer confusion are not legitimate objectives would suggest that none of these regimes was adopted to achieve a legitimate objective.

7.638 We have reviewed examples of the mandatory labelling requirements maintained by the complainants[838] and by third parties to this dispute.[839] We observe that many of these labelling

[834] *See* Exhibit US-68 (listing Argentina, Australia, Barbados, Brazil, Canada, China, Chile, Costa Rica, Colombia, Dominica, the Dominican Republic, Egypt, El Salvador, the European Union and its 27 Member States (Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Republic of Ireland, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom), Ghana, the six members of the Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates), India, Indonesia, Israel, Japan, Kenya, Korea, Malaysia, Mexico, New Zealand, Nigeria, Panama, Peru, the Philippines, Singapore, South Africa, Switzerland, Chinese Taipei, Thailand, and Vietnam as WTO Members with mandatory country of origin labelling requirements.) In addition to these 67 WTO Members, the United States has learned that Guatemala also has mandatory country of origin labelling requirements (as confirmed by Guatemala's responses to the Panel's questions).

[835] Many of the country of origin labelling systems that the United States identified in Exhibit US-68 apply at the retail level. Among the third parties, Australia, Brazil, Colombia, the EU, Japan, Guatemala, Korea, and Chinese Taipei all maintain mandatory country of origin labelling requirements that apply at the retail level. Others with such requirements include Chile, Malaysia, the Philippines, and Vietnam, among other WTO Members.

[836] This includes Australia, Barbados, Brazil, Chile, Dominica, the EU, Korea, and Chinese Taipei (Exhibit US-69).

[837] Among those Members are Colombia, Dominica, the EU, Malaysia, Qatar, and Switzerland (Exhibit US-69).

[838] Canada submits that "meat that is derived from animals slaughtered in Canada is not required to have a country of origin label"; rather, voluntary country of origin claims are governed by the "Product of Canada guidelines (Canada's response to Panel question No. 40). However, Canada maintains various mandatory country of origin requirements for dairy products (Exhibit CDA-164), eggs (Exhibit CDA-165) and processed eggs (Exhibit CDA-166). There are also several mandatory country of origin requirements for imported products, such as maple products (Exhibit CDA-167), processed fish (Exhibit CDA-168), processed products (Exhibit CDA-169), brandy (Exhibit CDA-170), organic products (Exhibit CDA-171), fresh fruit and

requirements purport to provide consumer information on origin of food products. This suggests that consumer information on country of origin is considered by a considerable proportion of the WTO Membership to be a legitimate objective under the TBT Agreement. For example, among the third parties, Australia notified the TBT Committee of its "Final Assessment Report Proposal P292 – Country of Origin Labelling of Food" whose objective is ensuring "that adequate information is provided about the origin of food products to enable consumers to make informed choices".[840]

7.639 Further support for our understanding can be found in the context of the GATS. Specifically, the *Accountancy Disciplines*, developed in accordance with Article VI:4 of the GATS, also refers to the "protection of consumers" as an example of "legitimate objectives" in Section II, paragraph 2 (General Provisions). The *Accountancy Disciplines*, as the first disciplines developed under the mandate of Article VI:4 of the GATS, have an almost identical text to that of Article 2.2. Section II, paragraph 2 of the *Accountancy Disciplines* states:

> "Members shall ensure that measures ..., relating to licensing requirements and procedures, technical standards and qualification requirements and procedures *are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, inter alia, the protection of consumers* (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession."[841] (emphasis added)

7.640 We are mindful that, given the different types of measures falling within the scope of the TBT Agreement and Article VI:4 of the GATS, legitimate objectives pursued through measures

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vegetables (Exhibit CDA-172) and honey (Exhibit CDA-173). With the exception of the regulation on organic products, all of the other measures pre-date the establishment of the WTO. Mexico imposes certain mandatory country of origin labelling requirements for prepackaged food and non-alcoholic beverages through the measure *Especificaciones generales de etiquetado para alimentos y bebidas no alcohólicas preenvasados-Información commercial y sanitaria* (NOM-051-SCFI/SSA1-2010). The objective set out in the measure is to establish the commercial and sanitary information for the labelling of prepackaged food and non-alcoholic beverages of domestic or foreign origin (Exhibits MEX-72 and 73; G/TBT/N/MEX/178/Add.2.)

[839] The European Union notified the TBT Committee of its Proposal for Regulation Establishing a System for the Identification and Registration of Bovine Animals and Regarding the Labelling of Beef and Beef Products and Repealing Council Regulation (EC) No 820/97 (as amended) whose objective is establishing a compulsory labelling system in the beef sector based on objective criteria of the origin of the beef and to continue the voluntary labelling arrangements for labels containing indications other than those provided for in the compulsory system (Exhibit US-68; G/TBT/Notif.00/289 (20 June 2000)). Korea has notified several instruments to the TBT Committee establishing provisions regarding the country of origin labelling of certain meat products sold in restaurants. Within the various measures notified there are four main objectives: (i) ensuring the consumers' right-to-know and right-to-choose; (ii) the prevention of deceptive practices; (iii) establishing market and distribution order of agricultural and livestock products and providing correct information for purchase to consumers; and (iv) enhancing the credibility of beef products (Exhibit US-68; G/TBT/N/KOR/111 (22 June 2006); G/TBT/N/KOR/156 (18 September 2007) and G/TBT/N/KOR/202 – Addendum (20 January 2009); G/TBT/N/KOR/173 (7 May 2008); G/TBT/N/KOR/181 (7 August 2008); G/TBT/N/KOR/202 (20 January 2009); G/TBT/N/KOR/291 (23 September 2010)).

[840] The notified Proposal recommends, *inter alia*, expanding the scope of country of origin labelling beyond fish, fruit and vegetables for certain processed foods, such as fruit and vegetables and pork, which are displayed for retail sale unpackaged (Australia's third party response to Panel question No. 1; Exhibit US-68; G/TBT/N/AUS/45).

[841] The Council for Trade in Services adopted the concerned Accounting Disciplines on 14 December 1998.

falling under each agreement might not always be identical. Nonetheless, the reference to protection of consumers as one example of legitimate objectives in the context of the GATS, which has the language almost identical to Article 2.2, suggests to us that objectives relating to consumer information or consumer protection can in principle constitute a legitimate objective under the WTO covered agreements.

7.641 As already noted above[842], there is a basic agreement among the parties that consumer information concerning country of origin can constitute a legitimate objective. At the same time, the complainants underline that its legitimacy should be determined based on the factual circumstances of each case. In their view, the United States' stated objectives in this dispute should not be found legitimate unless the United States can prove that it is important for consumers to be provided with that information or why consumers need that information. Specifically, Canada points out that the United States has provided very limited evidence of consumer desire for information related specifically to the origin of meat derived from imported livestock. It maintains that "[t]he 'consumer interest' expressed in that limited evidence is protectionist, based on a false premise, or concerned with an objective the COOL measure does not seek to achieve".[843]

7.642 The United States argues that the origin information in question helps consumers make informed choices and prevents consumer confusion caused by the FSIS "Product of the U.S.A." labelling system and the USDA grade labelling system.[844]

7.643 In addressing the parties' arguments in this regard, we recall the concern expressed by the panel in *EC – Sardines*:

> "If we were to accept that a WTO Member can 'create' consumer expectations and thereafter find justification for the trade-restrictive measure which created those consumer expectations, we would be endorsing the permissibility of 'self-justifying' regulatory trade barriers. Indeed, *the danger is that Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory intervention on the basis of the governmentally created consumer expectations*. ..."[845] (emphasis added)

7.644 In the context of the present dispute, the complainants are of the view that the United States is trying to shape consumer perception through regulatory intervention and to justify the legitimacy of this intervention on the basis of a governmentally created consumer perception.[846] We bear this in mind in proceeding with our analysis.

7.645 The United States maintains that there is strong evidence showing US consumer demand for country of origin information of the kind covered by the stated objective.[847] The United States submits that leading consumer organizations in the United States have expressed support for country of origin labelling for consumer information purposes and as a means of preventing consumer confusion. As one example, the United States refers to Consumers Federation of America, which indicated that it "has long supported a mandatory country of origin labelling (COOL) program as a

[842] See para. 7.633.
[843] Canada's opening oral statement at the first substantive meeting of the Panel, para. 49.
[844] See paras. 7.587-7.589.
[845] Panel Report, *EC – Sardines*, para. 7.127.
[846] Mexico's first written submission, paras. 294-295.
[847] United States' response to Panel question No. 129; Exhibits US-17, 49, 61, 85, 113 to 115, 119 to 125.

means of providing consumers with important information about the source of their food".[848] In a joint letter with the National Consumers League and Public Citizen – two other leading US consumer organizations, the Consumers Federation of America also wrote that "[w]ithout country of origin labelling, these consumers are unable to make an informed choice between US and imported products. In fact, under the Agriculture Department's grade stamp system, they could be misled into thinking some imported meat is produced in this country".[849] Similarly, the Consumers Union wrote that "it is clear that consumers desire to know where their food is coming from".[850]

7.646 The United States also refers to the following to demonstrate consumer support for the country of origin information of meat: (i) exhibits showing individual consumers who have expressed support for country of origin labelling to provide consumer information and prevent consumer confusion[851]; (ii) thousands of other consumers who expressed a similar view during the rule-making process, urging USDA to adopt the COOL implementing regulations for these purposes[852]; and (iii) numerous polls that indicate consumer support for mandatory country of origin labelling.[853]

7.647 This evidence generally refers to comments made during the legislative process, hence it may not necessarily prove the existence of public policies or consumer demand calling for the pursuit of the stated objective that led to the introduction of the COOL measure. The absence of evidence independent of the legislative process showing consumer desire for the information on origin as defined by the United States, however, is not in itself sufficient to prove that providing such consumer information on origin is not a legitimate objective within the meaning of Article 2.2.

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[848] Exhibit US-5 (20 August 2007). In their comments on mandatory country of origin during the legislative history of the COOL measure Consumers Federation of America defines itself as "a non-profit association of more than 300 organizations with a combined membership of over 50 million Americans nationwide (...) to advance the consumer interests through research, education and advocacy" (Exhibit US-5, page 1).

[849] Exhibit US-61, p. S13275.

[850] Exhibit US-4 (20 August 2007). The United States argues that the support of pro-consumer organizations for country of origin labelling for consumer information purposes is also found internationally. For example, the Trans Atlantic Consumer Dialogue ("TACD"), a forum of 27 U.S. consumer organizations (Exhibit US-110), 49 EU consumer organizations (Exhibit US-110), and 3 observer organizations from Canada and Australia (Exhibit US-110), adopted a resolution on country of origin labelling stating that "consumers have repeatedly and overwhelmingly expressed their support for country of origin labelling of food products both in the United States and in European countries." (TACD Resolution on Country of Origin Labelling, Doc. No. Food 29-08 (March 2008) (Exhibit US-111), p. 1) TACD's objective is to develop policy recommendations for the US government and the EU to promote consumer interest and the organizations often adopt recommendations and resolutions by consensus of its members (TACD Annual Recommendations (Exhibit US-112). The United States points out that in TACD's resolution on country of origin labelling, these 79 different consumer organizations espoused the benefits of country of origin labelling (Exhibit US-111, p. 2). It states in relevant part, "[C]ountry of origin labeling can provide consumers with additional information to make informed choices about the food they wish to purchase and consume. Many consumers may wish to purchase food from producers in their own country or may wish to purchase food products from another country known for producing a particular food. Reasons for this vary from environmental and ethical principles to food quality and food standard choices. Without labeling that identifies where that food has been produced, consumers are unable to make those choices in an informed manner when they are at the point of purchase."

[851] For example, Gregory Cook of Fircrest, Washington wrote to USDA: "I am writing in support of regulations requiring country of origin labelling (COOL) of meats sold in the U.S. I believe that we – consumers and citizens – should be able to make informed choices when purchasing meat and other foods. Labels stating country of origin would be a big help in those choices." (Comments submitted by Gregory Cook to USDA (July 18, 2007) (Exhibit US-113)); and Becky McManus of Volin, South Dakota wrote to USDA: "I completely support country of origin labelling. As consumers we have the right to know where the food we consume comes from" (Comments submitted by Becky McManus to USDA (July 2007) (Exhibit US-114)).

[852] Exhibits US-17, 49, 61, 85, 113 to 115, 119 to 125.

[853] Exhibit US-5.

7.648 Clearly, if consumers know the country of origin, they will be able to make informed choices with respect to origin of products, including meat. Some consumers may indeed have preferences for products produced by or originating in particular countries for a variety of reasons.

7.649 We also acknowledge that Members have certain policy space in determining their objectives. There are therefore circumstances in which Members may decide to adopt particular regulations even in the absence of a specific demand from their citizens, and may do so without in fact shaping consumer expectations through regulatory intervention. We also note the panel's statement in *Korea – Various Measures on Beef* that "there can be good reasons – apart from any protectionist motives – why a WTO Member might want information to be provided as to the origin of products, and particularly meat products, at the retail level".[854]

7.650 We are persuaded, based on the evidence before us regarding US consumer preferences as well as the practice in a considerable proportion of WTO Members, that consumers generally are interested in having information on the origin of the products they purchase. We also observe that many WTO Members have responded to that interest by putting measures in place to require the provision of such information, albeit with different definitions of "origin". In this regard, we once again recall the words of the panel in *EC – Sardines* referring to the conclusion of the panel in *Canada – Pharmaceutical Patents* that a legitimate objective refers to "protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms".[855] In our view, whether an objective is legitimate cannot be determined in a vacuum, but must be assessed in the context of the world in which we live.[856] Social norms must be accorded due weight in considering whether a particular objective pursued by a government can be considered legitimate. It seems to us, based on the evidence before us, that providing consumers with information on the origin of the products they purchase is in keeping with the requirements of current social norms in a considerable part of the WTO Membership.

7.651 In light of the foregoing, we conclude that providing consumer information on origin is a legitimate objective within the meaning of Article 2.2.

(d) Whether the COOL measure is more trade-restrictive than necessary to fulfil the legitimate objective

7.652 In this section, we assess whether the complainants have established that the COOL measure is more trade-restrictive than necessary to fulfil the identified objective of providing consumer information on origin. The complainants' position on this issue is based on the following two elements: (i) the COOL measure does not fulfil the objective; and (ii) even if the COOL measure were found to fulfil the objective, it is more trade-restrictive than necessary because there are alternative measures that are less trade-restrictive than the COOL measure, but which equally fulfil the objectives.

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[854] Panel Report, *Korea – Various Measures on Beef*, para. 655.

[855] Panel Report on *EC – Sardines*, para. 7.121, referring to Panel Report on *Canada – Pharmaceutical Patents*, para. 7.69. The Panel also refers to the Panel in *US – Section 110(5) Copyright Act*, which stated that the term has "the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights" (para. 6.224).

[856] The Appellate Body in *EC – Hormones* states:

> "It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die" (Appellate Body Report, *EC – Hormones*, para. 187).

(i) Main arguments of the parties

7.653 **Canada** submits that, to fulfil its stated objective, the information available as a result of the COOL measure would have to be clear and accurate.[857] The COOL requirements can, however, provide consumers with inaccurate or misleading information. For example, the label information for muscle cuts is confusing because the meaning of the labels is not easily deciphered by consumers. Specifically, where meat products carrying labels B and C are put next to each other at the retail level, it is a reasonable inference that a consumer would not be able to appreciate the distinction between them.[858] Therefore, they are not provided with accurate information about the country of origin of the muscle cuts of the meat that they are purchasing.[859] Canada asserts that, even if consumers did understand the difference between labels A, B, and C, the information on a label provides virtually no useful information because of the way the COOL measure operates.[860] Moreover, with regard to ground meat, labels consistent with the requirements under the 2009 Final Rule (AMS) may indicate that a package of ground meat contains meat from a specified country when in fact it does not. Furthermore, the COOL measure requires limited information to be put on the labels because countries are mentioned without any explicit link to place of birth, raising, or slaughter of the livestock used to produce meat.[861] Specific information on the amount of time that the animal spent in the United States is not provided.

7.654 Canada further submits that to fulfil the objective of providing consumers with information, the information must be "meaningful" by providing consumers with information that is desired by them, or at least information on which they are willing to act.[862] The COOL measure, however, provides information that US consumers generally are not interested in knowing and thus is not meaningful.

7.655 Canada argues that, if the commingling provisions and exceptions were removed, the COOL measure would come closer towards fulfilling the objective. However, the COOL requirements would still not fulfil the objective because there is no evidence that consumers understand the meaning of labels B and C.[863]

7.656 Canada contests the United States' allegation that consumers of meat obtained from Canadian-born cattle or hogs are confused by the USDA grade labelling. Canada recalls that pork is not USDA graded and thus, any confusion could only apply to beef. Even assuming that consumers are confused about the meaning of the USDA grading, the COOL measure will not remove that confusion.[864]

7.657 **Mexico** submits that in examining whether the measures fulfil the objective, the Panel must consider not only the express legal provisions of the measures, but also their design, architecture and structure. The COOL measures have substantial gaps in coverage and impose confusing labels which create ambiguity and uncertainty.[865] Thus, they cannot fulfil a legitimate consumer information objective.

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[857] Canada's second written submission, paras. 78-80.
[858] Canada's response to Panel question No. 65; second written submission, para. 79.
[859] Canada's first written submission, paras. 178-181.
[860] Canada's second written submission, para. 80.
[861] Canada's response to Panel question No. 64(a).
[862] Canada's second written submission, paras. 81-82, referring to exhibits CDA-177, 192; US-87; opening oral statement at the second substantive meeting, para. 69.
[863] Canada's response to Panel question No. 143; second written submission, para. 79.
[864] Canada's response to Panel question No. 138.
[865] Mexico's first written submission, paras. 296-302; second written submission, para. 164.

7.658 Mexico asserts that while there have been no studies on the extent of consumer knowledge about the labels under the COOL measure, labels B and C are prima facie incomplete and misleading.[866] Mexico argues that consumers would need a matrix to determine even roughly where their meat products originated under the COOL requirements. This scheme does not and cannot enlighten consumers. Its only consequence is to create extra costs for foreign cattle. Mexico highlights the situation where a US consumer would not be able to tell if the animal from which the beef was derived was born and raised in the US, and then slaughtered in Mexico, because such beef would be labelled as Category D ("Product of Mexico"). Mexico contends that the average consumer would not be able to understand the exact meaning of the information on the labels under COOL.[867] Mexico argues that the only label giving accurate information to the consumer is Label A.[868]

7.659 Mexico submits that the COOL measure provides information on the labels with regard to the possible origin of the product, but not specific information on the amount of time that the animal spent in the United States.[869] Like Canada, Mexico suggests that the COOL requirements would better fulfil the stated objective if the commingling provisions and exceptions were removed. However, the COOL measure would still have an illegitimate objective and would be more trade-restrictive than necessary to fulfil that objective. In addition, the removal of the commingling flexibilities would not remedy the modification of conditions of competition, underlying the non-discrimination claims brought by Mexico.[870]

7.660 Further, the COOL measure does not alleviate the alleged consumer confusion derived from the USDA grade label.[871]

7.661 The **United States** argues that the COOL measures fulfil the legitimate objectives of providing consumers with additional information about the origin of the food that they buy at the retail level and of helping to prevent consumer confusion related to the labelling of certain products not entirely produced in the United States and which still carry a USDA grade label.

7.662 Regarding the complainants' position that the meat labels are confusing, the United States submits that the complainants have provided no evidence demonstrating that the current labelling scheme has caused or will cause any consumer confusion. Concerning whether average US consumers are able to tell the difference between label categories B and C, the United States submits that a consumer is likely to believe that the meat is most closely affiliated with the name of the country that appears first on the label.[872] Further, USDA has undertaken several efforts to educate consumers on the COOL requirements.[873]

7.663 As regards whether the COOL requirements convey accurate information in light of the COOL provisions on commingled commodities, the United States emphasizes that meat derived from livestock imported for immediate slaughter will not be labelled as solely of US origin (i.e. "Product of the U.S.A.") regardless of whether the animal was commingled with other animals on a single

[866] Mexico's response to Panel question No. 65.

[867] Mexico's response to Panel question No. 75; opening oral statement at the second substantive meeting, paras. 49-51.

[868] Mexico's opening oral statement at the second substantive meeting, para. 51.

[869] Mexico's response to Panel question No. 64(a).

[870] Mexico's response to Panel question No. 143.

[871] Mexico's response to Panel question No. 138.

[872] United States' response to Panel question No. 65.

[873] The United States points out that a significant amount of information on the COOL measures is posted on USDA's website, including a brochure for consumers and retailers to educate them about the different COOL labels (Exhibit US-88). The United States also refers to a questions and answers page for consumers, and an explanatory video about the programme (United States' response to Panel question No. 71).

production day.[874] Consistent with consumer expectations, only meat derived from animals that were born, raised, and slaughtered in the United States will be designated as of US origin. The United States concedes that while it is true that the COOL requirements could have been designed to provide even more specific information in certain circumstances (requiring the labelling of each production step or not permitting commingling), it argues that measures designed in this way would also have been much more burdensome.[875] The envisaged measures were altered during the rule-making process in response to comments received from interested parties, including Canada and Mexico, and added flexibilities to help reduce compliance costs while providing greater information than previously available. Thus, the COOL measures achieve their stated objectives.[876]

7.664 The United States argues that certain gaps existing in the coverage of products under the measures do not mean that the measures do not fulfil the stated objective. Article 2.2 does not require that a Member pursue the particular objective to the maximum possible degree without regard to costs or other considerations. Nor does Article 2.2 preclude a Member from striking a balance between the level at which a technical regulation achieves a particular legitimate objective and the costs that a technical regulation imposes on market participants. The United States clarifies that taking costs into consideration does not reflect a lowering of the level at which it decided to fulfil its objectives of providing consumer information about origin and preventing consumer confusion.[877] In fact, the commingling provisions criticized by the complainants were specifically included at the request of the Canadian Pork Council and the Canadian government.[878]

7.665 Furthermore, the United States submits that the COOL requirements help prevent consumers from being misled about the origin of meat in two different ways.[879] First, by ensuring that all meat sold at the retail level has an origin label, the COOL requirements prevent consumer confusion related to the appearance of a USDA grade label on meat that is not US origin, while also allowing both domestic and imported products to benefit from the use of these grade labels. Second, the COOL requirements prevent the confusion that may have occurred when products that were derived from animals born and/or raised in another country and then slaughtered in the United States were labelled as a "Product of the U.S.A." Under the COOL requirements, these products will now be labelled as mixed origin products and consumers will not mistakenly believe that they are products derived from animals born, raised, and slaughtered in the United States when that is not the case.[880]

(ii) Analysis by the Panel

7.666 In assessing the COOL measure's fulfilment of the objective, we start by recalling the objective pursued by the United States and the core features of the country of origin labelling requirements.

7.667 In conducting this assessment, we will also refer to the legal test established under relevant provisions of other covered Agreements, including both Article XX of the GATT 1994[881] and

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[874] United States' response to Panel question No. 64(b).

[875] United States' first written submission, paras. 62-66; responses to Panel questions Nos. 58, 73.

[876] United States' first written submission, paras. 234-241; response to Panel question No. 24; second written submission, paras. 101-102; opening oral statement at the second substantive meeting, paras. 48-49.

[877] United States' response to Panel question No. 142.

[878] United States' second written statement, footnote 32; opening oral statement at the second substantive meeting, para. 44, referring to Exhibit US-44.

[879] United States' response to Panel question No. 56; Exhibit US-84.

[880] United States' response to Panel question No. 56.

[881] We are aware that Article 2.2 of the TBT Agreement sets out a provision setting out specific obligations, whereas Article XX of the GATT 1994 provides for general exceptions to obligations. This has an important implication regarding the allocation of the burden of proof between the complainants and the

Article 5.6 of the SPS Agreement, to the extent appropriate.[882] In this connection, we find support for our approach in the Appellate Body's statement in *Australia – Apples*. In the context of analysing a provision under the SPS Agreement, the Appellate Body found interpretative assistance in the meaning attributed to a provision of the GATT 1994, based on the fact that both provisions form integral parts of the same Agreement by virtue of Article II:2 of the WTO Agreement.[883]

7.668 Although the United States agrees that the legal interpretative approach undertaken by the Appellate Body in the context of Article 5.6 of the SPS Agreement provides useful insights for the interpretation of Article 2.2 of the TBT Agreement[884], it has argued that the legal interpretive approach developed by previous panels and the Appellate Body in the context of Article XX of the GATT 1994 is not relevant to Article 2.2 in the present dispute.[885] In essence, the United States puts forward the following arguments to support its position. First, the United States contrasts the context in which the word "necessary" is used and the legal question under Article 2.2 of the TBT Agreement with that under Article XX of the GATT 1994. Specifically, the United States describes the question under Article 2.2 of the TBT Agreement as whether a measure is "more trade restrictive than necessary to fulfil a legitimate objective", whereas under Article XX of the GATT 1994 the question is whether it is necessary to breach the obligation(s) under the GATT 1994 to pursue one or more of the policy objectives under Article XX. Second, the United States highlights the difference in the allocation of the burden of proof under Article 2.2 of the TBT Agreement and Article XX of the GATT 1994.[886] Third, the United States argues that the language in Article 5.6 of the SPS Agreement is much more similar to the language in Article XX of the GATT 1994, and there is no textual basis to apply the legal interpretive approach under Article XX to Article 2.2.

7.669 We do not consider the United States' arguments as supporting its position that the legal interpretive approach under Article XX is not relevant to Article 2.2. We agree that Article 2.2 of the TBT Agreement and Article XX of the GATT 1994 are two independent provisions under two

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respondent. Thus, the complainants in the current dispute must establish a prima facie case that the COOL measure is more trade-restrictive than necessary to fulfil a legitimate objective within the meaning of Article 2.2. In contrast, it would be the respondent under Article XX of the GATT 1994 who must establish a prima facie case that the measure is necessary to [achieve] certain objectives within the scope of the provision.

[882] Several third parties submit that the Panel should refer to the extent necessary to the legal tests developed under Article XX of the GATT 1994 or Article 5.6 of the SPS Agreement. However, all these third parties agree that, in the context of Article 2.2 of the TBT Agreement, it is not necessary for the complainants to provide a less trade-restrictive alternative measure which is *significantly* less trade-restrictive, as is the case under Article 5.6 of the SPS Agreement. See, for example, Australia's third party written submission, paras. 74, 76; Brazil's third party written submission, paras. 7-8; Japan's third party written submission, para.27; and New Zealand's third-party oral statement at the second substantive meeting, para. 7.

[883] Appellate Body Report, *Australia – Apples*, para. 173, footnote 285. In finding interpretative assistance in the meaning that has been attributed to a phrase in Article III:1 of the GATT 1994 in relation to its analysis of a phrase contained in Annex A(1)(a) of the SPS Agreement, the Appellate Body noted that both provisions form part of the same Agreement by virtue of Article II:2 of the WTO Agreement and thus each constitutes context relevant to the interpretation of the other.

[884] United States' second written submission, paras. 102-105.

[885] United States' second written submission, paras. 104-105, also referring to Guatemala's response to Panel third party question No. 5.

The United States also referred to a letter from the Director-General of the GATT to the Chief Negotiator as evidence confirming that Article 2.2 of the TBT Agreement should be interpreted similarly to Article 5.6 of the SPS Agreement (United States' first written submission, para. 248; second written submission, para. 105; Exhibit US-53). Although it focuses on the similar interpretive approaches that should be taken between Article 2.2 of the TBT Agreement and Article 5.6 of the SPS Agreement, the United States has not elaborated on how the letter supports its position that the interpretive approach under Article XX of the GATT 1994 is irrelevant to Article 2.2 of the TBT Agreement.

[886] See footnote 881 for our observation in this regard.

different WTO covered agreements. This does not mean, however, that the legal interpretive approach under one provision and the legal interpretive approach under another cannot inform each other. In our understanding, the United States highlights the differences between these provisions without explaining why such differences render the legal test under Article XX irrelevant for an analysis under Article 2.2.

7.670 The following considerations further support the view that the legal interpretive approach under Article XX is relevant to Article 2.2. First, the 2nd recital in the Preamble of the TBT Agreement prescribes the WTO Members' desire to "further the objectives of GATT 1994". This indicates a close connection between the TBT Agreement and the GATT 1994. Second, Article 2.2 of the TBT Agreement is textually similar to Article XX of the GATT 1994. The examples of legitimate objectives explicitly listed in Article 2.2 resemble the types of policy objectives prescribed under Article XX of the GATT 1994.[887] Further, the wording of the 6th recital in the Preamble of the TBT Agreement is also similar to that of the chapeau of Article XX of the GATT 1994. We therefore disagree with the United States.

7.671 The objective that the United States pursues through the COOL measure is to provide consumers with information on the origin of products they consume. Specifically with respect to meat products, the United States describes its objective in more detail as follows: (i) consumer information – the COOL measure purports "to provide consumers with as much clear and accurate information as possible about the country or countries of origin of meat products that they buy at the retail level", particularly "information on the countries, where the animal from which the meat was derived was born, raised, and slaughtered"; and (ii) prevention of consumer confusion – the COOL measure purports to prevent confusion relating to a USDA grade label and the previous FSIS "Product of the U.S.A." labelling system, which allowed this label if the meat products received minimal processes in the United States.

7.672 As explained in detail in Section VII.C.1(b)(i) above, under the COOL measure, retailers of covered commodities are required to inform consumers of the country of origin of the covered commodity according to the labelling requirements under the measure. Muscle cuts of meat must fall under one of the four categories for labelling (i.e. Labels A, B, C, and D) based on the countries where the animal from which meat was derived was born, raised, and slaughtered. The 2009 Final Rule (AMS) allows the use of Labels B or C interchangeably when any combination of meat falling under category A, B, and/or C is commingled on a single production day.

7.673 The United States defines the origin of meat based on the place where an animal from which meat is derived was born, raised, and slaughtered.[888] In this context, the United States elaborates that the COOL measure adopts a definition of origin that avoids misleading consumers into believing that

[887] The examples of legitimate objectives explicitly listed in Article 2.2 of the TBT Agreement are as follows: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. The policy objectives falling within the scope of Article XX of the GATT include the following: protection of public morals; protection of human, animal or plant life or health; the compliance with laws or regulations relating to customs enforcement or the prevention of deceptive practices; and the conservation of exhaustible natural resources.

The term "necessary" in Article XX of the GATT 1994 follows the term "measures" and is followed by the phrases such as "*to protect* human … life or health" and "*to secure* compliance with laws or regulations". The same term "necessary" in Article 2.2 of the TBT Agreement follows the phrase "not more trade restrictive than" and is followed by the phrase "*to fulfil* a legitimate objective".

[888] We are not presented with evidence showing that any other Member has adopted the same definition of the origin of meat as the United States.

the meat they are buying was derived from an animal that was born, raised, and slaughtered in the United States when this is not the case.[889]

7.674 We are aware that the US definition of origin for labelling purposes is different from that employed for customs purposes. For customs purposes, the United States relies on the rules of substantial transformation for determining the origin of products imported into the United States.[890] For imports from a *NAFTA* country, there are two sets of rules regarding *NAFTA* qualification – one set for preference purposes and another for marking purposes. Usually they have the same outcome. The NAFTA Marking Rules are based on the tariff-shift principle. Thus, the tariff classification of the imported product is compared to the tariff classification of the finished product to determine whether a sufficient shift has occurred.

7.675 There is no basis, however, for us to find that the United States is prohibited from adopting for labelling purposes an origin definition which is different from that for customs purposes. We thus carry out our analysis of the COOL measure and its fulfilment of the stated objective on the basis of the definition of origin for meat products as determined by the United States. We recall that the United States defines the origin of meat based on the places where animals used to produce meat were born, raised and slaughtered.

7.676 The complainants argue that the COOL measure was designed to protect the domestic industry. Even if the objective were to provide consumer information on origin as claimed by the United States, according to the complainants, the COOL measure does not fulfil the identified objective, essentially because the country of origin information provided according to the labelling requirements is confusing and insufficient.

7.677 In light of the complainants' argument and of our earlier decision to examine this argument in the context of whether the COOL measure fulfils the identified objective[891], we first examine whether the identified objective is indeed the objective of the COOL measure.

<u>Whether consumer information on origin is the objective of the COOL measure</u>

7.678 The complainants contend that the COOL measure is designed to protect the domestic industry. According to the complainants, this must be confirmed based on not only the text of the measure, but also the design, architecture and structure of the COOL measure. In this context, the complainants have also referred to various statements made by legislators during the legislative process for the COOL statute. We will address these elements in turn, starting with the text of the COOL measure.

7.679 We first turn to the text of the COOL measure.[892]

7.680 The text of the COOL statute and the 2009 Final Rule (AMS) contains provisions on the country of origin labelling requirements, including the product scope and nature of the requirements.[893] We find that while the text of these provisions does not describe the objective of the

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[889] United States' opening oral statement at the second substantive meeting, para. 42.

[890] Canada's response to Panel question No. 59; Mexico's response to Panel question No. 59.

[891] See para. 7.608.

[892] Australia agrees that the Panel should start its analysis for determining the objective of the COOL measure with the text of the measure (Australia's third-party oral statement at the second substantive meeting, para. 10).

[893] The main requirement ("Notice of Country of Origin" – "In General") under the 2002 Farm Bill, as amended and the 2008 Final Rule is the following: "a retailer of a covered commodity shall inform consumers,

measure, it is devoted exclusively to the labelling requirements on origin. The summary part of the 2009 Final Rule (AMS) also states that the COOL statute requires retailers to notify their customers of the country of origin of covered commodities.[894] As part of the agency response to comments from the public, USDA further explains that "[w]ith regard to producer benefits, while some U.S. producers may hope to receive benefits from the COOL program for products of U.S. origin, the purpose of the COOL program is to provide consumers with origin information".[895] Therefore, the text of the COOL measure confirms that the objective of the COOL measure is to provide consumer information on origin.

7.681 To support their position that the objective of the COOL measure is not consumer information as stated by the United States, the complainants also point to the measure's design and structure, particularly the coverage of commodities and exemptions, of the COOL measure.

7.682 The scope of covered commodities under the measure is defined in 7 U.S.C. §1638(2)(A) of as follows: "[t]he term 'covered commodity' means– (i) muscle cuts of beef, lamb, and pork; (ii) ground beef, ground lamb, and ground pork; (iii) farm-raised fish; (iv) wild fish; (v) a perishable agricultural commodity; (vi) peanuts; and [footnote omitted] (vii) meat produced from goats; (viii) chicken, in whole and in part; (ix) ginseng; (x) pecans; and (xi) macadamia nuts".[896] The complainants argue that the United States limited the product scope of the COOL measure to US products threatened by foreign competition. The complainants highlight the fact that various products[897] that are produced in the United States, but that face little or no competition, are not subject to the COOL measure.[898]

7.683 The complainants further submit that the true objective of the COOL measure is trade protectionism as demonstrated by the fact that the COOL measure excludes from its scope covered commodities that are an ingredient in a processed food item or that undergo processing[899], as well as certain entities (e.g. service food establishments[900], entities selling perishable agricultural commodities below US$230,000 per year[901]). In fact, argue the complainants, if the objective of the COOL measure were to provide origin information, it would have to apply on a more widespread basis.[902]

7.684 We are not persuaded by the complainants' arguments. We consider that merely because the COOL measure does not apply to all food products and all relevant entities does not necessarily mean that the measure is designed for a protectionist purpose. In fact, it is not atypical for any kind of

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at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity."

[894] 74 FR 2658.

[895] 74 FR 2670.

[896] Exhibits CDA-1; MEX-9.

[897] Canada argues that the products that face little or no import competition, include almonds (with a market share of 99.5%), walnuts (with a market share of 99.1%), pistachios (with a market share of 99%) and turkey (with a market share of 99.9%).

[898] Canada's first written submission, paras. 161-170; Mexico's first written submission, paras. 171-172.

[899] 7 C.F.R. §65.220.

[900] 7 U.S.C. §1638a (b).

[901] Mexico's first written submission, para. 10; United States' first written submission, para. 49; Exhibit CDA-5, p. 2705; 7 U.S.C. 499a(b)(11) of the PACA defines a retailer as "a person that is a dealer engaged in the business of selling any perishable agricultural commodity at retail." Then, 7 U.S.C. 499a(b)(6) defines the term "dealer" as follows: "(B) no person buying any such commodity solely for sale at retail shall be considered as a 'dealer' until the invoice costs of his purchases of perishable agricultural commodities in any calendar year are in excess of $230,000".

[902] Canada's second written submission, para. 57; Mexico's first written submission, paras. 173-174.

regulation to have exceptions in terms of the products and entities that are subject to it. Some of such exceptions might be justifiable for practical reasons and simply facilitate the implementation of the measure at issue without necessarily involving protectionist intent. We also consider that the scope of the COOL measure is broad enough to cover a significant range of food products and entities handling these products.

7.685 Our assessment of the COOL measure, based on its text, and design and structure, is that its objective is consumer information on origin as declared by the United States.

7.686 Finally, we turn to the issue of meaning and legal relevance of various statements made by legislators during the legislation process for the COOL measure to confirm its objective.[903] We are aware of the Appellate Body's statement in *Japan – Alcoholic Beverages* addressing the prohibition in Article III against applying internal taxes and other charges "so as to afford protection to domestic production", indicating that it is "not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent".[904] In *Chile – Alcoholic Beverages*, the Appellate Body explained that "[t]he *subjective* intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters".[905] The same logic could be applied to Article 2.2 of the TBT Agreement when inquiring into a Member's measure setting out its stated legitimate objective. In this case, we have evidence before us purporting to demonstrate the legislators' intentions. According to the Appellate Body, it is possible to have recourse to "the statutory purposes or objectives – that is, the purpose or objectives of a Member's legislature and government as a whole – to the extent that they are given objective expression in the statute itself".[906] Thus, although the Appellate Body has indicated that it is *not necessary* for a panel to conduct the inquiry, we will examine the statements referred to by the parties to assess whether they are given objective expression in the COOL measure itself.

7.687 The complainants presented several statements from Members of the US Congress with a view to demonstrating that the objective of the COOL measure is trade protectionism.[907] The United States argues in response that statements by Members of Congress confirm that the objective of the COOL measure is "to provide consumers with additional information regarding the origin of the covered commodities".[908]

7.688 Canada submits that the intent of the COOL measure is to protect US ranchers from foreign competition by recapturing market share for US cattle.[909] Examples of statements identified by Canada include the following: (i) "I want to capture that 22 percent of the beef market for our

[903] Korea considers that reference to only certain chosen statements from legislators may not be able to convey the legislative background accurately (Korea's third party written submission, para. 18).

[904] Appellate Body Report, *Japan – Alcoholic Beverages*, p. 27.

[905] Appellate Body Report, *Chile – Alcoholic Beverages*, para. 62 (emphasis in original). See also the Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 259.

[906] Appellate Body Report, *Chile – Alcoholic Beverages*, para. 62.

[907] Canada's first written submission, paras. 13, 172-174; Mexico's second written submission, paras. 79-80. The complainants also refer to statements by an interest group, R-CALF. In particular, a letter from R-CALF to the US Secretary of Agriculture and US Trade Representative states the following: "[l]acking any affirmative action on the part of USDA or USTR to mitigate this untenable but prolonged trade imbalance that continues to drive tens of thousands of U.S. cattle farmers and ranchers out of business each year, COOL is the *only* available tool that the U.S. cattle industry has to even begin to rebalance the lopsided trade relationships with Canada and Mexico." (Canada's first written submission, para. 171, referring to Exhibit CDA-145; Mexico's first written submission, para. 182, referring to Exhibit MEX-50).

[908] United States' first written submission, para. 28 (Exhibit US-12).

[909] Canada's first written submission, paras. 13, 172-174.

American producers"[910]; (ii) "I am perfectly willing to put barriers at the borders so I just want to clear that up"[911]; (iii) "[the COOL measure would] give our independent producers a leg up".[912]

7.689 Mexico also puts forward statements by Members of the US Congress in the context of the 2002 Farm Bill allegedly showing protectionist intent. These include the following statements: (i) "[p]roducers pushed Congress to include a country of origin labeling and their work paid off. When given this option, I believe consumers will pick American produce over our foreign competitors"[913]; (ii) "Western South Dakota cow-calf ranchers will be proud to know that the standard for 'U.S. beef' under my provision will require it to come from cattle born, raised, and slaughtered in the United States, despite a last-minute campaign by opponents to allow foreign cattle to qualify as U.S. beef"[914]; (iii) "[t]his program will specifically inform consumers right at their local markets whether they are eating U.S. products, or products produced under the laws of another nation (...) U.S. origin labeling is important because it will allow consumers to vote with their wallets to support U.S. farmers, ranchers, and fishermen"[915]; (iv) "Country of Origin Labeling for fresh meats, fruits, vegetables and fish will help Oregon's producers".[916]

7.690 The United States submits statements by two Congressmen which support their position that the COOL measure provides information to consumers about the origin of their food. One of them states that this legislation is important mainly[917] because "[f]irst, consumers have the right to know the origin of the meat that they buy in the grocery store. Second, ranchers deserve to have their product clearly identified. Third, current law creates a false impression about the origin of USDA grade meat".[918] Another Member of Congress advances that "[t]he country of origin of their food is as important as knowing the country of origin of any other product they might buy as a consumer in the United States".[919]

7.691 We have examined all of the statements by individual legislators submitted by the parties in this respect and conclude that, while the sentiment in some of them finds expression in the COOL measure, the sentiment in others does not. On balance, we do not find this evidence of assistance in our inquiry into the objective of the COOL measure. In fact, it is not inconceivable that parliaments and governments pursue more than one objective through a certain measure. Different constituencies and legislators may have different objectives, which nonetheless lead to the adoption of a particular measure. In such cases, a panel should not be second-guessing various intents behind the introduction of that measure. The above statements therefore do not affect our conclusion that the objective of the COOL measure is to provide consumer information on origin.

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[910] Hearing before the Sub-committee of livestock and horticulture of the Committee on Agriculture, House of Representatives, 26 September 2000 (Exhibit CDA-10, p.6).

[911] Hearing before the Sub-committee of livestock and horticulture of the Committee on Agriculture, House of Representatives, 26 September 2000 (Exhibit CDA-10, p.42).

[912] Congressional Record, Farm Security and Rural Investment Act, 7 May 2002 (Exhibit CDA-146, S3918).

[913] Mexico's second written submission, para. 80; Exhibit MEX-89.

[914] Mexico's second written submission, para. 80; Exhibit MEX-91.

[915] Mexico's second written submission, para. 80; Exhibit MEX-92.

[916] Mexico's second written submission, para. 80; Exhibit MEX-93.

[917] The same Congressman advances two additional reasons why the COOL measure should be enacted: (i) "Most other consumer products are labeled as to country of origin. Meat should be no different"; and (ii) "Numerous countries already are imposing country of origin labeling requirements, including Canada, Mexico, and the European Union" (Exhibit US-13).

[918] United States' first written submission, footnote 31; Exhibit US-13.

[919] United States' first written submission, footnote 31; Exhibit US-14.

Whether the COOL measure fulfils the objective of providing consumer information on origin

7.692 The term "fulfil" can be defined as "2. Provide fully with what is wished for; satisfy the appetite or desire of; 3. Make complete, supply with what is lacking; replace (something); ... 6. Carry out, perform, do (something prescribed)".[920] The ordinary meaning of "fulfil", therefore, indicates that to meet the requirement in Article 2.2 of the TBT Agreement, the COOL measure must carry out and perform the objective of providing origin information to consumers.

7.693 Before starting our analysis, it is useful to recall the Appellate Body's clarification in the context of Article XX(b) of the GATT 1994 that in assessing whether a measure makes a contribution to the objective pursued under Article XX(b), panels are not required to apply a particular methodology. The Appellate Body considered that a contribution exists when there is *a genuine relationship of ends and means* between the objective pursued and the measure at issue.[921] In our view, this approach is also relevant for analysing a measure under Article 2.2 of the TBT Agreement, specifically with respect to whether it fulfils the objective for which it was put in place. As noted above[922], we consider that the legal interpretive approach under Article XX(b) of the GATT 1994 is relevant to our analysis of Article 2.2 of the TBT Agreement.

7.694 Bearing this in mind, we now turn to the parties' specific arguments on the fulfilment by the COOL measure of the identified objectives.

7.695 The parties do not dispute that information on the origin of products must be clear and accurate for it to be able to convey meaningful information to consumers.[923] Under a labelling regime adopted for this purpose, the fulfilment of this objective will depend on the capability of labels to convey clear and accurate information on origin. To determine whether clear and accurate country of origin information of meat products is conveyed to consumers under the COOL measure, we must examine how the specific labelling scheme under the COOL measure, particularly the content and categorization of different categories of labels, is set out in the measure itself.

7.696 The complainants argue that country of origin labels under the COOL measure can provide consumers with inaccurate or misleading information. Their position is largely based on the following contentions: (i) the meaning of the labels, particularly labels B and C for muscle cuts, is

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[920] *The Shorter Oxford English Dictionary*, (Sixth Edition) Oxford University Press, Vol. I, p.1053 (2007).

[921] The Appellate Body in *Brazil – Retreaded Tyres* stated:

> "We turn to the methodology used by the Panel in analyzing the contribution of the Import Ban to the achievement of its objective. Such a contribution exists *when there is a genuine relationship of ends and means between the objective pursued and the measure at issue.* The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made. Because the Panel, as the trier of the facts, is in a position to evaluate these circumstances, it should enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it. This latitude is not, however, boundless. Indeed, a panel must analyze the contribution of the measure at issue to the realization of the ends pursued by it in accordance with the requirements of Article XX of the GATT 1994 and Article 11 of the DSU." (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145)

[922] See paras. 7.667-7.670.

[923] Canada's first written submission, paras. 178, 210-211; Mexico's response to Panel question Nos. 64 and 105; United States' first written submission, paras. 85, 154, 155, 210-211, 240. Australia and New Zealand agree that the information conveyed through the COOL measure must be accurate. (Australia's third party written submission, para. 68; New Zealand, third party written submission, para. 40.).

confusing and cannot be easily understood by consumers; and (ii) the flexibility accorded to processors and retailers to use labels B and C interchangeably for all categories of muscle cuts upon commingling, makes origin information even more confusing for consumers.[924]

7.697 We start with the meaning of different categories of labels under the measure. We recall that meat falling within the scope of categories B and C is required to carry labels indicating "product of the US, Country X" (Label B) and "product of Country X, the US" (Label C). As described above in Section VII.C.1(b)(i), Label B refers to meat derived from animals born in Country X, and raised and slaughtered in the United States, whereas Label C refers to meat derived from animals imported for immediate slaughter (i.e. animals born and raised outside the United States). Labels B and C are therefore differentiated by the order of country names indicated on the label.

7.698 The complainants argue that the description of origin under Label B and Label C are confusing. For example, a meat product with a B or C label will indicate multiple countries of origin (i.e. "Product of the US, Country X" and "Product of Country X, the US"). This is confusing because consumers will not understand the meaning of these labels in terms of the countries where specific production steps took place.[925] Particularly, in Mexico's view, a label marked with "product of the US, Country X" might lead consumers to think that a package contains both muscle cuts of meat produced in the United States and muscle cuts produced in Mexico when this is not the case.[926]

7.699 As described above, the US definition of origin involves information on the places where animals from which meat is derived were born, raised, and slaughtered. Thus the labels identifying origin refer to several elements. As a result, it appears to us, the description of origin on Label B and Label C does not, in fact, deliver origin information as defined under the measure or as the consumer might understand it.

7.700 For example, a label "Product of the US, Mexico" does not describe what "the US and Mexico" means as far as origin of the meat is concerned. As Mexico suggests, on its face, these names could be understood as meaning products comprising meat originating in both the United States and Mexico. This may be the case particularly for meat sold in a bulk display. However, confusion is also likely in a case where a consumer-ready package contains only a single piece of meat, as the meaning of the two country names listed on the label is not clear. Indeed, in order for the average consumer to understand the meaning of a specific COOL label on meat products, he would also need to understand the definition of each category of labels as prescribed in the measure.

7.701 Furthermore, the complainants argue that the meaning of Label B and Label C is not easily distinguishable. The descriptions on Labels B and C are differentiated based on the order of country name, which is determined by whether animals were raised in the United States (Label B) or whether imported right before slaughter (Label C). For example, if an animal from which meat was derived was raised in the United States (not born in the United States), the first country name on the label is the United States ("Product of the US, Country X"). It is far from clear to us that differentiation of origin based on the order of country names will indeed communicate accurate origin information. For example, if two packages of steak on a store shelf respectively carrying the labels of "product of the

[924] Most of the third parties agree with the view that certain aspects of the COOL measure might provide inaccurate information to consumers. See, for example, Australia's third party written submission, para.70; European Union's third-party oral statement at the first substantive meeting, para. 41; Guatemala's third-party oral statement at the first substantive meeting, p. 2; Japan's third-party oral statement at the second substantive meeting, para. 7.

[925] Canada's first written submission, para. 181; Mexico's first written submission, para. 301; second written submission, para. 46.

[926] Mexico's first written submission, para. 301; second written submission, para. 46.

US, Mexico (or Canada)" and "product of Mexico (or Canada), the US", in our view the similarity in content between these two labels will render it very unlikely that the average consumer in the United States will be able to distinguish between these two labels in terms of origin as defined under the COOL measure.[927] The United States argues that, generally speaking, a consumer is likely to think that the meat is most closely affiliated with the name of the country that appears first on the label.[928] We are not presented with any evidence to support this assertion and hence must set it aside for the purpose of our decision.

7.702 Even if we were to conceive of a perfect consumer who is fully informed of the meaning of different categories of labels under the COOL measure, she may never be assured that the label precisely reflects the origin of meat as defined under the COOL measure. This is because of the manner in which the labelling requirements under the measure operate, *inter alia*, in connection with the interchangeable use of Label B and Label C allowed for commingled meat.[929] We turn to consider this aspect of the measure now.

7.703 Under the 2009 Final Rule (AMS), when categories A and B, categories A and C, or categories A, B, and C animals are commingled in a single production day, meat produced from those animals may be labelled as either category B or C. Mexico describes different possible combinations of meat with different origins under the commingling provisions as follows: "A & B = B or C; A & C = B or C; B & C = B or C; A & B & C = B or C".[930] Therefore, a B or C label affixed to a meat product may not necessarily correspond to the definition of origin under the measure. This is the case even with meat derived from animals born, raised, and slaughtered in the United States (i.e. category A meat) as it may be carrying Labels B or C rather than Label A according to the commingling provisions.

7.704 We also note that commingling can take place in multiple stages of the meat production process (e.g. processors and packers), including at the retail level.[931] This, we understand, may reduce

[927] Canada submits in response to a question from the Panel that it is a reasonable inference that a consumer would not be able to appreciate the distinction between meat products labelled as B and C respectively (Canada's response to Panel question No. 65). Mexico argues that there is no evidence that US consumers either can or do perceive the vast implications of this minute change in word order and that consumer would need a matrix to determine even roughly where their meat products originated under the COOL regime (Mexico's response to Panel question No. 65).

[928] United States' response to Panel question No. 65. In response to a similar question from the Panel that addressed two separate packages of beef, one labelled as "Product of the US, Canada, and Mexico" and another labelled as "Products of Mexico, Canada, and the US", the United States referred to three circumstances in which beef could be labelled as described in the question: (i) ground beef from a processor who had all three types of beef in its inventory in the last 60 days; (ii) a muscle cut of beef derived from an animal that spent time in all three countries (i.e. born in Canada, raised in Mexico, and slaughtered in the United States); or (iii) a muscle cut of beef from a processor who commingled multiple types of animals in a single production day. The United States adds that in none of these circumstances does the 2009 Final Rule (AMS) require the names of these countries to be listed in a particular order.

We note that the United States also asserts that the USDA has provided a significant amount of information on the COOL requirements, mainly directed to consumer education. Among the different types of information that can be found on the website there is a brochure for consumers and retailers to educate them about the different COOL labels (Exhibit US-88), a question and answer page for consumers and an explanatory video about the program. (United States' response to Panel question No. 71).

[929] We also note that the 2009 Final Rule (AMS) allows category B meat to list country names in any order.

[930] Mexico's second written submission, footnote 39. Mexico also provides a matrix of labels under the COOL measure (Mexico's response Q. 65).

[931] For example, a brochure on COOL prepared by USDA explains COOL for commingled commodities as follows: "[M]eat covered commodities (e.g., rib eye steaks) derived from U.S. and mixed origin

compliance costs to a certain extent.[932] At the same time, it further diffuses the content and impact of origin labels as defined by the measure. If a retailer were to decide to commingle meat products that had already been commingled during the production process, the resulting labels affixed to these products would be even less accurate in terms of the origin of such products as defined by the United States.

7.705 As an example, if Category A and B animals are commingled at the slaughterhouse, the meat derived thereof should, in principle, use Label B. If this Label B meat is commingled at the retail level with Label C meat, the resulting group can use Label B or C. Assuming that the retailer decides to use Label C for that group of meat, the consumer has no certainty as to the origin of meat as defined by the United States. In this scenario, the consumer could alternatively believe that this meat comes from any of the following: (i) animals born and raised in country X and slaughtered in the United States; (ii) animals born in country X and raised and slaughtered in the United States that were commingled with animals born and raised in country X and slaughtered in the United States; or (iii) animals born in country X and raised and slaughtered in the United States that simply list the country names in any order. As this example shows, the COOL measure creates a framework in which consumers make their purchasing decisions with little, if any, additional certainty as to the accurate origin of meat products.

7.706 Furthermore, as discussed in paragraphs 7.421-7.430 in the context of Article 2.1, the COOL measure allows the ground meat label to list "all of the reasonably possible countries of origin of … ground beef [or] … pork" and to reference a country of origin even if the processor has not had ground meat from that particular country in its inventory for the last 60 days or less. Because of this so-called "60-day inventory allowance" in the 2009 Final Rule (AMS), the ground meat label is likely to convey inaccurate origin information as a processor may use the same label for all of its ground meat listing all countries of origin of the ground meat that the processor has had in its inventory at least for 60 days. In other words, an origin label affixed on ground meat could be listing a country name of meat that the processor might not even have used to produce the specific ground meat in that package. In fact, the Vilsack letter contains a statement confirming this: "[t]his provision [60-day inventory allowance] allows for labels to be used in a way that does not clearly indicate the product's country of origin".

7.707 Therefore, for the reasons explained above, the labelling under the COOL measure in our view provides information on meat with regard to the *possible*, but not necessarily actual, or for that matter accurate, origin as defined by the measure.

7.708 The United States points out that the complainants provided no evidence demonstrating any confusion was caused by the labelling scheme under the COOL measure.[933] Although quantitative evidence based on market surveys, for example, could have been helpful in assessing consumers' understanding of the meaning of different categories of labels, we do not consider the presence of such quantitative evidence necessary in assessing the measure's contribution to the stated objective. As noted in paragraph 7.693 above, a certain degree of latitude is afforded to panels in adopting methodology to assess a measure's fulfilment of the objective. We are thus free to rely on either quantitative or qualitative evidence, or both. We are therefore allowed to determine whether the

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animals that are commingled during a production day may carry the mixed origin claim, *Product of the U.S., Country X, Country Y. ...*" (Exhibit, US-88)

[932] See paragraph 7.343.

[933] United States' first written submission, para. 239.

COOL measure fulfils the objective on the basis of the complainants' arguments on how the labelling provisions under the COOL measure operate.[934]

7.709 The United States further argues that, "in general", the COOL requirements satisfy the US definition of origin.[935] The United States explains that meat derived from mixed origin animals will always receive either a category B or C label that informs consumers of all the countries in which the animal from which the meat is derived had spent time.

7.710 We are not convinced by the United States' arguments. As described above, the United States has defined the origin of meat based on the place where animals from which meat was derived were born, raised, and slaughtered. The United States further submits that, in respect of meat products, providing origin information based on this specific definition forms part of the objective of providing consumer information on origin within the meaning of Article 2.2. We do not see how providing general information about the various countries in which an animal has spent time and slaughtered is in keeping with the objective that the United States claims the measure seeks to achieve.

7.711 Further, the United States created exceptions and added flexibility into the regulations because the United States strived to reduce the costs of compliance, and it wanted to provide as much consumer information as possible.[936] The United States argues that it had to strike a balance between providing consumer information and reducing the compliance costs for industry. Of course, it is often necessary and important for governments to take conflicting interests into account in implementing laws and regulations to fulfil policy objectives. The act of balancing conflicting interests cannot, however, justify any inconsistency found in the impugned measure with the obligations of the respondent under the covered agreements. In the factual circumstances of the present dispute, the pertinent question for us is whether the COOL measure is fulfilling the identified objective in accordance with the obligations under Article 2.2 of the TBT Agreement.

7.712 The United States further emphasizes that in no circumstances will animals that spent their entire life in another country before being imported to the United States for immediate slaughter be listed as a "Product of the US" under the measure. The United States highlights that "[c]onsistent with the expectations of the US consumer, only meat derived from animals that were born, raised, and slaughtered in the United States will be designated as U.S. origin".[937] This, in the United States' view, fulfils the objective of preventing consumer confusion relating to a USDA grade label and the previous FSIS voluntary "Product of the U.S.A." labelling system, which allowed this label if the meat products received minimal processes in the United States. The United States underlines that, by ensuring that all meat sold at the retail level has an origin label, the COOL requirements prevent consumer confusion relating to the appearance of a USDA grade label on meat that is not US origin while also allowing both domestic and imported products to benefit from the use of these grade labels.[938]

7.713 In essence, the specific objective pursued by the United States through the COOL measure as explained above, namely the prevention of confusion caused by the previous COOL regime as well as USDA grade labelling, is that the United States aims to prevent meat derived from animals of non-US origin from carrying a US-origin label under any circumstances. To that extent, the COOL measure appears to fulfil the objective because the measure prohibits such meat from carrying a Label A even though the same meat may still carry a USDA grade label.

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[934] See paragraph 7.693.
[935] United States' response to Panel question No. 73.
[936] United States' opening oral statement at the first substantive meeting, para. 44.
[937] United States' response to Panel question No. 64(b).
[938] United States' response to Panel question No. 56(d).

7.714 Finally, the United States emphasizes that the COOL measure ensures that consumers have much more information available to them about origin than they previously did.[939] According to the United States, the COOL measure reduces the likelihood of consumer confusion in certain circumstances.[940] Therefore, in the United States' view, the COOL measure fulfils the legitimate objectives at the level that the United States deemed appropriate.

7.715 However, as clarified in paragraph 7.620 above, the United States aims to achieve its stated objective by providing as much *clear* and *accurate* origin information as possible. Considered against this level of fulfilment of its objective and in light of the nature of the objective (i.e. to provide accurate origin information), merely providing *more* information than under the previous labelling regime or fulfilling only a limited aspect of the identified objective does not contribute in a meaningful way to fulfilling the objective. As discussed above, the different and complex categories of labels under the COOL measure and the operation of the COOL regime based on the commingling provisions render origin information contained in labels inaccurate and confusing.[941]

Overall assessment

7.716 Overall, the mandatory labelling scheme under the COOL measure falls short of providing consumers with information on the country of origin of meat products in an accurate and clear manner.

7.717 We acknowledge that labels required to be affixed to meat products according to the requirements under the measure provide additional country of origin information that was not available prior to the COOL measure. We also agree that the labelling requirements under the COOL measure may have reduced consumer confusion that existed under the pre-COOL measure and USDA grade labelling system.

7.718 However, we agree with the complainants that origin information on labels as prescribed by the measure does not ensure meaningful information for consumers, except origin information on Label A. Specifically, considered in light of the origin definition as determined by the United States for meat products, the description of origin for Label B and Label C is confusing in terms of the meaning of multiple country names listed in these labels. Moreover, the possibility of interchangeably using Label B and Label C for all categories of meat based on commingling does not contribute in a meaningful way to providing consumers with accurate information on origin of meat products.

7.719 We therefore conclude that the COOL measure does not fulfil the identified objective within the meaning of Article 2.2 because it fails to convey meaningful origin information to consumers. Given this conclusion, we do not consider it necessary to proceed with the next step of the analysis,

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[939] United States' response to Panel question Nos. 58, 64(b). The United States emphasizes that the COOL measure has provided millions of US consumers with information that was previously unavailable to them (United States' opening oral statement at the first substantive meeting, para. 43).

[940] United States' response to Panel question Nos. 64(b), 73. The United States characterizes country of origin information under the COOL measure as meaningful by distinguishing it from the allegedly misleading information that would be provided about meat products under a labelling system solely based on substantial transformation.

[941] According to Canada, data collected during the first quarter of 2010 show that the different labelling categories for muscle cuts of beef were supplied in major supermarkets as follows: Label A 78.6%; Labels A and B 6.3%; Label B 14.2%; and Labels B and C 0.9% (Exhibit CDA-211). According to the United States, as of July 2009 the different origin declarations for muscle cuts of beef were used in the following percentages: US 71%; US, Canada 5%; US, Mexico 0.5%; Canada, US 0.5%; US, Canada, Mexico 22%; and foreign (category D) 0.3% (Exhibit US-145).

namely whether the COOL measure is "more trade-restrictive than necessary" based on the availability of less trade-restrictive alternative measures that can equally fulfil the identified objective.[942]

(e) Conclusion on the complainants' claims under Article 2.2 of the TBT Agreement

7.720 For the foregoing reasons, we conclude that the complainants have demonstrated that the COOL measure does *not* fulfil the objective of providing consumer information on origin, particularly with respect to meat products, within the meaning of Article 2.2. We therefore find that the United States has acted inconsistently with Article 2.2.

4. Mexico's claim under Article 2.4

(a) Introduction

7.721 Article 2.4 provides:

> "Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."

7.722 Mexico submits that the COOL measure is inconsistent with Article 2.4 because the United States failed to base its regulation on the General Standard for the Labelling of Prepackaged Foods ("CODEX-STAN 1-1985"), an international standard that is an effective and appropriate means for the fulfilment of the legitimate objective pursued by the United States.[943]

7.723 The United States argues that Mexico has failed to meet its burden to show that any of the COOL measures breach Article 2.4. In particular, Mexico has failed to show that this standard is not an ineffective or inappropriate means for achieving the legitimate objective of the United States.[944]

7.724 The United States therefore does not contest that CODEX-STAN 1-1985 was not used as a basis for the COOL measure. Given that the United States has not rebutted Mexico's argument on this point, we will be able to find that the United States acted inconsistently with its obligations under Article 2.4 if we conclude that Mexico has established that CODEX-STAN 1-1985 is an effective and appropriate means for the fulfilment of the legitimate objective pursued by the United States.

(b) Whether CODEX-STAN 1-1985 is not an ineffective or inappropriate means for the fulfilment of the legitimate objective pursued

(i) Main arguments of the parties

7.725 **Mexico** submits that if the Panel concludes that the COOL measure pursues a legitimate objective, CODEX-STAN 1-1985 is an effective and appropriate means for the fulfilment of such legitimate objective. According to Mexico, CODEX-STAN 1-1985 is an "effective" means of fulfilling the US objective because: (i) it seeks to: protect consumers from deceptive practices; and

[942] See the Appellate Body Reports, *Brazil – Retreaded Tyres*, paras. 156, 178; and *China – Publications and Audiovisual Products*, paras. 237-249.
[943] Mexico's first written submission, para. 321.
[944] United States' second written submission, para. 173.

(ii) it conveys information on the country of origin through a label.[945] In support of its position, Mexico points to several comments that the USDA received during the revision of the Interim Final Rule (AMS), suggesting that CODEX-STAN 1-1985 should continue to apply instead of the proposed COOL measure.[946] Mexico adds that CODEX-STAN 1-1985 is "appropriate", because the rules on country of origin contained therein are specially designed, and thus suitable, for achieving the purpose of informing consumers about the country of origin of prepackaged foods.[947]

7.726 The **United States** argues that basing the COOL measures on CODEX-STAN 1-1985 is both an "ineffective" and "inappropriate" means of fulfilling the legitimate objective of providing consumer information on origin.[948] Regarding the exact information on origin that it seeks to provide to consumers, the United States refers to "information on the countries where the animal from which the meat was derived was born, raised and slaughtered"[949]. In particular, CODEX-STAN 1-1985, which appears to be based on substantial transformation, does not meet the objective of providing information about the different countries in which an animal was born, raised and slaughtered.[950] Moreover, CODEX-STAN 1-1985 would provide misleading information to consumers when meat derived from an animal that spent a portion of its life in another country before being brought into the United States for slaughter is labelled US-origin.[951]

7.727 Mexico rejects this argument and highlights that the only example of such situation provided by the United States is when cattle enters the US territory one day prior to slaughter. In Mexico's view, that is exactly the opposite situation of Mexican cattle, which gains 70% of their weight in the United States.[952]

(ii) Analysis by the Panel

7.728 In *EC – Sardines*, the Appellate Body established that under Article 2.4 of the TBT Agreement the complaining party bears the burden of demonstrating that the relevant international standard at issue is appropriate and effective to fulfil the legitimate objectives pursued by the responding party through its regulation.[953] Thus, we will examine whether Mexico has established that CODEX-STAN 1-1985 is an effective or appropriate means for the fulfilment of the legitimate objectives pursued by the United States through the COOL measure.

7.729 We are mindful that the parties disagreed on whether CODEX-STAN 1-1985 is a relevant international standard within the meaning of Article 2.4 of the TBT Agreement. In this context, we also recall that the SPS Agreement recognizes the relevance of the Codex Alimentarius Commission by acknowledging that for food safety, international standards, guidelines and recommendations are the ones established by the Codex Alimentarius Commission.[954] We also recognize that CODEX plays a crucial role in food safety and quality. For our analysis of Mexico's claim under Article 2.4 of the TBT Agreement, however, we find it sufficient to assess whether CODEX-STAN 1-1985 is an *effective* and *appropriate* means to fulfil the identified objective pursued by the United States. "To enhance simplicity and efficiency" in our decision-making in the present

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[945] Mexico's first written submission, para. 351; response to Panel question No. 78.
[946] Mexico's first written submission, paras. 352-355.
[947] Mexico's first written submission, para. 357; response to Panel question No. 78.
[948] United States' first written submission, paras. 68, 201, 228; response to Panel question No. 17; second written submission, paras. 97, 106, 107, 147.
[949] United States' response to Panel question No. 58.
[950] United States' opening oral statement at the first substantive meeting, paras. 51, 54.
[951] United States' first written submission, para. 268; second written submission, para. 176.
[952] Mexico's second written submission, paras. 176-177.
[953] Appellate Body Report, *EC – Sardines*, para. 282.
[954] Annex A(3)(a) of the SPS Agreement.

case[955], we carry out this analysis on the assumption that CODEX-STAN 1-1985 is a relevant international standard within the meaning of Article 2.4.[956]

7.730 The panel in *EC – Sardines* established that "in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued".[957] In that dispute, the Appellate Body found that, in that case, a consideration of the *appropriateness* of the standard and a consideration of the *effectiveness* of the standard were interrelated due to the nature of the objectives of the regulation under examination.[958]

7.731 We recall our findings above that the objective pursued by the United States through the COOL measure is providing consumer information on origin.[959] We also recall that the exact information on origin that the United States wants to provide to consumers through the COOL measure is the countries where the animal from which the meat is derived was born, raised and slaughtered.[960]

7.732 Turning to the matter of *effectiveness* and *appropriateness*, CODEX-STAN 1-1985 would be *effective* if it had the capacity to accomplish the objective, and it would be *appropriate* if it were suitable for the fulfilment of the objective.

7.733 We consider that in this case a consideration of the *effectiveness* and a consideration of the *appropriateness* of CODEX-STAN 1-1985 are interrelated, due to the nature of the objective of the COOL measure.

7.734 In our view CODEX-STAN 1-1985 does not have the function or capacity of accomplishing the objective of providing information to consumers about the countries in which an animal was born, raised and slaughtered. The reason is that the standard confers origin *exclusively* to the country where the processing of food took place. In other words, it is based on the principle of substantial transformation. This means that no more than one country can claim origin under CODEX-STAN 1-1985; even when an animal is born and raised in a third country and then slaughtered in the

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[955] In *China – Publications and Audiovisual Products*, the Appellate Body provided guidance on the use of *arguendo* assumptions by panels as follows:

> "We observe that reliance upon an assumption *arguendo* is a legal technique that an adjudicator may use in order to enhance simplicity and efficiency in decision-making. Although panels and the Appellate Body may choose to employ this technique in particular circumstances, it may not always provide a solid foundation upon which to rest legal conclusions. Use of the technique may detract from a clear enunciation of the relevant WTO law and create difficulties for implementation. Recourse to this technique may also be problematic for certain types of legal issues, for example, issues that go to the jurisdiction of a panel or preliminary questions on which the substance of a subsequent analysis depends." (Appellate Body Report, *China – Publications and Audiovisual Products*, para. 213)

[956] In light of the guidance provided by the Appellate Body, our approach will not potentially affect our legal conclusions for two reasons. First, our assumption creates no difficulties for the implementation of DSB recommendations and rulings; and, second, the question of whether or not CODEX-STAN 1-1985 is an effective and appropriate means for the fulfilment of the objective pursued by the United States does not fall under our jurisdiction nor as a preliminary question on which the substance of our subsequent analysis depends.

[957] Panel Report, *EC – Sardines*, para. 7.116.

[958] Appellate Body Report, *EC – Sardines*, para. 289.

[959] United States' first written submission, paras. 68, 201, 228; response to Panel question No. 17; second written submission, paras. 97, 106, 107, 147.

[960] United States' response to Panel question No. 58.

United States, the origin would *exclusively* be the United States. Thus, the exact information that the United States wants to provide to consumers cannot be conveyed through CODEX-STAN 1-1985. For the same reasons, we find that CODEX-STAN 1-1985 is an inappropriate means for the fulfilment of this objective, as it is not specially suitable for providing this type of information to the consumer.

7.735 Based on the above, we find that CODEX-STAN 1-1985 is *ineffective* and *inappropriate* for the fulfilment of the specific objective as defined by the United States.

(c) Conclusion on Mexico's claim under Article 2.4

7.736 In light of the foregoing, we find that Mexico has not established that the COOL measure violates Article 2.4.

5. Mexico's claims under Articles 12.1 and 12.3

(a) Main arguments of the parties

7.737 **Mexico** argues that the COOL measure is inconsistent with Articles 12.1 and 12.3 of the TBT Agreement. It claims that the United States did not take into account Mexico's special needs as a developing country when preparing and applying the COOL measure, with a view to ensuring that no unnecessary obstacles are created to Mexico's cattle exports to the United States.

7.738 According to Mexico, Article 12.3 of the TBT Agreement contains two separate obligations in the context of the COOL measure: (i) to "take account of" the special development, financial and trade needs of Mexico as a developing country Member; and (ii) to ensure that the COOL measure does not create unnecessary obstacles to Mexico's cattle exports as a developing country.[961]

7.739 As regards the first type of action, Mexico contends that in the preparation of the COOL measure, the United States did not take into account the special development, financial and trade needs of Mexico as a developing country.[962] According to Mexico, 56% of its territory (110 million hectares, equalling 1.1 million km^2) is used for cattle production, involving over 1 million direct and over 2 million indirect jobs at 1.132 million bovine production facilities, 65 federally inspected and 940 municipal slaughterhouses, and approximately 100 packing plants specialized in processing beef.[963] Of the approximately 30 million head of Mexican domestic cattle inventory, about 6 million are destined for domestic consumption and 1.2 million for exports to the United States.[964] Cattle production represents about 33% of Mexican agriculture and animal production GDP, and 1.3% of Mexico's overall GDP.[965] Export sales of feeder cattle to the United States amount to USD 400-600 million annually.[966]

7.740 According to Mexico, the term "take into account" means "consider", and "the requirement to 'consider' evidence would not be satisfied by simply 'receiving evidence' or merely 'tak[ing] notice of evidence'".[967] Mexico suggests that compliance with Article 12.3 of the TBT Agreement could be proven by showing that the United States considered (i) "how the measure may impact developing

[961] Mexico's first written submission, para. 362.
[962] Mexico's first written submission, para. 364.
[963] Mexico's first written submission, para. 365.
[964] Mexico's first written submission, para. 366.
[965] Mexico's first written submission, para. 366.
[966] Mexico's first written submission, para. 366.
[967] Mexico's response to Panel question No. 82, para. 218 (citing Appellate Body Report, *US – Softwood Lumber V*, para. 133).

countries"; (ii) possible steps to "minimize the impact of the measure on developing countries"; and (iii) "discussion on less onerous alternatives considered".[968]

7.741 Mexico references the Summary of Comments on the Interim Final Rule (AMS) contained in the 2009 Final Rule (AMS), arguing that USDA anticipated, but did not address, some of the potential effects to trade of feeder cattle from Mexico.[969] Mexico alleges that it had the opportunity to comment on the development of the 2009 Final Rule (AMS) "when the COOL provisions were already established and only needed to be implemented". At this stage of development of the COOL measure, there was no flexibility for changes in the regulation. Thus, Mexico's comments were merely received, but not "taken into account" by the United States in the preparation and application of the COOL measure.[970]

7.742 Mexico adds that developing countries have no obligation under Article 12.3 of the TBT Agreement to identify and convey to the developed country the specific nature and character of their special needs. Nonetheless, Mexico contends that it explained to the United States that the COOL measure was going to have a disproportionately negative impact on Mexican cattle.[971]

7.743 With regard to the second type of action allegedly required under Article 12.3 of the TBT Agreement, Mexico contends that, as explained in the context of Article 2.2 of the TBT Agreement, the COOL measure creates unnecessary obstacles to trade. Therefore, the United States also failed to comply with its obligation to ensure that the COOL measure does not create unnecessary obstacles to Mexico's exports as a developing country Member under Article 12.3.

7.744 Mexico submits a consequential claim of violation under Article 12.1 of the TBT Agreement in that it argues that the COOL measure's inconsistency with Article 12.3 of the TBT Agreement results also in its inconsistency with Article 12.1 of the TBT Agreement. According to Mexico, Article 12.3 must be interpreted and applied together with Article 12.1, since "Article 12.1 requires that the United States provide *differential and more favourable* treatment to Mexico through, *inter alia*, Article 12.3".[972]

7.745 In response to Mexico's arguments, the **United States** contends that the COOL statute and 2009 Final Rule are not inconsistent with Article 12.1 or 12.3 of the TBT Agreement.[973]

7.746 According to the United States, there is one single obligation under Article 12.3 of the TBT Agreement, and Mexico must demonstrate the following to establish a violation of that Article: (i) "that [Mexico] is a developing country"; (ii) "that the [United States] did not take account of its special development, financial or trade needs during the preparation and application of [the COOL measure]"; and (iii) "that the [United States] did not take account of these needs *with a view* to ensuring that the technical regulation does not create unnecessary obstacles to export".[974]

7.747 The United States submits that Mexico failed to prove any of these three elements. Not only did Mexico not demonstrate that it is a developing country, but it also did not show evidence that it communicated its special needs to the United States or that the United States did not "take account of" these needs in the preparation and application of the COOL Statute and 2009 Final Rule. Hence, and

[968] Mexico's reponse to Panel question No. 82.
[969] Mexico's first written submission, para. 368 (citing Exhibit MEX–7).
[970] Mexico's second written submission, paras. 181-182.
[971] Mexico's response to Panel question No. 154.
[972] Mexico's first written submission, paras. 372-373 (original emphasis) and Mexico's response to Panel question No. 82, paras. 216-218.
[973] United States' first written submission, para. 271.
[974] United States' first written submission, para. 274.

given that Mexico bears the burden of proof, Mexico did not establish a prima facie case of violation under Article 12.3 of the TBT Agreement.[975]

7.748 Even if Mexico had shown sufficient evidence for the above, the United States argues that, in fact, Mexico had many opportunities to comment on the development of the COOL measure. The United States responded to Mexico's comments, and changed the 2002 Farm Bill and implementing regulations in accordance with suggestions provided by Mexico to minimize the impact of the COOL measures on trade and facilitate compliance with record-keeping and audit verification requirements.[976] The United States argues that the term "take account of" in Article 12.3 of the TBT Agreement does not require a Member to "accept every recommendation presented by the developing country Member", and notes that "a developed country [Member] developing a regulation is expected to balance developing country considerations against the views of other interested parties, such as consumers and retailers".[977]

7.749 With regard to the alleged third element of Article 12.3, the United States contends that the term "with a view to ensuring" does not contain a substantive obligation prohibiting the creation of unnecessary obstacles to trade. The Member in question is required merely to attempt not to create unnecessary obstacles to developing country exports when preparing and applying a technical regulation. Thus, there is no obligation under Article 12.3 of the TBT Agreement contemplating the actual effects of the COOL measure on developing countries' exports.

7.750 On the relationship between Articles 12.3 and 2.2 of the TBT Agreement, the United States explains that Article 2.2 provides for a broader obligation as it also uses the term "with the effect of" creating unnecessary obstacles to trade. According to the United States, "a measure that is in compliance with TBT Article 2.2 would also be in compliance with TBT Article 12.3"; however, "a Member may violate TBT Article 2.2 without breaching TBT Article 12.3".[978]

7.751 As a result of Mexico's failure to demonstrate that the COOL measures are inconsistent with Article 12.3 of the TBT Agreement, the United States concludes that the Panel should also reject Mexico's consequential claim of inconsistency with Article 12.1 of the TBT Agreement.[979]

(b) Analysis by the Panel

7.752 In light of the parties' arguments, we turn first to Mexico's claim under Article 12.3 of the TBT Agreement. Article 12.3 reads:

> "Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members."

7.753 Before analysing the substance of Mexico's claim, we assess three points of disagreement concerning the legal test under Article 12.3 of the TBT Agreement, namely:

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[975] United States' first written submission, para. 275 and United States' response to Panel question No. 82.

[976] United States' first written submission, para. 275.

[977] United States second written submission, para. 185 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1621).

[978] United States' response to Panel question No. 83.

[979] United States' first written submission, para. 277.

(a) whether Article 12.3 involves one or two legal obligations;

(b) the distribution of the burden of proof under Article 12.3; and

(c) the meaning of the term "take account of".

(i) Whether Article 12.3 of the TBT Agreement involves one or two legal obligations

7.754 The first question regarding the legal test under Article 12.3 of the TBT Agreement is whether, as Mexico argues, this provision involves two legal obligations, or only one, as the United States contends. As an interpretive issue, the question boils down to the function of the following clause at the end of Article 12.3: "with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members".

7.755 The dictionary defines the term "with a view to" as "with the aim or object of attaining, effecting, or accomplishing something".[980] Therefore, in the context of Article 12.3, the term "with a view to" introduces an objective.

7.756 The first part of Article 12.3 prescribes that "Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members". This language uses the word "shall" and lays down an obligation addressed to all Members.

7.757 We read this first part of Article 12.3 as the operative part of that provision.

7.758 This reading of Article 12.3 is confirmed by *EC – Approval and Marketing of Biotech Products*, where the panel found that the various paragraphs of Article 12 contain a number of separate obligations (as opposed to a single obligation), and described the "obligation" under Article 12.3 as follows:

> "Article 12.3 requires that in preparing and applying technical regulations, standards and conformity assessment procedures, Members take account of the special needs of developing country Members."[981]

7.759 Further, according to the same panel, "Article 12.3 is a specific application of the obligation in Article 12.2 to take account of developing country needs in the implementation of the TBT Agreement at the national level".[982]

7.760 Indeed, the final clause of Article 12.3 starting with "with a view to" is a specific formulation in favour of developing countries of the more general principle expressed in the preamble to the TBT Agreement as follows:

> "*Desiring* … to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade."

[980] Mexico's response to Panel question No. 82 (citing Exhibit MEX–82).
[981] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47, subpara. 75.
[982] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47, subpara. 77.

7.761 This principle is also reflected in other provisions of the TBT Agreement.[983]

7.762 In light of the above, we conclude that Article 12.3 of the TBT Agreement lays down only one of the two legal obligations argued by Mexico, namely the one spelt out in the operative part of that provision: "Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members". The second half of the sentence lays down the objective of this obligation, namely to "ensur[e] that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members".

7.763 In finding that Article 12.3 of the TBT Agreement lays down only one legal obligation that is limited to the operative part of that sentence, we are not suggesting that the final clause of the sentence starting with "with a view to" should be read out of Article 12.3 or rendered ineffective.

7.764 An assessment of a claim under Article 12.3 entails a review of whether the respondent's relevant action or inaction with regard to the operative part of Article 12.3 fulfils, or is carried out with, the objective of ensuring that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

7.765 This assessment, however, necessarily follows the review of whether the respondent has complied with the operative part of Article 12.3.

7.766 Accordingly, we turn to whether the United States has complied with the operative part of Article 12.3 of the TBT Agreement. We start this assessment by reviewing two major issues of disagreement in regard to this operative part, namely: (i) the distribution of the burden of proof; and (ii) the meaning of the term "take account of".

(ii) Burden of proof under Article 12.3 of the TBT Agreement

7.767 Mexico's claims under Articles 12.1 and 12.3 of the TBT Agreement raise the question as to which party has the burden to prove inconsistency with these provisions, in particular with Article 12.3.

7.768 The United States suggests that the burden of proof in this regard rests with Mexico as the complainant. In contrast, in its third-party written submission, Colombia argues that the burden is entirely on the United States to prove that it has complied with these provisions.[984] Mexico does not explicitly argue that the burden is on the United States; nevertheless, it specifies the kind of evidence the United States should be submitting in order to show that it has complied with Article 12.3.[985]

7.769 Articles 12.1 and 12.3 of the TBT Agreement are phrased like other classical obligations in the covered agreements. This suggests that, in principle, the established normal approach to burden of proof applies in regard to these provisions, too. In *EC – Sardines*, the Appellate Body referenced this established approach in the context of the TBT Agreement:

> "We recall that, in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, we said the following about the burden of proof:

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[983] See, for instance, Articles 2.2, 2.4, and 5.1.2 of the TBT Agreement.
[984] Colombia's third party written submission, paras. 64-65.
[985] See Mexico's response to Panel question No. 82 and Mexico's second written submission, para. 183.

> … the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.
>
> In the context of the GATT 1994 and the WTO Agreement, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case. (footnote omitted)"[986]

7.770 Article 12 addresses the "Special and Differential Treatment of Developing Country Members", and its beneficiaries are limited to a subcategory of WTO Members. However, neither this in itself nor the level of development of the WTO Members in the subcategory should turn around the established normal distribution of burden of proof.

7.771 Articles 12.3 and 12.1 are not termed as exceptions from other obligations in the TBT Agreement. These Articles contain obligations additional to the rest of the Articles in the TBT Agreement. And even if Articles 12.3 and 12.1 of the TBT Agreement could be described as exceptions from other obligations, this in itself would not be sufficient to shift the initial burden of proof to the respondent. As the Appellate Body explained in the context of the SPS Agreement, and later confirmed in the context of the TBT Agreement:[987]

> "The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an 'exception'."[988]

7.772 The panel in *EC – Approval and Marketing of Biotech Products* also held that in the context of Article 10.1 of the SPS Agreement, which the panel described as the "equivalent provision" to Article 12.3 of the TBT Agreement[989], the burden was clearly on the complaining party to prove that its development needs had not been taken into account:

> "Argentina argues that the European Communities has not provided any evidence which would prove that it has taken into account Argentina's special needs as a developing country Member. This argument lacks merit, for it is incumbent on Argentina as the Complaining Party to adduce evidence and argument sufficient to raise a presumption that the European Communities has failed to take into account Argentina's special needs as a developing country Member."[990]

7.773 Accordingly, we see no reason to depart from the established normal distribution of burden of proof in assessing Mexico's Article 12.1 and 12.3 claims. It is not the respondent, the United States,

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[986] Appellate Body Report, *EC – Sardines*, para. 270 (footnote omitted). See also, Panel Report, *EC – Sardines*, paras. 7.48-7.50.
[987] Appellate Body Report, *EC – Sardines*, para. 271.
[988] Appellate Body Report, *EC – Hormones*, para. 104.
[989] Panel Report, *EC – Approval and Marketing of Biotech Products*, footnote 1330.
[990] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1622.

that needs to establish that it has "take[n] account of [Mexico's] special development, financial and trade needs" "in the preparation and application of [the COOL measure]". In saying this, however, we are not calling into question that Article 12 imposes substantive obligations on the United States as a Member, and as a respondent in the current dispute.

7.774 In line with the established normal distribution of the burden of proof, it is Mexico, the complainant bringing a claim under Article 12.3, that bears the initial burden to make a prima facie case that the United States did not "take account of [Mexico's] special development, financial and trade needs" "in the preparation and application of [the COOL measure]". Once Mexico has succeeded in making a prima facie case, the burden is on the United States, the respondent, to refute this.

(iii) Meaning of the term "take account of"

7.775 As regards the meaning of "take account of", the first question is whether, in general, this term involves a requirement for a Member to merely consider specific needs, views or positions, or also to act upon, and in accordance with, them.

7.776 The dictionary defines "to take account of", as well as the similar term "to take into account" as: "to take into consideration as an existing element, to notice".[991] This suggests that "to take account of" and "to take into account" mean to consider, but not necessarily to act in line with the specific need, view or position under consideration.

7.777 This is confirmed by the meaning the panel in *US – Continued Suspension* gave to the term "take into account" in Article 5.2 of the SPS Agreement:

> "As noted above in the context of risk assessment techniques, *taking available scientific evidence into account does not require that a Member conform its actions to a particular conclusion in a particular scientific study*. The available scientific information may contain a multiplicity of views and data on a particular topic. It is the view of the Panel that the requirement in Article 5.2 is to ensure that a Member, when assessing risk with the aim of formulating an appropriate SPS measure, has as wide a range as possible of scientific information before it to ensure that its measure will be based on sufficient scientific data and supported by scientific principles."[992] (emphasis added)

7.778 In *EC – Approval and Marketing of Biotech Products*, Argentina also made a claim under Article 10.1 of the SPS Agreement, which the panel described as the "equivalent provision" to Article 12.3 of the TBT Agreement.[993] Like Article 12.3 of the TBT Agreement, the key obligation under Article 10.1 of the SPS Agreement is "to take account of" the special needs of developing countries:

> "In the preparation and application of sanitary or phytosanitary measures, Members *shall take account of* the special needs of developing country Members, and in particular of the least-developed country Members." (emphasis added)

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[991] See United States' second written submission, para. 178 and Exhibit US-140.
[992] Panel Report, *US – Continued Suspension*, para. 7.480.
[993] Panel Report, *EC – Approval and Marketing of Biotech Products*, footnote 1330.

7.779 The panel in *EC – Approval and Marketing of Biotech Products* emphasized that the obligation in Article 10.1 of the SPS Agreement is to "take account of" the needs of developing countries, and interpreted this term in a restrictive manner:

> "Argentina's argument implies that when an importing Member applies a measure which (i) treats exports originating in the territory of developing country Members in the same way as exports originating in the territory of developed country Members and (ii) has a significant adverse effect on the developing countries' exports, the importing Member is acting inconsistently with its obligation under Article 10.1. Argentina suggests that in such situations the exports of developing country Members are entitled under Article 10.1 to special and differential treatment *vis-à-vis* the exports of developed country Members. However, the obligation laid down in Article 10.1 is for the importing Member to 'take account' of developing country Members' needs. *The dictionary defines the expression 'take account of' as 'consider along with other factors before reaching a decision'.*[994] Consistent with this, *Article 10.1 does not prescribe a specific result to be achieved.* Notably, *Article 10.1 does not provide that the importing Member must invariably accord special and differential treatment in a case where a measure has lead* [sic], *or may lead, to a decrease, or a slower increase, in developing country exports.*"[995] (emphasis added)

7.780 The same panel added that the needs of developing countries may be balanced against other interests:

> "While the European Communities must take account of the interests of developing country Members in applying its approval legislation, the European Communities may at the same time take account of other legitimate interests, including those of its own consumers, its environment, etc. *There is nothing in Article 10.1 to suggest that in weighing and balancing the various interests at stake, the European Communities must necessarily give priority to the needs of Argentina as a developing country.*"[996] (emphasis added)

7.781 Based on the approach to Article 10.1 of the SPS Agreement by the panel in *EC – Approval and Marketing of Biotech Products* and the interpretation of the term "take into account" by the panel in *US – Continued Suspension*, we find that Article 12.3 of the TBT Agreement does not amount to a requirement for WTO Members to conform their actions to the special needs of developing countries but merely to give consideration to such needs along with other factors before reaching a decision.

7.782 We reach this conclusion in part based on the panel report in *EC – Approval and Marketing of Biotech Products*. Mexico points out the textual difference between Article 10.1 of the SPS Agreement and Article 12.3 of the TBT Agreement, in particular the absence from the former of the clause starting with "with a view to". According to Mexico, this makes the findings of the panel in *EC – Approval and Marketing of Biotech Products* irrelevant in the context of Mexico's claim under Article 12.3 of the TBT Agreement in the current dispute.[997]

7.783 However, as we explained above, the final clause of Article 12.3 of the TBT Agreement starting with the term "with a view to" is outside the operational part of that provision, and merely

[994] *(footnote original) The Concise Oxford Dictionary*, 10th edn., J. Pearsall (ed.) (Clarendon Press, 1999), p. 8.
[995] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1620.
[996] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1621.
[997] See Mexico's response to Panel question Nos. 82 and 152.

specifies the objective to be achieved by the obligation contained in the operational part. Accordingly, we reach our conclusion with regard to the specific meaning of the term "take account of" in Article 12.3 of the TBT Agreement independently of the separate, final clause of that provision. Even considering that final clause together with the operational part does not make a difference, in that it does not change the nature or scope of the action required under Article 12.3 but merely specifies its objective.

7.784 Accordingly, we consider that the findings of the panel in *EC – Approval and Marketing of Biotech Products*, on the meaning of "take account of the special needs of developing country Members" in Article 10.1 of the SPS Agreement, are relevant for interpreting the meaning of the clause "take account of the special development, financial and trade needs of developing country Members", in particular the term "take account of".

7.785 As regards the practical meaning of the term "take account of", Mexico also references other WTO disputes interpreting the terms "account shall be taken of" and "consider".[998] In particular, Mexico quotes *US – Softwood Lumber V*, where the Appellate Body held that, in the context of Article 2.2.1.1 of the Anti-dumping Agreement, "the requirement to 'consider' evidence would not be satisfied by simply 'receiving evidence' or merely 'tak[ing] notice of evidence'".[999] Mexico also quotes *US – Softwood Lumber VI*, where the panel held that the term "consider" in Article 15.7 of the SCM Agreement entails that "consideration must go beyond a mere recitation of the facts in question, and put them in context".[1000] Further, Mexico quotes the following passage from the panel report on *EC and certain member States – Large Civil Aircraft* on the meaning of the phrase "account shall be taken of" in Article 2.1(c) of the SCM Agreement:

> "To take something into account means to take something into reckoning or consideration; to take something on notice.[1001] Therefore, in the context of the third specificity factor, the last sentence of Article 2.1(c) requires that the length of time during which the relevant subsidy programme has been in operation must form part of the *consideration or reckoning* of whether the amount of a subsidy granted to certain enterprises pursuant to that same subsidy programme is disproportionately large."[1002]

7.786 We agree with these interpretations of the terms "consider" and "take account of". They show that the Member bound by these terms needs to accord active and meaningful consideration to certain factors. Thus, in the context of Article 12.3 of the TBT Agreement, the term "take account of" entails that Members are obliged to accord active and meaningful consideration to the special development, financial and trade needs of developing country Members.

7.787 As to what such active and meaningful consideration means in practical terms, we do not read Article 12.3 of the TBT Agreement as prescribing any specific way. In particular, while not excluding it, Article 12.3 does not specifically require WTO Members to actively reach out to developing countries and collect their views on their special needs. Further, we do not interpret the term "take account of" in Article 12.3 of the TBT Agreement as an explicit requirement for Members to document specifically in their legislative process and rule-making process how they actively considered the special development, financial and trade needs of developing country Members.

[998] See Mexico's response to Panel question No. 152.

[999] Mexico's response to Panel question No. 82 (citing Appellate Body Report, *US – Softwood Lumber V*, para. 133). See also Mexico's response to Panel question No. 152.

[1000] Mexico's response to Panel question No. 82 (citing Panel Report, *US – Softwood Lumber VI*, para. 7.67). See also Mexico's response to Panel question No. 152.

[1001] *(footnote original)* The New Shorter Oxford Dictionary, Fourth Edition, p. 15.

[1002] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.969.

Indeed, the panel in *EC – Approval and Marketing of Biotech Products* held that "it is not sufficient, for the purposes of establishing a claim under Article 10.1 [of the SPS Agreement], to point to the absence in the EC approval legislation of a reference to the needs of developing country Members".[1003]

7.788 Indeed, there are a variety of ways in which Members may take account of the special development, financial and trade needs of developing country Members. As explained above, this requires Members to accord active and meaningful consideration to such needs, entailing a positive obligation for the WTO Membership. We now turn to whether the United States has fulfilled its obligation in regard to the COOL measure.

(iv) Assessment of Mexico's claim under Article 12.3

7.789 Mexico argues that the United States breached Article 12.3 of the TBT AGREEMENT by not having given Mexico an opportunity to comment on the preparation of the COOL measure, in particular the 2002 Farm Bill.

7.790 As explained above, however, we do not consider that the United States had an explicit obligation, enforceable in WTO dispute settlement, to reach out and collect Mexico's views during the preparation and application of the COOL measure. The United States is merely required under Article 12.3 to "take account of [Mexico's] special development, financial and trade needs" "in the preparation and application of [the COOL measure]". This means giving active and meaningful consideration to such needs.

7.791 Mexico has not demonstrated that the United States failed to do this. Mexico argues that the United States ignored Mexico's comments and the impact that it knew the COOL measure would have on Mexican exports.[1004] However, Mexico does not prove this. In particular, we have no evidence from Mexico demonstrating that the United States has failed to "take account of [Mexico's] special development, financial and trade needs" "in the preparation and application of [the COOL measure]" in the above sense.

7.792 In fact, Mexico does not contest the United States' arguments and evidence showing that the United States actively reached out to discuss the development of the COOL measure with Mexico at the following occasions:

(a) at least four opportunities for interested parties to provide formal comments on the COOL regulations[1005];

(b) a USDA briefing on 27 August 2008 on the Interim Final Rule (AMS) for embassy officials[1006];

(c) a meeting on 11 September 2008 between AMS Administrator Lloyd Day and officials from the Mexican Embassy to discuss COOL rule-making[1007];

[1003] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1623.

[1004] See Mexico's opening oral statement at the first substantive meeting, para. 48, opening oral statement at the second substantive meeting. para. 62 and closing oral statement at the second substantive meeting, para. 39.

[1005] See United States' first written submission, para. 60, United States' second written submission, para. 183 and Exhibits CDA-13, MEX-13, MEX-14, MEX-15, MEX-16, MEX-17, MEX-18, MEX-19 and MEX-20.

[1006] See United States' first written submission, para. 274 and United States' second written submission, para. 183.

(d) meetings of the United States – Mexico Consultative Committee on Agriculture, chaired by USDA and USTR officials, in October 2002, April 2003, May 2004, May 2007 and January 2008 to discuss COOL rule-making.[1008]

7.793 Nor does Mexico contest the United States' arguments and evidence demonstrating that, in the context of the above consultations, Mexico submitted comments on key elements of the COOL measure on 23 February 2004 and 15 August 2008[1009], and that high-level USDA officials indicated that Mexico's input will be taken into account. In particular, we have evidence before us that, in September 2003, the USDA Undersecretary sent a letter to the Secretary of Agriculture of Mexico stating that "[w]e will fully consider your comments ... as we develop the final rule".[1010] Similarly, in October 2008, the USDA Secretary sent a letter to the Secretary of the Mexican Association of Secretaries of Rural Development requesting additional input on the rule-making as part of the Canada-Mexico Working Group by "encourag[ing] the Canada-Mexico Working Group to submit comments on this COOL regulation so that we can implement the program in a way that incorporates your input".[1011]

7.794 Further, Mexico does not dispute that the United States introduced certain modifications to elements of the COOL measure in response to concerns expressed by Mexico, namely by softening the record-keeping requirements and by introducing the commingling flexibility in part in response to Mexico's comments.[1012]

7.795 We also note that the United States made a public invitation to comment on the 2002 Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts (AMS). The 2003 Proposed Rule (AMS) of October 2003 records this commenting process, and references *inter alia* "[t]estimony [by at least one commenter] that this law may violate United States trade obligations under the World Trade Organization".[1013] Further, as regards the Interim Final Rule (AMS) of August 2008[1014], the comments section of the 2009 Final Rule (AMS)[1015] explicitly references the United States' "trading partners" and responds to at least one concern expressed by them.[1016]

7.796 Mexico argues that the United States failed to "take account of [Mexico's] special development, financial and trade needs" in particular in regard to the 2002 Farm Bill since the United States did not consult Mexico when developing that bill.[1017] As we explained, however, under Article 12.3 of the TBT Agreement, the United States did not have an explicit obligation to initiate such consultation.

[1007] See United States' first written submission, para. 274 and United States' second written submission, para. 183.

[1008] See United States' second written submission, para. 183.

[1009] See United States' second written submission, para. 184 and Exhibits US-19 and 127.

[1010] Exhibit US-141. See also United States' second written submission, para. 183.

[1011] Exhibit US-142. See also United States' second written submission, para. 183.

[1012] See United States' response to Panel question No. 84, United States' second written submission, para. 184 and Exhibits US-19 and 127.

[1013] 68 FR 61945. See also United States' opening oral statement at the first substantive meeting, para. 55.

[1014] See Exhibit CDA-4.

[1015] 74 FR 2678 and 2679.

[1016] 74 FR 2678. See also Mexico's first written submission, para. 368 (citing 74 FR 2669).

[1017] Mexico's second written submission, paras. 180-182, opening oral statement at the second substantive meeting, para. 61, closing oral statement at the second substantive meeting, para. 40 and Mexico's response to Panel question Nos. 153-155.

7.797 Although the COOL measure was introduced in its initial form by the 2002 Farm Bill, it took effect as a fully developed and enforceable legal requirement for the products at issue in this dispute only on 30 September 2008. Mexico does not contest that it was consulted by the United States well before this later date.[1018] Mexico even recognizes that it expressed its views both to USDA and the US Congress: "[d]uring the preparation process of the COOL measure, both the United States Congress and the USDA were made aware that the COOL measure would harm imports of Mexican feeder cattle".[1019] The 2008 Farm Bill significantly amended the 2002 Farm Bill. Therefore, any opportunity to comment on the 2008 Farm Bill effectively involved an opportunity to express views on the 2002 Farm Bill as it was being developed by the United States towards what finally became what we address as the statutory part of the COOL measure in this dispute. In fact, the 2002 Farm Bill introduced specific rules only with regard to beef and pork exclusively born, raised and slaughtered in the United States.[1020] The specific provisions on what became Labels B, C and D and the ground meat label under the final version of the COOL measure, were introduced only by the 2008 Farm Bill, following consultations with Mexico on various occasions.[1021]

7.798 It is the finalized version of the COOL measure that Mexico calls into question in its claims in the current dispute, including in its claim under Article 12.3 of the TBT Agreement. In fact, Mexico argues that we should treat the various instruments challenged in this dispute as a single measure. We have chosen to do that for the most part. Accordingly, it is inappropriate for Mexico to single out one of the earliest instruments comprised in the COOL measure, and it would be inadequate also for us to review whether the United States violated Article 12.3 of the TBT Agreement with regard to that single instrument.

7.799 In light of the above considerations and the various documents showing how the United States considered Mexico's special development, financial and trade needs in an active and meaningful way, we conclude that Mexico has not demonstrated that the United States failed to "take account of [Mexico's] special development, financial and trade needs" "in the preparation and application of [the COOL measure]".

7.800 In light of this finding, we refrain from addressing other aspects of Mexico's Article 12.3 claim, and turn to Mexico's claim under Article 12.1 of the TBT Agreement.

(v) Assessment of Mexico's claim under Article 12.1

7.801 Article 12.1 of the TBT Agreement stipulates that:

> "Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement."

7.802 As explained above, Mexico claims that the United States violated this provision by having breached Article 12.3 of the TBT Agreement.

7.803 Given that Mexico has failed to establish the violation of Article 12.3 of the TBT Agreement, we need not pursue Mexico's claim under Article 12.1 of the TBT Agreement; we conclude that Mexico has also failed to demonstrate the violation of Article 12.1.

[1018] United States' second written submission, para. 183.
[1019] Mexico's first written submission, para. 367. See also Mexico's response to Panel question No. 82.
[1020] See 7 U.S.C. § 1638a(a)(2).
[1021] See 7 U.S.C. § 1638a(a)(2).

(c) Conclusion on Mexico's claim under Articles 12.1 and 12.3

7.804 Accordingly, we find that Mexico has not established that the United States acted inconsistently with Article 12.3 of the TBT Agreement.

E. Claims under the GATT 1994

1. The complainants' claims under the GATT 1994

7.805 The complainants advance claims against the measures at issue under Articles III:4 and X:3(a) of the GATT 1994.

7.806 We note that there is a distinction between Articles III:4 and X:3(a) in respect of the type of measures subject to the obligations under the respective provisions. The obligation under Article X:3(a) applies to the administration of the laws, regulations, decisions and rulings of the kind falling within the scope of Article X:1, but not to such laws and regulations themselves.[1022] The consistency of laws and regulations themselves should be examined under the relevant provisions of the GATT 1994, such as Article III:4, and not Article X:3(a).[1023]

7.807 The complainants' claims under Article III:4 concern both the COOL measure and the Vilsack letter.[1024] In accordance with our decision to examine the COOL measure separately from the Vilsack letter, however, we examined the COOL measure under Article 2.1 of the TBT Agreement. As we found that the Vilsack letter was not a technical regulation, we did not proceed to examine the letter under Article 2.1. The COOL measure was then found inconsistent with the national treatment obligation under Article 2.1.[1025] Given the close connection between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 with respect to the nature of the obligations[1026] and in light of our finding under Article 2.1 of the TBT Agreement, we consider it unnecessary to examine the complainants' claims in respect of the COOL measure under Article III:4 of the GATT 1994.[1027]

7.808 As regards the Vilsack letter, Canada challenges it under Article X:3(a). Mexico also brought a claim under Article X:3(a) against the alleged shifts in the interpretation of the COOL measure as reflected in the USDA's guidelines, non-public pressure by the US government on individual

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[1022] Appellate Body Reports, *EC – Bananas III*, para. 200; *EC – Poultry*, para. 115. In this regard, the Appellate Body held in *EC – Bananas III* that "[t]he text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings." (para. 200). The Appellate Body reiterated this view in *EC – Poultry*, where it held that "Article X relates to the *publication* and *administration* of "laws, regulations, judicial decisions and administrative rulings of general application", rather than to the *substantive content* of such measures." (para.115).

[1023] Appellate Body Report, *EC – Bananas III*, para. 200.

[1024] Canada's first written submission, para. 219; Mexico's first written submission, para. 225. See paras. 3.1-3.3.

[1025] See paras. 7.420, 7.547-7.548.

[1026] See Section VII.D.2.

[1027] In addressing the principle of judicial economy, the Appellate Body clarified that panels need not examine all legal claims made by a complaining party. The Appellate Body stated that, in line with the aim of the WTO dispute settlement system as set out in Articles 3.4 and 3.7 of the DSU, panels may make findings only on those claims that such panels concluded were necessary to resolve the particular matter (Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 17-20).

Considered against the standard applied for the panels' exercise of judicial economy, we consider that, in this dispute, given our finding under Article 2.1 of the TBT Agreement, we need not make findings on the national treatment obligation embodied in Article III:4 of the GATT 1994.

companies, and the Vilsack letter.[1028] Accordingly, in this section, we will examine the complainants' claims concerning the United States' act of administering the COOL measure under Article X:3(a). If the Vilsack letter is found not to fall within the scope of Article X:3(a), we will proceed to examine whether it falls within the scope of Article III:4.

2. Article X:3(a)

7.809 Canada and Mexico claim that the United States acted inconsistently with its obligations under Article X:3(a) with respect to its administration of the COOL measure. Canada's claim is confined to a "reasonable" administration of the COOL measure, whereas Mexico's claim concerns all requirements under Article X:3(a), namely a "reasonable", "uniform", and "impartial"[1029] administration of the COOL measure.

7.810 Article X:3(a) provides:

> "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

7.811 Article X:1 in turn reads:

> "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, ..."

7.812 To establish a violation of Article X:3(a), a complaining party must show that the responding Member *administers* the legal instruments of the kind described in Article X:1 in a manner that does not meet the standard of *uniformity*, *impartiality*, or *reasonableness* set out in Article X:3(a).[1030]

7.813 In the current dispute, for the complainants to prove their claim under Article X:3(a), they must establish the following elements: (i) the COOL measure falls within the scope of laws, regulations, decisions and rulings of the kind described in Article X:1; (ii) the United States "administered" the COOL measure; and (iii) the administration of the COOL measure by the United States was not uniform, impartial or reasonable.

(a) Laws, regulations, decisions and rulings of the kind described in Article X:1

7.814 The parties do not dispute that the COOL measure falls within the category of "laws, regulations, decisions and rulings of the kind described in paragraph 1" of Article X of the GATT 1994 and referenced in Article X:3(a).[1031]

[1028] Canada's first written submission, para. 227; opening oral statement at the first substantive meeting, para. 2; second written submission, para. 108; opening oral statement at the second substantive meeting, paras. 73-75. Mexico's first written submission, para. 378; opening oral statement at the first substantive meeting, paras. 49-51; second written submission, paras. 185-189; opening oral statement at the second substantive meeting, paras. 65-68.

[1029] Mexico's second written submission, paras. 185 and 189. Mexico's claim on the partial administration by the United States of the COOL measure is presented for the first time in its second written submission.

[1030] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.866.

7.815 We agree with the parties' view on this issue. For the purposes of this dispute, we use the term "COOL measure" to refer to the COOL statute and the 2009 Final Rule (AMS). These are formal legal instruments, which qualify as either "laws" or "regulations" within the meaning of Article X:1 of the GATT 1994.

7.816 We therefore proceed to the next element of Article X:3(a), namely whether the complainants properly identified an act of the United States that amounts to the "administration" of the COOL measure.

(b) "Administer" its laws and regulations

(i) Main arguments of the parties

7.817 **Canada** argues that the exact "US government act of administration" in the present case is the Vilsack letter, because it is a means of "putting into practical effect, or applying" the 2009 Final Rule (AMS) and the underlying statutory provisions, which corresponds to the definition of the term "administer".[1032] The Vilsack letter created uncertainty as to the precise requirements of the COOL measure, thereby administering the COOL measure in an unreasonable manner.[1033] According to Canada, the requirements in the Vilsack letter went beyond the requirement of the COOL legislation and the 2009 Final Rule (AMS):[1034] it encouraged industry to take action that was not required by the COOL legislation and the 2009 Final Rule (AMS).[1035] This was accompanied by a threat to US market participants who were following the letter of the COOL legislation and the 2009 Final Rule (AMS). The threat involved the imposition of even more onerous requirements if market participants did not go beyond the law's requirements by complying with the Vilsack letter's "suggestions for voluntary action".[1036]

7.818 **Mexico** argues that the act of administration lies in the different changes made to the COOL measure during the implementation of the regulations, as reflected in the associated guidelines issued by USDA[1037], non-public pressure by the US government on individual companies[1038], and the Vilsack letter.[1039] According to Mexico, acts taken by USDA regarding changes in the criteria of compliance are actions taken "for purposes of the administration" of the measure.[1040] Mexico submits that the inconsistent and unpredictable guidance from USDA was not part of the legislative or rulemaking process, but the action of an agency not reflected in statutes or regulations.[1041] Mexico contends that the continuing changes in USDA policy, first indicating that mixed origin labels were permissible, then discouraging them, contributed to the disruptions experienced by the Mexican

[1031] Canada's first written submission, para. 226; Mexico's first written submission, para. 376. The United States does not contest that the COOL measure is qualified as "laws, regulations, decisions and rulings of the kind described in paragraph 1" of Article X of the GATT 1994.
[1032] Canada's response to Panel question No. 85. (italics in the original).
[1033] Canada's first written submission, paras. 228-231.
[1034] Canada's first written submission, para. 228.
[1035] Canada's first written submission, para. 229.
[1036] Canada's first written submission, para. 230.
[1037] Mexico's second written submission, para. 187, referring to Exhibit CDA-29.
[1038] Mexico's first written submission, paras. 258-259; second written submission, para. 188 (Exhibits MEX-33, MEX-55, 56 and 57).
[1039] Mexico's first written submission, para. 378; response to Panel question No. 85; second written submission, para. 185.
[1040] Mexico's opening oral statement at the second substantive meeting, paras. 67-68.
[1041] Mexico's response to Panel question No. 86.

industry.[1042] The COOL measure has not been administered in a uniform, impartial and reasonable manner, contrary to Article X:3(a) of the GATT 1994.[1043]

7.819 The **United States** argues that the complainants have failed to provide any evidence relating to the administration of the COOL measures at all.[1044] The United States submits that the complainants cannot base their claims on the Vilsack letter because the issuance of that letter does not fall within the scope of Article X:3(a).[1045] That provision applies to the manner in which WTO Members "administer" their laws, regulations, decisions and rulings referred to in Article X:1. The United States contests that the Vilsack letter would have "put into practical effect" or "applied" the COOL requirements.[1046] Instead of dealing with the administration of either the statute or the 2009 Final Rule, the Vilsack letter merely suggests that certain market participants can voluntarily take actions that would go beyond what the COOL statute or 2009 Final Rule (AMS) require.[1047] The statement in the letter that "it pertains to the implementation of the Mandatory Country of Origin Labelling (COOL) Final Rule" merely indicates that the letter addresses the implementation of the 2009 Final Rule.[1048]

7.820 The United States also calls into question Mexico's characterization of the term "administration" because that term does not extend to the steps and actions related to the making of an administrative decision. The actions leading to the 2009 Final Rule (AMS) do not "put into practical effect" or "apply" the COOL requirements, because they occurred before the enactment of the 2009 Final Rule (AMS).[1049]

(ii) Analysis by the Panel

<u>Canada's argument</u>

7.821 The term "administer" in Article X:3(a) refers to "putting into practical effect or applying" a legal instrument of the kind described in Article X:1.[1050] We also recall the panel's observation in *Argentina – Hides and Leather* regarding the proper scope of Article X:3(a) that the relevant question is "whether the substance of such a measure is *administrative in nature* or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994".[1051]

7.822 Canada argues that the Vilsack letter is an act of administration because it is a means of "putting into practical effect or applying" the COOL measure.

[1042] Mexico's response to Panel question No. 85; Mexico's second written submission, para. 188.

[1043] Mexico's second written submission, para. 189.

[1044] United States' first written submission, para. 289.

[1045] United States' first written submission, para. 291.

[1046] United States' first written submission, paras, 291-292 (citing Appellate Body Report, *EC – Bananas III*, para. 200); and second written submission, paras. 187-189.

[1047] United States' first written submission, para. 292; opening oral statement at the first substantive meeting, para. 59; and second written submission, paras. 187-188.

[1048] United States' response to Panel question No. 87.

[1049] United States' second written submission, paras. 187-189.

[1050] Appellate Body Report, *EC – Selected Customs Matters*, para. 224. See also Canada's second written submission, para. 108, footnote 164. In *EC – Selected Customs Matters*, the Appellate Body clarified that "the term 'administer' may include administrative processes", which can be understood "as a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision" (Appellate Body Report, *EC – Selected Customs Matters*, para. 224).

[1051] Panel Report, *Argentina – Hides and Leather*, para. 11.70 (emphasis added).

7.823 We clarified above that the legal instrument being administered within the meaning of Article X:3(a) in this case is the COOL measure (i.e. the COOL statute and the 2009 Final Rule (AMS)). We must determine therefore whether Canada has demonstrated that the United States put into practical effect or applied the COOL measure by issuing the Vilsack letter.

7.824 As previously noted[1052], the Vilsack letter starts with the statement that it pertains to the implementation of the 2009 Final Rule (AMS). The essence of the Vilsack letter is that Secretary Vilsack announced that the 2009 Final Rule (AMS) would enter into force as scheduled by the previous administration and, at the same time, suggested that, based on "concerns" with the requirements set out in the 2009 Final Rule (AMS), industry take more stringent voluntary actions.

7.825 Regarding the circumstances surrounding the issuance of the Vilsack letter, the United States explains that, in accordance with the White House directive issued by the new administration, Secretary Vilsack reviewed the Interim Final Rule (AMS), which is one of the regulations developed by the previous administration that had not yet taken effect.[1053] Having reviewed the 2009 Final Rule (AMS), Secretary Vilsack sent the letter to US industry indicating that the 2009 Final Rule (AMS) would take effect without modifications and including certain suggestions that companies could follow on a voluntary basis to provide even more information to consumers. Assuming that, as the United States submits, Secretary Vilsack intended to allow the regulations to go into effect as drafted by the previous administration, it is not clear why the letter included suggestions for more stringent voluntary action by the industry than is required under the 2009 Final Rule (AMS). According to the United States, Secretary Vilsack chose to issue the letter instead of amending the 2009 Final Rule (AMS), because he did not intend to change US law but to allow the regulations to go into effect as drafted by the previous administration.[1054]

7.826 The United States put forward that other US secretaries and high-ranking administration officials have also issued letters of this kind to industry or made similar announcements to interested parties. Such other communications as presented by the United States – a podcast by the Interior Secretary on the importance of protecting polar bears; a letter from the Food and Drug Administration on the potential danger of an unsafe amount of vitamin D for infants; and a letter from the Secretary of Health and Human Services to CEOs of insurance companies to justify premium hikes – do not suggest, in our view, any particular similarity in nature or in content to the Vilsack letter.[1055] They nonetheless show the authority and discretion granted to heads of US administrative agencies in general, and confirm the administrative authority of Secretary Vilsack.

7.827 The contents of the Vilsack letter and the circumstances surrounding its issuance, as explained by the United States, therefore indicate that the issuance by Secretary Vilsack of the letter to the US industry falls within the broad scope of administrative authority given to USDA regarding the application of the COOL measure, including any guidance on the specific requirements under the measure to be provided to the public.

7.828 In fact, as noted above, the letter was issued to confirm the implementation of the 2009 Final Rule (AMS) after having reviewed the issues of law and policy relating to the requirements, in accordance with the mandate given by the new president. The directive issued by the White House indicates the possibility of revisiting laws and policies of new and pending regulations, including the

[1052] See para. 7.123.

[1053] United States' response to Panel question No. 4, referring to the directive from the White House (Exhibit US-62). The directive states that as way of managing the federal regulatory process at the beginning of his Administration, President Obama sought to review and approve any new or pending regulations.

[1054] United States' response to Panel question No. 4.

[1055] Exhibits US-63, 65.

2009 Final Rule (AMS). Therefore, in the case of the 2009 Final Rule (AMS), the Vilsack letter effectively confirmed the application of the 2009 Final Rule (AMS), which we consider falls within the scope of the administration of the COOL measure.

7.829 In coming to this conclusion, we are well aware that the issuance of the concerned letter is distinguishable from situations where USDA "applies" the specific requirements under the COOL measure in particular instances. Despite the absence of any specific instance of application, the context in which the letter was issued by Secretary Vilsack to industry in general shows a sufficient basis for the letter to constitute an act of administering the COOL measure.

7.830 We therefore conclude that the issuance of the Vilsack letter falls within the scope of the term "administer" under Article X:3(a).

Mexico's argument

7.831 Unlike Canada, Mexico does not focus only on the Vilsack letter to identify acts of administration of the COOL measure. It is our understanding of Mexico's argument that the guidance from USDA on the labelling requirements under the COOL measure, which allegedly changed throughout the rule-making process, is an act taken for the purposes of administering the COOL measure. According to Mexico, the concerned guidance from USDA is reflected in the associated guidelines issued by USDA, the "non-public pressure by the US government on individual companies"[1056], and the Vilsack letter.

7.832 The following table summarizes the evidence referenced by Mexico to demonstrate the guidance by USDA, and how this evidence relates to the regulatory rule-making process (highlighted in grey in the table) concerning the implementation of the COOL statute.

Categorization by Mexico	**Exhibit**	**Date**	**Content**
Interim Final Rule (AMS) issued (01/08/2008)			
USDA guidelines	USDA guidelines (FAQ) (CDA-29)[1057]	11/09/2008	USDA advised that Label B can be used for Label A meat

[1056] We note that the so-called "non-public pressure" is Mexico's own characterization of certain *evidence* as described in the table in paragraph 7.832.

[1057] In its second written submission, Mexico refers to the concerned exhibit submitted by Canada (Mexico's second written submission, para. 187).

Interim Final Rule (AMS) entered into force 30/09/2008			
USDA guidelines	Farm and Dairy website (MEX-83)	30/09/2008	Article referring to the USDA guidelines of 11 September 2008
Non-public pressure	"Tyson Cool With Federal Labeling Law" (MEX-55)	16/10/2008	Article referring to the USDA's intention of closing a "loophole" that allowed meat processors to use Label B for most of their products.
Non-public pressure	"The Pig Site" (MEX-56)	16/10/2008	"Reuters reports that the leading U.S. beef and No. 2 pork producer had initially planned on categorizing its beef and pork cuts with Label B, but abandoned that plan after receiving feedback from government officials and some industry groups".
Non-public pressure	JBS letter (MEX-57)	23/10/2008	JBS letter to customers explaining that their initial intention was to label the majority of their product under the category B label, but that due to the evolving interpretation of the COOL measure they would opt for producing the majority of meat under the category A label.
2009 Final Rule (AMS) issued (15/01/2009)			
Vilsack letter sent to industry (20/02/2009)			
2009 Final Rule (AMS) entered into force (16/03/2009)			
Non-public pressure	Tyson brochure to costumers (MEX-33)	April 2009	Tyson letter to customers explaining that although their initial compliance approach was using Label B for most of their products, input from government officials led them to shift to Label A for the majority of products.

7.833 We consider that the act of providing guidance on the meaning of specific requirements of a measure amounts to an act of administering such measure within the meaning of Article X:3(a). It is within the right of government agencies to provide businesses and the public with the guidance on the meaning of the specific requirements under the relevant regulations. In our view, USDA "put into practical effect" the COOL measure by providing guidance on the labelling requirements. As the authority implementing the COOL measure, USDA advised the subjects of the COOL requirements on how to comply with the specific labelling requirements.

7.834 We proceed to examine whether Mexico has established that USDA provided such guidance with respect to the COOL measure. Specifically, Mexico submitted three categories of evidence, namely the USDA guidelines, the non-public pressure, and the Vilsack letter, arguing that these show the act of USDA providing guidance to the industry.

7.835 First, regarding the USDA guidelines, Mexico refers to a list of "frequently asked questions" published by USDA on 11 September 2008 and the Farm and Dairy website in which the same guidelines were referenced.[1058] Specifically, Mexico argues that the administrative guidance at issue is the following:

> **"Q.** Can a retailer, like a meat packer, declare the origin of meat products derived from livestock born, raised, and slaughtered in the United States (i.e. Product of

[1058] Exhibits CDA-29, MEX-83. Canada presents further evidence on other USDA guidelines. See Exhibits CDA-7, 30 and 31.

> USA) as a mixed origin label such as Product of the United States, Canada, and Mexico?
>
> **A.** Yes. Retailers are permitted to market U.S. produced meat products under a mixed origin label declaration."[1059]

7.836 As regards the second category of guidance by USDA, described by Mexico as the so-called "non-public pressure" from the US government, Mexico refers to two articles and two letters from meat producers. Mexico submits that these exhibits demonstrate that USDA subsequently reversed the initial guidance provided in the USDA guidelines of 11 September 2008 and privately contacted major US meat processors to advise them not to use mixed origin labels. We note that the two letters from meat producers indicate their intention to label the majority of their meat products under Label A in light of certain input from the US government.[1060] Both letters show that, to comply with the COOL requirements, these companies had initially intended to label the majority of their products under Label B. However, this initial compliance approach changed afterwards to labelling the majority of their meat products under Label A. Specifically, the letter from Tyson Fresh Meats, Inc. to customers states in relevant part:

> "[The initial approach] involved offering the majority of our beef and pork cuts under the multi-country Category B label ... Based on the input we have since received from government officials and various industry groups, we now believe this initial compliance approach will not be viable in the longterm. ... Our approach will be to use the "U.S." or Category A label on all of our premium beef programs beginning early 2009".[1061]

7.837 The letter from JBS USA, Inc. to customers similarly establishes that:

> "During the development of our policy on Country of Origin Labeling (COOL) for beef products JBS made the decision to label the majority of our products under the Category B label ... [A]s the interpretation of Country of Origin Labeling continues to evolve, we feel it is essential that we adapt to the most current understanding of the regulation. ... JBS has elected to begin transitioning to a "Product of U.S.A." label on the majority of our beef products. This change will occur during the next several months".[1062]

7.838 Mexico further refers to two press articles, one written by Tom Johnston and another published on a website called the "Pig Site". These articles describe the changes in Tyson's approach in how to comply with the COOL measure.[1063] One article reports that the initial compliance approach was abandoned after receiving feedback from the government and industry groups.[1064] The other article indicates that USDA worked to close the "loophole" reflected in the first compliance approach by the industry, considering that "the law seeks to differentiate US meat products from those of other countries".[1065]

[1059] Mexico's second written submission, para. 187, referring to Exhibit CDA-29.
[1060] Exhibits MEX-33, 55, 56 and 57.
[1061] Exhibit MEX-33.
[1062] Exhibit MEX-57.
[1063] Exhibits MEX-55 and 56.
[1064] Exhibit MEX-56.
[1065] Exhibits MEX-55 and 83.

7.839 Of the above evidence referenced by Mexico, the USDA guidelines of 11 September 2008 and the Vilsack letter are instruments issued by the US government, whereas press articles and letters from meat producers are not.

7.840 We consider that the issuance by the US government of instruments such as the USDA guidelines of 11 September 2008 and the Vilsack letter constitutes acts of administering the COOL measure. As stated above, the act of providing guidance on the meaning of specific requirements under a measure, for instance by publishing "frequently asked questions", is an act of administering such measure within the meaning of Article X:3(a). We also recall our earlier conclusion that the issuance of the Vilsack letter is an act of administration under Article X:3(a).[1066]

7.841 We are further provided with press articles and industry letters to their customers. In this set of evidence, references are made to certain feedback and input from the US government regarding the labelling requirements under the COOL measure. Mexico attempts to show that certain contacts between meat producers and USDA, as referenced in these exhibits, have guided these meat producers' decision on how to comply with the labelling requirements. Specifically, the initial USDA guidance as illustrated in the USDA guidelines of 11 September 2008 appears to have led meat producers to decide to label most of their products under category B. The evidence implies that, in light of a subsequent change in the guidance from the US government, certain producers chose to adopt a different labelling policy, namely to label the majority of muscle cut meats under category A. Despite the absence of evidence demonstrating specific contacts between USDA and meat producers as referenced in these exhibits, we can nonetheless infer from them that USDA provided meat producers with certain input or guidance on the labelling requirements. We also note that the United States has not put forward an argument that such input or guidance from USDA as mentioned in these exhibits did not exist.

7.842 The evidence as a whole therefore shows that USDA provided guidance to meat producers. This, in our view, constitutes an act of administration within the meaning of Article X:3(a).

(c) "Not reasonable" administration of laws and regulations

(i) Main arguments of the parties

7.843 According to **Canada**, the Vilsack letter constitutes unreasonable administration of the COOL statute and the 2009 Final Rule (AMS).[1067]

7.844 Canada argues that the Vilsack letter constitutes government action that lies outside of the normal enforcement of laws and regulations in the United States and therefore is unreasonable.[1068] The Vilsack letter addresses the implementation of the Final Rule and amounts to "regulation-making" through a public letter invoking the intent of the US Congress.[1069] Canada emphasizes that threatening the US industry with the possibility of reopening the 2009 Final Rule (AMS) and

[1066] See para. 7.830.

[1067] Canada's first written submission, para. 231. Canada quotes *Dominican Republic – Import and Sales of Cigarettes*, where based on the dictionary definition, the panel interpreted the term "reasonable" as referring to notions such as "in accordance with reason", "not irrational or absurd", "proportionate", "having sound judgement", "sensible", "not asking for too much", "within the limits of reason, not greatly less or more than might be thought likely or appropriate", "articulate" (Canada's first written submission, para. 231, footnote 262, referencing Panel Report, *Dominican Republic – Import and Sales of Cigarettes*, para. 7.385 and footnote 589).

[1068] Canada's first written submission, para. 231.

[1069] Canada's second written submission, para. 111.

imposing more onerous requirements if the industry did not comply with Secretary Vilsack's "suggestions for voluntary action" amounts to unreasonable administration of the COOL measure.

7.845 Canada submits that the available evidence in the form of witness statements, letters from US slaughterhouses and econometric analyses demonstrates compliance with the Vilsack letter.[1070] Canada maintains that the Vilsack letter had an impact on the industry, because of its timing and circumstances, the position of the person who signed the letter, the public nature of the letter, the directions given to US industry, and the explicit threat backing up Secretary Vilsack's directions.[1071] Therefore, according to Canada, the United States has violated its obligation under Article X:3(a) of GATT 1994 to administer its laws, regulations and administrative rulings of general application in a reasonable manner.[1072]

7.846 **Mexico** argues that the administration of the COOL measure, characterized by shifts in interpretation and guidance by USDA on its statutory and regulatory provisions, has been anything but predictable and reasonable.[1073] Mexico argues that the administration of the details of the COOL measure changed over the course of the Interim Final Rule (AMS) and the 2009 Final Rule (AMS) and the associated guidelines issued by USDA over this period. The recurrent changes of the USDA policy, which first allowed the use of mixed origin labels and then discouraged it, are further evidence of unreasonable administration.[1074]

7.847 These uncertainties continued with the Vilsack letter, which suggested additional practices and threatened to modify the COOL measure if such practices were not followed. Mexico contends that the Vilsack letter is part of a series of actions taken by the US government to preclude the industry from using foreign cattle. As a clear sign of effect of government input through the Vilsack letter, certain US meat processors have changed their initial compliance approach to the COOL requirements.[1075] Thus, the administration of a law or regulation in such a manner cannot amount to uniform (i.e. predictable) and reasonable administration within the meaning of Article X:3(a) of the GATT 1994.

7.848 The **United States** contends that Canada and Mexico have failed to demonstrate that the COOL measures have been administered in an *unreasonable* manner, either through the issuance of the Vilsack letter or via the changes made to the implementing regulations during their development.[1076] According to the United States, the complainants have not presented evidence establishing behaviour by USDA in administering the COOL measures that has been unreasonable in any sense.[1077] Since the Vilsack letter does not administer the COOL measures at all, the complainants are wrong to argue that the letter is an "unreasonable" administration of those measures. Further, Mexico has adduced no evidence to suggest that any decisions made to the implementing regulations as they evolved through the regulatory process were "irrational" or "absurd".

[1070] Canada's second written submission, para. 106.
[1071] Canada's second written submission, para. 103.
[1072] Canada's first written submission, para. 232.
[1073] Mexico's first written submission, paras. 377, 378, referring to the Panel Report, *Dominican Republic – Import and Sales of Cigarettes*, para. 7.385 and footnote 589; second written submission, paras. 185-186.
[1074] Mexico's second written submission, para. 188, referring back to its first written submission, para. 258 (Exhibits MEX-33, 55, 56, 57 and 83); opening oral statement at the second substantive meeting, paras. 67-68.
[1075] Mexico's opening oral statement at the first substantive meeting, paras. 50-51. (Exhibit MEX-33)
[1076] United States' first written submission, para. 297.
[1077] United States' first written submission, para. 299.

7.849 The United States considers that the complainants have failed to demonstrate that the issuance of the Vilsack letter or the development of the 2009 Final Rule were unreasonable. The Vilsack letter was issued in accordance with a directive from the Obama Administration to review all pending regulations of the previous Administration. Some of the changes during the development of the 2009 Final Rule (AMS), such as the flexibility on commingling, served to address the concerns of the complainants.[1078]

(ii) Analysis by the Panel

7.850 The term "reasonable" is defined as "in accordance with reason", "not irrational or absurd", "proportionate", "sensible", and "within the limits of reason, not greatly less or more than might be thought likely or appropriate".[1079] We assess the parties' claims of not reasonable administration in light of these definitions.

7.851 In our view, whether an act of administration can be considered reasonable within the meaning of Article X:3(a) entails a consideration of factual circumstances specific to each case. This is confirmed by previous disputes where the requirement of reasonable administration was understood as requiring the examination of the features of the administrative act at issue in the light of its objective, cause or the rationale behind it.[1080]

<u>Canada's argument – the Vilsack letter</u>

7.852 We first recall the United States' explanation on the circumstances under which the letter was issued.[1081] It was issued in the context of the Directive from the new administration to review the laws and policies of the new and pending regulations that had been enacted by the previous administration. In essence, the Directive indicates that the new administration wanted to review these regulations to decide whether to maintain them without any change. As for the 2009 Final Rule (AMS), Secretary Vilsack confirms in the letter the new administration's intention to implement it as originally scheduled by the previous administration and includes certain voluntary suggestions to industry.

[1078] United States' second written submission, para. 191.

[1079] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.385 referring to the *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. II, p. 2482 (2002).

[1080] In *Argentina – Hides and Leather*, for example, the panel considered access to confidential information by a competitor in the market to be a relevant factor in determining reasonableness of the administrative action in that dispute (para. 11.86). We further recall the Appellate Body's analysis in *Brazil – Retreaded Tyres* that "the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence" (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226; Panel Report, *Thailand – Cigarettes*, para. 7.291). In *Thailand – Cigarettes (Philippines),* the Philippines claimed that the appointment of dual function officials as directors of a company under administrative proceedings constituted unreasonable administration because the officials were in a position where they could gather and reveal confidential information on Philippines industries' direct competitors. The panel found that Thailand did not act inconsistently with Article X:3(a). However, the overall delays in the administrative proceedings shown throughout the course of the review process of customs valuation were considered by the panel "*not* appropriate or proportionate" considered against the nature of the circumstances concerned, and therefore, the administration was considered to be "unreasonable" (Panel Report, *Thailand – Cigarettes*, para. 7.969). In *Dominican Republic – Import and Sale of Cigarettes,* the Panel found that the Dominican Republic had administered the provisions governing the Selective Consumption Tax in a manner that was "unreasonable" and therefore inconsistent with Article X:3(a) of GATT 1994 (paras. 7.365-7.394).

[1081] See paras. 7.39-7.42 above.

7.853 The letter, however, suggests that the industry voluntarily adopt stricter labelling practices concerning origin information than those required under the 2009 Final Rule (AMS). Specifically, the Vilsack letter asks the industry to voluntarily follow three recommendations for the labelling of meat products that are not contained in the COOL measure.

7.854 The first recommendation in the Vilsack letter is the inclusion of information about what production step occurred in each country when multiple countries appear on the label. The Vilsack letter gives the following examples about how such information could be included in the labels: "Born and Raised in Country X and Slaughtered in Country Y" or "Born in Country X and Raised and Slaughtered in Country Y".[1082] This suggestion goes beyond the labelling requirements set out in the COOL measure. Under the COOL measure, the country of origin declaration for meat products derived from livestock of multiple countries of origin (Label B) or imported for immediate slaughter (Label C) need not determine the countries where such livestock were born, raised and slaughtered. For Label B meat the producer only needs to label "Product of the United States, Product of country X", whereas for Label C the information is "Product of country X, Product of the United States".[1083]

7.855 The second recommendation in the Vilsack letter is that even when products are subject to curing, smoking, broiling, grilling, or steaming, voluntary labelling should be provided. This recommendation goes beyond the COOL measure, which clearly exempts from the general obligation of providing country of origin information covered commodities that undergo any of the above-mentioned processing steps.[1084]

7.856 Third, as regards ground meat, the COOL measure establishes that processors shall list all countries of origin that may have reasonably been contained in their inventory during the 60 days prior to the country of origin declaration. The Vilsack letter suggests that the industry reduce that time allowance from 60 days to ten days.[1085]

7.857 The above comparison shows that the voluntary actions suggested in the Vilsack letter go beyond certain obligations and reduce certain flexibilities foreseen in the COOL measure.

7.858 Canada does not challenge, and we see no issue *per se* with a new administration reviewing regulations and policies developed by a previous administration. Based on its assessment, the new administration may decide to change existing regulations or adopt new regulations making use of the latitude accorded to the executive branch of the government within the legislative framework.

7.859 However, as regards the Vilsack letter, we do not find any justifiable rationale for suggesting stricter labelling practices than the ones required by the 2009 Final Rule (AMS) while at the same time allowing the 2009 Final Rule (AMS) to enter into force. If anything, the suggestions in the letter – even if they concern voluntary action by industry – undermine the labelling requirements in the 2009 Final Rule (AMS).[1086] In fact, the letter addresses issues that do not directly emanate from the actual labelling requirements at issue under the 2009 Final Rule (AMS). Importantly, this is done in the very same letter announcing the entry into force of the 2009 Final Rule (AMS) as a result of Secretary Vilsack's having reviewed it. Although the suggested actions in the letter are only for

[1082] Vilsack letter.
[1083] 7 C.F.R. § 65.300 (e).
[1084] 7 C.F.R. § 65.220.
[1085] 7 C.F.R. § 65.300 (h).
[1086] United States' first written submission, para. 293; United States' second written submission, para. 188.
The United States itself states that the Vilsack letter's recommendations are inconsistent with the 2009 Final Rule (AMS) (United States' comments on Canada's and Mexico's responses to Panel question No. 96).

voluntary action, the language of the letter may still have caused uncertainty and confusion as to the consequences of the letter, including possible modifications to the 2009 Final Rule (AMS) should the industry not follow Secretary Vilsack's suggestions for additional voluntary action.

7.860 Furthermore, the Vilsack letter was issued less than one month prior to the entry into force of the 2009 Final Rule (AMS). This may have caused further confusion for industry in terms of the specific labelling requirements to be observed. In particular, what we are addressing here is a letter issued by the head of a government agency to the industry in general. Compared to situations where the administration applies the COOL measure to particular individual entities, this type of letter can, in our view, have a broader impact on the industry because the letter was issued to the industry in general, not to specific entities.

7.861 Although, in general, a WTO Member has the discretion to administer its laws and regulations in the manner it deems fit, it equally has the responsibility to respect "certain minimum standards for transparency and procedural fairness" as regards its actions. As the Appellate Body observed, Article X:3(a) of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations.[1087]

7.862 This responsibility, in our view, applies to all types of actions falling within the broad scope of the term "administer" under Article X:3(a). We consider that the Vilsack letter did not meet these minimum standards of procedural fairness in relation to the implementation of the 2009 Final Rule by both allowing the 2009 Final Rule (AMS) to enter into force and, at the same time, suggesting industry compliance with stricter labelling requirements than those contained in the 2009 Final Rule (AMS).

7.863 Based on the manner in which the Secretary of Agriculture addressed the decision to implement the 2009 Final Rule (AMS), taken together with the circumstances under which the letter was issued, we consider that the Vilsack letter was not "appropriate", and thus does not meet the requirement of reasonable administration of the COOL measure within the meaning of Article X:3(a).

7.864 We therefore conclude that Canada has demonstrated that the United States acted inconsistently with Article X:3(a) by failing to administer the COOL measure in a reasonable manner through the issuance of the Vilsack letter.

<u>Mexico's argument – shifts in interpretation and guidance by USDA</u>

7.865 As explained above, unlike Canada, Mexico did not focus its argument exclusively on the issuance of the Vilsack letter. In Mexico's view, the alleged unreasonable administration of the COOL measure is reflected in shifts in the guidance and interpretation by USDA on its statutory and regulatory provisions, which culminated in the Vilsack letter.

7.866 To the extent that Mexico's claim is based on the issuance of the Vilsack letter, we have already concluded that the issuance of the Vilsack letter was not a reasonable administration of the COOL measure within the meaning of Article X:3(a). We note that Mexico did not develop its argument relating to the Vilsack letter as extensively as Canada. In our view, however, Mexico has adduced sufficient evidence to demonstrate that the Vilsack letter created uncertainties for industry

[1087] Appellate Body Report, *US – Shrimp*, para. 183. The Appellate Body also underlined that "inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of *due process* should be required in the application and administration of a measure ... " (Appellate Body Report, *US – Shrimp*, para. 182) (emphasis added).

regarding how to comply with the specific labelling requirements contained in the 2009 Final Rule (AMS).[1088] In particular, Mexico highlights that the Vilsack letter suggested practices additional to the ones foreseen under the 2009 Final Rule (AMS), and threatened to modify the 2009 Final Rule (AMS) if such practices were not followed. It is essentially for these same reasons that we found that Canada has demonstrated that the Vilsack letter is inconsistent with the requirement of reasonable administration under Article X:3(a) of the GATT 1994. Accordingly, we find that Mexico has demonstrated that the Vilsack letter does not meet the standard of reasonable administration of the COOL measure within the meaning of Article X:3(a).

7.867 Regarding Mexico's argument that the United States changed its interpretation of the COOL measure too frequently to render the administration reasonable, Mexico presented the evidence summarized in the table in paragraph 7.832 above.

7.868 In our understanding, Mexico is referring to these exhibits *as a whole* as evidence to assert that USDA has been providing inconsistent implementation guidance to industry over time. We can infer from the content of these exhibits that the industry was indeed provided with evolving interpretations regarding the labelling requirements under the COOL measure.

7.869 At the same time, we note that the changes in guidance, particularly regarding the use of different labels for different categories of meat, reflect the very modifications made to the Interim Final Rule (AMS) prior to the issuance of the 2009 Final Rule (AMS). As explained in Section VII.C.1(a)(ii), the main changes from the Interim Final Rule (AMS) to the 2009 Final Rule (AMS) are the removal of the possibility of using Label B for category A meat and the addition of the commingling provisions. The USDA administrative guidance, as illustrated in the USDA guidelines of 11 September 2008 and as implied in news articles and industry letters after the entry into force of the Interim Final Rule (AMS), therefore corresponded to the changes made to the substance of the COOL implementing regulations during the rule-making process as envisaged under the US legal system. To the extent that the differences in the guidance by USDA were due to the changes made to the substantive law or regulations at issue, we do not find such administrative acts irrational or inappropriate within the meaning of Article X:3(a). USDA was acting within its authority and mandate to provide interpretations of the labelling requirements under the applicable COOL implementing regulations at a given time.

7.870 Accordingly, we find that, unlike with regard to the Vilsack letter, Mexico has not established that the United States failed to administer the COOL measure in a reasonable manner through the shifts in the guidance by USDA on the labelling requirements under the COOL measure.

(d) "Non-uniform" administration of laws and regulations

(i) Main arguments of the parties

7.871 **Mexico** argues that "uniform" administration requires that Members ensure that their laws are applied consistently and predictably.[1089] Mexico affirms that the "non-uniform" administration is due to the significant changes on requirements and interpretation during the implementation of the statutory and regulatory provisions.[1090] The administration of the details of the COOL measure changed over its implementation and review processes and the associated guidelines issued by USDA

[1088] See paras. 7.846-7.847.
[1089] Mexico's first written submission, para. 377 (citing Panel Report, *Argentina – Hides and Leather*, para 11.83).
[1090] Mexico's second written submission, paras. 188-189.

over this period created uncertainties, which continued with the Vilsack letter issued on 20 February 2009.

7.872 The **United States** submits that Mexico has failed to demonstrate that the COOL measures have been administered in a *non-uniform* manner because of changes to the rule over time.[1091] Mexico has not produced evidence to prove this assertion either with regard to changes made to the implementing regulations or concerning the issuance of the Vilsack letter.[1092] The changes to which Mexico refers merely reflect the notice-and-comment system of US rule-making, and do not represent the application of the statute or the 2009 Final Rule (AMS).[1093] The United States references the panel report in *Argentina – Hides and Leather*[1094], according to which "uniform" administration requires that Members ensure that their laws are applied consistently and predictably.[1095]

7.873 The United States adds that in *US – Stainless Steel*, the panel noted that, "the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts differ". That panel clarified that Article X:3(a) does not require that the administration of a regulation be fixed and unvarying over time; the administration of a regulation must only be uniform at a given time.[1096] The United States argues that Mexico has not provided evidence to demonstrate that the COOL statute or the 2009 Final Rule has been administered in a way that affected similarly situated persons in a non-uniform manner.[1097] At all times the United States has maintained a single set of regulations implementing the COOL Statute, and these regulations have been administered in a uniform fashion. The United States adds that Mexico has not adduced evidence to suggest that the 2009 Final Rule has affected persons similarly situated in different ways with respect to the period after that date.[1098]

(ii) Analysis by the Panel

7.874 Mexico claims that the alleged "non-uniform" administration arises because of the significant changes to the guidance on the labelling requirements under the COOL measure. According to Mexico, these changes contributed to disruptions experienced by Mexican industry.

7.875 The United States argues that Mexico has not provided evidence to demonstrate that the COOL statute or the 2009 Final Rule (AMS) has been administered in a way that affected similarly situated persons in a non-uniform manner.[1099] At all times the United States has maintained a single set of regulations implementing the COOL statute, and these regulations have been administered in a uniform fashion. The United States adds that Mexico has not adduced evidence to suggest that the 2009 Final Rule (AMS) has affected persons similarly situated in different ways with respect to the period after that date.[1100]

[1091] United States' first written submission, para. 296.
[1092] United States' first written submission, para. 293.
[1093] United States' opening oral statement at the first substantive meeting, para. 60.
[1094] Panel Report, *Argentina – Hides and Leather*, para. 11.83.
[1095] United States' first written submission, para. 294.
[1096] Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.
[1097] United States' first written submission, para. 294.
[1098] United States' first written submission, para. 295.
[1099] United States' first written submission, para. 294.
[1100] United States' first written submission, para. 295.

7.876 The term "uniform" is defined as "of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times".[1101] We find guidance for the meaning of "uniform" under Article X:3(a) in the findings by panels in previous disputes. For instance, the panel in *Argentina – Hides and Leather* stated that "uniform administration" requires that Members ensure that their laws are applied consistently and predictably.[1102] Additionally, in *US – Stainless Steel*, the panel noted that, "the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated".[1103] Based on the dictionary meaning and guidance provided by previous panels, we will assess whether Mexico has established that the concerned shifts in the guidance provided by USDA constitute a non-uniform administration of the COOL measure.

7.877 In the current dispute, as the United States points out, Mexico has not presented facts or evidence showing that at any specific point in time USDA treated persons similarly situated in a non-uniform manner when putting into practical effect the labelling requirements under the COOL measure. Rather, the evidence submitted by Mexico shows that USDA provided guidance on the labelling requirements which was applicable to the US industry in general.[1104]

7.878 Turning to the changes in USDA guidance over time challenged by Mexico as being non-uniform, we note that, as the panel in *EC – Selected Customs Matters* states, the interpretation of the term "uniform" in Article X:3(a) does not necessarily entail instantaneous uniformity. Rather, uniformity must be attained within a period of time that is reasonable. What is reasonable will depend on the form, nature and scale of the administration at issue, as well as on the complexity of the factual and legal issues raised by the act of administration that is being challenged.[1105]

7.879 The shifts in the guidance on the labelling requirements under the COOL measure, evoked by Mexico, took place between September 2008 and April 2009. As observed above, these changes or shifts during this period are related to the modifications made to the substance of the regulations themselves in the context of rule-making over a relatively short period of time. The form and structure of the changes in the guidance and interpretation, which Mexico argues culminated in the Vilsack letter, do not demonstrate an act "of changing form" or act which is "not the same at different times" so as to render it a "non-uniform" administration within the meaning of Article X:3(a).

7.880 In fact, the publication of the administration's guidance on the COOL implementing regulation through frequently asked questions can be considered as an example of an industry-friendly action by the administration, which can enhance the transparency of the government's administration of the regulations.

7.881 For the foregoing reasons, we conclude that Mexico has not established that the United States acted inconsistently with Article X:3(a) by administering the COOL measure in a non-uniform manner.

[1101] *The Shorter Oxford English Dictionary*, (Sixth Edition) Oxford University Press, Vol. II, p. 3440 (2007); Panel Report, *EC- Selected Customs Matters*, para. 7.124.

[1102] Panel Report, *Argentina – Hides and Leather*, para. 11.83. The panel found that the measures at issue were inconsistent with Argentina's obligations under Article X:3(a) of GATT 1994.

[1103] Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.

[1104] See Exhibits CDA-29; MEX-33, 55, 56, 57 and 83; Table in page 182.

[1105] Panel Report, *EC – Selected Customs Matters*, para. 7.135.

(e) "Partial" administration of laws and regulations

(i) Main arguments of the parties

7.882 **Mexico** argues that the administration of the COOL measure was partial as the final interpretation of the USDA on the implementation of the regulation and its provisions was in favour of US producers of cow-calves.[1106]

7.883 The **United States** does not address Mexico's argument regarding the "partial" administration.

(ii) Analysis by the Panel

7.884 Mexico presented its claim on the United States' alleged *partial* administration of the COOL measure for the first time in its second written submission by merely asserting the lack of impartial administration. Mexico, however, fails to explain in what way the administration of the COOL measure was partial by favouring US cow-calf producers.

7.885 Accordingly, we find that Mexico has not established a prima facie case that the United States administered the COOL measure in a partial manner within the meaning of Article X:3(a).

(f) Conclusion on the complainants' claims under Article X:3(a)

7.886 In light of the foregoing, we find that Canada and Mexico have established that the United States acted inconsistently with Article X:3(a) by failing to administer the COOL measure in a reasonable manner through the issuance of the Vilsack letter.

7.887 We find, however, that Mexico has not demonstrated that the concerned shifts in the USDA guidance on the labelling requirements under the COOL measure is not a reasonable administration of the COOL measure within the meaning of Article X:3(a). Further, we find that Mexico has failed to establish that the United States administered the COOL measure in a non-uniform and partial manner inconsistently with Article X:3(a).

3. Non-violation claim under Article XXIII:1(b)

7.888 We are turning to the complainants' non-violation claims after having addressed their claims of violation. This follows the sequence of the parties' arguments in the current dispute. It is also in line with the general priority to be accorded to dealing with violation as opposed to non-violation claims, enunciated by the panel in *Japan – Film*:

> "[T]raditionally in cases involving both violation and non-violation claims, panels first address claims of inconsistency with a covered agreement pursuant to Article XXIII:1(a), before moving on to consider claims of non-violation nullification or impairment under Article XXIII:1(b)."[1107]

(a) Main arguments of the parties

7.889 **Mexico** and **Canada** submit that the application of the COOL requirements nullifies or impairs benefits accruing to them under successive rounds of multilateral trade negotiations.[1108] According to the complainants, by applying the COOL requirements, the United States is upsetting

[1106] Mexico's second written submission, paras. 185 and 189.
[1107] Panel Report, *Japan – Film*, para. 10.26.
[1108] Canada's first written submission, para. 237 and Mexico's first written submission, para. 379.

the competitive relationship and frustrating the complainants' legitimate market access expectations with respect to live cattle and hogs from Canada[1109], and live cattle from Mexico.[1110]

7.890 All three parties agree[1111] that the following three-pronged test established by the panel in *Japan – Film* for addressing non-violation claims is applicable also in the current dispute:

> "The text of Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure."[1112]

7.891 As regards the first element of this legal test, the complainants submit that the application by the United States of various aspects of the COOL requirements fulfils this element.[1113]

7.892 The **United States** responds that not all elements of the COOL requirements challenged by the complainants are eligible for a non-violation claim. According to the United States, a non-violation claim is possible only with regard to measures that are currently being applied; consequently, only the COOL statute and the 2009 Final Rule (AMS) may be subject to a claim under Article XXIII:1(b) of the GATT 1994 in this dispute.[1114]

7.893 As regards the second element of the legal test under Article XXIII:1(b) of the GATT 1994, the United States contends that the complainants have no legitimate expectations, since various country of origin labelling rules on meat at the retail level have existed in the United States since as far back as the 1930s, a long time before the Uruguay Round. Thus, the complainants could have reasonably anticipated at the time of these tariff negotiations that the United States would modify or supplement country of origin labelling rules as it has been doing since the 1960s, contemplating various pieces of legislation on country of origin labelling with additional requirements for meat at the retail level.[1115]

7.894 In response, the complainants maintain that their expectations of market access are legitimate as they could not have reasonably anticipated the application by the United States of the mandatory COOL requirements or any other measure regarding origin labelling with such drastic implications on the market access of cattle and hogs from Canada, and cattle from Mexico. Although there were voluntary country of origin labelling regulations in force at the time of the negotiation of tariff concessions subsequently incorporated in the WTO Agreement, these regulations were not specific to cattle and hogs, and they did not have such restrictive provisions as the COOL requirements.[1116]

7.895 With regard to the second element of the legal test, the United States also argues that the benefits invoked by the complainants accrue from tariffs under NAFTA because it is not the concessions made under the WTO that they are benefiting from, but the lower tariff rate negotiated

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[1109] Canada's first written submission, para. 239.

[1110] Mexico's first written submission, para. 379.

[1111] Canada's first written submission, para. 235, Mexico's first written submission, para. 385 and United States' first written submission, para. 303.

[1112] Panel Report, *Japan- Film*, para. 10.41.

[1113] Canada's first written submission, para. 235 and Mexico's first written submission, paras. 386-392.

[1114] United States' first written submission, para. 305, footnote 348.

[1115] United States' first written submission, paras. 309-310 and United States' second written submission, para. 195.

[1116] Canada's first written submission, paras. 237-239; Mexico's first written submission, paras. 388-390 and second written submission, para. 193.

under NAFTA, which entered into force at the beginning of 1994. Hence, the United States argues, these benefits cannot be enforced under Article XXIII:1(b) of the GATT 1994.[1117]

7.896 In response, the complainants assert that they are entitled to expect market access to the United States in accordance with the tariff bindings negotiated under the WTO, even though their current tariff concessions for livestock are based on NAFTA. In particular, Canada points out that the current MFN bound tariff of the United States for cattle other than dairy or breeding is 1 cent/kg for tariff line 0102.90.40. This tariff is in the United States' schedule of concessions negotiated in the Uruguay Round. In addition, Canada notes that all 8-digit tariff lines under Live Swine (tariff line 0103) in the same tariff schedule of the United States show an *ad valorem* bound duty of 0%, and the free import of hogs to the United States pre-dates the WTO Agreement (and also the Canada-United States Free Trade Agreement and NAFTA).[1118] Mexico adds that its non-violation claim is based on the United States' MFN bound tariff of 1 cent/kg of cattle negotiated under WTO.[1119] Hence, the complainants had a benefit accrued to them from legitimate market access expectations based on the United States schedule under the WTO.

7.897 As regards the third element of the legal test under Article XXIII:1(b) of the GATT 1994, the complainants maintain that the COOL requirements drastically restrict their market access as compared to the level of market access negotiated during the WTO Uruguay Round. Canada submits that by requiring US retailers to label beef and pork in a manner that is fundamentally at odds with the normal practice applied in other areas of United States customs law, the United States has nullified the unrestricted market access that Canada was entitled to expect for its cattle and hogs exports.[1120]

7.898 Mexico contends that the COOL measure created a new series of restrictions to cattle exported from Mexico. It reduced the number of US plants processing Mexican cattle, limited the days on which those plants receive cattle from Mexico, introduced new requirements of advance notice, and US processors imposed a discount on imports of Mexican cattle.[1121] The actual price discount created by the COOL measure is from USD 40 to USD 60 for the same 300-400 pound animal, and the competitive disadvantage and level of protection reflected in this price discount vastly exceeds Mexico's legitimate expectation of USD 1.36 to 1.81 tariff per animal negotiated under the WTO.[1122] According to Mexico, this competitive relationship with domestic livestock in the United States was upset by the application of the COOL requirements.[1123]

7.899 The United States responds that the complainants failed to demonstrate, "with the required 'detailed justification'" and with clear and solid evidence, that they have suffered a nullification or impairment of benefits "as a result of the application" of the COOL measure.[1124] According to the United States, the complainants did not demonstrate or provide evidence of a "clear correlation" between the COOL measure and the alleged adverse effects on imports of livestock from Mexico and Canada. The United States maintains that other market forces, including the financial crisis and animal diseases, had a serious negative impact on livestock markets in the United States, Canada and

[1117] United States' second written submission, para. 194.
[1118] Canada's response to Panel question No. 88.
[1119] Mexico's response to Panel question No. 88.
[1120] Canada's first written submission, para. 239, Canada's response to Panel question No. 88 and Canada's second written submission, paras. 45-46.
[1121] Mexico's opening oral statement at the first substantive meeting of the Panel, para. 55.
[1122] Mexico's response to Panel question No. 88.
[1123] Mexico's first written submission, paras. 391-392, Mexico's response to Panel question No. 88 and Mexico's second written submission, para. 191.
[1124] United States' first written submission, para. 317 and United States' second written submission, para. 196.

Mexico. Thus, the adverse effects on livestock cannot be exclusively attributed to the COOL requirements.[1125]

(b) Analysis by the Panel

7.900 At the outset of our analysis of the complainants' non-violation claims, we recall that the panel in *Japan – Film* explained that the non-violation nullification or impairment remedy should be treated with caution and as an exceptional concept:

> "Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been 'on the books' for almost 50 years, we note that there have only been eight cases in which panels or working parties have substantively considered Article XXIII:1(b) claims.[1126] This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Communities and the United States in the *EEC – Oilseeds* case, and the two parties in this case, have confirmed that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept.[1127] The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules."[1128]

7.901 The Appellate Body confirmed this in *EC – Asbestos* by holding that, "[l]ike the panel in ... *Japan – Film* ... , we consider that the remedy in Article XXIII:1(b) 'should be approached with caution and should remain an exceptional remedy'".[1129]

7.902 We also note that in *Japan – Film* the panel stressed that the need for analysing a non-violation claim in a specific case "should be examined on its own merits", and should involve a case-specific assessment.[1130]

[1125] United States' first written submission, paras. 314-316.

[1126] *(footnote original)* Report of the Working Party on *Australian Subsidy on Ammonium Sulphate*, adopted on 3 April 1950, BISD II/188; Panel Report on *Treatment by Germany of Imports of Sardines* ("*Germany – Sardines*"), G/26, adopted on 31 October 1952, BISD 1S/53; *Uruguayan Recourse*, adopted on 16 November 1962, BISD 11S/95; Panel Report on *EC – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* ("*EC – Citrus Products*"), GATT Doc. L/5576, dated 7 February 1985 (unadopted); Panel Report on *EEC – Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes* ("*EEC – Canned Fruit*"), GATT Doc. L/5778, dated 20 February 1985 (unadopted); *Japan – Semi-conductors*, adopted on 4 May 1988, BISD 35S/116; *EEC – Oilseeds*, adopted on 25 January 1990, BISD 37S/86; *United States – Agricultural Waiver*, adopted on 7 November 1990, BISD 37S/228.

[1127] *(footnote original)* In *EEC – Oilseeds*, the United States stated that it "concurred in the proposition that non-violation nullification or impairment should remain an exceptional concept. Although this concept had been in the text of Article XXIII of the General Agreement from the outset, a cautious approach should continue to be taken in applying the concept". *EEC – Oilseeds*, BISD 37S/86, 118, para. 114. The EEC in that case stated that "recourse to the 'non-violation' concept under Article XXIII:1(b) should remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty". Ibid, para. 113.

[1128] Panel Report, *Japan – Film*, para. 10.36. See also ibid., para. 10.37.

[1129] Appellate Body Report, *EC – Asbestos*, para. 186 (footnote omitted).

[1130] Panel Report, *Japan – Film*, para. 10.37.

7.903 In the current dispute, we have already found that the COOL measure violates Articles 2.1 and 2.2 of the TBT Agreement, and that the Vilsack letter is in violation of Article X:3(a) of the GATT 1994.

7.904 The GATT panel in *EEC – Oilseeds I* set out the following test for assessing whether it is necessary to turn to the complainant's non-violation claim in light of a finding of inconsistency with Article III:4 of the GATT:

> "The Panel first examined whether its finding that the payments to the processors are inconsistent with the General Agreement might make an examination of the question of the nullification or impairment of the tariff concessions unnecessary. The Panel noted that this would be the case *if compliance by the Community with the finding on Article III:4 would necessarily remove the basis of the United States claim of nullification or impairment*."[1131] (emphasis added)

7.905 In the current dispute, compliance by the United States with the above-mentioned findings of violation would remove the basis of the complainants' non-violation claims of nullification or impairment. Indeed, the panel in *Japan – Film* identified a parallelism between key elements of the legal tests under Articles III:4 and XXIII:1(b) of the GATT 1994:

> "[I]t could be argued that the standard we enunciated and applied under Article XXIII:1(b) – that of 'upsetting the competitive relationship' – may be different from the standard of 'upsetting effective equality of competitive opportunities' applicable to Article III:4. However, we do not see any significant distinction between the two standards apart from the fact that this Article III:4 standard calls for no less favourable treatment for imported products in general, whereas the Article XXIII:1(b) standard calls for a comparison of the competitive relationship between foreign and domestic products at two specific points in time, i.e. when the concession was granted and currently."[1132]

7.906 Arguably, a similar relationship exists between Article XXIII:1(b) of the GATT 1994 and Article 2.1 of the TBT Agreement. Indeed, we have noted the resemblance between key language in Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement; hence, we have recognized a similarity between relevant portions of the legal tests under these two provisions.[1133]

7.907 Accordingly, we stop our analysis of the complainants' non-violation claims here. Compliance by the United States with our finding of violation under Article 2.1 of the TBT Agreement would remove the basis of the complainants' non-violation claims of nullification or impairment. This also would be ensured by US compliance with our findings of violation under Article 2.2 of the TBT Agreement and Article X:3(a) of the GATT 1994.

[1131] GATT Panel Report, *ECC – Oilseeds I*, para. 142.
[1132] Panel Report, *Japan – Film*, para. 10.380.
[1133] See paras. 7.228-7.234 above.

VIII. FINDINGS AND RECOMMENDATIONS

8.1 We recall the United States' request that we issue our findings in the form of a single document containing two separate reports with separate findings and recommendations for each complainant. We also recall that Canada agreed, and Mexico did not object, to the United States' request.[1134] Accordingly, we provide two separate sets of findings and recommendations, with separate numbers/symbols for each complainant (WT/DS384 for Canada and WT/DS386 for Mexico).

[1134] See para. 2.11 above.

A. COMPLAINT BY CANADA (DS384): FINDINGS AND RECOMMENDATION

8.2 Canada has made claims with regard to the COOL measure and the Vilsack letter under Articles 2.1 and 2.2 of the TBT Agreement and Articles III:4, X:3(a) and XXIII:1(b) of the GATT 1994.

8.3 With respect to Canada's claims under the TBT Agreement, we conclude that:

(a) the COOL measure is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement, whereas the Vilsack letter is not;

(b) the COOL measure, particularly in regard to the muscle cut meat labels, violates Article 2.1 because it affords imported livestock treatment less favourable than that accorded to like domestic livestock; and

(c) the COOL measure violates Article 2.2 because it does not fulfil the objective of providing consumer information on origin with respect to meat products.

8.4 With respect to Canada's claims under the GATT 1994, we conclude that:

(a) we need not make a finding on the COOL measure under Article III:4 in light of our finding that the same measure violated the national treatment obligation under Article 2.1 of the TBT Agreement;

(b) the Vilsack letter violates Article X:3(a) because it does not constitute a reasonable administration of the COOL measure; and

(c) having found that the Vilsack letter falls within the scope of Article X:3(a), we refrain from examining whether it is inconsistent with Article III:4.

8.5 Finally, in light of the above findings of violation, we have refrained from examining Canada's non-violation claim under Article XXIII:1(b) of the GATT 1994.

8.6 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the United States has acted inconsistently with Articles 2.1 and 2.2 of the TBT Agreement and Article X:3(a) of the GATT 1994, it has nullified or impaired benefits accruing to Canada under these agreements.

8.7 Pursuant to Article 19.1 of the DSU, having found that the United States has acted inconsistently with Articles 2.1 and 2.2 of the TBT Agreement and Article X:3(a) of the GATT 1994, we recommend that the Dispute Settlement Body request the United States to bring the inconsistent measures into conformity with its obligations under the TBT Agreement and the GATT 1994.

A. COMPLAINT BY MEXICO (DS386): FINDINGS AND RECOMMENDATION

8.2 Mexico has made claims with regard to the COOL measure and the Vilsack letter under Articles 2.1, 2.2, 2.4, 12.1 and 12.3 of the TBT Agreement and Articles III:4, X:3(a) and XXIII:1(b) of the GATT 1994.

8.3 With respect to Mexico's claims under the TBT Agreement, we conclude that:

(a) the COOL measure is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement, whereas the Vilsack letter is not;

(b) the COOL measure, in particular in regard to the muscle cut meat labels, violates Article 2.1 because it affords imported livestock treatment less favourable than that accorded to like domestic livestock;

(c) the COOL measure violates Article 2.2 because it does not fulfil the objective of providing consumer information on origin with respect to meat products;

(d) Mexico has not established that the COOL measure violates Article 2.4;

(e) Mexico has not established that the United States acted inconsistently with Article 12.3; and

(f) in light of our finding on Mexico's claim under Article 12.3, Mexico has not established its claim under Article 12.1.

8.4 With respect to Mexico's claims under the GATT 1994, we conclude that:

(a) we need not make a finding on the COOL measure under Article III:4 in light of our finding of violation by the same measure of the more specific national treatment obligation under Article 2.1 of the TBT Agreement;

(b) the Vilsack letter violates Article X:3(a) because it does not constitute a reasonable administration of the COOL measure;

(c) Mexico has not established that the United States administered the COOL measure in a non-uniform and partial manner inconsistently with Article X:3(a) through the shifts in the guidance by USDA on the COOL measure; and

(d) having found that the Vilsack letter falls within the scope of Article X:3(a), we refrain from examining whether it is inconsistent with Article III:4.

8.5 Finally, in light of the above findings of violation, we have refrained from examining Mexico's non-violation claim under Article XXIII:1(b) of the GATT 1994.

8.6 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the United States has acted inconsistently with Articles 2.1 and 2.2 of the TBT Agreement and Article X:3(a) of the GATT 1994, it has nullified or impaired benefits accruing to Mexico under these agreements.

8.7 Pursuant to Article 19.1 of the DSU, having found that the United States has acted inconsistently with Articles 2.1 and 2.2 of the TBT Agreement and Article X:3(a) of the GATT 1994, we recommend that the Dispute Settlement Body request the United States to bring the inconsistent measures into conformity with its obligations under the TBT Agreement and the GATT 1994.

ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CANADA

I. INTRODUCTION

1. This dispute concerns the establishment by the United States of country-of-origin labelling requirements (the "COOL measure"). The COOL measure has many negative effects on Canadian cattle and hogs:

- It disrupts long-established practices regarding the importation of Canadian cattle and hogs to the United States and the subsequent production of beef and pork derived from them.
- It imposes additional and unnecessary costs and burdens on US feeding operations, slaughter houses and retailers that use Canadian animals or sell meat derived from them.
- It reduces demand for Canadian animals or meat derived from them in the US market by discouraging US feeding operations and slaughter houses from buying Canadian animals and US retailers from selling beef and pork derived from such animals.

2. The end result of the COOL measure has been a significant decline in exports of Canadian cattle and hogs to the United States and a reduction in the prices being offered by US purchasers for certain Canadian livestock .

II. BACKGROUND TO THE DISPUTE

A. THE COOL MEASURE

3. The COOL measure includes:

- the 2008 Farm Bill, enacted on June 18, 2008;
- the Interim Final Rule, published on 1 August 2008;
- the Final Rule, published on 15 January 2009; and
- the "Vilsack Letter" of US Secretary of Agriculture Tom Vilsack, issued on 20 February 2009.

4. The 2008 Farm Bill requires certain US retailers to identify the country of origin of muscle cuts of beef (including veal), lamb, chicken, goat, and pork; ground beef, ground lamb, ground chicken, ground goat, and ground pork; wild and farm-raised fish and shellfish; perishable agricultural commodities (fresh and frozen fruits and vegetables); peanuts; pecans; ginseng; and macadamia nuts.

5. The COOL measure applies only to retail establishments that sell more than US $230,000 worth of perishable agricultural commodities during a calendar year. Butcher shops and food service establishments are exempt from the COOL measure.

6. The country of origin of meat must be identified through the use of one of five labels:

- Label A – "Product of the United States" – used only for muscle cuts derived from animals, born, raised, and slaughtered in the United States.

- Label B – "Product of United States and Country X" – used for muscle cuts from animals born in country X, but raised and slaughtered in the United States.

- Label C – "Product of Country X and the United States" – used for muscle cuts derived from animals born and raised in Country X and imported for immediate slaughter in the United States.

- Label D – "Product of Country X" – used for imported muscle cuts.

- Label E – "Product of Country X, Country Y, Country Z" – used for ground meat; the label must list all countries of origin of the meat contained in the ground meat or that may reasonably be contained in it.

7. The main responsibility for maintaining accurate records on the country of origin of the covered commodities falls on retailers. However, the responsibility for maintaining accurate records flows through the entire production chain from producers to feeding operations to slaughter houses and, ultimately, to retailers. Any supplier of a covered commodity who is responsible for making a country-of-origin declaration must possess records to substantiate the country-of-origin claim.

8. The Interim Rule provided the initial regulatory basis for the implementation of the COOL legislation.

9. On the basis of the language of the Interim Final Rule, and to avoid the costs of segregation that multiple labels would impose, several major US slaughter houses indicated their intent to use Label B for the bulk of their products - even those derived from exclusively US-origin cattle and hogs (and so entitled to Label A). In response, the USDA issued a series of clarification documents that provided direction on various aspects of the Interim Final Rule, including a statement that it was not permissible to label meat derived from US-origin livestock with a mixed-origin label if solely US-origin meat was produced during the production day. There was also a meeting between select members of the US slaughter industry and US congressional leaders where such leaders threatened to modify the COOL legislation to remove any flexibility allowing the commingling of animals during slaughter, if US industry did not abandon its plans to use primarily Label B. The combination of the clarification documents and the meeting had a profound effect on the US slaughter industry. Major US slaughter houses indicated that they would change their procurement practices, so that the majority of their meat would carry Label A.

10. On 15 January 2009, the USDA published the Final Rule, which allowed for greater flexibility in the use of B or C Labels. However, the Final Rule removed the flexibility of labelling products from only US-origin animals as Label B, unless there is commingling with non-US-origin animals during a single production day.

11. On 20 February 2009, USDA Secretary Tom Vilsack issued an open letter ("Vilsack Letter") to industry outlining his concerns about the flexibility still contained in the Final Rule. He asked industry to adopt labelling practices that are even more stringent than the requirements found in the Final Rule, including asking industry to "voluntarily" adopt labelling by production point (i.e., Born in Country X, Raised in Country Y and Slaughtered in Country Z). The Letter stated that failure to comply with the "voluntary" suggestions could result in modifications to the Final Rule.

B. CANADA-UNITED STATES CATTLE AND HOG MARKETS: INTEGRATED INDUSTRIES

12. The Canadian and US cattle and hog markets are highly integrated, with producers, feeding operations and slaughter houses located on both sides of the Canada-United States border.

13. The United States is Canada's largest export market for cattle and hogs. In 2007, prior to the COOL measure, Canadian cattle exports totalled approximately 1.4 million head and Canadian hog exports totalled approximately 10 million head. In 2009, the first full year after the COOL measure went into effect, exports of cattle declined to approximately 1.1 million head and exports of hogs declined to approximately 6.4 million head, reductions of 23% and 36% respectively.

14. Canadian cattle and hog exports to the United States are a major percentage of Canadian production (30% in 2007). The United States is essentially Canada's only export market for cattle and hogs for non-breeding purposes, due to its proximity and the practical limitations on the transportation of live animals to other countries.

15. In contrast, US feeding operations and slaughter houses in most regions are able to quite easily find domestic substitutes for Canadian imports when the costs of using Canadian animals are higher than the costs of using US animals. Because of the size of the US market, Canadian exports of cattle and hogs are a small percentage of US slaughter - a percentage that has dropped since the introduction of the COOL measure:

- for cattle 4.2% of US slaughter in 2007, dropping to 3.1% in 2009;
- for hogs 9.2% of US slaughter in 2007, dropping to 5.5% in 2009.

C. EFFECTS OF THE COOL MEASURE

16. The COOL measure has caused significant differential effects on Canadian cattle and hogs as compared to US cattle and hogs. It imposes significantly greater costs and burdens on the use of Canadian rather than on US cattle and hogs in the production of beef and pork, mainly in the form of requirements for product segregation. Therefore, the COOL measure creates a significant incentive to use exclusively US-origin animals.

17. As a result of the COOL measure, there has been decreased demand from US feeding operations and slaughter houses for Canadian cattle and hogs. That decreased demand has led to a significant reduction in both quantity of US imports of Canadian cattle and hogs and a reduction in the prices being offered by US purchasers for certain Canadian livestock.

III. LEGAL ARGUMENTS

18. The COOL measure is inconsistent with the following WTO obligations of the United States:

- TBT Agreement Articles 2.1 and 2.2; and
- GATT 1994 Articles III:4, X:3(a), and XXIII:1(b).

1. TBT Agreement

(a) The COOL measure is a technical regulation

19. A measure is a technical regulation under the TBT Agreement if: it applies to an identifiable product or group of products; it lays down a product characteristic; and compliance with the product characteristics laid down in the measure is mandatory. The COOL measure is a technical regulation because it applies to specific commodities; lays down product characteristics by requiring labels that contain a means of identification of the products based on their origin; and is mandatory.

(b) The COOL measure violates Article 2.1 of the TBT Agreement

20. There is a violation of Article 2.1 if a technical regulation applies to "like" products and the technical regulation treats imported products less favourably than like domestic products. A measure provides less favourable treatment to an imported product if it modifies the conditions of competition in the relevant market to the detriment of imported products.

21. Imported and domestic cattle and hogs are like products for the purposes of Article 2.1 because the only basis of distinction between imported and domestic cattle and hogs is their origin.

22. The COOL measure accords less favourable treatment to Canadian cattle and hogs than their US counterparts because it imposes substantial additional costs and burdens on use of Canadian cattle and hogs. In particular:

- The COOL measure imposes segregation costs and burdens on feeding operations, slaughter houses and retailers that use Canadian-origin cattle and hogs or meat derived from them.

- Such costs and burdens have resulted in many US feeding operations and slaughter houses no longer accepting Canadian cattle and hogs. As a result, those animals that are exported must be transported over greater distances, at increased costs, to those US feeding operations and slaughter houses that are still accepting Canadian animals.

- In order to accommodate the need to segregate Canadian cattle and hogs from US cattle and hogs, US slaughter houses that are still accepting Canadian cattle and hogs have restricted the days of the week and often the times of the day when Canadian animals will be accepted at their facilities. Such restricted days and times have caused border delays, increased transport costs and created other logistical problems for Canadian producers.

- The COOL measure has forced US feeding operations and slaughter houses to modify their contracting practices to the detriment of Canadian cattle and hogs.

- The COOL measure has created administrative and political uncertainty for the use of Canadian cattle and hogs. The USDA and Congress have provided contradictory and confusing direction as to the implementation of the COOL measure. This has created uncertainty for US feeding operations and slaughter houses that use Canadian cattle and hogs – uncertainty that does not exist for feeding operations and slaughter houses that use only US cattle and hogs.

23. As the COOL measure imposes substantial additional costs and burdens in the use of Canadian cattle and hogs as compared to the use of US animals in the United States, there is decreased demand for Canadian cattle and hogs. The decrease in demand has resulted in a significant

decline in imports of Canadian animals and a reduction in the prices being offered by US purchasers for certain Canadian livestock, as confirmed by econometric analyses and the U.S Congressional Research Service.

24. The COOL measure has therefore modified the conditions of competition in the US market to the detriment of Canadian livestock, contrary to Article 2.1.

(c) The COOL measure violates Article 2.2 of the TBT Agreement

25. A technical regulation violates Article 2.2 if:

- Its objective is not a legitimate one;

- It fails to fulfil the legitimate objective; or

- The technical regulation is more trade restrictive than necessary to fulfil the legitimate objective. An important consideration in this element of the test is whether a reasonably available and less trade-restrictive alternative measure exists that would fulfil the legitimate objective.

26. The true objective of the COOL measure is trade protectionism, which is shown by the selection of the commodities covered by the COOL measure as well by statements of US lawmakers and industry groups during the development and enactment of the COOL measure. Trade protectionism can never be a justifiable or legitimate objective under Article 2.2 of the TBT Agreement. Therefore the COOL measure violates Article 2.2.

27. The COOL measure does not fulfil its purported objective of providing consumers with accurate country-of-origin information because it actually provides inaccurate or misleading information about the country-of-origin of the meat consumers are purchasing.

28. The COOL measure is more trade-restrictive than necessary to achieve the US purported objective. There are less trade-restrictive alternatives reasonably available to the United States that can meet the US objective of providing consumer information. These include voluntary country-of-origin labelling and labelling based on substantial transformation.

29. Voluntary labelling is an appropriate alternative as there is limited consumer demand in the United States for country-of-origin information and there is no compelling justification, such as health or safety, which would warrant mandating its provision. Voluntary country-of-origin labelling would make country-of-origin information available to consumers who consider such information sufficiently important to their purchasing decisions that they are willing to pay for it. It would also be less trade-restrictive than the COOL measure by removing or reducing the differential costs and burdens on the use of Canadian cattle and hogs.

30. Labelling based on substantial transformation, which would determine the country of origin on the basis of whether processing in a second country changes the nature of a product, is also an appropriate alternative. It would provide clear and relevant country-of-origin information to consumers, while being less confusing and easier to understand than the COOL measure. It would also be simple, and both technically and economically feasible, to use this approach for retail labelling. Finally, it would not impose differential costs on the use of imported cattle and hogs as there would be no costs associated with segregating animals during production.

2. GATT 1994

(a) The COOL measure violates Article III:4 of the GATT 1994

31. Three elements must be satisfied for a measure to violate Article III:4: (1) the imported and domestic products must be "like"; (2) the measure must constitute a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use; and (3) the measure must accord less favourable treatment to the imported product by modifying the conditions of competition in the relevant market to the detriment of imported products.

32. Imported and domestic cattle and hogs are like products for the purposes of Article III:4 because the only basis of distinction between imported and domestic cattle and hogs is their origin.

33. The COOL measure is a law, regulation or requirement that affects the internal sale, offering for sale, purchase, distribution and use of imported cattle and hogs, as well as beef and pork derived from imported cattle and hogs. The COOL measure affects the competitive opportunities for Canadian cattle and hogs by imposing greater costs and burdens on US industry when using Canadian cattle and hogs. This has resulted in a significant decrease in demand for Canadian cattle and hogs, therefore affecting the sale, purchase and use of Canadian animals.

34. The COOL measure modifies the conditions of competition in the US market to the detriment of imported Canadian products. Therefore, it is inconsistent with Article III:4 of the GATT 1994 because it accords to imported products treatment less favourable than the treatment it accords to "like" domestic products.

(b) The COOL measure violates Article X:3(a) of the GATT 1994

35. Article X:3(a) requires a WTO Member to administer laws, regulations, and administrative rulings of general application affecting the sale, distribution, processing or other use of imports in a uniform, impartial and reasonable manner.

36. The COOL measure is a law, regulation and administrative ruling of general application affecting the sale, distribution, processing or other use of imports.

37. The United States prescribed requirements through the Vilsack Letter that are not found in laws and regulations of the United States. It enforced that prescription by a threat of regulatory amendments. This constitutes an unreasonable administration of the COOL legislation and the Final Rule. The United States has therefore violated its obligation under Article X:3(a) of the GATT 1994 to administer its laws, regulations and administrative rulings of general application in a reasonable manner.

(c) The COOL measure has nullified or impaired Canada's benefits as a result of the application of the COOL measure

38. A complaining party must establish three elements for a claim under Article XXIII:1(b): 1) the application of a measure by a WTO member; 2) a benefit accruing under the relevant agreement; and 3) the nullification or impairment of the benefit as the result of the application of the measure.

39. The United States has applied the COOL measure thus satisfying the first element. Canada is entitled to expect market access to the United States for its cattle and hogs that is related to the tariff concessions that would apply, on a MFN basis, between the United States and Canada under the WTO Agreement, thereby satisfying the second element.

Canada reasonably expected that its access to the US market for live cattle and hogs would be virtually unrestricted, given the low MFN rates. The extent of the restrictions on market access due to the COOL measure could not reasonably have been expected. By requiring US retailers to label beef and pork in a manner that is fundamentally at odds with the normal practice applied in other areas of US customs law – i.e., substantial transformation – the United States has nullified or impaired the benefits that Canada negotiated at the time off the conclusion of the Uruguay Round and is entitled to under Article XXIII:1(b) of the GATT 1994.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF MEXICO

I. INTRODUCTION

1. This dispute concerns a mandatory country of origin labelling measure (hereinafter the COOL measure) that is applied in a manner and in circumstances such that it unjustifiably discriminates against and restricts imports of Mexican cattle into the United States.

2. Historically, Mexico has been an important supplier of cattle to the United States and the largest importer of US beef. Mexico and the United States have established an integrated market on this sector.

3. The COOL measure has modified the conditions of competition to the disadvantage of Mexican cattle compared to like US cattle. It has also reduced the export opportunities available to, increased the handling cost of, and reduced the price of Mexican cattle. The COOL measure has resulted in adverse effects to the Mexican cattle industry.

4. The COOL measure is a mandatory internal country of origin labelling measure that, by virtue of its design, structure and application, unjustifiably discriminates against and restricts imports of Mexican cattle into the United States. Its purpose and effect is to protect the US cattle industry and other domestic industries that produce covered commodities against competition with like imported products and it has achieved that purpose and effect in the case of cattle from Mexico.

5. The COOL measure violates the provisions of GATT Article III:4 and X:3 and Articles 2.1, 2.2, 2.4 and 12 of the TBT Agreement, and cannot be justified under other WTO provisions. It also nullifies or impairs benefits accruing to Mexico under the GATT 1994 within the meaning of Article XXIII:1(b) of the GATT 1994.

II. LEGAL BACKGROUND

A. THE MEASURE AT ISSUE

6. The measure at issue in this dispute – the COOL measure – comprises the following legal instruments: *(i)* the Agricultural Marketing Act of 1946, as amended by the Farm, Security and Rural Investment Act of 2002 (hereinafter Farm Bill 2002) and the Food, Conservation and Energy Act of 2008 (hereinafter Farm Bill 2008); *(ii)* the Interim Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Gingseng, and Macadamia Nuts; *(iii)* the Interim Final Rule on Mandatory Country of Origin Labelling of Muscle Cuts of Beef (including Veal), Lamb, Chicken, Goat and Pork, Ground Beef, Ground Lamb, Ground Chicken, Ground Goat, and Ground Pork, and its affirmation; *(iv)* the Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Gingseng and Macadamia Nuts; *(v)* the Letter from the United States Secretary of Agriculture, Thomas J. Vilsack, to Industry Representatives; *(vi)* any modifications, amendments, administrative guidance, directives or policy announcements issued in relations to items i through v above.

B. THE STATUTORY COOL PROVISIONS

7. The Farm Bill 2002 amended the Agricultural Marketing Act of 1946, adding Subtitle D-*Country of Origin Labelling*. The Farm Bill 2008 modified some of the statutory country of origin labelling provisions that were first introduced by the Farm Bill 2002.

1. The contents of the statutory COOL provisions

8. The main requirement of the statutory COOL provisions is that retailers must notify consumers of the country of origin of the covered commodities.

9. In order for an entity to be considered a "retailer" for purposes of COOL, it must sell perishable agricultural commodities (i.e. fruits and vegetables, including cherries in brine) at a level above a $230,000 per year threshold. Entities that make sales below the threshold or do not sell any fruits and vegetables are not covered by COOL provisions.

10. The commodities covered by COOL requirements in the statutory provisions are: *(i)* muscle cuts of beef, lamb and pork, *(ii)* ground beef, ground lamb and ground pork; *(iii)* farm raised fish; *(iv)* wild fish*; (v)* a perishable agricultural commodity; *(vi)* peanuts; *(vii)* meat produced from goats; *(viii)* chicken, in whole or in part; *(ix)* ginseng; *(x)* pecans; and *(xi)* macadamia nuts.

11. The statutory provisions exclude from the scope of the COOL requirements those covered commodities used as an ingredient in a further processed food item, and those prepared in a food service establishment.

12. In relation to muscle cuts of beef, the statutory provisions include four labelling rules: *(i)* US Country of Origin[1]; (ii) Multiple Countries Of Origin[2]; (iii) Imported for Immediate Slaughter[3]; and Foreign Country of Origin[4]

13. Regarding ground meat, according to the statutory COOL provisions, it must be labelled indicating a list of all countries of origin of such ground meat, or a list of all reasonably possible countries of origin of such ground meat.

14. *Audit Verification System:* The statutory COOL provisions give the US Department of Agriculture (USDA) authority to conduct audits of any person that prepares, stores, handles, or distributes a covered commodity for retail sale.

15. The statutory COOL provisions include specific provisions for audit verification system for suppliers and retailers, informational obligations for suppliers, and its enforcement procedures.

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[1] In order for a muscle cut to be labelled as having a US country of origin, it has to derive from *(i)* an animal exclusively born, raised and slaughtered in the United States; *(ii)* an animal present in the United States on or before 15 July 2008, or *(iii)* an animal born and raised in Alaska and Hawaii and transported to the United States through Canada within 60 days.

[2] Meat derived from an animal that was not exclusively born, raised and slaughtered in the United States, or that was either born, raised or slaughtered in the United States and not imported for immediate slaughter, must be labelled indicating all of the countries in which the animal may have been born, raised, or slaughtered.

[3] Meat products derived from animals imported for immediate slaughter must be labelled indicating both the country from which the animal was imported, and the United States.

[4] Meat products with a foreign country of origin must be labelled indicating the country of origin of the meat.

C. THE REGULATIONS

16. On 1 August 2008, the Agricultural Marketing Service (AMS) of the USDA published the interim final rule for covered commodities other than fish and shellfish. On 15 January 2009 the AMS published the final rule for the mandatory country of origin labelling for all covered commodities, which came into effect on 16 March 2009.

1. The contents of the regulations implementing the statutory COOL provisions

17. The US origin for meat was defined in the regulations as the meat derived from animals exclusively born, raised and slaughtered in the United States.

18. The regulations further developed the statutory rule for Multiple Countries of Origin. Muscle cuts with multiple countries of origin "may" be labelled indicating first the United States, and second, the country or countries of foreign origin. Also, if the muscle cut covered commodities derived from animals born in a foreign country, and raised and slaughtered in the United States are commingled in a single production day with animals born raised and slaughtered in the United States, the origin "may" be designated as Product of the United States, Country X, and (as applicable) Country Y.

19. The regulations further developed the statutory rule for Imported for Immediate Slaughter. Muscle cuts derived from animals that were imported for immediate slaughter "*shall*" be labelled indicating first the country of foreign origin, and second, the United States. Also, if the muscle cut covered commodities derived from animals imported into the United States for immediate slaughter are commingled in a single production day with animals born in a foreign country, and raised and slaughtered in the United States, the origin may be designated as Product of the United States, Country X, and (as applicable) Country Y.

20. Regarding Foreign Country Of Origin, the regulations provide that the normal customs border labelling requirements continue to apply to muscle cuts of foreign origin.

21. Also, the regulations further developed the statutory rule for ground products, specifying that the labelling of ground meat, must list all countries of origin contained in it, or all countries that may be reasonably contained in it. Regarding the term "reasonable", when a raw material from a specific origin is not in a processor's inventory for more than 60 days, that country cannot be included on the label as a possible country of origin.

22. *Recordkeeping Requirements:* Regarding the authority given to the USDA by the statutory provisions for the audit verification system and enforcement, the regulations include a section describing the recordkeeping requirements.

D. THE VILSACK LETTER AND COMMENTS

23. On 20 February 2009, Thomas Vilsack, Secretary of Agriculture of the United States, issued a news release announcing that he had sent a letter inviting stakeholders to follow additional voluntary labelling practices. Mr. Vilsack's letter was addressed to industry representatives, and it suggested that, after the effective date of the final rule, the industry voluntarily follow the practices contained in his letter. The practices consist of:

- *Multiple countries of origin:* Including information about the production steps that occurred in each country.

- *Processed foods:* Labelling the products that are subject to curing, smoking, broiling, grilling, or steaming.

- *Inventory Allowance for Ground Meat:* Reducing from 60 to 10 days the time a raw material must be in a processor's inventory in order to be included in the notice of country of origin.

24. Mr. Vilsack's letter included a warning, stating that based on industry compliance with his suggestions, the USDA would consider whether or not it is necessary to modify the regulations.

III. FACTUAL BACKGROUND: THE IMPACT OF COOL ON IMPORTS OF MEXICAN CATTLE

A. OVERVIEW

25. The cattle and beef industries of Mexico and the United States have been historically integrated and interrelated. Mexico produces and exports feeder cattle to the United States where it is raised in grasslands and feedlots and subsequently slaughtered. The industry of feeder cattle for export has become of such importance for Mexico, that from 2003 to 2007, the years prior to COOL implementation, Mexico exported an average of over 1,200,000 head of cattle per year, with a value of over USD$500 million dollars per year.

B. THE PRODUCTION PROCESS OF BEEF DERIVED FROM LIVESTOCK BORN IN MEXICO

26. The Mexican industry dedicated to the production of feeder cattle for export is composed by a large number of independent cow-calf operators. The core business of the cow-calf operators is to generate the birth of calves and then raise them until they are weaned and ready to be sent to the grasslands. Therefore, the usual commercial practice is to sell calves at a weight ranging between 300 and 400 pounds.

27. There are different ways through which Mexican cattle for export are sold to the US market. Depending on a cow-calf operator's capacity, it can either sell calves directly to the buyer in the United States, or sell calves to a broker who will complete the transaction with the buyer in the United States. The sale of the calves from the broker or cow-calf operator to their clients in the US usually takes the form of a direct transaction between them.

28. The selling price of Mexican calves for export is usually determined in advance by the buyer and the seller before the cattle crosses the Mexico-US border. The selling price is negotiated between the buyer and the seller taking into account several factors, which include the market demand for calves, the quality of the calves determined by the USDA grading system, the reference prices used in the livestock auctions in the United States, the costs for transporting the calves, the future prices and the costs of feeding. Because the feeder cattle are a commodity product, Mexican sellers must maintain a competitive price in order to retain their clients in the Unites States. A small increase in the cost of the cattle can result in lost clients.

29. In general, the calves from the Mexican exporting states, mostly located in the Northern region of Mexico, have the same genetic features as the calves from the South-western regions of the United States. There are no qualitative differences between the Mexican calves for export and calves that are born in the United States.

30. Once the cattle are exported to the United States, they are shipped throughout US territory. The cattle are sent to grasslands where they are raised and fed with grass. They remain grazing on the grasslands until they reach a weight ranging between 600 to 700 pounds.

31. Once the cattle reach 600 to 700 pounds, they are sent to feedlots where it receives intensive feeding based on grains. They remain confined in the feedlots until it reaches a weight between 1,100 to 1,200 pounds.

32. When the animals reach 1,200 pounds, they are considered as fed cattle ready for slaughter, and thus, the animals are sent to the slaughterhouses. The chilled carcass is broken down in to pieces of meat that are placed in boxes. The boxed meat is then transported to distribution centres, and subsequently to retail markets.

C. CHANGES IN THE BEEF PRODUCTION PROCESS AFTER THE IMPLEMENTATION OF THE COOL PROVISIONS

33. The implementation of the COOL provisions disrupted the well integrated cattle-beef market between Mexico and the United States. Before COOL, beef labelled as "Product of the US" could refer to beef derived from an animal that was born in Mexico but slaughtered in the United States. This allowed Mexican-born cattle and US-born cattle to be fed, slaughtered, processed, boxed and sent to the retail market together without having to segregate them in each of those steps.

34. After the COOL measure, meat derived from cattle born in Mexico and raised and slaughtered in the United States must be labelled as "Product of US and Mexico. This makes it impossible for the meat derived from cattle born in Mexico to be slaughtered and processed in US plants together with cattle born and raised in the United States. Implementation of the COOL measure necessarily requires segregation through the cattle-to-beef chain.

35. The US beef processors must now incur additional costs to segregate cattle throughout the production process of beef and keep evidentiary records of such segregation. To limit those costs, each of the four major US beef processors has decided to slaughter and process Mexican cattle at only one of their plants. Also, in the case of one processor, its facilities may process Mexican born cattle only limited days per week and with a 14-day advance notice.

36. In the feedlots and grasslands cattle has to be segregated as well. Also, considering that the few processing facilities that accept Mexican-born cattle are located near the US–Mexico border, it has become economically unviable for grasslands and feedlots other than those located near the border to acquire Mexican calves. Thus, some backgrounders and feedlot operators who formerly purchased Mexican-born cattle have simply decided to suspend those purchases, in order to avoid the costs of compliance with the COOL measure and also to adjust to the new policies of the US processors.

37. In addition, the need to segregate has caused a price decrease of Mexican feeder cattle relative to comparable US cattle, which ranges between US $40 and US $60 dollars per head.

38. For an industry that has historically operated using domestic and imported cattle without distinction, the enactment of the COOL measure signifies a drastic modification of its operations, which in turn has resulted in significant losses in the volume and value of the Mexican exports of cattle to the United States.

IV. THE PROTECTIONIST OBJECTIVE OF COOL

39. The true purpose of the COOL measure by virtue of its design, structure and application is to protect domestic producers in the United States by altering the operation of the US beef industry in favour of US feeder cattle. A measure that creates a new system, independent from an existing one, and provides information on the country of origin of inputs of a product manufactured in the United States but only for *some* products that are purchased in *certain* retail stores and that excludes such information for inputs into *certain* processed products cannot be characterized as being designed and structured to achieve a legitimate consumer information objective.

40. The protective effect of the COOL measure is confirmed by its legislative history and the actions of the Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF), the main proponents and supporters of the COOL measure. Country of origin labelling was seen by R-CALF and its supporters as a means to protect the US cattle industry from foreign competition.

V. LEGAL ARGUMENT

41. The measure at issue in this dispute is inconsistent with the obligations of the United States under the following provisions: *(i)* Articles III and X of the GATT 1994, and *(ii)* Articles 2 and 12 of the TBT Agreement. *(iii)* It also nullifies or impairs benefits that accrue to Mexico under the GATT 1994 within the meaning of GATT Article XXIII:1(b).

A. ARTICLE III OF THE GATT 1994

42. The COOL measure accords Mexican feeder cattle treatment less favourable than that accorded to US feeder cattle in a manner that is inconsistent with Article III:4 of the GATT 1994.

43. In *Korea – Various Measures on Beef,* the Appellate Body explained that a Member's measure is deemed to breach Article III:4 if three elements are met: *(i)* imported and domestic products at issue are "like products"; *(ii)* the measure at issue is a law, regulation or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use; *(ii)*the imported products are accorded "less favourable" treatment than that accorded to like domestic products. The three elements are met by the COOL measure.

1. Like products

44. Mexico's claims relate to the treatment accorded to Mexican exports of live feeder cattle produced by Mexican cow-calf operators. Live feeder cattle born in Mexico, and raised in the United States, and live feeder cattle born, raised and slaughtered in the United States are "like products", considering the criteria established in the findings and recommendations from the WTO DSB on this specific issue:

- The physical properties of Mexican feeder cattle are equivalent to US feeder cattle. Feeder cattle, whether from Mexico or the United States, meet the same standards and industry requirements.

- Regarding end-uses, the feeder cattle, whether from Mexico or the United States are used principally to produce beef. Prior to the COOL measure, Mexican and US cattle were employed without distinction in the production and processing of beef.

- As to the perceptions and behaviour of consumers, the consumers of feeder cattle are the US backgrounders, feedlots and the packing plants in which the cattle are processed.

Prior to the COOL measure, such backgrounders, feedlots and packing plants perceived and treated Mexican and US feeder cattle identically.

- Finally, both Mexican and US cattle are classified under subheading 0102.90 of the Harmonized System (live bovine animals – other).

45. Accordingly, by all relevant criteria, Mexican and US feeder cattle are like products.

2. Laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use

46. The COOL measure comprises a series of laws and regulations that set out the country of origin labelling requirement. These laws, regulations and requirements "affect the internal sale, offering for sale, purchase, transportation, distribution or use" of feeder cattle.

47. The COOL measure applies to a specified group of "covered commodities", among which is beef. The COOL measure imposes a requirement on retailers to notify their customers of the country of origin of beef. The measure also imposes recordkeeping and verification requirements to substantiate the origin claims that apply to all persons engaged, either directly or indirectly, in the supply of beef to retailers including stockbreeders, backgrounders, feedlot operators and meat processors and packers. While the COOL measure does not directly regulate feeder cattle, it *affects* the internal sale, offering for sale, purchase, transportation, distribution or use of feeder cattle because it regulates retail beef, which is derived from those cattle.

48. The COOL measure therefore pertains to the category of laws, regulations and requirements that *affect* the internal sale, offering for sale, purchase, transportation, distribution or use of Mexican feeder cattle within the meaning of Article III:4. Thus, the national treatment obligation in that article applies.

3. Less favourable treatment

49. The COOL measure requires that beef sold at the retail level be labelled with information indicating the place where the cattle are born, raised and slaughtered and impose record keeping and verification requirements to support the labels. The COOL measure by itself does not *de jure* distinguish between domestic and imported like products nor do the measures *de jure* distinguish between like Mexican and US feeder cattle. However, GATT Article III:4 applies to both *de jure* and *de facto* inconsistency. The focus is whether the measure modifies the conditions of competition, and the COOL measure gives US feeder cattle a competitive advantage over like Mexican feeder cattle in the US feeder cattle market.

50. The COOL measure has caused US packing plants to cease commingling fed cattle born in Mexico and raised in the United States with fed cattle born and raised in the United States and instead segregate by: *(i)* reducing the number of plants that slaughter and process fed cattle that was born in Mexico and raised in the United States. *(ii)* reducing the number of days per week that such cattle are slaughtered and processed; (iii) reducing the overall number of such cattle that are slaughtered and processed; and *(iv)* requiring advance notice prior to accepting such cattle.

51. The COOL measure has also caused US packing plants to reduce the price paid for fed cattle that was born in Mexico and raised in the United States, by means of applying an additional discount to the purchase price. The discount ranges between US$ 40 and US$ 60 dollars per head.

52. These actions have had the following direct adverse upstream effects: *(i)* some backgrounders and feedlots have simply stopped buying feeder calves born in Mexico; *(ii)* the only backgrounders and feedlots that are willing to receive feeder calves that were born in Mexico are those that are close to the packing plants that are still receiving finished cattle that were born in Mexico; *(iii)* finished cattle that were born in Mexico and raised in the United States are segregated from finished cattle born in the United States for shipping and transportation to packing plants and, in some cases, at backgrounding and feedlot facilities. *(iv)* the discount applied by packing plants against the purchase price of finished cattle that were born in Mexico and raised in the United States has been ultimately passed on to the Mexican cow-calf operators that produce the Mexican feeder calves.

53. In addition, the uncertainty created by Secretary Vilsack's letter has had the effect of encouraging the US packing plants, backgrounders and feedlots to make the actions described above even stricter.

54. Similar actions have not been taken in respect of the stockbreeding, backgrounding, feeding and transport of like US born cattle.

55. These actions have modified the conditions of competition in the US market to the detriment of Mexican feeder cattle. In this way, the COOL measure gives US feeder cattle a competitive advantage over like Mexican feeder cattle in the US feeder cattle market and thereby violate the national treatment obligation in Article III:4.

B. AGREEMENT ON TECHNICAL BARRIERS TO TRADE

56. The COOL measure is a technical regulation within the meaning of Annex 1.1 of the TBT Agreement that is inconsistent with Articles 2.1, 2.2, 2.4, 12.1 and 12.3 of the Agreement.

1. The COOL measure is a "technical regulation" for purposes of the TBT Agreement

57. The obligations in Articles 2.1, 2.2 and 2.4 of the TBT Agreement apply to technical regulations, as defined by Annex 1.1 of the TBT Agreement. The COOL measure falls within the scope of the TBT Agreement, because it constitutes a "technical regulation" pursuant to the definition contained in Annex 1.1, for the following reasons:

- The COOL measure is contained in a set of published legal instruments that are undoubtedly "documents" within the meaning of Annex 1.1 of the TBT Agreement. These documents meet the three criteria to be considered a "technical regulation": *(i)* they apply to an identifiable product or group of products; *(ii)* they lay down one or more characteristics of the product; *(iii)* compliance with those product characteristics is mandatory.

- The COOL provisions expressly state that the country of origin labelling requirements apply to a specific group of "covered commodities". Muscle cuts of beef and ground beef are included among those covered commodities. Secretary Vilsack's letter and its press release apply to the same group of "covered commodities". Thus, the COOL measure expressly applies to an identifiable group of products.

- Regarding the second criterion, the definition of "technical regulation" expressly includes "marking or labelling requirements". The Appellate Body in *EC – Asbestos* clarified that a "labelling requirement" is a product characteristic. The COOL measure imposes on retailers the obligation of informing consumers of the country of origin of the covered commodities. It further describes the method for identifying the country of origin of the covered commodities, namely, by means of a label, stamp, mark, placard, or other visible sign. In the case of some covered commodities, such as muscle cuts of beef, the COOL measure lays down rules for determining when this product can be labelled as having a US origin, multiple countries of origin or foreign countries of origin. These features contained in the COOL measure leave no doubt that they fulfil the second criterion of laying down product characteristics consisting of marking or labelling requirements.

- Finally, the COOL measure imposes a mandatory obligation on retailers to inform consumers about the country of origin of the covered commodities. It is clear from the statutory COOL provisions that the United States imposes a mandatory scheme. With respect to the letter of Secretary Vilsack and its press release, they also have a mandatory nature, evident from the threat implied therein, that additional modifications will depend on the industry's compliance, threat that is seriously taken by the industry.

58. In conclusion, the COOL measure falls within the scope of the TBT Agreement, for it constitutes a "technical regulation" pursuant to the definition contained in Annex 1.1 of the TBT Agreement.

2. The COOL measure is inconsistent with Article 2.1 of the TBT Agreement

59. As already explained when analyzing Article III of The GATT 1994, the COOL measure accords Mexican feeder cattle treatment less favourable than that accorded to US feeder cattle, contrary to Article 2.1 of the TBT Agreement.

60. There is a close resemblance between the terms used in Article 2.1 of the TBT Agreement with those of Article III:4 of the GATT 1994. Accordingly, the essential elements of an inconsistency with Article 2.1 are: *(i)* that the measure at issue is a "technical regulation"; *(ii)* that the imported and domestic products at issue are "like products" within the meaning of that provision; and *(iii)* that the imported products are accorded "less favourable" treatment than that accorded to like domestic products.

61. As already explained, the COOL measure indeed is a "technical regulation", the products at issue are "like products", and the COOL measure accords products imported from Mexico, treatment less favourable than that accorded to like products of national origin. For these reasons, the COOL measure is inconsistent with Article 2.1 of the TBT Agreement.

3. The COOL measure is inconsistent with Article 2.2 of the TBT Agreement

62. The COOL measure is inconsistent with Article 2.2 of the TBT Agreement because it was prepared, adopted and applied with a view to, and with the effect of, creating unnecessary obstacles to international trade, and is more trade restrictive than necessary to fulfil a legitimate objective taking account of the risks non-fulfilment would create.

63. Two issues must be addressed under this provision, specifically, whether the technical regulation: *(i)* fulfils or is capable of fulfilling a legitimate objective; *(ii)* is not more trade-restrictive than necessary to fulfil such objective taking account of the risks non-fulfilment would create.

64. The COOL measure does not fulfil a legitimate objective nor is it capable of fulfilling such an objective as described hereinafter. If the Panel disagrees with that assertion, Mexico submits that the measure is certainly more trade restrictive than necessary to fulfil that objective, taking account of the risks non-fulfilment would create. Therefore, the COOL measure constitutes an unnecessary obstacle to international trade.

(a) The COOL measure does not fulfil a legitimate objective

65. In the case at issue, the objective of the COOL measure is not legitimate for the following reasons:

66. As explained above, the COOL measure does not pursue a legitimate objective since the real objective of the measure is to protect domestic producers in the United States by altering the operation of the US beef industry in favour of US feeder cattle to the disadvantage of like Mexican feeder cattle. The objective of the measure is clearly protectionist.

67. However, if this Panel finds that the objective of the COOL measure is the provision of consumer information, Mexico is of the view that while in certain circumstances providing consumer information can be a legitimate objective within the meaning of the provision, it is not a legitimate objective in *all* circumstances. Whether the objective is legitimate will depend on the specific type of information being provided to consumers and whether the provision of that information is "justifiable" in the light of all relevant circumstances relating to that information.

68. In the case of the COOL measure, both the character and the intrinsic value of the information given to consumers are inherently protectionist.

69. Regarding the character of the information, it is that US origin beef is produced from cattle that are "born, raised, slaughtered and processed" in the United States. Such detailed and specific information has only one purpose which is inherently protectionist.

70. As to the value of the information, the COOL measure provides a type of information whose value to the consumer is, as well, solely protectionist. By enacting the COOL measure, the United States is trying to shape consumer perception through regulatory intervention, and justify the legitimacy of this intervention on the basis of a governmentally created consumer perception. In such circumstances, it cannot be said that the provision of consumer information conforming to this regulatory intervention is a "legitimate objective".

71. Furthermore, if the Panel finds that, in the circumstances of this dispute, the provision of consumer information is a legitimate objective, Mexico submits that the COOL measure does not fulfil that consumer information objective because of the substantial gaps in its coverage and because of the ambiguity and uncertainty that it creates.

72. Regarding the gaps in the coverage, the COOL measure is limited to certain commodities, only governs certain retailers, and certain processed food items are excluded from the coverage. A measure that provides information on the country of origin of inputs in a product manufactured in the United States but only for some products that are purchased in certain retail stores and that excludes such information for inputs into certain processed products cannot reasonably be characterized as intended to "fulfil" a consumer information objective.

73. Regarding the ambiguity and uncertainty created by the COOL measure, first, the United States has long had a comprehensive system in place for regulating the information provided to consumers on packaging of meat products; second, the labelling "Product of USA and Mexico" under the COOL, in itself, is confusing because consumers will not know that the entire process of meat production took place in the United States while only the birth and minimal raising of the animal occurred in Mexico. A measure that creates new rules for determining the origin of beef for labelling purposes that differ from pre-existent criteria, and imposes such confusing labels cannot fulfil a legitimate consumer information objective.

(b) Even if the COOL measure was considered to fulfil a legitimate objective, the measure is more trade-restrictive than necessary to fulfil that objective, taking account of the risks non-fulfilment would create.

74. In the event that the Panel concludes that the COOL measure fulfils a legitimate objective, Mexico submits that the COOL measure is more trade restrictive than necessary to fulfil that objective, taking account of the risks non-fulfilment would create.

75. The USDA has found that the value of the information provided and its contribution to the needs of a US consumer is minimal and restricted to a limited sub-set of US consumers. Thus, the importance of the objective of providing consumer information is low. Likewise, the possibility of adverse consequences arising should the objective not be carried out is low and to the extent that those consequences arise they will be restricted to a limited sub-set of US consumers.

76. It is clear that the COOL measure is more trade-restrictive than necessary to fulfil a legitimate objective, taking into account the risks that non-fulfilment would create. The measure is highly trade restrictive as evidenced by its adverse effect on imports of Mexican feeder cattle.

77. Finally, there are at least other alternative measures that are reasonably available that provide the equivalent contribution to the objective. The first alternative is a *voluntary* country of origin labelling requirement. A second alternative is to modify the labelling criteria to conform to the pre-existing criteria (change of tariff classification and processing, both including the rule of substantial transformation or a change in nature).

78. In this way, the US measure is inconsistent with Article 2.2 of the TBT Agreement.

4. The COOL measure is inconsistent with Article 2.4 of the TBT Agreement

79. The COOL measure is not based on an existing relevant international standard, contrary to the obligation contained in Article 2.4 of the TBT Agreement.

80. The COOL measure is inconsistent with Article 2.4 of the TBT Agreement because: *(i)* a relevant international standard exists; *(ii)* the United States failed to base its regulation on that international standard; and *(iii)* the relevant international standard is not an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued.

81. CODEX-STAN 1-1985 is the "General Standard for the Labelling of Prepackaged Foods." It is a standard because it falls within the definition of "standard" contained in Annex 1.2 of the TBT Agreement. It is relevant because it contains rules for the labelling of pre-packaged foods, including rules regarding the country of origin for labelling such foods, and muscle cuts of beef and ground beef are within its the scope. It is international because it was approved by an international body.

82. According to the CODEX-STAN 1-1985, if labelling with a country of origin is considered necessary, meat that is derived from cattle that are born in Mexico and subsequently raised and slaughtered in the United States should be labelled as having a US country of origin. In direct contradiction to this international standard, the COOL measure confers the United States country of origin only to muscle cuts of beef and ground beef that derive from cattle that are exclusively born, raised, and slaughtered in the United States. Thus, the United States failed to base its regulation on the relevant international standard,

83. Finally, in the event that the Panel concludes that the COOL measure pursues a legitimate objective, Mexico submits that the rule in CODEX-STAN 1-1985 is an effective and appropriate means for the fulfilment of a legitimate objective.

84. The United States has stated that the objective of COOL measure is to inform consumers and give them accurate information pertaining to the country of origin, for the purposes of making purchasing decisions. CODEX-STAN 1-1985 is an effective means for achieving the pursued objective because it seeks to protect consumers from deceptive practices, and information on the country of origin is conveyed through a label. It is an appropriate means for informing consumers of the country of origin of the covered commodities because the rules regarding country of origin contained therein are specially designed, and thus suitable, for achieving the purpose of informing consumers about the country of origin of prepackaged foods.

85. In this way, the US measure is inconsistent with Article 2.4 of the TBT Agreement.

5. The COOL measure is inconsistent with Articles 12.1 and 12.3 of the TBT Agreement

86. The COOL measure is contrary to the obligations of the United States under articles 12.1 and 12.3 of the TBT Agreement of providing special and differential treatment to developing countries.

87. The obligation set forth in Article 12.3 can be divided into two elements: *(i)* the obligation of the United States to take into account the special development, financial and trade needs of Mexico as a developing country in the preparation and application of technical regulations; and *(ii)* the obligation of the United States to ensure that the COOL measure does not create unnecessary obstacles to exports from Mexico as a developing country.

88. Neither of those two actions was carried out by the United States.

89. First, during the preparation process of the COOL measure, both the US Congress and the USDA were made aware that the COOL measure would harm imports of Mexican feeder cattle. There is no doubt that the United States was cognizant of the possible negative effects on Mexican exports of feeder cattle. The US Congress and the USDA, however, did not address those comments and consequently made no effort to take into account the special development and financial trade needs of Mexico in its capacity of developing country.

90. Last, the COOL measure has the effect of creating unnecessary obstacles to trade, and thus the United States failed to comply with its obligation of ensuring that the technical regulations do not create unnecessary obstacles to exports from Mexico as a developing country Member.

C. ARTICLE X:3(A) OF THE GATT 1994

91. The COOL measure is inconsistent with Article X:3(a) of the GATT 1994, because the administration of the COOL measure has been anything but predictable and reasonable. The administration of the details of the measure changed over the course of the interim final rule and the final rule and the associated guidelines issued by USDA over this period. These uncertainties continued with Vilsack's letter. Administration of a law or regulation in such a manner cannot amount to uniform (i.e., predictable) and reasonable administration.

D. NON-VIOLATION NULLIFICATION OR IMPAIRMENT: ARTICLE XXIII:1(B) OF THE GATT 1994

92. The COOL measure also nullifies or impairs benefits accruing to Mexico based on tariff concessions made by the US in respect of live cattle at the end of successive multilateral rounds of trade negotiations, in a manner that is inconsistent with Article XXIII:1(b) of the GATT 1994.

93. The Article provides that a Member may have recourse to WTO dispute settlement if it considers that any benefit accruing to it directly *or indirectly* under the GATT 1994 is being nullified or impaired as the result of the application by another Member of any measure, whether or not it conflicts with the provisions of the GATT 1994.

94. In the case at issue, first, the United States enacted and implemented the COOL measure through a series measures including statutory provisions, regulations and other implementing guidance, directives of policy announcements issued in relation to those measures. Thus, a measure was applied.

95. Second, Mexico is entitled under Article XXIII:I(b) of the GATT 1994 to expect market access to the United States for its feeder cattle that is related to the tariff concessions that would apply, on a Most-Favoured-Nation (MFN) basis, between Mexico and the United States under the WTO Agreement. Mexico does not view these tariff concessions as creating a guarantee of trade volumes, but rather as creating trade expectations as to the competitive relationship between Mexican and US feeder cattle. Thus, there are benefits accruing to Mexico under the GATT 1994.

96. Last, given the low MFN rates of the United States in respect of feeder cattle, Mexico reasonably expected that its access to the US market for feeder cattle would be virtually unrestricted. The COOL measure drastically restricts this access in a manner that could not have been anticipated at the time of the conclusion of the Uruguay Round. It therefore nullifies and impairs the benefits under the GATT 1994 that Mexico negotiated during the Round.

VI. CONCLUSIONS

97. On the basis of the foregoing, Mexico respectfully requests that the Panel find that US measures are inconsistent with Articles III:4 and X:3 of the GATT 1994 and Articles 2.1, 2.2, 2.4 and 12 of the TBT Agreement. Mexico also requests that Panel find the US measure also nullifies or impairs benefits accruing to Mexico under the GATT 1994 within the meaning of Article XXIII:1(b) of the GATT 1994.

ANNEX A-3

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. The US country of origin labelling measures are the product of a decade long legislative and regulatory process, driven by the desire to provide consumers with additional information about the origin of meat and other food products they buy at the retail level. Quite simply, consumers in the United States want better information about where their food comes from.

2. Previous US labelling requirements did not require meat labelling at the retail level and did nothing to alleviate consumer confusion about origin, which for some products was compounded by the grade labelling program administered by the US Department of Agriculture ("USDA"). The labelling provisions included in the 2002 Farm Bill, amended in 2008, and the 2009 implementing regulations, were the results of hard work to reconcile the views of US consumer advocacy groups, who strongly supported stricter labelling requirements, and industry interests, who sought to minimize compliance costs. The legislative and regulatory record demonstrates the lengths to which the United States went to balance these interests, and the efforts made to address concerns of interested parties, including Canada and Mexico, while ensuring that US consumers would receive better information about the products they buy.

3. The United States is not alone in seeking to provide consumers with information on country of origin. Motivated by the objective of providing consumer information, numerous WTO Members, including Canada and Mexico, have enacted mandatory country of origin labelling regimes, applying to a vast cross-section of products.

4. Despite the widespread acceptance of country of origin labelling requirements by WTO Members and US efforts to carefully design the COOL measures, Canada and Mexico allege that they are inconsistent with US obligations under the TBT Agreement, the GATT 1994, and nullify and impair their benefits under the GATT. Fundamentally, Canada and Mexico's objections amount to nothing more than an attempt to re-weigh the complex balance of interests that led to the measures, and in the process prevent the United States from providing its consumers with information that is routinely available to consumers in other WTO Members.

5. They seek to do so *not* because the measures are discriminatory on their face, nor because they result in *de facto* discrimination vis-à-vis Canadian or Mexican meat, but because some US slaughterhouses have allegedly modified certain policies in processing Canadian and Mexican livestock. On this basis alone, they seek to upend the entire US statutory and regulatory framework, notwithstanding that nothing in the measures requires slaughterhouses to take the actions that some allegedly did. Canada and Mexico ignore the fact that slaughterhouses segregated livestock before the labelling requirements took effect, and that the measures were designed to provide market participants with as much flexibility as possible to minimize burdens on suppliers.

6. Nor in fact have those slaughterhouses' actions had an appreciable impact on trade – indeed, cattle exports to the United States are sharply up in 2010. Only by ignoring basic market factors unrelated to the COOL measures – the global economic recession, high feed costs, animal disease issues, declining inventories, and a restructuring of the North American hog industry – can Canada and Mexico attempt to imply some commercial impact on their livestock attributable to the COOL measures. Indeed, it is telling that, in advancing a (remarkably underdeveloped) claim that their

benefits have been nullified and impaired, neither complainant can even identify how they have been harmed. The failure of the complaining parties to put forward a colourable argument in this regard illustrates the weak foundations upon which their arguments rest. The COOL measures do not provide less favourable treatment to Canadian and Mexican livestock. They fulfil the legitimate objective of providing consumer information without substantially restricting trade, are administered fairly, and were developed and applied in a manner that took into account a wide range of interests. Throughout the process, the United States carefully weighed competing objectives – the desire to provide better consumer information and the desire to limit the impact on market participants – and incorporated the views of interested parties in an attempt to strike the correct balance. The COOL measures reflect these objectives and are not inconsistent with the WTO Agreements.

II. LEGAL ARGUMENT

7. Canada and Mexico describe the measures at issue as a single "COOL measure," but as they define this term, their complaint rests on several substantively distinct measures: Section 10816 of the 2002 Farm Bill, as amended by Section 11002 of the 2008 Farm Bill, the 2008 Interim Final Rule, the 2009 Final Rule, and a February 20, 2009 letter from Secretary Vilsack. Mexico also characterizes the FSIS Final Rule as an additional element of the "COOL measure".

8. In so doing, Canada and Mexico obscure the fact that the 2008 Interim Final Rule is not in effect. In addition, the Vilsack Letter (even if considered a US measure) is not subject to the TBT disciplines that complainants claim the United States has breached because it is not "mandatory". Finally, Canada and Mexico overlook important substantive differences between each of the elements of the "COOL measure," which has important implications for their respective legal claims. For example, Canada and Mexico's arguments do not address how the statute, apart from the 2009 Final Rule, is inconsistent with US obligations, nor does Mexico explain how the FSIS Rule is inconsistent with US obligations.

9. By treating these measures as a single "COOL measure," Canada and Mexico attempt to sweep into the Panel's analysis a document not subject to the relevant commitments, to obtain findings on a measure no longer in effect, and to avoid making their case with respect to other measures. Rather than evaluating them collectively, the Panel should assess each document on its own merits, consistent with the approach used in previous disputes.

III. THE COOL MEASURES ARE NOT INCONSISTENT WITH THE TBT AGREEMENT

10. Canada and Mexico discuss the Vilsack Letter at length in arguing that the "COOL measure" is inconsistent with US obligations under the TBT Agreement. However, the Vilsack Letter does not meet the definition of a "technical regulation" – by its terms, compliance with it is not mandatory. In describing its suggestions, the Vilsack Letter states that the Secretary is simply recommending that the industry "*voluntarily* adopt ... practices to ensure that consumers are adequately informed about the source of food products". The Vilsack Letter also does not include any mechanism to ensure that companies follow its suggestions. While Canada and Mexico attempt to characterize the Secretary's comment that he "will carefully consider whether modifications to the rule will be necessary to achieve the intent of Congress" as evidence of the Letter's so-called "mandatory nature," this statement merely reflects the fact that USDA (like any other regulator) has the ability to revisit its rule making. Finally, Canada and Mexico offer no evidence demonstrating that industry is following the letter's suggestions.

11. The COOL measures are not inconsistent with TBT Article 2.1. To demonstrate that a measure is inconsistent with this obligation, the complaining party must demonstrate that: (1) the

measure is a technical regulation; (2) the imported and domestic products at issue are "like" products; (3) the imported products receive less favourable treatment than the "like" domestic products; and (4) such treatment is in respect of the technical regulation.

12. As discussed above, the Vilsack Letter is not a technical regulation. With regard to the 2002 COOL Statute, as amended, 2009 Final Rule, and FSIS Rule, the requirements contained therein provide for labelling of beef and pork with country of origin information at the retail level regardless of whether the product is imported or produced domestically. Further, Canada and Mexico do not even address the fact the COOL measures apply to meat, not livestock.

13. Even if it were appropriate to evaluate a measure for consistency with Article 2.1 based on evidence regarding a product not regulated by that measure, Canada and Mexico have failed to show that the COOL measures provide less favourable treatment to livestock. These measures require meat to be labelled with origin information regardless of where the livestock from which the meat was derived was born, raised, or slaughtered.

14. Rather than asserting that the COOL measures by their terms accord different treatment to their beef and pork, Canada and Mexico claim that the measures have modified the conditions of competition to the detriment of their livestock. Central to their argument is the assertion that the measures require US processors to segregate their production lines. Further, the complainants allege that US processors have avoided segregation costs by refusing foreign livestock. These arguments do not withstand scrutiny.

15. In law and in fact, the COOL measures do not require US processors to segregate. Feeding operations and slaughter houses can meet the law's requirements in any way they choose. In fact, the 2009 Final Rule indicated that there are multiple ways a processing facility could comply with the law, which may or may not include segregation.

16. Not only does nothing in these measures require segregation, but the flexibility they provide reduces the likelihood that livestock will need to be segregated to comply with the law. For example, the 2009 Final Rule contains significant flexibility that allows processors to commingle muscle cuts of meat from various different sources and affix the same label to all of the meat that is processed. Retailers can use a Category B or C label when various combinations of Category A, B, and C meat are commingled during a single production day.

17. Even if a US processor did not take advantage of these flexibilities and chose to segregate or only accept one type of livestock, nothing in these measures would require them to favour US livestock. A processor could easily dedicate its processing line to Canadian or Mexican instead of US livestock and still efficiently comply with the COOL measures.

18. In conclusion, a slaughter house has a number of options available to it to comply with the COOL measures without segregating. The slaughter house may: (1) process cattle of exclusively domestic origin; (2) process cattle of exclusively foreign origin; (3) process domestic cattle and imported cattle during the same production day when producing muscle cuts; or (4) process cattle and meat of varying origins when producing ground meat.

19. While none of the COOL measures require segregation, Canada and Mexico argue that this practice is widespread and has had a detrimental impact on their products. Canada and Mexico also allege that several slaughter houses have been rejecting their livestock entirely.

20. As a threshold matter, it is not clear that what Canada and Mexico assert is accurate. In addition, the evidence they cite show that four of the five largest cattle packers and four of the five

largest swine packers are continuing to accept foreign cattle at some of their processing plants. Together, these plants have more than enough capacity to process all of Canada's and Mexico's exports. Canada's evidence also indicates that many producers are taking advantage of the law's flexibilities to continue processing domestic and foreign livestock without segregating.

21. Canada and Mexico also ignore the fact that certain US processors segregated their processing lines before the 2009 Final Rule was implemented. This pre-existing segregation undermines Canada's and Mexico's argument that the COOL measures have generated high costs of compliance for processors that handle their livestock by requiring them to segregate processing lines. It also demonstrates that individual market actors have reasons for segregating products that have nothing to do with the COOL measures.

22. In addition to incorrectly asserting that the COOL measures require segregation, Canada and Mexico argue that these measures "create incentives" for US industry to segregate, citing to the Appellate Body report in *Korea – Various Measures on Beef* to argue that this is sufficient to prove the measures afford less favourable treatment. However, *Korea – Various Measures on Beef* provides no support for this position. The measure at issue there created a dual retail system for domestic and foreign beef – thus, the measure itself imposed on retailers "the *legal* necessity of making a choice" between domestic and foreign products. By contrast, the complainants argue that the US law leads to a *commercial* necessity to segregate products. Indeed, the fact that some companies are not segregating demonstrates that it is not commercially necessary, and certainly not legally necessary. Processors can, and have been, accepting both types of meat, both in a segregated and non-segregated fashion.

23. Even if Canada and Mexico could prove that some producers began to segregate after adoption of the COOL measures, this does not establish less favourable treatment because this decision would have resulted from circumstances unrelated to these measures. Canada and Mexico both appear to acknowledge that any decision by US packers to change their production practices results in large part from the complaining parties' relatively small market shares.

24. Finally, the trade data does not support the conclusion that Canadian and Mexican livestock have been adversely impacted by the COOL measures. Canadian and Mexican cattle exports were close to their 10-year averages in 2009 and are expected to increase in 2010. Prices of Canadian and Mexican cattle are also expected to increase. Similarly, Canadian hog prices have been rising since late 2009. Although Canadian hog exports are still at low levels, this results from the significant restructuring of the industry, which has outweighed the positive momentum from other factors.

25. To the extent that economic conditions for Canadian and Mexican livestock were positive in 2008 and 2009, this results from factors unrelated to COOL. Canadian and Mexican cattle export volumes and prices have been influenced by the recession, feed costs, transportation costs, currency fluctuations, weather conditions, and animal diseases. The recent Canadian hog market conditions are consistent with the significant industry restructuring, the recession, falling inventories, high feed costs, currency fluctuations, and H1N1. A USDA analysis demonstrates that factors other than the 2009 Final Rule were responsible for the decline in Canadian exports of cattle and hogs to the United States in 2008 and 2009. In particular, USDA's analysis shows that the economic recession is more likely the cause of the temporary decline in imports than the 2009 Final Rule.

26. The studies cited by Canada and Mexico to demonstrate that market conditions in 2008 and 2009 would have been more favourable but for the implementation of the 2009 Final Rule are flawed. The Informa Report suffers from four key limitations: (1) non-transparent methodologies; (2) a failure to account for previously occurring segregation; (3) a failure to account for impact of flexibilities in 2009 Final Rule; and (4) implausible conclusions given market trends. The two models developed by

Professor Daniel Sumner are also flawed. Exhibit CDA-78 relies on the unsubstantiated and flawed results produced by the Informa Report. Likewise, Exhibit CDA-79 fails to account for key factors that drove North American livestock markets during this turbulent period, erroneously relies on the use of dummy variables to explain complex changes in U.S.-Canadian price differentials and US livestock imports, and makes other methodological errors.

27. Canada and Mexico's arguments about the COOL measures also ignore a fundamental reality of regulation: namely, that any time a government passes a new law or adopts a new technical regulation, it may impose significant compliance costs on industry or even impose a greater cost on some market participants versus others. This does not mean that the measure "modifies conditions of competition" so as to afford less favourable treatment. Rather, to the extent they exist, the "costs" identified by Canada and Mexico are at most simply transition and compliance costs – costs that typically arise whenever governments implement a new regulation.

28. Canada and Mexico additionally cite to alleged administrative and political "uncertainty" surrounding the adoption and implementation of the COOL measures. Incongruously, these objections appear to be directed at a the transparent nature of the US regulatory process, which provided multiple opportunities for stakeholder input, and changes that were made to take the input into account in developing the 2009 Final Rule. Indeed, Canada and Mexico point to nothing in the process that disadvantaged imported products over domestic products.

29. Finally, while the COOL Statute and 2009 Final Rule contain labelling requirements that "relate to" the labelling of beef and pork, they are not "in respect of" the labelling of livestock. Accordingly, the Panel need not conduct an inquiry into whether the COOL measures have resulted in less favourable treatment to Canadian and Mexican livestock because these measures do not apply in respect of these products.

30. The COOL measures are not inconsistent with Article 2.2 of the TBT Agreement. The United States adopted these measures to achieve the legitimate objective of providing consumer information, information that, among other things, helps prevent consumer confusion related to the use of USDA grade labels. Further, the COOL measures were carefully constructed and modified during the legislative and regulatory processes to ensure that they were not more trade restrictive than necessary to achieve their objective.

31. To determine the objective of the COOL measures, the Panel should begin with their text and should consider their "design, architecture, and revealing structure". The 2009 Final Rule's text makes clear that its objective is to provide consumers with information about the food that they buy at the retail level. A number of aspects of the measures' design and structure confirm this purpose. For meat, Congress determined that retailers should provide consumers with information about the country in which the animal from which the meat is derived was slaughtered and about where that animal was born and raised if that animal was slaughtered in the United States. Congress determined that this was necessary to reduce the likelihood that consumers would be confused about the origin of the meat in instances where the animal was slaughtered in the United States. In the absence of this requirement, meat from livestock that spent its entire life outside of the United States and was only present in the United States for a short time before slaughter could still be labelled as a US product. Reading the label, a consumer could reasonably assume that the meat they purchased came from a cow that had spent most of its life within the United States. At the same time, this product would also carry a USDA grade label, which would further reinforce the erroneous impression that the meat was derived from a "US" animal. The objective of the COOL measures is also evident in other elements of their design, such as record keeping requirements and fines to ensure the consumer receives accurate origin information.

32. The coverage of commodities under the COOL measures does not support the conclusion that their objective is not consumer information. The COOL measures cover products that make up more than 90 per cent of the meat products consumed by Americans and require that all fruits and vegetables sold at the retail level be labelled. The fact that a measure does not cover every conceivable product within a sector for which the pursuit of the same objective would be legitimate is not evidence that the measure is protectionist any more than the fact that a Member had adopted labelling requirements for one sector but not another. Indeed, the fact that the COOL measures encompass much more than beef and pork argues against a finding that their intent is protectionism for the livestock sector.

33. Canada and Mexico argue that COOL's protectionist intent is evidenced by the fact that the covered commodities are more likely to face import competition than those not covered. However, in making this argument, Canada and Mexico overlook the obvious – that if a measure's objective is to provide consumers with information about where the food they buy comes from, that information is the most valuable precisely when consumers have the option of choosing among a mix of domestic and imported options. If there was no import competition for a particular product, there is less imperative to require an origin label because it is less likely to provide any additional information to the consumer or help clear up consumer confusion.

34. Putting this aside, the data that Canada and Mexico cite are misleading. With regard to omitted commodities, Canada appears to cite only the import statistics that support its theory while ignoring those that do not. And even within covered commodities, no pattern is discernable. Some covered commodities face significant competition while other commodities do not.

35. Congress' decisions to only apply the requirements to retailers who sell fresh fruits and vegetables in excess of $230,000 and to exempt certain processed foods were also not irrational or motivated by protectionism. Rather, these decisions were made to help reduce compliance costs for both foreign and domestic producers.

36. Finally, Mexico's argument that the COOL measures were adopted for a protectionist purpose because the United States already had other consumer information measures in place does not withstand scrutiny. First, these requirements did not ensure that consumers had accurate information about certain food products at the retail level, including meat. Second, there is nothing inherently protectionist about adopting more than one measure to achieve the same objective. Third, the existing FSIS label pre-approval program by which packers and processors could apply for approval to use a "Product of the U.S.A." label was a voluntary program that did not ensure that consumers received adequate information about the majority of the agricultural products they buy.

37. Canada and Mexico also base their allegations of a "protectionist" intent for the COOL measures on a handful of statements of individual groups and legislators. In relying on these statements, Mexico and Canada vastly oversimplify the domestic policy debate surrounding COOL in the United States and ignore the large assortment of interested parties that participated in the multi-year legislative and regulatory process, while attempting to divine the intent of the measures at issue from an arbitrary selection of participants rather than the text itself.

38. First, the US meat industry *opposed* the inclusion of beef and pork as covered commodities under the statute. Thus, to the extent that Canada and Mexico suggest that the coverage of the statute reflects the protectionist desires of US industry as a whole, they are simply incorrect. Second, the principal sponsors of the legislation repeatedly referred to the desire for consumer information as the objective of the legislation. Third, Canada and Mexico ignore the hundreds of comments received during the rule making process by numerous consumers and consumer groups in unanimous support of the measures.

39. Article 2.2 interpreted in the context of the TBT Agreement preamble leaves each Member to decide on which legitimate objectives it wishes to pursue and the level at which it seeks to pursue them. TBT Article 2.2 contains a non-exhaustive list of legitimate objectives, as confirmed by the use of the term "*inter alia*". The text reflects that objectives other than those expressly listed in Article 2.2 may be "legitimate.". Further, one of the specifically enumerated legitimate objectives is "the prevention of deceptive practices," which is closely related to consumer information.

40. Neither Canada nor Mexico assert that consumer information cannot constitute a legitimate objective. Canada does not deny that providing consumer information is a legitimate objective and Mexico's arguments do not withstand scrutiny. To the extent that Mexico suggests that consumer information is never a legitimate objective when the information supplied pertains to origin, it would appear to call into question all mandatory country of origin labelling systems maintained by Members, including its own programs. Further, to the extent Mexico is asserting that the information required by the COOL measures can be distinguished from that required under other origin labelling programs, it offers no meaningful basis on which to draw such a distinction.

41. The adoption of the COOL measures has also "fulfilled" the US objective by providing millions of US consumers with information about the origin of the products they buy at the retail level when this information was not previously available. Although the COOL measures do not cover every conceivable scenario in which a consumer buys food, this does not mean that they do not fulfil their objective. After all, Article 2.2 does not require that a Member pursue an objective to the maximum possible degree without regard to costs or other considerations. In fact, when designing the COOL measures, Congress and USDA had to balance competing interests. On one hand, they sought to design measures that provided as much information to consumers as possible regarding origin. On the other hand, they wanted to ensure that the cost of compliance with these measures would not place too large a burden on foreign or domestic producers or retailers. As a result, Congress and USDA provided a range of flexibilities and exceptions to reduce compliance costs without jeopardizing the larger objective.

42. While Canada and Mexico assert that the meat labels prescribed by the COOL measures are "confusing" and cannot be viewed as fulfilling a consumer information objective, they have provided no evidence demonstrating that the current labelling scheme has caused or will cause any consumer confusion. To the contrary, COOL's labelling of meat reflects the facts about these products' origin much more accurately than the labels previously available to consumers.

43. Article 2.2 of the TBT Agreement provides that technical regulations shall not be "more trade-restrictive than necessary" to fulfil a legitimate objective. Based on the ordinary meaning of Article 2.2, and its relevant context, in order for a WTO Member to show that another government's technical regulation is more trade restrictive than necessary for purposes of the second sentence of TBT Article 2.2, the complaining member must show that, first, there is another measure that is reasonably available to the government. Second, that measure must fulfil the government's legitimate objectives. Finally, the measure must be *significantly* less restrictive to trade.

44. Both Canada and Mexico suggest that the United States adopt a voluntary labelling program. A voluntary labelling program fails to fulfil the objective of providing consumers with country of origin information on a wide range of products sold at the retail level. Indeed, before implementing mandatory country of origin labelling requirements for meat, the United States tried this option without success. The primary problem with voluntary labelling is that many businesses will not voluntarily make the choice to label their products with origin information when given the option.

45. Canada and Mexico also suggest that the United States adopt a meat labelling system based on substantial transformation. This alternative would not fulfil the US objective because it would not

provide consumers with information about where the various processing steps took place. The United States has determined that this must be a key part of any labelling regime due to the consumer confusion related to products that have been imported for immediate slaughter. Indeed, consumers do not expect meat derived from an animal that spent its entire life in a foreign country before coming into the United States for a very short period of time before it is slaughtered to be labelled US origin. Similarly, for animals that spend significant periods of their lives in both the United States and a foreign country, a US origin label does not provide complete information. As a result, consumers would have incomplete and misleading information, and significantly less information than under the system provided for by the COOL measures.

46. The COOL measures are not inconsistent with TBT Article 2.4. Mexico argues that they are inconsistent with this provision because they are not based on CODEX-STAN 1-1985. To constitute an international standard, the standard must be adopted by a body whose membership is open to the relevant bodies of all Members and is based on consensus. It is possible that CODEX-STAN 1-1985 may qualify as such, but Mexico bears the burden of demonstrating that this is the case.

47. Even assuming *arguendo* that CODEX-STAN 1-1985 is a "relevant international standard" and that the United States did not base the COOL measures on it, Mexico's claim fails because, insofar as this standard addresses the provision of country of origin information of a product based on a substantial transformation rule, it would fail to fulfil the legitimate objective pursued by the United States of providing consumer information and thus would be an ineffective and inappropriate means of fulfilling the objective of the COOL measures.

48. To the extent that CODEX-STAN 1-1985 addresses providing country of origin information based on a substantial transformation rule for all products, it would not provide meaningful information to consumers about the origin of the products at issue in this dispute. With respect to meat, a substantial transformation rule would mean that meat from a cow born and raised in Canada or Mexico would be labelled as a product of the United States simply because it was transported across the border for a single day to be slaughtered. This renders the rule "ineffective" because it does not have the function of accomplishing the legitimate objective pursued. Nor is a substantial transformation rule "appropriate," as the type of information provided is in some cases misleading.

49. The COOL measures are not inconsistent with Articles 12.1 and 12.3 of the TBT agreement. Mexico does not argue that the United States has independently breached Article 12.1; rather its argument appears to rest on the premise that the United States has acted inconsistently with TBT Article 12.3, and as a result, also acted inconsistently with Article 12.1.

50. To establish a violation of Article 12.3, the complaining party must demonstrate that: (1) it is a developing country; (2) the other Member did not take account of its special development, financial or trade needs during the preparation and application of a technical regulation; and (3) that the Member did not take account of these needs *with a view* to ensuring that the technical regulation does not create unnecessary obstacles to export.

51. Mexico has failed to meets its burden to prove any of these elements. Even assuming *arguendo* that Mexico is a developing country, Mexico has not demonstrated that the United States did not take account of one or more special needs of Mexico in the preparation and application of the COOL measures. To the contrary, the United States offered Mexico numerous opportunities to formally comment on the development of the regulations and held meetings with Mexico to discuss the rule making. In addition, changes to the COOL measures are consistent with suggestions provided by Mexico during the regulatory process on ways to minimize their impact on trade and to facilitate compliance with the labelling requirements contained therein.

52. Moreover, Mexico's argument that the United States has violated Article 12.3 because the COOL measures have created an unnecessary obstacle to trade applies the wrong legal standard. TBT Article 12.3 requires that Members take account of the needs of developing country Members in the "preparation and application" of a measure, "*with a view*" to ensuring that these measures do not create unnecessary obstacles to trade. This means that Members must consider the special needs of developing countries when developing their technical regulations with the goal of ensuring that their technical regulations do not constitute unnecessary obstacles to trade, which the United States has done. Article 12.3 does not actually prohibit the creation of unnecessary obstacles to trade. That obligation is set out in Article 2.2 of the TBT Agreement, and as demonstrated, the COOL Statute and Final Rule are not inconsistent with that obligation.

IV. THE COOL MEASURES ARE NOT INCONSISTENT WITH GATT 1994

53. The COOL measures are not inconsistent with GATT Article III:4. To demonstrate that a Member has acted inconsistently with Article III:4, a complaining party must establish three elements: (1) the imported and domestic products are "like products"; (2) the measure in question is a "law, regulation, or requirement" that affects the "internal sale, offering for sale, purchase, transportation, distribution, or use" of the imported products; and (3) the imported products are accorded "less favourable" treatment than "like" domestic products. Canada and Mexico's arguments fail to satisfy these elements.

54. Canada and Mexico have not demonstrated that Canadian and Mexican livestock are like products with US livestock under GATT Article III:4. Further, the complaining parties have not even made a case with regard to beef or pork.

55. Secretary Vilsack's Letter to industry representatives is not a "law, regulation, or requirement" affecting the internal sale, offering for sale, purchase, distribution and use of imported livestock or beef and pork within the meaning of GATT Article III:4, nor do Canada and Mexico explain why they consider the Vilsack Letter to qualify as such. The letter is plainly not a "law" or "regulation". Nor is it a "requirement". The industry is not "legally bound" to carry out the Vilsack Letter's suggestions, which by their terms are voluntary. In addition, the Vilsack Letter does not include suggestions that companies may "voluntarily accept in order to obtain an advantage from the government". Canada and Mexico claim that the industry would benefit by "not being subjected to possibly stricter and more extensive regulation in the future". However, the letter does not contain a commitment not to regulate, nor does the Secretary have legal authority to prevent Congress (or a future Secretary) from modifying the labelling requirements or requiring additional regulations.

56. Canada and Mexico have also failed to demonstrate that the statute and 2009 Final Rule treat their livestock less favourably than US livestock. The United States will not repeat its arguments on this point that were already made in the context of TBT Article 2.1.

57. The COOL measures are not inconsistent with Article X:3(a) of GATT 1994. Canada's entire Article X claim rests on its allegation that the Vilsack Letter constitutes an unreasonable administration of the COOL laws because the letter allegedly "threatened" US companies and persons who did not go beyond the terms of the statute and 2009 Final Rule and "voluntarily" take certain actions. Mexico makes a similar argument that the administration of the COOL measures is non-uniform and unreasonable because the Vilsack Letter led to uncertainties regarding the administration of the measures.

58. The Vilsack Letter does not fall within the scope of Article X:3(a). Article X:3(a) applies to the manner in which WTO Members "administer" their laws, regulations, decisions and rulings referred to in paragraph 1. The Appellate Body has interpreted the term "administer" to mean "putting

into practical effect" or "applying" those measures enumerated in paragraph 1 of Article X. The Vilsack Letter does not "apply" to the COOL measures or put them into "practical effect".

59. Mexico alleges that the administration of the COOL measures has been non-uniform because of changes to the rule over time. Even assuming *arguendo* that the Vilsack Letter falls within the scope of Article X:3(a), Mexico has not provided evidence to demonstrate that the statute or 2009 Final Rule has been administered in a way that affected persons similarly situated in a non-uniform manner. At all times the United States has maintained a single set of regulations implementing the COOL Statute, and these regulations have been administered in a uniform fashion.

60. Canada and Mexico have also failed to establish that the COOL measures are being administered in an unreasonable fashion. Indeed, Canada and Mexico have not presented evidence establishing behaviour by USDA in administering the COOL measures that has been unreasonable in any sense. First, because the Vilsack Letter does not administer the COOL measures, the complainants are wrong to argue that the Vilsack Letter is an "unreasonable" administration of those measures. Second, Mexico has adduced no evidence to suggest that any decisions made regarding the implementing regulations as they evolved through the process were "irrational" or "absurd".

V. THE COOL MEASURES DO NOT NULLIFY OR IMPAIR THE BENEFITS ACCRUING TO CANADA AND MEXICO UNDER THE WTO AGREEMENTS

61. Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the GATT 1994; and (3) nullification or impairment of the benefit as a result of the application of the measure.

62. Canada and Mexico bear the burden of proof of demonstrating that their benefits are being nullified or impaired and must "provid[e] a detailed justification" for their non-violation claims. Canada and Mexico also bear the burden of proving that the US measures could not have been reasonably anticipated at the time the relevant tariff concessions were negotiated and that the challenged measures have directly upset the competitive relationship between domestic and imported products which existed as a consequence of the relevant tariff concessions. Canada and Mexico's cursory treatment of these elements fails to establish even a prima facie case that the COOL measures have nullified or impaired any legitimate expectations that they fairly held.

63. First, neither Canada nor Mexico explains how a tariff benefit accruing to them directly or indirectly under the GATT 1994 is being nullified or impaired when their trade is not, in fact, relying on a tariff concession under the GATT 1994: each concede that it is a tariff concession under the NAFTA that provides them with market access. Second, Canada and Mexico assert, without support, that they are entitled to expect market access to the United States for their live cattle (and, for Canada, live hogs) that are related to the tariff concessions "that would apply, on an MFN basis ... under the WTO Agreement". Even assuming *arguendo* that this claim can proceed, neither Canada nor Mexico specifically identify which tariff concession incorporated into the GATT 1994 allegedly gives rise to the benefits that they claim have been nullified or impaired.

64. Second, Canada and Mexico have not demonstrated that they could not have reasonably anticipated the COOL measures at the time the tariff concessions were negotiated. Indeed, many US goods have been required to be labelled with origin information at the retail level since 1930, decades before the conclusion of the Uruguay Round or the NAFTA. In addition, the US Congress has long contemplated various pieces of legislation that would require additional labelling requirements for meat. Finally, many other WTO Members have required country of origin labelling for various products (including meat) for many years. Accordingly, Canada and Mexico should have reasonably

anticipated that the United States would maintain some kind of origin labelling on meat products when the tariff rates were negotiated.

65. Canada and Mexico have also failed to demonstrate that the benefits provided to their imported livestock under the relevant tariff concessions have been nullified or impaired by proving "a clear correlation" that the COOL measures have upset the competitive relationship between domestic and imported livestock in the United States to the detriment of imports. Other than submitting flawed and unverifiable economic models, Canada and Mexico have provided no evidence in their submissions to prove that COOL measures have negatively impacted imported livestock as a whole greater than domestic livestock or that such effects are clearly correlated to the COOL measures themselves rather than attributable to independent market forces.

VI. CONCLUSION

66. For the foregoing reasons, the United States respectfully requests that the Panel reject the claims made by Canada and Mexico in their entirety.

ANNEX B

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX B-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CANADA

I. INTRODUCTION

1. The United States has challenged few of Canada's legal arguments or evidence in this case. Where the United States has, it has done so in a cursory way. That is particularly the case regarding Canada's claims of discrimination under GATT Article III:4 and TBT Article 2.1, where the United States has made only bare assertions to counter the wealth of Canadian and Mexican evidence of discrimination.

2. Canada therefore takes this opportunity to review its key claims and arguments and, to the extent that it has not yet done so, to address arguments and evidence put forward by the United States.

II. TBT ARTICLE 2.1/GATT ARTICLE III:4

A. INTRODUCTION

3. TBT Article 2.1 and GATT Article III:4 prohibit the United States from according less favourable treatment to Canadian-born livestock by changing the conditions of competition to the detriment of that livestock in the US market. The inconsistency of the COOL measure with these obligations is at the heart of the dispute: discrimination against Canadian-born livestock, which was the fundamental reason for Canada to bring this case.

B. US LEGAL ARGUMENTS TO JUSTIFY A VIOLATION OF TBT ARTICLE 2.1 ARE WITHOUT MERIT.

4. In its defence, the United States tries to argue that since it endeavoured to consult with industry in developing the COOL measure and, after doing so, made certain accommodations in the measure to address industry concerns, there is no violation of Article 2.1 of the TBT Agreement. It also suggests that all technical regulations result in costs and benefits that are not always spread evenly among market actors. Even if these points are valid, TBT Article 2.1 still requires that technical regulations do not accord less favourable treatment to imported products.

5. In the context of its argument that all regulations cause costs and benefits that are not always evenly spread, the United States explicitly refers to the OECD Checklist for Regulatory Decision Making. This document does not support the assertion of the United States that the COOL measure is consistent with its national treatment obligation: it only provides guidelines for OECD members to consider when developing regulations; there is no reference in the Checklist to trade effects or discrimination on imports; and in any case the United States has not claimed that it followed the Checklist. There is nothing in TBT Article 2.1 or GATT Article III:4 that justifies a measure that would otherwise violate those provisions because a certain approach was taken to regulatory decision-making.

6. The United States argues that the national treatment obligation under TBT Article 2.1 does not apply to products not explicitly covered by a technical regulation, contending that "less favourable treatment" accorded to Canadian-born cattle and hogs would not be "in respect of" the COOL measure because the measure applies only to beef and pork. That argument is flawed. First, the COOL measure applies to livestock and thus is "in respect of" livestock because it requires tracking, which in practical terms requires segregation of both livestock and the resulting meat. Second, TBT Article 2.1 requires that WTO Members shall ensure national treatment is accorded to imported products. The

words "in respect of" refer to the technical regulations, not the products that are the subject of the discrimination claim. If the United States' interpretation were accepted, a WTO Member would be free under TBT Article 2.1 (but not GATT Article III:4) to discriminate against imported products that are the contents, inputs or ingredients of a final product as long as the technical regulation did not discriminate against the final product on the basis of origin.

7. The United States argues that the words "in respect of" in TBT Article 2.1 require a WTO Member to ensure that no less favourable treatment of like products only when the treatment can be directly attributed to a Member. A WTO Member cannot divorce itself from the response by industry to its technical regulation. The actions of private actors can be attributed to the WTO Member, particularly where a measure creates incentives for those actors to act in such a manner that has adverse effects on the conditions of competition. Having imposed the COOL measure, the US government is more than sufficiently involved in the industry's response to be held responsible for the resulting violation of TBT Article 2.1.

C. Measures of other WTO Members are not at issue in this dispute, and in any event do not assist the United States in justifying the COOL measure.

8. The United States has referred to a number of WTO Members that maintain country-of-origin labelling measures. Those measures are not relevant to this dispute for a number of reasons: they are not at issue in this dispute; they do not make the COOL measure any less inconsistent with the WTO Agreement; and Canada does not contend that country-of-origin labelling generally violates the WTO Agreement.

9. In any case, those other measures are not similar to the COOL measure in a number of significant ways: none of them explicitly deals with meat obtained from livestock slaughtered within the territory of the WTO Member; many of the measures recognize substantial transformation as conferring origin; most of the measures cited refer to labelling of pre-packaged foods; many do not have the objective of providing information to consumers; and some of the measures relate to voluntary labelling. Even if those measures were similar to the COOL measure, these can only be legally relevant if they collectively represent a "concordant, common and consistent" sequence of acts or pronouncements implying the agreement of the WTO Members regarding an interpretation of the WTO Agreements, which they do not.

D. Limited pre-existing segregation and certain flexibilities in the COOL measure do not prevent the COOL measure from causing discriminatory treatment to Canadian livestock.

10. The United States has asserted that the US industry has not changed its practices because of the COOL measure due to pre-existing segregation practices; and that there is flexibility in the design and architecture of the COOL measure. That is not correct.

11. The limited segregation prior to the COOL measure was not for origin, but principally for premium programs concerning meat quality. The voluntary pre-existing segregation under those programs to meet the limited demand for such products did not have the effect of lowering the widespread segregation costs of the COOL measure. To participate in such programs, the vast majority of which apply only to beef (not pork), US slaughter houses absorbed the costs of operation, including the costs of segregation, in order to obtain the price premium associated with meat products labelled as meeting a particular program's criteria. Similarly, the voluntary USDA carcass grading program identifies the quality of beef produced from a particular animal and does not require plants to segregate their slaughter animals. There is no grade labelling for pork.

12. There was very limited pre-COOL segregation for export, again principally for beef: total beef exports account for just 6.4% of US production, and of that well over half goes to countries that do not limit imports based on the origin of livestock. Where origin is an issue, it is based on a number of factors that vary by destination, and importantly, the cuts from those animals which are not exported under the Export Verification (EV) Program move seamlessly into the US domestic supply chain. The EV programs are voluntary, with slaughter houses participating when the premium derived from the export sale is greater than the cost to comply with the EV program.

13. US industry was also engaged in segregation by origin for the domestic market on a limited basis whenever it decided to participate in any voluntary country-of-origin labelling programs. Again, slaughter houses were willing to absorb the costs of segregation but only to the extent that the premium available for these origin-label products exceeded those costs.

14. Finally, the US position that the COOL measure does not require segregation or did not force US industry to alter its pre-existing segregation practices is directly contrary to the extensive unchallenged evidence that the COOL measure caused slaughter houses to terminate or limit their acceptance of Canadian-born livestock.

15. The United States asserts that there is some flexibility in the Final Rule that allows implementation of the COOL measure at lower cost than if the COOL measure had been less flexible. Any such flexibility is without legal significance. There is no flexibility in the requirement that all beef and pork, being "covered commodities" subject to the COOL measure, must be labelled by covered retailers. Any flexibility in the COOL measure does not apply to Label "A".

E. FLAWS IN THE US CRITIQUE OF CANADA'S ECONOMETRIC ANALYSIS AND ECONOMIC DATA

16. Contrary to the assertion of the United States, Dr. Sumner's analysis and the Informa Report took into account pre-existing costs of segregation, whether for health and safety reasons or otherwise. Dr. Sumner's statistical analysis shows that the COOL measure caused specific reductions in the Canadian price of fed cattle compared to US fed cattle and reductions in US imports of Canadian fed and feeder cattle, slaughter hogs and feeder pigs relative to the use of domestic animals.

17. The United States has offered monthly trade data to challenge Dr. Sumner's economic analysis. The United States bases its statistical analysis on monthly data, despite the ready availability of weekly data from the US Animal and Plant Health and Inspection Service (US-APHIS) for cattle imports as used by Dr. Sumner. By only using monthly observations rather than the weekly data from the US-APHIS, the United States reduces the size of the available data set and reduces the precision with which the effects of the COOL measure may be measured. In contrast, by using additional weekly observations, Dr. Sumner improves the ability to test hypotheses and measure effects with precision. There is no bias in the weekly data. As a result, Dr. Sumner's analysis based on these data is superior.

18. Contrary to what the United States asserts, changes in export numbers do not change the fundamental point that the COOL measure continues to impose differential discriminatory burdens on imports of Canadian-born livestock. The chart prepared by the United States in answer to Panel Question 50 is consistent with the weekly data available from the US APHIS which Canada uses, and as a result does not serve to disprove any of Canada's economic data or econometric analysis.

III. THE COOL MEASURE VIOLATES TBT ARTICLE 2.2.

19. As Canada indicated in its response to Panel Questions, the proper interpretation of a technical regulation's compliance with this Article requires a five-step test:

- Determine if the technical regulation restricts international trade. If it does not, the measure cannot violate Article 2.2.

- Identify the objective of the technical regulation.

- Determine if it the objective of the technical regulation is legitimate. If it is not, the technical regulation violates Article 2.2.

- Determine if the technical regulation, alone or in connection with other measures, fulfils the legitimate objective. If it does not do that, the technical regulation violates Article 2.2.

- Assess other alternative measures that would fulfil the legitimate objective in a less trade-restrictive way, "taking into account the risks non-fulfilment would create". If there are such alternative measures, the technical regulation violates Article 2.2.

20. Applying the elements of that test shows that the COOL measure violates TBT Article 2.2 in each of steps 3, 4, and 5 of the test.

A. THE COOL MEASURE RESTRICTS INTERNATIONAL TRADE.

21. If a technical regulation imposes any restriction on international trade, it meets the first element of the test. There is abundant unchallenged evidence that the COOL measure has restricted international trade by reducing the ability of Canadian-born livestock to be exported to the United States.

B. THE OBJECTIVE OF THE COOL MEASURE IS PROTECTIONISM.

22. The Panel should determine the objective of a measure. This determination should focus on the "design, the architecture and the structure" of that measure, not the text of the measure. That focus should be supplemented as necessary with additional information to determine the objective of the measure, including its legislative history. If the objective of a measure is one that is explicitly listed in TBT Article 2.2, then it is not necessary to provide more precision in defining the objective. If the measure's objective is not specifically listed in TBT Article 2.2, then it is necessary to define the objective with an appropriate level of specificity, which in this instance needs to be high, because "consumer information" as an objective can be for both legitimate and illegitimate purposes.

23. The design, architecture and the structure of the COOL measure show that the measure's objective is not to provide consumer information but rather to provide protection to US producers of cattle and hogs. That is evident in the special rules and reporting requirements applied to imported livestock that do not apply to other covered commodities; the selection of covered commodities itself; and the very limited information provided by the COOL measure.

24. The protectionist objective of the COOL measure is confirmed by other evidence showing that the intent of the makers of the measure was to economically help US farmers and ranchers: its introduction in the 2002 Farm Bill (not with a package of other consumer information measures); statements made by the principal architect of the COOL provisions in the Farm Bill in connection with its introduction in the US Senate; and the interventions reflecting producer interests in its support.

25. The United States has highlighted a letter submitted during the legislative process by a number of consumer groups. But that letter, which itself discloses protectionist interests as part of its motivation, is the only one included in the Congressional Record from consumer groups. All the

other letters come from producer groups. The three other pieces of secondary evidence presented by the United States deal mostly with country-of-origin labelling generally; wrongly suggest the COOL measure will assist in enhancing food safety; focus on issues not addressed in the COOL measure; and focus on protectionist purposes.

26. Although the United States has conceded that the COOL measure was not enacted in direct response to deceptive practices, it has more recently asserted that the objective of the COOL measure is related to deceptive practices because of consumer confusion. The design, architecture, and structure of the COOL measure do not support a finding that the objective is to counter consumer confusion, much less deception. Nor does legislative history or related context reveal an objective to counter confusion. Further, even if there was evidence of consumers being deceived by the USDA grading stamp, the appropriate solution would have been to refine the USDA grading program to address that confusion. The United States cannot use confusion caused by its own voluntary programs to justify the COOL measure.

C. THE OBJECTIVE OF THE COOL MEASURE IS NOT LEGITIMATE WITHIN THE MEANING OF TBT ARTICLE 2.2.

27. Since the alleged objective of the COOL measure is not specifically listed, the United States must prove that the COOL objective is legitimate. This requires clear and compelling evidence of legitimacy, including evidence of a wider intent to implement a particular policy goal.

28. The general term of "inter alia" followed by specific terms means that the general term is limited to the type of items listed in the specific terms (a principle often referred to by the Latin term ejusdem generis). The list of specific legitimate objectives in Article 2.2 are all important objectives recognized elsewhere in exceptions in the covered agreements: national security requirements; protection of human health or safety, animal or plant life or health; protection of the environment; and the prevention of deceptive practices. It would therefore be reasonable to conclude that the type of items listed in the specific terms covers objectives set out as general exceptions or other similar situations in the covered agreements. Even if the Panel finds that the objective of the COOL measure is not to provide protection to US livestock producers but to "provide information to consumers", this is not an objective of the type listed in TBT Article 2.2. "Consumer information" is a broad term. It is therefore particularly important to define the objective with more precision for the analysis under TBT Article 2.2. Any specific definition of the objective is either not legitimate (providing information to consumers is to encourage them to favour US domestic producers of livestock over foreign competitors), or not an objective addressed by the COOL measure (health and safety, environment).

D. IF THE OBJECTIVE OF THE COOL MEASURE IS LEGITIMATE, IT DOES NOT FULFIL THAT OBJECTIVE.

29. Even if the Panel rejects Canada's position and determines that providing "consumer information" is a legitimate objective, the COOL measure does not fulfil its objective. In order to fulfil that objective, the COOL measure must provide clear and accurate information to consumers. If not, the consumers are given misinformation. Most consumers do not understand the subtle differences between Label "A", "B", and "C" meat. Even if a consumer did understand the intricate difference between Label "A", "B", and "C", because of the way the COOL measure operates, it provides virtually no useful information.

30. In order to fulfil the objective of providing consumers with information, the information must provide consumers with information that is desired by them, or at least information on which they are willing to act. The COOL measure provides information that US consumers generally are not interested in knowing and it is therefore not meaningful. The vast majority of consumers express no

interest in country-of-origin labelling, even at a general level, much less in the kind of information required to be provided by the COOL measure.

E. OTHER ALTERNATIVE MEASURES WOULD FULFIL ANY LEGITIMATE OBJECTIVE OF THE COOL MEASURE IN A LESS TRADE-RESTRICTIVE WAY, "TAKING ACCOUNT OF THE RISKS NON-FULFILMENT WOULD CREATE".

31. TBT Article 2.2 requires an assessment of another less trade-restrictive alternative measure against the challenged technical regulation. An assessment of the risks non-fulfilment would create requires a consideration of both the type of risk and the importance of legitimate objective. A challenged technical regulation, the objective of which is very important, is easier to justify than a technical regulation that addresses a less important objective. Technical regulations that discriminate against imports cannot be justified when the objective could be fulfilled in other, less trade-restrictive ways. That is particularly the case when the risks created by the failure to fulfil the objective are low. It is also important here where the COOL measure requires distinctions with discriminatory effects that are not based on neutral technical criteria but based on origin.

32. The United States has suggested that the test for an alternative measure is rather whether it meets a WTO Member's objective "at the level [it] deems appropriate while also being significantly less restrictive to trade". The suggestion that the level is that "deemed appropriate" by a WTO Member is misplaced because it relies on text found in SPS Article 5.6 that is not in TBT Article 2.2, and text in the preamble to the TBT Agreement that can only be useful as an aid to interpretation, and in any case, applies only to a closed list of objectives. The argument that alternative measures must be "significantly" less trade-restrictive lacks merit because that language is not found in the text of the Agreement, and the 1993 letter submitted by the United States in support demonstrates that an attempt by the United States to include that test for a closed list of objectives was rejected by other WTO Members.

33. Even if the test is to meet an objective at a level that a WTO Member considers appropriate, the determination of that level has to involve an objective assessment of what level of protection the challenged technical regulation actually provides. Because the COOL measure provides information that is neither accurate nor meaningful, the "level" of protection established by the United States for providing information to consumers is also very low. Consequently, non-fulfilment of that objective would pose few risks.

34. A legitimate objective that the COOL measure fulfils would have to bear some relation to informing consumers where the livestock used to produce the meat they are purchasing was born, raised, and slaughtered. The COOL measure fails to fulfil any reasonably defined legitimate objective because it does not cover purchases at places such as restaurants, specialty stores that do not sell fruits and vegetables, and smaller grocery stores; it allows commingling; and it allows transformed meat (i.e., processed meats), but not livestock, to escape from the coverage of the COOL measure. Canada is not suggesting that if those limitations were removed, the COOL measure would be consistent with the WTO Agreement. Many of these limitations mitigate (but do not eliminate) the loss of competitive position (contrary to TBT Article 2.1 and GATT Article III:4) that would have been suffered by Canadian cattle and hogs in the US market if the COOL measure did not have those limitations. But those limitations are also indicia that the United States does not consider the risk of non-fulfilment of the objective of providing information to consumers to be very high since it is willing to accept non-fulfilment of that allegedly legitimate objective in a number of significant ways.

35. Voluntary labelling is a less trade-restrictive alternative that already exists and could be expanded or modified as required. Voluntary labelling provides interested consumers with information about where livestock is born, raised, and slaughtered. It can apply to all points of sale (so could include restaurants, small grocery stores, etc.) The segregation costs and other burdens

associated with providing that information would apply only to the livestock and resulting meat that is produced to satisfy that specialized market. Other livestock and resulting meat would remain free to be traded without facing the costs and burdens of a mandatory country-of-origin labelling measure.

36. Applying substantial transformation would also be significantly less trade- restrictive as there would be no need to track an animal and its meat throughout the supply chain. Mandatory labelling based on substantial transformation would provide consumers who want to know "where their meat comes from" with that information. They would get that: labelling of meat based on the state it arrives at the border, with transformation within the country serving to change the origin to the last place of transformation. As with voluntary labelling, it could also provide greater information to consumers by including additional points of sale. It would be less trade-restrictive as it would be much simpler to label meat, removing costly segregation costs on imported livestock.

IV. THE VILSACK LETTER

37. Canada disagrees with the United States' characterization of the Vilsack Letter as being non-binding and its suggestion that the letter was of a routine nature.

38. The Vilsack Letter is extraordinary because of its timing and circumstances, the position of the person who signed the letter, the public nature of the letter, the directions given to US industry, and the fact that the Secretary's directions were backed up by an explicit threat (to reopen the Final Rule if the directions contained in the letter were not complied with by the US industry).

39. The Vilsack Letter was not a routine letter. There were multiple instances in which the new Administration reviewed pending regulations that were issued in the final days of the previous Administration. None of these resulted in a letter like that from Secretary Vilsack.

40. The Vilsack Letter expressed concern about "the regulation's treatment of product from multiple countries" and in that regard urged point–of–production labelling of muscle cuts, rather than the use of the labels and corresponding designations provided for in the Final Rule. Secretary Vilsack's concern was able to be readily addressed by US industry shifting to the use of only livestock that were born, raised and slaughtered in the United States and by selling only meat derived from such livestock. This is what has happened in practice. Thereby the US industry avoids practices that potentially conflict with the directions of the Vilsack Letter. The shift by the US industry away from livestock born in Canada was demonstrated by Canada through witness statements and confirmed by economic and econometric analyses. This shift demonstrates compliance with the directions of Secretary Vilsack.

41. Regardless of the legal status of the Vilsack Letter in US law, the Panel should characterize the directions in the Vilsack Letter as "mandatory", within the meaning of the TBT Agreement. In this respect the Panel should take into account the threat in the letter to reopen the Final Rule following a review of compliance by US industry with the directions contained in the letter as well the reference in the letter to the "intent of Congress". These factors lead to the conclusion that the directions in the Letter are mandatory.

V. ARTICLE X:3(A) OF GATT 1994

42. Canada's claim under GATT Article X:3(a) concerns the unreasonable administration by the United States Government, through the Vilsack Letter, of the Final Rule and the underlying statutory COOL provisions.

43. The Vilsack letter is being complied with through a shift by US industry away from Canadian-born livestock and is thus a form of enforcing the Final Rule and the underlying statutory COOL provisions.

44. The Vilsack Letter is an unreasonable manner of administering and enforcing the Final Rule and the underlying COOL legislation because the Letter addresses the implementation of the Final Rule, and at the same time adds further rules, while invoking the intent of Congress and threatening to reopen the provisions of the Final Rule. This amounts to regulation-making by the government of the United States through a public letter addressed to US industry. Its is an unreasonable manner of administering the Final Rule and the underlying COOL legislation, in contravention of GATT Article X:3(a).

VI. GATT ARTICLE XXIII:1(B)

45. In relation to Canada's claim under GATT Article XXIII:1(b), Canada clarified that its claim is based on the tariff concessions granted by the United States in its MFN tariff schedule that was negotiated in the Uruguay Round.

46. The current MFN rate of the United States for cattle, other than cattle for dairy or breeding, is US $ 0.01 per kilogram, in accordance with the bound rate of duty of US $ 0.01 per kilogram in the US MFN tariff. As to hogs, the same MFN tariff schedule of the United States ensures duty-free imports of hogs into the United States; this pre-dates the WTO Agreement (and even the Canada-United States Free Trade Agreement, of 1988, and the NAFTA, of 1992).

VII. CONCLUSION

47. Canada respectfully requests that the Panel find that the COOL measure of the United States is inconsistent with its obligations under the TBT Agreement, in particular Articles 2.1 and 2.2; and with its obligations under the GATT 1994, in particular Articles III:4, X:3(a) and XXIII:1(b); and that the Panel recommend that the United States bring the COOL measure into conformity with these obligations, subject to the provision of Article 26.1 of the DSU in respect of GATT Article XXIII:1(b).

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF MEXICO

I. INTRODUCTION

1. This dispute concerns a particularly egregious type of country of origin labelling measure as it applies to specific facts and circumstances. Mexico's case is not a broad challenge to country of origin labelling. Mexico's case highlights that country of origin labelling measures are subject to the application of the disciplines in the WTO Agreements and are permissible only when they are in compliance with those disciplines.

2. In its first written submission, Mexico established a prima facie case with respect to each of the elements of its claims in respect of the COOL measure and the United States has failed to rebut that case.

3. The design, structure and application of the COOL measure, in respect of muscle cuts of beef and ground beef, unjustifiably discriminates against and restrict imports of Mexican cattle into the United States. Prior to the COOL measure, Mexican cattle were processed throughout the United States at various packing plants without the need for segregation by origin. The COOL measure changed this. Mexican cattle are now segregated from US cattle and processed at a limited number of packing plants, during a limited number of days and subject to additional conditions such as advance notification. Not only has this reduced the packing plants and processing opportunities available to Mexican cattle, it has reduced the feedlots and backgrounders that are willing to take Mexican cattle. This adverse change in the conditions of competition is a direct result of the COOL measure. It is clear from the case presented by Mexico that the purpose and effect of COOL measure is to protect the US cattle industry against competition with Mexican like products – live cattle.

4. On the basis of the argument and evidence presented by Mexico, it requests that the Panel find that the COOL measure is inconsistent with Articles III:4, X:3 and XXIII:1(b) of the GATT 1994 and Articles 2.1, 2.2, 2.4 and 12 of the TBT Agreement and make such recommendations that are necessary for the United States to bring itself into conformity with these provisions.

II. THE MEASURE AT ISSUE

A. THE COOL MEASURE IS DISTINGUISHABLE FROM OTHER COUNTRY OF ORIGIN LABELLING MEASURES

5. Mexico recognizes that country of origin labelling is used by WTO Members. However, most of those measures differ from the COOL measure in their design and structure and are applied in different circumstances.

6. The most common form of country of origin labelling measures relate to imported products that are to be consumed in the importing WTO Member in the form in which they are imported. This type of labelling measure is often mandatory and is applied at the border.

7. Another form of country of origin labelling measures relates to products manufactured within the territory of a WTO Member from domestic and/or imported inputs. This type of measure can be mandatory or voluntary, it can employ different types of rules and conditions for application and it can employ different forms of compliance mechanisms (e.g., certification and audit, trace back).

8. The COOL measure falls within this second form of measures. However, it occupies a very specific sub-category of such measures. The features that distinguish the COOL measure are: (i) it is mandatory; (ii) it applies very strict rules and conditions for application, related to place of birth, developing and processing of the input used to produce the final food product; (iii) it employs a certification and audit compliance mechanism; and (iv) it implicitly discriminates in the treatment between domestic and imported cattle.

B. COOL IS A SINGLE MEASURE

9. The COOL measure, like most measures created by WTO Members, is made up of various instruments. It comprises the statutory provisions, the regulations, and the administrative guidance including the Vilsack letter. Each instrument is dependent upon others and it is the collection of the instruments as a whole that creates the measure that is being challenged by Mexico. Therefore, Mexico requests that the Panel rule on these instruments as a whole. It is in this context that Mexico refers to the instruments as the "COOL measure".

C. THE COMPONENTS OF THE SINGLE MEASURE

1. The statute

10. The Statute comprises the Agricultural Marketing Act of 1946, as amended by the Farm Bill 2002 and Farm Bill 2008. It is in the Statute where the country of origin labelling requirements were created, and specifically, where the rules for labelling muscle cuts of meat and ground products were created.

2. The regulations

11. The regulations comprise the AMS Interim Final Rule, the FSIS Interim Final Rule, the AMS Final Rule and the FSIS Final Rule. These regulations implemented the statutory COOL provisions. Without the statutory provisions the regulations would not have been issued, but without the regulations, the statutory provisions could not be implemented and put into force.

3. The Vilsack letter and the administrative guidance

12. The Vilsack letter is part of the COOL measure and is subject to the TBT Agreement and GATT Article III. Even if viewed in isolation, the Vilsack letter is a "requirement" and a "technical regulation".

13. At the very least, the Vilsack letter confirms the strict interpretation of the COOL measure that has been applied by the USDA — i.e., that it is not possible for the US industry to use multiple country of origin labels in order to avoid the segregation and other costs associated with using the A label.

14. In addition to the Vilsack letter, the guidance received by the industry from the USDA further confirms the strict interpretation of the rules adopted by the US authorities.

D. THE COOL PROVISIONS FOR MEAT PRODUCTS: LABELLING CATEGORIES BASED ON THE ORIGIN OF THE CATTLE

15. The COOL measure has created a new system for labelling muscle cuts of meat and ground meat, through labelling categories based on the place where the animal from which the meat is derived was born and raised, and not on the place where the meat was produced from that animal. In this way, it ignores the substantial transformation processes that occur in the United States.

16. The COOL measure creates a labelling system with four labelling categories for muscle cuts of meat and one labelling category for ground beef. These categories do not apply to any other edible parts of the same animal and they do not apply to butcher shops and specialty meat stores, or to food service establishments.

17. In relation with Category "B", it does not make sense that the meat derived from a Mexican animal will never be able to obtain a "Product of the United States" labelling when it: (i) was born in Mexico and has the same genetic features of the cattle born in the United States, (ii) was sent to the United States at a very early period in its life to be fed in the same grasslands on which cattle born in the United States are fed, (iii) was sent thereafter to a feedlot to be fed with the same grains with which cattle born in the United States are fed, (iv) obtained more than 70% of its weight in the United States, and (v) was slaughtered and processed into meat in the same facilities as the cattle born in the United States, and further (vi) its meat was classified with the same quality grading as meat derived from an animal born in the United States

18. Furthermore, the end consumer might think that parts of the cuts come from Mexico and parts of the cuts come from the United States. This creates confusion between what is truly a "Product of Mexico" and what is considered by the COOL measure as a "Product of the United States and Mexico".

19. Importantly, the "B" label can be used in several other instances, so the end consumer might never be able to know whether a product labelled as "Product of the United States and Mexico" derived from a cattle born in Mexico and transported at a very early stage, raised, slaughtered and processed into meat in the United States.

E. THE SUPPOSED EFFORTS TO BALANCE COMPETING INTERESTS

1. The reduction of the costs of compliance

20. Although the United States attempted to reduce the burdens on US domestic retailers and producers, it is not true that it tried to reduce the burden for foreign producers or industry participants using foreign cattle.

21. The first way in which the United States tried to reduce compliance for its own market participants was through an express prohibition of the creation of any mandatory identification system to verify the country of origin of the covered commodities, and from requiring additional records other than those maintained in the course of the normal business. This prohibition does not reduce the impact of the COOL measure for Mexican cow calf producers; rather, it was designed to protect US cow calf producers.

22. The COOL measure also excludes retailers such as butcher shops and specialty meat shops from its application. This minimizes the impact of the measure on US domestic interests but keeps untouched the protectionist objective and effect of the measure because the principal distribution channels remain covered.

23. Finally, the US "compromise" excludes so many products from the scope of the COOL measure, that it has created a complex matrix of rules which would confound the most diligent consumer. This further clarifies that protectionism – not consumer information – was the true objective of the law.

2. The "flexibilities" regarding commingling

24. The United States argues that the flexibilities in the labelling rules minimize the impact on foreign cattle. This is simply incorrect. There is no flexibility regarding label "A" beef which cannot be used for beef produced from Mexican cattle notwithstanding that such cattle have the same genetic features as US cattle, were raised in the United States and were processed in the United States into beef.

25. Also, to the extent there is any practical flexibility to commingle US and Mexican cattle and use label B, the USDA's strict interpretation of the provisions has effectively discouraged this commingling. Furthermore, the flexibility to choose between label "B" or "C" does not facilitate the use of foreign cattle.

26. These flexibilities serve mainly to protect label "A", but do not provide any meaningful benefits to foreign cattle.

F. THE OBJECTIVES OF THE COOL MEASURE

1. Determining the objectives

27. Mexico presented detailed argument and evidence that the true purpose of the COOL measure, by virtue of its design, structure and application, is to protect domestic producers in the United States by altering the operation of the US beef industry in favour of the US feeder cattle. Its protectionist purpose and objective is reflected in, *inter alia*, its scope being limited to certain commodities, the targeting of the principal downstream products (i.e., muscle cuts of beef) and distribution network (i.e., large diversified retailers), the exclusion of small retailers and the US processed food industry, and the departure from the established comprehensive system that was in place for regulating consumer information. The United States has not rebutted this evidence.

28. In determining the objectives of the COOL measure it is necessary for the Panel to examine the measure at a high degree of detail. If the objectives were self-defining and beyond scrutiny by a Panel, it would be difficult if not impossible for developing country Members such as Mexico to challenge such measures.

2. Protectionist intent and effect

29. It is Mexico's view that the evidence demonstrates that the intent of the COOL measure is overwhelmingly protectionist. The protectionist intent of the COOL measure is reflected in the circumstances in which the measure was introduced, its design and structure and in secondary corroborating evidence in the form of statements of US legislators and officials and of members of the US cattle industry.

(a) Circumstances in which the measure was introduced

30. It is clear that consumers supported the idea of country of origin labelling for fruits, vegetables and meat in general, although that idea was firstly introduced and supported not by consumers, but by producers.

31. To the extent some US consumers stated they wanted information on the country in which the cattle used to produce beef products were born and raised, the proportion of those consumers to the entire population of US beef consumers was very small, and unwilling to pay higher prices for any country of origin information.

32. The interests of the US cattle producers were the motivating factor in the design of the special COOL provisions for beef. In other words, the motivation was protectionism.

(b) Design and structure of the measure

33. The design and structure of the COOL measure denotes its protectionist intent. By virtue of the design and structure of the COOL measure, the only label that provides relatively precise information is the A label. The intent of the United States was to draw a distinction between beef produced exclusively from US cattle and beef produced from imported cattle or commingled imported and domestic cattle.

34. Evidence of the protectionist intent of the COOL measure is the fact that the design and structure of the COOL measure favours the use of the label A and that US authorities are interpreting and applying the measure strictly so that US beef producers maximize the use of the label A and production of A label beef and minimize the use of the multiple country of origin label and therefore the production of beef from imported cattle.

35. Also, all the efforts to reduce burdens and costs were designed to help the cow-calf operators, processors and suppliers in the United States, not to reduce the cost of compliance of foreign producers.

36. Finally, the compliance mechanism implemented in the COOL measure is designed so that the lowest cost alternative for compliance is to exclude all non-U.S. animals from the processing stream or segregate those animals in the processing stream. If there were trace back to the originating farm, there would likely be no incentive to exclude imported Mexican cattle or shift the cost of compliance solely to Mexican animals.

(c) Corroborating statements of legislators, regulators and industry

37. The legislative history of the COOL measure during the discussion of the 2002 Farm Bill clearly reflects the protectionist intent of the COOL measure.

38. Also, the protectionist intent of the COOL measure is reflected in public statements of R-CALF, the main proponents and supporters of the COOL measure. Country of origin labelling was seen by R-CALF, other producer groups and their supporters as a means to protect the US cattle industry from foreign competition.

(d) Protectionist effect

39. The protectionist intent of the COOL measure is reflected in the adverse effects of the COOL measure. If the effects of the COOL measure were simply a reflection of consumer choice, there would be very little adverse effect in the market because such a small proportion of consumers care about the country of origin of the beef they are purchasing. Instead, the actual adverse effects of the COOL measure on Mexican cattle are market-wide. This manifestly reflects protectionism and not consumer choice.

3. The consumer information objective: two principal objectives

40. Assuming *arguendo* that the Panel accepts that the COOL measure is not merely protectionist, it is Mexico's view that the COOL measure could be viewed as a labelling measure that, at a very general level, is intended to provide information to consumers on where the cattle that were processed into beef in the United States were born, raised and slaughtered. However, it is not

sufficient for the Panel to define the objectives of the COOL measure at this general level. It must go further to determine the true objectives of the measure.

41. Although the A, B, and C labels purport to provide various combinations of origin information, the two underlying and primary objectives of the COOL measure are: (i) to provide information on label A, namely beef produced from cattle that are born, raised and slaughtered in the United States; and (ii) to ensure that most of the beef sold at retail in US stores is label A beef. This second objective goes beyond simply informing consumers of the origin of the inputs used to produce the beef they purchase and promotes the production of beef from cattle born, raised and slaughtered in the United States.

42. The first objective is apparent when the design, structure and circumstances of application of the COOL measure are analyzed against the stated objective of the measure. It is not clear that the average consumer is aware of what the B and C labels actually mean. It is impossible for US consumers to accurately determine the origin of beef identified with the label "B". The only label giving accurate information is label "A".

43. With respect to the second objective, the Statute requires that to use label A (i.e., "product of the United States"), the beef must be produced from cattle that are exclusively born, raised and slaughtered in the United States. Moreover, in the Final Rule there is no practical flexibility in labelling when label A beef is produced. Finally, the Final Rule does not allow the use of "or" or "and/or" when connecting a string of two or more countries of origin on a declaration of origin, further restricting flexibility. These aspects promote the use of the label A and beef production meeting that label and make it harder to use alternative labels.

44. To the extent that the Final Rule provides any flexibility for US producers to commingle production and use the B and/or C labels, USDA has interpreted the Statute and applied the Final Rule strictly to discourage US producers from commingling imported and domestic cattle and beef and therefore label most of their beef production as label A. This strict interpretation and application is confirmed by the Vilsack letter.

4. Shaping consumer expectations

45. The strict standard for the use of the label "A" was developed with the intent of ensuring that the beef sold at retail in US stores is label A beef, thereby affecting both the consumers of the cattle (i.e. backgrounders, feedlot operators and processors) and the end consumers of beef.

46. The Panel in *EC – Sardines* stated that *"the danger is that Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory intervention on the basis of governmentally created consumer expectations."* In this dispute, through the COOL measure, the United States is trying to shape consumer expectations and perceptions through regulatory intervention, and to justify the legitimacy of this intervention on the basis of a governmentally created consumer perception and expectation.

III. FACTUAL INFORMATION

A. THE COOL MEASURE CONTINUES TO UPSET THE BALANCE OF COMPETITIVE OPPORTUNITIES TO THE DETRIMENT OF MEXICAN CATTLE

47. The COOL measure continues to upset the balance of competitive opportunities to the detriment of Mexican cattle compared to like US cattle. Mexico summarizes these as follows: *(i)* the reduction in the number of plants that slaughter and process fed cattle that were born in Mexico and raised in the United States; *(ii)* the reduction of the number of days per week that such cattle are

slaughtered or processed; *(iii)* the reduction in the number of backgrounders and feedlots taking Mexican cattle; and *(iv)* the imposition of additional requirements in the form of advance notice prior to accepting Mexican cattle for slaughter and processing.

48. These factors that evidence the upsetting of the balance of competitive opportunities continue. Over the summer, this continued to be reflected in a price discount being applied to Mexican cattle. For example, Mexico is submitting evidence of transactions in July and August in which different processors applied downward adjustments of $40 per head and $25 per head to Mexican cattle.

B. THE OTHER FACTORS IDENTIFIED BY THE US DO NOT EXPLAIN THE LOSS OF COMPETITIVE OPPORTUNITIES

49. Mexico acknowledges that the North American market for cattle is affected by factors outside of the COOL measure and that those factors affect both the price of cattle and the volume of trade flows within North America. Nonetheless, the available recent documentation shows that the US processors are still imposing COOL-based downward adjustments to the prices they pay for Mexican born cattle, and the Mexican industry will continue to have to bear the burden of that differential during times of both rising and declining prices.

50. Independent of those factors, the COOL measure is upsetting the balance of competitive opportunities against Mexican cattle in favour of like US cattle. Mexican cattle have been denied competitive opportunities that existed prior to the COOL measure and, irrespective of North American market conditions, would be better off if those competitive opportunities were restored through the elimination of the COOL measure.

IV. LEGAL ARGUMENT

A. GENERALLY

51. Mexico has presented a prima facie case with respect to all of the elements of its claims. None of the arguments raised by the United States rebut the case that Mexico has presented.

B. MEXICO'S *DE FACTO* DISCRIMINATION CLAIMS UNDER ARTICLE III:2 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TBT AGREEMENT

1. The burden of proof in a *de facto* claim

52. Contrary to what the EU suggests, there is no basis for increasing the evidentiary threshold for *de facto* discrimination claims. *De facto* discrimination claims go back to the GATT 1947 and nowhere has such a high evidentiary threshold been applied to such claims. The normal burden of proof applies. Mexico must establish a prima facie case with respect to each element of its *de facto* discrimination claims. Mexico has met this burden.

2. The timeframe for examining *de facto* discrimination claims

53. The EU also argues that "the immediate regulatory shock" of a regulation does not, in itself, necessarily demonstrate less favourable treatment. There is no legal basis for this argument. Whether or not a challenged measure *de facto* discriminates in a manner that violates a provision of a WTO agreement must be assessed by a Panel on the basis of the facts existing at the time of the establishment of the Panel.

54. Mexico's *de facto* discrimination claims are grounded in the fact that the economically rational way for US processors to comply with the COOL measure is to either stop processing

Mexican cattle or to segregate the processing of those cattle in a way that restricts the access to Mexican cattle. This fact will not change over time.

3. Like products

55. In the view of the United States, the like product analysis should focus on beef. Mexico disagrees. The COOL measure explicitly applies to *both* beef and cattle. This is evident from the text of the Statute and the Final Rule which links the relevant label for beef to the country in which the cattle were born, raised and slaughtered. Moreover, Mexico's challenge of the COOL measure relates to its effect on imported inputs (i.e., Mexican cattle). The relevant like product is therefore domestic cattle. Mexican and US cattle are clearly like.

56. In regards to Mexico's *de facto* discrimination claim under Article 2.1 of the TBT Agreement, the United States argument regarding the term "in respect of" is misplaced. That term simply clarifies that the non-discrimination obligation in Article 2.1 applies only to technical regulations. It does not prevent Mexico from challenging the *de facto* discrimination created between like imported and domestic inputs.

4. Private actions and market forces

57. The United States argues that any action by private actors not compelled by the measure at issue does not result in a violation of the non-discrimination provisions. In this sense, the Appellate Body stated in *Korea – Various Measures on Beef* that *"[w]hat is addressed by Article III:4 is merely the governmental intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory"*.

58. It is the COOL measure that is imposing the legal necessity of making the choice of either not accepting Mexican cattle or restricting their access. The reduced access Mexican cattle have to the US market is a direct consequence of the COOL measure. To the extent some element of private choice is involved, it does not relieve the United States of responsibility for the resulting establishment of competitive conditions less favourable for imported Mexican cattle than like US cattle.

5. Costs inherent to regulating

59. The United States argues that to the extent that the COOL measure imposes costs, they are merely costs inherent to regulating. In its view, compliance costs may and often do vary among market participants based on their pre-existing makeup and market participants may respond to new costs in different ways.

60. While the United States' observations about the distribution of costs of regulation among market participants may be correct in certain circumstances, they are inapplicable to the facts of this dispute. This dispute is not about the distribution of costs among individual market participants; it is about the discriminatory and trade restrictive effects of the COOL measure on imported cattle. It is about the disproportionate or possibly even complete allocation of costs to one market participant (the Mexican cattle producers and other participants carrying Mexican cattle) over others based solely on the origin of the cattle they provide.

61. While regulations can distribute costs throughout the market in a variable manner, they cannot discriminate on the basis of origin as does the COOL measure.

6. Less favourable treatment

(a) Mexico is not arguing that market participants are being "forced" to discontinue the purchase of Mexican cattle

62. The United States argues that Mexico's arguments regarding less favourable treatment are flawed because "they presuppose that market participants will all choose to comply, and in fact, are *forced* to comply with the regulations by discontinuing the purchase of Canadian and Mexican livestock".

63. This characterization of Mexico's arguments is incorrect. Mexico is arguing that the COOL measure is imposing the necessity of making a choice and in the light of the normal economic conditions in the market that choice is to either stop carrying Mexican cattle or to segregate Mexican cattle in a way that restricts trade in those cattle. By law, relevant US market participants must comply with the COOL measure. The design and structure of the measure is such that when complying with the measure the market participants will discontinue or restrict the purchase of Mexican cattle.

(b) Differential effect on different market participants

64. The EU argues that the effects arising from different volumes of trade do not, in themselves, necessarily demonstrate less favourable treatment. The EU misconstrues Mexico's arguments. Mexico is not arguing that the COOL measure is imposing the same total cost on imported and like domestic cattle but a higher per unit cost on imported cattle. Rather, the COOL measure is structured so that the most commercially rational means of compliance is to stop carrying Mexican cattle or to segregate Mexican cattle in a way that restricts trade in those cattle. Mexico's *de facto* discrimination claims have nothing to do with per unit costs.

(c) Sufficient remaining US capacity to process all Mexico's cattle exports

65. Whether or not the remaining US slaughterhouses have enough capacity to process all of the Mexican cattle exports is immaterial. What matters is that access to the US market for Mexican cattle is being limited to certain slaughterhouses on certain days and under certain circumstances. This reduces the competitive opportunities for the sale of Mexican cattle compared to like US cattle.

(d) Segregation

66. The United States argues that the provisions of the COOL measure do not require segregation and that the flexibility provided by the measures reduces the likelihood that livestock will need to be segregated.

67. The United States misplaced the point made by Mexico. Mexico is arguing that the COOL measure is structured so that the most commercially rational means of compliance is to stop carrying Mexican cattle or to segregate Mexican cattle in a way that restricts trade in those cattle. Also, the flexibility provided by the measures does *not* reduce the likelihood that livestock will need to be segregated. Given the restrictive conditions applicable to the application of the multiple origin label to label A beef the use of the multiple label is severely restricted and is therefore of little practical use to avoid segregation.

68. Mexico has presented prima facie evidence that segregation was an understood consequence of the COOL measure and that it is in fact occurring.

(e) Small market shares

69. The United States argues that Canada and Mexico both appear to acknowledge that any decision by US packers to change their production practices results in large part from their relatively small market shares.

70. In assessing whether the COOL measure *de facto* discriminates against Mexican cattle, the Panel must assess the facts and circumstances related to the trade in Mexican cattle that would normally exist in the absence of the measure and then examine how the facts change when the measure is applied. Mexico's share of the US market may be one of the facts that is taken into account in this analysis, however, the fact Mexico has a small market share does not mean that any *de facto* discrimination against Mexican imports resulting from the COOL measure is to be ignored. To do so would fundamentally prejudice developing country Members who generally account for only a small portion of the trade with any given developing country Member.

(f) Other factors affecting the reduction in the demand for Mexican cattle

71. The United States argues that Canada and Mexico have failed to consider the numerous external factors that explain any reduction in the demand for and price of their livestock.

72. Mexico acknowledges that there are many economic factors that could affect the demand for cattle in the North American market. However, the detrimental effects Mexico is challenging relate to the upsetting of the balance of competitive opportunities between Mexican cattle and like US cattle. These effects include the reduction in the number of slaughterhouses accepting Mexican cattle, the reduction in the number of days Mexican cattle are being accepted, the additional conditions required for Mexican cattle, and the consequent reduction in the number of market participants carrying Mexican cattle or segregating Mexican cattle. None of these important facts can be attributed to the external factors highlighted by the United States. Those factors affect the North American market as a whole and do not discriminate against Mexican cattle. The factors at issue in this dispute are a direct consequence of the COOL measure and discriminate against Mexican cattle.

7. The COOL measure is inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement

73. In the context of Mexico's challenge, the fundamental thrust of the COOL measure is the protection of US domestic cattle to the detriment of like Mexican cattle. In other words, pure protectionism. This is reflected in the upsetting of the balance of competitive opportunities to the disadvantage of Mexican cattle.

C. TBT AGREEMENT

1. The COOL measure is a technical regulation

74. Mexico has demonstrated that the COOL Measure is a technical regulation. The only point upon which Mexico and the United States disagree is whether the Vilsack letter, viewed in isolation, constitutes a technical regulation. In Mexico's view the Vilsack letter is a "requirement" and a "technical regulation". However, even if it is not a "requirement" or "technical regulation" when viewed in isolation, it clearly is when viewed as part of the COOL measure as a whole, which is unquestionably a "requirement" and "technical regulation".

2. The COOL measure is inconsistent with Article 2.2 of the TBT Agreement

(a) Preamble to the TBT Agreement

75. The United States argues that Article 2.2 provides deference to WTO Members in the pursuit of their policy objectives and must be read in conjunction with the sixth recital in the preamble of the TBT Agreement.

76. The United States ignores an important caveat in this recital—i.e., "subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade". It is crucial that this language in the preamble is given meaning. Otherwise, WTO Members could define the objectives of their technical regulations so narrowly and with such high levels of protection that no other alternative measure could fulfil those objectives. This would insulate such measures from challenge under the TBT Agreement.

77. In Mexico's view the COOL measure is "applied in a manner which […]constitute[s] a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and it is a "disguised restriction on international trade".

78. The objective of the measure is protectionist and, in the light of the failure of the measure to fulfil its stated objective of consumer information and the reduction of consumer confusion, it is clearly arbitrary. Also, the COOL measure is being taken under the guise of a "consumer information" measure that is clearly aimed not at consumers but at protecting US domestic industry so it is a disguised restriction on international trade.

(b) The objectives of the COOL measure

79. It is essential to the proper interpretation and application of Article 2.2 that the Panel first objectively determines the objective of the COOL measure to the necessary level of specificity.

(c) The objectives are not legitimate

80. The COOL measure is applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail and it is a disguised restriction on international trade. Its objectives are overwhelmingly protectionist. Such objectives cannot be "legitimate" within the meaning of Article 2.2. They go against the object and purpose of the WTO Agreements. If there ever was a measure whose true objective was not legitimate, the COOL is such a measure. A finding that the objectives of the COOL measure are legitimate would render this element of Article 2.2 inutile.

(d) If the objectives are found to be legitimate, the COOL measure does not fulfil those objectives

81. If the Panel finds that the objectives of the COOL measure are legitimate, it is Mexico's position that the COOL measure does not fulfil those objectives. There are substantial gaps in the retail coverage of the measure and the information provided further confuses rather than clarifies the origin of the beef that is being purchased.

(e) If the COOL measure fulfils those objectives, it is more trade-restrictive than necessary taking account of the risks non-fulfilment would create

82. Mexico proposed two alternative measures: (i) voluntary country of origin labelling that uses the same strict transformation rule and other requirements currently utilized in the COOL measure; or (ii) mandatory country of origin labelling that uses the transformation rule applied by US Customs to imported products.

83. The United States has not sufficiently explained how these two alternative measures do not fulfil the objectives of the COOL measure. Moreover, it fails to address an important element of this final step in the application of Article 2.2, namely "taking into account the risks non-fulfilment would create". Mexico addresses this element in its first written submission. The value of the information provided by the COOL measure "to the consumer" is minimal and to the extent it has value to US consumers it is to a very limited sub-set of those consumers. In such circumstances, a voluntary measure or a measure that employs the substantial transformation test applied by US Customs is sufficient to meet the objectives of the COOL measure.

84. There is also a third alternative measure that, depending on how it is implemented, may be less trade restrictive in the sense that it may eliminate the discrimination currently facing Mexican cattle imports. That alternative is a country of origin labelling measure that employs the strict requirements of the COOL measure but that also employs a trace back compliance mechanism.

D. THE COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.4 OF THE TBT AGREEMENT

1. CODEX STAN 1-1985 is a relevant international standard

85. The United States suggested that Mexico had failed to establish that CODEX STAN 1-1985 was "adopted by a body whose membership is open to the relevant bodies of at least all Members and is based on consensus." *EC – Sardines* involved another standard of the CODEX Alimentarius, which the Appellate Body affirmed was a relevant standard. In *EC – Sardines*, the EU argued that the complainant had the burden of proving that the standard at issue had been adopted by consensus. The Appellate Body expressly disagreed.

86. The United States has already conceded that CODEX STAN 1-1985 is "relevant".

87. The United States questions whether the CODEX standard is actually equivalent to the "substantial transformation" standard, noting that the word "processing" in CODEX STAN 1-1985 is undefined. However, the complete relevant term in the CODEX standard is "When a food undergoes processing in a second country which changes its nature,". The "change in nature" standard is closely similar, if not identical, to substantial transformation, which under US law is a change that results in a different name, character or use.

88. In any event, it cannot be seriously questioned that the conversion of a live animal into cuts of beef meets both standards, however they are interpreted. The end of temporal existence is a fundamental change of condition in and of itself. The death of the animal followed by dismemberment and slicing into cuts of meat is certainly "processing … which changes [the] nature" of the cattle" within the meaning of the standard.

2. The CODEX standard would be both effective and appropriate

89. The United States argues that CODEX STAN 1-1985 would not be effective or appropriate because the substantial transformation test would provide misleading information in some situations.

The example offered by the United States is a situation in which cattle would be in US territory only one day prior to slaughter.

90. Mexico has previously explained, and the United States has not disputed, that Mexican cattle are brought to the United States at a young age, gain 70% of their weight in the United States, and are fed on the grasslands and in the same feedlots as US born cattle. Accordingly, the US example is wholly inapplicable to Mexico.

91. In any event, Mexico observes that: *(i)* CODEX Stan-1985 was adopted twenty five years ago and reflects a multilateral consensus on how origin should be identified on prepackaged food products to as to avoid misleading consumers; *(ii)* as a factual matter the processing of live animals into cuts of beef is an extremely extensive form of processing, and relying on the substantial transformation/processing test cannot fairly be characterized as misleading. *(iii)* the United States, in effect, applied the CODEX standard to meat processed within its territory for many years, without considering it misleading.

92. The United States seems to be arguing that CODEX STAN 1-1985 is ineffective and inappropriate because it is different than the COOL measure. That approach would turn the obligations of the TBT Agreement on their head and render Article 2.4 meaningless. CODEX STAN 1-1985 deals specifically with the purported objective of the COOL measure as claimed by the United States – to inform consumers of the origin of food products. The COOL measure is not based on CODEX STAN 1-1985, but rather conflicts with it.

E. THE COOL MEASURE IS INCONSISTENT WITH ARTICLES 12.1 AND 12.3 OF THE TBT AGREEMENT

93. The United States argues that developing country Members were given ample opportunity to participate in the development of the measure. While it is true that the United States gave some opportunity to Mexico to comment on the development of the 2009 Final Rule, it is not true that the United States gave Mexico the opportunity to participate in the development of the 2002 Farm Bill. The only opportunity that Mexico had to provide comments was when the COOL provisions were already established and only needed to be implemented.

94. At that point, there was little flexibility in the measure, and thus, contrary to Article 12 of the TBT Agreement, the United States did not take into account the special development, financial and trade needs of Mexico as a developing country in the formulation of the 2002 Farm Bill, and thus, in the formulation of the country of origin provisions and the rules for labelling meat products.

95. Also, Mexico summarizes the type of evidence that the US would have to present in order to show that it "took into account" Mexico's special needs: *(i)* evidence that the United States has "looked at attentively", "reflected on", or "weighed the merits of" the special development, financial and trade needs of Mexico and evidence that, in undertaking these steps, the United States has made certain that the COOL measure does not create unnecessary obstacles to exports from Mexico; *(ii)* public comments during the preparation process of the COOL Measure made Congress and the USDA cognizant of the possible negative effects on Mexican exports. Neither Congress nor the USDA responded to these comments; *(iii)* the Regulatory Flexibility Act requires US agencies to consider the impact of their regulatory proposals on small entities, analyze effective alternatives that minimize the impact, and make their analyses available for public comment; and *(iv)* evidence that the "special needs" referred to in Article 12.3 have been taken into account would require a showing that consideration was given to how the measure may impact developing countries, that steps were taken to minimize the impact of the measure on developing countries, and that less onerous alternatives were considered.

96. There is no evidence that the United States took any of these actions.

F. GATT ARTICLE X:3(A)

97. The administration of the COOL measure has been characterized by shifts in interpretation and guidance by USDA on its implementation of the statutory and regulatory provisions, as reflected in USDA's guidelines, non-public pressure by the US government of individual companies, and the Vilsack letter. The final interpretation by USDA was both partial (favouring US producers of cow-calves) and unreasonable.

98. The USDA privately contacted major US. Processors to tell them not to use mixed origin labels. USDA later issued the Vilsack letter to put more pressure on the industry, by stating that processors and retailers should "voluntarily" adopt additional burdens if they used a multiple country of origin label (B or C); this made obvious that USDA preferred that labels B and C not be used at all. The continuing changes in USDA policy – first indicating that mixed origin labels were permissible, then discouraging them – significantly contributed to the disruptions experienced by the Mexican industry. It is also evidence of unreasonable, arbitrary administration of the law, as USDA's change in position was made in reaction to pressure motivated by protectionism.

99. Plainly, the COOL measure has not been administered in a uniform, impartial and reasonable manner, contrary to the obligation of GATT Article X.3(a).

G. NON-VIOLATION NULLIFICATION OR IMPAIRMENT UNDER GATT ARTICLE XXIII:1(B)

100. Mexico has demonstrated with sufficient evidence that the benefits provided to its imports of livestock to the US under the relevant tariff concessions have been nullified or impaired.

101. The US bound tariff is 1 cent per kilogram, which is about \$1.36 to \$1.81 for a 300 to 400 pound animal. Based on this WTO tariff binding, Mexico could legitimately expect that its cattle would have a competitive disadvantage of \$1.36 to \$1.81 per animal compared to like US products. The actual price discount created by the COOL measure has been up to \$60 for the same 300-400 pound animal. The competitive disadvantage or level of protection reflected in this price discount vastly exceeds Mexico's legitimate expectation of \$1.36 to \$1.81 per animal. Thus, the COOL measure nullifies or impairs benefits accruing to Mexico under the WTO tariff bindings of the United States.

102. The United States argues that Mexico could have reasonably anticipated that the United States would enact the COOL measure's origin labelling requirements for meat products. None of the legislative proposals submitted by the United States included the born/raised/slaughtered origin rule for meat products. Those proposals involved general requirements for origin labelling, unrelated to Mexico's claims in this proceeding.

V. CONCLUSIONS

103. On the basis of the foregoing, Mexico requests that the Panel find that the COOL measure is inconsistent with Articles III:4, X:3 and XXIII:1(b) of the GATT 1994 and Articles 2.1, 2.2, 2.4 and 12 of the TBT Agreement and make such recommendations that are necessary for the United States to bring itself into conformity with these provisions.

ANNEX B-3

**EXECUTIVE SUMMARY OF THE
SECOND WRITTEN SUBMISSION OF THE UNITED STATES**

I. INTRODUCTION

1. Canada and Mexico's core claims in this dispute are predicated on three basic factual and legal fallacies: first, that the US COOL measures were a response to protectionist demands rather than consumers' desire for information about where their food comes from; second, that the US *measures* discriminate against imports because *some US* processors allegedly *chose* to modify their handling of imported livestock; and third, that the measures adversely affected imports. Consumers overwhelmingly demanded the COOL measures, these measures do not discriminate against imports, and – given current trade volumes and import prices – it cannot be the case that the measures have resulted in significant additional costs on imports.

2. In their oral statements, Canada and Mexico have introduced a fourth fallacy: that accepting their arguments would *not* require the conclusion that most – and perhaps all – mandatory country of origin labelling regimes maintained by WTO Members are inconsistent with the WTO agreements. In fact, notwithstanding the fact that both complaining parties maintain labelling laws of their own, were Canada and Mexico's arguments accepted, it is difficult to conceive of a mandatory country of origin labelling system that would be found WTO-consistent.

3. In particular, Canada and Mexico would have the Panel believe that the US COOL measures are "more trade restrictive than necessary" because they require retailers to provide too much information about the meat that they sell – but at the same time that they do not fulfil their legitimate objective because the amount of information that they provide is not enough. Putting aside that many of the flexibilities and exceptions contained in the measures were added at the request of the complaining parties, accepting their arguments would put all WTO Members with country of origin labelling laws in an impossible position.

4. The Panel should reject Canada and Mexico's attempts to turn the question of whether a Member's measures comply with TBT Article 2.2 into a re-evaluation of every choice the Member made in the process of developing a complex regulatory regime. Designing a technical regulation necessitates difficult choices, especially when balancing the views of numerous interested parties, such as US consumers and trading partners. The Panel need not – and should not – stand in the shoes of the regulator and attempt to re-calibrate the balance that was struck. Rather, all the Panel need determine is whether the US measures, as designed, fulfil their legitimate objectives at the level the United States considers appropriate without restricting trade more than is necessary.

5. Likewise, the labelling systems that Canada and Mexico put forward as "reasonably available alternatives" to the US regime – if accepted as such – would call into question the WTO-consistency of the origin labelling requirements maintained by nearly half of the WTO membership. Were the Panel to accept voluntary labelling as a reasonably available alternative, and ergo one that fulfils the consumer information objective at the same level as a mandatory regime, it would raise doubts about the systems of over 70 WTO Members who maintain mandatory origin labelling requirements. Similarly, finding that labelling based on substantial transformation is a reasonably available alternative would suggest that the labelling requirements of many of these same Members who do not base their origin designations on substantial transformation principles, may likewise be inconsistent with TBT Article 2.2.

II. THE PANEL SHOULD ANALYZE THE DIFFERENT US INSTRUMENTS SEPARATELY FROM EACH OTHER

6. Given the differences between the instruments that Canada and Mexico challenge in this dispute, and the fact that some have been superseded, are not acts attributable to the United States, or do not create binding legal obligations, the Panel should reject Canada and Mexico's attempt to characterize the instruments at issue as a single "COOL measure". By glossing over these substantive differences – differences which, among other things, have implications for how the obligations at issue apply – Canada and Mexico avoid making their case with regard to each instrument that is the subject of the dispute. Further, the previous WTO reports that Canada cites in support of the proposition that the Panel should consider the instruments as a single measure are inapposite.

7. Unlike the 2009 Final Rule and COOL statute, the Vilsack Letter is not mandatory and has no legal status. The fact that the Vilsack Letter is not mandatory and not a technical regulation is confirmed by the text of the letter itself, which clearly identifies the suggestions as "voluntary" in four separate instances, as well as the industry's decision not to follow the Vilsack Letter. Canada and Mexico ignore the text of the letter and are unable to adduce any evidence to show that industry is following the Vilsack Letter's suggestions.

8. Due to significant differences between the COOL statute and the 2009 Final Rule, these instruments should be examined as separate measures. The COOL statute establishes the framework for US COOL requirements, but requires separate implementing regulations to provide necessary details before any requirements could take effect. For example, for muscle cuts of meat, the 2009 Final Rule provides necessary details about what is included on each label and specifies when there is flexibility between the different labels. The 2009 Final Rule also defines many key terms and establishes the final record keeping requirements. These details are relevant to Canada and Mexico's legal and factual arguments, and thus, these two instruments should not be examined together. It is also worth noting that Canada and Mexico have never explained how the COOL statute breaches US WTO obligations, separate and apart from the 2009 Final Rule; thus, they have failed to make a prima facie case with regard to this measure.

9. The Interim Final Rule no longer exists under US law and has been replaced by a 2009 Final Rule that contains substantively different provisions. Further, the Interim Final Rule did not exist at the time when the Panel was established. With regard to the FSIS Interim Rule and FSIS Final Rule, Mexico has failed to make a prima facie case with regard to either instrument. The FSIS Final Rule is a distinct legal instrument from the 2009 Final Rule and COOL statute, yet Mexico has not even attempted to explain how this instrument is inconsistent with US WTO obligations. Further, the FSIS Interim Rule no longer exists. And contrary to new assertions advanced by Canada, an alleged statement in a meeting that was held between Representative Collin Peterson and the US industry and USDA clarification documents are not a "measures". Representative Peterson's statements are not an "act or omission" of the United States and the USDA clarification documents have no status under US law. Moreover, neither Canada nor Mexico identified either as measures in their consultations or panel requests; thus, they are not within the Panel's terms of reference.

III. NONE OF THE COOL MEASURES BREACH TBT ARTICLE 2.1 OR GATT ARTICLE III:4

10. Canada and Mexico have failed to demonstrate that any of the COOL measures breach TBT Article 2.1 or GATT Article III:4. These provisions obligate Members to ensure that its measures do not accord imported products "less favourable treatment" than like products of national origin.

11. Based on past WTO reports, Canada and Mexico's arguments that the COOL measures breach TBT Article 2.1 or GATT Article III:4 must fail. The COOL measures do not treat domestic and

imported like products differently. Rather, they require retailers to label all covered meat commodities at the retail level, regardless of whether they are derived from imported animals or not, and the exact same record keeping requirements apply to imported livestock as domestic livestock. In addition, to the extent that Canadian and Mexican livestock have experienced any detrimental effects, these effects are not attributable to the origin of the livestock and are not attributable to the COOL measures. Any detrimental effects can be attributed to external factors, such as Canada and Mexico's limited market share, the economic downturn, and the independent decisions of private market actors on how to respond to the COOL measures.

12. In arguing to the contrary, Canada and Mexico misapply both the *Korea – Various Measures on Beef* and *Dominican Republic – Import and Sale of Cigarettes* reports. The measures in *Korea – Various Measures on Beef* required separate distribution channels based on origin, whereas the measures here do not. Unlike in *Korea – Various Measures on Beef*, the COOL measures do not restrict a processor's ability to process or a retailer's ability to sell all types of products together (for example, by commingling) as long as adequate records are maintained and accurate labels affixed to the product. Thus, the most that Canada and Mexico can allege is that US processors have somehow responded to the COOL measures by processing different types of meat in different distribution channels; however, even if this were factually accurate, it does not establish a breach. The complaining parties also mis-characterize the Appellate Body's findings and the facts in *Dominican Republic – Import and Sale of Cigarettes*, arguing that it is "not analogous because there is no dispute here over a single origin-neutral measure imposed equally on companies, some of which happen to be foreign and have a lower market share". Contrary to this assertion, the COOL measures apply equally to all companies, requiring slaughter houses to maintain adequate records and all retailers to label their products regardless of the origin of the product. Both domestic and foreign livestock must be tracked in some way to ensure that the resulting product is correctly labelled.

13. Contrary to Canada and Mexico's arguments, the COOL statute and 2009 Final Rule do not require segregation. By allowing for a single label to be used for meat derived from livestock with different origins, the commingling flexibility obviates the need for a slaughter house to segregate the livestock that it is processing. In addition, a slaughter house may comply with the COOL requirements and process muscle cuts without segregating by processing only livestock of foreign or domestic origin, or process domestic and mixed origin livestock on separate days, and on each given day label the resulting meat as appropriate.

14. Canada and Mexico's claims that the US industry is not utilizing the commingling flexibility is directly refuted by their own evidence and other evidence obtained by the United States. For example, the Can Fax updates indicate that some US slaughter houses are commingling and that at least 14 US slaughter houses are accepting Canadian and Mexican animals. Similarly, the letter from the American Meat Institute indicates that approximately 5 per cent of animals are being commingled and photographs taken around the country indicate that commingling is occurring as do industry affidavits and other information collected by USDA. As this indicates, US slaughter houses have not found it cost prohibitive to use the commingling flexibility or to continue producing Category B meat.

15. Canada and Mexico also dramatically overstate the costs associated with segregation for slaughter houses and others who choose to segregate in response to the 2009 Final Rule. They ignore all of the pre-existing segregation programs that exist in the United States, including (1) USDA's grade labelling program; (2) private premium label programs; (3) export market requirements for at least 22 countries; (4) animal production and raising label programs. US processors and others in the supply chain have long segregated for these purposes and thus have developed synergies that can be applied to any segregation done in response to the COOL measures. If the cost of segregation was as high as Canada and Mexico assert, and segregation was truly the only way that US slaughter houses could comply with the COOL measures, then there is no reason that US feed lots and slaughter houses would ever continue to accept Canadian and Mexican livestock. Yet, the export numbers tell a

different story. Over the first eight months of 2010, Canadian cattle exports are up 7.5 per cent and Mexican cattle exports are up 29 per cent over last year's levels.

16. These export numbers contradict the picture of economic distress that Canada and Mexico have attempted to paint during this dispute. Canada and Mexico have presented "evidence" that some US feedlots and slaughter houses have limited their purchase of Canadian and Mexican livestock, but the most this evidence can prove is that some processors have made the independent decision to modify their business practices after the COOL measures were enacted in a way that is detrimental to some Canadian and Mexican livestock. None of these decisions were required by the COOL measures, and indeed, as the United States explained, there are numerous options for these entities to comply with COOL without changing their sourcing patterns.

17. Not only is Canada and Mexico's evidence of little relevance from a legal standpoint, but much of it is inaccurate. Mexico's claim that the number of feed lots accepting their feeder cattle has declined from 24 to 3 is directly contradicted by evidence on the ground: not all of the 24 facilities that Mexico identifies accepted their cattle in the first instance and more than 3 are accepting their cattle now. Similarly, Canada's claim that none of the 12 slaughter houses are accepting Canadian origin livestock without limitations is not substantiated by any evidence that Canada has submitted and is actually refuted by Exhibit CDA-41.

18. Canada and Mexico attempt to downplay the increase in their exports during 2010 in various ways. For example, Canada argues that although exports have risen significantly in 2010, their market share has decreased. However, as Canada indicates "looking at market share alone is deceptive" because it captures larger trends in the US market that have nothing to do with Canadian imports. Regardless, if one were to believe that market share were a reliable indicator, Canada and Mexico's share of the US market remains at levels consistent with their historical averages. Second, Canada points out that although its exports of cattle have increased in 2010, its hog exports have not rebounded, but Canadian hog exports are declining for reasons that have nothing to do with the COOL measures; namely Canada's rapidly declining hog inventories fully explain the decline in Canada's exports.

19. Canada and Mexico also both attempt to minimize the export data by focusing on price data, but Canadian and Mexican livestock prices are at high levels. The price paid for Canadian slaughter cattle is up 15.3 per cent while the price being paid for Canadian feeder cattle is up 18.9 percent. These price increases are higher than the increase in the prices for US feeder and slaughter cattle, indicating that Canadian animals are not being discounted due to the COOL measures. The price paid for Mexican feeder cattle and Canadian hogs have also risen significantly, directly contradicting claims by Mexico that the COOL measures have resulted in discounting.

20. To the extent that there has been any negative impact on Canadian and Mexican cattle exports in recent years, it is not due to the COOL measures. While the COOL measures were being implemented, the world was in the throes of a global economic recession. As a result, it would have been a major surprise had Canadian and Mexican livestock exports and prices not declined. Consistent with these expectations, a USDA analysis that examined the decline in Canadian and Mexican exports in 2008 and 2009 concluded that the economic recession is more likely the cause of the temporary decline than the 2009 Final Rule.

IV. NONE OF THE COOL MEASURES BREACH TBT ARTICLE 2.2

21. Canada and Mexico have failed to demonstrate that the COOL statute or 2009 Final Rule breach TBT Article 2.2. This provision prohibits technical regulations from being "more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create". Article 2.2 does not prohibit all technical regulations that create obstacles to trade,

rather only those that create "*unnecessary* obstacles". The text of Article 2.2, interpreted in light of the relevant context provided by the preamble to the TBT Agreement, permits WTO Members to adopt measures to achieve legitimate objectives at the levels they consider appropriate. Thus, WTO Members who adopt measures to achieve the same or similar objectives need not design these measures in the exact same way. They are permitted to design their measures in the way that best suits their objectives as long as they are not more trade restrictive than necessary.

22. Past Appellate Body reports that have interpreted SPS Article 5.6 provide useful insights for the interpretation of TBT Article 2.2 based on the textual similarities between the provisions, the similarities between the TBT and SPS Agreements themselves, and a letter from the Director-General of the GATT to the Chief US Negotiator confirming that TBT Article 2.2 should be interpreted similarly to SPS Article 5.6. Thus, to prove that any of the COOL measures are inconsistent with TBT Article 2.2, Canada and Mexico must first show that the COOL measures restrict trade. If the complaining parties make this showing, then the Panel may examine whether the measures in question are "more trade restrictive than necessary" in the sense that: (1) there is another measure that is reasonably available to the government, taking into account economic and technical feasibility; (2) that measure fulfils the legitimate objective at the level that the United States has determined is appropriate; and (3) is significantly less trade restrictive.

23. In conducting the "more trade restrictive than necessary" analysis, it would not be appropriate to apply the same interpretive approach panels and the Appellate Body have undertaken in connection with the word "necessary" as it appears in GATT Article XX. The term "necessary" there is used in a different context than in TBT Article 2.2. Further, there is no textual basis to apply the panel and Appellate Body's interpretive approach to GATT Article XX to Article 2.2 of the TBT Agreement.

24. Providing consumer information about origin and preventing consumer confusion are legitimate objectives under TBT Article 2.2. Neither complaining party has directly challenged the US assertion that providing consumer information about origin and preventing consumer confusion are legitimate objectives and many of the third parties have acknowledged that they are. The legitimacy of these objectives is supported by their connection to the prevention of deceptive practices, which also relates to ensuring that consumers in the territory of the WTO Member are not misled or mistaken about the products they buy, whether about the product's origin or some other product characteristic. Other WTO Members have also recognized the connection between country of origin labelling and the prevention of deceptive practices as evidenced by their TBT notifications, including Colombia, the EU, and Korea. Finally, the strong consumer support for country of origin labelling in the United States and internationally and the fact that many WTO Members have notified their country of origin labelling requirements to the TBT Committee, identifying their objective as consumer information, supports the legitimacy of these objectives.

25. US consumers and consumer organizations widely support country of origin information on the food products they buy at the retail level. Nearly all the leading US consumer organizations have expressed support for country of origin labelling for consumer information purposes and to prevent consumer confusion. For example, the Consumers Federation of America (CFA) indicated that it "has long supported a mandatory country of origin labelling (COOL) program as a means of providing consumers with important information about the source of their food". In a joint letter with the National Consumers League and Public Citizen, two other leading US consumer organizations, CFA wrote that "[w]ithout country-of-origin labelling, these consumers are unable to make an informed choice between US and imported products. In fact, under the Agriculture Department's grade stamp system, they could be misled into thinking some imported meat is produced in this country." Similarly, the Consumers Union wrote that "it is clear that consumers desire to know where there food is coming from". Individual US consumers have also expressed strong support for country of origin labelling in order to provide consumer information and prevent consumer confusion.

26. The support of pro-consumer organizations for country of origin labelling for consumer information purposes is not confined to the United States. In 2008, the Trans Atlantic Consumer Dialogue ("TACD"), a forum of 27 US consumer organizations, 49 EU consumer organizations, and 3 observer organizations from Canada and Australia, adopted a resolution on country of origin labelling stating that "consumers have repeatedly and overwhelmingly expressed their support for country of origin labelling of food products both in the United States and in European countries". Numerous domestic and international polls also indicate strong consumer support for mandatory country of origin labelling.

27. Providing consumer information about origin and preventing consumer confusion are indisputably the objectives of the COOL measures. To determine the objective of the US measures, the Panel should start with their text and may consider their design, architecture, and structure. The 2009 Final Rule states: "the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions". The design, architecture, and structure of the COOL measures reinforce the fact that these are their objectives, with both the statute and 2009 Final Rule structured around the requirement that retailers provide country of origin information to consumers on the covered commodities they buy at the retail level. At the same time, the measures prevent consumer confusion by requiring retailers to list more than one country when an animal was not exclusively born, raised, and slaughtered in the United States.

28. To the extent that the Panel considers the legislative history relevant, it confirms that the objective of COOL measures is consumer information and the prevention of consumer confusion. The conference reports accompanying the statute clearly indicate that it was enacted with the objective of providing consumers with information about origin and the floor statements of the legislators involved with the enactment of the statute indicate that the objective of the measure was consumer information and the prevention of consumer confusion. As one example, Representative John Thune stated: "Why is this important? For several reasons. First, consumers have the right to know the origin of the meat that they buy in the grocery store. Second, ranchers deserve to have their product clearly identified. Third, current law creates a false impression about the origin of USDA grade meat... "

29. The numerous changes made to the implementing regulations to reduce the costs of compliance for foreign and domestic producers also demonstrate that the US objective was not protectionism. After all, it would not have made these changes to help reduce compliance costs if its objective were to protect the domestic industry. Certain changes to the Interim Final Rule – such as the clarification in the 2009 Final Rule that Category B labels cannot be used on Category A meat that is not commingled – are not evidence of protectionism either. To the contrary, these changes were made at the request of US consumer organizations, such as Food & Water Watch and others.

30. To the extent that US consumers, the domestic industry, or Members of Congress expressed a desire to enact the COOL measures to help US farmers through the enactment of the COOL measures, their advocacy was premised on a desire to help US farmers differentiate their products from their competitors, not as a form of protectionism. For example, one US consumer wrote: "American farmers and ranchers produce a superior product and they deserve the right to receive credit for their efforts. Label it and let the market decide." Similar points were echoed by the US producers groups and Members of Congress, all of whom noted a desire to increase competition by providing this information with the hope that the US products would fare well in a competitive market. Thus, it is incorrect to construe the support of the US domestic industry or the support of those that indicated they wanted to help the domestic industry as a protectionist motive. Rather, country of origin labelling was intended to help these producers respond to consumer demand and differentiate their products in a competitive market place, a legitimate motive.

31. The COOL statute and 2009 Final Rule fulfil the legitimate objectives of providing consumer information and preventing consumer confusion at the level that the United States considers appropriate. They have provided millions of consumers with information that was not previously available to them. With regard to meat, these measures ensure that consumers are provided with information about all of the countries in which an animal that was slaughtered in the United States was born and raised.

32. Of course, the United States could have designed the measures to provide even more information to consumers than they currently do. The United States could have required point of production labelling for meat products, could have omitted any flexibility between the use of different labels, and could have omitted certain exemptions. If the United States had designed its measures in this way, consumers would have even more information. However, the United States did not do this. Rather, it responded to the concerns raised by interested parties – including Canada and Mexico – during the regulatory process and sought to design its measures so that they achieved their objectives at a reduced cost of compliance.

33. These efforts by the United States do not demonstrate that the COOL measures do not fulfil their objectives. As a result of the 2009 Final Rule, most of the meat derived from animals born, raised, and slaughtered in the United States is accurately and appropriately being labelled as US origin, consistent with the requests of US consumers. The 2009 Final Rule also ensures that consumers who purchase Category B or C meat are informed of all of the countries in which at least one processing step occurred. Consumers who purchase Category D meat are also informed of that meat's country of origin. Although the commingling provisions may reduce the level of detail provided in certain circumstances, consumers will never be mislead by commingled meat because meat will never be labelled as US origin unless it was in fact derived from an animal born, raised, and slaughtered in the United States. Additionally, the COOL measures help resolve the confusion related to USDA grade labelling and FSIS's "Product of the USA" program by adopting a standard definition of US origin meat that comports with consumer expectations and by adding an origin label to meat products so that the USDA grade label does not mislead the consumer into believing that the meat is derived from a US origin animal when that is not the case.

34. Canada and Mexico's arguments, if accepted, would mean that no Member could adopt a labelling system and achieve its legitimate objective without covering every possible scenario in which a consumer buys food, and would make it extremely difficult to adopt commonsense flexibilities to help reduce compliance costs without jeopardizing the measure itself. At the same time, it would make it challenging to design a measure that is not more trade restrictive than necessary because a Member would always be required to cover every commodity and every scenario even if that particular Member did not believe that it was cost effective or desirable to do so. Additionally, the Member would not be able to adopt flexibilities even when it believes those flexibilities would reduce the overall burden without fear that those efforts would then be used against them in the WTO dispute settlement context as evidence of how the Member did not fulfil its objective. In this sense, Canada and Mexico's arguments illustrate the importance of ensuring that WTO Members are allowed to weigh costs and benefits in the design of their technical regulations. Members must be able to make their own decisions on how to weigh competing interests and should not be discouraged from taking into account the views of interested parties or adopting flexibilities to meet the needs of those parties. Such an approach is entirely consistent with the TBT Agreement.

35. Thus, the Panel should reject Canada and Mexico's attempt to turn the question of whether a particular Member's labelling measure fulfils its objective into a question of whether that Member could have conceivably designed its measure in a different, and perhaps better way. Deciding how to design a technical regulation often necessitates difficult choices, especially when balancing the views of numerous interested parties, and it is quite possible that some parties might choose to make different choices than the United States did in this instance. Some Members might have chosen to err

more on the side of consumer information while others might have decided to err on the side of reduced costs. Regardless, the Panel need not decide whether it would have been appropriate for the United States to lean more in one direction or the other as it attempted to weigh the views of interested parties such as Canada, Mexico, and US consumers. Rather all the Panel must decide in this part of its analysis is whether the US measures fulfil the US objectives at the level the United States considers appropriate. And as the United States explained, the COOL statute and 2009 Final Rule do just that.

36. Canada and Mexico's arguments about the scope of the COOL statute and 2009 Final Rule also would implicate the labelling systems of many other WTO Members. Canada and Mexico argue that the COOL measures are both protectionist and fail to fulfil their objective because of the scope of the products covered and the exemptions that are included. Yet many other Members' labelling systems include similar characteristics. For example, Australia's mandatory labelling requirements apply to pork and fish but not to beef, chicken, or lamb. Australia's requirements also apply at the retail level, but exempt food sold in restaurants. The labelling requirements of Brazil, Colombia, Canada, and the EU, and Korea, among others, share similar characteristics with regard to scope and exemptions.

37. Canada and Mexico have failed to present any reasonably available alternatives to the US COOL measures. A voluntary country of origin labelling system is a not a reasonably available alternative because it would not achieve the US legitimate objectives at the level that the United States considers appropriate. In particular, a voluntary labelling system would not provide consistent and reliable country of origin information to consumers about the covered commodities that they buy at the retail level. This is clear from the fact that the United States proposed a voluntary labelling system, but this system was not followed by US retailers. Most consumer organizations oppose voluntary labelling because they do not believe that it is effective in providing consumers with information. Accepting that voluntary labelling is a reasonably available alternative to mandatory labelling would raise doubts about mandatory labelling systems applied at the retail level by over 70 WTO Members.

38. A system based on substantial transformation is also not a reasonably available alternative; it would fail to achieve the US legitimate objectives for at least three reasons. First, it would not provide any information about the multiple countries where an animal spent its life when it was not born, raised, and slaughtered in more than a single country, information that US consumers and consumer organizations indicated was important to them. Second, it would perpetuate confusion about the origin of animals that were only in the United States for a short period of time before being slaughtered. Third, it would require a definition of origin that is at odds with the views of US consumers and consumer organizations. Indeed, a recent Consumers Union poll confirms the fact that consumers do not support a definition of origin based on substantial transformation and would find such a definition misleading. When asked how they would expect beef derived from a cow born and partially raised in Mexico before being sent to the United States to be fattened for two months and slaughtered to be labelled, 72 per cent of consumers picked a definition other than substantial transformation. Given the lack of consumer support for such a definition of origin, it is clearly not a reasonably available alternative.

39. Finally, Canada and Mexico's arguments that a country of origin labelling system must be based on substantial transformation is inconsistent with the country of origin labelling requirements adopted by many WTO Members, and thus, would call into question the WTO-consistency of these systems. Examples of labelling requirements that do not solely define origin using substantial transformation principles include: (1) Australia's mandatory country of origin labelling requirements for all packaged foods and unpackaged fresh or processed fruit, vegetables, seafood and pork sold at retail; (2) Canada's voluntary "Product of Canada" labelling requirements; (3) Colombia's labelling requirements for honey; (4) the EU's labelling requirements for beef sold at retail; (5) Japan's

labelling requirements for fresh food sold at retail; and (6) Korea's labelling requirements for beef, pork, chicken, rice, and *kim chi*.

V. NONE OF THE COOL MEASURES BREACH TBT ARTICLE 2.4

40. Mexico has failed to meet its burden to show that any of the COOL measures breach TBT Article 2.4. To meet its burden, Mexico must first demonstrate that CODEX-STAN 1-1985 is a relevant international standard for the particular labelling requirements at issue in this dispute, which requires the standard in question to be an international standard and to bear upon or relate to the particular requirements at issue. Mexico has failed to meet its burden with regard to CODEX-STAN 1-1985 because it has not shown that it bears upon or relates to the labelling requirements for a significant number of products at issue in this dispute; namely, the COOL requirements as they apply to meat that is not pre-packaged. A significant portion of meat sold in stores covered by the COOL measures is not pre-packaged, which raises serious questions about whether CODEX-STAN 1-1985 is a relevant standard. Mexico appears to admit as much, conceding that "the standard does not apply to meat that is not prepackaged".

41. Mexico has also failed to demonstrate that the CODEX standard is not an ineffective or inappropriate means of achieving the US legitimate objectives. In this case, CODEX-STAN 1-1985 is both ineffective and inappropriate because it is based on substantial transformation. Thus, it does not fulfil the legitimate objectives of the United States for the reasons discussed in the preceding section.

VI. NONE OF THE COOL MEASURES BREACH TBT ARTICLE 12.3

42. Mexico has failed to meet its burden to demonstrate that any of the COOL measures breach TBT Article 12.3. The text of Article 12.3 requires the developed country Member to take account of a developing country Members' needs *with a view* to avoiding unnecessary obstacles to trade, not to accept every recommendation presented by the developing country Member. Examined in the context of other provisions of the TBT Agreement, such as the most favoured nation provisions, Article 12.3 does not require the developed country Member to treat the developing country Member more favourably than other similarly situated parties. Similar provisions in other agreements, such as SPS Article 10.1, may also provide relevant context and disputes concerning this provision may be instructive. In *EC – Approval and Marketing of Biotech Products*, the panel found that the EC had not breached SPS Article 10.1 despite its failure to produce evidence suggesting it had taken Argentina's needs as a developing country Member into account during the preparation and application of its measure.

43. Mexico has also failed to meet its burden to establish a violation of Article 12.3 of the TBT Agreement. Mexico has not adduced any evidence to demonstrate that the United States did not take its needs into account, but rather implies that the burden is on the United States to show that it did. While the United States does not bear this burden as the responding party, the United States has repeatedly demonstrated the steps it took to take Mexico's concerns into account. For example: (1) USDA provided Mexico with multiple opportunities to comment on development of the COOL implementing regulations and took Mexico's concerns into consideration; (2) USDA held a briefing on the Interim Final Rule for embassy officials, including those from Mexico, who were provided the opportunity to share their views; (3) AMS individually met with officials from the Mexican Embassy to discuss the COOL rule making and took their views into account; and (4) the United States discussed the COOL rule making at meetings of the United States - Mexico Consultative Committee on Agriculture (CCA).

44. The United States also modified the COOL measures to address Mexico's concerns by significantly reducing the record keeping burden and introducing significant flexibility (such as

commingling) into the 2009 Final Rule that has helped mitigate any potential impact on exports from Mexico. Although the United States did not adopt every single suggestion put forward by Mexico, TBT Article 12.3 does not require it to do so. Rather, a developed country developing a regulation is expected to balance developing country considerations against the views of other interested parties, such as consumers and retailers. In this instance, the United States weighed the views of all interested parties as it designed the 2009 Final Rule in a way that would provide consumer information without imposing an undue burden on foreign and domestic producers. Thus, even if Mexico had put forth information to show that the United States did not take account of its views, the information that the United States has put forth is sufficient to rebut it.

VII. NONE OF THE COOL MEASURES BREACH GATT ARTICLE X:3

45. Canada and Mexico have failed to demonstrate that any of the COOL measures breach GATT Article X:3. Both parties continue to focus on actions that are not the "administration" of the COOL measures. The meaning of the term "administer" is to "put into practical effect" or to "apply" the measures referred to in paragraph 1 of Article X:3. Contrary to Mexico's suggestion, the meaning of the word "administration" does not include all of the "steps, actions, or events that are taken or occur in relation to the making of an administrative decision". The Appellate Body explicitly rejected this interpretation, clarifying that "under Article X:3(a), it is the application of a legal instrument of the kind described in Article X:1 that is required to be uniform, but not the processes leading to administrative decisions, or the tools that might be used in the exercise of administration". Thus, Canada and Mexico's focus on the Vilsack Letter and the development of the 2009 Final Rule is legally inapposite. Neither action "puts into practical effect" or "applies" any of the COOL measures.

46. Canada and Mexico's arguments also lack any evidentiary support for the proposition that the US administration has been non-uniform or unreasonable. The complaining parties have not produced any evidence to suggest that the COOL measures were not applied equally to all entities subject to their requirements or that the issuance of the Vilsack Letter or the development of the 2009 Final Rule were unreasonable. The Vilsack Letter was issued in accordance with a directive from the Obama Administration to review pending regulations while the development of the 2009 Final Rule proceeded in accordance with the normal US rule making process. While the implementing regulations evolved, this is commonplace in a transparent system and many changes were made in response to comments received by Canada and Mexico to reduce the 2009 Final Rule's burden.

ANNEX C

THIRD PARTY SUBMISSIONS

ANNEX C-1

**EXECUTIVE SUMMARY OF THE
THIRD PARTY WRITTEN SUBMISSION OF AUSTRALIA**

I. INTRODUCTION

1. The US country of origin labelling requirements (the "COOL measure") at issue in these proceedings raise significant systemic issues concerning the legal obligations and rights of WTO Members under the Agreement on Technical Barriers to Trade (TBT Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994).

II. THE MEASURE AT ISSUE

2. Canada and Mexico have broadly identified the measure at issue to encompass the 2008 Interim Final Rule and the Vilsack Letter[1] in addition to the 2009 Final Rule and the 2002 COOL Statute, as amended. Mexico has also included the Food Safety and Inspection Service Interim Rule. The COOL measure thus identified covers many commodities and affects every stage of the supply chain. Relevantly (given Australia's large exports of muscle cuts and manufactured ground beef), Australia notes ground beef (along with other ground meats) is subject to very particular COOL requirements under §65.300(h) of the 2009 Final Rule.

3. Australia disagrees with the US contention that Canada and Mexico have failed properly to identify the measure at issue because they have not addressed the WTO consistency of all elements of the COOL measure. In this regard, Australia notes the Panel's statement in *EC-Sardines* that a complaining party may elect to "identify and challenge only those offending provisions of the measure it deems central to its interest in resolving the dispute".[2]

4. Like Canada and Mexico, Australia also regards the Vilsack Letter as a measure which can be challenged in WTO dispute settlement proceedings. It is an act directly attributable to the executive of a WTO Member. The Vilsack Letter is an official document that sets out the official position of the US Department of Agriculture as mandated by the Secretary of the Department and is characterised by the Secretary as representing the will of the US Congress.

III. THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

A. DEFINITION OF TECHNICAL REGULATION

5. Australia considers the COOL measure meets the three criteria identified by the Appellate Body in *EC – Asbestos* required to fall within the definition of a "technical regulation" under Annex 1 of the TBT Agreement,[3] as it relates to named "covered commodities", provides for labelling requirements (as referred to in the definition of a technical regulation in Annex 1), and is of binding or compulsory nature.

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[1] US Secretary of Agriculture Thomas J. Vilsack's letter to Industry Representatives dated 20 February 2009.

[2] Panel Report, *EC – Sardines*, para. 7.34.

[3] Appellate Body Report, *EC – Asbestos*, paras. 66-70, cited also in Appellate Body Report, *EC – Sardines*, para. 176. See Canada's first written submission, paras. 71-74 and Mexico's first written submission, paras. 238-260.

6. Australia notes Mexico directly addresses the mandatory nature of the Vilsack Letter. The United States challenges Mexico's characterisation of the letter as mandatory. In Australia's view, Mexico is correct in asserting that how the US Department of Agriculture characterises the Vilsack Letter should not be determinative of its character. Instead, a critical question for the Panel is whether industry views this letter as mandating action.

B. ARTICLE 2.1 OF THE TBT AGREEMENT

7. There is limited direct guidance from WTO Panel and Appellate Body Reports on the application of Article 2.1 of the TBT Agreement. However, Australia believes the Panel can be informed by the interpretation of the phrases "like product" and "treatment no less favourable" in GATT Article III:4.

8. Australia notes the US argument that Canada and Mexico's "like product" analysis is deficient because the subject of the COOL measure is meat and not livestock. Australia disagrees with this interpretation and believes Article 2.1 should be applied to country of origin labelling requirements, so as to encompass "like products" that, at whatever point of the supply process, are required to be identified for the purposes of labelling the end product. In other words, the application of the COOL measure to all early stage products, whether livestock, muscle cuts or beef trimmings used in ground beef, should be subject to Article 2.1.

9. In Australia's view, both Canada and Mexico have clearly established that live cattle, and in the case of Canada, live hogs, are "like products" to US live cattle and hogs.

10. Australia also submits that imported beef trimmings used for processing or grinding into ground beef in the United States are like products to domestic (US) beef trimmings. Imported beef trimmings have the same properties, nature and quality as the US product, and the same end uses as US beef trimmings, as both are processed into ground beef. Finally, Australia also notes that imported beef trimmings and US beef trimmings that are processed into ground beef are classified under the same subheading 0201 and 0202 under the Harmonised System of Tariff Classification.

11. The objective of the "treatment no less favourable" requirement is to provide "equality of opportunities" for imported goods.[4] As part of this analysis, it is necessary to examine whether the COOL measure "modifies the conditions of competition in the relevant market to the detriment of imported products".[5]

12. On its face, the COOL measure provides for formally identical treatment of imported product as the same requirements to identify the origin of the product apply equally to domestic product. However, the COOL measure has the potential to accord different treatment to imported product that amounts to less favourable treatment within the meaning of Article 2.1 of the TBT Agreement because it results in additional operational costs on imported product.

13. Australia does not object to identifying imported product on labels and does not agree with Mexico's claim that country of origin labelling measures "are inherently protectionist and discriminatory".[6] As the United States submits, "there is nothing about country of origin labelling that

[4] *US – Section 337 of the Tariff Act*, para. 5.11: see Canada's first written submission, paras. 87 and 88 and Mexico's first written submission, para. 217, with reference to the Appellate Body Report, *Korea – Various Measures on Beef*, para. 137 and Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 93.

[5] Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

[6] Mexico's first written submission, para. 5.

is inherently unfavourable to imported products".[7] At times it may even favour imported product. Australia maintains its own mandatory country of origin labelling requirements and as an exporter of many products to countries with country of origin labelling requirements seeks to ensure such requirements do not hinder international trade. Australia notes many WTO Members maintain country of origin labelling requirements.

14. However, Australia agrees with Mexico's claim that the COOL measure discriminates "by virtue of its design, structure and application".[8] Australia's concerns focus on the higher cost burdens the requirements place on the use of imported product throughout the chain of supply. The COOL requirements applicable to ground beef are an example of such *de facto* discrimination, as labelling of all possible countries of origin in accordance with the 60 day inventory allowance could distort the market in favour of domestic product and is likely to result in discrimination against imported product.

15. Should the Vilsack Letter be found to be a "technical regulation", Australia agrees with Canada's assessment that the effect of the labelling practices in the letter "would severely curtail the ability to commingle meat from various countries of origin".[9] Both production step labelling and extending coverage to processed meats would impose higher costs where imported product is used. Further, a reduction in the ground meat inventory allowance to <u>*10 days*</u> as set out in the Vilsack Letter (from the 60 day requirement contained in the 2009 Final Rule) would reduce the minimal flexibility currently available to processors. There would be a corresponding increase in compliance costs relating to traceability, record keeping and packaging or other forms of labelling as labels would have to be changed more frequently.

C. ARTICLE 2.2 OF THE TBT AGREEMENT

16. Article 2.2 of the TBT Agreement grants Members the right to adopt technical regulations for the purpose of fulfilling legitimate objectives. Australia submits the correct analysis under Article 2.2 involves examination of:

- whether the objective of the measure at issue is a legitimate objective;
- whether the measure at issue is more trade-restrictive than necessary to fulfil a legitimate objective, which in turn involves an assessment of:
- whether the measure is trade-restrictive;
- whether the measure is to fulfil a legitimate objective; and
- whether there are other reasonably available alternatives that may be less trade-restrictive while still fulfilling the legitimate objective at the level of protection the Member considers appropriate; and
- the risks non-fulfilment [of the legitimate objective] would create.

17. Firstly, Australia submits that an examination of the legitimacy of an objective is confined to an examination of whether the objective put forward by the respondent is legitimate within the meaning of Article 2.2. The text of Article 2.2 provides that legitimate objectives include, among

[7] United States' first written submission, para. 141.
[8] Mexico's first written submission, para. 5.
[9] Canada's first written submission, para. 28.

other things, the prevention of deceptive practices and the protection of human health and safety. Article 2.2 does not expressly restrict what might be legitimate objectives; the list is not exclusive. The United States has put forward the provision of consumer information so as to minimise consumer confusion as the legitimate objective of the COOL measure.[10] Australia regards enabling consumers to identify the source of a product a legitimate objective for the purposes of Article 2.2.

18. Second, Australia considers that Article 2.2, in requiring that a challenged measure must be necessary "to fulfil a legitimate objective", means that the measure must fulfil or at least have the capacity to fulfil, the legitimate objective. The relevant question in this dispute is whether the COOL measure does carry out, or has the capacity to carry out, its stated objective of providing accurate additional consumer information.

19. In Australia's view, Canada has identified aspects of the COOL measure that do not appear to achieve that stated objective, particularly in the labelling of ground beef.[11] In some respects, the COOL measure can in fact result in misleading and inaccurate information. In particular, the 60 day inventory allowance could result in inaccuracy, as the label could identify the origin of products not in fact used in the ground beef.

20. Third, as noted by Canada and Mexico, GATT disciplines on the use of restrictions are meant to protect not "trade flows", but rather the "competitive opportunities of imported product".[12] Trade-restrictive measures therefore include those that impose any form of limitation, discriminate against or deny competitive opportunities to imported product. In Australia's view, the COOL measure limits trade by imposing recordkeeping and segregation costs which are likely to be greater when imported product is used and thus impact on the competitive opportunities of imported product.

21. Australia notes that elements of the "necessity" analysis developed under GATT Article XX are similar to the elements contained in the language of Article 2.2 of the TBT Agreement. Applied to Article 2.2, establishing the necessity of the trade-restrictive elements of the COOL measure may require consideration of the extent to which the trade-restrictive elements make a contribution to the legitimate objective or contribute to the realisation of the end pursued: the greater the contribution the more easily the trade-restrictive elements of the measure might be considered necessary.[13]

22. Thus, with respect to ground beef, the COOL measure does not appear to fulfil its objective and further, may be more trade-restrictive than necessary given the reasonable availability of other alternatives.

23. One possible alternative would require labels to identify "domestic" or "imported" product (without specifying the particular country of origin). This greater flexibility would enable processors to use imported product without needing to segregate product by country of origin or adjust recordkeeping practices to avoid financial penalties under the COOL measure.

24. In summary, Australia considers that the trade-restrictive aspects of the COOL measure are not necessary to fulfil the stated objective of providing accurate consumer information and that the

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[10] United States' first written submission, para. 206. The United States notified the "objective and rationale" as "consumer information" in its amended Notification to the Committee on Technical Barriers to Trade: G/TBT/N/USA/281/Add.1, 7 August 2008.

[11] Canada's first written submission, paras. 178-180.

[12] Canada's first written submission, para. 184 and Mexico's first written submission, para. 306 citing Panel Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, at para. 7.330 and Panel Report, *EC – Bananas III (Article 21.5 – US)*, at para. 7.677.

[13] Appellate Body Report, *Korea – Various Measures on Beef*, paras. 160-163.

objective of providing consumer information could be fulfilled by the less trade-restrictive alternative for ground beef outlined above.

D. Article 2.4 of the TBT Agreement

25. Mexico identifies the *Codex General Standard for the Labelling of Prepackaged Foods* ("CODEX-STAN 1-1985") prepared by the Codex Commission as a "relevant" international standard upon which the COOL measure should be based. Australia queries whether the purpose of the CODEX-STAN 1-1985 is relevant or bears upon the COOL measure, which is not intended directly to address misleading or deceptive labelling practices (though it may complement such practices).

26. In the alternative, should the Panel find that CODEX-STAN 1-1985 is a relevant standard that should have provided the basis for the COOL measure, Australia considers that CODEX-STAN 1-1985 is unlikely to be effective or appropriate in all cases to fulfil the legitimate objective of providing accurate consumer information.

IV. THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT 1994)

27. Australia notes the three elements that must be satisfied to establish a violation of GATT Article III:4: that the imported and domestic products are "like products"; that the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and that the imported products are accorded "less favourable treatment" than that accorded to like domestic products.[14]

28. As under Article 2.1 of the TBT Agreement, Australia considers that the COOL measure has the potential to impose higher cost burdens on the use of imported product throughout the chain of supply and therefore provides less favourable treatment to imported product contrary to Article III:4 of GATT 1994.

V. CONCLUSION

29. In Australia's view, contrary to the national treatment obligations in Article 2.1 of the TBT Agreement and Article III:4 of GATT 1994, the COOL measure has the potential detrimentally to affect the conditions of competition so as to discriminate against imported product, resulting in treatment less favourable for such products.

30. Furthermore, Australia believes the COOL measure is inconsistent with the obligation set out in Article 2.2 of the TBT Agreement, in that the trade-restrictive nature of the COOL measure is not necessary to fulfil its objective of providing accurate consumer information, given less trade-restrictive and reasonably available alternatives, including that identified by Australia in relation to ground beef.

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[14] Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.

ANNEX C-2

THIRD PARTY ORAL STATEMENT OF AUSTRALIA AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. Mr Chairman, members of the Panel. Thank you for the opportunity to present Australia's views on this dispute, which raises important issues of legal interpretation. Australia highlighted some of these issues in its written submission. We will not repeat all of those arguments today.

2. Instead, in this statement we will identify some of the key questions which Australia believes the Panel should address in relation to the claims by Canada and Mexico that the US COOL measure is inconsistent with Articles 2.1 and 2.2 of the TBT Agreement; and in relation to the arguments put by the United States to the contrary.

3. Whilst noting the claims of Canada and Mexico extend beyond Articles 2.1 and 2.2, Australia has chosen to focus on these articles, and on these questions, because many of the questions have not yet been specifically addressed by a panel or the Appellate Body.

II. QUESTIONS FOR THE PANEL'S CONSIDERATION

A. WHAT IS THE NATURE OF THE COOL MEASURE?

4. Canada and Mexico have broadly identified the COOL measure to encompass a number of individual measures, which together make up the measure at issue in these proceedings.

5. Australia submits that the Panel must decide whether the COOL measure, as identified by Canada and Mexico, is a measure for the purposes of dispute settlement under the DSU and a technical regulation for the purposes of the TBT Agreement.

6. Of particular interest in this calculus, is the Panel's characterisation of the so-called Vilsack Letter, sent by US Secretary of Agriculture Thomas J. Vilsack to Industry Representatives on 20 February 2009.

7. In Australia's view, the Vilsack Letter is an act directly attributable to the executive of a WTO Member, and therefore, consistent with the Appellate Body's comments in *US – Corrosion-Resistant Steel Sunset Review*, challengeable in WTO dispute settlement proceedings. The letter is an official document that sets out in detail the official position of the US Department of Agriculture as mandated by the Secretary of that department and is characterised by the Secretary as representing the will of the US Congress.

8. For the purposes of the definition of a technical regulation in Annex 1 of the TBT Agreement, a further consideration is whether the Vilsack Letter is a mandatory element of the COOL measure. This issue is addressed by Mexico in its submission. Australia notes the argument by the United States that compliance with the Vilsack Letter is in fact voluntary. However, Australia believes that none of the factors set out by the United States in support of this contention are necessarily determinative of whether the Vilsack Letter is in fact mandatory, or "binding or compulsory". Nor is the US Department of Agriculture's characterisation determinative. Rather, the critical question for the Panel to examine is whether industry views the letter as mandating action.

B. TO WHAT PRODUCTS DOES THE COOL MEASURE RELATE?

9. Canada and Mexico have based their claims under Article 2.1 of the TBT Agreement (and Article III:4 of GATT 1994) on an analysis of 'like product' between Canadian and Mexican live cattle on the one hand, and US live cattle on the other; and between Canadian and US live hogs.

10. Australia notes that the COOL measure applies broadly to a range of covered commodities, including beef trimmings for which Australia has a particular export interest. In its third party submission, Australia also submits that imported beef trimmings are a like product to US domestic beef trimmings used in ground beef.

11. In addressing this issue, the Panel should consider whether Canada and Mexico (with what appears to be agreement from the United States) are correct in applying the GATT Article III:4 analysis of like product to the analysis of like product under Article 2.1 of the TBT Agreement.

12. Further, the Panel ought to reject the US argument that the subject of the COOL measure is in fact meat and not livestock, and therefore Canada and Mexico's claim fails, as they have not demonstrated that Canadian and Mexican meat is a like product to US meat.

13. In this respect, Australia notes that such a narrow interpretation of the phrase "in respect of technical regulations" in Article 2.1 would in fact undermine the application of the Article. It would allow, for example, a country to actively discriminate against a broad range of source products, simply because those source products are not the subject of, or "in respect of" the actual technical regulation.

14. Australia submits the better view, in particular with respect to country of origin labelling requirements, is that Article 2.1 should be applied so as to encompass like products that, at whatever point of the supply process, are required to be identified for the purposes of labelling the end product. Applied to the COOL measure, all early stage products, whether livestock, muscle cuts or beef trimmings used in ground beef, would be subject to the disciplines of Article 2.1.

C. DOES THE COOL MEASURE PROVIDE FOR TREATMENT LESS FAVOURABLE?

15. Australia notes the approach taken by Canada and Mexico drawing upon the analysis developed under GATT Article III:4 in determining whether the COOL measure provides for less favourable treatment to like products of non-national origin. Should the Panel agree with this approach, then Australia believes the critical question for the Panel to examine is whether the COOL measure "modifies the conditions of competition in the relevant market to the detriment of imported products" (as articulated by the Appellate Body in the *Korea – Various Measures on Beef* dispute).

16. In this case, where the measure provides for formally identical treatment on its face, the Panel should also consider whether the measure has the potential to accord de facto less favourable treatment. Canada and Mexico both seek to demonstrate the COOL measure accords differential treatment to imported livestock that amounts to less favourable treatment within the meaning of Article 2.1 of the TBT Agreement. Put simply, Canada and Mexico contend that the COOL measure results in additional operational costs on imported product, in particular with respect to segregation and recorC-keeping, than the costs it imposes when domestic product is used.

17. Should the Panel agree with Canada and Mexico on this point, then Australia would submit this does constitute differential (and less favourable) treatment for the purposes of Article 2.1 of the TBT Agreement.

18. Australia also believes this differential (and less favourable) treatment extends to ground beef, as another covered commodity of the COOL measure. As the ground beef market in the United States is currently structured, it is more likely that US beef trimmings used in ground beef will be present in the inventory of a production plant compared to imported beef trimmings from any one country. Accordingly, the impact of the COOL measure would be felt most heavily when imported product is used, creating an incentive for processors to favour domestic product (and to discriminate against imported product).

19. Australia does not believe that country of origin labelling schemes generally are "inherently protectionist and discriminatory", as claimed by Mexico in its submission. Rather, the question for the Panel is whether the US COOL measure provides (or has the potential to provide) treatment less favourable by virtue of its "design, structure and application".

D. IS THE COOL MEASURE'S OBJECTIVE LEGITIMATE?

20. For the purposes of Article 2.2 of the TBT Agreement, Australia submits the Panel must first determine whether the objective of the measure at issue is legitimate.

21. Consistent with the findings of the Appellate Body in the *EC-Sardines* dispute, Australia believes that an examination of legitimacy is confined to whether an examination of the stated objective, as put forward by the United States, is legitimate within the meaning of Article 2.2. It does not extend to an examination of whether the stated objective is actually the objective of the measure. Rather, Australia invites the Panel to determine, with regard to the text of Article 2.2, whether the United States' stated objective of the COOL measure – to provide consumer information so as to minimise consumer confusion – is in fact legitimate.

22. In Australia's view, the United States, through the COOL measure, is seeking to provide consumers with additional useful information. Australia considers that such an objective is a legitimate objective, and accepts the US view that this objective is "closely related" to preventing deceptive practices.

E. DOES THE COOL MEASURE FULFIL ITS LEGITIMATE OBJECTIVE?

23. Australia considers the Panel must then separately decide whether the COOL measure fulfils the stated objective. Australia submits the Panel must determine whether the COOL measure actually carries out, or at least has the capacity to carry out, its stated objective of providing accurate additional consumer information. Should the Panel conclude that a complainant has demonstrated that a measure does not or could not achieve its stated objective, it would be open to conclude the measure does not meet the terms of the second sentence of Article 2.2 and therefore amounts to an unnecessary obstacle to trade within the meaning of the first sentence of Article 2.2.

24. In this regard, Australia notes Canada's arguments in particular, that the COOL measure does not appear to achieve its stated objective of providing accurate consumer information, with respect to the labelling of meat products derived from livestock and of ground beef.

F. ARE THERE ANY REASONABLY AVAILABLE ALTERNATIVES?

25. Australia submits that the correct analysis called for under Article 2.2 also requires the Panel to decide whether there are other reasonably available alternatives that may be less trade-restrictive while still fulfilling the legitimate objective at the level the respondent considers appropriate.

26. Australia notes that the complainants, as well as a number of third parties to this dispute, have highlighted a number of reasonably available alternatives, including: voluntary labelling schemes; labelling schemes based on substantial transformation; and, in Australia's case, mandatory labelling which identifies imported or domestic product (without specifying the particular country of origin).

27. Australia submits if the alternative of marking product with 'imported' or 'domestic' were adopted, this would achieve greater accuracy with respect to the labelling of ground beef and be less trade-restrictive than the existing requirements under the COOL measure. Nonetheless, the objectives of the COOL measure would still be met: accurate, additional information would be available to consumers, in particular whether the source of the product was domestic or foreign. Adopting this approach would reduce associated segregation and recordkeeping costs, as processors would not need to segregate product by each particular country of origin. Notably, processors would always have the option of voluntarily identifying specific countries of origin if consumer demand justified the additional cost.

III. CONCLUSION

28. In conclusion, Australia considers the Panel should pay careful attention to the following questions, amongst others, in assessing the consistency of the COOL measure:

- What is the nature of the COOL measure?
- To what products does the COOL measure relate?
- Does the COOL measure provide for treatment less favourable?
- Is the COOL measure's objective legitimate?
- Does the COOL measure fulfil its legitimate objective?
- Are there any reasonably available alternatives?

29. Australia considers, in general, that mandatory country of origin labelling regimes must be designed and implemented in the least trade-restrictive manner possible so that imported products are not subject to less favourable treatment than like domestic products due to labelling requirements.

30. In Australia's view, contrary to the national treatment obligations in Article 2.1 of the TBT Agreement and Article III:4 of GATT 1994, the COOL measure has not been designed in such a manner. It has the potential to detrimentally affect the conditions of competition so as to discriminate against imported product, resulting in treatment less favourable for such product.

31. Furthermore, in Australia's view, the COOL measure does not appear to be consistent with the obligation set out in Article 2.2 of the TBT Agreement in that the trade-restrictive nature of the COOL measure is not necessary to fulfil its objective given the less trade-restrictive and reasonably available alternatives identified by the parties and third parties, including by Australia in relation to ground beef.

32. Australia would be pleased to provide answers to any questions from the Panel, including as requested on Australia's mandatory country of origin labelling regime.

ANNEX C-3

**THIRD PARTY ORAL STATEMENT OF AUSTRALIA
AT THE SECOND SUBSTANTIVE MEETING**

I. INTRODUCTION

1. Mr Chairman, members of the Panel, thank you for this further opportunity to present Australia's views in this dispute, and in particular, for the opportunity to participate in this second panel hearing.

2. In this statement we have chosen to focus on some of the key questions the Panel may wish to address in its consideration of Article 2.2 of the TBT Agreement.

II. QUESTIONS FOR THE PANEL'S FURTHER CONSIDERATION

A. How should the Panel approach its interpretation of Article 2.2 of the TBT Agreement?

3. One such question is *how* the Panel should approach its interpretation of this Article.

4. Australia submits that the second sentence of Article 2.2 elaborates on the meaning of the fundamental discipline in the first sentence. Thus the elements in the second sentence must be considered in the context of the overarching commitment to ensure that technical regulations are not unnecessary obstacles to international trade.

5. Accordingly, Australia agrees with the principal parties that the first threshold question for the Panel to address under Article 2.2 is whether a technical regulation is 'trade restrictive' or an 'obstacle to international trade'.

6. Australia notes that GATT disciplines on the use of restrictions are meant to protect the competitive opportunities of imported products rather than trade flows.[1] Given this, Australia agrees with Canada and Mexico that a measure may be trade restrictive if it imposes any form of limitation on imports, discriminates against imports or denies competitive opportunities to imports.

7. If the measure is found to be trade restrictive, Australia submits that the Panel must then determine whether it is more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create, in accordance with the second sentence of Article 2.2. In other words, the Panel must assess whether the measure is an *unnecessary* obstacle to international trade.

B. How should the Panel approach its assessment of the legitimacy of the objective of the COOL measure?

8. The next question Australia would like to address is how the Panel should approach its assessment of the legitimacy of the objective of the COOL measure.

[1] See citations in Australia's third party written submission, para. 71.

9. Australia considers that the correct approach is first to establish the objective of the measure and then to consider the legitimacy of that objective, taking into account the fundamental obligation in the first sentence of Article 2.2.

10. In making its preliminary determination of the objective of the measure, Australia agrees with the United States that the Panel should start with the text of the measure.[2]

11. Broader evidence relevant to the development of a measure may be considered by the Panel in making this determination. However, in Australia's view, the Panel should not lightly overturn the stated objective of a measure.

12. Australia notes that some parties and third parties have argued that for objectives not specifically listed in Article 2.2, including, in this case, the provision of consumer information, a Member must provide 'clear and compelling evidence'[3] of its legitimacy. This includes evidence of a wider intent to implement a particular policy goal.

13. The inclusion of the term *inter alia* before the list of objectives in Article 2.2 clearly indicates this list is non-exhaustive. Further, the TBT Agreement affords flexibility to Members to implement technical regulations to pursue any number of legitimate domestic policy objectives.

14. Setting high thresholds for objectives not listed in Article 2.2 runs the risk of curtailing this flexibility. It may also result in Members attempting to artificially adjust the 'official' objective of a regulation so that it fits neatly within one of the listed objectives.

15. Australia believes the objective of providing consumer information is closely related to the prevention of deceptive practices. Providing additional accurate information about a product also assists consumers to make informed purchasing decisions. In Australia's view, the provision of consumer information is clearly a legitimate objective for the purposes of Article 2.2.

C. How should the Panel approach the question of whether the COOL measure fulfils the legitimate objective?

16. Moving on to the next question, Australia submits that the Panel must assess whether the COOL measure 'fulfils' its legitimate objective. In this regard, assuming that the objective of the measure is to provide information to consumers and prevent consumer confusion, the COOL measure must actually carry out, or at least have the capacity to carry out, this objective.

17. Although we agree that a Member has some discretion to pursue legitimate objectives at the levels it considers appropriate, this discretion does not extend to a Member being able to introduce measures that do not actually fulfil, or are not capable of fulfilling, the legitimate objective.

18. In this case, evidence that may be relevant to this enquiry includes whether the information provided to consumers under the COOL measure is potentially inaccurate or misleading. Australia notes the example of the application of the COOL measure in relation to ground beef where a country of origin may potentially be listed on the label of a product that does not in fact include any product from that country.

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[2] United States' second written submission, para. 119.
[3] Canada's second written submission, para. 70; New Zealand's written submission, para. 32.

D. TO WHAT EXTENT IS IT UP TO THE RELEVANT MEMBER TO STRIKE A BALANCE BETWEEN FULFILLING THE LEGITIMATE OBJECTIVE AND REDUCING TRADE RESTRICTIVENESS?

19. The United States emphasises that the TBT Agreement allows Members to design measures to achieve legitimate objectives at the level they consider appropriate.[4] Given this, the United States argues that the COOL measure was specifically designed to strike what it considers to be an appropriate balance between achieving its objective of providing consumer information whilst reducing the costs of compliance.[5]

20. Australia agrees that a Member can exercise some discretion in pursuing measures that achieve its legitimate objectives at the levels it considers appropriate. However, there is a limit to that discretion. The panel in *EC – Sardines* emphasised that although the TBT Agreement accords a degree of deference with respect to the policy objectives Members may wish to pursue, 'it shows less deference to the means which Members choose to employ to achieve their domestic policy goals'[6].

21. This is reflected in the preamble to the TBT Agreement which includes the caveat that a measure must not be applied in a manner which would constitute a 'means of arbitrary or unjustifiable discrimination'. In the specific context of Article 2.2, the check on a Member's discretion is borne out in the question of whether the measure is an *unnecessary* obstacle to international trade. And, as discussed, this may in turn necessitate a consideration of the factors set out in the second sentence of Article 2.2.

22. It is Australia's view that although it is up to the United States to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them, it is for the Panel to determine whether the means by which the United States has chosen to achieve this – the COOL measure – are more trade restrictive than necessary to fulfil the legitimate objective to the extent identified by the United States.

E. HOW 'IMPORTANT' IS THE OBJECTIVE OF PROVIDING CONSUMER INFORMATION AND TO WHAT EXTENT SHOULD THE PANEL SHOULD TAKE THIS INTO CONSIDERATION?

23. Australia submits that a finding as to whether a technical regulation is 'more trade restrictive than necessary to fulfil a legitimate objective' must be weighed against the risks non-fulfilment of the particular legitimate objective would create. If the risks associated with non-fulfilment of a particular objective are high, a measure may still be justified regardless of its trade-restrictiveness.

24. Australia agrees that such risks may differ depending on the *nature* or, as suggested by Canada, the *importance* of the legitimate objective the measure is designed to fulfil.[7]

25. Australia is however concerned by any implication that the COOL measure's objective of providing additional consumer information is of low importance.

26. Australia emphasises that providing consumer information can be an important objective. This is particularly the case given the increasingly globalized and complex supply chains for products such as beef and other consumables. The importance of providing consumer information is evidenced by the significant number of Members which maintain, or intend to maintain, a COOL scheme of some description.

[4] United States' second written submission, para. 154.
[5] United States' first written submission, para. 238.
[6] Panel Report, *EC – Sardines*, para. 7.120.
[7] Canada's second written submission, para. 86.

27. The parties have acknowledged that COOL schemes are not *per se* WTO inconsistent.[8] Australia would therefore caution that a finding that the objective of providing consumer information is of such a low order that only limited trade restrictiveness would be justifiable may have the practical effect that no Member can maintain or implement COOL measures for the purpose of providing information to its consumers.

F. WHAT IS THE RELEVANT EVIDENTIARY THRESHOLD WHEN CLAIMING *DE FACTO* DISCRIMINATION?

28. Finally, Australia also wishes to briefly comment on the evidentiary threshold that must be met when claiming *de facto* discrimination under the national treatment principle in Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement.

29. In particular, Australia notes the submission by the European Union that there is a 'high threshold and a need for particular rigour' in proving a *de facto* discrimination case.[9] In addition, the European Union has suggested that it may be necessary for a complainant to wait for an undefined period of time to accurately assess the impacts of the regulation to determine whether there are equal opportunities for the different goods concerned.[10]

30. Australia wishes to emphasise that the national treatment principle 'protects expectations' of the equality of the competitive relationship between imported and domestic products.[11] This approach is necessary to avoid the situation where a Member is only able to challenge regulations after the event and not in order to forestall less favourable treatment.[12]

31. Australia recalls its argument in relation to ground beef that the COOL measure has the potential to impact on the competitive opportunities of imported products to the detriment of those products.

III. CONCLUSION

32. To conclude, in this statement we have sought to highlight some of the key issues of interpretation surrounding Article 2.2 of the TBT Agreement, a provision on which there has been limited guidance to date.

33. In particular, Australia submits that the Panel's assessment of the trade-restrictiveness inherent in the COOL measure's structure and design, and its ability to fulfil its legitimate objective, may be particularly relevant considerations in determining whether the COOL measure is inconsistent with Article 2.2.

34. Australia would be pleased to answer any questions from the Panel.

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[8] See, for example, Canada's responses to the Panel's questions from the first substantive meeting, para. 73; Mexico's Responses to the Panel's questions from the First Substantive Meeting, para. 103.

[9] Replies to the First Questions by the European Union, para. 32.

[10] *Ibid*, para. 29-30.

[11] Appellate Body Report, *Japan – Alcoholic Beverages II, page 16*; GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.13; Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215; Panel Report, *Korea – Various Measures on Beef*, paras. 623-, 627.

[12] GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.13.

ANNEX C-4

THIRD PARTY WRITTEN SUBMISSION OF BRAZIL

I. INTRODUCTION

1. Brazil welcomes this opportunity to provide its views in these proceedings. As one of the largest producers and exporters of some of the commodities covered by the measures at issue in this dispute, Brazil has significant interests in the outcome of this dispute, the factual analysis to be conducted by the panel and the legal interpretation to be developed. Moreover, not only the United States but also many other large markets for Brazilian products have been applying a growing number of technical barriers to trade, of increasing complexity.

2. Brazil believes that better consumer information may be beneficial to the economy and to the society at large, as it may allow more informed purchasing decisions by consumers. However, Brazil is especially concerned with the risk posed by some measures, such as labelling requirements, which might open a new avenue for disguised protectionism if not properly disciplined. Therefore, their consistency with the covered agreements should be evaluated with utmost caution by panels.

3. One of the critical aspects when dealing with technical regulations is the difficulty in determining whether a specific measure responds primarily to a public interest or to protectionist interests. Sometimes the problem is compounded by the fact that both motives may be combined in a single technical regulation. Thus, a panel should always carefully analyse not only the alleged justification, but also the design and operation of specific measures in this domain.

II. INTERPRETATION OF TBT ARTICLE 2.2

4. Both complainants claim that the COOL measure violates, among others, Article 2.2 of the Agreement on Technical Barriers to Trade ("TBT Agreement"). In this connection, Brazil would like to offer its views on some elements that it believes should be taken into account in the panel's interpretation of Article 2.2.

5. Article 2.2 establishes that:

> "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended enC-uses of products."

6. The reading of this article suggests that the following sequence of analysis may be useful in assessing compliance with Article 2.2 of the TBT Agreement: (i) first, the Panel should assess whether the objective stated by the regulating Member is "legitimate"; (ii) second, if the stated objective is found to be legitimate, the Panel should evaluate whether the actual measure at issue bears a rational link with the stated objective. If that is the case, then (iii) the measure at issue should be subject to the "necessity test" that is provided under Article 2.2. Such a test entails an assessment of whether the technical regulation in question is more trade-restrictive than necessary to fulfil the

legitimate objective in point. This assessment may include, inter alia, consideration of the degree of trade-restrictiveness of the technical regulation; its effectiveness in fulfilling the given objective; and possible less trade-restrictive alternative measures which might be reasonably available.

A. "MORE TRADE-RESTRICTIVE THAN NECESSARY"

7. The interpretation of the phrase "more trade-restrictive than necessary " in Article 2.2 can draw – as relevant context and as acknowledged by the parties – on the interpretation of the term "necessary" in Article XX of the GATT 1994 and on the combined reading of Article 5.6 and footnote 3 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"). Although Brazil agrees with the contextual importance of these provisions, one should be cautious with the US approach regarding the importation of the "significantly" less trade restrictive standard from footnote 3 to Article 5.6 of the SPS Agreement into Article 2.2 of the TBT Agreement, as that term is found only in that specific agreement.

8. The letter sent by the GATT Director-General to the U.S Chief Negotiator, mentioned by the United states in Paragraph 248 of its submission, does not serve – in Brazil's view – as confirmation that the standard set out in footnote 3 to the SPS Agreement applies to the TBT Agreement. Brazil disagrees that a letter sent by the then Director-General to only one WTO Member may, by itself, inform the meaning of a multilateral agreement. Moreover, as that same letter acknowledges in the passage immediately preceding the citation made by the U.S., "…it was not possible to achieve the necessary level of support for a US proposal [concerning a clarifying footnote to Article 2.2 and 2.3 of the TBT Agreement]…"[1]

9. In addition, Article 2.2 expressly provides that this "necessity test" must take account of, and thus be informed by, the risks that could be created by non-fulfilment of the legitimate objective contemplated by the measure. Brazil comments on some of these elements below.

B. ASSESSMENT OF THE PURSUED OBJECTIVES

10. The first two elements of the sequence indicated above are, first, whether the objectives stated by the regulating Member are "legitimate" and, second, if the stated objectives are found to be legitimate, whether the actual measures at issue bear a rational link with the stated objectives. Both questions involve factual issues that the Panel must assess based on the evidence before it.

11. In the present dispute, the United States claims that its "COOL measures" qualify as technical regulations, have the stated objective of providing information to consumers and are an adequate means to achieve that objective, which the United States deems legitimate under Article 2.2.[2]

12. A Member imposing a technical regulation is entitled to define its objective or objectives. This does not mean, however, that a panel has no role to play in determining whether the actual objectives of the technical regulation are "legitimate." In EC – Sardines, with respect to article 2.4 of the TBT, the Appellate Body agreed with the panel that it was "required to determine the legitimacy of [the] objectives" for claims asserted under Article 2.4 of the TBT Agreement:[3]

[1] Exhibit US-53.
[2] United States' first written submission, para. 131.
[3] Panel Report, *EC – Sardines,* para. 7.121.

> … we share the view of the Panel that the second part of Article 2.4 implies that there must be an examination and a determination on the legitimacy of the objectives of the measure.[4]

13. The same reasoning is equally valid under Article 2.2.

C. "TAKING INTO ACCOUNT THE RISKS THAT NON-FULFILMENT WOULD CREATE"

14. Another interpretative issue raised by Article 2.2 is the meaning and scope of the ending clause of the second sentence: "… technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create." This phrase must be read together with an illustrative list of factors in the last sentence of Article 2.2 that regulating Members must "tak[e] account" "in assessing such risks". Together, these Article 2.2 provisions require that a Member proposing a technical regulation must assess the risks that would arise if the legitimate objective in question were not fulfilled. This involves assessing the importance of the objective and the harm that could arise if the legitimate objective were not met.

15. Such risks would have to be assessed qualitatively and/or quantitatively by the Member. In Brazil's view, an essential part of this aspect of the risk assessment would be to assess the importance of the legitimate objective.[5] For example, if the legitimate objective were the protection of human life and health, then the risks of non-fulfilment would likely be extremely high. If the objectives were different, the risks could be lower. The result of such risk assessment would then have to be brought to bear on the inquiry as to the necessity of the technical regulation in light of its degree of trade-restrictiveness and thus as to whether it is more trade restrictive than necessary to fulfil the given objective.

16. These risk assessment provisions in Article 2.2 are an integral part of the core obligation in Article 2.2, i.e., that a "technical regulation [not be] more trade-restrictive than necessary to fulfil a legitimate objective." Where an assessment of the risks of non-fulfilment shows that these would be negligible, the proposed technical regulation may likely be not "necessary", or more trade restrictive than necessary, within the meaning of Article 2.2.

17. Translating these considerations into the circumstances of the present case, it seems that the question to be asked would be about the risks, or consequences, of consumers in the United States not being informed, in all instances, of the origin of the covered commodities. The underlying issue here would also revolve around what confers "origin", according to consumers' perception, to, for example, processed beef. On a more fundamental level, it may become relevant to consider what the concept of "origin" implies in multinational or regional integrated economic sectors. With relation to the covered commodities, it may be important to understand how and to what extent place of birth, feeding, slaughtering and processing (and even the geographic origin of the genetic material) have a bearing on the assignation of "origin".

18. Additionally, the panel may also want to assess the added value provided by the information given to consumers, relative to products that, according to the United States, do not seem to represent very significant import shares[6]. On the basis of the specific facts of the present dispute, the Panel may want to consider whether the trade-restrictiveness caused by the COOL measure bears any correlation with the importance of the objective and the alleged commercial impact the measure is having.

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[4] Appellate Body Report, *EC – Sardines*, para. 286.
[5] *See, e.g.*, Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.
[6] United States' first written submission, paras. 90 and 108.

19. Furthermore, the complainants submit, as alternative less trade-restrictive measures, the possibility of voluntary country-of-origin labelling. The United States rebuts this allegation affirming that such an option has already been attempted, with little adhesion, and therefore, in its view, the objective of informing consumers was not achieved[7]. It may be relevant to inquiry whether this absence of participation of producers and retailers is not due to perceived considerable costs and insufficient consumer interest in labelling information.

20. In the light of the above considerations, it must also be noted that the wording of Article 2.2, by linking the legitimacy of objectives, the need to avoid unnecessary trade restrictions and the need to assess the risks of non-fulfilment of a legitimate objective, follows a rationale that suggests the search for a balance between ends and means of a technical regulation vis-à-vis its effects on trade. Therefore, when assessing conformity with Article 2.2, the Panel should ascertain whether this balance has been met by the technical regulation at issue, on the basis of the evidence before it.

III. CONCLUSION

21. Brazil appreciates the opportunity to comment on the issues at stake in this dispute, and hopes this submission may assist the Panel in examining the matter.

[7] United States' first written submission, paras. 252-253.

ANNEX C-5

THIRD PARTY ORAL STATEMENT OF BRAZIL AT THE FIRST SUBSTANTIVE MEETING

1. Mr. Chairman, distinguished Members of the Panel, Brazil appreciates the opportunity to appear before you and present its views as a Third Party in the current proceedings. Our statement today will be very brief and concentrate on a few issues related to the interpretation of the TBT Agreement – in particular its Article 2.2.

2. It has been noted that the list of "legitimate objectives" contemplated by Article 2.2 is not a closed one. It is precisely for this reason that, in Brazil's view, the interpretation of Article 2.2 should be approached with a high degree of caution. Even though it may be open to a Member to elect which objectives it considers "legitimate" and adopt technical regulations in order to fulfil those objectives, such discretion is not unbounded. Otherwise, highly trade-restrictive measures could be put in place to meet objectives that, no matter how unreasonable under generally accepted criteria, could be unilaterally deemed "appropriate" by the Member implementing the regulation.

3. The United States asserted that "each Member has the right to decide for itself which legitimate objectives to pursue and to take measures to meet those objectives 'at the levels it considers appropriate'."[1] Brazil would first note that, while the United States takes the reference to the "levels it considers appropriate" from the preamble to the TBT Agreement, this expression appears in the preamble – unlike Article 2.2 – in connection with only a limited set of objectives, which include the protection of human, animal or plant life or health and the prevention of deceptive practices, but not, for example, the provision of information to consumers. Thus the assertion that a Member may take measures "at the levels it considers appropriate" to meet any legitimate objective it elects to pursue does not have a direct legal basis in the TBT Agreement.

4. Second, as stated in its third party submission, Brazil considers that the Panel has a role to play in determining whether the actual objectives of the technical regulation in question are "legitimate". Brazil does not take a position as to whether the specific objectives pursued by the United States with the COOL measures are legitimate or not within the meaning of Article 2.2 of the TBT Agreement. In any event, Brazil agrees with Mexico that, for the purposes of the assessment of a measure under Article 2.2, an objective should not be defined at such level of generality that would render it always necessarily "legitimate", but rather at a level of specificity that corresponds to the measure in point.[2]

5. As I noted a moment ago, although the list of objectives envisaged by Article 2.2 is not exhaustive, this does not mean that there are no limits to the discretion of Members implementing technical regulations . In addition to the issue of the legitimacy of the objectives pursued – an issue that can, and should, be addressed by the Panel -, a further check is provided by the clause "taking account of the risks non-fulfilment would create". As Brazil indicated in its third party submission, this provision invites an assessment of the importance of the (presumably legitimate) objectives being pursued and the harm that could arise if those objectives were not fulfilled.

6. In the circumstances of the present dispute, the United States seems to be arguing that, if the objectives being pursued by the COOL measures were not fulfilled, consumers would be confused about the origin of the products at issue. In Brazil's view, this is an important part of the analysis

[1] United States' opening statement at the first Panel meeting, para. 36.
[2] Mexico's opening statement, para. 36.

under Article 2.2 – one that should be subject to careful scrutiny by the Panel. Some relevant questions would be (i) whether consumers would indeed be left in a state of confusion if the specific objectives sought with the COOL measures were not fulfilled; and (ii) what would be the extent and nature of such confusion. An inquiry into these questions would help reveal the "risks non-fulfilment would create". Such risks, in turn, would then be brought to bear on the assessment of the necessity of the technical regulation in light of its degree of trade-restrictiveness and thus on whether it is more trade restrictive than necessary to fulfil the given objectives.

7. As a final and more general remark, Brazil would urge the Panel to look with special care at arguments which seek to attribute views, desires or tastes to consumers. Such views, desires or tastes should not be lightly assumed but rather substantially backed by evidence. It is also in this connection that Brazil takes issue with the European Union's statement that "if a domestic political process leads to mandatory origin labelling, that may reasonably be taken as an indication that consumers want it."[3] This would seem extreme, since the mandatory labelling scheme – or any technical regulation justified on the grounds of consumer demand, for that matter – would constitute itself the evidence that consumers want it. Such a view should be rejected.

8. Mr Chairman, Members of the Panel, this concludes our brief statement. Thank you for your attention.

[3] European Union's third party written submission, para.41.

ANNEX C-6

**THIRD PARTY ORAL STATEMENT OF BRAZIL
AT THE SECOND SUBSTANTIVE MEETING**

1. Mr Chairman, distinguished members of the Panel, it is a pleasure to appear before you today. In our statement this morning we will briefly address two issues: (i) the question of whether different instruments could be considered together as a single measure; and (ii) the treatment that the Panel should give to the unsolicited letter addressed to it by the Consumers Union.[1]

2. With regard to the first issue, the United States asserts that the Panel should not make findings with regard to a single "COOL measure", since the separate instruments that the complainants identify as composing that measure are substantively and legally distinct. The United States thus affirms that the Panel is effectively required to examine those instruments separately.[2]

3. In Brazil's view, the fact that separate instruments or measures differ in their substance or legal status does not preclude the possibility that they, *operating together*, violate specific provisions of the WTO agreements. Article 3.3 of the DSU provides that one of the purposes of the dispute settlement system is to address "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by *measures* taken by another Member". Nothing in Article 3.3 precludes a claim that a set of measures, working together, impair benefits accruing to a Member under the covered agreements.

4. In that respect, the legal nature and the substantive content of the individual instruments that operate together may well be different. One of the instruments could, for example, provide an interpretation of a legal norm to which it relates. Such an interpretation could or could not be of a mandatory nature (as the Appellate Body has clarified, in general, the fact that an instrument is not mandatory does not prevent it from being the subject of dispute settlement proceedings[3]). If that interpretation sheds light on the norm in a way that gives rise to an inconsistency with a WTO provision, a panel would be entirely justified in concluding that the norm and the interpretation, considered *together*, are inconsistent with that provision.

5. In fact, this was exactly one of the conclusions of the panel in the dispute brought against the European Union concerning tariff treatment of information technology products. In a report that has been adopted by the Dispute Settlement Body, that panel found that CNENs, which are Explanatory Notes to the Combined Nomenclature of the European Union – interpretive instruments under the EU law with no legally-binding force -, *operating in conjunction with* a Council Regulation of the European Union, violated provisions of the GATT 1994.[4]

6. Therefore, in Brazil's view, regardless of the differences among separate instruments, as long as a complainant claims that the combined operation of those instruments results in a violation of WTO provisions, a panel should not be precluded from examining that claim and should not instead be obliged to separately verify the consistency of each instrument with those provisions.

7. It is true that, under the TBT Agreement, the measures at issue are normally technical regulations – documents which lay down characteristics, methods or provisions with which

[1] Letter by the Panel dated 26 November 2010.
[2] United States' opening statement at the second Panel meeting, paras. 12-15.
[3] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review* (DS244), para. 89.
[4] See, for instance, *EC – IT Products (US)* (DS375), paras. 8.4 and 8.6.

compliance is mandatory. In this regard, Brazil notes however that Article 2.2 of the TBT Agreement – one of the provisions at issue in this dispute – sets out that "Members shall ensure that technical regulations are not prepared, adopted or *applied* with a view to or with the effect of creating unnecessary obstacles to international trade". In that context, a document which may not in itself constitute a technical regulation could nevertheless be relevant to an examination under Article 2.2, insofar as it is relevant to the *application* of the technical regulation itself.

8. Finally, Brazil wishes to comment briefly on the unsolicited letter received by the Panel. Article 13.2 of the DSU provides in part that "Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter." In this regard, Brazil respectfully submits – and in fact has been reiterating this position for quite a long time now – that the right to *seek* information from any relevant source should not be confused with a right – not provided for under the DSU – to consider information *not sought* by the Panel.

9. It is Brazil's view that, in accepting and considering unsolicited documents such as *amicus curiae* briefs, WTO adjudicators may step beyond the rights ascribed to them under the DSU. They may also potentially open participation in WTO dispute settlement proceedings to any individual or institution that is not represented by a Member which is a party to the dispute. Beyond disrupting the inter-governmental nature of the WTO dispute settlement system, this may represent a burden that cannot be met equally by all Members. Indeed, developing Members are likely to be the most adversely affected by such decisions, since their more limited resources would have to be used not only to address factual and legal claims and arguments made by other Members in a dispute, but also by a potentially large number of other interested parties whose participation in proceedings was not foreseen in the DSU.

10. The inclusion of this issue in the DSU Review discussions is a recognition both of the importance Members attach to the matter and that the special session of the DSB is the appropriate forum for its consideration.

11. In the specific instance of this dispute, Brazil would suggest that the Panel only consider the unsolicited letter if it is made part of a submission by one of the parties (as an exhibit, for example). Such party would then have to respond for the contents of the brief and assume the responsibility of making it part of its own case. This is an approach that would be the least disruptive and would still allow for a substantive discussion of the unsolicited contribution.

12. In closing, Brazil thanks the Panel for the further opportunity to present its views in this dispute.

ANNEX C-7

THIRD PARTY ORAL STATEMENT OF CHINA AT THE SECOND SUBSTANTIVE MEETING

1. Mr. Chairman, distinguished members of the Panel, China appreciates this opportunity to present our opinion before you on this dispute. We refrain ourselves from making statement on the merits of the case, and would like to comment briefly on the issue of *amicus curiae* briefs.

2. *Amicus curiae* brief is an old issue. During the Uruguay Round, some relevant proposals were raised, negotiated and rejected. Similar proposals were again raised by a few Members during the DSU review, but did not produce any consensus results. In the ongoing DSU negotiations, there are great disagreements among Members on *amicus curiae* briefs. Some Members propose to explicitly give panels and the Appellate Body the right to accept and consider unsolicited information and advice provided that this information or advice is directly relevant to the factual and legal issues under consideration. On the contrary, some other Members submitted textual proposals that would explicitly prohibit panels and the Appellate Body to consider such information and advice.

3. In the practice of dispute settlement, the Appellate Body found itself and the Panel had the authority to accept so called *amicus curiae* briefs in some cases. These findings are based on the assessment of the facts and conditions in the specific cases, which would not directly bound the Panels in other cases. For all this, members expressed their strong concerns in the General Council special meeting on 22 November 2000.

4. Article 13 of the DSU provides "each Panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate". This provision literally gives the Panel authority to seek information and technical advice, but does not grant individuals and institutions outside the WTO the right to submit briefs to be considered by the Panel. When it is necessary to seek information in a dispute, the Panel could do on its own initiative. If the Panel passively accepts *amicus curiae* briefs, it would possibly bring about injustice to the other organizations who do not submit such kind of briefs and the Members who are not participants or third parties to the dispute, and cause adverse effect on the fact finding. The great disagreements among Members and the ongoing negotiation also indicate that there is no agreement among Members on the acceptance of *amicus curiae* briefs.

5. China believes the issue of *amicus curiae* briefs has systemic influence in the dispute settlement, and should be settled by negotiations among Members. China would like to advise the Panel follow its terms of reference and function, interpret the relevant provisions in DSU according to the customary rules of interpretation of public international law, ignore such *amicus curiae* briefs and do not take them into consideration.

ANNEX C-8

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF COLOMBIA

I. INTRODUCTION

1. Colombia thanks the Panel and the Parties for this opportunity to present its views in the present proceeding. Colombia intervenes in this case given its systemic interest in the application of several provisions of the WTO covered agreements discussed in this dispute.

2. While not taking a final position on the specific facts of this case, Colombia will provide its views on some of the legal claims advanced by the Parties to the dispute. First, Colombia will address the issue of whether an apparently voluntary measure can be deemed mandatory under the definition of technical regulation provided for in Annex 1.1 of the Agreement on Technical Barriers to Trade (the "TBT Agreement"). Then, Colombia will comment on the definition of *treatment no less favourable* in Articles 2.1 of the TBT Agreement and III:4 of the GATT. As a third issue, Colombia will present its comments on the definition of the term *legitimate objective,* within the relevant provisions of the WTO covered agreements. Another issue that will be addressed by Colombia is related to the scope of the Members obligations with respect to special and differential treatment to developing countries, under Article 12 of the TBT Agreement. Finally, Colombia will close its submission with some comments on the conditions that must be met for a claim under Article XXIII:1(b) of the GATT. In virtue of the foregoing, this document is divided in five sections where each of the mentioned issues will be addressed.

II. THE MANDATORY CHARACTER OF TECHNICAL REGULATIONS

3. One of the complaining parties' claims is that the country of origin labelling measures (the "COOL measures")[1], are technical regulations subject to the TBT Agreement. In response, the United States of America (the "USA") claimed that Secretary Vilsack's letter is not a measure whose *compliance is mandatory,* in the terms of Annex 1.1 of the TBT Agreement[2].

4. Under the definition of a technical regulation as provided in Annex 1.1 of the TBT Agreement, one of the elements of a technical regulation is that its compliance is mandatory. Regarding the interpretation of Annex 1.1 of the TBT Agreement, only one WTO Panel has directly addressed the issue of how the term *mandatory*[3] should be construed. That Panel concluded that a measure can be deemed mandatory when it is obligatory as a consequence of a command.[4]

5. Given the limited amount of cases that have dealt with the interpretation of "*with which compliance is mandatory*" under the definition of Annex 1.1 of the TBT Agreement, Colombia submits to the Panel the question of whether it would be appropriate to analyze a measure's mandatory character in order to determine if it is a technical regulation, pursuant to the standard of application under Article XI:1 of the GATT. Hence, the Panel could take this opportunity to clarify if in any

[1] In Mexico's first written submission, para. 9, Mexico lists the measures that it considers are part of the COOL measures; and in Canada's first written submission, para. 1 footnote 1, Canada lists the measures that it considers are part of the COOL measures. Both claiming parties agree that the letter that the Secretary of Agriculture of the United States of America, Thomas J. Vilsack, sent to the representatives of the industry on February 20 2009, is part of the COOL measures.

[2] United States' first written submission, paras. 133-137.

[3] The case was *EC – Trademarks and Geographical Indications (Australia)*.

[4] *EC – Trademarks and Geographical Indications (Australia)*, para. 7.453.

given circumstances, the standard set forth in the GATT case *Japan – Semi-conductors*[5] in relation to a measure's mandatory nature pursuant to Article XI:1 of the GATT, would be useful to construe the term "*with which compliance is mandatory*" in Annex 1.1 of the TBT Agreement. In consequence, the Panel should conclude if Secretary Vilsack's letter is mandatory and thus a technical regulation.

III. LESS FAVOURABLE TREATMENT UNDER ARTICLES 2.1 OF THE TBT AGREEMENT AND III:4 OF THE GATT 1994

6. The claimants allege that the COOL measures implemented by the USA are inconsistent with Article 2.1 of the TBT Agreement, since such measures accord a less favourable treatment to the feeder cattle from Canada and Mexico and the hog from Canada than that provided to the like products from the USA.[6] In response, the USA claims that the COOL measures provide an identical treatment both to the feeder cattle and hogs from Canada and Mexico than the one provided to the like products from the USA, given that the measures at issue require the same labelling conditions for national and foreign products.[7] In this case, the USA holds that the COOL measures do not affect the conditions of competition for the sale of these products, as well as the fact that such measures have no direct adverse effect over trade. Therefore, the USA argues that the COOL measures are consistent with Article 2.1 of the TBT Agreement.

7. Article 2.1 of the TBT Agreement, provides that technical regulations shall not accord treatment less favourable to imported products than the one accorded to like imported products. Some panels[8] have analyzed the above mentioned provision, and have concluded that Article 2.1 of the TBT Agreement should be interpreted in light of the principles set forth in Article III:4 of the GATT 1994, given that the obligation not to accord a *treatment less favourable* has been understood in the same sense in both provisions. Following what has been said by prior panels[9], Colombia recalls that for there to be a breach of the national treatment obligation, the following aspects of the measure at issue should be assessed: i) if it is a technical regulation; i) if it accords any differential treatment to the domestic products with respect to the imported ones; iii) if the domestic products are like to the imported ones; and iv) the effects that the differential treatment have over the competitive conditions between domestic and imported products.

8. Based on the foregoing, Colombia requests the Panel to determine whether the challenged measures imply a less favourable treatment to imported products in the USA market; and to what extent, this means a modification of the competition conditions between domestic and imported products, in such a manner that suffices the standard under which Articles III:4 of the GATT 1994 and 2.1 of the TBT Agreement could be breached.

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[5] GATT Panel Report in the case *Japan – Semi-Conductors*, para. 109.

[6] Mexico's first written submission, paras. 268 – 269 y 217 – 232 (with respect to Article III:4 of the GATT) and Canada's first written submission, paras. 86-154.

[7] United States' first written submission, paras. 138-200.

[8] *EC – Trademarks and Geographical Indications (Australia)*, para. 7.464; *EC-Sardines*, para. 5.27; and *EC – Asbestos*, para. 3.410.

[9] *EC – Trademarks and Geographical Indications (Australia)*, para. 7.444. A similar analysis was undertaken in the following cases with respect to Article III:4 of the GATT 1994: *EC – Asbestos*, para. 3.410; *Canada – Autos*, para. 6.231; *US – Gasoline*, para. 6.5. Appellate Body Report in the case of *Korea – Various Measures on Beef*, para. 133.

IV. LEGITIMATE OBJECTIVES UNDER THE WTO COVERED AGREEMENTS

9. Canada and Mexico claim that the COOL measures do not fulfil a legitimate objective under article 2.2 of the TBT Agreement, since their purpose is not to pursue such an objective[10]. The USA claims that providing information to consumers is in itself a legitimate objective.[11]

10. According to Article 2.2 of the TBT Agreement, for there to be a breach of the Member's obligations under such provision, it is necessary to analyze if the measure at issue is a technical regulation adopted to fulfil a legitimate objective, and whether it has been implemented in a manner that does not create unnecessary obstacles to trade. This kind of reasoning should be carried out in light of the necessary measures to fulfil the legitimate objective under Article 2.2 of the TBT Agreement.

11. Colombia considers that in order to determine what is a legitimate objective under the definition of Article 2.2 of the TBT Agreement, the Panel should take into account the relevant panel and Appellate Body reports[12] and other WTO provisions[13], relative to the protection of Member's central societal values.

V. MEMBERS' OBLIGATIONS TO PROVIDE SPECIAL AND DIFFERENTIAL TREATMENT, ACCORDING TO ARTICLE 12 OF THE TBT AGREEMENT

12. Mexico submits[14] that the COOL measures are contrary to the obligations of the USA under Articles 12.1 and 12.3 of the TBT Agreement, since it did not take due account of its special development, financial and trade needs as a developing country. In response the USA submits[15] that Mexico did not satisfy the test of inconsistency arising from Articles 12.1 and 12.3 of the TBT Agreement.

13. Colombia considers that Article 12.1 of the TBT Agreement implies an obligation as such,[16] and that Article 12.3 of the TBT Agreement should be read in light of the provisions of Article 12.2 of the TBT Agreement.[17] In addition, it seems clear to Colombia that Article 12.2 places the burden of proof on the Members that are developed countries. Therefore, the satisfaction of the burden of proof is not up to the developing country that is alleging the breach of a (developed country) Member's obligations under Article 12. Instead, it is the developed country Member that has placed a potential technical barrier to trade, the one who has to meet the burden of proving whether it has complied with its obligations under Article 12 of the TBT Agreement, in particular, regarding its duties of *taking into account the special development, financial and trade needs of* the developing countries.

14. Hence, the developed country implementing the measure: i) should prove that it took into account the special development, financial and trade needs of a developing country partner, when

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[10] Mexico's first written submission, paras. 276-302 and Canada's first written submission, paras. 158-176.

[11] United States' first written submission, paras. 226-233.

[12] Panel Report in *EC – Sardines*, para. 7.118, this position was confirmed by the Appellate Body in its report on the same case *EC – Sardines* (Appellate Body Report), para. 286; Panel Report in *EC – Sardines*, paras. 7.120 and 7.121.

[13] Articles XX of the GATT 1994, XIV of the GATS, 17 and 30 of the TRIPS Agreement. Also see: Panel Report in *Canada – Pharmaceutical Patents*, para. 7.69 and Panel Report in *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.662 and 7.663.

[14] Mexico's first written submission, paras. 359-373.

[15] United States' first written submission, paras. 271-277.

[16] *EC – Approval and Marketing of Biotech Products*, para. 74.7 sub 75.

[17] Panel Report, *EC – Approval and Marketing of Biotech Products,* para. 74.7 sub 77.

adopting a measure with the potential of affecting bilateral trade; and ii) is obliged to prove its due diligence with respect to special an differential treatment, when adopting technical regulations, standards and conformity procedures.

15. In view of the foregoing comments, Colombia kindly requests the Panel to complete the standard set forth by other panels, regarding the extent of the members' special and differential treatment obligations, in accordance to Article 12 of the TBT Agreement.

VI. CLAIMS UNDER ARTICLE XXIII:1(B) OF THE GATT 1994

16. The claiming parties hold that the COOL measures nullify and impair the advantages derived from the tariff concessions granted by the USA to them on feeder cattle and hogs, as a result of the negotiations of the Uruguay Round[18]. Thus, the measures at issue are inconsistent with Article XXIII:1(b) of the GATT 1994. Based on the report of the Appellate Body in the case *EC – Asbestos*, the USA holds that recourse to Article XXIII:1(b) of the GATT should be done in a cautious and exceptional manner.[19] Moreover, the USA focuses its assessment in the lack of evidence presented by the claiming parties in relation to their claim of nullification and impairment pursuant to Article XXIII:1(b) of GATT 1994.[20]

17. There have been few claims under Article XXIII:1(b), both under the GATT 1947 as under the WTO. Only eight cases were considered by working groups as well as panels under GATT 1947.[21] In two of those cases, the panels found that the non-violation complaint was justified, but the report was not adopted. [22] In three cases, the non-violation complaints were rejected.[23] Only in three cases the non-violation complaints were accepted and adopted. [24] Since the establishment of the WTO, only four cases have dealt with non violation claims. [25] These cases have identified some requirements for claims under Article XXIII:1(b) of the GATT 1994: non-violation complaints must be exceptional[26], there has to be an application of a measure by a Member,[27] there must be a benefit accruing under the relevant agreement,[28] and there must be a nullification or impairment of that benefit as a result of the application of the measure at issue[29].

18. In order to undertake a complete assessment of the claims advanced by the complaining parties and the responding party reply, the Panel in this case should examine the *de iure* and *de facto* evidence presented by the Parties with respect to the COOL measures in light of the elements of nullification or impairment without violation construed from the different cases under the GATT and the WTO.

[18] Mexico's first written submission, para. 379 and Canada's first written submission, paras. 234-235.
[19] Appellate Body Report *EC – Asbestos*, para. 186.
[20] United States' first written submission, paras. 305-316.
[21] *Australia – Subsidy on Ammonium Sulphate*; *Germany – Sardines*; *Uruguayan Recourse*; *EEC – Citrus Products; EEC – Canned Fruit; Japan – Semi-Conductors; EEC – Oilseeds I;* and *US – Sugar Waiver*.
[22] *EEC – Citrus Products* and *EEC – Canned Fruit*.
[23] *Uruguayan Recourse*; *Japan – Semi-Conductors*; and *United States – Sugar Waiver*.
[24] *Australia – Subsidy on Ammonium Sulphate*; *Germany – Sardines;* and *EEC – Oilseeds I.*
[25] *Japan – Film*; *EC – Computer Equipment*; *Korea – Procurement*; and *EC – Asbestos*.
[26] *Japan – Film*, para. 10.36.
[27] *Japan – Film*, para. 10.43.
[28] *Japan – Film*, paras. 10.61, 10.71-10.74, 10.77, and 10.79-10.81.
[29] *Japan – Film*, paras. 10.41 and 10.83.

VII. CONCLUSION

19. Colombia considers that this case raises important questions on the interpretation of Articles III:4 of the GATT 1994, various provisions of the TBT Agreement as well as Article XXIII:1(b) of the GATT 1994. While not taking a final position on the merits of the case, Colombia requests this Panel to carefully review the scope of the claims in light of the observations made in its submission. Colombia reserves its right to make further comments at the third party session of the first substantive meeting with the Panel.

ANNEX C-9

THIRD PARTY ORAL STATEMENT OF COLOMBIA AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. Mr. Chairman, distinguished Members of the Panel, on behalf of the Government of Colombia, I thank you for giving us the opportunity to express our views in this dispute.

2. Our participation as a third party is based on our systemic interest in the proper interpretation of several provisions of the WTO covered agreements, discussed in this case. In its written submission, Colombia set out its understanding of some of the major legal issues arising from this dispute. I will therefore not repeat all the content of the submission, but will rather focus on a few specific comments regarding the interpretation of the obligations of special and differential treatment under Article 12 of the TBT Agreement and the *necessity* requirement under Article 2.2 of the TBT Agreement.

3. Colombia recognizes that many of the issues in this dispute are factual in nature. In that regard, Colombia would like to emphasize that it does not take a position as to whether the USA has or has not complied with its obligations under the TBT Agreement.

II. SPECIAL AND DIFFERENTIAL TREATMENT TO DEVELOPING COUNTRIES

4. Mexico submits that the COOL measures are contrary to the obligations of the USA under Articles 12.1 and 12.3 of the TBT Agreement, since the latter did not take due account of the former's special development, financial and trade needs as a developing country. In response, the USA submits that Mexico did not satisfy the test of inconsistency arising from Articles 12.1 and 12.3 of the TBT Agreement.

5. Following the reasoning of the Panel in *EC – Approval and Marketing of Biotech Products*[1], Colombia considers that Article 12.1 of the TBT Agreement implies, in itself, the obligation to provide developing country Members differential and more favourable treatment with respect to measures subject to the TBT Agreement.

6. In addition, Colombia considers that Article 12.3 of the TBT Agreement should be read in light of the provisions of Article 12.2 of the TBT Agreement.[2] Therefore, it seems clear to Colombia that Article 12.2 places the burden of proof, with respect to the obligation to take due account of the special development, financial and trade needs of developing country Members, on the developed country Member imposing the potential technical regulation.

7. Hence, the developed country implementing the measure: i) should prove that it took into account the special development, financial and trade needs of a developing country partner, when adopting a measure potentially affecting bilateral trade; and ii) is obliged to prove its due diligence with respect to special and differential treatment to developing country Members, when adopting technical regulations, standards and conformity procedures.

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[1] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 74.7 sub 75.
[2] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 74.7 sub 77.

8. In view of the foregoing comments, Colombia kindly requests the Panel to complete the standard set forth by other panels, regarding the extent of the Members' special and differential treatment obligations, in accordance with Article 12 of the TBT Agreement.

III. NECESSITY TEST UNDER ARTICLE 2.2 OF THE TBT AGREEMENT

9. Canada and Mexico claim that the COOL measures do not pursue a legitimate objective, but in case they were considered to do so, such measures are more trade restrictive than necessary to fulfil the legitimate objective, taking account the risk non-fulfilment would create. The USA responds by arguing that the COOL measures are not more trade restrictive than necessary under Article 2.2 of the TBT Agreement.

10. The debate regarding the *necessity* of a measure, in light of its trade restrictiveness and the risk of non-fulfilment has not been directly dealt with in WTO disputes. In Colombia's view, this represents an opportunity for this Panel to contribute to the analysis of the standard that must be followed under Articles 2.2 and 12.3 of the TBT Agreement, in order to conclude if a measure is more trade restrictive than necessary to fulfil the legitimate objective pursued in light of the risks of non-fulfilment.

11. Colombia submits that Article 2.2 of the TBT Agreement entails a *necessity* test of the measure according to its trade restrictiveness, which should be weighed with respect to the risk that non-fulfilment would create. Hence, for there to find a breach of Article 2.2, the Panel should determine that the measure at issue is more trade restrictive than necessary, and that not complying with such a measure does not pose a risk to the protection of the legitimate objective pursued. This also requires the demonstration that the objective pursued by the measure is a legitimate one.

12. In Colombia's view, the *necessity* test under the TBT provisions mentioned above should be construed taking into account the *necessity* test used by several Panels and the Appellate Body in cases involving the application of Articles XX:(b) and XX:(d) of the GATT 1994. Additionally, Colombia calls the attention of the Panel to the crucial role of a *necessity* test in weighing the trade restrictiveness of a measure and the policy goals pursued by Members' through their national regulations. Thus, Colombia considers that this type of test can provide transparent and clear elements, for the compatibility analysis of national measures with various provisions of the WTO covered agreements. For example, SPS Agreement Article 5.6 and GATS Article VI.4 both provide for necessity tests. However, only the former has been analyzed by WTO panels and the Appellate Body.

13. As established by the Appellate Body in the case of EC- Asbestos, a measure would be deemed necessary under Article XX(b) of the GATT 1994, if there are no more GATT consistent reasonable alternatives available for the Member implementing the measure. The Appellate Body followed this same line of thought when applying Article XX(d) of the GATT in the case of Korea – Various Measures on Beef.

14. Colombia respectfully requests the Panel to construe a clear necessity test for the proper application of Articles 2.2 and 12.3 of the TBT Agreement by the Members.

15. The Panel could take the aforementioned analysis as a reference to determine when a measure is more trade restrictive than necessary. In that sense, and as proposed by the complaining parties, the Panel could use as an element of the necessity test under Article 2.2 of the TBT Agreement the reasonably available alternatives approach.

16. On the other hand, Colombia also invites the Panel to clarify the sense in which the risks of non-fulfilment should be weighed with respect to the trade restrictiveness of the measure.

17. This is of great relevance, since notwithstanding the pre-eminent protection of the Members' right to exercise their sovereignty over their territory; Members are also called to respect their international obligations under the covered agreements. This balance is usually clear, but there are cases like the ones referred to above in which the dispute settlement system can achieve its objective pursuant to the DSU to provide security and predictability to the multilateral trading system.

18. Mr. Chairman, distinguished Members of the Panel, with these comments, Colombia expects to contribute to the legal debate of the parties in this case, and would like to express again its appreciation for this opportunity to share its points of view on this relevant debate, regarding the application of Articles 12.1, 12.3 and 2.2 of the TBT Agreement. We thank you for your kind attention and remain at your disposal for any question you may have, including as requested on Colombia's mandatory country of origin labelling provisions.

ANNEX C-10

**THIRD PARTY ORAL STATEMENT OF COLOMBIA
AT THE SECOND SUBSTANTIVE MEETING**

1. Mr. Chairman, distinguished Members of the Panel, on behalf of the Government of Colombia, I thank you for giving us the opportunity to express our views in this dispute.

2. This case has raised a legal debate on the conformity of country of origin labelling (the "COOL") requirements with the Agreement on Technical Barriers to Trade (the "TBT Agreement") and the WTO covered agreements in general.

3. It is Colombia's view that COOL requirements are not, as such, contrary to WTO Members' obligations under the covered agreements. Rather, Colombia invites the Panel to consider that the conformity assessment of the COOL measures adopted by the United States has to be done in light of the particular circumstances of the present dispute.

4. As has been mentioned by Colombia both in its written submission and its oral statement in the first session, this case is an opportunity for the Panel to clarify several issues related to the TBT Agreement.

5. In particular, Colombia recalls the importance of this case for the following issues: defining how to construe if a measure is mandatory for the purposes of the definition of a technical regulation; the way in which a measure applied to a processed good (i.e. beef) can render a treatment less favourable to the conditions of sale of a non-processed good (i.e. cattle); the definition of a legitimate objective under Article 2.2 of the TBT Agreement; the application of a necessity test under Article 2.2 of the TBT Agreement; the scope of application of the obligations of special and differential treatment under Article 12 of the TBT Agreement; and the conditions for claims of nullification and impairment under Article XXIII:1(b) of the GATT 1994.

6. In addition, Colombia would like to make a brief comment on the issue of the acceptance of certain *amicus curiae* writing. In line with what has been said by several panel and Appellate Body reports, Colombia considers that it is a decision of the Panel to accept or not such writing. However, when taking such decision, the Panel must ensure that the right of defence, in the context of the due process, is not impaired in any way through the Panel's decision on the matter.

7. Mr. Chairman, distinguished Members of the Panel, Colombia expects that the report of the Panel in this case will contribute to the security and predictability of the multilateral trading system, by clarifying the legal issues involved in the present dispute. We will be pleased to answer any questions from the Panel.

ANNEX C-11

**EXECUTIVE SUMMARY OF THE
THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN UNION**

I. THE MEASURE OR MEASURES AT ISSUE

1. Pending a response from Canada and Mexico with respect to these US arguments, the European Union observes that a complaining Member has a certain discretion when it comes to identifying what it considers to be the "measure at issue". In particular, faced with more than one document, a complaining Member may identify each document as a measure at issue; or may identify the documents together as a measure at issue; or may argue that the documents are evidence of an unwritten measure. This discretion, like any discretion, is not entirely unfettered, although precisely why Canada and/or Mexico might have exceeded the bounds of their discretion in this case is not yet entirely clear to the European Union.

2. Insofar as the 2008 Interim Final Rule has not been in force since 16 March 2009, that is, prior to the panel requests on 7 and 9 October 2009, then the European Union would not normally expect it to constitute a measure at issue, or part of a measure at issue. However, it might still constitute evidence of facts that the complaining Members might consider relevant to their cases.

II. ANNEX 1, PARAGRAPH 1 OF THE TBT AGREEMENT: DEFINITION OF "TECHNICAL REGULATION"

3. Referring to past cases, the European Union concludes that, whilst the Appellate Body has not been called upon to deal with a case concerning origin labelling, the panel in *EC – Trademarks and Geographical Indications* was confronted with such an issue. Furthermore, with respect to this issue, the approach of the panel in *EC – Trademarks and Geographical Indications* was consistent with the approach of the Appellate Body in the *Asbestos* and *Sardines* cases when it comes to interpreting and applying Annex 1, paragraph 1 of the TBT Agreement. That approach involves interpreting the second sentence of Annex 1, paragraph 1 as setting out examples, and reasoning that if one example is present then the document is a technical regulation. The particular example in this case is "labelling requirements". Thus, the reasoning is that if a document includes "labelling requirements" (and the other requirements of Annex 1, paragraph 1 are met), then the document is a technical regulation. The further reasoning is that the second sentence of Annex 1, paragraph 1 does not limit the term "labelling requirements" by reference to the substantive content of the label. It requires only that the "labelling requirements" "apply" to a "product, process or production method". Consequently, according to this line of reasoning, there is no need to consider whether or not "origin" is a "product characteristic" within the meaning of the first sentence of Annex 1, paragraph 1. If there is a requirement that the product bear a label stating the origin of the product, then the measure is a technical regulation. The European Union would conclude that if this Panel follows the approach of the panel in *EC – Trademarks and Geographical Indications* (specifically with respect to origin labelling) and the approach of the Appellate Body in the *Asbestos* and *Sardines* cases then it would conclude that the measure is a technical regulation. That being said, the specific issue raised in this case has not previously been directly considered, and the European Union reserves its further observations pending additional clarifications from the Parties.

4. One might also observe that perhaps the question of whether or not the measure is a technical regulation within the meaning of the TBT Agreement may not be critical to the outcome of the assessment, at least in this particular case. One might think that whether one conducts the assessment through the prism of Article III:4 (especially when dealing with an in fact claim as in the present case)

and the general exceptions in Article XX of the GATT 1994; or the through the prism of Articles 2.1 and 2.2 of the TBT Agreement, the outcome should be broadly similar or the same.

5. With respect to the Vilsack Letter and the subsequent press statement, the European Union observes that the assessment may be different depending upon whether one assesses those documents in isolation, or whether one assesses them together with other documents cited by Canada and Mexico. For example, it is possible that documents are not in themselves mandatory, but nevertheless might be relevant for a domestic court's interpretation and application of other measures that are mandatory. In the latter case, it would not necessarily be correct to conclude that the non-mandatory documents would be irrelevant to a panel's assessment under the TBT Agreement. Since this is to some extent a question of the domestic law of the United States, the European Union reserves its further comments pending additional clarifications from the Parties.

III. ARTICLE 2.1 OF THE TBT AGREEMENT: TREATMENT NO LESS FAVOURABLE TO LIKE PRODUCTS OF NATIONAL ORIGIN

A. LIKE PRODUCTS

6. The European Union agrees with Canada and Mexico that in interpreting and applying the term "like products" in Article 2.1 of the TBT Agreement it is appropriate to have regard to the way in which the term "like products" in Article III:4 of the GATT 1994 has been interpreted and applied. The treaty terms are obviously the same. Furthermore, the GATT 1994 and the TBT Agreement are each context for the interpretation of the other. Finally, the second recital of the TBT Agreement refers to the desire to further the objectives of the GATT 1994, so the object and purpose of the TBT Agreement would appear to be co-extensive with or at least limited by the object and purpose of the GATT 1994.

B. TREATMENT NO LESS FAVOURABLE

7. For the reasons indicated above, the European Union agrees with Canada and Mexico that in interpreting and applying the term "no less favourable" in Article 2.1 of the TBT Agreement it is appropriate to have regard to the way in which the same term in Article III:4 of the GATT 1994 has been interpreted and applied.

8. Canada and Mexico would appear to acknowledge that the measure does not explicitly require less favourable treatment for imports. Nevertheless, Canada and Mexico argue that the measure has that effect. In other words, Canada's and Mexico's case is not an "in law" case but rather an "in fact" case. The difference between an in law case and an in fact case is not the standard, but the evidence. In an in law case the evidence is the text of the measure itself. In an in fact case the text of the measure is not adduced or does not expressly provide for less favourable treatment. However, other evidence is adduced to support factual assertions, and the complaining Member explains how such facts and other evidence, working together in reasoned and logical ways, demonstrates the existence and precise content of a measure inconsistent with the relevant standard. This is a high threshold and a difficult task, requiring the exercise of particular rigour, and not a result to be lightly assumed.

9. That a measure may have an adverse effect on trade is not in itself enough to establish that it is WTO inconsistent. All regulatory measures by definition at least potentially affect different firms differently, even if they produce like products, both within the regulating Member and as between the regulating Member and other Members. Neither the GATT 1994 nor the TBT Agreement set out to eliminate regulatory diversity in itself. Just because a new regulation disrupts existing trade flows or structures does not necessarily mean that there is less favourable treatment of imports.

10. In this context, notions of intent need to be approached with caution. The contested measure may have an object and purpose either expressly stated or objectively apparent from its overall design and architecture, and that may be relevant to understanding how the measure is to be interpreted and applied in particular cases, which may in turn be relevant to understanding whether or not there is less favourable treatment. However, the assessment cannot usefully focus on the subjectively deemed "intent" of unspecified persons connected in some way with the adoption or application of the measure.

11. In such an assessment an adjudicator will reference the framework of Article III:4 of the GATT 1994 and any relevant provisions of Article XX of the GATT 1994. Similarly, an adjudicator may reference both Article 2.1 of the TBT Agreement (which Canada and Mexico would appear to agree echoes Article III:4 of the GATT 1994) and Article 2.2 of the TBT Agreement (which Canada and Mexico would appear to agree echoes Article XX of the GATT 1994) – although the European Union is not suggesting that the relationships between these different provisions are necessarily the same.

12. Turning to the substantive point of dispute, without prejudice to the development of our position concerning the interpretation of the definition of "technical regulation", and recognizing that these observations may relate to some extent to both Article 2.1 and 2.2 of the TBT Agreement, the European Union considers that the provision of information to consumers about origin may, in itself, generally be a legitimate objective within the meaning of Article 2.2 of the TBT Agreement. In particular, mandatory origin rules and declarations (as distinct from labelling) may be required to ensure that the correct customs duties are applied, including in order to permit distinctions between goods subject to different tariffs. The European Union recognizes that origin *labelling* might also facilitate choices by consumers. Depending upon one's perspective, one might consider some of these choices to be rational and in harmony with the WTO agreements, or one might consider some of these choices to be irrational or economically inefficient. For example, choices might reflect actual or perceived risk associated with food from a particular region or Member; or actual or perceived positive qualities of food from a particular region or Member; or ethical considerations about a particular region or Member; or a desire to foster sustainable development in a particular region or Member; or a desire to economically support a regional or domestic industry; or considerations of taste and personal judgment. One cannot hope to have perfect information about why such choices are made – that is the whole point of the label – it empowers the consumer.

13. The European Union might have an issue with measures adopted by a Member that would initiate, encourage or amplify such choices in a manner that would be inconsistent with the covered agreements. However, the European Union does not consider that the covered agreements set out to preclude origin labelling in itself, nor the making of such choices by consumers, nor that they could hope to do so effectively in the long term. If it is true that one of the basic objectives of the WTO is to facilitate the operation of market forces in the global economy, it is equally true that consumers *are* the market, it being up to firms to persuade consumers to prefer their products. One could hardly imagine *firms* being precluded from identifying products as their own. From this perspective, origin labelling may not be obstructing market forces, but facilitating their operation.

14. The essential difference between voluntary and mandatory labelling is that an individual consumer in a supermarket is hardly in a position to demand labelling with respect to particular information. They are only able to do that through organisation, notably through their domestic political processes. Thus, if a domestic political process leads to mandatory origin labelling, that may reasonably be taken as an indication that consumers want it, so that they are in a position to make the kinds of choices outlined above.

15. With these observations in mind, the European Union has not yet fully understood, based on Canada's and Mexico's First Written Submissions, how the facts and evidence are said to work together in specific and logical ways in order to demonstrate less favourable treatment. As indicated above, the European Union considers that origin labelling may be generally legitimate. The European Union also considers that in some cases, and particularly where relevant economic activity straddles borders, rules may be necessary to determine the origin of a product – and the Agreement on Rules of Origin sets out WTO rules that relate to that matter. The European Union has not yet understood why it might be that a rule of origin based on specific production points would necessarily be WTO inconsistent. Nor has the European Union understood why it might be that, if such rules of origin would be WTO consistent, requiring labelling on that same basis would necessarily be WTO inconsistent. This being so, the European Union has not yet understood why the less restrictive labelling rules in the measure are necessarily WTO inconsistent.

16. Similarly, the European Union has not yet understood, for example, the following matters: why the rules preclude the existence or the coming into existence of slaughter houses that deal only with cattle and hogs born in Canada or Mexico but raised and slaughtered in the United States; why, if the rules disfavour mixed activities, they necessarily tip slaughterhouses back to pure US meat based activity and never to pure Canadian or Mexican meat based activity; and why it is impossible to pass *any* of the additional costs to US meat producers or US consumers. With respect to Canada's tables showing US imports as a proportion of domestic production, the European Union would have been interested to see those numbers placed in the context of all imported US products, in order to see whether or not the products subject to the measure are all grouped at the top of such a list. Finally, the European Union has not yet understood how, if the Panel were to agree with Canada and Mexico, one could avoid the conclusion that all mandatory origin labelling would be WTO inconsistent, or how one could objectively distinguish, with security and predictability, between those measures that would be WTO consistent and those that would be WTO inconsistent.

IV. ARTICLE 2.2 OF THE TBT AGREEMENT: UNNECESSARY OBSTACLES TO INTERNATIONAL TRADE – NOT MORE TRADE RESTRICTIVE THAN NECESSARY

17. The European Union does not agree with Canada that merely demonstrating that the objective of a technical regulation is not "legitimate" is sufficient to support a finding of inconsistency with Article 2.2 of the TBT Agreement. For example, if such a regulation would not be restrictive of trade, then it would not be inconsistent with Article 2.2 – although this example may be relatively hypothetical. Similarly, the European Union does not agree with Canada that merely demonstrating that a technical regulation fails to fulfil its objective is sufficient to support a finding of inconsistency with Article 2.2 of the TBT Agreement. The European Union would invite the Panel to interpret and apply the treaty text in Article 2.2 directly, rather than paraphrasing it in the terms set out by Canada.

18. The European Union observes that the second sentence of Article 2.2 of the TBT Agreement begins with the phrase "For this purpose". The European Union understands the "purpose" referred to here to be the purpose indicated in the first sentence of Article 2.2. That purpose is to ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. The European Union therefore sees a connection between the first and second sentences. Thus, the European Union considers that the focus of the assessment should be on whether or not the technical regulation is more restrictive than necessary to fulfil the legitimate objective, taking into account the risk that non-fulfilment would create. This confirms the view that merely demonstrating that the objective of the measure is protectionism is not sufficient to establish an inconsistency with Article 2.2 of the TBT Agreement.

19. With respect to Canada's argument that the measure does not fulfil its purported objective, the European Union has not yet understood how the existence of some approximate elements in the measure would necessarily support a finding of inconsistency. With respect to voluntary labelling, the European Union has not yet understood how US consumers would pay for such costs, in light of Canada's explanations that in practice no such costs would be born by US meat. Finally, with respect to "substantial transformation", the European Union has not yet understood to what extent Canada and Mexico are advocating for a change in origin rules, as opposed to a change in labelling requirements.

V. ARTICLE 2.4 OF THE TBT AGREEMENT: FAILURE TO BASE THE MEASURE ON AN INTERNATIONAL STANDARD (MEXICO ONLY)

20. The European Union has not yet understood to what extent Mexico is advocating for a change in origin rules, as opposed to a change in labelling requirements. Aside from that, the European Union has not yet understood how labelling processed meat as of US origin would inform consumers about the origin of the animal from which such meat was obtained.

VI. ARTICLE III:4 OF THE GATT 1994: LESS FAVOURABLE TREATMENT THAN LIKE PRODUCTS OF NATIONAL ORIGIN

21. The observations of the European Union with respect to Article III:4 of the GATT 1994 are in essence an analogue of its prior observations.

ANNEX C-12

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF THE EUROPEAN UNION AT THE FIRST SUBSTANTIVE MEETING

I. THE VILSACK LETTER

1. One point on which we would like to comment further is the Vilsack Letter, which has attracted a certain amount of interest from the Third Parties. There seems to be a reasonable consensus that this is a measure for the purposes of these proceedings, and one that is imputable to the US. That said, although the US may be responsible for the content of the Vilsack Letter and may have to account for it to this Panel, as far as the EU is able to ascertain, the procedures for its adoption and its status as a matter of US domestic law may be different from those relevant to US statute or regulation. On the face of the document, it appears to have been issued only under the authority of the Secretary for the US Department of Agriculture. Thus, it remains unclear to the EU whether or not the balance struck between the various competing interests is the same in the 2008 Farm Bill and the Final Rule on the one hand, and the Vilsack Letter on the other hand.

2. In its Oral Statement the US describes the statute as the product of "a long and thoughtful legislative process" and the Final Rule as the result of "an equally deliberative regulatory process". The US informs us that "in crafting these rules" the US made "substantial efforts" "to strike the right balance", "formally soliciting input … on at least four occasions". Are these statements equally true, we wonder, of the Vilsack Letter? And Mr. Chairman we are particularly reflecting on this issue from the point of view of Article 12.3 of the TBT Agreement, which relates to special and differential treatment for developing countries, and which we agree is an important provision. It states that Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures to not create unnecessary obstacles to exports from developing country Members. In particular, we are reflecting on whether or not the Vilsack Letter should be considered to be consistent with Article 12.3.

3. Disagreement remains, however, on the question of whether or not the Vilsack Letter is "mandatory" for the purposes of the TBT Agreement. We have two comments on that issue. First, it is not entirely clear to the EU that the answer to that question would necessarily be determinative for the case, given the legal framework that is also available under the GATT 1994 (although it might be if Article 2.2 of the TBT Agreement were to become the focus of the Panel's assessment). Second, reviewing the content of the Vilsack Letter, there would appear to be two types of statement that are interwoven. One type of statement is the suggestion that it may be necessary to modify the Final Rule if the suggested voluntary steps are not taken – and it is this on which the Third Parties have tended to focus. However, the second type of statement would rather appear to relate to the implementation, interpretation and/or application of the Final Rule as currently drafted. Just to illustrate this with one example, the first paragraph of the Vilsack Letter states that the Final Rule is "important to providing consumers with additional information about the source of food products and to helping producers differentiate their products." This appears to be a statement about the object and purpose of the Final Rule. The EU is not in a position to express a view on whether or not such statement duplicates, broadens or narrows the object and purpose as it would result from an examination of the Final Rule. However, and this is the important point, we cannot rule out the possibility that the Vilsack Letter *might* be also relevant to the interpretation or application of the Final Rule, as a matter of US domestic law. And Mr. Chairman, the precedent that we have in mind is the US Statement of Administrative Action, a measure that accompanied the adoption of the US Uruguay Round Agreements Act

(URAA), implementing the WTO Agreement in the US. The Statement of Administrative Action it not "mandatory" in US domestic law, but is relevant, as a matter of US domestic law, to the interpretation and application of the URAA in the US jurisdiction. The US Statement of Administrative Action has been referenced in past WTO disputes.

4. As we have indicated in our written submission, if this would be the case, we could not rule out the possibility that the measure at issue consists of the Final Rule and the Vilsack Letter taken together, or the possibility that these two documents together evidence the measure at issue. If that were the case, it may be that these two documents form an indivisible package that is the measure at issue, and from which it might not be possible to extract the threat of modification of the Final Rule. Considered as a whole, it may be that this package could be construed as mandatory within the terms of the TBT Agreement. In short, if the Vilsack Letter is, in effect, leveraging the Final Rule, then, from a WTO compliance point of view, would it be entirely inappropriate if the nullification or impairment associated with the Final Rule would leverage the Vilsack Letter (in the event that it would be WTO inconsistent), at least until the Vilsack Letter would be withdrawn? After all, one good turn deserves another. The EU does not express a view on whether or not this is in fact the case, that being a matter for the Panel.

5. And Mr. Chairman, there is one treaty term in Article 2.2 of the TBT Agreement to which we would like to draw your particular attention, and that is the term "prepared". Thus, it appears that some obligations in the TBT Agreement might also apply to the preparation of technical regulations. We are reflecting on how the term "mandatory" might be interpreted and applied having regard to the context of the use of the term "prepared", and particularly whether or not issues regarding the preparation of what is destined to be a mandatory measure might or might not be subject to disciplines in the TBT Agreement. We are reflecting whether the Vilsack Letter might be considered to fall with the concept of preparation.

II. SUBJECTIVE INTENT DISTINGUISHED FROM THE EXPRESS OR IMPLIED OBJECT AND PURPOSE OF THE MEASURE AT ISSUE

6. The second point on which we would like to comment relates to a matter already touched on in our written submission, and also the subject of comments from the other Third Parties. It is the distinction between the notion of subjective intent on the one hand, and the objective notion of the object and purpose of the measure at issue, as it results from the terms of that measure (such as its preamble) or from its overall design and architecture. For the EU, in an "in fact" assessment, there is no fact or piece of evidence that is excluded as a matter of principle from the analysis. Of course, to be of any interest or value, the complaining party will have to explain how such fact or evidence is *relevant* to the assessment. That is, how, when taken together with other facts or evidence, it permits further factual inferences, leading to the conclusion that the complaining Member has demonstrated the existence and precise content of a WTO inconsistent measure.

7. From this perspective, the EU would not necessarily seek to exclude from the assessment as a matter of principle factual assertions or evidence that relate to the alleged subjective state of mind (or intent) of a particular natural person associated in some way with the legislative process. However, it remains far less clear to the EU how such factual assertion or evidence would be relevant to the assessment. There may be many natural persons associated in some degree with a legislative procedure, and it appears highly problematic to the EU to accord any substantial weight, or indeed any weight at all, to assertions about their alleged state of mind at some point in the process. On the other hand, the EU does consider that as part of its assessment it may well be very important for a panel to consider the objective concept of the object and purpose of the measure at issue. The Appellate Body has correctly confirmed that the *meaning* of a measure at issue is a question of law, even if the existence and content of a document addressing such meaning is a question of fact. In

considering what is the meaning of a measure at issue, a panel will need to look to the rules of interpretation and other relevant legal rules applicable in the domestic jurisdiction (as opposed to the rules of interpretation applicable in WTO dispute settlement). However, the EU finds it difficult to conceive of a system of interpretation in which object and purpose has no role whatsoever. Thus, the object and purpose of the measure at issue is a matter that it is legitimate or even necessary for the Panel to consider. It will form part of the overall framework that will allow the Panel to correctly ascertain how the measure at issue is interpreted and applied (and thus also what effects it may have). This is an appropriate and even necessary part of considering any "in fact" claim.

III. LEGISLATIVE HISTORY OR PREPARATORY WORK

8. The third related point on which we would like to comment concerns the legislative history or preparatory work of the measure at issue, to which some of the other Third Parties have also referred. Similar observations apply. Such considerations might be relevant to understanding how the measure at issue is to be interpreted and applied, and should be approached from the perspective of the interpretative rules applicable in the domestic jurisdiction (as opposed to the WTO, recalling that the *Vienna Convention* refers to preparatory work as a supplementary means of interpretation). That said, preparatory work is often something of a two edged sword: does the meaning apparent from the preparatory work confirm the meaning apparent from the final text; or disprove it? Furthermore, as indicated above, insofar as the documents referenced merely speak to the intent of particular natural persons at a particular time, they may be of limited if any value to the assessment.

IV. THE 60 DAY FLEXIBILITY AND FULFILMENT OF THE LEGITIMATE OBJECTIVE

9. The fourth point on which we would like to comment relates to the 60 day flexibility provided for in the Final Rule for ground meat, and the observations by the complaining Members and some Third Parties that this confirms that the measure at issue does not fulfil its stated objective. The EU – like the US – is somewhat puzzled by this line of argument. It seems to us that the objective of the measure might fairly be stated to be informing consumers *whilst at the same time avoiding unnecessary costs for importers*. Furthermore, it appears to the EU that the 60 day flexibility is an aspect of the measure that is designed to reasonably accommodate the interests of importers. For the importers to attack it appears both to ignore the mixed nature of the measure's objectives, and to be at least potentially counter-productive.

V. ALTERNATIVE PROPOSED MEASURE: DOMESTIC AND IMPORTED

10. The next point on which we would like to comment relates to an alternative measure proposed by some of the other third parties. The EU is not at this stage persuaded by the proposal of a measure that would merely distinguish between domestic and imported products. It seems to us that this would only risk to further disconnect consumer choices from rational and potentially WTO consistent considerations. It would seem to exacerbate and accentuate the nature of the problem, driving consumers only towards domestic production, without regard to the relative merits or disadvantages of meat imported from various other countries, appropriately differentiated.

VI. LABEL B FOR LABEL A SCENARIOS

11. Listening to the Parties' oral submissions, one issue that we are carefully considering – and that appears to us to be of particular importance for the parties -is the question of whether or not Label B (US and Canada\Mexico) should be available also for products derived only from US animals. We are considering this issue from the perspective of the arguments of both parties. Looking at the complainants' arguments, there are three specific points on which we are reflecting. First, we are

reflecting on why it might be unreasonable to require Label A if the steak (for example) is in fact made from 100% US cattle (born, raised and slaughtered in the US). It is not immediately apparent to us why such a requirement, viewed in isolation, would be, *per se*, unreasonable. Second, we are puzzled by the assertion that daily segregation between Label A and Label B would not be possible because Canadian\Mexican livestock might "inadvertently slip in to a Label A day" (Canada's Oral Statement, paragraph 15). We wonder if it would be excessively costly to prevent this happening. Third, if slaughterhouses would really wish to use Label B, we do not understand why it would be excessively expensive for them to always add one cut of Canadian\Mexican meat to each daily production run. Thus, there would never be a Label A issue.

12. In general terms, we appreciate that relatively small import volumes (compared to domestic production) may likely incur higher unit costs for complying with new regulations, but, like the US, we hesitate to see this, in itself, as sufficient to find WTO inconsistency. On the other hand, looking at the same issue from the point of view of the US arguments, there are still issues that are not clear to us. First, we take the US at their word and posit a "perfect" consumer – that is, one that understands what the labels mean. Second, we take the three specific explanations provided by the US that refine and explain what the "legitimate objective" is: to avoid confusion (US Oral Statement, paragraph 9); to provide something "meaningful" (US Oral Statement, paragraph 9); and to provide additional information to assist in purchasing and consumption decisions.

13. Now, I imagine myself on my next trip to the US purchasing a Label B (US <u>and</u> Mexico) steak to eat. In doing so, I have no idea whether or not commingling on the same production day occurred with respect to that steak. All I know is that my steak (which being a steak must reasonably be considered to have come from one animal) comes from one of three types of animal: born in Mexico, raised and slaughtered in the US; born, raised and slaughtered in the US (and commingled); or born and raised in Mexico and slaughtered in the US. As an informed consumer I have consented to and chosen all three of these possibilities. So far, so good. I cook my steak (medium rare) and settle down to eat it with some salad and French fries (if I'm allowed to use that term). At this point a helpful gentleman from the US Department of Agriculture appears at my side and enjoins me to stop – because I am making a terrible error (or should I say, mistake). I am confused, he informs me. Things are not what they seem. That steak in fact comes from an animal born, raised and slaughtered in the US, *and there was no commingling* – it should have been labelled "A". I am misled. But I would politely reply that I am not confused – and that with respect I think that he might be confused. I would remind him that when I purchased the steak I had no idea whether or not commingling had occurred, and could not care a less. I had already accepted the possibility that the steak might be from an animal born, raised and slaughtered in the US when I made my decision to purchase and consume it. The helpful gentleman might try a different variation on the same theme, telling me that he is providing me with something meaningful – to which I would respectfully reply that I know it already, so it is no more meaningful to me than the information that I am sitting on a chair and holding a knife and fork. Finally, he might try to suggest that on the basis of this additional information I might care to change my purchase and consumption decision – and again I would respectfully decline, because I had already taken it into account when I made my original decision. In other words, Mr. Chairman, to coin a phrase, I think I would have my steak … and eat it.

14. Perhaps one could understand the helpful gentleman's concern if my purpose in buying a Label B (US and Mexico) steak was the hope that I might make a contribution to the development of Mexico – an objective apparently thwarted by the fact that I have been misled into purchasing a pure US steak. However, the EU has not yet located on the file any evidence to support the proposition that the object and purpose of the measure at issue includes providing consumers with the opportunity of discriminating in favour of imports for positive reasons – but perhaps we are overlooking it. To conclude, if it would turn out that, *taking the parameters of the measure as they are* (including the commingling rules), *and based on the US' own specific clarifications of what it means by legitimate*

objective, this part of the measure does not, in the "real world", plausibly meet the stated objective, then we would have to further reflect about Article 2.2 of the TBT Agreement.

VII. ORIGIN RULES VERSUS ORIGIN LABELLING

15. Finally, Mr. Chairman, we would like to re-iterate a point that we have already alluded to in our submissions. We make a distinction between the issue of origin rules on the one hand, and the issue of labelling (including as regards origin) on the other hand. This case is not about origin rules. It is about labelling. And we are concerned that it should not spill-over into a case about origin rules. Article IX of the GATT 1994 addresses marks of origin and the Agreement on Rules of Origin, which cross-references Article IX of the GATT 1994, contains provisions about origin rules that are permissive. We wonder about the extent to which, if a rule of origin would be permitted pursuant to these provisions, labelling on the same basis should be precluded by the TBT Agreement, which we recall does not refer expressly to origin. We note that one can have mandatory labelling about anything (we refer to dumping or subsidies as an example), and it seems to us that it might be problematic to dissociate any assessment of such matters from the covered agreements that specifically regulate the substantive issue.

ANNEX C-13

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF THE EUROPEAN UNION AT THE SECOND SUBSTANTIVE MEETING

1. Mr. Chairman, distinguished Members of the Panel. We have the following brief observations at this time, particularly in light of the responses to questions, rebuttals and second oral statements.

I. ARTICLE IX OF THE GATT 1994 AND THE AGREEMENT ON RULES OF ORIGIN

2. We note that notwithstanding the Panel's questions[1], neither Canada[2] nor Mexico[3] pursues any claims under Article IX of the GATT 1994 or the Agreement on Rules of Origin; and the US does not reference these provisions in its defence.[4] Consequently there is no basis for the Panel to make findings with respect to these provisions. Accordingly, we ask the Panel to state clearly in its Report that any findings it makes are without prejudice to the relevance of such provisions in any future dispute.

II. THE VILSACK LETTER

3. With respect to the Vilsack Letter,[5] we believe it may be of assistance to the Panel to recall the relevant provisions of Articles 4,[6] 5[7] and 7[8] of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts,[9] which have been

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[1] European Union's third party written submission, para. 3; European Union's first oral statement, para. 42; European Union's reply to questions 2 and 18.

[2] Canada's second written submission and replies to first set of questions (no reference to Article IX or the *Agreement on Rules of Origin*).

[3] Mexico's second written submission (no reference to Article IX or the *Agreement on Rules of Origin*) and reply to question 55, para. 151.

[4] United States' second written submission and replies to first set of questions (no reference to Article IX or the *Agreement on Rules of Origin*).

[5] European Union's third party written submission, para. 24; European Union's first oral statement, paras. 10 to 18; European Union's reply to question 7, paras. 40 to 43.

[6] "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

[7] "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

[8] "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

[9] Draft Articles on Responsibility of States for Internationally Wrongful Acts, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected.

referenced in a number of WTO disputes as reflecting customary public international law, also with respect to the question of imputability.[10]

4. We remain unpersuaded by the latest US submissions[11] that, in construing the Final Rule and the Vilsack Letter together as a single measure or evidence of a single measure, Canada[12] and Mexico[13] have exceeded their (fettered) discretion in relation to such matters; nor that the Panel would do so if it would proceed in the same manner. We do not see the (un-evidenced and thus uncertain) status of the Vilsack Letter under US domestic law as determinative of this question. Rather, it appears to us that, considered in isolation, the Vilsack Letter would be meaningless. It only takes on meaning when considered together with the other document(s) to which it refers, particularly the Final Rule.

III. ALLEGED LESS-FAVOURABLE TREATMENT "IN FACT" (ARTICLE III:4 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TBT AGREEMENT)

5. Without entering into the facts, as indicated in our prior submissions,[14] we remain unpersuaded by the Complainants' arguments and their general methodological approach to the problem of demonstrating less favourable treatment "in fact".[15] We agree with them that the US "like product"[16] and "private actor"[17] arguments are unconvincing; and that the position in other Members is not relevant.[18] Furthermore, it might or might not be that the introduction of this new regulatory measure has increased costs, and that this has been felt more keenly, either temporarily or as a result of lower volumes and higher unit costs, by importers.[19] But these are common features of regulatory change and do not, in our view, in themselves, demonstrate less

[10] Appellate Body Report, *US – Cotton Yarn*, para. 120 and footnote 51; Appellate Body Report, *US –Line Pipe*, para. 259 and footnotes 255 to 257; Panel Report, *US-Gambling*, paras. 6.128 to 6.129 and footnotes 697 to 701; Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.180 and footnotes 404 and 405; Panel Report, *EC-Selected Customs Matters*, para. 7.552 and footnote 932; Panel Report, *Brazil – Retreaded Tyres*, para. 7.305 and footnote 1480; Appellate Body Reports, *Canada/US – Continued Suspension*, paras. 382; Panel Report, *Thailand – Cigarettes*, para. 7.120 and footnote 533. See also: Arbitration Panel Report *EC – Bananas III (US) (Article 22.6 – EC)*, footnote 67; Arbitration Panel Report, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.44 and footnotes 45, 46 and 48; and Arbitration Panel Report, *US – FSC (Article 22.6 – US)*, footnote 52 and paras. 5.58 to 5.60 and footnotes 67 to 69.

[11] United States' second written submission, paras. 11 to 19.

[12] Canada's second written submission, paras. 102 to 107; Canada's reply to question 1.

[13] Mexico's second written submission, paras. 35 to 42; Mexico's reply to question 1.

[14] European Union's third party written submission, paras. 31 to 43; European Union's reply to question 3, paras. 29 to 32.

[15] In particular, Canada's second written submission, paras. 5 to 45; Mexico's second written submission, paras. 108 to 145; Canada's second oral statement, paras. 9 to 57. See also: United States' second written submission, paras. 29 to 96.

[16] European Union's third party written submission, paras. 25 to 30; Canada's second written submission, paras. 11 to 14; Mexico's second written submission, paras. 116 to 120; United States' reply to question 47.

[17] Canada's second written submission, paras. 15 to 16; Mexico's second written submission, paras. 121 to 129.

[18] Canada's second written submission, paras. 17 to 23; Canada's Second Oral Statement, paras. 58 to 59.

[19] Canada's second written submission, paras. 24 to 45; Mexico's second written submission, paras. 125 to 145.

favourable treatment.[20] Nor do we agree that origin labelling rules that apply equally to all cannot, by definition, be characterised as neutral technical regulations.[21]

6. We are not positing a higher evidential burden for "in fact" cases.[22] We are just recalling the basic fact that if you have the text of a measure that is expressly discriminatory it is a simple matter to adduce it to a panel. If you do not, you necessarily have to adduce evidence of other facts (at least two or more) and explain how they work together to support the finding of further facts, of which there is no direct evidence, so as to build a reasoned and adequate explanation between the facts thus established and any finding of inconsistency. We think this is something more than "aims and effects", and we just don't find it clearly set out in the Complainants' submissions.

7. The covered agreements pursue a trade objective, but they do not set out to eliminate regulatory diversity; and mutual recognition is only a stable operational approach if the costs implied by different regulatory systems do not differ excessively.

8. Finally, we observe that an alleged "in fact" breach of Article 2.1 of the TBT Agreement is a particularly serious matter, to the extent that it would be the case that Article XX of the GATT 1994, for example, would not be available as a defence.

IV. PROPORTIONALITY (ARTICLE 2.2 OF THE TBT AGREEMENT)

9. As we have indicated in our submissions, we consider that proportionality probably offers the best approach in this case. We agree with the US that the importing Member sets its own ALOP, and that panel's should exercise restraint on the questions of whether the objective is as stated and whether it is legitimate.[23] However, we do think that the Panel can and should enquire into the question of whether or not the Complaining Members have demonstrated that there are less trade restrictive measures that equally fulfil the legitimate objective.

A. THE OBJECTIVE OF THE MEASURE IS CONSUMER INFORMATION

10. We do not believe that it would be necessary or appropriate in this case for the Panel to find that – objectively – the objective of the measure is something other than the provision of consumer information.[24] As we have indicated in our submissions, we think that the Panel can provide a satisfactory resolution of the dispute without calling into question that aspect of the US submissions.

[20] European Union's third party written submission, paras. 31 to 43; United States' reply to questions 14 and 46.

[21] Canada's second oral statement, para. 12.

[22] Mexico's second written submission, para. 110.

[23] United States' second written submission, paras. 98 to 105.

[24] European Union's third party written submission, para. 37; European Union's first oral statement, paras. 19 to 23; European Union's reply to question 10, paras. 50 to 51 and Question 19, paras. 66 to 69; Canada's second written submission, paras. 50 to 54 and 57 to 68; Mexico's second written submission, paras. 149 to 161; United States' second written submission, paras. 118 to 146 and reply to question 3; Canada's second oral statement, paras. 62 to 67.

11. We do not agree with Canada that the TBT list of objectives is closed by reference to other provisions of the covered agreements;[25] nor do we agree that such objectives have to be "specific".[26]

B. THE OBJECTIVE OF CONSUMER INFORMATION IS LEGITIMATE

12. We consider that the objective of providing consumer information about origin is a legitimate one.[27] We fail to see how the Complainants can reasonably argue that the reference to "labelling" in the TBT Agreement also refers to origin labelling;[28] and yet at the same time that origin labelling is not a legitimate objective. We do not agree that the defending Member has to provide "clear and compelling" evidence of legitimacy.[29]

C. THE IMPORTANCE OF THE OBJECTIVE AND THE RISKS OF NON-FULFILMENT

13. Whilst we agree that not all objectives will necessarily be legitimate, we do not consider that it would be necessary or appropriate in this case for the Panel to address this question. We think it both unnecessary and incorrect to opine about the relative degree of regulatory space under the SPS and TBT Agreements – if anything we see more regulatory space under the TBT Agreement.[30] We think that the Panel can provide a satisfactory resolution of the dispute on the basis of other reasoning.

D. LABEL B IN LABEL A SCENARIOS: A LESS TRADE RESTRICTIVE MEASURE THAT EQUALLY FULFILS THE STATED OBJECTIVE

14. We have already explained why we think that the Complainants have identified a measure that is less trade restrictive, or *significantly* less trade restrictive, and that *equally* fulfils the stated objective.[31] That measure would be to permit the use of label B in all cases, even if co-mingling did not occur, or occurred over an extended period of time (such as a year, for example). This would be less trade restrictive because US slaughter houses would no longer be fettered by the COOL measure in their decisions to take Canadian and Mexican cattle and hogs. It would *equally* fulfil the stated objective because the overall design and architecture of the measure reveals that it is premised on the assumption that US consumers do not care if their steak is *a bit more likely* to be American than one might imagine, given the indication on the label (US and Canada/Mexico).[32] Conversely, there is no evidence to support the view that the measure was designed so as to enable US consumers to prefer *imported* meat.[33] Finally, nothing would prevent slaughterhouses using label A if consumers would want it. We think this would largely address the concerns raised by Canada and Mexico, whilst leaving the essence of the measure, *as it is already designed*, in place.[34]

[25] Canada's second written submission, paras. 70 to 76.
[26] Canada's second written submission, paras. 55 to 56 and para. 69.
[27] United States' second written submission, paras. 106 to 117.
[28] See the discussion at paras. 15 to 22 of the European Union's third party written submission.
[29] Canada's second written submission, para. 70.
[30] Canada's second written submission, para. 86 and paras. 91 to 95.
[31] European Union's first oral statement, paras. 27 to 41.
[32] United States' reply to question 48.
[33] United States' reply to question 56.
[34] Canada's second written submission, paras. 77 to 83; Canada's reply to question 24; Mexico's second written submission, paras. 87 to 98; Mexico's reply to question 24; US Replies to Questions 10, 24 and 29.

E. THE VILSACK LETTER

15. We have explained that we consider the Vilsack Letter – which apparently "reflects the priorities of the new Administration"[35] – to be more trade restrictive than the Final Rule, and thus by definition inconsistent with Article 2.2 of the TBT Agreement. We think that such a finding would preclude reversion to a measure of that substantive content in the context of compliance.[36]

F. VOLUNTARY LABELLING

16. We have explained why we consider that voluntary labelling would not necessarily achieve the stated objective.[37]

G. SUBSTANTIAL TRANSFORMATION

17. We have explained why we consider that the Complainants' arguments about substantial transformation are not persuasive.[38]

V. CONCLUSION

18. On the basis of the foregoing, we consider that the Panel could reasonably find that the measure is inconsistent with Article 2.2 of the TBT Agreement insofar as it does not permit the use of label B in *other* situations where the meat may in fact be of pure US origin; and insofar as the Vilsack Letter is more trade restrictive than necessary to fulfil a legitimate objective. With the possible exception of Article 12 of the TBT Agreement,[39] the Panel could judicially economise on the remainder of the claims.

[35] United States' reply to question 4, para. 6.

[36] European Union's reply to question 6, paras. 40 to 43; Canada's second written submission, paras. 102 to 111; Mexico's second written submission, paras. 35 to 42.

[37] European Union's third party written submission, paras. 41 and 56; Canada's second written submission, paras. 96 to 98; Mexico's second written submission, paras. 165 to 169; United States' reply to question 37.

[38] European Union's third party written submission, para. 57; European Union's reply to question 17, paras. 63 to 64 and Question 2, para. 27; Canada's second written submission, paras. 99 to 101; Mexico's second written submission, paras. 165 to 169.

[39] European Union's first oral statement, para. 12; European Union's reply to question 16, paras. 59 to 62.

ANNEX C-14

THIRD PARTY ORAL STATEMENT OF GUATEMALA AT THE FIRST SUBSTANTIVE MEETING

1. Mr. Chairman, Members of the Panel, delegations representing the Parties and Third Parties to this dispute, staff of the WTO Secretariat, good morning.

2. At the outset, on behalf of the delegation of Guatemala, I would like express our appreciation for this opportunity to present our views during this proceeding.

3. Guatemala is a small country with limited resources. Nevertheless, Guatemala makes every effort to actively participate in those disputes, where it has a systemic interest. In this case, Guatemala has a systemic interest in all the issues raised by the Parties and my delegation would like to take this opportunity to offer some comments to the Panel.

4. Guatemala recognizes that all WTO Members have the right to adopt mandatory country of origin labelling requirements. That is, any Member may require meat or any other product to have its origin indicated when it arrives at its border. None of the Parties or the Third Parties appear to disagree on this. The question then, is whether by adopting such origin labelling requirements, a particular Member (in this case, the United States) is, or is not, acting in a manner contrary to its obligations under the WTO Agreements.

5. Canada and Mexico argue that this case is about protectionism and discrimination. According to the complainants, the US country of origin requirements impose significantly greater costs and burdens on the use of Canadian and Mexican cattle and hogs in the production of beef and pork, mainly because it is required to segregate the products to effectively comply with the COOL measure.

6. In addition, as a part of the legal instruments that conform the COOL measure, Canada and Mexico include an open letter from the US Secretary of Agriculture, Mr. Tom Vilsack, on which he asked the industry to "voluntarily" adopt labelling in a manner more restrictive than that provided in the COOL legislation and the Final Rule. As an alternative, Mr. Vilsack stated in his letter that he would "carefully consider whether modifications to the rule will be necessary to achieve the intent of Congress".

7. On the other hand, the United States argues that the objective of its labelling requirements is to ensure that consumers are provided information about the meat and other food products they buy at the retail level and to prevent "consumer confusion" with regard to the origin of the products. According to the US, among other aspects, nothing in the regulations requires segregation. The US has the position that the legal instruments identified by the complainants do not conform one COOL measure and that the Vilsak Letter is not a technical regulation nor is it mandatory.

8. None of the parties to the dispute appear to deny that COOL requirements (independently whether it is a single measure or a set of measures) are technical regulations. Therefore, in Guatemala's view, the Panel should ascertain first, whether the technical regulation or regulations fulfil a legitimate objective.

9. Guatemala agrees with the US that Article 2.2 of the TBT Agreement contains a nonexhaustive list of legitimate objectives, as confirmed by the use of the term "inter alia". However, Guatemala is not persuaded that, in this particular case, the measure or measures at issue are designed

in a manner to fulfil the alleged legitimate objective (i.e., among others, to prevent "consumer confusion").

10. We all heard yesterday that there could be cases where commingling 1% meat from the United States with 99% of meat from Canada (or Mexico) may allow the use of the label stating that the product is from the United States and Canada (or Mexico). We also heard from Mexico the example that cattle coming from Guatemala and being simply slaughtered in Mexico would be classified in the United States as Mexican beef. However, it would not be the same case for Mexican cattle that was slaughtered in the United States, as the beef would not be classified as from the United States, but as Mexican.

11. Therefore, Guatemala is of the view that the United States has not offered sufficient evidence as to how the COOL measure or measures fulfil the alleged legitimate objective of giving accurate information to the consumer regarding the origin of the products and, in this manner, to prevent confusion.

12. In the event that the Panel considered that the COOL measure or measures fulfil a legitimate objective, in Guatemala's view, the second question would be to ascertain whether the technical regulation or regulations are not "prepared, adopted or applied" with a view to or with the effect of creating unnecessary obstacles to international trade. Here, the analysis of the legal value of the Vilsak Letter might be relevant. Guatemala considers that this letter should be considered as a measure for purposes of this dispute.

13. In particular, not only because any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings, but also because the letter, although requests "voluntary" actions from the industry, appears not to give any other option but to comply with such "voluntary" actions (making this measure, de facto, mandatory).

14. In the remote event that the Panel determined that the technical regulation or regulations were not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade, Guatemala is of the view that the Panel then needs to examine whether the conditions of competition where modified. This examination should be, in Guatemala's view, linked to the question of whether products imported from the territory of any Member are accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country. To this end, the Panel may need to ascertain whether the alleged costs of segregation effectively modified the conditions of competition.

15. Finally, Mr. Chairman, regarding the question you posed to the third parties about any mandatory country-of-origin labelling scheme that our countries could maintain, I can inform that we have just received a considerable amount of information from our Capital. We are in the process of examining this information. Provisionally, I can advance that we have some mandatory rules for country-of-origin labelling. However, we would submit further detailed information in writing within the delays established by the Panel foreseen to that end.

ANNEX C-15

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. Japan's third party submission focuses on the consistency with Article 2.1 of the Agreement on Technical Barriers to Trade (the "TBT"), Article III.4 of the General Agreement on Tariffs and Trade 1994 (the "GATT") and Second Sentence of Article 2.2 of the *TBT*, of the country-of-origin labelling requirements (the "COOL measure") imposed by the United States on certain covered commodities including beef and pork when they are sold to final consumers.

II. THE PANEL SHOULD CAREFULLY SCRUTINIZE WHETHER THE COOL MEASURE ACCORDS LESS FAVOURABLE TREATMENT TO IMPORTED PRODUCTS THAN TO LIKE PRODUCTS OF NATIONAL ORIGIN WITHIN THE MEANING OF ARTICLE 2.1 OF THE TBT AND ARTICLE III.4 OF THE *GATT*

2. The first question to be examined by the Panel is whether the COOL measure, which is applied only to *beef* and *pork*, is considered as according less favourable treatment to Canadian/Mexican *cattle* and *hogs* than that to those of the United States, and constitutes the violation of Article 2.1 of the *TBT* and Article III.4 of the *GATT*.

A. ARTICLE 2.1 OF THE *TBT*

3. Canada and Mexico consider that the COOL measure constitutes a technical regulation defined in ANNEX 1, paragraph 1 of the *TBT*.[1] On this basis, they claim that Canadian/Mexican *cattle* and *hogs* are accorded treatment less favourable than that to *cattle* and *hogs* of the United States, and that the COOL measure is in violation of Article 2.1 of the *TBT*.

4. The United States, on the other hand, considers that the phrase "in respect of" in this provision is interpreted as meaning "be directed to; refer to; related to; deal with; be concerned with" in accordance with the Oxford Dictionary[2] and argues that the scope of the national treatment obligation is restricted to the products which are "related to" or "directed to" a technical regulation concerned on the basis of "in respect of technical regulations" in Article 2.1 of the *TBT*. In other words, the United States argues that, since the COOL measure merely regulates the labelling related to *beef* and *pork* in the retail market of the United States, this measure is not considered as being "related to" to the labelling of livestock such as *cattle* and *hogs*, and thus falls outside the regulatory scope of Article 2.1 of the *TBT*. However, neither Canada nor Mexico refers to this regard[3].

5. Since there is no jurisprudence regarding the phrase "in respect of" in Article 2.1 of the *TBT*, and since Article 2.1 of the *TBT* places no limiting words on "technical regulations" in contrast to Article III:4 of the *GATT*, where "all laws, regulations and requirements" are limited by the words "affecting their internal sale, offering for sale, purchase, transportation, distribution or use", Japan would respectfully ask the Panel to carefully examine the interpretation and argument by the United States regarding the phrase "in respect of", which is spelled out in the previous paragraphs in this submission.

[1] Canada's first written submission, paras. 69-74; Mexico's first written submission, paras. 239-260.
[2] United States' first written submission, para. 197.
[3] United States' first written submission, para. 198.

B. ARTICLE III.4 OF THE *GATT*

6. The claim by Canada and Mexico that the COOL measure, which is applied only to *beef* and *pork*, accords less favourable treatment to Canadian/Mexican *cattle* and *hogs* than that to those of the United States needs to be examined in relation to "affecting" and "less favourable treatment" under Article III.4 of the *GATT*.

7. Regarding the word "affecting", the Appellate Body held that this requirement 'serves to define the scope of application of Article III:4'.[4] In this regard, Mexico claims that, while the COOL measure does not directly regulate *cattle*, it affects the internal sale of *cattle*.[5] Thus, it concludes that the COOL measure violates the national treatment obligation in Article III.4 of the *GATT*. Canada also makes similar arguments to Mexico.[6]

8. There are not a few precedents regarding the term "affecting" under Article III.4 of the *GATT*. For example, the panel in *Canada – Autos* held that '[t]he word "affecting" in Article III:4 of the GATT has been interpreted to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products'.[7]

9. Moreover, the panel's reasoning in *Mexico – Taxes on Soft Drinks* with respect to Article III.4 of the *GATT* may offer a suggestion for the present case. In this case, the United States claimed that the soft drink tax and the distribution tax, both of which are imposed on *soft drinks and syrups* when they are sold in retail, affected not only the internal sale of *soft drinks and syrups* but also the internal sale of sweeteners which are used to produce soft drinks, in the Mexican market, and accorded less favourable treatment to US *beet sugar* than that to Mexican *cane sugar* under Article III.4 of the *GATT*. In this regard, the panel concluded that the internal sale of *beet sugar* of the United States in the Mexican retail market was also affected by the soft drink tax and the distribution tax.[8]

10. Thus, there is no doubt for the Panel to conclude that the COOL measure is considered as affecting internal sale of Canadian/Mexican *cattle* and *hogs* in the retail market of the United States. Moreover, this issue should also be examined in relation to "less favourable treatment". In this regard, the United States points out that the detrimental effects to import *cattle*/*hogs* in the market alleged by Canada and Mexico are caused by "factors not related to the COOL measures", and thus concludes that the COOL measures do not modify the condition of competition.[9]

11. Japan is of the view that the question whether the COOL measure modifies the condition of competition in livestock trade, that is Canadian *cattle* and *hogs*, should be carefully examined by the Panel, because this measure does only regulates the labelling requirement for *beef* and *pork* and does not directly regulate internal sale of livestock.

12. Lastly, Japan points out that the reason is not that clear why the United States cites the paragraphs from 196 to 199 of its Written Submission, which are about the interpretation of the phrase "in respect of" in Article 2.1 of the *TBT*, in the footnote 331 of its written submission in the context of "less favourable treatment" of Article III.4 of the *GATT*. Should the United States consider that there is a link between two phrases, the reason for such link needs to be further clarified.

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[4] United States' first written submission, para. 198.

[5] Mexico's first written submission, para. 213.

[6] Canada's first written submission, paras. 221-222.

[7] Panel Report, *Canada – Autos*, para. 10.80. See also Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 208-209.

[8] See Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.109.

[9] United States' first written submission, para. 150.

III. THE PANEL SHOULD CAREFULLY EXAMINE WHETHER THE COOL MEASURE IS TRADE-RESTRICTIVE THAN NECESSARY TO FULFIL A LEGITIMATE OBJECTIVE

13. The next question to be examined by Japan is whether the COOL measure, which is applied as a technical regulation only to *beef* and *pork*, is determined to be more restrictive to trade of Canadian/Mexican *cattle* and *hogs* than necessary to fulfil a legitimate objective under Article 2.2 of the *TBT*.

A. The Panel Should Carefully Examine Whether the COOL Measure Restricts Trade

14. Canada and Mexico also allege a violation of the second sentence of Article 2.2 of the *TBT*. In order to find that a measure is considered more trade-restrictive than necessary to fulfil a legitimate objective, Canada argues that the following two elements need to be established: first, a technical measure must restrict trade; and second, the trade-restrictiveness of the technical regulation must be greater than necessary to fulfil its legitimate objective.[10] With respect to the first requirement, Canada argues that the COOL measure has restricted trade in Canadian *cattle* and *hogs*, while the COOL measure is applied only to *beef* and *pork*.[11]

15. Thus, Japan respectfully asks the Panel to carefully examine whether the COOL measure is considered as restricting trade of Canadian/Mexican *cattle* and *hogs* to the United States under second sentence of Article 2.2 of the *TBT*. The legal relationship between the first sentence and the second sentence of Article 2.2 of the *TBT* might shed some lights on the assessment of this question. The first sentence reads that "[m]embers shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to *international trade*." (Italic Added) Since the second sentence begins with the phrase of "[f]or this purpose", and as also confirmed by the United States and Canada that 'the second sentence explains what the first sentence means'[12], the interpretation of the phrase "international trade" in the first sentence could provide for some clues to the regulatory scope of "trade" under the phrase "trade-restrictive" in the second sentence.

B. The United States needs to demonstrate in its rebuttal that the alternative measures raised by Canada and Mexico are not less restrictive to trade of Canadian/Mexican *cattle* and *hogs* than the COOL measure

16. Both Canada and Mexico claim that the COOL measure is more restrictive to trade of Canadian/Mexican *cattle* and *hogs* than necessary to fulfil its legitimate objective. In this context, they raise the following alternative measures; first, a Voluntary Labelling Scheme; and second, a Labelling System Based on Substantial Transformation.[13]

17. In this regard, Canada enumerates the three elements to be established for determining whether a measure is "more trade-restrictive than necessary" under the second sentence of Article 2.2 of the *TBT* as follows: first, an alternative measure exists that would meet the Member's legitimate objective; second, the alternative measure is reasonably available taking into account technical and

[10] Canada's first written submission, para. 183. Mexico also refers to "trade-restrictive" as one of the requirements. Mexico's first written submission, paras. 305-307.
[11] Canada's first written submission, para. 186. Mexico also considers that the meaning of "trade-restrictive" is to "deny competitive opportunities to imports of Mexican feeder cattle". Mexico's first written submission, para. 313.
[12] United States' first written submission, para. 202.
[13] Canada's first written submission, para. 191.

economic feasibility; and third, the alternative measure is less restrictive to trade than the measure being challenged.[14] With respect to the third requirement, Canada claims that the COOL measure has resulted in a significant reduction in exports of Canadian *cattle* and *hogs* to the United States.[15]

18. While the United States does not attempt to rebut the case by Canada and Mexico concerning this regard, it is to be noted that the United States, if necessary, would need to show in its rebuttal that the alternative measures raised by Canada and Mexico are not less restrictive to trade of Canadian/Mexican *cattle* and *hogs* to the United States than the COOL measure, not trade of Canadian/Mexican *beef* and *pork*.

C. THE PANEL SHOULD CAREFULLY INTERPRET THE SECOND SENTENCE OF ARTICLE 2.2 OF THE *TBT*

19. Regarding how to prove "more trade-restrictive than necessary" under the second sentence of Article 2.2 of the *TBT*, the United States argues that one of the elements to be established by a complainant is whether an alternative measure is *significantly* less trade-restrictive to trade.[16] In support of incorporating the term "significantly" into this provision, it relies on the contextual similarities between Article 2.2 of the *TBT* and Article 5.6 and Footnote 3 of the Agreement on the Application of Sanitary and Phytosanitary Measure (the "*SPS*").[17] It also invokes the December 15, 1993 letter from the Director-General of the GATT to the Chief United States Negotiator concerning the application of Article 2.2 of the *TBT* in order to support its own contextual interpretation[18].

20. However, the United States seems to misunderstand the ordinary meaning of the terms in interpreting the WTO Agreement. It is already established that Article 31 of the Vienna Convention on the Law of Treaties has attained the status of a rule of customary or general international law in interpreting the WTO Agreement.[19] The fact that there is neither "significant" nor "significantly" in Article 2.2 of the *TBT* must be taken into account, and the difference in the wording between Article 2.2 of the *TBT* and Article 5.6 and Footnote 3 of the *SPS* must be read on the contextual basis. Thus, Japan would request the Panel to examine carefully the above assertion of the United States in this light.

[14] Canada's first written submission, para. 190. See also Mexico's first written submission, para. 310.
[15] Canada's first written submission, para. 199. See also Mexico's first written submission, para. 317.
[16] United States' first written submission, para. 249 (italic original).
[17] United States' first written submission, paras. 246-247.
[18] United States' first written submission, para.248.
[19] See also Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

ANNEX C-16

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF JAPAN AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. Due to its systemic interest in the sound interpretation of the legal obligations at issue, Japan's third party oral statement focuses on two points regarding Article 2.1 of the Agreement on Technical Barriers to Trade ("TBT Agreement"), especially the following issues.

(1) Whether the COOL measure accords less favourable treatment to Canadian/Mexican cattle and hogs than to the like products of the United States; and

(2) the interpretation of the phrase "in respect of" under Article 2.1 of the TBT Agreement in its consideration of the views expressed by the United States and other third parties.

II. WHETHER THE COOL MEASURE ACCORDS LESS FAVOURABLE TREATMENT TO CANADIAN/MEXICAN CATTLE AND FOGS THAN TO THE LIKE PRODUCTS OF THE UNITED STATES UNDER ARTICLE 2.1 OF THE TBT AGREEMENT

2. It is established that a measure in question is considered to be according less favourable treatment to foreign products than to the like products of domestic origin if this measure modifies the *conditions of competition* in the relevant market to the disadvantage of the imported product.[1]

3. In *Korea – Various Measures on Beef*, the Korea's dual retail system promulgated in 1990 restricted a 'Specialized Imported Beef Store' from selling *domestic beef*, and other small retailers from selling *imported beef* in the Korean retail market. As the result of this, 'the existing small retailers had to choose between, on the one hand, continuing to sell domestic beef and renouncing the sale of imported beef or, on the other hand, ceasing to sell domestic beef in order to be allowed to sell the imported product. Apparently, the vast majority of the small meat retailers chose the first option'.[2] Accordingly, while the dramatic reduction in number of retail outlets for imported beef occurred by the decisions of individual retailers who could choose freely to sell the imported beef, the Appellate Body stated that '<u>[t]he legal necessity of making a choice</u> was…imposed by the measure itself. The restricted nature of that choice should be noted…The choice was limited to selling domestic beef only or imported beef only'.[3] The Appellate Body also held that '[w]hat is addressed by Article III:4 is merely the *governmental intervention* that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory'.[4]

4. In this regard, Canada asserts that the COOL measure requires US feeding operations and slaughter houses to segregate livestock at each stage of the production process.[5] On the other hand, the United States argues that '[i]n law and in fact, the 2002 COOL Statute, as amended, 2009 Final Rule,

[1] Appellate Body Report, *Korea – Various Measures on Beef*, para. 144; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 91.
[2] Appellate Body Report, *Korea – Various Measures on Beef*, para. 145.
[3] *Korea – Various Measures on Beef*, Appellate Body Report, para. 146. (underline added)
[4] *Korea – Various Measures on Beef*, Appellate Body Report, para. 149. (italic original)
[5] Canada's written submission, para. 95.

and FSIS Final Rule do not require US processors to segregate livestock'.[6] According to the United States, US processors are not legally prevented from buying Canadian/Mexican cattle and hogs in the US retail market and explained several options available for US processors.

5. Japan notes that, in *Korea – Various Measures on Beef*, the dual distribution system based on the origins of products was directly imposed by Korea's law and regulation. However, there may be a possibility that the COOL regulations are still regarded as governmental intervention that *de facto* compels US feeding operations and slaughter houses to make a choice to purchase US cattle and hogs.[7] While admitting that "U.S. feeding operations and slaughter houses do, in theory, have ability to 'choose' whether to use Canadian cattle and hogs, and US retailers have, in theory, the ability to 'choose' to sell Canadian-origin beef and pork", Canada still asserts that "the COOL measure imposes the 'necessity of making a choice'" on US industry to use exclusively US-origin livestock.[8] The United States responds that, while contrasting with the Appellate Body in *Korea – Various Measures on Beef* which referred to "the *legal* necessity of making a choice", "the COOL leads to some producers experiencing a *commercial* necessity to segregate products."[9] (Italic Original)

6. Thus, there appear to be divergent views among the parties on whether the COOL measures at issue impose a kind of "legal necessity of making a choice" referred to by the Appellate Body in *Korea – Various Measures on Beef*. Japan considers that resolving this issue would turn on a factual analysis as to whether the measures at issue requires segregation and whether segregation costs are such a high level that they compel US processors to use only US-origin animals.

III. THE INTERPRETATION OF THE PHRASE "IN RESPECT OF" UNDER ARTICLE 2.1 OF THE TBT AGREEMENT IN CONSIDERATION OF THE VIEWS EXPRESSED BY OTHER THIRD PARTIES

7. Regarding the phrase "in respect of" under Article 2.1 of the *TBT*, the United States argues in its written submission that, since the COOL Statute and 2009 Final Rule merely regulate the labelling related to *beef* and *pork* in the retail market of the United States, this measure is not considered as being "related to" to the labelling of livestock such as *cattle* and *hogs*, and thus falls outside the regulatory scope of Article 2.1 of the *TBT*.[10]

8. On this issue, Australia provides its view that the phrase "in respect of" should mean that "where technical regulations are applied by a WTO Member".[11] The EU seems to argue that

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[6] United States' written submission, paras. 153, 159.

[7] In this regard, New Zealand also argues in its third party submission that 'there may be a violation [of Article 2.1 of the *TBT*] where those private actions are compelled, *de facto* or *de jure*, by the measure at issue'. New Zealand submits that 'the Panel should consider whether governmental actions have created the situation where private actors are compelled to act in a certain way because of a "necessity of making a choice"'. From these observations, New Zealand seems to argue that, even in case that private actors are *de facto* compelled to act in a certain way through governmental actions, it might be decided that the condition of competition is modified to the disadvantage of the imported product. According to New Zealand, 'although a technical regulation may not explicitly require a specific action, it nevertheless unduly influences the actions of private entities so as to adversely affect "the conditions under which like goods, domestic and imported compete in the market"' (New Zealand, third party written submission, paras. 26-27.).

[8] Canada's written submission, para. 91.

[9] United States' written submission, para. 171.

[10] United States' first written submission, para. 198.

[11] Australia's third party submission, paras. 39-44.

Article III.4 of the *GATT* provide relevant context for the interpretation of this phrase under Article 2.1 of the *TBT*. [12]

9. While Article III.4 of the *GATT* reads "in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use", Article 2.1 of the *TBT* reads "in respect of technical regulations". Given the similarity of, and close relation between, those two provisions, as agreed among parties,[13] Article III.4 of the *GATT* should provide guidance for the interpretation of Article 2.1 of the *TBT*, including the phrase "in respect of".

[12] European Union's third party submission, paras. 27-30.

[13] See Canada's first written submission, para. 78; Mexico's first written submission, para. 263; United States' first written submission, para. 145.

ANNEX C-17

THIRD PARTY ORAL STATEMENT OF JAPAN AT THE SECOND SUBSTANTIVE MEETING

I. INTRODUCTION

1. Mr. Chairman and distinguished members of the Panel, Japan appreciates the opportunity to present its brief views as a third party in this important dispute. Today, we will not reiterate what we have already said in our written submission and first oral statement. Rather, we will focus on different issues regarding Article 2.2 of the Agreement on Technical Barriers to Trade ("TBT Agreement").

II. ARTICLE 2.2 OF THE TBT AGREEMENT

2. The parties claim that whether the COOL measure "fulfils" the legitimate objective of providing consumer information and preventing consumer confusion depends on the factors including the following ones.

- What kind of information US <u>consumers</u> want from a country-of-origin labelling;
- Whether US <u>consumers</u> can understand the differences between Label "A", "B", and "C" meat products; and
- Whether the COOL measure provides US consumers with accurate information about the <u>origin</u> of meat products.

3. First, according to Canada,[1] "[t]he COOL measure provides information that US consumers generally are not interested in knowing and it is therefore not meaningful."[2] It also argues that "the vast majority of consumers express no interest in country-of-origin labelling[…]much less in the kind of information required to be provided by the COOL measure."[3] Mexico also argues that "[t]o the extent some US consumers stated they wanted information on the country in which the cattle used to produce beef products were born and raised, the proportion of those consumers to the entire population of US beef consumers was very small."[4] In response, the United States claims that the US consumers want information about the country-of-origin of the meat products they buy, including information about where the source animals were born, raised, and slaughtered.[5] As a matter of fact, it may occur to any society that the scope of information that a labelling measure in question provides to its domestic consumers does not correspond exactly to the one they actually desire. In other words,

[1] Canada argues that "in order to fulfil the objective of providing consumers with information, the information must be 'meaningful'. In other words, it must provide consumers with information that is <u>desired</u> by them, or at least information on which they are willing to act." (Canada's second written submission, para. 81, Underline Added).

[2] Canada's second written submission, para. 82.

[3] Canada's second written submission, para. 82. See also Canada's responses to the Panel's questions from the first substantive meeting, para. 82 ("There may be a small sub-set of consumers who are interested in whether their meat comes from animals born and raised in the United States").

[4] Mexico's second written submission, para. 68.

[5] United States' second written submission, paras. 111-114. The United States also states that "[US] consumers believe that meat products that are designated as US origin are and should be derived from animals born, raised, and slaughtered in the United States and that other definitions of US origin would be misleading." (United States' answers to Panel's first set of questions, para. 93).

information to be provided by a labelling measure may cover information other than domestic consumers actually want. Does this fact lead a panel to decide that this measure does not fulfil the legitimate objective of providing consumers information? Given that its objective is to provide consumers with information, we do not believe that a government should always be free to enforce any labelling measure irrespective of what kind of information domestic consumers actually desire. However, in Japan's view, only the evidence showing the minor gap between consumers' desire and a labelling measure in terms of the scope of information does not always lead a panel to rule that the measure does not fulfil the legitimate objective of providing consumers information.

4. This view is also supported by the following reasoning. As also explained in its answer to the Panel's question 15, Japan is of the view that the term "origin" in the context of the customs law is different from the one in the context of a labelling.[6] Therefore, the Agreement on Rules of Origin does not provide clear guidance for the term "origin" in the context of a labelling. Moreover, it is provided in the preamble of the TBT Agreement that "no country should be prevented from taking measures necessary[…]at the levels it considers appropriate". On this basis, there exists no clear provision in the WTO Agreement specifying what information should be attached to a country-of-origin labelling. In other words, the question as to what extent of information a country-of-origin labelling system should include falls within the discretion of WTO Members. However, this labelling system should not be more trade-restrictive than necessary to fulfil its legitimate objectives.

5. Second, according to Canada,[7] "[t]he meaning of the labels [in the COOL measure] is not easily deciphered by [US] consumers. The average consumer would not be able to appreciate the difference between the various labels",[8] and "[m]ost consumers do not understand the subtle differences between Label 'A', 'B', and 'C' meat." [9] Mexico also states that "it is clear that the average consumer [in the United States] will not be able to understand the exact meaning of the information contained in the label."[10] However, no party submits any convincing evidence that shows the consumer's ability or disability to distinguish the differences between these Labels. It might be true that US consumers are sometimes not able to perfectly understand what the difference between Label "B" and "C" means without additional information. While the consumers' perception may play a certain role to a panel in examining whether a labelling measure fulfils its legitimate objective of providing consumers information about the country-of-origin for meat products, the Panel should carefully examine whether the alleged disability of consumers to recognize the distinctions between Label "A", "B", and "C" is sufficient to decide that the COOL measure does not fulfil such an objective.

6. Third, the COOL measure aims at providing US consumers with information about the country-of-origin where the animal from which the meat was derived was born, raised, and slaughtered.[11] In addition, the United States claims that the objective of the COOL measure is to prevent US consumers from being confused with the wrong use of labelling "Product of U.S.", which, according to the United States, should be used only when the source animals were born, raised, and slaughtered in the United States.[12] Thus, it needs to be examined whether the COOL measure is structured so that US consumers are informed of and not confused with the country-of-origin of meat products.

[6] Japan's replies to questions from the Panel following the first hearing, paras. 3-5.

[7] Canada argues that "to fulfil its purported objective, the information available as a result of the COOL measure would have to be accurate." (Canada's first written submission, para. 178).

[8] Canada's first written submission, para. 181.

[9] Canada's second written submission, para. 79.

[10] See also Mexico's responses to the Panel's questions from the first substantive meeting, para. 116.

[11] United States' answers to Panel's first set of questions, paras. 105, 107; United States' opening statement at the first substantive meeting, para. 38.

[12] See also United States' answers to Panel's first set of questions, paras. 100-101,104.

7. As to the multiple-origin labelling for *muscle cuts of meat* under the COOL measure such as Label B and Label C, Mexico claims that Label B, "in itself, is confusing because consumers will not know that the entire process of meat production took place in the United States while only the birth and minimal raising of the animal occurred in Mexico."[13] Japan agrees with this Mexico's view to some extent. As long as the objective of the COOL measure is to provide US consumers with three specific pieces of information about where the source animals were (1) born, (2) raised, and (3) slaughtered, Label B "Product of US and Country X" and Label C "Product of Country X and U.S." would not be able to provide US consumers with information the COOL measure intends to provide unless further and specified information were added to these Labels. Only the description "Product of US and Mexico" *itself* under Label "B" provides US consumers with no exact information about where the source animals were born, raised, and slaughtered.[14]

8. Even as to the single-origin labelling for muscle cuts of meat under the COOL measure, Mexico argues that, in addition to the case where the animal sources were born, raised, and slaughtered in Country X, and imported into the United States, there are three more cases where Label D "Product of Country X" may be used under the COOL measure.[15] If so, US consumers would not be able to identify the four different cases from Label "D" itself.

9. However, it should be noted that the multiple-origin labelling for muscle cuts of meat such as Label "B" and Label "C" may fulfil the other objective of the COOL measure, that is to prevent US consumers from being confused with the wrong use of labelling "Product of U.S." for meat products, the animal resources of which were actually born and raised in a foreign country and immediately slaughtered in the United States.[16] In this regard, both Label "B" and Label "C" at least inform US consumers that muscle cuts of meat labelled with Label "B" or "C" are different from Label "A" and that the source animals were not exclusively born, raised, and slaughtered in the United States. However, the COOL measure is still subject to the review as to whether it is not more trade-restrictive than necessary to fulfil its legitimate objectives.

10. As to the labelling rules under the COOL measure for meat products that are derived from the *commingling* of various livestock, there exists the flexibility under the 2009 Final Rule that permits a retailer to use either Label "B" or "C" on any combination of Label A, B, and C livestock in case that they are commingled during a single production day.[17] In this regard, Canada argues that "even a consumer who ardently wished to purchase meat that went through a particular life-cycle (say 'Canadian-born, U.S.-raised and – slaughtered') would not be able to determine from the Labels whether the meat came from such an animal." [18] As also questioned by the Panel to the United States,[19] even when 1% of Label A livestock (i.e. born, raised and slaughtered in the United States) and 99% of Label C livestock (e.g. born and raised in Country X and immediately slaughtered in the

[13] Mexico's first written submission, para. 301.

[14] It is also noted that, as Mexico also points out, Label "C" may also be used for two occasions under the COOL measure; first, where the source animals were born and raised in Mexico, and immediately slaughtered in the United States; and second, where they were born in the United States, raised in Mexico, and slaughtered in the United States (Mexico's responses to the Panel's questions from the first substantive meeting, para. 188). If so, US consumers are not able to recognize the difference between above two cases from Label "C" itself.

[15] Mexico's responses to the Panel's questions from the first substantive meeting, paras. 188-189.

[16] United States' answers to Panel's first set of questions, paras. 100-101,104.

[17] As to the labelling rules for commingling under the COOL measure, see United States' answers to Panel's first set of questions, para. 16; United States' second written submission, para. 42; Mexico's second written submission, para. 47; Mexico's responses to the Panel's questions from the first substantive meeting, para. 37.

[18] Canada's second written submission, para. 80.

[19] United States' answers to Panel's first set of questions, para. 48.

United States) are commingled in a single production day, the meat product based on these livestock may still be labelled as Label B "Product of US and Country X". In this case, while 99% of meat products are actually based on cattle born and raised in Country X, the name of the United States may come first under Label "B".[20] In this regard, according to the United States, "a consumer [in the United States] is likely to believe that the meat is most closely affiliated with the name of the country that appears first on the label".[21] As already explained above, we raise a question to the Panel whether such consumers' perception is not sufficient for the Panel to reach a conclusion. In addition to this, if the United States measures are designed to misguide US consumers who act on such a perception, Japan is of the view that the COOL measure is more likely not to fulfil the objective of preventing US consumer confusion to this extent.

11. Moreover, there is no disagreement that there are two cases where Label "B" may be used; first, for *muscle cuts of meat*[22]; and second, for meat products that are derived from the commingling of any combination between Label A, B, and C livestock. Japan agrees with Canada, Mexico and the EU that US consumers are not able to identify which case the meat products labelled with Label B actually indicate without further information.

12. This concludes our statement today. We would be pleased to respond to any questions that the Panel may have.

[20] Even when Label B livestock (i.e. born in Country X, and raised and slaughtered in the United States) and Label C livestock (e.g. born and raised in Country Y, and immediately slaughtered in the United States) are commingled in a single production day, the meat product may also be labelled with Label B, that is for example "Product of US and Country X and Country Y".

[21] United States' answers to Panel's first set of questions, para. 118.

[22] When the source animals were born in a foreign country, and raised and slaughtered in the United States.

ANNEX C-18

**EXECUTIVE SUMMARY OF THE
THIRD PARTY WRITTEN SUBMISSION OF KOREA**

I. INTRODUCTION

1. This dispute arises from the United States' recent introduction of country-of-origin labelling requirements (the "COOL Measure") for certain covered commodities. The complainants assert that the COOL Measure violates various provisions of the TBT Agreement and the GATT 1994.

2. As Korea has systemic interests in the interpretation and application of various provisions of the TBT Agreement and the GATT 1994, it has reserved its third party rights pursuant to Article 10.2 of the DSU. Korea appreciates this opportunity to present its views to the Panel.

II. LEGAL ARGUMENTS

A. THE COOL MEASURE SEEMS TO BE A SPECIFIC RESPONSE TO US CONSUMERS' INCREASING DEMAND FOR ACCURATE COUNTRY OF ORIGIN INFORMATION FOR CERTAIN PRODUCTS

3. One of the controversial issues raised in this dispute is whether the COOL Measure is a consumer information provision measure or a disguised protectionist measure to drive out certain designated foreign products from the respondent's market. Korea notes that a large number of Members have respective country of origin labelling systems already in place. The wide permeation of the country of origin labelling system may indicate that there is nothing inherently wrong about a Member's effort to introduce a measure setting forth country of origin labelling requirements in response to specific demand from its own consumers for such information.

4. In addition, in this dispute the "likeness" analysis of a product alone may not necessarily provide an accurate barometer in determining whether a Member's decision to provide certain information to its own consumers is appropriate under the circumstances. While a "like product" analysis usually focuses on the product characteristics, a consumer information appropriateness inquiry would have to look into the demand and preference for certain specific information from a distinct group of consumers within a Member's jurisdiction, which may or may not be the same as the demand or preference from the group of consumers from another Member even though the products at issue may be considered "like" in that particular instance.

B. INCURRENCE OF "ADDITIONAL COSTS" ALONE MAY NOT BE SUFFICIENT TO CONSTITUTE MODIFICATION OF "CONDITIONS OF COMPETITION" UNDER ARTICLE 2.1 OF THE TBT AGREEMENT AND ARTICLE III:4 OF THE GATT 1994

5. The complainants' main argument in the competition-of-condition modification claim pretty much hinges on the alleged burden of additional "segregation costs" that they have been forced to bear as a result of the introduction of the COOL Measure. The complainants' first written submissions, however, do not seem to have provided sufficient evidence to prove that the US business entities' alleged reluctance to trade foreign product can be single-handedly attributed to the alleged "segregation costs" attendant to the COOL Measure. In the course of the future proceedings, the Panel would have to look into the record in this dispute carefully to determine (i) whether other factors than additional "segregation costs" contributed to the US business entities' decision to curtail

their transactions with the product from the complainants; and (ii) if so, whether additional "segregation costs" have played a predominant role among others in their decision making process.

6. Likewise, the complainants' claim that the COOL Measure has caused "drastic reduction of commercial opportunities" also warrants an in-depth inquiry from the Panel. As the complainants argue, the "segregation costs" span over various expenditures including costs accruing from differentiated inventory and stock controls, training of staff, and time to monitor each product is appropriately labelled. And as complainants seem to agree, these are in fact costs to ensure *accuracy* of the information to be contained in the label including information on country of origin. An argument can be made that costs to ensure *accuracy* of information may accompany any sort of governmental regulation and that such costs may not be unique characteristics of country of origin labelling in general or the COOL Measure in particular.

C. A MEMBER'S LEGISLATIVE HISTORY SHOULD BE CAREFULLY EXAMINED WITH A FULL PICTURE IN MIND

7. In order for a panel to accurately discern objectives of laws and regulations of a Member, the entire spectrum of the discussions on the record should be examined and contemplated. Only then could we confirm the existence of protectionist intent, if there is any. Reference to only certain chosen statements from industry officials or legislative members may not be able to convey the background and legislative intent accurately.

8. An important piece of evidence raised in this regard is the letter from the US Secretary of Agriculture to the US domestic industry officials. The exact nature of the US Secretary's letter can only be confirmed through a careful scrutiny into the entire situations involving the interactions between the US government and US industries at that particular point in time.

D. A MEMBER CLAIMING NULLIFICATION AND IMPAIRMENT UNDER ARTICLE XXIII:1(B) OF THE GATT 1994 IS REQUIRED TO SHOW MORE THAN MERE COMMERCIAL LOSS AS A RESULT OF INTRODUCTION OF A MEASURE

9. Korea submits that the nullification and impairment provision contained in Article XXIII:1(b) of the GATT 1994 is not intended to protect business entities of other WTO Members from all instances of commercial loss. Thus, in *EC – Asbestos* the Appellate Body stated that "the remedy in Article XXIII:1(b) should be approached *with caution* and should remain an *exceptional remedy*."[1]

10. As such, the Appellate Body precedents make clear that this is an exceptional remedy that can be considered only in exceptional situations in which a Member's legitimate expectation of benefit from a trade agreement has been seriously harmed because of a measure and the Member were not reasonably able to anticipate such a measure at the time of the conclusion of the agreement. This provision therefore should not be expanded to cover all the instances of unexpected business loss, foregone commercial opportunities or deteriorating business performance of entities of a Member in the domestic market of another Member.

11. The questions posed in this dispute, therefore, are whether the alleged harm is so severe that a drastic remedy under Article XXIII:1(b) of the GATT 1994 is warranted and whether complainants could not have reasonably anticipated the COOL Measures at the time the tariff concessions were negotiated during the Uruguay Round. These questions merit the Panel's careful examination of the factual record and consideration of the parties' arguments.

[1] Appellate Body Report, *EC – Asbestos*, at para. 186. (emphasis added).

ANNEX C-19

THIRD PARTY ORAL STATEMENT OF KOREA AT THE FIRST SUBSTANTIVE MEETING

1. Mr. Chairman and members of the Panel. The Republic of Korea ("Korea") appreciates this opportunity to present its views on the key issues included in Korea's third party submission.

A. THE COOL MEASURE SEEMS TO BE A SPECIFIC RESPONSE TO US CONSUMERS' DEMAND FOR ACCURATE COUNTRY OF ORIGIN INFORMATION FOR CERTAIN PRODUCTS

2. The core controversial issue raised in this dispute is whether the COOL Measure is an appropriate consumer information provision measure or a disguised protectionist measure to drive out certain designated foreign products from the respondent's market. Korea would like to offer two observations concerning this issue. Korea first notes that a large number of Members have respective country of origin labelling systems already in place. The wide permeation of the country of origin labelling system may indicate that there is nothing wrong about a Member's effort to introduce a measure setting forth country of origin labelling requirements in response to specific demand from its own consumers for such information. Korea further notes that in this dispute the "likeness" analysis of a product alone may not necessarily provide an accurate barometer to determine whether a Member's decision to provide certain information to its own consumers is appropriate under the circumstances.

B. INCURRENCE OF "ADDITIONAL COSTS" ALONE MAY NOT BE SUFFICIENT TO CONSTITUTE MODIFICATION OF "CONDITIONS OF COMPETITION" UNDER ARTICLE 2.1 OF TBT AGREEMENT AND ARTICLE III:4 OF GATT 1994

3. The complainants argue that the COOL Measure modifies "conditions of competition" in the market. The complainants' main argument in the competition-of-condition modification claim pretty much hinges on the alleged burden of additional "segregation costs" that they have been forced to bear as a result of the introduction of the COOL Measure. Korea notes discrepancy in parties' factual accounts in this regard. In Korea's view, in the course of the first substantive meeting, the Panel would have to look into the record in this dispute carefully to determine (i) whether other factors than additional "segregation costs" contributed to the US business entities' decision to curtail their transactions with the product from the complainants; and (ii) if so, whether additional "segregation costs" have played a predominant role among others in their decision making process.

4. Likewise, in our view much of the costs mentioned by the complainants seem to be in fact costs to ensure *accuracy* of the information to be contained in the label including information on country of origin. An argument can be made that costs to ensure *accuracy* of information may accompany any sort of governmental regulation and that such costs may not be unique characteristics of country of origin labelling in general or the COOL Measure in particular.

C. A MEMBER'S LEGISLATIVE HISTORY SHOULD BE CAREFULLY EXAMINED WITH A FULL PICTURE IN MIND

5. Next, Korea would like to draw the Panel's attention to the importance of considering the entire evidence on the record in exploring objectives of laws and regulations of a Member. Only then could the Panel confirm the existence of protectionist intent, if there is any. The Panel should be mindful that reference to only certain chosen statements from industry officials or legislative members may not be able to convey the background and legislative intent accurately. The controversial letter

from the US Secretary of Agriculture to the US domestic industry officials should also be put into proper perspective. Mere communication with the industry officials through an "open letter" and remarks on the possibility of exercising statutory authority may not necessarily turn the letter into a document issuing mandatory requirements.

D. A MEMBER CLAIMING NULLIFICATION AND IMPAIRMENT UNDER ARTICLE XXIII:1(B) OF THE GATT 1994 IS REQUIRED TO SHOW MORE THAN MERE COMMERCIAL LOSS AS A RESULT OF THE INTRODUCTION OF A MEASURE

6. As regards the nullification and impairment claim, Korea submits that the nullification and impairment provision contained in Article XXIII:1(b) of the GATT 1994 is not intended to protect business entities of WTO Members from *all* instances of commercial loss. We note that the Appellate Body precedents make clear that this is indeed an exceptional remedy that can be considered only in exceptional situations in which a Member's legitimate expectation of benefit from a trade agreement has been seriously harmed because of a measure and the Member were not reasonably able to anticipate such a measure at the time of the conclusion of the agreement. This provision therefore should not be expanded to cover all instances of unexpected business loss, foregone commercial opportunities or deteriorating business performance of entities of a Member in the domestic market of another Member.

7. Mr. Chairman and members of the Panel, Korea realizes that determination of these issues much depends on the development and clarification of factual issues to be made through the present substantive meeting of the Panel. Korea respectfully requests the Panel to discharge its obligation under Article 11 of the DSU by reviewing the facts on the record carefully and by applying appropriate jurisprudence.

8. Korea again thanks the Panel for the opportunity to present its views in this proceeding.

ANNEX C-20

**EXECUTIVE SUMMARY OF THE
THIRD PARTY WRITTEN SUBMISSION OF NEW ZEALAND**

I. INTRODUCTION

1. New Zealand's participation as a Third Party in this dispute reflects both its interest in the systemic legal issues arising from the country of origin labelling (COOL) measure, and its trade interest in the United States beef market. As an agricultural exporting nation, the proper implementation of the WTO Agreement on Technical Barriers to Trade (the TBT Agreement) is of fundamental importance to New Zealand.

II. THE TBT AGREEMENT

A. GENERAL

2. New Zealand recognizes the rights of WTO Members to take measures necessary to ensure, *inter alia*, the protection of human, plant, or animal health, the environment, or for the prevention of deceptive practices, at the levels they consider appropriate. However, any such measures are subject to the disciplines of the WTO Agreements. With respect to technical regulations and standards, and procedures for assessment of conformity with technical regulations and standards, New Zealand notes the particular importance the TBT Agreement places on ensuring that such measures do not create unnecessary obstacles to trade. The United States' COOL measure raises several questions regarding compliance with the provisions of the TBT Agreement.

B. WHETHER THE VILSACK LETTER IS A TECHNICAL REGULATION

3. Canada and Mexico claim that an open letter from the United States' Secretary of Agriculture, Thomas J. Vilsack, to industry representatives dated 20 February 2009 (the "Vilsack letter"), and a related press release, constitute a technical regulation within the meaning of Annex 1.1 of the TBT Agreement. The letter suggests that industry "voluntarily adopt" certain labelling practices in addition to those required in regulations. To determine that the Vilsack letter constitutes a technical regulation within the meaning of Annex 1.1, the Panel will have to find that compliance with the letter is mandatory. This raises the question whether compliance is required to be mandatory on the face of the document, or whether it can also be deemed *de facto* mandatory due to surrounding circumstances.

4. New Zealand takes the view that Annex 1.1 does not exclude the possibility of a measure being deemed a technical regulation even though compliance with it is not mandatory on its face. It is important to recognize this possibility in order to prevent WTO Members from circumventing their obligations under the TBT Agreement by designing measures that appear on their face to be voluntary, but are in fact mandatory.

5. New Zealand recognizes, however, that the Panel should not make such a finding lightly. To do so would risk rendering null and void the intended distinction between mandatory technical regulations and voluntary standards provided for in the TBT Agreement. To find a technical regulation *de facto* mandatory, there must be some factor present in the nature of the document and its surrounding context that is sufficient to transform the measure from one that is intended to be adhered to on a voluntary basis to one that is truly compulsory. New Zealand submits that a measure should only be deemed *de facto* mandatory where industry or other market participants have no real choice as

to whether or not to comply. The Panel must be satisfied that the practices are in effect compulsory and that this is due to the exertion of Government power.

C. ARTICLE 2.1: LESS FAVOURABLE TREATMENT OF LIKE PRODUCTS

6. Article 2.1 of the TBT Agreement obliges WTO Members to accord imported products "treatment no less favourable than that accorded to like products of national origin." In accordance with jurisprudence on Article III:4 of GATT, New Zealand submits that *de facto* as well as *de jure* discrimination falls within the scope of the "less favourable treatment" obligation.[1] As the Appellate Body has stated, the focus should be on whether a measure "modifies the conditions of competition in the relevant market to the detriment of imported products."[2] New Zealand submits that even though the COOL measure is "facially neutral",[3] the measure could still result in less favourable treatment.

7. At issue in the dispute is whether any detriment to imported products is the result of the COOL measure, or whether it is due to market-driven private actions . This issue is raised particularly in the context of the additional costs of segregating animals of different origin throughout the supply chain. New Zealand accepts that there is no violation of Article 2.1 where market-driven practices of private entities result in detriment to imports. However, New Zealand submits that even if a measure does not expressly require private actors to act in a certain way, government actions may have created a situation that compels private actors to act in that way because of the "necessity of making a choice". [4] In New Zealand's view, such compulsion could be found to violate the less favourable treatment obligation, if it results in domestic like products being given a competitive advantage in the market over imported like products. This will be a matter for the Panel to determine on the facts of the dispute.

D. ARTICLE 2.2: IS THE COOL MEASURE MORE TRADE RESTRICTIVE THAN NECESSARY?

8. Article 2.2 and the Preamble of the TBT Agreement affirm the rights of WTO Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them. However, it also places limits on the means employed to achieve those objectives: they must be consistent with a Member's obligations under the Agreement.

9. New Zealand submits that there are three steps in assessing compliance with Article 2.2: (i) there must be a legitimate objective; (ii) if the purported objective is found to be legitimate, the measure must also fulfil this objective; and (iii) the Panel should consider whether the technical regulation is more trade restrictive than necessary to fulfil the objective, taking into account the risks non fulfilment would create.

1. Is there a legitimate objective?

10. The United States claims that the legitimate objective of the COOL measure is to provide consumer information.

11. Article 2.2 provides an illustrative list of legitimate objectives. As the list in Article 2.2 is non-exhaustive, New Zealand recognizes that a Member may demonstrate that other legitimate objectives also justify technical regulations. However, New Zealand notes that in the context of a

[1] Appellate Body Report, *Canada – Autos*, para. 57.
[2] Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.
[3] United States' first written submission, para. 144.
[4] Canada's first written submission, para. 90, citing the GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.11.

WTO dispute, a panel has a role to play in determining whether a given objective is legitimate, in light of the context and circumstances of the case. New Zealand submits that, where a purported objective is not listed in Article 2.2, a WTO Member must provide particularly clear and compelling evidence of its legitimacy.

12. New Zealand takes no position as to whether there is a legitimate objective at play in this dispute. However, in light of the United States' argument that the COOL measure is also required "so as to reduce consumer confusion", New Zealand comments on the distinction between the concepts of consumer information and deceptive practices.

13. New Zealand submits that an important distinction should be drawn between the objective of consumer information and that of preventing deceptive practices. While consumer information can be a tool through which a Member seeks to counter or prevent deceptive practices, the prevention of deceptive practices is a narrower concept. This interpretation is supported by the context of Article 2.2. The other legitimate objectives that are provided as examples in Article 2.2 are potentially of a particularly important or high-risk nature. The nature of these objectives should therefore colour the interpretation of the objective of preventing deceptive practices, which is included alongside them.

2. Does the technical regulation fulfil the legitimate objective?

14. In the event that the Panel considers that consumer information does constitute a legitimate objective on the facts of this dispute, the next element to consider is whether the COOL measure fulfils this objective. The respondent must demonstrate why the COOL measure is necessary for consumer information purposes, and explain how it will influence consumer purchasing decisions. The design and structure of a measure will be essential in determining whether the objective is fulfilled. For example, the Panel may find it helpful to consider whether there are any arbitrary gaps in coverage of the COOL measure and also whether information conveyed to consumers is accurate and useful.

3. Whether the technical regulation is more trade restrictive than necessary to fulfil the objective, taking into account the risks non fulfilment would create

15. The final determination in assessing whether a measure is consistent with Article 2.2 is whether the technical regulation is more trade restrictive than necessary to fulfil the legitimate objective, taking into account the risks non-fulfilment would create.

16. In considering whether a measure is necessary, New Zealand refers to the Appellate Body's guidance in *Brazil – Tyres*[5] on the necessity test under Article XX(b) of the GATT. New Zealand submits that, as identified in *Brazil – Tyres,* the Panel should consider the importance of the interests or values at stake.[6] Such a consideration is pertinent to the Article 2.2 requirement that a Member must bear in mind "the risks non-fulfilment would create". In New Zealand's view, where the importance of the interest or value is higher, the risks from non-fulfilment must weigh more heavily in the consideration. As discussed above, New Zealand considers that, in identifying specific legitimate objectives in Article 2.2, the TBT Agreement recognizes the particular importance of the interests or values behind these objectives. The risks of non-fulfilment would therefore justify more restrictive measures being taken when those objectives are at stake.

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[5] Appellate Body Report, *Brazil –Retreaded Tyres*.
[6] *Ibid.,* at para. 178.

17. Finally, in determining whether a measure is necessary, the Panel must consider whether less trade restrictive options exist. In the context of mandatory COOL, particular attention should be paid to the alternative of a voluntary scheme. This is particularly so where there is no health or safety justification behind the regulation. Voluntary COOL has the ability to provide the same information to the consumer, where there is the consumer demand for such information.

E. THE EXISTENCE OF A RELEVANT INTERNATIONAL STANDARD UNDER ARTICLE 2.4

18. The TBT Agreement does not define the term "international standard". However, New Zealand considers that, to constitute an international standard under Article 2.4, a standard must be a document approved by a recognized body, such body being an international standardizing body within the definition provided by the ISO/IEC Guide 2:1991, and whose membership is open to the relevant bodies of at least all WTO Members. [7]

19. New Zealand submits that the Codex Alimentarius Commission is a "recognized body" for the purposes of Annex 1.2 of the TBT Agreement and that CODEX-STAN 1-1985 is an international standard within the context of Article 2.4. The Codex Alimentarius Commission meets the principles of transparency, openness, impartiality, effectiveness and relevance and coherence set out by the TBT Committee in relation to international standardising bodies.

III. THE GATT 1994

A. ARTICLE III:4: LESS FAVOURABLE TREATMENT

20. New Zealand refers to its arguments in respect of Article 2.1 of the TBT Agreement and notes that the same considerations will apply with respect to GATT Article III.4.

B. ARTICLE X: UNIFORM, IMPARTIAL AND REASONABLE ADMINISTRATION OF REGULATIONS

21. GATT Article X:3(a) provides that Members must "administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings". In assessing Canada and Mexico's claims in respect of Article X:3(a), the Panel must distinguish between the measure itself and its *administration*. The Appellate Body has emphasized that Article X:3 applies solely to the *administration* of laws, regulations, decisions and rulings.[8]

22. Article X.3 is important as it recognizes that matters of governance, including uniform and reasonable administration of laws and regulations, can have just as significant a trade restrictive effect as border measures and domestic regulations. A claim under this provision ought therefore to be taken seriously. However, New Zealand recognizes that a certain amount of caution in the interpretation of the scope of this provision is desirable, given the potentially intrusive nature of a determination that a Member has violated Article X.3(a). Allegations that the conduct of a WTO Member is unreasonable are serious, and should not be taken lightly.[9] Therefore in reaching a decision on the facts, the Panel ought to seek a balance between the promotion of good governance and trade liberalisation, while recognizing that countries do have very different systems of administration of laws and not every difference or difficulty faced by traders ought to result in a finding of violation of Article X.3(a).

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[7] *Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the TBT Agreement,* G/TBT/9, 13 November 2000, para. 20 and Annex 4.

[8] Appellate Body Report, *EC – Bananas III*, para. 200.

[9] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 217.

ANNEX C-21

THIRD PARTY ORAL STATEMENT OF NEW ZEALAND AT THE FIRST SUBSTANTIVE MEETING

1. Mr Chairman, Members of the Panel, New Zealand's views on the issues raised in this dispute are set out in our third party submission of 18 August. In light of the time available today, I will focus on only a few key issues. As with our written submission, New Zealand is not seeking to address the specific facts of the case, but rather seeks to provide the panel with its views on the legal interpretation of various relevant aspects of the TBT Agreement and the GATT.

2. New Zealand joined this dispute because of its systemic interests, and desire to ensure that the delicate balance of rights and obligations set out in the WTO Agreements, especially the TBT Agreement, is maintained. New Zealand also has a trade interest in the dispute, given its pattern of beef exports into the US market.

3. **First**, turning to the threshold issue of whether the letter from the Secretary of Agriculture, Thomas Vilsack, constitutes a technical regulation under the TBT Agreement. A key question in this regard is whether compliance with the letter is 'mandatory', within the meaning of Annex 1.1 of the TBT Agreement. In essence, the question is whether on the face of the document compliance is required, or whether compliance can be deemed to be mandatory given the surrounding circumstances.

4. New Zealand's view is that Annex 1.1 does not exclude the possibility of a measure being deemed a technical regulation even though compliance with it is not mandatory on its face. It is important to recognize this possibility in order to prevent WTO Members from circumventing their TBT obligations by designing measures that appear on their face to be voluntary, but that are in fact mandatory. In other words, it is New Zealand's view that the Panel should allow for the possibility of a measure being *de facto* mandatory.

5. New Zealand recognizes, however, that such a finding should not be made lightly. To do so would risk rendering null and void the TBT Agreement's intended distinction between mandatory technical regulations and voluntary standards. The Agreement contains different sets of obligations in respect of mandatory regulations and voluntary standards. New Zealand submits that a measure should only be deemed *de facto* mandatory where industry or other market participants have no real choice as to whether or not to comply. The Panel must be satisfied that the practices are in effect compulsory and that this is in some way a result of the exercise of Government power.

6. **Second**, New Zealand submits that similar considerations should be taken into account under Article 2.1 of the TBT Agreement and Article III.4 of the GATT, when determining whether a measure modifies the conditions of competition to the detriment of imported products. New Zealand submits that even if a measure, on its face, does not require private actors to act in a certain way, government actions may create a situation where private actors are compelled to act in that way because of a "necessity of making a choice." In New Zealand's view, such compulsion could be found to violate the no less favourable treatment obligation in the TBT Agreement and GATT. This would be the case if it results in domestic like products being given a competitive advantage in the market over imported like products.

7. **Third**, New Zealand would also like to comment on Article 2.2 of the TBT Agreement. The Preamble and Article 2.2 of the TBT Agreement make clear the right of WTO Members to take measures to advance domestic policy, including to pursue national security purposes, to prevent

deceptive practices, and to protect human health or safety, animal plant life or health or the environment. However, in adopting measures to achieve these ends, WTO Members must comply with the disciplines of the TBT Agreement. These are designed to ensure that TBT measures are legitimate and are not more trade restrictive than necessary.

8. As you are aware, in this dispute the United States has put forward consumer information as its legitimate objective. This is not a legitimate objective listed in Article 2.2 of the TBT Agreement. New Zealand recognizes that a WTO Member may demonstrate that other legitimate objectives do exist, beyond those listed in Article 2.2. However, New Zealand submits that where an objective is not listed in Article 2.2, a WTO Member must provide particularly clear and compelling evidence of its legitimacy.

9. In the event the Panel accepts that consumer information does amount to a legitimate objective on the facts of the dispute, the Panel should next consider whether the technical regulation fulfils this legitimate objective. In asking whether this is the case on the facts in this dispute, New Zealand submits that the Panel should consider the consistency of coverage of the goods subject to the COOL requirement, as well as the accuracy, clarity and usefulness of the information obtained by consumers.

10. The final step in the assessment of whether there has been a violation of Article 2.2 is whether the measure is more trade restrictive than necessary, taking into account the risks non-fulfilment would create. As part of determining whether a measure is necessary, the Panel must consider whether less trade restrictive alternatives exist. New Zealand would like to emphasise the relevance of voluntary country of origin labelling as an alternative to a mandatory regime, particularly where a consumer information objective is concerned. Voluntary COOL has the ability to provide the same information to the consumer, where there is the consumer demand for such information. It is responsive to market demand as opposed to creating or distorting the market. Voluntary COOL therefore allows the design and operation of the labelling system to be developed in response to supply and demand needs. As such, it is a relevant alternative to mandatory COOL, particularly where there is no compelling evidence of market failure.

11. **Finally**, New Zealand would like to provide a general comment on Article X.3 of GATT. Article X.3 importantly recognizes that matters of governance, including the uniform and reasonable administration of laws and regulations, can have just as significant a trade restrictive effect as border measures and domestic regulations. Traditionally, trade barriers were imposed at the border in the form of tariffs or quotas. As these barriers were brought down, behinC-the-border barriers in the form of technical regulations and the like gained prominence. It was recognized by the negotiators of the GATT in the 1940s that administration could also form a trade barrier. However, for a long time, not a lot of attention was paid to Article X. Since 1994 it has become an increasing area of focus for WTO Members, and New Zealand wishes to emphasize the importance of the discipline and development of jurisprudence with respect to it.

12. New Zealand does however recognize the potentially intrusive nature of a determination that a Member has violated Article X.3(a). Allegations that the conduct of a WTO Member is unreasonable are serious, and should not be taken lightly. New Zealand therefore submits that, in reaching a decision on the facts, it is necessary to seek a balance between the promotion of good governance and trade liberalisation, while recognizing that countries have different administrative systems and not every difference or difficulty faced by traders should result in a finding of a violation of Article X.3(a).

13. With respect to the Panel's question regarding any mandatory country of origin labelling requirements in place in third parties, we have passed the request back to capital and would be pleased to provide a response in writing in due course.

14. Mr Chairman, members of the Panel, New Zealand respectfully thanks you for your attention.

ANNEX C-22

THIRD PARTY ORAL STATEMENT OF NEW ZEALAND AT THE SECOND SUBSTANTIVE MEETING

1. Mr Chairman, Members of the Panel. New Zealand appreciates the opportunity to be present at this second hearing and to be able to make a brief oral statement in accordance with the enhanced rights third parties have been granted in this dispute. Access to this open hearing, and the opportunity to receive the Parties' second written submissions improves the ability of third parties to be able to follow and meaningfully participate in the dispute.

2. Having read Canada, Mexico and the United States' second written submissions, New Zealand wishes to focus its comments today on the interpretation of Article 2.2 of the TBT Agreement. More specifically, we wish to comment on the relevance of Article 5.6 of the SPS Agreement and Article XX of GATT in determining whether, under Article 2.2, a measure is more trade restrictive than necessary, taking account of the risks non-fulfilment would create.

I. GATT ARTICLE XX (B) AND (D)

3. In its written submission and replies to questions from the Panel following the first hearing, New Zealand expressed its view that the jurisprudence concerning the necessity requirement under GATT Articles XX(b) and (d) *is* relevant to the determination under Article 2.2 of the TBT Agreement. Recent jurisprudence around the Article XX necessity test is particularly pertinent in light of the Article 2.2 requirement to take account of the "risks of non-fulfilment". New Zealand considers that Article 2.2 requires balancing factors such as the interests and values at stake (that is, the importance of the objective and, as a corollary, the risks that non-fulfilment would create), the contribution of the measure to the achievement of the objective and the degree of trade-restrictiveness of the measure. This is similar to the 3-way weighing and balancing exercise that panels and the Appellate Body have undertaken when determining if a measure is "necessary" under GATT Article XX(b).

II. SPS ARTICLE 5.6

4. In its written statement and replies to the Panel's questions, New Zealand also explained that many, but not all, elements of Article 5.6 of the SPS Agreement and its jurisprudence are relevant to interpreting Article 2.2 of the TBT Agreement. Because of the important differences in language in the two provisions, interpreters of the agreements should be careful not to read in specific phrases and/or additional requirements that are not present in Article 2.2, but which are explicit in Article 5.6

5. In addition to the points made in its written submission and replies to questions, New Zealand would like to comment on another important difference between Articles 2.2 and 5.6. This is that unlike Article 5.6, Article 2.2 does not refer to the concept of "appropriate level of protection". Instead, Article 2.2 refers to fulfilment of a legitimate objective. This difference is important because the SPS Agreement makes clear that Members have the right to set their own "appropriate level of protection", although measures must still take into account scientific evidence and other prescribed factors. However, a similar level of Member discretion is not present in Article 2.2 of the TBT Agreement, where a panel has a clear role in determining both whether the stated objective is legitimate and whether the measure fulfils such objective. Neither the concept of "appropriate level of protection" nor the important additional SPS Agreement requirements around science are included elsewhere in the text to ensure that a Member's discretion to determine what is "appropriate" is not used as a disguised restriction on trade.

6. New Zealand recognizes that the Preamble to the TBT Agreement refers to Members taking measures "at the levels [they] consider appropriate". However this discretion relates to measures taken in the pursuit of a specific list of objectives. Furthermore, the content of a preamble to a treaty does not comprise an independent obligation in and of itself. Instead, under Article 31(2) of the Vienna Convention on the Law of Treaties, it provides relevant context particularly when determining the object and purpose of the rest of the text. New Zealand therefore considers that a panel should be careful when looking to add to rights and obligations in the main text of the TBT Agreement based on language found only in the preamble.

7. In sum, there are clear similarities between the tests in Article 2.2 of the TBT Agreement, Article 5.6 of the SPS Agreement and Article XX of the GATT. There are also key differences. It is appropriate for a panel to look to the requirements and jurisprudence under all three articles, but panels must be conscious, and cautious, of the differences.

8. Mr Chairman, Members of the Panel, New Zealand respectfully thanks you for your attention.

ANNEX C-23

THIRD PARTY ORAL STATEMENT OF PERU AT THE FIRST SUBSTANTIVE MEETING[1]

1. Mr. Chairman, distinguished Members of the Panel, representatives of the parties and third parties, Peru welcomes this opportunity granted by the Panel to present its views on the dispute between Canada and Mexico, on the one hand, and the United States (US), on the other, with respect to certain Country of Origin Labelling (COOL) requirements.[2]

2. Peru's participation as a third party to this dispute is based on a systemic interest related to the proper interpretation and application of the provisions of the agreements of the World Trade Organization (WTO), particularly the Agreement on Technical Barriers to Trade (TBT), considering the importance of the legal debate raised by Canada and Mexico.

3. In our view, the claims submitted by Canada and Mexico are very similar as both Members claim that the mandatory provisions of the COOL measure are contrary to Articles 2.1, 2.2 of the TBT Agreement, Article III: 4, X and XXIII of the General Agreement on Tariffs and Trade (GATT 1994). In addition, Mexico makes a reference to Articles 2.4 and 12.1 and 12.3 of the TBT Agreement.

4. Firstly, we would like to refer to the main argument outlined by the US which seeks to justify the alleged compatibility of its measures with the articles mentioned in the preceding paragraph. The US bases such measures on the right to information for consumers and, therefore, totally rejects that COOL is a protectionist measure.

5. In this regard, Peru considers that providing better information to consumers is beneficial as it provides them with the necessary tools to make informed decisions about the products they are going to buy. However, Peru would like to draw attention to its concerns about the implementation of compulsory labelling schemes in different countries which, as has been raised by Canada and Mexico, might not be used properly and could become trade-restrictive measures.

6. Secondly, Peru would like to refer to the suppositions of Article 2.2 of the TBT Agreement, which establishes the analysis to be followed to determine whether a technical regulation is contrary to the TBT Agreement: First, the panel must verify whether the objective pursued by the technical regulation is legitimate. Secondly, if it is determined that it is a legitimate objective, it will have to be determined whether the technical regulation restricts trade more than necessary to achieve that legitimate objective, taking into account the risks non-fulfilment would create.

7. In this regard, we believe that the panel has the special task to determine if the basis outlined by the US, providing information to consumers, is a legitimate objective within the scope of Article 2.2 of the TBT Agreement, and particularly if it does not restrict trade more than necessary to achieve the legitimate objective pursued, taking into account the arguments provided by Canada and Mexico.

8. Furthermore, Mexico argues that the measure is inconsistent with Article 2.4 of the TBT Agreement, because an international standard (CODEX-STAN 1-1985) already exists on which

[1] This oral statement was originally made in Spanish.
[2] The measures that are included on the mandatory provisions of the COOL measure are established in Mexico's first written submission in para. 9, and in para. 1, footnote 1, in Canada's submission.

the US should base its measure. However, the US argues that it would be inappropriate to apply this standard as it would not allow the legitimate objectives pursued to be fulfilled given that it would not provide consumers with information on the origin of meat, and it is in this way that the US justifies the non-application of the international measure.

9. Peru understands that when there are relevant international standards such as CODEX STAN 1-1985, Standard for the Labelling of Pre-packaged foods, Members shall use such standards or relevant parts as a basis for technical regulations, unless such international standards are not effective or appropriate for achieving the desired objectives. In other words, international standards should always be used in the formulation of technical regulations. The reference to "the basis" of Article 2.4 allows each Member to adapt this international standard to their reality or their particular circumstances, but not to alter the objectives and substance of the international standard in question.

10. It should be noted that Article 2.4 provides for an exception, when it says: "... except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued ...." In that sense, if despite the existence of an international standard, the Member considers that it is not an effective or appropriate means for achieving the desired objectives, the Member must explain why the international standard does not permit the desired objectives to be achieved. The question that therefore arises is whether the CODEX STAN 1-1985, is an effective and appropriate means for achieving the objectives pursued by the US.

11. In this regard, our interest is that the panel should address this issue in depth so as to interpret the scope of this provision, especially with regard to the term "ineffective or inappropriate standard" to try to identify the type of elements that would permit non-implementation by a Member of this international standard and not justify non-application of the standard simply by stating that it is ineffective or inappropriate for the achievement of the legitimate objective.

12. Finally, along these lines, and considering the systemic interest expressed by several Member Countries in this dispute, we would like to submit that a very important element is the means of implementing the recommendation of the panel that we understand must obviously begin from the assumption of the existence of a violation of multilateral commitments and therefore the formula must be fully compatible with them. That is, if the arguments outlined by Canada and Mexico on the incompatibility of the measure with the TBT Agreement are accepted, the panel report must be implemented through a measure which is compatible with the Multilateral Agreements.

13. These are the elements that Peru would like to contribute to this debate, as well as underlining the importance of this controversy due to its content, its scope and its implications for market access.

14. Finally, and regarding the panel's question on mandatory country of origin labelling schemes, Peru has identified among its Technical Regulations, a mandatory scheme of labelling of country of origin. This is the Supreme Decree 019-2005-PRODUCE, Technical Regulations on tires for cars, light trucks, buses and trucks, notified to the WTO through document G/TBT/N/PER/7 (dated 5 July 2004), which establishes mandatory technical features and labelling for new tires for general use on cars, light trucks, buses and trucks, whether domestic or imported, in order that their use does not endanger life and personal safety.

15. To ensure compliance, domestic manufacturers or importers must submit a Certificate of Conformity, the requirements and tests established in the regulations, including the requirement for country of origin labelling. To fulfil this requirement, the country of origin must be stamped or engraved in the tires, at least on one side, in a clear, visible and permanent manner, in Spanish or

English. Under this regulation, country of origin is understood to refer to the country of manufacture of the tire and not the country of shipment.

16. This technical regulation was formulated in the framework of international standards on the subject, among which we can mention the FMVSS[3] 109 (49CFR571.109), the FMVSS 119 (49CFR571.119) and FMVSS 139 (49CFR571.139).

[3] Federal Motor Vehicle Safety Standards.

ANNEX D

ORAL STATEMENTS OF THE PARTIES AT THE FIRST AND SECOND SUBSTANTIVE MEETINGS

ANNEX D-1

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF CANADA AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. The COOL measure requires different labels to be placed on meat from cattle and hogs slaughtered in the United States depending on where those animals were born and raised. The COOL measure was not designed or implemented to provide consumers with accurate information to further a legitimate objective. The objective of the COOL measure was to distort the conditions of competition in the US market to favour US cattle and hogs compared to imported livestock.

II. THE COOL MEASURE CHALLENGED BY CANADA

2. The US measure challenged by Canada consists of multiple legal instruments and governmental actions:

- The Final Rule, which came into force on March 16, 2009.
- The Interim Final Rule, which was an integral part of the measure when it became operative on September 30, 2008. Well before the Final Rule took effect the Interim Final Rule caused slaughter houses and feeding operations to take critically important decisions to restructure their operations in order to comply with the COOL measure.
- The action by Collin Peterson, Chairman of the Committee on Agriculture of the US House of Representatives, in instructing representatives of the US industry not to use Label "B" for the majority of their products.
- Clarification documents of the US Department of Agriculture that took away the flexibility to use Label "B" for meat from livestock born, raised, and slaughtered in the United States.
- The Vilsack Letter, which introduced additional uncertainty for industry regarding the proper application of the measure.

3. Regardless of whether the COOL measure is characterized as one overall measure made up of several legal instruments and governmental actions, or as several related measures that work together to achieve the same policy objective, the legal analysis is the same.

III. THE COOL MEASURE HAS ADVERSELY MODIFIED THE CONDITIONS OF COMPETITION FOR CANADIAN CATTLE AND HOGS, IN VIOLATION OF TBT ARTICLE 2.1 AND GATT ARTICLE III:4.

4. The United States has agreed that in the context of GATT Article III:4, a measure provides less favourable treatment if it "modif[ies] the conditions of competition in the relevant market to the detriment of the imported product". It has also agreed that the meaning of less favourable treatment in the GATT context is relevant to interpreting the obligation in TBT Article 2.1. That this modification has actually happened is established by two types of evidence: (1) witness statements and other evidence showing that the US market responded to the COOL measure by favouring US-born and -

raised livestock over imported livestock; and (2) Dr. Sumner's econometric analysis, which quantifies the amount of the adverse effects.

1. The COOL measure effectively requires segregation of imported livestock

5. The COOL measure requires US participants throughout the supply chain - from the importer through to the retailer that sells the meat - to track the country of birth, raising, and slaughter of cattle and hogs and meat produced from those cattle and hogs. In practice this requires segregation.

6. The United States wrongly suggests that the discriminatory costs of segregation can be avoided. The first option presented by the United States is to only buy livestock born in a single country. That would establish separate but nominally equal distribution chains that in practice favour domestic product. Such a discriminatory system was found WTO-inconsistent in Korea – Various Measures on Beef. The second option would be to commingle on the same day, but that still imposes additional segregation costs on operations that use both US-born livestock and livestock born abroad. Either option changes the conditions of competition to the advantage of US-born livestock.

7. Canada presents three slides to illustrate how the COOL measure effectively requires segregation and the differential impact that has had on Canadian cattle and hog imports to the United States.

8. Basic economic logic based on the facts leads to the result that firms that use imported livestock or meat derived therefrom can only recover their added costs by paying less for the imported livestock. The lower US demand for imported cattle and hogs is reflected in lower import quantities or in lower prices relative to the use of comparable domestic livestock.

9. Canada has submitted unchallenged specific evidence, in the form of witness statements and letters, on the loss of competitive position caused by the COOL measure. That evidence establishes that the COOL measure has modified the conditions of competition in the US market to the detriment of imported Canadian livestock.

10. The US argued that because of Canada's low market share, the "conditions of competition" have not really been altered, relying on the Appellate Body report in Dominican Republic – Import and Sale of Cigarettes. The present case is not analogous because there is no dispute here over a single origin-neutral measure imposed equally on companies, some of which happen to be foreign and have a lower market share. The present case is more analogous to the case of Korea – Various Measures on Beef, in which the measure at issue required separate channels of distribution for imported and domestic beef that in practice resulted in the limited use of imported beef.

11. The US also argues that the COOL measure does not "require" segregation. However, as the United States concedes, the COOL measure requires processors to track information about where livestock is born and raised, which in practice is done through segregation.

12. It is not necessary for the Panel to decide at this stage the precise degree of impairment that Canada has suffered. However, the economic analysis prepared by Dr. Sumner supports and quantifies the degree of loss of competitive position.

2. Canada's econometric analysis

13. US criticisms of Dr. Sumner's analysis are not well founded. Dr. Sumner's econometric analysis explores whether the conditions of competition for Canadian exports of cattle and hogs have

been differentially affected as a result of the COOL measure. Therefore much of the US criticism, which is focussed on issues such as the general economic situation at the time and the ratio of imports, misses the point.

14. The United States does not dispute that segregation has potentially large negative differential effects on the demand for imported livestock relative to comparable domestic livestock. The unchallenged specific evidence presented by Canada shows that the costs of segregation caused most major slaughter houses to limit or terminate the use of Canadian cattle and hogs. Dr Sumner's simulation analysis shows that even low segregation costs cause substantial effects.

15. Unlike the US analysis, Canada's data analysis properly avoids the BSE period and the associated structural disruptions; it includes a BSE variable only to account for any potential cross-effects related to import restrictions on older cattle from July 16, 2005 to November 19, 2007. The model tests the importance of this variable and finds no significant effect.

16. Canadian cattle exported to the United States typically travel farther than their US competitors, and did so before the COOL measure. But the US analysis that suggests that including this factor reduces the harm caused by the COOL measure is incorrect. This is because the United States used the wrong index in its analysis (one that is focussed on what consumers pay for items such as new cars, parking fees and tolls, airline fares, and tickets for public transit). Dr. Sumner used the relevant right data (the producer price index for trucking) in his revised analysis and found that the harm caused by the COOL measure is actually higher when transportation is included.

IV. THE COOL MEASURE VIOLATES TBT ARTICLE 2.2.

17. The United States argues that "the objective" of the COOL measure is to "provide consumer information". Any determination of whether providing consumer information is a legitimate objective must consider the nature of the information that is provided under the measure.

18. The United States has not seriously disputed that certain US cattle and hog producers and political leaders advocating on their behalf were the driving force behind the COOL measure. Most of the US evidence of consumer support for country-of-origin labelling is focussed on support for elements of the COOL regime that are not at issue in this dispute, such as the protection of animal and human health. The United States has presented very limited evidence of consumer desire for information related specifically to the origin of meat derived from imported livestock. Furthermore the "consumer interest" expressed in that limited evidence does not support a legitimate objective. Specifically, the "consumer interest" evidence is from certain hog and cattle producers or their representatives, whose advocacy on behalf of consumers is highly suspect; it is focussed on labelling for health and safety reasons, which is an objective disavowed by the United States; it relates to the protectionist objective to "support US farmers", which cannot be a legitimate; or it relates to information the COOL measure does not provide, such as a desire to "support the family farm" or to buy meat that is produced close to home.

19. The United States has provided virtually no evidence of consumers being concerned about deception. As to possible confusion on the part of consumers about the USDA grading of meat and country of origin, this could have been addressed by clarifying that USDA grading does not indicate country of origin.

20. Even if the objective of the COOL measure was to provide consumer information for a legitimate purpose, it does not fulfil this purported objective. Canada provides a further slide illustrating the COOL regime as it applies to products other than meat derived from imported

livestock slaughtered in the United States, to demonstrate that the regime hardly serves the purpose of providing information to consumers. The information provided to consumers through this process, even if it were to further a legitimate objective (which Canada disputes) is confusing at best and deceptive at worst.

21. Even if the COOL measure furthers a legitimate objective, it does not do so in the least trade-restrictive way. Canada has suggested two less trade-restrictive alternatives: voluntary labelling and substantial transformation.

22. The United States stated that voluntary labelling was attempted but failed. However, the evidence demonstrates, in fact, that where there is a true consumer demand for it, voluntary labelling does succeed, for example in programs such as organic labelling, certified Angus, and Australian and New Zealand lamb.

23. On substantial transformation, the United States essentially argues that it would not provide consumers with information about where the various processing steps take place. However, the United States has not explained why substantial transformation is an appropriate basis for labelling meat slaughtered outside of the United States (such as on meat from a US-born and-raised animal slaughtered in Canada, classified as Label "D" under the COOL measure), but is not an appropriate basis for labelling meat slaughtered in the United States.

V. CONCLUSION

24. On the basis of the evidence showing that the COOL measure has changed the conditions of competition of Canadian livestock in the US market, the COOL measure violates TBT Article 2.1 and GATT Article III:4. The United States' criticism of Canada's supporting economic analysis is flawed in many fundamental ways. The COOL measure also violates TBT Article 2.2 because it does not achieve a legitimate objective and even if it did, it does not do so in a least trade-restrictive way. In the interest of time, Canada has not specifically addressed Articles X:3(a) and XXIII:1(b) of GATT in this Statement but will be pleased to do so in answer to questions.

ANNEX D-2

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF MEXICO AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. This case is about a US measure "the COOL measure" that discourages the use of Mexican cattle in the production of beef products in the United States. The COOL measure has adversely modified the competitive conditions to the disadvantage of Mexican producers and has distorted the market with the sole purpose of protecting the US cattle industry, and thereby disrupted what was previously a mutually beneficial trade relationship.

II. OVERVIEW OF MEXICAN CATTLE EXPORTS TO THE US

2. The productions of cattle in Mexico and beefs in the US have been closely integrated for many decades. The Mexican cow-calf industry produces high quality, genetically desirable cattle for the US market. They have the same genetic features as calves from the United States, and are pastured on grass or winter wheat, similar to US calves. The US and Mexican cattle are clearly like products.

3. The United States has conceded that the COOL measure is not an SPS measure, or any other type of safety measure. Mexico wishes to highlight that separately the United States subjects the Mexican cattle to stringent SPS requirements. Mexico fully complies with those stringent measures.

4. In the case of Mexico, the overwhelming majority of cattle exported are young animals, usually no more than seven or eight months old, and weighing in the range of 300 to 400 pounds. At the time of slaughter, this is, when they reach 1100 to 1200 pounds, approximately 70% of the weight and value of the animal has been added within the US territory.

III. THE MEASURE

5. This dispute concerns a mandatory country of origin labelling requirement that is applied in a manner and in circumstances such that it unjustifiably discriminates against and restricts imports of Mexican cattle into the United States. The COOL measure comprises statutory provisions, regulations and other administrative actions by the US government. All of the components identified by Mexico in its First Written Submission are legal elements of the COOL measure.

6. The COOL measure is an internal measure applied to US processed beef that has an adverse effect on imported inputs for that product – that is, cattle. US producers of beef products have segregated cattle of different origins entirely in order to comply with the measure, and have passed along the resulting costs to the Mexican cattle industry.

7. The COOL measure has disrupted the integrated Mexico-US market and has modified the conditions of competition to the disadvantage of Mexican cattle compared to like US cattle. It has also reduced the export opportunities available to, increased the handling cost of, and reduced the price of Mexican cattle. The adverse effects of the COOL measure on the Mexican cattle industry have been substantial. Specifically:

- US processors have restricted the number of plants that will process Mexican cattle;

- US processors have restricted the days on which plants will accept Mexican cattle;
- US processors have imposed special notice requirements;
- US processors have lowered the price of Mexican cattle expressly because of the costs of complying with the COOL measure; and
- Some US backgrounders and feedlot operators have stopped purchasing Mexican cattle entirely.

8. Mexico has presented evidence of each of these effects.

IV. IN THE CIRCUMSTANCES OF THIS DISPUTE, THE US COOL MEASURE IS INCONSISTENT WITH THE WTO

9. Mexico is not challenging mandatory country of origin labelling in general. Whether a particular mandatory country of origin labelling is WTO-consistent will depend on the specific circumstances at issue and must necessarily be assessed on a case-by-case basis.

10. For example, mandatory country of origin labelling imposed on imported products at the border is generally viewed as WTO-consistent. But the COOL measure is an internal measure that has effects only with respect to goods that are processed in the United States.

11. The COOL measure has requirements and procedures that result in a loss of competitive opportunities for imported cattle. In particular, under the COOL measure the United States refuses to acknowledge that any processing of cattle is relevant – notwithstanding that the imported Mexican cattle spend the great majority of their lives in the United States and are slaughtered and processed there under the supervision of US agricultural officials.

V. THE DE FACTO NATURE OF MEXICO'S CLAIMS

12. Mexico has been very clear that its claim is based on the de facto effects of the COOL measure.

VI. LEGAL CLAIMS

A. DISCRIMINATION CLAIMS UNDER ARTICLE 2.1 OF TBT AGREEMENT AND ARTICLE III:4 OF THE GATT 1994

1. Like product

13. Mexico's claim concerns the treatment of Mexican cattle that are imported into the United States for processing into beef. By its structure and design, the COOL measure applies indirectly to cattle. In other words, the effect of the COOL measure – indeed its core purpose – is to regulate the inputs to beef products – namely, cattle. Mexico presented prima facie evidence that Mexican and US cattle, both of which compete for the same processing market, are like products. The United States did not refute that evidence.

14. Long before the COOL measure came into existence, the high quality Mexican cattle exported to the US market were treated as completely interchangeable with US cattle. There is no question that Mexican and US cattle are "like products".

2. Less favourable treatment under 2.1. of the TBT Agreement and GATT Article III:4

15. By its design and structure, the COOL measure creates a situation where the most economically rational and low-cost method for compliance with the measure is to restrict the processing of Mexican cattle in the United States. What I mean by "restrict" is the reduction of processing facilities, the reduction of processing days, the imposition of advance notification requirements, and the imposition of a discount against the price of Mexican cattle.

16. By any standard, these effects are clearly a denial of competitive opportunities.

B. OBSTACLES TO TRADE UNDER TBT ARTICLE 2.2

17. The COOL measure not only discriminates against Mexican cattle, it also creates a restriction against imports of such cattle. This restriction is in the form of an unnecessary obstacle to trade, which violates TBT Article 2.2.

18. The United States argues that the legitimate objective is "consumer information". Mexico does not deny that providing consumer information, in the abstract, can be a legitimate objective. However, the legitimate objective must be defined at a level of specificity that accurately describes the measure that is being justified. In this dispute, the objective has to be defined as informing the consumer where the cattle incorporated in the beef were born.

19. Consumer information objectives must be assessed on a spectrum. If the consumer information provided is to protect safety or health, such as a listing of ingredients, or to provide economic protection to purchasers, such as mandating accurate data about weight and volume, the measure is likely to be legitimate. If the information is in fact misleading, or intended to discourage purchases of products made with foreign inputs, the objective likely is not legitimate.

20. In this instance, when viewed from the perspective of its design, structure, application and all other relevant circumstances, the objective of this measure is solely protectionist and, therefore, clearly not legitimate.

21. In this regard, the sole reason to provide information on the birthplace of the cattle incorporated into the beef is to give US domestic cattle a competitive advantage. Moreover, a fundamental flaw of the COOL measure is that it does not provide accurate information to consumers.

C. TBT ARTICLE 2.4

22. The COOL measure is not based on the applicable CODEX standard, and therefore is inconsistent with TBT Article 2.4. The US position is that if a relevant international standard would prevent the United States from implementing a measure, the international standard must be inappropriate and ineffective. Obviously, the US approach to this issue would make Article 2.4 completely meaningless.

23. In this regard, the United States has asserted that the CODEX standard does not define the word "processing", and suggests that this constitutes a gap in the standard. In fact, the United States has rejected the CODEX standard entirely for beef products. The COOL measure disallows the possibility that any processing – including raising the animal from a young age, slaughtering and processing – could affect the country of origin of the resulting beef product.

24. At the same time, the United States determines country of origin consistently with the CODEX standard for beef products imported from other countries, for parts of the cattle other than muscle cuts and ground beef, and for the great majority of other food products.

D. TBT ARTICLES 12.1 AND 12.3

25. Regarding TBT Articles 12.1 and 12.3, the United States has taken the position that simply allowing Mexico to submit comments on the regulations was sufficient to satisfy the US obligation to take into account of the special needs of developing countries. That interpretation of Articles 12.1 and 12.3 would render them meaningless. The United States does not, and can not, point to anything it did in the preparation and application of the COOL measure with a view to avoid creating an unnecessary obstacle to exports from Mexico. Rather, it ignored Mexico's comments and the impact that it knew the COOL measure would have on Mexican exports.

E. GATT ARTICLE X

26. Mexico's claim under GATT Article X helps to emphasize the inconsistent and arbitrary manner in which the COOL measure has been implemented. The COOL measure has truly been a "moving target". There have been changes to the statute and changes to the regulations, as well as both formal and informal pressure by the US authorities to restrict the manner in which US processors can comply with their legal obligations.

27. The Vilsack letter is part of continuing actions by the United States government, under authority of the COOL statute, to pressure the US industry not to use foreign cattle

28. Furthermore, the Vilsack letter pressured the industry to undertake additional labelling requirements when using the multiple label. This is evidence of US government pressure on companies not to use the multiple origin label. This in turn eliminated the economic feasibility of commingling Mexican and US cattle.

F. NON-VIOLATION NULLIFICATION AND IMPAIRMENT

29. With regard to Mexico's non-violation nullification or impairment claim, the United States argues that Mexican cattle enter the United States under the NAFTA tariff concessions and not those of the WTO. The NAFTA tariff is zero and the US MFN bound tariff is 1 cent per kilogram, which is about $1.36 to 1.81 for a 300 to 400 pound animal. Based on this WTO tariff binding, Mexico could legitimately expect that its cattle would have a competitive disadvantage of $1.36-1.81 per animal compared to like US products. The actual price discount created by the COOL measure is between $40.00-$60.00 for the same 300-400 pound animal. The competitive disadvantage or level of protection reflected in this price discount vastly exceeds Mexico's legitimate expectation of $1.36-1.81 per animal.

30. Thus, the COOL measure nullifies or impairs benefits accruing to Mexico under both its NAFTA and WTO tariff bindings.

VII. CONCLUSION

31. From the facts of this dispute and the evidence provided by Mexico it is clear that the COOL measure adopted by the United States adversely affects Mexican exports of cattle. Even though US is trying to justify its measure by characterizing it as a facially neutral measure aimed at providing additional information to the consumers, the measure is discriminatory because it upsets the conditions of competition of Mexican cattle in favour of like US cattle and creates an unnecessary obstacle to trade. Such a measure is not permitted by the WTO rules.

ANNEX D-3

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING

1. Countries around the world have recognized that consumers desire – and have the right to know – the origin of the products they buy at the retail level. In fact, at least 40 WTO Members have enacted COOL requirements in recent years. These requirements apply to a broad range of products including consumer goods, apparel, and food, among others.

2. In this dispute, Canada and Mexico challenge US COOL requirements as they apply to beef and pork. These measures are the result of a longstanding effort by the US Congress and USDA to update and improve upon COOL requirements first adopted in the United States in 1930. The objective of these updated requirements is to ensure that consumers are provided information about the meat and other food products they buy at the retail level and to prevent consumer confusion regarding the origin of muscle cuts of meat.

3. The updated US COOL system is the product of deliberative legislative and regulatory processes. The United States made substantial efforts to ensure its measures provide consumers with as much information as possible without imposing unduly burdensome compliance costs on market participants. The United States formally solicited input on its regulations and received thousands of comments. Many commentators strongly supported enhanced COOL requirements for meat, including consumer groups and individual consumers. The United States received comments from others, including industry and trading partners such as Canada and Mexico, opposing new labelling requirements as overly burdensome. In response, the United States modified its proposed measures to make them less burdensome and to reduce compliance costs.

4. While Canada and Mexico have brought claims under numerous WTO provisions, their arguments focus on two issues. First, they challenge the specific manner in which the United States designed its COOL measures. They focus on the 2009 Final Rule's requirement that retailers list more than one country of origin for meat derived from animals who were born and/or raised in another country before being slaughtered in the United States. They argue that this requirement renders the measures more trade restrictive than necessary. Accordingly, they suggest that the United States abandon its carefully crafted system in favour of a voluntary labelling system or one based on substantial transformation.

5. These alternatives were proposed by the complaining parties during the regulatory process; they were not accepted then because, quite simply, they do not work: they do not ensure that consumers get meaningful information about the origin of meat at the retail level. These suggestions also do nothing to provide clarity in the one area where meat labels have the greatest potential to be confusing – where the meat is derived from an animal that crossed the US border before being slaughtered. Thus, these suggestions should not be accepted now.

6. The United States went to great lengths to accommodate the cost-related concerns of Canada, Mexico, and others while ensuring that its measures provide consumers with meaningful information. Canada and Mexico's arguments on this point overlook these efforts and ignore the TBT Agreement's recognition that any WTO Member may take measures necessary to achieve legitimate regulatory objectives "at the levels it considers appropriate". The United States decided that consumers should be provided with origin information about the food products they buy at the retail level, including where the source animal for meat products was born, raised, and slaughtered to prevent consumer

confusion. None of the alternatives that Canada and Mexico propose would fulfil the US objective at the level the United States determined is appropriate.

7. Second, Canada and Mexico argue that the COOL regulations accord less favourable treatment to their livestock because they force US slaughterhouses to stop purchasing their animals to avoid allegedly high costs associated with processing both foreign and domestic livestock. A major problem with these arguments is that they misrepresent the details of the COOL measures, inaccurately asserting that they require segregation. To the contrary, the regulations were designed so that segregation would not be necessary. Canada and Mexico also overstate the costs associated with segregation for those firms who may choose to do so and they ignore market conditions unrelated to COOL that explain the recent experience of their livestock producers. Finally, Canada and Mexico's claims regarding the impact of the measures cannot be reconciled with recent trade data. US processors continue to buy livestock from Canada and Mexico with strong increases in US livestock imports in 2010.

8. Canada and Mexico's less favourable treatment arguments are also flawed because they presuppose that market participants will all choose to comply, and in fact, are *forced* to comply with the regulations by discontinuing the purchase of Canadian and Mexican livestock. This is simply not the case. Rather, the COOL measures establish origin neutral labelling requirements for retailers of meat. Nothing in the measures prescribes how market participants in the upstream supply chain must respond. These market participants are allowed to, and in fact they have been, complying with the regulations in many different ways, including in ways that allow them to continue to purchase significant amounts of Canadian and Mexican livestock. Even Canada and Mexico's own evidence indicates that some market participants have not altered their purchasing behaviour in response to the regulations. And even if the complaining parties could prove that some market participants decided to buy less foreign livestock, this reflects independent decisions of private market actors and cannot be attributed to the measures.

9. Canada and Mexico argue that various instruments (the COOL statute; the 2008 Interim Rule; the 2009 Final Rule; the Vilsack Letter; and for Mexico, the FSIS Interim Rule and FSIS Final Rule) constitute one "COOL measure". By defining the various US instruments this way, Canada and Mexico attempt to sweep into the analysis measures that no longer exist and, with regard to others, to avoid proving their case. For example, the Vilsack Letter does not include mandatory labelling requirements and is not a technical regulation under the TBT Agreement. Similarly, neither party has explained how the COOL statute and FSIS Final Rule, when examined separately from the 2009 Final Rule, are inconsistent with US WTO obligations. The Panel should reject Canada and Mexico's characterization of a single measure and instead analyze each of these measures and documents on its own, consistent with the approach taken in past disputes.

10. Turning to their substantive claims, neither Canada nor Mexico prove that the COOL measures are inconsistent with TBT Article 2.1 or GATT Article III:4 because all of the measures at issue in this dispute treat beef, pork, and livestock identically regardless of origin. Despite this, Canada and Mexico argue that the COOL measures are *de facto* inconsistent with US national treatment obligations because they modify the conditions of competition to the detriment of their livestock.

11. These arguments are flawed for multiple reasons. First, they are founded on the erroneous assertion that a US slaughterhouse can only process both foreign and domestic livestock by segregating its production lines. To the contrary, the regulations do not require segregation. Rather, they permit US slaughterhouses to commingle US and foreign origin cattle within a single production day and affix the resulting muscle cuts of meat with a mixed origin label.

12. Second, to the extent that US processors might choose to comply with COOL by segregating instead of commingling, the cost of doing so is not as high as Canada and Mexico assert, and it is not prohibitive. The complaining parties overstate the costs, in part, because they overlook the fact that many US processors have long segregated their production lines to meet grade labelling requirements, for other marketing programs, and to meet export requirements. Insofar as these processors may segregate to meet the COOL requirements, they are unlikely to incur significant new costs since they would not be deviating much from prior practice.

13. Third, these arguments presuppose that US slaughterhouses who choose to segregate cannot pass on any compliance costs to consumers and do not account for the possibility that some slaughterhouses will continue to source both foreign and domestic livestock even if there is an added expense. The reason for this is that their business models are based on a supply of mixed origin animals to ensure that the plant runs at full capacity and at maximum efficiency.

14. Beyond segregation, Canada and Mexico's view of what is happening in the market is inaccurate. According to the evidence presented by Canada and Mexico, at least 12 of the 15 US slaughterhouses that were accepting foreign and domestic livestock in 2008 are continuing to do so. This indicates that these slaughterhouses do not consider the cost of processing foreign livestock under the regulations to be prohibitive. These slaughterhouses have more than enough capacity to process all Canadian and Mexican livestock sent to the United States.

15. To the extent that any US slaughterhouse may decide to stop processing foreign livestock to comply with COOL, this would be the decision of that private market actor alone. The COOL measures permit processors to comply with the labelling requirements in any way they see fit as long as they provide accurate information to retailers. Nothing in the regulations compels them to stop accepting foreign livestock or to segregate.

16. Canada and Mexico's discussion of trade data ignores external factors that explain any reduction in their livestock exports. In fact, while the COOL measures were being implemented, the world was in the throes of a global economic recession. In 2009, trade in agricultural products was down 12 per cent around the world and down 11 per cent in the United States. Given the recession, it would have been a major surprise if Canadian and Mexican livestock exports did not decline as well. Yet both Canada and Mexico's submissions and the economic studies they commissioned fail to take notice of this major economic shock, much less to account for it in their analysis. Canada and Mexico would have the Panel believe that had the United States not enacted the COOL measures, their livestock would have entered the United States at levels and prices unaffected by the recession. This position does not withstand scrutiny.

17. Third, Canada and Mexico overstate the severity of the decline in their exports and they ignore recent market trends. Even during the recession, Canadian and Mexican cattle exports remained above their historical averages and exports of both of these products are increasing significantly in 2010. US imports of Canadian cattle are up 6 per cent while imports of Mexican cattle are up 31 percent. These trends are expected to continue.

18. Canada and Mexico's arguments regarding less favourable treatment are premised on an incorrect understanding of the meaning of less favourable treatment under the national treatment provisions. The TBT Agreement preamble affirms the right of Members to regulate. Any time a Member enacts a technical regulation, it likely imposes some costs on market participants. Further, depending on their situation, some market actors will face higher costs than others, and they will respond to these costs in different, and often unpredictable, ways. The fact that some market actors

may decide to change their behaviour in a manner that disfavours products from some Members does not establish that the measures accord those products less favourable treatment.

19. Here, the measures themselves are neutral on their face. The changes in the market that Canada and Mexico identify are not mandated by the measures themselves, but at most reflect how some private entities have decided to structure their business based on their assessment of costs and other commercial considerations. As such, the measures do not accord "less favourable treatment" to Canadian and Mexican livestock.

20. This conclusion is consistent with the Appellate Body's reasoning in *Dominican Republic – Import and Sale of Cigarettes* where the Appellate Body noted that "the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors and circumstances unrelated to the origin of the product, such as the market share of the importer in this case."

21. Canada and Mexico have failed to prove that any of the measures breach TBT Article 2.2. Under Article 2.2, read in conjunction with the TBT Agreement preamble, each Member has the right to decide for itself which legitimate objectives to pursue and to take measures to meet those objectives "at the levels it considers appropriate". The *EC – Sardines* panel agreed with this interpretation.

22. The COOL measures were enacted with the legitimate objective of providing consumers with information about the covered commodities they buy at the retail level. For muscle cuts of meat, the United States decided that retailers should provide information about all the countries where the source animal was born, raised, and slaughtered. If the measures only required retailers to list where the animal was slaughtered, meat derived from livestock that spent its entire life outside of the United States and was only present in the country for a short time period (perhaps less than 24 hours) would be designated US origin. Reading the label, a consumer would assume that the source animal had been born and raised in the United States. The fact that this product might also carry a USDA grade label would only exacerbate this confusion.

23. To verify the objective, the Panel should begin with their text and may consider their design, architecture, and revealing structure. As the Appellate Body noted, "it is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent."

24. The text of the COOL measures clearly indicate that their objective is consumer information. The 2009 Final Rule states that "the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions". The COOL measures are also designed to ensure that consumers receive information about the covered commodities and are structured to prevent consumer confusion.

25. As a number of third parties have noted, the objectives of the US measures are legitimate. TBT Article 2.2 contains a non-exhaustive list of legitimate objectives, as confirmed by the use of the term "*inter alia*". Thus, objectives not included in the list may also be legitimate. The legitimacy of the US objectives are validated by the widespread consumer support for this information and the fact that over 40 WTO Members have country of origin labelling systems. Additionally, one of the objectives listed in Article 2.2 (the prevention of deceptive practices) is closely related to consumer information and the prevention of consumer confusion.

26. The COOL measures fulfil their objectives at the level that the United States has deemed appropriate. They provide US consumers with information previously unavailable to them and have helped prevent confusion. While they do not require retailers to convey every detail regarding the product's origin or cover every instance in which a consumer purchases food, this does not support the conclusion that the measures' objective is something other than consumer information or demonstrate that the measures do not fulfil their objectives. It is true that if exceptions and flexibilities were not included and certain modifications were not made, the 2009 Final Rule would require retailers to provide more information to consumers than it does. However, the rule would also have imposed higher costs on industry. Given that USDA made a number of changes in response to concerns expressed by Canada and Mexico, the United States finds it somewhat ironic that the complaining parties now attempt to use these changes against the United States.

27. Taking into account the US objectives, and given the flexibilities the United States built into its measures, they are not "more trade restrictive than necessary". The TBT Agreement does not define the phrase "more trade restrictive than necessary" and it has not been interpreted by any WTO adjudicative body. Based on the text, a complaining party must demonstrate (1) that a particular measure is trade restrictive and (2) that the measure restricts trade more than is necessary to fulfil the measure's legitimate objective. The United States agrees with Canada that SPS Article 5.6 provides useful context for the interpretation of the phrase "more trade restrictive than necessary". SPS Article 5.6 includes similar language to TBT Article 2.2 and the Appellate Body has noted the "strong conceptual similarities" between the two agreements. Therefore, a Member asserting a breach of this provision must demonstrate that there is another measure that (1) is reasonably available to the government, taking into account technical and economic feasibility; (2) fulfils the government's legitimate objectives at the level the government has determined is appropriate; and (3) is significantly less trade restrictive.

28. Canada and Mexico have failed to prove that any of the COOL measures adopted by the United States are more trade restrictive than necessary. Canada and Mexico's arguments in this regard rest on their erroneous assertions that the US measures require segregation and that there are high costs associated with that practice that have forced US processors to completely reject foreign livestock. Additionally, the complaining parties ignore recent trade data that illustrate a significant increase in Canadian and Mexican livestock exports in 2010.

29. Canada and Mexico have failed to demonstrate there is another measure that would meet the US objectives of providing consumer information and preventing consumer confusion at the level the United States deems appropriate while being significantly less restrictive to trade. Both of the measures that Canada and Mexico suggest – a voluntary labelling system and a mandatory system based on substantial transformation – fall short. A voluntary system would clearly not meet the US objective. Indeed, the United States at one time attempted to implement a voluntary system, but US retailers simply opted not to label their products.

30. A system based on substantial transformation would fail to meet the US legitimate objectives. This system would not provide any information about the different countries in which an animal was born and raised when the animal was born and/or raised in a foreign country and then slaughtered in the United States. Further, it would not prevent consumer confusion. Under this system, meat derived from an animal that spent its entire life in another country before being slaughtered in the United States would be characterized as US origin. This would defy consumer perception and could perpetuate confusion. Finally, Canada and Mexico have not shown that a substantial transformation system is significantly less trade restrictive.

31. Mexico has also failed to establish the COOL measures breach TBT Article 2.4. In particular, Mexico has not demonstrated that the CODEX standard it advances is an effective or appropriate means of fulfilling the legitimate objectives pursued by the United States. CODEX-STAN 1-1985 appears to be based on substantial transformation. Thus, this standard suffers from the same deficiencies as the alternative just discussed.

32. Mexico's arguments under TBT Article 12.3 fail to establish that any of the COOL measures breach this provision. Mexico has not demonstrated that the United States did not take its needs into account during the preparation and application of the 2009 Final Rule. Rather, the United States gave Mexico the opportunity to participate in the US rule making process and to share its concerns with the United States in other fora. The United States considered Mexico's contributions and even modified its regulations in response to concerns raised by Mexico.

33. Canada and Mexico have failed to demonstrate that any of the COOL measures are inconsistent with US obligations under GATT Article X:3. Neither party offers evidence to show that the administration of these measures has been unreasonable or non-uniform. Indeed, their arguments do not even relate to the administration of the COOL measures. Rather, Canada and Mexico focus on the issuance of the Vilsack Letter, an action that did not in any way "put into practical effect" or "apply" the COOL statute or regulations. Further, changes the United States made to the regulations were not non-uniform or unreasonable. In fact, many changes were made at the request of interested parties, including Canada and Mexico.

34. Finally, Canada and Mexico have not demonstrated that any of the COOL measures nullify or impair their benefits under the WTO Agreements. In fact, neither party is able even to identify the relevant benefits under the covered agreements that have been affected, let alone establish that they could not have reasonably anticipated the enactment of the COOL measures.

ANNEX D-4

CLOSING ORAL STATEMENT OF CANADA AT THE FIRST SUBSTANTIVE MEETING

1. Mr. Chairman, members of the Panel, we thank you for the opportunity to provide a few concluding comments.

2. We appreciate the contributions made by the third parties through their written submissions, their statements and answers to questions.

3. Canada considers that we had a useful first discussion in this case. However, Canada is struck by the fact that we have not really engaged in detailed discussion of some key evidentiary issues. Perhaps this is because the United States has offered no credible evidence, and in some cases no evidence at all, to rebut the complainants' case.

4. The adverse effects of the COOL measure on the conditions of competition for Canadian cattle and hogs in the US market is a critical issue in this case. The United States has not contested the letters and witness statements produced by Canada demonstrating the adverse effects. However, the United States did criticize certain aspects of Dr. Sumner's econometric analysis on the effect of the COOL measure. Canada has responded to this criticism in its Oral Statement.

5. Yesterday, the United States filed further exhibits (US-57, US-58 and US-59) and discussed the data in paragraphs 27-29 of its Oral Statement. These exhibits are so elementary and general in nature that they cannot be considered any response to the serious and thorough analysis submitted by Canada (in CDA-79 and updated in Canada's new exhibit CDA-152).

6. Canada has pointed out that simple pictures of broad trade patterns provide no useful information to help the Panel understand how the COOL measure has actually affected the US demand for imported cattle and hogs relative to comparable animals in the United States.

7. Using detailed weekly time patterns of import ratios (and differences between prices of domestic livestock and comparable imported livestock), as Canada does in its analysis of recent data, helps account for potential factors such as economy-wide fluctuations, that affect the market as a whole. Canada has shown the significant degree to which imports relative to US feedlot placements and slaughter use have been directly and specifically caused by the COOL measure, after accounting for trends, seasonality and other events.

8. Comparing overall cattle imports during the severely depressed first half of 2009 with the first half of 2010 (which is done in exhibit US-59) is irrelevant and misleading. First, such data say nothing about the continued lower prices received for Canadian fed cattle. And second, the United States does not provide any data on hogs. On this point, we note how little emphasis there has been on the exports of hogs as compared to cattle. In fact, US hog imports from Canada have declined consistently since the COOL measure went into effect.

9. We trust that there will be more opportunity to explore these aspects in answers to written questions and also at the next meeting, in December.

10. As to other evidence, the United States provides vague suggestions on what the objective of the COOL measure is. It suggests that it provides some kind of information to consumers (though

what exactly is unclear) in response to an alleged strong demand for this unclear information. It conflates consumer information with deceptive practices without providing any evidence, or even persuasive logic, to explain how any consumers have been deceived prior to the COOL measure and are now not deceived any more. Consumer deception or addressing consumer confusion cannot be a legitimate objective when such deception or confusion is a result of the WTO Member's own laws and regulations. Ultimately, where there is an unnecessary obstacle to trade in the absence of a decipherable legitimate objective, there is a violation of Article 2.2 of the TBT Agreement.

11. Furthermore, the United States continues to deny the link between the COOL measure and segregation in practice, and attributes any segregation to private business decisions. Yet as Canada has already pointed out in detail in its Opening Statement at paragraphs 27 and 28, and Mexico has also shown (such as in exhibit MEX-41), slaughtering operations imposed segregation as a necessary response to the COOL measure. The US suggestion that segregation is a private business decision unconnected to COOL is disingenuous in the light of that evidence.

12. Mr. Chairman, Members of the Panel, we thank you for your attention and your continuing work on this very important matter for Canada and the other Members of the World Trade Organization. We would also like to express our appreciation to the Secretariat for organizing this meeting. We look forward to receiving your written questions.

ANNEX D-5

CLOSING ORAL STATEMENT OF MEXICO AT THE FIRST SUBSTANTIVE MEETING[1]

1. Mr Chairman and Members of the Panel, a number of issues have been discussed during this substantive meeting. In this final statement, I intend to focus on a few key points only.

I. INTEGRATION OF THE MEXICAN MARKET

2. To begin with, it needs to be stressed that the cattle and beef industries of Mexico and the United States have historically been integrated and inter-related. Mexico's comparative advantage in this relationship has involved producing feeder cattle to be sent at a very early stage to be raised and slaughtered in the United States.

3. The comparative advantage of the United States has consisted in feeding the cattle, slaughtering it, producing and marketing the meat and sending it to its domestic market, to Mexico and to other countries. This is a historical relationship.

4. Today, Mexico is celebrating the 200th anniversary of its fight for independence and the 100th anniversary of its Revolution. Since those times, the market has become naturally integrated to the benefit of both countries.

5. Mexico has had to adapt to all of the sanitary requirements imposed by the United States; and in spite of this, the United States has disrupted a natural trade relationship by introducing the COOL measure.

II. DISCRIMINATION ARGUMENTS

6. Mexico's discrimination arguments with regard to Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 are fundamental to its case.

7. The COOL measure has adversely influenced the competitive opportunities of Mexican cattle imports in favour of United States cattle by directly producing the following effects:

Reducing the number of plants that slaughter and process feed cattle that was born in Mexico and raised in the United States;
reducing the number of days per week that such cattle are slaughtered and processed in the remaining plants;
requiring advance notice prior to accepting such cattle;
reducing the number of US feeders that are ready to accept Mexican cattle.

8. US cattle has suffered no such loss of competitive opportunities. These losses have reduced the price paid for Mexican cattle as compared to the price paid for cattle born in the United States, thereby adversely affecting the conditions of competition for Mexico.

9. Mexico has presented a clear case of *de facto* discrimination in violation of Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

[1] This oral statement was originally made in Spanish.

III. EVIDENCE

10. Let me emphasize that Mexico has made a prima facie case with respect to every fact and legal element involved, particularly as regards the direct effect of the COOL measure on the balance of competitive opportunities in the United States market.

11. Turning to the Vilsack letter, Mexico notes that one of the ways in which the industry can comply with the letter is to avoid using the Category B label. The evidence that Mexico has adduced with respect to the limitations imposed on exports of Mexican cattle would indicate that the main processors have been forced to do just that.

IV. PRIVATE ACTORS

12. In its written and oral submissions, the United States argues that the effects identified by Mexico as being the direct result of the COOL measure are in fact the result of action by private actors in the industry.

13. The United States cites the report of the Appellate Body in *Korea – Various Measures on Beef* in support of its argument.

14. The United States erroneously interprets the Appellate Body's decision. What the Appellate Body said in paragraph 146 of its report was the following:

> "146. We are aware that the dramatic reduction in number of retail outlets for imported beef followed from the decisions of individual retailers who could choose freely to sell the domestic product or the imported product. **The legal necessity of making a choice was, however, imposed by the measure itself.** The restricted nature of that choice should be noted. The choice given to the meat retailers was *not* an option between remaining with the pre-existing unified distribution set-up or going to a dual retail system. The choice was limited to selling domestic beef only or imported beef only. Thus, the reduction of access to normal retail channels is, in legal contemplation, the effect of that measure. **In these circumstances, the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product.**" (Emphasis added)

15. This is exactly what is happening in this dispute. The COOL measure is limiting the options available to US processors, so that the private sector actions can be attributed to the measure itself.

V. THE UNITED STATES' OBJECTIVE

16. As Mexico has said, the true objective of the COOL measure is "protectionism". It is also clear to Mexico that the objective is not legitimate.

17. The objective adduced by the United States has been made clear: "to eliminate consumer confusion".

18. To the extent that such confusion may have existed, it was due to an already existing legal system in the United States.

19. It is clear from our discussions with the United States during this meeting that the measure merely causes confusion.

VI. ACKNOWLEDGEMENTS

20. We would like to thank the Panel for its attention during this meeting, and the Secretariat and interpreters for their assistance.

ANNEX D-6

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

1. Canada and Mexico have asserted that they are not challenging country of origin labelling requirements in general. They acknowledge that many WTO Members maintain country of origin labelling requirements for food and that this practice is not necessarily WTO-inconsistent. They both maintain country of origin labelling requirements as do many third parties.

2. Canada and Mexico necessarily claim then, that their concern is not with country of origin labelling *in general*, but only with the particular measures that the United States adopted with respect to beef and pork. However, Canada and Mexico's arguments regarding the WTO obligations at issue cannot be reconciled with this position: were their arguments accepted, it is difficult to conceive of any country of origin labelling system that would survive WTO scrutiny.

3. The complaining parties assert the US measures do not fulfil their legitimate objectives and are protectionist because they apply only to some food products; yet even a cursory review of the labelling systems of the third parties shows they do not apply to all products either. Canada and Mexico find fault with the fact that the US measures are mandatory and apply at retail; yet again, the United States has identified nearly 70 Members with mandatory requirements, many of which apply at retail. Canada and Mexico criticize the US measures because they are not based on the concept of substantial transformation; but the United States is hardly the only WTO Member not to base its labelling requirements on this concept. Thus, if the US measures are WTO-inconsistent due to their scope, their mandatory nature, the fact that they apply at the retail level, or the fact that they rely on criteria other than substantial transformation, this would raise questions about many other labelling requirements maintained by WTO Members.

4. Canada and Mexico criticize the US measures as not providing complete information to consumers, in particular because the United States strived to reduce compliance costs by adding, at Canada's request, commingling provisions. When coupled with their argument that compliance costs are too high, Canada and Mexico's complaint regarding commingling puts the United States and other WTO Members with labelling requirements in an impossible position. Canada and Mexico condemn the US measures as "more trade restrictive than necessary" because of their compliance costs, yet at the same time claim that they fail to fulfil their legitimate objectives because of efforts made by the United States to reduce these costs. In effect, Canada and Mexico's theory presupposes that WTO panels should stand in the shoes of the regulator, re-calibrate the costs and benefits of a given measure, and in the process undermine the right of WTO Members to adopt measures to provide origin information to their consumers at the level they consider appropriate.

5. In addition to making overly-broad arguments that would jeopardize the ability of WTO Members to adopt origin labelling requirements, Canada and Mexico argue that the US measures are WTO-inconsistent because of their alleged effects in the market. However, Canada and Mexico have not identified any aspects of the COOL measures *themselves* that accord less favourable treatment to their livestock exports. While the complaining parties have provided limited evidence suggesting some private market actors changed their policies in response to the measures, much of this information is inaccurate and any such actions are not required by the measures. The measures only require retailers to label their products with origin information, regardless of what that origin may be, and they require suppliers to provide accurate information to those retailers. They do not require feed lots or slaughter houses to segregate and do not prevent them from accepting foreign livestock.

Further, Canada and Mexico's assertions regarding the impact of the measures cannot be reconciled with recent data showing Canadian and Mexican livestock exports and prices are up.

6. Canada and Mexico's theory that the COOL measures were adopted for protectionist reasons is contradicted by the text of the measures, their design, and extensive evidence demonstrating that US consumers and consumer organizations actively supported and sought the enactment of the US measures. The United States provided substantial evidence regarding the role played by the consumer, including letters of support from individual consumers, extensive lobbying efforts by the leading consumer organizations in the United States, and even a recommendation adopted by the Trans-Atlantic Consumer Dialogue (TACD), a coalition of 27 US and 49 EU consumer organizations, explicitly endorsing the COOL statute.

7. Instead of making their case with regard to all of the instruments, Canada and Mexico urge the Panel to make findings with regard to a single "COOL measure". This characterization overlooks substantive differences between the instruments that have implications for how the various WTO obligations apply. In addition, many of the instruments Canada and Mexico characterize as part of the single "COOL measure" have expired or are not within the Panel's terms of reference. Further, the WTO reports that Canada and Mexico cite to support their "single measure" theory are not applicable to the instant dispute. Thus, the Panel should examine each instrument separately as was done in *Japan – Film* and *Turkey – Rice*.

8. By advancing the "single measure" theory, Canada and Mexico attempt to hide deficiencies in their case, such as the fact that the Vilsack Letter is not a technical regulation under the TBT Agreement or a "requirement" under GATT Article III:4. The Vilsack Letter does not meet these definitions because it is not mandatory. This is obvious from the letter's text, its lack of an enforcement mechanism, and the fact that it has no legal status. Tellingly, the evidence before the Panel also indicates that industry is not following the letter's suggestions.

9. Canada and Mexico have failed to demonstrate that the COOL measures breach TBT Article 2.1 or GATT Article III:4. The COOL measures treat covered commodities of all origins identically, requiring products to be labelled with origin regardless of what their origin may be. To the extent that these measures apply to livestock, they apply to them identically – requiring that meat derived from these livestock be labelled at the retail level, regardless of where the source animal was born, raised, and slaughtered.

10. Canada and Mexico's arguments to the contrary are premised on a misunderstanding of the legal obligations at issue and a misapplication of past reports examining the meaning of "less favourable treatment". A Member does not act inconsistently with these provisions unless its measure treats domestic products one way and provides different, less favourable treatment to imported products based on origin. A Member will not breach these provisions as a result of the behaviour of private market actors not required by the measure itself. Neither the GATT 1994 nor the TBT Agreement guarantees a Member a particular outcome in the hands of an individual market actor or a particular level of sales for their product. The question is whether any of the COOL measures provides for different treatment based on origin, and if so, whether that different treatment is less favourable for imported products. Not only do the COOL measures not provide for different treatment based on origin, but the detrimental effects complained about are based on the actions of private market actors or due to external market factors.

11. Canada and Mexico's attempts to analogize the instant situation to *Korea – Various Measures on Beef* by asserting that the COOL measures impose a choice on market actors that requires them to accord less favourable treatment to imports are not persuasive. The *Korea – Various Measures on*

Beef measure on its face accorded different treatment to imported and domestic products and required small retailers to choose between selling only domestic or only imported products; they could not sell both. The COOL measures are origin neutral and do not require retailers or any other private market actors to make a choice between domestic and imported products or to take any particular action at all that would harm imports. In fact, the COOL measures allow market actors to comply in any fashion they choose as long as the end product bears an accurate label. Feed lots and slaughter houses may respond in many different ways, including by accepting all domestic livestock, accepting all foreign livestock, commingling different origin livestock on the same production day, accepting different origin livestock on different days, or by segregating if they so choose.

12. In addition to misapplying the legal standard, Canada and Mexico ignore the commingling provisions, which obviate the need to segregate. Using these provisions, feed lots can feed different types of livestock together and send these animals to be slaughtered on the same production day without segregation. The slaughter house can process these animals together or commingle them further and characterize the resulting meat as mixed origin. Finally, after the meat derived from this livestock leaves the slaughter house, it does not need to be segregated because it can all be affixed with the same label at the retail level. Evidence before the Panel demonstrates that US processors are taking advantage of the commingling flexibility, directly contradicting Mexico's vague assertion that USDA is somehow adopting a strict interpretation of the 2009 Final Rule that has discouraged the use of these provisions.

13. Even if some feed lots and slaughter houses choose to respond to the COOL measures by segregating, this does not establish that the *measures* accord different treatment based on origin, let alone less favourable treatment. Segregation is but one among many options that these entities have to respond to the measures, and the feed lots and slaughter houses who choose to respond to the COOL measures by segregating are not required to reduce the price they pay for livestock (imported or domestic) in order to offset any costs they choose to bear as a result. Rather, these entities can absorb any associated costs, pass these costs on to consumers, or distribute these costs throughout the supply chain. Nothing in these measures requires them to impose these costs solely or disproportionately on imported livestock through price discounting.

14. In addition to ignoring the commingling provisions and pre-supposing that any segregation costs will be imposed only on their products, Canada and Mexico downplay the significance of the segregation that has long been occurring in the market independent of the COOL measures. The significance of this pre-existing segregation is not merely that slaughter houses who choose to respond to the COOL measures by segregating can use existing segregation mechanisms at limited additional cost, but that segregation is extremely common and US processors can use their experience and existing synergies to establish new segregation practices at a lower cost than if they had not previously segregated for other purposes.

15. The evidence and economic studies that Canada and Mexico submit do not demonstrate that the COOL measures accord less favourable treatment to their livestock. First, the evidence is of questionable accuracy, and to the extent that it is accurate, it does not represent less favourable treatment accorded by the measures. Second, Canada and Mexico's argument that the COOL measures have forced US feed lots and slaughter houses to reject their livestock and discount the price paid for these animals is contradicted by recent economic data. Third, the economic models and reports the complaining parties have submitted are highly flawed.

16. Canada and Mexico have failed to demonstrate the COOL measures breach TBT Article 2.2. If their arguments were accepted, it is unclear whether a Member could ever adopt country of origin labelling requirements without breaching its WTO obligations. Canada and Mexico's arguments that

the COOL measures are "more trade restrictive than necessary" because they require too much information and fail to fulfil their objectives because they do not provide enough put the United States in an impossible position. The Panel should reject Canada and Mexico's attempts to turn the TBT Article 2.2 analysis into a wholesale re-evaluation of every choice the United States made in the process of developing a complex regime. Designing a technical regulation necessitates difficult choices, especially when balancing the interests of US consumers and trading partners like Canada and Mexico. Some interested parties advocated for a labelling system that provided more information, while others advocated for a less costly system. The Panel need not – and should not – stand in the shoes of the regulator and attempt to re-calibrate the balance that was struck. Rather, all the Panel need determine is whether the measures fulfil their legitimate objectives at the level the United States considers appropriate without restricting trade more than necessary.

17. The objectives of the COOL measures – providing consumer information about origin and preventing consumer confusion regarding origin – are legitimate. Many third parties agree and neither Canada nor Mexico dispute this fact. The legitimacy of these objectives is also confirmed by the strong consumer support for country of origin labelling as well as the fact that many WTO Members have adopted country of origin labelling requirements and explicitly identified "consumer information" as their objective in their TBT notifications.

18. Providing consumer information about origin and preventing consumer confusion are the objectives of the COOL measures. To determine the objectives, the Panel should focus on the measures' text and may also consider their design, architecture, and revealing structure. The text and design of the COOL measures clearly indicate that their objectives are consumer information about origin and the prevention of consumer confusion. For example, the 2009 Final Rule states that "the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions".

19. Canada and Mexico's arguments that the COOL measures are protectionist because of their product coverage or origin definition would imply that most, if not all, of the labelling systems maintained by WTO Members are also protectionist. Similarly, the fact that the 2009 Final Rule does not provide the most detailed information possible in all circumstances does not imply that its objective is protectionism. The commingling provisions were specifically included at Canada's request and they have reduced implementation costs. The fact that the COOL measures do not require retailers to list more than one country on a Category D label when processing steps occur in more than one country does not illustrate a protectionist objective either. The amount of meat to which this applies is trivial and requiring multiple countries to be listed on a Category D label would increase compliance costs for foreign producers.

20. To the extent that the legislative and regulatory history of the COOL measures are relevant, it confirms the objectives as providing consumer information about origin and preventing consumer confusion. This is obvious from the Committee Reports, statements of legislators, statements of interest groups, and statements of US consumers on the record.

21. The COOL measures fulfil their objectives at the levels the United States considers appropriate. As a result of the measures, millions of consumers have information not previously available to them. With regard to meat, consumers have information on all the countries in which processing steps took place when the meat is slaughtered in the United States and will not be misled into believing that meat labelled as US origin was derived from an animal born, raised, and slaughtered in the United States when this is not the case.

22. While many consumers are pleased with the COOL measures and the information they provide, the United States could have designed these measures to provide even more information by omitting the commingling flexibility or requiring point-of-production labelling. However, the TBT Agreement does not require Members to take every step possible to fulfil its legitimate objectives without regard to cost, and for this reason, Canada and Mexico's arguments regarding product coverage and imperfect information must fail.

23. Canada and Mexico have not identified a reasonably available alternative. The suggestion of a voluntary labelling system is not a reasonably available alternative because the United States attempted this option without success; therefore, it failed to fulfil the US objectives in a very fundamental way. The suggestion that the United States adopt a system based on substantial transformation fails to fulfil the US objectives because it does not provide any information about the multiple countries in which an animal spent its life when it was not born, raised, and slaughtered in a single country; thus, it does not provide as much information as the US system and does nothing to reduce consumer confusion regarding meat products from animals born and/or raised in another country and slaughtered in the United States. Many US consumers and consumer organizations indicated that this level of information is important, and they rejected a definition based on substantial transformation. Accompanying the 2009 Final Rule with a trace back system is not a reasonably available alternative either. It is unclear how this alternative could possibly be less trade restrictive.

24. Mexico has failed to demonstrate that the COOL measures breach TBT Article 2.4. Mexico asserts that the United States has conceded that the CODEX standard is relevant, but this mis-characterizes the US position and fails to address the fact that the CODEX cannot be a relevant standard for a large portion of the meat at issue (meat not pre-packaged) since it does not apply to these products. Mexico has also failed to explain how substantial transformation would be an "effective" or "appropriate" means of achieving the US legitimate objectives.

25. Mexico has also failed to demonstrate that the COOL measures breach TBT Article 12.3 and has failed to identify what "special needs" it had. Mexico's arguments are based on a flawed legal interpretation that ignores the text of Article 12.3, the context provided by other TBT provisions, and the context provided by the special and differential treatment provisions of the SPS Agreement in addition to past reports that have interpreted the SPS provision. Based on this, it is clear that Mexico bears the burden of proof under this provision and that the United States was not required to take any particular actions in response to comments it received from Mexico. In addition, the United States has provided evidence on how it has taken Mexico's concerns into consideration *with a view* to avoiding unnecessary obstacles to Mexico's exports.

26. Canada and Mexico have failed to demonstrate that any of the COOL measures breach GATT Article X:3(a). Their arguments focus on actions that do not represent the "administration" of the COOL measures and neither party has put forward any evidence to suggest that the US administration of the measures was unreasonable or non-uniform.

27. Finally, Canada and Mexico have continued to treat their nullification and impairment claims in a cursory fashion. They have failed to present "a detailed justification in support" of their claim that the COOL measures violate GATT Article XXIII(b) as required by DSU Article 26.1(a).

ANNEX D-7

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF CANADA AT THE SECOND SUBSTANTIVE MEETING

I. INTRODUCTION

1. Canada is challenging the COOL measure principally because it has caused a serious disruption to the conditions of competition in the US livestock market.

2. As a first preliminary point, Canada notes that it is not a defence to a violation of either TBT Article 2.1 or 2.2, for a WTO Member to argue that it took into account competing interests in developing a measure and provided flexibility to accommodate all such interests. As a second preliminary point, Canada notes that it is illogical to argue, as the United States does, that Canada has to prove a violation of the statutory COOL provisions separate from the Final Rule when the United States itself has stated that the statutory COOL provisions needed to be implemented by regulations (i.e., the Interim Final Rule, and later the Final Rule).

II. TBT ARTICLE 2.1 AND GATT ARTICLE III:4

3. Findings regarding Canada's claims under TBT Article 2.1 and GATT Article III:4 are important to achieve a "positive solution to the dispute", within the meaning of DSU Article 3.7. As the TBT Agreement deals "specifically, and in detail" with technical regulations, the COOL measure should be assessed first under that Article; a similar finding of a violation of GATT Article III:4 will follow from a finding of a violation of TBT Article 2.1.

4. The COOL measure has negatively affected the conditions of competition for Canadian-born cattle and hogs. Like all country-of-origin labelling, the COOL measure treats imported and domestic products differently. US claims to the contrary, apparently to equate the COOL measure with origin-neutral technical regulations, are incorrect. It is also not relevant that that not all US slaughter houses have rejected Canadian-born cattle and hogs. What is necessary is to show that the COOL measure has negatively changed the conditions of competition for Canadian livestock by creating a disincentive in the US market to use Canadian-born cattle and hogs.

5. Nothing in the TBT Agreement or the GATT supports the United States' apparent argument that a measure that causes harm to the conditions of competition for one category of products – cattle –may somehow be "saved" if the product in question is an input into other products – beef –, the sales of which have increased.

6. Despite its suggestion that the COOL measure did not cause slaughter houses in the United States to stop or limit their use of Canadian-born cattle and hogs, the United States has effectively conceded that the response by private actors can be attributed to the COOL measure. The US reference to Dominican Republic – Cigarettes case is not of assistance to it either. In that case the Dominican Republic applied this requirement identically to different individual companies without reference to the origin of the product they sold. In contrast, the COOL measure makes product distinctions solely based on the origin of the livestock.

A. SEGREGATION

7. The COOL measure requires participants throughout the meat supply chain to track the origin of the livestock and meat derived from that livestock. This tracking in practice requires segregation.

8. The United States proposes four "options" to avoid segregation, which focus only on slaughter houses. Options one and two require separate supply chains. In Korea-Beef, retailers had a choice to sell Korean or imported beef, or to place both types of beef in separate display cabinets in large stores. The Appellate Body found that this created "obstacles" for imported beef that negatively affected its conditions of competition. Similarly, the COOL measure denies foreign-born cattle and hogs access to the "normal" distribution chain: the exclusive Label "A" distribution chain that has little or no segregation costs. Option three (commingling), does not eliminate segregation costs that create an economic disincentive to use Canadian-born livestock. Meat from commingled livestock must still be labelled differently –segregated from the majority of meat in the US market (being, Label "A"). Option four (processing "B" or "C" Label meat on different days than Label "A" meat) was adopted by slaughter houses that limited (but did not stop) their purchase of Canadian-born cattle and hogs. It requires significant segregation costs.

9. The United States speculates (with no evidence) that pre-existing segregation programs may reduce (but not eliminate) segregation costs related to the COOL measure. Those pre-existing programs cannot reduce the disincentive to the use of Canadian-born cattle and hogs for at least three reasons. First, very few such programs relate to segregation on the basis of origin. Second, segregation throughout the supply chain under those pre-existing programs remains voluntary. Third, the costs of those programs were taken into account in both the Informa Report and Dr. Sumner's simulation analysis.

10. The United States also claims that post-segregation costs are low, ignoring the fact that a great deal of meat is cut and packaged by distributors or retailers, and that therefore there are costs of segregation throughout the meat distribution chain. Similarly, the US alleges that a retailer that sells meat bearing only one type of label will not have additional segregation costs. This ignores the fact that added costs incurred to sell meat under an additional label will be incurred overwhelmingly for adding Label "B" or "C" meat, resulting in more favourable treatment for domestic products (Label "A"). Finally, it is not relevant that the magnitude of the disincentive caused by the COOL measure varies over time as a result of responses by market actors and particular market conditions because these fluctuations do not remove the ongoing negative effects on the conditions of competition for Canadian-born livestock.

B. ECONOMIC FACTORS

11. Adverse trade effects, which is what the United States focuses on, are not necessary to establish a violation of the WTO Agreement. Prices and volumes of Canadian exports of cattle and hogs did drop during the recession, but that does not address the differential detrimental effect caused by the COOL measure on those Canadian exports. Similarly, Canadian livestock exporters' reliance on consumer demand in the United States does not explain differential effects when the market at issue for both Canadian-born and US-born livestock in this case is the US market. The gradual decline in hog inventories in Canada does not explain the extensive unchallenged evidence that the COOL measure caused slaughter houses to reduce or eliminate their purchase of Canadian-born hogs. The decline began in 2005, but Canadian exports to the United States increased until 2008 when the effects of the COOL measure began to be felt, and market share dropped precipitously while inventories continued to decline gradually.

C. Economic analysis quantifying the loss of competitive position

12. Criticism of Dr. Sumner's econometric analysis by the United States is ill-founded, and unsupported by a revised econometric analysis of its own.

13. The United States wrongly argues that weekly APHIS data used by Canada differ "quite considerably" from official US census data. In fact, as demonstrated in Exhibit CDA-196, differences are the result of errors by the United States. Notably, the United States compares census data that included cows and bulls to APHIS numbers that appropriately excluded them. Cows and bulls are not included in Dr. Sumner's analysis because the lower quality of their meat means that it is generally not subject to "A", "B", or "C" labelling. The United States also mistakenly compares eight-week lagged APHIS data in Exhibit CDA-160 with real-time census data.

14. The United States wrongly criticizes the use of a market share ratio that rightly eliminates market factors that do not have **differential** impacts on imported livestock.

15. The United States misleadingly compares prices in 2009 (after the COOL measure went into effect) to 2010, instead of comparing 2007 (the year before the COOL measure came into effect) to 2010. In any event, while the price gap caused by the COOL measure may decrease in tight market conditions, it will increase again when supplies are not as tight and slaughter houses can avoid absorbing any of the additional costs of segregation by using only US-born and -raised cattle.

16. Dr. Sumner's analysis controls for long-term trends in the Canadian market, but it would be a serious mistake to include in that analysis factors that are also in part caused by the COOL measure such as the quantity of livestock in Canada. Similarly, increased Canadian beef exports were caused by market reaction to distortions caused by the COOL measure.

17. There is no evidence that the recession, starting in 2007 had differential effects in the US market. Finally, the United States misunderstands that the BSE ban in force from 2005 to 2007 applied only to mature animals, and that Dr. Sumner's statistical analysis explicitly accounted for any potential spillover effects.

III. MEASURES OF OTHER WTO MEMBERS

18. The country-of-origin labelling measures of other WTO Members cited by the United States include measures that vary in their product coverage and their mandatory or voluntary nature. Canada is not challenging those measures, nor country-of-origin labelling generally. A country-of-origin labelling measure may well be consistent with the *TBT Agreement* and the GATT 1994 if that measure does not negatively affect the conditions of competition for imports, and it fulfils a legitimate objective in the least trade-restrictive way.

IV. TBT ARTICLE 2.2

19. Canada applies the five step test for an analysis under TBT Article 2.2 to issues raised in the Second Written Submission of the United States.

20. The United States has raised no new issues on this first element, *i.e.*, the determination whether the technical regulation restricts international trade.

21. On the second element of the test, the objective of the measure, the United States presents evidence that many consumers are interested in mandatory country-of-origin labelling generally (*i.e.*,

not specifically for meat obtained by slaughter of imported livestock). That evidence is not relevant to whether the COOL measure's specific labelling requirements that affect imported livestock have as their objective the provision of consumer information. Most of the new evidence adduced by the United States does not address what origin definition should be used for meat. And all but one of the limited interventions specifically related to the definition of origin for meat either reflect producer interests or are based on a connection between the COOL measure and food safety that the United States agrees does not exist. The Consumers Union survey prepared in October 2010 was prepared as an advocacy piece to support US submissions in this dispute. It reveals key errors, bias and has no probative value.

22. The United States argues that the objective of the COOL measure is not protectionism because a variety of political representatives voted in favour of the Farm Bill or elements of it, and because some principal supporters of the COOL measure sometimes cited consumer information as a reason to support the COOL measure. These facts do not refute the extensive legislative history and other material showing that those instrumental in bringing the COOL measure into force favoured US cattle and hog producer interests.

23. On the third element, whether the objective is legitimate, support of certain consumer interest groups and measures of many WTO Members generally does not support the legitimacy of the objective of the COOL measure. Canada is challenging the COOL measure under TBT Article 2.2 because of its particular characteristics, including its structure, its objective, and the limited information it provides. Therefore other measures of WTO Members with different characteristics are not relevant to determining that the objective of the COOL measure is not legitimate.

24. On the fourth element, whether the challenged measure fulfils a legitimate objective, the limited evidence of consumer interest cited by the United States does not assist it for reasons already discussed. Further, the limited information that the COOL measure provides does not fulfil the objective of providing meaningful information to consumers.

25. On the final element, assessing the challenged measure against other less trade-restrictive alternatives, the comparisons of mandatory labelling to a voluntary alternative must be fact-specific, not based on general characteristics of measures by other WTO Members. For example, a mandatory system of "trace back" for meat would provide extensive detail on where the animal from which the meat was derived was born, where it was raised, and where it was slaughtered. Such a system would also have the practical advantage of being potentially useful for animal health and food safety purposes. A trace back system would no doubt impose higher costs, but those costs could (if the system were designed correctly) be imposed equally on both domestic and imported livestock. However, the COOL measure provides none of those advantages.

26. Canada also notes that mandatory US country-of-origin labelling for meat, based on where the livestock was slaughtered, could be combined with voluntary information about where the animal is born and raised for any consumers that want such additional information.

V. GATT ARTICLE X:3(A)

27. Through the Vilsack Letter, the United States government issued directives, backed up by a threat of regulatory amendments. This constitutes an unreasonable administration of the COOL legislation and the Final Rule, contrary to GATT Article X:3(a), because on the one hand the Letter invokes "the intent of Congress" and on the other hand it issues directives to US industry for which no authority exists.

VI. GATT ARTICLE XXIII:1(B)

28. Canada is entitled under Article XXIII:1(b) of the GATT 1994 to expect market access to the United States for its live cattle and hogs that corresponds to the tariff concessions that would apply, on a MFN basis, between the United States and Canada, under the *WTO Agreement*. Given the absence of any tariff on imported live hogs and a very low tariff rate in respect of live cattle under the US MFN schedule, Canada was entitled to reasonably expect that its access to the US market for live cattle and hogs would not be restricted through the effects of the COOL measure. Canada could not have expected the possibility of a labelling regime formulated in the manner of the COOL measure, which requires US retailers to label the origin of meat in a manner that is fundamentally at odds with the long-standing rule of US customs law – *i.e.*, the recognition of substantial transformation.

ANNEX D-8

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF MEXICO AT THE SECOND SUBSTANTIVE MEETING

I. INTRODUCTION

1. The COOL measure constitutes an attempt by the US to disguise a restriction on trade as a consumer information measure.

2. Mexico has a competitive advantage in the production of feeder cattle and an efficient and competitive industry has developed in this sector. For decades, Mexican cattle exports were fully integrated into the US market and were commingled with US cattle at all of the production stages. The COOL measure has broken this integration and has adversely affected the conditions of competition of Mexican cattle compared to like US cattle.

3. The COOL measure is made up of statutory provisions, regulations and administrative guidance, all of which Mexico is challenging as a single measure.

4. The scope of Mexico's challenge is narrow. It concerns an internal measure that discourages the use of imported inputs, specifically Mexican feeder cattle, to produce domestic US beef products.

5. Non-tariff measures such as the COOL measure are particularly problematic for developing country Members. It is important that the Panel carefully review the measure and cumulatively apply, in a strict manner, the WTO provisions raised in Mexico's claims.

6. Mexico requests that the Panel rule on each of Mexico's claims and avoid the exercise of judicial economy. This is necessary to achieve a satisfactory resolution of this dispute.

II. MEXICO'S *DE FACTO* DISCRIMINATION CLAIMS UNDER ARTICLE III:4 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TBT AGREEMENT

7. The WTO-inconsistent nature of the COOL measure is most apparent in the *de facto* discrimination it creates against imports of Mexican cattle.

A. LESS FAVOURABLE TREATMENT

8. The United States argues that Mexico misinterprets past WTO Reports, (*Korea – Various Measures on Beef* and *Dominican Republic – Import and Sale of Cigarettes*). Contrary, these reports support Mexico's claims.

9. Mexico is citing these reports for two principles. First, whether or not imported products are treated less favourably than like domestic products should be assessed by examining whether a measure modifies the *condition*s *of competition* in the relevant market to the detriment of imported products. Second, that a measure accords less favourable treatment to imported products if it gives domestic like products a competitive advantage in the market over imported like products. The facts in *Korea – Various Measures on Beef* are similar to this dispute, the effect of the COOL measure is to restrict Mexican born cattle access to the normal distribution chain.

10. As a direct result of the COOL measure, the conditions of competition in the relevant market have been modified to the detriment of imported Mexican cattle in the following ways: *(i)* reduction in processing plants accepting Mexican cattle; *(ii)* reduction in the number of days per week Mexican cattle are processed; *(iii)* reduction in backgrounders and feedlots that will accept Mexican cattle; *(iv)* and advanced notification requirements for processing.

11. The COOL measure has also caused US packing plants to reduce the price paid for fed cattle that were born in Mexico and raised in the United States, by means of applying a discount to the purchase price. This discount continues.

12. The United Stated affirms that Mexico has presented only "*anecdotical evidence*" to substantiate its claims. Contrary of the United States' assertion, Mexico has filed *positive evidence* in the following manner: *(i)* Current invoices; *(ii)* affidavits provided by the Mexican industry; and *(iii)* documentary evidence from packers and US processors.

13. These factors demonstrate how the COOL measure has disrupted the integrated North American market for cattle and the conditions of competition within that market to the detriment of Mexican cattle. US "like" cattle have *not* faced a reduction in processing plants, processing days, backgrounders, and feedlots, additional requirements or a COOL discount.

14. The United States also argues that there are many factors other than the COOL measure that are affecting price and trade volumes of Mexican cattle. Mexico acknowledges these other factors; however, they are irrelevant to the assessment of "conditions of competition" and Mexico need only demonstrate that the measure modifies the conditions of competition in the relevant market to the detriment of imported products. Mexico has clearly done so.

B. SEGREGATION

15. The United States wrongly argues that Mexico has not proven that the COOL measure requires segregation. Although segregation is not explicitly required by the COOL measure, in practice it is necessary for the industry to comply with the measure. Mexico has demonstrated that segregation exists as a consequence of the COOL measure: *(i)* in light of how the COOL measure is structured and designed, as a practical matter there is no way to comply with the measure without segregating; *(ii)* USDA has recognized that segregation is a necessary means; *(iii)* US packing companies are segregating; and *(iv)* studies show that segregation is required, all of these in order to comply with the COOL measure.

16. The United States asserts that the COOL measure does not require segregation. It attempts to support its assertion by pointing to 4 different options which, in its view, show that it is possible to avoid segregation. Its assertion is without merit for the following reasons: *(i)* the first option is that US slaughterhouses could process only livestock of domestic origin. This option inherently involves segregation because it excludes non-U.S. origin cattle from the processing stream and thereby segregates that source completely; *(ii)* the second option is that slaughterhouses could process livestock of exclusively mixed non-U.S. origin. This option is not economically feasible; *(iii)* the third option is that slaughterhouses could process domestic and mixed non-U.S. origin livestock on the same production day. Even though a slaughterhouse could agree on using label "B" only, it would still need to segregate; and *(iv)* under the final option, the slaughterhouses could process domestic and mixed origin livestock on separate days. This option inherently involves segregation.

17. Thus, it is clear that segregation in some form is required by the COOL measure.

C. THE COSTS OF COMPLIANCE WITH COOL CAN BE MINIMIZED BY USING US BORN CATTLE ONLY

18. The United States argues that a comparison of the four options will show that the cost of processing only US origin livestock is not significantly different from the cost of complying with COOL by other means. This is incorrect. Segregation represents compliance costs, and meat processors can minimize the costs of compliance by using US born cattle only.

19. Regarding the US arguments that commingling avoids segregation, even if slaughterhouses use the commingling rules, they need to segregate to be certain that they are complying with the rules and therefore must bear the attendant segregation costs.

20. The US argument that processing cattle from different origins during different days does not result in additional costs is wrong. This requires segregation in order to identify the cattle and gather animals from the same weight and the same origin.

D. THE INCREASE OF EXPORTS OF MEXICAN CATTLE RELATIVE TO THE PREVIOUS YEAR DOES NOT ELIMINATE THE DESCRIBED EFFECTS OF THE COOL MEASURE

21. The United States refers to the recent increase in exports of Mexican cattle to the US Increased exports have been due to factors such as general supply and demand conditions in the US market.

22. However, the modification of conditions of competition continues. But for the COOL measure, the volume and selling prices of Mexican cattle would be even higher. Also, it is not necessary for Mexico's claims to demonstrate adverse trade effects. It only needs to demonstrate that the conditions of competition have been modified by the COOL measure. Mexico has done this.

E. ACTIONS OF PRIVATE PARTIES

23. The United States argues that it is not the COOL measure that is causing the problems facing Mexican cattle but, rather, the actions of private participants in the US market. The United States misinterprets and misapplies the Appellate Body's reasoning in *Korea – Various Measures on Beef*.

24. In this dispute, the necessity of US market participants to take action to reduce the number of plants processing Mexican cattle, reduce the number of processing days, reduce the number of backgrounders and feedlots that will accept Mexican cattle and impose advance notice requirements is imposed by the COOL measure itself. If not for the COOL measure, these actions would not have taken place. It is the measure and not private choice that is modifying the conditions of competition.

F. ORIGIN NEUTRAL MEASURES

25. The United States argues that the COOL measure is origin neutral. In support of its argument, it cites as authority the Appellate Body report in *Dominican Republic – Import and Sale of Cigarettes*. However, the discrimination in this dispute does not depend on the characteristics of individual importers but, rather, on the origin of the cattle. In this dispute *it does matter* from which country the importer/re-seller purchased the cattle.

26. It is notable that the examples that the United States presents of pre-COOL segregation are origin neutral. The COOL measure is *not* origin neutral. The origin of the cattle is precisely what the COOL measure is about.

III. THE COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.2. OF THE TBT AGREEMENT

A. INTRODUCTION

27. The United States has not raised any new arguments regarding Mexico's claim.

B. THE EVIDENCE PRESENTED BY THE UNITED STATES ABOUT CONSUMERS DEMANDING COUNTRY OF ORIGIN INFORMATION DOES NOT SUPPORT THE US ARGUMENTS

28. The United States presents comments from individual consumers indicating their desire to know the origin of the food that they buy, which do not support the US arguments.

29. The vast majority of the statements presented by the United States relate to country of origin in general and not for the specific origin rules created for meat products, and, specifically not for the origin of the input used to produce the meat. In the narrow context of the subject matter of this dispute, they cannot be used to justify the COOL measure.

30. Also, all the statements were made after the creation of the 2002 Farm Bill, so they do not serve as evidence of the reasons why the US government created the COOL measure.

31. In *EC – Sardines* the panel stated that "the danger is that Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory intervention on the basis of governmentally created consumer expectations."

32. The introduction of the COOL measure in the 2002 Farm Bill and the discussions concerning that measure would have shaped consumer expectations and perceptions rather than the expectations and perceptions that would exist in the absence of the measure.

33. The evidence presented by Mexico clearly shows that the intent of the measure was to protect US ranchers and cattle producers with the political cover of providing information to the consumer at the retail level.

34. Finally, the consumer poll referred to by the US does not represent a reliable source to demonstrate what consumers want in the context of this dispute.

C. THE COOL MEASURE DOES NOT FULFIL THE STATED OBJECTIVE OF THE UNITED STATES AND INSTEAD FULFILS A PROTECTIONIST OBJECTIVE

35. The objective of the COOL measure is protectionist and is not legitimate.

36. If the Panel finds that the objective of the measure is legitimate, the COOL measure does not fulfil that objective. The COOL measure does not achieve the stated objective. Rather, it misleads consumers when labels other than the "A" label are used.

37. In the case of Mexico, it misleads the consumer when label B (Product of the United States and Mexico) is used. The most diligent consumer will never know that the meat labelled as "B" was produced in the United States from an animal that *(i)* was born in Mexico and has the same genetic features of the cattle born in the United States, *(ii)* was sent to the United States at a very early period in its life to be fed in the same grasslands on which cattle born in the United States are fed, *(iii)* was

sent thereafter to a feedlot to be fed with the same grains with which cattle born in the United States are fed, *(iv)* obtained more than 70% of its weight in the United States, and *(v)* was slaughtered and processed into meat in the same facilities as the cattle born in the United States, and *(vi)* its meat was classified with the same quality grading as meat derived from an animal born in the United States.

38. The United States refers to the ability of US producers to distinguish their products for their quality. This assertion is without merit. The beef produced from cattle that was born in Mexico, has identical quality from beef produced from a cattle born in the United States.

39. The only label giving accurate information to the consumer is label "A". The United States argues that the COOL measure fulfils its stated objective of consumer information at the level it considers appropriate. However, the level it considers appropriate is the level that will allow the United States to achieve its protectionist objective by isolating label "A" beef and maximizing production under that label.

D. MEXICO HAS PRESENTED AT LEAST THREE REASONABLY AVAILABLE ALTERNATIVES

40. Mexico has identified three less trade restrictive alternatives that fulfil any legitimate consumer information objective.

2. Voluntary labelling with "born, raised, slaughtered rule" is a reasonably available alternative

41. Although the first alternative will satisfy consumers interested in this information, it is not accepted by the United States because in the view of the United States it will not be sufficiently adopted by participants in the US market. It is notable that this alternative will transfer the costs of the labelling to their domestic industries and their consumers.

3. Mandatory lbailing based on substantial transformation is a reasonably available alternative

42. The benefit of this second alternative is that it can be a mandatory measure that does not depend on voluntary implementation in the US market. This alternative is not acceptable to the United States because it would not target meat based on where the animal was born. In other words, it would not support the protectionist element.

4. A real traceback system is a reasonably available alternative

43. The third alternative is a tracing system that should ensure tracking from the farm where the animal was born to the table where the meat is consumed. Since such a measure tracks cattle based on the farm on which they originate, it does not discriminate based on national origin. There is no incentive under such a system to reduce access for Mexican cattle. The same costs will have to be incurred irrespective of the country of origin of the cattle. However, the United States cattle producers, which strongly support the COOL measure, have strongly opposed a tracing system that would create equal costs to every participant, instead of creating a disproportionate cost on Mexican cattle.

IV. THE COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.4 OF THE TBT AGREEMENT

44. The COOL measure is not based on the relevant international standard that is effective and appropriate for informing consumers about the country of origin of the product at issue.

45. The United States argues that some meat sold in US stores is not prepackaged but it offers no defence to the fact that the Codex standard applies to the prepackaged meat products that compose most of the meat sales by large grocery stores.

46. The very purpose of the Codex standard is to avoid deception and confusion for consumers. The United States has not explained why the substantial transformation rule is not effective or appropriate. It is only protectionism that cannot be achieved.

V. THE COOL MEASURE IS INCONSISTENT WITH ARTICLE 12.3 OF THE TBT AGREEMENT

47. Contrary to the US assertions, it did not take into account Mexico's special financial and trade needs as a developing country as required by Article 12.3.

48. The United States did not notify or give any opportunity to Mexico to participate in the drafting of the 2002 Farm Bill. Only after the COOL Measure was approved, signed and ready to be implemented, was Mexico able to provide comments to the United States. This situation cannot amount to compliance with Article 12.3 of the TBT Agreement.

49. Also, the United States did not undertake any discernible effort to take into account Mexico's special needs as a developing country in the creation of the COOL Measure. The issue is that the US did not take seriously the special needs of Mexico as a developing country in accordance with Article 12.3 of the TBT Agreement.

VI. THE COOL MEASURE IS INCONSISTENT WITH ARTICLE X:3 OF THE GATT 1994

50. The United States argues that the COOL Measure is not in breach of Article X:3, and focuses on the Vilsack letter and the development of the 2009 Final Rule, claiming that neither put the COOL measure into practical effect. Mexico does not see how those actions taken for purposes of the administration of the measure cannot be considered as part of the administration of the measure. The United States ignores the evidence put forward by Mexico that USDA pressured US processors not to commingle US cattle with imported cattle and is wrong in its interpretation of "administration" under Article X:3.

51. The continuing change in the criteria expressed by the USDA with regard to the compliance with the COOL measures, which included but was not limited to the issuance of the Vilsack letter, are clear examples of a measure that is not administered in a reasonable and predictable manner within the meaning of GATT Article X:3.

VII. THE COOL MEASURE NULLIFIES OR IMPAIRS BENEFITS ACCRUING TO MEXICO WITHIN THE MEANING OF ARTICLE XXIII:1(B) OF THE GATT 1994

52. The United States argues that Mexico has failed to identify a relevant benefit under the covered agreement. The nullification or impairment not only exceeds the NAFTA tariff but also the WTO tariff, and thus, nullifies and impairs benefits under the covered agreements.

53. Also, none of the previous initiatives presented by the United States demonstrates that Mexico, after years of trade in cattle with the United States, could have expected a rule that would require the labelling of the meat derived from cattle born in Mexico, but raised and slaughtered in the United States as "Product of the United States and Mexico". A reasonable assessment of the facts demonstrated that Mexico could have not expected such rule.

VIII. CONCLUSION

54. Mexico has presented a prima facie case that demonstrates that the COOL measure is a protectionist measure that is inconsistent with core provisions of the WTO.

55. Mexico respectfully requests that the Panel find that the COOL measure is inconsistent with the aforementioned provisions of the WTO.

ANNEX D-9

**CLOSING ORAL STATEMENT OF CANADA
AT THE SECOND SUBSTANTIVE MEETING**

I. INTRODUCTION

1. Mr. Chairman, members of the Panel, we thank you for the opportunity to provide a few concluding comments.

2. We appreciate the contributions made by the parties and third parties through their statements and answers to questions at the second substantive meeting.

II. TBT ARTICLE 2.1 AND GATT ARTICLE III:4

3. In respect of Canada's claims under TBT Article 2.1 and GATT Article III:4, Canada is pleased that there was more of an exchange at the second substantive meeting about the effects of the COOL measure. As noted by Canada, the discriminatory effects of the COOL measure are at the heart of this dispute.

4. Canada wishes to emphasize again that proof of actual trade effects is not a prerequisite for a finding of less favourable treatment and that all that is required for such a finding is proof that the conditions of competition for Canadian-born cattle and hogs have been adversely affected by the COOL measure, as compared with US-born cattle and hogs. Canada has provided abundant documentary and econometric evidence demonstrating these adverse effects on the conditions of competition. Moreover, despite attempts to impugn Dr. Sumner's work, the United States has not been able to undermine Canada's documentary and econometric evidence, which stands unrefuted.

5. Canada appreciates the Panel's useful questions on Canada's econometric analysis quantifying the negative effects the COOL measure has had and is having on fed and feeder cattle and market hogs and feeder pigs from Canada. Canada looks forward to further assisting the Panel in assessing the quantification of these negative effects. Specifically, we will seek to assist the Panel in that endeavour by further developing and explaining, with reference to the appropriate economic literature, the strengths of particular economic and econometric approaches to incorporate the influence of the state of the general economy (including strong economic conditions and recessions) on meat demand and the derived demand for livestock.

6. Canada objects to the characterization by the United States of the multiple witness statements submitted by Canada as "anecdotal evidence" (in paragraph 30 of the Second Opening Statement of the United States). These witness statements, confirmed by letters from major US slaughter houses, are not "anecdotal" but demonstrate the actual effects of the COOL measure in the US market. Nor have these "anecdotes" been rebutted by any evidence from the United States. This is direct evidence of less favourable treatment of Canadian-born cattle and hogs from private actors in the US market. If it were not true that slaughter houses and others limited or stopped their acceptance of Canadian-born cattle and hogs because of the COOL measure, surely the United States could have provided a myriad of statements to that effect. They have provided none: not on that key point, nor even on its secondary argument that pre-existing segregation for other purposes somehow reduces the costs of segregation imposed by the COOL measure.

III. TBT ARTICLE 2.2

7. As to TBT Article 2.2, there has been extensive discussion about the stated objective of the United States (providing information to consumers) and what evidence the United States has that consumers in the United States want country-of-origin labelling of beef and pork.

8. The United States remains unable to explain what additional information the COOL measure provides to consumers. In particular, in the context of the discussion of USDA grading and health certification, it has been unable to explain what additional value the confusing information provided by the COOL measure gives to consumers. While the United States has alleged generally that consumers may make origin distinctions on the basis of "quality", it has presented no evidence that on the specific facts of this case there is any difference in quality, nor that consumers perceive that there is. Canada emphasizes that this case deals with livestock imported into the United States, often raised for the majority of their life in the United States, slaughtered in the United States, and subject to the same USDA grading and food safety certification (and other US quality, health and safety, and animal welfare programs) as US-born and –raised livestock. While some consumer groups have supported COOL, none has cited alleged quality differences as a reason for that support – consumer support overwhelmingly is based either on protectionist purposes or a false connection between the COOL measure and health and safety.

9. Canada notes also that the United States has presented no evidence that consumers would obtain any less information related to quality or other objective criteria from the "mixed-origin" label, i.e., "Product of Canada, Mexico, or the United States". This is essentially the option the European Union advocates in paragraph 14 of its Second Oral Statement. Canada does not agree with the EU that consideration of this option obviates the need to find a violation of TBT Article 2.1. However, Canada notes that this option is another alternative measure that would better fulfil the United States' purported legitimate objective than the COOL measure.

10. US industry planned to use the mixed-origin label (Label "B") after the Interim Final Rule was issued until certain US producer interests (not consumer interests) pressured Congress and the USDA to prevent that. It was not until after that, following pressure by Chairman Peterson on slaughter houses to use mostly Label "A", and the issuance by USDA of new guidance documents, that the first communication stating consumer interest on the question was received. It is therefore obvious that consumer interests did not influence the formulation of the COOL measure.

11. Mr. Chairman, Members of the Panel, we thank you for your attention and your ongoing work on this very important matter for Canada and the other Members of the World Trade Organization. In addition, we would like to express our appreciation to the members of the WTO Secretariat for organizing this meeting, and to the interpreters. We look forward to receiving your written questions.

ANNEX D-10

CLOSING ORAL STATEMENT OF MEXICO AT THE SECOND SUBSTANTIVE MEETING

I. INTRODUCTION

1. I would like to follow up on the *amicus curiae* issue and the points raised by Canada. On further reflection Mexico agrees with Canada that letter contains some elements that are different from the exhibit presented by the United States. Mexico agrees with Canada's comments on this point.

2. The COOL measure has the effect of protecting producers not informing consumers. The historic integration between the Mexican and US cattle industries has been destroyed by a system that provides no useful information to US consumers. COOL ignores the fact that the Mexican Cattle and US are alike in every respect, except the place where they were born. The only purpose for this provision is to impose additional cost on Mexican cattle, thus benefiting the US industry.

3. I would like to re-iterate Mexico's request that the Panel rule on all of the claims before it and not exercise judicial economy with respect to any of those claims.

4. In its third party statement today, the European Union suggested that this dispute could be resolved through a ruling on Mexico and Canada's claim under Article 2.2 of the TBT Agreement and that the Panel could judicially economize on the remainder of the claims. This is incorrect.

5. Mexico's discrimination claims are very important to its challenge and it is essential that the Panel rule on both discrimination claims under Article 2.1 and III:4 of the GATT. It is also necessary that the Panel rule on the remainder of the claims because this is the first time a mandatory country of origin labelling measure has been challenged and such rulings will allow for the satisfactory resolution of this dispute.

II. MEXICO'S DISCRIMINATION CLAIMS

6. Starting with Mexico's discrimination claims, Mexico is requesting that the Panel make findings under both Article 2.1 of the TBT Agreement *and* Article III:4 of the GATT 1994.

7. Mexico has presented evidence establishing a prima facie case that the COOL measure modifies the *conditions of competition* in the relevant market to the detriment of imported products in the following ways:

- reduction in processing plants accepting Mexican cattle;
- reduction in the number of days per week Mexican cattle are processed;
- reduction in backgrounders and feedlots that will accept Mexican cattle; and
- additional requirements imposed on Mexican cattle in the form of advanced notification requirements for processing.

8. The COOL measure has also caused US packing plants to reduce the price paid for fed cattle that were born in Mexico and raised in the United States, by means of applying a discount to the purchase price.

9. US "like" cattle have *not* faced a reduction in processing plants, processing days, backgrounders, and feedlots. They have not faced additional requirements such as advanced notification requirements. Finally, they have not faced the COOL discount.

10. The United States' defence is limited to arguing that Mexico is relying on "anecdotal" evidence limited to certain participants and is not reflective of conditions in the market as a whole. These points are completely without merit.

11. The United States' position that Mexico's evidence is "anecdotal" goes to the quality of the evidence. The term is used to refer to evidence that is in the form of an "anecdote" and there is doubt about its veracity. It is also used where evidence is considered untrustworthy.

12. This is plainly *not* the case for the evidence put forward by Mexico to establish the modification of conditions of competition. The evidence put forward by Mexico is "positive evidence" of an affirmative, objective and verifiable character. It is credible evidence. That evidence is in the form of documents and invoices from large US beef processors and affidavits from the Mexican cattle industry. For instance, MEX-42, containing BCI, presents a communication from a major slaughterhouse indicating that Mexican-born cattle may be processed only in one plant due to COOL segregation. Other exhibits of Mexico showing the reduction of competitive conditions against Mexican-born cattle are MEX-33, MEX-37, MEX-46, MEX-64 and MEX-97. This evidence is corroborated by other evidence in the form of price statistics and industry reports that the United States has failed to rebut.

13. The United States' argument that the evidence is not reflective of conditions in the US market as a whole is equally without merit.

14. In light of this, Mexico has focused its evidence on the top three US beef processors (Tyson, Cargill and JBS) as well as a few others. These processors are market leaders and their actions are reflective of the market as a whole. The US cattle market is a commodity market which inherently will drive actions and prices to similar levels across the market. Canada's evidence on the modification of conditions of competition corroborates the fact that the effects are throughout the US market as a whole.

15. Mexico's evidence on the price discount is reflected in the invoices of specific processors *as well as* in the pricing data for the US cattle market as a whole (Exhibits MEX-37 and MEX-48). For instance, MEX-97, containing BCI, presents recent invoices from July and August 2010 where the price of Mexican-born cattle was subject to a direct reduction in price for a COOL adjustment. Even the evidence on US market prices that was filed by the United States confirms that the discounts on Mexican feeder cattle are market-wide (Exhibit US-108).

16. Thus, contrary to the argument of the United States, Mexico has presented a prima facie case that the modification of conditions of competition in the relevant market to the detriment of imported products is occurring across the US cattle market.

17. The United States also argues that there are many factors that influence the trade effects related to Mexican cattle exports and that the cost of the COOL measure to the industry is not significant.

18. Mexico's case focuses on conditions of competition not trade effects. It is not a legal requirement that Mexico prove adverse trade effects in order to succeed in its *de facto* discrimination claims (*AB, Japan – Alcoholic Beverages,* p. 16; AB, *US – FSC,* para. 215). It is also not necessary

for it to demonstrate the costs of the COOL measure in financial terms. It is sufficient for Mexico to demonstrate that the conditions of competition have been modified. We has clearly done so.

19. The European Union focuses on the costs that are inherent in regulating and the fact that those costs might be felt differently among participants. Mexico acknowledges this fact. However, it is not relevant to Mexico's discrimination claims. Mexico's claims do not focus on the cost associated with the COOL measure. To the extent that costs are relevant, Mexico focuses on the distribution of those costs to Mexican cattle compared to like US cattle. Moreover, Mexico is not arguing about the magnitude of those costs but rather how the conditions of competition are modified by the COOL measure as a result of the disincentives to carry Mexican cattle.

20. The European Union also argues that in a situation such as this, a complainant like Mexico must:

> "necessarily have to adduce evidence of other facts (at least two or more) and explain how they work together to support the finding of other facts, of which there is no direct evidence, so as to build a reasoned and adequate explanation between the facts thus established and any finding of inconsistency". (paragraph 6 of oral statement)

21. Mexico fundamentally disagrees with this characterization of Mexico's case. Mexico has *direct evidence* of the modification of conditions of competition and this is supported by both positive evidence from numerous sources as well as by corroborating evidence. Even if the European Union's characterization of Mexico's case was accurate, Mexico has in any event met the evidentiary standard stated by the European Union, that is Mexico has adduced evidence of at least two or more facts and has explained how they work together to support the finding of other facts.

III. MEXICO'S CLAIMS UNDER ARTICLE 2.2 OF THE TBT AGREEMENT

22. The obligations in Article 2.2 are complex. It is therefore important that the Panel apply each of the elements of that Article in a comprehensive manner starting with the determination of the "objective" of the COOL measure.

23. Where the substantive content of an obligation is complex such as it is in the case of Article 2.2, it is helpful to have an established methodology to interpret and apply the provision. Mexico has set out such a methodology in its first written submission as has Canada.

24. The objective of the measure is the starting point for this obligation and it must be carefully defined at the outset.

25. Mexico has explained why the objective of the measure is overwhelmingly protectionist.

26. However, if the Panel concludes that there is a consumer information objective within the measure, Mexico considers that it is important that the Panel examine and define not just the general categorization of the objective (e.g., "the provision of consumer information" or "the provision of consumer information on country of origin") but examine and define all relevant details. What exact type of consumer information on country of origin? In the case of the COOL measure, the objective is to provide information to consumers concerning whether the cattle that were an input into the beef were born outside the US

27. This objective would be clear from the design and structure of the COOL measure. The only accurate information provided by the COOL measure is whether the beef is from cattle born, raised and slaughtered in the United States.

28. The next question is whether the objective of providing information to consumers concerning whether the cattle that were an input into the beef were born in the US or, by negative implication, they were born in a foreign country, is legitimate.

29. In Mexico's view, the COOL measure as structured has the sole purpose of distinguishing between domestic and foreign inputs in a protectionist manner. The objective of protectionism can never be found to be legitimate within the meaning of Article 2.2 because it goes against the fundamental purpose of the WTO Agreements—i.e., to avoid protectionism.

30. If there ever was a measure that had an objective that was not legitimate it is the COOL measure. If this measure is found to be legitimate it will rob the "legitimacy" requirement in Article 2.2 of any meaning.

31. If the Panel disagrees with Mexico on this point, it is Mexico's alternative position that the COOL measure does not fulfil the legitimate objective. The reasons for this are set out in Mexico's written submissions and answers to questions of the Panel.

32. The United States argues that the gaps in product and sector coverage in the COOL measure are the result of flexibility to take into account the various interests including the interest of Mexico. Mexico disagrees. The flexibility has no value to Mexican cattle. The only value that flexibility had was to US domestic interests. As noted in Mexico's written submission, that flexibility minimizes the adverse impact of the COOL measure on US domestic interests while maintaining the effect of the measure on the main distribution channel for beef and, therefore, maximizing its adverse effect on imported Mexican cattle.

33. If the Panel finds that the COOL measure fulfils a legitimate objective, Mexico has presented three less trade restrictive alternatives to the COOL measure that would meet the same legitimate objectives taking into account the risks non-fulfilment would create.

34. As explained in response to questions during this meeting, the more precise the information provided in a consumer information measure the fewer options that are available to implement that measure in a manner that is consistent with Article 2.2.

35. If the United States wishes to provide the highest level and quality of consumer information related to origin it may be limited to the third alternative proposed by Mexico, which would be a fairly implemented traceback system. As explained in paragraph 78 of Mexico's second written submission, such a system is technologically and economically feasible in the United States.

IV. MEXICO'S CLAIMS UNDER ARTICLE 12 OF THE TBT AGREEMENT

36. This case presents crucial issues regarding the interpretation of Article 12.3, in particular whether it has any meaning at all.

37. The United States has asserted that it adjusted the COOL measure at the request of Mexico. There is no evidence that the United States took any steps to accommodate <u>Mexico</u>, as opposed to US interests, such as excluding restaurants and small butcher shops. Indeed, as we have shown, the burden of the costs of the measure has been disproportionately shifted to Mexico.

38. It is Mexico's position that it is not sufficient for a Member simply to make a new measure available for comment, as the United States is arguing. That would make Article 12.3 of the TBT meaningless.

39. In any event, the United States did not notify or give any opportunity to Mexico to participate in or comment upon the drafting of the original COOL measure (i.e., in the drafting of the 2002 Farm Bill). It is this original law that established the requirement to base origin on where the cattle were born. Mexico was given the opportunity to comment only after the enactment into law. This situation cannot amount to compliance with Article 12.3 of the TBT Agreement.

ANNEX E

WORKING PROCEDURES FOR THE PANEL

UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING (COOL) REQUIREMENTS (DS384 and DS386)

WORKING PROCEDURES FOR THE PANEL
AS REVISED ON 21 SEPTEMBER 2010

1. The Panel will provide the parties to the dispute (hereinafter "parties") and third parties to the dispute (hereinafter "third parties") with a timetable for panel proceedings and shall follow the relevant provisions of the Dispute Settlement Understanding (DSU). In addition, the following working procedures shall apply.

2. The Panel shall conduct its internal deliberations in closed session. The parties, and the third parties, shall be present at the meetings only when invited by the Panel to appear before it. The Panel may open its meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting the parties.

3. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these working procedures shall preclude a party or third party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the Panel with the parties and third parties, the parties shall transmit to the Panel written submissions in which they present the facts of the case and their arguments. The third parties may also transmit to the Panel written submissions in accordance with the timetable established by the Panel.

5. At its first substantive meeting with the parties, the Panel shall ask Canada and Mexico then the United States to present their cases. All third parties may be present during the entirety of the first substantive meeting with the parties.

6. All third parties shall be invited to present their views during a session of the first substantive meeting of the Panel set aside for that purpose. All third parties may be present during the entirety of this session with third parties. During this meeting, third parties may ask questions to the parties or to the other third parties. The parties and the other third parties, however, have no obligation to respond to these questions.

7. Formal rebuttals shall be made at the second substantive meeting of the Panel. At this meeting, the United States shall have the right to take the floor first to be followed by Canada and Mexico. The parties shall submit, prior to that meeting, written rebuttals to the Panel in accordance with the timetable. All third parties may be present during the entirety of the second substantive meeting with the parties.

8. The Panel may at any time put questions to the parties and third parties and ask them for explanations either during the course of a meeting with the parties and third parties or in writing. Written replies to questions shall be submitted in accordance with the timetable.

9. All third parties shall be invited to present a brief statement during a session of the second substantive meeting of the Panel set aside for that purpose. All third parties may be present during the entirety of this session with third parties. During this meeting, third parties may ask questions to the parties or to the other third parties. The parties and third parties, however, have no obligation to respond to these questions.

10. The parties and third parties shall make available to the Panel a written version of their oral statements by 5:30 pm (Geneva time) on the first working day after the meeting. Each party shall make available a copy of the written version to the other parties, and each third party shall make available a copy of the written version to the parties and the other third parties, at the same time it makes available the written version to the Panel. The parties and third parties are encouraged to provide a provisional written version of their oral statements at the time the oral statement is presented.

11. The presentations, rebuttals and statements referred to in paragraphs 5, 6, 7, 8 and 9 shall be made in the presence of the parties. Moreover, each party's written submissions, written answers to questions and comments thereon, comments on the descriptive part of the report, and written request for review of precise aspects of the interim report and comments on another party's request shall be made available to the other parties. Each party's written submissions and written answers to questions after the first substantive meeting with the Panel shall also be made available to all third parties.

12. Any request for a preliminary ruling (including rulings on jurisdictional issues) shall be submitted at the earliest possible moment, and in any event no later than in a party's first written submission. If a party requests such a preliminary ruling, the other parties shall submit their respective response to such request within a time limit specified by the Panel. Exceptions to this procedure will be granted upon a showing of good cause.

13. The parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to factual evidence necessary for purposes of rebuttals, answers to questions or comments on answers provided by each other. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other parties shall be accorded a period of time for comment, as appropriate.

14. To facilitate the maintenance of the record of the dispute, and for ease of reference to exhibits submitted by the parties, the parties are requested to number their exhibits sequentially throughout the stages of the dispute. For example, exhibits submitted by Canada could be numbered CAN-1, CAN-2, etc, exhibits submitted by Mexico could be numbered MEX-1, MEX-2, etc. and exhibits submitted by the United States could be numbered US-1, US-2, etc. If, for example, the last exhibit in connection with the first submission was numbered CAN-5, the first exhibit of its next submission thus would be numbered CAN-6. The parties and third parties may submit exhibits as electronic files saved on CD-ROMs. However, 2 paper copies of the exhibits contained on a CD-ROM shall be provided to the Panel. Moreover, where a party requests a paper copy of an exhibit submitted as an electronic file, the party or third party having submitted the exhibit shall provide, within three business days, one paper copy to the other parties to the dispute and, where an electronic exhibit was served on the third parties, on the third parties.

15. The parties and third parties shall submit executive summaries of their written submissions (excluding any separate requests for a preliminary ruling and responses thereto) and oral statements within twenty days of the original submission or statement concerned. Each executive summary of the written submissions to be provided by each party shall not exceed 10 pages in length and each executive summary of the oral statements shall not exceed 5 pages in length. The summary to be

provided by each third party shall not exceed 5 pages. The Panel may revise these page limits upon request of a party. Paragraph 21 shall apply to the service of executive summaries.

16. The executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case. The Panel intends to use them solely for the purpose of preparing the descriptive part of its report, subject to any modifications deemed appropriate by the Panel. The replies of the parties and third parties to questions and the parties' comments on each other's replies to questions will not be attached to the Panel report as annexes. They will be reflected in the findings section of the Panel report where relevant.

17. The parties and third parties to these proceedings have the right to determine the composition of their own delegations. The parties and third parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations act in accordance with the rules of the DSU and the Working Procedures of this Panel. The parties and the third parties shall provide a list of the participants of their delegation before each meeting with the Panel to the Secretary of the Panel, Mrs. Tessa Bridgman (e-mail: tessa.bridgman@wto.org).

18. To allow the Panel to prepare its report in an efficient manner, any party wishing to request a separate panel report pursuant to Article 9.2 of the DSU shall make such a request no later than at the second substantive meeting of the Panel.

19. Following issuance of the interim report, the parties shall have two weeks to submit written requests to review precise aspects of the interim report and to request a further meeting with the Panel. The right to request such a meeting must be exercised no later than at the time the written request for review is submitted. Following receipt of any written requests for review, in cases where no further meeting with the Panel is requested, the parties shall have the opportunity within one week to submit written comments on the other parties' written request(s) for review. Such comments shall be strictly limited to responding to the other parties' written request(s) for review. The parties are also reminded that the interim report shall be kept strictly confidential and shall not be disclosed. The Panel reserves the right to earmark its communications to enable the identification of possible breaches of confidentiality, especially the Panel's interim report and its final report before the latter's circulation to all Members.

20. The Panel will do its utmost to provide the parties with electronic versions of the descriptive part of its report, its interim report and its final report. Paper copies will be provided to the parties in any event. In case of inconsistency between the electronic and paper copy version of these documents, the hard copy version shall prevail.

21. The following procedures regarding service of documents apply:

(a) Each party and third party shall serve any document submitted to the Panel directly on the other parties. Each party shall, in addition, serve its written submissions and written answers to the Panel's questions after the first substantive meeting on all third parties. Each third party shall serve any document submitted to the Panel on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

(b) Each party and third party should provide the Panel and the other parties with their submissions, written answers to questions and comments invited by the Panel by 7:00 p.m. (Geneva time) of the date referred to in the timetable, unless a different time is set by the Panel. Each party shall, in addition, provide all third parties with its written answers to the Panel's questions after the first substantive meeting by 7:00 p.m. (Geneva time) of the date indicated by the Panel.

(c) Each party and third party shall provide the Panel with 9 paper copies of all documents submitted to the Panel. Where a party or third party submits exhibits as electronic files pursuant to paragraph 14, it shall provide the Panel with four CD-ROMs containing such files and 2 paper copies of the files contained on the CD-ROMs. All these copies shall be filed with the Dispute Settlement Registrar, Mr. Ferdinand Ferranco (office 3178).

(d) At the time it provides a hard copy of its submissions, each party and third party shall also provide the Panel with electronic copies of all its submissions on a CD-ROM or DVD or as an e-mail attachment in a format compatible with the Secretariat's text-editing software. E-mail attachments shall be sent to the Dispute Settlement Registry (DSRegistry@wto.org) with a copy to Ms. Aegyoung Jung (e-mail: aegyoung.jung@wto.org), Mr. János Volkai (janos.volkai@wto.org) and Mrs. Tessa Bridgman (e-mail: tessa.bridgman@wto.org). If a CD-ROM or DVD is provided, it should be delivered to Mr. Ferdinand Ferranco in four copies.

22. The Panel reserves the right to modify these procedures at any time following consultations with the parties.

UNITED STATES - CERTAIN COUNTRY OF ORIGIN LABELLING (COOL) REQUIREMENTS (DS384 and DS386)

Procedures of the Panel Concerning Business Confidential Information[1]

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel.

2. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the Party submitting the information, that is not available in the public domain, and the release of which would seriously prejudice an essential interest of the person or entity that supplied the business information to the Party.

3. No person may have access to BCI except a member of the Secretariat or the Panel, a party's or third party's employee participating in the dispute, and a party's or third party's outside advisor for purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of cattle, swine, beef, or pork. When a party or third party provides BCI to an outside advisor who is an employee or officer of an industry association of such enterprises, that party or third party shall obtain written assurances from such advisor that he or she has read and understands these Working Procedures and will not disclose any BCI in contravention of the Working Procedures.

4. A party or third party obtaining access to BCI as a result of the BCI being submitted in this dispute shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute.

5. A party or third party submitting or referring to BCI in a document shall mark the cover and each page of the document to indicate the presence of BCI in the document as follows: BCI shall be placed between double brackets (for example, [[xx,xxx.xx]]). The cover and the top of each page of the document shall contain the notice "Contains Business Confidential Information". Any BCI that is submitted in electronic form shall be clearly marked with the phrase "Contains BCI" on a label on the storage medium, and clearly marked with the phrase "Contains BCI" in the electronic file name.

6. In the case of an oral statement containing BCI to be delivered in the session not open to public observation as foreseen in paragraphs 2 and 3 of the "Procedures for open hearings, first and second substantive meetings of the Panel," the Panel should ensure that only persons authorized to have access to BCI pursuant to these procedures are permitted to hear the statement.

7. The parties, third parties, and the Panel shall store all documents containing BCI so as to prevent unauthorized access to such information.

8. The Panel shall not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel makes its final report publicly available,

[1] These procedures are adopted according to, and are an integral part of, the Panel's Working Procedures of 18 June 2010.

the Panel shall give each party an opportunity to ensure that the report does not contain any information that it has designated as BCI.

9. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX F

PROCEDURES FOR OPEN HEARINGS

UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING (COOL) REQUIREMENTS (DS384 and DS386)

Procedures for open hearings, first and second substantive meetings of the Panel[1]

1. Subject to the availability of suitable WTO meeting rooms, the Panel will start its first and second substantive meetings, on 14-16 September 2010 and 1-3 December 2010, respectively, with a session with the parties open to the public. At that session, be that within the context of the first or the second substantive meeting with the parties, each party will be asked to make an opening and closing statement. After the parties have made their statements, they will be given the opportunity to pose questions to the other party or make comments on the other party's statement. The Panel may pose any questions or make any comments during such session.

2. To the extent that the Panel or any of the parties considers it necessary, the Panel will also hold a session with the parties not open to public observation during which the parties will be allowed to make additional statements or comments and pose questions that involve business confidential information. The Panel may also pose questions during such a session.

3. In addition to its sessions with the parties, at each substantive meeting the Panel will also hold a separate session with the third parties. The Panel will start the third party session at each substantive meeting by opening a portion of this session to the public. At this portion of the third party session, any third party wishing to make its oral statement (first substantive meeting) or brief statement (second substantive meeting) in a public session shall do so. Following the third party open session, the Panel will proceed to a third party closed session during which any other third party shall make its oral or brief statement, depending on the substantive meeting. At each of these third party open or closed sessions, after the third parties' statements, the Panel or any party may pose questions to any third party or make comments concerning these statements. Third parties may also ask questions to the parties or to the other third parties; however, the parties and the other third parties have no obligation to respond to these questions by third parties.

4. The following persons will be admitted into the meeting room during all sessions of the Panel's substantive meetings, whether open or closed to the public:

- the members of the Panel;
- all members of the delegations of the parties;
- all members of the delegations of the third parties; and
- WTO Secretariat staff assisting the Panel.

5. No person shall disclose any business confidential information at any session open to the public.

6. WTO Members and Observers and the public may observe the Panel's sessions that are open to the public by means of a real time closed-circuit television broadcast to a separate viewing room. The broadcasts will be open to officials of WTO Members and Observers upon presentation of their official badges. Accredited journalists and representatives of relevant NGOs may indicate to the Secretariat their interest in attending the broadcasts (Information and External Relations Division). Members of the general public will be invited to register their interest in attending each broadcast via

[1] These procedures are adopted according to, and are an integral part of, the Panel's Working Procedures of 18 June 2010.

the WTO website, by close of business on 1 September 2010 for the first substantive meeting, and 24 November 2010 for the second substantive meeting.