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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CANADA AND MEXICO

REPORTS OF THE PANEL

Note by the Secretariat:

These Panel Reports are in the form of a single document constituting two separate Panel Reports: WT/DS384/RW and WT/DS386/RW. The cover page, preliminary pages, sections 1 through 7, and page 204 of section 8, are common to the two Reports. The page header throughout the document bears the two document symbols WT/DS384/RW and WT/DS386/RW, with the following exceptions: section 8 on page CAN-205, which bears the document symbol for and contains the Panel's conclusions and recommendations in the Panel Report WT/DS384/RW; and section 8 on page MEX-206, which bears the document symbol for and contains the Panel's conclusions and recommendations in the Panel Report WT/DS386/RW. The annexes, which are a part of the Panel Reports, are circulated in a separate document (WT/DS384/RW/Add.1 and WT/DS386/RW/Add.1).

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CDA-2	Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, *United States Federal Register,* Vol. 74, No. 10, (15 January 2009), p. 2658
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MEX-28	Declaration of Rolando Peña Hinojosa in Support of Plaintiffs' Motion for a Preliminary Injunction, Case No. 13-cv-1033-KBJ (August 15, 2013)
MEX-33	Congressional Research Service, "Animal Identification and Meat Traceability"
MEX-34	G. T. Tonsor, T. C. Schroeder and Jayson L. Lusk, "Consumer Valuation of Alternative Meat Origin Labels", *Journal of Agricultural Economics* (2012)
MEX-35	M. R. Taylor and G. T. Tonsor, "Revealed Demand for Country of Origin Labeling of Meat in the United States", *Journal of Agricultural and Resource Economics* (forthcoming)
MEX-36	USDA, "Consumers Appear Indifferent to Country-of-Origin Labeling for Shrimp" (June 5, 2012)
MEX-37	D. J. Hayes and S. R. Meyer, "Impact of Mandatory Country of Origin Labelling on U.S. Pork Exports", Center for Agricultural and Rural Development, Iowa State University, (2003)
MEX-38	Harmonized Tariff Schedule of the United States (2013) (excerpt)
MEX-41	M. B. Bowling, D. L. Pendell, D. L. Morris, Y. Yoon, K. Katoh, K. E. Belk, and G. C. Smith, "Review: Identification and Traceability of Cattle in Selected Countries Outside of North America", *Professional Animal Scientist* 24 (2008), pp. 287-94
MEX-42	Ministry of Agriculture, Forestry and Fisheries of Japan, "Cattle Identification and Traceability Systems"
MEX-43	Uruguay's Presidential media publication, "Sistema de trazabilidad es el mayor hito en la ganadería nacional en los últimos años" (May 2013)
MEX-44	Media release from BBC Mundo, "¿De dónde viene su bife? La innovación uruguaya que conquista mercados" (October 2012)
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MEX-56	U.S. Country of Origin Labeling Rules and Canadian Cattle
MEX-60	Response to Panel Questions About Statistics
MEX-62	M. R. Taylor and G. T. Tonsor, "Revealed Demand for Country of Origin Labeling of Meat in the United States", *Journal of Agricultural and Resource Economics* 38(2), (2013), pp. 235-47
MEX-82	Final Rule, Traceability for Livestock Moving Interstate, United States Federal Register, Vol. 78, No. 6 (9 January 2013), p. 2040
MEX-86	Proposed Rule – Traceability for livestock moving interstate, Summary of Economic Analysis
MEX-87	Application of CDA-126 to Mexico

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US-3	USDA Country of Origin Labeling Survey (July 2009)
US-5	WTO Members with Country of Origin Regimes
US-6	TBT Notifications of Country of Origin Measures
US-9	Canada's Mandatory COOL Requirements for Imported Products
US-10	Scope of Third Party COOL Regulations
US-20	Letter from Director-General of the GATT, Peter D. Sutherland to Ambassador Schmidt (Geneva, December 15,1993)
US-27	National Meat Case Study Methodology
US-28	Amended COOL Label photos
US-33	Beef Imports and Beef Consumption
US-45	Canfax Research Services, Canadian Cattlemen's Association, "Economic Impacts of Livestock Production in Canada – A Regional Multiplier Analysis," Suren Kulshreshtha, Oteng Mondongo and Allan Florizone, at 11-12 (Sept. 2012)
US-46	Consumer Federation of America, "Large Majority of Americans Strongly Support Requiring More Information on Origin of Fresh Meat", May 15, 2013
US-47	Consumer Federation of America, letter dated 9 April 2013 of Chris Waldrop, Director of Food Policy Institute, to Julie Henderson, Director of COOL Division, USDA
US-48	National Research Center, "Country of Origin Labeling Poll, Final Report", 4 October 2010
US-50	"Raising Cattle: The Stages of Beef Production," 2014 Cattlemen's Beef Board and National Cattlemen Beef Association

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Number	Title
US-52	W. J. Umberger, "County-of-origin labeling (CoOL) A review of relevant literature on Consumer Preferences, Understanding, Use and Willingness-to-Pay for CoOL of Food and Meat," Final Report Food Standards Australia New Zealand, (2010), pp. 20-22
US-55	USDA, Animal and Plant Health Inspection Service (APHIS), Regulatory Impact Analysis & Final Regulatory Flexibility Analysis, "Traceability for Livestock Moving Interstate," APHIS-2009-0091 (2012), p. 34
US-58	J. Rude, J. Carlberg, and S. Pellow, "Integration to Fragmentation: Post-BSE Canadian Cattle Markets, Processing Capacity, and Cattle Prices", *Canadian Journal of Agricultural Economics*, 55(2) (2007), pp. 197-216
US-59	Econometric Exhibit A in response to Panel question A
US-62	Econometric Exhibit F in response to Panel question F
US-63	G. W. Brester and V. Smith, "Evaluating the Impacts of the US Department of Commerce's Preliminary Imposition of Tariffs on US Imports of Canadian Live Cattle," Trade Research Center discussion paper No. 34, Montana State University, Bozeman, MT, (1999)
US-64	G. W. Brester, J. M. Marsh, and V. Smith, "The Impacts on U.S. and Canadian Slaughter and Feeder Cattle Prices of a U.S. Import Tariff on Canadian Slaughter Cattle," *Canadian Journal of Agricultural Economics*, 50(1) (2005), pp. 51-66
US-65	R. Barichello, T. Josling and D. Sumner, "Agricultural Trade Relations between Canada and the United States", Working paper 2004-03, Food and Resource Economics, University of British Columbia (2004)
US-66	D. Sumner, R. Barichello, and M. Paggi, "Economic Analysis in Disputes over Trade Remedy and Related Measures in Agriculture with Examples from Recent Cases", Working Paper No. 2004-01, Food and Resource Economics, University of British Columbia, (2004)
US-68	"New Poll Shows Consumers Overwhelming Support Country-of-Origin Labeling on Food," Public Citizen Press Release (20 June 2005)
US-69	Letter from Consumer Federation of America to USDA (Aug. 20, 2007)
US-70	Consumers Union letter to Congress (Feb. 26, 2007)
US-71	Comments submitted by John and Rita Lesch to USDA (Aug. 2007)
US-72	Comments submitted by Ron Krishner to USDA (July 2007)
US-73	Comments submitted by Jennifer Walla to USDA (July 2007)
US-74	Letter from Ross Vincent to FSIS (Oct. 2, 2001)
US-76	S. Pouliot and D. Sumner, "Differential Impacts of Country of Origin Labeling: COOL Econometric Evidence from Cattle Markets", Structure and Performance of Agriculture and Agri-Products Industry Network, (2012)
US-77	R. Green, W. Hahn, and D. Rocke, "Standard Errors for Elasticities: A Comparison of Bootstrap and Asymptotic Standard Errors", *Journal of Business & Economic Statistics*, 5(1) (1987)
US-78	Revised Econometric Exhibit F (Exhibit US-62)
US-81	J. L. Lusk and J. D. Anderson, "Effects of Country-of-Origin Labeling on Meat Producers and Consumers", *Journal of Agricultural and Resource Economics,* 29(2) (2004), pp. 185-205

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ABBREVIATIONS USED IN THESE REPORTS

Abbreviation	Description
2002 Farm Bill	*The Farm Security and Rural Investment Act of 2002*, Pub. L. No. 107-171, § 10816, 116 Stat. 134, 533-535 (Exhibit CDA-4)
2008 Farm Bill	*The Food, Conservation, and Energy Act of 2008*, Pub. L. No. 110-234, § 11002, 122 Stat. 923, 1351-1354 (Exhibit CDA-5)
2009 Final Rule	Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, *United States Federal Register,* Vol. 74, No. 10, (15 January 2009), p. 2658 (Exhibits CDA-2 and MEX-12)
2013 Final Rule	Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, *United States Federal Register,* Vol. 78, No. 101, (24 May 2013), p. 31367 (Exhibits CDA-1 and MEX-3)
AMS	Agricultural Marketing Service of the United States Department of Agriculture
amended COOL measure	The COOL statute, and the 2009 Final Rule as amended by the 2013 Final Rule
BCI	Business confidential information
BSE	Bovine spongiform encephalopathy
COOL	Country of origin labelling
COOL statute	The Agricultural Marketing Act of 1946, Public Law No. 107-171, 7 U.S.C. § 1638 (2012), as amended by the 2002 Farm Bill and the 2008 Farm Bill (Exhibit CDA-3)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
eID	Electronic identification
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
Hayes and Meyer paper	D. J. Hayes and S. R. Meyer, "Impact of Mandatory Country of Origin Labelling on U.S. Pork Exports", Center for Agricultural and Rural Development, Iowa State University, (2003) (Exhibits CDA-89 and MEX-37)
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, 7 CFR Part 65 (1 August 2008)
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, 9 CFR Parts 317 and 381(28 August 2008)
Interstate Livestock Traceability Rule	Final Rule on Traceability for Livestock Moving Interstate, Parts 71, 77, 78, and 86, *United States Federal Register,* Vol. 78, No. 6 (9 January 2013), p. 2040 (Exhibits CDA-93 and MEX-82)
ICVI	Interstate certificate of veterinary inspection
KSU Consumer Valuation	G. T. Tonsor, T. C. Schroeder and J. L. Lusk, "Consumer Valuation of Alternative Meat Origin Labels", *Journal of Agricultural Economics,* (2012) (Exhibits CDA-84 and MEX-34)
KSU Revealed Demand	M. R. Taylor and G. T. Tonsor, "Revealed Demand for Country of Origin Labeling of Meat in the United States", *Journal of Agricultural and Resource Economics* 38(2), (2013), pp. 235-47 (Exhibits CDA-83, MEX-35, and MEX-62)
KSU Study Fact Sheet	G. T. Tonsor, J. L. Lusk, T. C. Schroeder, and M. R. Taylor, "Mandatory Country of Origin Labeling: Consumer Demand Impact", Kansas State University, Department of Agricultural Economics, (Publication AM-GTT-2012.6) (2012) (Exhibit CDA-82)
Mexican variant of the Sumner Economic Analysis	Application of the Sumner Economic Analysis to Mexico (Exhibit MEX-87)
MFN	Most-favoured nation
NAFTA	North American Free Trade Agreement
NAIS	National Animal Identification System
original COOL measure	The COOL statute and the 2009 Final Rule
PACA	Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499 (Exhibits CDA 10 and MEX-7)
RFID	Radio frequency identification
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures

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Abbreviation	Description
Sumner Economic Analysis	D. A. Sumner, "The magnitude of added compliance costs required for a non-discriminatory alternative measure to have equivalent export losses (trade effects) as the original discriminatory COOL measure", 17 December 2013 (Exhibit CDA-126)
Sutherland letter	Letter from Director-General of the GATT, P. D. Sutherland to Ambassador Schmidt (Geneva, December 15,1993) (Exhibit US-20)
TBT Agreement	Agreement on Technical Barriers to Trade
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
USDA	United States Department of Agriculture
Updated Sumner Econometric Study	D. A. Sumner, "Differential Effects of the Original COOL Measure on Canadian Cattle and Hogs: Empirical Specification of the Statistical Equations and Econometric Methods, with an Update of the Data to Reflect Recent Impacts", 9 September 2013 (Exhibit CDA-71); and D. A. Sumner, Detailed results from regressions quantifying the effects of the COOL measure on Canadian cattle and hogs, Part I (Exhibit CDA-179), Part II (Exhibit CDA-180), and Part III (Exhibit CDA-181)
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

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1 INTRODUCTION

1.1 Complaints by Canada and Mexico

1.1. This compliance dispute concerns the challenges by Canada and Mexico of the measure taken by the United States in 2013 to comply with the Dispute Settlement Body (DSB) recommendations and rulings in *United States – Certain Country of Origin Labelling (COOL) Requirements* (DS384 and DS386).[1]

1.2. On 10 June 2013, Canada and Mexico reached an understanding with the United States in "Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding" (Sequencing Agreement).[2] According to paragraph 2 of this Sequencing Agreement, Canada and Mexico were not required to hold consultations with the United States before requesting the establishment of a panel under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

1.2 Panel establishment and composition

1.3. On 19 August 2013, Canada and Mexico requested the establishment of a panel pursuant to Articles 6 and 21.5 of the DSU, Article 14 of the TBT Agreement, and Article XXIII of the GATT 1994, with standard terms of reference as set out in Article 7.1 of the DSU.[3]

1.4. At its meeting on 25 September 2013, the DSB referred this dispute to the original panel if possible, in accordance with Article 21.5 of the DSU.

1.5. 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/DS384/26 and by Mexico in document WT/DS386/25, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.6. In accordance with Article 21.5 of the DSU, the Panel was composed on 27 September 2013 as follows:

Chairperson:	Mr Christian Häberli
Members:	Mr Manzoor Ahmad Mr João Magalhães

1.7. Australia; Brazil; Canada (for DS386); China; Colombia; the European Union; Guatemala; India; Japan; the Republic of Korea; Mexico (for DS384); and New Zealand reserved their rights to participate in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.8. Taking into account the United States' letter of 10 October 2013 and after consultation with the parties, the Panel Working Procedures[4] and timetable were adopted on 28 October 2013. After further consulting the parties, the Panel revised its Working Procedures on 21 January 2014 and its timetable on 5 March 2014.

[1] See Panel Reports, *US – COOL*, as modified, reversed, or upheld by the Appellate Body Reports in the same dispute.
[2] WT/DS384/25 and WT/DS386/24.
[3] WT/DS384/26 and WT/DS386/25.
[4] See the Panel Working Procedures (as revised on 21 January 2014) in Annexes A-1 and A-2.

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1.9. The substantive meeting with the parties was held on 18 and 19 February 2014. A session with the third parties took place on 19 February 2014. On 10 April 2014, the descriptive part of the Panel Reports was issued to the parties. The Interim Reports were issued to the parties on 27 June 2014. The Final Reports were issued to the parties on 29 July 2014.

1.3.2 Procedures for an open substantive meeting

1.10. At the organizational meeting held on 18 October 2013, Canada and the United States requested, and the Panel agreed, that the substantive meeting would be open to public viewing. Mexico did not object to open hearings for these proceedings specifically, without prejudice to its systemic views on open hearings. The parties proposed additional procedures for an open substantive meeting. The Panel took into account the joint proposals received from the parties, and adopted additional procedures for an open substantive meeting on 28 October 2013, which were revised on 21 January 2014. These procedures provided for public viewing by means of simultaneous closed-circuit television broadcasting of the substantive meeting to a separate room. Closed sessions were foreseen for the parties to address business confidential information and for those third parties that had requested not to make their statements public.[5]

1.3.3 Procedures to protect Business Confidential Information (BCI)

1.11. At the organisational meeting on 18 October 2013, the parties agreed to submit proposals for additional procedures to protect BCI. On 28 October 2013, additional procedures to protect BCI were adopted, which took into account the joint proposal received from the parties.[6]

1.3.4 Procedures and Reports for DS384 and DS386

1.12. At the organizational meeting of 18 October 2013, the United States stated that the DSB had not established a single panel pursuant to Article 9.1 of the DSU, and expressed that the United States would be amenable to having two panels with harmonized procedures and timetables in accordance with Article 9.3 of the DSU. The United States requested that separate but harmonized Working Procedures be adopted for the compliance proceedings in DS384 and DS386.

1.13. After having consulted the complainants, separate but substantively identical versions of the Working Procedures, as well as additional procedures to protect BCI and additional procedures for an open substantive meeting, were adopted on 28 October 2013. In addition, on the same date, a single joint timetable was adopted for DS384 and DS386.

1.14. At the substantive meeting on 18 and 19 February 2014, the parties were asked whether they objected to including the Panel Reports in a single document with the understanding that, following the same approach as in the original dispute, the final sections on Conclusions and Recommendations would be printed on separate pages with the relevant DS symbol. The parties did not object to this. In light of this, the Panel did not consider further the issue raised by the United States under Article 9 of the DSU.

1.3.5 Request for enhanced third-party rights

1.15. In its third-party written submission of 2 December 2013, the European Union requested certain enhanced third-party rights, namely that:

> third parties be permitted to be present throughout the hearing; third parties should be permitted to comment, at the invitation of the Panel, on matters arising during the hearing; third parties should receive copies of any questions to the parties, their responses and comments, and be permitted to comment thereon; and third parties

[5] See additional procedures for an open substantive meeting in Annexes A-3 and A-4.
[6] See additional procedures to protect BCI in Annex A-5 and A-6.

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should similarly be permitted to be present at any subsequent meeting of the compliance Panel with the parties.[7]

1.16. After consulting the parties, on 21 January 2014 the Panel granted the following enhanced rights to all third parties:

a. the right to be present during the entirety of the substantive meeting of the Panel;

b. the right in the substantive meeting to ask questions, at the invitation of the Panel, to the parties or the other third parties without any obligation to respond on the part of parties or other third parties; and

c. access to the Panel's written questions to the parties and each party's written answers to questions after the substantive meeting of the Panel.

2 FACTUAL ASPECTS

2.1 Measure at issue

2.1. The claims brought by Canada and Mexico concern the United States' measure relating to the country of origin labelling of muscle cuts of meat (amended COOL measure). In their panel requests[8], Canada and Mexico identified the following instruments as the subject of their claims:

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. Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts (7 CFR Parts 60 and 65), 74 Fed. Reg. 2658-2707 (15 January 2009);

c. Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts (7 CFR Parts 60 and 65), 78 Fed. Reg. 31367-31385 (24 May 2013); and

d. any modifications or amendments to instruments listed in (a) through (c) above, including any further implementing guidance, directives, policy announcements or any other document issued in relation to those instruments.

2.2 Products at issue

2.2. As the complainants submitted in the original dispute, the products at issue are imported Canadian cattle and hogs as well as imported Mexican cattle, which are used in the United States to produce beef and pork, commodities covered by the amended COOL measure.[9]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Canada and Mexico request that the Panel find that the United States has failed to comply with the recommendations and rulings adopted by the DSB on 23 July 2012 on the basis that the amended COOL measure violates Articles 2.1 and 2.2 of the TBT Agreement and Article III:4 of the GATT 1994. Canada and Mexico also request that the Panel find that the amended COOL measure nullifies or impairs benefits accruing to Canada and Mexico within the meaning of Article XXIII:1(b) of the GATT 1994.

[7] European Union's third-party submission, 2 December 2013, section II.8.
[8] WT/DS384/26 and WT/DS386/25.
[9] Panel Reports, *US – COOL*, para. 7.64. See also WT/DS384/26 and WT/DS386/25.

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3.2. The United States requests that the claims made by Canada and Mexico be rejected in their entirety and that the complainants' claims under Article XXIII:(1)(b) of the GATT 1994 be found to be outside the terms of reference of this Panel.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries provided to the Panel in accordance with paragraph 18 of the Panel Working Procedures.[10]

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the third parties are reflected in their executive summaries provided to the Panel in accordance with paragraph 18 of the Panel Working Procedures.[11] Australia and Guatemala did not submit written or oral statements to the Panel.

6 INTERIM REVIEW

6.1. On 27 June 2014, the Panel submitted its Interim Reports to the parties. On 8 July 2014, Canada, Mexico, and the United States each submitted written requests for the review of precise aspects of the Interim Reports pursuant to Article 15.2 of the DSU.[12] On 15 July 2014, Canada, Mexico, and the United States submitted written comments on each other's requests for interim review. No party requested an additional meeting with the Panel on the issues identified in the written comments.

6.2. In accordance with Article 15.3 of the DSU, this section of the Panel Reports sets out the Panel's response to the requests and comments made at the interim review stage. The Panel modified aspects of its Reports in light of the parties' interim review requests and comments where it considered it appropriate to do so, as explained below. Section and paragraph numbers are the same in the Interim and Final Reports. References to footnotes in this section relate to the Interim Reports, except as otherwise indicated.

6.3. In addition to the modifications specified below, the Panel also corrected a number of typographical and other non-substantive errors throughout the Reports, including those specified by the parties.

6.4. In issuing its Interim Reports on 27 June 2014, the Panel requested the parties to identify any business confidential information which the Interim Reports or its annexes may contain, and which the parties wish to be redacted from the Final Reports. The parties did not identify any such information in their requests for interim review. In accordance with its additional procedures to protect BCI, on 29 July 2014 the Panel further requested the parties to confirm that the Final Reports and its annexes do not contain any BCI.

6.5. In its aforementioned communication to the parties dated 27 June 2014, the Panel also noted that it had received unsolicited follow-up comments by the parties on comments on the draft descriptive part of the Panel Reports sent to the parties on 10 April 2014.[13] The Panel invited each party to indicate in its requests for interim review whether its unsolicited comments on the draft descriptive part of the Reports should be considered by the Panel as interim review comments. In response, Canada noted that since the descriptive part had become part of the Interim Reports, Canada sees no reason for the Panel to consider the unsolicited follow-up communications as part of the interim review. Mexico did not object to the unsolicited follow-up comments on the descriptive part not being incorporated in the interim review. At the same time, Mexico suggested

[10] See executive summaries of the parties' arguments, Annexes B1-B3.
[11] See executive summaries of the third parties' arguments, Annexes C1-C8.
[12] The Panel notes that, despite the 5.00 p.m. (Geneva time) deadline on 8 June 2014 for parties' interim review requests, the United States submitted the electronic copy of its interim review request at 6.53 p.m. on 8 June, and the hard copy version at 10.10 a.m. the following day.
[13] In particular, on 24 April 2014 Canada and Mexico submitted unsolicited follow-up comments on the United States' comments of 23 April 2014. The United States responded to these with unsolicited follow-up comments on 12 May 2014. Finally, on 14 May 2014 Mexico submitted additional unsolicited comments. Most of these comments concerned the elements of the measure at issue, in particular the COOL statute.

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that comments on the descriptive part be incorporated into the final report, provided that inclusion does not affect the date of the issuance of final report to the parties. The United States did not respond to the Panel's invitation. In light of the above, the Panel left the descriptive part of its Interim Reports unchanged, and did not incorporate the parties' unsolicited comments on the descriptive part into its interim review.

6.6. Canada suggested revising **paragraph 7.18** to reflect that there are instances where the place of occurrence of a production step can be omitted. The United States did not support Canada's requested insertion of the phrase "subject to certain flexibilities" and considered the Panel's statement to be accurate. In light of the parties' comments, the Panel added the word "generally" to paragraph 7.18 in reference to the amended COOL measure's point-of-production labelling.

6.7. Canada objected to the characterization of its position in **footnote 52 (footnote 68 in the Final Reports) to paragraph 7.18** and contends that it did not concede the accuracy of reference to a "single label". Conversely, the United States asserted that the Panel did not mischaracterize Canada's position, and considered the Panel to have correctly cited Canada's written submission. In light of the parties' comments, the Panel adjusted the latter part of footnote 52 (footnote 68 in the Final Reports) to paragraph 7.18 regarding Canada's position as to the establishment of a "single label".

6.8. Canada pointed out that the description in **paragraph 7.28** of the definition of "retailer" under the Perishable Agricultural Commodities Act of 1930 omitted the exclusion of entities that do not ship, receive, or contract to be shipped or receive perishable agricultural commodities in quantities exceeding 2,000 pounds (one ton) in a single day. The Panel supplemented footnote 72 (footnote 88 in the Final Reports) to paragraph 7.28 with respect to the definition of "retailer" under PACA.

6.9. The United States requested that the Panel delete the references to "commingled covered commodities" from **paragraphs 7.33 and 7.34** and from **footnotes 85, 90, and 257 (footnotes 101, 206, and 275 in the Final Reports)**. According to the United States, the commingling flexibility for meat was set forth in § 65.300(e) of the 2009 Final Rule, whereas § 65.300(g) of the 2009 Final Rule "define[s]" the term "commingled covered commodities" only in regard to "perishable agricultural commodities", which exclude meat products. Canada objected to the United States' request. According to Canada, instead of a definition of any kind, § 65.300(g) sets out labelling rules; the term "commingled covered commodities" is defined in § 65.125.

6.10. The Panel declines the United States' request. The Panel notes that § 65.300(g) of the 2009 Final Rule does not define the term "commingled covered commodities". As noted in footnote 85 (footnote 101 in the Final Reports) to paragraph 7.33, that term is defined in the unamended § 65.125 of the 2009 Final Rule without any distinction between different types of "covered commodities" as follows: "covered commodities (of the same type) presented for retail sale in a consumer package that have been prepared from raw material sources having different origins." In turn, §§ 65.300(e) and (g) set forth different labelling rules for commingled meat products and commingled perishable agricultural commodities. In addition, in introducing the term "commingled covered commodities", paragraph 7.33 explains that the amended COOL measure "defin[es] 'covered commodities' *in relevant part* as '[m]uscle cuts of beef and pork' and '[g]round beef … and ground pork'." (emphasis added) As indicated in section 7.3.2.1, the Panel's review of the amended COOL measure is limited to the products at issue identified in paragraphs 2.2 and 7.26 of the Reports.

6.11. The United States commented that in s**ections 7.3.3.3 (paragraphs 7.38-7.43) and 7.3.4 (paragraph 7.44 and Table 2), as well as paragraph 7.108** the Panel "appear[s] to conclude that in the improbable case where an animal is imported for immediate slaughter after spending time in two different countries, the 2013 Final Rule would not allow similar flexibility in listing the country of raising as is the case under the B Label." The United States requested alteration in light of its arguments provided in response to the Panel's questions. Canada commented that the issue raised by the United States is addressed in paragraphs 7.245-7.254 and that the alteration of these sections proposed by the United States is thus unwarranted. Canada further stated that paragraph 7.108 simply summarizes the rules under the amended COOL measure that apply to Category C muscle cuts, and that there is no need to modify the paragraph as suggested by the United States.

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6.12. The Panel declines the United States' request. Section 7.3.3.3 describes the amended multiple countries of raising flexibility under the amended COOL measure. Section 7.3.4 simply sets out label variations in light of the flexibilities under the original and amended COOL measures. The specific point raised by the United States regarding Label C is discussed in paragraphs 7.107-7.110, 7.245-7.254, and again in 7.351. In these paragraphs, the Panel outlines the parties' disagreement as well as the relevant provisions of the COOL statute and 2013 Final Rule. Further, the Panel examines the parties' competing interpretations, including their arguments provided in response to the Panel's questions, and the labelling implications for both scenarios as depicted in Tables 9 and 14. As the United States' position is already reflected in these paragraphs, no further changes were considered necessary.

6.13. Canada suggested that the description of Label B in **paragraph 7.42** reflect the country order flexibility that existed under the 2009 Final Rule. In this respect, the United States suggested replacing the word "would" with "could". The Panel adjusted the relevant portion of paragraph 7.42 in light of the parties' comments.

6.14. In regard to **paragraph 7.117** and **Table 10**, Canada argued that non-commingled muscle cuts derived from Category C animals were not eligible for Label B ("Product of the United States, Canada") under the 2009 Final Rule. Conversely, the United States argued that the Reports already address Canada's request in paragraph 7.114 and footnote 268 (footnote 284 in the Final Reports). Although the Reports address Canada's request in footnote 268 (footnote 284 in the Final Reports) to paragraph 7.114, for greater accuracy the Panel deleted the word "or" and "Product of U.S., Canada" from both paragraph 7.117 and Table 10. The Panel also made consequential adjustments to footnote 269 (footnote 285 in the Final Reports) and to the Note to Table 10.

6.15. Canada argued that the statement that "many operators in the United States commingled" in the second sentence of **paragraph 7.121** should not be attributed to Canada as it was not supported by the relevant reference in footnote 271. The United States considers that the Panel did not mischaracterise Canada's position on commingling. In light of the passages referenced in footnote 271, the Panel split the second sentence of paragraph 7.121 into two sentences. In addition, the Panel adjusted the final sentence of the same paragraph accordingly.

6.16. Canada requested that the word "survey" in **paragraph 7.124** be replaced with a less comprehensive term for referencing the public consultation process conducted by the USDA before adopting the 2013 Final Rule. The United States also considered the word "survey" to be inaccurate, and suggested replacing "survey conducted by the USDA" with "responses received to the proposed rule". The Panel has replaced the word "survey" with "comments the USDA received on the proposed 2013 Final Rule" in paragraph 7.124.

6.17. Additionally, the United States requested that a sentence in **paragraph 7.124** referencing the American Meat Institute's comments on the proposed 2013 Final Rule be relegated to a footnote and adjusted so as to avoid the suggestion that evidence on slaughter facilities processing "mixed-origin" livestock demonstrates commingling. According to the United States, these slaughterhouses could have processed B or C category animals without commingling. Conversely, Mexico noted that the American Meat Institute's comments use the term "mixed-origin" to refer to animals born in different countries and processed in the United States. Canada also objected to the United States' request.

6.18. The Panel declines the United States' request. The American Meat Institute's comments of April 2013 include a section entitled "The Meat Industry Utilizes the Current Rule's Practice of Commingling and Prohibiting that Practice Will Impose Significant Costs not Considered by AMS". Within this section, the comments state that "AMS seems to ignore the fact that commingling occurs regularly and that the Category B label is used in the marketplace."[14] The rest of the section attempts to quantify commingling and the impact of its elimination under the proposed 2013 Final Rule. In this context, immediately after the sentence stating that "[t]here are at least 15 large cattle slaughter plants that process mixed origin livestock and at least 6 such hog

[14] Exhibit CDA-23, p. 3.

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slaughter facilities", the comments address the economic impact of "the loss of commingling" under the proposed 2013 Final Rule.[15]

6.19. The United States suggested adjusting **paragraph 7.125** to reflect more accurately its arguments on the percentages of commingling in the US meat industry as presented by the USDA in the 2013 Final Rule. In particular, the United States suggested inserting a sentence on how the USDA came to its estimates. Mexico objected to this suggested new sentence, arguing that the United States has not explained why it is necessary or appropriate.

6.20. The Panel notes that the new sentence suggested by the United States is similar to the sentence in a paragraph of the United States' first written submission already referenced in footnote 288 (footnote 304 in the Final Reports) to paragraph 7.125. Accordingly, the Panel declines the United States' suggestion to insert this sentence. As for the existing first sentence of the paragraph, the Panel made editorial changes in light of the United States' suggestions, while leaving footnote 288 (footnote 304 in the Final Reports) unchanged.

6.21. With regard to **paragraphs 7.128-7.132** and **Table 12**, Canada did not agree that, in practice, the 2013 Final Rule amended the coverage of Label D. In particular, Canada contends that the origin of Category D meat products under the 2009 Final Rule was determined based on the country of slaughter. Thus, according to Canada, "in practice, under the 2009 Final Rule, covered muscle [cut] commodities imported from Canada and derived from animals that underwent production steps in the United States were required to be labelled as 'Product of Canada'." Canada further contends that the United States undertook no extraterritorial verification of the life histories of animals used to produce imported muscle cut covered commodities, and that Canada does not maintain records that would allow retailers to demonstrate that an imported muscle cut commodity was derived from an animal that underwent a production step in the United States. Referring to Table 12, Canada thus asserts that, in practice, "Label D applied in scenarios D2, D3, and D4 under the original COOL measure." The United States commented that, as the 2009 Final Rule was written, Category D meat imported into the United States would be derived from animals that were not born, raised, or slaughtered in the United States. However, under customs rules, Category D meat would receive a country of origin designation from the country where the meat was slaughtered (substantially transformed).

6.22. The Panel declines to make any modifications to paragraphs 7.128-7.132 and Table 12. Canada's comments concern whether the 2013 Final Rule amended the coverage of Label D "in practice". As noted in the Panel's findings in paragraph 7.15, Category D origin is designated according to substantial transformation under both the 2009 and 2013 Final Rules. The amended terms of coverage introduced by the 2013 Final Rule are set out in paragraphs 7.15 and 7.128.[16] The evidence of the practical likelihood of Scenarios D2, D3, and D4 in Table 12 is addressed in paragraph 7.279. Although Canada's comments concern Label D coverage "in practice" under the original and amended COOL measures, Canada does not dispute the textual amendments introduced by the 2013 Final Rule. Nor does Canada address the absence of evidence that Scenarios D2, D3, or D4 ever occurred "in practice" under the original COOL measure. Canada's allegation that such origin scenarios would not have been detectable, or distinguishable from Scenario D1, would only be relevant if such scenarios were shown to occur. Even if this allegation were to be substantiated by evidence regarding the treatment of imported muscle cuts "in practice", the explicit terms of the original and of the amended COOL measures should not be ignored. As the Reports reflected the relevant *de jure* and *de facto* considerations with respect to Label D under the original and amended COOL measures, the Panel did not consider any changes to be necessary.

6.23. The United States suggested that **paragraph 7.135** also address the evidence submitted by the United States on the lack of a material impact from the 2013 Final Rule on large processors, such as Tyson Foods. The complainants objected to the United States' request. Canada argued that the evidence shows one company's slight increase in beef sales over a three-year period, measured in value, which has no direct relevance for the impact of the 2013 Final Rule. Both complainants noted that the evidence in question relates to Tyson Foods' annual reports for

[15] Exhibit CDA-23, p. 6.

[16] As observed by the Appellate Body, under the original COOL measure, "Category D meat derives from animals *not* born, raised, or slaughtered in the United States." Appellate Body Reports, *US – COOL*, para. 333.

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the fiscal years ending in October 2011, September 2012, and September 2013, the last of which ended in September 2013, two months before the end of the six-month adjustment period under the 2013 Final Rule. Canada added that other exhibits cited in the Reports containing statements from Tyson Foods address more directly the impact of the 2013 Final Rule.

6.24. The Panel considers that other exhibits referenced in the Reports, including in paragraph 7.135, in particular Exhibits CDA-25, CDA-42 (BCI), and CDA-70, more directly address the amended COOL measure's impact on the operations of Tyson Foods than the evidence referenced by the United States. In fact, these exhibits directly reflect Tyson Foods' views about the 2013 Final Rule before its adoption, and how Tyson Foods changed its sourcing policy following the 2013 Final Rule's entry into force. Accordingly, the Panel declines the United States' request and leaves paragraph 7.135 unchanged.

6.25. The United States requested supplementing the findings in **sections 7.5.4.1.2.4 (paragraphs 7.138-7.150) and 7.5.4.2.4.1 (paragraphs 7.220-7.221)** to include certain arguments made in its written submissions. Canada considered that the United States' arguments regarding the impact of the amended COOL measure on recordkeeping requirements were already addressed in the Panel's assessment.

6.26. The Panel declines the United States' request. Section 7.5.4.1.2.4 outlines the correlation between the nature of the origin claim and the recordkeeping requirements under the amended COOL measure. This covers the substance of the arguments referred to by the United States in its comments, including its reference to the Appellate Body's reasoning in the original dispute. In particular, relevant Appellate Body statements are reproduced in paragraph 7.142 and further addressed in footnote 324 (footnote 340 in the Final Reports). Therefore, the alterations requested by the United States were not considered necessary.

6.27. The United States considered the Panel's reference in **paragraphs 7.146-7.149** to "'augmentation of the records' to apparently mean the inclusion of 'additional information to a firm's bills of lading, invoices, or other records associated with movement of covered commodities from purchase to sale'." (quoting the 2009 Final Rule, p. 2699). With regard to the conclusion in **paragraph 7.149**, the United States submitted that it "does not see the logic in equating adding [sic] additional information to a bill of lading to the increase in a recordkeeping 'burden'". Canada commented that the Panel's conclusion is supported by an analysis that considers a broad range of factors extending beyond the impact of additional information added to bills of lading. Likewise, Mexico commented that the finding is not based exclusively on information requirements for bills of lading, and that the Panel cites other evidence in support of the conclusion in paragraph 7.149.

6.28. The Panel declines the United States' request. The only reference to additional information on a firm's bills of lading is found in footnote 338 (footnote 354 in the Final Reports) as part of a long passage cited from the USDA that evidences the dynamic between greater information on labels and more upstream records. The conclusion in paragraph 7.149 draws heavily upon preceding paragraphs and the Panel's findings with respect to greater label variety and segregation under the amended COOL measure.

6.29. The United States commented that **paragraph 7.148** contained a "partial quotation" from the 2009 Final Rule that "may misleadingly exaggerate the role of segregation as a cost driver", and suggested additions of the complete quotation. Canada commented that the major cost drivers are noted as *including* segregation when firms are not using a multiple-origin label. Canada therefore considered that there was no need to include the additions to the excerpt from the 2009 Final Rule set out in this paragraph. Mexico considered that the proposed expansion of the quotation would make the paragraph as a whole confusing, and that the United States' concern could be addressed by adding the words "*inter alia*".

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6.30. The Panel cited the USDA's reference to "the major cost drivers" of the 2009 Final Rule as "including" scenarios of segregation without commingling. The Panel did not consider this citation to distort the USDA's statement, which is cited in combination with another statement made by the USDA to a similar effect in footnote 340 (footnote 356 in the Final Reports). In light of the parties' comments, the Panel added "*inter alia*" to paragraph 7.148 and "or products" in footnote 340 (footnote 356 in the Final Reports).

6.31. The United States requested revision of **paragraph 7.149** to include its argument that recordkeeping has not changed and that "the amended COOL measure simply implements the Appellate Body recommendations that the information already maintained by upstream producers, be conveyed to consumers through more detailed labelling." Canada commented that this paragraph summarizes the Panel's conclusions after assessing the arguments of the parties and the evidence before it. In Canada's view, the repetition of US arguments is inappropriate in this context. Mexico similarly considered that the United States' arguments are already reflected, and that its request is improper for interim review as it would alter the Panel's findings by incorporating the United States' arguments into the Panel's conclusions.

6.32. The Panel declines the United States' request. Paragraph 7.149 summarizes the Panel's conclusions with respect to the recordkeeping burden under the amended COOL measure. The United States' arguments are reflected in the preceding paragraphs, and relevant Appellate Body statements are discussed in paragraph 7.142 and footnote 324 (footnote 340 in the Final Reports). Inasmuch as the United States is reasserting that the recordkeeping provisions under the original and amended COOL measures are formally identical, paragraphs 7.138-7.139 explain that the Panel's analysis focuses on whether *in practice* the amended COOL measure requires greater recordkeeping under formally unchanged provisions. The Appellate Body has held that Article 21.5 compliance panels may properly address "claims against measures taken to comply that incorporate unchanged aspects of original measures"[17] as well as "new claims against inseparable aspects of a measure taken to comply, which are unchanged from the original measure".[18] Further, the Appellate Body has indicated that, in the context of Article 21.5 proceedings, formally identical "wording" does not necessarily amount to challenged provisions having identical "meaning"; rather, this latter may depend on the interaction of different aspects of the measure under review.[19]

6.33. The United States suggested replacing the word "confirm" in the first sentence of **paragraph 7.162** with "assert in affidavits, but do not substantiate with specific evidence". The complainants objected to the United States' request. Mexico argued that the United States' is attempting to undermine the status of the evidence cited by the Panel. Canada pointed out that two pieces of evidence cited in the first sentence of paragraph 7.162 should not be qualified as affidavits as they are industry comments submitted to the USDA in its public comment exercise on the proposed 2013 Final Rule.

6.34. The Panel notes that in essence the first sentence of paragraph 7.162 consists of two citations from comments submitted by an industry participant to the USDA in its comments to the proposed 2013 Final Rule. The footnote to the second citation also references comments from another industry participant to the USDA as well as affidavits by Mexican industry participants. Like the original panel, the Panel in this compliance dispute considers affidavits by industry participants as evidence that may be relied upon to reach or confirm findings. Accordingly, the Panel declines the United States' request and leaves the first sentence of paragraph 7.162 unchanged.

[17] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 427.
[18] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 433.
[19] More specifically, in *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body noted that "the wording of Section 609 ha[d] not been changed since the first case" and went on to state that "[i]n addition, the meaning of Section 609 ha[d] not been changed" in light of a court ruling addressing other aspects of the challenged measure. Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia),* para. 93. The altered meaning of formally identical provisions is consistent with the Appellate Body's consideration that "the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings", and that "[i]t is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute." Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

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6.35. Canada pointed out that the section in the original *US – COOL* panel reports referenced in **footnote 378 (footnote 394 in the Final Reports) to paragraph 7.166** focuses more on the incentives arising from the measure than on the legal necessity of making a choice. The Panel has left paragraph 7.166 unchanged. The relevant paragraphs of the original *US – COOL* panel reports[20] referenced in footnote 378 (footnote 394 in the Final Reports), while also addressing the issue of incentives, are entitled "[t]he legal necessity of making a choice" and specifically examine Appellate Body guidance related to this issue.

6.36. The United States requested the Panel to adjust **paragraph 7.184** to reflect more accurately the objective of the Updated Sumner Econometric Study. The Panel has adjusted paragraph 7.184 concerning the objective of the Updated Sumner Econometric Study. At the same time, the Panel declines the United States' suggested addition to the last sentence of the same paragraph concerning how the Panel evaluates the possible impact of the different factors that may explain the evolution of livestock's price basis and import ratio.

6.37. Mexico requested additional references to its submissions in **footnote 454 (footnote 470 in the Final Reports) to paragraph 7.200**. The Panel included additional references in footnote 454 (footnote 470 in the Final Reports) to paragraph 7.200 to Mexico's submissions.

6.38. With respect to **footnote 467 (footnote 483 in the Final Reports) to paragraph 7.203**, Mexico recalled its arguments as to the distinction between three different concepts, namely "detrimental impact", "relevant regulatory distinction(s)", and "facts and circumstances related to the design and application of the relevant regulatory distinction(s)". The Panel supplemented footnote 467 (footnote 483 in the Final Reports) to paragraph 7.203 in light of Mexico's request.

6.39. According to Mexico, **paragraphs 7.206-7.207 and 7.280** did not fully reflect Mexico's argument regarding Label E. The United States countered that these paragraphs are focused on expressing the Panel's findings rather than summarizing the parties' arguments. The Panel revised footnote 474 (footnote 490 in the Final Reports) to paragraph 7.206 in light of the parties' comments to reproduce the complainants' arguments in greater detail. No further changes were considered necessary.

6.40. The United States requested supplementation of **paragraph 7.229** to reflect its arguments that Label D "is typically, if not always, produced entirely within the exporting country and including additional steps within the label would not provide additional origin information". Canada commented that this paragraph sets out certain facts as well as the intended effect of the amended COOL measure. Canada added that the arguments of the parties regarding Label D are addressed elsewhere in the Reports. Mexico commented that the United States' proposed additions inaccurately describe its own argument on the reasons for not requiring point-of-production information on Label D. Mexico also questioned the United States' substantiation of its argument and considered the statement in paragraph 7.229 to be fully accurate. The Panel added a citation into footnote 521 (footnote 537 in the Final Reports) to paragraph 7.229 to cross-reference paragraph 7.279, and inserted additional reference into footnote 611 (footnote 629 in the Final Reports) to paragraph 7.279 to the United States' arguments.

6.41. The United States requested that **paragraph 7.240** reflect its position "regarding the potential that animals imported for immediate slaughter may become B label" that "such a situation is economically unrealistic". Canada commented that the United States' position that the situation referred to is "economically unrealistic" is without merit. Canada referred to evidence that some Canadian livestock exporters are sending slaughter-weight animals to the United States for short periods of feeding so that the animals qualify for the Category B production stream. Mexico commented that the United States' proposed addition would affect the coherence of the paragraph, and took issue with the content of the United States' proposal as seeking to have the Panel adopt the United States' argument as its own.

6.42. In light of the parties' comments, the Panel declines to make the changes requested by the United States. Paragraph 7.240 sets out the relevant requirements of the amended COOL measure in the context of the complainants' contentions regarding the flexibility for multiple countries of

[20] Panel Reports, *US – COOL*, paras. 7.386-7.392.

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raising. Immediately following this, the Panel describes in paragraph 7.241 the evidence and arguments submitted by the parties regarding the actual amount of time imported feeder and fed cattle spend in the United States, which includes reference to the evidence mentioned by Canada in its interim review comments.

6.43. With respect to the average figures in **paragraph 7.242**, Canada pointed out that feeder cattle imported into the United States can spend more than 68% of their lives outside the United States. The Panel revised paragraph 7.242 by removing the phrase "as much as" and by inserting a footnote to explain that feeder cattle may spend an even greater amount of time outside the United States.

6.44. Mexico requested the Panel to add a paragraph to its analysis in **paragraphs 7.255-7.256** of the appearance and placement of labels in the context of legitimate regulatory distinctions. Mexico suggested that this new concluding paragraph should reflect Mexico's arguments that no retailers complied with the 2013 Final Rule during the six-month adjustment period following the Final Rule's entry into force in May 2013, and that some retailers still do not comply with it at this stage. Mexico suggested that this new paragraph conclude that "[t]he labels of those retailers do not provide any point of production information." Likewise, Mexico requested an adjustment to the Panel's analysis in **paragraph 7.354** concerning the amended COOL measure's degree of contribution. The United States objected to Mexico's request to insert a new paragraph on an issue the United States considered "unrelated" to paragraphs 7.255-7.256. The United States also suggested leaving paragraph 7.354 unchanged because Mexico's proposed sentence concerns the distinct issue of the amended COOL measure's enforcement.

6.45. The Panel notes that paragraph 7.8 addressed the entry into force of the 2013 Final Rule. Footnote 25 (footnote 41 in the Final Reports) to the same paragraph explains that the six-month adjustment period for the livestock and meat industry expired in November 2013. Nonetheless, for the sake of completeness, the Panel has inserted a footnote at the end of paragraph 7.256 addressing Mexico's evidence of labels following the end of the six-month adjustment period. In light of this, the Panel did not consider it necessary to adjust paragraph 7.354 and draw any conclusion from the unspecified prevalence of non-compliance with the 2013 Final Rule following the expiration of the six-month adjustment period.

6.46. Mexico commented with respect to **paragraph 7.258** that it had identified alternative sources of information for determining the share of beef products subject to the amended COOL measure. The Panel supplemented footnote 574 (footnote 592 in the Final Reports) to paragraph 7.258 to reflect Mexico's alternative sources regarding the share of beef products subject to the amended COOL measure.

6.47. Canada commented on the figures in **footnote 579 (footnote 597 in the Final Reports) to paragraph 7.260** that the original panel did not make findings to suggest that the percentages listed in this footnote were established facts. Conversely, the United States considered that the footnote accurately reflects what is already on the record from the original panel proceedings. The Panel modified footnote 579 (footnote 597 in the Final Reports) to paragraph 7.260 in light of the parties' comments to cite the original panel reports in greater detail.

6.48. Canada and Mexico commented that the percentages referred to in **paragraph 7.273** include all beef that is consumed in the United States, and not just muscle cuts. Likewise, the United States supported revising the paragraph to refer to all "beef consumed in the United States". The Panel adjusted paragraph 7.273 in light of the parties' comments.

6.49. Mexico argued that **paragraph 7.298** does not fully reflect Mexico's arguments, in particular Mexico's arguments in paragraphs 165-178 of its first written submission and in paragraphs 95-109 of its second written submission, on why the amended COOL measure falls into an exceptional situation where a comparative analysis of alternative measures would be redundant for finding a violation of Article 2.2 of the TBT Agreement. In addition, Mexico suggested adjusting **footnote 628 (footnote 646 in the Final Reports) to paragraph 7.290** to also reference paragraph 179 of Mexico's first written submission and paragraph 94 of Mexico's second written submission. The United States objected to Mexico's requests, which – according to the United States – are merely re-stating Mexico's arguments already addressed by the Panel.

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6.50. The Panel declines Mexico's request concerning paragraph 7.298. Paragraphs 165-178 of Mexico's first written submission contain sections entitled "The Relative Importance of the Interests or Values Furthered by the Amended COOL Measure"; "The Degree of Contribution Made by the Amended COOL Measure to the Legitimate Objective"; "The Trade-Restrictiveness of the Amended COOL Measure"; "The Nature of the Risks at Issue and the Gravity of Consequences that would Arise from Non-fulfilment of the Objective"; and "Weighing and Balancing of Relevant Factors Demonstrates that the Trade-Restrictiveness of the Amended COOL Measure is Unnecessary". In the latter section, Mexico argues that:

> [w]hen weighed and balanced in a holistic manner, it is clear from these factors that the trade-restrictiveness of the Amended COOL Measure is disproportionate to the risks that non-fulfilment would create. The fact that the Amended COOL Measure might make some contribution to the objective does not outweigh the other relevant factors. Accordingly, the trade-restrictiveness of the Amended COOL Measure is unnecessary and it is inconsistent with Article 2.2 of the TBT Agreement.[21]

6.51. This assertion by Mexico does not explain why the amended COOL measure falls into the exceptional situation where a comparative analysis of alternative measures would be redundant for finding a violation of Article 2.2 of the TBT Agreement. As regards the factors addressed by Mexico under the above-mentioned headers, the Panel addressed the relevance of each of these factors for its Article 2.2 analysis and analysed each relevant factor in turn elsewhere in its Reports.

6.52. Paragraphs 95-109 of Mexico's second written submission include sections carrying similar headers as the ones mentioned above. The key conclusion of these paragraphs[22] is almost identical to the one cited from Mexico's first written submission above.

6.53. As regards Mexico's request concerning footnote 628 (footnote 646 in the Final Reports), the Panel notes that paragraph 179 of Mexico's first written submission addresses how the comparative analysis should be conducted, not whether it is necessary in the case of the amended COOL measure. In turn, paragraph 94 of Mexico's second written submission references the Appellate Body's analysis of the *original* COOL measure's trade restrictiveness, and argues that a relational analysis of the amended COOL measure (including of the "relative importance" of the interests or values that it furthers) "will demonstrate" inconsistency with Article 2.2. As these arguments do not address why the amended COOL measure represents an exceptional situation, the Panel declines Mexico's request to adjust the footnote 628 (footnote 646 in the Final Reports) to paragraph 7.290.

6.54. Mexico argued that **paragraph 7.318** should not refer to compliance with the DSB recommendations and rulings in the original dispute as the "primary" purpose of the 2013 Final Rule. In light of Mexico's request, the Panel has replaced the word "primarily" with "in part".

6.55. Canada commented that the percentages of coverage in **paragraph 7.347** exaggerate the degree to which the amended COOL measure fulfils its objectives because they include Labels D and E. Canada accordingly requested revising the figures to correspond to the coverage of Labels A-C. Mexico similarly requested revision of this paragraph to reflect the focus on Labels A-C. The United States requested modifications so that the percentages refer to overall US beef and pork consumption and adjustments to the wording of certain sentences. Canada did not object to the United States' requests to refer to overall US beef and pork consumption or to delete the words "muscle cuts" in this paragraph. However, Canada objected to the United States' requested revisions with respect to the degree of contribution achieved by exempted products. Mexico similarly opposed the United States' requests for rephrasing certain findings in this paragraph. The United States opposed Canada's request to insert the statement that "Labels A-C cover, at most, between 16.3% and 24.5% of all beef consumed in the United States". Similarly, the United States did not support changes requested by Mexico regarding percentages for Labels A-D and additional language with such percentages in paragraph. 7.348.

6.56. In light of the parties' comments, the Panel revised paragraph 7.347 and inserted a new footnote explaining the beef and pork products represented by these figures. The Panel notes that

[21] Mexico's first written submission, para. 178.
[22] Mexico's second written submission, para. 109.

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the parties' data do not specify the proportion within Categories A-C that are labelled, as opposed to those that are exempted from coverage. Thus, although muscle cuts in Categories A-D comprise between 16.3% and 24.5% of US beef consumption, the proportion of exempted beef products that are muscle cuts as opposed to ground beef cannot be precisely determined based on the data provided by the parties. See also paragraph 7.258 below. The Panel further notes that, given the United States' importation of beef muscle cuts in Category D, the share of US beef consumption of muscle cuts in Categories A-C would be lower than 24.5%. As a final note, these ranges hinge on a number of assumptions, including the share of US beef or pork consumption sold in retailers and in food service establishments, as well as the share of processed food sold at (i) exempted retailers, (ii) food service establishments, or (iii) retailers subject to the amended COOL measure. Different values for these shares lead to different shares of beef or pork muscle cuts in relation to total US beef or pork consumption that are subject to the amended COOL measure.

6.57. Mexico requested additional references to paragraphs of its written submissions to be inserted into **footnote 842 (footnote 861 in the Final Reports) to paragraph 7.373**. The Panel supplemented footnote 842 (footnote 861 in the Final Reports) to paragraph 7.373 as requested by Mexico.

6.58. Canada argued that the Panel's analysis of the risks non-fulfilment would create in **paragraphs 7.374-7.383 and 7.415-7.424** does not address Canada's arguments (i) that origin information is a "credence attribute"; and (ii) that there would be "no harm" from consumers not receiving information on production steps and hence "mak[ing] their purchasing decision on false food safety assumptions."

6.59. The Panel declines Canada's request. In paragraph 7.379, the Panel explained that reviewing the risks of non-fulfilment of the amended COOL measure's objective under Article 2.2 of the TBT Agreement does not require defining any precise relationship with the relative importance of the interests or values protected under Article XX of the GATT 1994. For its Article 2.2 analysis of the amended COOL measure, the Panel therefore reviewed the risks non-fulfilment of the amended COOL measure's objective would create strictly from the viewpoint of the objective, i.e. providing consumer information on origin. The Panel continues to consider it unnecessary to address how this objective – or the consequences of its non-fulfilment –compares with other objectives or values such as food safety. As regards the specific issue of "credence attributes", the Panel notes that Canada references the USDA's analysis of possible credence attributes in connection with market failure arguments; at the same time, Canada also argues that "[t]he USDA has not explained what these 'latent attributes' might be, whether they actually exist or why they may be important to certain consumers."[23] In any event, the Panel does not review the risks non-fulfilment would create from a possible market failure perspective. As the Panel recalled in paragraph 7.421, "[t]here are … 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."

6.60. In regard to **paragraphs 7.415-7.424**, Canada argued that the Panel has an obligation to make a finding on the "gravity of the consequences" in the context of its analysis under Article 2.2. The United States was of the view that the Panel was very clear that, on the basis of the available evidence, it could not reach a conclusion on this matter.

6.61. In the paragraphs mentioned by Canada as well as the sections preceding these paragraphs, the Panel reviewed in detail the parties' evidence on the risks non-fulfilment would create. In light of this analysis, in paragraph 7.423 the Panel concluded that "based on th[is] evidence … [it] cannot ascertain the gravity of not fulfilling the amended COOL measure's objective." As explained by the Appellate Body, panels may not "make affirmative findings that lack a basis in the evidence contained in the panel record."[24] As a result, the Panel declines Canada's request.

6.62. Canada requested the Panel to delete from **paragraph 7.469** the reference to the "Product of the U.S." label. The United States objected to Canada's request as Canada did not formally disagree with the Panel's formulation of the "Product of the U.S." label in response to

[23] See Canada's first written submission, paras. 145-146.
[24] Appellate Body Report, *US – Carbon Steel*, para. 142.

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Panel question No. 51. Furthermore, according to the United States, to the extent Canada argues that the label under its first alternative measure would be identical to Label D, "Product of the U.S." is an appropriate formulation of Labels A-C under the first alternative measure. In light of Canada's request and the United States' comments, the Panel has adjusted the last sentence of paragraph 7.469.

6.63. The United States requested that **paragraph 7.489** be deleted because the parties did not address how less origin information might reduce consumer confusion, and there is no evidence on the record on this matter. Conversely, Canada considered that paragraph 7.489 should be kept as it sets out the Panel's reasoning similar to certain paragraphs in the Appellate Body Reports in the original *US – COOL* dispute. Mexico also objected to the United States' request, arguing that there is evidence on the record of labels that are difficult to understand.

6.64. The Panel considers paragraph 7.489 to be part of its reasoning on the first alternative measure's degree of contribution to the objective of providing consumer information on origin. The Panel has therefore maintained this paragraph.

6.65. In regard to **paragraphs 7.491 and 7.503**, Canada requested that the Panel complete the analysis and determine that the first and second alternative measures, respectively, are reasonably available and less-trade restrictive than the amended COOL measure. Mexico made a similar request in the context of **paragraph 7.491** with regard to all four alternative measures. Specifically, in regard to the third and fourth alternative measures, Mexico requested the Panel to address the degree of contribution to the amended COOL measure's objective. The United States objected to the complainants' requests. The United States argued that the Panel addressed the first two alternative measures' degrees of contribution, and explained that the three factors of a comparative analysis are conjunctive. Further, according to the United States, the Panel found that the third and fourth alternative measures were not adequately identified to allow a meaningful Article 2.2 comparison.

6.66. The Panel declines the complainants' request. The Panel notes that the complainants' interim review requests and comments do not address – let alone question – the Panel's analysis of the four alternative measures and its conclusion that the complainants did not make a *prima facie* case under Article 2.2 of the TBT Agreement for any of the four alternative measures. In particular, the complainants did not question the Panel's findings that the complainants had not persuasively demonstrated that the first two alternative measures achieve an equivalent degree of contribution as the amended COOL measure, specifically how increased coverage would compensate for less origin information provided on Labels A-C under these two alternatives. Likewise, the complainants did not call into question the Panel's findings that the complainants had not sufficiently explained how their third and fourth alternative measures would be implemented, and thus had not adequately identified these alternatives to allow a meaningful Article 2.2 comparative analysis. Finally, the complainants did not contest the conjunctive nature of the factors of an Article 2.2 comparative analysis, or the validity of the Appellate Body's reliance on the conjunctive nature of these factors in the original dispute[25] referenced by the Panel in paragraph 7.491.

6.67. Mexico requested the insertion of references into the **footnotes to paragraph 7.515** to exhibits submitted by Mexico in connection with the NAIS and Interstate Livestock Traceability Rule. The United States commented that the Interstate Livestock Traceability Rule (Exhibit MEX-82) is already referenced in multiple footnotes. As for other exhibits referred to by Mexico (Exhibits MEX-83, MEX-84, and MEX-85), the United States commented that these are APHIS documents submitted by Mexico, but that Mexico has not explained why these documents (unlike the official regulation of the Interstate Livestock Traceability Final Rule) should be included.

[25] In the original dispute, the Appellate Body held that "in most cases" a comparative analysis under Article 2.2 "will involve a comparison of the trade-restrictiveness of, and the degree of achievement of the objective by, the measure at issue, with that of possible alternative measures that may be reasonably available *and* that are less trade restrictive than the challenged measure, taking account of the risks non-fulfilment would create." Appellate Body Reports, *US – COOL*, para. 376 (original emphasis).

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6.68. As section 7.6.5.4 already provides references to the Interstate Livestock Traceability Rule as well as the parties' specific arguments on the third alternative measure, no further revisions to the footnotes to paragraph 7.515 were considered necessary.

6.69. Regarding **paragraph 7.518**, Canada commented that its reference to Uruguay's trace-back system concerned the second stage, rather than the second pillar of the first stage, of a trace-back system. The United supported revision of this paragraph to reflect Canada's specific arguments. The Panel revised paragraph 7.518 in light of the parties' comments.

6.70. The United States requested review of **section 7.7 (paragraphs 7.617-7.643)** in respect of the Panel's reliance on the Appellate Body's reports in *EC – Seal Products*. The United States noted that the circulation of those reports occurred after the period for the parties to make their arguments and submit evidence had ended. The United States referred to the Appellate Body's statement that "a Member's right to regulate under the sixth recital, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX".[26] In addition, the United States pointed to the Appellate Body's statement as to the lack of "any concrete examples of a legitimate objective that could factor into an analysis under Article 2.1 of the TBT Agreement, but would not fall within the scope of Article XX of the GATT 1994".[27] According to the United States, the Panel's analysis "does not appear to take this further aspect of Article III:4, as found by the Appellate Body, into account". The United States opined that the Panel's analysis "would suggest that one would expect there to be a COOL measure that causes a detrimental impact on imports yet is consistent with Article 2.1 of the TBT Agreement. According to the Appellate Body's approach, then, there must be an Article XX exception that would be available for COOL." Asserting that "the current circumstances are extraordinary", the United States contended that "the parties were not able to shape their submissions" according to the Appellate Body's finding regarding a responding Member's reliance on an Article XX exception with respect to a claim under Article III:4 of the GATT 1994 even where the measure could be consistent with Article 2.1 of the TBT Agreement. The United States therefore requested the Panel to "address the availability of Article XX as an exception for Article III:4 with respect to COOL". In the view of the United States, the Panel's "existing analysis would support finding under Article XX", particularly in respect of reasonably available alternative measures. The United States considered that the Reports, "as currently structured, would appear at odds with [the] principle" that "a Member's right to regulate is not, in principle, different under Article 2.1 than under Article III:4".

6.71. Canada commented that "[t]he nature of the United States' request to the Panel is unclear". Canada noted that the United States had not invoked Article XX as a defence, and was instead asking the Panel to address "issues on the 'availability' of an unspecified Article XX defence". Canada pointed to the burden of proof associated with Article XX of the GATT 1994 and asserted that interim review is not an appropriate stage in panel proceedings for a party to make new arguments or submit new evidence. Further, Canada disputed the suggestion that the findings of the Appellate Body in *EC – Seal Products* were unforeseeable, arguing that these findings were in line with those in *US – Clove Cigarettes* and simply upheld the panel's finding on the legal standard for claims under Article III:4 of the GATT 1994. Canada also disputed the United States' suggestion that the Panel could "transpose findings under … the TBT Agreement to a hypothetical analysis under GATT Article XX". In Canada's view, the United States could have structured its defence in this case to anticipate the findings of the Appellate Body, and that in this case it simply chose not to raise a defence under Article XX of the GATT 1994.

6.72. Mexico similarly opposed the United States' request, noting that interim review is "not the stage for a complainant to seek a finding related to the general exceptions of the GATT 1994, particularly considering that this defence was not raised by the United States" in these proceedings. Mexico disagreed with the United States' view that the current circumstances are "extraordinary", and contended that the Appellate Body's findings in *EC – Seal Products* were not unforeseeable. According to Mexico, the United States' request is conditioned on the existence of a measure that is consistent with Article 2.1 of the TBT Agreement and inconsistent with Article III:4 of the GATT 1994. Given the Panel's finding that the amended COOL measure is inconsistent with

[26] Citing Appellate Body Reports, *EC – Seal Products*, para. 5.122.
[27] Citing Appellate Body Reports, *EC – Seal Products*, para. 5.128.

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both Article 2.1 and Article III:4, Mexico argued that "the United States' request is based on a hypothetical set of circumstances that does not exist in this dispute".

6.73. The Panel notes that section 7.7 applies the legal standard under Article III:4 of the GATT 1994 as recently clarified by the Appellate Body in *EC – Seal Products*. The Panel further notes that the United States' request is quite general. The United States does not advance or argue a defence under Article XX of the GATT 1994, nor does it identify any sub-paragraph of that Article as relevant to the present dispute. The United States merely requests that the Panel "address this aspect of the Article III:4/Article 2.1 relationship and address the availability of Article XX as an exception with respect to COOL".

6.74. The United States' position appears to be predicated on a perceived conflict between, on the one hand, the Appellate Body's clarification of the relationship of national treatment under the GATT 1994 and the TBT Agreement and, on the other hand, the implications for a hypothetical measure found to be consistent with Article 2.1 of the TBT Agreement but in violation of Article III:4 of the GATT 1994. The Panel has found the amended COOL measure to be in violation of both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994. Therefore, the Panel is not faced with the situation hypothetically suggested by the United States. Under these circumstances, it is unclear how the assessment requested by the United States would be appropriate for securing a positive solution to the present dispute.

6.75. Moreover, accepting the United States' request at this stage would require examination of an issue for which neither the United States, nor the complainants, have provided specific evidence or argument. Indeed, at no point did the United States invoke Article XX of the GATT 1994 or any relevant sub-paragraph(s) thereof, or adduce arguments under Article XX at an appropriate stage of these proceedings. The Panel therefore declines the United States' request with respect to section 7.7.

6.76. Mexico requested the insertion of an additional citation into **footnote 1362 (footnote 1380 in the Final Reports) to paragraph 7.648** to its written submission as to the treatment of the terms "conflict" and "violation" as equivalent. The Panel supplemented footnote 1362 (footnote 1380 in the Final Reports) to paragraph 7.648 as requested by Mexico.

7 FINDINGS

7.1 Claims

7.1. Canada and Mexico claim that the amended COOL measure is inconsistent with the following four provisions of the covered Agreements:

a. *Article 2.1 of the TBT Agreement* and *Article III:4 of the GATT 1994* because it accords cattle and hogs imported from Canada and cattle imported from Mexico treatment less favourable than that accorded to US cattle and hogs;

b. *Article 2.2 of the TBT Agreement* because it creates an unnecessary obstacle to international trade, as it is more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create; and

c. *Article XXIII:1(b) of the GATT 1994* because it nullifies or impairs benefits to Canada and Mexico in respect of imports of cattle and, for Canada, also hogs to the US.[28]

7.2 Order of analysis

7.2. The parties do not suggest a particular order of analysis. With one exception[29], their written submissions address the national treatment claims first (Article 2.1 of the TBT Agreement, then

[28] Canada's request for the establishment of a panel, WT/DS384/26, pp. 2-3; Mexico's request for the establishment of a panel, WT/DS386/25, p. 3.

[29] Mexico's first written submission addresses its two TBT claims before its two claims under the GATT 1994.

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Article III:4 of the GATT 1994), followed by Article 2.2 of the TBT Agreement, and conclude with the non-violation claim under Article XXIII:1(b) of the GATT 1994.

7.3. In general, "panels are free to structure the order of their analysis as they see fit"[30] – unless, based on the "structure and logic" of the provisions at issue, "there exists a mandatory sequence of analysis which, if not followed, would amount to an error of law" or affect the substance of the analysis itself.[31] We do not consider, nor do the parties contend, that there is any such mandatory sequence of analysis in this compliance dispute.

7.4. The original panel noted that, given the principle of specificity, "if the [measure at issue] is a technical regulation, then the analysis under the TBT Agreement would precede any examination under the GATT 1994."[32] Accordingly, the original panel – like other TBT panels[33] – addressed the TBT claims before the GATT claims.

7.5. The original panel found that the original COOL measure was a "technical regulation" under the TBT Agreement.[34] The parties agree[35] that the COOL measure, in its amended form, continues to be a technical regulation. We agree with the parties in this respect. As explained below[36], the amended COOL measure meets the definition of a technical regulation in the TBT Agreement.[37]

7.6. Accordingly, we follow the approach of the original panel[38] and address the complainants' TBT claims before addressing their claims under Articles III:4 and XXIII:1(b) of the GATT 1994. Before turning to the complainants' legal claims, we provide an overview of the amended COOL measure and address the scope of this compliance dispute.

7.3 The amended COOL measure

7.7. The measures examined in the original dispute included the "COOL statute" (the Agricultural Marketing Act of 1946, as amended by the 2002 Farm Bill and the 2008 Farm Bill), and the regulatory provisions implementing the COOL statute in the 2009 Final Rule (AMS) (2009 Final Rule).[39] Other measures considered by the original panel have either expired or have been withdrawn, and are not at issue in these compliance proceedings.[40]

7.8. Following the original panel and appellate proceedings, the Agricultural Marketing Service (AMS) of the US Department of Agriculture (USDA) issued a final rule, effective 23 May 2013[41],

[30] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.

[31] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109. See also Appellate Body Report, *Canada – Feed-In Tariff Program*, para. 5.5; and Panel Reports, *EC – Seal Products*, para. 7.63.

[32] Panel Reports, *EC – Sardines*, paras. 7.15-7.16 (cited in Panel Reports, *US – COOL*, para. 7.73).

[33] Panel Reports, *EC – Sardines*; *US – Clove Cigarettes*; *US – Tuna II (Mexico)*; and *EC – Seal Products*.

[34] Panel Reports, *US – COOL*, para. 7.216. In the appellate proceedings, it was not at issue whether the original COOL measure was a technical regulation. Appellate Body Reports, *US – COOL*, paras. 239 and 267.

[35] Canada's first written submission, para. 23; Mexico's first written submission, paras. 63-76; United States' first written submission, para. 56.

[36] See section 7.5.2 below.

[37] Annex 1.1 of the TBT Agreement.

[38] See also Panel Reports, *EC – Seal Products*, paras. 7.61-7.70.

[39] Panel Reports, *US – COOL*, paras. 7.13-7.14.

[40] In addition to the COOL statute and 2009 Final Rule, the original panel identified two Interim Final Rules (AMS and FSIS) and a letter from US Secretary of Agriculture Thomas J. Vilsack as falling within the scope of its terms of reference. See Panel Reports, *US – COOL*, para. 7.21. The Interim Final Rules (AMS and FSIS) were found to have expired at the time of the original panel's establishment and the original panel made no findings or recommendations as to these Interim Rules. See Panel Reports, *US – COOL*, paras. 7.22 and 7.33-7.34. As noted by the Appellate Body, referring to a USDA letter to industry representatives, the United States pointed out that "the Vilsack letter was 'withdrawn' on 5 April 2012", and "at the oral hearing Canada stated that it was no longer seeking specific rulings from the Appellate Body on this measure." Appellate Body Reports, *US – COOL*, para. 251. The Vilsack letter has not been challenged or raised in this compliance dispute.

[41] The 2013 Final Rule specifies that "[t]he effective date of this regulation is May 23, 2013, and the rule is mandatory as of that date. … However, AMS understands that it may not be feasible for all of the affected entities to achieve 100% compliance immediately and that some entities will need time to achieve full compliance with the amended provisions for 100% of muscle cut covered commodities. *Therefore, during the six month period following the effective date of the regulation, AMS will conduct an industry education and*

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"to make changes to the labelling provisions for muscle cut covered commodities and certain other modifications to the program".[42] This rule (2013 Final Rule) is the only regulatory change identified by the parties as the United States' "measures taken to comply" with the DSB recommendations and rulings in the original dispute.[43]

7.9. In these Reports, the COOL statute and the 2009 Final Rule in its unamended form will be jointly referred to as the "original COOL measure". The COOL statute (which remains unchanged), and the 2009 Final Rule as amended by the 2013 Final Rule, will be jointly referred to as the "amended COOL measure".[44]

7.3.1 Amended COOL Labels

7.3.1.1 Definition of origin

7.10. The COOL statute defines the origin of muscle cuts of meat as a function of the country (or countries) where the animal from which they derive is born, raised, and slaughtered.[45] Under the unamended provisions of the 2009 Final Rule, "raised" is defined as "the period of time from birth until slaughter or in the case of animals imported for immediate slaughter … the period of time from birth until date of entry into the United States".[46] The term "slaughtered" is defined as "the point in which a livestock animal … is prepared into meat products (covered commodities) for human consumption".[47] "Born" is not explicitly defined for cattle and hogs in either the original or amended COOL measures.[48]

7.11. The 2009 Final Rule laid down origin labelling rules for meat based on the following five categories established by the COOL statute:

a. Category A muscle cuts: United States country of origin;

b. Category B muscle cuts: multiple countries of origin;

c. Category C muscle cuts: imported for immediate slaughter;

d. Category D muscle cuts: foreign country of origin; and

e. Category E: ground meat.[49]

7.12. As the COOL statute is unchanged, these broad statutory categories remain applicable under the amended COOL measure[50] – subject to the more detailed requirements of the implementing rules discussed below.

7.13. Category A represents muscle cuts "[f]rom animals exclusively born, raised, and slaughtered in the United States".[51]

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outreach program concerning the provisions and requirements of this rule." 2013 Final Rule, p. 31369 (emphasis added).

[42] See 2013 Final Rule, p. 31367.

[43] See Canada's first written submission, paras. 4 and 15-18; Mexico's first written submission, para. 10; and United States' first written submission, paras. 20-24.

[44] See Panel Reports, *US – COOL*, para. 7.13.

[45] See Appellate Body Reports, *US – COOL*, paras. 240 and 341.

[46] 2009 Final Rule, § 65.235.

[47] 2009 Final Rule, § 65.250.

[48] An unamended provision in the 2009 Final Rule only stipulates that "[*b*]*orn* in the case of chicken means hatched from the egg". 2009 Final Rule, § 65.115.

[49] See COOL statute, § 1638a(a)(2)(A)-(E); Panel Reports, *US – COOL*, para. 7.89.

[50] According to the 2013 Final Rule, "[t]he [COOL] statute contemplates four different labeling categories for meat, based on where the animal was born, raised, and/or slaughtered. This final rule preserves these four different labeling categories for meat and is consistent with labeling criteria set forth in the statutory scheme." 2013 Final Rule, p. 31370.

[51] 2009 Final Rule, § 65.180. See also COOL statute, § 1638a(a)(2)(A).

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7.14. Categories B and C pertain to animals slaughtered in the United States but born and/or raised in other countries, with distinct labelling requirements for each under the original and amended COOL measures.[52] While both Categories B and C denote mixed-origin livestock[53], Category C is specifically reserved for animals "imported into the United States for immediate slaughter".[54] Unamended provisions of the 2009 Final Rule define the term "imported for immediate slaughter" as "consignment directly from the port of entry to a recognized slaughtering establishment and slaughtered within 2 weeks from the date of entry".[55] Thus, an animal imported into the United States more than two weeks prior to its US slaughter would not qualify as being "imported for immediate slaughter", and would fall into Category B.

7.15. Under the original COOL measure, Category D extended to "[i]mported 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*".[56] The 2013 Final Rule amends this provision and now refers to "[m]uscle cut covered commodities derived from an animal that was slaughtered in another country … *including muscle cut covered commodities derived from an animal that was born and/or raised in the United States* and slaughtered in another country".[57] However, under the 2013 Final Rule, Category D origin is still designated according to the definition used for customs purposes[58], i.e. based on substantial transformation. For muscle cuts of meat, origin according to this definition is the country where the animal is slaughtered.[59]

7.16. With respect to Category E products (ground meat), unamended provisions of the 2009 Final Rule refer to "all countries of origin contained therein or that may be reasonably contained therein", adding that "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".[60]

7.3.1.2 Information on labels

7.17. The original COOL measure established labels for each of the above five categories, with various rules and flexibilities for the corresponding Labels A, B, C, D, and E. The 2009 Final Rule provided that muscle cuts in Category A "may bear a declaration that identifies the United States as the sole country of origin at retail".[61] In such situation, Label A could state "Product of the United States" or some other variation permitted under the original COOL measure.[62] With respect to Label B, the 2009 Final Rule provided that "[f]or muscle cut covered commodities derived from

[52] See Table 1 below.

[53] As the Appellate Body held, "[b]oth Categories B and C involve meat of mixed origin, in the sense that they have more than one country of origin. For each of these categories, at least one production step has taken place outside the United States, and at least one production step has taken place within the United States." See Appellate Body Reports, *US – COOL*, para. 244.

[54] In the COOL statute, Category B is under the heading "multiple countries of origin" and applies to "meat that is 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". Category C is confined exclusively to animals "imported for immediate slaughter". COOL statute, §§ 1638a(a)(2)(B) and (C). But see also para. 7.17 regarding the more specific origin requirements for Category B animals under the 2009 Final Rule.

[55] 2009 Final Rule, § 65.180.

[56] 2009 Final Rule, § 65.300(f) (emphasis added).

[57] 2013 Final Rule, § 65.300(f)(2) (emphasis added).

[58] 2009 Final Rule, § 65.300(f) and 2013 Final Rule, § 65.300(f)(2).

[59] See Panel Reports, *US – COOL*, para. 7.674; and Appellate Body Reports, *US – COOL*, para. 241. The complainants explain that the United States applies a "substantial transformation" test and, for NAFTA countries, a test based on change in tariff classification to determine origin. According to the complainants, the result under both tests is to designate the place of slaughter as the country of origin. See Canada's first written submission, para. 18 and footnote 53; and Mexico's first written submission, para. 32 and footnote 30.

[60] 2009 Final Rule, § 65.300(h). The USDA explained that "if a country of origin is utilized as a raw material source in the production of ground beef, it must be listed on the label", subject to the 60-day "inventory allowance" for "when countries may no longer be listed". 2009 Final Rule, p. 2671.

[61] 2009 Final Rule, § 65.300(d). See also COOL statute, § 1638a(a)(2)(A).

[62] 2009 Final Rule, p. 31369. See also Panel Reports, *US – COOL*, para. 7.100 and §§ 65.400(a) ("[t]he declaration of the country of origin or a product may be in the form of a statement such as 'Product of USA, 'Produce of the USA'") and 65.400(e) (describing acceptable country abbreviations, including "U.S. or USA" for the "United States of America").

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animals that were born in Country X or (as applicable) Country Y, 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".[63] In the case of Label C, when "an animal was imported into the United States for immediate slaughter as defined in § 65.180, the origin of the resulting meat products derived from that animal [had to] be designated as Product of Country X and the United States".[64] As referenced above, Label D reflected the country of origin of imported muscle cuts "as declared to U.S. Customs and Border Protection", namely the country of slaughter based on the principle of substantial transformation.[65] Finally, Label E required that ground meat products "shall list all countries of origin contained therein or that may be reasonably contained therein" based on the 60-day "inventory allowance" under the 2009 Final Rule.[66]

7.18. As a result of the 2013 Final Rule, the amended COOL measure imposes new labelling requirements for Labels A, B, and C.[67] For muscle cuts from animals slaughtered in the United States, the amended COOL measure now generally requires Labels A, B, and C to indicate the place of occurrence of each production step (born, raised, and slaughtered).[68]

7.19. With respect to Label D, which applies to muscle cuts from non-US slaughtered animals, the 2013 Final Rule preserves the required origin label declaration of the original COOL measure, but adds a voluntary option to provide more information. Thus, Label D must continue to indicate the origin "as declared to U.S. Customs and Border Protection at the time the products entered the United States, through retail sale (e.g., 'Product of Country X')".[69] In addition, Label D "may include more specific location information related to production steps (i.e., born, raised, and slaughtered) provided records to substantiate the claims are maintained".[70]

7.20. The requirements of Label E for ground meat were not changed by the 2013 Final Rule.[71] Label E for ground meat products "shall [continue to] list all countries of origin contained therein or that may be reasonably contained therein" based on the 60-day "inventory allowance" under the 2009 Final Rule.[72]

7.21. Table 1 below compares the origin definitions and examples of basic muscle cut labels under the 2009 and 2013 Final Rules.

[63] 2009 Final Rule, § 65.300(e)(1). The COOL statute provides for Category B that retailers "may designate the country of origin of such covered commodity as all of the countries in which the animal may have been born, raised, or slaughtered". COOL statute, § 1638a(a)(2)(B).

[64] 2009 Final Rule, § 65.300(e)(3). The 2009 Final Rule also stipulates that the countries on Label B "may be listed in any order", as distinct from Label C which did not have a similar flexibility.
2009 Final Rule, § 65.300(e)(4) and p. 2659. See also Panel Reports, *US – COOL*, para. 7.697.

[65] 2009 Final Rule, § 65.300(f).

[66] 2009 Final Rule, § 65.300(h).

[67] 2013 Final Rule, p. 31367; United States' first written submission, para. 25.

[68] See 2013 Final Rule, §§ 65.300(d) and (e), p. 31367. The United States and Mexico have stated that this is effectively a "single label" for these categories of meat. See United States' first written submission, para. 24; and Mexico's first written submission, para. 119. Canada contends that "[w]hether the labels are considered in the singular or the plural, it is the content of the labels and the incentives they create that are relevant." Canada's second written submission, para. 55.

[69] As the 2013 Final Rule points out, "[u]nder this final rule, these labeling requirements for imported muscle cut covered commodities remain unchanged." 2013 Final Rule, § 65.300(f)(2) and p. 31369.

[70] 2013 Final Rule, § 65.300(f)(2). Note that the provisions for voluntarily providing such information previously applied to former Labels B and C. 2009 Final Rule, § 65.300(e)(4).

[71] See 2013 Final Rule, p. 31372; Canada's first written submission, para. 18; and Mexico's first written submission, para. 45.

[72] 2009 Final Rule, § 65.300(h).

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TABLE 1: DEFINITIONS OF ORIGIN AND BASIC LABELS FOR MUSCLE CUTS

	2009 Final Rule	2013 Final Rule*
LABEL A	**Product of the U.S.**	**Born, Raised, and Slaughtered in the United States**
	"United States country of origin means … [f]rom animals exclusively born, raised, and slaughtered in the United States" (65.260(a)(1)) "A covered commodity *may* bear a declaration that identifies the United States as the sole country of origin at retail only if it meets the definition of United States country of origin as defined in § 65.260." (65.300(d) (emphasis added))	"The United States country of origin designation for muscle cut covered commodities *shall* include all of the production steps (i.e. 'Born, Raised, and Slaughtered in the United States')." (65.300(d) (emphasis added))
LABEL B	**Product of the United States, Country X** **Product of the United States, Country X, and … Country Y**	**Born and Raised in Country X, Raised and Slaughtered in the United States** **Born and Raised in Country X, Raised in Country Y, Raised and Slaughtered in the United States**
	"For muscle cut covered commodities derived from animals that were born in Country X or (as applicable) Country Y, raised and slaughtered in the United States, and were not derived from animals imported 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." (65.300(e)(1) (emphasis added))	"If an animal was born and/or raised in Country X and/or (as applicable) Country Y, and slaughtered in the United States, the resulting muscle cut covered commodities *shall* be labelled to specifically identify the production steps occurring in each country… . " (65.300(e) (emphasis added))
LABEL C	**Product of Country X and the United States**	**Born and Raised in Country X, Slaughtered in the United States**
	"If an animal was imported into the United States for immediate slaughter as defined in § 65.180, the origin of the resulting meat products derived from that animal *shall* be designated as Product of Country X and the United States." (65.300(e)(3) (emphasis added))	"If an animal was born and/or raised in Country X and/or (as applicable) Country Y, and slaughtered in the United States, the resulting muscle cut covered commodities *shall* be labelled to specifically identify the production steps occurring in each country (e.g., 'Born and Raised in Country X, Slaughtered in the United States')." (65.300(e) (emphasis added))
LABEL D	**Product of Country X**	**Product of Country X**
	"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." (65.300(f) (emphasis added))	"Muscle cut covered commodities derived from an animal that was slaughtered in another country *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 (e.g., 'Product of Country X')" (65.300(f)(2) (emphasis added))

**The excerpts from the 2013 Final Rule in the right-hand column replace the corresponding provisions from the 2009 Final Rule in the left-hand column, except for the excerpt in the top right-hand cell, which is additional to the excerpt in the top left-hand cell.*

Notes to Table 1: **Label A on the left** is taken from the 2009 Final Rule, p. 2668. See also Panel Reports, *US – COOL*, para. 7.100. **Label A on the right** is taken from the 2013 Final Rule, § 65.300(d). **The two Labels B on the left** are taken from the 2009 Final Rule, § 65.300(e)(1) and p. 2661. **The first Label B on the right** is taken from the 2013 Final Rule, p. 31368. **The second Label B on the right** is taken from the 2013 Final Rule, § 65.300(e). **Label C on the left** is taken from the 2009 Final Rule, § 65.300(e)(3). **Label C on the right** is taken from the 2013 Final Rule, § 65.300(e) and pp. 31368-31369. **Label D on the left** is taken from Panel Reports, *US – COOL*, para. 7.100. **Label D on the right** is taken from the 2013 Final Rule, § 65.300(f)(2).

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7.3.1.3 Methods of providing origin information

7.22. The amended COOL measure permits the same methods for conveying origin information as the original COOL measure. In particular, the COOL statute sets forth that country of origin information "may be provided 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".[73] The 2009 Final Rule additionally provides that "[c]ountry of origin declarations can either 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".[74] The declaration of country of origin in any of these forms "may be typed, printed, or handwritten"[75] 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".[76]

7.23. The USDA explained in the 2009 Final Rule that "[i]n order to provide the industry with as much flexibility as possible, this rule does not contain specific requirements as to the exact placement or size of the country of origin … declaration", provided that the declaration be "legible and conspicuous, and allow consumers to find the country(ies) of origin … easily and read them without strain when making their purchases".[77] The 2013 Final Rule adds with respect to labels and stickers that "abbreviations for the production steps are permitted as long as the information can be clearly understood by consumers", including the following specific examples: "'brn' as meaning 'born'"; "'raisd' as meaning 'raised'"; "'slghtrd' as meaning 'slaughtered'"; and "'hrvstd' as meaning 'harvested'"[78].[79]

7.24. Like the original COOL measure, the amended COOL measure provides that "[i]n general, country abbreviations are not acceptable" on meat labels.[80] However, declarations of origin may use "country abbreviations, as permitted by Customs and Border Protection, such as 'U.S.' and 'USA' for the 'United States of America'".[81]

7.3.2 Coverage of the amended COOL measure

7.3.2.1 Products at issue

7.25. The amended COOL measure continues to apply to a wide range of "covered commodities", which include muscle cuts of beef and pork as well as ground beef and pork.[82]

7.26. As in the original dispute, the only covered products challenged in this compliance dispute are imported Canadian cattle and hogs and imported Mexican cattle, which are used in the

[73] COOL statute, § 1638a(c)(1). See also Panel Reports, *US – COOL*, para. 7.110.
[74] 2009 Final Rule, § 65.400(a). See also Panel Reports, *US – COOL*, para. 7.110.
[75] 2009 Final Rule, § 65.400(c).
[76] 2009 Final Rule, § 65.400(b). See also Panel Reports, *US – COOL*, para. 7.111.
[77] 2009 Final Rule, p. 2663.
[78] The 2009 Final Rule provided that "[f]or purposes of labeling under this part, the word harvested may be used in lieu of slaughtered". 2009 Final Rule, § 65.250. The 2013 Final Rule states that "[t]he current COOL regulations permit the term 'harvested' to be used in lieu of 'slaughtered.' This final rule retains that flexibility." 2013 Final Rule, pp. 31369-31368.
[79] 2013 Final Rule, p. 31369. In explaining the allowance for such abbreviations, the USDA stated that it "recognizes that there is limited space to include the specific location information for each production step".
[80] 2009 Final Rule, § 65.400(e).
[81] 2013 Final Rule, p. 31369. See also Panel Reports, *US – COOL*, para. 7.112.
[82] According to the COOL statute, "[i]n general [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 (vii) meat produced from goats; (viii) chicken, in whole and in part; (ix) ginseng; (x) pecans; and (xi) macadamia nuts." COOL statute, § 1638(2)(A) (emphasis added). According to the 2009 Final Rule, "*[c]overed commodity* means: (1) *Muscle cuts of beef*, lamb, chicken, goat, *and pork*; (2) *Ground beef*, ground lamb, ground chicken, ground goat, *and ground pork*; (3) Perishable agricultural commodities; (4) Peanuts; (5) Macadamia nuts; (6) Pecans; and (7) Ginseng." 2009 Final Rule, § 65.135(a) (emphasis added). The 2013 Final Rule does not amend this provision of the 2009 Final Rule.

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United States to produce beef and pork commodities covered by the COOL measure.[83] As the 2013 Final Rule does not modify the original COOL measure in respect of its application to meat and livestock, the following findings from the original dispute are equally valid for the amended COOL measure:

> [T]he 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, 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". … [H]owever, 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". The latter Category of upstream market participants "shall provide information to the retailer indicating the country of origin of the covered commodity". The COOL measure supports this obligation with an enforcement mechanism, including fines – again, applicable to both retailers and their suppliers.[84]

7.3.2.2 Exemptions

7.27. The amended COOL measure retains the original COOL measure's three main exemptions from coverage, while slightly adjusting the first one:

a. entities not meeting the definition of the term "retailer";

b. ingredients in "processed food items"; and

c. products served in a "food service establishment".[85]

7.28. Both the original and amended COOL measures require labelling at the retail stage.[86] The original COOL measure defined "retailers" as "any person licensed as a retailer under the Perishable Agricultural Commodities Act of 1930" (PACA)."[87] Pursuant to the terms of PACA, this means an entity whose invoice costs of purchases of perishable agricultural commodities are in excess of US $230,000 in any calendar year.[88] Whereas the original COOL measure defined the term "retailer" as "retailer licensed under [PACA]", the 2013 Final Rule amends the definition to "any person *subject to be* licensed as a retailer under [PACA]".[89]

7.29. The COOL statute excludes from its scope any covered commodity that is "an ingredient in a processed food item".[90] The 2009 Final Rule defines "processed food item" as "a retail item derived from a covered commodity that has undergone specific processing resulting in a change in the

[83] Panel Reports, *US – COOL*, paras. 7.64-7.66. See also Canada's and Mexico's requests for the establishment of a panel (WT/DS384/26 and WT/DS386/25).

[84] Panel Reports, *US – COOL*, para. 7.246 (footnote references to unchanged provisions of the COOL statute omitted). See also Panel Reports, *US – COOL*, paras. 7.67 and 7.205; Appellate Body Reports, *US – COOL*, para. 239; and section 7.3.5 below.

[85] See Panel Reports, *US – COOL*, paras. 7.101-7.108; Appellate Body Reports, *US – COOL*, para. 334.

[86] See COOL statute, §§ 1638(6) and 1638a(a)(1); 2009 Final Rule, p. 2658; and 2013 Final Rule, p. 31367.

[87] 2009 Final Rule, § 65.240.

[88] See Panel Reports, *US – COOL*, para. 7.101; Canada's first written submission, footnote 39 and opening statement at the meeting of the Panel, footnote 14; Mexico's first written submission, para. 23; and United States' first written submission, footnote 15. In addition, a "retailer" under PACA must have shipped, received, or contracted to be shipped or receive in a single day perishable agricultural commodities in a quantity of at least 2,000 pounds (one ton). See Exhibits CDA-10 and MEX-7, 7 U.S.C. §§ 499a(b)(6) and (11); and MEX-8, 7 C.F.R. § 46.2(x).

[89] 2013 Final Rule, § 65.240 (emphasis added). The USDA explains that "[t]his change more closely aligns with the language contained in the PACA regulation and clarifies that all retailers that meet the PACA definition of a retailer, whether or not they actually have a PACA licence, are also covered by COOL". 2013 Final Rule, p. 31368. For an analysis of any practical implications of this change, see paras. 7.224-7.225 below.

[90] COOL statute, § 1638(2)(B).

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character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component".[91] The 2013 Final Rule does not modify these provisions.[92]

7.30. The COOL statute also exempts "food service establishments" from its labelling requirements.[93] 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".[94] As noted in the original proceedings, the 2009 Final Rule further develops this definition by adding that "[s]imilar food service facilities include salad bars, delicatessens, and other food enterprises located within retail establishments that provide ready-to-eat foods that are consumed either on or outside of the retailer's premises".[95] The exemption of food service establishments is not amended by the 2013 Final Rule.[96]

7.3.3 Flexibilities

7.31. The original COOL measure allowed for three main flexibilities from its general labelling requirements: (i) the commingling flexibility; (ii) the country order flexibility; and (iii) the multiple countries of raising flexibility. The 2013 Final Rule has removed the first two flexibilities, and amended the third one.

7.3.3.1 Commingling flexibility removed

7.32. The 2009 Final Rule included flexibility with respect to the commingling of muscle cuts from US-slaughtered livestock. This flexibility applied specifically between Label A and Label B[97] muscle cuts, as well as between Label B and Label C[98] muscle cuts, "commingled during a production day".[99]

[91] 2009 Final Rule, § 65.220. The definition of "processed food item" further states that "[s]pecific processing that results in a change in the character of the covered commodity includes cooking (e.g., frying, broiling, grilling, boiling, steaming, baking, roasting), curing (e.g., salt curing, sugar curing, drying), smoking (hot or cold), and restructuring (e.g. emulsifying and extruding)." See also Panel Reports, *US – COOL*, paras. 7.104-7.105.

[92] See 2009 Final Rule, § 65.300(c); 2013 Final Rule, p. 31372 (responding to comments that "the definition of processed should be narrowed such that more products are covered" as being "outside the scope of this rulemaking"); Canada's first written submission, para. 18; and Mexico's first written submission, para. 46.

[93] COOL statute, § 1638a(b).

[94] COOL statute, § 1638(4).

[95] 2009 Final Rule, § 65.140. See also Panel Reports, *US – COOL*, paras. 7.107-7.108.

[96] See 2009 Final Rule, § 65.300(b); 2013 Final Rule, p. 31372 (responding to comments that "[f]ood service establishments should be covered because 48% of spending on food occurs at restaurants" as being "outside the scope of this rulemaking"); Canada's first written submission, para. 18; and Mexico's first written submission, para. 46.

[97] According to the original COOL measure, "[f]or muscle cut covered commodities derived from animals born, raised, and slaughtered in the U.S. [i.e. Label A muscle cuts] that are commingled during a production day with muscle cut covered commodities described in § 65.300(e)(1) [i.e. Label B muscle cuts], the origin may be designated as Product of the United States, Country X, and (as applicable) Country Y." 2009 Final Rule, § 65.300(e)(2).

[98] According to the original COOL measure, "[f]or muscle cut covered commodities derived from animals that are born in Country X or Country Y, raised and slaughtered in the United States [i.e. Label B muscle cuts], that are commingled 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 [i.e. Label C muscle cuts], the origin may be designated as Product of the United States, Country X, and (as applicable) Country Y." 2009 Final Rule, § 65.300(e)(2).

[99] "As discussed in the 2009 final rule, USDA considers that commingling typically takes place in two different scenarios. First, muscle cut covered commodities derived from animals born, raised, and slaughtered in the United States 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, could be designated as, for example, Product of the United States, Country X, and (as applicable) Country Y. Second, muscle cut covered commodities derived from animals that are born in Country X or Country Y, raised and slaughtered in the United States, that are commingled during a production day with muscle cut covered commodities that are derived from animals that are imported into the

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7.33. The original panel noted that "commingling c[ould] take place in multiple stages of the meat production process (e.g. processors and packers), including at the retail level."[100] As to what might be commingled, the 2009 Final Rule referred to "commingled covered commodities"[101], defining "covered commodities" in relevant part as "[m]uscle cuts of beef and pork" and "[g]round beef … and ground pork".[102] In addition, as the original panel noted, the original COOL measure foresaw the possibility of commingling relevant types of animals.[103] Both the original[104] and amended COOL measures[105] describe commingling as potentially involving animals, not just muscle cuts.

7.34. The 2013 Final Rule deleted the original COOL measure's provisions on the modalities of commingling.[106] Thus, as the USDA points out, the amended COOL measure "eliminates the allowance for commingling of muscle cut covered commodities of different origins."[107] No party contests that the commingling flexibility is now completely eliminated. At the same time, the parties continue to differ on the extent to which this eliminated commingling flexibility was actually used, and disagree as to the implications of commingling for this compliance dispute.[108]

7.3.3.2 Country order flexibility removed

7.35. The 2009 Final Rule contained flexibility concerning the order of countries of origin on Label B.[109] The countries of origin could be listed in "any order"[110], so Label B for muscle cuts of, for example, mixed US-Canadian origin could read "Product of U.S., Canada or Product of Canada, U.S."[111] As a result, the Appellate Body noted that "[b]ecause the countries of origin for Category B meat c[ould] be listed in any order [under the original COOL measure], the labels for Categories B and C meat could look the same in practice."[112]

7.36. Under the 2009 Final Rule, this country order flexibility also applied cumulatively in regard to the commingling flexibility between Label A and Label B[113], as well as between Label B and Label C[114] muscle cuts.[115] Thus, the flexibility on the order of countries of origin, applied together

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United States for immediate slaughter, could be designated as Product of the United States, Country X, and (as applicable) Country Y." 2013 Final Rule, footnote 7. See also Appellate Body Reports, *US – COOL*, para. 246.

[100] Panel Reports, *US – COOL*, para. 7.704. See Appellate Body Reports, *US – COOL*, para. 475.

[101] According to the original COOL measure, "*[c]ommingled covered commodities* means covered commodities (of the same type) presented for retail sale in a consumer package that have been prepared from raw material sources having different origins." 2009 Final Rule, § 65.125.

[102] 2009 Final Rule, § 65.135(a)(1) and (2). See also Appellate Body Reports, *US – COOL*, para. 246.

[103] See Panel Reports, *US – COOL*, para. 7.705.

[104] As noted in the 2009 Final Rule, "[t]he Agency recognizes that the multitude of different production practices and possible sales transactions can influence the value determinations made throughout the supply chain resulting in instances of commingling of animals or covered commodities, which will have an impact when mixing occurs." 2009 Final Rule, p. 2670.

[105] 2013 Final Rule, p. 31368 ("commingled livestock"); p. 31378 ("firms currently using the flexibility afforded by commingling livestock of more than one origin on a single production day"); p. 31380 ("beef packers and processors that currently commingle domestic and foreign-origin cattle"; "the estimated number of commingled steers and heifers"; and "the estimated number of commingled barrows and gilts"); and p. 31384 ("facilities that currently commingle domestic and foreign-origin cattle or hogs").

[106] 2013 Final Rule, p. 31367. Of note, the amended COOL measure does not expunge the original COOL measure's definition of "commingled covered commodities." See footnote 101 above.

[107] 2013 Final Rule, p. 31385.

[108] See paras. 7.121-7.127 below.

[109] 2009 Final Rule, § 65.300(e)(4) and pp. 2659 and 2661.

[110] 2009 Final Rule, § 65.300(e)(4) and pp. 2659, 2661, and 2662.

[111] 2009 Final Rule, p. 2661.

[112] Appellate Body Reports, *US – COOL*, para. 245 (footnote omitted). Likewise, the original panel found that "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." Panel Reports, *US – COOL*, para. 7.288 (footnotes omitted).

[113] According to the original COOL measure, "[f]or muscle cut covered commodities derived from animals born, raised, and slaughtered in the U.S. [i.e. Label A muscle cuts] that are commingled during a production day with muscle cut covered commodities described in § 65.300(e)(1) [i.e. Label B muscle cuts], the origin may be designated as Product of the United States, Country X, and (as applicable) Country Y." 2009 Final Rule, § 65.300(e)(2).

[114] According to the original COOL measure "[f]or muscle cut covered commodities derived from animals that are born in Country X or Country Y, raised and slaughtered in the United States [i.e. Label B muscle cuts], that are commingled 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 [i.e. Label C

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with the commingling flexibilities, could result in commingled Label A, B, and C meat carrying the same, identical label:

> When Category A and Category B meat is commingled during a single production day, all of the resulting meat may be labelled as if it were Category B meat, even though a particular piece of meat may have been derived from a Category A animal. Further, when Category B and Category C meat is commingled during a single production day, all of the resulting meat may be labelled as if it were Category B meat, even though a particular piece of meat may have been derived from a Category C animal. In both cases, since the resulting meat may be labelled as if it were Category B meat, the declared countries of origin for all commingled meat may be listed in any order.[116]

7.37. By replacing the relevant provision in the 2009 Final Rule[117], the 2013 Final Rule eliminated the country order flexibility altogether, including as applied in combination with the now removed commingling flexibility.

7.3.3.3 Amended multiple countries of raising flexibility

7.38. In general, the 2013 Final Rule requires Labels B and C to "specifically identify the production steps occurring in each country."[118] At the same time, based on practical considerations[119], it includes some flexibility:

> If an animal is raised in the United States as well as another country (or multiple countries), the raising occurring in the other country (or countries) may be omitted from the origin designation.[120]

7.39. This flexibility does not apply to Label C ("if the animal was imported for immediate slaughter"), or "where by doing so the muscle cut covered commodity would be designated as having a United States country of origin."[121] The parties dispute the implications of this flexibility and its carve-outs for the complainants' TBT claims.[122]

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muscle cuts], the origin may be designated as Product of the United States, Country X, and (as applicable) Country Y." 2009 Final Rule, § 65.300(e)(2). See also ibid. p. 2659, 2661, and 2662.

[115] According to the original COOL measure, "[i]n each case of paragraphs (e)(1), (e)(2), and (e)(4) of this section, the countries may be listed in any order." 2009 Final Rule, § 65.300(e) (4). As the original panel noted, "[t]he 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." Panel Reports, *US – COOL*, para. 7.97 (footnote omitted).

[116] Appellate Body Reports, *US – COOL*, para. 246 (footnotes omitted). See also ibid. paras. 336-337. As the original panel held, "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." Panel Reports, *US – COOL*, para. 7.705.

[117] 2013 Final Rule, § 65.300(e).

[118] 2013 Final Rule, § 65.300(e).

[119] According to the 2013 Final Rule, "if animals are born and raised in another country and subsequently further raised in the United States, only the raising that occurs in the United States needs to be declared on the label, as it is understood that an animal born in another country will have been raised at least a portion of its life in that other country. Because the country of birth is already required to be listed in the origin designation, and to reduce the number of required characters on the label, the Agency is not requiring the country of birth to be listed again as a country in which the animal was also raised. Accordingly, under this final rule, the production step related to any raising occurring outside the United States may be omitted from the origin designation of these commodities." 2013 Final Rule, p. 31368.

[120] 2013 Final Rule, § 65.300(e).

[121] 2013 Final Rule, § 65.300(e).

[122] See paras. 7.233-7.244 below.

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7.40. The multiple countries of raising flexibility under the 2013 Final Rule resembles the flexibility under the 2009 Final Rule, which also applied only to Category B muscle cuts:

> [I]f animals are raised in another country and the United States, provided the animals are not imported for immediate slaughter as defined in § 65.180, the raising that occurs in the United States takes precedence over the minimal raising that occurred in the animal's country of birth.[123]

7.41. According to the USDA, "it is understood that an animal born in another country will have been raised at least a portion of its life in that other country."[124]

7.42. The main difference between the two versions of this flexibility is that the 2013 Final Rule specifies that the other country or countries of raising may be "omitted"[125], whereas the 2009 Final Rule refers to the US raising "tak[ing] precedence"[126] over the raising in the country of birth. Under the 2009 Final Rule, Label B did not need to show point-of-production information explicitly, although origin was based on such information. A muscle cut from a US-slaughtered animal born in Canada, and raised in Canada and the United States, could have carried a "Product of United States, Canada" label. US raising "taking precedence" over Canadian raising had no practical implication for this label. The label had to mention Canada in any event, given the place of birth.[127] Conversely, under the 2013 Final Rule, the flexibility means that for animals raised in the country of birth and the United States, Label B may read "'Born in Country X, Raised and Slaughtered in the United States' in lieu of 'Born and Raised in Country X, Raised and Slaughtered in the United States'".[128]

7.43. The multiple countries of raising flexibility under the 2013 Final Rule also allows for omitting "countr*ies*" of raising.[129] Thus, for instance, a Label B may now read "'Born in Country X, Raised and Slaughtered in the United States' in lieu of 'Born and Raised in Country X, Raised in Country Y, Raised and Slaughtered in the United States'".[130] By contrast, the corresponding flexibility in the 2009 Final Rule covered only the "minimal raising that occurred in the animal's country of birth."[131] In practice, this was again inconsequential for the label. Muscle cuts from an animal (i) born in Canada; (ii) raised in Canada, Mexico, and the United States; and (iii) slaughtered in the United States would carry a North American Label B ("Product of the United States, Canada, Mexico") in any case. Although raising in the United States could take precedence over raising in Canada, the label had to mention Canada in any event, given the place of birth.[132]

7.3.4 Label variations in light of the flexibilities

7.44. Table 2 below compares some possible variations of the muscle cut labels under the original and the amended COOL measures, in light of the original flexibilities as removed or amended by the 2013 Final Rule.

[123] 2009 Final Rule, p. 2659. See also ibid. p. 2662.
[124] 2013 Final Rule, p. 31368.
[125] 2013 Final Rule, § 65.300(e).
[126] 2009 Final Rule, p. 2659. See also ibid. p. 2662.
[127] According to the 2013 Final Rule, "the country of birth is already required to be listed in the origin designation." 2013 Final Rule, p. 31368.
[128] 2013 Final Rule, p. 31368.
[129] 2013 Final Rule, § 65.300(e) (emphasis added).
[130] 2013 Final Rule, § 65.300(e).
[131] 2009 Final Rule, p. 2659. See also ibid. p. 2662.
[132] According to the 2013 Final Rule, "the country of birth is already required to be listed in the origin designation." 2013 Final Rule, p. 31368. See paras. 7.233-7.244 below.

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TABLE 2: EXAMPLES OF POSSIBLE MUSCLE CUT LABELS IN LIGHT OF FLEXIBILITIES

	2009 Final Rule	2013 Final Rule
A	Product of the U.S. [i]	Born, Raised, and Slaughtered in the United States [ii]
A+B commingled	Product of the United States, Country X, and (as applicable) Country Y [iii] Product of the United States, Country X Product of the United States, Country X, and Country Y **Other label due to flexibility to list countries in "any order" [iv]:** Product of Country X, the United States, and (as applicable and in any position) Country Y	*Not applicable*
B	Product of the United States, Country X, and (as applicable) Country Y [v] Product of the United States, Country X [vi] Product of the United States, Country X, and … Country Y [vi] *e.g.* *Product of U.S., Canada* [vii] **Other label due to flexibility to list countries in "any order" [iv]:** Product of Country X, the United States, and (as applicable and in any position) Country Y *e.g.* *Product of Canada, U.S.* [vii]	Born and Raised in Country X, Raised and Slaughtered in the United States [viii] Born and Raised in Country X, Raised in Country Y, Raised and Slaughtered in the United States [ix] **Other label due to flexibility on raising [x]:** Born in Country X, Raised and Slaughtered in the United States [xi] *e.g.* *Beef is from animals born in Canada, Raised and Slaughtered in the United States* [xii]
B+C commingled	Product of the United States, Country X, and (as applicable) Country Y [xiii] *e.g.* *Product of U.S., Canada* [vii] **Other label due to flexibility to list countries in "any order" [iv]:** Product of Country X, the United States, and (as applicable and in any position) Country Y *e.g.* *Product of Canada, U.S.* [vii]	*Not applicable*
C	Product of Country X and the United States [xiv]	Born and Raised in Country X, Slaughtered in the United States [xv]
D	Product of Country X [xvi]	Product of Country X [xvii]

Footnotes to Table 2: [i] 2009 Final Rule, p. 2668. See also Panel Reports, *US – COOL*, para. 7.100. [ii] 2013 Final Rule, § 65.300(d) and p. 31368. [iii] 2009 Final Rule, pp. 2659 and 2661. [iv] 2009 Final Rule, § 65.300(e)(4) and pp. 2659, 2661 and 2662. [v] 2009 Final Rule, p. 2659. [vi] 2009 Final Rule, § 65.300(e)(1) and p. 2661. [vii] 2009 Final Rule, p. 2662. [viii] 2013 Final Rule, p. 31368. [ix] 2013 Final Rule, § 65.300(e). [x] 2013 Final Rule, § 65.300(e). [xi] 2013 Final Rule, § 65.300(e) and p. 31368. [xii] 2013 Final Rule, p. 31369. [xiii] 2009 Final Rule, § 65.300(e)(4) and pp. 2659, 2662 and 2670. [xiv] 2009 Final Rule, § 65.300(e)(3) and p. 2661. [xv] 2013 Final Rule, § 65.300(e) and pp. 31368-31369. [xvi] Panel Reports, *US – COOL*, para. 7.100. [xvii] 2013 Final Rule, § 65.300(f)(2) and p. 31369.

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7.3.5 Unchanged recordkeeping and verification rules

7.45. The amended COOL measure leaves the original COOL measure's recordkeeping and verification rules unchanged.[133] In particular, the recordkeeping and verification provisions of the COOL statute[134] and its prohibition of traceback[135] remain in effect. Further, the 2013 Final Rule does not amend the 2009 Final Rule's recordkeeping provisions.[136] Although the parties agree that the amended COOL measure leaves the pre-existing rules on recordkeeping and verification unchanged[137], they dispute whether the amended COOL measure entails more onerous recordkeeping and verification in practice.[138]

7.4 Scope of the compliance dispute

7.46. According to the United States, the complainants should not be allowed an "unfair second chance" to challenge unchanged aspects of the original COOL measure, or to use compliance proceedings to "re-raise" claims and arguments rejected in the original proceedings.[139] The United States identifies two aspects of the original COOL measure that "were not the subject of DSB recommendations and rulings and remained unchanged": (i) the ground meat rule; and (ii) the prohibition of a trace-back system. According to the United States, these are outside the terms of reference of this compliance Panel.[140]

7.47. The task of a compliance panel is to "consider th[e] new measure in its totality", which requires "consider[ing] both the measure itself and the measure's application".[141] In doing so, a compliance panel is "not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings".[142] At the same time, compliance proceedings should not allow a complainant to re-litigate a claim regarding unchanged aspects of an original measure.[143] Nor may a complainant use compliance claims to "re-open" issues decided in substance in the original proceedings.[144]

7.48. We note that the complainants' panel requests focus on muscle cut labels; they do not refer to either the ground meat rules or the trace-back prohibition.[145] Accordingly, the ground meat

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[133] For a description of these rules, see Panel Reports, *US – COOL*, paras. 7.116-7.121.

[134] According to the COOL statute:

"(1) The Secretary may conduct an audit of any person that prepares, stores, handles, or distributes a covered commodity for retail sale to verify compliance with this subchapter (including the regulations promulgated under section 1638c(b) of this title).

(2)(A) A person subject to an audit under paragraph (1) shall provide the Secretary with verification of the country of origin of covered commodities. Records maintained in the course of the normal conduct of the business of such person, including animal health papers, import or customs documents, or producer affidavits, may serve as such verification." COOL statute, § 1638a(d)(1) and (2)(A).

[135] According to the COOL statute, "[t]he Secretary shall not use a mandatory identification system to verify the country of origin of a covered commodity." COOL statute, § 1638a(f)(1).

[136] 2009 Final Rule, § 65.500.

[137] Canada's second written submission, para. 21; Mexico's first written submission, para. 45; and United States' first written submission, para. 3.

[138] See section 7.5.4.1.2.4 below.

[139] United States' first written submission, para. 48. In addition, the United States argues that the terms of reference of the compliance Panel cannot include a non-violation claim, which is addressed in section 7.8 below.

[140] United States' response to Panel question No. 1, paras. 2-5.

[141] Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 87. See Canada's second written submission, para. 7.

[142] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41. See Mexico's second written submission, para. 9.

[143] Appellate Body Report, *US – Upland Cotton (Art. 21.5 – Brazil)*, para. 210 (citing Appellate Body Reports, *EC – Bed Linen (Article 21.5 – India)*, para. 93 and *US – Shrimp (Article 21.5 – Malaysia)*, para. 96. See United States' first written submission, footnote 121.

[144] Appellate Body Report, *US – Zeroing (EC)*, para. 427. See also Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 96-98; United States' first written submission, footnote 120.

[145] See Canada's request for the establishment of a panel, pp. 2-3; and Mexico's request for the establishment of a panel, p. 3.

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rules and the trace-back prohibition are outside our terms of reference[146], and we could not address them as claims in these proceedings even if the complainants had characterised them as such subsequent to their requests for establishing this compliance Panel.

7.49. The complainants confirm that they are not bringing *claims* against the unchanged ground meat labelling scheme and the trace-back prohibition, but rather are referencing these as *arguments*.[147] Indeed, there is an important distinction to be made between *claims*, i.e. allegations of violation of the substantive provisions of the WTO covered agreements, and *arguments*, i.e. means whereby a party progressively develops and supports its claims.[148] Our mandate is limited to reviewing the complainants' above-mentioned claims[149] with regard to aspects of the amended COOL measure identified in the complainants' panel requests. In reviewing these claims, however, we are not precluded from considering the complainants' arguments concerning the ground meat rule and the trace-back prohibition.[150]

7.5 Article 2.1 of the TBT Agreement

7.5.1 Legal test

7.50. The complainants bring national treatment claims under both the TBT Agreement and the GATT 1994.[151] In relevant part, Article 2.1 of the TBT Agreement provides:

> 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 … .

7.51. The parties agree[152] on the three main criteria to establish a violation of national treatment under Article 2.1:

a. the measure at issue is a "technical regulation" as defined in Annex 1.1 to the TBT Agreement;

b. the imported and domestic products at issue are "like products"; and

c. the measure at issue accords less favourable treatment to imported products than to like domestic products.[153]

7.5.2 Technical regulation

7.52. According to the TBT Agreement, a "technical regulation" is a "[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable

[146] Appellate Body Reports, *Korea – Dairy*, para. 139; and *EC – Hormones*, para. 156. See also Constitution of the Panel, Note by the Secretariat, WT/DS384/27 and WT/DS386/26.

[147] Mexico's second written submission, paras. 19, 20, and 71; and Canada's second written submission, paras. 40 and 43-44 (emphasis added).

[148] As the Appellate Body held, *claims* "must be clearly set out in the request for the establishment of the panel", while *arguments* "do not need to be set out in detail in a panel request; rather, they may be developed in the submissions made to the panel." Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 121. See also Mexico's second written submission, para. 16.

[149] See section 7.1 above. According to the Appellate Body, "[t]h[e] task [of a compliance panel] is circumscribed by the specific claims made by the complainant when the matter is referred by the DSB for an Article 21.5 proceeding. It is not part of the task of a panel under Article 21.5 to address a claim that has not been made." Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 87.

[150] According to the Appellate Body, "[p]anels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties … to support its own findings and conclusions on the matter under its consideration." Appellate Body Report, *EC – Hormones*, para. 156.

[151] See section 7.1 above.

[152] Canada's first written submission, paras. 23-24; Mexico's first written submission, para. 62; and United States' first written submission, para. 55.

[153] Appellate Body Reports, *US – COOL*, para. 267. See also Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.444.

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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."[154]

7.53. In light of this definition, the original COOL measure was found to be a "technical regulation" based on three well-established criteria[155]:

a. compliance with the original COOL measure was mandatory;

b. the original COOL measure applied to an identifiable product or group of products (namely certain types of meat and livestock); and

c. the original COOL measure laid down one or more product characteristics by imposing a country of origin labelling requirement.[156]

7.54. The complainants argue that there are no changes under the amended COOL measure to alter this finding.[157] The United States accepts that it is "not in dispute" that the amended COOL measure is a technical regulation.[158]

7.55. As noted[159], the statutory element of the COOL measure, the COOL statute, remains unchanged. Accordingly, the original panel's findings that relevant aspects of the COOL statute fulfil the above three requirements[160] also remain valid for the amended COOL measure. As regards the regulatory element of the amended COOL measure, the 2013 Final Rule amends the 2009 Final Rule only partially. As explained[161], the main changes introduced by the 2013 Final Rule concern the introduction of point-of-production labelling for Category A-C muscle cuts as well as the elimination of the commingling and country order flexibilities. These changes do not affect aspects of the 2009 Final Rule examined by the original panel of relevance to the criteria and definition of a technical regulation.[162]

7.56. Therefore, we find that the amended COOL measure continues to be a "technical regulation" as defined by the TBT Agreement.

[154] Annex 1.1 of the TBT Agreement (explanatory note omitted).

[155] Appellate Body Report, *EC – Sardines*, para. 176. See also Appellate Body Reports, *EC – Asbestos*, paras. 66-70; and *EC – Seal Products*, paras. 5.21-5.23.

[156] Panel Reports, *US – COOL*, paras. 7.146-7.216. This finding was not appealed. See Appellate Body Reports, *US – COOL*, para. 239 (citing Panel Reports, *US – COOL*, paras. 7.162, 7.207, and 7.214) and footnote 371.

[157] Canada's first written submission, para. 23; Mexico's first written submission, paras. 63-76.

[158] United States' first written submission, para. 56.

[159] See paras. 7.7-7.9 above.

[160] In relation to the three applicable criteria, the original panel found that the COOL statute: firstly, "sets out the core [COOL] requirement by using the word 'shall'" (citing COOL statute, § 1638a(a)(1)) and "refers to the [COOL] requirement as 'the mandatory country of origin requirement'" (citing COOL statute, § 1638a(a)(2)(B)(ii)); secondly, it "explicitly defines 'covered commodity' for country of origin labelling purposes as including '(i) muscle cuts of beef ... and pork' and '(ii) ground beef ... and ground pork'" (citing COOL statute, § 1638(2)); and thirdly, "there is no dispute among the parties that the COOL measure lays down a country of origin labelling requirement", and that "the obligations set out by the [original] COOL measure, including the information requirement for '[a]ny person engaged in the business of supplying a covered commodity to a retailer', are closely related to this essential function" (citing COOL statute, § 1638a(e)). See Panel Reports, *US – COOL*, paras. 7.157, 7.161, 7.202, and 7.212. These findings of the original panel were not appealed.

[161] See section 7.3 above.

[162] For instance, the original panel found that the 2009 Final Rule "contains the word 'mandatory' in its very title, and consistently refers to the essence of the COOL measure as 'mandatory COOL'" and sets out obligations and information requirements for the original COOL measure for "any person engaged in the business of supplying a covered commodity to a retailer" (citing 2009 Final Rule, § 65.500(b)(3)). See Panel Reports, *US – COOL*, paras. 7.118 and 7.161. These findings of the original panel were not appealed.

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7.5.3 Likeness

7.57. The original panel found that "Canadian cattle and US cattle, and Mexican cattle and US cattle, are 'like products', and that Canadian hogs and US hogs are also 'like products' for purposes of Article 2.1".[163]

7.58. The complainants argue that there is no relevant change to the factual circumstances supporting this finding, and that the imported and domestic products at issue in this case continue to be "like".[164] The United States affirms that likeness is "not in dispute" in these compliance proceedings.[165]

7.59. Absent any factual change relevant for assessing likeness, we find that the relevant products continue to qualify as like products. Thus, as the original panel held, "Canadian and US cattle are like products; moreover, Canadian and US hogs are also like products. Further, Mexican cattle … and US cattle … are also like products."[166]

7.5.4 Less favourable treatment

7.60. In the context of Article 2.1, the parties' disagreement centres on whether the amended COOL measure accords less favourable treatment to Canadian and Mexican products than that accorded to like products of the United States.

7.61. The parties agree[167] that less favourable treatment is concerned with "whether the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of like domestic products."[168] The parties also recognize that establishing such detrimental impact does not suffice to establish less favourable treatment under Article 2.1; it must additionally be shown that any such detrimental impact does not stem exclusively from legitimate regulatory distinctions.[169]

7.62. Accordingly, we first assess whether the amended COOL measure has detrimental impact, and then proceed to inquire whether any such detrimental impact stems exclusively from legitimate regulatory distinctions.

7.5.4.1 Detrimental impact

7.63. The complainants claim[170] that the amended COOL measure has maintained and, in fact, increased the original COOL measure's detrimental impact on the competitive opportunities of imported livestock in comparison with like US products.[171] The United States accepts that the amended COOL measure was not intended to "remove [the original COOL measure's] detrimental impact on imports"[172]; at the same time, it rejects the suggestion that there is any increase in detrimental impact.

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[163] Appellate Body Reports, *US – COOL*, para. 256 (citing Panel Reports, *US – COOL*, para. 7.256). This finding of the original panel was not appealed.

[164] Canada's first written submission, para. 25; Mexico's first written submission, paras. 77-79.

[165] United States' first written submission, para. 56.

[166] Panel Reports, *US – COOL*, para. 7.256.

[167] Canada's first written submission, para. 28; Mexico's first written submission, para. 80; and United States' first written submission, para. 57.

[168] See Appellate Body Report, *US – Clove Cigarettes*, para. 180.

[169] See Canada's first written submission, para. 28; Mexico's first written submission, para. 80; United States' first written submission, para. 57; Appellate Body Reports, *US – COOL*, para. 271 (citing Appellate Body Reports, *US – Clove Cigarettes*, para. 182; *US – Tuna II (Mexico)*, paras. 215-216).

[170] Canada's request for the establishment of a panel, p. 2; Mexico's request for the establishment of a panel, p. 2.

[171] See Canada's first written submission, para. 35; and Mexico's first written submission, para. 12.

[172] According to the United States, "to comply with the DSB recommendations and rulings, the United States could either remove the detrimental impact on imports *or* ensure that any detrimental impact stems exclusively from a legitimate regulatory distinction. The 2013 Final Rule implements the second option – it addresses the DSB recommendations and rulings by ensuring that any detrimental impact stems exclusively from a legitimate regulatory distinction." United States' response to Panel question No. 18 (emphasis original).

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7.64. The original panel held that "[t]he [original] COOL measure create[d] 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"[173], and "reduce[d] the competitive opportunities of imported livestock relative to domestic livestock."[174] On this basis, the original panel "f[ou]nd that, in the context of the muscle cut labels, the COOL measure create[d] an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock."[175] Accordingly, the original panel "also f[ou]nd that, in the context of muscle cut labels, the COOL measure *de facto* discriminate[d] 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."[176] As regards the ground meat label, the original panel "f[ou]nd that the complainants have not demonstrated that the ground meat label under the [original] COOL measure results in less favourable treatment for imported livestock."[177]

7.65. The original panel's Article 2.1 finding concerning the ground meat label was not challenged on appeal. Regarding the muscle cut labels, the Appellate Body upheld the original panel's finding that the COOL measure resulted in less favourable treatment for imported livestock than for like domestic livestock.[178] However, the Appellate Body declared the original panel's legal analysis under Article 2.1 to be "incomplete", as the original panel "should have continued its examination [beyond assessing detrimental impact] and determined whether … the detrimental impact stems exclusively from a legitimate regulatory distinction".[179] Thus, while the Appellate Body endorsed the original panel's approach[180] and conclusion[181] regarding the detrimental impact aspect of the legal test, it also determined that the detrimental impact did not stem exclusively from a legitimate regulatory distinction.[182] Under the circumstances, the Appellate Body ultimately upheld the original panel's finding that the COOL measure is inconsistent with Article 2.1 of the TBT Agreement, but for different reasons.[183]

7.66. We shall follow the original panel's approach to detrimental impact[184] – focusing on the muscle cut labels.[185] As summarized by the Appellate Body, this approach involved three main legal considerations:

a. as a "starting point"[186], whether the different categories of muscle cut 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.[187]

7.67. In addition, the original panel examined the parties' evidence of actual trade effects – albeit stating that analysing actual trade effects was not indispensable for disposing of the complainants'

[173] Panel Reports, *US – COOL*, para. 7.398.
[174] Panel Reports, *US – COOL*, para. 7.381.
[175] Panel Reports, *US – COOL*, para. 7.420.
[176] Panel Reports, *US – COOL*, para. 7.420.
[177] Panel Reports, *US – COOL*, para. 7.437.
[178] Appellate Body Reports, *US – COOL*, para. 350.
[179] Appellate Body Reports, *US – COOL*, para. 293.
[180] The Appellate Body held that the original panel's "legal approach to assessing detrimental impact was correct." Appellate Body Reports, *US – COOL*, para. 293.
[181] The Appellate Body found that "the [original p]anel [had] properly examined whether the [original] COOL measure modifie[d] the conditions of competition in the US market to the detriment of imported livestock." Appellate Body Reports, *US – COOL*, para. 291. See also ibid. para. 292.
[182] Appellate Body Reports, *US – COOL*, para. 349.
[183] Appellate Body Reports, *US – COOL*, para. 350.
[184] For a "Summary of the [Original] Panel's Findings" under Article 2.1, in particular the original panel's approach to assessing detrimental impact, see Appellate Body Reports, *US – COOL*, paras. 257-264.
[185] In light of the parties' claims and explanations, we address detrimental impact only with regard to the muscle cut labels in this compliance dispute. See section 7.4 above.
[186] Appellate Body Reports, *US – COOL*, para. 258. See also Panel Reports, *US – COOL*, para. 7.296.
[187] See Appellate Body Reports, *US – COOL*, para. 257; Panel Reports, *US – COOL*, para. 7.279.

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Article 2.1 claims. Given that the Appellate Body did not find error in the original panel's approach to evidence on actual trade effects in the original dispute[188], we review the extensive evidence submitted on the same matter in this compliance dispute.

7.5.4.1.1 Different treatment

7.68. The original panel began by reviewing the statutory definitions of the four muscle cut labels.[189] It then addressed the commingling flexibility between products eligible for Labels A and B.[190] The original panel observed that under the original COOL measure, "imported livestock is ineligible for the label reserved for meat from exclusively US-origin livestock, whereas in certain circumstances meat from domestic livestock is eligible for a label that involves imported livestock."[191] The original panel considered this difference only as "the starting point"[192] of its analysis because "*different* treatment" of imported products is "not necessarily inconsistent … as long as the treatment by the measure is 'no less favourable'."[193]

7.69. On appeal, the Appellate Body confirmed its earlier finding that "'[a] formal difference in treatment between imported and like domestic products is … neither necessary, nor sufficient, to show a violation' of the national treatment obligation."[194] It noted that the original panel's statement on different treatment is not a "finding or a legal conclusion"[195], but "merely … a passing observation regarding the extent to which the COOL measure *de jure* treat[ed] imported livestock differently than domestic livestock."[196]

7.70. As explained[197], the 2013 Final Rule removed the commingling flexibility, which allowed Category A products to carry Label B in certain circumstances. Thus, the basis for observing any formally different treatment of domestic and imported livestock under the original COOL measure is not maintained under the amended COOL measure.

7.71. We do not need to explore further the existence of any formally different treatment under the amended COOL measure. As in the original dispute, "the complainants are not contesting any formal difference in the treatment accorded to domestic and imported livestock *per se*"; they claim[198] "*de facto* less favourable treatment to imported livestock."[199]

7.72. In any event, any further assessment of formally different treatment could only serve as a starting point for our less favourable treatment analysis. It would lack any "direct… connect[ion]" or implication for our ultimate finding on whether or not the amended COOL measure entails *de facto* discrimination.[200]

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[188] See also Appellate Body Reports, *US – COOL*, para. 264.
[189] See Panel Reports, *US – COOL*, paras. 7.284 and 7.286.
[190] Panel Reports, *US – COOL*, para. 7.295. The original panel noted the commingling flexibility between Label B and C products and that "Labels B and C may overlap in practice since 'the countries of origin may be listed in any order' on Label B." However, the original panel held that "flexibilities between Labels B and C have limited relevance for the complainants' claims under Article 2.1", and it chose to "focus … [on] 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." Panel Reports, *US – COOL*, paras. 7.288 (footnote omitted) and 7.289.
[191] Panel Reports, *US – COOL*, para. 7.295.
[192] Panel Reports, *US – COOL*, para. 7.296 (citing Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.464).
[193] Panel Reports, *US – COOL*, para. 7.296 (citing Appellate Body Report, *Korea – Various Measures on Beef*, paras. 135 (emphasis original) and 136-137).
[194] Appellate Body Reports, *US – COOL*, para. 277 (citing Appellate Body Report, *Korea – Various Measures on Beef*, para. 137).
[195] Appellate Body Reports, *US – COOL*, para. 278.
[196] Appellate Body Reports, *US – COOL*, para. 279.
[197] See section 7.3.3.1 above.
[198] See Canada's first written submission, para. 28; and Mexico's first written submission, para. 81.
[199] Panel Reports, *US – COOL*, para. 7.297.
[200] Appellate Body Reports, *US – COOL*, para. 279.

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7.73. We turn to whether the amended COOL measure involves *de facto*[201] less favourable treatment, including detrimental impact. In analysing this matter, we are mindful of the Appellate Body's guidance in the original dispute:

> [W]here a technical regulation does not discriminate *de jure*, a panel must determine whether the evidence and arguments adduced by the complainant in a specific case nevertheless demonstrate that the operation of that measure, in the relevant market, has a *de facto* detrimental impact on the group of like imported products. A panel's analysis must take into consideration the totality of the facts and circumstances before it, including any implications for competitive conditions discernible from the design and structure of the measure itself, as well as all features of the particular market at issue that are relevant to the measure's operation within that market. In this regard, "*any* adverse impact on competitive opportunities for imported products *vis-à-vis* like domestic products that is caused by a particular measure may potentially be relevant" to a panel's assessment of less favourable treatment under Article 2.1.[202]

7.5.4.1.2 Costs, segregation, and recordkeeping

7.5.4.1.2.1 Costs[203]

7.74. The original panel started its analysis of whether there is *de facto* detrimental impact by establishing that – according to the 2009 Final Rule – the original COOL measure involved compliance costs.[204]

7.75. Addressing the United States' arguments that "any regulation potentially involves costs"[205] and that these costs "may [be] differential for different types of market participants"[206], the original panel pointed out that "it is not the costs of the COOL measure in itself that the complainants contest."[207] It added that "Article 2.1 is concerned with the equality of competitive conditions between domestic and imported products", and "no competitive disadvantage shall be accorded to imported products as compared to like domestic products."[208] According to the original panel, "[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."[209]

7.76. The same analytical approach applies to the amended COOL measure and this compliance dispute. Like its predecessor[210], the 2013 Final Rule has a dedicated section on the costs of the amended COOL measure.[211] And, as in the 2009 Final Rule[212], the USDA "recognizes that

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[201] The original panel held that "it would be incongruous to interpret Article 2.1 of the TBT Agreement as excluding *de facto* discriminatory treatment." Panel Reports, *US – COOL*, para. 7.301. On appeal, the Appellate Body confirmed that "[a]s under Article III:4, the national treatment obligation of Article 2.1 prohibits both *de jure* and *de facto* less favourable treatment. That is, 'a measure may be *de facto* inconsistent with Article 2.1 even when it is origin-neutral on its face.'" Appellate Body Reports, *US – COOL*, para. 269 (footnotes omitted) (citing Appellate Body Reports, *US – Clove Cigarettes*, para. 175; and *US – Tuna II (Mexico)*, para. 225). See also Appellate Body Reports, *US – COOL*, para. 286.

[202] Appellate Body Reports, *US – COOL*, para. 286 (footnote omitted) (citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 225 (emphasis original)).

[203] In reviewing the costs of the amended COOL measure, we do not address recordkeeping and segregation requirements under other measures not at issue in this compliance dispute, e.g. food safety measures. Further, we do not address how such other measures, whether mandatory or voluntary, might impact or reduce the compliance burden of the amended COOL measure.

[204] The original panel held that "costs of compliance with the requirements [of the original COOL measure] arise at every stage of the livestock and meat supply chain, and … these costs increase as livestock and meat move downstream in the chain." Panel Reports, *US – COOL*, para. 7.310.

[205] Panel Reports, *US – COOL*, para. 7.311.

[206] Panel Reports, *US – COOL*, para. 7.312.

[207] Panel Reports, *US – COOL*, para. 7.311.

[208] Panel Reports, *US – COOL*, para. 7.313.

[209] Panel Reports, *US – COOL*, para. 7.313.

[210] See "Analysis of Benefits and Costs", 2009 Final Rule, pp. 2682 et seq. See also Panel Reports, *US – COOL*, paras. 7.304-7.308.

[211] See "Analysis of Benefits and Costs", 2013 Final Rule, pp. 31377 et seq.

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additional costs will be borne by industry participants as they comply with the requirements of th[e 2013 F]inal [R]ule".[213]

7.77. However, as in the original dispute, it is "not the costs of the COOL measure in itself that the complainants contest."[214] Accordingly, we follow the original panel and turn to whether "the costs of the [amended] COOL measure are higher for imported than for domestic livestock". As explained below, this requires assessing whether the amended COOL measure involves[215] – and possibly increases – segregation of meat and livestock according to origin as well as the implications of the amended COOL measure for recordkeeping burdens.

7.5.4.1.2.2 Segregation[216]

7.78. Given the nature and limited extent of relevant changes to the original COOL measure, the original panel's analysis of segregation remains generally applicable to the amended COOL measure.

7.79. Like its predecessor, the amended COOL measure "does not explicitly require segregation, let alone the segregation of domestic and imported livestock."[217] At the same time, under the 2013 Final Rule it remains "necessary ... to ensure label information accurately reflects the origin of muscle cut covered commodities in accordance with the intent of the statute."[218] The 2013 Final Rule is categorical that, as a basic requirement, "*all* origin designations for muscle cut covered commodities slaughtered in the United States *must* specify the production steps of birth, raising and slaughter of the *animal* from which the meat is derived that took place in *each* country listed on the origin designation."[219]

7.80. The COOL statute continues to require that "[a]ny person engaged in the business of supplying a covered commodity to a retailer … provide information to the retailer indicating the country of origin of the covered commodity."[220] In addition, the original COOL measure's recordkeeping requirements and sanctions for violating these[221] remain unchanged.[222]

7.81. Thus, the original panel's finding that that the original COOL measure "prescribes an unbroken chain of reliable country of origin information with regard to every animal and muscle cut"[223] remains valid for the amended COOL measure. In fact, the 2013 Final Rule refers to the

[212] According to the 2009 Final Rule, "firms and establishments throughout the supply chain for affected commodities will incur costs associated with the implementation of COOL. This includes producers, intermediaries, and retailers." 2009 Final Rule, p. 2680 (cited in Panel Reports, *US – COOL*, para. 7.303).

[213] 2013 Final Rule, p. 31375. Likewise, the USDA "recognizes that additional costs will be borne by industry participants." 2013 Final Rule, p. 31374.

[214] Panel Reports, *US – COOL*, para. 7.311.

[215] Panel Reports, *US – COOL*, para. 7.314.

[216] The Appellate Body "understood the [original p]anel to have used the term 'segregation' to encompass a broad range of activities, including physically segregating animals into different pens or fields or identifying each animal through the use of ear tags or other physical markings, temporally segregating animals by processing livestock of different origins on different days or at different times, and segregating animals completely in the sense of choosing to process only livestock of a single origin." Appellate Body Reports, *US – COOL*, para. 302 (footnotes omitted). We use the term "segregation" in the same sense in these Reports.

[217] Panel Reports, *US – COOL*, para. 7.315.

[218] 2013 Final Rule, p. 31372.

[219] 2013 Final Rule, p. 31368 (emphasis added). The 2009 Final Rule did not require Labels A-C to carry point-of-production origin information.

[220] COOL statute, § 1638a(e). See also Panel Reports, *US – COOL*, para. 7.316.

[221] Panel Reports, *US – COOL*, para. 7.316.

[222] See section 7.3.5 above.

[223] Panel Reports, *US – COOL*, para. 7.317.

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need for, and existing processes[224] to, "transfer information from one level of the supply chain to the next."[225]

7.82. The original panel's findings on how to ensure the unbroken chain of reliable country of origin information[226] necessitated by the original COOL measure remain valid for the amended COOL measure. The COOL statute continues to prohibit USDA from imposing a "traceability program"[227] through "a mandatory identification system to verify the country of origin of a covered commodity."[228] Further, the COOL statute continues to limit the recordkeeping requirements for retailers and their suppliers to "records maintained in the normal conduct of the business of such person, including animal health papers, import or customs documents, or producer affidavits"[229], and it continues to explicitly prohibit USDA from requiring retailers and suppliers to maintain any "additional records".[230] As summarized by the 2013 Final Rule:

> the existing COOL regulations already require retailers to maintain records and other documentary evidence upon which they have relied to establish a covered commodity's country or countries of origin. Similarly, any person directly or indirectly engaged in the business of supplying a covered commodity to a retailer, including wholesalers, must make available information to the buyer about the country(ies) of origin of the covered commodity. Thus, to comply with existing COOL regulations, wholesalers must already have distribution systems to allow for the tracking of COOL-related information for invoices and manifests and receiving procedures to verify the origin information received from packers and processors. This final rule does not alter those requirements … .[231]

7.83. The original panel held that "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."[232] Despite the parties' disagreement, the original panel concluded that "for all practical purposes, the COOL measure necessitates segregation of meat and livestock according to origin."[233] This finding was upheld on appeal.[234]

7.84. The same conclusion continues to apply to the amended COOL measure, which has the same features that led the original panel to reach its conclusion regarding segregation. In fact, the 2013 Final Rule refers to segregation as a fact: "the [2003] regulatory impact analysis accounted for the fact that animals and products would need to be segregated to enable labeling of muscle cut covered commodities by country of origin."[235]

7.85. As with the original COOL measure[236], various United States entities and market participants have stated that the amended COOL measure will necessarily lead to segregation in the meat

[224] For instance, the 2013 Final Rule points out that "[p]rocesses currently in place to transfer information from one level of the supply chain to the next should be sufficient to accommodate the additional requirements of this rule." 2013 Final Rule, pp. 31376-31377.

[225] 2013 Final Rule, p. 31373. Further, the 2013 Final Rule states that it "does not lessen any existing flexibility in how required country of origin information is currently conveyed along the supply chain." 2013 Final Rule, p. 31375.

[226] See Panel Reports, *US – COOL*, para. 7.319.

[227] 2009 Final Rule, p. 2679. See also Panel Reports, *US – COOL*, para. 7.319.

[228] COOL statute, § 1638a(f)(1). See also Panel Reports, *US – COOL*, para. 7.319.

[229] COOL statute, § 1638(d)(2)(A). See also Panel Reports, *US – COOL*, para. 7.319.

[230] COOL statute, § 1638(d)(2)(B). See also Panel Reports, *US – COOL*, para. 7.319.

[231] 2013 Final Rule, p. 31374. See also ibid. pp. 31373 and 31382.

[232] Panel Reports, *US – COOL*, para. 7.320.

[233] Panel Reports, *US – COOL*, para. 7.327.

[234] The Appellate Body found that "the Panel did not act inconsistently with its duties under Article 11 of the DSU in finding 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'." Appellate Body Reports, *US – COOL*, para. 310.

[235] 2013 Final Rule, p. 31379. Further, the 2013 Final Rule refers to "costs … of activities such as segregation", and notes that, "[a]s at the intermediary level, retailers may incur additional costs for segregation" as a result of the removal of the commingling flexibility. 2013 Final Rule, p. 31380.

[236] Panel Reports, *US – COOL*, para. 7.325.

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supply chain.[237] Indeed, the United States itself seems to recognize that, like its predecessor, the amended COOL measure involves segregation.[238]

7.86. Accordingly, like the original panel[239], we conclude that for all practical purposes, the amended COOL measure necessitates segregation of meat and livestock according to origin.

7.5.4.1.2.3 Increased segregation under the amended COOL measure

7.87. The parties disagree on the amended COOL measure's impact on segregation. In particular, the United States contests the complainants' argument that the amended COOL measure involves more segregation than the original COOL measure.

7.88. As noted[240], the COOL measure never formally prescribed segregation. However, the 2013 Final Rule introduced three potentially relevant changes:

a. point-of-production labelling, i.e. the requirement that Labels A, B, and C show the country(ies) where each production step, namely birth, raising, and slaughter, has taken place[241];

b. the removal of the commingling[242] and country order flexibilities[243] of the original COOL measure; and

c. the amended coverage of Label D.

Point-of-production labelling

7.89. As noted[244], one of the main changes under the amended COOL measure is the requirement that Labels A, B, and C indicate the country of each production step (born, raised, and slaughtered).[245] In the USDA's words, point-of-production labelling means that "muscle cut covered commodity COOL information will need to be augmented to provide the additional specific origin information required by th[e 2013 Final R]ule."[246] More specifically, "information available to consumers at retail will need to be augmented to include information on the location in which the three major production steps occurred."[247]

[237] See para. 7.135 below.
[238] According to the United States, "with regard to the allegation that the 2013 Final Rule 'compel[s] segregation,' it is clear that the only companies that will have to change any internal procedures are those that *were already commingling*. Companies that already completely segregated A, B, and C livestock (and the resulting meat products) are, of course, unaffected by this change in the regulations." United States' first written submission, para. 114 (footnotes omitted, emphasis original). Further, according to the United States, "it is impossible to understand *why* the complaining parties allege that the 2013 Final Rule is increasing segregation in such a meaningful way as to affect their producers' market access in the United States. By making such arguments, the complaining parties appear to allege that the original panel was *wrong* to find that the 2009 Final Rule 'necessitated' segregation, and that, in fact, the commingling flexibility so reduced the need for segregation for the companies that purchased Canadian and Mexican livestock that it could not be concluded that the 2009 Final Rule 'necessitated' segregation for those companies." United States' first written submission, paras. 115-116 (emphasis original). The United States adds that "to credit those arguments based on speculation of business impacts would require the compliance Panels to find that the original panel's finding that the 2009 Final Rule 'necessitated' segregation was wrong. The complainants have provided no basis for the compliance Panels to revisit and reverse findings adopted in the original proceeding." United States' first written submission, para. 119.
[239] Panel Reports, *US – COOL*, para. 7.327.
[240] See para. 7.79 above.
[241] 2013 Final Rule, § 65.300(d)-(e). See also section 7.3.1.2 above.
[242] See section 7.3.3.1 above.
[243] See section 7.3.3.2 above.
[244] See section 7.3.1.2 above.
[245] See 2013 Final Rule, §§ 65.300(d) and (e), p. 31367.
[246] 2013 Final Rule, p. 31378.
[247] 2013 Final Rule, p. 31382.

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7.90. A closer look at Labels A-C is necessary for assessing whether, in practice, "provid[ing] consumers with more specific information"[248] on these labels increases the number of distinct labels. We isolate point-of-production labelling to assess whether different origin muscle cuts that could carry a uniform origin label under the original COOL measure would need to carry more, distinct labels under the amended COOL measure. As the original panel found, more origins and labels means more segregation.[249]

[248] 2013 Final Rule, p. 31367.

[249] In the words of the original panel, "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." Panel Reports, *US – COOL*, para. 7.331. See also ibid. para. 7.346. The Appellate Body upheld this finding. Appellate Body Reports, *US – COOL*, para. 345.

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Label A

7.91. As regards Label A, the definition of origin is unchanged; Label A merely needs to be more detailed under the amended COOL measure and state, instead of "Product of the U.S."[250], "Born, Raised, and Slaughtered in the United States"[251]. Muscle cuts from exclusively US-born, -raised and -slaughtered livestock shall carry labels with information about these production steps; however, Category A muscle cuts may continue to carry a uniform Label A.

7.92. In brief, Label A shall be more detailed, but it may remain a uniform label. As shown in Table 3 below, point-of-production labelling in and of itself does not increase the number of labels for Category A muscle cuts, and thus does not lead to increased segregation.

TABLE 3: LABEL A

Category A origin	born	US
	raised	US
	slaughtered	US
Label A	original COOL measure	**Product of the U.S.**
	amended COOL measure	**Born, Raised, and Slaughtered in the United States**

Notes to Table 3: **The first label** is taken from the 2009 Final Rule, p. 2668. See also Panel Reports, *US – COOL*, para. 7.100. **The second label** is taken from the 2013 Final Rule, § 65.300(d).

Label B

7.93. Label B may involve livestock of a single foreign origin – in addition to raising[252] and slaughter in the United States. For instance, Label B may be used for muscle cuts derived from animals (i) born in Canada and (ii) raised and slaughtered in the United States. Under the original COOL measure, muscle cuts from livestock "born in Country X … , raised and slaughtered in the United States"[253] ("and … not derived from animals imported for immediate slaughter"[254]) could be designated as "Product of the United States, Country X … ."[255] Under the amended COOL measure, the same type of muscle cuts would now be designated "Born in Country X, Raised and Slaughtered in the United States".[256]

7.94. Thus, like for Label A, the amended COOL measure requires more information on Label B, but Category B muscle cuts from livestock born in a *single* foreign country, and raised and slaughtered in the United States may continue to carry a uniform label. As shown in Table 4 below, point-of-production labelling does not increase the number of labels and, hence, segregation for

[250] See 2009 Final Rule, p. 2668; and Panel Reports, US – COOL, para. 7.100.
[251] 2013 Final Rule, § 65.300(d).
[252] A distinct characteristic of Category B origin under the 2013 Final Rule is that animals in that origin category need to be not only slaughtered but also raised in the United States. Otherwise, muscle cuts derived from such animals would be imported for immediate US slaughter, and thus qualify for Label C. This is also confirmed by the multiple countries of raising flexibility, applicable to Label B, and allowing for omitting the "other" country or countries of raising but not the United States. 2013 Final Rule, § 65.300(e). See also the examples of Label B taken from the amended COOL measure in Table 2, each of which mentions US raising.
[253] 2009 Final Rule, § 65300(e)(1).
[254] 2009 Final Rule, § 65300(e)(1).
[255] 2009 Final Rule, § 65300(e)(1).
[256] 2013 Final Rule, § 65300(e).

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Category B muscle cuts of a single foreign origin in addition to raising and slaughter in the United States (Scenario B1).

7.95. This is also applicable to Category B muscle cuts from livestock of a single foreign origin, born and also raised in the foreign country of birth, i.e. muscle cuts from livestock (i) born and raised in Country X; and (ii) raised and slaughtered in the United States. In the absence of point-of-production labelling, these muscle cuts could also carry the "Product of the United States, Country X … "[257] label under the original COOL measure.[258] Under the amended COOL measure, these muscle cuts could now carry the "Born in Country X, Raised and Slaughtered in the United States"[259] label because of the multiple countries of raising flexibility.[260] In light of this flexibility[261], point-of-production labelling does not result in more segregation for Category B muscle cuts raised in both the foreign country of birth and in the United States.

TABLE 4: LABEL B ON CATEGORY B MUSCLE CUTS OF A SINGLE FOREIGN ORIGIN

		Scenario B1
Category B single foreign origin	born	Country X
	raised	*(Country X)* United States
	slaughtered	United States
Label B	original COOL measure	**Product of the United States, Country X**
	amended COOL measure	**Born in Country X, Raised and Slaughtered in the United States**

Notes to Table 4: **The first label** is taken from the 2009 Final Rule, § 65.300(e)(1). **The second label** is taken from the 2013 Final Rule, p. 31368, and § 65.300(e), including the multiple countries of raising flexibility.

7.96. There is also the possibility of Category B muscle cuts being derived from livestock of *multiple* foreign origins in addition to US raising and slaughter. For instance, the 2009 Final Rule addressed muscle cuts from livestock "born in Country X or (as applicable) Country Y, raised and slaughtered in the United States"[262] ("and … not derived from animals imported for immediate slaughter"[263]).

[257] 2009 Final Rule, § 65300(e)(1).

[258] This would not change with the multiple countries of raising flexibility of the original COOL measure – given that, despite US raising "tak[ing] precedence" over raising in the foreign country of birth, this latter country would still need to be mentioned on the label. See 2009 Final Rule, pp. 2659-2662, and section 7.3.3.3 above.

[259] 2013 Final Rule, § 65300(e).

[260] According to the 2013 Final Rule, "[i]f an animal is raised in the United States as well as another country (or multiple countries), the raising occurring in the other country (or countries) may be omitted from the origin designation except if the animal was imported for immediate slaughter … or where by doing so the muscle cut covered commodity would be designated as having United States country of origin." 2013 Final Rule, § 65.300(e). See section 7.3.3.3 above.

[261] In any event, as the 2013 Final Rule explains in regard to both the original and amended forms of this flexibility, "it is understood that an animal born in another country will have been raised at least a portion of its life in that other country." 2013 Final Rule, p. 31368.

[262] 2009 Final Rule, § 65.300(e)(1).

[263] 2009 Final Rule, § 65.300(e)(1).

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7.97. Under this scenario (Scenario B2), the Category B muscle cuts in question originate from both (i) livestock born in Country X, and raised and slaughtered in the United States, as well as (ii) livestock born in Country Y, and raised and slaughtered in the United States. This scenario therefore represents a combination of livestock from two different foreign countries of origin, which fall *within* Category B.[264]

7.98. According to the 2009 Final rule, the two types of muscle cuts in this scenario could be designated as "Product of the United States, Country X, and … Country Y." Conversely, under the 2013 Final Rule, these two types of muscle cuts would need to carry distinct labels to reflect their different countries of origin.

7.99. As shown in Table 5 below, segregation increases as a result of point-of-production labelling under this scenario (Scenario B2) – even taking into consideration the multiple countries of raising flexibility under the amended COOL measure.[265]

TABLE 5: LABEL B ON CATEGORY B MUSCLE CUTS OF DIFFERENT FOREIGN ORIGINS

<table>
<tr><td colspan="4"></td><td colspan="2">Scenario B2</td></tr>
<tr><td rowspan="3">Category B multiple foreign origins</td><td colspan="2">born</td><td>Canada</td><td>Mexico</td></tr>
<tr><td colspan="2">raised</td><td>Canada
US</td><td>Mexico
US</td></tr>
<tr><td colspan="2">slaughtered</td><td>US</td><td>US</td></tr>
<tr><td rowspan="3">Label B</td><td colspan="2">original COOL measure
(irrespective of country of raising flexibility)</td><td colspan="2">Product of the United States, Canada, and Mexico</td></tr>
<tr><td rowspan="2">amended COOL measure</td><td>without multiple countries of raising flexibility</td><td>Born and Raised in Canada, Raised and Slaughtered in the U.S.</td><td>Born and Raised in Mexico, Raised and Slaughtered in the U.S.</td></tr>
<tr><td>with multiple countries of raising flexibility</td><td>Born in Canada, Raised and Slaughtered in the U.S.</td><td>Born in Mexico, Raised and Slaughtered in the U.S.</td></tr>
</table>

[264] 2009 Final Rule, § 65.300(e)(1). In a certain way, this was a type of commingling. Commingling was more closely associated with scenarios of mixing covered commodities of different origin categories (e.g. muscle cuts Category A with B, Category B with C, respectively). See 2013 Final Rule, footnote 7; and footnote 99 above. However, the 2009 Final Rule defines "commingled covered commodities" as "covered commodities (of the same type) presented for retail sale in a consumer package that have been prepared from raw material sources having *different origins*." 2009 Final Rule, § 65.125 (emphasis added). Arguably, this could also cover muscle cuts of different origins within the same origin category.

[265] See section 7.3.3.3 above.

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7.100. Another multiple foreign-origin scenario (Scenario B3) might entail Category B muscle cuts from livestock raised in more than one foreign country in addition to being raised (and slaughtered) in the United States. This would involve livestock (i) born in Country X; (ii) raised in Country X, Country Y, and the United States; and (iii) slaughtered in the United States. Arguably, absent point-of-production labelling, the Label B under this scenario could also read "Product of the United States, Country X, and … Country Y"[266] under the original COOL measure.[267]

7.101. As shown in Table 6 below, the same type of muscle cuts could also carry a uniform but more detailed Label B under the amended COOL measure (Scenarios B3a and B3b taken separately).[268]

7.102. The situation is different regarding Category B muscle cuts from livestock (i) born in *two* different foreign countries; (ii) raised in the same two foreign countries and the United States; and (iii) slaughtered in the United States. Taking the example of a Category B muscle cut of US, Canadian, and Mexican origin, a uniform 'North American' label ("Product of the United States, Canada, and Mexico") could have been affixed on all of these muscle cuts under the original COOL measure. This is no longer possible under the amended COOL measure's point-of-production labelling. As shown in Table 6, distinct labels for these Category B muscle cuts would need to be affixed according to where each production step took place (Scenarios B3a and B3b taken together)[269] – even taking into consideration the multiple countries of raising flexibility under the amended COOL measure.[270]

[266] 2009 Final Rule, § 65.300(e)(1). Again, this would be a type of intra-Category commingling in the manner described above. See footnote 264 above.

[267] As noted, this would not change with the multiple countries of raising flexibility of the original COOL measure given that, despite US raising "tak[ing] precedence" over raising in the foreign country of birth, this latter country would still need to be mentioned on the label. See 2009 Final Rule, pp. 2659-2662, and section 7.3.3.3 above.

[268] This label could show each country of raising (e.g. "Born in Country X, Raised in Country X, Country Y and the United States, and Slaughtered in the United States") or only the United States, depending on whether the multiple countries of raising flexibility is being used on Label B.

[269] This also applies to muscle cuts from US-born and -slaughtered animals raised in both the United States and a foreign country. Under the original COOL measure, the relevant Label B would read "Product of the United States and Country X". The same Label B could cover Category B muscle cuts involving the same two countries but for different production steps, e.g. muscle cuts born in Country X, and raised and slaughtered in the United States. Point-of-production labelling means that these two types of muscle cuts would need to carry distinct labels under the amended COOL measure. In particular, muscle cuts from US-born and -slaughtered animals raised in both the United States and a foreign country would carry the label "Born and Raised in the United States, Raised in Country X, Slaughtered in the United States." 2013 Final Rule, p. 31368.

[270] See section 7.3.3.3 above.

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TABLE 6: LABEL B ON CATEGORY B MUSCLE CUTS OF DIFFERENT MULTIPLE FOREIGN ORIGINS

<table>
<tr><td></td><td></td><td></td><td>Scenario B3a</td><td>Scenario B3b</td></tr>
<tr><td rowspan="3">Category B multiple foreign origins</td><td colspan="2">born</td><td>Canada</td><td>Mexico</td></tr>
<tr><td colspan="2">raised</td><td>Canada
Mexico
US</td><td>Mexico
Canada
US</td></tr>
<tr><td colspan="2">slaughtered</td><td>US</td><td>US</td></tr>
<tr><td rowspan="3">Label B</td><td colspan="2">original COOL measure (irrespective of country of raising flexibility)</td><td colspan="2">Product of the United States, Canada, and Mexico</td></tr>
<tr><td rowspan="2">amended COOL measure</td><td>Without multiple countries of raising flexibility</td><td>Born in Canada, Raised in Canada, Mexico and the U.S., and Slaughtered in the U.S.</td><td>Born in Mexico, Raised in Mexico, Canada and the U.S., and Slaughtered in the U.S.</td></tr>
<tr><td>With multiple countries of raising flexibility</td><td>Born in Canada, Raised and Slaughtered in the U.S.</td><td>Born in Mexico, Raised and Slaughtered in the U.S.</td></tr>
</table>

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Label C

7.103. Like for Label B, for Label C we address scenarios involving livestock with single and multiple foreign origins which, pursuant to the Category C definition, are imported for immediate slaughter into the United States.

7.104. For single foreign-origin Category C muscle cuts, under the amended COOL measure, Label C would read "Born and Raised in Country X, Slaughtered in the United States"[271] instead of "Product of Country X and the United States".[272] Despite the more detailed information, Category C muscle cuts of a single foreign origin can thus continue to carry a uniform label under the amended COOL measure. As shown in Table 7 below, there is no increase in the number of labels or in segregation for single foreign-origin Category C muscle cuts as a result of point-of-production labelling.

TABLE 7: LABEL C ON CATEGORY C MUSCLE CUTS OF A SINGLE FOREIGN ORIGIN

		Scenario C1
Category C single foreign origin	born	Country X
	raised	Country X
	immediately slaughtered	US
Label C	original COOL measure	**Product of Country X and the United States**
	amended COOL measure	**Born and Raised in Country X, Slaughtered in the United States**

Notes to Table 7: **The first label** is taken from the 2009 Final Rule, § 65.300(e)(3). **The second label** is taken from the 2013 Final Rule, § 65.300(e) and pp. 31368-31369.

7.105. Turning to Category C muscle cuts of multiple foreign origins, muscle cuts from two different *single* foreign-origin Category C animals had to carry two distinct labels under the original COOL measure.[273] Muscle cuts from livestock born and raised in Canada, and muscle cuts of livestock born and raised in Mexico (both imported for immediate slaughter in the United States) would carry two distinct labels under the amended COOL measure.

[271] 2013 Final Rule, § 65.300(e) and pp. 31368-31369.
[272] 2009 Final Rule, § 65.300(e)(3).
[273] We do not think that a single 'North American' Label C could be affixed on the two different single-origin Category C livestock of Scenario C2 under the original COOL measure. The original COOL measure defined "commingled covered commodities" as "covered commodities (of the same type) presented for retail sale in a consumer package that have been prepared from raw material sources having different origins." 2009 Final Rule, § 65.125. Although this might cover muscle cuts of different origins within the same origin category, we do not think this was possible for Category C. Unlike for Label B, the original COOL measure determines Label C by reference to single foreign origin as "Product of Country X and the United States". 2009 Final Rule, § 65.300(e)(3). Further, the COOL statute foresees Label C of a single foreign origin by prescribing that labels on muscle cuts imported for immediate slaughter "shall designate the origin ... as (i) the country from which the animal was imported; and (ii) the United States." COOL statute, § 1638a(2)(c). In any event, even if this type of intra-category commingling was possible for two different single foreign-origin Category C muscle cuts, point-of-production labelling means that under the amended COOL measure, these two types of muscle cuts need to carry two different Category C labels depending on the animal's place of birth.

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7.106. As shown in Table 8 below, no increase in the number of labels or in segregation is involved in this scenario (Scenario C2) as a result of point-of-production labelling.

TABLE 8: LABEL C ON CATEGORY C MUSCLE CUTS OF DIFFERENT FOREIGN ORIGINS

		Scenario C2	
Category C single foreign origin	born	Canada	Mexico
	raised	Canada	Mexico
	immediately slaughtered	US	US
Label C	original COOL measure	**Product of Canada and the U.S.**	**Product of Mexico and the U.S.**
	amended COOL measure	**Born and Raised in Canada, Slaughtered in the U.S.**	**Born and Raised in Mexico, Slaughtered in the U.S.**

7.107. Another multiple foreign-origin scenario might entail Category C muscle cuts from livestock (i) born and raised in a foreign country; (ii) also raised in a second foreign country; and (iii) imported for immediate slaughter to the United States. Using the same two foreign countries, there are four potential scenarios depending on whether the animals were born in Country X or Y, and in what sequence they were raised in these two countries (Scenarios C3-C6).

7.108. The sequence of countries of raising might be relevant because of the parties' disagreement on which countries of raising need to be labelled for Category C muscle cuts from livestock raised in more than one country.[274] The 2013 Final Rule requires, as a general rule, that "Muscle Cut Covered Commodities of Multiple Countries of Origin from Animals Slaughtered in the United States" be "labelled to specifically identify the production steps occurring in each country".[275] Specifically, "the origin designation for muscle cut covered commodities derived from animals imported for immediate slaughter [i.e. Category C muscle cuts] … is required to include information as to the location of the three production steps."[276] However, under the 2013 Final Rule, "the country of raising for animals imported for immediate slaughter … shall be designated as the country from which they were imported (e.g. 'Born and Raised in Country X, Slaughtered in the United States')."[277] Further, the COOL statute foresees Category C labels listing a *single* foreign origin by prescribing that labels on muscle cuts imported for immediate slaughter "shall designate the origin … as (i) the country from which the animal was imported; and (ii) the United States."[278]

7.109. If the 2013 Final Rule precludes countries other than the country of export from being listed as the country of raising, there are more labels and thus more segregation under the amended COOL measure for Scenarios C3-C6. This is illustrated in the second to bottom row of Table 9 below.

7.110. Alternatively, if the 2013 Final Rule permits countries of raising other than the country of immediate import on Label C – and provided the countries of raising do not have to be listed in strict chronological order – the label could be arranged so as to retain the same number of distinct

[274] See paras. 7.245-7.254 below.
[275] 2013 Final Rule, § 65.300(e).
[276] 2013 Final Rule, pp. 31368-31369.
[277] 2013 Final Rule, p. 31369.
[278] COOL statute, § 1638a(2)(c).

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labels as under the original COOL measure, namely two distinct labels covering the four separate scenarios. This is illustrated in the bottom row of Table 9 below with the potentially overlapping labels having matching backgrounds.[279]

TABLE 9: LABEL C ON CATEGORY C MUSCLE CUTS OF DIFFERENT MULTIPLE FOREIGN ORIGINS

			Scenarios	*C3*	*C4*	*C5*	*C6*
Category C multiple foreign origins			born	Mexico	Canada	Mexico	Canada
			raised*	Mexico Canada	Mexico Canada	Canada Mexico	Canada Mexico
			immediately slaughtered	US	US	US	US
Label C	original COOL measure			**Product of Canada and the U.S.**		**Product of Mexico and the U.S.**	
	amended COOL measure	country of raising = country of immediate import		***Born in Mexico, Raised in Canada, Slaughtered in the U.S.***	***Born and Raised in Canada, Slaughtered in the U.S.***	***Born and Raised in Mexico, Slaughtered in the U.S.***	***Born in Canada, Raised in Mexico, Slaughtered in the U.S.***
		if additional countries of raising may be shown		***Born and Raised in Mexico, Raised in Canada, Slaughtered in the U.S.***	***Born and Raised in Canada, Raised in Mexico, Slaughtered in the U.S.***	***Born and Raised in Mexico, Raised in Canada, Slaughtered in the U.S.***	***Born and Raised in Canada, Raised in Mexico, Slaughtered in the U.S.***

** Countries listed in chronological order of raising.*

[279] As noted, the parties agree that the country order flexibility of the original COOL measure was abandoned, and no party raises such a flexibility in the context of the amended COOL measure or specifically in regard to Scenarios C3-C6.

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Conclusion

7.111. In light of the above, we conclude that point-of-production labelling, as prescribed by the amended COOL measure, in and of itself increases the number of distinct labels for:

a. Category B muscle cuts of different foreign origins (Scenario B2 – Table 5) – irrespective of the multiple countries of raising flexibility under the amended COOL measure;

b. Category B muscle cuts of different, multiple foreign origins (Scenarios B3a and B3b taken together – Table 6) – irrespective of the multiple countries of raising flexibility under the amended COOL measure; and

c. Category C muscle cuts of animals born in a foreign country, raised in that and another foreign country, and imported into the United States for immediate slaughter (Scenarios C3-C6 taken together – Table 9) – if only the country of immediate import can be shown as the country of raising on the label.[280]

7.112. As mentioned, under the amended COOL measure more labels still mean more segregation.[281] As a result of the unchanged requirement for an unbroken chain of reliable country of origin information, segregation of the downstream product (muscle cuts) necessarily entails segregation of the upstream product (livestock).[282] The increase in the number of distinct labels for the above three types of muscle cuts also entails more segregation for the relevant types of muscle cuts and the originating livestock.

7.113. We also conclude that, compared with the original COOL measure, point-of-production labelling in and of itself does not affect the number of labels for other types of Category B and C muscle cuts, and for Category A muscle cuts in general. In other words, point-of-production labelling under the amended COOL measure does not directly increase or decrease segregation for these types of muscle cuts and the originating livestock.

[280] As we are reviewing differences in the design and structure of the original and amended COOL measures to assess increased segregation, we reach these conclusions without assessing the probabilities of the various hypothetical scenarios. We also disregard the abbreviation flexibilities under the original and amended COOL measures, as these have no direct implications for understanding whether there is an increased number of distinct labels.

[281] See Panel Reports, *US – COOL*, paras. 7.331 and 7.346.

[282] According to the original panel, "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." Panel Reports, *US – COOL*, para. 7.315. See also ibid. para. 7.316. As the USDA noted in the context of the original COOL measure, "[p]roducers of cattle[and] hogs … while not directly covered by [the 2009 Final Rule], will nevertheless be affected because covered meat commodities are produced from livestock." 2009 Final Rule, p. 2695.

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Removal of the two flexibilities under the original COOL measure

7.114. In the original dispute, commingling between products eligible for Labels A and B, and Labels B and C, respectively, was found to have only partially mitigated the segregation necessitated by the original COOL measure.[283] The flexibility of listing countries of origin in any order on Category B and commingled muscle cuts had a similar effect.[284]

7.115. As shown in Table 2, these two flexibilities – applied cumulatively – meant that under the original COOL measure a uniform label could cover muscle cuts from livestock of possibly three different origins:

a. muscle cuts from livestock born, raised, and slaughtered in the United States;

b. muscle cuts from livestock raised, and slaughtered in the United States, and born elsewhere; and

c. muscle cuts from livestock imported into the United States for immediate slaughter after being born and raised elsewhere.

7.116. Put differently, as a combined result of the commingling and country order flexibilities, it was possible to affix a uniform label on the following four different types of Category A, B, and C muscle cuts:

a. commingled muscle cuts from Category A and B animals;

b. muscle cuts from Category B animals;

c. commingled muscle cuts from Category B and C animals; and

d. muscle cuts from Category C animals;

7.117. This is shown in the shaded parts on the left-hand side of Table 10 below, using the 2009 Final Rule's label example "Product of Canada, U.S.".[285]

7.118. This diverse applicability of the same, uniform label was due to the commingling and country order flexibilities under the original COOL measure. As these two flexibilities are now removed, the four specific types of muscle cuts (shaded on the left) derived from the three different origins of livestock (shaded in the middle) must always carry distinct labels under the amended COOL measure, as shown (shaded on the right) in Table 10 below.

[283] Panel Reports, *US – COOL*, para. 7.327. See also Appellate Body Reports, *US – COOL*, para. 310.

[284] As the Appellate Body held, "[m]eat derived from animals born outside the United States but raised and slaughtered in the United States (Category B meat) must be labelled as a product of the United States and the foreign country in which the animal was born, and the countries of origin may be listed in any order. For meat derived from animals imported into the United States for immediate slaughter (Category C meat), labels must indicate all of the countries of origin of the animal, but cannot list the United States first. Because the countries of origin for Category B meat can be listed in any order, the labels for Categories B and C meat could look the same in practice." Appellate Body Reports, *US – COOL*, para. 245.

[285] 2009 Final Rule, p. 2661. As the country order flexibility did not apply to non-commingled Label C muscle cuts under the 2009 Final Rule, the "Product of U.S., Canada" label could not be affixed to such muscle cuts. See 2009 Final Rule, p. 2662 and § 65.300 (e)(4). See also Panel Reports, *US* – COOL, para. 7.697; Appellate Body Reports, *US* – COOL, para. 245. In any event, in light of the country order flexibility, the "Product of U.S., Canada" label could be affixed to: (i) commingled Category A and B muscle cuts; (ii) Label B muscle cuts; and (iii) commingled Category B and C muscle cuts.

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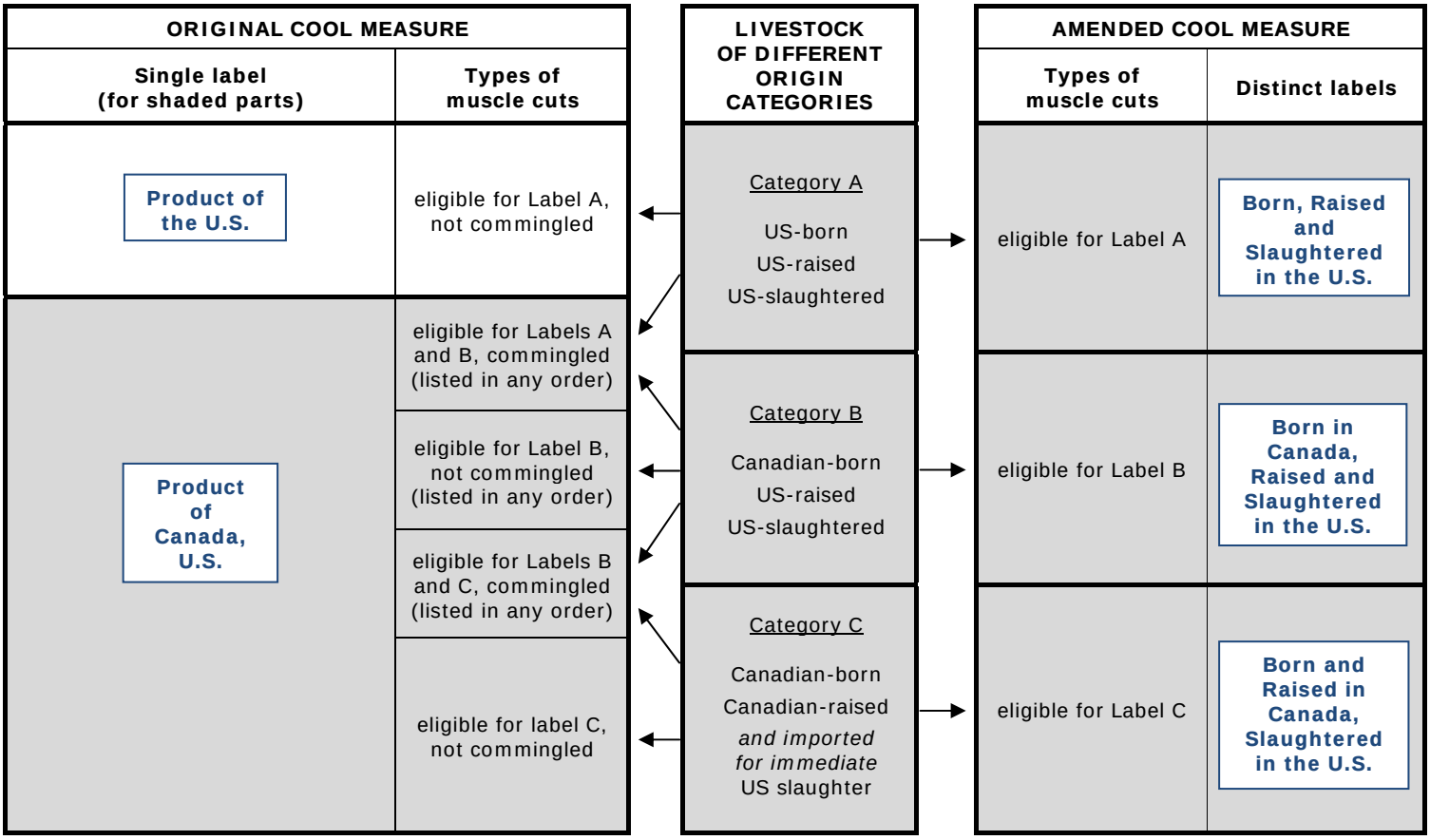
TABLE 10: MORE LABELS AS A RESULT OF THE COMMINGLING AND COUNTRY ORDER FLEXIBILITIES BEING REMOVED



Notes to Table 10: **The first label on the left** is taken from the 2009 Final Rule p. 2668. See also Panel Reports, *US – COOL*, para. 7.100. **The label in the shaded area on the left** is taken from the 2009 Final Rule, p. 2662. **The three labels on the right** follow the general provisions of the amended COOL measure.

7.119. The same conclusion applies also to the three main types of livestock and muscle cut origins in the US market – namely, exclusively US-origin (i.e. Category A) muscle cuts, and single foreign-origin muscle cuts of Categories B and C (i.e. muscle cuts from US-slaughtered Mexican feeder and Canadian fed cattle) – taken together.

7.120. Due to the commingling and country order flexibilities under the original COOL measure, a uniform 'North American' label ("Product of Canada, Mexico and the United States") could previously be affixed on all of these muscle cuts. Conversely, as shown in Table 11 below, absent the commingling and country order flexibilities, these three types of muscle cuts need to carry three distinct labels under the amended COOL measure.

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TABLE 11: MORE LABELS FOR MUSCLE CUTS FROM MEXICAN FEEDER AND CANADIAN FED CATTLE AS A RESULT OF THE COMMINGLING AND COUNTRY ORDER FLEXIBILITIES BEING REMOVED

	Category A	*Category B*	*Category C*
born	US	Mexico	Canada
raised	US	US	Canada
slaughtered	US	US	US
original COOL measure *(in light of commingling and country order flexibilities)*	**Product of Canada, Mexico and the United States**		
amended COOL measure *(absent commingling and country order flexibilities)*	**Born, Raised and Slaughtered in the U.S.**	**Born in Mexico, Raised and Slaughtered in the U.S.**	**Born and Raised in Canada, Slaughtered in the U.S.**

7.121. The parties disagree on the extent of the removed commingling flexibility. According to the Mexico, in practice many operators in the United States commingled.[286] According to Canada, the slaughterhouses that were accepting Canadian cattle and hogs under the 2009 Final Rule likely took advantage of the commingling flexibility, whereas under the amended COOL measure "when Canadian cattle and hogs are processed at these slaughterhouses, they will no longer be eligible for commingling.[287] Conversely, the United States contends that only few individual meat processors were commingling.[288] The parties held inverted positions on the prevalence of commingling in the original dispute.[289]

7.122. The original panel reviewed evidence on the practice and extent of commingling[290], and concluded that "[a]lthough it appears that some commingling is taking place, it is difficult to establish its precise extent."[291] Based on a letter from the American Meat Institute referenced by all three parties in the original dispute, the original panel added:

> 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

[286] Mexico's second written submission, para. 44.
[287] Canada's response to Panel question B, paras. 215-216.
[288] United States' first written submission, paras. 29-30, 115-116, and 177.
[289] In the original proceedings, the United States asserted that evidence "indisputably show[ed] significant use of the commingling provisions". The United States also alleged "occurrence of commingling on a widespread basis". Appellate Body Reports, *US – COOL*, paras. 27 and 296. The complainants contended that figures provided by the United States on Label A "are too low and that those on commingling are exaggerated". Panel Reports, *US – COOL*, para. 7.370. Mexico asserted that United States did "not clearly demonstrate [the occurrence] of commingling" and that the original "[p]anel's conclusion that the evidence did not provide compelling proof of the occurrence or extent of commingling is, therefore, 'entirely reasonable'". Appellate Body Reports, *US – COOL*, para. 298.
[290] See Panel Reports, *US – COOL*, paras. 7.364-7.368. The Appellate Body rejected the United States' appeal against the original panel's review of the evidence on commingling. According to the Appellate Body, "[b]ased on the Article 11 standard articulated above, we do not believe that the Panel's determinations regarding segregation and commingling evince a failure to assess the facts objectively." Appellate Body Reports, *US – COOL*, para. 310.
[291] Panel Reports, *US – COOL*, para. 7.364.

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imported meat, i.e. the quantities and share of non-US origin meat involved in any commingling.[292]

7.123. In general, the complainants rely on witness statements to seek to prove that the elimination of the commingling flexibility "ha[s] significant impact on [processors'] plants"[293] and "almost certainly … [leads] to distinct breaks in production".[294] However, the complainants do not submit a list of identified enterprises that commingle or the extent of commingling by these entities. When asked to provide the number or share of commingling operators, Canada refers to a potential range of commingling calculated by the USDA[295], and to cattle and hog procurement maps that do not provide direct data on the extent of commingling.[296] Mexico has no official statistics on commingling.[297] Instead, Mexico relies on statements illustrating the refusal of certain US producers to process imported meat[298], reduced demand for Mexican cattle[299], and other negative effects allegedly associated with the elimination of commingling.[300] These statements do not specify the actual use of commingling or the extent thereof.

7.124. The United States relies on the comments the USDA received on the proposed 2013 Final Rule concerning the actual extent of commingling, according to which only three beef processors and no pork processors confirmed that they commingled.[301] Conversely, in its comments on the proposed 2013 Final Rule, the American Meat Institute stated that there were at least fifteen large cattle slaughter plants and at least six hog slaughter facilities in the United States that processed mixed origin livestock.[302] Similarly, Mexico submits a statement of nine meat processors, "many" of which claim having practised commingling.[303] While these statements show the existence of commingling, they do not quantify its extent in the US market.

7.125. As regards the actual extent of commingling under the amended COOL measure, the United States relies on estimates made by the USDA in the 2013 Final Rule, which conclude that the extent of commingling in the US meat industry is between 5% and 20%, and that actual commingling likely fell closer to the lower end of 5%.[304] Canada also relies on the USDA estimates of 5% and 20%.[305] According to Mexico, the removal of commingling affected 18-21% of beef products sold in the US.[306]

7.126. Based on the above, like the original panel[307], we conclude that it appears that some commingling was taking place before the amended COOL measure both for cattle and hogs and resulting muscle cuts, but it is difficult to establish its precise extent. In light of the parties' arguments, we can only conclude that the use of the commingling flexibility did not exceed the rough estimate of 20% in the livestock and meat industry. However, we are unable to establish the share of commingling with any more specificity.

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[292] Panel Reports, *US – COOL*, para. 7.365.
[293] Exhibit MEX-21, p. 3.
[294] Exhibit CDA-23, p. 5.
[295] Canada's response to Panel question B, para. 215; 2013 Final Rule, p. 31368.
[296] See Exhibits CDA-116 and CDA-117. The maps provided by Canada demonstrate changes in policies of certain cattle and hog facilities with respect to their acceptance of Category B and C cattle. However, these data do not allow the Panel to identify the exact extent of commingling either in the mentioned facilities, or in the US meat industry in general. In response to the Panel's request for clarification, Canada admits that the described slaughterhouses only "likely" took advantage of commingling. See Canada's response to Panel question B.
[297] Mexico's response to Panel question B, para. 211.
[298] Mexico's response to Panel question B, para. 211. See also Exhibit MEX-56.
[299] Mexico's response to Panel question B, para. 212. See also Exhibit MEX-24.
[300] Mexico's response to Panel question B, paras. 213-217.
[301] United States' first written submission, para. 29 (citing Exhibit CDA-13, p. 15648).
[302] Exhibit CDA-23, p. 6.
[303] Mexico's second written submission, para. 44 (citing Exhibit MEX-24).
[304] United States' first written submission, para. 31. In the original proceedings, the United States contended that "approximately 22 percent of beef sold and 4 percent of the pork sold in the United States is derived from commingled livestock or meat." Appellate Body Reports, *US – COOL*, para. 27.
[305] Canada's response to Panel question B, para. 215.
[306] Mexico's first written submission, para. 137.
[307] Panel Reports, *US – COOL*, para. 7.364. As noted above, "any implications for competitive conditions discernible from the design and structure of the measure itself … may potentially be relevant" for assessing less favourable treatment under Article 2.1. Appellate Body Reports, *US – COOL*, para. 286.

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7.127. As to the country order flexibility, the parties do not address its extent. Absent arguments and evidence, we cannot determine its extent either. In any event, we need not do so.[308] For the purpose of comparing the design and structure of the original and amended COOL measures, it suffices to conclude that both the commingling and country order flexibilities were clearly available possibilities under the original COOL measure, and that these have now been eliminated. Having removed these flexibilities, the amended COOL measure leads to increased segregation for US-slaughtered livestock and resulting muscle cuts.[309]

Amended coverage of Label D

7.128. The 2013 Final Rule changed the coverage of Category D. As explained[310], under the 2009 Final Rule, Category D extended to "[i]mported 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*".[311] The 2013 Final Rule refers to "[m]uscle cut covered commodities derived from an animal that was slaughtered in another country … *including muscle cut covered commodities derived from an animal that was born and/or raised in the United States* and slaughtered in another country".[312]

7.129. The complainants do not challenge the amended COOL measure as regards imported muscle cuts from foreign-slaughtered livestock (Category D). As Canada explains, it "has not challenged the WTO-consistency of Label D under the COOL measure"[313], and "does not make claims of inconsistency of the provision of the amended COOL measure pertaining to the labelling of muscle cuts of foreign origin imported into the United States (referred to as Label D)."[314] Likewise, "Mexico is not challenging Label D."[315]

7.130. For the sake of completeness and in light of the parties' arguments[316], we nonetheless briefly review whether the amended coverage of Label D may lead to an increase in the number of distinct labels.

7.131. The change in coverage of Label D means that, under the amended COOL measure, Label D can cover muscle cuts from livestock of possibly four different origins depending on whether – prior to foreign slaughter – birth and/or raising took place in the foreign country and/or the United States, namely:

a. livestock born, raised, and slaughtered outside the United States (Scenario D1);

b. livestock born outside the United States, raised in the United States, and slaughtered elsewhere (Scenario D2);

c. livestock born in the United States, and raised and slaughtered elsewhere (Scenario D3); and

d. livestock born and raised in the United States, and slaughtered elsewhere (Scenario D4).

7.132. However, because Label D continues to indicate only the place of slaughter[317], this change does not entail any increase in the number of labels, as shown in Table 12 below. Although muscle

[308] Appellate Body Reports, *US – COOL*, para. 286 (footnote omitted) (citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 225) (emphasis original).
[309] As regards label accuracy, see section 7.5.4.2.4.3 below.
[310] See para. 7.15 above.
[311] 2009 Final Rule, § 65.300(f) (emphasis added).
[312] 2013 Final Rule, § 65.300(f)(2) (emphasis added).
[313] Canada's comments on the United States' response to Panel question No. 78.
[314] Canada's response to Panel question No. 47.
[315] Mexico's response to Panel question No. 47.
[316] See United States' response to Panel question No. 3; Canada's response to Panel question No. 3 and comments on the United States' response to Panel question No. 3.
[317] Unamended, the COOL statute describes Category D muscle cuts as those "derived from an animal that is not born, raised, or slaughtered in the United States", and requires designating "a country other than the United States as the country of origin of such commodity." COOL statute, § 1638a(2)(D). As noted above, the 2013 Final Rule leaves the definition of Category D muscle cuts unchanged, maintaining the direct link to

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cuts from livestock of three of the above four different origins were not covered by Label D under the 2009 Final Rule (Scenarios D2-D4)[318], under the 2013 Final Rule all four categories can use the same label as that permitted under the original COOL measure.

TABLE 12: CHANGE IN COVERAGE OF LABEL D

<table>
<tr><td></td><td>Scenarios</td><td>D1</td><td>D2</td><td>D3</td><td>D4</td></tr>
<tr><td></td><td>born</td><td>Country X</td><td>Country X</td><td>US</td><td>US</td></tr>
<tr><td></td><td>raised</td><td>Country X</td><td>US</td><td>Country X</td><td>US</td></tr>
<tr><td></td><td>slaughtered</td><td>Country X</td><td>Country X</td><td>Country X</td><td>Country X</td></tr>
<tr><td rowspan="2">Label D</td><td>original COOL measure</td><td>Product of Country X</td><td colspan="3">not applicable</td></tr>
<tr><td>amended COOL measure</td><td colspan="4">Product of Country X</td></tr>
</table>

Conclusion on segregation

7.133. We have reviewed the design and structure[319] of the amended COOL measure with respect to the need for segregation. Like the original panel[320], we have concluded that for all practical purposes, the amended COOL measure necessitates segregation of meat and livestock according to origin.[321]

7.134. We have also reviewed the changes in the COOL measure's design and structure[322] to compare the amended COOL measure's impact on segregation with that of the original COOL measure. In light of this, we have concluded[323] that:

a. point-of-production labelling in and of itself:

   i. increases the need for segregating Category B muscle cuts and livestock under two scenarios, namely muscle cuts of different single and different multiple foreign origins;

   ii. increases the need for segregating Category C muscle cuts of different multiple foreign origins – provided that only the country of immediate import can be shown as the country of raising on the label;

   iii. does not affect the need for segregation under other scenarios of Category B and C muscle cuts and livestock, or for Category A muscle cuts and livestock; and

b. the amended COOL measure's removal of the commingling and country order flexibilities increases the need for segregation.

where the originating livestock was slaughtered (substantial transformation). 2009 Final Rule, § 65.300(f); and 2013 Final Rule, § 65.300(f)(2). See also Panel Reports, *US – COOL*, para. 7.674; and Appellate Body Reports, *US – COOL*, para. 241.

[318] This also applies to the voluntary option for Label D to show not only the country of slaughter (substantial transformation) but also the countries of the other two production steps. Muscle cuts in Scenarios D1 and D4 would also carry four distinct voluntary augmented Labels D. See 2013 Final Rule, § 65.300(2).

[319] See Appellate Body Reports, *US – COOL*, para. 286.

[320] Panel Reports, *US – COOL*, para. 7.327.

[321] See para. 7.86 above.

[322] Appellate Body Reports, *US – COOL*, para. 286.

[323] See paras. 7.111 and 7.127 above.

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7.135. Various statements from individual industry participants[324] and groups[325] confirm that the amended COOL measure involves increased segregation throughout both the beef and pork muscle cuts supply chains, i.e. cattle and hogs as well as muscle cuts derived therefrom.

7.136. Accordingly, we find that the amended COOL measure involves segregation, as did its predecessor. Indeed, as compared with the original COOL measure, for all practical purposes, the amended COOL measure necessitates *increased* segregation of livestock and the resulting muscle cuts of meat according to origin in order to meet the information requirements on origin labels.

7.137. Like the original panel, we do not consider that segregation – or increased segregation for that matter – *per se* would constitute detrimental impact under Article 2.1 of the TBT Agreement, let alone a violation of Article 2.1.[326] We need to address whether segregation "'modifies the *conditions of competition* … to the disadvantage of the imported product' by imposing higher costs on imported than on domestic livestock."[327] Before doing so, however, we first assess the impact of the amended COOL measure on recordkeeping, which is closely linked to the need for segregation and its cost implications.

7.5.4.1.2.4 Recordkeeping

7.138. The parties dispute the impact of the amended COOL measure on recordkeeping. In particular, the complainants argue that the revised labels and elimination of commingling under the amended COOL measure result in increased recordkeeping and verification burdens as compared to the original COOL measure.[328] The United States counters that the 2013 Final Rule makes no changes to the recordkeeping provisions contained in the original COOL measure, which require accurate records irrespective of the origin of the products.[329]

7.139. The provisions regarding recordkeeping and verification are formally identical under the original and amended COOL measures.[330] We examine whether *in practice* the amended COOL measure requires greater recordkeeping as compared to the original COOL measure.

7.140. The recordkeeping requirements of the original COOL measure established an audit verification system imposing certain recordkeeping requirements for producers along the livestock and meat production chain.[331] In particular, 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".[332] Persons subject to audit under this provision must be able to make country of origin records available to the USDA for the purposes of origin verification.[333] Further, "[a]ny 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."[334]

[324] See Exhibits CDA-25, CDA-28, CDA-29, CDA-31, CDA-32, MEX-21, MEX-22, MEX-23, and MEX-28. In particular, for instance, Tyson, a major US processor, explains how the amended COOL measure leads to "additional segregation at several of [its] plants and lead to significant costs not included in the [USDA's] proposal [for the 2013 Final Rule]." Exhibits CDA-25 and MEX-21. Further, AgriBeef explains the ways in which segregating the fabrication runs would lead to increased segregation costs. Exhibit CDA-28.

[325] See Exhibits CDA-22, CDA-23, CDA-24, CDA-30, CDA-33, CDA-35, CDA-36, CDA-37, CDA-65, and MEX-26.

[326] Panel Reports, *US – COOL*, para. 7.328, citing that 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]." Appellate Body Report, *Korea – Various Measures on Beef*, para. 144 (emphasis original).

[327] Panel Reports, *US – COOL*, para. 7.328 (footnote omitted) (citing Appellate Body Report, *Korea – Various Measures on Beef*, para. 144 (emphasis original)). See also Panel Reports, *US – COOL*, para. 7.239.

[328] See Canada's first written submission, paras. 42-44 and second written submission, paras. 23-24; Mexico's first written submission, paras. 100-101 and second written submission, para. 43.

[329] United States' first written submission, para. 117.

[330] See section 7.3.5 above.

[331] See Panel Reports, *US – COOL*, para. 7.117.

[332] COOL statute, § 1638a(d)(1).

[333] See COOL statute, § 1638a(d)(2)(A); and 2009 Final Rule, § 65.500(a)(2).

[334] COOL statute, § 1638a(e).

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7.141. According to the 2009 Final Rule, "[a]ny 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 1 year from the date of the transaction."[335]

7.142. As explained in the original dispute, these recordkeeping requirements necessarily entail information that "can only be obtained from the upstream livestock and meat supply chain".[336] The 2009 Final Rule's explicit application to such upstream suppliers meant that:

> the [original] 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.[337]

7.143. Under the amended COOL measure, the information that needs to be obtained and maintained upstream continues to be closely tied to the "origin claim" that is made with respect to a covered commodity. This is based on the unchanged requirement that "suppliers and retailers … shall make available … records … that verify an origin claim".[338] The "origin claim"[339] is therefore a key determinant of the "records" and information that are required under the amended COOL measure for both retailers and suppliers.[340]

7.144. In this vein, the USDA's assertion that in practice "no additional recordkeeping is required by [the 2013 Final Rule]"[341] is called into question by its earlier recognition that recordkeeping burdens for various stages in the production chain are correlated to the nature of the origin claim and the requisite accuracy of supporting information. To take one example, in 2009 the USDA "recognize[d] that animal production cycles vary greatly and depending upon which records are used for origin verification, retention of documents should be commensurate with the claim being affirmed through an affidavit or other means of declaration."[342] For intermediary suppliers, the

[335] 2009 Final Rule, § 65.500(b)(3) (emphasis added). See also Panel Reports, *US – COOL*, para. 7.118.

[336] Panel Reports, *US – COOL*, para. 7.316; Appellate Body Reports, *US – COOL*, para. 249.

[337] Panel Reports, *US – COOL*, para. 7.317 (emphasis added). These implications were explicitly acknowledged in the USDA's cost-benefit analysis of the 2009 Final Rule. According to the USDA, "[t]h[e] [2009 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." 2009 Final Rule, p. 2684. See also 2009 Final Rule, p. 2697 ("producers, handlers, manufacturers, wholesalers, importers, and retailers of covered commodities" listed as part of "description of recordkeepers"); Panel Reports, *US – COOL*, para. 7.318; and Appellate Body Reports, *US – COOL*, para. 249.

[338] 2009 Final Rule, § 65.500(a)(2).

[339] To be precise, the "origin claim" referenced in the COOL recordkeeping requirements is initiated by the "slaughter facility". 2009 Final Rule, § 65.500(b)(1). The USDA explains that its "authority to audit ends at the slaughter facility as the slaughter facility is the first handler of the covered commodity" and that "as initiators of origin claims, packers must have records to substantiate those claims". 2009 Final Rule, p. 2674. The origin claim also serves as the basis for symmetry between the information to be provided by retailers and transmitted by suppliers. See 2009 Final Rule, p. 2660 ("upon request by USDA representatives, suppliers and retailers shall make available to USDA representatives, records maintained in the normal course of business that verify an origin … claim").

[340] In its Article 2.1 analysis, the Appellate Body relied upon the original panel's finding that "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". Appellate Body Reports, *US – COOL*, paras. 339 and 342, footnote 665. In a subsequent reference to the original COOL measure's recordkeeping, the Appellate Body mentioned labels having "less detail than the information regarding the countries in which the livestock were born, raised, and slaughtered, which upstream producers and processors are required to be able to identify in their records and transmit to their customers." Appellate Body Reports, *US – COOL*, para. 346. We do not understand this to contradict the original panel's factual finding that recordkeeping concerned "the kind of origin information required by the various COOL labels", as relied upon by the Appellate Body. Nor does it disturb the reasoning set forth based on the "origin claim" under the amended COOL measure.

[341] 2013 Final Rule, p. 31376.

[342] 2009 Final Rule, p. 2675.

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USDA anticipated that the transmission of information from "distribution centers" to retailers "likely will require modification of existing recordkeeping processes to ensure that the information passed from suppliers to retail stores permits accurate product labeling and permits compliance and enforcement reviews."[343] In short, suppliers' recordkeeping burden and obligations are explicitly tied to the "information needed to correctly label the covered commodities".[344]

7.145. This is consistent with the USDA's identification of two types of costs in relation to recordkeeping under the original COOL measure, namely "initial costs" and "maintenance costs".[345] First, "initial or start-up costs" were considered to consist of "some additional incremental costs to record, maintain, and transfer country of origin … information *to substantiate required claims made at retail*".[346] Second, "[i]n addition to these one-time costs to modify recordkeeping systems, enterprises will incur additional recordkeeping costs associated with storing and maintaining records".[347] For livestock in particular, it was anticipated under the original COOL measure that "all producers of … livestock (in the case of the covered meat commodities) will establish recordkeeping systems *sufficient to substantiate country of origin claims*".[348] Further, it was recognised that the nature of livestock production was such that both initial[349] as well as maintenance[350] costs of recordkeeping would be greater for these types of operations.

7.146. As shown above[351], an "origin claim" under the original COOL measure could consist of a muscle cut being a "product of" the country(ies) of origin involved. In addition, the original COOL measure stipulated that "the origin declaration [for Category B, Category C, and all commingled muscles cuts] may include more specific information related to production steps *provided records to substantiate the claims are maintained*".[352] The 2013 Final Rule now mandates such information on all covered US-slaughtered muscle cuts, and maintains the provision for voluntary specific information on production steps only for Category D imported muscle cuts ("provided records to substantiate the claims are maintained").[353] This implies that the augmented origin claims with specific information related to production steps on Labels A-C, as mandated under the amended COOL measure, entail corresponding augmentation of the records kept by livestock and meat producers to substantiate such claims.[354]

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[343] 2009 Final Rule, p. 2685.

[344] According to the 2009 Final Rule, "[t]he rule requires retailers to provide country of origin information for all of the covered commodities that they sell. *It also requires all firms that supply covered commodities to these retailers to provide the retailers with the information needed to correctly label the covered commodities*. In addition, 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." 2009 Final Rule, p. 2693 (emphasis added).

[345] See 2009 Final Rule, pp. 2697-2698, Table 9.

[346] 2009 Final Rule, p. 2698 (emphasis added). Further, "[e]xamples of initial or start-up costs would be any additional or recordkeeping burden needed to record the required country of origin … information and transfer this information to handlers, processors, wholesalers, or retailers via records used in the normal course of business". Ibid.

[347] 2009 Final Rule, p. 2699.

[348] 2009 Final Rule, p. 2698 (emphasis added).

[349] According to the 2009 Final Rule, "[i]n particular, it is believed that livestock backgrounders, stockers, and feeders will face a greater burden in establishing recordkeeping systems. These types of operations will need to track country of origin information for animals brought into the operation as well as for animals sold from the operation via records used in the normal course of business, increasing the burden of substantiating country of origin claims." 2009 Final Rule, p. 2698.

[350] According to the 2009 Final Rule, "it is expected that … livestock producers will incur higher costs to maintain country of origin … information. … [L]ivestock can and often do move through several geographically dispersed operations prior to sale for processing or slaughter. Cattle, for example, typically change ownership between 2 to 3 times before they are slaughtered and processed." 2009 Final Rule, p. 2699.

[351] See Table 1 above.

[352] 2009 Final Rule, § 65.500(e)(4) and p. 2662 (emphasis added).

[353] See 2013 Final Rule, § 65.300(f)(2) and p. 31369.

[354] The USDA acknowledges that "all affected retailers and packers will have to change their labelling practices to conform to [the 2013 Final Rule], regardless of the origin of the animal from which their muscle cut covered commodities are derived." 2013 Final Rule, pp. 31373-31374. Further, the dynamic between greater information on labels and more upstream records was highlighted by the USDA in its discussion of intermediaries' obligations resulting from the 2009 Final Rule. According to the 2009 Final Rule, "[t]he recordkeeping burden on handlers, processors, wholesalers, and retailers is expected to be more complex than the burden most producers face. These operations will need to maintain country of origin … information on the covered commodities purchased and subsequently furnish that information to the next participant in the supply

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7.147. Further, it follows from the foregoing analysis of increased segregation under the amended COOL measure that the revised labels create a greater variety of scenarios that must be verifiable by retailer and supplier records. We concluded above that point-of-production in and of itself increased the number of distinct labels for various production-step scenarios of Category B and Category C muscle cuts.[355] Just as the creation of more labels necessitates more segregation under the amended COOL measure, different "origin claims" require distinct substantiation for the segregated animals and meat. This is particularly evident in the case of the removal of commingling and country order flexibility. Tables 10 and 11 illustrate various scenarios for which, under the original COOL measure, animals and meat with different production-step origins could be consolidated under a unified "origin claim". Suppliers and retailers availing themselves of such a general "origin claim" would have a recordkeeping burden and obligation commensurate with the substantiation of that general claim. The greater diversity of labels resulting from the elimination of commingling and country-order flexibility creates a multiplicity of scenarios for which distinct and commensurate substantiating records are now required.

7.148. The USDA also referred to "the major cost drivers" of the 2009 Final Rule as including *inter alia* "when livestock or other covered commodities are segregated in the production or marketing process *when firms are not using a multiple-origin label*".[356] As a direct result of the 2013 Final Rule, "the flexibilities afforded by the use of multiple-origin labels"[357] under the original COOL measure are no longer available. A "mixed origin label"[358] under the amended COOL measure must now be understood to represent a greater diversity of mutually exclusive labels according to the possible variations of production steps.[359] Consequently, what was originally considered a "major cost driver" is now the precise situation mandated by the revised labels and removed flexibilities under the amended COOL measure.

7.149. In sum, the increase in the number of distinct labels and in segregation logically entails a higher recordkeeping burden. Although origin claims may be substantiated by documents maintained in the normal course of business, to the extent that origin claims become more diverse, they entail more burdensome recordkeeping. As products that could be covered by a uniform origin claim are now covered by more, distinct origin claims, the one set of normal business documentation to substantiate the previously uniform origin claim is now necessarily replaced with distinct sets of normal business documentation to substantiate the diverse origin claims. This logically leads to higher recordkeeping burdens and costs, as also confirmed by statements of industry participants.[360]

7.150. In light of the above, we find that, compared with the original COOL measure, the amended COOL measure entails an increased recordkeeping burden in practice for US-slaughtered livestock and the resulting muscle cuts of meat.

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chain. This will require adding additional information to a firm's bills of lading, invoices, or other records associated with movement of covered commodities from purchase to sale." 2009 Final Rule, p. 2699.

[355] See para. 7.111 above.

[356] 2009 Final Rule, p. 2689 (emphasis added). In this connection, we also note the USDA's acknowledgement that "[p]rocessors 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*." 2009 Final Rule, p. 2685 (emphasis added).

[357] 2009 Final Rule, p. 2691.

[358] See, e.g. 2013 Final Rule, p. 31374.

[359] See 2013 Final Rule, p. 31377 (indicating that the amended COOL measure "no longer allows a single mixed origin label" due to the elimination of commingling). See also Table 10 (showing one multiple-origin label under the original COOL measure potentially spanning three distinct labels under the amended COOL measure).

[360] See Exhibits CDA-22, CDA-25, CDA-28, CDA-29, CDA-30, CDA-32, CDA-33, CDA-34, CDA-35, CDA-36, CDA-37, MEX-21, and MEX-26. In particular, the Food Marketing Institute explains how putting more detailed origin information on the labels will be more costly. See Exhibits CDA-22 and MEX-26. Tyson, AgriBeef, FPL Food, and the National Grocers' Association also elaborate on how the amended COOL measure will increase the recordkeeping burden. See Exhibits CDA-25; CDA-28; CDA-32; MEX-21 and MEX-25, respectively.

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7.5.4.1.3 Incentives for handling domestic products and effects on the competitive opportunities of imported products

7.151. The original panel noted that segregation "does not necessarily impose differential implementation costs on imported and domestic products."[361] At the same time, the original panel concluded that more segregation entails more costs:

> [I]t 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.[362]

7.152. Given the Appellate Body's endorsement of this conclusion[363], we see no reason to find otherwise in the context of these compliance proceedings.

7.153. To assess whether segregation involves differential implementation costs for imports, the original panel compared five business scenarios based on whether the livestock being processed has domestic or imported origin(s):

> "(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."[364]

7.154. The original panel concluded that "[t]he relatively less costly business scenarios are the ones that involve processing meat from either exclusively domestic or exclusively foreign livestock at all times" because, "as a direct result of the [original] COOL measure, business scenarios involving more than one origin or muscle cut label result in generally higher costs than scenarios involving only one origin."[365]

7.155. In essence, this continues to apply in the context of this compliance dispute. Under the amended COOL measure, the first four business scenarios compared by the original panel remain valid. The fifth scenario involving commingling is no longer available. In any event, it was also found to be more costly than single-origin scenarios.[366] As regards the relative costs of the remaining four scenarios, various industry participants indicated that different stages of the supply chain would move to a single-origin category approach in light of the increased costs of processing products of multiple origin under the amended COOL measure.[367]

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[361] According to the original panel, "[t]he 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." Panel Reports, *US – COOL*, para. 7.330.

[362] Panel Reports, *US – COOL*, para. 7.331.

[363] See Appellate Body Reports, *US – COOL*, paras. 261, 287, and 345.

[364] Panel Reports, *US – COOL*, 7.333 and 7.335-7.344.

[365] Panel Reports, *US – COOL*, para. 7.347.

[366] The original panel found that "[c]ommingling might reduce [segregation and other compliance] costs at specific stages, but overall it still involves higher costs than processing single origin livestock only." Panel Reports, *US – COOL*, para. 7.346.

[367] See Exhibits CDA-17, CDA-25, CDA-28, CDA-29, MEX-22, MEX-24, and MEX-25.

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7.156. Comparing the two single-origin scenarios, the original panel concluded that "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."[368] In particular, the original panel considered that:

> [l]ivestock 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. 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.[369]

7.157. We see no significant change in the relative share of US and imported livestock and meat in the US market. The United States explains that the market has not changed in this regard.[370] Accordingly, the original panel's logic continues to apply: processing exclusively domestic livestock and meat remains the least costly and most viable business scenario under the amended COOL measure. As the original panel held:

> 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.[371]

7.158. This is confirmed by statements from US industry participants of different sizes. AB Foods, a US packing plant processing approximately 1% of the United States' annual beef production[372] noted that the segregation costs resulting from the amended COOL measure would place his company at a competitive disadvantage to packers in parts of the country, such as the Midwest, where there is a more consistent supply of US cattle.[373] Likewise, Tyson, a major US processor stated with regard to the amended COOL measure:

> [e]ven if a retail customer would be willing to accept 'B' or 'C' label products, there are not enough 'B' or 'C' livestock in any region to allow any Tyson plant (or, we believe, any other processor) to dedicate itself to 'B' or 'C' livestock, which would be the only way to avoid the segregation costs described above and remain viable.[374]

7.159. Reviewing how compliance costs are borne in the supply chain, the original panel noted that "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."[375] The original panel added that "[a]s the 2009 Final Rule … explains, at least some of the compliance costs of the COOL measure will arise at the level of suppliers of covered commodities." The USDA estimates that the costs of the amended COOL measure will also arise in the supply chain:

> [T]he Agency agrees that there will be additional costs associated with th[e 2013 F]inal [R]ule, although only those muscle cut covered commodities subject to COOL requirements will be affected by the changes in this final rule. Those costs will be incurred by processors and retailers as they adjust to the loss of commingling flexibility and to the new labeling requirements in this final rule.[376]

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[368] Panel Reports, *US – COOL*, para. 7.349.
[369] Panel Reports, *US – COOL*, para. 7.349 (footnote omitted).
[370] According to the United States, "the market forces found to exist during the original dispute – i.e., the vast majority of beef sold at retail is produced from animals born, raised and slaughtered in the U.S. – have … not changed in the interim time period." United States' response to Panel question No. 18 (footnote omitted).
[371] Panel Reports, *US – COOL*, para. 7.350.
[372] See Exhibit CDA-67.
[373] See Exhibit CDA-17.
[374] Exhibits CDA-25 and MEX-21.
[375] Panel Reports, *US – COOL*, para. 7.352.
[376] 2013 Final Rule, p. 31372.

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7.160. Further, according to the original panel, "the additional costs [of the COOL measure] cannot be fully passed on to consumers."[377] The original panel took into account "the lack of [consumer] interest in a voluntary COOL regime"[378], as noted by the USDA at the time.[379] Referencing previous disputes[380], the original panel concluded that:

> 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.[381]

7.161. This continues to apply in the context of the amended COOL measure. Although in the 2013 Final Rule the USDA does not address a voluntary COOL regime, or consumer interest in such a regime[382], the USDA explains that "the expected benefits from implementing mandatory COOL requirements [under the amended COOL measure] remain difficult to quantify and that the incremental economic benefits of this final rule will be comparatively small relative to those afforded by the current COOL requirements."[383] The USDA adds that "[t]he availability of COOL information does not imply that there will necessarily be any change in aggregate consumer demand or in demand for products of one origin versus others."[384]

7.162. US industry participants confirm that "the costs [of the amended COOL measure] will be staggering and impossible to pass to the customer or consumer"[385] "since there are no benefits derived for the consumer for which the consumer will pay a premium."[386] Likewise, McVean Trading and Investments, an investment management company specializing in agricultural products, and a trader of US cattle futures, notes that:

> [t]he situation in the U.S. beef industry reflects the fact that there are a large number of cattle producers and a very small number of packers who control a significant share of the overall kill capacity and an increasingly concentrated retail sector for meat products. The result is that the cattle producers are price takers largely as they have little or no market power. … The structure of the cattle and beef industries is such that

[377] Panel Reports, *US – COOL*, para. 7.353.
[378] Panel Reports, *US – COOL*, para. 7.354.
[379] Panel Reports, *US – COOL*, para. 7.354 (citing 2009 Final Rule, p. 2682).
[380] Panel Reports, *US – COOL*, para. 7.358.
[381] Panel Reports, *US – COOL*, para. 7.357.
[382] See 2013 Final Rule, p. 31372.
[383] 2013 Final Rule, p. 31376. The USDA explains in the 2013 Final Rule that it could not quantify the benefits of point-of-production labelling: "information on the production steps in each country may embody latent (hidden or unobservable) attributes, which may be important to individual consumers and result in additional but hard to measure benefit increases. The Agency, however, has not been able to quantify this benefit, as singling out the value of those additional latent attributes and the resultant consumer benefit increases would require complicated modeling techniques that none of the available studies utilized." 2013 Final Rule, p. 31377. Further, the USDA "observes that the comments it has received on the proposed rule reinforce the Agency's conclusion that the expected benefits from implementing the final rule's amendments to the existing COOL labeling requirements are difficult to quantify, as no commenters provided quantified assessments of the benefits. Moreover, the comments received do not alter the Agency's conclusion that the incremental economic benefits from the labeling of production steps will be positive, but likely will be comparatively small relative to those already afforded by the 2009 COOL final rule." 2013 Final Rule, p. 31377.
[384] 2013 Final Rule, p. 31376. Further, according to the USDA, "an empirical finding of no change in demand … may … imply that the economic benefits are positive but too small to be measurable in a general-population study." Ibid. The USDA references also a study in the context of shrimp on the USDA website, which concludes that "price is a more important determinant of buyer behavior than COOL, a finding consistent with various consumer surveys." Consumers Appear Indifferent to Country-of-Origin Labeling for Shrimp <http://www.ers.usda.gov/amber-waves/2012-june/consumers-appear-indifferent.aspx>. 2013 Final Rule, p. 31376, footnote 3. The USDA adds that "[c]omments received on the 2009 final rule and previous requests for comments elicited no evidence of significant barriers to the provision of this information other than private costs to firms and low expected returns. Thus, from the point of view of society, such evidence suggests that market mechanisms could ensure that the optimal level of country of origin information would be provided to the degree valued by consumers." 2013 Final Rule, p. 31377.
[385] Exhibit CDA-28. See also Exhibits CDA-30, MEX-19, MEX-23, and MEX-27.
[386] Exhibit CDA-28.

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> there is no likelihood that any additional costs will not be passed back upstream to cattle producers.[387]

7.163. Based on the points summarized above, the original panel "preliminarily conclude[d] that the [original] 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."[388]

7.164. As a factor confirming the incentive in favour of domestic livestock, the original panel took into account "the relative use of the muscle cut labels under the COOL measure".[389] It found that, "despite commingling, the use of Label A affects the vast majority of meat labelled under the COOL requirement"[390], and noted that "the complainants do not contest the US argument that the use of category C and D labels remains 'small'."[391]

7.165. The parties do not submit specific data on the shares of the four muscle cut labels under the amended COOL measure. However, the United States points out that "the market forces found to exist during the original dispute – i.e., the vast majority of beef sold at retail is produced from animals born, raised and slaughtered in the U.S. – have … not changed in the interim time period" since the 2009 Final Rule.[392] Further, all parties agree that the use of Label A will remain predominant under the amended COOL measure.[393] In fact, with the removal of the commingling flexibility, the totality of Category A muscle cuts will need to carry a Label A.

7.166. The original panel also concluded that, due to the incentive in favour of domestic livestock, the original COOL measure created a legal necessity of making a choice for private actors in favour of domestic livestock[394], and thus reduced the competitive opportunities of imported livestock. Similar to the original panel, the Appellate Body likened the COOL situation to the one in the *Korea – Various Measures on Beef* dispute in this regard[395]:

> [T]he circumstances of [the original dispute] are similar to those in *Korea – Various Measures on Beef*. … The Appellate Body did not find a detrimental impact on imported beef due only to '[t]he legal necessity of making a choice' that the measure itself imposed.[396] Rather, it held that the adoption of a measure requiring such a choice to be made had the 'direct practical effect', in that market, of denying competitive opportunities to imports. Such an effect was not 'solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits', but was the result of the governmental intervention that affected the conditions of competition for beef in Korea. … The relevant question is whether it is the governmental measure at issue that affects the conditions under which like goods, domestic and imported, compete in the market. While a measure may not legally require certain treatment of imports, it may nevertheless create incentives for market participants to behave in certain ways, and thereby have the 'practical effect' of treating imported products less favourably. Thus, the findings in *Korea – Various Measures on Beef* are consistent with, and support the proposition that, whenever the

[387] Exhibit MEX-55.
[388] Panel Reports, *US – COOL*, para. 7.372.
[389] Panel Reports, *US – COOL*, para. 7.360.
[390] Panel Reports, *US – COOL*, para. 7.370.
[391] Panel Reports, *US – COOL*, para. 7.371 (footnote omitted).
[392] United States' response to Panel question No. 18 (footnote omitted).
[393] Parties' responses to Panel question A(v).
[394] See Panel Reports, *US – COOL*, paras. 7.386-7.392.
[395] According to the original panel, "[a]s noted above, in *Korea – Various Measures on Beef*, the Appellate Body found a 'reduction of competitive opportunit[ies]' for imported products relative to domestic like products.

"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." Panel Reports, *US – COOL*, paras. 7.373-7.374 (footnotes omitted).
[396] Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.

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> operation of a measure in the market creates incentives for private actors systematically to make choices in ways that benefit domestic products to the detriment of like imported products, then such a measure may be found to treat imported products less favourably.[397]

7.167. The same considerations continue to apply under the amended COOL measure. As explained above[398], the amended COOL measure necessitates increased segregation and recordkeeping in practice, and it increases the incentive in favour of domestic livestock. As a consequence, the amended COOL measure increases the practical necessity for private actors to choose domestic over imported livestock, and has an increased negative effect on the competitive conditions of imported livestock in the US market.

7.168. In finding a *de facto* negative impact on the competitive opportunities of imported livestock, the original panel took into account the small market share of imported products.[399] The Appellate Body upheld this, confirming that *de facto* detrimental impact is closely connected to the market conditions in which a measure applies.[400]

7.169. As noted[401], imported livestock continues to have a small share in the US market. Like the original panel, we take this into account to find that the amended COOL measure has increased the detrimental impact on the competitive opportunities of imported livestock in the US market.

7.170. Further, like in the original dispute[402], the detrimental impact of the amended COOL measure is confirmed by industry statements.[403] In particular, numerous statements indicate that the amended COOL measure results in a stronger incentive for plants, retailers, or processing companies to refuse imported cattle and hogs or resulting muscle cuts, or that the amended COOL measure is leading to additional refusals of imported products[404] or of imported animals of Category B or C origin.[405] Some statements attest to increased transportation costs as a result of fewer US processors willing to accept imported livestock.[406] According to some statements,

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[397] Appellate Body Reports, *US – COOL*, para. 288 (footnotes omitted, emphasis original). The Appellate Body added that "while detrimental effects caused *solely* by the decisions of private actors cannot support a finding of inconsistency with Article 2.1, the fact that private actors are free to make various decisions in order to comply with a measure does not preclude a finding of inconsistency. Rather, where private actors are induced or encouraged to take certain decisions *because of the incentives created by a measure*, those decisions are not "independent" of that measure. As the Appellate Body noted, the "intervention of some element of private choice does not relieve [a Member] of responsibility … for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product", and thus does not preclude a finding that the measure provides less favourable treatment." Appellate Body Reports, *US – COOL*, para. 291.

[398] See section 7.5.4.1.2.3 above.

[399] See Panel Reports, *US – COOL*, paras. 7.393-7.404.

[400] According to the Appellate Body, "[a] market's response to the application of a governmental measure is always relevant to an assessment of whether the operation of that measure accords *de facto* less favourable treatment to imported products. That is, if a specific technical regulation adopted by a Member gives rise to adverse effects in the market, which disparately impact imported products, such effects will be attributable to the technical regulation for purposes of examining less favourable treatment under Article 2.1.

We understand the Panel to have considered that, in this case, the small market share held by Canadian and Mexican livestock imports exacerbates the effects of the COOL measure. In making its finding under Article 2.1, the Panel acknowledged that the incentive created by the COOL measure is "partly due to the relatively small market share of imported livestock". Such reasoning is not inconsistent with a finding that it was the COOL measure that caused the detrimental impact. Indeed, the opportunity for a technical regulation to discriminate may well derive from its operation within a given market that exhibits particular characteristics. In some instances, the market share held by imported products may be one such relevant characteristic." Appellate Body Reports, *US – COOL*, paras. 289-290.

[401] See paras. 7.156-7.157 above.

[402] See Panel Reports, *US – COOL*, paras. 7.374-7.380; Appellate Body Reports, *US – COOL*, paras. 315 and 318-323.

[403] See generally Exhibits MEX-17 (BCI), MEX-18 (BCI), and MEX-19 (BCI).

[404] See Exhibits CDA-18, CDA-19, CDA-22, CDA-23, CDA-25, CDA-32, CDA-37, CDA-42 (BCI), CDA-43 (BCI), CDA-44 (BCI), CDA-45 (BCI), CDA-46 (BCI), CDA-47 (BCI), CDA-48 (BCI), CDA-49 (BCI), CDA-50 (BCI), CDA-51 (BCI), CDA-52 (BCI), CDA-55 (BCI), CDA-56 (BCI), CDA-58, CDA-62, CDA-63, CDA-64, CDA-65, CDA-66, CDA-68, CDA-69, CDA-70, CDA-110, CDA-113, CDA-116, CDA-117, MEX-18 (BCI), MEX-21, MEX-23, MEX-26, and MEX-28. Panel Reports, *US – COOL*, para. 7.375.

[405] See Exhibits CDA-69 and CDA-70.

[406] See Exhibits CDA-24, CDA-49 (BCI), CDA-53 (BCI), CDA-54 (BCI), and CDA-64.

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delivery times for imported livestock would remain reduced or be made less flexible as a result of the amended COOL measure.[407] Some statements indicate that the amended COOL measure would lead to further worsened contractual conditions for imported cattle and hogs[408], or to a worsening of financial conditions for suppliers of imported livestock.[409] According to some statements, imported cattle continue to be excluded from premium beef programs, such as the Certified Angus Beef program, under the amended COOL measure.[410] In addition, various statements indicate that the decreasing number of processors accepting less imported livestock as a result of the amended COOL measure leads to an increased COOL discount on imported cattle and hogs.[411]

7.171. Canada and the United States also advance specific economic arguments on the evolution of the price basis between Canadian and US cattle following the implementation of the original COOL measure. In particular, the United States contests Canada's claim that the price basis between Canadian and US fed and feeder cattle has worsened to the detriment of Canadian cattle, with feeder cattle basis having recently increased to its widest margin.[412] The United States argues that because of seasonal fluctuation, the comparison of a pre-original COOL basis to a post-original COOL basis should be based on the averages of two time periods of similar time spans.[413] Relying on such an approach, the United States asserts that the price basis between Canadian and US fed cattle has actually narrowed since the implementation of the original COOL measure.[414]

7.172. We note that the weekly and monthly Canadian-US fed and feeder cattle price basis fluctuates over time based on the interaction of supply and demand, making price basis trend forecast difficult. In particular, it is not possible to fully appreciate the implications of the volatility of the price basis by simply looking at its evolution over time. Failing to consider the set of factors underlying the evolution of the price basis could in fact lead to misleading inferences. In addition, we agree with the United States that the comparison of the average pre-original COOL basis to the average post-original COOL basis hinges on the benchmark period considered, i.e. the length of the pre-original COOL period. This applies also to the figures advanced by the United States. For instance, the United States argues that the average Nebraska/Alberta fed cattle basis for the period 2003 to 2009 was 17 cents per pound, while the average basis for the period 2009 to 2013 was 10 cents per pound.[415] However, if the pre-original COOL period is extended to cover 1992 to 2009[416], the average fed cattle basis would be lower, contradicting the United States' argument that the average price basis has narrowed.

7.173. Instead of relying exclusively on averages, as suggested by the United States, we also consider the actual trend of the price basis. Based on weekly Alberta-Nebraska basis data submitted by Canada and also relied upon by the United States[417], we observe that the linear trend of the post-original COOL price basis is slightly negative, suggesting a slightly wider margin trend for the October 2008 to February 2014 period, even though the average weekly fed steers basis for this period is smaller in absolute value than the average basis for the May 2001 to September 2008 period.[418] Based on monthly Nebraska-Alberta fed basis data submitted by the United States, the positive linear trend of the post-original COOL price basis implies a wider margin trend for the period from September 2008 to December 2013[419] – as illustrated in Figure 1.

[407] See Exhibits CDA-24, CDA-42 (BCI), CDA-45 (BCI), CDA-52 (BCI), CDA-54 (BCI), and CDA-55 (BCI).
[408] Panel Reports, *US – COOL*, para. 7.378. See exhibits CDA-43 (BCI), CDA-46 (BCI), CDA-47 (BCI), CDA-48 (BCI), CDA-50 (BCI), CDA-52 (BCI), CDA-53 (BCI), CDA-54 (BCI), CDA-56 (BCI), and MEX-18 (BCI).
[409] Panel Reports, *US – COOL*, para. 7.379. See Exhibits CDA-59, CDA-60, CDA-61, and CDA-63.
[410] See Exhibits CDA-45 (BCI), CDA-46 (BCI), CDA-49 (BCI), and CDA-55 (BCI).
[411] Panel Reports, *US – COOL*, paras. 7.356 and 7.374. See Exhibits CDA-19, CDA-24, CDA-25, CDA-29, CDA-33, CDA-37, CDA-43 (BCI), CDA-49 (BCI), CDA-50 (BCI), CDA-52 (BCI), CDA-53 (BCI), CDA-63, CDA-69, MEX-19 (BCI), MEX-22, MEX-23, and MEX-28.
[412] Canada's second written submission, para. 17 and response to Panel question No. 19. See also Exhibits CDA-108, CDA-157, CDA-179, and CDA-180.
[413] United States' comments on Canada's response to Panel question No. 19.
[414] Exhibit US-78.
[415] United States' comments on Canada's response to Panel question No. 19.
[416] See Exhibit US-62.
[417] United States' comments on Canada's response to Panel question No. 19.
[418] Exhibit CDA-179. Weekly data on fed heifers basis displayed in Exhibit CDA-179 only covers the period May 2001 to November 2010. Similarly, monthly data on both fed steers and heifers price basis in Exhibit CDA-180 only cover the period January 2005 to December 2012.
[419] Exhibit US-78.

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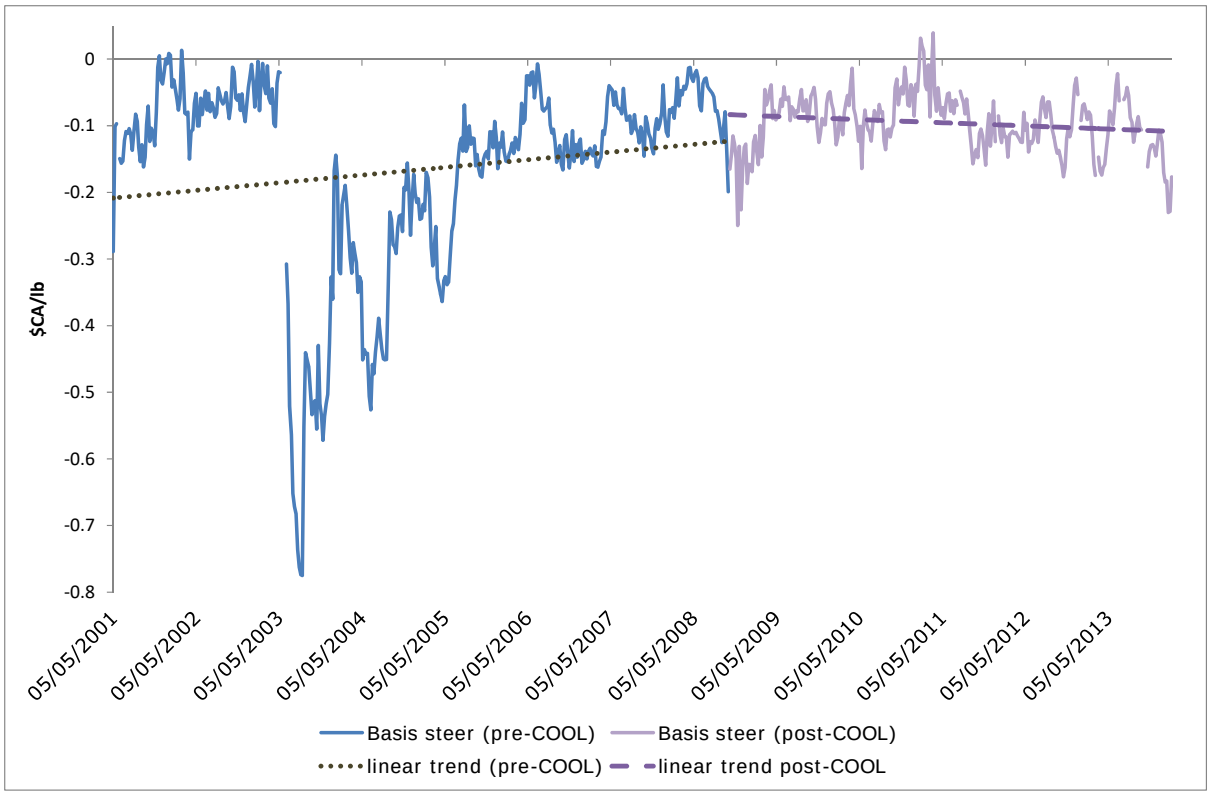
Figure 1: Weekly Alberta-Nebraska Fed Steers Basis with linear trends[420]



7.174. Despite the methodological uncertainties pointed out by the United States, we consider that the data on fed cattle price basis provided by both parties[421] show a slight trend in the widening of the price basis to the detriment of Canadian cattle for the period September/October 2008 to December 2013/February 2014, following the implementation of the original COOL measure. In particular, the price basis of fed cattle has increased, in absolute values and on average, by 3% weekly for the period October 2008 to February 2014 and by 10% monthly for the period from September 2008 to December 2013.

7.175. We reach similar conclusions when considering a polynomial trend of order 2 of the post-original COOL price basis (Figure 2), which shows in particular that the widening trend of the fed cattle price-basis has been more pronounced since March 2011, as Canada argues.

[420] Exhibit CDA-179.
[421] Exhibits CDA-179, CDA-180, and US-78.

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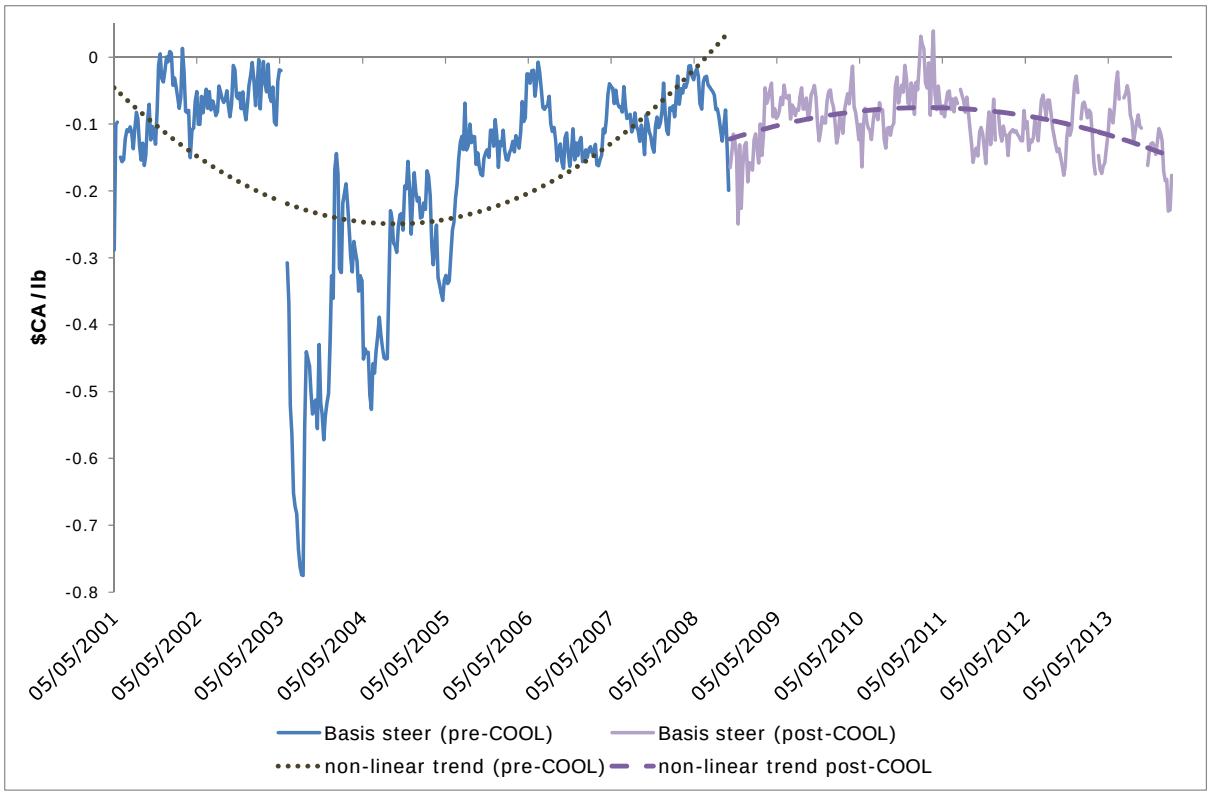
Figure 2: Weekly Alberta-Nebraska Fed Steers Basis with non-linear trends[422]



7.5.4.1.4 Conclusion on detrimental impact[423]

7.176. In light of the above, we find that, in the context of the muscle cut labels, and in comparison with the original COOL measure, the amended COOL measure creates an increased incentive in favour of processing exclusively domestic livestock and an increased disincentive against handling imported livestock.[424] Accordingly, in the context of the muscle cut labels, the amended COOL measure entails increased detrimental impact on imported livestock.

7.5.4.1.5 Actual trade effects

7.5.4.1.5.1 Parties' arguments

7.177. Canada submitted an updated version of the econometric study prepared by Professor Sumner in the original dispute[425] with a view to providing evidence of the actual trade effects of the amended COOL measure. In particular, this Updated Sumner Econometric Study[426] attempts to show that the negative and significant impact of the original COOL measure on Canadian livestock's price basis and import ratio[427] persisted through the end of 2013 and beginning of 2014, and that the implementation of the amended COOL measure negatively affected prices and shares of imported livestock.

[422] Exhibit CDA-179.

[423] These conclusions apply to the amended COOL measure in regard to muscle cuts from US-slaughtered livestock (Categories A-C). As explained above, the complainants do not bring claims either in regard to muscle cuts from foreign-slaughtered animals (Category D) or the ground meat aspect of the amended COOL measure (Category E). See sections 7.1 and 7.4 above. See also Canada's and Mexico's responses to Panel question No. 47.

[424] See Panel Reports, *US – COOL*, para. 7.420.

[425] For the Sumner Econometric Study addressed in the original dispute, see Exhibits CDA-64, CDA-79, CDA-152, CDA-174, and CDA-228 in the original dispute.

[426] See Exhibits CDA-71, CDA-179, CDA-180, and CDA-181.

[427] Panel Reports, *US – COOL*, para. 7.542. Appellate Body Reports, *US – COOL*, para. 326.

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7.178. The parties disagree on the methodology of the Updated Sumner Study and the validity of its findings. Canada argues that the Updated Sumner Econometric Study[428] with more recent data (December 2003/September 2005 to December 2012) confirms that from 2010 through 2012 the original COOL measure continued to drive down the Canadian-US fed cattle price basis and imports of Canadian cattle and hog as a share of US feed or slaughter placements.[429] Canada further submits that the significant negative long-run impact of the original COOL measure is robust to the separated inclusion of (i) additional variables (i.e. the difference in unemployment rate in the United States and Canada, a dummy variable for the 2008 economic recession and the producer price index for truck transportation)[430]; (ii) using monthly rather than weekly data[431]; and (iii) extending the sample period up to November 2013/February 2014.[432] Canada further argues that the amended COOL measure exacerbates the original COOL measure's negative trade effects on Canadian livestock in terms of price basis and import flows.[433]

7.179. The United States disagrees with Canada's conclusions. It considers the estimations of the long-run impact of the original and amended COOL measures to be overstated, and to suffer from inflated statistical significance.[434] The United States posits that there are numerous data and methodological shortcomings, including (i) the use of weekly rather than monthly data (i.e. inaccurate unofficial weekly cattle import data[435] and unclear construction of weekly data from quarterly or monthly data[436]); (ii) the failure to extend the sample period back to 2000[437]; and (iii) the lagging nature of the unemployment difference as a recession proxy.[438]

7.180. The United States adds that the econometric model of the Updated Sumner Econometric Study is misspecified. In particular, the study suffers from "omitted variable bias" by failing to include simultaneously all the factors affecting livestock demand and supply in both Canada and the United States, namely: (i) the 2008 economic recession dummy; (ii) the 2003-2005 US ban on Canadian cattle due to an occurrence of BSE in the Canadian herd; (iii) transportation costs; (iv) feed costs; and (v) Canada's cattle-slaughter capacity expansion.[439] Accordingly, the United States contends, the estimations of the original COOL measure account not only for the original COOL measure's own effects on the price basis or import ratio but also capture some impacts of the missing variables on the price basis or import ratio, resulting in overestimated or underestimated coefficients of the original and amended COOL measure.[440]

7.181. In addition, the United States claims that the asymptotic standard errors of the long-run estimated coefficients used to infer the statistical significance are artificially too low, which falsely

[428] The benchmark econometric specification is a dynamic model where the dependent variable (imports of Canadian cattle and hog as a share of US feed or slaughter placements or the price difference between imported Canadian and US livestock) is a function of the lagged dependent variable, the difference in the exchange rate ratio between US dollar and Canadian dollar, monthly dummies, and the impact of the original COOL measure. The impact of the original COOL measure is characterized by a so-called dummy variable, which takes the value of zero before the entry into force of the original COOL measure and one afterwards to represent its implementation. In addition, the benchmark specification of the import cattle ratio and cattle price basis include a dummy variable for the implementation of the specified risk material regulation (RSM) in Canada and another dummy variable for the reopening of US border to Canada cattle over 30 months old following the US ban because of Canada's Bovine Spongiform Encephalopathy (BSE) crisis. The benchmark specification of the cattle price basis also includes a lagged exchange rate ratio. The benchmark specification of the import hog ratio also includes a time trend variable and a dummy variable for the closing of Maple Leafs plants in Canada. The Sumner Econometric Study in the original proceedings covered the period December 2003/September 2005 to August 2010. See Exhibits CDA-64, CDA-79, CDA-152, CDA-174, and CDA-228 in the original dispute.

[429] Canada's first written submission, paras. 61-62; and Exhibit CDA-71, replaced by CDA-179.

[430] Canada's response to Panel question D(iii).

[431] Canada's response to Panel question D(iv). Estimation for feeder cattle using monthly data was not possible because of data unavailability.

[432] Canada's response to Panel questions C and E.

[433] Canada's response to Panel question E.

[434] See United States' second written submission, para. 140.

[435] See United States' second written submission, para. 141.

[436] See United States' comments on Canada's response to Panel question E.

[437] See United States' second written submission, footnote 258.

[438] See United States' second written submission, footnote 258.

[439] See United States' second written submission, footnote 258; and comments on Canada's response to Panel question E.

[440] See United States' comments on Canada's response to Panel question E.

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inflates the level of confidence in the original COOL measure's estimated impact.[441] Referring to another econometric study on the impact of the original COOL measure undertaken by Professor Sumner and S. Pouliot[442], the United States suggests using a different method, known as bootstrap procedure, to estimate consistent standards errors of the Updated Sumner Econometric Study's parameters.[443]

7.182. Mexico does not submit any evidence similar to Canada's Updated Sumner Econometric Study.

7.5.4.1.5.2 Panel's analysis

Methodology

7.183. For the reasons evoked by the original panel, we review this evidence – even though, as confirmed in the original dispute, there is no need to verify actual trade effects to dispose of claims under Article 2.1 of the TBT Agreement.[444] Like the original panel, we consider that it is not our duty to establish a unified econometric report, but rather assess, in light of the arguments raised by the parties, the robustness of the econometric results to the inclusion of additional explanatory variables and extension of the sample period.[445]

7.184. The objective of the Updated Sumner Econometric Study is to isolate and quantify the effect of the original and amended COOL measures on trade quantities (import ratios) and price basis. The use of econometrics to isolate those effects also allows for a quantification of different factors that explain the evolution of livestock's price basis and import ratio, such as the general economic situation, the occurrence of a specific event (e.g. BSE ban), seasonal effects, changes in transportation costs, exchange rate fluctuations, and other relevant determinants. We agree that such factors could affect or possibly invalidate any conclusions on the estimation of the impact of the original and amended COOL measure on the quantity and price of imported livestock.

7.185. We also consider that assessing each estimated factor in the econometric specification hinges on the degree of confidence and reliability of such estimates, defined as the level of statistical significance. As noted in the original dispute[446], a given variable is usually said to be statistically significant when there is at most a 5% probability that the value of the estimated coefficient is due to chance or random error. Put differently, there is at least a 95% probability that the value of the coefficient variable in question is different from zero.[447]

7.186. The Updated Sumner Econometric Study relies on a dynamic model specification to estimate the short- and long-run impacts of the original and amended COOL measures. The long-run estimation of the COOL impact is a non-linear function of the short-run coefficient of the COOL measure dummy variable and the lagged dependent variable's coefficient. It assumes that the model is in its steady state (i.e. stable production and consumption over time). To compute the standard errors of the long-run coefficients, the Updated Sumner Econometric Study uses a linear approximation, known as the delta method.[448]

7.187. In principle, the asymptotic standard errors that are obtained from using linear approximations can command confidence. However, as pointed out by the United States[449], the asymptotic standard error of a non-linear function, such as the long-run coefficients, can be too optimistic.[450] A bootstrap procedure, as proposed by the United States, estimates consistent

[441] See United States' comments on Canada's response to Panel question E.
[442] See Exhibit US-76, pp. 19-20.
[443] See United States' comments on Canada's response to Panel question E; and Exhibit US-77.
[444] See Panel Reports, *US – COOL*, paras. 7.438-7.453; and Appellate Body Reports, *US – COOL*, paras. 314-326.
[445] See Panel Reports, *US – COOL*, para. 7.539.
[446] See Panel Reports, *US – COOL*, para. 7.510.
[447] R.A. Fisher, *Statistical Methods for Research Workers*, 1st ed. (Oliver & Boyd, 1925).
[448] See Exhibit CDA-79 in the original dispute. See also Rao, C. R., *Linear Statistical Inference and Its Applications*, (John Wiley, 1965); and Gary W. Oehlert, *A Note on the Delta Method*, The American Statistician, 1992, Vol. 46, No. 1, pp. 27-29.
[449] See United States' comments on Canada's response to Panel question E; and Exhibit US-76.
[450] See Exhibit US-77, p. 148.

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standard errors (that is to say more conservative and accurate than the asymptotic ones); however, the problem of a potentially artificially high level of confidence is less severe when the sample size is large.[451] As the sample size considered in the Updated Sumner Econometric Study is rather large[452], this problem of a potentially artificially high level of confidence should in theory be less severe.

7.188. The short-run COOL impacts do not suffer from this specific problem of potentially artificially high level of confidence associated with the standard errors of a non-linear function. Accordingly, our review of the Updated Sumner Econometric Study focuses primarily on the estimated short-run rather than long-run COOL impacts.

Robustness of the original COOL measure's estimated impact

7.189. Based on our review of the 192 "ordinary least squares" estimations of the Updated Sumner Econometric Study (92 estimations for cattle and 100 for hogs), we conclude that the estimated short-run impact of the original COOL measure is robust to the inclusion of the above-mentioned additional explanatory variables[453], the extension of the sample period up to November 2013/February 2014, and the use of monthly data. In fact, the original COOL dummy variable has a negative and significant short-run impact at the 5% level in 153 estimations (80%) out of the 192 estimated specifications. This figure rises to 175 estimations (91%) when a 10% significance level is considered.[454]

7.190. As noted[455], the United States argues that the Updated Sumner Econometric Study suffers from omitted variable bias. We are unable to fully assess this in the absence of actual regression results of the econometric specification modified to incorporate simultaneously the United States' additional variables. For instance, it is impossible to assess whether the inclusion of all the variables suggested by the United States might lead to multicollinearity[456], thus altering the confidence interval of these variables' estimated coefficients. Further, the dynamic specification of the Updated Sumner Economic Study's model through the inclusion of the lagged dependent variable (i.e. import ratio or price basis) reduces any potential variable omission bias. The findings of the Updated Sumner Econometric Study regarding the original COOL measure impacts are also in line with the above-mentioned study by Professor Sumner and S. Pouliot submitted by the United States.[457] This latter study finds a significant impact of the original COOL measure through the widening of the price bases and a decline in ratios of Canadian imports to total domestic use for both fed and feeder cattle for the September 2005 to December 2010 period. Even though its model is specified differently, this study reaches the same conclusion as the Updated Sumner Econometric Study.[458]

Robustness of the amended COOL measure's estimated impact

7.191. In light of our review of the Updated Sumner Econometric Study with the most recent data up to February 2014, we conclude that the amended COOL measure's estimated impact is not sufficiently robust. The amended COOL measure's estimated impact in the Updated Sumner Econometric Study is negative and significant in most regressions of the cattle price basis

[451] See Hamilton, James, *Time Series Analysis*, (Princeton University Press, 1992); and MacKinnon, J. G., *Bootstrap Methods in Econometrics*, The Economic Record, The Economic Society of Australia, 2006, Vol. 82 (s1), pp. S2-S18, 09.

[452] The sample size ranges from 251 to 530 weekly observations and from 85 to 95 monthly observations.

[453] Namely transport costs, difference in unemployment rate in the United States and Canada, and recession dummy variables. See para. 7.178 above.

[454] The fact that the level of confidence of the (negative) effect of the original COOL measure varies by model specification is not uncommon, as long as the variable of interest remain significant in most specifications.

[455] See para. 7.180 above.

[456] For a definition of multicollinearity, see Panel Reports, *US – COOL*, para. 7.537.

[457] See Exhibit US-76.

[458] Namely the study by Professor Sumner and S. Pouliot includes the following additional variables: dummy variables for the week of Independence Day, Thanksgiving and Christmas; two week lag of the dependent variable; price of corn in the United States; price of barley in Canada; and transportation cost and difference in unemployment. See Exhibit US-76.

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specification. However, it is not significant in most of the specifications for cattle and hogs import ratios.

7.192. As suggested by Canada, this lack of significance is probably due to the very small number of weekly data available in the sample with only 11 observations for the amended COOL measure dummy (out of 430, 431, or 530 total observations). More data covering a longer post-amended COOL period would be necessary to draw any reliable conclusion on the robustness of the amended COOL measure's estimated impact in the Updated Sumner Econometric Study.

Conclusion

7.193. Accordingly, we consider that the updated Sumner Econometric Study is robust in showing that the negative and significant impact of the *original* COOL measure on the price basis and import shares of Canadian livestock persisted through the end of 2013 and beginning of 2014. However, the econometric evidence on the impact of the *amended* COOL measure on the price basis and import ratio is limited and not robust. Consequently, although the Updated Sumner Econometric Study provides additional useful information as regards the original COOL measure, we cannot read it as lending econometric support to our above finding that, in the context of muscle cuts, the amended COOL measure has increased detrimental impact on imported livestock relative to domestic like products.

7.5.4.2 Legitimate regulatory distinctions

7.5.4.2.1 Legal test

7.194. The Appellate Body has explained that a finding of *de facto* detrimental impact on competitive opportunities for imported products "is not dispositive of less favourable treatment under Article 2.1. Instead, a panel must further analyse whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."[459] In the original dispute, the Appellate Body summarized the inquiry into legitimate regulatory distinctions as follows:

> [S]ome technical regulations that have a *de facto* detrimental impact on imports may not be inconsistent with Article 2.1 when such impact stems exclusively from a legitimate regulatory distinction. In contrast, where a regulatory distinction is not designed and applied in an even-handed manner—because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination—that distinction cannot be considered "legitimate", and thus the detrimental impact will reflect discrimination prohibited under Article 2.1. In assessing even-handedness, a panel must "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue".[460]

7.195. Having found *de facto* detrimental impact on imports from the amended COOL measure, we proceed to examine whether such impact "stems exclusively from a legitimate regulatory distinction". Following the Appellate Body's guidance, we first identify the relevant regulatory distinctions drawn by the amended COOL measure[461], and then proceed to assess the legitimacy of such distinctions.[462]

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[459] Appellate Body Report, *US – Clove Cigarettes*, para. 182.

[460] Appellate Body Reports, *US – COOL*, para. 271 (footnotes omitted) (citing Appellate Body Reports, *US – Clove Cigarettes*, para. 182; and *US – Tuna II (Mexico)*, paras. 215-216).

[461] See Appellate Body Reports, *US – Clove Cigarettes*, para. 222 (identifying the distinction drawn between prohibited and permitted types of cigarettes); and *US – Tuna II (Mexico)*, para. 284 (identifying the distinction drawn between "labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand").

[462] See also Panel Reports, *EC – Seal Products*, para. 7.174. Specifically, the panel in *EC – Seal Products*, which was the first to examine "legitimate regulatory distinctions" under Article 2.1 following the TBT trilogy of Appellate Body Reports, considered this element to "entail[] an analysis of two main questions: (a)

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7.5.4.2.2 Relevant regulatory distinctions

7.5.4.2.2.1 Relevant distinctions under the original and amended COOL measures

7.196. In evaluating the legitimacy of regulatory distinctions under the original COOL measure, the Appellate Body began by "identify[ing] the relevant regulatory distinction", and made two observations in this respect. First, the Appellate Body noted that the original COOL measure "define[d] the origin of beef and pork as a function of the countries in which certain steps of the production process (birth, raising, and slaughter) take place" and, second, that it "require[d] retailers of muscle cuts of beef and pork to label that meat with one of four mandatory labels".[463] On this basis, the Appellate Body "consider[ed] that it is the distinctions between the three production steps, as well as between the four types of labels that must be affixed to muscle cuts of beef and pork, that constitute the relevant regulatory distinctions under the [original] COOL measure".[464]

7.197. The relevant regulatory distinctions identified by the Appellate Body remain broadly intact under the amended COOL measure. As explained above, the amended COOL measure retains the definition of origin as a function of the countries of birth, raising, and slaughter.[465] Further, the amended COOL measure continues to require retailers to label muscle cuts of beef and pork with mandatory labels based on the statutory Categories A, B, C, and D. The 2013 Final Rule revises Labels A-C so that they provide explicit information on the three production steps, while the origin indication on Label D remains the same as under the original COOL measure.[466]

7.198. Thus, the regulatory distinctions under the amended COOL measure are essentially the same as those under the original COOL measure. Accordingly, we consider that the distinctions between the three production steps as well as the mandatory labels to be affixed to muscle cuts of beef and pork are relevant regulatory distinctions under the amended COOL measure for the purposes of our analysis under Article 2.1 of the TBT Agreement. The parties do not dispute that these are relevant regulatory distinctions under the amended COOL measure.[467]

7.5.4.2.2.2 Other aspects of the amended COOL measure

7.199. The parties dispute the relevance of other aspects of the amended COOL measure for the Panel's assessment of legitimate regulatory distinctions. In particular, the United States stresses the Appellate Body's statement that "in an analysis under Article 2.1, we *only* need to examine the distinction that accounts for the detrimental impact on [imported] products as compared to [domestic] products".[468] The United States argues from this premise that the complainants inappropriately challenge "other regulatory distinctions that either have nothing to do with the detrimental impact caused by the amended COOL measure or, in fact, are not regulatory distinctions at all".[469] According to the United States, these include: (i) the exemptions and defined scope of the amended COOL measure; (ii) Label D for muscle cuts derived from foreign-slaughtered animals; (iii) the COOL statute's prohibition of a trace-back system; and (iv) Label E for ground meat products. We address each of these in turn.

Exemptions under the amended COOL measure

7.200. With regard to the relevance of the exemptions, the complainants highlight the Appellate Body's reference in its Article 2.1 analysis to exempted products, and point out that the

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first, what are the relevant regulatory distinctions under the [measure]; and (b) second, are such regulatory distinctions 'legitimate'".

[463] Appellate Body Reports, *US – COOL*, para. 341.

[464] Appellate Body Reports, *US – COOL*, para. 341.

[465] See section 7.3.1.1 above.

[466] See section 7.3.1.2 above.

[467] See Canada's second written submission, para. 47; Mexico's first written submission, paras. 118-119; and United States' second written submission, para. 19.

[468] See e.g. United States' first written submission, para. 81 (citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 286 (emphasis original)).

[469] United States' first written submission, para. 81.

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exemptions under the original COOL measure are unchanged by the 2013 Final Rule.[470] The United States counters that the exemptions are outside the Article 2.1 inquiry as they do not cause any detrimental impact.[471] In particular, the United States cites the original panel's statements that "[t]he exact proportion or magnitude of the exceptions or exclusions is irrelevant for our review of the complainants' claims under Article 2.1 of the TBT Agreement"[472], and 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".[473] The United States thus argues that the exemptions and scope of the amended COOL measure "cannot explain whether the detrimental impact stems exclusively from legitimate regulatory distinctions".[474]

7.201. We draw guidance from the Appellate Body's examination of the original COOL measure, where it "consider[ed] relevant the fact that the COOL measure exempts from its labelling requirements muscle cuts of beef and pork that are 'ingredient[s] in a processed food item', or are sold in a 'food service establishment' or in an establishment that is not a 'retailer'".[475] We agree with the United States that the exemptions were not explicitly identified by the Appellate Body as relevant regulatory distinctions, and that they were not found by the original panel to be a source of detrimental impact. Nevertheless, the exemptions formed a key element of the Appellate Body's evaluation of the legitimacy of regulatory distinctions under the original COOL measure.[476]

7.202. In our view, this is consistent with the Appellate Body's explanation that, having determined the detrimental impact and relevant regulatory distinctions under Article 2.1, a panel must "carefully scrutinize the particular circumstances of the case, that is the design, architecture, revealing structure, operation, and application of the technical regulation at issue".[477] In the original dispute, the three production steps and four muscle cut labels were distinctions drawn by the original COOL measure that did not operate in isolation, but were given effect in conjunction with other elements essential to the measure's design and operation.[478] The assessment of legitimate regulatory distinctions took account of the "overall architecture"[479] of the measure, and encompassed aspects of the measure that were not themselves "relevant regulatory distinctions" or independent sources of detrimental impact.[480]

7.203. The requirement for a broad appraisal of a measure's design and application is also consistent with the notion that detrimental impact forms the foundation, but not the entirety, of the inquiry into legitimate regulatory distinctions.[481] Indeed, as the United States has emphasized, discrimination under Article 2.1 must not be equated to detrimental impact alone.[482] Therefore,

[470] See Canada's first written submission, paras. 69-71, and second written submission, paras. 28-30; Mexico's first written submission, paras. 133-137, and second written submission, paras. 49 and 61-65.
[471] See United States' first written submission, para. 87 and second written submission, paras. 60-61.
[472] United States' first written submission, para. 88 (citing Panel Reports, *US – COOL*, para. 7.417).
[473] United States' first written submission, para. 88 (citing Panel Reports, *US – COOL*, para. 7.419).
[474] United States' second written submission, para. 61.
[475] Appellate Body Reports, *US – COOL*, para. 344.
[476] See, e.g. Appellate Body Reports, *US – COOL*, para. 348 ("We *emphasize* that … the limited consumer information conveyed through the retail labelling requirements and *exemptions* therefrom … is of *central importance* to our overall analysis under Article 2.1") (emphasis added).
[477] Appellate Body Reports, *US – COOL*, para. 271 (citing Appellate Body Report, *US – Clove Cigarettes*, para. 182).
[478] As explained further below, these elements included the recordkeeping of required information as well as the exemptions from ultimately providing such information to consumers. See Appellate Body Reports, *US – COOL*, paras. 342 and 344.
[479] Appellate Body Reports, *US – COOL*, para. 346.
[480] This incorporation of the exemptions into the Article 2.1 analysis is not at odds with the findings of the original panel that the exemptions do not in themselves "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." See Panel Reports, *US – COOL*, para. 7.419. While they do not modify incentives to the detriment of imported livestock, they are relevant to the distinct question of whether that detriment stems exclusively from legitimate regulatory distinctions.
[481] See, e.g. Appellate Body Reports, *US – COOL*, para. 327 (placing focus on whether "the *detrimental impact reflects discrimination* in violation of Article 2.1") (emphasis added). See also Appellate Body Reports, *US – Tuna II (Mexico)*, para. 231; and *US – Clove Cigarettes*, para. 224; and United States' second written submission, para. 20.
[482] See, e.g. United States' second written submission, para. 10, and opening statement at the meeting of the Panel, para. 3.

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although the exemptions under the amended COOL measure are not "relevant regulatory distinctions" as such, we nevertheless take them into account as part of our examination of the "overall architecture" of the amended COOL measure, insofar as they are relevant to whether "the detrimental impact reflects discrimination in violation of Article 2.1".[483]

Label D

7.204. As noted, the complainants clarify that they do not challenge Label D[484], and no detrimental impact on foreign livestock has been demonstrated to derive from Label D requirements.[485] In the original dispute, the Appellate Body explicitly identified "the distinctions between … the *four* types of labels that must be affixed to *muscle cuts* of beef and pork" as relevant regulatory distinctions under the original COOL measure.[486] Given the complainants' explicit delimitation of their claims and the lack of demonstrated detrimental impact, however, the relevance of Label D for legitimate regulatory distinctions must accordingly be adjusted in this compliance dispute. To the extent that Label D concerns the "overall architecture" of the amended COOL measure, and hence is relevant to the analysis of legitimate regulatory distinctions, we consider it below as it relates to the relevant distinctions identified above for other muscle cut labels.

Trace-back prohibition

7.205. It is in a similar light that the COOL statute's prohibition of trace-back could be considered under Article 2.1. In contrast to Label D and the exemptions, the Appellate Body made no reference to the trace-back prohibition in its assessment of regulatory distinctions under the original COOL measure. The complainants put forward various arguments that this aspect of the amended COOL measure evidences a violation of Article 2.1.[487] We address these arguments below to the extent relevant to our overall examination of legitimate regulatory distinctions.

Label E

7.206. With respect to Label E for ground meat products, we recall the finding in the original dispute that "the complainants ha[d] not demonstrated that the ground meat label under the COOL measure results in less favourable treatment for imported livestock."[488] We have explained above that the complainants do not challenge the ground meat label as a distinct claim in this

[483] Appellate Body Reports, *US – COOL*, para. 327. See also Appellate Body Report, *US – Clove Cigarettes*, para. 182. While we are mindful that "under Article 2.1, we *only* need to examine the distinction that accounts for the detrimental impact", we agree with Canada that this is not "intended to exclude everything from the analysis that is extraneous to the regulatory distinction(s) that cause the detrimental impact on imported products". See Appellate Body Report, *US – Tuna II (Mexico)*, para. 286 (emphasis original); and Canada's second written submission, para. 48. As Canada points out, such a narrow approach would contradict the Appellate Body's general guidance under Article 2.1 and conflict with its analytical approach in the original dispute. At the same time, the broad examination of the amended COOL measure encompassing its "overall architecture" is not without limits, and consideration of other "extraneous" factors must remain anchored in the measure's relevant regulatory distinctions and detrimental impacts. In this connection, we note Mexico's differentiation between "detrimental impact", "relevant regulatory distinction(s)", and "facts and circumstances related to the design and application of the relevant regulatory distinction(s)". Mexico raises aspects of the amended COOL measure that, in its view, relate to the third of these three concepts, but that are not themselves "regulatory distinctions". See Mexico's opening statement at the meeting of the Panel, para. 28.

[484] See Canada's and Mexico's responses to Panel question No. 47.

[485] See paras. 7.128-7.132 above.

[486] Appellate Body Reports, *US – COOL*, para. 341 (emphasis added).

[487] See, e.g. Canada's first written submission, para. 87, and second written submission, para. 45; Mexico's first written submission, para. 143.

[488] Panel Reports, *US – COOL*, para. 7.437. The Appellate Body "[did] not address the additional category for ground meat (Category E) and the associated labelling rules since the Panel concluded that the complainants had not established that these result in less favourable treatment for imported livestock, and no participant appeals this finding". Appellate Body Reports, *US – COOL*, footnote 388.

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compliance dispute.[489] Rather, Canada and Mexico advance arguments that the ground meat label evidences a lack of even-handedness or legitimacy of regulatory distinctions under Article 2.1.[490]

7.207. These arguments do not affect the original finding that the ground meat label had not been shown to result in less favourable treatment for imported livestock.[491] Further, we see no reason to depart from the Appellate Body's non-inclusion of the ground meat label among the relevant regulatory distinctions under the original COOL measure, or from the unappealed findings of the original dispute with respect to the ground meat label.[492] Accordingly, we find that the ground meat label does not constitute a relevant regulatory distinction of the amended COOL measure for the purposes of Article 2.1.

7.5.4.2.3 Appellate Body analysis of legitimate regulatory distinctions in the original dispute

7.208. Having determined that the original panel's analysis under Article 2.1 was "incomplete" for having concluded on a finding of detrimental impact[493], the Appellate Body reviewed a number of the original panel's factual findings that "provided a sufficient basis for [it] to determine whether the detrimental impact on Canadian and Mexican livestock stems exclusively from a legitimate regulatory distinction".[494] It then proceeded to "examine, based on the particular circumstances of this case, whether these distinctions are designed and applied in an even-handed manner, or whether they lack even-handedness, for example, because they are designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination".[495]

7.209. The Appellate Body "start[ed] by considering the recordkeeping and verification requirements imposed by the COOL measure, which the Panel found to the be the source of the incentive for US producers to process exclusively domestic livestock", and described the associated burden placed on upstream livestock and meat producers.[496]

7.210. The Appellate Body next found that "[a]s designed and applied, however, the COOL measure does not impose labelling requirements for meat that provide consumers with origin information *commensurate* with the type of origin information that upstream livestock producers and processors are required to maintain and transmit".[497] In support of this central point, the Appellate Body made a series of observations about the original COOL measure concerning: the

[489] See section 7.4 above.

[490] In particular, Canada argues that "the logic that underpinned the Appellate Body's analysis weighs in favour of the amended COOL measure's treatment of ground meat being regarded as a relevant factor in assessing the measure's consistency with TBT Article 2.1". Canada's second written submission, paras. 40-42; see also Canada's first written submission, para. 81. Mexico argues that "[i]n light of the ostensible consumer information objective of the measure, providing such flexibility for one form of beef product and not for another form is completely arbitrary". Mexico's first written submission, para. 140. According to Mexico, "[i]t is irrelevant that a different production method is used for the beef" as ground beef and muscle cuts are sold to the same US consumers, and because "[t]he objective at issue does not relate to the method of processing but, rather, to the origin content of the processed beef when viewed from the perspective of the U.S. consumer". Mexico's second written submission, para. 70. See also para. 7.280 below.

[491] Canada and Mexico's arguments focus on the flexibilities for ground meat and the accuracy of resulting labels, but they do not address whether and how the ground meat labelling rules account for any alleged detrimental impact on imported livestock. Indeed, the original panel reviewed in detail the features of the ground meat labelling rules and their flexibility, before noting that Canada and Mexico "ha[d] 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". See Panel Reports, *US – COOL*, paras. 7.421-7.436.

[492] The ground meat label is therefore different from the trace-back prohibition. The trace-back prohibition was not similarly examined in the original dispute. The complainants present this as a novel argument in this compliance dispute in light of the Appellate Body's elaboration of the Article 2.1 legal test.

[493] Appellate Body Reports, *US – COOL*, para. 293.

[494] Appellate Body Reports, *US – COOL*, para. 340.

[495] Appellate Body Reports, *US – COOL*, para. 341.

[496] Appellate Body Reports, *US – COOL*, para. 342. The Appellate Body noted in particular that livestock and meat producers were required "to track and transmit to their downstream buyers information regarding the countries in which each production step took place for the animals and/or meat that they process". Ibid.

[497] Appellate Body Reports, *US – COOL*, para. 343 (original emphasis).

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accuracy of labels and their omission of production step information; labelling flexibilities for commingled meat; and the exemptions from coverage.[498]

7.211. The Appellate Body additionally recalled that, under the US market's particular circumstances, "the burden of the recordkeeping and verification requirements, the consequent need for segregation, and the associated compliance costs" combined to make processing exclusively domestic livestock "the least costly way of complying with the COOL measure".[499] The Appellate Body further reasoned:

> Taking account of the overall architecture of the COOL measure and the way in which it operates and is applied, we consider the detail and accuracy of the origin information that upstream producers are required to track and transmit to be significantly greater than the origin information that retailers of muscle cuts of beef and pork are required to convey to their customers. That is, the labels prescribed by the COOL measure reflect origin information in significantly less detail than the information regarding the countries in which the livestock were born, raised, and slaughtered, which upstream producers and processors are required to be able to identify in their records and transmit to their customers.[500]

7.212. On these grounds, the Appellate Body concluded that "[the original COOL measure's] recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors, because the level of information conveyed to consumers through the mandatory labelling requirements is far less detailed and accurate than the information required to be tracked and transmitted by these producers and processors."[501] Thus, "the detrimental impact caused by the same recordkeeping and verification requirements under the [original] COOL measure cannot be explained by the need to provide information to consumers."[502]

7.213. Accordingly, the Appellate Body found that the detrimental impact on imported livestock did not stem exclusively from legitimate regulatory distinctions as "the regulatory distinctions imposed by the [original] COOL measure amount to arbitrary and unjustifiable discrimination against imported livestock, such that they cannot be said to be applied in an even-handed manner".[503]

7.5.4.2.4 Legitimate regulatory distinctions under the amended COOL measure

7.214. Based on the Appellate Body's guidance, and in light of the parties' arguments, we turn to whether the amended COOL measure's detrimental impact "stems exclusively from … legitimate regulatory distinction[s]".[504] In doing so, we take note of the analytical framework utilized by the *EC – Seal Products* panel, which was informed by the Appellate Body's approach to Article 2.1 of the TBT Agreement in the original dispute. According to the *EC – Seal Products* panel, the first element of this framework relates to whether the relevant distinctions are "rationally connected to the objective" of the measure.[505]

7.215. We consider the Appellate Body's approach in the original dispute to confirm the relevance of the challenged measure's objective to whether its detrimental impact stems exclusively from legitimate regulatory distinctions.[506] The Appellate Body "point[ed] out, as a preliminary matter,

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[498] Appellate Body Reports, *US – COOL*, paras. 343-344.
[499] Appellate Body Reports, *US – COOL*, para. 345.
[500] Appellate Body Reports, *US – COOL*, para. 346.
[501] Appellate Body Reports, *US – COOL*, para. 349.
[502] Appellate Body Reports, *US – COOL*, para. 349.
[503] Appellate Body Reports, *US – COOL*, para. 349.
[504] Appellate Body Reports, *US – COOL*, para. 271. See also Appellate Body Reports, *US – Clove Cigarettes*, para. 182; and *US – Tuna II (Mexico)*, para. 215.
[505] See Panel Reports, *EC – Seal Products*, para. 7.259. It should be noted that the panel also considered whether there was a justification for the regulatory distinctions *unrelated* to the objective, and went on to examine even-handedness based on the particular regulatory distinctions and facts of the dispute. Given its other findings under the TBT Agreement, the Appellate Body did not specifically review the panel's analysis of legitimate regulatory distinctions under Article 2.1.
[506] See also *US – Clove Cigarettes*, para. 225 ("[W]e are not persuaded that the detrimental impact of [the challenged measure] on competitive opportunities for imported [products] does stem from a legitimate

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that the [original p]anel identified the objective pursued by the United States as being 'to provide consumer information on origin'".[507] The Appellate Body also noted that the definition of origin under the original COOL measure was a function of the three production steps (born, raised, and slaughtered), and that the "various categories for muscle cuts of meat, and the labelling requirements applicable to each, are particularly relevant to an inquiry as to the COOL measure's even-handedness".[508] In addition, the Appellate Body displayed a concern for "the origin information that retailers of muscle cuts of beef and pork are required to convey to their customers" in its overall assessment of the regulatory distinctions under the original COOL measure.[509] This reflects the Appellate Body's understanding of the objective of the original COOL measure as being "the provision of consumer information on origin".[510]

7.216. We consider that the assessment of legitimate regulatory distinctions under Article 2.1 is different from the inquiry into the legitimacy of a technical regulation's objective, as well as from the review of a technical regulation's contribution to that objective. Whereas the latter inquiries form part of the necessity analysis under Article 2.2, which we discuss below, the analysis under Article 2.1 is confined to the specific distinctions drawn by the measure in conjunction with relevant aspects of the "the design, architecture, revealing structure, operation, and application of the technical regulation at issue".[511] Thus, we examine the regulatory distinctions of the measure in light of the objective the measure seeks to achieve.

7.217. As explained below, the objective of the amended COOL measure is to provide consumer information on origin.[512] Accordingly, taking the measure's objective as a point of reference, and drawing upon the Appellate Body's guidance, we assess the amended COOL measure according to the "disconnect"[513] between "the detailed information required to be tracked and transmitted by [upstream] producers" and the information "conveyed to consumers through the labels prescribed under the [amended] COOL measure".[514]

7.218. In particular, we scrutinize the two main types of informational "disconnect" from "the recordkeeping and verification requirements imposed on upstream producers and processers", as identified by the Appellate Body:

a. "the meat or meat products are exempt from the labelling requirements altogether"; and

b. "prescribed labels do not expressly identify specific production steps and, in particular for Labels B and C, contain confusing or inaccurate information".[515]

7.219. The common comparator in the two informational disconnects[516] is the recordkeeping required of upstream producers and processors. Accordingly, we first address the information that must be *kept* upstream under the amended COOL measure. We then turn to the information ultimately *conveyed* to retail consumers in the two respects outlined above to determine whether

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regulatory distinction. We recall that the stated *objective* of [the challenged measure] is to reduce youth smoking.") (emphasis added).

[507] Appellate Body Reports, *US – COOL*, para. 332 (footnote omitted).

[508] Appellate Body Reports, *US – COOL*, paras. 332-333.

[509] Appellate Body Reports, *US – COOL*, para. 346.

[510] See Appellate Body Reports, *US – COOL*, para. 433 (footnote omitted); and section 7.6.2.1 below.

[511] See section 7.5.4.2.2 above and Appellate Body Reports, *US – Tuna II (Mexico)*, para. 286 and *US – COOL*, para. 271 (citing Appellate Body Report, *US – Clove Cigarettes*, para. 182). Distinctions made in pursuit of a legitimate objective are not automatically "legitimate" under Article 2.1. Mexico clarifies that it does not challenge the legitimacy of the COOL objective pursued by the United States, and refers to the panel in *EC – Seal Products*, which explained that "the existence of a legitimate objective will not automatically imbue the discrimination under Article 2.1 with legitimacy; were that to be the case, one would simply need to assess whether the detrimental impact stems from a 'legitimate' objective." See Panel Reports, *EC – Seal Products*, para. 7.279; Mexico's second written submission, paras. 30-32 and 60; and United States' first written submission, para. 79.

[512] See section 7.6.2.1 below.

[513] Appellate Body Reports, *US – COOL*, para. 347.

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

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

[516] Mexico refers to these as "two major information asymmetries between the origin information collected and the origin information communicated to the consumer." Mexico's first written submission, para. 122.

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the amended COOL measure's detrimental impact "stems exclusively from legitimate regulatory distinctions".

7.5.4.2.4.1 Increased recordkeeping and verification

7.220. As explained above, the recordkeeping and verification provisions of the original and amended COOL measures are formally identical. In practice, however, the burden of complying with these requirements is closely linked to the "origin claim" required under the 2013 Final Rule. The amended COOL measure's revised labels result in the need for corresponding substantiation of the information on those labels. To the extent that greater and more detailed information is given on an "origin claim", it is incumbent upon upstream producers and processors to transmit and maintain such augmented information. Moreover, the greater segregation compelled under the amended COOL measure as a result of greater label variety means that records must differentiate between segregated livestock and muscle cuts.[517]

7.221. It follows that "the information regarding the countries in which the livestock were born, raised, and slaughtered, which upstream producers and processors are required to be able to identify in their records and transmit to their customers"[518], is now more exacting according to the increased diversity of origin claims. This is particularly evident in scenarios for which the original COOL measure permitted uniform origin claims for products of diverse origin, but which now must be differentiated by both retailers and suppliers. In such cases, substantiating documents maintained in the normal course of business would need to be similarly differentiated to adequately verify the claimed origin, as corroborated by industry participants.[519]

7.5.4.2.4.2 Products exempt from labelling requirements

7.222. The Appellate Body took note of three exemptions for retail labelling under the original COOL measure, namely for:

a. entities not meeting the definition of the term "retailer";

b. ingredients in "processed food items"; and

c. products served in a "food service establishment".[520]

7.223. The exemptions for "ingredient[s] in a processed food item" and "food service establishments" are established by the COOL statute[521], and are unchanged under the amended COOL measure.[522] The USDA accordingly deemed amendments relating to the coverage of restaurants or the definition of processed foods to be "outside the scope of this rulemaking" for the 2013 Final Rule.[523]

7.224. The definition of the term "retailer" is provided in the COOL statute by reference to the Perishable Agricultural Commodities Act of 1930 (PACA).[524] In response to comments on amending this definition, the USDA stated that it "does not have the authority to develop an alternative definition … as it is not consistent with the COOL statute".[525] The 2013 Final Rule does amend the definition, however, from a "retailer licensed under [PACA]"[526] to "any person *subject to be* licensed as a retailer under [PACA]".[527] The USDA considered that "[t]his change more closely aligns with the language contained in the PACA regulation and clarifies that all retailers that meet

[517] See section 7.5.4.1.2.4 above.
[518] Appellate Body Reports, *US – COOL*, para. 346.
[519] See section 7.5.4.1.2.4 above.
[520] Appellate Body Reports, *US – COOL*, para. 334.
[521] See COOL statute, §§ 1638(2)(B) and 1638a(b), respectively.
[522] See section 7.3.2.2 above.
[523] 2013 Final Rule, p. 31372.
[524] COOL statute, § 1638(6); see also 2009 Final Rule, § 65.240.
[525] 2013 Final Rule, p. 31371.
[526] 2009 Final Rule, § 65.240.
[527] 2013 Final Rule, § 65.240 (emphasis added).

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the PACA definition of a retailer, whether or not they actually have a PACA license, are also covered by COOL".[528]

7.225. With respect to the practical implications of this change for the coverage and application of the amended COOL measure, the United States explains:

> USDA understands that no more than a *de minimis* number of entities operate without a PACA license even though they meet the licensing requirements. As such, the United States does not consider that there are any practical implications of this change for the coverage of the amended COOL measure.[529]

7.226. We therefore find that in effect the amended COOL measure retains essentially the same exemptions from coverage as existed under the original COOL measure.

7.5.4.2.4.3 Accuracy of label information

Label accuracy under the original COOL measure

7.227. As explained below[530], the original and amended COOL measures share the same objective of providing consumer information on origin. In its assessment of regulatory distinctions made in service of that objective with respect to the original measure, the Appellate Body considered that "the origin information that must be conveyed to consumers is less detailed, and will often be less accurate" than the origin information maintained upstream.[531] The Appellate Body observed that "the [original] COOL measure requires the labels to list the country or countries of origin, but does not require the labels to mention production steps at all."[532] The Appellate Body illustrated this point through several examples, including the following[533]:

a. "Label A, indicating 'Product of the USA', which the Panel found to be the only label that provides 'meaningful information for consumers', is not required to refer explicitly to the productions steps of birth, raising, and slaughter."

b. "If, for example, the relevant production steps took place in more than one country, the relevant label (B or C) will identify more than one country, but will not identify which production step took place in which of those countries."

c. "For Category D meat, the COOL measure requires only that the customs designation of origin be indicated. Given that the United States does not use the same definition of 'origin' for customs purposes as it does for the COOL measure, a D Label will not convey information on the countries of birth or raising of the livestock from which the imported meat was derived."

7.228. The 2013 Final Rule requires that Label A for "United States country of origin designation for muscle cut covered commodities shall include all of the production steps (i.e., 'Born, Raised, and Slaughtered in the United States')."[534] Labels B and C are similarly augmented as muscle cuts from animals born and/or raised abroad and slaughtered in the United States "shall be labeled to specifically identify the production steps occurring in each country (e.g., 'Born and Raised in Country X, Slaughtered in the United States')."[535]

7.229. As a result, "origin designations for muscle cut covered commodities derived from animals slaughtered in the United States are required to specify the production steps of birth, raising, and slaughter of the animal from which the meat is derived that took place in each country listed on

[528] 2013 Final Rule, p. 31368.
[529] United States' response to Panel question No. 2. See also section 7.3.2.2 above regarding the retention of processed food item and food service establishment exemptions in unamended form.
[530] See section 7.6.2.1 below.
[531] Appellate Body Reports, *US – COOL*, para. 343.
[532] Appellate Body Reports, *US – COOL*, para. 343.
[533] Appellate Body Reports, *US – COOL*, para. 343.
[534] 2013 Final Rule, § 65.300(d).
[535] 2013 Final Rule, § 65.300(e).

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the origin designation."[536] In other words, the amended COOL measure generally seeks to address the defect of Labels A-C identified by the Appellate Body by requiring explicit indication of the country(ies) of each production step. Label D remains unchanged in this respect and therefore continues to allow omission of such information on specific production steps.[537]

7.230. The Appellate Body also noted that "due to the additional labelling flexibilities allowed for commingled meat, a retail label may indicate that meat is of mixed origin when in fact it is of exclusively US origin, or that it has three countries of origin when in fact it has only one or two."[538] The amended COOL measure's removal of commingling effectively eliminates this scenario. The various scenarios we reviewed in connection with detrimental impact[539] illustrate that a product of exclusively US origin must now be labelled as such, and that consolidated labels listing three countries of origin can no longer be carried by products having "only one or two" countries of origin.

7.231. Therefore, the 2013 Final Rule generally addresses factors that led the Appellate Body to find that the original COOL measure's "prescribed labels do not expressly identify specific production steps and, in particular for Labels B and C, contain confusing or inaccurate information".[540]

Label accuracy under the amended COOL measure

7.232. The complainants submit that the amended COOL measure may still convey potentially misleading or inaccurate information to consumers, particularly through the flexibility for multiple countries of raising as well as through Label C rules for the country of raising.[541]

Inaccuracy due to flexibility for multiple countries of raising

7.233. There is labelling flexibility with respect to the situation of multiple countries of raising. Thus, "if animals are born and raised in another country and subsequently further raised in the United States, only the raising that occurs in the United States needs to be declared on the label".[542] While this was inconsequential for the labels under the original COOL measure, the information provided on amended point-of-production labels can now vary according to the use of this labelling flexibility.

7.234. One of the USDA's explanations for this flexibility is that "it is understood that an animal born in another country will have been raised at least a portion of its life in that other country."[543] Indeed, this is necessarily so given that "raised" is defined by way of exclusion from the extreme starting and end points of an animal's life, that is from birth until slaughter or, in the case of Category C, entry into the United States for immediate slaughter. Immediately after an animal is born, "the period of time"[544] for raising commences and continues for the remaining lifespan.

7.235. The parties contest the potential accuracy of labels under the amended COOL measure in view of this flexibility. By definition, the raising flexibility can only be applied to Category B animals. Such animals will have been raised in at least two countries, one of which will be the United States. For animals born in a foreign country, two possible production-step labelling scenarios are: (1) born in Country X – raised in Country X and the United States – slaughtered in the United States; and (2) born in Country X – raised in Country X, Country Y, and the United States – slaughtered in the United States. If an animal is *born* in the United States, another

[536] 2013 Final Rule, p. 31367.
[537] See section 7.3.1.2 above and para. 7.279 below.
[538] Appellate Body Reports, *US – COOL*, para. 343.
[539] See section 7.5.4.1.2.3 above.
[540] Appellate Body Reports, *US – COOL*, para. 349.
[541] Canada's first written submission, para. 77 (second and third bullets); and second written submission, para. 52; Mexico's first written submission, para. 130; and second written submission, para. 58.
[542] 2013 Final Rule, p. 31368.
[543] 2013 Final Rule, p. 31368.
[544] 2009 Final Rule, § 65.235.

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possible production-step scenario in Category B is born in the United States – raised in the United States and Country X – slaughtered in the United States.[545]

7.236. The first scenario for foreign-born animals corresponds to Scenario B1 in Table 4 as well as to the separate columns of Scenario B2 in Table 5 above. The second scenario for foreign-born animals corresponds to separate columns of Scenarios B3a and B3b in Table 6 above. The third scenario for animals born and slaughtered in the United States and raised in another country will be referred to as Scenario B4. These are reproduced below in Table 13 in simplified form using Country X and Country Y to represent different foreign countries. Due to the multiple countries of raising flexibility, the labels affixed to muscle cuts would not be required to declare the information in square brackets.

TABLE 13: APPLICATION OF THE FLEXIBILITY FOR MULTIPLE COUNTRIES OF RAISING TO CATEGORY B SCENARIOS

	Scenario B1/B2	*Scenario B3*	*Scenario B4*
born	Country X	Country X	United States
raised	[*Country X*] United States	[*Country X*] [*Country Y*] United States	United States Country X
slaughtered	United States	United States	United States

7.237. Notably, the flexibility would not allow omission of any of the countries of raising under Scenario B4. This is because the 2013 Final Rule stipulates that the flexibility to omit such information is not available "where by doing so the muscle cut covered commodity would be designated as having a United States country of origin".[546] Therefore, muscle cuts from such animals could carry the label "Born and Raised in the United States, Raised in Country X, Slaughtered in the United States."[547] In a sense, this provision functions as a carve-out from the flexibility in order to prevent misleading label indications of exclusively United States origin. This is consistent with the definition of Category A under the COOL statute[548], as well as with regulatory concerns of Label A accuracy leading to the adoption of the 2009 Final Rule.[549]

7.238. In any event, Scenario B4 for animals "exported twice"[550] was considered by the USDA to be a "relatively rare situation".[551] The evidence before us does not refute this assessment.[552]

[545] In this final scenario, the animal would arguably be "raised" again in the United States before being slaughtered.

[546] 2013 Final Rule, § 65.300(e).

[547] 2013 Final Rule, p. 31368. Arguably, the USDA's statement that the label "*could*" read this way does not preclude that the raising in the United States could be omitted from the label. However, we do not consider this possibility to detract from our conclusions on Scenario B4 that: the foreign country of raising would be listed on the label; the animal's birth in the United States would imply some amount of raising there as well; and Scenario B4 is not a common occurrence in the actual North American trade of livestock.

[548] See COOL statute, § 1638a(a)(2)(A) ("A retailer … 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 was *exclusively* born, raised, and slaughtered in the United States") (emphasis added).

[549] The Interim Final Rule (AMS) had initially allowed use of Label B for Category A muscle cuts. The 2009 Final Rule removed this possibility due to concern that retailers and processers would predominantly resort to Label B for ease of compliance. As explained by the USDA, "[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." 2009 Final Rule, p. 2659; Panel Reports, *US – COOL*, paras. 7.290-7.294.

[550] United States' comments on complainants' responses to Panel question No. 8, para. 10.

[551] 2013 Final Rule, p. 31368.

[552] The import and export data maintained by Canada do not track the life histories of animals and therefore does not shed light on whether any animals exported to the United States were also born there. Canada's response to Panel question No. 8, para. 8. Canada has indicated that "it imports tens of thousands and sometimes hundreds of thousands of cattle annually". Canada's response to Panel question No. 5, para. 6. Imports of US feeder cattle into Canada may occur "when there is a cost of gain advantage" for Canadian feedlot operators. Exhibit CDA-148. See also Canada's second written submission, footnote 24. Canfax Canada

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We therefore find that the amended COOL measure would require accurate indication of the raising in the foreign country in such cases. At the same time, this is qualified by the remote likelihood that such a point-of-production scenario would actually occur in any significant numbers for traded livestock.

7.239. We turn to the accuracy of labels under Scenarios B1-B3 with similar regard for evidence of where such animals are actually "raised" and what must be ultimately labelled according to the terms of the amended COOL measure.

7.240. The complainants contend that, under the flexibility for multiple countries of raising, muscle cuts of meat may be labelled as coming from an animal raised in the United States even if that animal spends as little as 15 days in the United States prior to slaughter.[553] This is because animals imported for immediate slaughter, which are excluded from the raising flexibility, are subject to "consignment directly from the port of entry to a recognized slaughtering establishment *and slaughtered within 2 weeks from the date of entry*".[554] The label for muscle cuts from animals having spent time in the United States beyond this threshold, beginning with the "15 days" argued by the complainants, could in principle omit "the raising occurring in the other country (or countries)".[555] The use of the plural "countries" in the 2013 Final Rule means that not only muscle cuts in Scenarios B1/B2, but also in Scenario B3, can be labelled to indicate the United States as the *sole* place of raising.[556]

7.241. The parties have submitted generally concurring evidence as to the age at which *feeder* cattle are imported into the United States[557], as well as to the amount of time *fed* cattle typically spend in the United States prior to slaughter.[558] For feeder cattle, Canada submits that most of its feeder cattle exports are between 10 to 15 months old[559], and the United States reports that the

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explains that "if barley is cheaper in Canada compared to the price of corn in the US, Canada has a cost of gain advantage that, if large enough, creates an incentives to import U.S. feeder cattle." Exhibit CDA-148. According to Canada, "[t]hese animals are then available to be exported back to the United States for slaughter *or* to be processed within Canada" and "[i]t is *likely that some* of the muscle cuts produced from these animals are subsequently exported to the United States." Canada's response to Panel question No. 5, para. 6 (emphasis added). Canada cites a specific example of "value added feeder cattle … sold to feedyards in Quebec that finished these cattle and then shipped them back to processors in the U.S." See Canada's first written submission, footnote 223; Canada's response to Panel question No. 8, para. 9 (citing Exhibit CDA-76, p. 2). Mexico "does not have examples or data concerning livestock born and slaughtered in the United States, but 'raised' in another country(ies)." Mexico's response to Panel question No. 8. Thus, we have not been given evidence to suggest that Scenario B4 has a high probability or frequency of occurrence in US livestock trade.

[553] Canada's first written submission, para. 77 (second bullet); Canada's second written submission, para. 52; Mexico's first written submission, para. 130; Mexico's second written submission, para. 58.

[554] 2009 Final Rule, § 65.180 (emphasis added).

[555] 2013 Final Rule, § 65.300(e).

[556] 2013 Final Rule, § 65.300(e).

[557] The United States explains that it "does not import feeder cattle from any countries other than Canada and Mexico." United States' response to Panel question No. 9, para. 19. Canada's and the United States' estimates for feeder cattle are based on data tracking the weight of animals from which average ages have been extrapolated. See Exhibits CDA-148 and US-50.

[558] For an explanation regarding the differences between fed and feeder livestock, see Panel Reports, *US – COOL*, para. 7.141 (emphasis original) (footnotes omitted):

> 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. Conversely, Mexico generally exports *feeder cattle* immediately after the cow/calf stage to US backgrounding and feeding operations, because of a lack of sufficient grasslands in Mexico and the general lack of well-developed feed grains and cattle-feedlot sectors. As regards Canadian hog exports to the United States, these involve a larger proportion of *feeder* than *fed hogs*.

[559] Canada's response to Panel question No. 9, paras. 12-13. In particular, "[t]he majority of feeder exports are >700 lbs (72% of the annual total from 2009-2013), then 440-700 lbs (28% of the annual total from 2009-13) with less than 1% being less than 400 lbs over the last five years. The majority of Canadian feeder exports occur in the first half of the year (the 5 year average is 63%). This would indicate that most feeders exported to the US are calves that are backgrounded or pre-conditioned for a period of time making them approximately 10-15 months old (based on peak calving in Canada occurring in March)." Exhibit CDA-148.

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average age of imported feeder cattle is approximately 12 months.[560] Mexico submits[561], and the United States does not dispute[562], that the average age of Mexican feeder cattle exports ranges from six to seven months. For fed cattle, Canada[563] states that "[m]ost Canadian exports of fed cattle to the United States are slaughtered within 14 days of entry into the United States."[564] This is consistent with the United States' understanding "based on its experience in the regulation of U.S. slaughter facilities" "that cattle imported for immediate slaughter are almost always slaughtered the day they arrive in the United States."[565]

7.242. We understand from the evidence before us that the slaughter age of cattle is approximately 22 months.[566] Relative to this slaughter age, it is clear from the evidence that feeder cattle exported to the United States typically spend a substantial part of their lifespan in their country of birth. The parties' evidence indicates that on average Canadian feeder cattle spend between 45 and 68%, and feeder cattle from Mexico between 27 and 32%, of their raising period outside the United States. Yet these feeder cattle, falling in Scenarios B1 and B2 above, will be processed into muscle cuts that are eligible to be labelled "Born in Canada/Mexico, Raised and Slaughtered in the United States". Thus, feeder cattle imported into the United States may spend 68% of their lifespan outside the United States[567]; yet, the resulting meat products could be labelled to indicate that the originating animals were raised only in the United States.

7.243. Under these circumstances, we are not persuaded by the United States' contention that such a label can be regarded as "*entirely* accurate"[568], particularly given the definition of "raised" according to the amended COOL measure. The rationale for permitting flexibility to designate the United States as the sole place of raising was that it would "reduce the number of required characters on the label".[569] This was considered justifiable based on the correct presumption that raising must naturally occur at least in part in the country of birth. This flexibility, however, takes no account of the substantial amount of time that traded livestock typically spend outside the United States.

7.244. Turning to the design of the amended COOL measure, as explained above, the amended COOL measure would similarly afford this flexibility to designate the United States as the sole place of raising to an animal that spent as little as 15 days in the United States. Nevertheless, it does not appear that this occurs in practice. The parties' data indicate that Category B exports to the United States tend to be nearer to the midpoint of an average animal's lifespan, and livestock within Category C are usually slaughtered well within the 14 day window mentioned above. These averages suggest that in its *application*, the amended COOL measure permits labels indicating "raised in the United States" alone for livestock that commonly spend between approximately one third and one half of their lives elsewhere.

[560] United States' response to Panel question No. 9, para. 21.

[561] Mexico's response to Panel question No.9, para. 7; United States' response to Panel question No.9, para. 21; United States' comments on complainants' responses to Panel question No. 9, para. 14.

[562] United States' comments on complainants' responses to Panel question No. 9, para. 14.

[563] Mexico explains that its "industry focuses on the export of feeder cattle and not fed cattle." Mexico's response to Panel question No. 10.

[564] Canada's response to Panel question No. 10, para. 15.

[565] United States' response to Panel question No. 10, para. 22. In this connection, we note Canada's contention that the decision of some US packers to no longer accept Category C animals has led some exporters to send animals that would normally be sent directly to slaughter for short term feeding in the United States so as to qualify for Category B. Canada's response to Panel question No. 10, para. 16; Exhibits CDA-70, CDA-150 (BCI), CDA-151 (BCI).

[566] See Canada's response to Panel question No. 9, para. 13 and Exhibit CDA-75; United States' response to Panel question No. 9, para. 21 (estimating average slaughter age of between 18 and 22 months based on average slaughter weight of 544 kg) and Exhibit US-50.

[567] Imported feeder cattle may spend an even greater amount of time outside the United States, as evidenced by indications from industry participants that animals are being sent for short term feeding – e.g. for a period of 55 days before slaughter – in the United States. See Canada's response to Panel question No. 10, para. 16; Exhibits CDA-70, CDA-150 (BCI), CDA-151 (BCI).

[568] United States' comments on complainants' responses to Panel question No. 9, para. 16 (emphasis added).

[569] 2013 Final Rule, p. 31368.

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Label C rules for the country(ies) of raising[570]

7.245. Another contended aspect of label accuracy relates to whether, under the amended COOL measure, Label C requires that only the country of immediate export be indicated as the country of raising.

7.246. The 2013 Final Rule addresses Labels B and C under the same provision, which requires for animals "born and/or raised in Country X and/or (as applicable) Country Y, and slaughtered in the United States, [that] the resulting muscle cut covered commodities shall be labelled to specifically identify the production steps occurring in each country".[571] This is cited by the United States in conjunction with the broad definition of "raised" under the amended COOL measure as evidence of the "permissive nature of the measure".[572] The United States thus contends that Label C would permit indicating multiple countries of raising for Category C if this situation were to occur.[573]

7.247. Canada considers that the amended COOL measure requires designation only of the country of export as the country of raising. Canada cites the focus of the provision on animals that "undergo raising both outside and inside of the United States before slaughter in the United States", and that the USDA's specific guidance for Label C states:

> [T]he origin information for muscle cut covered commodities derived from animals imported for immediate slaughter as defined in § 65.180 is required to include information as to the location of the three production steps. However, the country of raising for animals imported for immediate slaughter as defined in § 65.180 shall be designated as the country from which they were imported (e.g., "Born and Raised in Country X, Slaughtered in the United States").[574]

7.248. As to indication on Label C of additional countries of raising other than the export country, we note that the COOL statute provides that a "retailer of a covered commodity … derived from an animal that is imported into the United States for immediate slaughter *shall designate the origin of such covered commodity as (i) the country from which the animal was imported*; and (ii) the United States".[575]

7.249. Taken together, the text of the relevant provisions of the amended COOL measure, combined with the USDA's guidance, are open to the competing interpretations put forward by the parties. We examine label accuracy under both interpretations of the requirements for Label C under the amended COOL measure.

7.250. Table 14 below reproduces in simplified form various point-of-production labelling combinations in Category C from scenarios outlined above, using Country X and Country Y to represent different foreign countries. As in Table 13, the labels affixed to muscle cuts would not need to declare the information in square brackets.

[570] See paras. 7.103-7.110 above.
[571] 2013 Final Rule, § 65.300(e). By comparison, the 2009 Final Rule contains separate provisions for Labels B and C. See 2009 Final Rule, § 65.300(e)(1) and (3).
[572] United States' response to Panel question No. 6, para. 12.
[573] See United States' response to Panel question No. 6.
[574] Canada's response to Panel question No. 6, para. 5 (citing 2013 Final Rule, pp. 31368-31369). Mexico also draws attention to the separate and exceptional treatment of Label C in section 65.300(e) of the 2013 Final Rule. Mexico's first written submission, para. 130.
[575] COOL statute, § 1638a(a)(2)(C) (emphasis added).

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TABLE 14: COUNTRY OF RAISING FOR CATEGORY C SCENARIOS

	Scenario C1/C2	*Scenario C3/C6*[576]	*Scenario C4/C5*
If raising is country of export only:			
born	Country X	Country X	Country X
raised	Country X	Country Y	Country X
slaughtered	United States	United States	United States
If additional countries of raising may be shown:			
born	*same as above*	Country X	Country X
raised		[*Country X and*] Country Y	[*Country Y and*] Country X
slaughtered		United States	United States

7.251. Even if the amended COOL measure is understood to allow indication of multiple countries of raising, as asserted by the United States, it remains uncontested that this would not be mandatory.[577] It would be an accurate reflection of an animal's raising to list the additional country in any of Scenarios C3-C6; conversely, this accuracy would be diminished by omitting the raising that occurred outside of the country of export. In Scenario C3/C6, the omission of the raising in Country X may have less implications for informational accuracy if, as suggested by the USDA, one may infer that some amount of raising will naturally occur in Country X as the place of birth.

7.252. However, the particular Scenario C4/C5 could not similarly support such an inference because the countries of birth and export to the United States would be the same. As shown in Table 14 above, the omitted country of raising would not be mentioned at all on the label. Thus, the omission of raising in Country Y for Scenario C4/C5 would result in inaccurate information about the animal's raising, as it would indicate raising as having occurred in only one country. In any event, we observe that all of the situations in Scenarios C3-C6, including Scenario C4/C5, appear to be unlikely in the United States' actual trade of livestock.[578]

7.253. If the amended COOL measure requires designating *exclusively* the country of export as the place of raising, as contended by Canada, the evidence before us indicates that this is in fact compatible with the most common situation for traded Category C animals. This is represented by Scenario C1/C2 where an animal is born and raised in the same country before import into the United States for immediate slaughter.[579] In that scenario, the label reading "Born and Raised in Country X, Slaughtered in the United States"[580] would be generally accurate for the animals actually traded between the complainants and the United States. However, this is not the case for any of Scenarios C3-C6, which would lead to label inaccuracy as described above. Specifically, the label for Scenario C3/C6 would omit raising in Country X but would still indicate that the animal was born in that country. The label for Scenario C4/C5 would be required to omit the other country of raising (Country Y) altogether.

7.254. In sum, the design of Label C rules under the amended COOL measure may allow – and possibly require – omission of actual countries of raising, resulting in label inaccuracy as to an animal's place of raising. In its actual application to traded livestock, however, Label C does not appear likely to convey misleading information about the country where animals imported for

[576] As pointed out by the United States, this could also become relevant "for the other highly improbable scenario where an animal [is] born in the United States, exported to Canada, and then re-exported United States as a C animal." United States' response to Panel question No. 6, para. 14.

[577] See Canada's comments on the United States' response to Panel question No. 6, para. 7; United States' response to Panel question No. 6, para. 12.

[578] See para. 7.241 above.

[579] Neither Canada nor Mexico submit evidence of livestock "imported for immediate slaughter" that were raised in more than one country (i.e. in any country other than their place of birth). See Canada's and Mexico's response to Panel question No. 7; and United States' comments on the complainants' responses to Panel question No. 7.

[580] 2013 Final Rule, § 65.300(e) and pp. 31368-31369.

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immediate slaughter are raised, given that these appear to be most commonly born and raised in the country of export.

Appearance and placement of labels

7.255. Mexico takes issue with what it considers to be obscure abbreviations and lack of specificity as to label placement.[581] According to Mexico, consumers have limited knowledge or understanding of the COOL labels.[582] Mexico argues that in many cases the information is "hidden or otherwise obscured".[583] In particular, Mexico questions whether consumers understand the meaning of an abbreviated label that says "brn in Mexico, rsd and slghtrd in US"[584], or the use of the word "harvested" on the labels instead of "slaughtered".[585] Mexico adds that COOL information is normally printed in very small typeface on labels, and often is on the rear of the packaging.[586] Mexico, therefore, questions whether consumers even see the COOL information.[587]

7.256. The amended COOL measure provides for considerable discretion as to how retailers convey country of origin information to consumers. The use of labels and stickers[588] is subject to the USDA's directive that "the information can be clearly understood by consumers".[589] At the same time, retail packaging submitted by the parties and the above examples referenced by Mexico reflect the potentially wide discretion afforded by the amended COOL measure.[590] Some of these examples show that, despite the retention and transmission of origin information on birth, raising, and slaughter, the final origin declaration can be written or placed in ways that are not equally understandable. Ultimately, we are not in a position to determine whether consumers would clearly understand the labels in each of the examples provided. In light of the limited available evidence of labels under the amended COOL measure, we cannot draw conclusions on the impact of this labelling discretion on label accuracy.[591]

Relative shares of the different origin categories and exemptions under the amended COOL measure

7.257. In terms of the incremental improvement in the information conveyed to consumers under the amended COOL measure, the relative proportions of meat products falling into Categories A-E and exempted from coverage are also relevant.

7.258. Data provided by the parties indicate that, of total (muscle cut and ground) beef consumption in the United States, between 33.3% and 42.3% is subject to the labelling requirements of the amended COOL measure. Of total US beef consumption, between 16.3% and 24.5% are muscle cuts carrying Labels A-D, and between 16.6% and 17.8% are ground meat

[581] Mexico's first written submission, paras. 129-130, and Mexico's second written submission, paras. 54-57. See also United States' second written submission, paras. 41-43 (discussing intelligibility of labels).
[582] Mexico's second written submission, para. 98.
[583] Mexico's second written submission, para. 98.
[584] Mexico's first written submission, para. 169.
[585] Mexico's second written submission, para. 98.
[586] Mexico's first written submission, para. 169.
[587] Mexico's first written submission, para. 169.
[588] See section 7.3.1.3 above regarding the permitted use of signs or placards as well.
[589] 2013 Final Rule, p. 31369.
[590] See Exhibits MEX-15, MEX-48, MEX-49, MEX-50, MEX-51, MEX-52, and US-28.
[591] In this connection, the Panel notes that Mexico submits labels on muscle cuts from US-slaughtered cattle that do not show origin information according to point-of-production even after the expiration of the 2013 Final Rule's six-month adjustment period in November 2013. See Exhibits MEX-48, MEX-49, MEX-57, MEX-58 and MEX-59. This evidence of specific labels does not address the prevalence of non-compliance with regard to muscle cuts of beef. Accordingly, the Panel cannot draw conclusions on the precise impact of eventual non-compliance with the 2013 Final Rule on label accuracy.

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carrying Label E.[592] The remaining share of beef products – between 57.7% and 66.7% – falls into one of the three exemptions and does not get labelled.[593]

7.259. The parties do not provide data on the shares of the three point-of-production labels for Categories A-C of the amended COOL measure. Referring to the USDA's mandatory COOL retail record reviews conducted in 2012, the United States argues that Categories A, B, and C muscle cuts constituted approximately 99.7% of COOL labelled muscle cuts sold in the United States, with Labels B and C accounting for 20% of meat being labelled.[594] The United States adds that imported Canadian beef muscle cuts would constitute approximately only 0.1% of COOL-labelled muscle cuts sold at retail (given that Category D meat from all sources constitutes only 0.3% of COOL labelled beef muscle cuts).[595]

7.260. Beyond numeric shares, all parties agree that in relative terms most beef will continue to be marketed with Label A.[596] In particular, Canada and Mexico project that Label A will even increase its market share, while the United States argues that the market shares of labels will not change under the amended COOL measure.[597] The divergence of views appears with respect to the future evolution of the distribution of labels within the US market. Canada is of the view that the increased segregation requirements will create incentives for producers to choose between different categories of animal, altering the distribution of the various labels within the US market and potentially reducing the use of Label C.[598]

7.261. With regard to pork products, Canada and the United States disagree on the extent of the coverage and exemptions from the amended COOL measure.[599] Both Canada and the United States agree, however, that there is virtually no ground pork meat subject to the amended

[592] See parties' responses to Panel question A. In addition, Mexico identifies alternative sources suggesting the proportion of beef covered by the amended COOL measure to be 25%, 30%, 33%, and 35%. See Mexico's response to Panel question A, paras. 178-192.

[593] More specifically, the parties estimate that between 34% and 51% of consumed beef is sold in a food service establishment; between 12% and 13.7% is sold by entities not meeting the definition of "retailer"; and between 3.7% and 10% is an ingredient in a processed food item.

[594] United States' first written submission, para. 31, footnote 63, and second written submission, para. 47; Exhibits US-3 and US-27.

[595] United States' second written submission, para. 58; footnote 98. Moreover, the United States submits that imports of beef muscle cuts have declined over time as overall consumption of beef has declined, and there is no reason to believe that Label D meat is being sold at higher percentages in 2013 than it has in any previous year. United States' second written submission, footnote 91; Exhibit US-33.

[596] See parties' responses to Panel question A(v). See also Canada's first written submission, para. 76; United States' first written submission, paras. 70-73.

[597] Before the original panel, the United States submitted 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". Canada and Mexico contested these figures and submitted that the proportion of meat carrying Label A was closer to 90%. See Panel Reports, *US – COOL*, paras. 7.369-7.370. Further, Canada argued before the original panel that data collected during the first quarter of 2010 showed 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%. 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%. See Panel Reports, *US – COOL*, footnote 941.

[598] Canada's response to Panel question A, para. 214 (referring to Exhibit CDA-70). See also para. 7.241 above; Mexico's response to Panel question A, para. 208; United States' response to Panel question A, para. 199.

[599] See Canada's and United States' response to Panel question A. The differences stem from the assumptions regarding the share of US pork consumption sold in retailers (35.9% for Canada and 62.2% for the United States) and in food service establishments (64.1% for Canada and 37.8% for the United States). The differences in terms of shares are also the result of different assumptions regarding the share of processed food (21.31% for Canada and 66.25% for the United States) sold at retailers and food service establishments.

The main source of difference in the share of US pork consumption sold in retailers and food service establishments stems from the inconsistency of units of measure between *carcass weight* and *boneless retail weight* made by Canada (as pointed out by the United States). Once the consistency of units of measure is addressed by expressing pork from food service establishments in *boneless retail weight* using the USDA conversion factors for converting pork carcass weight to retail weight (78%) and for converting pork carcass weight to boneless weight (72.9%), and keeping the calculation structure suggested by Canada unchanged, the differences in the amounts of the various shares submitted by both parties decrease.

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COOL measure. Consequently, virtually all labelled pork products subject to the amended COOL measure would be muscle cuts of pork falling within Categories A-D.

7.262. Based on harmonized figures submitted by the parties,[600] of total US pork consumption, between 15.9% and 16.5% comprises pork muscle cuts that are subject to labelling requirements under the amended COOL measure. Conversely, between 83.5% and 84.1% of pork products are exempted from labelling requirements.[601]

7.263. As with beef products, Canada and the United States do not provide figures on the shares of the point-of-production labels applied to muscle cuts of pork under the amended COOL measure. At the same time, Canada and the United States agree that the majority of pork will be marketed with Label A.[602]

7.5.4.2.4.4 Overall assessment of whether the amended COOL measure's detrimental impact stems exclusively from legitimate regulatory distinctions

7.264. The Appellate found for the original COOL measure that:

> the informational requirements imposed on upstream producers … are disproportionate as compared to the level of information communicated to consumers through the mandatory retail labels. That is, a large amount of information is tracked and transmitted by upstream producers for purposes of providing consumers with information on origin, but only a small amount of this information is actually communicated to consumers in an understandable manner, if it is communicated at all. Yet, nothing in the [original panel's] findings or on the [original panel] record explains or supplies a rational basis for this disconnect. Therefore, we consider the manner in which the COOL measure seeks to provide information to consumers on origin, through the regulatory distinctions described above, to be arbitrary, and the disproportionate burden imposed on upstream producers and processors to be unjustifiable.[603]

7.265. We identified three key determinants in the Appellate Body's reasoning for the informational "disconnect" of the original COOL measure:

a. informational requirements imposed on upstream producers;

b. the nature and accuracy of the information conveyed on labels; and

c. the proportion of the information that is exempted from being communicated to consumers.

7.266. Based on our foregoing analysis, we conclude that the amended COOL measure affects the first two of these aspects, while leaving the third one effectively the same as under the original COOL measure. Specifically, although the amended COOL measure increases the information communicated to consumers through mandatory retail labels, it necessarily increases the associated upstream informational (recordkeeping) requirements in order to do so. In addition, the amended COOL measure maintains the same proportion of information that is not communicated at all to consumers due to the exemptions from coverage.

7.267. Notwithstanding the parties' disagreement as to the actual proportions of labels used, the amended COOL measure directly responds to certain deficiencies of original Labels A-C by requiring point-of-production information. Moreover, the removal of commingling assures greater

[600] See parties' responses to Panel question A.

[601] More specifically, the parties estimate that between 12.8% and 35.6% of consumed pork is sold in a food service establishment; between 5.1% and 15.7% is sold by entities not meeting the definition of "retailer"; and between 33.2% and 66.2% is an ingredient in a processed food item.

[602] Panel Reports, *US – COOL*, paras. 7.369, 7.370, and footnote 941. See also Canada's first written submission, para. 76.

[603] Appellate Body Reports, *US – COOL*, para. 347.

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accuracy of labelling for multiple-origin muscle cuts, as well as for those Category A muscle cuts to which a commingled label would have been affixed under the previous rules.[604]

7.268. The greatest incremental improvement in origin information achieved by the 2013 Final Rule is for Labels B and C, which were effectively indistinguishable under the original COOL measure.[605] The possibility for overlap between Labels B and C is generally foreclosed under the amended COOL measure, given the typical indication on Label B of the United States as a country of raising.[606] Label C could bear a similar indication of US raising only hypothetically in the case of an animal born in the United States, raised abroad, and imported back into the United States for immediate slaughter. This appears to be uncommon in practice and, in any event, depends on how Label C requirements are interpreted.[607]

7.269. At the same time, the revised labels introduce the potential for informational inaccuracy in respect of where animals are "raised". While "birth" and "slaughter" are relatively straightforward and temporally discrete, the definition of "raised" as the entire intervening period between them is potentially problematic in the context of certain requirements of the amended COOL labels. In particular, the amended COOL measure allows labels to read "raised in the United States" (without listing any other country) on meat from Category B feeder cattle that spend a substantial portion of their lives either in Canada or Mexico. This is of primary importance to our assessment as it represents potential inaccuracy in light of the average age of cattle traded between the complainants and the United States, explained above. Apart from this, the design of the amended COOL measure permits an even greater amount of raising in Canada or Mexico to be omitted from the label, including in the most extreme case for an animal spending as little as 15 days in the United States before slaughter. Although Label C appears to accurately reflect the place of raising of Category C fed cattle in practice, certain ambiguities in the design of its labelling rules may also create the potential for inaccuracy due to the possible omission of countries of raising.[608]

7.270. The United States submits that Labels A-C provide the same level of accurate and meaningful origin information for the vast majority of labelled muscle cuts[609] and that "the amended COOL measure has increased the level of information to consumers while not increasing the recordkeeping and verification requirements for U.S. industry."[610] We have not been persuaded by this contention in light of the potential inaccuracies on Labels B and C with respect to the country of raising, which do not similarly arise for Label A.

7.271. Moreover, as we have explained, according to its design, operation, and application, the amended COOL measure necessarily imposes increased recordkeeping burdens in order to secure information of requisite verifiability on origin. We recall in this connection the Appellate Body's consideration, based on findings of the original panel, of "the recordkeeping and verification requirements … to be the source of the incentive for US producers to process exclusively domestic livestock".[611] Thus, the amended COOL measure's responsiveness to DSB recommendations and rulings must be assessed with regard for the new informational shortcomings on Labels B and C, as well as the aggravated source of detrimental impact due to increased recordkeeping.

7.272. Although the amended COOL measure has an impact on two elements of the informational "disconnect", it fails to address in any way "the fact that the [original] COOL measure exempt[ed] from its labelling requirements muscle cuts of beef and pork that are 'ingredient[s] in a processed food item', or are sold in a 'food service establishment' or in an establishment that is not a 'retailer'."[612] We have no evidence before us that calls into question the original panel's finding that "the ultimate disposition of a meat product is often not known at any particular stage of the

[604] As stated in paras. 7.121-7.126 above that actual extent of commingling is not known.

[605] As stated by the original panel, Labels B and C could "overlap and practice … [and thus] look the same, provided that the countries involved in the production of the Label B and C muscle cuts in question are the same." Panel Reports, *US – COOL*, para. 7.288.

[606] See Table 13 above.

[607] Further, in that hypothetical case there would be no requirement to list the raising in the United States, but merely a possibility of doing so. See para. 7.251 above.

[608] See paras. 7.245-7.254 above.

[609] See United States' second written submission, paras. 29-40.

[610] United States' second written submission, para. 51.

[611] Appellate Body Reports, *US – COOL*, para. 342.

[612] Appellate Body Reports, *US – COOL*, para. 344. See section 7.3.2.2 above.

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production chain"[613]. Thus, due to the increased recordkeeping burden under the amended COOL measure, even more "information regarding the origin of *all* livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers in accordance with the recordkeeping requirements … even though 'a considerable proportion'[614] of the beef and pork derived from that livestock will ultimately be exempt from the COOL requirements and therefore carry no COOL label at all."[615]

7.273. The United States defends these continued exemptions on the basis that they do not cause detrimental impact and are themselves even-handed in their design and application.[616] As we have explained, however, the exemptions are relevant as an integral part of "the overall architecture" of the amended COOL measure in the assessment of regulatory distinctions drawn in service of the measure's objective. It is therefore "of central importance to our overall analysis under Article 2.1"[617] that between 57.7% and 66.7% of beef consumed in the United States, and between 83.5% and 84.1% of pork muscle cuts, will convey no consumer information on origin despite imposing recordkeeping burdens upstream that detrimentally impact competitive opportunities for foreign livestock.

7.274. The United States also discusses how "such exemptions are often included as part of the mandatory country of origin labelling requirements imposed by Members"[618] and that "they are important mechanisms that policy makers use to control costs of measures in pursuit of legitimate government objectives".[619] The United States cites the size of its market (including the number of restaurants that would be impacted by removal of the exemption) and associated burdens to explain the rationale for its exemptions.[620]

7.275. The original panel acknowledged that "it is not atypical for any kind of 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."[621] Further, the Appellate Body has stated that "[n]othing in Article 2.1 prevents a Member from seeking to minimize the potential costs arising from technical regulations, provided that the technical regulation at issue does not overtly or covertly discriminate against imports."[622] Although the Appellate Body has thus recognized that cost considerations are not *per se* prohibited, it did not accept them as supervening justification for discriminatory measures.

7.276. In light of the Appellate Body's approach, we do not consider that such practical considerations justify the discriminatory nature of the amended COOL measure or call into question the Appellate Body's concern with the exemptions in the original dispute.

7.277. In line with the Appellate Body's guidance, we consider the exemptions from the amended COOL measure's coverage as evidence that the recordkeeping burden giving rise to the detrimental impact "cannot be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered".[623]

7.278. We turn now to other factors that may pertain to the amended COOL measure's "design, architecture, revealing structure, operation, and application" in the context of Article 2.1 of the TBT Agreement. We look in particular to the significance of such aspects for whether the measure

[613] Appellate Body Reports, *US – COOL*, para. 344 (citing Panel Reports, *US – COOL*, para. 417).
[614] (footnote original) Panel Reports, *US – COOL*, para.7.417.
[615] Appellate Body Reports, *US – COOL*, para. 344 (emphasis original).
[616] See United States' second written submission, paras. 60-67.
[617] Appellate Body Reports, *US – COOL*, para. 348.
[618] United States' first written submission, para. 89. The United States relies on certain findings of the Panel that exceptions of this nature "might be justifiable for practical reasons and simply facilitate the implementation of the measure at issue without necessarily involving protectionist intent". Panel Reports, *US – COOL*, para. 7.684.
[619] United States' first written submission, para. 91 (citing Panel Reports, para. 7.711). See also United States' second written submission, para. 67.
[620] United States' first written submission, para. 91.
[621] Panel Reports, *US – COOL*, para. 7.684.
[622] Appellate Body Report, *US – Clove Cigarettes*, footnote 431.
[623] Appellate Body Reports, *US – COOL*, para. 349.

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"is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination".[624]

7.279. As noted, although the complainants do not challenge Label D as such[625], they contend that it weighs against the "even-handedness" of the amended COOL measure. In the original dispute, the Appellate Body noted that Label D will not convey information on the place of an animal's birth or raising.[626] This aspect has not been modified under the amended COOL measure.[627] The complainants claim there is potential to mislead consumers given that birth or raising in other countries may be omitted from the label.[628] As the United States points out, however, the complainants have not provided evidence of Category D animals that were not born and raised in the country in which they were slaughtered.[629] In other words, there is nothing before us to suggest that muscle cuts with Label D stating "Product of Country X" will not be from animals that are entirely a product of that country. Thus, although the omission of production steps would result in provision of less detailed information, this does not seem apt to mislead consumers of Category D muscle cuts in the same fashion as would omission of countries on Labels B and C. Combined with the relatively small portion of Category D muscle cuts in the US market, and the absence of a claim that Label D creates any detrimental impact, we are not convinced that Label D rules of substantial transformation are compelling evidence of arbitrary or unjustifiable discrimination.

7.280. With respect to Label E for ground meat products, we recall that the complainants had not demonstrated detrimental impact caused by the ground meat rules in the original dispute.[630] The complainants refer to the large percentage of meat under the amended COOL measure that would carry Label E, which omits point-of-production labelling and contains "significant flexibility" as to which countries may be listed.[631] However, the original panel's findings on the ground meat labelling rules were not appealed, nor reviewed in the Appellate Body's Article 2.1 analysis in the original dispute. Further, it is not clear that the treatment of ground meat is sufficiently connected to the relevant regulatory distinctions to justify incorporation into our broad[632] assessment of the amended COOL measure's design and operation. As explained by the USDA, the production of ground meat entails the processing of "trimmings" of diverse origin that are ground into a final product[633], and the ground meat labelling rules were adapted to the purchasing, inventory, and production practices of US beef grinders.[634] The complainants do not refute the different forms of processing undergone by muscle cuts and ground meat, nor do they submit arguments in this compliance dispute as to the upstream burdens relating to ground meat. Given the findings in the original dispute and the complainants' arguments and claims in this compliance dispute, we do not consider Label E to evidence the amended COOL measure's violation of Article 2.1.[635]

7.281. Finally, although the complainants seek to use the trace-back prohibition as evidence of arbitrariness[636], the complainants do not provide specific arguments or evidence in this context as to the nature of the prohibited trace-back measure. Instead, the relevance of this argument to the

[624] Appellate Body Reports, *US – COOL*, para. 271.
[625] See para. 7.129 above.
[626] Appellate Body Reports, *US – COOL*, para. 343.
[627] See para. 7.19 above.
[628] See Canada's second written submission, para. 37, and second written submission, para. 39; Mexico's first written submission, para. 130.
[629] Canada's and Mexico's responses to Panel question No. 5; and United States' comments on complainants' responses to Panel question No. 5. See also United States' second written submission, para. 56 and response to Panel question No. 3. In response to the Panel's questions, Canada discusses US exports to Canada of calves intended for veal production, but does not provide concrete evidence that muscle cuts of such veal are actually exported to the United States as Category D meat.
[630] See para. 7.206 above.
[631] See Panel Reports, *US – COOL*, para. 7.435. See also Canada's first written submission, paras. 70 and 81, and second written submission, paras. 40-42; Mexico's first written submission, para. 137, and second written submission, para. 65.
[632] See Appellate Body Reports, *US – COOL*, para. 346.
[633] See 2009 Final Rule, p. 2671. See also United States' response to Panel question No. 11.
[634] See 2009 Final Rule, p. 2671. See also United States' response to Panel question No. 11.
[635] See Appellate Body Reports, *US – COOL*, para. 271 (referring to whether "the detrimental impact will reflect discrimination prohibited under Article 2.1").
[636] See Canada's second written submission, para. 45; and Mexico's second written submission, paras. 71-72.

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Article 2.1 analysis appears to be limited to whether the trace-back prohibition necessitates the same (or similar) audit and verification system of the amended COOL measure and its related detrimental impacts. Inasmuch as this argument reverts focus to the claimed deficiencies of the amended COOL measure's labelling rules, we consider that this is already addressed in the foregoing analysis.

7.282. In the original dispute, the Appellate Body found that "the manner in which the [original] COOL measure seeks to provide information to consumers on origin, through the regulatory distinctions described above, to be arbitrary, and the disproportionate burden imposed on upstream producers and processors to be unjustifiable."[637] We consider that this finding is also relevant for the amended COOL measure, which entails an increased recordkeeping burden and a potential for label inaccuracy, and continues to exempt a large proportion of muscle cuts.

7.283. We therefore find that, under the particular circumstances of this case, the detrimental impact caused by the amended COOL measure does not stem exclusively from legitimate regulatory distinctions.

7.5.4.3 Conclusion on less favourable treatment[638]

7.284. We have found that the amended COOL measure has increased the original COOL measure's detrimental impact on the competitive opportunities of imported livestock, and that this impact does not stem exclusively from legitimate regulatory distinctions. We therefore find that the amended COOL measure accords less favourable treatment to imported livestock than to like products of US origin.

7.5.5 Conclusion on Article 2.1 of the TBT Agreement

7.285. Having determined that the amended COOL measure is a technical regulation that accords less favourable treatment to imported livestock *vis-à-vis* like domestic products, we find that the amended COOL measure violates Article 2.1 of the TBT Agreement in respect of muscle cuts from US-slaughtered livestock (Categories A-C).

7.6 Article 2.2 of the TBT Agreement

7.6.1 Legal test

7.6.1.1 Main factors

7.286. Article 2.2 of the TBT Agreement 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.

7.287. As regards the legal test under the first two sentences of Article 2.2, the Appellate Body stated that "an assessment of whether a technical regulation is 'more trade-restrictive than

[637] Appellate Body Reports, *US – COOL*, para. 347.

[638] These conclusions apply to the amended COOL measure in regard to muscle cuts from US-slaughtered livestock (Categories A-C). As explained above, the complainants do not bring claims either in regard to muscle cuts from foreign-slaughtered animals (Category D) or the ground meat aspect of the amended COOL measure (Category E). See sections 7.1 and 7.4 above. See also Canada's and Mexico's responses to Panel question No. 47.

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necessary' within the meaning of Article 2.2 of the TBT Agreement involves an evaluation of a number of factors."[639] In particular:

> [a] panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure.[640]

7.288. The parties agree on the relevance of these three factors.[641] Additionally, according to Mexico, they constitute the first step under a "two-step" Article 2.2 analysis.[642] Mexico submits that, in addition to the above three factors, this first step also encompasses "the 'relative importance' of the interests or values furthered by the Amended COOL Measure".[643] For Mexico, this additional factor should be the starting point of the necessity test under Article 2.2 of the TBT Agreement.[644]

7.289. According to the Appellate Body, in addition to the above three factors, "in most cases" an Article 2.2 analysis needs to also entail a comparison of the challenged measure with possible alternatives:

> In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken. In particular, it may be relevant for the purpose of this comparison to consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available.[645]

7.290. Mexico argues that such a comparison with alternative measures is only the second step of the Article 2.2 analysis; it is necessary only if the review of the amended COOL measure under the first step would not lead to a finding of inconsistency.[646]

7.291. In light of the above, we first address whether the legal test under Article 2.2 of the TBT Agreement entails the two-step approach advanced by Mexico. We then turn to Mexico's suggestion that the relative importance of the interests or values furthered by the challenged measure constitutes an additional factor under the Article 2.2 test.

7.6.1.2 Whether Article 2.2 entails the two-step approach advanced by Mexico

7.292. Mexico relies upon[647] the Appellate Body's summary of the Article 2.2 legal test:

> [A]n assessment of whether a technical regulation is "more trade-restrictive than necessary" within the meaning of Article 2.2 of the TBT Agreement involves an evaluation of a number of factors. A panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of

[639] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322 (footnote omitted).
[640] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322 (footnote omitted).
[641] Canada's first written submission, para. 101; Mexico's first written submission, para. 151; and United States' first written submission, Section C.
[642] Mexico's first written submission, para. 153.
[643] Mexico argues that "[u]nder the first step of the necessity test, the following factors are relevant to the weighing and balancing analysis in respect of the Amended COOL Measure: (i) the "relative importance" of the interests or values furthered by the Amended COOL Measure; (ii) the degree of contribution made by the Amended COOL Measure to the legitimate objective at issue; (iii) the trade-restrictiveness of the Amended COOL Measure; and (iv) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the United States through the Amended COOL Measure." Mexico's first written submission, para. 164.
[644] Mexico's first written submission, para. 156.
[645] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322 (footnote omitted).
[646] Mexico's first written submission, paras. 177-178. Canada does not specifically argue this point.
[647] Mexico's first written submission, para. 151.

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> the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken. In particular, it may be relevant for the purpose of this comparison to consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available.[648]

7.293. According to Mexico, this approach dictates a "two-step necessity test".[649] The first step is a "relational analysis"[650] involving a "weighing and balancing" of the factors listed in the first part of the Appellate Body's above approach in considering the measure under review.[651] The second step is a "comparative analysis"[652], which involves a "weighing and balancing" of the factors listed in the second part of the Appellate Body's above approach in order to compare the amended COOL measure with each reasonably available alternative measure put forward by the complainants.[653] Mexico notes that, according to the Appellate Body, in some situations the second, "comparative analysis" will not be necessary[654]:

> We can identify at least two instances where a comparison of the challenged measure and possible alternative measures may not be required. For example, it would seem to us that if a measure is not trade restrictive, then it may not be inconsistent with Article 2.2. Conversely, if a measure is trade restrictive and makes *no* contribution to the achievement of the legitimate objective, then it may be inconsistent with Article 2.2.[655]

7.294. Relying on the phrase "at least two instances", Mexico contends that the amended COOL measure represents a further instance where inconsistency with Article 2.2 can be determined by a mere "relational analysis".[656] Mexico invites the Panel to do that, and to move on to addressing alternatives only if the first step would not lead to a finding of inconsistency.[657]

7.295. The United States disagrees.[658] According to the United States, "[t]he comparison between the challenged measure and an alternative measure is … central to the [Article 2.2] analysis."[659] As the Appellate Body held in the original dispute:

> to demonstrate that a technical regulation is inconsistent with Article 2.2, the complainant must make a *prima facie* case by presenting evidence and arguments sufficient to establish that the challenged measure is more trade restrictive than necessary to achieve the contribution it makes to the legitimate objective, taking account of the risks non-fulfilment would create. *A complainant may, and in most cases will, also seek to identify a possible alternative measure that is less trade*

[648] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322 (footnote omitted).
[649] Mexico's first written submission, para. 153.
[650] Mexico's second written submission, para. 90.
[651] Mexico's first written submission, para. 153.
[652] Mexico's second written submission, para. 90.
[653] Mexico's first written submission, para. 153.
[654] Mexico's first written submission, para. 155.
[655] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322, footnote 647 (emphasis original).
[656] Mexico's first written submission, para. 155.
[657] Mexico's first written submission, paras. 177-178.
[658] This disagreement between Mexico and the United States dates back to the original dispute. Before the Appellate Body, Mexico argued that: "[t]he concept of necessity is used in both the first and second sentences and must be given meaning in both sentences, that is, in the context of the creation of an obstacle to trade and in the context of a less trade-restrictive alternative. Thus, whether the technical regulation at issue is more trade restrictive than necessary is a 'two-step' analysis. Mexico considers this approach to be in line with the Appellate Body's clarification in *US – Gambling* and in *Brazil – Retreaded Tyres* that weighing and balancing involves two steps: first, a preliminary analysis of the necessity of the challenged measure on the basis of all relevant factors and, second, the conclusion of the preliminary analysis must be confirmed by comparing the measure with possible alternatives." Appellate Body Reports, *US – COOL*, para. 108.
[659] United States' first written submission, para. 146 (citing Appellate Body Report, *Australia – Apples*, para. 356).

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restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available.[660]

7.296. In this compliance dispute, neither Mexico, nor the United States, question that the "relational analysis" of the contested measure precedes the "comparative analysis" of the contested measure and suggested alternatives. What Mexico and the United States disagree on is whether the "relational analysis" might be sufficient for determining that the amended COOL measure is inconsistent with Article 2.2.

7.297. As Mexico points out, the Appellate Body foresaw this possibility in "at least two instances".[661] In *US – Tuna II (Mexico)*, the Appellate Body identified the above two scenarios in a footnote to a statement foreseeing the need for the comparative analysis "in most cases".[662] In the original *US – COOL* dispute, the Appellate Body confirmed both exceptions[663] as well as the need for a comparative analysis "in most cases".[664]

7.298. Our reading of the relevant Appellate Body statements suggests that a "comparative analysis" would be redundant only in exceptional circumstances where consistency or inconsistency with Article 2.2 may be deduced by looking solely at certain aspects of the challenged measure. Mexico has not explained why the Panel is faced with such exceptional circumstances in this case. In particular, Mexico does not argue that the amended COOL measure falls into either of the two exceptional scenarios identified by the Appellate Body; rather, Mexico contends that amended COOL measure represents a third scenario under which it should be found inconsistent without looking at alternatives. However, Mexico fails to identify what this third exceptional scenario entails in the context of the amended COOL measure.

7.299. In the original dispute, the United States challenged the original panel's "two-stage test that involved an initial inquiry into whether the measure fulfils the objective, and only if so, a separate and subsequent examination of whether the measure is more trade restrictive than necessary based on the existence of a reasonably available less trade-restrictive alternative measure".[665] The Appellate Body "agree[d] with the United States that" "the Panel erred" "by finding the COOL measure to be inconsistent with Article 2.2 of the TBT Agreement *without examining the proposed alternative measures*."[666]

7.300. The Appellate Body took issue with the original panel stopping short of the "comparative analysis".[667] The Appellate Body "consider[ed] the present case to be one that calls for an examination of the factors identified above *for both the COOL measure and the alternatives proposed by the complainants* in order to determine whether the COOL measure is more trade restrictive than 'necessary' to fulfil its objective."[668]

7.301. The Appellate Body did not draw any conclusions on Article 2.2 consistency at the end of its "relational analysis". The Appellate Body called this a "preliminary assessment" of the original COOL measure, and "proceed[ed] to examine the alternative measures proposed by [the complainants] … to *complete* [its] assessment of whether the COOL measure was 'more trade-restrictive than necessary to fulfil a legitimate objective'."[669]

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[660] Appellate Body Reports, *US – COOL*, para. 379 (emphasis added). See also United States' first written submission, para. 145.

[661] Mexico's first written submission, para. 155 (citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 322, footnote 647); Appellate Body Reports, *US – COOL*, para. 376, footnote 748.

[662] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322.

[663] Appellate Body Reports, *US – COOL*, para. 376, footnote 748.

[664] Appellate Body Reports, *US – COOL*, paras. 376, 379, 461, and 471.

[665] Appellate Body Reports, *US – COOL*, para. 455.

[666] Appellate Body Reports, *US – COOL*, para. 469 (emphasis added). "As the Appellate Body explained in *US – Tuna II (Mexico)*, the [original p]anel in this case was required also to evaluate the other factors referred to in Article 2.2 [i.e. other than whether the original COOL measure fulfilled its objective], and to undertake a comparison with the alternative measures proposed by Mexico and by Canada." Appellate Body Reports, *US – COOL*, para. 469.

[667] Appellate Body Reports, *US – COOL*, para. 469.

[668] Appellate Body Reports, *US – COOL*, para. 471 (emphasis added).

[669] Appellate Body Reports, *US – COOL*, para. 479 (emphasis added). See also ibid. para. 470.

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7.302. The Appellate Body undertook the "comparative analysis" before trying to draw "overall" conclusions with regard to Article 2.2.[670] The *EC – Seal Products* panel adopted a similar approach[671], noting that "[t]he Appellate Body stated that all these factors [including a comparison with alternative measures] provide the basis for the determination of what is to be considered 'necessary' in the sense of Article 2.2 … in a particular case."[672]

7.303. We do the same, and draw conclusions as to the consistency of the amended COOL measure with Article 2.2 of the TBT Agreement only after having considered all relevant factors. Like the Appellate Body in both *US – Tuna II (Mexico)*[673] and the original *US – COOL* dispute[674], we address the following six factors before reaching an overall conclusion on the complainants' Article 2.2 claims:

a. the amended COOL measure's degree of contribution to a legitimate objective;

b. the trade-restrictiveness of the amended COOL measure;

c. the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective pursued by the United States through the amended COOL measure;

d. whether the alternatives proposed by the complainants are less trade restrictive than the amended COOL measure;

e. whether the proposed alternatives would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create; and

f. whether the proposed alternatives are reasonably available.

7.6.1.3 Relative importance of interests or values furthered by the measure as an additional factor

7.304. According to Mexico, the "relative importance" of the interests or values furthered by the challenged measure is the first factor that a WTO adjudicator should assess when reviewing necessity under Article 2.2 of the TBT Agreement. Mexico contends that, "similar to the 'necessity' analysis in Article XX of the GATT 1994 and Article XIV of the GATS", "[t]he process [of assessing 'necessity' under Article 2.2] begins with an assessment of the 'relative importance' of the common interests or values furthered by the challenged measure"[675]; "after that a panel should consider other relevant factors of the measure at issue, including the contribution of the measure to the realization of the ends pursued by it and the trade restrictive impact of the measure, and undertake a weighing and balancing process."[676]

7.305. Mexico recognizes that "the relative importance of the common interests or values furthered by the challenged measure" "has not been explicitly identified [as a factor] in the context of the necessity test under Article 2.2."[677] According to Mexico, "however, in referring to the factors to be considered under Article 2.2, the Appellate Body referred to 'factors that include', indicating that the referenced factors are not exhaustive."[678]

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[670] Appellate Body Reports, *US – COOL*, para. 491.
[671] Panel Reports, *EC – Seal Products*, paras. 7.421-7.422 and 7.500-7.505.
[672] Panel Reports, *EC – Seal Products*, para. 7.356.
[673] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322.
[674] Appellate Body Reports, *US – COOL*, paras. 471-491. See also Panel Reports, *EC – Seal Products*, part 7.3.3.
[675] Mexico's first written submission, para. 156.
[676] Mexico's first written submission, para. 156. While Canada does not argue for a separate factor of the Article 2.2 legal test, it does reference the relative importance of interests or values in the context of the "risks non-fulfilment would create". See para. 7.378 below.
[677] Mexico's first written submission, para. 157.
[678] Mexico's first written submission, para. 157.

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7.306. Turning to the amended COOL measure, Mexico contends that "[t]he relative importance of the provision of consumer information is substantially lower than: protecting the environment or protecting human beings from health risks, both of which are vital and important in the highest degree; and protecting public morals, which a panel observed ranks among the most important values or interests pursued by Members as a matter of public policy."[679] Accordingly, Mexico argues, "the interests and values furthered by the Amended COOL Measure fall on the low end of the spectrum of importance."[680]

7.307. The United States counters that Mexico's approach is "faulty". The United States notes that "[t]his factor does not appear in the text [of Article 2.2], and Mexico explicitly concedes that such a factor is not part of the Appellate Body's Article 2.2 analysis in either *US – COOL* or in *US – Tuna II (Mexico)*."[681] The United States contrasts "Mexico's argu[ment before the Appellate Body] that the 'importance' of the measure should be analyzed for an Article 2.2 claim" with the "Appellate Body explaining Mexico's burden of proof for Article 2.2" without making any reference to such factor.[682]

7.308. In *US – Tuna II (Mexico)*, the Appellate Body referenced the "weighing and balancing" under the necessity test of Article XX of the GATT 1994[683] in providing guidance on the factors involved in a necessity analysis under the first two sentences of Article 2.2. The Appellate Body did not identify the relative importance of the values pursued by the contested measure as a relevant factor for assessing necessity under Article 2.2.[684] In *US – COOL*, the Appellate Body took a similar approach[685] – despite Canada's argument that, like in the context of Article XX of the GATT 1994, "a measure will be easier to justify [under Article 2.2] if it pursues an objective that is 'vital' or 'important'."[686] In neither dispute did the Appellate Body identify "relative importance" as a factor when setting out the overall test under Article 2.2.[687]

7.309. The Appellate Body did confirm the relevance of Article XX for interpreting the TBT Agreement[688], and referenced some potential similarities between the necessity tests under Article XX of the GATT 1994 and Article 2.2 of the TBT Agreement.[689] In this compliance dispute, Mexico itself argues that there is a distinction between the TBT Agreement, on the one hand, and the GATT 1994 and the GATS, on the other.[690] In describing the differences between the

[679] Mexico's first written submission, para. 165.

[680] Mexico's first written submission, para. 166. See also Mexico's second written submission, paras. 95-96.

[681] United States' first written submission, para. 147.

[682] United States' first written submission, para. 147 (referencing Appellate Body Reports, *US – COOL*, paras. 107 and 379).

[683] Appellate Body Report, *US – Tuna II (Mexico)*, para. 318, footnotes 642 and 643. See also Appellate Body Reports, *US – COOL*, para. 374, footnote 745.

[684] The Appellate Body held that "[b]oth the first and second sentence of Article 2.2 refer to the notion of 'necessity'. These sentences are linked by the terms '[f]or this purpose', which suggests that the second sentence qualifies the terms of the first sentence and elaborates on the scope and meaning of the obligation contained in that sentence. The Appellate Body has previously noted that the word 'necessary' refers to a range of degrees of necessity, depending on the connection in which it is used. *In the context of Article 2.2, the assessment of 'necessity' involves a relational analysis of the trade-restrictiveness of the technical regulation, the degree of contribution that it makes to the achievement of a legitimate objective, and the risks non-fulfilment would create*. We consider, therefore, that all these factors provide the basis for the determination of what is to be considered 'necessary' in the sense of Article 2.2 in a particular case." Appellate Body Report, *US – Tuna II (Mexico)*, para. 318 (footnotes omitted, emphasis added).

[685] Appellate Body Reports, *US – COOL*, para. 374.

[686] Appellate Body Reports, *US – COOL*, para. 79.

[687] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322 (footnote omitted). See also Appellate Body Reports, *US – COOL*, para. 378. In its arguments, Mexico itself cites this approach formulated by the Appellate Body. See Mexico's first written submission, para. 151.

[688] Appellate Body Report, *US – Clove Cigarettes*, para. 96.

[689] Appellate Body Report, *US – Tuna II (Mexico)*, para. 318, footnotes 642 and 643. See also Appellate Body Reports, *US – COOL*, para. 374, footnote 745, and para. 445. The Appellate Body also noted that "[b]y its terms, Article 2.2 requires an assessment of the necessity of the trade-restrictiveness of the measure at issue." Appellate Body Reports, *US – COOL*, para. 375. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

[690] According to Mexico, "[a]lthough the necessity test in Article 2.2 is similar to the necessity tests in Articles XX of the GATT 1994 and XIV of the GATS, it is not identical. The necessity test in Article 2.2 refers to the necessity of the *trade-restrictiveness* of the measure whereas the necessity tests in the other two

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relevant necessity tests, Mexico explains that "[i]mportantly, Article 2.2 includes the phrase 'taking account of the risks non-fulfilment would create'."[691] According to Mexico, "[t]his treaty language does not exist in [Articles XX of the GATT 1994 and XIV of the GATS] and meaning must be given to this difference."[692]

7.310. "The risks non-fulfilment would create" was identified by the Appellate Body as a "further" factor to be assessed in the context of Article 2.2.[693] As Mexico points out, "the risks non-fulfilment would create" is unique to the text of Article 2.2 of the TBT Agreement, does not appear in Article XX of the GATT 1994 and Article XIV of the GATS. We agree that meaning must be given to this difference.[694] In our view, the most appropriate way to give meaning to this difference is to address the risk non-fulfilment of the objective would create in the context of Article 2.2, which has been specifically identified by the Appellate Body as a factor of the Article 2.2 legal test. We shall do this, rather than assess as a separate factor "relative importance of the objective", which does not appear in the text of Article 2.2, and was developed only in the context of Article XX of the GATT 1994 and Article XIV of the GATS.

7.311. Accordingly, we dismiss Mexico's contention that relative importance of the common interests or values furthered by the challenged measure is a separate factor of the Article 2.2 test, let alone the starting point of an Article 2.2 analysis. Instead, we review the complainants' Article 2.2 claims by analysing the factors set out in the Appellate Body's relevant statements, which we have listed above, including the risks non-fulfilment of the objective would create.[695]

7.6.2 The amended COOL measure's degree of contribution to a legitimate objective

7.312. As the Appellate Body held, "the question of whether a technical regulation 'fulfils' an objective is concerned with the degree of contribution that the technical regulation makes toward the achievement of the legitimate objective."[696] Assessing this presupposes a determination of both the amended COOL measure's objective and whether this objective is legitimate.[697]

7.6.2.1 The objective of the amended COOL measure

7.313. In the original dispute, the Appellate Body summarized the "approach to be followed by a panel in determining the objective a Member seeks to achieve by means of a technical regulation":

> That analysis calls for an independent and objective assessment, based on an examination of the text of the measure, its design, architecture, structure, legislative history, as well as its operation. While a panel may take as a starting point the

provisions refer to the necessity of the *challenged measure*." Mexico's first written submission, para. 158 (emphasis added).

[691] Mexico's first written submission, para. 158.

[692] Mexico's first written submission, para. 158. Canada makes an argument similar to Mexico's in the context of the risk of non-fulfilment. See Canada's first written submission, para. 116.

[693] The Appellate Body held that "the obligation to consider 'the risks non-fulfilment would create' suggests that the comparison of the challenged measure with a possible alternative measure should be made in the light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective. This suggests a further element of weighing and balancing in the determination of whether the trade-restrictiveness of a technical regulation is 'necessary' or, alternatively, whether a possible alternative measure, which is less trade restrictive, would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and would be reasonably available." Appellate Body Report, *US – Tuna II (Mexico)*, para. 321. See also Appellate Body Reports, *US – COOL*, paras. 377, 378, and 478.

[694] Mexico's first written submission, para. 158.

[695] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 322; and *US – COOL*, para. 378.

[696] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 315.

[697] Appellate Body Reports, *US – COOL*, paras. 313-315 and 371-373. Likewise, as the panel in *EC – Seal Products* held, "to assess a measure's consistency with the obligations under Article 2.2 of the TBT Agreement, the Panel must *first* identify the objective pursued." Panel Reports, *EC – Seal Products*, para. 7.372 (emphasis added). Following its analysis of the objective, the *EC – Seal products* panel went on to address "the legitimacy of the identified objective". Panel Reports, *EC – Seal Products*, section 7.3.3.2. The original panel's approach was similar: "[h]aving determined the objective pursued by the United States [through the original COOL measure], [the original panel] proceed[ed] to examine its legitimacy." Panel Reports, *US – COOL*, para. 7.628.

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> responding Member's characterization of the objective it pursues through the measure, a panel is not bound by such characterization. This is so especially where the objective of a measure is contested between the parties, and competing arguments have been raised on the basis of the text of the measure, its design, architecture, structure, legislative history, and evidence relating to its operation.[698]

7.314. The parties agree that the amended COOL measure pursues the same objective as the original COOL measure.[699] What the parties dispute is the precise expression of the objective as found by the original panel and in particular the Appellate Body. Specifically, the disagreement concerns whether the objective is generally "the provision consumer information on origin" (as argued by the complainants)[700], or more specifically to provide information on where livestock are born, raised, and slaughtered (as argued by the United States).[701]

7.315. In the original dispute, the Appellate Body identified "the provision of consumer information on origin" as "what [it] consider[ed] the [original p]anel's understanding of the objective pursued through the COOL measure to be".[702] The Appellate Body went on to find that the original panel did not err in identifying the objective pursued through the COOL measure as being "to provide consumer information on origin".[703] Nevertheless, in a passage relied upon by the United States, the Appellate Body stated that "we see no reason to disturb the [original p]anel's finding with respect to the legitimacy of the objective pursued by the United States through the COOL measure, namely, to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered."[704]

7.316. The complainants point out that the more narrow formulation (providing for specific production steps) appears in the Appellate Body's discussion of the *legitimacy* of the measure's objective rather than its identification, and may skew the comparison with alternative measures.[705] The United States counters that "the relevant objective can be stated in a number of ways". While conceding that "it could be stated as 'to provide consumer information on origin'", the United States argues that "the same objective can be stated in more specific terms, such as how the Appellate Body has also stated it", and that these "are simply two formulations of the same objective".[706] The United States adds that the difference in characterization of the objective is "immaterial" insofar as the Article 2.2 analysis concerns "the degree of contribution to the objective that a measure *actually* achieves".[707] In its view, "[t]he degree of contribution to the objective that the measure actually achieves is *the same* under either formulation."[708]

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[698] Appellate Body Reports, *US – COOL*, para. 395. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 314.

[699] Canada's first written submission, para. 120; Mexico's first written submission, para. 167; and United States' first written submission, para. 143.

[700] Canada's first written submission, para. 120; Mexico's first written submission, para. 167.

[701] United States' first written submission, paras. 160 and 166.

[702] Appellate Body Reports, *US – COOL*, para. 391.

[703] Appellate Body Reports, *US – COOL*, para. 433.

[704] Appellate Body Reports, *US – COOL*, para. 453.

[705] Canada's second written submission, para. 64 ("The United States attempts to describe in an artificially narrow and self-serving manner the objective it pursues through the measure.") and para. 68 ("The United States' attempt to modify the description of its objective, if accepted, would give rise to … the reduced possibility of formulating alternative measures that meet the TBT Article 2.2 threshold."); Mexico's second written submission, para. 86 ("The United States attempts to redefine the objective to an artificially narrow and self-serving one. … [I]f an objective is described in an artificially narrow manner so as to correlate exactly with the challenged measure, it will rend the formulation of alternatives that meet the Article 2.2."). In this regard, both complainants cite New Zealand's third-party submission, para. 22.

[706] United States' second written submission, para. 103.

[707] United States' second written submission, para. 105 (citing Appellate Body Reports, *US – COOL*, para. 426 (emphasis original by the Appellate Body)).

[708] United States' second written submission, para. 105 (emphasis original).

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7.317. As the parties point out, the Appellate Body referred to the objective of the original COOL measure in at least two contexts:

1) in reviewing the original panel's analysis of the original COOL measure's objective:

> "to provide consumer information on origin[855]"
>
> [855] "We recall in this respect that the COOL measure defines the 'origin' of beef and pork as a function of the country or countries in which the livestock from which the meat is derived were born, raised, and slaughtered."[709]
>
> *(NB: The Appellate Body used an identical formulation and footnoting technique in its conclusions.[710])*; and

2) in reviewing the original panel's analysis of the legitimacy of the original COOL measure's objective:

> "to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered."[711]
>
> *(NB: The Appellate Body summarised this second formulation in the same paragraph as "providing consumers with information on origin, as defined under the COOL measure".[712])*

7.318. The Appellate Body emphasised "the importance of a panel identifying with sufficient clarity and consistency the objective or objectives pursued by a Member through a technical regulation".[713] To do this, we need not conduct a detailed, *de novo* assessment of the objective. The parties agree that the amended COOL measure continues to serve the same objective as its predecessor. The 2013 Final Rule refers to its objective by using a phrase almost identical to that considered by the original panel in establishing the objective of the original COOL measure.[714] The 2013 Final Rule did not change the objective of the original COOL measure; rather, it merely adjusted the design of the original COOL measure – in part to comply with the DSB recommendations and rulings in the original dispute.[715]

[709] Appellate Body Reports, *US – COOL*, para. 433 and footnote 855.
[710] Appellate Body Reports, *US – COOL*, para. 496(b)(ii).
[711] Appellate Body Reports, *US – COOL*, para. 453.
[712] Appellate Body Reports, *US – COOL*, para. 453.
[713] Appellate Body Reports, *US – COOL*, para. 387.
[714] Panel Reports, *US – COOL*, para. 7.680 (citing 2009 Final Rule, p. 2658): "to require retailers to notify their customers of the country of origin of covered commodities." The 2013 Final Rule states that "[t]he Agency is issuing this rule to make changes to the labelling provisions for muscle cut covered commodities to provide consumers with more specific information…" and the "changes will provide consumers with more specific information about the origin of muscle cut covered commodities." 2013 Final Rule, p. 31367. Further, the amended COOL Rule stipulates that "[t]he purpose of COOL is to provide consumers with information upon which they can make informed shopping choices." 2013 Final Rule, p. 31376.
[715] The 2013 Final Rule states that "[t]he Agency is issuing this rule to make changes to the labeling provisions for muscle cut covered commodities to provide consumers with more specific information". Under the header "The Purpose of the Regulatory Action", the 2013 Final Rule explains: "As a result of this action, the Agency reviewed the overall regulatory program and is issuing this rule, under the authority of the Agricultural Marketing Act (7 U.S.C. 1621 *et seq.*), to make changes to the labeling provisions for muscle cut covered commodities and certain other modifications to the program. The Agency expects that these changes will improve the overall operation of the program and also bring the current mandatory COOL requirements into compliance with U.S. international trade obligations." 2013 Final Rule, p. 31367.

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7.319. Nor do we need to choose between the above two formulations by the Appellate Body. It is sufficient to recall how this matter was resolved in the original dispute. The original panel identified the objective of the original COOL measure in three places in its report, as follows:

a. "to provide consumer information on origin"[716];

b. "to provide as much clear and accurate information as possible to consumers"[717]; and

c. "consumer information on origin as declared by the United States."[718]

7.320. Assessing whether "the [original] Panel Err[ed] in Its Identification of the Objective Pursued"[719], the Appellate Body noted all three formulations of the objective articulated by the original panel[720], and pointed out the "uncertainty in [the original panel's] reasoning" introduced by "these differing formulations of the objective".[721] To reconcile the original panel's different formulations, the Appellate Body surmised that the original panel had probably considered the more general formulation ("the provision of consumer information on origin") as reflecting the objective, and the more specific one ("the provision of *as much clear and accurate* origin information *as possible* to consumers"[722]) as relating to "the level of fulfilment that the United States desired to achieve."[723]

7.321. The Appellate Body cautioned against determining "in the abstract" the level at which a Member seeks to achieve an objective.[724] It confirmed that Members have the freedom to set the levels at which they wish to achieve a legitimate objective, and that assessing the intended level of fulfilment was unnecessary.[725] The Appellate Body continued by "identif[ying] what [it] consider[ed] the [original p]anel's understanding of the objective pursued through the COOL measure to be[:] … the provision of consumer information on origin".[726] The Appellate Body stated that, despite the original panel's "segmented" analysis of the objective, "in both instances … the [original p]anel reached the same result: that the objective that the United States pursues through the COOL measure is the provision of consumer information on origin."[727] Likewise, in reviewing Canada's other appeal under Article 11 of the DSU, the Appellate Body noted that "[t]he [original p]anel concluded, based on the text, design, and structure of the COOL measure, that the COOL measure's objective is to provide consumer information on origin."[728]

[716] Panel Reports, *US – COOL*, para. 7.617.
[717] Panel Reports, *US – COOL*, para. 7.620.
[718] Panel Reports, *US – COOL*, para. 7.685.
[719] Appellate Body Reports, *US – COOL*, part VI.C.3.
[720] Appellate Body Reports, *US – COOL*, paras. 384, 385, and 387.
[721] Appellate Body Reports, *US – COOL*, para. 387.
[722] Appellate Body Reports, *US – COOL*, para. 388 (emphasis original).
[723] Appellate Body Reports, *US – COOL*, para. 388.
[724] According to the Appellate Body, "in preparing, adopting, and applying a measure in order to pursue a legitimate objective, a Member articulates, either implicitly or explicitly, the level at which it seeks to pursue that particular objective. Neither Article 2.2 in particular, nor the *TBT Agreement* in general, requires that, in its examination of the objective pursued, a panel must discern or identify, in the abstract, the level at which a responding Member wishes or aims to achieve that objective. Rather, what a panel *is* required to do, under Article 2.2, is to assess the degree to which a Member's technical regulation, as adopted, written, and applied, contributes to the legitimate objective pursued by that Member." Appellate Body Reports, *US – COOL*, para. 390 (emphasis original).
[725] According to the Appellate Body, "the sixth recital of the preamble of the TBT Agreement provides that a Member shall not be prevented from taking measures necessary to achieve a legitimate objective 'at the levels it considers appropriate'. … This does not, however, require a separate assessment of a *desired* level of fulfilment." Appellate Body Reports, *US – COOL*, para. 390, footnote 779; see also para. 373.
[726] Appellate Body Reports, *US – COOL*, para. 391.
[727] Appellate Body Reports, *US – COOL*, para. 394.
[728] Appellate Body Reports, *US – COOL*, para. 407 (footnote omitted).

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7.322. The Appellate Body rejected the United States' appeal of the original panel's finding concerning the COOL measure's "level of fulfilment", reiterating that the identification of the objective should not entail an analysis of the respondent's desired level of fulfilment.[729] Ultimately, the Appellate Body concluded by reconciling all three of the original panel's formulations of the objective as follows: "we find that the Panel did not err, in paragraphs 7.617, 7.620, and 7.685 of the Panel Reports, in identifying the objective pursued by the United States through the COOL measure as being *to provide consumer information on origin*."[730] This is the first formulation used by the Appellate Body, as invoked by the complainants in this compliance dispute. It is the formulation of the objective the Appellate Body chose to use in concluding its review of the original panel's analysis of the original COOL measure's objective. The same formulation is reproduced in the conclusions of the Appellate Body reports.[731]

7.323. We observe that that the above finding of the Appellate Body is supplemented by a footnote referencing the three production steps:

> We recall in this respect that the COOL measure defines the "origin" of beef and pork as a function of the country or countries in which the livestock from which the meat is derived were born, raised, and slaughtered.[732]

7.324. However, we do not consider this footnote as part of the Appellate Body's formulation of the objective. We read it merely as an explanatory remark by the Appellate Body on how the original COOL measure defined origin.

7.325. The Appellate Body recognized the need to review the challenged measure in determining the pursued objective.[733] However, the Appellate Body did not equate the measure's design with the objective pursued through the measure. Rather, it held that the measure might articulate the desired level of fulfilment[734], while cautioning against a separate assessment of this latter – both for identifying the objective and for examining an Article 2.2 claim in general.[735] In requiring the objective's precise identification by panels, the Appellate Body emphasised that this serves to assess the degree of contribution: "the relevant objective is the benchmark against which a panel must assess the degree of contribution made by a challenged technical regulation, as well as by proposed alternative measures."[736]

7.326. We consider that the assessment of the degree of contribution would be confounded and would become virtually meaningless if the objective pursued by the amended COOL measure were to be equated with the way in which the same measure pursues that objective. A meaningful review of a Member's challenged measure entails a review against objective standards, not those of the challenged measure itself. Although the Appellate Body referred to the production steps in discussing the objective of the COOL measure[737], it did so in the context of reviewing Canada's

[729] According to the Appellate Body, "[the United States' appeal] assume[s] that, in identifying the objective, the Panel was also required to identify the desired "level of fulfilment". We have already explained in our analysis above why it was not necessary or appropriate for the Panel, in identifying the objective (that is, to provide consumer information on origin), to further identify the level at which the United States desired to fulfil its objective of providing consumer information on origin (that is, to provide *as much clear and accurate* origin information *as possible* to consumers). As we noted, the fulfilment of an objective is a matter of degree, and what is relevant for the inquiry under Article 2.2 is the degree of contribution to the objective that a measure *actually* achieves." Appellate Body Reports, *US – COOL*, para. 426 (emphasis original).

[730] Appellate Body Reports, *US – COOL*, para. 433 (footnote omitted, emphasis added).

[731] Appellate Body Reports, *US – COOL*, para. 496(b)(ii).

[732] Appellate Body Reports, *US – COOL*, para. 433, footnote 855. See also Appellate Body Reports, *US – COOL*, para. 496(b)(ii), footnote 1018.

[733] Appellate Body Reports, *US – COOL*, para. 395. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 314.

[734] "[I]n preparing, adopting, and applying a measure in order to pursue a legitimate objective, a Member articulates, either implicitly or explicitly, the level at which it seeks to pursue that particular objective." Appellate Body Reports, *US – COOL*, para. 390.

[735] Appellate Body Reports, *US – COOL*, paras. 390 and 426.

[736] Appellate Body Reports, *US – COOL*, para. 387.

[737] Appellate Body Reports, *US – COOL*, para. 435.

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appeal against "the [original p]anel's finding that 'providing consumer information on origin is a legitimate objective within the meaning of Article 2.2'[738]".[739]

7.327. Noting that "Canada ha[d] accepted, at a general level, that the provision of consumer information on origin can constitute a legitimate objective", the Appellate Body concluded that Canada "appears to consider that the [original p]anel [had] erred in finding the objective of providing consumers with information on origin *as defined under the COOL measure* (that is, based on where the livestock from which meat is derived were born, raised, and slaughtered) to be legitimate."[740] According to the Appellate Body, Canada "seem[s] to imply that, in assessing legitimacy, a distinction should be drawn between the provision of consumer information on origin, generally, and the provision of consumer information on origin based on the definition of 'origin' under the COOL measure."[741]

7.328. The Appellate Body refrained from reviewing this possible distinction. It merely noted that "Canada has not explained why it is *not* legitimate to define the origin of meat according to the countries in which the livestock from which it is derived were born, raised, and slaughtered."[742] The Appellate Body added that "[i]t [wa]s therefore unclear on what basis or to what extent, *in the context of its arguments relating to legitimacy*, Canada challenges the precise way in which the COOL measure defines 'origin.'"[743]

7.329. This lack of clarity was a principal reason for the Appellate Body's conclusion that it "s[aw] no reason to disturb the [original p]anel's finding with respect to the legitimacy of the objective pursued by the United States through the COOL measure, namely, to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered."[744] As the complainants point out, the Appellate Body was merely reviewing the original panel's analysis of the objective's legitimacy. After the above conclusion referring to the production steps, and in the same paragraph, the Appellate Body used the more general formulation of the objective in its actual finding on legitimacy:

> We … dismiss this ground of Canada's appeal and find that the Panel did not err, in paragraph 7.651 of the Panel Reports, in finding the provision of consumer information on origin is a legitimate objective within the meaning of Article 2.2 of the TBT Agreement.[745]

7.330. Finally, in the context of its Article 2.1 analysis, the Appellate Body quoted the original panel's articulation of the objective as "to provide consumer information on origin".[746] The Appellate Body distinguished this from the definition of origin, "under the COOL measure, as a function of the countries in which the cattle and hogs from which the meat is derived were born, raised and slaughtered."[747] The Appellate Body considered this latter as "particularly relevant to an inquiry as to the COOL measure's even-handedness" under Article 2.1, rather than for defining the original COOL measure's objective.[748]

7.331. In light of the above, we adopt the Appellate Body's first formulation (without the footnote) as the identification of the objective of the amended COOL measure: "to provide consumer information on origin".[749]

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[738] (footnote original) Panel Reports, para. 7.651.
[739] Appellate Body Reports, *US – COOL*, para. 434 (footnote omitted).
[740] Appellate Body Reports, *US – COOL*, para. 446 (footnoted omitted, emphasis original).
[741] Appellate Body Reports, *US – COOL*, para. 447.
[742] Appellate Body Reports, *US – COOL*, para. 447 (emphasis original).
[743] Appellate Body Reports, *US – COOL*, para. 447 (emphasis added).
[744] Appellate Body Reports, *US – COOL*, para. 447.
[745] Appellate Body Reports, *US – COOL*, para. 453. See also Appellate Body Reports, *US – COOL*, para. 496(b)(iii).
[746] Appellate Body Reports, *US – COOL*, para. 332 (citing Panel Reports, *US – COOL*, paras. 7.617, 7.620, 7.671, and 7.713).
[747] Appellate Body Reports, *US – COOL*, para. 332.
[748] Appellate Body Reports, *US – COOL*, para. 333.
[749] Appellate Body Reports, *US – COOL*, paras. 433 (footnote omitted) and 496(b)(ii) (footnote omitted).

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7.6.2.2 Legitimate objective

7.332. The non-exhaustive list of legitimate objectives in Article 2.2 does not specify the provision of consumer information on origin. As the Appellate Body explained in the original dispute, assessing an objective not listed in Article 2.2 requires further analysis of the legitimacy of such objective.[750] Nevertheless, we recall that the original panel found the objective of the original COOL measure to be legitimate[751], and that the Appellate Body upheld this finding, as explained in the previous section.[752] As noted, the amended COOL measure leaves the objective unchanged. Further, as the United States points out[753], neither complainant calls into question the legitimacy of the amended COOL measure's objective in this compliance dispute.[754]

7.333. Accordingly, there is no reason to re-open the issue of legitimacy: the objective of the amended COOL measure, i.e. to provide consumer information on origin, remains a legitimate objective under the TBT Agreement.

7.6.2.3 Degree of contribution

7.334. As explained by the Appellate Body[755]:

> [t]he degree or level of contribution of a technical regulation to its objective is not an abstract concept, but rather something that is revealed through the measure itself. In preparing, adopting, and applying a measure in order to pursue a legitimate objective, a WTO Member articulates, either implicitly or explicitly, the level at which it pursues that objective.[756] Thus, a panel adjudicating a claim under Article 2.2 must seek to ascertain—from the design, structure, and operation of the technical regulation, as well as from evidence relating to its application—to what degree, if at all[757], the challenged technical regulation, as written and applied, actually contributes to the achievement of the legitimate objective pursued by the Member.[758]

7.335. Before assessing the amended COOL measure's degree of contribution, we recall the relevant findings in the original dispute and the scope of our review of the amended COOL measure's degree of contribution.

7.6.2.3.1 Relevant findings in the original dispute

7.336. In reviewing the original panel's relevant findings, the Appellate Body noted that, according to the original panel, "information on the origin of products must be clear and accurate

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[750] According to the Appellate Body "a 'legitimate objective' refers to an aim or target that is lawful, justifiable, or proper. Article 2.2 lists specific examples of such 'legitimate objectives', namely: national security requirements; the prevention of deceptive practices; and the protection of human health or safety, animal or plant life or health, or the environment. The use of the words '*inter alia*' in Article 2.2 introducing that list, however, signifies that the list of legitimate objectives is not a closed one. In addition, the objectives expressly listed provide a reference point for other objectives that may be considered to be legitimate in the sense of Article 2.2. The sixth and seventh recitals of the preamble of the *TBT Agreement* refer to several objectives, which to a large extent overlap with the objectives listed in Article 2.2. As the Appellate Body has also noted, objectives recognized in the provisions of other covered agreements may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective under Article 2.2." Appellate Body Reports, *US – COOL*, para. 370.

[751] Panel Reports, *US – COOL*, para. 7.651.

[752] Appellate Body Reports, *US – COOL*, paras. 453 and 496(b)(iii). See para. 7.326 above.

[753] United States' first written submission, paras. 143-144.

[754] Canada's first written submission, para. 120; Mexico's first written submission, 167.

[755] Appellate Body Reports, *US – COOL*, para. 373.

[756] (footnote original) Appellate Body Report, *US – Tuna II (Mexico)*, para. 316.

[757] (footnote original) This may involve an assessment of whether the measure at issue is capable of achieving the legitimate objective. (Appellate Body Report, *US – Tuna II (Mexico)*, footnote 640 to para. 317)

[758] (footnote original) The Appellate Body explained that, as is the case when determining the contribution of a measure to the achievement of a particular objective in the context of Article XX of the GATT 1994, "a panel must assess the contribution to the legitimate objective actually achieved by the measure at issue." (Appellate Body Report, *US – Tuna II (Mexico)*, para. 317 (referring to Appellate Body Report, *China – Publications and Audiovisual Products*, para. 252))

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for it to be able to convey *meaningful information* to consumers."[759] The original panel thus reasoned that "[u]nder 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."[760]

7.337. The Appellate Body also noted the original panel's conclusion that, "[i]n 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."[761] The original panel therefore found overall that the original COOL measure "[did] not fulfil the identified objective within the meaning of Article 2.2 because it fails to convey meaningful origin information to consumers".[762]

7.338. Conversely, the Appellate Body considered that "[d]espite this overall finding, a number of findings and observations made by the [original panel] in the course of its analysis belie this conclusion and suggest that the [original] COOL measure does *contribute* to the objective of providing information to consumers on the countries in which the livestock from which meat is derived were born, raised, and slaughtered"[763]:

> With respect to Label A, the Panel found that the [original] COOL measure "appears to fulfil the objective because the measure prohibits [meat derived from animals of non-US origin] from carrying a Label A".[764] Even with respect to Labels B and C, the Panel found that these labels provide at least some origin information, namely, "information on meat with regard to the *possible* … origin as defined by the measure".[765] Moreover, the Panel found that, on the whole, the [original] COOL measure provides more information to consumers than was available to them prior to its enactment.[766] The Panel also noted that the "labels required to be affixed to meat products … provide additional country of origin information that was not available prior to the [original] COOL measure" and that this "may have reduced consumer confusion that existed under the pre-COOL measure and USDA grade labelling system".[767]

7.339. The Appellate Body recalled these findings of the original panel in its attempt to complete the legal analysis under Article 2.2, and interpreted them as "suggesting that the [original] COOL measure does contribute, at least to some degree, to providing consumers with information on origin".[768] Overall, the Appellate Body concluded that "the findings of the [original panel] and undisputed facts on the record indicate that the labelling requirements under the [original] COOL measure make some contribution to the objective of that measure", but did not consider these findings sufficient "to ascertain the *degree* of contribution made by the COOL measure to such an objective."[769]

7.340. A specific point addressed by the Appellate Body was the "implications of the [original panel's] findings for assessing the contribution made by Label A to the objective of the

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[759] Appellate Body Reports, *US – COOL*, para. 463 (emphasis original).
[760] Appellate Body Reports, *US – COOL*, para. 463 (quoting Panel Reports, *US – COOL*, para. 7.695).
[761] Appellate Body Reports, *US – COOL*, para. 464 (quoting Panel Reports, *US – COOL*, para. 7.718).
[762] Panel Reports, *US – COOL*, para. 7.719. See also Appellate Body Reports, *US – COOL*, para. 465.
[763] Appellate Body Reports, *US – COOL*, para. 466 (emphasis original).
[764] (footnote original) Panel Reports, para. 7.713. The finding of the Panel in its entirety is as follows:

> 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.

[765] (footnote original) Panel Reports, para. 7.707.
[766] (footnote original) According to the Panel, the COOL measure provides "*more* information than under the previous labelling regime". (Panel Reports, para. 7.715 (emphasis original))
[767] (footnote original) Panel Reports, para. 7.717.
[768] Appellate Body Reports, *US – COOL*, para. 473.
[769] Appellate Body Reports, *US – COOL*, para. 476.

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COOL measure, both in terms of the proportion of meat sold in the United States that carries this label, and in terms of the clarity and accuracy of the information Label A conveys".[770] In this connection, the Appellate Body recalled the "considerable proportion of beef and pork [that was] exempted from the [original] COOL measure" and the "vast majority" of meat covered by the original COOL measure that would carry Label A.[771]

7.341. The Appellate Body also reviewed "multiple examples of ways in which the labelling scheme prescribed by the [original] COOL measure provides unclear, imperfect, or inaccurate information to consumers, in particular with respect to Labels B and C".[772] This included the failure of these labels to "deliver origin information as defined under the measure or as the consumer might understand it", and the "confusion" in cases where packages containing a single piece of meat would list multiple countries on the label.[773]

7.342. The Appellate Body also cited the original panel's doubt that "differentiation of origin based on the order of country names will indeed communicate accurate origin information".[774] Further, as a result of the commingling flexibilities, the Appellate Body noted the original panel's finding that "not even a 'perfect consumer who is fully informed of the meaning of different categories of labels under the [original] COOL measure' could ever 'be assured that the label precisely reflects the origin of meat as defined under the [original] COOL measure'".[775]

7.6.2.3.2 Scope of review of the amended COOL measure's degree of contribution

7.343. In addition to Labels A-C, the complainants include references to Category D muscle cuts and the ground meat label (Label E) in support of their Article 2.2 claims.[776] In the context of analysing legitimate regulatory distinctions under Article 2.1 of the TBT Agreement, we addressed the parties' disagreement as to which aspects of the amended COOL measure were relevant to our analysis.[777] In that context, we noted the Appellate Body's clarification that "in answering the question of whether the measure gives accurate information to consumers, *all* distinctions drawn by the measure are potentially relevant. By contrast, in an analysis under Article 2.1, we *only* need to examine the distinction that accounts for the detrimental impact".[778] The Appellate Body made this statement in relying on findings under Article 2.2 of the TBT Agreement to complete the legal analysis of "whether the measure is calibrated for the purposes of Article 2.1".[779]

7.344. In principle, Label D (muscle cuts from foreign-slaughtered animals) and Label E (ground meat) could potentially be relevant for our assessment of Article 2.2 – including for the amended COOL measure's degree of contribution – irrespective of whether these labels account for any detrimental impact or constitute relevant regulatory distinctions under Article 2.1. However, the complainants have unequivocally stated that in this compliance dispute they are not bringing claims with respect to Labels D and E.[780] As explained below[781], the alternative measures they have proposed under Article 2.2 specifically apply only to US-slaughtered muscle cuts that would be eligible for Labels A-C. The complainants provide no indication of how the conclusions from a relational analysis based on all distinctions of the amended COOL measure could be meaningfully compared to alternative measures pertaining only to Labels A-C.

7.345. Thus, including Labels D and E in our relational analysis under Article 2.2 would not be consonant with the manner in which the complainants have presented their arguments, and could prejudice a comparative analysis under the same provision. As the Appellate Body held in *US* –

[770] Appellate Body Reports, *US – COOL*, para. 474.
[771] Appellate Body Reports, *US – COOL*, para. 474.
[772] Appellate Body Reports, *US – COOL*, para. 475.
[773] Appellate Body Reports, *US – COOL*, para. 475 (citing Panel Reports, *US – COOL*, paras. 7.699-7.700).
[774] Appellate Body Reports, *US – COOL*, para. 475 (citing Panel Reports, *US – COOL*, para. 7.701).
[775] Appellate Body Reports, *US – COOL*, para. 475 (citing Panel Reports, *US – COOL*, para. 7.702).
[776] See, e.g. Canada's first written submission, paras. 139-140, and second written submission, para. 97; Mexico's second written submission, paras. 127-128.
[777] See section 7.5.4.2.2 above.
[778] Appellate Body Report, *US – Tuna II (Mexico)*, para. 286.
[779] Appellate Body Report, *US – Tuna II (Mexico)*, para. 286.
[780] See paras. 7.48 and 7.129 above.
[781] See section 7.6.5 below.

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Tuna II (Mexico), examining alternative measures that do not align with the scope of a relational analysis can result in "an improper comparison"[782] amounting to legal error under Article 2.2 of the TBT Agreement.[783] Accordingly, we do not examine aspects of the measure in our relational analysis which the complainants do not challenge and which they exclude in their arguments under the comparative analysis.

7.6.2.3.3 The amended COOL measure's degree of contribution

7.346. As outlined above, the Appellate Body assessed the original COOL measure's degree of contribution to its objective by considering two main criteria: the proportion of muscle cuts in the United States that actually carry labels as well as the degree of clarity and accuracy of such labels.[784] These factors are equally relevant for reviewing the degree of contribution of the amended COOL measure to its objective.

7.347. The objective of the amended COOL measure is to provide consumer information on origin. The proportion of muscle cuts that are actually labelled, as opposed to those that are exempted, is the initial determinant of the degree to which the amended COOL measure is capable of fulfilling its objective. This is because, logically, no origin information is conveyed on a mandatory basis for muscle cuts falling within in the amended COOL measure's three exemptions. As noted, the amended COOL measure only covers between 33.3% and 42.3% of all beef consumed in the United States, and between 15.9% and 16.5% of all pork muscle cuts. Conversely, between 57.7% and 66.7% of all beef consumed in the United States, and between 83.5% and 84.1% of all pork muscle cuts, are either sold in a food service establishment, as an ingredient in a processed food item, or by an entity not subject to be licensed as a "retailer".[785] This represents a substantial portion of beef and pork[786] for which the amended COOL measure does not contribute at all to providing consumer information on origin. Hence, the degree of contribution of the amended COOL measure for this substantial portion of products is zero.[787]

7.348. Origin information could be conveyed only on the portion of muscle cuts that is actually required to be labelled. Labels A-C are the labels that have been most significantly revised by the 2013 Final Rule. The introduction of point-of-production information on Labels A-C represents a clear improvement of the information formerly provided under the original COOL measure. The original panel pointed out that the limited contribution of "providing general information about the various countries in which an animal ha[d] spent time and [been] slaughtered" was not in keeping with the United States' definition of "the origin of meat based on the place where animals from which meat was derived were born, raised, and slaughtered".[788] As a result of the 2013 Final Rule,

[782] Appellate Body Report, *US – Tuna II (Mexico)*, para. 328.
[783] Appellate Body Report, *US – Tuna II (Mexico)*, para. 331.
[784] The Appellate Body noted in the original dispute that "[w]hen it came to actually applying a standard of 'fulfilment' to the [original] COOL measure, the [original p]anel noted that, as the parties agreed, information on the origin of products must be clear and accurate for it to be able to convey *meaningful information* to consumers. Therefore, '[u]nder 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'." Appellate Body Reports, *US – COOL*, para. 463 (emphasis by the Appellate Body) (quoting Panel Reports, *US – COOL*, para. 7.695). The Appellate Body also noted that "[o]n appeal, the participants disagree as to the implications of the [original p]anel's findings for assessing the contribution made by Label A to the objective of the [original] COOL measure, both in terms of the proportion of meat sold in the United States that carries this label, and in terms of the clarity and accuracy of the information that Label A conveys." Appellate Body Reports, *US – COOL*, para. 474.
[785] See paras. 7.258 and 7.262 above. The parties do not indicate that these shares have changed under the original and the amended COOL measures.
[786] The above figures correspond to all beef consumed in the United States, including Categories A-C, imported muscle cuts (Category D), and ground meat (Category E). In the case of pork, data provided by Canada and the United States show that ground pork comprises a negligible share of total US pork consumption. See parties' responses to Panel question A; Exhibit US-59. Therefore, the figures provided for pork only relate to muscle cuts. As regards beef, these figures are thus an indicative approximation of the extent to which the exemptions prevent any contribution to the COOL objective. However, we are unable to determine the proportion of exempted products within Categories A-C specifically. For pork, these figures more closely overlap with the products under review, namely those falling in Categories A-C.
[787] We recall the Appellate Body's statement that the degree of contribution "may involve an assessment of whether the measure at issue is *capable* of achieving the legitimate objective". Appellate Body Reports, *US – COOL*, footnote 928 (emphasis added).
[788] Panel Reports, *US – COOL*, para. 7.710.

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the amended COOL measure provides consumer information that now largely corresponds to the measure's definition of origin by requiring labels that specify the country(ies) of birth, raising, and slaughter.[789]

7.349. The original COOL measure's contribution to its objective was supported by the findings "that Label A ensures 'meaningful information for consumers'"[790] and by the exclusive reservation of Label A for muscle cuts solely from US-origin animals.[791] The conveyance of meaningful information on Label A is even greater under the amended COOL measure, which also maintains the exclusivity of Label A for products from animals that were *exclusively* born, raised, and slaughtered in the United States.[792]

7.350. With respect to Labels B and C, the requirements under the original COOL measure evidenced a lower degree of contribution to the objective due to *inter alia* the commingling and country order flexibilities.[793] As the original panel held, "the different and complex categories of labels under the [original] COOL measure and the operation of the COOL regime based on the commingling provisions render origin information contained in labels inaccurate and confusing."[794] We note that, under the modified requirements of the amended COOL measure, the requirement of point-of-production information and the removal of commingling on Labels B and C remedy many of the sources of inaccuracy found in the original dispute.

7.351. In particular, the amended COOL measure effectively distinguishes Labels B and C in a manner that was not the case under the original COOL measure. Label B is now required to include the United States as a country of raising, with the additional possibility of including other foreign countries of raising.[795] This appears to take care, in particular, of labelling the origin of foreign, and in particular Mexican, cattle also grazing in the United States before being slaughtered there. Label C is required to indicate the country from which livestock were imported as a country of raising. Only in the event that an animal imported for immediate slaughter also spent some amount of time in the United States – and depending on the interpretation of the applicable rules[796] – could Label C possibly include the United States as a country of raising. However, the evidence shows that, in practice, Category C livestock are typically of solely Canadian origin prior to US-slaughter. Hence, it does not appear that Label C would be likely to indicate the United States as a country of raising in a typical Category C scenario.[797]

7.352. In light of the above, the amended COOL measure makes "some contribution" to the objective of providing consumer information on origin. For covered products, the amended COOL measure contributes to the relevant objective to a greater degree than the original COOL measure. As regards non-covered products, the amended COOL measure continues to exempt "a considerable proportion of beef and pork"[798] for which it does not contribute at all to the objective of providing consumer information on origin.

7.353. Ascertaining the amended COOL measure's precise *degree* of contribution requires further scrutiny of the information actually provided on labels for the covered products relevant to our analysis. On the one hand, the majority of muscle cuts that are actually labelled under the amended COOL measure will be eligible for Label A, which continues to provide "meaningful information for consumers"[799] in accordance with the definition of origin based on birth, raising, and slaughter. Muscle cuts carrying Labels B and C will similarly provide point-of-production information according to rules that will likely operate to distinguish the two labels. The elimination

[789] See section 7.3.1 above and 2013 Final Rule, p. 31367.
[790] Appellate Body Reports, *US – COOL*, para. 473 (citing Panel Reports, *US – COOL*, para. 7.718).
[791] Appellate Body Reports, *US – COOL*, para. 473 (citing Panel Reports, *US – COOL*, para. 7.713).
[792] See para. 7.237 above.
[793] Appellate Body Reports, *US – COOL*, para. 475 (citing Panel Reports, *US – COOL*, paras. 7.701-7.702).
[794] Panel Reports, *US – COOL*, para. 7.715. We note that the commingling flexibility also implicated muscle cuts from animals of exclusively US-origin to the extent that Category A muscle cuts were commingled with those from Categories B and C.
[795] See paras. 7.235-7.244 and Table 13 above.
[796] See paras. 7.103-7.110 above.
[797] See paras. and 7.245-7.254 and Table 14 above.
[798] See Appellate Body Reports, *US – COOL*, para. 474 and Panel Reports, *US – COOL*, para. 7.417.
[799] See Appellate Body Reports, *US – COOL*, para. 474 and Panel Reports, *US – COOL*, para. 7.718.

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of the commingling and country order flexibilities generally remedies the original COOL measure's potential to provide misleading and inaccurate information through overlapping possibilities of Labels A-C.[800]

7.354. On the other hand, the degree of contribution achieved for Labels A-C is limited to some extent by the potential inaccuracy and incompleteness of information with respect to the country(ies) of raising. As noted, under certain conditions, the amended COOL measure allows omission of non-US countries of raising from the label even though an animal may have spent a substantial portion of its life outside the United States and as little as 15 days inside the United States before slaughter.[801] This potential for inaccurate or incomplete information lowers the amended COOL measure's degree of contribution for Category B muscle cuts. Conversely, Category A muscle cuts have only US origin and, as explained, Category C muscle cuts would typically show that only the animal's slaughter occurred in the United States.[802]

7.355. As to the appearance and placement of labels, we recall that the amended COOL measure allows for some discretion as to how retailers convey country of origin information to consumers, while stipulating that flexibilities as to label placement and abbreviation "are permitted as long as the information can be clearly understood by consumers".[803] Based on the evidence of actual labels submitted, we cannot draw conclusions about label accuracy from this labelling discretion and consequently are unable to determine its implications for the amended COOL measure's degree of contribution to providing consumer information on origin.[804]

7.356. In conclusion, we find that the amended COOL measure contributes to the objective of providing consumer information on origin to a significant degree for products carrying Labels A-C. At the same time, the amended COOL measure does not make any contribution for products exempted from its coverage that would otherwise carry such labels. Overall, the amended COOL measure thus makes a considerable but necessarily partial contribution to its objective of providing consumer information on origin.

7.6.3 The amended COOL measure's trade-restrictiveness

7.357. The parties concur[805] that trade-restrictiveness means "having a limiting effect on trade"[806]. However, they disagree how this should be assessed in the context of Article 2.2 of the TBT Agreement.

7.358. The complainants consider that trade-restrictiveness amounts to affecting the conditions of competition to the detriment of imported products.[807] They refer[808] to the original panel's approach and finding in this regard[809], which, they point out, the Appellate Body did not modify.[810] They note that the original panel found that, due to segregation, the original COOL measure altered the conditions of competition to the detriment of imported livestock.[811] The complainants refer to their arguments under Article 2.1 of the TBT Agreement, and contend that the amended COOL measure continues to alter, and in fact aggravates, the conditions of competition to the detriment of imported livestock.[812] They note that in the context of Article 2.2, the Appellate Body relied on the original panel's analysis of detrimental impact to find that the

[800] See 7.5.4.2.4.4 above.
[801] See paras. 7.233-7.244 above.
[802] See paras. 7.245-7.254 above.
[803] 2013 Final Rule, p. 31369.
[804] See paras. 7.255-7.256 above.
[805] Canada's first written submission, para. 110, and second written submission, para. 71; Mexico's first written submission, para. 170; and United States' first written submission, para. 154.
[806] Appellate Body Reports, *US – COOL*, para. 375.
[807] Canada's first written submission, para. 110.
[808] Canada's first written submission, para. 110.
[809] Panel Reports, *US – COOL*, para. 7.575.
[810] Appellate Body Reports, *US – COOL*, para. 381.
[811] Canada's first written submission, para. 122; Mexico's first written submission, para. 170.
[812] Canada's first written submission, paras. 123 and 125; Mexico's first written submission, para. 172.

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original COOL measure had a "considerable degree of trade-restrictiveness"[813], and assert that this is aggravated under the amended COOL measure.[814]

7.359. The United States concedes that the amended COOL measure is trade restrictive.[815] However, according to the United States, trade-restrictiveness refers to the restriction of trade flows, not to discrimination[816], which is "subject to a separate provision".[817] The United States recalls that Articles 2.1 and 2.2 of the TBT Agreement are "separate obligation[s]", and "Article 2.2 is not a specific application of Article 2.1".[818] The United States notes that in *US – Tuna II (Mexico)*, the Appellate Body cautioned that the analysis under one Article is not dispositive of the other[819], and determined that the challenged measure in that dispute was inconsistent with Article 2.1, while not inconsistent with Article 2.2.[820]

7.360. The United States adds[821] that Article 2.2 was interpreted as allowing for "some trade-restrictiveness"[822], and argues that "it is impossible to square this approach with the complaining parties' contention that the term 'trade-restrictive' refers to discrimination" because "[i]t simply does not make sense to discuss how Article 2.2 allows for 'some' discrimination."[823] According to the United States, the Appellate Body noted that "what Article 2.2 disciplines is 'trade restrictive *effect*'".[824] Accordingly, the United States contends, trade-restrictiveness should be interpreted as limiting market access,[825] and it should be assessed in a purely quantitative analysis.[826]

7.361. Canada responds that the concept of trade-restrictiveness under the TBT Agreement is not different from the same concept under the GATT 1994[827], and does not require the demonstration of actual trade effects, as the original panel recalled.[828] Canada notes that the Appellate Body established that the original COOL measure was trade-restrictive by referencing the Article 2.1 findings of the original panel as demonstrating a "considerable degree of trade restrictiveness insofar as [the original COOL measure] ha[d] a limiting effect on the competitive opportunities for imported livestock".[829] Canada recalls that the Appellate Body added that "[t]his was confirmed by the Panel's analysis of the actual trade effects of the COOL measure."[830] According to Canada, this shows that trade-restrictiveness may be expressed in qualitative terms.[831]

7.362. Mexico adds that the original panel "examined the meaning of the term 'trade-restrictive'[832], reviewed the applicable GATT and WTO jurisprudence[833], and concluded (i) that 'the scope of the term 'trade-restrictive' is broad'[834] and (ii) that the concept of 'trade-restrictiveness' 'does not require the demonstration of any actual trade effects, as the focus

[813] Appellate Body Reports, *US – COOL*, para. 477.
[814] Canada's first written submission, paras. 124 and 125; Mexico's first written submission, paras. 170 and 172.
[815] United States' first written submission, para. 143. See also United States' second written submission, para. 106.
[816] United States' first written submission, para. 153.
[817] United States' first written submission, para. 153.
[818] United States' first written submission, para. 156.
[819] United States' first written submission, para. 156 (citing Appellate Body Report, *US – Tuna II (Mexico)*, paras. 307-308).
[820] United States' first written submission, para. 156.
[821] United States' first written submission, para. 154.
[822] United States' first written submission, para. 154 (citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 319 and Appellate Body Reports, *US – COOL*, para. 375).
[823] United States' first written submission, para. 154. See also United States' second written submission, para. 107.
[824] United States' first written submission, para. 155 (emphasis added).
[825] United States' first written submission, para. 155.
[826] United States' first written submission, para. 184.
[827] Canada's second written submission, para. 72.
[828] Canada's second written submission, para. 72 (citing Panel Reports, *US – COOL*, para. 7.572).
[829] Canada's second written submission, para. 73 (citing Appellate Body Reports, *US – COOL*, para. 477).
[830] Canada's second written submission, para. 73 (citing Appellate Body Reports, *US – COOL*, para. 477 (emphasis added by Canada)).
[831] Canada's second written submission, para. 74.
[832] (footnote original) Panel Reports, *US – COOL*, paras. 7.566-7.568.
[833] (footnote original) Panel Reports, *US – COOL*, paras. 7.569-7.572.
[834] (footnote original) Panel Reports, *US – COOL*, para. 7.572.

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is on the competitive opportunities available to imported products'[835]."[836] Mexico recalls that "[t]he [original p]anel's ultimate conclusion that the COOL measure is 'trade-restrictive' within the meaning of Article 2.2 by affecting the competitive conditions of imported livestock was accepted by the Appellate Body[837]."[838] Quoting the Appellate Body's relevant findings[839], Mexico argues that "[t]he Appellate Body has clearly stated that the [original p]anel's finding in the original proceedings that the COOL Measure denied equal competitive opportunities was sufficient to establish a 'considerable degree of trade-restrictiveness insofar as it has a limiting effect on the competitive opportunities for imported livestock.'[840]"[841] Mexico adds that it has demonstrated the trade-restrictiveness of the amended COOL measure by showing evidence similar to that taken into account by the Appellate Body.[842]

7.363. As the parties note, the Appellate Body summarized the legal test of trade-restrictiveness under Article 2.2 of the TBT Agreement as follows[843]:

> By its terms, Article 2.2 requires an assessment of the necessity of the trade-restrictiveness of the measure at issue. In this regard, the Appellate Body in *US – Tuna II (Mexico)* defined "trade-restrictive" to mean "having a limiting effect on trade".[844] Moreover, it found that the reference in Article 2.2 to "unnecessary obstacles" implies that "some" trade-restrictiveness is allowed and, further, that what is actually prohibited are those restrictions on international trade that "exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective".[845]

7.364. In attempting to complete its Article 2.2 analysis in the original dispute, the Appellate Body noted the original panel's "finding that the COOL measure is '"trade-restrictive" within the meaning of Article 2.2 by affecting the competitive conditions of imported livestock'."[846] The Appellate Body also noted the original panel's distinction between the focus on competitive opportunities and actual trade effects: "the scope of the term 'trade-restrictive' is broad and 'does not require the demonstration of any actual trade effects, as the focus is on the competitive opportunities available to imported products'."[847]

7.365. The Appellate Body then recalled[848] the original panel's main findings under Article 2.1 with regard to changes to the "conditions of competition" between US and foreign livestock resulting from the original COOL measure.[849] In particular, the Appellate Body noted that the original panel had "found that 'by imposing higher segregation costs on imported livestock", the original COOL measure negatively affects the conditions of competition of imported livestock *vis-à-vis* like domestic livestock in the US market.'[850]"[851]

7.366. Based on this summary of the original panel's main Article 2.1 findings on changes to competitive conditions, the Appellate Body established that the original COOL measure was trade-restrictive within the meaning of Article 2.2. The Appellate Body further determined the original COOL measure's degree of trade-restrictiveness:

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[835] (footnote original) Panel Reports, *US – COOL*, para. 7.572.
[836] Mexico's second written submission, para. 102.
[837] (footnote original) Appellate Body Reports, *US – COOL*, paras. 477 and 479.
[838] Mexico's second written submission, para. 102.
[839] Appellate Body Reports, *US – COOL*, para. 477, footnote 981.
[840] (footnote original) Appellate Body Reports, *US – COOL*, paras. 477 and 479.
[841] Mexico's second written submission, para. 103 (citing Appellate Body Reports, *US – COOL*, paras. 477 and 479).
[842] Mexico's second written submission, para. 104.
[843] Appellate Body Reports, *US – COOL*, para. 375.
[844] (footnote original) Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.
[845] (footnote original) Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.
[846] Appellate Body Reports, *US – COOL*, para. 477 (footnote omitted).
[847] Appellate Body Reports, *US – COOL*, para. 477 (footnotes omitted).
[848] Appellate Body Reports, *US – COOL*, para. 477.
[849] (footnote original) Panel Reports, *US* – COOL, para. 7.387.
[850] (footnote original) Panel Reports, *US – COOL*, para. 7.574.
[851] Appellate Body Reports, *US – COOL*, para. 477.

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> [A]lthough the Panel declined to make a finding "on the level of trade-restrictiveness" of the COOL measure, its findings suggest it considered the measure to have a *considerable degree of trade-restrictiveness* insofar as *it has a limiting effect on the competitive opportunities for imported livestock as compared to the situation prior to the enactment of the COOL measure*.[852]

7.367. As the complainants point out, it is only after having reached this conclusion that the Appellate Body referenced the original panel's finding on actual trade effects, stating that "[t]his was confirmed by the [original p]anel's analysis of the actual trade effects of the COOL measure."[853]

7.368. In light of the findings in the original dispute, we are unable to accept the argument that trade-restrictiveness under Article 2.2 is limited to actual and quantifiable effects on trade or market access. Instead, following the Appellate Body's approach, we review the trade-restrictiveness of the amended COOL measure by relying on our findings under Article 2.1 concerning the amended COOL measure's detrimental impact on the competitive conditions for imported livestock.

7.369. As noted, the United States also accepts that the amended COOL measure is trade restrictive.[854] We have found that the amended COOL measure increases the detrimental impact on the competitive opportunities of imported livestock as compared to the original COOL measure. We have concluded that this is corroborated by witness statements, and that it is also confirmed to some extent by economic and econometric evidence submitted by Canada on the actual trade effects of the amended COOL measure.

7.370. Given the increased detrimental impact on the competitive opportunities of imported livestock, we conclude that the amended COOL measure has increased the "considerable degree of trade-restrictiveness" found by the Appellate Body in the original dispute.[855] We recall, however, that although a labelling scheme may entail some degree of trade-restrictiveness, the trade-restrictiveness of a challenged measure constitutes only one factor of the legal test, and does not alone amount to a violation of Article 2.2 of the TBT Agreement.[856]

7.6.4 Risks of non-fulfilment of the amended COOL measure's objective

7.371. In assessing whether a technical regulation is "more trade-restrictive than necessary to fulfil a legitimate objective", Article 2.2 of the TBT Agreement mandates taking into account "the risks non-fulfilment [of a legitimate objective] would create." According to the Appellate Body, this is a "further element of weighing and balancing"[857] under Article 2.2.

7.372. We have found that the objective of the amended COOL measure remains the provision of consumer information on origin[858], and that this is a legitimate objective.[859]

7.373. Both Canada and Mexico argue that the risks of non-fulfilment of the amended COOL measure's objective are low[860], partly as a result of what the complainants allege is US consumers' lack of interest in country of origin information and due to their unwillingness to pay for the information.[861] The United States counters that US consumer interest in country of origin labelling

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[852] Appellate Body Reports, *US – COOL*, para. 477 (footnotes omitted, emphasis added).
[853] Appellate Body Reports, *US – COOL*, para. 477 (footnote omitted).
[854] United States' first written submission, para. 143. See also United States' second written submission, para. 106.
[855] See Appellate Body Reports, *US – COOL*, para. 477.
[856] See section 7.6.1 above.
[857] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 321; and *US – COOL*, para. 377. See also Canada's first written submission, para. 114; Mexico's first written submission, para. 159; and United States' first written submission, para. 157.
[858] See section 7.6.2.1 above.
[859] See section 7.6.2.2 above.
[860] Canada's first written submission, para. 138; Mexico's first written submission, para. 176.
[861] Canada's first written submission, paras. 141-144, response to Panel question No. 36, para. 67, and comments on responses to Panel question No. 36, para. 45; Mexico's first written submission, paras. 95, 175-176, 185 and 228.

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is high[862], and that consumers are willing to pay for the information conveyed on labels under the amended COOL measure.[863]

7.6.4.1 Legal test and relevant factors

7.374. According to the Appellate Body, reviewing "the risks non-fulfilment [of a legitimate objective] would create" entails assessing "the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective".[864]

7.375. Article 2.2 provides that "[i]n assessing … risks, relevant elements of consideration are *inter alia*: available scientific and technical information, relayed processing technology or intended end uses of products." The complainants' relevant arguments and evidence address only what could be considered technical information relating to consumer interest in, and willingness to pay for, origin information. In the original dispute, the Appellate Body briefly addressed the risks non-fulfilment of the original COOL measure's objective would create by taking into account consumer interest in, and willingness to pay for, country of origin information.[865] Like the Appellate Body, we address these factors for the risks non-fulfilment of the amended COOL measure's objective would create.

7.376. In response to the Panel's question on the elements for assessing the risks non-fulfilment of the objective would create, Mexico points out that Article 2.2 contains an illustrative list and that "the context of Article 2.2 (in particular, explicit requirement for the assessment of such risks, indication of relevant elements for conducting the assessment) suggests that the Panel should examine whether *actual* risks exist."[866] However, Mexico does not explain how an assessment of *actual* risks should be carried out or how such assessment may differ from assessing the risks non-fulfilment of the amended COOL measure's objectives would create.

7.377. Canada suggests several additional factors for assessing the risks non-fulfilment of the amended COOL measure's objective would create. In particular, Canada refers to "whether the information is provided for a broad range of products and to what extent products in a category of the measure are covered."[867] Canada argues that "[i]n this case, while the amended COOL measure applies to a series of categories of products, it applies to only a small proportion of beef and pork."[868] This is an issue we have addressed in the context of legitimate regulatory distinctions under Article 2.1 and also in our Article 2.2 analysis of the amended COOL measure's degree of contribution to its objective. Hence, we see no reason to address this factor again in the context of the risks non-fulfilment of the amended COOL measure's objectives would create.

7.378. Canada also suggests that we address "[w]hether the information relates to risks to human or animal health, safety or the environment or is provided for any other serious reasons related to the protection of the public."[869] Canada argues that "[i]n this case, none of those reasons applies."[870] This suggested element is related to a more general argument Canada makes on the relative importance of values and interests protected by the measure. Relying on the necessity test of Article XX of the GATT 1994, Canada argues that "the more important the values or interests underlying the objective – that is, the greater the risks and severity of the consequences of not achieving the objective, the more likely it is that a restrictive measure will be found to be 'necessary'[871]."[872] Canada thus suggests that the relative importance of values or

[862] United States' response to Panel question No. 13, para. 26.
[863] United States' response to Panel question No. 13, paras. 28-29.
[864] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 321; and *US – COOL*, para. 377. See also Canada's first written submission, para. 114; Mexico's first written submission, para. 159; and United States' first written submission, para. 157.
[865] Appellate Body Reports, *US – COOL,* para. 478.
[866] Mexico's response to Panel question No. 36 (emphasis original).
[867] Canada's response to Panel question No. 36.
[868] Canada's response to Panel question No. 36.
[869] Canada's response to Panel question No. 36.
[870] Canada's response to Panel question No. 36.
[871] (footnote original) For example, in the context of the necessity test in Article XX, the Appellate Body in *Korea – Various Measures on Beef* stated that, "[t]he more vital or important [the] common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument." See Appellate Body Report, para. 162.

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interests that it is the objective of the measure to protect is directly linked to the risks non-fulfilment would create under Article 2.2 of the TBT Agreement.

7.379. We have held that the relative importance of interests or values protected by a measure is not a separate factor of the Article 2.2 legal test.[873] We do not exclude the possibility for overlap between analytical components of the legal obligations of the TBT Agreement and the GATT 1994. The Appellate Body has held that "the two Agreements should be interpreted in a coherent and consistent manner."[874] Ultimately, however, the text of the TBT Agreement requires us to assess the necessity of a technical regulation's trade-restrictiveness by "taking account of the risks non-fulfilment would create".[875] In the Appellate Body's reading, this factor of an Article 2.2 analysis is to be examined according to two criteria: the nature of the risks and the gravity of the consequences. We need not define the precise relationship between the nature of risks and gravity of the consequences of the non-fulfilment of a legitimate objective under the TBT Agreement, on the one hand, and the relative importance of the interests or values protected under Article XX of the GATT 1994, on the other. We confine our analysis to the express terms of the TBT Agreement, as clarified by the Appellate Body, instead of defining the precise relationship between terms in the TBT Agreement and the GATT 1994.

7.380. Finally, Canada suggests that we assess risks according to "[w]hether the design and architecture of the measure consistently reflect the importance of the objective."[876] Canada argues that "[i]n this case, there is no logic to the proposition that consumers interested in origin information care less when buying ground meat, or when buying meat in restaurants, in butcher shops or in the form of processed food."[877] We note that there may be a variety of possible reasons unrelated to risks for exempting or treating differently certain product categories under a Member's technical regulation, such as regulatory or compliance costs. Further, we consider that the amended COOL measure's treatment of different categories of meat products is more directly connected to the degree of contribution under Article 2.2 and the legitimacy of regulatory distinctions under Article 2.1.[878] To the extent that Canada's suggestion concerns the relative importance of the amended COOL measure's objective, we have explained the legal test that it is our task to apply to the complainants' Article 2.2 claims, including as regards the risks non-fulfilment would create.

7.381. In light of the above, we review the risks non-fulfilment of the amended COOL measure's objective would create by assessing the nature of the risks and the gravity of the consequences. We do this by assessing consumer interest in, and willingness to pay for, country of origin information, in accordance with the Appellate Body's approach in the original dispute.

7.382. The parties argue that each other's evidence on consumer interest and willingness to pay is either irrelevant[879], or biased[880] and of dubious scientific value.[881] As the Appellate Body explained, Article 11 of the DSU requires a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis

[872] Canada's first written submission, para. 116.
[873] See section 7.6.1.3 above.
[874] Appellate Body Report, *US – Clove Cigarettes*, para. 91.
[875] See para. 7.310 above. Mexico itself argues that Article 2.2 of the TBT Agreement differs from Article XX of the GATT 1994 by virtue of its reference to the "risks that non-fulfilment [of the objective] would create".
[876] Canada's response to Panel question No. 36.
[877] Canada's response to Panel question No. 36.
[878] See sections 7.5.4.2 and 7.6.2.3 above.
[879] See Mexico's response to Panel question No. 15, para. 15; Mexico's comments on responses to Panel question No. 13, paras. 14-16; and the United States' response to Panel questions No. 13, para. 28 and No. 15, para. 36.
[880] Canada's comments on responses to Panel question No. 15, para. 8; Mexico's response to Panel question No. 15, para. 18, and comments on responses to Panel question No. 13, para. 13; and United States' comments on responses to Panel question No. 15, para. 29.
[881] Mexico's comments on responses to Panel question No. 13, paras. 17 and 20.

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in that evidence."[882] We are also mindful that we "are not required to accord to factual evidence of the parties the same meaning and weight as do the parties."[883]

7.383. Accordingly, we carry out a critical assessment of the evidence submitted by the parties on consumers' interest in, and willingness to pay for, country of origin information. As we consider that these are two facets of consumer demand for origin information, we assess them separately. In light of the parties' arguments and for the sake of completeness, we address the parties' evidence both in terms of general country of origin information and in terms of point-of-production origin information according to the country of birth, raising, and slaughter.[884]

7.6.4.2 Consumer interest

7.6.4.2.1 Consumer interest in general country of origin information

7.384. The complainants submit various studies in support of their argument that US consumers do not have an interest in country of origin information.[885]

7.6.4.2.1.1 Summary KSU Study Fact Sheet and KSU studies

7.385. The complainants contend that mandatory country of origin labelling has not brought about any identifiable changes to consumer demand for the products subject to the disputed labelling rules relative to the products exempt from labelling.[886] Canada submits an article, the summary KSU Study Fact Sheet, which summarizes the first known post-implementation assessment of how consumer demand has been influenced by mandatory country of origin labelling rules in the United States.[887] The methodology of the KSU Study Fact Sheet and the underlying assessments are contained in two separate studies, KSU Revealed Demand[888] and KSU Consumer Valuation, each submitted by both complainants.[889] According to the KSU Revealed Demand study, relative demand for covered meat products has not changed following the implementation of the original COOL measure.[890] According to the KSU Study Fact Sheet, the KSU Consumer Valuation study shows that US consumers are unaware of the measure and do not look for meat origin information.[891]

7.386. We are not persuaded of the relevance of the two KSU studies and the summary KSU Study Fact Sheet for our findings on consumer demand for general country of origin information.

7.387. As regards the KSU Revealed Demand study, it demonstrates unchanged relative demand for the products covered by the original COOL measure. However, we are unable to conclude from this study that this unchanged demand is necessarily attributable to a lack of interest in the type of information mandated by the original COOL measure. There could be various reasons for which relative demand for the covered and exempted products has remained steady. For example, consumers might have found the labels confusing[892], and demand for both the covered and

[882] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 254; *Philippines – Distilled Spirits*, para. 135; *Brazil – Retreaded Tyres*, para. 185; and *EC – Hormones*, paras. 132-133.

[883] Appellate Body Report, *Australia – Salmon*, para. 267.

[884] In fact, despite finding that the objective of the original COOL measure was the provision of consumer information on origin, in reviewing the risks non-fulfilment would create the Appellate Body referenced both "country of origin labelling of beef and pork" in general, and specific "information on the countries of birth, raising, and slaughter of livestock". Appellate Body Reports, *US – COOL*, para. 478.

[885] Exhibits CDA-84, CDA-85, CDA-154, and MEX-34.

[886] Canada's first written submission, para. 143; Mexico's first written submission, para. 176; Exhibits CDA-82, CDA-83, MEX-35, MEX-36, and MEX-62.

[887] Exhibit CDA-82.

[888] Exhibits CDA-83, MEX-35, and MEX-62.

[889] Exhibits CDA-84 and MEX-34.

[890] Exhibits CDA-83, MEX-35, and MEX-62.

[891] Exhibit CDA-82, p. 2.

[892] In fact, this was what Canada and Mexico claimed in the original dispute. See Panel Reports, *US – COOL,* paras. 7.653, 7.655-7.658, 7.660, and 7.676. In *US – COOL* the Appellate Body observed that "with respect to meat bearing Labels B and C, however, any contribution made [to the fulfilment of the original COOL measure's legitimate objective] is much more limited because the information may be confusing and inaccurate". Appellate Body Reports, *US – COOL*, para. 476. See also Canada's first written submission, paras. 77 and 151; and Mexico's first written submission, para. 176.

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exempted products might be inelastic for reasons unrelated to the measure, such as consumer preferences for specific types of meat or other foodstuffs. As the United States notes, the complainants "fail to explain how a change in a consumer's purchasing patterns is probative of consumer demand for the provision of certain information, which only constitutes one element of decision making."[893]

7.388. The KSU Revealed Demand study concludes that there is a net economic welfare loss because of the combined effect of steady demand for the covered products and labelling costs.[894] We have not been persuaded that there is a direct link between this conclusion and consumer interest in general country of origin information. The KSU Revealed Demand study relies on grocery-store sales data for the covered products and a number of other products over a period of time. This, however, has no direct bearing on whether consumers buying the covered products have experienced an increase in welfare as a result of country of origin information. Indeed, as the USDA explains, even if "the economic benefits from the COOL requirements are positive", they are "difficult to quantify".[895] The KSU Revealed Demand study addresses net economic welfare for *producers* and consumers in terms of variables that do not capture specific *consumer* welfare, let alone consumer interest in country of origin information.

7.389. Turning to the KSU Consumer Valuation survey, it finds that US consumers are largely unaware of the original COOL measure and its legal status.[896] The complainants reference this as further demonstration of consumers' low interest in country of origin labelling.[897] However, this assumes that consumer awareness of a given measure is a reliable proxy for consumer interest in the objective of that measure. Absent substantiation of such an assumption, we question the relevance of US consumers' awareness of the amended COOL measure for our consideration of consumer interest in general country of origin information.

7.390. Finally, according to the summary KSU Study Fact Sheet, a typical US consumer does not look for meat origin information.[898] As far as we can tell from the KSU Study Fact Sheet, this conclusion is based on in-person surveys and experiments that were conducted in grocery stores in Texas in 2012. The results seem to have been reported in a working paper from 2012, referenced in the KSU Study Fact Sheet as "Klain et al, 2012". However, this working paper has not been submitted by any of the parties. Having reviewed the underlying studies before us for the KSU Study Fact Sheet (i.e. the KSU Revealed Demand and KSU Consumer Valuation studies), we find no specific, detailed explanation for the KSU Study Fact Sheet's conclusion.

7.6.4.2.1.2 Studies on food values

7.391. Canada submits a study pertaining to US consumers' preferred food values[899] in support of its argument that origin information is among the least important food values for US consumers.[900] As regards its methodology, the survey acknowledges that it involved a small and not necessarily fully representative sample of US consumers.[901] The consumers consulted were not asked questions about meat in particular, but about food in general.[902] As borne out by the evidence put forth by the United States in the context of willingness to pay, "the value of country-of-origin information is *product specific* even within a product category (e.g. meat)."[903] Based on the

[893] United States' comments on responses to Panel question No. 13. The same reservations apply to a study submitted by Mexico with regard to demand for shrimp, which, like KSU Revealed Demand study, shows no change in demand for shrimp following the original COOL measure's entry into force. Exhibit MEX-36.

[894] Exhibits CDA-83 and MEX-62, p. 245. See also Exhibit MEX-35.

[895] 2009 Final Rule, p. 15647.

[896] Exhibits CDA-84 and MEX-34, p. 14.

[897] Canada's first written submission, para. 143; Mexico's first written submission, para. 176.

[898] Canada's first written submission, para. 143 (citing Exhibit CDA-82, p. 2).

[899] Exhibit CDA-85.

[900] Canada's first written submission, para. 144.

[901] Exhibit CDA-85. Only 220 individuals out of the two thousand households asked responded, of which 176 were used for the analysis. The profile of the respondents was 65% male, 61% had a college degree and the average age was 56 years whereas the average income was US$ 74,000. It is stated that "work such as that presented here should be repeated with a larger and more representative sample of consumers", and the study's sample is characterised as "somewhat small". Exhibit CDA-85, pp. 193-194.

[902] See Exhibit CDA-85, p. 191: "previous studies dealt specifically with beef steaks, whereas our study deals with food in general".

[903] Exhibit US-52, p. 22 (emphasis original).

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evidence before us, we have no reason to consider that consumer interest in general country of origin information would not be similarly product specific.

7.392. Canada also submitted a working paper applying a similar methodology as the aforementioned study that relates specifically to meat, as well as other products.[904] This working paper involved a larger, more representative sample of consumers who were asked specifically about food values in relation to ground beef, beef steak, chicken breast, and milk.[905] The working paper concludes that, compared to other food values, such as food safety, consumers do not value origin highly.

7.393. The questions posed in the working paper referenced origin as follows: "the extent to which the locations and identities of producers and processors are known".[906] We are not inclined to rely on this evidence as proof of consumer general interest in covered products' country of origin, given that origin has been referenced very differently from its definition in the original and amended COOL measures. For us, it cannot be excluded that consumers might have answered differently had origin been defined more consistently with the original or amended COOL measures.

7.394. In any event, any relevance of the results of the above-mentioned study and working paper submitted by Canada on food values is at most indirect for our purposes. Both documents were designed in a way that enquired about food origin in relation to other values.[907] That consumers may value origin less than other values does not necessarily speak to the absolute value consumers attach to origin.

7.6.4.2.1.3 Letters and opinion polls submitted by the United States

7.395. The United States submits evidence in the form of letters of support from individuals, consumer groups, and associations, and opinion polls conducted domestically, with a view to demonstrating that there is considerable consumer interest in country of origin labelling in general.[908]

7.396. Much of this evidence was also submitted by the United States in the original dispute.[909] In the context of reviewing the original COOL measure's objective, the original panel observed that the evidence "generally refers to comments made during the legislative process, hence it may not necessarily prove … consumer demand calling for the pursuit of the stated objective".[910] Assessing the risks non-fulfilment of the amended COOL measure's objective would create, the Appellate Body held that the original panel had thus "cast doubt" on the probative value of the evidence that the United States adduced to demonstrate consumer interest.[911] The same might apply to a significant proportion of the letters and polls submitted by the United States in this compliance dispute.

[904] Exhibit CDA-154.
[905] Exhibit CDA-154, p. 5.
[906] Exhibit CDA-154, Table 1. It is also stated that "*Origin/Traceability* is more encompassing than simply *Origin* and can incorporate preferences for a country of origin, for locally produced food, and/or for a well-documented supply chain." Exhibit CDA-154, p. 5 (emphasis original).
[907] Exhibit CDA-85, p. 191: "The importance of each food value was estimated relative to origin".
[908] United States' response to Panel question No. 13, paras. 25-27, and Exhibits US-48, US-68, US-69, US-70, and US-71.
[909] Exhibits US-68, US-69, US-70, and US-71 were submitted as Exhibits US-117, US-5, US-116, and US-123 respectively in the original dispute. Exhibit US-48, presenting the results of a telephone survey from 2010, was not submitted in the original dispute.
[910] Panel Reports, *US – COOL,* para. 7.647.
[911] Appellate Body Reports, *US – COOL,* para. 450.

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7.397. The relevant piece of US evidence before this compliance Panel, but not the original panel, is an opinion poll based on telephone interviews conducted in October 2010. The poll was based on responses from 1014 individuals to the following question:

> Suppose a cow is born and raised in Mexico, and then sent to the U.S. to be fattened for two months, slaughtered and sold. If you saw the meat from this animal in your supermarket, which of the following labels would you prefer it to have?
>
> - Product of U.S. and Mexico
> - Product of Mexico
> - Product of U.S.
> - Other (specify)
> - Don't know[912]

7.398. The poll concludes that "[n]early half (47%) of consumers said they prefer comprehensive labeling – the label for meat from an animal raised both in the U.S. and Mexico should reflect the animal's complete history."[913]

7.399. We note that the poll, in particular the question and the possible categories of responses, assumes that consumers would like some form of origin labelling. In fact, the poll does not explicitly ask whether or not consumers would like to have meat carry labels with origin information. Rather, the question focuses on what kind of information should be shown on the label. Accordingly, we cannot assume that 47% of the consumers consulted, let alone 47% of all US consumers, would actually be interested in having a meat label with country of origin information. This poll – together with the other letters and poll submitted by the United States – only suggests that there is some consumer interest in country of origin information in general.

7.6.4.2.2 Consumer interest in point-of-production origin information

7.400. The complainants submit no evidence pertaining in particular to consumer interest in point-of-production information on the animal's place of birth, raising, and slaughter.

7.401. The above-mentioned studies invoked by the complainants[914] do not contain any findings with regard to labelling specifically in accordance with the requirements of the amended COOL measure, which, as explained earlier[915], differ from the original COOL measure as regards point-of-production information.

7.402. For instance, consumers responding to the KSU Consumer Valuation study had to choose between three distinct labels: "Product of United States", "Product of Canada, Mexico and US", and "Product of North America". None of the three labels makes any reference to the animal's country of birth, raising, and slaughter. Similarly, the survey on demand for shrimp that Mexico submits is not concerned with labels containing information on the country of birth, raising, and slaughter/harvest information.[916]

7.403. Likewise, the KSU Revealed Demand study relies on grocery-store sales data collected from 2007 until 2011, that is to say two years before and after the entry into force of the 2009 Final Rule.[917] As the stagnation in demand observed by the study is relevant only to the period of time when the original COOL measure was in force, it does not show how demand might be impacted by information on the animal's country of birth, raising, and slaughter.

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[912] Exhibit US-48, p. 3.
[913] Exhibit US-48, p. 3.
[914] Exhibits CDA-82, CDA-83, CDA-84, MEX-34, MEX-35, MEX-36, and MEX-62.
[915] See section 7.3.1 above.
[916] Exhibit MEX-36.
[917] Exhibits CDA-83 and MEX-62, p. 237. See also Exhibit MEX-35.

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7.404. The United States submits various pieces of evidence pertaining specifically to consumer interest in information on the animal's place of birth, raising, and slaughter.[918] Some of the United States' relevant exhibits had been submitted in the original dispute.[919] Most are letters of support from individual consumers and consumer groups and organizations, as well as comments on the legislative proposal for country of origin labelling.[920] In this regard, we recall that the original panel had "cast doubt" on the probative value of this evidence, as noted and relied upon by the Appellate Body.[921]

7.405. The United States also submits a press release from an association of consumer organizations reporting the results of a telephone survey undertaken in 2013.[922] Two questions in the survey enquired about 1000 US individuals' interest in country of origin labels showing the animal's country(ies) of birth, raising, and slaughter. The press release concludes that "a large majority of Americans continue to strongly support mandatory country of origin labeling for fresh meat and strongly favor requiring meat to be labeled with even more specific information about where the animals were born, raised and processed."[923] Conversely, Mexico points out that this press release was issued right before the finalization of the amended COOL measure, and argues that the survey was commissioned and designed to support the trade association's political position.[924]

7.406. We note that the press release makes extensive reference to the USDA's regulatory process leading towards the finalization of the amended COOL measure. Further, the press release explicitly references a letter addressed to the USDA in support of its proposed regulatory changes following the original dispute.

7.407. We recall the Appellate Body's above-mentioned caution with respect to the relevance of letters and polls submitted in the original COOL legislative process. The press release submitted by the United States may similarly be regarded with caution insofar as it may be connected to a particular interest expressed in the regulatory process leading to the adoption of the amended COOL measure. On balance, we read this press release and its survey as showing that there is some consumer interest in country of origin information according to point-of-production. However, we are unable to find this press release and survey dispositive of the actual degree of consumer interest in such information.

7.6.4.3 Consumers' willingness to pay

7.6.4.3.1 Consumers' willingness to pay for general country of origin information

7.408. The complainants claim that the evidence they submit in relation to risks of non-fulfilment demonstrates not only consumers' lack of interest in origin information, but also that consumers are not willing to pay to obtain the information.[925]

7.409. The complainants submit one piece of evidence that addresses consumer willingness to pay for country of origin information in general. Based on the KSU Consumer Valuation study[926], the complainants argue that consumers' unwillingness to pay for country of origin information is revealed by US consumers valuing products labelled "Product of North America" approximately the same as those labelled "Product of United States".[927]

[918] Exhibits US-46, US-47, US-72, US-73, and US-74.
[919] Exhibits US-72, US-73, and US-74 were submitted as Exhibits US-124, US-125, and US-115 respectively in the original dispute. Exhibits US-46 and US-47 are submitted for the first time in this compliance dispute.
[920] Exhibits US-47, US-72, US-73, and US-74.
[921] See para. 7.395 above
[922] Exhibit US-46.
[923] Exhibit US-46.
[924] Mexico's response to Panel question No. 15.
[925] Exhibits CDA-83, CDA-84, MEX-35, and MEX-62. Canada's comments to responses to Panel question No. 36, para. 45; Mexico's comments to responses to Panel question No. 13, paras. 18-19.
[926] Exhibits CDA-84 and MEX-34.
[927] Canada's first written submission, para. 143; Mexico's first written submission, para. 176.

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7.410. The KSU Consumer Valuation study concludes that consumers would be willing to pay on average a premium of USD 1.77 per 12 ounces of meat products for the label "Product of United States", and USD 1.88 per 12 ounces of meat products for the label "Product of North America".[928] Despite the higher premium for the North American label, we read this as showing that consumers are indeed willing to pay something for origin information – whether country-specific or not. At the same time, the KSU Consumer Valuation study indicates that consumer willingness to pay has not increased. In the words of the KSU Consumer Valuation study, "[t]he magnitudes of these [willingness to pay] values are similar to, or less than, those identified in previous studies" prepared in 2007 and 2009.[929]

7.411. The United States submits an Australian report on country of origin labelling that presents the results of a literature review, including on US consumers' willingness to pay for country of origin labelling.[930] According to the United States, the studies presented in this literature review demonstrate that US consumers are willing to pay a premium for country of origin labelling.[931]

7.412. We note that some of the studies presented in the Australian report are the same as those that were discussed in an academic paper submitted in the original dispute with regard to consumer willingness to pay.[932] In the original dispute, based on the original panel's findings, the Appellate Body held that "most US consumers are not prepared to pay to receive information on origin as defined in the [original] COOL measure with respect to the meat products they purchase."[933] Also, as the Australian report acknowledges, estimating consumer willingness to pay is "arduous" because origin is a complex attribute and estimates can be influenced by experimental or study design factors.[934] Accordingly, we are similarly doubtful of the probative value of the Australian report submitted by the United States in regard to consumers' willingness to pay.

7.6.4.3.2 Consumers' willingness to pay for point-of-production origin information

7.413. The parties' limited evidence concerning willingness to pay does not address consumers' willingness to pay for origin information specifically according to point-of-production information.

7.414. As noted, the KSU Consumer Valuation study examines consumers' willingness to pay for meat carrying labels without any point-of-production origin information. The Australian report submitted by the United States is a literature review, which does not explain in detail the methodologies of the referenced studies. From what can be deduced from the review, relevant studies asked consumers about the premium, if any, they would be willing to pay for labels such as "Certified U.S." and "U.S.A. Guaranteed".[935] Again, these labels do not convey point-of-production information.

7.6.4.4 Conclusions on risks of non-fulfilment of the amended COOL measure's objective

7.415. In the original dispute, the Appellate Body addressed the risk of non-fulfilment of the original COOL measure's objective, concluding that "[o]verall, … the [original p]anel's factual findings suggest that … the consequences that may arise from non-fulfilment of the objective would not be particularly grave."[936] The Appellate Body reached this conclusion in light of the original panel's doubts about on the probative value of evidence presented to show consumer interest and US consumers' unwillingness to bear all the costs of country of origin labelling of beef and pork.[937]

[928] Exhibits CDA-84 and MEX-34, p. 6.
[929] Exhibits CDA-84 and MEX-34, pp. 6 and 9. In particular, the KSU Consumer Valuation study refers to studies by Loureiro and Umberger (2007), and Gao and Schroeder (2009).
[930] United States' response to Panel question No. 13, para. 28 and footnote 29; and Exhibit US-52, pp. 20-22.
[931] United States' response to Panel question No. 13, para. 28.
[932] Exhibit US-87 in the original dispute.
[933] Appellate Body Reports, *US – COOL*, para. 478.
[934] Exhibit US-52, p. 18.
[935] Exhibit US-52, pp. 20-21.
[936] Appellate Body Reports, *US – COOL,* para. 479.
[937] Appellate Body Reports, *US – COOL*, para. 478.

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7.416. We recall that, similarly to the original panel, we have found that consumers are not ready to bear all the costs of the amended COOL measure. However, unlike the original panel, we have found in this compliance dispute that consumers are interested both in country of origin information in general and in country of origin information according to point-of-production. We have also found that consumers show some willingness to pay for general country of origin information. At the same time, we have not been given probative evidence showing consumer willingness to pay for country of origin information according to point-of-production.

7.417. Accordingly, we find that there is some risk associated with the non-fulfilment of the amended COOL measure's legitimate objective. In terms of the nature of this risk, we observe that the risk is related to the objective of the amended COOL measure, which is to provide consumer information on origin. The consequence that would arise from non-fulfilment of the amended COOL measure's objective is that consumers would not receive meaningful information on the origin of the covered products. In other words, consumers would be misinformed, confused, or not informed at all.

7.418. As regards the gravity of this specific consequence, we consider consumer demand for origin information as a relevant indicator. In this regard, we recall that the evidence on the record does not allow us to determine the strength of consumer interest in either general country of origin information or country of origin information according to point-of-production. As for willingness to pay, the KSU Consumer Valuation study addresses the premium consumers would be ready to pay for labels showing general information on country of origin. However, as noted, this study does not show any increase in consumer willingness to pay for country of origin information from previous studies pre-dating the original COOL measure.[938] Further, while the study quantifies the premium consumers would be willing to pay for labels showing general information on country of origin, neither the study nor the complainants have translated the implications of this figure for the specific degree of gravity of the consequences of not fulfilling the objective to provide consumer information.

7.419. The benefits accruing to consumers from receiving origin information may also be determinant of consumer demand for such information. By the same logic, the benefits that consumers would forego in the absence of meaningful origin information are relevant for the gravity of the consequences of such an eventuality.

7.420. The USDA attempted to evaluate the "economic benefits" of the original and amended COOL measures. For the original COOL measure, the USDA concluded that "the economic benefits will be small and will accrue mainly to those consumers who desire country of origin information."[939] The USDA added that "[t]he expected benefits from implementation of th[e 2009 Final R]ule are difficult to quantify."[940] The USDA reached similar conclusions for the 2013 Final Rule by stating that "the expected benefits from implementing mandatory COOL requirements remain difficult to quantify and that the incremental economic benefits of this final rule will be comparatively small relative to those afforded by the current COOL requirements."[941] Thus, even the USDA was unable to ascertain the benefits to consumers based on their "desire [for] country of origin information."[942]

7.421. The original panel "acknowledge[d] that Members have certain policy space in determining their objectives":

> There are … 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

[938] Exhibits CDA-84 and MEX-34, pp. 6-7.
[939] 2009 Final Rule, p. 2683.
[940] 2009 Final Rule, p. 2683.
[941] 2013 Final Rule, p. 31376.
[942] 2009 Final Rule, p. 2683.

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might want information to be provided as to the origin of products, and particularly meat products, at the retail level".[943]

7.422. A Member's interest in pursuing a legitimate objective might also be relevant for ascertaining the gravity of the consequences of not fulfilling such objective. However, even the USDA found it difficult to quantify the continued "small" consumer benefits under both the original and amended COOL measures.

7.423. Accordingly, although we have found that the amended COOL measure pursues the same legitimate objective as the original COOL measure, based on the evidence before us in this compliance dispute we cannot ascertain the gravity of not fulfilling the amended COOL measure's objective.

7.424. We have established the nature of the risks, and the consequences, of not fulfilling the amended COOL measure's objective; however, we have been unable to ascertain the gravity of these consequences. Accordingly, we conclude our relational analysis of the amended COOL measure without drawing definitive conclusions on the complainants' Article 2.2 claims.

7.425. We turn to the comparison with the complainants' proposed alternative measures.[944]

7.6.5 Comparative analysis

7.426. The complainants refer to four alternative measures to demonstrate that the amended COOL measure violates Article 2.2 of the TBT Agreement:

a. mandatory labelling of muscle cuts based on the country of substantial transformation (i.e. slaughter), combined with voluntary labelling based on the country of birth and raising, and the elimination of the amended COOL measure's three main exemptions;

b. extending the mandatory 60-day inventory rule applicable to ground meat also to muscle cuts, combined with the elimination of the three main exemptions;

c. mandatory labelling using a trace-back system; and

d. mandatory state or province designation of where the three production steps took place, in addition to the current country designations under the COOL measure.

7.427. As noted above, the Appellate Body held that, for assessing consistency with Article 2.2, in most cases a comparison of the challenged measure and possible alternative measures should be undertaken. For such a comparison, "it may be relevant … to consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available".[945]

7.428. In attempting to complete its Article 2.2 analysis in the original dispute, the Appellate Body identified the "relevant" "factual elements" in the context of an "analysis of the proposed alternative measures": (i) whether these alternative measures are less trade restrictive than the COOL measure; (ii) whether they would make an equivalent contribution to the relevant objective, taking account of the risks non-fulfilment would create; and (iii) whether they are reasonably available to the United States.[946]

[943] Panel Reports, *US – COOL*, para. 7.854 (footnote omitted).
[944] See Appellate Body Reports, *US – COOL,* para. 479.
[945] Appellate Body Reports, *US – COOL*, para. 378 (citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 322 (footnote omitted)).
[946] Appellate Body Reports, *US – COOL,* para. 481 (citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 322).

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7.6.5.1 Preliminary issues

7.429. Before reviewing the complainants' suggested alternatives, we address three preliminary issues:

a. burden of proof;

b. the United States' argument that any relevant alternative needs to be "significantly" less trade restrictive than the amended COOL measure; and

c. the compliance cost that any non-discriminatory alternative would need to exceed in order to be trade restrictive.

7.6.5.1.1 Burden of proof

7.430. The complainants argue that the burden of proof in the context of comparing alternatives is limited in two ways. According to Canada, "while ascertaining the level of trade-restrictiveness of a technical regulation as proposed by the United States would be possible for regulations that have been in force long enough to produce documented trade effects, such an ascertainment may not be done with the same precision for regulations that have not yet produced measurable trade effects or for possible alternative measures."[947] According to Mexico, in light of the legal test under Article 2.2, "Mexico's burden is simply to 'identify possible alternatives'"[948], and "[t]he burden is on the United States to present sufficient evidence and arguments showing that these alternative measures are not less trade restrictive, do not make an equivalent contribution to the objective pursued, taking account of the risks non-fulfilment would create and are not reasonably available."[949]

7.431. The United States counters that "[n]either approach is consistent with the admonition of the Appellate Body as to the burden of proof resting on the party that asserts a claim."[950] The United States cites[951] the Appellate Body's statement in *US – Wool Shirts and Blouses* that "it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[952]

7.432. Turning to Mexico's argument, we recall that in the original dispute the Appellate Body summarized "the burden of proof under Article 2.2" as follows:

> In order to demonstrate that a technical regulation is inconsistent with Article 2.2, the complainant must make a *prima facie* case by presenting evidence and arguments sufficient to establish that the challenged measure is more trade restrictive than necessary to achieve the contribution it makes to the legitimate objective, taking account of the risks non-fulfilment would create. *A complainant may, and in most cases will, also seek to identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available. It is then for the respondent to rebut the complainant's prima facie case* by presenting evidence and arguments showing that the challenged measure is not more trade restrictive than necessary to achieve the contribution it makes toward the objective pursued, for example, by demonstrating that the alternative measure identified by the complainant is not, in fact, "reasonably available", is not less trade restrictive, or does not make an equivalent contribution to the achievement of the relevant legitimate objective.[953]

[947] Canada's second written submission, para. 77.
[948] Mexico's second written submission, para. 115.
[949] Mexico's second written submission, para. 118.
[950] United States' second written submission, para. 95.
[951] United States' second written submission, para. 95.
[952] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[953] Appellate Body Reports, *US – COOL*, para. 379 (emphasis added).

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7.433. Mexico contends that the Appellate Body's use of the term "identify" for what is required of complainants in terms of possible alternative measures need not go further than "identification" in terms of proposing such alternatives. We do not agree with Mexico's reading of the Appellate Body's explanation. The statement relied upon by Mexico includes three elements relevant for the comparison of the alternatives with the challenged measure, namely "a possible alternative measure that is less trade restrictive, [that] makes an equivalent contribution to the relevant objective, and is reasonably available."[954] After placing the burden in regard to these three factors on the complainants, the Appellate Body moves to discuss the respondent's burden of proof in respect of alternative measures.

7.434. In our view, Mexico misreads the Appellate Body's statements to suggest that the burden of proof shifts after the complainant has merely "identified" an alternative, without having to make at least a *prima facie* case that such alternative "is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[955] Such an approach would run counter complainants' burden of proof in WTO disputes enunciated by the Appellate Body in *US – Wool Shirts and Blouses* and followed consistently by panels and the Appellate Body since then. Had the Appellate Body intended to prescribe a different burden of proof from that followed in general in WTO dispute settlement, we are confident it would have explained that it was doing so. It did not.

7.435. The Appellate Body's review of the original panel's analysis of legitimate objectives also suggests that the general rule on burden of proof applies to Article 2.2 of the TBT Agreement. The Appellate Body was "troubled by certain aspects of the [original p]anel's analysis of the legitimacy of the United States' objective", namely that "although the Panel recognized, at the outset of its analysis, that the burden of proving that an objective is *not* legitimate lay with the complainants, its reasoning at times suggests that it, instead, placed on the United States the burden of proving that its objective was legitimate."[956]

7.436. Further, in the original dispute, the United States argued "that the Panel erred by relieving the complaining parties of their burden to prove that the measure is 'more trade-restrictive than necessary' based on the availability of less trade-restrictive alternative measures."[957] In response, the Appellate Body referenced the above approach to burden of proof under Article 2.2, and explicitly stated that "the burden of proof with respect to such alternative measures is on the complainants."[958][959]

7.437. For these reasons, we reject Mexico's argument with regard to the burden of proof under Article 2.2. The complainants have the burden to "identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[960] This requires that the complainants both identify at least one specific alternative measure, and that they make a *prima facie* case that such alternative is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available.

7.438. These conclusions are also relevant for Canada's point that ascertaining the level of trade-restrictiveness of a technical regulation "may not be done with the same precision for regulations that have not yet produced measurable trade effects or for possible alternative measures."[961] We recall that trade-restrictiveness relates to detrimental impact on the competitive opportunities for imported livestock, and is not limited to actual trade effects.[962] In any event, the complainants must address the trade-restrictiveness of both the amended COOL measure and the alternative measures with a sufficient level of precision that allows us to conduct a meaningful comparison with alternative measures under Article 2.2 of the TBT Agreement. The complainants cannot be relieved of their burden to prove that at least one specific, reasonably available, and less trade-

[954] Appellate Body Reports, *US – COOL*, para. 379.
[955] Appellate Body Reports, *US – COOL*, para. 379.
[956] Appellate Body Reports, *US – COOL*, para. 449 (emphasis original).
[957] Appellate Body Reports, *US – COOL*, para. 469.
[958] (footnote original) Appellate Body Report, *US – Tuna II (Mexico)*, para. 323.
[959] Appellate Body Reports, *US – COOL*, para. 469.
[960] Appellate Body Reports, *US – COOL*, para. 379 (emphasis added).
[961] Canada's second written submission, para. 77.
[962] See section 7.6.3 above.

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restrictive alternative exists that would fulfil the US objective at least to a degree equivalent to the amended COOL measure.

7.6.5.1.2 "Significantly" less trade restrictive

7.439. Like in the original dispute[963], the United States argues that a complainant cannot establish a breach of Article 2.2 if an alternative measure is only insignificantly less trade restrictive than the challenged measure. The United States argues that the word "significantly" in footnote 3 to Article 5.6 of the SPS Agreement should guide the interpretation of Article 2.2 of the TBT Agreement. The United States relies on a letter sent by Mr. Sutherland, then Director-General of the GATT, to the Chief US Negotiator in mid-December 1993, as a supplementary means of interpretation of the term "more trade-restrictive than necessary" within the meaning of Article 32 of the Vienna Convention on the Law of Treaties.[964]

7.440. Mexico counters that, "[a]s in the original proceedings, the United States attempts to incorporate Article 5.6 of the SPS Agreement into Article 2.2 of the TBT Agreement."[965] Mexico points out that the United States' similar arguments failed in the original proceedings.[966] Mexico refers to the Appellate Body's articulation in the original dispute of the Article 2.2 legal test enunciated in *US – Tuna II (Mexico)*, and notes that the Appellate Body refrained from using the word "significantly", and stated merely that the relevant element of the legal test was "whether the proposed alternative is less trade restrictive".[967] Mexico adds that Article 2.2 neither contains the word "significant", nor a footnote similar to footnote 3 to Article 5.6[968], which provides that "[f]or purposes of paragraph 6 of Article 5 [of the SPS Agreement], a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking onto account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is *significantly* less restrictive to trade."[969] According to Mexico, "[t]hese omissions must be given meaning."[970],[971]

7.441. Mexico adds that according to Article 1.4 of the SPS Agreement, "[n]othing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement". Mexico concludes that "the SPS Agreement and the TBT Agreement provide different regimes and rules and their scope of application is mutually exclusive"[972], and it suggests that "precedents interpreting the SPS Agreement should not be applied in disputes involving the TBT Agreement."[973] Finally, Mexico argues that the Sutherland letter is irrelevant and cannot be considered a supplementary means of interpreting Article 2.2 because there is no footnote in that Article, as there is in Article 5.6 of the SPS Agreement, that clarifies the meaning of the phrase "more trade-restrictive than necessary."

7.442. As Mexico points out, the United States made a very similar argument before the Appellate Body, including a reference to the Sutherland letter as a supplementary means of interpretation.[974] In particular, the United States argued that the comparison with alternatives involves assessing the following three elements: "whether (i) there is a reasonably available alternative measure (ii) that fulfils the Member's legitimate objective at the level that the Member considers appropriate and (iii) is *significantly* less trade restrictive."[975]

7.443. To recall, before the Appellate Body, both complainants contested the United States' similar argument in the context of "more trade-restrictive than necessary". Canada contended that

[963] Appellate Body Reports, *US – COOL,* para. 45.
[964] United States' first written submission, para. 153, footnote 293.
[965] Mexico's second written submission, para. 120.
[966] Mexico's second written submission, para. 121.
[967] Mexico's second written submission, para. 121 (citing Appellate Body Reports, *US – COOL,* para. 378 (in turn citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 322)).
[968] Mexico's second written submission, para. 122.
[969] Article 5.6 of the SPS Agreement, footnote 3 (emphasis added).
[970] (footnote original) Appellate Body Report, *Japan – Alcoholic Beverages II*, para. 38.
[971] Mexico's second written submission, para. 122.
[972] Mexico's second written submission, para. 123.
[973] Mexico's second written submission, para. 123.
[974] Appellate Body Reports, *US – COOL,* para. 45.
[975] Appellate Body Reports, *US – COOL,* para. 455 (footnote omitted, emphasis added).

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"the fact that Article 2.2 of the TBT Agreement does not contain a footnote similar to footnote 3 of the SPS Agreement indicates that 'significantly' should not be read into the 'less trade-restrictive' test of Article 2.2."[976] Mexico advanced arguments similar to the ones adduced in these compliance proceedings.[977]

7.444. In reviewing the United States' argument in the original proceedings, the Appellate Body noted that it had established the "proper approach" for interpreting Article 2.2 of the TBT Agreement in *US – Tuna II (Mexico)*.[978] The Appellate Body added that "[t]hrough … [a comparison of the challenged measure and possible alternative measures] a panel will be able to judge the 'necessity' of the trade-restrictiveness of the measure at issue, that is, to discern whether the technical regulation at issue restricts international trade beyond what is necessary to achieve the degree of contribution that it makes to the achievement of a legitimate objective."[979] As with the degree of contribution achieved by the challenged measure[980], the Appellate Body did not qualify this test of relative trade-restrictiveness.

7.445. In describing the comparative analysis for completing its Article 2.2 analysis, the Appellate Body twice referred to trade-restrictiveness without mentioning the word "significantly" or referencing Article 5.6 of the SPS Agreement: "it will be relevant to consider whether the proposed alternative is less trade restrictive"[981] and "whether these alternative measures are less trade restrictive than the COOL measure."[982] Accordingly, we are of the view that the Appellate Body's assessment of the four alternative measures in the original proceedings did not entail an analysis of trade-restrictiveness based on the qualifier "significantly".

7.446. As Mexico points out, Article 2.2 does not contain a footnote similar to that in Article 5.6, and this should be given meaning.[983] The plain reading of Article 2.2 and the application of the general rules of treaty interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties do not warrant introducing a minimum threshold of trade-restrictiveness by importing the word "significantly" from another covered agreement. Indeed, applying these rules suggests that the drafters intended that "more trade-restrictive than necessary" be interpreted differently in Article 2.2 than in Article 5.6.

7.447. The Appellate Body has confirmed that the supplementary means of treaty interpretation codified in Article 32 of the Vienna Convention have also attained the status of a rule of "customary or general international law".[984] By the terms of Article 32 itself, recourse to supplementary means of interpretation is available to "confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." It does not appear to us that general rules of interpretation leave the meaning of the term "more trade-restrictive than necessary" as used in Article 2.2 ambiguous, obscure, or manifestly absurd or unreasonable. Thus, we are not persuaded that recourse to Article 32 of the Vienna Convention is required in seeking to clarify the meaning of "more trade-restrictive than necessary" as that term is used in Article 2.2.

7.448. Turning to the Sutherland letter, this states that "it was clear from … consultations at the expert level that participants felt that the [TBT] Agreement does not concern itself with

[976] Appellate Body Reports, *US – COOL,* para. 77 (footnote omitted).

[977] "Mexico contests the need to employ supplementary means of interpretation given that the text of Article 2.2 and the application of Article 31 of the Vienna Convention make clear that, unlike in Article 5.6 of the SPS Agreement, in Article 2.2 of the TBT Agreement, there is no footnote providing clarification on the meaning of the phrase 'more trade-restrictive than necessary'. The absence of such a footnote must have meaning. Indeed, even the letter relied upon by the United States indicates that it was not the common intention of Members to incorporate such a footnote in the TBT Agreement. Therefore, in Mexico's view, there is no legal basis for incorporating into Article 2.2 of the TBT Agreement the test in footnote 3 to Article 5.6 of the SPS Agreement." Appellate Body Reports, *US – COOL,* para. 109.

[978] Appellate Body Reports, *US – COOL,* para. 461.

[979] Appellate Body Reports, *US – COOL,* para. 461.

[980] Appellate Body Reports, *US – COOL,* paras. 461 and 468.

[981] Appellate Body Reports, *US – COOL,* para. 471.

[982] Appellate Body Reports, *US – COOL,* para. 478.

[983] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 26.

[984] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10.

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insignificant trade effects."[985] In the light of this, the Sutherland letter asked the United States to withdraw its objection to adopting the TBT Agreement without the United States' proposed footnote to Article 2.2 (similar to footnote 3 to Article 5.6 of the SPS Agreement).[986] The Sutherland letter notes that "[i]t was not possible to achieve the necessary level of support for the U.S. proposal to add a new footnote to Article 2.2 … ."[987]

7.449. To us, the Sutherland letter does not serve the purpose suggested by the United States. Rather, it supports the view that there was no agreement among negotiators to read the footnote to Article 5.6 of the SPS Agreement into the TBT Agreement. Thus, we cannot agree with the United States that we should read such language into the text of Article 2.2.

7.450. According to the Sutherland letter, what negotiators seemed to agree on is that the TBT Agreement does not concern itself with "insignificant trade effects."[988] The Sutherland letter does not define this term, let alone suggest that this should be applied specifically to the comparison of the trade-restrictiveness of a challenged measure with alternatives.[989] Instead, the Sutherland letter references the fifth recital of the preamble of the TBT Agreement, which refers to ensuring that technical regulations do not create unnecessary obstacles to international trade. Thus, even if it were appropriate in this case to rely upon supplementary means of interpretation under Article 32 of the Vienna Convention – and we are not convinced that it is – what the Sutherland letter might demonstrate is negotiators' agreement on the overall balance of the TBT Agreement, as reflected in the fifth preambular recital. This is markedly different from what the United States sees in the Sutherland letter.

7.451. We therefore decline to read the word "significantly" into Article 2.2 of the TBT Agreement.

7.6.5.1.3 Sumner Economic Analysis on the magnitude of compliance costs

7.452. Canada submitted an economic study by Professor Sumner to support its estimate of the magnitude of added compliance costs required for any non-discriminatory alternative measure to cause export revenue losses equivalent to those caused by the original COOL measure (Sumner Economic Analysis).[990] Canada claims that the Sumner Economic Analysis demonstrates that any non-discriminatory alternative measure[991] would require "incredibly large" costs in order to drive down imports as much as the original COOL measure has done.[992]

7.453. Following standard supply and demand assumptions[993], the model specification of the added compliance costs in the Sumner Economic Analysis hinges on four parameters: (i) the elasticity of demand for meat; (ii) the elasticity of livestock supply; (iii) the share of livestock cost in the meat product's retail unit cost; and (iv) the change in livestock revenue based on the econometric estimations of the original COOL measure's impact in the Sumner Econometric Study.[994]

7.454. According to Canada, depending on these parameters' values, the findings of the Sumner Economic Analysis, when applied to the US-Canada livestock market, suggest that any alternative measure would have to generate a 27-118% increase in meat unit in the cattle sector, and a 22-72% increase in the hogs sector, to cause export revenue losses comparable to the impact of

[985] Exhibit US-20.
[986] Exhibit US-20.
[987] Exhibit US-20.
[988] Exhibit US-20.
[989] Exhibit US-20.
[990] Exhibit CDA-126. See also Canada's second written submission, paras. 93-95.
[991] Canada's comments on United States' response to Panel question K, para. 144.
[992] According to Canada, the term "non-discriminatory alternative measure" in the Sumner Economic Analysis refers to a measure that does not modify the conditions of competition to the detriment of imported livestock, which is a definition it considers consistent with WTO jurisprudence in general and with the findings of the Panel and the Appellate Body in the original proceedings. Canada's comments on United States' response to Panel question K, para. 146.
[993] Canada's response to Panel question H, para. 248.
[994] Canada's comments on United States' response to Panel question No. 39, para. 73.

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the original COOL measure.[995] For an average-sized (1,280 pound) steer, the additional processing and marketing costs due to increased costs under any non-discriminatory alternative measure would need to range between $608 and $2,672. For an average-sized (280 pound) hog, the additional processing and marketing costs would need to range from $116 to $378.[996] Referring to the estimated costs of Uruguay's trace-back system[997], Canada argues that the findings of the Sumner Economic Analysis demonstrate that a non-discriminatory alternative measure such as a trace-back system could not plausibly cause greater export revenue losses than those caused by the original or the amended COOL measure.[998]

7.455. In response to the Panel, Mexico submitted a variant of the Sumner Economic Analysis adapted to the US-Mexican livestock market.[999] Using the same economic model specification as Canada, the Mexican variant of the Sumner Economic Analysis suggests that, depending on the values of the parameters chosen[1000], any non-discriminatory alternative measure would have to entail a 6-30% increase in the unit cost of meat in the US-Mexican cattle sector. For an average-sized (770 pound) Mexican feeder cattle, an alternative measure such as a trace-back system would have to add from $136 to $679 per head of cattle to existing costs in order to generate an impact on Mexico's cattle export revenues losses equivalent to the impact of the original COOL measure.[1001] Mexico argues that since the Sumner Economic Analysis only focuses on the original COOL measure, the results understate the additional costs that would have to be created to match the larger adverse trade effects of the amended COOL measure.[1002]

7.456. The United States disagrees with Canada and Mexico, and argues that the methodology and theoretical economic model of the Sumner Economic Analysis and its Mexican variant are flawed. According to the United States, the measure of lost export revenue, unlike the common approach of price-gap analysis, is an unusual approach in economics that requires a sophisticated economic modelling, the results of which are sensitive to the underlying assumptions.[1003] The United States contends that some of the assumptions in the Sumner Economic Analysis contradict several academic papers.[1004] In particular, the United States questions the use of a single country-market, in which (i) there is no substitutability effects between meat (beef, pork and chicken); and (ii) the Canadian or Mexican export supply sectors respond in the same way as the US domestic supply sector. The United States argues that since the measure of lost export revenue is sensitive to large price elasticities, a small change in conditions can lead to major changes in imports and exports values.[1005] The United States also claims that there is no basis for equating the term "export revenue loss" with "costs" to assess whether an alternative measure is less trade restrictive[1006] than the amended COOL measure.[1007]

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[995] Canada's second written submission, paras. 93-95, and response to Panel question No. 40, paras. 86-89; Exhibit CDA-126.

[996] Canada's second written submission, paras. 93-95, and response to Panel question No. 40, paras. 86-89; Exhibit CDA-126.

[997] Canada's opening statement at the meeting of the Panel, para. 47; Exhibits CDA-131 and CDA-145 (BCI).

[998] Canada's opening statement at the meeting of the Panel, para. 42.

[999] See Mexico's response to Panel question No. 34; and Exhibit MEX-87.

[1000] Mexico considers the same values for the demand and supply elasticities applied in the Sumner Economic Analysis to Canadian livestock, but uses different values for the share of cattle in the cost of supplying muscle cuts and change in cattle export revenue caused by the original COOL measure.

[1001] Mexico's response to Panel question No. 34, para. 56; Exhibit MEX-87.

[1002] Mexico's response to Panel question No. 34, para. 57.

[1003] United States' comments on Canada's response to Panel question No. 39, paras. 113-115; United States' comments on parties' responses to Panel question L, paras. 253-255.

[1004] United States' response to Panel question K, paras. 218-220; comments on Mexico's response to Panel question No. 34, para. 86; comments on Canada's response to Panel question H, paras. 243 and 245; comments on Canada's response to Panel question J, para.247; comments on parties' responses to Panel question K, paras. 249-250; comments on Canada's additional response to Panel question H, paras. 5-7; Exhibits US-58, US-63, US-64, and US-81.

[1005] The United States suggests measuring the loss of total profits to producers, defined as the "producer surplus" loss, because, according to the United States, the measure of export revenue losses overstates the gross profit losses of livestock producers by overlooking the reduced production costs associated with reduced production. United States' comments on Canada's additional response to Panel question H, para. 14.

[1006] According to the United States, the Sumner Economic Analysis also relies on a definition of "non-discrimination" that contradicts the Appellate Body's finding defining a non-discriminatory measure as a

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7.457. In addition to the alleged incorrect model specification of the Sumner Economic Analysis and its Mexican variant, the United States argues that the estimations suffer from numerous data and methodological shortcomings.[1008] The United States claims that the use of inflated econometric estimates in the Sumner Economic Analysis applied to Canadian livestock yields drastically overstated additional costs.[1009] The United States further points out that the Mexican variant of the Sumner Economic Analysis did not rely on econometric estimates but used a "COOL discount" of $40 per head to estimate the change in Mexican cattle export revenue caused by the original COOL measure, which, according to the United States, is inconsistent with Canada's effort to isolate the COOL effect from other factors.[1010]

7.458. Overall, the United States claims that the findings of the Sumner Economic Analysis and its Mexican variant are inflated, unrealistic and not borne out by the facts and data in the market. According to the United States, Mexican exports to the US and Canadian cattle prices relative to US price have both increased since the implementation of the original COOL measure. The United States further argues that the results contradict basic economics referenced in various papers by Professor Sumner. According to these papers, taxing trade in livestock (i.e. a "COOL discount") in an open and duty-free meat market would have minimal effect on the price of livestock. It could only affect where the livestock are slaughtered, leaving the supply of, or demand for, meat unaffected.[1011]

7.459. More generally, the United States claims that the Sumner Economic Analysis and its Mexican variant are irrelevant because they do not identify any particular alternative measure, but rather assess the trade effect of an undefined measure unrelated to country of origin labelling.[1012] As a result, the United States contends that both Canada and Mexico fail to establish (i) how the figures in Canada's Sumner Economic Analysis and its Mexican variant correlate to a reduction in Canadian and Mexican exports; (ii) what the corresponding costs would be under a trace-back regime; (iii) how the additional costs of the alternative measure would not exceed the estimated minimum trade-restrictive cost; and (iv) how such additional costs would relate to an increase in trade under such an alternative.[1013] The United States is of the view that any trade impacts the amended COOL measure may cause are due to the much lower processing and marketing costs of the original and amended COOL measures outlined in the USDA regulatory impact analyses that accompany the 2009 and 2013 Final Rules. Moreover, the United States contends, these costs will fall over time after industry has adjusted to the new labelling regime of the amended COOL measure.[1014]

measure "causing an equal reduction in market share", where domestic and imported livestock are equally competitive. United States' response to Panel question K, paras. 205-208 and 211-212; comments on Canada's additional response to Panel question H, para. 12.

[1007] United States' response to Panel question No. 39, para. 118.

[1008] United States' second written submission, paras. 140-141 and 144-146; response to Panel question No. 39, para. 118; response to Panel question K, paras. 205-209 and 213-223; comments on Canada's and Mexico's responses to Panel question No. 7 para. 9; comments on parties' responses to Panel question No. 8, para. 10; and comments on Mexico's response to Panel question No. 34, para. 84.

[1009] United States' second written submission, para. 141; response to Panel question K, paras. 213-217; comments on parties' response to Panel question No. 41, para. 119; comments on Canada's response to Panel question J, para. 248; and comments on Canada's additional response to Panel question H, paras. 9-10.

[1010] The United States also argues that the Mexican variant of the Sumner Economic Analysis does not establish that the amount computed of per head regulatory cost represents a "non-discriminatory" alternative measure, unlike the analysis applied to Canada. United States' comments on Mexico's response to Panel question No. 34, para. 87; comments on Canada's additional response to Panel question H, paras. 15-21; and comments on Mexico's response to Panel question No. 34, paras. 87 and 92-93.

[1011] United States' second written submission, para. 145; United States' response to Panel question K, paras. 221-223; comments on Canada's response to Panel question J, para. 248; Exhibits US-64, US-65, and US-66.

[1012] United States' comments on Mexico's response to Panel question No. 34, paras. 89-91.

[1013] United States' opening statement at the meeting of the Panel, paras. 45-46; comments on Canada's response to Panel question No. 40, paras. 116-118; comments on Mexico's response to Panel question No. 41, para. 120; and comments on Canada's and Mexico's responses to Panel question No. 42, paras. 121 and 123.

[1014] United States' comments on Canada's response to Panel question J, para. 248; comments on Canada's additional response to Panel question H, para. 8; Exhibits CDA-1, CDA-2, and US-81.

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7.460. As noted[1015], we consider that it is not our task to establish a unified economic model; rather, we need to assess, in light of the parties' arguments, whether the simulated estimations are reliable.

7.461. We note that, unlike a general equilibrium model, a partial equilibrium analysis, such as the Sumner Economic Analysis, only considers the effects of a policy in the equilibrium of a particular market, i.e. the US-Canada and US-Mexico market segments, respectively, ignoring its effects (including feedback effects) in any other markets.

7.462. Having reviewed the Sumner Economic Analysis and its Mexican variant, we note that the simulation results are contingent on the interplay of three main elements:

a. the theoretical model used to derive the effects of the original COOL measure on market equilibrium, which depends on the assumptions considered, many of which are simplified in order to derive readily a closed-form (solvable) specification;

b. the value of the exogenous parameters of the demand and supply elasticities and of the share of slaughter livestock farm price in cost of retail meat; and

c. the estimation of the lost imported livestock revenue caused by the original COOL measure, which hinges on the pre-COOL and post-COOL price and quantity data used for the calibration and on the estimation of the long-run impact of the original COOL measure.[1016]

7.463. The comparison of the figures reported in the Sumner Economic Analysis and its Mexican variant shows how sensitive the results are to the set of parameters' value considered, especially with respect to the value assigned to the change in export revenue. The simulated increase in the unit cost of meat can be up to 337%, 227% and 400% higher than the lowest simulated figures for the Canadian cattle and hogs, and Mexican cattle sectors, respectively.

7.464. Moreover, as the United States points out, all economic models are based on assumptions, and small changes in these assumptions can have major (positive or negative) effects on the simulated figures. We also note that Canada and Mexico fail to address some of the issues raised by the United States, such as the existence of elasticities of substitution between different meats and the use of specific and different supply elasticities for Canada, Mexico and the United States. For instance, various studies assessing US and Canadian supply and import demand elasticities suggest that the short-run US import demand price elasticity for Canadian slaughter steers (-1.79) is relatively elastic compared to the US slaughter demand price elasticity (-0.65 and -0.76), mainly because of Canada's small market share of US cattle supplies.[1017]

7.465. We note further that we have not been given simulation results associated with different assumptions underlying the economic model specification (and not simply with different parameters values), we are unable to determine and compare to what extent the findings of the Sumner Economic Analysis and its Mexican variant would have changed if some of the above-referenced points raised by the United States[1018] were to be incorporated in the computation of the model specification. As a result, we cannot rely on the range of estimated figures of the Sumner Economic Analysis and its Mexican variant.

7.466. In addition, as the United States points out, the figures reported in the Sumner Economic Analysis and its Mexican variant are related to a hypothetical non-discriminatory undefined measure. In fact, the structure of the economic model specification in the Sumner Economic Analysis is such that it makes no distinction between alternative measures. The Sumner Economic Analysis and its Mexican variant implicitly assume, without substantiating it, that the set of all possible hypothetical non-discriminatory measures has the same impact in terms of added compliance costs. As a result, neither of the complainants' studies assesses the actual magnitude

[1015] See section 7.5.4.1.5 above.

[1016] This itself depends on the econometric specification and/or data used. Exhibit CDA-126 and Canada's responses to Panel questions H-L.

[1017] Exhibits US-63 and US-64.

[1018] United States' response to Panel question K, para. 221. Exhibits US-63, US-64, and US-81.

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of the cost of a specific trace-back system or any of the other three alternatives put forward by the complainants. Hence, we cannot draw any inferences from these studies as to whether the implied additional costs of an alternative, such as a trace-back system, implemented in the United States would be effectively lower than the hypothetical and simulated figures.

7.467. Given the limitations of Canada's Sumner Economic Study and its Mexican variant, and our conclusion that we cannot rely on them in our assessment of alternative measures, we need not address the United States' procedural objections to Mexico's reliance on the Sumner Economic Study.[1019]

7.6.5.2 First alternative measure

7.468. The complainants' first alternative measure would involve mandatory origin labelling based on the country of substantial transformation, combined with voluntary point-of-production labelling according to the country of the animal's birth, raising, and slaughter.[1020] The first alternative measure would cover all muscle cuts from US-slaughtered animals (Categories A-C)[1021], and exclude foreign-slaughtered muscle cuts (Category D)[1022] and ground meat (Category E).[1023]

7.469. The mandatory element of the complainants' first alternative measure would require that Labels A-C indicate origin according to substantial transformation, i.e. the animal's country of slaughter.[1024] The labelling requirements for muscle cuts from foreign-slaughtered animals (Label D)[1025] would remain unchanged; the first alternative measure would extend these requirements to muscle cuts from US-slaughtered animals (Labels A-C).[1026] As all Category A-C muscle cuts originate from US-slaughtered animals, all Labels A-C[1027] could read "'Product of the U.S.' (or some variant indicating US origin)"[1028], such as "Slaughtered (or harvested) in the US".[1029]

7.470. As a voluntary aspect of the complainants' first alternative measure, Labels A-C may specify the countries where the animal was born and raised[1030], thus providing the same information as under the amended COOL measure. The first alternative measure would not change the current Label D in this regard either; rather, it would extend the amended COOL measure's voluntary labelling rule for Category D muscle cuts to US-slaughtered (Category A-C) muscle cuts.[1031]

7.471. For US-slaughtered muscle cuts, the complainants' first alternative measure would remove the three exemptions maintained under the amended COOL measure for (i) entities not meeting

[1019] See United States' response to Panel question No. 35, and comments on Mexico's responses to Panel questions Nos. 34-35.
[1020] See Canada's first written submission, para. 156; and Mexico's first written submission, para. 182.
[1021] Canada's first written submission, paras. 157 and 162, and response to Panel question No. 51; Mexico's first written submission, para. 184.
[1022] Canada's response to Panel question No. 47; Mexico's response to Panel question No. 47.
[1023] Canada's response to Panel question No. 44; Mexico's response to Panel question No. 44.
[1024] See Canada's first written submission, para. 156; and Mexico's first written submission, para. 183. See also United States' first written submission, para. 167 and para. 7.15 above.
[1025] Canada's and Mexico's responses to Panel question No. 47. See also Canada's first written submission, para. 157, and response to Panel question No. 47; Mexico's first written submission, para. 190, and second written submission, para. 128.
[1026] See Canada's first written submission, para. 160; and Mexico's first written submission, para. 190.
[1027] Canada's and Mexico's responses to Panel question No. 51.
[1028] Panel question No. 51.
[1029] Canada's response to Panel question No. 51. See also Canada's responses to Panel questions Nos. 46 and 47.
[1030] See Canada's first written submission, para. 156; and Mexico's first written submission, para. 185.
[1031] Canada's and Mexico's responses to Panel question No. 47. See also Canada's first written submission, para. 160; and Mexico's first written submission, para. 190. The amended COOL measure already allows for providing more detailed origin information for Category D muscle cuts on a voluntarily basis. According to the 2013 Final Rule, Label D "may include more specific location information related to production steps (i.e., born, raised, and slaughtered) provided records to substantiate the claims are maintained". 2013 Final Rule, § 65.300(f)(2).

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the definition of the term "retailer"; (ii) ingredients in "processed food items"; and (iii) products served in a "food service establishment".[1032]

7.472. As to how origin information would be conveyed following the removal of these three exemptions, according to Canada:

> [f]ood service establishments could convey information about origin on menus, signs or placards. Menus and displays could be set up so as to allow a modification in the information without having to replace them (through clips on menus, for instance). With respect to processed food items, origin information on muscle cuts of beef or pork they contain could be displayed on packages in the list of ingredients (e.g. "beef (slaughtered in the U.S.)" under the first alternative measure; and "pork (product of U.S., Canada)" under the second alternative). … [F]ood processors may not have to modify the ingredients lists often, because it would be relatively easy for them to find a steady supply of meat with the same origin (e.g. product of the U.S. and Canada). As for small retailers, they would have to convey information about origin in the same way as do covered retailers under the amended COOL measure (e.g. butcher shops could use signage).[1033]

7.473. Mexico adds that "[f]ood service establishments could inform consumers about the origin of muscle cuts and processed food items by indicating origin information on menus, blackboards where daily specials are posted, and on their web sites".[1034]

7.6.5.2.1 Whether the first alternative measure would make an equivalent contribution to the relevant legitimate objective

7.474. In meat production "substantial transformation" means the slaughter of the originating animal – both in the context of the amended COOL measure and the complainants' suggested first alternative measure.[1035] Slaughter is only one of the three production steps (birth, raising, and slaughter) on which Labels A-C provide consumer information under the amended COOL measure. Thus, the complainants' first alternative measure would mandate less label information on the origin of muscle cuts derived from US-slaughtered livestock than the amended COOL measure. As the Appellate Body held, "under … a [mandatory] labelling scheme [based on substantial transformation,] consumers would be provided with information on where livestock were slaughtered, but they would not be provided with any information as to where the livestock were born and raised."[1036]

7.475. This would result in limited contribution to the objective of providing origin information to consumers. In the original dispute, the Appellate Body noted that, "in the context of Article 2.4 of the TBT Agreement, the [original p]anel [had] found that CODEX STAN 1-1985, which is based on the principle of substantial transformation, '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' and hence is '*ineffective* and *inappropriate* for the fulfilment of the specific objective as defined by the United States'."[1037] According to the Appellate Body, these findings by the original panel "suggest that a mandatory labelling regime based on substantial transformation would, at best, contribute only partially to the objective of providing information to consumers on where livestock from which meat is derived were born, raised, and slaughtered."[1038]

[1032] See Canada's first written submission, para. 162, and response to Panel question No. 51; Mexico's first written submission, para. 182.

[1033] Canada's response to Panel question No. 46.

[1034] Mexico's response to Panel question No. 46.

[1035] Canada's first written submission, para. 156. As noted above, the complainants assert that the United States applies a "substantial transformation" test and, for NAFTA countries, a test based on change in tariff classification to determine origin. According to the complainants, the result under both tests is to designate the place of slaughter as the country of origin. Canada's first written submission, para. 18 and footnote 53; Mexico's first written submission, para. 32 and footnote 30.

[1036] Appellate Body Reports, *US – COOL*, para. 485.

[1037] Appellate Body Reports, *US – COOL*, para. 485 (emphasis original, footnote omitted).

[1038] Appellate Body Reports, *US – COOL*, para. 486.

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7.476. The complainants explain that information on the other two production steps (birth and raising) would be voluntary under their first alternative measure.[1039] According to the Appellate Body, "the contribution of a voluntary labelling requirement to the objective of providing consumers with information on where livestock were born, raised, and slaughtered would be a function of the accuracy with which labels reflect origin as the country or countries in which different production steps took place, the scope of the products covered by such a voluntary labelling scheme, and the extent to which labels would be used."[1040]

7.477. In the original dispute, the Appellate Body explained that "in its analysis under Article 2.1 of the TBT Agreement, the [original p]anel [had] referred to evidence suggesting that US consumers are not generally willing to pay for information on origin, and that, prior to the introduction of the COOL measure, there was a lack of widespread participation in voluntary origin labelling programmes."[1041] We have held that the original panel's finding about "the lack of [consumer] interest in a voluntary COOL regime"[1042] continues to apply in this compliance dispute.[1043]

7.478. In the context of the first alternative measure, Canada and the United States question whether industry participants would voluntarily provide origin information in the absence of sufficient consumer readiness to pay for it.[1044] Mexico argues that "at least one major retailer" voluntarily labelled its products "100% US beef".[1045] Although Mexico advances this piece of evidence[1046] to show the occurrence of voluntary origin labelling, it is silent on the extent of such voluntary labelling and whether industry participants would voluntarily affix country of origin labels on muscle cuts according to the three production steps. On the whole, the evidence does not suggest that the voluntary option would be exercised on a wide scale.

7.479. Thus, even with its voluntary element, the complainants' first alternative measure would provide less information on origin than the amended COOL measure for muscle cuts derived from US-slaughtered livestock covered by Labels A-C.

7.480. In the original dispute, the Appellate Body reviewed a similar measure with combined mandatory and voluntary aspects, but could not draw a definitive conclusion for comparing the respective degrees of contribution after assessing merely the contribution under the alternative measure's mandatory and voluntary aspects.[1047] The Appellate Body noted that an alternative measure's coverage might also be relevant for assessing its degree of contribution. In reviewing the complainants' first alternative in the original dispute (mandatory origin labelling based on substantial transformation), the Appellate Body stated that:

> without knowing whether a mandatory labelling system based on substantial transformation would require all beef and pork sold in the United States to be labelled, we are unable to compare the degree of the COOL measure's contribution with that of this alternative measure proposed by the complainants.[1048]

7.481. We note that the complainants' first alternative measure would remove the three exemptions of the amended COOL measure. Given the extent of these exemptions[1049], the first alternative measure would cover a significantly wider range of muscle cuts from US-slaughtered livestock than the amended COOL measure. Effectively, all muscle cuts from US-slaughtered

[1039] Canada's first written submission, para. 158; Mexico's first written submission, para. 182.
[1040] Appellate Body Reports, *US – COOL*, para. 483.
[1041] Appellate Body Reports, *US – COOL*, para. 483 (footnotes omitted).
[1042] Panel Reports, *US – COOL*, para. 7.354.
[1043] See para. 7.160 above.
[1044] Canada's second written submission, para. 98; United States' first written submission, para. 168.
[1045] Mexico's second written submission, para. 130.
[1046] Exhibit MEX-15-A.
[1047] According to the Appellate Body, "it is unclear whether a voluntary labelling scheme combined with a mandatory labelling requirement based on substantial transformation would make a contribution to the objective of providing consumers with information on where livestock were born, raised, and slaughtered, at least equivalent to the contribution made by the COOL measure." Appellate Body Reports, *US – COOL*, para. 488.
[1048] Appellate Body Reports, *US – COOL*, para. 486.
[1049] See paras. 7.258-7.262 above.

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livestock marketed in the United States would carry an origin label under the complainants' first alternative measure. At the same time, the labels under the first alternative measure would provide less origin information for this extended coverage than the amended COOL measure. The question, therefore, is whether a suggested alternative that would provide less origin information on a wider range of products would make at least "an equivalent contribution to the relevant legitimate objective"[1050] as the amended COOL measure.

7.482. We have found that the objective of the amended COOL measure is to provide origin information to consumers[1051], and that this is a legitimate objective under the TBT Agreement.[1052] We have also established the level at which the United States "actually"[1053] achieves this legitimate objective through the amended COOL measure.[1054] Further, the Appellate Body has consistently held that, for the purposes of Article 2.2 of the TBT Agreement, an alternative measure needs to make at least an "equivalent degree" of contribution as the challenged measure.[1055] Hence, an alternative measure making a less than equivalent contribution to the legitimate objective in question cannot prove a violation of Article 2.2 of the TBT Agreement.

7.483. The complainants have confirmed that all[1056] Labels A-C could read "Product of the U.S."[1057] or "Slaughtered (or harvested) in the US"[1058] under their first alternative measure.[1059] As a result, not only would the first alternative measure provide less origin information (although for a significantly wider range of products), it would result in all muscle cuts from US-slaughtered animals carrying the same label, irrespective of where the animals were born and raised. This would be in sharp contrast with the amended COOL measure, which mandates distinct labels for Category A, B, and C muscle cuts, reflecting not only the animals' identical country of slaughter (i.e. the United States) but also their potentially different countries of birth and raising. Based on this, the first alternative measure as described by the complainants does not seem capable of making an actual contribution to the objective of providing consumer information on origin at least equivalent to the actual contribution of the amended COOL measure.

7.484. While recognizing that Labels A-C would appear the same under their first alternative measure, the complainants argue that this alternative measure, taken as a whole and including its extended coverage, should be considered as making an equivalent contribution "taking account of the risks non-fulfilment would create". The United States responds that alternative measures that contribute to a legitimate objective to a lesser degree than the challenged measure cannot prove a violation of Article 2.2.[1060] Referencing the sixth recital to the TBT Agreement[1061], the United States adds that it is up to each Member to determine what legitimate objectives it wishes to pursue and to what degree.[1062]

[1050] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322 (footnote omitted).

[1051] See section 7.6.2.1 above.

[1052] See section 7.6.2.2 above.

[1053] Appellate Body Reports, *US – COOL*, para. 426. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 317.

[1054] See section 7.6.2.3 above.

[1055] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 321, 322, 323, and 330. Appellate Body Reports, *US – COOL*, paras. 378, 379, 471, 481 and 488.

[1056] Canada's and Mexico's responses to Panel question No. 51.

[1057] Mexico's response to Panel question No. 51.

[1058] Canada's response to Panel question No. 51. See also Canada's responses to Panel questions Nos. 46 and 47.

[1059] See also Mexico's response to Panel question No. 51; and United States' comments on Mexico's response to Panel question No. 51.

[1060] United States' second written submission, para. 121 (citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 330).

[1061] The sixth recital to the TBT Agreement reads as follows: "*Recognizing* that 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, 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, and are otherwise in accordance with the provisions of this Agreement".

[1062] See United States' first written submission, para. 170, and second written submission, para. 121 (citing Appellate Body Reports, *US – COOL*, para. 373 and Appellate Body Report, *US – Tuna II (Mexico)*, paras. 315-316).

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7.485. We are mindful of a Member's right to pursue legitimate objectives "at the levels it considers appropriate."[1063] However, as the Appellate Body noted, the preamble to the TBT Agreement strikes a "balance … between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate."[1064] The sixth preambular recital to the TBT Agreement reflects this by setting forth that a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives at the levels it considers appropriate, "subject to certain qualifications"[1065]: namely that such measures "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, and are otherwise in accordance with the provisions of this Agreement."

7.486. The Appellate Body explained the relevance of the phrase "the risks non-fulfilment would create" in the context of a comparative analysis under Article 2.2:

> [T]he obligation to consider 'the risks non-fulfilment would create' suggests that the comparison of the challenged measure with a possible alternative measure should be made in the light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective. This suggests a further element of weighing and balancing in the determination of whether the trade-restrictiveness of a technical regulation is 'necessary' or, alternatively, whether a possible alternative measure, which is less trade restrictive, would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and would be reasonably available.[1066]

7.487. This suggests that "the risks non-fulfilment would create" may be a relevant factor in assessing whether an alternative measure fulfils the legitimate objective to an equivalent degree as the challenged measure. This is confirmed by the Appellate Body's summary of the three main elements of the comparative analysis under Article 2.2 of the TBT Agreement:

> In making this comparison, it will be relevant to consider whether the proposed alternative is less trade restrictive; *whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create*; and whether it is reasonably available.[1067]

7.488. Given the potential relevance of risks of non-fulfilment in comparing degrees of contribution, we consider that providing less origin information to consumers for a significantly wider range of products through a measure like the complainants' first alternative measure might achieve an equivalent degree of contribution as the amended COOL measure. However, in reviewing "the risks non-fulfilment would create", we were unable to ascertain the gravity of these consequences.[1068] Accordingly, we cannot determine the specific implications of risks of non-fulfilment for the interplay between less information coupled with more extensive coverage under the first alternative measure, or for the first alternative's degree of contribution.

7.489. We observe that less origin information might reduce consumer confusion or misinformation in some circumstances. For example, consumers might find a large amount of information on a product packaging difficult to understand. In addition, consumers might be more interested in specific types of origin information, for instance in origin information according to certain production steps, such as the place of slaughter. In any event, the implications of the quantity of origin information for consumers being effectively informed would depend on the

[1063] See sixth recital to the TBT Agreement; Appellate Body Reports, *US – COOL*, para. 373; and *US – Tuna II (Mexico)*, paras. 315-316.

[1064] Appellate Body Report, *US – Clove Cigarettes*, para. 96.

[1065] Appellate Body Reports, *US – COOL*, para. 373 (citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 316).

[1066] Appellate Body Report, *US – Tuna II (Mexico)*, para. 321. See also Appellate Body Reports, *US – COOL*, para. 377.

[1067] Appellate Body Reports, *US – COOL*, para. 471 (citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 322) (emphasis added).

[1068] See 7.6.4.4 above.

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nature of the information being conveyed and the method of conveyance. In the context of the first alternative measure, it is difficult to establish the exact implications for consumer information of having less information on the labels – even for a wider coverage of products.

7.490. Ultimately, the complainants have not persuasively demonstrated how the increased coverage of their first alternative measure would compensate for less origin information provided on Labels A-C under the first alternative measure. Accordingly, we find that the complainants have not made a *prima facie* case that their first alternative measure would make an at least equivalent degree of contribution to the objective of providing origin information to consumers as does the amended COOL measure.

7.491. The United States argues that this should be the end of our analysis of the first alternative measure.[1069] We agree. According to the Appellate Body, the three factors of the comparative analysis are conjunctive.[1070] An alternative measure that has not been proven to make at least an equivalent degree of contribution cannot serve as a basis for finding a violation of Article 2.2 of the TBT Agreement – irrespective of whether the alternative measure is reasonably available or how its eventual trade-restrictiveness compares with the challenged measure. As the United States points out[1071], at the outset of its Article 2.2 assessment in *US – Tuna II (Mexico)*, the Appellate Body noted all three factors of the comparative analysis under that Article[1072], but ended its Article 2.2 review after having overturned the panel's finding that the alternative measure would make a contribution equivalent to that made by the challenged measure.[1073]

7.6.5.3 Second alternative measure

7.492. The complainants' second alternative measure would extend ground meat labelling rules to muscle cuts[1074] from US-slaughtered[1075] animals.[1076] Thus, Labels A-C would "list all countries of origin contained therein or that may be reasonably contained therein".[1077] This would be governed by the 60-day "inventory allowance"[1078], according to which if "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."[1079]

7.493. Under the second alternative measure, Labels A-C would not provide information on where the originating animal was born, raised, and slaughtered.[1080] These labels would read "Product of the U.S."[1081] for muscle cuts from exclusively US-origin animals. In light of the 60-day inventory allowance, the labels could also read "Product of the U.S., Canada"[1082] or "Product of the United States and Mexico"[1083] depending on whether Canadian or Mexican origin raw material may also be reasonably contained in the ground meat. As the original panel held, "a processor may use the same label for all of its ground meat, provided that the label lists all countries of origin of the

[1069] United States' opening statement at the meeting of the Panel, para. 38.
[1070] See Appellate Body Reports, *US – COOL*, para. 376.
[1071] United States' opening statement at the meeting of the Panel, para. 38.
[1072] The Appellate Body stated that "[i]t was for the Panel, therefore, in assessing Mexico's claim that the US 'dolphin-safe' labelling provisions 'are more trade-restrictive than necessary' within the meaning of Article 2.2, to examine, inter alia, the contribution that the US measure makes to the achievement of its objectives; the trade-restrictiveness of the US 'dolphin-safe' labelling provisions; whether Mexico had identified a 'reasonably available' and less trade-restrictive alternative measure, and to compare the degree of the US measure's contribution with that of the alternative measure, which is reasonably available and less trade restrictive, taking account of the risks non-fulfilment would create." Appellate Body Report, *US – Tuna II (Mexico)*, para. 326.
[1073] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 324-333.
[1074] Like the first alternative, the complainants' second alternative measure would not modify the ground meat label. Canada's and Mexico's responses to Panel question No. 44.
[1075] Like the first alternative, the complainants' second alternative measure would not modify Label D. Canada's and Mexico's responses to Panel question No. 47.
[1076] Canada's first written submission, para. 164; Mexico's first written submission, para. 192.
[1077] 2009 Final Rule, § 65.300(h) (unamended).
[1078] Panel Reports, *US – COOL*, para. 7.435.
[1079] 2009 Final Rule, § 65.300(h) (unamended).
[1080] Canada's and Mexico's responses to Panel question No. 52.
[1081] Canada's response to Panel question No. 53.
[1082] Canada's response to Panel question No. 53.
[1083] Canada's response to Panel question No. 53.

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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."[1084]

7.494. Similarly to the first alternative measure, the complainants' second alternative measure would remove the three exemptions of the original COOL measure and maintained by the amended COOL measure.[1085]

7.6.5.3.1 Whether the second alternative measure would make an equivalent contribution to the relevant legitimate objective

7.495. The complainants' second alternative measure would extend the original COOL measure's unchanged ground meat labelling rules, including the 60-day inventory allowance, to muscle cuts from US-slaughtered animals.

7.496. As noted, under the second alternative measure, Labels A-C would "list all countries of origin contained therein or that may be reasonably contained therein".[1086] Thus, unlike under the amended COOL measure, Labels A-C would not provide country of origin information according to point-of-production (birth, raising, and slaughter).[1087] As a consequence, the complainants' second alternative measure would involve less detailed origin information for muscle cuts from US-slaughtered animals than the amended COOL measure.

7.497. Apart from the reduced detail of information, the 60-day inventory allowance would introduce new potential for label inaccuracy. The original panel viewed inventory allowance as a "significant flexibility"[1088] because "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."[1089] In addition, in its Article 2.2 analysis, the original panel held that the ground meat label could provide origin information only with limited accuracy:

> Because of th[e] 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 [60-day inventory allowance] provision allows for labels to be used in a way that does not clearly indicate the product's country of origin".[1090]

7.498. As regards the actual contribution of the second alternative measure, like for the first alternative measure, we take note of the origin information that Category A-C muscle cut labels would convey based on the complainants' descriptions. According to Canada, the "majority"[1091] of US-slaughtered muscle cuts would be labelled "Product of the U.S."[1092], and market actors handling muscle cuts of both US and Canadian origin would increasingly affix a joint "Product or the US., Canada" label.[1093] Likewise, according to Mexico, the "majority"[1094] of meat processed by plants relying also on Mexican cattle would carry a joint "Product of the United States and Mexico" label.[1095]

[1084] Panel Reports, *US – COOL*, para. 7.427.
[1085] As for how previously exempted products and sectors would label products under the complainants' second alternative measure, see paras. 7.472-7.473 above.
[1086] 2009 Final Rule, § 65.300(h).
[1087] Canada's and Mexico's responses to Panel question No. 52.
[1088] Panel Reports, *US – COOL*, para. 7.435.
[1089] Panel Reports, *US – COOL*, para. 7.427.
[1090] Panel Reports, *US – COOL*, para. 7.706. This supporting finding was not overturned by the Appellate Body.
[1091] Canada's response to Panel question No. 53.
[1092] Canada's response to Panel question No. 53.
[1093] Canada's response to Panel question No. 53.
[1094] Mexico's response to Panel question No. 53.
[1095] Mexico's response to Panel question No. 53.

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7.499. We note that these labels would be similar in appearance to those under the original COOL measure[1096], but would indicate origin according to the flexibility for mixing animals and products of potentially different sources. In light of the 60-day inventory allowance, and given that Mexico and Canada are the two main sources of US livestock imports[1097], we note the possibility that a single North American label (e.g. "Product of Canada, Mexico, and the United States") could be affixed to some proportion of muscle cuts from US-slaughtered animals marketed in the United States. As long as products from Canada, Mexico, and the United States are in a market participant's inventory during any 60-day window, muscle cuts derived from US-slaughtered animals could indistinguishably carry the same North American label under the complainants' second alternative measure.[1098] Absent indications from the complainants to the contrary, this outcome cannot be excluded in light of the relative integration of the North American livestock and meat market[1099] and the fact that the 60-day inventory allowance is available for market participants at every stage of meat supply and distribution.[1100] Further, to the extent that market participants make economically rational choices to avail themselves of this inventory allowance, an increasing proportion of muscle cuts of purely US origin would no longer be labelled as such under the second alternative measure, but would carry a label also showing a foreign origin.[1101]

7.500. The second alternative measure could thus result in muscle cuts from US-slaughtered animals born or raised in different countries carrying the same label, which could possibly be affixed on muscle cuts that do not originate in at least one of the countries shown on the label.[1102] This would be in sharp contrast with the amended COOL measure, which mandates distinct labels for Category A, B, and C muscle cuts, reflecting – with the relatively higher degree of accuracy established above[1103] – the countries of birth, raising, and slaughter of the originating animals. Thus, the complainants' second alternative measure would potentially provide less accurate origin information than the amended COOL measure for covered muscle cuts of US-slaughtered animals. Based on this, the second alternative measure as described by the complainants does not seem capable of making an actual contribution to the objective of providing consumer information on origin at least equivalent to the actual contribution of the amended COOL measure.

7.501. Like for the first alternative measure, the complainants argue that removing the three exemptions of the amended COOL measure should offset the loss of accuracy in origin information under the second alternative measure.[1104] We have explained[1105] that in light of the risks, we considered that the first alternative measure might achieve an equivalent degree of contribution as the amended COOL measure, by providing *less* origin information to consumers for a significantly wider range of products. In a similar vein, we consider that by providing *less accurate* origin information to consumers for a significantly wider range of products, the second alternative measure might achieve an equivalent degree of contribution as the amended COOL measure. In any event, absent sufficient arguments and evidence from the complainants, we have been unable to ascertain the gravity of the consequences of not fulfilling the objective of providing consumer information on origin.[1106] Accordingly, like for the first alternative measure, we cannot determine the specific implications of risks of non-fulfilment for the interplay between less

[1096] See Table 1 above; Panel Reports, *US – COOL*, para. 7.100.

[1097] The trade figures submitted by the parties indicate that Canada and Mexico are the two main direct sources of US livestock imports. According to these figures, the United States imports cattle from Canada and Mexico, and hogs from Canada. For US cattle imports, see Exhibit Appendix CDA-2, Exhibits MEX-60, and Exhibit US-59. For US hog imports, see Exhibit Appendix CDA-7 and Exhibit US-59.

[1098] The original panel held that "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." Panel Reports, *US – COOL*, para. 7.427.

[1099] See Panel Reports, *US – COOL*, paras. 7.140-7.142.

[1100] Panel Reports, *US – COOL*, para. 7.434 (citing 2009 Final Rule, p. 2671).

[1101] Canada's a nd Mexico's responses to Panel question No. 53; United States' comments on Canada's and Mexico's responses to Panel question No. 53.

[1102] The complainants argue that the labelling flexibility of their second alternative measure would reduce the sources of discriminatory costs (segregation, recordkeeping) under the amended COOL measure. See Canada's first written submission, para. 167; and Mexico's first written submission, para. 194.

[1103] See section 7.6.2.3 above.

[1104] See Canada's first written submission, para. 167; and Mexico's first written submission, para. 197.

[1105] See para. 7.488 above.

[1106] See section 7.6.4.4 above.

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accurate information and more extensive coverage under the second alternative measure, or for the second alternative's degree of contribution.

7.502. Like for the first alternative measure, we lack relevant arguments and explanations from the complainants in this regard. Consequently, we cannot determine how and to what degree extended coverage could actually compensate for the less accurate origin information provided to consumers under the second alternative measure.

7.503. Accordingly, we find that the complainants have not made a *prima facie* case that their second alternative measure would make an equivalent degree of contribution to the objective of providing origin information to consumers as the amended COOL measure. In light of this finding and for the reasons explained under the first alternative measure[1107], we end our analysis of the second alternative measure here.

7.6.5.4 Third alternative measure

7.504. The complainants' third alternative measure would apply to muscle cuts from US-slaughtered animals.[1108] It would entail a mandatory trace-back[1109] system to provide "specific information"[1110] on "the precise location"[1111] where the animal was born, raised, and slaughtered.[1112] The complainants do not indicate that this alternative would remove the existing exemptions under the amended COOL measure.

7.505. The essence of the third alternative measure would be to preserve the link between the animal (or group of animals) and the resulting meat[1113] by requiring that a retailer be able to trace a muscle cut piece of meat back to the original animal.[1114] According to the complainants, the third alternative would eliminate the need to segregate, throughout the supply chain, both animals and muscle cuts on the basis of the country or countries where the animals were born and raised, because each individual animal or group of animals and each covered muscle cut commodity would have to be traceable, regardless of its country of origin.[1115]

7.506. The United States contends that the complainants present the third alternative "more as a concept than as an actual measure".[1116] As explained above[1117], adequate identification of an alternative measure by the complainants is a prerequisite of meeting their burden to make a *prima facie* case that such measure "is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available".[1118] As the Appellate Body pointed out, the complainants' identification of an alternative measure should, at a minimum, enable comparison with the challenged measure in terms of the relevant legal elements.[1119] An alternative measure may be found not to be reasonably available, for example "where it is *merely theoretical* in

[1107] See para. 7.491 above and Appellate Body Report, *US – Tuna II (Mexico)*, paras. 324-333.
[1108] Canada's second written submission, para. 125, and response to Panel question Nos. 44, 47, 55, and 60; Mexico's first written submission, para. 206, and response to Panel question Nos. 44, 47, and 55.
[1109] Further to the parties' explanations, we use the term "traceability" as a general term to describe the tracking of a given product and "trace-back" to specifically denote traceability from the birth of an animal to the retail sale of a resulting muscle cut of meat. See parties' responses to Panel question No. 54, and Appellate Body Reports, *US – COOL*, para. 489 and footnote 1009.
[1110] Mexico's first written submission, para. 200.
[1111] Canada's first written submission, para. 169.
[1112] Canada's first written submission, para. 169; Mexico's first written submission, paras. 200 and 206. As Mexico points out, the complainants suggested a similar alternative in the original proceedings. See Mexico's first written submission, para. 200; and Appellate Body Reports, *US – COOL*, paras. 480 and 489-490.
[1113] Canada's response to Panel question No. 62.
[1114] Mexico's first written submission, para. 201.
[1115] Canada's first written submission, para. 177; Mexico's first written submission, paras. 200-210.
[1116] United States' comments on responses to Panel question No. 57, para. 172.
[1117] See section 7.6.5.1.1 above.
[1118] Appellate Body Reports, *US – COOL*, para. 379.
[1119] Specifically, the Appellate Body has referred to a complainant's identification of "a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available" See Appellate Body Reports, *US – COOL*, para. 379. As explained, a full analysis of the complainants' Article 2.2 claims requires a comparison of the amended COOL measure with the complainants' suggested alternatives. See section 7.6.1.2 above.

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nature".[1120] Likewise, adequate identification of the alternative is essential for determining the alternative measure's trade-restrictiveness and degree of contribution in comparison with the challenged measure. We therefore consider the complainants' explanations of the implementation of trace-back by the United States to be of central importance to their burden of proof and our examination of the complainants' third alternative measure.

7.507. We note that the complainants describe the third alternative measure with reference to various examples of traceability and trace-back programs in the United States and other countries, which are discussed below. In their arguments on the third alternative, the parties also reference the costs associated with other traceability and trace-back programs. The complainants accept that a trace-back system for muscle cuts from US-slaughtered animals would entail costs.[1121] They argue that such costs would be distributed throughout the supply chain and would thus fall evenly on all market participants, whether foreign or domestic. This would allegedly eliminate the disincentive to use imported livestock and the disproportionate costs borne by foreign producers under the amended COOL measure.[1122]

7.508. The United States asserts that the estimation of the cost of a trace-back system is a complex undertaking, requiring extensive stakeholder outreach.[1123] In its view, a trace-back system – even one designed in general terms – would significantly increase the costs associated with recordkeeping and verification as well as labelling.[1124] According to the United States, the complainants' suggested trace-back regime would not merely impose costs on the domestic market, but also on foreign producers who would need to develop compatible trace-back programmes.[1125] The United States argues that costs associated with a trace-back regime would amount to several billions of dollars[1126], leading to changes in the industry that are difficult to predict, including increased consolidation and a dramatic slowdown in the slaughtering process.[1127]

7.509. Given the parties' extensive reference to the costs entailed by the third alternative[1128], we examine the trace-back system proposed by the complainants with regard for the evidence and arguments on its associated costs. To the extent that such evidence and arguments are advanced to describe the complainants' third alternative, the issue of costs may be relevant for assessing whether they have met their burden of adequately identifying a "trace-back" measure. In addition, the costs imposed by an alternative measure may be directly relevant to whether such a measure can be considered reasonably available to a responding Member.[1129] The potential costs of trace-back are further relevant to examine the validity of the complainants' arguments on the relationship between costs and trade-restrictiveness.

[1120] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156 (quoting Appellate Body Report, *US – Gambling*, para. 308) (emphasis added).

[1121] See, e.g. Canada's first written submission, para. 178; and Mexico's first written submission, para. 209.

[1122] Canada argues that "while a trace-back system would entail costs for tracking throughout the supply chain, the fact that these costs would be related to each individual animal or group of animals – irrespective of the country of origin – means that the costs would fall evenly on all market participants, whether foreign or domestic." Canada's first written submission, para. 178 (footnotes omitted). Mexico contends that "this alternative would accurately and comprehensively fulfil the objective of the COOL Measure and yet not discriminate against imports in the sense that it would eliminate the option of restricting trade in imports and as well as the option of discounting the price of imports as the most commercially viable option to comply with the Amended COOL Measure. Thus, costs of the mandatory labelling would be spread evenly throughout the market." Mexico's first written submission, para. 200.

[1123] United States' comments on responses to Panel question No. 59, para. 179.

[1124] United States' first written submission, para. 185.

[1125] United States' first written submission, para. 187.

[1126] United States' first written submission, para. 190.

[1127] See United States' opening statement at the meeting of the Panel, para. 52.

[1128] See generally parties' responses to Panel questions Nos. 39-41. This is notably reflected in Canada's position that there is a certain level of compliance costs that a non-discriminatory alternative measure could entail that would generate trade impacts equivalent to or greater than those of the amended COOL measure. See Canada's second written submission, paras. 94-95; response to Panel question No. 40; and Exhibit CDA-126. We have addressed the methodological and other shortcomings of the evidence submitted by Canada as to the magnitude of those costs required to have equivalent trade effects to the original COOL measure. See section 7.6.5.1.3 above.

[1129] See Appellate Body Reports, *EC – Seal Products*, para. 5.277; *Brazil – Retreaded Tyres*, para. 156; and *US – Gambling*, para. 308.

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7.510. We turn to the complainants' identification and description of the proposed trace-back system with particular focus on the parties' arguments on the implementation and related costs of such a measure. We are guided by the Appellate Body's clarification that a party bearing the burden in the context of an alternative measure's reasonable availability "must support such an assertion with sufficient evidence", and "provide evidence … substantiating the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system".[1130]

7.6.5.4.1 Implementation and costs of the third alternative measure

7.511. According to Canada, a trace-back system would involve three stages: (i) from the birth of the animal to the slaughterhouse; (ii) the killing of the animal and the division of the carcass into cuts at the slaughterhouse; and (iii) the delivery of cuts from the slaughterhouse to the consumer through the distribution chain.[1131] The first stage, birth to slaughterhouse, would entail three pillars: (a) premises identification; (b) animal identification; and (c) animal movement.[1132] According to Canada, full implementation of the animal movement pillar would not be necessary because not all animal movements are relevant (e.g. animal movements to an auction facility).[1133] The table below represents graphically the structure of Canada's suggested trace-back system.

<table>
<tr><td colspan="3">Stage 1

from birth to slaughterhouse</td><td>Stage 2

killing of the animal and division of the carcass into muscle cuts at slaughterhouse</td><td>Stage 3

delivery of muscle cuts from the slaughterhouse through the distribution chain all the way to the retailer</td></tr>
<tr><td>1st pillar: Premises identification</td><td>2nd pillar: Animal identification</td><td>3rd pillar: Animal movement identification</td><td></td><td></td></tr>
</table>

7.512. Although Canada refers to dispensable aspects of the third pillar and Mexico does not explicitly adopt these stages, the complainants' general description of the third alternative suggests that trace-back would, at a minimum, be required to maintain some continuity between the livestock and meat products being traced, from birth through the slaughter process and up to the point of retail sale.[1134] We note that the United States does not contest the general relevance of these phases for trace-back. We therefore adopt the general framework of these distinct stages and pillars to assess the trace-back system suggested by the complainants.

[1130] Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 327-328. We note that the Appellate Body was referring in that case to the respondent's burden under Article XX of the GATT 1994 to show that an alternative measure would impose an undue burden. See also Appellate Body Report, *Korea – Various Measures on Beef*, para. 181. As acknowledged by Mexico, it is the complainants' burden under Article 2.2 of the TBT Agreement to make a *prima facie* case that their proposed alternatives are less trade restrictive, reasonably available, and make an equivalent contribution to the objective of the amended COOL measure. See Mexico's second written submission, paras. 114-117.

[1131] Canada's second written submission, para. 109. See also Canada's response to Panel question No. 62.

[1132] Canada's second written submission, para. 112.

[1133] Canada's second written submission, para. 112. See also Canada's response to Panel question No. 57.

[1134] See, e.g. Exhibit CDA-92, p. 6 and Figure 1.

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7.6.5.4.1.1 Stage 1: Trace-back from birth to the slaughterhouse

7.513. With respect to the first stage of the proposed trace-back system, namely from animal birth to the slaughterhouse, the complainants refer to two US traceability programmes: the National Animal Identification System (NAIS) and the 2013 Final Rule on Traceability for Livestock Moving Interstate (Interstate Livestock Traceability Rule).

7.514. The NAIS was first proposed in 2002 and primarily concerned the protection of commercial interests from the potential harm associated with the outbreak of an animal disease.[1135] To this end, the NAIS aimed "to achieve the ability to identify and trace animals of interest within 48 hours of an animal disease problem" with "rapid access to reliable and complete data on both animal ID and movement history".[1136] Further, "[t]o collect the requisite information, NAIS was composed of three sequential components – premises registration, animal identification, and animal tracking."[1137] This "was based on a state-federal-industry partnership", and that, while some states mandated some components of animal identification, "at the federal level, NAIS was a voluntary program".[1138]

7.515. In 2010, the USDA decided "to replace NAIS with a more flexible, state-based program that mandates traceability only for livestock moving in interstate commerce."[1139] The result was the Interstate Livestock Traceability Rule under which, "unless specifically exempted, livestock belonging to species covered by the regulations that are moved interstate must be officially identified and accompanied by an interstate certificate of veterinary inspection or other documentation."[1140] According to the United States, the Interstate Livestock Traceability Rule "represents a significantly more modest approach to the problem than the previously contemplated [NAIS]".[1141] Generally speaking, the Interstate Livestock Traceability Rule currently creates traceability for an animal's movement between the slaughter facility and the state the animal was in at 18 months of age.[1142]

7.516. For the general costs of the first stage of trace-back, the complainants refer to cost assessments related to each of these traceability programs. Canada argues that it has been documented that implementing full animal traceability under the NAIS would have added about USD 5.97 per head to the costs of cattle, and USD 0.06 per head to the costs of hogs.[1143] In total, implementing NAIS was estimated to cost the federal government of the United States between USD 23.8 and 33 million annually. The same estimate concluded that the cost would be partially offset by direct benefits in the form of cost savings achieved through NAIS. Further, NAIS would have provided the government with "an array of 'indirect benefits' that are difficult to empirically value".[1144] Full traceability, that is to say 100% NAIS participation, would have cost around USD 210 million annually to the US cattle industry and USD 6.4 million annually to the US hog industry.[1145] Put in perspective, Canada argues, this represents less than a quarter of 1% of the retail value of US beef products.[1146]

7.517. Mexico submits a summary of an economic analysis conducted by the USDA to assess the economic impact of implementing the Interstate Livestock Traceability Rule on the cattle industry.[1147] This analysis combined compliance costs with official identification and interstate movement documentation components of the rule, concluding that "annual incremental costs

[1135] See Exhibit CDA-92, p. 13; United States' response to Panel question No. 63, para. 145.
[1136] Exhibit CDA-92, p. 13.
[1137] Exhibit CDA-92, p. 13.
[1138] Exhibit CDA-92, p. 11.
[1139] Exhibit CDA-92, p. 11.
[1140] Interstate Livestock Traceability Rule, p. 2040.
[1141] United States' response to Panel question No. 62, para. 135.
[1142] United States' response to Panel question No. 62, paras. 136-137.
[1143] Canada's second written submission, para. 124 (citing Exhibit CDA-133, pp. 68 and 98).
[1144] Canada's second written submission, para. 132 (citing Exhibit CDA-133, pp. 143 and 184)
[1145] Canada's second written submission, para. 133 (citing Exhibit CDA-133, pp. 71 and 100). According to the study, the USDA admits that the estimates are likely higher than what actual costs would have been. See Exhibit CDA-133, p. xiii.
[1146] Canada's second written submission, para. 133; and comments on the United States' response to Panel question No. 63, para. 96.
[1147] Exhibit MEX-86.

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would range from a total of USD 5.5 million to USD 7.3 for producers who combine official identification eartagging with current management activities, to USD 14.5 million to USD 34.3 million for producers who would handle their cattle solely for compliance with the regulation, or a cost per animal range from USD 0.18 to USD 12.18."[1148] According to the USDA, the estimated cost was minimal and represented only a "small fraction" of the value of US cattle and calf production, which was estimated at USD 31.8 billion in 2009.[1149]

7.518. With respect to the specific sub-components (three pillars) of the first stage, the complainants do not advance explanations or data on the costs for implementing premises identification, i.e. the first pillar of the first stage of the proposed trace-back system. As to the second pillar of the first stage, Canada notes that the USDA observed that implementing a single ear tag approach to comply with animal identification requirements under the Interstate Livestock Traceability Rule could be cost-efficient to producers, as evidenced by other countries' practice.[1150] For the third pillar, Canada points out that the NAIS involved tracking animal movements in one of the NAIS-compliant animal tracking databases.[1151] Canada also claims that tracking cattle movements is not as costly as the United States portrays it, and that tracking cattle movements under the NAIS was estimated to represent at most one fifth of the costs associated with implementing the NAIS for the cattle industry.[1152]

7.519. In response, the United States points out that the NAIS analysis referred to by Canada only provides an assessment of an existing and limited voluntary system. According to the United States, the analysis assesses only the direct costs of replacing the existing tagging and branding systems with an electronic system. Moreover, the NAIS was limited to identifying animals only from birth to slaughter, where identification is maintained through carcass inspection.[1153] The United States also questions the relevance of the Interstate Livestock Traceability Rule based on the fact that its costs are incurred primarily by ranches and feed lots as opposed to downstream entities such as slaughter facilities, processors, and retailers.[1154] The United States notes that the costs of a trace-back system would be substantially greater for its cattle than its hog industry. The former is far more complex than the latter, requiring the tracking of each individual head of cattle. By contrast, the hog industry is far more integrated and trace-back could be based on batches of swine instead of individual animals.[1155] According to the United States, this would mean that 90% of the costs of the NAIS would fall on its cattle industry.[1156]

7.520. We recall the complainants' argument that the third alternative measure would eliminate the need to segregate livestock and muscle cuts according to country of origin. The Interstate Livestock Traceability Rule may give support to this contention as regards livestock. As the United States explains, under the Interstate Livestock Traceability Rule, "there is no need to physically segregate different animals as all covered animals have an official identification number on an ear tag (or through some other means)."[1157] Further, the United States adds that "[a]t the time the animal receives its identification number, all animals are treated the same, regardless of whether any particular animal has spent time outside the United States previously."[1158]

[1148] See Exhibit MEX-86, p. 1; and Mexico's response to Panel question No. 62, para. 139. In connection with the fourth alternative measure, Canada cites cost estimates provided in the final Interstate Livestock Traceability Rule that differ slightly from the estimates for the proposed rule relied upon by Mexico. For example, according to Interstate Livestock Traceability Rule, "[t]he combined annual costs of the rule for cattle operations of official identification and movement documentation will range between $14.5 million and $34.3 million, assuming official identification will be undertaken separately from other routine management practices; or between $10.9 million and $23.5 million, assuming that tagging will be combined with other routine management practices that require working cattle through a chute." Interstate Livestock Traceability Rule, p. 2041.

[1149] Mexico's response to Panel question No. 62, para. 139.

[1150] Canada's comments on responses to Panel question No. 68, para. 108.

[1151] Canada's second written submission, para. 124.

[1152] Canada's second written submission, para. 127 (citing Exhibit CDA-133, pp. 69-70).

[1153] United States' second written submission, para. 134.

[1154] United States' response to Panel question No. 62, para. 144.

[1155] United States' response to Panel question No. 65, para. 153.

[1156] United States' first written submission, para. 192.

[1157] United States' response to Panel question No. 62, para. 140.

[1158] United States' response to Panel question No. 62, para. 141. With respect to the Interstate Livestock Traceability Rule, it was noted that "[t]his rulemaking does not affect our import/export

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7.521. However, the traceability of interstate animal movements under the Interstate Livestock Traceability Rule differs substantially from the type of trace-back system contemplated in the complainants' third alternative measure. As pointed out by the United States, the Interstate Livestock Traceability Rule provides for notable exceptions from the requirement that animals moving interstate have an official identification number and be accompanied by an interstate certificate of veterinary inspection (ICVI)[1159] or other document.[1160] Apart from the limitation of coverage to animals moving interstate, the Interstate Livestock Traceability Rule exempts cattle intended for slaughter that are under the age of 18 months from the requirement to have an official identification number.[1161] Further, the United States notes that "animals that are 'moved directly to a recognized slaughtering establishment' (which includes all animals imported for immediate slaughter) are exempt from the system entirely in that they do not need an official identification number or an ICVI".[1162]

7.522. Given these differences, the evidentiary value of the Interstate Livestock Traceability Rule is at best limited in respect of the implementation and the potential costs of the complainants' third alternative measure. The Interstate Livestock Traceability Rule represents only a fragment of the first stage of trace-back, unlike the more comprehensive trace-back from animal birth to retail muscle cut under the complainants' proposal. Indeed, Canada acknowledges that the Interstate Livestock Traceability Rule framework "would be insufficient for the first stage of a trace-back system (i.e. the three pillars of an identification and traceability system for livestock)".[1163] Consistent with the narrower scope of the Interstate Livestock Traceability Rule, the United States indicates that its "regulatory impact analysis estimated the incremental costs of additional measures associated with the interstate traceability requirements for all dairy cattle and beef cattle at age 18 months or older."[1164]

7.523. Further, the Interstate Livestock Traceability Rule does not appear to provide origin information on US livestock imports in Categories B and C. For Category B, as mentioned, the average age at which Category B feeder cattle are imported into the United States is typically within the first year of their lives (before they are 18 months old). By tracking only interstate movements long after animals have been in the United States, the Interstate Livestock Traceability Rule does not provide information on a relevant portion of the animal's life history. Canada states that "the USDA has confirmed that feeder cattle (cattle under 18 months of age) 'will be subject to the official identification requirements in a future rulemaking'. It is Canada's understanding that the program will apply to all ages of cattle as of 2015."[1165] At the same time, in asserting that that "the costs could not be greater than the estimated costs under the NAIS", Canada recognizes that "the costs of covering these animals [i.e. animal less than 18 months older] under the [Interstate

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requirements. While brands may be used as official identification for cattle moving interstate in accordance with the provisions of this final rule, the branding of imported cattle from Canada and Mexico is not intended to provide official individual identification, but is rather a permanent mark used to designate the country that exported the animal." Interstate Livestock Traceability Rule, p. 2048.

[1159] Under the Interstate Livestock Traceability Rule, the ICVI is defined as "[a]n official document issued by a Federal, State, Tribal, or accredited veterinarian certifying the inspection of animals in preparation for interstate movement", and further required to show *inter alia* "the species of animals covered by the ICVI; the number of animals covered by the ICVI; the purpose for which the animals are to be moved; [and] the address to which the animals are destined". See Interstate Livestock Traceability Rule, § 86.1.

[1160] See United States' response to Panel question No. 62, para. 139; Interstate Livestock Traceability Rule, § 86.5(c).

[1161] See United States' response to Panel question No. 62, para. 139 (citing Interstate Livestock Traceability Rule, § 86.5(c)(7)(ii)). According to the United States, "[t]here was significant opposition by the U.S. cattle industry to extending the traceability regime back to birth." United States' response to Panel question No. 62, footnote 126 (citing Interstate Livestock Traceability Rule, p. 2047: "Other commenters stated that the sheer number of animals that will be required to be identified and tracked under these regulations will make including feeder cattle very costly for producers, veterinarians, sale barns, and State agencies and that the volume of information that will need to be generated may swamp the whole system, for no significant benefit.").

[1162] See United States' response to Panel question No. 62, para. 139 (citing Interstate Livestock Traceability Rule, § 86.5(c)(1) and (7)(i)).

[1163] Canada's response to Panel question No. 64, para. 160.

[1164] United States' response to Panel question No. 62, para. 143 (citing Exhibit US-55).

[1165] Canada's response to Panel question No. 74, para. 183 (citing Interstate Livestock Traceability Rule, p. 2047 and Exhibit CDA-127, p. 32).

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Livestock Traceability Rule] are not known to Canada".[1166] Mexico does not directly address the implications of extending traceability to Category B livestock imports for the relevance of its cost assessments and implementation of the first stage of trace-back.[1167]

7.524. The evidence before us also suggests that Category C cattle would fall into the Interstate Livestock Traceability Rule's exemption for animals "moved directly to a recognized slaughtering establishment".[1168] Canada states that "[e]ven if an ICVI is not required for cattle moved directly to a slaughterhouse, such cattle must be accompanied by an 'owner-shipper statement'."[1169] Although the "owner-shipper statement" is defined in such a way as to include potentially relevant origin information, Canada only argues the applicability of such information in the context of its fourth alternative measure, without indicating whether and how it would serve for the third alternative. Mexico does not address the tracking of animals imported for immediate slaughter in connection with the third alternative's implementation or cost estimates.

7.525. To the extent that the complainants adduce cost estimates based on a traceability system, such as the Interstate Livestock Traceability Rule, that does not apply to the majority of imported animals in Categories B and C, such evidence is of limited assistance in assessing an alternative measure designed to convey origin information on muscle cuts derived from such animals. Like the first two alternatives, the complainants' third alternative measure would cover all muscle cuts from US-slaughtered animals, including animals born and/or raised outside the United States. While the NAIS may have extended to such animals, we note the program's voluntary nature, and the limited participation in its premises registration. In light of the complainants' limited arguments in this regard, we are unable to ascertain the relevance of the Interstate Livestock Traceability Rule and the NAIS for the implementation and costs of the first stage of their third alternative.

7.526. With regard to the specific sub-divisions of the first stage, the complainants provide only a partial description, particularly as to what the first and third pillars would consist of and how they would be implemented. For the first pillar, neither complainant has explained the exact manner of premises identification to be included in the third alternative measure.

7.527. For the third pillar, Canada states that full implementation of animal movement traceability would not be necessary because not all animal movements are relevant.[1170] Canada explains that "the system would only need the reporting of the birth of an animal on a farm and the presence of an animal on a farm or feedlot where it is being raised" to provide information on where livestock were born, raised, and slaughtered.[1171] In response to the Panel's request for clarification, Canada addresses the dispensability of the third pillar with respect to its own traceability system: "for the purpose of fulfilling the United States' objective and in order to make a trace-back system in the United States non-discriminatory and less trade-restrictive than the amended COOL measure, the third pillar of *Canada's* system for cattle may not be strictly necessary."[1172]

[1166] Canada's response to Panel question No. 74, para. 183. While this is presumably based on the fact that the NAIS envisaged complete first-stage traceability, it takes no account of the voluntary nature of the NAIS nor the limitations of the NAIS costs assessments put forward. See United States' second written submission, para. 134 (asserting that the NAIS cost analysis evaluated "only 'direct' costs of changing the tagging and branding systems in place to an electronic system" and that identification was only "maintained through carcass inspection") and para. 151. See also Exhibits CDA-133 and CDA-92, p. 22.

[1167] Similar to Canada, Mexico states that "rule-making concerning traceability for this category of livestock is expected in the near future". Mexico's response to Panel question No. 63, para. 136.

[1168] See para. 7.241 above.

[1169] Canada's comments on the United States' response to Panel question No. 63, para. 99 (citing Interstate Livestock Traceability Rule, § 86.5(c)(1)). Canada additionally notes that an "owner-shipper statement" is defined as "[a] statement signed by the owner or shipper of the livestock being moved *stating the location from which the animals are moved interstate; the destination of the animals*; the number of animals covered by the statement; the species of animal covered; the name and address of the owner at the time of the movement; the name and address of the shipper; and the identification of each animal, as required by the regulations, unless the regulations specifically provide that the identification does not have to be recorded". Canada's comments on the United States' response to Panel question No. 63, para. 99 (citing Interstate Livestock Traceability Rule, § 86.1) (emphasis by Canada).

[1170] See para. 7.511 above.

[1171] Canada's second written submission, para. 112.

[1172] Canada's response to Panel question No. 57, para. 130 (emphasis original).

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7.528. These explanations imply that the third alternative would require *some* form of animal movement traceability within the United States for animals raised there for any period of time before slaughter. While Canada refers to tracking "the presence of an animal on a farm or feedlot where it is being raised", it is unclear whether this necessarily extends to every animal movement and raising location, or what the cost implications would be based on the amount of information tracked. Moreover, the complainants do not account for whether this has any implications for the comparability of the third alternative to evidence they have put forward regarding other traceability schemes, such as the NAIS.[1173] While some unspecified element of the third pillar might be dispensable under the first stage, the complainants have not explained what this pillar would consist of in order to provide origin information under their third alternative measure.

7.6.5.4.1.2 Stage 2: Trace-back at the slaughterhouse

7.529. Both Canada and Mexico suggest that there are particular challenges for trace-back after the first stage. As acknowledged by Canada, "[t]he essence of a trace-back system is to preserve the link between the animal or group of animals and the meat (i.e. the identity of the meat)".[1174] According to Canada, "the second stage – the killing of the animal and the division of the carcass into cuts at the slaughterhouse – is the stage of a trace-back system where most of the compliance costs would be entailed."[1175] While Mexico does not specifically address the costs associating with maintaining traceability in the slaughter facility, it also refers to the view of some industry participants "that linking the two systems [of animal identification and product tracking] will be difficult and costly".[1176]

7.530. The United States argues that maintaining individual trace-back for each animal once processing has begun, on an industrial scale, would entail dramatic slowdowns in the meat cutting process, and would add substantial burdens and costs to retailers and other vendors who would have to associate particular cuts of meat with labels that would correspond to individual animals.[1177] According to the United States, the cost analysis commissioned by the USDA, which Canada relies upon, evaluates traceability only up to the point of slaughter, which is the least expensive of the three stages of meat production. Thus, the United States claims, neither complainant has provided any evidence as to the costs of trace-back during this stage.[1178]

7.531. The importance of maintaining traceability through the slaughter process illustrates the limitations of cost estimates confined to the first stage of trace-back. Although Canada states that linking animal and meat "mostly concerns the second stage of the system" of traceability within the slaughterhouse[1179], it notes that the Interstate Livestock Traceability Rule framework "deals with traceability for livestock, not meat".[1180] This raises doubts as to the utility of referring to such existing – or abandoned – systems with a view to obtaining a clear understanding of the third alternative measure, particularly if, as Canada says, "the bulk of the costs of a trace-back system are incurred at the second stage of the system, i.e. at the slaughterhouse."[1181] The same is true of a program like the NAIS, which applied only up to the point of slaughter. As a result, the traceability systems referred to by the complainants for the description and costs of trace-back stop short of bridging the very gap between animal and meat traceability that the complainants' third alternative would have to fill in order to function.

7.532. The complainants also refer to examples of non-US trace-back systems in the context the second stage of trace-back, specifically regarding the continuity between animal and meat

[1173] For example, with respect to tracing animal movements under the NAIS, it was considered that "[t]he minimum traceback information included: the national premises identification number (PIN); the animal ID number (AIN) or group ID number (GIN); the date of the event; and the event itself (e.g., move-in to a new premises or move-out of the current premises)." Exhibit CDA-92, p. 17.
[1174] Canada's response to Panel question No. 62, para. 144.
[1175] Canada's response to Panel question No. 42, para. 94 (citing Exhibits CDA-86, p. 32; CDA-89, p. 9; and CDA-158, pp. 2-3).
[1176] Mexico's first written submission, para. 210 (citing Exhibit MEX-33, p. 11).
[1177] United States' second written submission, paras. 152 and 154.
[1178] United States' second written submission, paras. 151-152; opening statement at the meeting of the Panel, para.51; and comments on responses to Panel question No. 42.
[1179] Canada's response to Panel question No. 62, para. 144.
[1180] Canada's response to Panel question No. 62, para. 145.
[1181] Canada's comments on parties' responses to Panel question No. 54, para. 87.

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identification. Canada states that "[p]reserving that link is done on a country-wide and commercial basis in at least two WTO Members, namely Japan and Uruguay".[1182] According to Canada, "[w]hile there is no single method, Uruguay's system provides a good example of how preserving the link is done from an operational perspective."[1183] Canada also "notes that the operations at the second stage of the trace-back system in Uruguay are financed by a contribution from market participants in the amount of 1 U.S. dollar per animal slaughtered."[1184] Mexico also points to trace-back systems in the European Union, Korea, Japan, and Uruguay, noting that "Uruguay has implemented a comprehensive trace back system which allows tracking livestock and the meat derived from those animals".[1185]

7.533. The complainants' references to other trace-back systems do not always clearly separate the second and third stages, and appear to be made for the more general illustration of maintaining the link from animal birth to retail sale. Therefore, some of this evidence may be understood to have potential relevance for both the second and third stages of trace-back. We accordingly address other trace-back systems below in connection with any relevant clarification they provide as to the overall implementation of trace-back under the third alternative.[1186]

7.6.5.4.1.3 Stage 3: Trace-back from slaughterhouse to retail

7.534. Canada notes that "[t]he third stage of a trace-back system involves the distributors and the retailer. … The distributors and the retailer have to preserve the information about the muscle cut, including if further cutting is done."[1187] Mexico foresees that the third alternative measure "will cover the production steps after delivery of the animals to the slaughterhouse up to the point of sale to the consumer."[1188]

7.535. In addition to these general descriptions, Canada and Mexico both reference the trace-back system in Uruguay with respect to the post-slaughter stages of the third alternative measure, again without clear distinction between the second and third stages.[1189] With specific regard to the costs of the third stage, i.e. beyond the slaughterhouse, Canada contends that Japan's experience shows how the costs of conveying information to consumers under a trace-back system may be borne directly by governments rather than businesses. According to Canada, bearing the costs of correctly conveying information to consumers, for instance by maintaining a website, could reduce labelling costs to market participants.[1190]

7.536. The United States responds that the third stage of trace-back would require each retailer to provide consumers with the ability to trace each individual cut of beef back to an individual animal. According to the United States, this would be especially costly for retailers that further process and cut the meat they receive from slaughterhouses, as such retailers would need to set up potentially complicated processes to ensure that each cut that was further processed would continue to retain traceability.[1191] The United States maintains that those procedures would add substantial burden to retailers and other vendors, who would have to associate particular cuts of meat with labels that would correspond to the individual animal.[1192] As with the second stage, the

[1182] Canada's second written submission, para. 117.
[1183] Canada's second written submission, para. 117 (citing Exhibits CDA-95; CDA-96; CDA-97, pp. 6-9; CDA-98, pp. 10-11; CDA-104; CDA-105; CDA-106; CDA-131, pp. 49-55).
[1184] Canada's second written submission, para. 124 (citing Exhibit CDA-134).
[1185] Mexico's first written submission, para. 208, (citing Exhibits MEX-41, MEX-42, MEX-43, and MEX-44).
[1186] See paras. 7.547-7.549 below.
[1187] Canada's second written submission, para. 118.
[1188] Mexico's response to Panel question No. 60, para. 127.
[1189] See, e.g. Canada's second written submission, para. 118; Mexico's response to Panel question No. 42, para. 86 ("For example, in the case of Uruguay, Canada has provided evidence on the cost of trace-back from farm to consumer on a per head basis. This includes all states of production and sale.") (citing Exhibit CDA-145 (BCI)).
[1190] Canada's comments on parties' responses to Panel question No. 68, para. 107.
[1191] United States' second written submission, para. 152.
[1192] United States' second written submission, para. 154.

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United States argues that neither complainant provides estimates or adequate evidence of the costs incurred in later stages leading to retail.[1193]

7.537. Given the complainants' treatment of the second and third stages in their descriptions of trace-back, we address the third stage and the relevance of other trace-back systems below in connection with the overall implementation of trace-back under the third alternative.

7.6.5.4.1.4 Overall implementation and costs of trace-back

7.538. The complainants' evidence and arguments leave significant gaps as to the three separate stages that would need to be linked under the third alternative measure. As noted, for the first stage, the complainants cite certain traceability programs within the United States that have more limited coverage and applicability than that required under the third alternative measure. The complainants' point to more comprehensive trace-back schemes in other countries, but have claimed that these are illustrative of feasibility and not necessarily indicative of the exact trace-back that would be implemented in the United States.

7.539. To obtain an overall view of the implementation and costs of a trace-back system within the United States, the complainants' description would need to be examined beginning with the birth of livestock, including livestock born abroad. In this regard, Canada and Mexico contend that they currently (or imminently in the case of Canadian hogs) have in place traceability systems that could supply relevant origin information for animals exported to the United States.[1194] To the extent that the third alternative covers muscle cuts from all US-slaughtered animals, this may be relevant for a complete review of the implementation of a comprehensive US trace-back system for such muscle cuts. However, we are not in a position to carry out such a review, given the uncertainties in the complainants' description of trace-back following the animals' entry into the United States.

7.540. We understand from the complainants' descriptions that the third alternative could be implemented in the United States through a variety of different tracking technologies and informational systems. For example, Canada states that its own identification and traceability systems will provide relevant origin information through individual ear tag numbers for live cattle and group tattoo numbers for hogs up to the point of export. According to Canada, "[t]his number could be transferred to the US system electronically, depending on an electronic system being in place in the United States to receive the data."[1195] Canada further argues that "[t]here is no indication that the cost of transferring the origin information from Canada to the United States would be higher than the costs of linking any database established by the United States under the first phase of a trace-back system with any database established by it under the second or third phases of a trace-back system."[1196] Similarly, Mexico explains that applicable rules already require that its cattle exports bear an ear tag "that can be used to trace the animal, including the State of origin, the ranch which the cattle belongs to, and complete information about its producer".[1197] Mexico states that "[t]here are many methods of animal identification and traceability available today, for example, ear tags and electronic methods".[1198]

[1193] United States' second written submission, paras. 151-152; opening statement at the meeting of the Panel, para. 51; and comments on responses to Panel question No. 42.

[1194] Parties' responses to Panel questions Nos. 58-59.

[1195] Canada's response to Panel question No. 59, para. 136. Canada further notes that "the USDA (APHIS), too, observed that a single eartag to comply with animal identification requirements under the Final Rule on Traceability could be cost-efficient to producers". Canada's comments on the United States' response to Panel question No. 68, para. 108 (citing Interstate Livestock Traceability Rule, p. 2058: "Additionally, within beef operations, over 60 percent of calves had some form of individual identification. […] Additionally, with an array of official eartags, producers may choose a single eartag that meets both management and official identification needs. This option would make the additional cost of official eartags quite small.").

[1196] Canada's response to Panel question No. 59, para. 137.

[1197] Mexico's first written submission, para. 211.

[1198] Mexico's first written submission, para. 209.

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7.541. We note that there are a number of methods of animal identification – the second pillar of the first stage of trace-back – with potentially varying costs.[1199] The NAIS cost analysis referenced by Canada made certain assumptions as to the type of identification system used. For instance, "[i]n the cattle (bovine) industry, it was assumed the technology used for animal identification would be electronic identification (eID) using Radio Frequency Identification (RFID) ear tags and identification would be on an individual animal basis."[1200] For swine, the study "assumed market hogs would be identified with a group/lot ID and cull breeding stock would be identified with a unique visual premises ear tag".[1201] Any resulting cost estimates may be of assistance only to the extent the complainants' third alternative adopted these and other operational assumptions, but would not be directly or at all comparable to, and hence relevant for, any trace-back system that employed other means. The complainants do not specify whether and to what extent their third alternative would incorporate such operational assumptions used with respect to other traceability programs.

7.542. A further difficulty of assessing the overall implementation and costs of the third alternative arises with respect to the retrieval and management of trace-back information. Canada's description of the third alternative measure envisions the possibility of establishing some form of "database".[1202] According to the United States, "[a]t present, there is no searchable electronic data base at the national level" and "[t]he vast majority of states do not have searchable electronic databases either".[1203] Traceability of animal movements under the Interstate Livestock Traceability Rule occurs "by following the paper trail that animal has created through ICVI's that are on record in the livestock facilities that the animal has resided in."[1204] While Canada points to certain mechanisms that could facilitate the management of information under a trace-back regime[1205], it leaves unclear the manner of data storage, management, and retrieval – as well as related costs – that would form part of the third alternative. For its part, Mexico discusses its own readiness to export cattle equipped for trace-back purposes[1206], but does not explain the sort of information tracking and storage that would exist within in the United States through later stages of its third alternative measure.

7.543. Both complainants seem to distinguish trace-back from the COOL recordkeeping and audit requirements. In particular, they contend that the COOL statute's prohibition of a mandatory identification system necessitates use of the latter at the expense of Canadian and Mexican

[1199] One source notes that that, apart from branding, "[o]ther methods of animal identification include tattooing, retina scanning (Optibranding™), iris imaging, and, currently the most common method, tagging. Tags may have simple printed numbers, imbedded microchips, or machine-readable codes, such as radio frequency identification (RFID). Ear tags cost in the neighborhood of $1 or $2 apiece. RFID technology is more costly, with instruments for reading RFID tags costing several hundred dollars apiece, though prices have been rapidly falling." Exhibit CDA-86, p. 28. Another source refers to "tags, radio frequency identification devices, and other ID devices" capable of bearing "a unique, 15-digit" animal identification number. Further, "[i]n recent years, the use of RFID devices and injectable transponders with information that is read by scanners and fed into computer databases is becoming more common, because these devices allow for faster, easier access to information." Exhibit CDA-92, p. 16.

[1200] Exhibit CDA-133, p. 8.

[1201] Exhibit CDA-133, p. 8. See also Exhibit MEX-86.

[1202] See Canada's response to Panel question No. 59, para. 137.

[1203] United States' response to Panel question No. 62, para. 137.

[1204] United States' response to Panel question No. 62, para. 137. As the Interstate Livestock Traceability Rule relies on the "paper trail" of ICVIs on record in livestock facilities or animal identification by other documents created in the ordinary course of business, the United States explains that "the current traceability regime for animal movements is considered a 'book end' system." See United States' response to Panel question No. 62, footnote 128.

[1205] Canada notes that "APHIS provides information systems that the states and tribes may use at no charge" and "[a] state or tribe may also decide to develop its own system". Canada's comments on the United States' response to Panel question No. 62, para. 89 (citing the Interstate Livestock Traceability Rule, p. 2059). Canada further states that "[u]nder the NAIS, a producer would select one of the NAIS-compliant animal tracking databases (ATDs) maintained by states and private industry to report the movements of an animal. The USDA would operate a 'portal system' to enable health official to submit requests for information to the administrators of the ATDs. Thus, there was no single database. However, that would not have been an obstacle to an efficient traceability system for livestock (the first stage of a trace-back system)." Canada's comments on the United States' response to Panel question No. 63, para. 93 (footnotes omitted).

[1206] See Mexico's responses to Panel questions Nos. 57-59.

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livestock.[1207] However, there are indications that these systems might not be so clearly dichotomous, as the complainants' explanations suggest that the third alternative measure could entail elements of recordkeeping and audit similar to that under the amended COOL measure.[1208] For example, Canada describes mitigation of trace-back costs through reducing the amount of label information, but states that "market participants would nevertheless have to be able to demonstrate, if audited, that a muscle cut derives from an animal (or group of animals) that was born, raised and slaughtered *at a specific location* (farm, feedlot, slaughterhouse)."[1209] Thus, we understand that the third alternative measure could possibly require audit capability of records for even more information than that required under the amended COOL measure, with possible cost implications that the complainants do not address.[1210] Ultimately, the complainants' explanations do not resolve these basic questions, and leave us in doubt about the existence, amount, manner, and resulting costs of recordkeeping and audit under the third alternative measure.

7.544. The lack of clarity on the complainants' third alternative measure is compounded by their explanations of the eventual muscle cut labels. For example, Canada states that the label "would provide consumers with information, not only in respect of country of origin, but on the precise name and location of the farm, feedlot and processing facility (i.e. state/province, municipality, or specific address)."[1211] Canada further describes the following labelling flexibility as follows:

> Under a trace-back system, the label could indicate the precise name and address of the farm, feedlot and processing facility where each of the production steps took place. However, the costs of labelling could be mitigated by reducing the information conveyed on the label. The labelling requirements under a trace-back system could be the same as those under the amended COOL measure.[1212]

7.545. Mexico similarly proposes that the third alternative could provide detailed information on where the animals were born, raised, and slaughtered[1213] as follows:

> [A] "Product of U.S." or similar label that is based on a "born, raised and slaughtered" rule will be permissible under this alternative as well as the more detailed information on where the animal was born, raised and slaughtered. This [third] alternative provides the United States with flexibility in establishing the labeling conditions.[1214]

7.546. Both complainants thus frame their third alternative in flexible terms as to what information the label would convey to consumers. At the same time, the complainants seem to presuppose that the trace-back system would entail tracking more detailed information than under the amended COOL measure, irrespective of the information actually labelled. Ultimately, the complainants do not explain whether and to what extent the method and costs of traceability across the three stages of trace-back would depend on the information being labelled. Nor do they

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[1207] See Canada's first written submission, paras. 172 and 178; Mexico's first written submission, paras. 202-203 (both citing Hayes and Meyer paper, p. 7).

[1208] In this connection, we note that the Hayes and Meyer paper refers to "some mixture of both systems". Hayes and Meyer paper, p. 8. In addition, the paper factors the costs of "labels, *additional record keeping, audit compliance* and labor" into its trace-back costs estimates. Hayes and Meyer paper, p. 9 (emphasis added).

[1209] Canada's second written submission, para. 120 (emphasis original).

[1210] Such recordkeeping burdens would likely extend throughout the entire supply chain, as "the ultimate disposition of a meat product is often not known at any particular stage of the production chain". See para. 7.272 above; Appellate Body Reports, *US – COOL*, para. 344. As stated by the Hayes and Meyer paper with respect to the US pork industry, "all pork sold through US retailers will have to be identified and traced. Since it is not likely that 'retail' and 'foodservice' production systems will be segregated, all U.S. born, raised and slaughtered pork (since any of it may enter the retail channel), and all pork from feeder pigs or slaughter pigs imported from Canada would be subject to traceback." Hayes and Meyer paper, p. 9.

[1211] Canada's first written submission, para. 169.

[1212] Canada's second written submission, para. 120 (footnote omitted). Canada adds that "[i]nstead of displaying all the information on the label, the label could instead contain a bar code that consumers could scan using a scanner made available in the store. Another possibility is to put an identification number on the label, as in Japan, to allow consumers to obtain the information through a website, which they could access in the store with their smartphones." Canada's second written submission, para. 120, footnote 208.

[1213] Mexico's first written submission, para. 206.

[1214] Mexico's first written submission, para. 207. See also Mexico's second written submission, para. 138.

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clarify the implications of any differences between the information kept in the supply chain and eventually conveyed to consumers under their third alternative.

7.547. Finally, the various foreign trace-back systems referred to by complainants do not explain how these are meant to elucidate the implementation of trace-back in the context of the US livestock and meat market. Third parties to this dispute with trace-back systems cited by the complainants have cautioned against drawing undue comparisons between the regimes adopted by different Members.[1215] These third parties have also provided descriptions of their trace-back systems[1216], in some cases revealing potentially important differences from the complainants' third alternative measure and its requirement of verifiable trace-back from the birth of an animal to the retail sale of its muscle cut meat.[1217]

7.548. In other cases, such as the trace-back system of the European Union, continuity across the three stages appears to be maintained[1218], but the complainants do not account for how certain

[1215] Australia notes "that the information from third parties may inform the Panel as to other trace-back practices", but that "the subject of these proceedings is the compliance of measures applied by the US and not measures and systems in place in other WTO member countries." Australia's response to Panel question No. 68. The European Union avers that "simply because a measure is reasonably available to one Member that does not necessarily mean that it is reasonably available to another Member, within the meaning of Article 2.2 of the TBT Agreement and/or that it fulfils the level of protection chosen by the Member concerned." European Union's response to Panel question No. 68, para. 46. New Zealand states that "while the [its trace-back] scheme works well for New Zealand's purposes and in the New Zealand context, New Zealand is unable to comment on the extent to which this experience can inform the reasonable availability of a trace-back measure in the United States to provide origin information to consumers." New Zealand's response to Panel question No. 68, para. 8. Japan states that "[s]ince production and distribution systems vary from country to country, we are not in a position to be able to express a view regarding the extent to which Japan's Cattle Identification and Traceability System corresponds to the complainants' suggested trace-back system and in what way, if any, it could be relevant for the reasonable availability of the trace-back system." Japan's response to Panel question No. 68.

[1216] For example, Australia explains that it has in place the "National Livestock Identification System (NLIS)" "for the identification and traceability of cattle, sheep and goats. The NLIS is a centralised system which records movement of livestock through the supply chain from farm to slaughter." This system entails premises identification of "livestock producing properties, saleyards and abattoirs" and animal identification by means of "individual electronic identification devices (ear tags and/or rumen boluses) for cattle". Traceability to premises is maintained during slaughter and "carcasses are identified … enabling the continuation of traceability throughout the slaughter and processing chain." The Australian Department of Agriculture is responsible for supervision and audit activities to verify "effective operation of the systems in place". Australia's response to Panel question No. 68.

In Japan, "the Cattle Traceability Act stipulates that it is obligatory to record cattle's information including the date of birth and movement history of each animal for the purposes of preventing the spread of BSE and promoting the provision of individual identification information." This includes requirements for "producers to report the movement history information of each animal at every stage, from its birth to slaughter" to an independent administrative agency. These "reports must contain each animal's individual identification number, date of birth or date of importation, sex, species, individual identification number of its mother, information of its movement (the farm(s) that raised the animal), date of movement, and date of slaughter, death or export." Cattle are equipped with ear tags with their identification number when they are born or imported. "After cattle are slaughtered, the package of beef product must show the individual identification number of the animal the beef is derived from down to the retail stage." Consumers can access the animal's information by searching the identification number on a designated website. Japan's response to Panel question No. 68.

[1217] Australia repeatedly refers to food and product safety as elements of its trace-back system, including in connection with animals "that may pose a biosecurity or health risk" and declarations of "essential information about the food safety status of the livestock". Australia's response to Panel question No. 68. New Zealand explains that it "has a National Animal Identification and Tracing (NAIT) scheme that provides for traceability from birth to death or live export of animals". This scheme is mandatory for cattle and is administered by a company owned by various industry bodies. New Zealand's response to Panel question No. 68, para. 1. New Zealand notes that its NAIT scheme covers the three pillars of the first stage of trace-back. New Zealand's response to Panel question No. 68, para. 6. However, "[a]s to the second and third stages, the NAIT scheme is not designed to provide traceability past death or live export." New Zealand's response to Panel question No. 68, para. 6.

[1218] The European Union explains that its regulations require "the establishment of a system for the identification and registration of bovine animals, including a computerised database. Animals are identified by an ear tag applied to each ear for life, with the same unique code establishing the birth place. Each moving animal is accompanied by a passport and its movements registered. A compulsory label for beef indicates where the animal from which the beef is derived was born, fattened and slaughtered. … Beef from third countries must at least be labelled as non-EU origin, together with the place of slaughter." The European Union

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features, such as the use of "batch traceback", would be applied in the United States under the third alternative measure.[1219] There is also evidence to question the general comparability of conditions in the European Union and the United States for the implementation of trace-back. For instance, the Hayes and Meyer paper, which the complainants invoke, refers to several "key advantages" in the European Union for the implementation of trace-back, including prior mandatory animal identification, smaller EU plant size and slower line speeds, and other particular features of the EU pork industry.[1220]

7.549. Similarly, we understand the complainants' references to the trace-back systems of Japan and Uruguay as being made for the general proposition that trace-back through the stages of animal, carcass, and muscle cut is feasible.[1221] The complainants do not cite any particular similarity between the livestock and meat industries of the different countries, nor do they adopt any concrete features of these systems for their third alternative. While the complainants have disputed the cost implications of the differing features of the United States' industry[1222], their abstract reliance upon the examples of foreign trace-back systems provides little if any clarity about the proposed trace-back system to be implemented in the United States.

7.550. As regards costs in general, it is clear that the complainants' third alternative would impose costs on the affected industries and regulatory authorities involved in any trace-back system. The complainants nonetheless contend that these costs are within the reach of the United States as a responding Member for the purposes of Article 2.2 of the TBT Agreement. Canada asserts that "[i]t is technically and economically feasible to establish a trace-back system in the United States. Trace-back systems exist in other WTO Members. A trace-back system is, therefore, a reasonably available alternative measure."[1223] Mexico similarly asserts that "the Hayes and Meyer Paper suggests that trace-back is technically and economically feasible in the United States and, therefore, is a reasonably available alternative."[1224]

7.551. However, the complainants' references to other traceability and foreign trace-back systems do not cohesively span the necessary stages between animal, carcass, and retail muscle cut. Nor

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has also proposed indicating the country of origin or place of provenance for pork that would provide for "identification and registration ensuring the link between the meat and the animal or group of animals from which it was obtained, and the transmission of such information from the slaughterhouse to consumers." European Union's response to Panel question No. 68, paras. 44-45.

[1219] According to one source, this is used by EU retailers and processors who "typically do not make any attempt to maintain the identity of the meat as it is broken down into retail packs." The Hayes and Meyer paper discusses this in contrast to further tracing of "an individual piece of meat back to the original passport" and "a bar codded tag for each individual retail cut … placed manually on the pack". Hayes and Meyer paper, p. 9. The European Union states that "[i]n principle, a batch may have been raised in no more than one country and slaughtered in no more than one country. The label must state the country or countries of rearing and of slaughter. There is a derogation for third countries: the label need only state that the animal was reared in a non-EU country, and the country of slaughter." European Union's response to Panel question No. 68, paras. 44-45. According to Canada, "[t]hat link is also preserved in the EU, but it is Canada's understanding that, while it may be possible to trace a muscle cut of beef back to an animal or group of animals, it may not always be possible to obtain the entire life history of the animal or group of animals from the reference code (bar code) on the label of a meat package." Canada's second written submission, para. 117, footnote 203.

[1220] Hayes and Meyer paper, p. 9. It also notes that "[t]he almost universal reliance on the sale of boxed products or retail ready packs in the U.S. would force packers to adopt the more expensive individual cut traceback system".

[1221] We note the United States' position that Uruguay does not have a system that requires consumers to be able to trace back particular meat products to the ranch, and that related cost estimates are therefore not relevant. United States' comments on responses to Panel question No. 40, para. 117. See also United States' response to Panel question No. 54, para. 133, footnote 120 (citing Exhibit CDA-92, p. 41); and Exhibit CDA-131, p. 33 ("The main objective of the SNIG to this day has been to guarantee the individual or group traceability of bovine cattle, from slaughterhouse to the farm of origin" and not through retail or to the ultimate consumer.)

[1222] The United States contends that both Japan and Uruguay have much smaller industries and have different types of production. See United States' second written submission, para. 155, and comments on responses to Panel question No. 42, para. 127. Canada in particular counters this with its Sumner study on the magnitude of trade-restrictive costs. See section 7.6.5.1.3 above. Mexico cross-refers to evidence submitted by Canada on the cost of trace-back from farm to consumer on a per head basis in Uruguay, but does not elaborate on its applicability to the implementation of trace-back in the United States. Mexico's response to Panel question No. 42, para. 86 (citing Exhibit CDA-145 (BCI)).

[1223] Canada's first written submission, para. 180 (footnotes omitted).

[1224] Mexico's first written submission, para. 208.

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do the complainants elaborate on the manner or cost implications of spanning these stages in the United States under the third alternative measure. Canada outlines various forms of cattle and swine traceability that currently exist in the United States but acknowledges that "they are not pieced together in one single national system".[1225] Canada states that it "is not aware of the specific costs under each of the programs" it identified at the federal and state levels with various forms of traceability.[1226] Nevertheless, "Canada understands that the costs of these programs are well within the capacity of the United States and of the relevant market participants."[1227] Mexico cites a Congressional Research Service report from 2005 on the challenges of tracing animal identification post-slaughter, which generally refers to linking animal and meat identification while also reflecting the objection of the meat industry that "linking the two systems will be difficult and costly".[1228]

7.552. In conclusion, the complainants evoke distinct stages of the third alternative for tracking an animal's birth, slaughter, processing, and product labelling.[1229] However, the complainants do not address each of these stages with sufficient clarity. In fact, the complainants' explanations on the implementation and costs of the third alternative provide for extensive flexibility both overall and for specific stages. As result, we lack a cohesive depiction of the complainants' third alternative measure and the linkages between the various stages of trace-back.

7.553. Consequently, the complainants have not sufficiently explained how their third alternative measure would be implemented in the United States. In our view, this lack of an adequate identification of the third alternative measure prevents us from undertaking an assessment of this alternative and meaningfully comparing it with the amended COOL measure as required under Article 2.2 of the TBT Agreement. Arguably, on this ground alone the complainants have not made a *prima facie* case as to the third alternative measure of trace-back in the United States. This is more clearly borne out under the separate legal elements of the comparative analysis under Article 2.2 of the TBT Agreement, which we examine in the following sections.

7.6.5.4.2 Whether the third alternative measure is reasonably available

7.554. The Appellate Body has held that, for conducting an assessment of consistency with Article 2.2, "[i]n most cases, a comparison of the challenged measure and possible alternative measures should be undertaken".[1230] Further, "it may be relevant for the purpose of this comparison to consider … whether it is reasonably available".[1231]

7.555. In the context of Article XX of the GATT 1994 and Article XIV of the GATS, the Appellate Body has stated "[a]n alternative measure may be found not to be 'reasonably available'

[1225] Canada's response to Panel question No. 62, para. 158.
[1226] Canada's response to Panel question No. 62, para. 158.
[1227] Canada's response to Panel question No. 62, para. 158. Canada also references the building of "traceability systems to bridge the separate animal and meat tracking systems" in general terms without clearly indicating how this would be accomplished under the third alternative measure. Canada's first written submission, para. 171. In this connection, there is evidence suggesting that historical factors have resulted in the creation of "two largely distinct sets of traceability systems in the livestock/meat sector: one set for live animals and another for meat", and that the "current challenge for the cattle/beef sector is to link these systems and develop a system for identifying farm-level attributes in finished meat products". Canada's reference to NAIS as a potential "building block for a trace-back system to verify designations on labels" would similarly cover only a limited portion of the trace-back required under the third alternative. Canada's second written submission, para. 111.
[1228] Mexico's first written submission, para. 210 (citing Exhibit MEX-33, p. 11):
> As the extent of traceability increases, so do likely costs. Animal ID prior to slaughter, and product tracking after slaughter and processing, generally now are within practical reach, most industry observers agree. However, the meat industry essentially has argued, notably in the context of COOL, that linking the two systems will be difficult and costly. Industry officials said new costs will be incurred in identifying and segregating animals, physically reconfiguring plants and processing lines, and labeling and tracking the final products.

See also Exhibit CDA-92, p. 21.
[1229] See para. 7.511 above.
[1230] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322. See also Appellate Body Reports, *US – COOL*, para. 379.
[1231] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322. See also Appellate Body Reports, *US – COOL*, para. 379.

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… where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."[1232] In *EC – Seal Products*, the Appellate Body further clarified this as follows:

> This passage suggests that the "prohibitive costs or substantial technical difficulties" are indeed those associated with the burden placed on a Member. At the same time, however, this language does not foreclose the possibility that there may be other indications that the alternative measure is "merely theoretical in nature". As we see it, if there are reasons why the prospect of imposing an alternative measure faces significant, even prohibitive, obstacles, it may be that such a measure cannot be considered "reasonably available". We would not exclude *a priori* the possibility that an alternative measure may be deemed not reasonably available due to significant costs or difficulties faced by the affected industry, in particular where such costs or difficulties could affect the ability or willingness of the industry to comply with the requirements of that measure. We therefore consider that an assessment of the reasonable availability of an alternative measure could potentially include the burden on the industries concerned.[1233]

7.556. The Appellate Body has stated that a party bearing the burden in the context of the an alternative measure's reasonable availability "must support such an assertion with sufficient evidence", and "provide evidence … substantiating the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system".[1234] As noted, the complainants put forward cost estimates that would only partially cover the suggested alternative[1235], along with trace-back systems of other WTO Members of limited evidentiary value in terms of the implementation and costs of the complainants' third alternative measure in the United States.[1236] We do not wish to imply that complainants are required in all cases to describe each and every specific aspect of an alternative measure and provide quantified cost estimates for each of these. Nevertheless, we do consider that adequate identification of alternative measures requires more precision than the sometimes vague and in some respects incomplete description of the implementation and ultimate magnitude of the associate costs provided by the complainants in this case.

7.557. We therefore find that the complainants have not made a *prima facie* case that the trace-back system proposed as their third alternative measure is reasonably available for the purposes of their claims under Article 2.2 of the TBT Agreement.

7.6.5.4.3 Whether the third alternative measure is less trade restrictive than the amended COOL measure

7.558. Apart from reasonable availability, the parties also presented views as to the relationship between the costs of trace-back and the relative trade-restrictiveness of the third alternative. For example, Canada contends that "[a] technical regulation that increases compliance costs in a non-discriminatory manner, but does not otherwise modify the conditions of competition to the detriment of imported products may nevertheless be 'trade-restrictive' if the cost increase has the

[1232] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156 (quoting Appellate Body Report, *US – Gambling*, para. 308). While these statements were made in the context of necessity under Article XX of the GATT 1994 and Article XIV of the GATS, we find them instructive for whether a technical regulation is "more trade-restrictive than necessary to fulfil a legitimate objective" under the TBT Agreement. In the context of Article 2.2 of the TBT Agreement, the Appellate Body recalled its own precedent that "in order to establish 'necessity' in the context of Article XX of the GATT 1994 and Article XIV of the GATS, a comparison of a measure found to be inconsistent and reasonably available less trade-restrictive alternatives should be undertaken." Appellate Body Report, *US – Tuna II (Mexico)*, footnote 645 (citing as an example Appellate Body Report, *Korea – Various Measures on Beef*, para. 166).

[1233] Appellate Body Reports, *EC – Seal Products*, para. 5.277.

[1234] Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 327-328.

[1235] See section 7.6.5.4.1.1 above.

[1236] It is also unclear how much more costly trace-back would be for cattle and beef as compared to hogs and pork. It has been noted that "the cattle industry is expected to bear the brunt of the costs of implementing a national ID program, in large part because each individual animal will have to be tagged, unlike in the large, vertically integrated pork and poultry industries, where animals are usually raised and moved in lots". Exhibit CDA-92, pp. 10-11. See also Exhibits CDA-86, p. 33; CDA-89 and MEX-37, p. 7.

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effect of reducing trade flows or reducing prices of both imported and domestic products."[1237] Likewise, according to Mexico, "the costs of compliance with a technical regulation may be a factor in the assessment of trade-restrictiveness of the measure at issue. For example, the cost of compliance may be very high, upsetting competitive opportunities available to imported products."[1238] The United States emphasizes the focus on trade-restrictiveness under Article 2.2 and contends that the "complainants would have to establish a causal nexus between a change in costs on the U.S. industry and a change in market access for Canadian and Mexican producers."[1239]

7.559. In this case, the complainants have not demonstrated that trace-back – including the various possible costs of animal identification, meat traceability, and eventual recordkeeping and verification aspects – would be less trade restrictive based purely on the alleged even distribution of costs.[1240]

7.560. We therefore find that the complainants have not made a *prima facie* case that a trace-back system for all US-slaughtered cattle and swine would be less trade restrictive than the amended COOL measure. Given the complainants' insufficient description of their third alternative and the above limitations of their evidence put forward on its costs, we need not address the parties' disagreement on the specific relationship of costs and trade-restrictiveness under Article 2.2 of the TBT Agreement.

[1237] Canada's comments on the United States' response to Panel question No. 39, para. 55. Canada elsewhere refers to "the costs that a measure entails for market participants, in the sense of the losses that the measure causes them." Canada's response to Panel question No. 39, para. 80.

[1238] Mexico's response to Panel question No. 39, para. 82.

[1239] United States' response to Panel question No. 39, para. 115.

The European Union states that, with respect to trade-restrictiveness, "one question that arises is whether one is looking only at the *absolute* impact of a regulation on imports, or also at its *relative* impact on imported and domestic products. The point may be significant in this case because Canada and Mexico appear to argue that there is an alternative measure (the third alternative) that is generally overall more costly, but preferable in the sense that the costs would be equally distributed amongst domestic and imported products." European Union's third-party submission, para. 110 (emphasis original).

Korea submits that "the ordinary meaning of trade-restrictiveness would be that the flow of goods and services between national borders is constrained. Considering the additional costs and administrative burden incurred by the trace-back system, one would tend to conclude that the alternative measure would constrain the flow of the goods in dispute. … If the trade-back system incurring additional costs and administrative burden unnecessarily requires more information than the policy objective of the COOL requirements pursues, Korea considers that the trace-back system should not be regarded as a *reasonably* available alternative measure." Korea's third-party submission, paras. 10 and 12.

In the view of Japan, "costs can be a relevant factor in the assessment under Article 2.2 and that cost information could constitute probative evidence of trade restrictiveness. Costs can reflect the regulatory burden imposed by the challenged measure on imports. In some cases, costs can help estimate the magnitude of the impact. Furthermore, costs can provide an objective basis to compare the regulatory burden imposed by the challenged measure with the regulatory burden that would be imposed by reasonably available alternative measures identified by the complaining party. At the same time, costs should not be dispositive." Japan's response to Panel question No. 39.

[1240] For example, Canada argues that this "could not possibly entail costs that would have a greater impact" and "it would create a level playing field". Canada's second written submission, para. 112. Canada also contends that "[a] relevant consideration in that [Sumner] analysis is the fact that, under any one of the alternative measures Canada has proposed, the costs of complying with the measure would be borne by all market participants. Any cost increase associated with those tasks would not disproportionately affect imported livestock." Canada's comments on the United States' response to Panel question No. 39, para. 54. Mexico submits that "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. This is because all farmers would be treated the same and it would be immaterial where they were located. Because U.S. beef processors would still have to trace U.S. cattle to individual farms, there would be no cost saving associated with excluding Mexican cattle. Thus, the economic incentive to discriminate against Mexican cattle would likely be eliminated." Mexico's first written submission, para.204. We note that Canada expressly recognizes that "there might be some contraction in the U.S. industry under a trace-back system as a result of a possible reduction in consumer demand." Canada's second written submission, para. 136. See also Hayes and Meyer paper, p. 12 (explaining the reduction of consumer purchases of pork in response to increased production costs and prices).

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7.6.5.4.4 Whether the third alternative measure would make an equivalent contribution to the relevant legitimate objective

7.561. In the original dispute, the Appellate Body understood the participants "to accept that a trace-back system could require the provision of consumer information on the country(ies) where livestock were born, raised, and slaughtered, or of even more detailed information, such as the specific location of individual production steps within a country."[1241] The complainants put forward arguments to similar effect in this compliance dispute.[1242]

7.562. The capability of the proposed trace-back system to fulfil the relevant objective would largely depend on the system adopted, subject to what may be reasonably available and technically feasible. We consider this analogous to the alternative measure assessed by the panel in *EC – Seal Products*, for which there was found to be an "inextricable link between the contribution of the alternative measure to the objective and the feasibility of its implementation".[1243] Thus, while a trace-back system may provide "consumer information on the country(ies) where livestock were born, raised, and slaughtered, or of even more detailed information"[1244], the actual contribution of trace-back to the relevant objective would be "merely theoretical"[1245] until the alternative measure is adequately identified and the complainants demonstrate its reasonable availability.

7.563. The insufficiency of the complainants' evidence and arguments as to the implementation of the third alternative impedes our assessment of its provision of consumer information. In any event, we are not required[1246] to assess the contribution of the third alternative measure to the relevant objective due to the complainants' failure to meet their *prima facie* burden as to reasonable availability and trade-restrictiveness.

7.6.5.4.5 Conclusion on the third alternative measure

7.564. We have found that the complainants have not provided a sufficient explanation of how their third alternative measure would be implemented. This lack of adequate identification of the third alternative measure prevents an assessment of the required elements of this alternative and its comparison with the amended COOL measure under Article 2.2 of the TBT Agreement. Accordingly, we find that the complainants have not made a *prima facie* case that the third alternative measure is reasonably available and less trade restrictive than the amended COOL measure. For these reasons, we are neither able nor required to find whether it would contribute to fulfilment of the relevant objective to an equivalent degree.

7.6.5.5 Fourth alternative measure

7.565. The fourth alternative measure would prescribe that muscle cuts from US-slaughtered animals[1247] carry labels indicating the place of birth, raising, and slaughter according to "states and/or province(s)"[1248] – in addition to the country designations required by the amended COOL measure. Relying on the amended COOL measure's abbreviations[1249], Labels A-C could read, for instance, as follows[1250]:

[1241] Appellate Body Reports, *US – COOL*, para. 490.

[1242] Canada's first written submission, para. 169; Mexico's first written submission, paras. 206-207.

[1243] Panel Reports, *EC – Seal Products*, para. 7.485. See also Appellate Body Reports, *EC – Seal Products*, para. 5.267. The panel also stated that "the degree of contribution achieved by the alternative measure … depend[ed] on the reasonable availability of satisfying adequate … standards … as well as the capability of accurately distinguishing the resulting products for placement on the … market." Panel Reports, *EC – Seal Products*, para. 7.481.

[1244] Appellate Body Reports, *US – COOL*, para. 490.

[1245] See para. 7.555 above.

[1246] See para. 7.491 above.

[1247] According to the complainants, their alternatives would not cover ground meat or muscle cuts from foreign-slaughtered animals, and would not change the amended COOL measure's Labels D and E. See Canada's and Mexico's responses to Panel questions Nos. 44 and 47.

[1248] Canada's second written submission, para. 138; Mexico's response to Panel question No. 71.

[1249] According to the amended COOL measure, "[a]bbreviations may be used for state, regional, or locality label designations for these commodities whether domestically harvested or imported using official

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Born: Canada, AB Raised: U.S., MT Slaughtered: U.S., WI	*OR*	Brn: CDA, AB Raisd: USA, MT Slghtrd: USA, WI

7.566. According to the complainants[1251], the labels could also show only one state or province for the production step of raising: for instance, the last state or province in which raising took place (i.e. where the animals were "finished" before slaughter).

7.567. As a further flexibility, according to Canada, the United States could limit the labelling requirements to country designations identical to those under the amended COOL measure. However, market participants would nevertheless have to be able to demonstrate, if audited, that a muscle cut was derived from an animal that was born in a specific state/province, raised in a specific state/province, and slaughtered in specific state/province.[1252]

7.568. According to the complainants, a key element of the fourth alternative measure would be to eliminate segregation on a country basis.[1253] Instead, segregation would be required on a more detailed state/province level.[1254] For this, the fourth alternative could maintain the amended COOL measure's recordkeeping requirements and rely on records kept under the Interstate Livestock Traceability Rule.[1255] Verifying the designation of a state or province in which a production step took place could be done through the same audit and verification system of the amended COOL measure.[1256]

7.569. As an alternative to segregation on a state/province basis for all movements of animals (and reliance on the Interstate Livestock Traceability Rule), a national identification and traceability system, such as the United States' abandoned NAIS, could be used on a mandatory basis.[1257]

7.6.5.5.1 Mexico's endorsement of the fourth alternative measure

7.570. The fourth alternative measure was first proposed by Canada in its second written submission.[1258] Mexico endorsed it later in the proceedings, first during the substantive meeting with the Panel[1259], and again in its responses to the Panel.[1260]

7.571. The United States considers Mexico's endorsement to have come too late, and contends that it has not had sufficient time to respond to Mexico's claims under the fourth alternative.[1261] According to the United States, our Working Procedures, read in conjunction with Articles 9 and 12.4 of the DSU, preclude us from admitting Mexico's endorsement of Canada's fourth alternative measure and the evidence submitted in support.[1262]

United States Postal Service abbreviations or other abbreviations approved by CBP." 2009 Final Rule, § 65.400(f) (unamended).

[1250] Canada's second written submission, para. 149; Mexico's response to Panel question No. 71.

[1251] Canada's and Mexico's responses to Panel question No. 71.

[1252] Canada's response to Panel question No. 71.

[1253] Canada's second written submission, paras. 140 and 142-143, response to Panel question No. 71; Mexico's response to Panel question No. 71.

[1254] Canada's second written submission, para. 142; Mexico's response to Panel question No. 71.

[1255] Canada's and Mexico's responses to Panel question No. 71.

[1256] Canada's second written submission, para. 141. See also Mexico's response to Panel question No. 71.

[1257] Canada's and Mexico's responses to Panel question No. 71.

[1258] Canada's second written submission, paras. 90-91 and 138-152.

[1259] Mexico's opening statement at the meeting with the Panel, para. 54.

[1260] See Mexico's response to Panel questions Nos. 71-72.

[1261] United States' response to Panel question No. 35, para. 102, and comments on Mexico's response to Panel question No. 72.

[1262] United States' response to Panel question No. 35, para. 102, and comments on Mexico's response to Panel question No. 72.

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7.572. As both the United States and Mexico note, each complainant must individually and separately meet its burden of proof for each of its claims.[1263] This follows also from Article 9 of the DSU, according to which, even when a single panel is established for the examination of multiple complaints on the same matter, such a panel must "organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired."[1264]

7.573. As a factual matter, Mexico endorsed Canada's fourth alternative measure for the first time in its opening oral statement at the Panel's substantive meeting on the 18 February 2014.[1265] After the meeting, the parties were asked to provide written answers to a set of questions posed by the Panel. One of those written questions invited Mexico to confirm whether it was also proposing Canada's fourth alternative measure, and if yes to provide evidence in support of its *prima facie* case on the matter.[1266] In accordance with the timetable adopted by the Panel, Mexico responded to the Panel's written questions on 7 March 2014, confirming its endorsement of Canada's fourth alternative measure.[1267] Prior to receiving these answers, in a communication dated 3 March 2014, the United States requested an additional week for submitting comments on the complainants' and third parties' responses to the Panel's questions. Having considered the parties' comments on the United States' request for extension, on 5 March 2014 the Panel revised the timetable to grant the additional week requested by the United States.[1268] In line with this revised timetable, on 21 March 2014 the parties submitted their comments on each other's responses.

7.574. Article 12.4 of the DSU provides that "[in] determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions". In the context of the fourth alternative measure, meeting this requirement entailed giving the United States sufficient time to respond to Mexico's endorsement at the meeting as well as its relevant responses to the Panel's questions following the meeting. As indicated by the Appellate Body in *Australia – Salmon*, "[a] fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it".[1269]

7.575. More generally, according to the Appellate Body:

> [d]ue process is a fundamental principle of WTO dispute settlement.[1270] It informs and finds reflection in the provisions of the DSU.[1271] In conducting an objective

[1263] Mexico's response to Panel question No. 35, para. 59; United States' response to Panel question No. 35, and comments on Mexico's response to Panel question No. 35. Mexico seems to suggest otherwise, however, when it states that "Mexico and Canada […] have jointly presented a *prima facie* case with respect to the four alternative measures that have been proposed." Mexico's opening statement at the meeting with the Panel, para. 55.

[1264] Article 9.2 of the DSU. We make this observation without prejudice to our comments above with respect to procedural aspects of the establishment of this compliance Panel. See section 1.3.4 above.

[1265] This endorsement was not solicited by any of the advanced questions sent to the parties before the substantive meeting.

[1266] Panel question No. 72 asked Mexico: "Do you propose the fourth alternative measure put forward by Canada in its Second Written Submission? If yes, please elaborate how the Article 2.2 test should be applied to this alternative, and please also answer Question 71." Question No. 71 addressed Canada in the following terms: "How would the fourth suggested alternative measure affect segregation, recordkeeping, and labelling? Please respond to the US arguments about frequent interstate movements and the concentration of Canadian cattle production. (United States' Second Written Submission, paras. 161-162)."

[1267] Mexico's response to Panel questions Nos. 71-72.

[1268] The Appellate Body has held that panels enjoy a margin of discretion to deal with situations that are not explicitly regulated. According to the Appellate Body, "the DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated." Appellate Body Report, *EC – Hormones*, footnote 138.

[1269] Appellate Body Report, *Australia – Salmon*, para. 278.

[1270] (footnote original) The Appellate Body has held that "the protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU", and that "due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings". (Appellate Body Reports, *Canada – Continued Suspension / US – Continued Suspension*, para. 433; and Appellate Body Report, *Thailand – H-Beams*, para. 88, respectively. See also Appellate Body Report, *Chile – Price Band System*, para. 176).

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> assessment of a matter, a panel is "bound to ensure that due process is respected".[1272] Due process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules. The protection of due process is thus a crucial means of guaranteeing the legitimacy and efficacy of a rules-based system of adjudication.[1273]

7.576. The "fair", "impartial", "balanced and orderly" nature of due process entails that due process applies to all parties in a dispute equally.[1274] In this sense, complainants' right "to be afforded an adequate opportunity to pursue their claims" and respondents' right "to be afforded an adequate opportunity … to make out their defences" are two sides of the same coin: the right to be heard. Whereas the United States is undeniably entitled to an adequate opportunity to respond to claims made against it, it is equally imperative that Mexico have an adequate opportunity to make its claims. The same applies generally to arguments and evidence advanced by the parties.

7.577. That balance is also reflected in our Working Procedures. Paragraph 7 thereof provides that "each party shall submit all factual evidence to the Panel no later than during the substantive meeting, *except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other* party."[1275] Moreover, "[e]xceptions to this procedure shall be granted upon showing good cause", provided that the Panel "shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting."[1276]

7.578. Mexico endorsed the fourth alternative measure at the Panel's single substantive meeting with the parties. It would have been preferable for Mexico to do this at an earlier stage, and not following the two exchanges of written submissions among the parties. Likewise, it would have been preferable for Canada to propose the fourth alternative measure in its first written submission. Introducing and clarifying the alternative measures at the earliest possible stage would have contributed to more efficient panel proceedings – both organizationally, and in terms of the other parties' and third parties' right to be heard more fully with regard to the fourth alternative measure.[1277]

7.579. Canada, the other complainant in this dispute, proposed the fourth alternative measure only in its second written submission, with the result that the opening oral statement at the substantive meeting was Mexico's first opportunity to endorse Canada's newly introduced alternative measure. The terms of the Working Procedures did not preclude Mexico from endorsing Canada's fourth alternative measure in the opening oral statement at the Panel hearing.[1278]

[1271] See Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 107. See also Appellate Body Reports, *India – Patents (US)*, para. 94; and *Chile – Price Band System*, para. 176.

[1272] (footnote original) Appellate Body Report, *Chile – Price Band System*, para. 176.

[1273] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.

[1274] Panel Report, *Australia – Apples,* para. 7.7 (citing Appellate Body Report on *Canada – Continued Suspension*, para. 433).

[1275] Panel Working Procedures (as revised on 21 January 2014) in Annex A-1.

[1276] Panel Working Procedures (as revised on 21 January 2014) in Annex A-1.

[1277] In *Thailand – Cigarettes (Philippines)*, the Appellate Body "recalled that panel proceedings consist of two main stages, the first of which involves each party setting out its 'case in chief, including a full presentation of the facts on the basis of submission of supporting evidence', and the second designed to permit the rebuttal by each party of the arguments and evidence submitted by the other parties. Nonetheless, the submission of evidence may not always fall neatly into one or the other of these categories, in particular when panels themselves, in the exercise of their fact finding authority, seek to pursue specific lines of inquiry in their questioning of the parties. In this respect, we wish to reiterate that due process will best be served by working procedures that provide 'for appropriate factual discovery at an early stage in panel proceedings'." Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 149 (footnotes omitted).

[1278] According to the Appellate Body, "when the particular circumstances of specific disputes present situations that are not explicitly regulated by their working procedures, panels, in the exercise of their control over the proceedings, and subject to the constraints of due process and the DSU, enjoy a margin of discretion to deal with such situations." Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 149 (footnote omitted).

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7.580. Once a claim or argument is properly put before it, a panel has broad powers of investigation and discovery in order to make an objective assessment of the matter before it.[1279] Following Mexico's endorsement of the Canada's fourth alternative measure at the substantive meeting, the Panel availed itself of these faculties to invite the complainants to submit further arguments and factual evidence with respect to the fourth alternative measure. By the terms of paragraph 7 of the Working Procedures, Mexico then had the right to submit arguments and evidence in response to these questions from the Panel.

7.581. Turning to the United States, we granted the extension for the period of comments requested by the United States. As a result, the United States had in total four and a half weeks to prepare its response to Mexico's endorsement of the fourth alternative measure, and two weeks to comment on Mexico's responses to the Panel's questions, including with regard to the fourth alternative measure. By way of comparison, the United States had less than four weeks to submit its first written submission following receipt of the complainants' first written submissions. Likewise, the parties had less than four weeks to submit their second written submissions setting out rebuttals on the totality of the claims.

7.582. We recognize that during the two and a half weeks between Mexico's endorsement of the fourth alternative measure and its responses to the Panel's questions, the United States could not have anticipated the arguments and evidence that Mexico might put forward in its responses in relation to the fourth alternative measure. Yet, Mexico gave clear indications at the substantive meeting that it was proposing the same alternative that Canada had raised in its second written submission. In its opening statement, Mexico stated that it "agrees with Canada's submissions on this alternative and the fact it (i) would provide a greater contribution to the objective than the Amended COOL Measure, (ii) would be less trade restrictive and (iii) is reasonably available."[1280] In addition, Mexico referenced "the evidence and arguments" of Canada in this regard.[1281] In its comments on Mexico's responses to the Panel, the United States noted that it "has had time to evaluate Canada's fourth alternative."[1282] We see no reason why the same does not apply to Mexico's endorsement of Canada's evidence and arguments for the fourth alternative measure at the hearing, given that at that point Mexico advanced no additional argument and evidence to that provided by Canada.

7.583. We also recognize that, as the United States points out[1283], a response to the same claim made by separate complainants may be different – depending, for instance, on any differences between the complainants and their relevant arguments and evidence. In fact, this was one of the considerations we took into account for extending the period of time for parties to comment on each other's responses. The extension we granted corresponds exactly to the period of time requested by the United States following Mexico's responses to the Panel's relevant questions.

7.584. In light of the above, we do not consider that Mexico's endorsement of Canada's fourth alternative measure came too late in these proceedings. Nor do we consider that the United States' rights of due process rights have been affected as a result. Accordingly, we admit Mexico's endorsement of the fourth alternative measure and the arguments and evidence submitted in support of its claims under that alternative measure. Under the circumstances, we proceed to examine whether Canada and Mexico make a *prima facie* case in relation to the fourth alternative measure.

7.6.5.5.2 The implementation of the fourth alternative measure

7.585. As noted, in comparing the challenged measure with a proposed alternative measure under Article 2.2 of the TBT Agreement, "it will be relevant to consider whether the proposed alternative is less trade restrictive; whether it would make an equivalent contribution to the relevant

[1279] Panel Report, *Australia – Apples,* para. 7.76. See also Appellate Body Report, *Japan – Agricultural Products,* para. 129, for the same proposition and the limits to a panel's investigative authority.
[1280] Mexico's opening statement at the meeting of the Panel, para. 54.
[1281] Mexico's opening statement at the meeting of the Panel, para. 55.
[1282] United States' comment on Mexico's response to Panel question No. 72.
[1283] United States' comments on Mexico's response to Panel question No. 35, para. 100.

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legitimate objective, taking account of the risks non-fulfilment would create; and whether it is reasonably available."[1284]

7.586. Before reviewing these aspects of the fourth alternative measure, we first address how this proposed measure would be implemented according to the complainants. As noted, adequately explaining how an alternative measure would be implemented is an essential part of the complainants' burden to identify an alternative measure that is not limited to a "concept[]" but entails an "actual, concrete proposal[]".[1285] Having a basic understanding of how an alternative measure would be implemented is a prerequisite for comparing this alternative with the challenged measure.[1286]

7.587. The complainants' fourth alternative measure would prescribe that origin information be provided at retail – or at least maintained and transmitted in the supply chain[1287] – according to states/provinces, and not just by countries of origin. As noted, the complainants suggest two approaches to achieve this: (i) trace-back; and (ii) segregation and recordkeeping.

7.6.5.5.2.1 Trace-back

7.588. According to the complainants, the first approach would entail a national identification and traceability system, such as the United States' abandoned NAIS, applied on a mandatory basis.[1288]

7.589. We have already addressed the shortcomings of the complainants' references to the NAIS for describing the operation of trace-back under the third alternative measure.[1289] In the context of the fourth alternative measure, the complainants refer to the NAIS without adducing any arguments that would affect the relevance of these shortcomings for a trace-back approach under the fourth alternative measure. Further, the complainants do not explain how NAIS should be implemented differently to provide origin information according to states/provinces.

7.590. In any event, as Canada recognizes, the NAIS could serve as a model for only "the first stage of a trace-back system" under the fourth alternative measure.[1290] As regards the second stage, Canada describes a single aspect of trace-back at the slaughterhouse. Canada argues that US slaughterhouses could assemble groups of animals on a state/province basis in larger groups than under the third alternative measure.[1291] Thus, according to Canada, trace-back under the fourth alternative measure would entail lower compliance costs than the third alternative.[1292] Canada makes this argument in response to the United States' contention that state/province labelling would entail that "each individual head of cattle be tracked as it goes through the livestock production process"[1293], and thus, like the third alternative measure, the fourth alternative would also require "the tracking of individual animals."[1294] Mexico advances no description as to how trace-back could serve for the implementation of the fourth alternative measure at the second stage, i.e. the killing of the animal and the division of the carcass into cuts at the slaughterhouse. Further, the complainants provide no specific argument as to how trace-back would be implemented in the third stage, i.e. in meat processing and distribution beyond the slaughterhouse, under the fourth alternative measure.

7.591. In sum, the complainants, in particular Mexico, provide very limited or no specific description of how a trace-back approach would serve to implement their fourth alternative

[1284] Appellate Body Reports, *US – COOL,* para. 471 (citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 322).
[1285] United States' comment on Canada's response to Panel question No. 74.
[1286] See paras. 7.553 and 7.556 above.
[1287] Canada's response to Panel question No. 71.
[1288] Canada's and Mexico's responses to Panel question No. 71.
[1289] See section 7.6.5.4.1 above.
[1290] Canada's response to Panel question No. 71.
[1291] Canada's response to Panel question No. 74.
[1292] Canada's response to Panel question No. 74.
[1293] United States' second written submission, para. 160.
[1294] United States' opening statement at the meeting of the Panel, para. 56. Mexico seems to agree with this US point, arguing that under the fourth alternative measure "each head of livestock would be treated individually within the system and all cattle would be treated the same." Mexico's response to Panel question No. 72.

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measure. For the first stage, the complainants have referenced an abandoned US measure (NAIS), without addressing the shortcomings of the NAIS for describing the operation of trace-back at that stage. We lack an adequate explanation from the complainants for the second and third stages of trace-back. Yet, Canada considers the second stage to be the most costly.[1295] Further, as explained for the third alternative measure, all three stages of trace-back are necessary to ensure origin information at the point of retail sale.[1296] To the extent relevant, we also note that the complainants provide no explanation on how they could supply relevant state/province origin information compatible with a US trace-back system specifically for the fourth alternative measure.

7.592. Accordingly, we find that the complainants have not provided a sufficient explanation of how their fourth alternative measure would be implemented using a trace-back system.

7.6.5.5.2.2 Segregation and recordkeeping

7.593. According to the complainants, the second approach to implement the fourth alternative measure would entail segregation on a more detailed state/province level.[1297] To substantiate origin claims, the amended COOL measure's recordkeeping requirements could be maintained, relying also on records kept under the Interstate Livestock Traceability Rule.[1298]

7.594. The complainants refer specifically to the Interstate Livestock Traceability Rule for its recordkeeping requirements on interstate movements.[1299] According to Canada, if "further developed to facilitate the verification of origin designations by state", the "records kept for … complying with the [Interstate Livestock Traceability Rule] could be used to verify [origin] designations under the proposed [fourth] alternative measure."[1300] At a later point, Canada appears to adjust this argument by stating that the "United States could rely on the segregation of animals on a state/province basis and on documents generated pursuant to, or required under, [the Interstate Livestock Traceability Rule], combined with requirements for producer's affidavits for elements that are not currently fully covered under that Rule."[1301]

7.595. Canada and the United States contest the exact scope of the current exemptions from the Interstate Livestock Traceability Rule for inter-state livestock movements, including from its record-keeping rules, and whether these exemptions would be addressed in future rulemaking.[1302] In any event, the United States argues that records kept pursuant to the Interstate Livestock Traceability Rule do not accompany the animal.[1303] Canada responds that all cattle moving interstate and destined for slaughter, irrespective of age, must be accompanied by an owner-shipper statement, which is subject to the recordkeeping requirements.[1304]

7.596. We noted above the shortcomings of the complainants' references to the Interstate Livestock Traceability Rule for describing the implementation or essential features of the third alternative measure.[1305] In the context of the fourth alternative measure, the complainants refer to this Rule without adducing arguments that would clarify its requirements or relevance to an alternative providing state/province designations on retail muscle cuts.

7.597. In particular, only Canada provides a limited explanation of how the Interstate Livestock Traceability Rule might apply under the fourth alternative measure. We understand Canada to advance a combination of owner-shipper statements under the Interstate Livestock Traceability Rule and producer's affidavits for elements that are not currently fully covered under that Rule. Nevertheless, Canada recognizes that currently "there is no requirement to record the

[1295] Canada's response to Panel question No. 74.
[1296] See section 7.6.5.4.1 above.
[1297] Canada's second written submission, para. 142; Mexico's response to Panel question No. 71.
[1298] Canada's and Mexico's responses to Panel question No. 71.
[1299] Canada's second written submission, paras. 150-151; Mexico's response to Panel question No. 71.
[1300] Canada's second written submission, para. 151.
[1301] Canada's comments on United States' response to Panel question No. 70.
[1302] Canada's comments on United States' response to Panel question No. 70; United States' comments on Canada's response to Panel question No. 71.
[1303] United States' comments on Canada's responses to Panel questions Nos. 71 and 74.
[1304] Canada's comments on United States' response to Panel question No. 70.
[1305] See section 7.6.5.4.1.1 above.

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identification number of [currently exempted] cattle on the owner-shipper statement".[1306] Accordingly, it is unclear how owner-shipper statements could be used to convey origin information on specific animals, and consequently what elements would not be fully covered and thus need to be substantiated by producers' affidavits for the purposes of the fourth alternative measure. In any event, the Interstate Livestock Traceability Rule deals with traceability of interstate animal movements.[1307] Thus, it is limited to the life of the animal.

7.598. The complainants advance limited arguments on how recordkeeping would be implemented under the fourth alternative measure from the animal's slaughter to the meat retail stage. As a general point, the complainants assert that the recordkeeping requirements "could be the same as those under the amended COOL measure".[1308] They add that verifying the designation of a state or province in which a production step took place could be done through the same audit and verification system of the amended COOL measure.[1309] As regards applying the fourth alternative measure specifically at the slaughterhouse, according to Canada, "U.S. slaughterhouses could continue to rely on, for instance, health papers or producer affidavits, including for animals born and/or raised in Canada."[1310]

7.599. However, the complainants do not specify how the amended COOL measure's recordkeeping requirements would be implemented to maintain and transmit the more detailed origin information under the complainants' fourth alternative measure. For instance, despite its assertions, Canada recognizes that "[t]he presence of an ear tag from Canada would no longer be sufficient because information on the province would be necessary."[1311] The United States agrees, and points out that "*Canadian* entities would need to maintain those records with each sale of the animal, including the sale of the animal to the U.S. slaughterhouse."[1312] As a result, it is not clear, for instance, what records would be necessary to allow US slaughterhouses to initiate the origin claim of foreign-origin animals, and whether relying on the amended COOL measure's recordkeeping requirements would be sufficient for the complainants' fourth alternative measure.

7.600. Finally, we note that the complainants argue that the fourth alternative measure is not merely theoretical because the amended COOL measure already provides that state, regional, or locality label designations may be used in lieu of country of origin labelling for perishable agricultural commodities.[1313] To the extent the complainants are advancing this argument to describe how their fourth alternative measure could be implemented, we consider its relevance to be limited. In fact, Canada recognizes that this voluntary rule does not apply to meat, and it is not aware of US retailers having used this rule for the products covered by the rule.[1314]

7.601. In light of the above, we find that the complainants have not sufficiently explained how their fourth alternative measure would be implemented by means of either trace-back, or recordkeeping and segregation.

7.6.5.5.2.3 Conclusion on the implementation of the fourth alternative measure

7.602. As noted, the complainants' limited explanations do not provide a sufficient description of how their fourth alternative measure would be implemented in the United States. As noted[1315], an adequate identification of an alternative measure is a prerequisite for assessing its reasonable availability and for comparing its trade-restrictiveness and degree of contribution with the

[1306] Canada's comments on United States' response to Panel question No. 70.
[1307] Canada's second written submission, para. 150.
[1308] Canada's response to Panel question No. 71; Mexico's response to Panel question No. 71.
[1309] Canada's second written submission, para. 141. See also Mexico's response to Panel question No. 71.
[1310] Canada's response to Panel question No. 71.
[1311] Canada's response to Panel question No. 71. To the extent relevant, we note that the complainants provide no further arguments as to how their industries would collect and convey information necessary for, and compatible with, their fourth alternative measure.
[1312] United States' comments on Canada's response to Panel question No. 71 (emphasis original).
[1313] Canada's second written submission , para. 149 and Mexico's response to Panel question No. 72. See 2009 Final Rule, § 65.205.
[1314] Canada's response to Panel question No. 73. See also United States' comments on Canada's response to Panel question No. 73.
[1315] See paras. 7.553-7.556 above.

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challenged measure. Accordingly, we are not in a position to carry out the comparative analysis with regard to the fourth alternative measure.

7.6.5.5.3 Costs of the fourth alternative measure

7.603. In light of the parties' arguments in this dispute, we have noted that the costs of an alternative measure may have implications for both its reasonable availability and its trade-restrictiveness.[1316] We have also noted that the complainants have the initial burden to make a *prima facie* case in this regard.[1317] The complainants have adduced only limited arguments on the costs of the fourth alternative.

7.604. As regards implementing the fourth alternative measure by means of trace-back, only Canada has adduced argument as to the specific costs of this approach.[1318] This argument is limited to the NAIS and, hence, to only the first stage of trace-back.

7.605. As regards implementing the fourth alternative measure by means of recordkeeping and segregation, Canada relies on "the same mechanisms and logic that prevail under the amended COOL measure, except that the mechanisms and logic apply one level down (states and provinces, as opposed to countries)."[1319] Accordingly, based on the logic set out above[1320], the fourth alternative measure would involve increased segregation and higher overall segregation costs than the amended COOL measure.

7.606. With the increase of segregation, the overall recordkeeping burden and costs would also be higher under the fourth alternative measure than under the amended COOL measure. As the United States explains, "while the type of documents may be the same, the information provided in these documents, the entity maintaining those documents, and the sheer number of documents, would be quite different (and more burdensome) under the fourth alternative than it is under the amended COOL measure."[1321]

7.607. Thus, implementing the fourth alternative measure by recordkeeping and segregation could entail higher overall segregation and recordkeeping costs than the amended COOL measure. Indeed, in response to the United States' suggestion that Canada may voluntarily provide province designations[1322], Canada recognizes that this would create a "further … burden" for Canada.[1323] Instead of specifying the overall costs, the complainants focus on whether the segregation and recordkeeping costs of their fourth alternative would be borne in a discriminatory fashion. Yet, the complainants recognize that there might be an absolute cost level which might result in trade-restrictiveness even with a non-discriminatory distribution of costs.[1324]

7.608. The complainants' limited arguments on the costs of the fourth alternative measure[1325] reinforce our conclusion that the complainants have not adequately explained how the fourth

[1316] See para. 7.509 above.
[1317] See para. 7.510 above.
[1318] Canada argues that "the costs of [the NAIS] had been estimated to be $ 5.97 per head for cattle and $ 0.06 for hogs." Canada's response to Panel question No. 74.
[1319] Canada's response to Panel question No. 71.
[1320] See section 7.5.4.1.2.3 above.
[1321] United States' comments on Canada's response to Panel question No. 71.
[1322] United States' second written submission, para. 163.
[1323] Canada's response to Panel question No. 73.
[1324] See section 7.6.5.1.3 above. In regard to this point, Canada advances that "state and/or province designations would certainly not entail additional costs in the minimum amount of $608 per head of cattle and $116 per hog." Canada's second written submission, para. 146 (footnote omitted). However, we have found that we cannot draw any inferences from the studies advanced by the complainants as to whether the implied additional costs of any non-discriminatory alternative measure implemented in the United States are effectively lower than the hypothetical and simulated figures. See 7.6.5.1.3 above.
[1325] Canada contests the relevance of the United States' argument that there could be more animal concentration and less animal movements in Canada than in the United States. However, Canada does not contest this argument as such. As the United States points out, this might have implications for the overall costs of the fourth alternative in the United States and Canada. Hence, it might also impact how these costs would be distributed among the United States and Canada. To reduce the overall US costs of the fourth alternative measure, Canada mentions that only the last state/province of raising should be shown on the label. However, Canada does not address the implication of this flexibility for the distribution of costs among

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alternative measure would be implemented so as to enable a meaningful comparison with the amended COOL measure.

7.6.5.5.4 Conclusion on the fourth alternative measure

7.609. The complainants failed to provide an adequate explanation of how their fourth alternative measure would be implemented. In addition, the complainants have not advanced sufficient arguments on the costs of the fourth alternative measure to enable us to review the fourth alternative measure's reasonable availability and trade-restrictiveness.

7.610. Consequently, we find that the complainants have not made a *prima facie* case that the fourth alternative measure is reasonably available and less trade restrictive than the amended COOL measure. In light of this, we do not find it necessary to assess whether the fourth alternative measure would make a contribution to the objective of providing consumer information on origin at least equivalent to the amended COOL measure's actual degree of contribution to the same objective.

7.6.6 Conclusion on Article 2.2 of the TBT Agreement

7.611. We have found that the amended COOL measure pursues a legitimate objective and contributes to the fulfilment of this objective to a considerable but necessarily partial degree. Further, we have found that the amended COOL measure has increased the "considerable degree of trade-restrictiveness" found by the Appellate Body in the original dispute. We have also established the nature of the risks of not fulfilling the amended COOL measure's objective as well as the consequences of non-fulfilment; however, we have been unable to ascertain the gravity of these consequences.

7.612. Following this relational analysis, we conducted a comparative analysis of the complainants' suggested four alternative measures, and found that the complainants did not make a *prima facie* case that any of these alternatives demonstrate that the amended COOL measure is more trade restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement.

7.613. In light of the above, we conclude that the complainants have not made a *prima facie* case that the amended COOL measure violates Article 2.2 of the TBT Agreement.

7.614. In concluding, we recall our earlier finding that providing consumer information on origin is a legitimate objective. A Member is therefore free to adopt technical regulations consistent with its WTO obligations to pursue this objective. Further, in making our findings, we do not mean to imply that there is no practical, WTO-consistent way for Members to pursue the above legitimate objective. In the context of Article 2.2 of the TBT Agreement, we have not made a determination whether or not the complainants' four alternative measures fulfil the three elements[1326] of the legal test of the comparative analysis. Rather, our comparative analysis is focused on whether the complainants have made a *prima facie* case, and concludes that the complainants have not done so in the context of our comparative analysis. In this context, we consider that some form of trace-back could require the provision of consumer information on the country(ies) where livestock were born, raised, and slaughtered, or of even more detailed information, such as the specific location of individual production steps within a country.[1327]

7.615. By virtue of our terms of reference, our comparative analysis under Article 2.2 of the TBT Agreement is confined to the four alternative measures as identified by the complainants. We have not reviewed other possible variations of these alternatives; nor have we considered general techniques to convey country of origin information to consumers in the abstract. We do not wish to exclude that some variation of the alternatives suggested by the complainants might provide a WTO-consistent solution for pursuing the legitimate objective of providing consumer information on origin.

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the two countries. Canada's response to Panel question No. 71; United States' second written submission, paras. 159-161.

[1326] See paras. 7.427-7.428 above.

[1327] See Appellate Body Reports, *US* – COOL, para. 490, and para. 7.562 above.

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7.616. In sum, our findings of violation relate specifically to the discriminatory nature of the amended COOL measure with respect to imported livestock. In our view, attaining a non-discriminatory solution might well be achieved through further consultations among the parties.

7.7 Article III:4 of the GATT 1994

7.617. Article III:4 of the GATT 1994 provides in relevant part:

> 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.

7.618. The complainants argue that the amended COOL measure violates Article III:4 of the GATT 1994, and request the Panel to address their claims under Article III:4 irrespective of the Panel's findings under Article 2.1 of the TBT Agreement.[1328] The United States contends that the complainants failed to establish the inconsistency of the amended COOL measure with Article III:4 of the GATT 1994.[1329]

7.7.1 Legal test

7.619. As the Appellate Body has recently confirmed, there are three elements that must be demonstrated to establish that a measure is inconsistent with Article III:4: "(i) that the imported and domestic products are 'like products'; (ii) that the measure at issue is a 'law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use' of the products at issue; and (iii) that the treatment accorded to imported products is 'less favourable' than that accorded to like domestic products."[1330]

7.620. The complainants argue, and the United States does not contest, that the amended COOL measure fulfils the first two elements.[1331] At the same time, the parties disagree on the specific criteria for the "less favourable treatment" element, and on the extent to which it might overlap with the "less favourable treatment" test under Article 2.1 of the TBT Agreement.[1332]

7.621. The United States argues in this regard that detrimental impact on competitive conditions "is not enough" for establishing less favourable treatment under Article III:4.[1333] It contends that

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[1328] See Canada's first written submission, para. 90; and Mexico's first written submission, para. 213.

[1329] See United States' first written submission, Section III.C.

[1330] Appellate Body Reports, *EC – Seal Products*, para. 5.99 (citing Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 127 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 133). See also Canada's first written submission, para. 91; and Mexico's first written submission, para. 215. In its arguments, the United States focuses on the "less favourable treatment" of Article III:4 of the GATT 1994, and does not call into question the relevance of the other two elements of the Article III:4 legal test.

[1331] For the "like products" element, see Canada's first written submission, para. 92; and Mexico's first written submission, para. 217. For the "measure at issue" element, see Canada's first written submission, para. 93; and Mexico's first written submission, para. 224.

[1332] See Canada's first written submission, para. 94; Mexico's first written submission, paras. 225-229; United States' first written submission, paras. 121-138; Canada's second written submission, paras. 57-62; Mexico's second written submission, paras. 73-80; and United States' second written submission, paras. 81-94.

As regards the third parties, the European Union agrees with the United States, and contends that the analysis under Article III:4 of the GATT 1994 "includes a consideration of not only the impact of the measure on competitive opportunities for imports, but also a consideration of whether the origin neutral objective or regulatory distinction is legitimate and even-handed". European Union's third-party submission, para. 140. See also European Union's third-party statement, paras. 36-37 and 44-45. Conversely, New Zealand supports the complainants' approach, arguing that the legal test under Article III:4 does not entail "an analysis of whether the … measure makes distinctions that can be explained by factors or circumstances unrelated to the origin of the imported products". New Zealand's third-party submission, paras. 27-29. Finally, Japan submits that importing the interpretation of Article 2.1 of the TBT Agreement into Article III:4 of the GATT 1994 "is not without difficulties", and that introducing flexibility into Article III:4 may render Article XX of the GATT 1994 "meaningless". Japan's third-party statement, paras. 18-19.

[1333] United States' first written submission, para. 123.

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the Panel should additionally assess whether any detrimental impact can be "explained by other factors or circumstances that do not reflect discrimination".[1334]

7.622. Canada responds that the United States is trying to "import the legitimate regulatory distinction component of the TBT Article 2.1 test into the GATT Article III:4 analysis" of less favourable treatment, without any textual basis.[1335] Mexico adds that, unlike under Article 2.1 of the TBT Agreement, establishing less favourable treatment in the context of Article III:4 of the GATT 1994 remains a single-step approach,[1336] and there is "no need to make any additional determination under Article III:4 on whether the detriment reflects discrimination against like imported products".[1337]

7.623. The Appellate Body has recently clarified the meaning of the term "treatment no less favourable" in Article III:4 of the GATT 1994. In particular, it considered "well established" that "the term 'treatment no less favourable' requires effective equality of opportunities for imported products to compete with like domestic products."[1338] The Appellate Body added that "because Article III:4 is concerned with ensuring effective equality of competitive opportunities for imported products, a determination of whether imported products are treated less favourably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products."[1339] Thus, according to the Appellate Body, "Article III:4 permits regulatory distinctions to be drawn between products, provided that such distinctions do not modify the conditions of competition between imported and like domestic products."[1340]

7.624. On this basis, the Appellate Body concluded:

> If the outcome of this assessment is that the measure has a detrimental impact on the conditions of competition for like imported products, *then such detrimental impact will amount to treatment that is "less favourable" within the meaning of Article III:4*. … We do not consider … that for the purposes of an analysis under Article III:4, a panel is required to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction.[1341]

7.625. We consider the Appellate Body's clarifications in this regard to directly dispose of similar arguments in this compliance dispute. The Appellate Body unequivocally stated that "the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement does not apply equally to claims under Article … III:4 of the GATT 1994."[1342] Accordingly, we reject the United States' suggestion to address legitimate regulatory distinctions in the context of less favourable treatment under Article III:4 of the GATT 1994.

[1334] United States' first written submission, para. 123 (citing Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96). The United States also argues that "[t]he analysis under Article III:4 … necessarily entails an examination of whether the regulation *makes distinctions* that could not be considered even-handed as to the group of 'like' imported products versus the group of 'like' domestic products, or whether those distinctions are, in fact, even-handed and any detrimental effect can be explained by factors or circumstances unrelated to the foreign origin of the imported product." See United States' first written submission, para. 134 (emphasis original, footnote omitted).

[1335] Canada's second written submission, para. 58.

[1336] Mexico's second written submission, para. 75.

[1337] Mexico's second written submission, para. 75.

[1338] Appellate Body Reports, *EC – Seal Products*, para. 5.101 (citing Appellate Body Reports, *US – Clove Cigarettes*, para. 176 (in turn referring to GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.10); *China - Publications and Audiovisual Products*, para. 305 (in turn referring to Appellate Body Report, *Korea - Various Measures on Beef*, paras. 135 and 136); and *Thailand – Cigarettes (Philippines)*, para. 126 (in turn referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16)).

[1339] Appellate Body Reports, *EC – Seal Products*, para. 5.101 (citing Appellate Body Reports, *US – Clove Cigarettes*, paras. 177 and 179; and *Korea – Various Measures on Beef*, para. 137).

[1340] Appellate Body Reports, *EC – Seal Products*, para. 5.116.

[1341] Appellate Body Reports, *EC – Seal Products*, paras. 5.116-5.117 (emphasis added).

[1342] Appellate Body Reports, *EC – Seal Products*, paras. 5.130 and 6.1(b)(i).

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7.7.2 Judicial economy

7.626. The complainants request us to address their claims under Article III:4 of the GATT 1994, and not to exercise judicial economy in this regard.[1343] We recall that panels have full discretion to exercise judicial economy on a claim[1344] as long as this does not amount to "false judicial economy".[1345]

7.627. The original panel held that under Article III:4 of the GATT 1994, "[a]ccording 'treatment no less favourable' [in the sense of Article III:4] means … according *conditions of competition* no less favourable to the imported product than to the like domestic product".[1346] The original panel applied this reasoning in its analysis of less favourable treatment under Article 2.1 of the TBT Agreement, and emphasized the close connection between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.[1347] In light of its findings under Article 2.1, the original panel considered it unnecessary to assess the claims under Article III:4.[1348] Thus, the original panel equated the less favourable treatment tests under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

7.628. Subsequently, in *US – Clove Cigarettes* the Appellate Body established that the analysis of less favourable treatment under Article 2.1 of the TBT Agreement entails assessing whether the detrimental impact on competitive opportunities for imports stems exclusively from legitimate regulatory distinctions.[1349] The Appellate Body followed this approach in addressing the appeal of the original panel's Article 2.1 finding in *US – COOL*.[1350]

7.629. As noted, the Appellate Body in *EC – Seal Products* confirmed that the "less favourable treatment" tests under Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement are different. Therefore, and taking into account the complainants' explicit request to address their Article III:4 claims[1351], we shall not exercise judicial economy. We address the established three elements of the Article III:4 test.

7.7.3 Likeness

7.630. As we have mentioned above, the complainants argue, and the United States does not contest, that imported and US cattle and hogs continue to be like products.[1352]

[1343] Canada's first written submission, para. 22; Mexico's first written submission, para. 55.

[1344] In *India – Patents* the Appellate Body established that "[a] panel has the discretion to determine the claims it must address in order to resolve the dispute between the parties". Appellate Body Report, *India – Patents,* para. 87.

[1345] In *Australia – Salmon*, the Appellate Body held that the task of a panel is to "address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings … 'in order to ensure effective resolution of disputes'", and cautioned that "provid[ing] only a partial resolution of the matter at issue would be false judicial economy". Appellate Body Report, *Australia – Salmon*, para. 223. In *US – Wool Shirts and Blouses*, the Appellate Body found that neither Article 11 of the DSU nor "previous GATT practice require[d] a panel to examine all legal claims made by the complaining party" (emphasis omitted). The Appellate Body agreed with the practice of previous panels to 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*, p. 18.

[1346] Panel Reports, *US – COOL,* para. 7.276 (citing Appellate Body Report, *Korea – Various Measures on Beef*, para. 135 (emphasis original)).

[1347] Panel Reports, *US – COOL,* para. 7.277. The Appellate Body also recognized the close relationship between "less favourable treatment" tests in Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, finding that "relevant guidance for interpreting the term 'treatment no less favourable' in Article 2.1 may be found in the jurisprudence relating to Article III:4 of the GATT 1994". Appellate Body Reports, *US – COOL*, para. 269.

[1348] Panel Reports, *US – COOL,* para. 7.807. Like the original panel, the Appellate Body did not make any findings on Article III:4 of the GATT 1994 in the original dispute. See Appellate Body Reports, *US – COOL*, para. 493.

[1349] Appellate Body Report, *US – Clove Cigarettes*, paras. 174-175.

[1350] Appellate Body Reports, *US – COOL*, paras. 271-272.

[1351] Canada's first written submission, para. 22; Mexico's first written submission, para. 55.

[1352] Canada's first written submission, para. 92; Mexico's first written submission, para. 217.

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7.631. The concept of likeness in Article 2.1 of the TBT Agreement should be read in the context of Article III:4 of the GATT 1994.[1353] In addition, the legal tests for likeness in both Article 2.1 and Article III:4 concern the determination of the "competitive relationship between and among the products at issue"[1354], and in the context of Article 2.1 of the TBT Agreement we have found that Canadian cattle and US cattle, and Mexican cattle and US cattle, are like products, and that Canadian hogs and US hogs are also like products.[1355]

7.632. In the original dispute, the original panel established that "addressing and indicating 'origin' is the essence and rationale of the [original] COOL measure".[1356] Based on previous disputes, the original panel recalled that "products that [were] distinguished solely on the basis of their origin were found to be like products within the meaning of Article III:4".[1357] The original panel concluded that there was no need to engage in any further analysis to establish the likeness of the products at issue.[1358]

7.633. The changes introduced by the 2013 Final Rule do not affect the rationale of the original COOL measure to address the origin of the products at issue; the same rationale continues to apply to the amended COOL measure. The products at issue are also the same, and can be distinguished solely on the basis of origin. Like the original panel, we consider this sufficient to establish the likeness of the products at issue.

7.634. Accordingly, we conclude that the products at issue are like products within the meaning of Article III:4 of the GATT 1994.

7.7.4 Law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the products at issue

7.635. The complainants allege, and the United States does not contest, that the amended COOL measure is a "law, regulation, or requirement affecting [the] internal sale, offering for sale, purchase, transportation, distribution, or use" of the products at issue.[1359]

7.636. Based on the text of Article III:4, this element entails two considerations: (i) whether the measure is a law, regulation, or requirement within the meaning of Article III:4; and (ii) whether the measure affects the internal sale, offering for sale, purchase, transportation, distribution, or use of the products at issue.[1360]

7.637. We recall that the amended COOL measure consists of a statutory and a regulatory element.[1361] Thus, by virtue of their legal form, these instruments qualify as a law and regulation, respectively. In addition, we have established that the amended COOL measure is a technical regulation, in part because of its mandatory nature.[1362] The mandatory nature of the amended COOL measure confirms that the amended COOL measure falls within "laws, regulations or requirements" as those terms are used in Article III:4 of the GATT 1994.[1363]

[1353] Appellate Body Report, *US – Clove Cigarettes*, para. 120. See also Panel Reports, *US – COOL*, para. 7.234.

[1354] Appellate Body Report, *US – Clove Cigarettes*, para. 120.

[1355] See section 7.5.3 above.

[1356] Panel Reports, *US – COOL,* para. 7.255. The original panel stated that "[a]s 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".

[1357] Panel Reports, *US – COOL,* para. 7.254 (citing Panel Reports, *Turkey – Rice*, para. 7. 214; *Canada – Autos,* para. 10.74; *US – FSC (Article 21.5 – EC)*, para. 8.133; *India – Autos*, para. 7.174; and *Canada – Wheat Exports and Grain Imports,* para. 6.164 and footnote 246).

[1358] Panel Reports, *US – COOL,* paras. 7.255-7.256. The original panel stated that "[a]s 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".

[1359] Canada's first written submission, para. 93; Mexico's first written submission, para. 224.

[1360] See Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 208-209.

[1361] See section 7.3 above.

[1362] See 7.5.2 above.

[1363] See Panel Reports, *India – Autos*, paras. 7.190-7.191; and *China – Publications and Audiovisual Products,* para. 7.1513.

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7.638. The second part of the test is that the measure "affect[s] … internal sale, offering for sale, purchase, transportation, distribution, or use" of the products at issue. The Appellate Body considered the term "affecting" to have a broad scope of application[1364], and qualified it as a "link between identified types of government action ('laws, regulations and requirements') and specific transactions, activities and uses relating to products in the marketplace ('internal sale, offering for sale, purchase, transportation, distribution or use')".[1365]

7.639. According to Annex 1.1 of the TBT Agreement, a technical regulation is a document which lays down product characteristics. In its analysis of whether the original COOL measure constitutes a technical regulation, the original panel had found that the measure laid down one or more product characteristics through a country of origin labelling requirement.[1366] As noted[1367], the technical changes introduced by the 2013 Final Rule do not affect the applicability of this finding to the amended COOL measure. In fact, both the original and amended COOL measures require labelling of meat at retail, i.e. at the point of sale to consumers. By imposing a country of origin labelling requirement at retail, the amended COOL measure affects sales in the above broad sense as it "has an effect on"[1368] "specific transactions, activities and uses relating to products in the marketplace ('internal sale, offering for sale, purchase, transportation, distribution or use')" within the meaning of Article III:4.[1369]

7.640. Accordingly, we conclude that the amended COOL measure satisfies the second element of the Article III:4 test.

7.7.5 Less favourable treatment[1370]

7.641. According to the Appellate Body, Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 are both concerned with whether the measure at issue "modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of like domestic products."[1371] As explained, the Appellate Body established that under Article III:4 of the GATT 1994, "an analysis of whether the detrimental impact on competitive opportunities for like imported products is attributable to the specific measure at issue does not involve an assessment of whether such detrimental impact stems exclusively from a legitimate regulatory distinction".[1372]

7.642. We found that the amended COOL measure has a detrimental impact on the competitive opportunities of imported livestock in comparison with like US products.[1373] As the Appellate Body has made clear, "[i]f the outcome of [the assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products] is that the measure has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount to treatment that is 'less favourable' within the meaning of Article III:4."[1374] Hence, we conclude that the amended COOL measure accords less favourable treatment within the meaning of Article III:4 of the GATT 1994.

[1364] Appellate Body Reports, *EC – Bananas III,* para. 220; and *US – FSC (Article 21.5 — EC)*, para. 210.
[1365] Appellate Body Report, *US – FSC (Article 21.5 — EC)*, para. 208.
[1366] Panel Reports, *US – COOL*, para. 7.214.
[1367] See section 7.5.2 above.
[1368] The Appellate Body interpreted the word "affecting" as "hav[ing] an effect on". Appellate Body Report, *EC – Bananas III,* para. 220.
[1369] Appellate Body Report, *US – FSC (Article 21.5 — EC)*, para. 208.
[1370] As under Article 2.1 of the TBT Agreement, this section applies to the amended COOL measure in regard to muscle cuts from US-slaughtered livestock (Categories A-C). As explained above, the complainants do not bring claims either in regard to muscle cuts from foreign-slaughtered animals (Category D) or the ground meat aspect of the amended COOL measure (Category E). See sections 7.1 and 7.4 above. See also Canada's and Mexico's responses to Panel question No. 47.
[1371] Appellate Body Report, *US – Clove Cigarettes*, para. 180.
[1372] Appellate Body Reports, *EC – Seal Products*, para. 5.105. See also ibid., para. 5.117.
[1373] See section 7.5.4.1 above.
[1374] Appellate Body Reports, *EC – Seal Products*, para. 5.101 (citing Appellate Body Reports, *US – Clove Cigarettes*, para. 179; *Thailand – Cigarettes (Philippines)*, para. 128; and *Korea – Various Measures on Beef*, para. 137).

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7.7.6 Conclusion on Article III:4 of the GATT 1994

7.643. In the light of these conclusions, we find that the complainants have made a *prima facie* case, not rebutted by the United States, that the amended COOL measure fulfils all three elements of the legal test under Article III:4 of the GATT 1994. Accordingly, we find that that the amended COOL measure violates Article III:4 of the GATT 1994 in respect of muscle cuts from US-slaughtered livestock (Categories A-C).

7.8 Article XXIII:1(b) of the GATT 1994

7.644. In addition to their claims of violation, the complainants raise a non-violation claim under Article XXIII:1(b) of the GATT 1994, which provides:

> If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
>
> ...
>
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, ...
>
> ...
>
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

7.645. Article 26.1 of the DSU establishes the applicable rules for "Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994", and provides in relevant part:

> Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:
>
> (a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;
>
> (b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment ... .

7.646. We are mindful that "the remedy in Article XXIII:1(b) 'should be approached with caution and should remain an exceptional remedy'."[1375] As noted by the Appellate Body, "Members

[1375] Appellate Body Report, *EC – Asbestos*, para. 186 (citing Panel Report, *Japan – Film*, para 10.37). See also Panel Reports, *US – COOL*, paras. 7.900-7-901.

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negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules."[1376]

7.8.1 Jurisdiction of Article 21.5 compliance panels concerning non-violation claims

7.647. As a preliminary matter, the United States contends that non-violation claims are outside the terms of reference of panels established under Article 21.5 of the DSU. According to the United States, the text of Article 21.5 only permits compliance panels to consider either the existence of a measure taken to comply with a previous adverse finding, or the consistency with a covered agreement of a measure taken to comply.[1377] The United States argues that the latter involves a determination of whether a measure taken to comply is *inconsistent* with a covered agreement. In the United States' view, such examination of a measure's "consistency" does not entail the question of *non-violation* nullification or impairment, which by definition concerns a measure that does not conflict with the provisions of a covered agreement.[1378]

7.648. Canada and Mexico counter that a measure which does not conflict with the covered agreements may still be inconsistent with them, meaning that non-violation claims under Article XXIII:1(b) of the GATT 1994 are within the scope of Article 21.5 of the DSU.[1379] According to the complainants, inconsistency with a covered agreement within the meaning of Article 21.5 is broader than "conflict" with, or "violation" of, a covered agreement.[1380]

7.649. In essence, the parties dispute the scope of Article 21.5 *vis-à-vis* Article 26 of the DSU and Article XXIII:1(b) of the GATT 1994. This requires determining whether an "inconsistent" measure necessarily "conflicts" with a provision of the covered agreements, or whether the notion of "inconsistency" is broad enough to encompass measures that do not "conflict" with the covered agreements, but that nevertheless nullify or impair a benefit accruing to a WTO Member.

7.650. The scope of inquiry of compliance panels is determined by Article 21.5 of the DSU. In relevant part, Article 21.5 provides:

> Where there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

7.651. The Appellate Body has clarified "the appropriate *subject-matter* of Article 21.5 proceedings" by explaining that, "[a]s in *original* dispute settlement proceedings, the 'matter' in Article 21.5 proceedings consists of two elements: the specific *measures* at issue and the legal basis of the complaint (that is, the *claims*)."[1381] In their requests for the establishment of a compliance panel, the complainants identify the specific measure at issue, namely the amended

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[1376] Appellate Body Report, *EC – Asbestos*, para. 186 (citing Panel Report, *Japan – Film*, para 10.36).

[1377] United States' first written submission, para. 200.

[1378] United States' first written submission, paras. 199 and 202, and second written submission, para. 166.

[1379] Canada's second written submission, para. 154; Mexico's second written submission, paras. 144-145 and 150-152.

[1380] Canada's second written submission, para. 154; Mexico's second written submission, para. 151.

The parties' submissions include reference to both "conflict" and "violation" in this context. As noted by the Appellate Body, cases under Article XXIII:1(b) of the GATT 1994 are sometimes described as "non-violation" cases, though the word "non-violation" does not appear in that provision. Appellate Body Reports, *EC – Asbestos*, para. 185. We observe that the heading of Article 26.1 of the DSU is "Non-*Violation* Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994". (emphasis added) In addition, Article 26.1 references the situation where "a case concerns a measure that *does not conflict* with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable." (emphasis added)

In their arguments, the parties appear to concur in treating "conflict" and "violation" as equivalent in the relevant provisions of the GATT 1994 and DSU. See Canada's second written submission, para. 155 (stating that "the first sentence of DSU Article 26.1 confirms the jurisdiction of 'a panel' in general to make such a finding [of non-violation]"); Mexico's second written submission, paras. 145-152; and United States' first written submission, para. 202.

[1381] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 78 (emphasis original). See also Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 64.

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COOL measure, and include claims under Article XXIII:1(b) of the GATT 1994. In turn, our terms of reference require us "[t]o 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" in the complainants' requests for the establishment of a compliance panel.[1382] Accordingly, the "subject-matter" of these compliance proceedings does not *a priori* preclude the complainants' claims under Article XXIII:1(b) of the GATT 1994.[1383]

7.652. We turn to the jurisdictional issue raised by the United States, beginning with the ordinary meaning of the disputed treaty terms, namely "consistency"[1384] and "conflict(s)".[1385] A dictionary definition of "consistency" is "being consistent; agreement (*with* something, *of* things etc.); uniformity, regularity" – with "consistent" defined as "congruous, compatible"[1386] – whereas "conflict" is defined as "be[ing] incompatible".[1387] In turn, "compatible" is defined as "able to be admitted or employed together or to coexist in the same subject; consistent, congruous".[1388] These dictionary definitions appear to overlap in terms of some notion of "compatibility", but they do not clearly settle whether "consistency" in Article 21.5 may be broader than – or instead must be exactly coterminous with – that which does not "conflict". In any event, we refrain from simply equating the ordinary meaning of these terms "with the meaning of words as defined in dictionaries", as this has been viewed by the Appellate Body as "too mechanical an approach".[1389] As the Appellate Body has stated, "dictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents."[1390] We therefore proceed to examine the relevant context of the disputed terms.

7.653. The terms "consistent" and "conflict" (or variations thereof) appear in various places throughout the covered agreements. Most relevantly, the term "consistent" appears in some form in Articles 3.7, 19.1, and 21.5 of the DSU, and "conflict(s)" appears in Article 26 of the DSU and Article XXIII:1(b) of the GATT 1994. Neither agreement defines these terms or explains their relationship. The French and Spanish versions of the DSU and GATT 1994 similarly use different terms in Articles 3.7, 19.1, and 21.5, on the one hand, and Articles 26 of the DSU and XXIII:1(b) of the GATT 1994 on the other.[1391]

7.654. Article 19.1 of the DSU provides:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[9] bring the measure into conformity with that Agreement.[10]
>
> ———————————
>
> [9] The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

[1382] See Constitution of the Panel, Note by the Secretariat, WT/DS384/27 and WT/DS386/26, para. 2.

[1383] See Articles 7.1 and 7.2 of the DSU. The Appellate Body considered that the phrase "these dispute settlement procedures" in Article 21.5 "does encompass Article 6.2 of the DSU, and that Article 6.2 is generally applicable to panel requests under Article 21.5." Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 59. Although the Appellate Body did not consider it necessary "to determine the precise scope of th[e] phrase ['these dispute settlement procedures' in Article 21.5 of the DSU]", we follow the Appellate Body's guidance in referring to the complainants' panel requests, made pursuant to Articles 6 and 21.5 of the DSU, to determine the subject-matter of this dispute.

[1384] Article 21.5 of the DSU.

[1385] Verb used in Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU.

[1386] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 497.

[1387] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 488.

[1388] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 469.

[1389] Appellate Body Report, *US – Gambling*, para. 166.

[1390] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 248.

[1391] In French, the corresponding translation for "consistent" is "compatible", while "conflict" is translated as "contraire". In Spanish, the corresponding translation for "consistent" is "compatible", while "conflict" is translated as "contraria".

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[10] With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

7.655. In turn, Article 26.1(b) of the DSU provides that where a non-violation claim is upheld, "there is no obligation to withdraw the measure", but that instead "the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment".

7.656. Two distinct remedial approaches are thereby established: one for measures found to be "inconsistent" with one of the covered agreements (the panel or the Appellate Body shall recommend that the measure be brought into conformity – Article 19.1), and another for measures found to nullify or impair benefits without violation of a covered agreement (the panel or the Appellate Body shall recommend that the Member make a mutually satisfactory adjustment – Article 26.1).[1392] Reading these two provisions together, it could be argued that a finding that a measure is "inconsistent" within the meaning of Article 19.1 does not encompass a finding of nullification or impairment of benefits without violation of a covered agreement.

7.657. Nevertheless, we are mindful that the Appellate Body has warned against an interpretive approach that would "eviscerate the distinctive meaning that must be respected in the words of the text".[1393] In our view, "consistency" in Article 21.5 and non-violation under Article 26.1 (i.e. "a measure that does not conflict") should not be given identical meaning so as to exclude claims of the latter from reviews of compliance with the former.

7.658. The Appellate Body has clarified that "Article XXIII:1(b) of the GATT 1994 sets forth a separate cause of action for a claim that, through the application of a measure, a Member has 'nullified or impaired' 'benefits' accruing to another Member, 'whether or not that measure conflicts with the provisions' of the GATT 1994. Thus, it is not necessary, under Article XXIII:1(b), to establish that the measure involved is inconsistent with, or violates, a provision of the GATT 1994."[1394] Although the Appellate Body used the word "inconsistent" in its clarification of non-violation claims, it was not addressing the term "consistency" in the specific context of Article 21.5 of the DSU. Nor was it presented with the question of the jurisdiction of compliance panels. Indeed, the Appellate Body stressed the narrowness of the specific question raised on appeal in that dispute, which related to the scope of application of Article XXIII:1(b).[1395] We therefore decline to read the Appellate Body's analysis as dispositive of the jurisdictional issue before us in the present dispute.

7.659. Article 26 of the DSU provides that for "case[s] concern[ing] a measure that does not conflict with the provisions of a covered agreement" under Article XXIII:1(b) of the GATT 1994, "the procedures in this Understanding shall apply, subject to the following". It then proceeds to list certain modifications to the DSU rules, none of which concern Article 21.5.[1396] Additionally, Article 26 of the DSU refers generally to "a panel" making rulings and recommendations on non-violation complaints. We find no reason, and the parties have not provided any, to conclude that a compliance panel established pursuant to Article 21.5 would be excluded from the meaning of "panel" in this context.[1397]

7.660. To the extent that "conflict(s)" and "violation" can be considered equivalents[1398], we draw further support from Article 23.1 of the DSU, which provides that "[w]hen Members seek the redress of a violation of obligations *or other nullification or impairment of benefits under the covered agreements* … they shall have recourse to, and abide by, the rules and procedures of this

[1392] The dichotomy is strengthened by Article 3.7 of the DSU, which foresees withdrawal as the result of a finding that a measure is "inconsistent with the provisions of any of the covered agreements".

[1393] Appellate Body Report, *Japan – Alcoholic Beverages II*, p.26.

[1394] Appellate Body Report, *EC – Asbestos*, para. 185. The Appellate Body also stated that "a measure may, at one and the same time, be inconsistent with, or in breach of, a provision of the GATT 1994 and, nonetheless, give rise to a cause of action under Article XXIII:1(b)". Ibid. para. 187

[1395] Appellate Body Report, *EC – Asbestos*, paras. 184 and 190.

[1396] Indeed, Article 26.1(c) provides that "*notwithstanding the provisions of Article 21*", the arbitration provided for in Article 21.3 may include additional determinations and suggestions. This may suggest that the other provisions of Article 21 of the DSU, including Article 21.5, "shall apply" to the cases referred to in Article 26.1 of the DSU.

[1397] See Canada's second written submission, para. 155.

[1398] See footnote 1380 above.

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Understanding."[1399] Thus, as part of strengthening the multilateral system, WTO Members have envisaged that non-violation nullification or impairment is to be redressed through the DSU, without exclusion of any provisions therein.

7.661. The objective of Article 21.5 of the DSU is "to promote the prompt compliance with DSB recommendations and rulings … by making it unnecessary for a complainant to begin new proceedings and by making efficient use of the original panelists".[1400] It is clear that excluding non-violation claims from Article 21.5 proceedings would not promote prompt compliance with DSB recommendations and rulings and would not be efficient. Such exclusion could plausibly result in the original complainant having to request the establishment of an entirely new panel to adjudicate the non-violation complaint following the original respondent's measures to comply with a recommendation or ruling. Indeed, the Appellate Body has clarified a compliance panel's "mandate to assess whether a 'measure taken to comply' is *fully consistent* with WTO obligations" – in recognition of the possibility that "a 'measure taken to comply' may be *inconsistent* with WTO obligations in ways different from the original measure."[1401] If non-violation claims were inadmissible under Article 21.5, a Member could avoid review under that Article by taking measures that do not violate the covered agreements, but that nevertheless nullify or impair benefits accruing to another Member.

7.662. In such a situation, a complainant would have to pursue both a compliance panel and an entirely new panel to adjudicate the violation and non-violation aspects of the same measure taken to comply. This seems incongruous with the objective of prompt dispute settlement enshrined in Article 3.3 of the DSU, which specifically refers to "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". It would also be at odds with the principle of "[p]rompt compliance with recommendations or rulings of the DSB" found in Article 21.1 of the DSU, and reflected in the design of Article 21.5 of the DSU, which prescribes an expeditious procedure including, wherever possible, resort to the original panel.[1402] In our view, such systemic considerations weigh strongly against excluding non-violation claims from the jurisdiction of compliance panels established under Article 21.5 of the DSU. Additionally, it seems to us that such a reading would lead to increased litigation costs for all Members involved in disputes and increased costs for the WTO.

7.663. Based on the above, we conclude that reviewing the "consistency" of a measure taken to comply under Article 21.5 of the DSU extends to non-violation claims under Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU. Accordingly, we find that the complainants' claims under Article XXIII:1(b) of the GATT 1994 are properly before us and fall within the competence of this Article 21.5 compliance Panel.

7.8.2 Judicial economy

7.664. Having found that we have jurisdiction to entertain the complainants' non-violation claims, we now turn to consider whether to exercise judicial economy on the substance of those claims. In doing so, we take into account that we have already found that the amended COOL measure violates Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement. The text of Article XXIII:1(b) of the GATT 1994 clearly stipulates that a claim under that provision may arise *whether or not* the contested measure conflicts with the GATT 1994. It is therefore possible for a measure to simultaneously violate a provision of the GATT 1994 or another covered agreement, and still give rise to a cause of action under Article XXIII:1(b).[1403]

7.665. In assessing the propriety of judicial economy in this particular dispute, we recall that the aim of the WTO dispute settlement system is "to resolve the matter at issue and 'to secure a

[1399] Article 23.1 of the DSU (emphasis added).

[1400] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 212 (citing Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 151). See also Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 72; and Mexico's second written submission, para. 145.

[1401] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 79 (emphasis original).

[1402] See also Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 72.

[1403] See, e.g. Appellate Body Report, *EC – Asbestos,* para. 187.

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positive solution to a dispute'".[1404] In general, a panel may refrain from ruling on a claim "as long as it does not lead to a 'partial resolution of the matter'".[1405] The original panel addressed judicial economy on the complainants' non-violation claims based on the criterion of whether "compliance … with the finding on Article III:4 [of the GATT 1994] *would necessarily remove the basis of the … claim of nullification or impairment*".[1406] The original panel exercised judicial economy, reasoning that compliance with the findings of *de facto* discrimination under Article 2.1 of the TBT Agreement would have removed the basis of the complainants' claims of non-violation nullification or impairment.[1407]

7.666. The findings of violation in this compliance dispute differ from those of the original panel in two significant respects. First, our finding of violation under Article 2.1 of the TBT Agreement reflects the fact that Article 2.1 of the TBT Agreement does not prohibit *all* detrimental modifications of the conditions of competition, but only those that do not stem exclusively from a "legitimate regulatory distinction".[1408] Hence, a measure that modifies the conditions of competition pursuant to a legitimate regulatory distinction may be consistent with Article 2.1 of the TBT Agreement, while still causing nullification or impairment of a benefit under Article XXIII:1(b) of the GATT 1994. In such a case, compliance with findings of violation under Article 2.1 of the TBT Agreement would not necessarily remove the basis for nullification or impairment.

7.667. Second, we have found that the amended COOL measure accords less favourable treatment to imported livestock than to like US livestock under Article III:4 of the GATT 1994.[1409] In reaching this finding, we noted the Appellate Body's emphasis that this provision is concerned with the "effective equality of opportunities for imported products to compete with like domestic products".[1410] According to the Appellate Body, this does *not* require an additional inquiry into "whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction".[1411]

7.668. Articles III:4 and XXIII:1(b) of the GATT 1994 are distinguishable in respect of their standards of discrimination. Whereas Article III:4 concerns the "effective equality" of relative conditions of competition for like products of foreign and domestic origin, Article XXIII:1(b) calls for a *temporal* inquiry that compares "the competitive relationship between foreign and domestic products at two specific points in time, i.e. when the concession was granted and currently".[1412]

7.669. Thus, whether or not the exercise of judicial economy is appropriate in this dispute may be assessed by comparing (i) the competitive relationship between foreign and domestic products at the time concessions were granted, and (ii) the "effective equality" of competitive conditions for like foreign and domestic products. Unless the former is more favourable than the latter for the competitive opportunities of imported products, compliance with a finding of violation under Article III:4 (and consequent removal of detrimental impact) would necessarily remove the basis of the non-violation claim.

7.670. In this case, compliance by the United States with our finding of violation of Article III:4 would require *eliminating* the detrimental impact on competitive opportunities for Canadian and Mexican livestock altogether. Hence, restoring "effective equality" between foreign and domestic products in this regard would necessarily remove the basis of nullification or impairment claimed under Article XXIII:1(b). In fact, the complainants do not contend that the competitive relationship

[1404] See Appellate Body Report, *Australia – Salmon*, para. 223 (citing Article 3.7 of the DSU).
[1405] Appellate Body Report, *US – Tuna II (Mexico)*, para. 404 (citing Appellate Body Report, *US – Upland Cotton*, para. 732).
[1406] Panel Reports, *US – COOL*, para. 7.904 (citing GATT Panel Report, *EEC – Oilseeds I*, para. 142) (emphasis by original panel).
[1407] Panel Reports, *US – COOL*, para. 7.907.
[1408] Appellate Body Report, *US – Clove Cigarettes*, paras. 182 and 215.
[1409] The original panel exercised judicial economy with respect to the complainants' claims under Article III:4 of the GATT 1994 "[g]iven 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". Panel Reports, *US – COOL*, paras. 7.807.
[1410] See paras. 7.623-7.625 above. See also Appellate Body Reports, *EC – Seal Products*, para. 5.101.
[1411] Appellate Body Reports, *EC – Seal Products*, para. 5.117 (emphasis added).
[1412] Panel Report, *Japan – Film*, para. 10.380.

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existing at the time relevant concessions were granted – the focus of Article XXIII:1(b) – would be more favourable than the standard of "effective equality" required under Article III:4.

7.671. Accordingly, we exercise judicial economy with respect to the complainants' non-violation claims.

7.672. At the same time, we are mindful of the Appellate Body's admonition that a panel may need to make additional findings in the event supporting findings or determinations are overturned on appeal.[1413] We also recognize that, while Mexico raises a conditional non-violation claim, Canada invokes Article XXIII:1(b) as an additional claim that is not made in the alternative to its other claims of violation.[1414] Thus, we proceed to analyse the complainants' non-violation claims so that, were the Appellate Body to disagree with our findings on violation or with our approach to judicial economy, it will have the benefit of our factual findings under Article XXIII:1(b). We emphasise that, given our exercise of judicial economy, our examination is conditional and primarily factual. We draw no legal conclusions in the subsequent sections of our Article XXIII:1(b) analysis, and we limit any interpretation of relevant terms and provisions to what is necessary to make conditional factual findings.

7.8.3 Legal test

7.673. The parties follow[1415] the three-step test for non-violation claims developed by the panel in *Japan – Film*:

> 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 a result of the application of the measure.[1416]

7.674. As the parties agree[1417], the complainants bear the burden of proof to make a *prima facie* case for their non-violation claims.[1418] Further, Article 26.1(a) of the DSU stipulates that "the complaining part[ies] shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement". This is in line with the exceptional nature of the non-violation remedy, which we bear in mind in examining the complainants' non-violation claims.

7.8.4 Application of a measure

7.675. Under the first limb of the test, the complainants must demonstrate the application of a measure by the United States. Both Canada and Mexico identify the amended COOL measure as the measure being applied by the United States that allegedly nullifies or impairs benefits accruing to them under the GATT 1994.[1419] This has not been contested by the United States.

[1413] See Appellate Body Report, *US – Tuna II (Mexico)*, para. 405:
> the Panel should have made additional findings under the GATT 1994 in the event that the Appellate Body were to disagree with its view that the measure at issue is a "technical regulation" within the meaning of the TBT Agreement. As a result, it would have been necessary for the Panel to address Mexico's claims under the GATT 1994 given that the Panel found no violation under Article 2.1 of the TBT Agreement. By failing to do so, the Panel engaged, in our view, in an exercise of "false judicial economy" and acted inconsistently with its obligations under Article 11 of the DSU.

[1414] Canada's opening statement at the meeting of the Panel, para. 55; and response to Panel question No. 77.

[1415] Canada's first written submission, para. 189; Mexico's first written submission, para. 236; United States' first written submission, para. 204.

[1416] Panel Report, *Japan – Film*, para. 10.41 (citing GATT Panel Report, *EEC – Oilseeds I*, paras. 142-152 and GATT Working Party Report, *Australia – Subsidy on Ammonium Sulphate*, pp. 192-193).

[1417] See Canada's answer to Panel question No. 78; Mexico's answer to Panel question No. 78; United States' first written submission, para. 207; and response to Panel questions Nos. 78 and 79.

[1418] Panel Report, *Japan – Film*, para. 10.29.

[1419] Canada's first written submission, para. 190; Mexico's first written submission, para. 238.

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7.8.5 Benefit accruing

7.676. Canada and Mexico claim that the benefit nullified or impaired consists of legitimate market access expectations from the United States' tariff concessions under the GATT 1994.[1420] Two issues are contested by the parties under this limb of the test:

a. whether the benefits claimed are in fact "accruing" to the complainants within the meaning of Article XXIII:1(b) of the GATT 1994; and

b. whether the complainants could reasonably have anticipated the amended COOL measure.[1421]

7.677. According to the United States' Goods Schedule annexed to the Marrakesh Protocol to the GATT 1994, the MFN bound rate tariff for item number 0103, live swine, is zero.[1422] The North American Free Trade Agreement (NAFTA) rate for live swine is also zero.[1423] Thus, the MFN bound rate under the Uruguay Round concessions and the NAFTA rate are identical. Based on this, we consider that benefits for live swine are currently being enjoyed by the complainants under the GATT 1994 in the sense that relevant trade is conducted under its concessions. Accordingly, the parties' disagreement the meaning of "benefit accruing" does not arise in respect of swine.

7.678. With regard to the bound rates for live cattle, the parties agree that under the relevant US tariff bindings from the Uruguay Round, the current MFN rate for live cattle is USD 0.01 per kilogram.[1424] They also agree that NAFTA accords duty-free access to the US market for Canadian and Mexican live cattle.[1425] Access to the US market for live cattle is, thus, more preferential under NAFTA than it is under the relevant concessions from the Uruguay Round. In light of this, the parties disagree on the meaning of "benefit accruing" under Article XXIII:1(b) of the GATT 1994. Specifically, the parties dispute whether a non-violation claim can be made in respect of benefits stemming from the Uruguay Round when the relevant trade is conducted under tariff concessions arising from a preferential regional trade agreement.

7.679. Accordingly, the first issue concerns the definition of the term "benefit accruing" and arises only for cattle. The second issue concerns the factual existence of a "benefit accruing" and whether the complainants could reasonably have anticipated the amended COOL measure for both cattle and swine.

7.8.5.1 Definition of "benefit accruing"

7.680. In addressing the term "benefit accruing", we are confined by our terms of reference, which require us "[t]o 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 [the complainants]".[1426]

7.681. Article XXIII:1(b) of the GATT 1994 refers to "any benefit accruing to [a Member] directly or indirectly under [the GATT 1994]." Similarly, Article 26.1 of the DSU refers to "any benefit

[1420] Canada's first written submission, para. 183; Mexico's first written submission, paras. 239-241; United States' first written submission, para. 208.
[1421] United States' first written submission, paras. 208 and 210-211.
[1422] Schedule XX (United States of America) annexed to the Marrakesh Protocol.
[1423] United States' first written submission, para. 210; Exhibit CDA-99.
[1424] Canada's first written submission, paras. 184 and 190; and response to Panel question No. 75; Mexico's first written submission, para. 240; Exhibit MEX-38; United States' response to Panel question No. 75. See also the Schedule XX (United States) annexed to the Marrakesh Protocol, tariff item number 0102.90.40 (for live cattle).
[1425] Canada's response to Panel question No. 75; Mexico's first written submission, para. 240; United States' first written submission, para. 210; Exhibit CDA-99.
[1426] See Constitution of the Panel, Note by the Secretariat, WT/DS384/27 and WT/DS386/26, para. 2 (emphasis added). The relevant provision cited by Canada and Mexico for their non-violation nullification or impairment claims is Article XXIII:1(b) of the GATT 1994. See also Article 3.2 DSU, which states that "[t]he Members recognize that [the dispute settlement system of the WTO] serves to preserve the rights and obligations of Members *under the covered agreements*, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law" (emphasis added) and Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 56.

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accruing to [a Member] directly or indirectly under the relevant covered agreement". Dictionary definitions of "benefit" include "an advantage, a good" and "pecuniary profit".[1427] Additionally, dictionary definitions of "accrue" include "of a benefit or sum of money[, to] be received in regular or increasing amounts" and "arise or spring as a natural growth or result".[1428] In principle, these definitions do not preclude that a benefit may "accrue" without being actually utilized.

7.682. By protecting benefits that accrue "directly or indirectly", both Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU suggest a possibly broad scope for the term "benefit". Further, both Articles refer to "any" benefit. Given the dictionary definition of the word "any", these provisions might apply "no matter which, or what"[1429] particular benefit is at issue. This would not support narrowing the term "benefit" to a specific manner of enjoyment or entitlement.

7.683. In any event, neither the dictionary definitions of "benefit" and "accrue", nor the text of Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU, provides a clear and dispositive answer to the parties' disagreement about the meaning of "benefit accruing" as used in those provisions.[1430]

7.684. Under Article II of the GATT 1994, Members' goods schedules "annexed to [the GATT 1994] are … an integral part of … this Agreement."[1431] By virtue of Article II of the GATT 1994, WTO tariff concessions serve as a form of insurance policy for Members.[1432] WTO Members have committed to an effective, good faith application of the WTO Agreement, including their goods schedules.[1433]

7.685. In fact, one of the principal objectives of the WTO Agreement is to "promot[e] security and predictability in international trade … through the exchange of concessions".[1434] The DSU also serves this objective by subjecting the "covered agreements", including Members' goods schedules, to WTO dispute settlement.[1435] The enforceability – and hence the predictability – of multilateral concessions must not be compromised by concluding regional trade agreements. To do otherwise would upset the predictability of the multilateral trading system, and would render WTO concessions illusory, or – as termed by the respondent – "theoretical".[1436]

[1427] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 220.

[1428] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 16. The latter definition adds that it is especially used in law "of the coming into existence of a possible cause of action".

[1429] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 95.

[1430] See para. 7.652 above regarding the Appellate Body's statement that "dictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents." Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 248. See also Appellate Body Report, *US – Gambling*, para. 166.

[1431] Article II:7 of the GATT 1994. According to Recitals 1, 3, and 4 of the WTO Agreement, the WTO also promotes "reciprocal and mutually advantageous arrangements … directed to the substantial reduction of tariffs and other barriers to trade" and encourages "develop[ing] an integrated, more viable, and durable multilateral trading system". See further Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, paras. 432-433.

[1432] See in general Article II of the GATT 1994 and the Understanding on the Interpretation of Article II:1(b) of the GATT 1994, paras. 4 and 6. As Canada points out, WTO concessions would continue to apply if the NAFTA were terminated or otherwise ended. Canada's second written submission, para. 157; and response to Panel question No. 81. Mexico clarifies that "it has two 'layers' of tariff bindings protecting its feeder cattle exports to the United States: NAFTA tariff bindings and WTO tariff bindings". Mexico's comments on the United States' response to Panel question No. 81, para. 87.

[1433] See also Articles XI:1 and XII of the WTO Agreement. As referred to by the Appellate Body, Article 26 of the Vienna Convention, which is entitled "Pacta sunt servanda", sets forth that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Appellate Body Report, *EC – Sardines*, para. 278.

[1434] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 433.

[1435] Article 3 of the DSU.

[1436] United States' response to Panel question No. 81.

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7.686. We note that Article XXVIII of the GATT 1994 prescribes specific and formalised procedures allowing Members to modify the concessions in their Schedules.[1437] These procedures require negotiation and agreement with Members primarily concerned, as well as consultations with other Members having substantial interest, and they cannot be circumvented.[1438] Moreover, modification does not come without a price: Members concerned "shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in [the GATT 1994] prior to such negotiations", and "may include provision for compensatory adjustment with respect to other products".[1439]

7.687. In regulating entry into preferential regional and bilateral trade agreements, Article XXIV of the GATT 1994 allows for the establishment of customs unions and free trade areas, stipulating that "[t]he purpose of a customs union or a free-trade area should be to facilitate trade … and not to raise barriers to … trade."[1440] Thus, the formation of regional trade agreements is not meant to undermine WTO concessions and other obligations, or to frustrate WTO market access benefits. Indeed, Article XXIV:6 provides that if a Member entering into a customs union or free trade agreement "proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply". This reflects the principle that each WTO Member entering into a free trade agreement remains bound by its WTO commitments, including bound tariff ceilings.

7.688. In sum, it would be an impermissibly narrow reading of "benefit accruing" in Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU to limit that term to concessions that are actually enjoyed or applied to trade in the relevant goods. WTO Members have assigned primary importance to "[t]he prompt settlement of 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".[1441] Accordingly, we are guided by the role of WTO dispute settlement as a "central element in providing security and predictability to the multilateral system … [and] preserv[ing] the rights and obligations of Members under the covered agreements".[1442]

7.689. In the context of this dispute, the approach argued by the United States, requiring goods to be subject to *and* currently utilizing a particular concession, would potentially bar Members from relying on WTO concessions for claims of non-violation when their trade was being conducted under a preferential trade agreement. We note that Article XXIII:1(b) of the GATT 1994 has been construed as protecting "commitments on conditions of competition for trade".[1443] In other words, "competitive *opportunities*"[1444], not just their actual, or current, enjoyment are protected under Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU.[1445] Based on the above considerations, the phrase "benefit accruing" in Article XXIII:1(b) of the GATT 1994 and

[1437] See Article XXVIII of the GATT and the Understanding on the Interpretation of Article XXVIII of the GATT 1994. Members may also withdraw from the WTO Agreement pursuant to Article XV of the WTO Agreement.

[1438] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 452.

[1439] See Article XXVIII:2.

[1440] Article XXIV:4 of the GATT 1994. In addition, Article XXIV:5 requires that "duties and other regulations of commerce … shall not be higher or more restrictive" than what they had been prior to the formation of the "customs union" (Article XXIV:5(a)) or "free trade area" (Article XXIV:5(b)). See also Article V of the GATS entitled "Economic Integration", which envisages Members' entry "into an agreement liberalizing trade in services between or among the parties to such an agreement". Article V:4 of the GATS provides that any such agreement "shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement."

[1441] Article 3.3 of the DSU.

[1442] Article 3.2 of the DSU.

[1443] GATT Panel Report, *EEC – Oilseeds I*, para. 150.

[1444] GATT Panel Report, *EEC – Oilseeds I*, para. 144 (quoted in Panel Report, *Japan – Film*, para. 10.35) (emphasis added).

[1445] See also Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 469 (stating in the context of Article 3.8 of the DSU that "the contested measure may not have actual trade effects" but that "in order to determine whether [a Member] has suffered nullification or impairment, 'competitive opportunities' … must be taken into account"); and Appellate Body Report, *Korea – Alcoholic Beverages*, para. 120.

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Article 26.1 of the DSU extends to multilateral WTO market access concessions even when the relevant products are directly traded under a regional trade agreement according preferential market access.

7.690. We decline to read Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU in a manner that would render inutile multilateral concessions and key obligations in the covered agreements and frustrate their enforceability. In light of the above, we conditionally conclude that the United States' relevant Uruguay Round multilateral concessions for cattle can be covered by the term "benefit accruing" in the sense of Article XXIII:1(b) and Article 26.1 of the DSU.[1446]

7.8.5.2 Reasonable anticipation of the measure

7.691. As noted above, the second issue contested under the second limb of the Article XXIII:1(b) test is whether the benefit allegedly accruing to the complainants from Uruguay Round concessions creates legitimate expectations of market access. That is contingent on the contested measure not having been reasonably anticipated[1447] at the time the concessions were made.[1448]

7.8.5.2.1 Timeline of the COOL measure

7.692. A chronology of the amended COOL measure is essential for addressing the question of its reasonable anticipation by the complainants. The statutory framework of the amended COOL measure, the COOL statute, consists of the Agricultural Marketing Act of 1946 as amended by the 2002 Farm Bill and the 2008 Farm Bill.[1449] While the initial legislative act dates to 1946, the relevant country of origin labelling requirements for the products at issue originate in the 2002 Farm Bill, and were subsequently modified in the 2008 Farm Bill.[1450]

7.693. The original panel found that "[a]lthough 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 [the original] dispute on 30 September 2008."[1451] Based on this statutory framework, the 2009 and 2013 Final Rules were the implementing regulations providing "the details necessary for the program to operate in the market".[1452] Thus, the legislation of the contested COOL requirements emerged in 2002 and took definitive shape in 2008, followed by more specific regulations in 2009 and 2013.[1453]

7.694. This chronology indicates that the relevant measure came into force years after the negotiation of the Uruguay concessions that are claimed to create the complainants' legitimate expectations of market access.[1454] Before reaching any conditional conclusion from this for

[1446] As explained above, this legal question does not arise with respect to swine. See paras. 7.677-7.679 above.

[1447] See Panel Report, *Japan – Film*, para. 10.76.

[1448] See Canada's first written submission, para. 190, and second written submission, para. 156; Mexico's first written submission, para. 239, and second written submission, para. 156; United States' first written submission, para. 208.

[1449] See section 7.3 above.

[1450] According to the USDA's background summary of the 2009 Final Rule, "[t]he Farm Security and Rural Investment Act of 2002 (2002 Farm Bill), the 2002 Supplemental Appropriations Act (2002 Appropriations), and the Food, Conservation and Energy Act of 2008 (2008 Farm Bill) *amended the Agricultural Marketing Act of 1946 (Act) to require retailers to notify their customers of the country of origin of covered commodities*." 2009 Final Rule, p.2658 (emphasis added). Further, the USDA stated that the 2009 Final Rule was "the direct result of statutory obligations to implement the COOL provisions of the 2002 and 2008 Farm Bills." 2009 Final Rule, p.2693. See also 2013 Final Rule, p. 31367.

[1451] Panel Reports, *US – COOL*, para. 7.797.

[1452] United States' first written submission, para. 9.

[1453] This development of the original and amended COOL measures is confirmed by the account of the Congressional Research Service. "With the passage of the 2002 farm bill, retail-level COOL was to become mandatory for … beef [and] pork … starting September 30, 2004". After postponement of implementation by Appropriations Acts of 2004 and 2006, "[p]rovisions dealing with record-keeping requirements, the factors to be considered for labeling U.S. and non-U.S. origin products, and penalties for noncompliance were modified [by the 2008 Farm Bill]." Exhibit CDA-8, p. 1; see also pp. 1-2 and 27 regarding the USDA's issuance of the 2009 and 2013 Final Rules.

[1454] For example, the panel in *Japan – Film* considered that "in the case of measures shown … to have been introduced subsequent to the conclusion of the tariff negotiations at issue, it is our view that the

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reasonable anticipation of the amended COOL measure, we analyse other factors argued by the United States.

7.8.5.2.2 Connection to earlier measures in the United States

7.695. A further question in the context of reasonable anticipation is whether a measure may be "so clearly contemplated in an earlier measure that [the complainants] should be held to have anticipated it".[1455] To demonstrate this, it would not be sufficient to show merely that the measure "is consistent with or a continuation of a past *general* government policy", but rather that there is a "clear connection" between the challenged and earlier measures.[1456]

7.696. The United States argues that "imported meat, along with a host of other agricultural and non-agricultural goods, has been required to be labelled at the retail level with its country of origin since 1930, decades before the conclusion of the Uruguay Round or the NAFTA."[1457] According to the United States, its "own long history of labeling laws and policy discussion on meat and other products, as well as the proliferation of similar labeling regimes by other WTO Members, prior to the time the Uruguay Round was concluded" show that the complainants could have reasonably anticipated the amended COOL measure.[1458]

7.697. Apart from the COOL statute[1459], the United States refers to the Tariff Act of 1930[1460] as an earlier measure that required "imported meat … to be labelled at the retail level with its country of origin since 1930".[1461] The Tariff Act of 1930 has required, since its enactment, the labelling of "every article of foreign origin".[1462] Such articles of foreign origin would encompass imported meat, along with many other agricultural and non-agricultural goods.[1463]

7.698. We observe, however, that there are notable differences in the nature and extent of the obligations imposed by the Tariff Act of 1930 and the amended COOL measure. As explained by the United States in reference to the Tariff Act of 1930, "these previous labeling requirements did not apply to many of the products covered by the amended COOL measure, including meat derived from animals slaughtered in the United States."[1464] Indeed, according to the 2009 Final Rule:

> Under preexisting Federal laws and regulations, COOL is not universally required for the commodities covered by this rule. In particular, labeling of United States origin is not mandatory, and labeling of imported products at the consumer level is required only in certain circumstances. Thus, the Agency has not identified any Federal rules that would duplicate or overlap with this rule.[1465]

7.699. The 2013 Final Rule makes a similar observation with regard to the requirement to give point-of-production information for the animals from which covered muscle cuts are derived:

> Under preexisting Federal laws and regulations, origin designations for muscle cut covered commodities need not specify the production steps of birth, raising, and

[complainant] has raised a presumption that it should not be held to have anticipated these measures and it is then for [the respondent] to rebut that presumption." Panel Report, *Japan – Film*, para. 10.79.

[1455] Panel Report, *Japan – Film*, para. 10.79.

[1456] Panel Report, *Japan – Film*, para. 10.79 (emphasis original); see also Panel Report, *EC – Asbestos*, para. 8.291(a).

[1457] United States' first written submission, para. 212.

[1458] United States' first written submission, para. 215.

[1459] As explained, the relevant requirements of the COOL statute came into effect no earlier than 2002 and assumed their current form in 2008, notwithstanding the 1946 enactment of the original Agricultural Marketing Act.

[1460] See Exhibits CDA-101 and CDA-189.

[1461] United States' first written submission, para. 212.

[1462] Tariff Act of 1930, § 1304(a).

[1463] See United States' response to Panel question No. 82, para. 191.

[1464] United States' response to Panel question No. 82, para. 191.

[1465] 2009 Final Rule, p. 2693.

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> slaughter of the animals from which the cuts are derived. Thus, the Agency has not identified any Federal rules that would duplicate or overlap with this rule.[1466]

7.700. In keeping with these statements, the complainants highlight the original and amended COOL measures' departure from the principle of substantial transformation in previous labelling requirements.[1467] The application of the Tariff Act of 1930 to imported *meat* excluded "meat derived from animals slaughtered in the United States".[1468] These are the very products claimed by the United States to be a primary aspect of the amended COOL measure's coverage[1469], as well as the focus of the complainants' allegations of nullification or impairment. In effect, earlier requirements cited by the United States would have extended no further than the equivalent of Label D under the original and amended COOL measures. As found with respect to both the original and amended COOL measures, this represents a small percentage of the meat sold in the United States.[1470]

7.701. Hence, although there was a past government policy of labelling imported meat with its country of origin, we do not consider this to demonstrate a reasonable anticipation of the key features and requirements of the amended COOL measure. In particular, the mandatory retail labelling of meat from US-slaughtered livestock, including the recent specifications under the amended COOL measure, appears to be a significant departure from pre-existing labelling rules and practices as they concern the products at issue.[1471]

7.702. The United States also discusses the domestic history of US labelling laws and policy discussions on meat. It submits that "for at least the last 40 years, since the 1960s, the U.S. Congress has contemplated various pieces of legislation that would have imposed additional requirements for country of origin labelling for meat at the retail level."[1472] Our reading of these non-enacted proposals does not reveal any clear connection with the amended COOL measure, as these proposals would have applied only to imported meat rather than livestock and would not have required detailed information about where the animal was born and raised.[1473] Even assuming that the complainants would have been aware of the measures introduced in the United States Congress, it is not clear that those proposed measures could have alerted them to the possibility of a measure such as the amended COOL measure.[1474]

7.703. In any case, it is questionable whether legislative initiatives that are not enacted into mandatory legislation suffice to establish reasonable anticipation on the part of the complainants.[1475] Even charging Canada and Mexico with knowledge of the legislative initiatives, the indicative value of that knowledge could be inconclusive. The very fact that successive proposals were defeated in Congress might plausibly have led the complainants to expect that any similar (or more rigorous) future proposals would also be rejected.

[1466] 2013 Final Rule, p. 31382.

[1467] See Canada's comments on the United States' response to Panel question No. 78, para. 120 (referring to "the rejection of the long-standing principle of substantial transformation in the COOL measure"); and Mexico's comments on the United States' response to Panel question No. 82, para. 174 (referring to the original and amended COOL measure as being "fundamentally different from previous labeling measures applied to beef in the U.S. market").

[1468] United States' response to Panel question No. 82, para. 191.

[1469] See, e.g. United States' second written submission, paras. 9-10 and 23; opening statement at the meeting of the Panel, paras. 8 and 13.

[1470] See para. 7.259 above and Panel Reports, *US – COOL*, paras. 7.369-7.371.

[1471] See Exhibit CDA-8, Appendix A. See also Panel Report, *Japan – Film*, para. 10.79.

[1472] United States' first written submission, para. 213.

[1473] See United States' response to Panel question No. 78.

[1474] The only proposal with some similarity to the amended COOL measure dates from 1999, which could not possibly have forewarned the complainants at the close of the Uruguay Round years earlier to anticipate a significant change in country of origin labelling requirements. See Country of Origin Meat Labeling Act of 1999, H.R. 1144, 106th Cong. (1st Sess. 1999) (introduced by Rep. Helen Chenoweth-Hage). This proposed legislation would have amended the Federal Meat Inspection Act to require that all meat and meat food products, whether domestic or imported, bear a label notifying the ultimate purchaser of meat and meat food products of the country of origin of the livestock that is the source of the meat and meat food products. Exhibit CDA-9 in the original dispute.

[1475] For instance, the panel in *Japan – Film* considered that a complainant could be "charged with knowledge of … measures as of the date of their publication." Panel Report, *Japan – Film*, para. 10.80.

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7.8.5.2.3 International prevalence of similar measures

7.704. The United States additionally argues that "the proliferation of similar labeling regimes by other WTO Members, prior to the time the Uruguay Round was concluded, 'could not do other than create a climate which should have led [Canada and Mexico] to anticipate a change in the attitude of the importing countries' towards embracing more origin information being disclosed to consumers at the retail level."[1476] To support an inference of reasonable anticipation, the United States submitted a list of WTO Members with country of origin regimes.[1477] The United States acknowledges that of the numerous measures of other Members referenced, only a handful of measures (from Australia, Barbados, Canada, Chile, Chinese Taipei, Colombia, the European Union, Korea, Japan, and Mexico) concern meat in particular.[1478]

7.705. The adoption by other Members of measures with some similarity to the challenged measure does not necessarily mean that the latter should reasonably have been anticipated.[1479] For instance, the panel in *Japan – Film* did not "consider that as a general rule the United States should have reasonably anticipated Japanese measures that are similar to measures in other Members' markets. In each such instance, the issue of reasonable anticipation needs to be addressed on a case-by-case basis."[1480] Similarly, the panel in *EC – Asbestos* considered that "the accumulation of international and Community decisions concerning the use of asbestos … did not necessarily make it certain that the use of asbestos would be banned by France".[1481]

7.706. From the information provided by the United States, it appears that only one other measure mandates the provision of information on the country where the animal from which the meat is harvested was born, raised, and slaughtered.[1482] This does not support a high degree of international prevalence or similarity of the measures from other jurisdictions to the amended COOL measure.[1483] Moreover, there is wide variation in the proffered reasons for the adoption of

[1476] United States' first written submission, para. 215 (citing Panel Report, *EC – Asbestos*, para. 8.297). See also Exhibits US-5 and US-6.

[1477] Exhibit US-5.

[1478] United States' first written submission, para. 39.

[1479] As the panel held in *Japan – Film*, "[n]or do we consider that as a general rule the United States should have reasonably anticipated Japanese measures that are similar to measures in other Members' markets. In each such instance, the issue of reasonable anticipation needs to be addressed on a case-by-case basis." Panel Report, *Japan – Film*, para. 10.79. Likewise, in *EC – Asbestos* the panel considered that "the accumulation of international and Community decisions concerning the use of asbestos … did not necessarily make it certain that the use of asbestos would be banned by France". Panel Report, *EC – Asbestos*, para. 8.297.

[1480] Panel Report, *Japan – Film*, para. 10.79.

[1481] Panel Report, *EC – Asbestos*, para. 8.297.

[1482] United States' first written submission, para. 39 and footnote 87; Exhibits US-5 and US-6. We refer here to the EU measure (See Notification to the TBT Committee, G/TBT/N/EU/158, of 7 October 2013) and the United States' description of that measure in the United States' first written submission, para. 40.

[1483] From the information available to us from the TBT Committee notifications of the other Members specifically referred to by the United States, it appears that none requires the provision of information to consumers on the country or countries where the animal was born, raised and slaughtered. Instead, what is required is the identification of the country of origin of the product covered or, in the case of processed food, of individual ingredients in the product. It is not possible to deduce from the information provided by the United States how the county of origin is determined. Moreover, there is variation as to the scope of product coverage of those measures. See Exhibit US-10. The Australian measure (G/TBT/N/AUS/45 of 13 December 2005; G/TBT/N/AUS/70 of 23 August 2011; G/TBT/N/AUS/70/Add.1 of 8 January 2013) covers both packaged and unpackaged meat. The Barbadian measure (G/TBT/N/BRB/2 of 15 November 2005) covers pre-packaged meat. The Canadian measure (Exhibit US-9, in particular Sections 109 and 123) covers meat products. The Chilean measure (G/TBT/N/CHL/33 of 5 June 2002) applies to packaged food for human consumption. The first measure of Chinese Taipei (G/TBT/N/TPKM/41 of 13 December 2006) requires the labelling of all pre-packaged foods with the origin of the ingredient. The second measure of Chinese Taipei (G/TBT/N/TPKM/126 of 29 August 2012) requires the labelling of meat with the country of origin of the product or, in the case of beef and edible cattle offals, with the country where the animal was slaughtered. The first Colombian measure (G/TBT/N/COL/69 of 31 August 2005; G/TBT/N/COL/69Add.1 of 14 February 2006) applies to ingredients listed on containers and packages used for all food for human consumption. The second Colombian measure (G/TBT/N/COL/82 of 22 December 2006; G/TBT/N/COL/82/Add.1 of 7 June 2007) applies to meat, edible meat products and meat by-products for human consumption and does not seem to impose labelling requirements. The first Japanese measure (G/TBT/Notif.99/668 of 23 December 1999) applies *inter alia* to all processed foods and certain fresh foods and appears to concern labelling standards in general. The second relevant Japanese measure (G/TBT/Notif.00/483 of 9 October 2000; G/TBT/N/JPN/7 of 24 January 2001; G/TBT/N/JPN/12 of 12

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those measures, including public health[1484], the proper identification of meat cuts and their quality[1485], the provision of information to consumers[1486], consumer protection[1487], and the avoidance of deceptive practices.[1488]

7.707. Under such circumstances, the existence of labelling requirements in other countries does not evidence the kind of "trend" that could give rise to a "climate" in which the amended COOL measure could reasonably have been anticipated.[1489]

7.8.5.2.4 Measures pursuing legitimate policy objectives

7.708. Finally[1490], we address the relevance for non-violation claims of the covered agreements' recognition of specific objectives that may be pursued by Members. In this regard, the United States points to the prevention of deceptive practices as a "legitimate objective" under Article 2.2 of the TBT Agreement.[1491]

7.709. We note that the panel in *EC – Asbestos* applied a "stricter burden of proof" for non-violation claims against measures pursuing certain recognized interests.[1492] In particular, the *EC – Asbestos* panel considered for Article XX of the GATT 1994 that "in accepting the WTO Agreement Members also accept, *a priori*, through the introduction of these general exceptions, that Members will be able, at some point, to have recourse to these exceptions".[1493] The panel thus reasoned that recourse to Article XXIII:1(b) of the GATT 1994 should be treated as particularly exceptional in relation to measures justified by Article XX of the GATT 1994.[1494]

7.710. The exceptional treatment suggested above would impute greater awareness to complainants of the possibility that other Members might regulate under the general exceptions of the GATT 1994 in ways nullifying or impairing WTO concessions. At the same time, a measure's justification based on its pursuit of a legitimate objective should not be grounds, in and of itself, for finding that that measure could reasonably have been anticipated.[1495] Otherwise, the non-

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April 2001; G/TBT/N/JPN/42 of 25 March 2002; G/TBT/N/JPN/124 of 18 June 2004) applies to fresh and processed food. It was amended in 2004 to remove a country of origin labelling rule for livestock meat derived from animals imported live and slaughtered in Japan. The first Korean measure applies to all meat products being commercially sold (G/TBT/N/KOR/156 of 18 September 2007; G/TBT/N/KOR/202 of 20 January 2009); the second one (G/TBT/N/KOR/173 of 7 May 2008) covers food, food additives, apparatus, packaging and containers for food; and the third one (G/TBT/N/KOR/181 of 7 August 2008) applies *inter alia* to beef and pork. The Mexican measure (Mexican Official Standard NOM-194-SSA1-2004 on Sanitary Specifications for Establishments Dedicated to Slaughtering and Preparing Animals for Slaughter, Storage, Transport and Vending, available at http://www.salud.gob.mx/unidades/cdi/nom/194ssa104.html, last accessed 3 June 2014) applies to meat, ground meat, viscera and other edible parts. See also United States' first written submission, paras. 40-44.

[1484] See the Australian, Barbadian, Chinese Taipei, Colombian and Korean measures cited above in footnote 1483 and in Exhibit US-5.

[1485] See the Barbadian measure cited above in footnote 1483 and in Exhibit US-5.

[1486] See the Australian, Barbadian, Chinese Taipei, Chilean, European Union and Korean measures cited above in footnotes 1482 and 1483 and in Exhibit US-5.

[1487] See the Chinese Taipei and Japanese measures cited above in footnote 1483 and in Exhibit US-5.

[1488] See the Australian, Colombian and Korean measures cited above in footnote 1483 and in Exhibit US-5.

[1489] See Panel Report, *EC – Asbestos*, para. 8.297.

[1490] Another possible factor to consider is the temporal gap between the coming into being of the challenged measure and the granting of concessions of market access. The United States submits that "in light of the many years that have elapsed since the Uruguay Round, Canada and Mexico 'could not assume that, over such a long period, there would not be' changes to the U.S. labeling regime with the risk that meat products derived from imported livestock would have to be labeled." United States' first written submission, paras. 215 (citing Panel Report, *EC – Asbestos,* para. 8.292). The panel in *EC – Asbestos* emphasised the long time that had lapsed between the concessions and the measure (between 35 and 50 years). However, the force of that argument is significantly reduced in the context of this dispute where the relevant legislative acts were adopted in 2002 and 2008, much closer in time to the granting of Uruguay Round concessions.

[1491] United States' answer to Panel question no. 78, para. 180.

[1492] See Panel Report, *EC – Asbestos*, para. 8.282.

[1493] Panel Report, *EC – Asbestos*, para. 8.272.

[1494] Panel Report, *EC – Asbestos*, para. 8.281.

[1495] Panel Report, *Japan – Film*, para. 10.79.

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violation remedy for measures that do *not* conflict with – including those justified under – the covered agreements would be rendered ineffective.[1496]

7.711. In the present compliance dispute, the above considerations do not alter our analysis of the amended COOL measure's reasonable anticipation.[1497] The amended COOL measure's legitimate objective[1498] and the prevention of deceptive practices as recognized in the TBT Agreement could only evidence a general government policy of labelling foreign products with some indication of their country of origin. As described above, however, "it is not sufficient to claim that a *specific* measure should have been anticipated because it is consistent with or a continuation of a past *general* government policy."[1499] To the extent that the amended COOL measure marks a notable departure from such past policy, it would not be reasonably anticipated simply by virtue of pursuing a recognized or legitimate objective.

7.8.5.2.5 Conclusion on reasonable anticipation

7.712. In sum, the chronology of the amended COOL measure's introduction shows that it postdates the granting of relevant tariff concessions. As for the other factors we have examined, we do not find compelling evidence that the amended COOL measure could have been reasonably anticipated before its adoption. Overall, and having assessed the relevant facts and circumstances[1500], we conditionally conclude that the amended COOL measure introduced a significant degree of regulatory novelty to the labelling of the products relevant in this dispute.

7.8.6 Nullification or impairment and causation

7.713. The third limb of the Article XXIII:1(b) test concerns the existence and causation of nullification or impairment.[1501] The complainants argue that the amended COOL measure has upset the competitive relationship between US and Canadian and Mexican cattle and hogs established by the United States' tariff bindings.[1502] In particular, Canada contends that both the original and the amended COOL measures discourage US slaughterhouses from buying Canadian cattle and hogs, and retailers from selling Canadian beef and pork.[1503] According to Canada, this worsens the competitive position of Canadian cattle and hogs in the US market.[1504] Mexico argues that segregation according to origin continues under the amended COOL measure, and US producers continue to apply a price discount on Mexican-born cattle.[1505] Mexico notes that the number of processors accepting Mexican cattle "remains restricted"[1506], and US processors continue to require advance delivery notice for Mexican cattle.[1507] The United States does not contest that the amended COOL measure is one of the factors that affect trade of livestock between its market and those of Canada and Mexico.[1508]

7.714. With regard to the causal link between the amended COOL measure and the nullification or impairment of relevant benefits, the complainants must establish "a clear correlation between the

[1496] See also Appellate Body Report, *EC – Asbestos*, para. 187.
[1497] As a threshold matter, the panel's justifications in *EC – Asbestos* for according stricter treatment to non-violation claims are not clearly applicable to the present dispute. The panel in *EC – Asbestos* addressed "the special situation of measures justified under Article XX, insofar as they concern non-commercial interests whose importance has been recognized *a priori* by Members". Panel Report, *EC – Asbestos*, para. 8.281. The Appellate Body expressed doubts as to the distinction of "non-commercial" interests, stating that "in practice, clear distinctions between health and commercial measures may be very difficult to establish". Appellate Body Report, *EC – Asbestos*, para. 189. As pointed out by Canada, the panel in *EC – Asbestos* was explicitly concerned with Article XX of the GATT 1994, which has not been relied upon by the United States. See Canada's comments on the United States' response to Panel question No. 78, para. 121.
[1498] See sections 7.6.2.1 and 7.6.2.2 above.
[1499] Panel Report, *Japan – Film*, para. 10.79 (emphasis original).
[1500] Panel Report, *Japan – Film*, para. 10.37.
[1501] Panel Report, *Japan – Film,* para. 10.82.
[1502] See Canada's second written submission, para. 156; Mexico's first written submission, para. 243.
[1503] Canada's first written submission, footnote 375.
[1504] Canada's first written submission, footnote 375.
[1505] Mexico's first written submission, para. 97.
[1506] Mexico's first written submission, para. 97.
[1507] Mexico's first written submission, para. 97.
[1508] United States' response to Panel question No. 76, para. 166.

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measures and the adverse effect on the relevant competitive relationships".[1509] The criterion of causality consists in showing that the amended COOL measure "has made more than a *de minimis* contribution to nullification or impairment".[1510]

7.715. In light of the above and the parties' arguments on the third limb of the complainants' non-violation claim, we conditionally conclude that the amended COOL measure meets the requirement of causing an adverse effect on the relevant competitive relationships.

7.8.7 Conclusion on Article XXIII:1(b) of the GATT 1994

7.716. We have explained that compliance by the United States with our finding of violation under Article III:4 of the GATT 1994 would necessarily remove the basis of the complainants' non-violation claims. Consequently, we decided to exercise judicial economy with respect to the complainants' non-violation claims under Article XXIII:1(b) of the GATT 1994. To the extent that the findings underpinning our exercise of judicial economy are overturned on appeal, we have reviewed relevant factual and interpretive issues, and have reached conditional factual conclusions on this basis.

[1509] Panel Report, *Japan – Film*, para. 10.82.
[1510] Panel Report, *Japan – Film*, para. 10.84.

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8 CONCLUSIONS AND RECOMMENDATIONS

8.1. We recall that at the substantive meeting of 18 and 19 February 2014, the parties did not object to including the Panel Reports in a single document, with the understanding that, following the same approach as in the original dispute, the final sections on Conclusions and Recommendations would be printed on separate pages with the relevant DS symbol. 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).

8.2. In making these findings, we recall our above observations in respect of potential WTO-consistent solutions for achieving the amended COOL measure's legitimate objective.[1511]

[1511] See paras. 7.614-7.616 above.

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8.1 Complaint by Canada (DS384): Conclusions and recommendations

8.3. With respect to Canada's claims under the TBT Agreement, we conclude that:

a. the amended COOL measure is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement;

b. the amended COOL measure violates Article 2.1 because it accords imported Canadian livestock treatment less favourable than that accorded to like domestic livestock, in particular because the amended COOL measure increases the original COOL measure's detrimental impact on the competitive opportunities of imported Canadian livestock, and this detrimental impact does not stem exclusively from legitimate regulatory distinctions; and

c. Canada has not made a *prima facie* case that the amended COOL measure is more trade restrictive than necessary within the meaning of Article 2.2.

8.4. With respect to Canada's claims under the GATT 1994, we conclude that the amended COOL measure violates Article III:4, as it has a detrimental impact on the competitive opportunities of imported Canadian livestock, and thus accords less favourable treatment within the meaning of Article III:4 of the GATT 1994. In light of the above findings of violation, in particular under Article III:4 of the GATT 1994, we have exercised judicial economy with regard to Canada's non-violation claim under Article XXIII:1(b) of the GATT 1994; at the same time, we have set out conditional, factual conclusions and legal interpretations in the event that our supporting findings or determinations are overturned on appeal.

8.5. 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 Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, it has nullified or impaired benefits accruing to Canada under these agreements.

8.6. Pursuant to Article 19.1 of the DSU, having found that the United States has acted inconsistently with Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, we recommend that the Dispute Settlement Body request the United States to bring the inconsistent measure into conformity with its obligations under the TBT Agreement and the GATT 1994.

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8.2 Complaint by Mexico (DS386): Conclusions and recommendations

8.3. With respect to Mexico's claims under the TBT Agreement, we conclude that:

a. the amended COOL measure is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement;

b. the amended COOL measure violates Article 2.1 because it accords imported Mexican livestock treatment less favourable than that accorded to like domestic livestock, in particular because the amended COOL measure increases the original COOL measure's detrimental impact on the competitive opportunities of imported Mexican livestock, and this detrimental impact does not stem exclusively from legitimate regulatory distinctions; and

c. Mexico has not made a *prima facie* case that the amended COOL measure is more trade restrictive than necessary within the meaning of Article 2.2.

8.4. With respect to Mexico's claims under the GATT 1994, we conclude that the amended COOL measure violates Article III:4, as it has a detrimental impact on the competitive opportunities of imported Mexican livestock, and thus accords less favourable treatment within the meaning of Article III:4 of the GATT 1994. In light of the above findings of violation, in particular under Article III:4 of the GATT 1994, we have exercised judicial economy with regard to Mexico's non-violation claim under Article XXIII:1(b) of the GATT 1994; at the same time, we have set out conditional, factual conclusions and legal interpretations in the event that our supporting findings or determinations are overturned on appeal.

8.5. 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 Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, it has nullified or impaired benefits accruing to Mexico under these agreements.

8.6. Pursuant to Article 19.1 of the DSU, having found that the United States has acted inconsistently with Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, we recommend that the Dispute Settlement Body request the United States to bring the inconsistent measure into conformity with its obligations under the TBT Agreement and the GATT 1994.

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WORLD TRADE ORGANIZATION

WT/DS384/RW/Add.1
WT/DS386/RW/Add.1

20 October 2014

(14-5928)

Original: English

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CANADA AND MEXICO

REPORTS OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Reports of the Panel to be found in documents WT/DS384/RW and WT/DS386/RW.

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ANNEX A

WORKING PROCEDURES OF THE PANEL

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL (DS384)

Adopted on 25 October 2013 and revised on 21 January 2014

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. 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 to the dispute (hereafter "party") 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. The Panel may adopt special procedures concerning Business Confidential Information after consulting the parties.

3. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "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.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Canada requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Canada shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the

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same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1.

10. To facilitate the maintenance of the record, and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the compliance proceedings. For example, exhibits submitted by Canada could be numbered CDA-1, CDA-2, etc. If the last exhibit in connection with the first submission was numbered CDA-5, the first exhibit of the next submission thus would be numbered CDA-6. The first time a party or third party submits to the Panel an exhibit that corresponds to an exhibit submitted in the original panel proceedings, the party or third party submitting such exhibit shall also identify the number of the original exhibit in the original panel proceedings.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally in the course of the substantive meeting or in writing.

Substantive meeting

12. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and no later than 5.00 p.m. (Geneva time) on the previous working day.

13. The substantive meeting of the Panel shall be conducted as follows:

a. The Panel shall invite Canada to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before taking the floor, each party shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel. The Panel's written questions to the parties and each party's written answers to questions after the substantive meeting with the Panel shall be made available to all third parties.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Canada presenting its statement first, followed by the United States.

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Third parties

14. The Panel shall invite each third party to transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

15. All third parties may be present during the entirety of the substantive meeting with the parties. During this meeting, third parties may, at the invitation of the Panel, ask questions to the parties or the other third parties. The parties and the other third parties, however, have no obligation to respond to these questions.

16. Each third party shall also be invited to present its views orally during a session of the substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. (Geneva time) on the previous working day.

17. The third party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. In the event that interpretation is needed, each third party shall provide additional copies to the interpreters. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. (Geneva time) on the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These 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.

19. Each party shall submit an executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. This executive summary may also include a summary of responses to questions. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions. The executive summary provided by each party shall not exceed 15 pages.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

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Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file three paper copies of all documents it submits to the Panel. When exhibits are provided on CD-ROMS/DVDs, three CD-ROMS/DVDs and three paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to *****@wto.org, and cc'd to *****.*****@wto.org, to *****.*****@wto.org, to *****.*****@wto.org, and to *****.*****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly 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.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures at any time following consultations with the parties.

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ANNEX A-2

WORKING PROCEDURES OF THE PANEL (DS386)

Adopted on 25 October 2013 and revised on 21 January 2014

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. 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 to the dispute (hereafter "party") 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. The Panel may adopt special procedures concerning Business Confidential Information after consulting the parties.

3. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "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.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Mexico requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Mexico shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the

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same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1.

10. To facilitate the maintenance of the record, and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the compliance proceedings. For example, exhibits submitted by Mexico could be numbered MEX-1, MEX-2, etc. If the last exhibit in connection with the first submission was numbered MEX-5, the first exhibit of the next submission thus would be numbered MEX-6. The first time a party or third party submits to the Panel an exhibit that corresponds to an exhibit submitted in the original panel proceedings, the party or third party submitting such exhibit shall also identify the number of the original exhibit in the original panel proceedings.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally in the course of the substantive meeting or in writing.

Substantive meeting

12. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and no later than 5.00 p.m. (Geneva time) on the previous working day.

13. The substantive meeting of the Panel shall be conducted as follows:

a. The Panel shall invite Mexico to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before taking the floor, each party shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel. The Panel's written questions to the parties and each party's written answers to questions after the substantive meeting with the Panel shall be made available to all third parties.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Mexico presenting its statement first, followed by the United States.

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Third parties

14. The Panel shall invite each third party to transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

15. All third parties may be present during the entirety of the substantive meeting with the parties. During this meeting, third parties may, at the invitation of the Panel, ask questions to the parties or the other third parties. The parties and the other third parties, however, have no obligation to respond to these questions.

16. Each third party shall also be invited to present its views orally during a session of the substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. (Geneva time) on the previous working day.

17. The third party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. In the event that interpretation is needed, each third party shall provide additional copies to the interpreters. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. (Geneva time) on the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These 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.

19. Each party shall submit an executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. This executive summary may also include a summary of responses to questions. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions. The executive summary provided by each party shall not exceed 15 pages.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

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Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file three paper copies of all documents it submits to the Panel. When exhibits are provided on CD-ROMS/DVDs, three CD-ROMS/DVDs and three paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to *****@wto.org, and cc'd to *****.*****@wto.org, *****.*****@wto.org, *****.*****@wto.org, and *****.*****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly 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.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures at any time following consultations with the parties.

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ANNEX A-3

PROCEDURES FOR AN OPEN SUBSTANTIVE MEETING OF THE PANEL[1] (DS384)

Adopted on 28 October 2013 and revised on 21 January 2014

1. The Panel shall hold a joint substantive meeting in DS384 and DS386.

2. Subject to the availability of suitable WTO meeting rooms, the Panel will start its substantive meeting, on 18-19 February 2014, with a session with the parties open to the public. At that session, each party will be asked to make an opening 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. The parties will also have an opportunity to make their closing statement during the session open to the public.

3. To the extent that the Panel or any party 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.

4. In addition to its sessions with the parties, at the substantive meeting the Panel will also hold a separate session with the third parties. The Panel will start the third party session 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 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 statement. 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 other third parties at the invitation of the Panel; however, the parties and the other third parties have no obligation to respond to these questions by third parties.

5. The following persons will be admitted into the meeting room during all sessions of the Panel's substantive meeting, whether open or closed to the public:

- the members of the Panel;
- all members of the delegations of the parties to DS384 and DS386;
- all members of the delegations of the third parties to DS384 and DS386; and
- WTO Secretariat staff assisting the Panel.

6. No person shall disclose any business confidential information at any session open to the public.

7. 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 non-governmental organizations 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 the WTO website, by close of business on 7 February 2014.

[1] These procedures are adopted according to, and are an integral part of, the Panel's Working Procedures of 25 October 2013.

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ANNEX A-4

PROCEDURES FOR AN OPEN SUBSTANTIVE MEETING OF THE PANEL[1] (DS386)

Adopted on 28 October 2013 and revised on 21 January 2014

1. The Panel shall hold a joint substantive meeting in DS386 and DS384.

2. Subject to the availability of suitable WTO meeting rooms, the Panel will start its substantive meeting, on 18-19 February 2014, with a session with the parties open to the public. At that session, each party will be asked to make an opening 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. The parties will also have an opportunity to make their closing statement during the session open to the public.

3. To the extent that the Panel or any party 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.

4. In addition to its sessions with the parties, at the substantive meeting the Panel will also hold a separate session with the third parties. The Panel will start the third party session 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 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 statement. 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 other third parties at the invitation of the Panel; however, the parties and the other third parties have no obligation to respond to these questions by third parties.

5. The following persons will be admitted into the meeting room during all sessions of the Panel's substantive meeting, whether open or closed to the public:

- the members of the Panel;
- all members of the delegations of the parties to DS386 and DS384;
- all members of the delegations of the third parties to DS384 and DS386; and
- WTO Secretariat staff assisting the Panel.

6. No person shall disclose any business confidential information at any session open to the public.

7. 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 non-governmental organizations 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 the WTO website, by close of business on 7 February 2014.

[1] These procedures are adopted according to, and are an integral part of, the Panel's Working Procedures of 25 October 2013.

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ANNEX A-5

PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION[1] (DS384)

Adopted on 28 October 2013

1. These procedures apply to any business confidential information (BCI) that a party submits 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 could reasonably be considered to cause or threaten to cause harm to an 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 paragraph 2 of the "Procedures for an open substantive meeting 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, 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.

[1] These procedures are adopted according to, and are an integral part of, the Panel's Working Procedures of 25 October 2013.

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ANNEX A-6

PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION[1] (DS386)

Adopted on 28 October 2013

1. These procedures apply to any business confidential information (BCI) that a party submits 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 could reasonably be considered to cause or threaten to cause harm to an 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 paragraph 2 of the "Procedures for an open substantive meeting 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, 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.

[1] These procedures are adopted according to, and are an integral part of, the Panel's Working Procedures of 25 October 2013.

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ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENT OF CANADA

I. INTRODUCTION

1. In a report issued on 29 June 2012, the Appellate Body confirmed that the COOL measure of the United States accorded less favourable treatment to imported livestock as compared to domestic livestock, in violation of the United States' obligations under TBT Article 2.1. In response to this ruling, instead of eliminating the incentive created by the COOL measure for U.S. market actors to handle exclusively domestic livestock, the United States amended the labelling requirements in a manner that further undermined the competitive position of Canadian cattle and hogs in the U.S. market.

II. FACTUAL BACKGROUND

A. The original COOL measure

2. The original COOL measure provided that retailers licensed under the *Perishable Agricultural Commodities Act*, *1930* were required to provide consumers with origin information on pork and beef muscle cuts that was loosely based on the location of three production steps undergone by livestock: birth, raising, and slaughter. Muscle cuts of pork and beef were divided into the following four categories:

Category A	Meat from animals born, raised, and slaughtered in the United States, or from animals present in the United States on or prior to 15 July 2008	*Product of the U.S.*
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 U.S., Country X, Country Y (if applicable; can appear in any order)*
Category C	Meat from animals imported into the United States for immediate slaughter	*Product of Country X, U.S.*
Category D	Foreign meat imported into the United States	*Product of Country X*

3. The original COOL measure permitted the commingling of muscle cuts derived from categories A, B, and C on a single production day. Where commingling occurred, the muscle cuts could be labelled under a common, mixed-origin label (e.g. "Product of Canada, United States"). Imported muscle cuts were labeled so as to indicate that they were a product of the country in which the animal from which they were produced was slaughtered (e.g. "Product of Canada"), regardless of where the birth and raising steps occurred.

4. In addition, the original COOL measure permitted labels that applied to ground beef and pork to list countries if "raw material" from those countries was in a processor's inventory less than 60 days prior to the ground meat's production. This "60-day inventory allowance" flexibility was available for market participants at every stage of meat supply and distribution.

5. Large amounts of pork and beef consumed in the United States were exempted from the scope of the original COOL measure's application. Specifically, food service establishments, all processed pork and beef, and retailers that either purchased less than $230,000 worth of fresh fruits and vegetables annually or that did not ship, receive, or contract to be shipped or received fresh fruits and vegetables in quantities exceeding 2,000 pounds (one ton) in a single day were exempt from the original COOL measure's labelling requirements.

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B. The amended COOL measure

6. The amendments to the original COOL measure introduced two major changes: (1) the commingling flexibility, which had somewhat mitigated the original COOL measure's segregation requirements, was eliminated; and (2) subject to certain exceptions, labels applying to muscle cuts of beef and pork were required to name the country (countries) in which the animal from which the muscle cut was derived was born, was raised, and was slaughtered.

7. The amended COOL measure provides that if an animal was raised in part in the United States and in part outside the United States, the label may treat the animal as if it was raised entirely in the United States, unless the animal was imported for immediate slaughter (when it is consigned directly from a port of entry to a recognized slaughtering establishment and slaughtered within two weeks from its date of entry) or where by doing so the muscle cut covered commodity would be designated as having a United States country of origin.

8. The amended COOL measure did not modify the original COOL measure's extensive exclusions and exemptions, the labelling of imported muscle cuts, or the 60-day inventory allowance that applies to ground beef and pork.

III. THE SCOPE OF CANADA'S CHALLENGE

9. Canada's challenge of the amended COOL measure concerns the labelling of muscle cuts of beef and pork derived from livestock slaughtered in the United States. Canada does not make claims of inconsistency of the provisions of the amended COOL measure pertaining to the labelling of muscle cuts of foreign origin imported into the United States or the labelling of ground meat with the WTO obligations of the United States. However, Canada refers to these provisions of the amended COOL measure to demonstrate the WTO-inconsistency of the labelling requirements in respect of muscle cuts of beef and pork derived from livestock slaughtered in the United States.

IV. LEGAL CLAIMS

A. The amended COOL measure is a technical regulation and Canadian cattle and hogs are "like" U.S. Cattle and hogs

10. The Panel concluded that the original COOL measure was a technical regulation. The United States did not appeal this finding and this aspect did not become an issue in the current compliance proceedings. The amended COOL measure equally qualifies as a technical regulation. In the original proceedings, the Panel concluded that Canadian cattle and hogs are "like" U.S. cattle and hogs. This was not appealed in the previous proceedings and this aspect did not become an issue in the current compliance proceedings either.

B. The amended COOL measure violates TBT Article 2.1

1. The amended COOL measure accords less favourable treatment to Canadian cattle and hogs, in violation of TBT Article 2.1

11. TBT Article 2.1 imposes a national treatment obligation on WTO Members with respect to technical regulations. The analysis of whether a technical regulation is *de facto* inconsistent with TBT Article 2.1 consists of the following two inquiries: (i) whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of imported products compared to like domestic products; and, if so, (ii) whether the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction (LRD).

12. The assessment under element (i) is the same test as that which applies under GATT Article III:4 for determining whether a measure accords less favourable treatment to imported products. The legal test under element (ii) assesses both whether the regulatory distinction and technical regulation in issue are designed and applied in an even-handed manner. In assessing even-handedness, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation and application of the technical regulation at issue.

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13. As a result of the removal of the commingling flexibility and the introduction of point-of-production labelling through the 2013 Final Rule, the amended COOL measure's labelling, recordkeeping, and segregation requirements are more onerous than those that prevailed under the original COOL measure.

14. Throughout the original proceedings, the United States argued that the original COOL measure did not require the segregation of animals on the basis of their origin because of the availability of commingling, which was alleged by the United States to be widely used by producers. The elimination of the commingling flexibility removes any pretence that segregation is not necessary under the COOL regime. This view is confirmed by comments on the amended COOL measure that were submitted by industry actors to the U.S. Department of Agriculture (USDA) and referred to by Canada in these proceedings.

15. Basic economic logic suggests that the elimination of commingling and the resulting additional recordkeeping and segregation requirements will further deter market actors from handling Canadian livestock and the muscle cuts derived therefrom. The United States resorts to both bald assertions regarding what it now considers to have been the limited extent to which commingling occurred and criticism directed at industry actors for failing to provide evidence regarding the extent of commingling in practice.

16. The United States further contends that Canada's claim regarding the amended COOL measure's detrimental impact is based on the elimination of commingling. This contention is without merit. While the prohibition of commingling has exacerbated the original COOL measure's significant and negative impact, this is by no means the sole basis for Canada's argument regarding the amended COOL measure's detrimental impact. The amended COOL measure does nothing to alter the elements of the original COOL measure that were responsible for undermining the competitive position of Canadian cattle and hogs in the U.S. market.

17. The amended COOL measure has increased the recordkeeping and verification requirements that cause the segregation that is the source of the detrimental impact on Canadian cattle and hogs.

18. As a result of the commingling flexibility that applied under the original COOL measure, producers could affix a common label to muscle cuts derived from combinations of commingled Category A, B, and C animals. Both the provisions on commingling that were set out in the 2009 Final Rule and the USDA's commentary on that Rule reveal that the original COOL measure provided flexibility for upstream producers that reduced the records that had to be kept in the case of commingled muscle cuts. This flexibility has been eliminated by the amended COOL measure.

19. Furthermore, the original COOL measure permitted Category B muscle cuts to bear Label C, even where no commingling occurred. In practical terms, only one set of records was necessary to track Category B and C animals and the muscle cuts derived therefrom. The elimination of this flexibility means that two sets of records will now be required.

20. Canada has submitted evidence that demonstrates the widespread expectation among a wide range of industry actors, that recordkeeping will increase under the amended COOL measure, and has provided practical examples that demonstrate the reasons for this expectation.

21. The United States acknowledges that compliance costs will rise as a result of the changes introduced through the amended COOL measure but fails to recognize that it is the structure of the North American markets for beef and pork muscle cuts that ensures that Canadian cattle and hogs will bear a disproportionate burden of those compliance costs.

22. The U.S. market for cattle and hogs is dominated by U.S. animals. As a result, U.S. market actors can usually avoid the segregation requirements of the amended COOL measure by handling exclusively U.S. animals and muscle cuts derived therefrom. In order to compete with these entities, market actors selling muscle cuts or animals that have undergone a production step in Canada must pass the higher costs of segregating and tracking Canadian cattle and hogs and the muscle cuts derived therefrom up the supply chain to Canadian cattle and hog producers. The amended COOL measure not only perpetuates this situation but adds to the higher costs arising

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from the use of imported livestock, thereby strengthening the incentive for U.S. producers to handle exclusively domestic livestock.

23. Canada has submitted extensive evidence demonstrating the detrimental impact that the amended COOL measure has had on Canadian cattle and hogs, even with the six-month delay in the amended COOL measure's enforcement. This evidence is consistent both with basic economic logic, which is elaborated upon by Dr. Sumner in his report on the amended COOL measure's economic impact on Canadian livestock, and the expectations of industry actors that are documented by Canada.

24. Canada has shown that the amended COOL measure does not stem exclusively from a LRD, in that the measure is arbitrary, lacks even-handedness, and results in unjustifiable discrimination against Canadian livestock.

25. The United States attempts to limit the scope of the Panel's analysis under TBT Article 2.1, adopting the position that the distinctions between the categories of meat and the different labels should be considered in the abstract, divorced from the amended COOL measure's overall architecture and application. In so doing, the United States advocates an approach that runs directly counter to both the analytical framework that the Appellate Body has developed and applied under the LRD component of the TBT Article 2.1 test and to the analysis conducted by the Appellate Body in this case.

26. At the core of the Appellate Body's approach are assessments of the even-handedness of both the challenged technical regulation and the relevant regulatory distinction(s). These assessments require close scrutiny of the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue.

27. An important panel finding supporting the Appellate Body's conclusion that the detrimental impact on Canadian cattle and hogs caused by the COOL measure did not stem from a LRD was the "considerable proportion" of beef and pork that is exempt from labelling requirements. The amended COOL measure does not address the scope of the extensive exemptions to the original COOL measure in any way.

28. Canada has demonstrated that approximately 33% of beef and 9% of pork that is consumed in the United States is subject to the amended COOL measure's labelling requirements. These figures are broadly consistent with the findings of the U.S. Congressional Research Service in its report on COOL and this WTO dispute. Furthermore, factoring ground beef into this consideration shows that approximately only 16% of all beef that is consumed in the U.S. bears labels that provide origin information regarding the place of birth, raising, and slaughter.

29. Thus, despite the fact that information regarding the origin of all livestock must be identified, tracked, and transmitted throughout the chain of production by producers, processors, and retailers, the amended COOL measure conveys information regarding the location of the three production steps on only a fraction of the meat that is derived from this livestock. This reveals that a lack of correspondence between the recordkeeping and verification requirements, on the one hand, and the limited information provided to consumers, on the other hand, persists under the amended COOL measure. Consequently, the detrimental impact on Canadian cattle and hogs cannot be explained by the need to provide origin information to consumers and, therefore, reflects arbitrary and unjustifiable discrimination.

30. The amended COOL measure purports to address the lack of correspondence between the recordkeeping and verification requirements and the limited information conveyed to consumers. However, the requirements of the latter half of this ratio have been expanded by the amended COOL measure. Moreover, the increased recordkeeping and verification requirements apply throughout the entire beef and pork muscle cut supply chains, while the information conveyed through the new labels is limited to the much smaller segment of beef and pork that is subject to point-of-production labelling. This more than offsets the contribution that any additional information provided to consumers under the amended COOL measure makes to the rectification of the imbalance described above.

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31. The Appellate Body considered that Label A was capable of conveying to consumers that the livestock used to produce muscle cuts were born, raised, and slaughtered in the United States. Label D remains unchanged under the amended COOL measure. Therefore, any additional meaningful information provided to consumers by the amended COOL measure is limited to those muscle cuts to which Labels B and C were previously applied.

32. Even if the United States' assertion that roughly 27 to 28% of pork and beef muscle cuts that were subject to the original COOL measure bore Label B or C is accepted, this means that the additional information provided to U.S. consumers by the amended COOL measure applies to less than a third of all muscle cuts that are subject to the amended COOL measure's labelling requirements.

33. The information conveyed to consumers by the amended COOL measure may be incomplete or misleading, particularly with respect to the labels that apply to muscle cuts that are derived from animals that do not satisfy the definition of U.S. origin. For example: (1) Imported muscle cuts may be labeled as "Product of Canada" even if the animal used to produce the muscle cut was born and raised in the United States; (2) Muscle cuts may be labelled as "Born in Canada, Raised and Slaughtered in the United States" even if the animal from which the muscle cut is derived spends as little as 15 days in the United States prior to slaughter; (3) Labels affixed to an animal that spends a short time in Canada prior to being exported to the United States for immediate slaughter must be labelled as "Born and Raised in Canada, Slaughtered in the United States".

34. The United States describes the objective of the amended COOL measure as the provision of accurate origin information to consumers. Yet, consideration of the amended COOL measure's design, architecture, and revealing structure demonstrates that significant dissonance exists between this objective and the measure's operation and application. The following aspects of the amended COOL measure's treatment of meat consumed in the United States illustrate this point: (1) The only information on the location of the production steps that can be relied on by U.S. consumers as accurate is that which is conveyed in respect of muscle cuts that are derived from animals that satisfy the measure's definition of U.S. origin; (2) As a result of the 60-day inventory allowance that applies to ground beef and pork, consumers are only informed of the countries of origin "that may be reasonably contained therein". The USDA simply asserts that this is reasonable because precise labelling for ground meat would be burdensome for industry, ignoring the contradiction with its approach to muscle cut labels, which is also burdensome for industry; (3) The amended COOL measure permits the omission of information on the raising production step occurring in a foreign country if an animal is raised in both the United States and a foreign country. However, this flexibility is unavailable if an animal is born and raised in the United States, raised in another country, and then raised and slaughtered in the United States. The United States offers no explanation that accounts for this clear contradiction that prioritizes U.S. origin information; (4) The amended COOL measure continues to exempt food service establishments, processed foods, and retailers that either do not purchase $230,000 worth of fresh fruit and vegetables annually or do not ship, receive, or contract to be shipped or received quantities of fresh fruit and vegetables in quantities exceeding 2,000 pounds (one ton) in a single day. This means that butcher shops, i.e. *shops that specialize in selling meat products* do not provide consumers with origin information.

35. These elements of the amended COOL measure reveal the uneven manner of its operation and application to meat products and the animals from which they are produced. This uneven application in turn demonstrates that the amended COOL measure and its regulatory distinctions are arbitrary, and that the discrimination against Canadian cattle is unjustifiable.

36. The Panel's findings in respect of Label D were a factor in the Appellate Body's analysis of the legitimacy of the original COOL measure's regulatory distinctions. Furthermore, Label D is part of the amended COOL measure's design, architecture, and revealing structure that affects its operation and application. Therefore, Label D must factor into the Panel's LRD analysis.

37. Canada is not challenging the consistency of the ground meat label with the WTO obligations of the United States. However, the logic that underpinned the Appellate Body's analysis weighs in favour of the amended COOL measure's treatment of ground meat being regarded as a relevant factor in assessing the measure's consistency with TBT Article 2.1.

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38. Cattle and hogs, which are used to produce both muscle cuts and ground meat, are subject to the amended COOL measure's onerous tracking and verification requirements, despite the fact that a large portion of the meat derived from these animals (i.e. ground meat) does not convey the information that must be tracked and transmitted upstream. This element of the amended COOL measure supports the following conclusions: (i) the detrimental impact on Canadian cattle and hogs that results from the recordkeeping and verification requirements cannot be explained by the need to provide origin information on the location of the three production steps; and (ii) the amended COOL measure, therefore, reflects discrimination.

39. The prohibition of trace-back is a relevant consideration in assessing whether the amended COOL measure's detrimental impact on Canadian livestock reflects discrimination. This prohibition, coupled with a mandate for the Secretary of Agriculture to audit retailers to verify compliance, necessitates the implementation of the amended COOL measure's labelling requirements through the system of recordkeeping and verification that is the cause of the detrimental impact on Canadian livestock. Therefore, the prohibition on trace-back is a critical element in demonstrating that the detrimental impact on Canadian livestock does not stem exclusively from a LRD.

C. The amended COOL measure violates GATT Article III:4

40. The Appellate body has clarified that the national treatment obligations in TBT Article 2.1 and GATT Article III:4 differ in scope and content. As a result, Canada requests that, regardless of the Panel's findings under TBT Article 2.1, the Panel address Canada's claim under GATT III:4.

41. According "treatment no less favourable" in the context of a *de facto* violation of GATT Article III:4 means according conditions of competition no less favourable to the imported product than to the like domestic product. The analysis of a measure's effect on the conditions of competition in the context of TBT Article 2.1 applies equally to GATT Article III:4.

42. Notwithstanding the long line of jurisprudence that has applied the GATT Article III:4 analysis, the United States seeks to import the LRD component of the TBT Article 2.1 test into this analysis. There is no textual basis for the position of the United States, which disregards the specific context in which the LRD analysis was developed and the context provided for in the GATT 1994 itself.

43. The genesis of the LRD analysis is the balance between the right to regulate and the commitment to liberalize trade that is provided for in the context of the TBT Agreement and also reflected in GATT Articles III and XX. That balance is reflected in both GATT Articles III *and* XX (as well as in the two-step TBT Article 2.1 test) accounts for the Appellate Body's clarification that the scope and context of TBT Article 2.1 and GATT Article III:4 are not the same.

44. The United States fails to explain how an assessment of whether a challenged technical regulation is applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination, as is required in the LRD analysis under the TBT Agreement would somehow apply under GATT 1994. In particular, the United States does not explain how the assessment of arbitrary or unjustifiable discrimination that it proposes to read into GATT Article III:4 would interact with the assessment under the chapeau of GATT Article XX of whether the challenged measure is "applied in a manner that would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail".

45. The extensive jurisprudence interpreting the relationship between GATT Article III and XX should not be jettisoned through the importation of the interpretation of TBT Article 2.1 into the GATT. Accepting the United States' position on this point would defy basic principles of treaty interpretation and create uncertainty among Members about the scope of both the WTO commitments that they have agreed to and that are under negotiation.

46. If the United States had legitimate regulatory purposes relevant for an analysis under the GATT 1994, it should have put forward a GATT Article XX defence. Having failed to do so, it cannot now seek to twist the GATT Article III:4 test to pretend that it does not need Article XX of GATT 1994.

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D. The amended COOL measure violates TBT Article 2.2

47. Two issues are in dispute: (i) the identification of the objective, and; (ii) the necessity of the trade-restrictiveness of the amended COOL measure.

48. The objective of a measure is the benchmark on a scale against which to assess the actual contribution of the measure to the fulfilment of the objective. If defined too narrowly, an objective may more easily correlate with the measure that is being challenged and, as a result, affect the comparison with alternative measures by reducing the possibility of formulating measures that achieve a level of fulfilment of the objective that is equivalent to that achieved by the challenged measure.

49. In the original proceedings, the Appellate Body confirmed the Panel's finding that the United States' objective was "the provision of consumer information on origin". The United States nevertheless contends that its objective may be stated in a number of ways, including more narrowly as "to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised and slaughtered". The Panel should reject the United States' attempt to reformulate its objective in an artificially narrow and self-serving manner, all the more because the United States has conceded that its objective remains the provision of consumer information on origin.

50. Assessing the necessity of the trade-restrictiveness of a measure involves the consideration of the following factors: (i) the trade-restrictiveness of the regulation; (ii) the degree of contribution the regulation makes to the achievement of the objective, and (iii) the nature of the risks are issue and the gravity of the consequences that would arise from non-fulfilment of the objective pursued through the measure. In most cases, the analysis involves a comparison with alternative measures.

51. A measure is trade-restrictive if it has a limiting effect on trade. A measure that affects the conditions of competition to the detriment of imported products is trade-restrictive. An actual reduction in trade flows is not a *conditio sine qua non* for a measure to be considered trade-restrictive. A technical regulation that increases compliance costs in a non-discriminatory manner, but does not otherwise modify the conditions of competition to the detriment of imported products, may nevertheless be trade-restrictive if the cost increase has the effect of reducing trade flows or reducing prices of both imported and domestic products. The amended COOL measure is highly trade-restrictive.

52. WTO jurisprudence recognizes that panels enjoy a certain latitude in choosing and designing the methodology to assess the contribution of a measure to the fulfilment of the measure's objective. There is no reason why panels should not enjoy the same latitude in choosing the methodology to assess the trade-restrictiveness of a measure. Contrary to the position expressed by the United States, trade-restrictiveness is not exclusively concerned with trade volumes. The assessment of trade-restrictiveness is concerned with the *impact* of a measure on imports. Such an impact may be, *inter alia*, a reduction in prices or quantities or both, as in this case.

53. The assessment of the contribution is concerned with the degree of contribution that the technical regulation *actually* makes towards the achievement of the objective. There is no requirement for a panel to identify, in the abstract, the level at which a responding Member aims to achieve that objective. The Appellate Body has explained that a Member, "by preparing, adopting, and applying a measure in order to pursue a legitimate objective, articulates either implicitly or explicitly the level at which it seeks to pursue that particular legitimate objective".

54. Contrary to the contention of the United States, whether an alternative measure provides an equivalent "amount" of information on the countries where the animal was born, raised and slaughtered is not the "only question". Further, determining the actual degree of contribution of a measure does not preclude characterizing that degree as, for instance, "low" or "limited". Such characterization allows comparing the degree of contribution of the challenged measure with alternative measures that contribute to the objective in a different way.

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55. The amended COOL measure is capable of contributing towards its objective to a very limited degree. A considerable proportion of beef and pork sold in the United States continues to be exempted from the labelling requirements.

56. The obligation to consider the "risks non-fulfilment would create" means that the comparison of the challenged measure with a possible alternative measure should be made in the light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective. In this case, the consequence that would arise from non-fulfilment would be that those consumers who want information on the origin of source livestock might not be able to get it. The Appellate Body has already found that the consequences that may arise from non-fulfilment of the objective would not be particularly grave.

57. The comparison with possible alternative measures is a *conceptual tool* for ascertaining whether the challenged measure is more trade-restrictive than necessary. As with any analytical tool, it must not be applied in a mechanistic fashion. It is relevant to determine whether the alternative is less trade-restrictive, whether it would make an equivalent contribution to the relevant objective, taking into account the risks non-fulfilment would create, and whether it is reasonably available. An alternative measure is not reasonably available if it imposes an undue burden on the responding Member, such as prohibitive costs or substantial technical difficulties. The reasonable availability of an alternative measure must be assessed in relation to the *capacity* of the responding Member to implement it.

58. A comparison with an alternative measure that is less trade-restrictive than the challenged measure but fulfils the responding Party's objective to a lesser extent does not preclude a finding that the challenged measure is more trade-restrictive than necessary. Such a finding would require that the consequences that would arise from non-fulfilment of the objective would not be grave.

59. Turning to the comparative analysis, Canada submitted a detailed analysis prepared by Dr. Sumner to assist the Panel in making a determination on the trade-restrictiveness element (Exhibit CDA-126). That analysis calculates the magnitude of compliance costs required for a non-discriminatory alternative measure to cause an impact on trade equal to the impact of the original COOL measure. The impact is calculated in terms of export revenue losses in dollar amounts. The concept of export revenue losses captures the meaning of trade restrictiveness because it is a measurement of the magnitude of the impact of a measure on imports. Dr. Sumner used the costs of the original COOL measure to Canadian producers – in the sense of the losses that the measure has caused them, both in terms of reduced prices and quantities – to calculate how much tracing livestock and meat, labelling meat and keeping records would need to cost to market participants under a non-discriminatory measure to cause Canadian producers the same export losses as under the original COOL measure. In Exhibit CDA-126, Dr. Sumner has demonstrated that a non-discriminatory alternative measure would have to entail implausibly high compliance costs to cause such losses. These already implausibly high minimum amounts of compliance costs are even much higher when calculated based on the export revenue losses caused by the amended COOL measure or on quantities alone, further to the United States' conception of trade-restrictiveness. None of the alternative measures could possibly entail compliance costs of the magnitude calculated.

60. The United States has not rebutted Canada's *prima facie* case that any one of the proposed alternative measures would be less trade-restrictive than the amended COOL measure.

61. First alternative measure – Mandatory labelling of muscle cuts of beef and pork based on substantial transformation could be implemented, combined with voluntary labelling for the production steps of birth and raising. This measure would be significantly less trade-restrictive than the amended COOL measure because it would not require segregation of livestock and muscle cuts for that segment of the market that does not voluntarily provide consumer information on where livestock were born and raised. The United States has not contested that this alternative measure is reasonably available.

62. While this alternative measure might not contribute to the fulfilment of the objective to the exact same degree as the amended COOL measure, that consideration does not preclude the Panel from finding that the amended COOL measure is more trade-restrictive than necessary. This is so because the consequences that may arise from non-fulfilment of the objective of the amended

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COOL measure are not particularly grave. Based on the following factors, considered in conjunction, the Panel should find that the amended COOL measure is more trade-restrictive than necessary: the amended COOL measure is capable of contributing towards its objective to a very limited degree; the amended COOL measure is highly trade-restrictive; any difference in the degrees of fulfilment of the objective between the two measures is not considerable, given that the alternative measure would have a broader scope of application than the amended COOL measure, and; the alternative measure would be significantly less trade restrictive than the amended COOL measure.

63. Second alternative measure – The 60-day inventory allowance flexibility applicable to ground meat could be extended to muscle cuts of beef and pork. This alternative measure would be significantly less trade-restrictive than the amended COOL measure, because market participants throughout the meat supply chain would have sufficient flexibility as a result of less intense segregation requirements. Also, the alternative measure could not possibly entail costs of the magnitude calculated by Dr. Sumner to track livestock and meat, label meat and keep records. This alternative measure is reasonably available. While this alternative measure, like the first alternative measure, might not contribute to the fulfilment of the objective to the exact same degree as the amended COOL measure, that consideration does not preclude the Panel from finding that the amended COOL measure is more trade-restrictive than necessary for the same reasons Canada provided with respect to the first alternative measure.

64. Third alternative measure – A mandatory trace-back system could be implemented to provide information, with respect to covered muscle cuts derived from livestock slaughtered in the United States, on where the production steps took place for the relevant source animal or group of animals. Tellingly, the amended COOL measure *prohibits* the USDA from using a trace-back system.

65. The first stage of a trace-back system involves the establishment of an animal identification and traceability system. Several WTO Members have established such a system. The United States once had a comprehensive voluntary system – the National Animal Identification System (NAIS) – that could have been maintained and made mandatory to provide information to consumers. The second stage of a trace-back system occurs at the slaughterhouse, where processors have to preserve the link between the animal, or group of animals, and the muscle cuts. Preserving the link between the animal, or groups of animals, and the muscle cuts is done on a country-wide and commercial basis in at least two WTO Members, namely Japan and Uruguay; various supply chains elsewhere on the globe also preserve that link. Most of the compliance costs under a trace-back system would be incurred at that stage. The third stage of a trace-back system involves the distributors and the retailers, who have to preserve the information about the muscle cut.

66. A trace-back system would achieve a contribution to the fulfilment of the objective that is equal to or greater than the contribution achieved by the amended COOL measure. The label on a muscle cut could indicate the precise name and address of the facility where each of the production steps took place. However, as an alternative, the labelling requirements under a trace-back system could be the same as those under the amended COOL measure, provided that market participants be able to demonstrate, if audited, that a muscle cut has been derived from an animal, or group of animals, that was born, raised and slaughtered *at a specific location*.

67. Also, a trace-back system would be less trade-restrictive than the amended COOL measure. This is so because it could be implemented in such a way as to avoid modifying the conditions of competition to the detriment of imported livestock and it could not possibly entail the minimum amounts of compliance costs calculated by Dr. Sumner.

68. Further, a trace-back system is a reasonably available alternative measure. It would be unreasonable for the United States to expect Canadian producers to continue shouldering the burden of a measure that affects the competitive conditions of imported livestock when all market participants could share equally the burden of providing consumer information on origin. Further, there is no evidence that the first stage of a trace-back system would reward vertical integration at the expense of family farms in the United States. While a trace-back system would likely increase compliance costs for U.S. producers (and would lower the overall enormous costs borne by Canadian producers), these costs would not be prohibitive; the U.S. industry would remain profitable. The experience of other countries' industries demonstrates that changes in production practices are well within the capacity of the U.S. industry. Finally, given that the United States has

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asserted that providing consumer information on origin is very important, the United States should be expected to use its capabilities to implement its objective consistently with its WTO obligations.

69. Fourth alternative measure – In addition to the existing requirements of the amended COOL measure to designate the country or countries where production steps occurred on labels of muscle cuts of beef and pork derived from livestock slaughtered in the United States, the designation of the state(s) and/or province(s) where each of those steps occurred could also be required on those labels.

70. The proposed alternative measure would achieve a greater degree of fulfilment than that achieved by the amended COOL measure, because it would provide the same consumer information as that provided under the amended COOL measure, with the addition of other information.

71. The proposed alternative would also be less trade-restrictive than the amended COOL measure. This is so because it could be implemented in such a way as to avoid modifying the conditions of competition to the detriment of imported livestock and it could not possibly entail the minimum amounts of compliance costs calculated by Dr. Sumner.

72. The proposed alternative measure is reasonably available. State/province designations may already be used in lieu of country of origin labeling for, *inter alia*, perishable agricultural commodities. Also, the alternative measure is based on the principle that animals should be traceable when in interstate commerce in the United States, which is operationalized in the Final Rule on Traceability for Livestock Moving Interstate (Final Rule on Traceability). The fourth alternative measure would entail lower compliance costs than a trace-back system. Further, animals would not need to have been raised in all the same states or provinces; it would be sufficient that they have the last state/province in common. The United States could rely on the segregation of animals on a state/province basis and on documents generated pursuant to, or required under, the Final Rule on Traceability, combined with requirements for producer's affidavits for elements that are not currently fully covered under that Rule, to implement the fourth alternative measure. Alternatively, the United States could implement a national animal identification and traceability system, as many other WTO Members have done. The United States once had such a system – i.e. the NAIS – but decided not to make it mandatory. Neither solution proposed by Canada to implement the fourth alternative measure would represent an undue burden for the United States.

E. The COOL measure nullifies or impairs benefits that have accrued to Canada within the meaning of GATT Article XXIII:1(b)

73. The amended COOL measure also nullifies or impairs benefits that have accrued to Canada on the basis of tariff concessions made by the United States in respect of live cattle and hogs as part of the Uruguay Round. These tariff concessions apply on a most-favoured-nation (MFN) basis.

74. The three elements that, according to the WTO jurisprudence, must exist for a finding of non-violation nullification or impairment in the sense of GATT Article XXIII:1(b), are all present in this case: (1) The application of the amended COOL measure by the United States has deprived Canada of benefits; (2) The benefits that have accrued to Canada from which Canada has been deprived are tariff concessions made by the United States in the Uruguay Round, on the basis of which Canada is entitled to rely for its expectation that its live cattle and hogs will have unimpeded access to the U.S. market; and (3) By applying the requirements of the amended COOL measure, the United States has upset the competitive relationship between U.S. and Canadian livestock, and has nullified or impaired the benefits accruing to Canada under the GATT 1994.

75. The benefits concerned accrued to Canada under the WTO Agreement, regardless of the operation of the *Canada-United States Free Trade Agreement* (Canada-United States FTA) and of the *North American Free Trade Agreement* (NAFTA), by virtue of which Canadian live cattle and hogs are entitled to duty-free entry into the United States.

76. The current MFN rate of the United States under the WTO Agreement for cattle other than for dairy or breeding is US $ 0.01 per kilogram. The duty-free import of hogs into the United States pre-dates the WTO Agreement (as well as the Canada-United States FTA and the

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NAFTA). These tariff concessions would apply if in the future Canada or the United States were to withdraw from the NAFTA or if the NAFTA were to be suspended by agreement between Canada and the United States.

77. Canada provided detailed justification for its claim under GATT Article XXIII:1(b), in paras. 182-190 of its first written submission and in paras. 154-157 of its second written submission. In addition, Canada has placed on the record extensive evidence on the upset by the COOL measure, both in its original and amended form, of the conditions of competition between Canadian and US cattle and hogs. Canada has established a *prima facie* case, which the United States has failed to rebut.

78. Meat from Canadian cattle and hogs imported into the United States and subsequently slaughtered there was considered, until the adoption of the COOL measure, to be a U.S. product and was allowed to be marketed as such in the United States. The upset of the competitive relationship between Canadian livestock and U.S. livestock caused by the original COOL measure and continued and aggravated by the amended COOL measure could not reasonably have been anticipated by Canada.

79. The United States tries to confuse the issue by referring to its meat labelling legislation of the U.S. *Tariff Act of 1930*, which concerns only the labelling of imported muscle cuts. Therefore, this Act is irrelevant in terms of Canada's reasonable expectations as to the importation of Canadian cattle and hogs into the United States and their competitive position in the U.S. market.

80. The issue of the origin labelling of muscle cuts derived from imported animals that were subsequently slaughtered in the United States did not arise before 2003, when a Proposed Rule was published under the 2002 Farm Bill, well after the conclusion of the Uruguay Round and the entry into force of the WTO Agreement. It is the rejection of the long-standing principle of substantial transformation in the COOL measure that has upset the competitive position of Canadian cattle and hogs in the U.S. market. There is no merit in the suggestion of the United States that because of the U.S. *Tariff Act of 1930* Canada could have foreseen the COOL measure and its effects on muscle cuts derived from Canadian cattle and hogs slaughtered in the United States. Even under the original and amended COOL measure the United States has continued to apply substantial transformation in respect of imported muscle cuts (Label D) and muscle cuts from animals slaughtered in the United States destined for export from the United States.

81. As to the assertion of the United States that the Panel lacks jurisdiction to deal with the claim of non-violation under GATT Article XXIII:1(b), Canada refers to the words "consistency with a covered agreement" in Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The terms "consistency with a covered agreement" are broad enough to cover a non-violation case because "consistency" can have a meaning that is broader than a violation or infringement of a covered agreement.

82. Article 26.1 of the DSU sets out a series of special rules that apply to non-violation claims under GATT Article XXIII:1(b). The jurisdiction of a compliance panel to make findings of non-violations was not ousted by DSU Article 26.1. To the contrary, the first sentence of DSU Article 26.1 confirms the jurisdiction of "a panel" in general to make such a finding. This applies equally to a panel acting under DSU Article 21.5. Furthermore, from a systemic perspective, there is no good reason why a non-violation claim could not be heard by the Panel, particularly in a case like this, in which a similar claim was made in respect of the original COOL measure in the previous phase of the litigation but no finding was made in respect of that claim.

83. Because the COOL measure was adopted well after the conclusion of the Uruguay Round and the entry into force of the WTO Agreement, Canada is entitled to benefit from the presumption articulated by the panel in *Japan-Film*, at para. 10.79 of its Report, i.e. that a measure that was adopted following the conclusion of tariff negotiations could not have been foreseen by the complaining Member and that it is up to the defending Member to rebut that presumption. Canada has established a *prima facie* case of non-violation, which has not been rebutted by the United States.

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V. REQUEST FOR RELIEF

84. Canada requests the Panel to find that the amended COOL measure: (i) continues the violation of Article 2.1 of the TBT Agreement previously found in respect of the original COOL measure; (ii) violates Article III:4 of the GATT 1994; and (iii) violates Article 2.2 of the TBT Agreement. Canada also request the Panel to find that the amended COOL measure nullifies or impairs benefits accruing to Canada under the GATT 1994, within the meaning of Article XXIII:1(b) of that Agreement.

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ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO

I. INTRODUCTION AND BACKGROUND INFORMATION

1. This proceeding, under Article 21.5 of the DSU, concerns a disagreement as to the consistency with the covered agreements of measures taken to comply with the recommendations and rulings of the DSB in the dispute *United States – Certain Country of Origin Labelling (COOL) Requirements*.

2. Mexico has initiated this proceeding to address the failure of the United States to comply with its WTO obligations in relation to its mandatory "country of origin" labeling system ("COOL") for muscle cuts of beef. A measure that is found to be inconsistent with a core non-discrimination provision cannot later be found by a compliance Panel to be consistent with that obligation if the arbitrary and unjustifiable discriminatory effects of the measure have not been removed, or, as in the present case, have been increased.

3. This dispute was initiated by Mexico in December 2008 and it has been ongoing for more than five years without a positive resolution. It is now 2014, and Mexico's cattle producers face even worse discrimination and trade restrictions than they did in 2010. The Amended COOL Measure still has the effect of requiring all imported cattle to be segregated. The measure continues to discourage the use of imported cattle in meat production and there is still a "COOL discount" imposed on Mexican cattle. There are still restrictions on the number of U.S. processing plants that will accept Mexican cattle and on the days at which Mexican cattle can be delivered.

4. The Panel and Appellate Body ("AB") Reports found that the "COOL Measure", particularly in regard to the muscle cut meat labels, is inconsistent with Article 2.1 of the TBT Agreement because it accords less favourable treatment to imported livestock than to like domestic livestock. The DSB recommended that the United States bring the COOL Measure into conformity with the United States' obligations under the covered agreements.

5. The reasonable period of time was determined through binding arbitration under Article 21.3(c) of the DSU, to be the 23 May 2013. On 12 March 2013, the United States published in the Federal Register a proposed rule to amend the COOL regulations. On 23 May 2013 USDA published the "Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts" (the "2013 Final Rule"), which made only minor changes to the proposed rule. The Final Rule purportedly entered into force on that same date, although the notice published with the rule indicates that the new regulation would not actually be enforced for an additional six months. Although the COOL Statute was part of the measure found by the Panel and the AB to be inconsistent with Article 2.1 of the TBT Agreement, the United States did not modify the Statute. In this sense, the United States has failed to bring the COOL Measure – as a whole – into compliance.

6. The Amended COOL Measure has in fact strengthened the incentive to favour domestic livestock in meat production by imposing higher segregation costs and further adversely affecting competitive conditions in the U.S. market to the detriment of imported livestock. The measure continues to discourage the use of imported cattle in meat production and there is still a "COOL discount" imposed on Mexican cattle.

II. THE AMENDED COOL MEASURE

7. The Amended COOL Measure includes the COOL Statute and the 2009 Final Rule, as amended by the 2013 Final Rule. As stated by the Panel and confirmed by the AB the statutory and regulatory provisions were an integral part of one single COOL measure. The COOL Statute maintains a close legal and substantive link with the 2013 Final Rule and remains an integral part of the Amended COOL Measure.

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8. The Amended COOL Measure entailed changes only in the implementing regulations, and not in the COOL Statute. The COOL Statute is contained in the Agricultural Marketing Act of 1946, as amended by the Farm Bill 2002 and the Farm Bill 2008. These provisions were codified in the United States Code ("U.S.C."), in Title 7 (Agriculture), Chapter 38 (Distribution and Marketing of Agricultural Products), Subchapter IV (Country of Origin Labeling) (hereinafter the "COOL Statute").

9. The COOL Statute excludes from the scope of the COOL requirements covered commodities that are used as an ingredient in a processed food item, those that are served or sold in "food service establishments" (e.g., restaurants, cafeterias, etc.). The law also does not apply to retailers who do not sell fruits and/or vegetables (e.g., butcher shops) or to products destined for export.

10. The 2009 Final Rule repeated the requirements from the statute for origin labeling for covered beef products. As described by the Panel, the options were as follows. For a product to be eligible to be labelled as U.S. origin – the animals from which the meat was derived must have been born, raised and slaughtered in the United States (known as "Label A"). For products made from animals born in another country/ies, and raised and slaughtered in the United States, the regulations authorized the use of a label that would say "Product of the United States, Country X and (as applicable) Country Y" (known as "Label B"). For products made from animals born and raised in another country and imported for immediately slaughter, the regulations required that the name of the foreign country be listed first: "Product of Country X and the United States" (known as "Label C").

11. The 2009 Final Rule added a feature to the rules that was not addressed by the statute. Specifically, the commingling provisions allows that muscle cuts processed on the same production day contained meat from animals born in another country and animals born in the United States could be labelled "Product of the United States, Country X, and (as applicable) Country Y." The 2013 Final Rule eliminated these flexibilities.

12. For ground beef, the label must list all countries of origin contained therein or that may be reasonably contained therein. In determining what is considered reasonable, when a raw material from a specific origin is not in a processor's inventrory for more than 60 days, that country may no longer be included as a possible country of origin. Mexico is not challenging the application of the Amended COOL Measure to ground beef.

13. The Amended COOL Measure has not changed in relation to the scope of coverage, the definitions of "origin," the labeling requirements for imported meat products, the recordkeeping, verification and enforcement provisions, or the labelling rules for ground meat. As with the original COOL Measure, the Amended COOL Measure applies only to: (i) meat in the form of muscle cuts and ground beef, and not to other edible portions of the animal such as the liver, tongue and head; (ii) only to covered products sold in major grocery stores, and not to such items sold in food service establishments (e.g., restaurants and cafeterias) and smaller retailers, including butcher shops; and does not apply to: (i) covered products that are an ingredient in a processed food item; and (ii) to exported products, which in the case of beef constitutes about 10 percent of total U.S. production.

III. LEGAL ARGUMENT

14. The Amended COOL Measure is inconsistent with the obligations of the United States under Articles 2.1 and 2.2 of the TBT Agreement, and Article III:4 of the GATT 1994. It also nullifies or impairs benefits that accrue to Mexico under the GATT 1994 within the meaning of Article XXIII:1(b). Mexico requests that the Panel rule on each of Mexico's claims and avoid exercising judicial economy. This is necessary to achieve a satisfactory resolution of this dispute.

A. TERMS OF REFERENCE OF THE PANEL

15. It is necessary for the Panel to rule on all of Mexico's claims under Articles 2.1 and 2.2 of the TBT Agreement and Article III:4 of the GATT 1994, its obligations scope and content are not the same.

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16. In *US – Tuna II (Mexico)*, the AB clarified the boundaries of judicial economy. It criticized the panel for exercising false judicial economy by not ruling on Mexico's claims under Articles I and III:4 of the GATT 1994 ("panels may refrain from ruling on every claim as long as it does not lead to a "partial resolution of the matter"). This finding is particularly relevant given the differences of Articles 2.1 and 2.2 of the TBT Agreement and Article III:4 of the GATT 1994.

17. If the Panel does not make all findings under Mexico's other claims and there is an appeal, the AB would be unable to complete the analysis of those claims, and there would only be a partial resolution. Taking into account that in the original proceedings the AB was unable to complete the legal analysis under Article 2.2 of the TBT Agreement due to the absence of relevant factual findings by the Panel and of sufficient undisputed facts on the record, the Panel should make clear findings regarding all factors of the Amended COOL Measure and proposed less trade-restrictive alternative measure.

18. The claims advanced by Mexico are raised exclusively in respect of the measure "taken to comply" –"that is, in principle, a new and different measure" –and do not, as the United States alleges, constitute attempts to re-open the adopted findings of the DSB. Further to the original proceedings, the DSB adopted the finding that the original COOL Measure was inconsistent with Article 2.1 of the TBT Agreement, but as for Article 2.2 there were insufficient factual findings and undisputed evidence on the record for the AB to complete the analysis.

19. Similarly, no findings were made in respect of Mexico's claims under Articles III:4 and XXIII:1(b) of the GATT 1994 due to the exercise of judicial economy. None of the claims raised by Mexico against the Amended COOL Measure under Articles 2.1 and 2.2 of the TBT Agreement and Articles III:4 and XXIII:1(b) of the GATT 1994 impinge on the finality of any findings, recommendations, or rulings adopted by the DSB in relation to the original proceedings. Hence, nothing precludes the Panel from considering these claims in respect of the Amended COOL Measure in the present proceedings.

B. THE AMENDED COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT

20. For a violation of the national treatment obligation in Article 2.1 to be established, three elements must be satisfied: (i) the measure at issue must be a "technical regulation"; (ii) the imported and domestic products at issue must be like products; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products.

1. Technical Regulation

21. In order to qualify as a "technical regulation" within the meaning of the definition in Annex 1.1, a document must: (i) apply to an identifiable product or group of products; (ii) lay down one or more characteristics of the product; and (iii) require mandatory compliance with the product characteristics.

22. The Amended COOL Measure is a "technical regulation". The AB acknowledged the Panel's finding that the original COOL Measure is a "technical regulation" which is subject to the requirements of Article 2 of the TBT Agreement, and observed that this finding was not challenged in the appeal. For the same reasons as those on which the Panel's finding was based in respect of the COOL Measure, the Amended COOL Measure continues to be a "technical regulation" for the purposes of the TBT Agreement.

2. Like Products

23. The relevant imported and domestic products – in the case of Mexico's cattle, in particular feeder cattle – also continue to be "like". Although the labeling requirements at issue apply to muscle cuts of beef, by its structure and design, the Amended COOL Measure applies indirectly to cattle. The effect of that measure –indeed its core purpose– is to regulate the inputs to muscle cuts –namely, cattle.

24. Before the Panel, the United States did not contest the arguments presented by the complainants that the products at issue are "like" and did not dispute the proposition that the only basis of distinction between the products at issue is that of origin. The factual circumstances of the

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relevant imported and domestic products have neither changed nor been affected in any way by the adoption of the Amended COOL Measure. The same kinds of Mexican cattle and the same kinds of U.S. cattle remain the products at issue. Hence, the relevant imported and domestic products continue to be "like".

3. Treatment no Less Favourable

25. The AB has established a two-step approach for assessing whether a technical regulation accords less favourable treatment under Article 2.1: (i) whether the measure at issue modifies the conditions of competition in the relevant market to the detriment of imported products as compared to like domestic products or products originating in any other Member; and (ii) whether any detrimental impact reflects discrimination against the imported products.

a. The Amended COOL Measure Modifies Competitive Opportunities to the Detriment of Imports

26. As explained by the AB in *US – COOL*, when a panel determines whether the operation of a measure, in the relevant market, has a *de facto* detrimental impact on the group of like imported products, its analysis must take into consideration the totality of the facts and circumstances before it, including any implications for competitive conditions discernible from the design and structure of the measure itself, as well as all features of the market at issue that are relevant to the measure's operation within that market.

27. There have been no material changes made in the Amended COOL Measure to the design and structure of the COOL Measure that were found by the Panel and the AB to modify the competitive opportunities in the U.S. market to the detriment of the imported products at issue. The key elements of the design and structure of the measure that operated together to deny competitive opportunities were: (i) the mandatory labelling requirement, (ii) the "born, raised and slaughtered" requirement to determine origin, (iii) the recordkeeping requirement and verification requirement, and (iv) the enforcement requirement. These elements remain integral components of the Amended COOL Measure.

28. Although the Panel and the AB highlighted the recordkeeping and verification requirements of the COOL Measure, it was not these requirements, in isolation, that modified the competitive opportunities. These requirements operate in conjunction with other important elements of the measure explained below, that collectively deny competitive opportunities. Accordingly, as was the case with the original COOL Measure, it is the collective effect of the foregoing four elements of the Amended COOL Measure that continues to deny competitive opportunities.

29. Because the features of the relevant market also remain unchanged, the denial of competitive opportunities for Mexican cattle that the Panel and the AB found to be caused by the COOL Measure has continued unabated under the Amended COOL Measure. Moreover, the available evidence indicates that the Amended COOL Measure is exacerbating the discriminatory impact of the original COOL Measure. The impact of the Amended COOL Measure can be separated into two categories of analysis: (i) the failure to eliminate the discriminatory impact of the original measure and (ii) the increase in discriminatory effects caused by the new regulations.

30. The Panel in the original proceedings undertook a detailed examination of the impact of the COOL Measure on imported livestock. The Panel found that competitive opportunities were reduced in significant ways. No aspect of the new regulations is aimed at eliminating or reducing the burdens and discriminatory impact of the COOL Measure. Thus, it is reasonable to assume that all of these instances of the denial of competitive opportunities continue under the Amended COOL Measure.

31. For the second category of the impact analysis, the three major areas in which increased effects are expected are (i) increased requirements to segregate cattle of different nationalities; (ii) greater reductions in the value of Mexican cattle resulting directly from the Amended COOL Measure; and (iii) heightened disincentives to purchase Mexican cattle.

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b. The Detrimental Impact Reflects Discrimination against Imports

32. Based on the two-step approach of the AB in *US-COOL*, the Panel must analyze whether the above-noted detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. In making this determination, the Panel must carefully scrutinize the particular circumstances of this dispute - the design, architecture, revealing structure, operation, and application of the Amended COOL Measure- and, in particular, whether it is even-handed, in order to determine whether it discriminates against the group of imported products.

c. Relevant Regulatory Distinctions

33. In conducting its assessment of the COOL Measure, the AB first identified the relevant regulatory distinctions made by the COOL Measure, namely the distinctions between the three production steps, as well as between the types of country of origin labels that must be affixed to muscle cuts of beef and pork. The Amended COOL Measure makes the same distinctions among the three production steps.

34. The Panel must examine, based on the particular circumstances of this dispute, whether the distinctions (i.e., born, raised and slaughtered) are designed and applied in an even-handed manner, or whether they lack even-handedness because, for example, they are designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination.

35. The AB found that the COOL Measure is inconsistent with Article 2.1 on the basis that the regulatory distinctions imposed by the COOL Measure amount to arbitrary and unjustifiable discrimination against imported livestock, such that the distinctions could not be said to be applied in an even-handed manner. On this basis, it found that the detrimental impact on imported livestock did not stem exclusively from a legitimate regulatory distinction but, instead, reflected discrimination in violation of Article 2.1. In particular, the AB considered that the manner in which the COOL measure seeks to provide information to consumers on origin, through the regulatory distinctions described above, to be arbitrary, and the disproportionate burden imposed on upstream producers and processors to be unjustifiable.

36. This finding was anchored in the AB's finding that the detrimental impact caused by the COOL Measure could not be explained by the need to provide origin information to consumers. This finding, in turn, was based on the existence of two major information asymmetries between the origin information collected and the origin information communicated to the consumer. First, the COOL Measure did not impose labelling requirements for meat products that provide consumers with origin information commensurate with the type of origin information that upstream livestock producers and processors were required to maintain and transmit. Second, information regarding the origin of all livestock had to be identified, tracked, and transmitted along the chain of production by upstream producers in accordance with the recordkeeping and verification requirements of the COOL Measure, even though a considerable proportion of the beef derived from this livestock was ultimately exempted from the COOL requirements under the exclusions for processed food items, food service establishments, and other establishments that are not a "retailer" within the meaning of the COOL Measure.

d. The Distinctions are not applied in an Even-Handed Manner

37. The factors raised by Mexico that demonstrate a lack of even-handedness relate to the "facts and circumstances related to the design and application of the relevant regulatory distinctions of the COOL Measure" found by the AB.

38. In *US -COOL*, the AB applied its reasoning from *US – Tuna II (Mexico)* when it found that the COOL measure modifies the conditions of competition in the U.S. market to the detriment of imported livestock by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock (para. 292). The AB concluded that the original COOL Measure was not even-handed because of the two information asymmetries. These information asymmetries are "facts and circumstances" related to the design and application of the "relevant regulatory distinctions". They are not, in themselves, relevant regulatory distinctions.

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39. The two information asymmetries identified by the AB demonstrate the expansive nature of the inquiry into the "facts and circumstances" related to the design and application of the relevant regulatory distinctions. In principle, every fact or circumstance that can demonstrate that the relevant regulatory distinctions are not even-handed should be covered by this expansive inquiry. The four additional factors raised by Mexico to demonstrate that the measure is not even handed clearly fall within this scope.

e. Additional factors that demonstrate that the Amended COOL Measure is not Even-Handed

40. In addition to the two information asymmetries, Mexico identified four additional factors to demonstrate that the discrimination is against imported products.

41. First, according to the United States, a key justification for the COOL label is to avoid "consumer confusion" it claims is caused by the USDA's own grade labelling system. To the extent that the Amended COOL Measure is designed to override the positive impression for beef products with a USDA Prime, Choice or Select label when the product is made from imported cattle, the Amended COOL Measure is intentionally discriminatory and not even-handed. Second, the Amended COOL Measure maintains different labelling rules for different forms of beef, namely muscle cuts of beef and ground beef. Specifically, 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, the allegedly needed consumer information is provided with the flexibility of a 60-day inventory allowance for ground beef but with no inventory allowance for muscle cuts of beef. Third, "Trace-back", a less trade restrictive alternative measure is prohibited under the Amended COOL Measure. Such a system would accurately track information on where the livestock contained in beef were born, raised and slaughtered, and it would do so in a less trade restrictive manner. The Amended COOL Measure, like the COOL Measure, employs a certification and audit compliance mechanism that inherently shifts the costs of complying with the COOL Measure to imported cattle. The fact that a trace-back alternative is expressly prohibited demonstrates that the detrimental impact on imported livestock does not stem exclusively from a legitimate regulatory distinction. The exclusion is arbitrary and, because it prohibits the substitution of the certification and audit compliance mechanism with a less trade restrictive mechanism and even the simple consideration of such an alternative, is evidence that the Amended COOL Measure is a disguised restriction on international trade. It is therefore not even-handed.

42. Finally, only a very small sub-set of U.S. consumers is interested in information on the origin of beef. To the extent that the Amended COOL Measure mandates the communication of origin information to a broader group of U.S. consumers, those additional consumers will not pay any attention to the information and will not benefit from it. The only beneficiary of this unnecessary additional coverage is the U.S. cattle industry, which directly benefits from the discriminatory effects of the measure. In this sense, this unnecessary additional coverage is further evidence that the Amended COOL Measure is a disguised restriction on international trade. It is therefore not even-handed.

43. For the above reasons, the detrimental impact that continues to be caused by the Amended COOL Measure cannot be explained or justified by the need to provide origin information to consumers.

C. ARTICLE III:4 OF THE GATT 1994

44. The Amended COOL Measure accords Mexican cattle treatment less favourable than that accorded to U.S. feeder cattle in a manner that is inconsistent with Article III:4. The AB has made clear that the scope and content of the provisions of Article III:4 and Article 2.1 of the TBT Agreement are different. Accordingly, the Panel's decision on Mexico's claim under Article 2.1 will not necessarily resolve Mexico's Article III:4 claim, and it is therefore crucial the Panel's findings on the Article III:4 claim.

45. In *Korea – Various Measures on Beef*, the AB explained that a Member's measure is inconsistent with Article III:4 if three elements are met: (i) the 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; and (iii) the

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imported products are accorded "less favourable" treatment than that accorded to like domestic products.

1. Like Products

46. The imported and domestic products at issue (i.e., Mexican and U.S. cattle) are like products.

2. Laws, Regulations and Requirements Affecting Their Internal Sale, Offering for Sale, Purchase, Transportation, Distribution or Use

47. Article III:4 applies to those "laws, regulations and requirements" that affect "the internal sale, offering for sale, purchase, transportation, distribution or use" of the products at issue. The Amended COOL Measure, which comprises a group of laws and regulations that set out the country of origin labeling requirement, pertains to the category of "laws, regulations and requirements". These instruments include the COOL Statute the 2009 Final Rule (AMS); and the 2013 Final Rule, which "affect the internal sale, offering for sale, purchase, transportation, distribution or use" of feeder cattle.

3. Less Favourable Treatment

48. The collective effect of the four elements of the Amended COOL Measure identified above (i.e., the mandatory requirement, the born/raised/slaughtered requirement, the recordkeeping and verification requirement, and the enforcement requirement) continue to deny competitive opportunities to imported cattle. In particular, the failure of the Amended COOL Measure to eliminate the various discriminatory effects of the original measure and the increase in discriminatory effects caused by the new regulations.

49. In the original proceedings, the Panel observed that 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, that the other possibility is to continue processing imported livestock through segregation, which entails additional costs in virtually all cases and that either process configuration is likely to cause a decrease in the volume and price of imported livestock. Those effects continue under the Amended COOL Measure, and indeed are becoming worse.

50. The Amended COOL Measure accords less favourable treatment to Mexican cattle compared to U.S. cattle, providing U.S. cattle with a competitive advantage in the U.S. market.

4. Article 2.1 of the TBT Agreement and Article III:4 of the GATT

51. The United States and the European Union argue that the meaning of "treatment no less favourable" should be the same in Article 2.1 and Article III:4. In their view, the two-step approach to determining treatment no less favourable under Article 2.1 should be applied when interpreting "treatment no less favourable" under Article III:4. This interpretation is incorrect.

52. In the recent disputes *US – Clove Cigarettes, US – Tuna II* and *US –COOL*, the AB provided useful guidance on the relationship between the non-discrimination provisions – Article 2.1 and Article III.4 –. The AB noted that both provisions maintain some close similarities in terms of their language, but at the same time recognized that "the scope and the content" of both provisions are not the same.

53. Mexico's interpretation of Article III:4 follows the interpretation developed in a long series of WTO and GATT 1947 reports i.e., a measure confers less favourable treatment under Article III:4 where it modifies conditions of competition in the relevant market to the detriment of imported products compared to like domestic products. Therefore, in order to analyze whether the amended COOL measure accords "less favorable treatment" to imported livestock under GATT Article III:4, the only relevant inquiry is whether the measure modifies the conditions of competition in the relevant market to the detriment of the group of imported products vis-à-vis the group of domestic like products.

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D. THE AMENDED COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.2 OF THE TBT AGREEMENT

54. In ruling on the claims raised by Canada and Mexico under Article 2.2 in the original proceedings, the Panel found that the COOL measure is "trade-restrictive"; that the objective pursued by the United States through the COOL measure is "to provide consumer information on origin" and that this objective is "legitimate" within the meaning of Article 2.2. The AB confirmed these findings.

55. Ultimately, the Panel found that the COOL measure does not fulfil the identified objective within the meaning of Article 2.2 and therefore violated Article 2.2. The AB reversed the ultimate finding and attempted to complete the legal analysis under Article 2.2, but found it could not do so because the Panel had not made relevant factual findings and there were not sufficient uncontested facts.

56. In this proceeding, therefore, it is crucial that the Panel make "clear and precise" findings, in particular, with respect to: (i) the Amended COOL Measure: the degree of its contribution to the objective of providing consumers with information on origin, the degree of its trade-restrictiveness, the relative importance of the common interests or values furthered by the challenged measure, the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the legitimate objective; and (ii) each proposed alternative measure: the degree of its contribution to the objective of providing consumers with information on origin, taking account of the risks non-fulfilment would create, the degree of its trade-restrictiveness and whether it is reasonably available.

57. The United States misinterprets the Panel's and the AB's findings when it states that the objective pursued through the original COOL Measure was to provide consumers with information on origin, namely, with respect to meat, where the animal was born, raised and slaughtered. This misinterpretation should be rejected. The original Panel and the AB found that the objective pursued by the United States through the COOL Measure was "to provide consumer information on origin".

58. The new United States' argument that the objective of the Amended COOL Measure is specifically to provide information on where the livestock from which muscle cuts are produced were born, raised and slaughtered is contradicted by the facts, including the Amended COOL Measure itself. The United States attempts to redefine the objective to an artificially narrow and self-serving one.

1. The Two-Step Necessity Test under Article 2.2 of the TBT Agreement

59. Article 2.2 requires a two-step analysis: first, examination of the measure at issue and second, comparison of this measure with the identified alternative measures. The Panel should objectively examine the trade-restrictiveness of the Amended COOL Measure to determine whether it is "necessary", in itself and independently of less trade restrictive alternative measures. Before moving to the second step of the legal analysis and conducting an assessment of each proposed alternative measure, the Panel should assess the Amended COOL Measure.

a. Application of the First Step of the Necessity Test to the Amended COOL Measure

60. Under the first step of the necessity test, the following factors are relevant to the weighing and balancing analysis in respect of the Amended COOL Measure: (i) the "relative importance" of the interests or values furthered by the Amended COOL Measure; (ii) the degree of contribution made by the Amended COOL Measure to the legitimate objective at issue; (iii) the trade-restrictiveness of the Amended COOL Measure; and (iv) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the United States through the Amended COOL Measure. In conducting this holistic analysis, the Panel should find that the trade restrictiveness of the Amended COOL Measure is not necessary because it is disproportionate to the risk non-fulfilment would create.

61. The interests and values furthered by the Amended COOL Measure fall on the low end of the spectrum of importance. The relative importance of the provision of consumer information is

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substantially lower than protecting the environment or protecting human beings from health risks, both of which are vital and important in the highest degree; and protecting public morals, which a panel observed ranks among the most important values or interests pursued by Members as a matter of public policy. Importantly, the interests or values furthered by the Amended COOL Measure are not *common*. The USDA has acknowledged that there is "interest by *certain* U.S. consumers in information disclosing the countries of birth, raising and slaughter on muscle cut product labels".

62. The following facts demonstrate that the Amended COOL Measure has a very low degree of contribution to the objective of providing consumer information on origin: (i) the Panel and AB already determined that the labelling scheme for muscle cuts under the COOL Measure did not provide clear and accurate information, (ii) the Amended COOL Measure does not apply to all beef sold within the United States because the measure's labelling requirements do not apply to all entities that sell beef or to all beef products, the labeling requirements apply only to a very limited portion of the meat products produced in the United States – about 18 to 21 percent, (iii) like the COOL Measure, the Amended COOL Measure continues to provide unclear, imperfect, or inaccurate information to consumers, the information conveyed by the point of production information will not in all cases be accurate. It is questionable whether consumers will understand the meaning of a label that says "brn in Mexico, rsd and slghtrd in US". The COOL information is normally printed in very small typeface on labels, and often is on the bottom (rear) of the packaging; (iv) Mexico is not aware of any information published by USDA to educate consumers on what the COOL labelling information means.

63. The Amended COOL Measure does nothing to eliminate these negative effects on competitive opportunities of imported livestock. The U.S. meat processing industry has stated that the Amended COOL Measure, through its prohibition of commingling, will increase the burdens of using imported cattle even more. There will be increased burdens and effects relating to the need to segregate, the application of the "COOL discount" to Mexican cattle, and the disincentive to purchase Mexican cattle.

64. The risks at issue and the consequences that may arise from non-fulfilment of the objective are certainly very minor, in light of the following facts: (i) the COOL Measure is not a food safety measure, only a small percentage of U.S. consumers are even aware of the measure, (ii) the meaning of the labels is unclear, (iii) consumers value a label that says "Product of North America" at least as much as a label that says "Product of United States, (iv) the COOL Measure has not affected sales of meat products, (v) USDA itself sees little economic value in the COOL Measure and the Amended COOL Measure, (vi) USDA has reported that a comprehensive analysis of consumer reaction to COOL requirements for shrimp – implemented in 2005 – shows that COOL had no effect on consumer behavior.

65. In conducting the first step of the necessity test, it is clear from these factors that the trade-restrictiveness of the Amended COOL Measure is disproportionate to the risks that non-fulfilment would create. The fact that the Amended COOL Measure might make some contribution to the objective does not outweigh the other relevant factors. Accordingly, the trade-restrictiveness of the Amended COOL Measure is unnecessary and it is inconsistent with Article 2.2 of the TBT Agreement.

b. Application of the Second Step of the Necessity Test to the Amended COOL Measure: Evaluation of the Alternative measures proposed by Mexico

66. If the Panel finds that the trade-restrictiveness of the Amended COOL Measure is necessary, under the second step, all relevant factors of each alternative measure are considered and a comparison is undertaken between the challenged measure and each possible alternative measure. The Panel must consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available.

67. As in the case of the COOL Measure, alternative measures exist that are less trade-restrictive than the Amended COOL measure, make an equivalent contribution to the legitimate objective of providing consumer information on origin taking account of the risks non-fulfilment would create, and are reasonably available to the United States. The alternatives are: (i)

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mandatory labeling based on a substantial transformation rule of origin combined with voluntary labelling of specific information (i.e., born, raised and slaughtered); (ii) mandatory labeling based on the 60-day inventory allowance rule currently used for ground beef; (iii) mandatory labelling of more specific information (i.e., born, raised and slaughtered) using a "trace-back" system under which the precise source of each animal and muscle cut must be traceable through the production process, and (iv) a state/province labeling presented by Canada and adopted by Mexico.

68. The first proposed alternative will provide all consumers with mandatory required information on the origin of beef products based on the substantive transformation rule and those consumers, who are interested in further details, with voluntary information on where livestock were born, raised and slaughtered. Under this alternative, the exemptions of products (i.e., processed food items) and market segments (i.e., beef sold in food service establishments and retailers) are eliminated, giving the mandatory labelling element of this alternative labelling a broader scope of application than the Amended COOL Measure. This alternative measure is not trade restrictive.

69. It would have a greater contribution to the provision of origin information to consumers than the Amended COOL Measure. At the very least, through the combination of mandatory and voluntary labelling requirements, this alternative measure would make an equivalent contribution to the objective of providing consumers with information on origin, taking account of the risks non-fulfilment would create. A weighing and balancing of the relevant factors of both the Amended COOL Measure and the alternative measure demonstrates that compared to the challenged measure, this alternative is less-trade restrictive and more proportionate to the risks non-fulfilment would create. The voluntary labelling element of this alternative is reasonably available and is used in the United States in many other contexts.

70. The second proposed alternative is to extend the mandatory country of origin labelling rule that is currently applied to ground beef to apply to muscle cuts of beef and to processed food items made of beef. Under this alternative, the exemptions of products (i.e., processed food items) and market segments (i.e., beef sold in food service establishments and small retailers) are eliminated, giving the mandatory labelling a broader scope of application. For ground beef, the label must list all countries of origin contained therein or that may be reasonably contained therein. In determining what is considered reasonable, when a raw material from a specific origin is not in a processor's inventory for more than 60 days, that country may no longer be included as a possible country of origin. By extending this rule to muscle cuts of beef and processed food items, such products must be labeled in a manner that lists all countries of origin contained therein or that may be reasonably contained therein in accordance with the 60-day inventory allowance. The COOL rules for ground beef are less trade restrictive than the Amended COOL Measure for muscle cuts, because they provide more flexibility to cattle producers and meat processors. Since the flexibility relates to the inputs in meat processing, the same beneficial effects will occur if the ground beef rules are applied to muscle cuts and processed food items. This alternative is reasonably available. The ground beef requirement fulfils this objective for 40 percent of the beef products consumed in the United States, and there is no objective basis for distinguishing between ground beef and muscle cuts and processed food items in this context.

71. The third proposed alternative measure is a trace-back system. During the original proceedings, Mexico and Canada proposed a trace-back system as a reasonably available less trade-restrictive alternative. This alternative would accurately and comprehensively fulfil the objective of the COOL Measure and yet not discriminate against imports in the sense that it would eliminate the option of restricting trade in imports and as well as the option of discounting the price of imports as the most commercially viable option to comply with the Amended COOL Measure. Thus, costs of the mandatory labelling would be spread evenly throughout the market. The employment of a trace-back system to meet the objectives of the COOL measure is discussed in a paper written by Dermot J. Hayes and Steve R. Meyer entitled *Impact of Mandatory Country of Origin Labeling on U.S. Pork Exports* ("Hayes and Meyer Paper"). Although it focuses on pork, its analysis and conclusions apply equally to beef. The authors discuss this system as a potential method to implement COOL.

72. In Mexico's view, if there were trace-back system in place, there would be no incentive to exclude imported Mexican cattle or shift the cost of compliance solely to Mexican animals. A mandatory trace-back alternative will provide detailed information on where the animals were born, raised and slaughtered on all beef covered commodities. The Hayes and Meyer Paper

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suggests that trace-back is technically and economically feasible in the United States and, therefore, is a reasonably available alternative. Trace-back systems are used in the EU, Korea, Japan and other countries. For example, Uruguay has implemented a comprehensive trace back system which allows tracking livestock and the meat derived from those animals. The Mexican system provides all the information needed for a trace-back system for Mexican cattle. The applicable rules require that cattle exported to the United States bear an ear-tag that can be used to trace the animal, including the State of origin, the ranch which the cattle belongs to, and complete information about its producer.

73. Finally, Canada presented a fourth alternative measure which involves state/province labelling. Mexico acknowledged to the Panel that Canada presented this fourth alterative measure and Mexico endorsed and adopted this alternative by agreeing with Canada's submissions on this alternative and the fact it (i) would provide a greater contribution to the objective than the Amended COOL Measure, (ii) would be less trade restrictive and (iii) is reasonably available. The arguments and evidence that were endorsed and adopted by Mexico were presented by Canada in its Second Written Submission. Given that Mexico and Canada have separately filed submissions rather than a single joint submission, Mexico endorsed and adopted the arguments and evidence at the first available opportunity in its Opening Statement to the Panel. Thus, Mexico is clearly entitled to endorse and incorporate the arguments and evidence of Canada pertaining to the third and fourth alternative measures.

74. A weighing and balancing the relevant factors of both the Amended COOL Measure and the alternative measure demonstrates that the Amended COOL Measure is more trade-restrictive than necessary within the meaning of Article 2.2 and is, therefore, inconsistent with that provision.

2. Allocation of the Burden of Proof under Article 2.2

75. It is clear that, in addition to making a prima facie case that the challenged measure is more trade restrictive than necessary to achieve the contribution it make to the legitimate objective, taking account of the risks non-fulfilment would create, a complainant may seek "to identify" a possible alternative measure. Mexico's burden is simply to "identify possible alternatives", which it has done so. In this dispute, Mexico has identified three possible alternative measures that are less trade restrictive, make an equivalent contribution to the relevant objective, taking account of the risks non-fulfilment would create, and are reasonably available. The burden is on the United States to present sufficient evidence and arguments showing that these alternative measures are not less trade restrictive, do not make an equivalent contribution to the objective pursued, taking account of the risks non-fulfilment would crate and are not reasonably available. The United States failed to do so.

3. The Test of Article 5.6 of the SPS Agreement is Not Applicable to Article 2.2 of the TBT Agreement

76. As in the original proceedings, the United States attempts to incorporate Article 5.6 of the SPS Agreement into Article 2.2 of the TBT Agreement, by arguing that the test of Article 2.2 was equivalent to Article 5.6 and that an alternative measure should be *significantly* less trade restrictive as required by footnote 3 of Article 5.6. These arguments failed in the original proceedings. The test described in paragraph 378 of the AB Report clearly indicates that: (i) Article 2.2 requires evaluation of the challenged measure, and in some cases a comparative analysis with a proposed alternative; and (ii) when comparing with an alternative measure, it may be relevant to consider "whether the proposed alternative is less trade restrictive".

77. Second, Article 2.2 neither contains the word "significant" nor a footnote similar to footnote 3 to Article 5.6 of the SPS Agreement. Third, Article 1.4 of the SPS Agreement provides that the different regimes, rules and the scope of application of it and that of the TBT Agreement are mutually exclusive, and therefore provisions of the SPS Agreement cannot be incorporated into the provisions of the TBT Agreement. Fourth, with regard to the letter from Peter D. Sutherland to John Schmidt on December 15, 1993, offered by the United States, Mexico considers that it is not relevant because there is no footnote in Article 2.2 that clarifies the meaning of the phrase "more trade-restrictive than necessary". Such letter cannot be considered as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention on the Law of Treaties*.

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E. ARTICLE XXIII:1(B) (NON-VIOLATION NULLIFICATION OR IMPAIRMENT) OF THE GATT 1994

78. The Amended COOL Measure nullifies or impairs benefits accruing to Mexico based on tariff concessions made by the United States 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).

79. The Panel in *Japan – Film* dispute summarized the elements of a non-violation nullification and impairment claim, and stated that in order to make out a cognizable claim under Article XXIII:1(b) the complaining party must demonstrate the following three elements: (i) an application of any measure by a WTO Member; (ii) a benefit accruing under the relevant agreement; and (iii) nullification or impairment of the benefit as a result of the application of the measure.

80. The first element relates to the phrase "the application by another Member of any measure", the word "any" indicates that Article XXIII:1(b) does not distinguish between, or exclude, certain types of measures. The United States enacted and implemented the COOL Measure and the Amended COOL Measure through a series measures including statutory provision, regulations and other implementing guidance, directives of policy announcements issued in relation to those measures. The application of such measures by the United States meets this element of Mexico's claim under Article XXIII:1(b).

81. The second element requires demonstrating the existence of a "benefit accruing" to the complaining Member. This benefit can be measured in terms of "legitimate expectations" of improved market-access opportunities. An expectation is considered to be legitimate if the challenged measure could not have been "reasonably anticipated" at the time the tariff concession was negotiated.

82. Although the tariff concessions between Mexico and the United States are currently based on the NAFTA, Mexico is entitled under Article XXIII:I(b) 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. The extent of the restrictions on market access resulting from the Amended COOL Measure clearly could not have been expected. Mexico was entitled to expect for exports of its feeder cattle.

83. The third required element is that the benefit accruing to the WTO Member (e.g., improved market access from tariff concessions) is nullified or impaired as the result of the application of a measure by another WTO Member. In this sense, the Panel affirmed that it must be demonstrated that the competitive position of the imported products subject to and benefitting from a relevant market access (tariff) concession is being upset by ("nullified or impaired ... as the result of") the application of a measure not reasonably anticipated. Given the low U.S. MFN rates in respect of feeder cattle, Mexico reasonably expected that its access to the U.S. market for feeder cattle would be unrestricted. The Amended 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.

F. MEXICO'S CLAIM UNDER ARTICLE XXIII:1(B) OF THE GATT 1994 IS WITHIN THE SCOPE OF THE PANEL'S TERMS OF REFERENCE

84. Mexico's non-violation nullification or impairment ("NVNI") claim raised under Article XXIII:1(b) is within this Panel's terms of reference in these Article 21.5 proceedings. The purpose of Article 21.5 proceedings is to resolve, on an expedited basis, "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" adopted by the DSB. This mandate encompasses claims by the complaining party that a measure "taken to comply" is inconsistent with a covered agreement. A measure "taken to comply" that results in the non-violation nullification or impairment of any benefit which accrues to a party under the GATT 1994 is no less inconsistent with the GATT 1994 than a measure which results in a violation of one or more provisions. The mere existence and operation of Article XXIII:1(b) indicates that the application of a measure does not need to result in a violation of a provision of the GATT 1994 to be considered inconsistent with the GATT 1994 if it nullifies or impairs a benefit accruing under the GATT 1994. Hence, a claim to this effect under Article XXIII:1(b) is entirely within the scope of Article 21.5 proceedings.

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85. Article 26.1 of the DSU clearly establishes that a panel or the AB has jurisdiction to consider and resolve claims under Article XXIII:1(b), "whether or not" the measure at issue conflicts with the provisions of the relevant covered agreement, and provides additional guidance for circumstances in which the measure at issue does not conflict with the provisions of the relevant covered agreement.

IV. CONCLUSION

86. As Mexico has shown, the Amended COOL Measure is inconsistent with the national treatment obligation under 2.1 of the TBT Agreement and Article III:4 of the GATT, also constitutes an unnecessary obstacle to trade in violation of Article 2.2. of the TBT Agreement, and nullifies and impairs benefits accruing to Mexico under the GATT 1994, within the meaning of Article XXIII:1(b). United States has not brought itself into compliance with its obligations through the adoption of the Amended COOL Measure.

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ANNEX B-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

A. Complainants Have Failed to Establish That the Amended COOL Measure Is Inconsistent with Article 2.1 of the TBT Agreement

1. The United States has taken a measure to comply that directly addresses the concerns in the Appellate Body reports. The amended COOL measure increases the information provided and sets out what is in effect a single label – disclosing the country of birth, raising, and slaughter – for the three categories of meat that impact complainants' livestock imports (*i.e.*, categories A, B, and C). The single label affixed to those categories of meat is even-handed. As such, any detrimental impact resulting from the amended COOL measure now stems exclusively from legitimate regulatory distinctions.

2. What complainants primarily contest, however, is a series of regulatory distinctions that has nothing to do with the detrimental impact at all. The sum result of complainants' arguments appears to be an attempt to convince the Panels that proof of a detrimental impact alone proves a technical regulation to be discriminatory, despite the Appellate Body's statements to the contrary. And, of course, this insistence that a detrimental impact is enough to prove a technical regulation discriminatory is the foundation of complainants' claim under GATT Article III:4.

3. Complainants' approach, if successful, would render a great many regulatory measures vulnerable to WTO challenge for the first time. All a complainant would need to prove to successfully make a national treatment claim would be that a majority of the domestic producers satisfy a particular standard, while a majority of the complainants' producers do not, a fact pattern that surely repeats itself many times over throughout the WTO membership.

4. However, the Appellate Body has confirmed that technical regulations are not discriminatory where they draw legitimate, even-handed regulatory distinctions, even where they disproportionately impact the complaining party's producers. And complainants' arguments fail on this very point. The regulatory distinctions made in the amended COOL measure are, in fact, legitimate distinctions. In particular, the label that is now affixed to A, B, and C meat explicitly references the location where each of the three production steps took place, and provides equally meaningful and accurate origin information for all three categories of meat. Moreover, because the 2013 Final Rule eliminates the allowance for commingling, the information provided for each of the three categories of meat is equally accurate.

5. Complainants thus fail to prove their case that any detrimental impact "reflect[s] discrimination." Accordingly, the amended COOL measure does not accord less favorable treatment to imported livestock within the meaning of Article 2.1 of the TBT Agreement.

1. The Complaining Parties Have Failed to Show That Any Detrimental Impact Caused by the Amended COOL Measure Does Not Stem Exclusively From Legitimate Regulatory Distinctions

a. DSB Recommendations and Rulings Regarding Legitimate Regulatory Distinctions

6. To prove that the measure accords less favorable treatment, and therefore discriminates *de facto* against imports from the complaining parties, complainants must prove that it "modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products." The Appellate Body has further clarified that a party must demonstrate (1) that the measure has a "detrimental impact on imported livestock;" and, if so, (2) that this detrimental impact does not stem exclusively from a legitimate regulatory distinction, but rather reflects discrimination or a lack of even-handedness. While the parties agree on that general framework, they appear to agree on little else. In particular, the parties disagree as to (1) which regulatory distinctions are relevant to the Article 2.1 analysis, and (2) what analysis should be performed with regard to the relevant regulatory distinctions.

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7. As to the first point, the Appellate Body has stated that because "technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics, or related processes and production methods," not every distinction a measure makes is relevant to the inquiry. Rather, "in an analysis under Article 2.1, we *only* need to examine the distinction that accounts for the detrimental impact on [imported] products as compared to [domestic] products." As to the second point, the Appellate Body has also been clear that a panel should examine whether the regulatory distinction is "even-handed" or not.

8. Neither complainant incorporates this analytical framework into their arguments. While Canada "agrees that the regulatory distinction that must be examined to determine *the consistency* with TBT Article 2.1 is the distinction that *causes* the detrimental impact on imported products," Canada argues that that is not the entirety of the analysis. Rather, Canada contends that "panels are not precluded from considering elements of the challenged technical regulation that do not specifically cause the detrimental impact but nevertheless demonstrate *that the relevant regulatory distinction(s)* reflect discrimination." But the test is not whether the relevant regulatory distinctions reflect discrimination, but whether *the detrimental impact* reflects discrimination – a point that the Appellate Body has made repeatedly. Canada provides no support for its preferred analytic framework. Mexico ignores this part of the analysis entirely.

9. Moreover, complainants largely ignore whether the regulatory distinctions they focus on are even-handed or not, preferring to criticize the distinctions as not constituting "significant" enough change, or being "arbitrary," or that the information is not "intelligible." In so arguing, they appear to apply the wrong test. The test under Article 2.1 is *not* whether another Member thinks that the measure could be designed better, or more clearly, or otherwise improved upon. The test is whether the measure treats imported products less favorably than like products of another origin. And as the Appellate Body has explained, this means whether any detrimental impact on imported products stems exclusively from legitimate regulatory distinctions.

10. The question then is whether the regulatory distinctions being made are legitimate, not whether the technical regulation could, in the opinion of another Member, be better designed.

b. The Complaining Parties Fail to Establish a *Prima Facie* Case That Any Detrimental Impact Caused by the Amended COOL Measure Does Not Stem Exclusively From Legitimate Regulatory Distinctions

11. First, Canada wrongly argues that the B and C labels have the "potential [for] inaccuracy" where the animal "spends as little as 15 days in the United States" and where animals "spend a short time in Canada prior to export for slaughter in the United States."

12. Distinguishing between the three stages of production necessarily entails defining when each stage ends. And any definition will always be open to criticism that it could be done differently or better, or that product on one side of the defined line between stages is not sufficiently distinct from product on the other. Complainants must rely on exotic hypotheticals because the new labeling requirements do, in fact, provide the same accurate and meaningful origin information on A, B, and C categories of meat resulting from animals actually being produced in the three countries. But as to animals *actually traded*, neither complainant disputes that the origin information provided regarding the meat produced from feeder cattle actually traded is inaccurate (*e.g.*, "Born in Mexico, Raised and Slaughtered in the U.S."), and certainly not less accurate than the information provided for A category meat. Similarly, Canada makes no claim that the origin information provided for fed cattle actually traded (*i.e.*, "Born and Raised in Canada, Slaughtered in the United States") is inaccurate, and certainly not less accurate than the information provided for A category meat. The analysis should end there. The fact that complainants are forced to rely on hypothetical scenarios not related to actual products being traded and sold reveals that there is no basis for the complainants' *de facto* claims.

13. Of course, no actual labeling situation will be able to address every hypothetical a clever lawyer can invent, or every unusual circumstance that may occur. Rather, the labelling system should address what is happening in the real world. And the amended COOL measure does just that. The origin information regarding meat produced from all (or virtually all) animals *actually traded* by Canada and Mexico is *as meaningful* and *as accurate* as the origin information regarding A meat, *and neither Canada nor Mexico dispute that fact*.

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14. Second, Canada (but not Mexico) contends that because B and C meat only constitute approximately a third of the COOL labeled meat, any "new accurate information conveyed by the amended COOL measure cannot be regarded as significant." By adding the production steps to the label and eliminating the allowance for commingling, the amended COOL measure provides a single label that provides for the same level of origin information for A, B, and C category meat, which constitutes approximately 99.7 percent of COOL labeled muscle cuts sold in the United States. The United States has thus directly responded to the concerns in the Appellate Body reports regarding the original COOL measure, which was not just limited to the B and C labels, but included a concern that the previous A label did not explicitly list the three production steps either.

15. Third, Mexico (but not Canada) again argues that the labels being used by retailers to provide origin information (both in terms of the size of the font and the abbreviations allowed) does not provide "information that is accessible by or intelligible to consumers." Mexico makes no claim that that the label affixed to the B or C meat is less intelligible than the label affixed to A meat. Indeed, Mexico and the United States agree that a "single label" is now used to provide origin information regarding A, B, and C category COOL-labelled meat. Accordingly, we understand Mexico to concede that the design and application of the label itself is even-handed. Further, Mexico does not establish a *prima facie* case by merely making bare allegations that it "submits" are true.

16. Fourth, Mexico criticizes the six month period of education and outreach that USDA provided for in the 2013 Final Rule, although it remains unclear what legal significance Mexico attributes to its argument. However, Mexico does not appear to contest that the six month period of education and outreach is even-handed (if, it could even be considered a regulatory distinction at all). Mexico further concedes that retailers are complying with the new rule and provides photographs from retailers to prove this point.

17. Fifth, Canada argues, incorrectly, that the elimination of the commingling will dramatically increase the record keeping requirements and the overall detrimental impact on Canadian livestock imports. To be clear, the United States has always taken the position that the allowance of commingling reduced costs for those producers that handle both U.S. origin and mixed origin animals or meat. However, as discussed in the U.S. First Written 21.5 Submission, only *three* beef processors, and *zero* pork processors, stated for the record that they commingle different origin animals. Accordingly, the administrative record of the 2013 Final Rule suggests that a limited number of processors have been actually making use of this flexibility, and that the adjustment costs due to the elimination of commingling are low. Notably, Canada puts forward no evidence that any additional beef processors (other than three already on the record) or any pork processors at all have been commingling.

c. None of the Complaining Parties' Other Criticisms Undermines the Conclusion That Any Detrimental Impact Caused by the Amended COOL Measure Stems Exclusively From Legitimate Regulatory Distinctions

18. First, it is clear that the D Label is affixed to imported *meat*, and therefore does not cause any detrimental impact on imported *livestock*. Neither complaining party contests this fact. It should be quite clear, therefore, that any examination of the D Label will simply not explain whether the detrimental impact on imported livestock reflects discrimination. Moreover, Canada does not even allege – much less prove – that the content of the D Label disadvantages Canadian producers while benefiting U.S. producers. Indeed, Canada (and Mexico) believe the opposite – that it is categories A, B, and C that disadvantage their producers, not Category D.

19. Canada also argues that Label D has the "potential to mislead consumers" where the meat was produced from animals that were born and raised in a different country than the exporting one. Yet imported meat is typically – if not always – produced entirely within the exporting country as few countries around the world import significant quantities of live cattle and hogs, and even fewer represent major beef or pork suppliers to the United States. Canada is further unable to say whether any meat derived from those imported cattle is actually exported back into the United States (much less sold as D labeled-meat by a retailer). Accordingly, Canada is forced to argue that the D Label merely has the "potential to mislead consumers" because Canada has *no* evidence that the Canadian D labeled meat (*i.e.*, "Product of Canada") is *actually* misleading. It is clear that requiring the additional production step information to be provided would not provide the consumer much, if any, additional origin information as all (or virtually all) imported meat sold

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by U.S. retailers will be derived from animals born, raised, and slaughtered in the country denoted on the label (*e.g.*, "Product of Canada"). In other words, "Product of Canada" means, for all practical purposes, "born, raised, and slaughtered in Canada."

20. Second, complainants argue that the three exemptions from the COOL measure prove that the amended COOL measure is discriminatory in that the detrimental impact does not stem exclusively from legitimate regulatory distinctions. Neither party asserts that the design and operation of the three exemptions has any nexus to any detrimental impact. In fact, Canada affirmatively argues that such exemptions do not cause the detrimental impact at all. As such, it would appear that all parties agree with the original panel's finding that the "exact proportion or magnitude of the exceptions and exclusions is irrelevant" for purposes of the detrimental impact analysis. It is also clear that the exemptions themselves are perfectly even-handed. That is to say, nothing in the design or operation of the exemptions that define the scope of the amended COOL measure disadvantage Canadian and Mexican livestock exports. Mexico also argues that the exemptions prove that the amended COOL measure itself is not even-handed. But, Mexico, like Canada, fails to explain why a measure that required small businesses and restaurants to label their muscle cuts would make the measure, as a whole, more even-handed in the measure's treatment of imported livestock on the one hand and U.S. livestock on the other. The fact of the matter is that it would not. Complainants also argue that the "disconnect" between the amended COOL measure's "very limited coverage" and the upstream costs of the amended COOL measure proves that the detrimental impact reflects discrimination. Of course, neither Canada nor Mexico can explain why exemptions that do not cause the detrimental impact, and are, themselves, entirely even-handed, mean that the measure is discriminatory. The United States, of course, disagrees with this approach – complainants must prove that the detrimental impact reflects discrimination because it does not stem exclusively from legitimate regulatory distinctions. Moreover, the coverage of COOL is hardly limited. The measure constitutes a major policy decision to require over 30,000 grocery stores and other retailers throughout the United States to provide country of origin information to their customers on the $38.5 billion worth of beef and $8.0 billion worth of pork they sell annually.

21. Third, complainants argue that the rules regarding ground meat (Category E) prove that rules for muscle cuts are discriminatory without providing any basis for that argument. In fact, the original panel has already found that the ground meat labeling rule does not have a detrimental impact on imported livestock. As such, it simply cannot be that any detrimental impact from the COOL measure stems from the ground meat labeling rules. Further, USDA created the separate labeling rules for ground meat based on the unique attributes regarding the production of ground meat, which differs substantially from the production of muscle cuts. Canada also contends that while it "is not challenging the consistency of the ground meat label," it also claims that the ground meat label provides origin information that "is far less detailed than that which is required to be tracked and verified," and, therefore, not legitimate. The ground meat rule does not cause a detrimental impact and therefore it is impossible to say that the detrimental impact does not stem from a legitimate regulatory distinction because the ground meat rule provides a different level of information. Moreover, nothing about the ground meat rule could be said not to be "even-handed." The rule operates exactly the same – not only between the products of Canada, Mexico and the United States, but between the products of all countries that are used by U.S. ground meat producers.

22. Mexico appears to argue that the ground meat rule does not provide consumer information on origin. Mexico is wrong, of course. The ground meat rule does provide consumer information on origin, but does so differently than the rules governing muscle cuts, a point that Mexico itself concedes in the final sentence of its argument. Mexico also argues that it is "arbitrary" for the United States to set forth different origin labeling rules for ground meat than for muscle cuts. But Article 2.1 disciplines discriminatory measures, not arbitrary measures, and as discussed above, the analysis of whether a measure provides less favorable treatment to imported products does not call for an analysis of arbitrariness – standing alone – as Mexico appears to contend.

23. Fourth, complainants argue that the statutory prohibition of USDA implementing a "farm to fork" traceability regime proves that the amended COOL measure is discriminatory. This statutory provision (7 U.S.C. § 1638A(f)(1)) is an unchanged part of the amended COOL measure, which does not cause any detrimental impact, and, as such, is not relevant for purposes of this analysis.

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24. Canada now argues that "the prohibition [of a "farm to fork" traceability system], coupled with a mandate for the Secretary of Agriculture to audit retailers to verify compliance, necessitates the implementation of the amended COOL measure's labelling requirements through the system of recordkeeping and verification that is the cause of the detrimental impact on Canadian livestock." Mexico appears to take a similar position, contending that "the prohibition is a disguised restriction on international trade," and establishes that the entire measure "is not even-handed." Again, the prohibition contained in 7 U.S.C. § 1638A(f)(1) is not the cause of the detrimental impact. The original panel made no such finding, and neither did the Appellate Body. Rather, the Appellate Body determined that the detrimental impact stemmed from the distinctions between the production steps and the distinctions between the different types of labels. Those distinctions are set out in other parts of the statute and the 2009 Final Rule, and it is those parts – not 7 U.S.C. § 1638A(f)(1) – that are relevant to this inquiry.

B. Complainants Have Failed To Establish That the Amended COOL Measure is Inconsistent with Article III:4 of the GATT 1994

25. Despite arguing repeatedly in the original proceeding that the national treatment provisions contained in the TBT Agreement and the GATT 1994 should be given the same interpretation, complainants now encourage these Panels to judge as to whether the amended COOL measure is discriminatory under two entirely different legal standards. For purposes of Article III:4, complainants contend that "treatment no less favourable" is established solely based on proof that the technical regulation results in a detrimental impact on imported products. This analysis is incorrect.

26. The phrase "treatment less favourable" as used in Article III:4 has always provided regulatory space for the Member to take otherwise legitimate measures that may restrict trade unevenly across the membership. Complainants disagree, arguing that once a detrimental impact is established, the reasons underlying the requirements of the technical regulation are irrelevant to the analysis. The WTO has never adopted as narrow of an interpretation as complainants assert here. It has long been understood that, consistent with Article III:4, "a Member *may draw distinctions* between products which have been found to be 'like,' without, *for this reason alone*, according to the group of 'like' imported products 'less favourable treatment' than that accorded to the group of 'like' domestic products." Thus, the existence of distinctions between imported and domestic products is not enough. Any Article III:4 analysis must include an examination of whether such distinctions are evidence that the measure is discriminatory or not. Given this, the Appellate Body's approach to Article 2.1 is not surprising. The Appellate Body has noted: "the two Agreements should be interpreted in a coherent and consistent manner" in light of the fact that the Members intended the TBT Agreement "to further the objectives of the GATT 1994."

27. Complainants argue that the *sole* relevant consideration is the effect of the measure. Any examination of whether the technical regulation draws legitimate, even-handed distinctions is deferred to the analysis of whether the "discrimination" is "arbitrary or unjustified" under Article XX. Of course, for technical regulations that pursue legitimate objectives not listed in Article XX, the matter would end there. As to these measures, the question of whether a measure is discriminatory turns only on whether a majority of the domestic products satisfy a particular technical regulation, while a majority of the like foreign products do not. A responding Member is simply not afforded the opportunity to explain, nor would a panel have the ability to examine, the underlying rationale and operation of the standard. The legitimacy – *even the correctness* – of the requirements is wholly immaterial to the national treatment analysis.

28. Complainants' overly narrow interpretation of Article III:4 greatly undermines a Member's ability to regulate in the public interest, particularly where the Member pursues legitimate governmental objectives not listed in Article XX. What complainants' approach suggests is that a Member must, prior to applying a technical regulation, survey all current and potential trading partners of products affected by the measure to determine whether the affected products of those countries either meet that standard (or whether its producers are willing to adapt to the new standard). Where a particular country's products do not meet that standard (and that country's producers are not willing to adapt), the Member must *lower* its standards to avoid creating an obstacle to trade. This "least common denominator" analysis approach would undermine entirely the fact that the Member may take technical regulations "necessary to achieve its legitimate objectives '*at the levels it considers appropriate*.'"

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29. Each criticism of the U.S. approach fails. First, Canada challenges that the United States has "no textual basis" for claiming that the Article III:4 analysis "necessarily entails an examination of whether the regulation makes distinctions that could not be considered even-handed as to the group of 'like' imported products versus the group of 'like' domestic products . . ." But what Canada ignores is that this conclusion is built upon the Appellate Body's interpretation of the text of Article III. Moreover, Canada is simply wrong to argue that the United States ignores the context of the TBT Agreement and the GATT 1994. The context supports the U.S. interpretation. While it is unquestioned that Article III:4 provides relevant context for the interpretation of Article 2.1, Article 2.1, in fact, provides relevant context for the interpretation of Article III:4, especially *where the measure at issue is a technical regulation*.

30. Second, complainants criticize the U.S. interpretation as trying to alter the "balance" set out between Article III:4 and Article XX. The United States is not contending that the Panel must "read into" Article III:4 an assessment of whether the discrimination is "arbitrary or unjustifiable," as Canada alleges. Rather, what the United States is saying is that the appropriate interpretation of *whether* a technical regulation *is discriminatory* must necessarily include an examination of the basis for the regulatory distinctions that cause the detrimental impact. Furthermore, in light of their view that Article 2.1 sets a much higher bar for a discrimination claim, complainants fail to explain how their approach interprets the two agreements "in a coherent and consistent manner." Just the opposite would appear to be the case. Complainants' artificially narrow interpretation of Article III:4 renders Article 2.1 a nullity.

31. The ultimate goal of complainants is clear. While they no longer directly challenge the proposition that providing consumer information on origin as to where the animal is born, raised, and slaughtered is a legitimate governmental objective, complainants' overly narrow construction of Article III:4 would prevent the United States from doing just that, short of fundamentally altering how the entire U.S. meat industry operates. To accept complainants' approach would be to accept that there is no practical and reasonable way for the United States to provide accurate origin information to its consumers, even where the meat was derived from an animal that spent less than a day in the United States before being slaughtered.

C. Complainants Have Failed to Establish That the Amended COOL Measure is Inconsistent with Article 2.2 of the TBT Agreement

1. The DS386 Panel Should Reject Mexico's "Two Step Necessity" Test

32. Mexico argues that the DS386 Panel should adopt a "two step necessity" test, comprising what Mexico calls a "relational analysis" and a "comparative analysis." Mexico fails to explain why the Appellate Body did not engage in this "two step necessity" test in the one dispute where it examined the merits of the claim, *US – Tuna II (Mexico)*. Indeed, in *US – Tuna II (Mexico)*, the Appellate Body *does not even acknowledge* the possibility of such an approach.

33. Mexico tries to ground its approach in the fact that the Appellate Body acknowledges that there may be instances where a comparison between the challenged measure and an alternative measure would not be needed. But what Mexico cannot explain – and, in fact, studiously ignores – is *why* the Appellate Body determined in the original *US – COOL* proceeding that, in fact, the original panel should have made this comparison. Indeed, the Appellate Body reversed the original panel's Article 2.2 finding on this very point. It is clear that Mexico's "two step" invention is designed to lessen its own burden of proof. Mexico was quite explicit in this regard in its first submission, arguing that the DS386 Panel could find the amended COOL measure inconsistent with Article 2.2 without making a comparison to an alternative measure. Under Article 2.2 the complaining party must establish that an alternative measure exists that "is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available." The arguments by either complaining party that seek to relieve themselves of any part of this burden should be rejected.

2. Factors to Consider in Comparison Between the Amended COOL Measure and an Alternative Measure

34. First, the objective of the amended COOL measure was "to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered," quoting the Appellate Body. Complainants disagree,

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contending that the United States has taken the quote out of context and that the Appellate Body made that statement in the context of whether the objective was legitimate, and not in its identification. As such, complainants appear to argue that the Appellate Body, in evaluating whether the COOL measure's objective was legitimate, analyzed the *wrong* objective. That is clearly incorrect. As the Panels are well aware, the relevant objective can be stated in a number of ways. Certainly, it could be stated as "to provide consumer information on origin," which is how both the Appellate Body and the Panel has characterized it. Of course, that same objective can be stated in more specific terms, such as how the Appellate Body has also stated it. They are simply two formulations of the same objective. Complainants disagree with the Appellate Body's formulation because that formulation mentions the three production steps. Although they do not say so directly, it would appear that complainants view such a formulation as undermining their first two alternatives, neither of which provide much, if any, origin information on the three production steps. Complainants would simply prefer that providing consumers with information about the production steps not factor into the analysis.

35. But this is where the flaw of complainants' approach is truly exposed. For the real issue is not what the objective is – that has been decided – but, as the Appellate Body explains, what "is the degree of contribution to the objective that a measure *actually* achieves." And what the amended COOL measure *actually* achieves is that it provides meaningful and accurate information on origin for muscle cuts sold at retail as to where the animal was born, raised, and slaughtered. It is thus immaterial whether the objective is characterized as "to provide consumer information on origin," on the one hand, or it is "to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered," on the other. The degree of contribution to the objective that the measure actually achieves is *the same* under either formulation.

36. Second, Canada and (sometimes) Mexico continue to equate the phrase "less trade restrictive" with the phrase "less discriminatory." The term "trade restrictive" "means something having a limiting effect on trade." Accordingly, the Appellate Body in *US – Tuna II (Mexico)* concluded that "Article 2.2 does not prohibit measures that have any trade-restrictive effect. It refers to 'unnecessary obstacles' to trade and thus allows for *some* trade-restrictiveness …" In light of that guidance, it simply cannot be that Article 2.2 allows for *some* discrimination. Indeed, the Appellate Body's statement that what Article 2.2 disciplines is "trade-restrictive effect" only makes sense when "trade restrictive" is understood to refer to limiting trade effects, *i.e.*, limiting market access.

37. Canada requests that the DS384 Panel "be sufficiently flexible" in its interpretation of the agreement "to account for elements that are difficult to quantify, such as practical difficulties in selling or handling imported products" under the amended COOL measure. Yet the difficult question here is not what the trade effects of the amended COOL measure are. The question is what will be the trade effects of the "farm to fork" traceability regime, and it is that burden that complainants fail to meet.

38. Mexico attempts to lessen its burden by contending that it does not have the burden of proof with regard to any alternative measures it proposes. Canada appears to take a similar, albeit more limited approach, contending that it should not have to carry this burden where it is difficult to do so. Yet the Appellate Body has been clear on this point – the allocation of the burden of proof does not depend on how difficult it is for the complainant to prove its case.

39. The United States agrees with Canada that it may very well be difficult to establish that a "farm to fork" traceability regime (or the state/province alternative) is actually less trade restrictive than the amended COOL measure. The reason for this is fairly obvious – determining how a complicated regulatory mechanism would affect the complex U.S. livestock and meat industries is not easily done. Indeed, Canada may understand this problem better than most, given that it has failed to completely implement its own "farm to fork" traceability regime in Canada despite examining the issue for over a decade. But this is the complainants' burden.

40. Third, complainants appear to accept the framework for evaluating whether a measure could be considered to be "reasonably available." However, neither party satisfies its burden in this regard, particularly with regard to the "farm to fork" traceability alternative and state/province designation alternative.

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3. The Complaining Parties Have Failed to Establish a *Prima Facie* Case That an Alternative Measure Exists That Proves the Amended COOL Measure Is Inconsistent With Article 2.2

a. The Burden of Proof

41. Mexico contends that it does not have the burden of proving that an alternative measure exists that establishes that the amended COOL measure is inconsistent with Article 2.2. Mexico's position directly contradicts *its own position* before the Appellate Body in this very dispute where it accepted that, as a complainant, *it is Mexico* that carries "the burden of proof with respect to such alternative measures." It has been long understood that complainants carry the burden of proof for their claims under those rules, and respondents carry the burden of proof for their affirmative defenses. Mexico's argument is just the latest attempt by the complainants to relieve themselves of their own burden of proof. The United States requests both Panels to reject arguments of the complaining parties that seek to relieve themselves of their own burden.

b. First Alternative Measure

42. The design, structure, and operation of the amended COOL measure indicates that the degree to which it *actually* contributes to its objective of providing consumer information on origin: it provides meaningful and accurate information on origin for muscle cuts sold at retail as to where the animal was born, raised, and slaughtered. Alternative measures that contribute to the objective at a lesser degree do not prove a challenged measure inconsistent with Article 2.2. This is the only logical interpretation of the TBT Agreement whose 6th preambular recital acknowledges that the Member "shall not be prevented from taking measures necessary to achieve its legitimate objectives '*at the levels it considers appropriate*,'" a point that the Appellate Body has repeatedly emphasized. Complainants' analyses are directly contradictory to both the applicable agreement and the Appellate Body's interpretation of that agreement. Complainants' proposed first alternative unquestionably fails the legal test of Article 2.2.

43. Rather than acknowledging these problems directly, complainants discuss the labeling differences between Categories A, B, and C, on the one hand, and Categories D and E, on the other. First, Canada appears to argue that they have satisfied their own burden of proof because *the United States* "has not explained why it considers that Label D and Label E fulfil its objective." Notwithstanding the obvious burden of proof problem, what should be obvious to all participants in this dispute is that this is not the test for Article 2.2 – *none* of the parties need to prove that a label does or does not "fulfill" the U.S. objective in the abstract. The question is rather, whether complainants have established a *prima facie* case that an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available." Second, Mexico argues that "[t]he United States has not provided a basis for distinguishing consumers' desires for origin information as between muscle cuts, ground beef and imported meat products." But again Mexico, like Canada, fails to explain how the existence or non-existence of such a basis is relevant to the required *prima facie* case for this claim. Third, the phrase "risks non-fulfilment would create" does not provide a different conclusion. What complainants are essentially arguing here is that the objective of consumer information is simply not "legitimate" or "important" enough to rebut an Article 2.2 challenge. As should be clear, the United States considers that providing consumers with this information is very important. And nothing in the TBT Agreement generally, or Article 2.2, requires the United States to re-order its objectives to conform to the policy priorities of its trading partners.

c. Second Alternative Measure

44. Complainants continue to maintain that applying the ground meat rules to all muscle cuts without exemptions proves the amended COOL measure inconsistent with Article 2.2. This argument is in error. The ground meat rules provide limited origin information as to where the animal was born, raised, and slaughtered, and, therefore, cannot be considered to make an equivalent contribution to the objective that the amended COOL measure does – namely, to provide meaningful and accurate information on origin for muscle cuts sold at retail as to where the animal was born, raised, and slaughtered.

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d. Third Alternative Measure

45. Third, complainants maintain that the alternative of a "farm to fork" traceability regime proves the amended COOL measure inconsistent with Article 2.2. This argument is in error. A complaining party does not discharge its burden of proof by putting forward an alternative that is "merely theoretical in nature." The party must base its alternative on "sufficient evidence," which "substantiat[es] the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system." Bare allegations that the Member could adopt the alternative are simply not enough to establish a *prima facie* case.

46. Canada now argues that "farm to fork" traceability is less trade restrictive for two reasons: 1) the alternative is non-discriminatory; and 2) the alternative "could not possibly entail" the same costs that the amended COOL measure does with respect to Canadian producers. Canada continues to decline to examine what effects a "farm to fork" traceability system would actually have on trade. Mexico provides no additional timely evidence, simply alleging that such a system "would not impose material new costs on Mexican producers."

47. As to Canada's first argument, the TBT Agreement cannot be read to mean that a "less trade restrictive" measure is one that is simply "less discriminatory." Rather, a "less trade restrictive" measure is one that will permit greater market access for goods than the challenged measure. Moreover, in *EC – Seals*, Canada appears to agree with the United States that trade flows, not discrimination, is the touchstone of trade restrictiveness.

48. As explained previously, the central question here is what effect the adoption of this alternative will have on trade. And as to this central question, neither complainant *even alleges* that trade would increase under a trace-back regime.

49. As to Canada's second argument, Canada relies on Dr. Sumner's analyses of the original COOL regime, which Canada claims to prove a "farm to fork" traceability regime to be less trade restrictive because it "could not possibly entail" the same amount of costs to Canadian industry as the original COOL measure has allegedly imposed, an impact which Dr. Sumner estimates to be the equivalent of increasing processing and marketing costs by $608 per head of cattle and $116 per hog on all livestock processed in the United States. However, the conclusions drawn from the previous econometric models are not credible, highly inflated (to say the least), and suffer from numerous data and methodological shortcomings.

50. However, even setting aside the inaccuracies and discrepancies, then Dr. Sumner's conclusions should be readily observable in today's market for Canadian cattle in the United States, given that the original COOL measure is imposing costs of approximately $600 per head, in the form of increased processing and marketing costs, on Canadian exported cattle. Under these circumstances, one would expect to see drastic differences between Canadian and U.S. steer prices to account for such an effect. To the contrary, there has been minimal change between the prices and the difference between them has actually narrowed.

51. Given these minimal changes in Canadian steer prices in respect of U.S. steer prices, Dr. Sumner's model, if appropriate, implies that Canadian cattle producers and U.S. packers and feedlots purchasing Canadian livestock are internalizing the majority of the estimated equivalent costs (which, according to Dr. Sumner, at a minimum, are equivalent to 39 percent of the average wholesale steer price). But to do so would be prohibitively expensive and should cause the Canadian live cattle export market to the United States to disappear entirely. But this is not occurring. In fact, the quantity and price of cattle exported from Canada into the United States has remained relatively consistent, accounting for normal fluctuations since the implementation of the 2009 Final Rule. In short, Dr. Sumner's analysis is simply not credible and is not borne out by the facts and data in the market.

52. Mexico's "adoption" of Dr. Sumner's calculations contained in CDA-126 were untimely, and inconsistent with paragraph 7 of the Working Procedures of the Panel and DSU Article 12.4.

53. While complainants appear to accept the Appellate Body's view in *US – Gambling* that an alternative measure is not "reasonably available" where it "imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties," neither complainant

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provides any evidence to establish a *prima facie* case that the measure is, in fact, reasonably available.

54. First, Mexico contends that it does not shoulder the burden in this regard, and (presumably) in light of that position, provides no additional cost analysis, nor responds to any of the U.S. criticisms of the sole piece of evidence that Mexico relies on, the ten year old Hayes & Meyer article. As discussed above, it is clear that Mexico, as the complaining party, has the burden of proof with regard to the alternatives it proposes. It is equally clear that Mexico has failed to satisfy that burden of proof.

55. Second, while Canada appears to accept that it has the burden of proof to prove that a "farm to fork" traceability regime is "reasonably available," Canada does not put forward sufficient evidence to establish a *prima facie* case in this regard, relying solely on a cost estimate done in relation to the NAIS.

56. As to the costs of the alternative itself, as noted above, Canada misleadingly relies on a cost analysis commissioned by APHIS and performed by a consortium of non-government researchers in connection with the NAIS. The NAIS Study did not evaluate a trace-back system from farm to *retail*. Rather, it only evaluated traceability up to the point of *slaughter*, since it was focused on animal disease status, not consumer information. Yet the implementation of animal traceability would create heavy costs after the animal has been slaughtered at the processing and retail levels where workers are forced to keep meat from each animal segregated and attached to data generated at the farm and intermediary production steps. As such, it is clear that Canada has not put forward a complete cost analysis.

57. USDA has never produced an analysis of the costs of implementing a farm to retail trace-back regime for beef and pork, and, as discussed above, it is not the U.S. burden to do so for purposes of this proceeding. As is clear, however, the costs of implementing such a regime would be high indeed, and would likely have dramatic effects on the industry. By moving from a COOL regime to a traceability regime that is concerned with the life history of each animal, animals are forced to move in batches of one animal (*i.e.*, animal by animal) through the slaughter facility, in the packaging process, and at the retail level, as meat cutters are forced to segregate each animal and the meat for each animal from other animals to ensure the label finally placed at retail has accurate detailed information about place of birth, development, and slaughter. Those procedures would require dramatic slowdowns in the meat cutting process, and would add substantial burdens to retailers and other vendors who must associate particular cuts of meat with labels that correspond to the individual animal. In this regard, the U.S. industry differs greatly from the two examples Canada cites to, Japan and Uruguay, both of which have much smaller industries than the United States does.

58. It is, of course, telling that Canada cannot cite *itself* as an example of a country that has implemented a "farm to fork" traceability regime, despite studying the issue since 2003. All Canada can say is that it and its stakeholders "are working towards a practical phased-in strategy for tracking animal movements." The fact that Canada has been "working towards" full national traceability for over a decade now, without being able to implement (or even being able to state *when* it will implement), underscores just how difficult it is for a country to implement this extremely expensive system. And if that is true for Canada then it means it will be even more true for the United States, which has much larger herds than does Canada, and whose individual animals appear to move much more frequently domestically than do Canadian animals.

e. Fourth Alternative Measure

59. Canada puts forward a fourth alternative measure: a labeling regime whereby the label would inform consumers as to the state or province from which an animal was born, raised, and slaughtered. Canada puts forward no (or virtually no) evidence to support this alternative, and it is abundantly clear that Canada has not established a *prima facie* case that that this alternative proves that the amended COOL measure is inconsistent with Article 2.2. Canada merely alleges, without support, that the alternative would provide a "greater degree of fulfillment" than the amended COOL measure and would be less trade-restrictive. Importantly, however, it does not appear to the United States that this alternative is any more reasonably available or any less trade-restrictive than the "farm to fork" traceability regime. As such, the United States considers that this alternative does not present an entirely new alternative at all.

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60. Cattle production in the United States is widely dispersed throughout the entire country. However, because it is often less expensive to move animals than feed, the U.S. industry is characterized by a large amount of interstate movement of animals. This is particularly true for cattle, 57 percent of which move interstate, but it is true for hogs as well. As such, the U.S. industry has evolved such that different regions of the country have specialized in certain aspects of livestock production system. As an individual cow moves through its lifecycle it would not be unusual for it to move through multiple states as it goes to different specialized feed lots, etc. Moreover, the overwhelming majority of cattle (85 percent) are sold and resold in local auctions, often several times, where they are "sorted and mixed with calves from other areas before ultimately arriving at pastures or feedlots." This repeated intermingling of cattle from different states between multiple auction houses commonplace within the cattle industry would necessitate that each individual head of cattle be tracked as it goes through the livestock production process. As such, it would appear to the United States that the recordkeeping that would need to be required in any such system would need to track the individual animal, no different from the "farm to fork" traceability system.

61. We do note, however, that U.S. cattle production is in stark contrast to Canadian cattle production, which is highly concentrated in Western Canada, with nearly 86.6 percent of all beef cows within this region. Additionally, the remaining cattle not produced in Western Canada are exceptionally concentrated, with 91 percent of all beef cattle raised in Eastern Canada occurring in the provinces Ontario and Quebec. It does not appear to the United States that there is the same amount of inter-province movement of cattle (or hogs) as there is in the United States.

62. Mexico's "adoption" of this argument was untimely, and inconsistent with paragraph 7 of the Working Procedures of the Panel and Article 12.4 of the DSU.

D. Complainant's Claims Under Article XXIII:(1)(b) of the GATT 1994 Are Outside the Terms of Reference of these Panels and Otherwise Fail

1. NVNI Claims Are Outside the Terms of Reference of These Proceedings

63. Under the plain text of DSU Article 21.5, the terms of reference of a compliance panel do not include a claim that a measure taken to comply causes NVNI. This is because the questions presented are either: (1) whether a measure taken to comply exists (an issue not presented in the current proceeding); or (2) whether a measure taken to comply is inconsistent with a covered agreement. The first question is inapplicable in this case since the United States has taken a measure to comply. The second question by definition concerns the inconsistency of a measure, and therefore excludes a claim of NVNI.

64. Complainants respond that "'consistency' can have a meaning that is broader than a violation or infringement of a covered agreement" or, perhaps even more surprisingly, that a "measure 'taken to comply' that results in the non-violation nullification or impairment of any benefit which accrues to a party under the GATT 1994 is no less *inconsistent* with the GATT 1994 than a measure which results in a violation of one or more provisions." Neither approach can be reconciled with the text of the DSU or with the complainants' own claims.

65. DSU Articles 19.1 and 26.1(b) make clear that if a measure is inconsistent with the covered agreements, then Article 19.1 applies and Article 26.1(b) does not, and the converse is also true. Contrary to what the complainants assert, the term "inconsistent" does not encompass measures that are both consistent and inconsistent with the covered agreements.

66. The NVNI claims of the complainants appear to be claims in the alternative. Essentially, the complainants are claiming that, if the Panels find that the amended COOL measure is not inconsistent with one of the provisions of a covered agreement cited by a complainant in its panel request, then the amended COOL measure nonetheless nullifies or impairs the benefits of Canada or Mexico. However, complainants' own claims demonstrate that their NVNI claims do not involve a "disagreement as to the … consistency with a covered agreement of measures taken to comply." Rather, at the point their NVNI claims would become relevant, there is no longer a disagreement as to consistency, and the issue involves instead the issue of whether, despite the lack of any inconsistency, the amended COOL measure nullifies or impairs benefits. This latter question is not within the terms of reference of Article 21.5 of the DSU.

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2. Complainants' NVNI Claims Otherwise Fail

67. Complainants appear to agree that they need to demonstrate that the amended COOL measure nullifies or impairs benefits accruing to them under the WTO Agreement. However, they fundamentally misunderstand what this demonstration entails. First, they have only generally referred to "tariff concessions" under the GATT 1994 without ever specifying what they are in detail. This general reference is not sufficient to meet the requirement in Article 26.1(a) that "the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement."

68. But even more importantly, the complainants do not explain how the amended COOL measure can nullify or impair any benefits under these unspecified tariff concessions when they concede that currently their trade is governed by, and benefitting from, tariff concessions under the NAFTA. If their trade is not benefitting from WTO tariff concessions, then the benefits under those tariff concessions are being neither nullified nor impaired.

69. Complainants also appear to misunderstand the aspect of an NVNI claim relating to reasonable expectations. Complainants state that they could not have anticipated the "upset of the competitive relationship" or "a change to the labelling regime that is designed and implemented in a manner which results in severe discriminatory treatment and the modification of competitive opportunities in the U.S. market to the detriment of Mexican cattle." In both cases, however, complainants appear to be arguing that they did not anticipate a measure in breach of the covered agreements. This argument does not, however, address *NVNI* claims.

70. Furthermore, the complainants do not address the evidence put forward by the United States that the complainants had a reasonable expectation that the United States could require more information be provided to consumers as to the origin of the meat they purchased.

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ANNEX C

ARGUMENTS OF THIRD PARTIES

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ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil hereby presents its integrated executive summary, where it provides a brief description of the main points it submitted to the Panel in its Third Party Submission and Oral Statement.

(a) The legitimacy of the objective of a technical regulation does not constitute a waiver to illegitimate regulatory discrimination that is detrimental to the conditions of competition of imported products

2. Brazil agrees that in the pursuit of a legitimate objective, adopted technical regulations may have an adverse impact on imports inasmuch as compliance with such regulations is mandatory. Accordingly, it has been clarified that Article 2.1 of the *TBT Agreement* does not prohibit measures that result in a detrimental impact on imports, provided that such impact stems exclusively from a legitimate regulatory distinction.[1] However, in Brazil's understanding, the fact that the objective of the measure is legitimate has no bearing on the determination of the legitimacy of the regulatory distinction under Article 2.1 of the TBT.[2] Rather, the legitimacy and the legality of the distinction itself must be assessed separately.

3. In addition, for the assessment of the consistency of the measure taken to comply with Article 2.1 of the *TBT Agreement*, Brazil recalls the approach taken by the Appellate Body in the original proceeding. While verifying whether a treatment no less favorable is accorded to like imported products, it is relevant to consider the effect of the measure on the competitive opportunities in the market.[3] As Brazil stated in its Third Party Submission, the market conditions prevailing before and after the measure taken to comply can be informative to such assessment.

(b) The assessment on whether a technical regulation is no more trade restrictive than necessary must encompass not only the analysis of the intrinsic features of the measure, but also a comparative analysis of other available substitutable measures.

4. While assessing whether the changes in the COOL measure contributed to restore the aforementioned conditions of competition, the Panel may also look into its effects on international trade, in light of Article 2.2 of the TBT Agreement.

5. As the Appellate Body has already stated, the determination of whether a measure is more restrictive to trade than necessary involves a process of weighting and balancing a series of factors, including the impact of the regulation on imports or exports.[4] In addition, a comparison with reasonably available alternative measures is a conceptual tool for the purpose of ascertaining whether a challenged measure is more trade restrictive than necessary in the light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective.[5]

6. Once a measure is found to genuinely contribute to the fulfilment of its legitimate policy objectives, the analysis should turn to the effects of the measure itself, taking into account the contribution it makes to the objective and the risks that the non-fulfilment of the objective would create. Brazil agrees with the Parties that this assessment cannot be done in abstract; rather, it has to be discerned from the design and operation of the measure itself. This involves necessarily an analysis of ends and means and, from the comparison between ends and means and less trade-restrictive alternatives, what could be considered technically and economically feasible.

[1] US – Clove Cigarettes (Appellate Body Report, para. 174)
[2] EC – Seal Products (Panel Report, para. 7.278-7.278)
[3] *US – COOL* (AB Reports, paragraph 270). Emphasis added.
[4] *Korea – Various Measures on Beef* (AB Report, paragraph 164)
[5] US-Tuna II (Appellate Body Report paragraph 321)

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7. Assuming that the COOL measure, if properly applied, could contribute to the legitimate objective of providing meaningful information to consumers, the focus of the inquiry, in the context of an Article 21.5 panel procedure, should be on whether the changes introduced in the measure by the United States can achieve this very objective in a manner consistent with the DSB recommendations and rulings. The changes must ensure that the same conditions of competition prevail between imported and national products. The degree of trade-restrictiveness of the amended COOL measure may serve as useful guidance to the panel's assessment.

(c) The scope of compliance proceedings includes not only newly adopted measures, but also any unmodified part of the original challenged measure

8. Brazil understands that compliance with DSB's recommendations and rulings must be assessed through the examination of the measures taken to comply broadly understood, i.e. including not only new administrative and legal measures but also omissions and relevant measures in force before the adoption of the report(s) by the DSB. This means that such assessment must encompass the effects of both the amendments and the unaltered parts of the original challenged measure as they operate jointly.

9. Were unaltered parts of the original challenged measure outside the jurisdiction of the compliance panel, this would mean that the responding party would be able to circumvent the DSB's recommendations and rulings by complying with only selected parts of challenged measures, while evading compliance with all the rest, as these would be immune to further challenge.[6]

[6] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 71.

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ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

1. Whether the Amended COOL measure is consistent with Article 2.1 of the TBT Agreement

- Exemptions Granted by the Amended COOL Measure

1. In the original proceeding, the Appellate Body found "the Panel's legal approach to assessing detrimental impact was correct",[1] but the Panel shall not end its analysis under Article 2.1 of the TBT Agreement there, and leave its legal analysis under Article 2.1 incomplete. Instead, "the Panel should have continued its examination and determined whether the circumstances of this case indicate that the detrimental impact stems exclusively from a legitimate regulatory distinction, or whether the COOL measure lacks even-handedness".[2]

2. The Appellate Body further stated that "A regulatory distinction is not designed and applied in an even-handed manner—for example, because it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination—that distinction cannot be considered legitimate and, thus, the detrimental impact will reflect discrimination prohibited under Article 2.1."[3]

3. China understands there are two respects of fact leading to the conclusion of the Appellate Body that regulatory distinctions imposed by the COOL measure are arbitrary and unjustifiable: (1) prescribed labels do not expressly identify specific production steps, in particular for Labels B and C; (2) considerable proportion of beef and pork is exempted from the COOL requirements.

4. As demonstrated by the complaining parties, it seems that the Amended COOL Measure does not address the scope of the extensive exemptions to the COOL measure in any way, the only modification is a slight change to the definition of "retailer" to include any person subject to be licensed as a retailer under the PACA.[4] The US itself does not contend this argument, and the US admits that the Amended COOL measure "makes no change to the scope of the COOL measure".[5]

5. In its first written submission, the US provided three arguments to prove that revising the scope of the COOL measure is not necessary, which China does not agree.

6. Firstly, the US relies on the finding of the Panel that the exemptions that define the scope of the Amended COOL measure were simply "irrelevant" to the detrimental impact analysis.[6]However, the US seems to ignore the fact that the Appellate Body has revised the reasoning of the Panel as to Article 2.1 of the TBT Agreement, and it made extensive findings in terms of the scope of the COOL measure. Contrary to the US's argument, the Appellate Body emphasizes that "this lack of correspondence between the recordkeeping and verification requirements, on the one hand, and the limited consumer information conveyed through the retail labelling requirements and exemptions therefrom, on the other hand, is of central importance to our overall analysis under Article 2.1 of the TBT Agreement".[7]

7. Secondly, the US argues that the challenged measure is not unusual at all – in fact it is firmly in the majority, since even the complaining parties' own COOL measures do have limitations.[8] This logic is problematic. If the US believes that measures of other complaining parties also accorded less favorable treatments to the imported product from the US than those

[1] Appellate Body Report, *US – COOL*, para. 293.
[2] Ibid.
[3] Ibid.
[4] Canada's First Written Submission, *US – COOL (21.5),* para. 69.
[5] US's First Written Submission, *US – COOL (21.5),* para. 87.
[6] US's First Written Submission, *US – COOL (21.5),* para. 88.
[7] Appellate Body Report, *US – COOL*, para. 348.
[8] US's First Written Submission, *US – COOL (21.5),* para. 90.

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domestic products, it is entitled to challenge, as it often did in the past, in the dispute settlement procedure. Nevertheless, the fact that other WTO Members keep similar measures can not be an excuse for the US to adopt measures violating its WTO obligations, no matter to what extent those measures are "similar".

8. Thirdly, the US argues that the statistics provided by the complainants are not correct. As demonstrated by the complaining parties, the Amended COOL Measure provides information to consumers on only 30% of the U.S. beef supply and on 11% of this pork supply – figures that include ground beef and pork.[9] According to the US, the statistics are not very accurate and miss some amounts which have been included in the 2013 Final Rule. However, even using the figures provided by the US, there are still over 50% percent of the beef supply that are not covered by the COOL measure. China is of the view that, although necessary exemption could be allowed in order to reflect the complexity of economy, significant percentage of exemption would likely show that the objective of a technical regulation is arbitrary and not even-handed. And what is important is that the exemption has been found by the Appellate Body to constitute a very important element demonstrating that the legal disctiction is arbitrary and not even-handed, but it remains in the place.

9. China notes the US repeatedly argued in the second submission that the design and operation of the three exemptions does not have any nexus to any detrimental impact and the exemptions themselves are perfectly even-handed.

10. However, China is not persuaded by the US's argument. The asymmetry between the coverage of the Amended COOL Measure and the burdens it imposes on all imports was an important evidence for the Appellate Body to conclude that the COOL Measure is not even-handed. The US tends to argue that only those exemptions that directly discriminate the imported products need to be revised in the implementation stage. But the Appellate Body has made it clear: "In assessing even-handedness, a panel must 'carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue'." In this regard, we agree with Canada that those exemptions are elements of the original COOL measure, and form part of the measure's "overall architecture" that the Appellate Body considered in its analysis. Therefore, China is of the view that, without taking any measure to change the scope and remove or minimize the exemptions of the COOL measure, it will be very difficult to imagine how the Amended COOL Measure may cure the inconsistency found by the Panel and Appellate Body in particular.

2. Whether the Amended COOL measure is consistent with Article 2.2 of the TBT Agreement

- Whether the "two-step necessity" test under Article 2.2 of the TBT Agreement alleged by Mexico is correct

11. In its first written submission, Mexico submits in its explanation of Article 2.2 that the Appellate Body effectively established a two-step test to determine whether a measure is more trade-restrictive than necessary. According to Mexico, "The first step starts with the statement '[a] panel should begin by considering factors that include'" [10]: "(i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure".[11] According to Mexico, the first step "requires a weighing and balancing of relevant factors in respect of the challenged measure itself"[12]. And according to Mexcio, there is also a second step, which "starts with the statement '[i]n most cases, a comparison of the challenged measure and possible alternative measures should be undertaken'".[13] According to Mexico, this step "involves a weighing and balancing analysis similar to that under the first step, except that it is undertaken in respect of a

[9] US's First Written Submission, *US – COOL (21.5),* para. 92.
[10] Mexico's First Written Submission, *US – COOL (21.5),* para. 153,
[11] Appellate Body Reports, *US – COOL*, para. 378 (quoting Appellate Body Report, US – Tuna (II) Mexico, para. 322)
[12] Mexico's First Written Submission, *US – COOL (21.5),* para. 153,
[13] Ibid.

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comparison between the challenged measure and each reasonably available less trade-restrictive alternative measure."[14]

12. Mexico also submits that "when weighed and balanced in a holistic manner, it is clear from these factors that the trade-restrictiveness of the Amended COOL Measure is disproportionate to the risks that non-fulfilment would create."[15] Mexico believes "the fact that the Amended COOL Measure might make some contribution to the objective does not outweigh the other relevant factors."[16] Accordingly, Mexico thinks "the trade-restrictiveness of the Amended COOL Measure is unnecessary and it is inconsistent with Article 2.2 of the TBT Agreement."[17]

13. China is of the view that the comparison of the challenged measure and possible alternative measures is a integrated part of analysis of whether the technical regulation is more trade restrictive than necessary to fulfill its legitimate objective instead of a standalone analysis due to the following reasons.

14. Firstly, the phrase "comparison of the challenged measure and possible alternative measures" is not the language appearing in the text of Article 2.2 of the TBT Agreement, instead, it is developed by the Panel and Appellate Body in the interpretation of the second sentence of Article 2.2. Therefore, it can only be part of the test instead of an addition to the interpretation of the second sentence.

15. Secondly, the language of Article 2.2 of the TBT Agreement suggests that the technical regulations have inherent characteristics of trade restrictiveness. Therefore, what is important is not whether the trade restiveness of a measure is necessary, but whether it exceeds the extent to fulfil a legitimate objective. Without weighting the factors contributing to the legitimate objective and trade-restiveness, it will be hard to come to the conclusion. In most cases, it could be very difficult to quantify the extent of contribution to the legitimate objective and trade-restiveness, and therefore, it is useful to examine the availability of alternative measures.

16. Thirdly, the Panel report on EC-Seal Products also confirms that the Mexico' interpretation is not appropriate. The Panel states "an examination of the obligations under Article 2.2 requires a relational analysis of all of the following elements: (a) trade-restrictiveness of the EU Seal Regime; (b) degree of the measure's contribution to the identified objective; and (c) availability of alternative measures."[18] Therefore, the discussion on alternative measure should be part of analysis if a measure is more trade restrictive than necessary to fulfil a legitimate objective.

17. China notes that Mexico has retreated from its previous position in its second written submission, and Mexico stated "even if the Panel decides that the Amended COOL Measure is inconsistent with Article 2.2 on the basis of the relational weighing and balancing test discussed above, it should make a comparative analysis of challenged measure and each alternative measure to ensure that the record is complete in the event of a review by the Appellate Body". Therefore, China is of the view that the discussion on alternative measure should be part of analysis if a measure is more trade restrictive than necessary to fulfill a legitimate objective and that "there are not two steps, but one." And the "two-step" approach indeed has risk of lessening the burden of proof and loosening the conditions under Article 2.2.

18. To sum up, China believes that the unchanged significant exemptions under the Amended COOL Measure sheds lights on the analysis of consistency of the measure with Article 2.1 of the TBT Agreement, and that the "two-step necessity" test is not a correct approach for Article 2.2 test.

[14] Ibid.
[15] Mexico's First Written Submission, *US – COOL (21.5),* para. 178,
[16] Ibid.
[17] Ibid.
[18] Panel report, *EC-Seal Products*, para 7.467.

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ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF COLOMBIA

I. INTRODUCTION

1. Colombia, as a Member of the WTO, had a systemic interest in the application of Article 2.2 of the TBT Agreement. In its intervention Colombia wanted to reiterate what was expressed in previous opportunities during the present dispute, in the sense that an appropriate interpretation of this provision is essential to avoid unnecessary barriers to trade.

II. INTERPRETATION OF ARTICLE 2.2 OF THE TBT

2. First, Colombia considered important to highlight that the debate in the present issue was not whether the objective pursued by the amended COOL measure was legitimate or not. In fact, previous Panels and the Appellate Body have found that consumer's information is a legitimate objective under Article 2 of the TBT Agreement[1]. Colombia's submission related to the standard that the Panel must apply in order to determine if the adopted measure is in accordance with Article 2.2 of the TBT. As Colombia stated in its submission, Article 2.2 "more restrictive than necessary" standard might imply either a complex or a simple approach to the standard on necessity.

3. Colombia considered that the construction of a proper standard for assessing whether a technical regulation "is more trade-restrictive than necessary to achieve the contribution it makes to the legitimate objective", seems extremely relevant in the process of designing, adopting and assessing a TBT measure. Therefore, Colombia respectfully suggested the Panel in this case to take into account the fold arguments in order to clarify the "more trade-restrictive than necessary" standard of article 2.2 of the TBT.

4. However, in Colombia's opinion a Member could also proceed in a simpler way, proving necessity by showing that a trade restrictive measure, as such, was either a proportional or a proper response to achieve a legitimate policy objective. Thus, in this vein, the definition of proportional also means that a measure corresponds, matches or is equivalent in size or amount to something else; in this case, to achieve a legitimate objective.[2] According to Colombia, it is a matter of reasonability used by several courts around the World, and by the WTO legal texts.[3] In the end, the fact that a measure is proportional to achieve a legitimate objective means that such a measure is reasonable, and not more trade restrictive than necessary to achieve such a legitimate objective.

5. In other words, rather than demanding a unique assessment involving, among other elements, the pondering of a measure's "degree of contribution of the TBT to the legitimate objective", article 2.2 allows Members to construe the "more trade restrictive than necessary" standard under two scopes: a complex approach or a more simple one, that allow to analyze whether the measure was, at the moment of its adoption, either an appropriate, a proportional or a reasonable policy response to achieve a legitimate objective.

6. As it has been pointed out by some authors, "proportionality is a trade-off-device which helps resolve conflicts between different norms, principles, and values. It is also a determining factor for the role of courts in reviewing administrative or legislative measures. Proportionality thus provides a legal standard against which individual or state measures can be reviewed. From a more procedural perspective, proportionality is closely related to the issues of intensity of review-

[1] AB Report, United States – certain country of origin labelling (cool) requirements. WT/DS384/AB/R WT/DS386/AB/R, adopted 29 June 2012.

[2] According to the Oxford Dictionary definition.

[3] To elaborate on this concept's application, Colombia suggests to consult Max Andenas and Stefan Zleptnig, Proportionality: Wto Law: In Comparative Perspective Texas International Law Journal - Vol. 42 Num. 3, July 2007

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the level of scrutiny exercised by judges-and whether there should be a full review on the merits or a more deferential standard of judicial review."[4]

III. THE PANEL'S OBJECTIVE ASSESSMENT PERSUANT TO ARTICLE 21.5

7. Colombia recalled the Appellate Body's previous statements when it acknowledged, "that Members enjoy the right to determine the legitimate policies they want to pursue".[5] Therefore "WTO Members have a large measure of autonomy to determine their own policies (…). Colombia highlighted that so far as it concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements."[6]

8. It was Colombia's position, that the Panel and the Appellate Body should show some kind of comity when assessing a Member's public policy, and its trade restrictiveness. This applies for a technical regulation, and the "more trade-restrictive than necessary" standard "to achieve the contribution it makes to the legitimate objective". Additionally, this "degree of contribution" standard seems to be more like an ex-post review based not in the data or information available at the moment that the measure was issued, but with the information available at the date of its review. Hence, in Colombia's opinion that is not the appropriate comity that both, Panels and the Appellate Body, should show to a Member's policy under the DSU.

9. According to the Black's Law Dictionary, comity stands for "courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will". It was Colombia's opinion that the WTO provides Members with leeway to adopt technical measures in order to achieve an objective. Colombia was referring to this meaning of comity. There must be a balance in the Panel's analysis between the regulatory objective of a measure and the conformity of such measure to WTO provisions. The purpose of Article 2.2 of the TBT is to allow a Member certain discretion with regard to its regulatory powers, always bearing in mind that these regulatory powers cannot amount to be unnecessary barriers to trade.

10. Pursuant to Article 11 of the DSU the Panel has to conduct an objective assessment of the facts of the case, of the adopted measure, and of the relevant provisions under the Covered Agreements. When considering the facts of the case the Panel does not have to do a de novo examination, a complete repetition of the Member's fact finding, nor it has to have total deference towards the Member's fact submission. The Panel, complying with the mandate of standard review encompassed in Article 11 has to analyse all the relevant facts in order to determine if the adopted measure is in compliance with the obligations under the WTO.

11. Bearing this in mind, Colombia considered that a Panel is not allowed to conduct an ex-post review of the adopted measure in every case. This would be contrary, not only to the comity that the Panel should show to the Member's regulatory powers, but also to Article 3.2 of the DSU in as much as it would not provide the system with security and predictability. If the Panel were to conduct its review of the facts with an ex-post perspective, depending on the factual context at the time of the decision, then every measure adopted by a Member would be subject to a continuous scrutiny by the DSB, depriving the system of security and predictability.

12. Therefore, in Colombia's opinion a Panel should keep a delicate balance when assessing a measure. In principle and based in articles 11 and 3.2 of the DSU, a Panel should start considering the factual elements that an authority of a Member had available when it was assessing the chance of imposing a particular measure. Then, according to Colombia, a Panel should assess the effects of a measure as such; and just in case this information is not enough in order to conduct an objective assessment, a Panel may start examining criteria or factual findings that came after the measure was discussed at the DSB on an ex post basis.

[4] Supra Max Adenas and Stefan Zleptnig, p. 4

[5] Report of the Panel. United States – Measures Concerning the Importation, Marketing and Sale of Tuna And Tuna Product. WT/DS381/R adopted15 September 2011. Para. 7.441

[6] AB. US – Gasoline, p. 28; Panel Report, US – Shrimp, para. 7.26,
Fn 629; GATT Panel Report, Japan – Alcoholic Beverages I, para. 5.13

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13. Colombia considered that this case rose important questions on the interpretation and application of Article 2.2 of the TBT. While not taking a final position on the merits of the case, Colombia requested the Panel to carefully review the scope of the claims in light of the observations made throughout this submission.

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ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. **Third party rights**. Since the Panel modified the standard working procedures in Appendix 3 DSU to permit the shifting of fact, evidence and argument to the second phase, it must adopt re-balancing measures preserving (not enhancing) third party rights, as mandated in Article 10 DSU, which the Panel must not diminish. The Panel does not require the parties' agreement. This is required by the multilateral nature of dispute settlement and the principles of due process and consent. It is particularly important in balancing cases, such as the present one; and where a defence has a significant role to play. It is particularly appropriate in the case of a public hearing. Thus, third parties must have the right to: be present throughout the hearing; comment at the invitation of the Panel; receive the questions and responses thereto; and respond to written questions.

2. **Relationship between original and compliance proceedings**. There is no formal rule of precedent in WTO law, although original proceedings and compliance proceedings are part of a continuous process, and compliance panels are expected to be guided by their prior findings. There is also no rule of *res judicata*, although compliance panels may refer to prior findings as *part* of their objective assessment.

3. **Scope of these compliance proceedings**. The amended COOL measure is a declared measure taken to comply within the scope of these compliance proceedings. It can only meaningfully and reasonably be considered as a whole. The facts of *EC – Bed Linen (Article 21.5 – India)* were different and the reasoning in that case does not apply.

4. **Order of analysis**. The Panel should begin with the more specific agreement: the TBT Agreement. It should follow the order of analysis in the original proceedings: Article 2.1 then Article 2.2.

5. **Article IX GATT and Agreement on Rules of Origin**. The Panel should not make any findings regarding Article IX GATT or the Agreement on Rules of Origin, which are not before it, and should ensure that nothing in its report prejudges the interpretation or application of those provisions in another case.

6. **Article 2.1 TBT**. Several provisions of the covered agreements seek a balance between a desire to avoid unnecessary obstacles to international trade and a recognition of a Member's right to regulate in an *even-handed* manner in pursuit of a legitimate objective. The second TBT recital confirms that the GATT and TBT overlap in scope and have similar objectives; that the TBT expands on pre-existing GATT disciplines; and that the two should be interpreted in a coherent and consistent manner. The national treatment obligations of Articles III:4 and 2.1 are built around the same core terms. The balance set out in the TBT preamble, and in particular in the fifth and sixth recitals, is not in principle different from the balance set out in the GATT, where the national treatment obligation in Article III:4 is qualified by the general exceptions provision of Article XX. The fifth and sixth recitals are reflected, *inter alia*, in Article 2.1 TBT. Article 2.2 also informs contextually Article 2.1. Thus, in cases involving an alleged *de facto* breach, that same balance is to be found in Article 2.1 TBT itself.

7. Determining the scope of the imported *product* and the scope of the domestic *product* to be compared is about the nature and extent of any *competitive relationship* between the two things being considered as potentially part of the *product.* Any distortive effects that the measure itself might have are to be discounted. Regulatory distinctions are only relevant to the extent that they find expression in the relevant competitive relationship, such as through consumer preferences. Once the imported and domestic products have been properly identified, Article 2.1 TBT requires a panel to compare the treatment accorded under the technical regulation to *all like products imported* from the complaining Member (that is, the "group" or "universe" of imported products) with that accorded to *all like domestic products* (that is, the "group" or "universe" of domestic like products). There must be a *genuine* relationship between the measure and an adverse impact on competitive opportunities for imported products – conditions resulting *solely* from private actions

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cannot ground a breach. Measures that create incentives may breach. Asymmetrical impact resulting from the lower market share of imports is an exacerbating element, but is not sufficient. However, the national treatment obligation of Article 2.1 does not require Members to accord no less favourable treatment to each and every imported product as compared to each and every domestic like product. Regulatory distinctions that stem *exclusively* from the pursuit of legitimate objectives are permissible.

8. In assessing whether or not there is less favourable treatment the existence of a detrimental *impact* on competitive opportunities for the group of imported vis-à-vis the group of domestic like products is relevant but *not dispositive*. A panel must further analyze whether the detrimental impact on imports stems *exclusively* from a *legitimate* regulatory distinction rather than reflecting discrimination. In making this determination, a panel must carefully scrutinize the *particular circumstances* of the case, that is, the design, architecture, revealing structure, operation and application of the measure, and in particular whether that measure is *even-handed*. There are no facts that are *per se* excluded, it being for the litigant asserting such facts to persuade the adjudicator of their relevance. The burden of proof rests in principle with the party asserting the affirmative.

9. In this case, in assessing whether or not there is a detrimental impact, the relevant comparison is between the situation before adoption of the original COOL measure and the present situation. All regulatory change may involve costs that, in the short term, will inevitably be unequally distributed amongst existing firms and Members as a function of their past investment decisions. This does not mean the measure breaches. What is important is that, in the long term, all firms and Members can adjust to the new regulatory regime and enjoy equal competitive opportunities. The mere fact that unit regulatory compliance costs may be higher for firms or Members with lower production volumes or market share does not establish breach. Firms and Members make their own choices about economies of scale. Propensity to breach WTO law is not a function of the relative size of Members or their firms or their production volumes or market shares. A measure that regulates a downstream product that has effects on upstream products, or *vice versa*, justifies an assessment that encompasses all such aspects.

10. The root of the problem in this case is that the production chain currently employed by Canadian and Mexican firms is partly *transnational*, which, as a matter of fact, necessitates more specific record keeping, segregation, and therefore higher costs. In this respect, it is helpful to consider the situation in which birth, raising and slaughter occur only in one Member. Does this scenario, which does not involve any transnational element in the production or processing chain, reveal *de facto* discrimination? It is very difficult to see any. Furthermore, it is very difficult to see that, in this scenario, the exemptions for restaurants, small retailers and ground meat would alter that conclusion. It is also helpful to think about the case from the perspective of the MFN principle. If the transnational element is determinative in concluding that there is a *de facto* breach of the national treatment obligation, what would this imply with respect to possible *de facto* breaches of the MFN rule? Would it not mean that, if there are two third countries, one of which maintains the chain of production or processing entirely within its own territory, and the second of which does not – but rather carries out some part of it in a further third country – there would also be a breach of the MFN rule? This seems to imply that a regulating Member might find it *impossible* to regulate because, whatever origin neutral rule is put in place, there would be *de facto* discrimination.

11. **Article 2.2 TBT Agreement**. The *legitimate objective* of the measure is to provide consumers with information about origin and points-of-production. There may be many reasons why consumers might want such information. Some consumers might want to boost trade or development. Some might have their own opinions about issues they perceive to be associated with a particular product or production process and wish to express them when making choices about what they consume. There is always a concern that such labels may facilitate irrational origin-based discrimination. In an increasingly integrated global economy it may become increasingly difficult to discern a rational link between origin described in terms of a particular WTO Member and a particular issue. Nevertheless, the objective is legitimate. Once origin labelling is accepted as a legitimate objective, that same approach has to be adopted for all WTO Members, and it is problematic to go on to question the motives of particular consumers. In a very real sense they *are* the market. Even if some irrational origin-based discrimination persists or re-emerges, it is simply part of the task of firms to overcome it through information and marketing. The same reasoning generally applies, by extension, to other types of labels. Food labelling is a particular

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issue. We are speaking of what people choose to eat, for themselves and their children. Information and evidence about what labels consumers want may be relevant to an assessment under Article 2.2 TBT, but not determinative. WTO Member governments also have the right to determine what their legitimate regulatory objectives are.

12. The measure is *significantly trade-restrictive*, such that a consideration of the other elements of Article 2.2 TBT is necessary. The trade-restriction must be *significant.* It is not possible nor permissible to put a precise number on what this means: it is something that can only be considered on a case-by-case basis. This is but one part of a more complex mechanism, so precise quantification may be unnecessary. But this requirement of significance implies there is a category of regulations that do not significantly restrict trade and do not therefore breach Article 2.2 TBT. To be meaningful, this category must be reasonably populated. Furthermore, this significance requirement, as well the requirement to compare the trade-restrictiveness of alternative measures, implies some degree of precision about what the concept of trade-restriction means, and how it is to be generally calibrated, if not precisely measured.

13. The concept of trade-restrictiveness encompasses what effects a measure has had, and may have in the *future*. However, it may be difficult to appreciate the degree of trade-restrictiveness on a hypothetical basis. Modelling may be used, but may be expensive, data may be difficult to obtain, and the conclusion may be excessively dependent on the assumptions. In a hypothetical, attempts at precise measurement may be misplaced. At some point mooted trade-restrictiveness may be too remote to establish breach. Under the TBT Agreement, regulations may be consistent when adopted but become inconsistent later (and *vice versa*). Excessively speculative cases can be deferred. In the short term, all regulatory change can impose one-off costs and so appear to restrict trade. However, in the long term, once firms adapt, some regulatory change may increase trade, or at least be fully absorbed by traders. Thus, one should not be too quick to jump to the conclusion that a new regulation restricts trade just because there is an initial shock. A good place to look for guidance about the meaning of trade-restrictiveness could be arbitration panel reports. However, one should be cautious about transposing excessively. Article 3.8 of the DSU presumes nullification or impairment; and no special interest is required to bring a case. In short, assessing trade-restrictiveness should be grounded in reasonable, balanced and qualitative considerations of good sense, accessible to all Members.

14. The concept of trade-restrictiveness involves focussing on the impact of a particular measure on imports. If a measure has no impact on imports, it cannot be said to be trade-restrictive. An asymmetrical distribution of costs may be significant, but rather something to analyse under the heading of whether or not there is a *de facto* breach of the national treatment obligation in Article 2.1. Regulation is rarely an easy task, especially in a complex and more integrated global economy, and often necessitates the striking of reasonable compromises. Pointing to specific inconsistencies at the margins may not always reveal much about the overall balance of a particular regulation. It is legitimate to regulate for some of the people. A US consumer concerned about such issues can choose. They can go to a large supermarket and read the labels; and at the same time choose to avoid restaurants, processed foods and small retailers. This does not make the measure WTO inconsistent. The same is true with respect to ground meat: the measure simply allows concerned US consumers to avoid it.

15. With respect to Canada and Mexico's argument that the measure causes a reduction in the price of their imported products, they appear to be treating the concepts of trade restriction and nullification or impairment as being the same thing. We do not think that this is correct. However, what they appear to be arguing is that if they do raise their prices (in order to account for their increased costs) then, all other things being equal, they will lose volume, and that is the required restriction of trade, albeit an anticipated one rather than an actual one. Perhaps they are reticent about making this clear because they are concerned about a counter-argument from the US to the effect that what they would experience would be caused by their own actions and not by the measure at issue. They should have no concern. If the measure is a genuine and substantial cause of the trade restriction, that will be sufficient. There can be more than one genuine and substantial cause. Thus, a hypothetical price rise would not break the causal link for the purposes of their claims under Articles 2.1 and 2.2. In effect, Canada and Mexico appear to be mitigating the trade loss (in terms of volume) that would otherwise accrue to them by reducing their prices and thus absorbing the additional costs, at least temporarily. Mitigation of loss is foreseen in Article 39 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, which provides that account shall be taken of the contribution to the injury by wilful or negligent action or

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omission of the injured States. WTO Members mitigating trade loss should not, for that reason, be precluded from pursuing a claim pursuant to Articles 2.1 or 2.2 TBT.

16. It is not for WTO adjudicators to rank in general and abstract terms the importance of legitimate regulatory objectives, which may overlap and which are rarely comparable. In WTO law, the fixing of the ALOP is strictly reserved to the regulating Member. It is not for WTO adjudicators to weigh the relative values of different WTO Members. Different WTO Members have different values, sometimes in counterpoint to each other. Attempting to harmonise or rank them is no task for a judge; and it is not a task that has been conferred on WTO adjudicators. Regulatory competition promotes efficiency and makes a positive contribution to the objectives of the WTO. Regulatory autonomy is as much a pillar of the WTO as MFN and national treatment. The WTO has no mandate to apply a pure proportionality test. If a particular measure is put through the disciplines of the TBT Agreement, and no breach is found, but a WTO judge simply comes to a point at which what appears to that judge to be a very large trade restriction is being justified by what seems to that judge to be a matter of very small concern, the WTO judge must defer to the national measure. It is not for WTO judges to value legitimate objectives: that is reserved to WTO Members.

17. Canada and Mexico read Article 2.2 as if it refers to the *consequences* that non-fulfilment would create. They have in mind the proposition that the *consequence* of someone being killed, for example, is graver than the *consequence* of someone eating a steak without having accurate information about the place of birth, raising and slaughter of the animal from which the steak is derived. On this basis, they imagine that the alternative measure could make a lesser contribution to the legitimate objective, because the consequence of non-fulfilment is, in relative terms, not so serious. However, Article 2.2 does not refer to the consequences of non-fulfilment. It refers to the *risks* non-fulfilment would create. This does not imply any diminishing of the ALOP. It merely directs the enquiry towards the question of whether or not there is a rational relationship between the various parts of the measure or alternative measure.

18. Although the list in the final sentence of Article 2.2 is open, the three listed items are all *technical* in nature: none of them empower a panel to *question the ALOP*. If this provision would be calling upon panels to provide a general ranking of the relative *political values* of WTO Members, then one would expect *other kinds* of references, such as, for example, to the UN Charter or other international agreements. These are referenced in many other provisions, but not here. In short, a panel has full authority to consider whether or not the relationships between the various moving parts of the measure or alternative measure are rational, and this is the additional element of weighing and balancing – not a re-setting of the ALOP.

19. In the context of Article 2.2 TBT, there is no direct relationship between the degree of asymmetry in the distribution of regulatory costs between domestic and foreign firms and the legitimacy of a particular regulatory distinction or objective. That is because (1) Article 2.2 is about necessity (not discrimination) and (2) as a matter of logic, there is no necessary connection between the two concepts. Thus, regulatory costs could be distributed in a perfectly equal way both in the short and long term; but the regulatory distinction or objective might nevertheless not be legitimate. If the measure significantly restricts trade (constituting an unnecessary obstacle to international trade) and the regulatory distinction or objective is not legitimate, Article 2.2 will be breached. Conversely, regulatory costs could be distributed in a perfectly unequal way both in the short term and in the long term; but the regulatory distinction or objective might nevertheless be legitimate. Although the TBT Agreement classically applies to regulations of general application to all WTO Members, its application is not precluded in the case of measures relating to goods originating from a particular WTO Member. Just as under the SPS Agreement, in some instances this might be justified or even necessary. The unequal distribution is something that may be taken into account in the overall assessment, but it does not necessarily result in a re-opening of the question of whether or not the objective is legitimate.

20. Similarly, in the context of Article 2.1 TBT, there is no direct relationship between the degree of asymmetry in the distribution of regulatory costs between domestic and foreign firms and the legitimacy of a particular regulatory distinction or objective, because, as a matter of logic, there is no necessary connection between the two concepts. In the context of a *de facto* breach of the national treatment obligation there must be a negative impact on competitive conditions or opportunities for foreign products, at least in the short term. What constitutes the short term is something to be considered on a case-by-case basis. In this particular case, to the extent that the

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alternatives (the importing Members conduct all operations on their own territories or establish their own slaughterhouses in the US) may not be reasonably available, there would appear to be a long term impact on market structures that constitutes a disincentive to the market integration pursued by the WTO Agreement.

21. The mechanism by which the volume of imports are reduced or suppressed compared to domestic sales volume, on an actual or anticipated basis, classically involves an asymmetrical incidence of costs. That is because, as their costs increase, and importing firms raise prices relative to domestic producers, in order to remain profitable, all other things being equal, they will lose volume. Nevertheless, as in the case of Article 2.2, this does not necessarily mean that the regulatory distinction or objective is not legitimate. Conversely, if there is no asymmetry in the distribution of regulatory costs in the short or long term then it is difficult to see in what sense there may be a negative impact on competitive conditions or opportunities for foreign products. In such a case, there is no breach of Article 2.1, irrespective of the regulatory distinction or objective being pursued.

22. The differences between claims of *de facto* breach of Article 2.1 and breach of Article 2.2 are that (1) Article 2.1 focusses on discrimination whilst Article 2.2 focusses on necessity (2) Article 2.1 requires a particular impact on the competitive conditions or opportunities for imports whilst Article 2.2 requires only a significant restriction of trade and (3) a particular issue may appear as a fact in the Article 2.1 analysis (thus just one fact to be taken into account with all the other facts) but as part of the operation of a particular legal rule in the Article 2.2 analysis (for example, if a measure that significantly restricts trade makes no contribution to its objective then Article 2.2 is breached – but this would be only one fact to consider with other facts in the context of Article 2.1).

23. The *first alternative* would involve a particular origin rule: substantial transformation. This is problematic. As the EU has explained above, the Agreement on Rules of Origin leaves this matter open and to the discretion of WTO Members. If this would be the only alternative, then, by a process of elimination, the US would eventually be compelled to adopt it in order to comply. The EU considers that the TBT Agreement, which does not even refer expressly to origin, was not adopted in order to effectively compel WTO Members to do something that is expressly reserved as a matter for their discretion, pursuant to the terms of the Agreement on Rules of Origin.

24. The *second alternative* would certainly be less restrictive of trade. Slaughterhouses could, in effect, label all meat as originating in Canada and the US, as long as they had both types of animal within their inventory in the last 60 days. However, it seems equally clear that this measure would make a lesser contribution to the objective. For this reason, the EU considers that the second alternative measure is insufficient for the purposes of establishing a breach of Article 2.2 TBT.

25. The *third alternative* would remove the asymmetry complained of by Canada and Mexico, would be more trade-restrictive in the sense that it would increase costs for imports. If it would be the only viable alternative, that would seem to imply that the only way that the US could comply would be by adopting a heavier regulatory burden. The EU considers that it is not the task of the WTO to impose such regulatory decisions on WTO Members. In our view, by definition, the alternative measure should be one that imposes equivalent or fewer costs. In so far as Canada and Mexico are concerned about asymmetry, that mater can be addressed under Article 2.1. Thus, the third alternative measure is insufficient for the purposes of establishing a breach of Article 2.2 TBT.

26. **Article III:4 GATT**. The *scope* and *content* of Article III:4 of the GATT and the scope of Article 2.1 TBT differ. However, the basic concept of a *de facto* breach of a national treatment obligation is the same whether one is in Article III:4 of the GATT or Article 2.1 TBT. It includes a consideration of not only the impact of the measure on competitive opportunities for imports, but also a consideration of whether the origin neutral objective or regulatory distinction is legitimate and even-handed, rather than *de facto* discriminatory. If one is going to accept the concept of a *de facto* breach, then the necessary *quid pro quo* is that one at least considers the reasons for the origin neutral regulatory distinction.

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ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA[*]

1. India thanks the Panel for this opportunity to present its views in the present proceedings. India has systemic interest with respect to certain issues raised in this Article 21.5 proceeding. India does not take any position on the factual aspects of this dispute but limits its statement only on the issue of the scope of Article 21.5 proceedings.

2. In the present proceeding, the United States has argued that the scope of a Panel request in an Article 21.5 proceeding is only limited to the measures which has been taken to comply with the ruling and recommendations of the DSB and has contended that:

   a. GATT Article XXIII: 1(b) claim is outside the Panel's terms of reference as Article 21.5 proceeding is limited to the issue of determining the existence of a measure taken to comply or the consistency with a covered agreement of a measure taken to comply whereas the claim under GATT Article XXIII:1(b) involves a situation other than the question of consistency of a measure with a covered agreement.

   b. The claim with respect to trace back and labeling rule for ground beef is outside the terms of reference as these two measures were not found to be inconsistent. Thus Article 21.5 proceeding cannot be used to raise claims related to an unchanged aspect of the original measure.

   c. Lastly the United States has also argued that the complainants in the 21.5 proceedings are asserting claims with respect to issues already considered in the original proceedings. This as per the United States is contrary to DSU which does not allow the complaining parties to use compliance proceedings to re raise claims and arguments which were rejected during the original proceedings.

3. Mr. Chairman, Article 21.5 proceedings are initiated for the purpose of assessing whether the respondent country has complied with the ruling and recommendation of the DSB. However while making this assessment, India believes that Article 21.5 proceedings should not be limited to evaluating the implementing measure only but instead should be extended to a full consideration of the factual and legal background against which the implementing measure is taken.[1]This broad approach would ensure that a respondent country would not be able to circumvent the ruling and recommendation of the DSB by complying with the same through one measure, while, at the same time, negating compliance through another.[2]

4. This position of India is consistent with the Appellate Body report in *Canada — Aircraft (Article 21.5 — Brazil)*[3] wherein it concluded that a review by the Panel pursuant to Article 21.5 of the DSU would not be limited to examining the measures 'taken to comply'. Further the Appellate Body in *US Shrimp* (21.5) observed that *"when the issue concerns the consistency of a new measure "taken to comply", the task of a panel in a matter referred to it by the DSB for an Article 21.5 proceeding is to consider that new measure in its totality. The fulfilment of this task requires that a panel consider both the measure itself and the measure's application"*[4]*.* Therefore India believes that the scope of a Panel request in an Article 21.5 proceeding includes not only the measure which has been taken to comply with the ruling and recommendation of the DSB but also its application.

[*] India's oral statement serves as the integrated executive summary.
[1] WT/DS257/AB/RW, paragraph 67-69. Also see Appellate Body report in *US OCTG SSR* (21.5), WT/DS268/AB/RW, paragraph 147
[2] WT/DS257/AB/RW, paragraph 71
[3] WT/DS70/AB/RW, paragraph 40-42
[4] *US Shrimp* (21.5), WT/DS58/AB/RW, paragraph 87

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5. India therefore submits that pursuant to Article 11 of the DSU, the Panel in an Article 21.5 proceeding is obligated to objectively assess not only whether the respondent party has complied with the recommendation of the DSB but also evaluate the new measure[5], if any, taken by the respondent in its entirety. This position of India is consistent with the objective behind Article 21.5 proceeding as highlighted by the Appellate Body in *US — Softwood Lumber IV (Article 21.5)*.[6]

6. India would now address the issue of Article XXIII:1(b) of GATT and its inclusion in an Article 21.5 proceedings. The Appellate Body observed in *US-Shrimp* that a Panel in an Article 21.5 proceeding is required to consider both the measure itself and measure's application.[7] Therefore if the application of the new measure implemented pursuant to the ruling and recommendation of the DSB leads to nullification or impairment as provided under Article XXIII:1(b) of GATT, India believes that the same can be pursued by the Panel in this Article 21.5 proceeding. This position of India is also supported by the Appellate Body report in *EC- Asbestos*[8] where it observed that *Article XXIII:1(b) of GATT sets forth a separate cause of action for a claim that through the application of a measure, a member has nullified or impaired benefits accruing to another member, whether or not that measure conflicts with the provision of GATT 1994.* However whether the application of the new implemented measure leads to nullification or impairment is a factual exercise which has to be undertaken by the Panel.

7. With respect to the issue concerning inclusion of trace back and labeling rule for ground beef within the Panel's terms of reference, Mexico has responded and argued that the complainant is not challenging the rule with respect to ground beef and the rule with respect to trace back but are using the same as an argument to compare with the amended rule for muscle cut of beef and to establish that the amended COOL measure is a disguised restriction on the international trade respectively.

8. In this respect, India believes that as long as the complainants in the present proceeding are not challenging the aspect of the original measure which was not found to be inconsistent but are simply using the same as an argument to establish their claim, the same should be within the Panel's terms of reference.

9. With respect to the issue of re raising claims in 21.5 proceedings which were rejected in the original proceedings, India would draw the attention of the Panel that the United States is ambiguous in its argument as it has not explicitly identified all such claims.

10. India would therefore respectfully request the Panel to identify the claims which has been re raised by the complainants in the present proceedings but which were rejected by the Panel in the original proceedings. If the same relates to the claims of the complainants under Articles III:4 and XXIII:1(b) of the GATT 1994 which the original Panel did not address on account of judicial economy, India believes that the same can be addressed in a Article 21.5 proceeding.

11. This position of India is supported by the Appellate Body ruling in EC-Bed Linen (21.5)[9] wherein it was observed that in a situation where a panel, in declining to rule on a certain claim, has provided only a partial resolution of the matter at issue, a complainant should not be held responsible for the panel's false exercise of judicial economy, such that a complainant would not be prevented from raising the claim in a subsequent proceeding.

Therefore India respectfully requests the Panel to take into consideration the above jurisprudence as outlined above while assessing the issue of judicial economy, assuming that this was the issue the United States was referring to with respect to the issue of re raising claims in Article 21.5 proceedings which were rejected in the original proceedings.

[5] *US Shrimp* (21.5), WT/DS58/AB/RW, paragraph 86-87
[6] WT/DS257/AB/RW, paragraph 71
[7] *US Shrimp* (21.5), WT/DS58/AB/RW, paragraph 87
[8] WT/DS135/AB/R, paragraph 185
[9] WT/DS141/AB/RW, footnote 115 to para 96. Also see paragraph 14 of the second written submission by Mexico.

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India thanks the Panel for the opportunity to present its views and to participate in these proceedings.

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ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

Third Party Submission

I. Article 2.1 of the TBT Agreement

1. Japan wishes to address one issue relating to Article 2.1, namely, the relevance of the exemptions under the Amended COOL measure for purposes of assessing whether there is "treatment no less favourable."

2. Canada and Mexico explain that the Amended COOL measure made two key changes to the original measure: (i) the Amended COOL measure requires that retail labels for muscle cut covered commodities list the country or countries in which the animal from which the muscle cut was derived was born, raised, and slaughtered; and, (ii) it eliminated the commingling flexibility, *i.e.*, the allowance to use the mixed origin label on muscle cuts produced the same production day.[1]

3. It would appear that the first change is intended to address part of the disconnect that the Appellate Body found between the "large amount of information … tracked and transmitted by upstream producers for purposes of providing consumers with information on origin" and the "small amount of this information … actually communicated to consumers in an understandable manner, if it is communicated at all."[2] However, Japan notes that the Appellate Body also found it difficult to reconcile that – one the one hand – information regarding the origin of all livestock had to be identified, tracked, and transmitted through the chain of production by upstream producers, while – on the other hand – a considerable proportion of the beef and pork derived from that livestock would ultimately be exempt from the COOL requirements, and therefore carry no COOL label at all.[3] Canada and Mexico underscore the fact that these exemptions remain unchanged.[4]

4. Japan submits that the Amended COOL measure's exemptions are relevant to the analysis of "treatment no less favourable" under Article 2.1, even though they are not, on their own, dispositive of the question of whether the Amended COOL measure is "even-handed". The exemptions may undermine the proposition that the detrimental impact caused by the recordkeeping and verification requirements of the Amended COOL measure stems exclusively from a legitimate regulatory distinction because the exemptions exclude "a considerable portion"[5] of meat products from the need to provide origin information to consumers. Japan encourages the Panel to carefully scrutinize the rationale of the exemptions provided under the Amended COOL measure in light of, among others, the measure's objective of providing origin information to consumers, and to determine whether the exemptions are consistent with the requirement that any detrimental impact stem exclusively from a legitimate regulatory distinction.

5. In the original proceedings, the United States maintained that WTO Members should be allowed to weigh costs and benefits in the design of their technical regulations, and explained that the United States had decided to adopt certain exemptions and flexibilities to reduce the costs of compliance for industry, taking into account the views of interested parties.[6] Japan accepts that when a government designs a technical regulation, it is reasonable for that government to try to reduce the compliance costs for market participants by allowing for reasonable exemptions and flexibilities. This is a consideration that a government can take into account, along with other relevant factors such as the diminished level of fulfillment of the objective pursued as a result of the exemptions and flexibilities, as well as consumer preferences. However, in Japan's view, if a technical regulation modifies the conditions of competition in the market to the detriment of

[1] Canada's first written submission, para. 15; Mexico's first written submission, para. 44.
[2] Appellate Body Report, *US – COOL*, para. 347.
[3] Appellate Body Report, *US – COOL*, para. 344.
[4] Canada's first written submission, para.18; Mexico's first written submission, para.46.
[5] Appellate Body Report, *US – COOL*, para. 344, quoting Panel Report, *US – COOL*, para. 7.417.
[6] United States' second written submission to the original Panel, paras. 149, 153-154; see also Panel Report, *US – COOL*, para. 7.711.

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imported livestock, the government adopting it would be required to take into account the burdens of compliance to be borne by imported products as well as those by domestic products in adopting the technical regulation, including exemptions of the kind maintained in the Amended COOL measure.

6. Japan observes that the Amended COOL measure does not seem to address the disproportionate burdens of compliance that fall on the imported products. Moreover, although the United States indicated in the original proceedings that the flexibility regarding the use of labels B and C had been added in response to requests from Canada and its producer groups,[7] this flexibility has been abolished in the Amended COOL measure. This Panel appears to be confronted with a technical regulation that further increases the costs of compliance, thus exacerbating a situation in which compliance costs were already borne disproportionately by the imported product. The Panel must "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue."[8]

II. Article 2.2 of the TBT Agreement

7. In its Article 2.2 arguments, Mexico argues that, in these compliance proceedings, a comparison with reasonably available alternative measures is not required given the circumstances of the Amended COOL measure.[9] Mexico finds support for its view in the Appellate Body Report in *US – Tuna II (Mexico)*.[10]

8. Japan notes that the two instances mentioned by the Appellate Body in *US – Tuna II (Mexico)* are extreme scenarios where the challenged measure is either not trade restrictive or makes no contribution at all to achieving the relevant legitimate objective. Japan further observes that, in the original proceedings, the Appellate Body recognized that the Panel's findings, and undisputed facts on the record, indicated that the labeling requirements under the COOL measure did make some contribution to the objective of providing consumer information on origin.[11] In the absence of evidence demonstrating that such contribution has been eliminated completely under the Amended COOL measure, an assessment of Article 2.2 should include a comparison of the Amended COOL measure and possible alternative measures.

9. Canada argues that a reasonably available alternative measure need not achieve "precisely the same degree of contribution to the achievement of the objective as that of the challenged measure in all cases."[12] Mexico makes a similar point.[13]

10. Japan recalls the Appellate Body's statement that "the importance of a panel identifying with sufficient clarity and consistency the objective or objectives pursued by a Member through a technical regulation cannot be overemphasized."[14] Japan agrees with this statement, and further observes that the greater the precision with which a panel identifies the objective pursued by a government, the more accurately the panel can identify what would constitute an equivalent contribution by a reasonably available alternative measure. If the objective is not defined with sufficient precision, the panel may have difficulties deciding whether an alternative measure can fulfill the objective at a level that is acceptable to the government adopting the technical regulation.

11. In addition, Japan notes that the Appellate Body has said, in the context of evaluating "necessity" under Article XX of the GATT 1994 and Article XIV of the GATS, that a measure qualifies as an alternative measure if it preserves for the responding Member the right to achieve its desired level of protection with respect to objective pursued.[15] The Appellate Body's

[7] United States' second written submission to the original Panel, para.137.
[8] Appellate Body Report, *US – COOL*, para. 271, quoting Appellate Body Report, *US – Clove Cigarettes*, para. 182.
[9] Mexico's first written submission, para. 155.
[10] Appellate Body Report, *US – Tuna II (Mexico)*, footnote 647 to para. 322 (emphasis omitted).
[11] Appellate Body Report, *US – COOL*, para. 476.
[12] Canada's first written submission, para. 118 (emphasis omitted).
[13] Mexico's first written submission, para. 162.
[14] Appellate Body Report, *US – COOL*, para. 387.
[15] *See* Appellate Body Report, *US – Brazil Retreated Tyres*, para. 156 and Appellate Body Report, *US – Gambling*, para. 308.

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interpretation of the necessity test in these similar contexts would seem to require a stricter comparison than is suggested by Canada and Mexico, between the degree of contribution achieved by the challenged measure and the degree achieved by any alternatives raised by a complaining party.

12. Mexico finds support for the more flexible comparison that it advocates in the language in Article 2.2, calling for consideration of "the risks non-fulfilment would create." The Appellate Body, however, has explained that "the risks non-fulfilment would create" is a "further element of weighing and balancing" in the analysis under Article 2.2.[16] In other words, "the risks non-fulfilment would create" is a factor, among others, to be considered in weighing and balancing under Article 2.2 and does not provide a basis for a more flexible comparison between the challenged measure and any reasonably available alternatives. Therefore, a lesser degree of contribution by the alternative measure cannot be justified in the light of the risks non-fulfilment would create, as Mexico contends.

Third Party Oral Statement

I. "Legitimate Regulatory Distinction" Test under Article 2.1 of the TBT Agreement

1. With respect to Article 2.1 of the TBT Agreement, the United States does not appear to contest that the Amended COOL measure has a detrimental impact on the imported products. Instead, the contestation centers on the second prong of the test articulated by the Appellate Body previously,[17] that is, whether the detrimental impact stems from a legitimate regulatory distinction. In the earlier TBT disputes, the Appellate Body initially referred to this test as involving an inquiry about even-handedness. In a subsequent case, the Appellate Body referred to the measure being "designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination" as an example of a situation that would not be considered to be even-handed.[18] Japan further notes that, in applying the even-handedness test, the Appellate Body has also focused on the "calibration" of a measure as well as the proportionality of certain requirements. Japan recalls that "even-handedness" is not treaty text and is, in fact, twice removed from it. The concept is an elaboration or clarification of the second prong of the test articulated by the Appellate Body. It is a useful concept and a good illustration of the type of discrimination that is prohibited by Article 2.1 of the TBT Agreement. However, Japan would caution against relying too rigidly on this term.

2. In Japan's view, the assessment of whether the detrimental impact stems exclusively from a legitimate regulatory distinction broadly encompasses consideration of two elements. The first element relates to the legitimacy of the rationale or objective that the regulatory distinction pursues. The second element looks more broadly at the design or manner in which the measure is applied in the light of the rationale or objective claimed to be pursued. Whether the examination of these two elements is part of a single, holistic assessment of "even-handedness" (or legitimacy) or separate inquiries, in our view, both elements must be properly considered.

3. As regards the first element, Japan does not understand the Appellate Body to have suggested that Article 2.1 allows all possible regulatory distinctions. Rather, the regulatory distinctions must further one of the policy objectives recognized in the TBT Agreement. This should not be a superficial inquiry that is satisfied merely because the measure has some connection to the objective pursued. A panel must confirm that the regulatory distinction drawn by the regulation in question can indeed further the objectives allegedly pursued by it.

4. In this case, the Panel must scrutinize what information, which is not already provided voluntarily, the United States considers that consumers need in order to avoid confusion or deception when shopping. Where certain information would be unnecessary from a consumer point of view, the disclosure requirement merely imposes additional costs on the covered products without providing any value or utility. In addition, the Panel must scrutinize the relationship between the measure and the objective it pursues. Under the particular facts of this case, this

[16] Appellate Body Report, *US – Tuna (Mexico)*, para. 321; see also Appellate Body Report, *US – COOL*, para. 377.

[17] Appellate Body Report, *US – Tuna II (Mexico)*, para. 215 (referring to Appellate Body Report, *US – Clove Cigarettes*, paras. 180 and 215).

[18] Appellate Body Report, *US – COOL*, para. 271.

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inquiry must examine the manner in which the information is provided to consumers and whether the measure in fact provides consumers with the information that they purportedly require.

5. With respect to the second element, the Appellate Body has stated that, in assessing even-handedness, a panel must "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue".[19] We recall that, in this case, the United States has questioned whether the exemptions are relevant for the assessment of less favourable treatment. Japan does not see any reason to exclude *ex ante* any exemptions from the assessment of less favourable treatment. To fully understand the scope of a measure and how it operates, it is often necessary to consider any and all exemptions.

6. Japan understands that the particular exemptions at issue exclude certain meat products from the scope of the Amended COOL measure. In so doing, the exemptions appear to effectively create an additional product category of origin "unknown" or "unidentified" under the Amended COOL measure. The existence of this category covering a large proportion of meat products may cast doubt on the need for the information required under the four types of labels of the Amended COOL measure because meat products falling under that additional category do not provide origin information to consumers. Also, by allowing certain meat products to be put in the additional category, the exemptions appear to preclude them from being classified in any of the four categories on the basis of the relevant regulatory distinction, i.e. the three production steps and the countries in which such steps take place. Under these circumstances, Japan wonders whether the regulatory distinction can be said to be calibrated or tailored to the basis or rationale of the distinction.

7. Therefore, Japan respectfully requests the Panel to take into account the above considerations to examine whether the relevant regulatory distinction under the Amended COOL measure is legitimate or designed or applied in an even-handed manner, so as to determine whether the detrimental impact on imported livestock stems exclusively from a legitimate regulatory distinction.

II. The Relationship Between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994

8. The parties would appear to hold different views as to whether the phrase "treatment no less favourable" should be interpreted in the same manner under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994. Another question raised in these proceedings is whether the second prong of the *de facto* discrimination test that the Appellate Body developed in the context of Article 2.1 of the TBT Agreement[20] applies to the assessment of *de facto* discrimination claims under Article III:4 of the GATT 1994.

9. At the outset, Japan recalls that the non-discrimination rule under Article 2.1 of the TBT Agreement applies specifically "in respect of technical regulations". Thus the application of the second prong of the test developed by the Appellate Body is unique to technical regulations. In contrast, Article III:4 of the GATT 1994 addresses a broad and diverse range of measures, including technical regulations. Thus, it would arguably be prudent to exercise a degree of caution when drawing guidance from the interpretation developed in the context of Article 2.1, even though we also recognize that Article 2.1 provides context to the interpretation of Article III:4 "in respect of technical regulations".

10. Japan also notes that the Appellate Body developed the second prong of the test at least partly based on the "absence among the provisions of the TBT Agreement of a general exception provision similar to Article XX of the GATT 1994"[21] and the structural parallel between the balance set out in the TBT Agreement, on the one hand, and "the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX."[22] Japan further notes that Article 2.2 also contains certain elements set

[19] Appellate Body Report, *US – Clove Cigarettes*, para. 182.

[20] Appellate Body Report, *US – Tuna II (Mexico)*, para. 215 (*referring to* Appellate Body Report, *US – Clove Cigarettes*, paras. 180 and 215).

[21] Appellate Body Report, *US – Clove Cigarettes*, para.88.

[22] Appellate Body Report, *US – Clove Cigarettes*, para.96. See also Appellate Body Report, *US – Clove Cigarettes*, para.101.

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out in Article XX of the GATT 1994. Therefore, although a technical regulation could be found to be consistent with Article 2.1 of the TBT Agreement and yet inconsistent with Article III:4 of the GATT 1994, under the Appellate Body's theory, this "inconsistency" could be resolved by the application of Article XX of the GATT 1994.

11. That being said, it is theoretically possible that some technical regulations may not find protection under Article XX. In such a situation, Japan notes that the TBT Agreement does not contain the same helpful guidance found in Article 2.4 of the SPS Agreement.

12. To address such interpretive discrepancies, some Members suggest to import the interpretation of Article 2.1 of the TBT Agreement directly to Article III:4 of the GATT 1994, thus requiring the assessment of a *de facto* claim of less favourable treatment under Article III:4 to follow a two-step analysis similar to the one developed under Article 2.1 of the TBT Agreement. This approach has its attraction. After all, both Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement address "treatment no less favourable". Moreover, technical regulations in principle are not only regulated under Article 2.1 of the TBT Agreement, but also fall among the types of measures regulated by Article III:4 of the GATT 1994.

13. The approach that Japan has described, however, is not without difficulties. For one thing, there would appear to be some tension between this approach and the approach followed by the Appellate Body in earlier cases. Indeed, this would not be the first time that consideration of the objectives pursued by the challenged measure is sought to be introduced into Article III:4, but to date the Appellate Body apparently has been reluctant to accept such considerations, even though the Appellate Body has taken such considerations into account when the objectives have a bearing under one of the criteria of the "like products" analysis, as was the case in *EC – Asbestos*.[23] Japan also recalls the Appellate Body's statement that, with respect to regulatory distinctions based on a regulatory objective, such "distinctions among products that have been found to be like are better drawn when considering subsequently, whether less favourable treatment has been accorded".[24] The other difficulty stems from Article XX itself. If some flexibility were introduced into Article III:4, questions arise as to whether this would make Article XX meaningless. These questions should be answered taking into consideration the fact that certain restrictions on exports or imports of, for example, exhaustible natural resources or non-automatic import licensing requirements, which are found to be inconsistent with GATT Article XI:1 can be justified only under Article XX. Japan also notes that under the chapeau of Article XX, the issue is whether "the reasons given for this discrimination bear [] rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective", as found by the Appellate Body in *Brazil – Retreaded Tyres*.[25]

14. The Panel must carefully address these interpretive difficulties in resolving the issue of the consistent interpretation of TBT Article 2.1 and GATT Article III:4 (in light of GATT Article XX(b)) for technical regulations raised by the parties.

III. Article 2.2 of the TBT Agreement

15. Finally, Japan wishes to address the following two points regarding the analysis under Article 2.2: (i) the scope of the concept of "trade restrictiveness", and (ii) the role of "reasonably available alternative measures" in the Article 2.2 analysis.

16. Japan notes that despite the apparent differences in the way in which the parties define "trade-restrictiveness", they do not essentially disagree on the factors to examine in the "trade-restrictiveness" analysis. Canada recalls that WTO jurisprudence interpreted the term "trade-restrictive" to mean "having a limiting effect on trade" and argues that a measure that affects the conditions of competition to the detriment of imported livestock is trade-restrictive.[26] Mexico takes a similar position. The United States interprets the term "trade restrictive" as referring to something that has a limiting effect on trade, that is, limits market access.[27] Although the United States argues that the term "trade restrictiveness" refers to the restricting of trade flows,

[23] Appellate Body Report, *EC – Asbestos*, paras. 113-116. *See also* Appellate Body Report, *US – Clove Cigarettes*, paras.117-119.

[24] Appellate Body Report, *US – Clove Cigarettes*, paras.116.

[25] Appellate Body Report, *Brazil – Tyres*, para.227.

[26] Second Written Submission of Canada, para. 71.

[27] Second Written Submission of the United States of America, para. 107.

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and not to the concept of discrimination,[28] it does not explicitly exclude qualitative impacts on trade from being taken into account, along with quantitative ones, in the analysis of "trade restrictiveness."[29]

17. Japan does not see a basis for excluding discrimination from the scope of the analysis of trade restrictiveness under Article 2.2 of the TBT Agreement. The text of Article 2.2 prohibits WTO Members from creating "unnecessary obstacles to international trade". In Japan's view, this language suggests a broad scope of application and it supports the conclusion that Article 2.2 imposes a prohibition on a range of activities that are broader than the direct denial of market access.

18. The United States highlights the separate obligations set out by Articles 2.1 and 2.2 and on this basis argues that the term "trade restrictiveness" does not refer to the concept of discrimination. Japan notes, in this regard, that Article 2.1 addresses whether a technical regulation has a detrimental impact on imported products, whereas Article 2.2 examines the degree of impact that it has on trade.

19. In its third party submission, the European Union raises the question of whether the concept of trade-restrictiveness is merely concerned with the *absolute* impact of a regulation on imports, or also with its *relative* impact on imported and domestic products.[30] Japan observes that none of the parties, not even the United States as the respondent, seems to confine "a limiting effect on trade" to the absolute impact of a regulation on imports.

20. Japan turns now to the role of "reasonably available alternative measures" in the Article 2.2. Japan recalls that except for the two extreme instances mentioned by the Appellate Body in *US—Tuna II (Mexico)* where the challenged measure is either not trade restrictive or makes no contribution at all to achieving the relevant legitimate objective, a comparison between the trade-restrictiveness of the technical regulation at issue and that of an alternative measures is required under Article 2.2.

21. The comparison with alternative measures is a fundamental element of the analysis of trade-restrictiveness under Article 2.2. The objective of this comparison is to determine whether there is an alternative measure that has a lower impact on trade, or is more neutral as regards the competitive opportunities of the imported products in the relevant market, than the challenged measure. In this assessment, the removal of disproportionate compliance costs on imported products would certainly have the effect of facilitating trade. In other circumstances, depending on the absolute and relative costs that it imposes on imported products, a non-discriminatory measure can have a more limiting effect on trade than a discriminatory measure. Japan considers that this lends further support to the conclusion that the term "trade restrictive" addresses a broad range of impacts on trade including, but not limited to, the modification in the competitive conditions of imported products.

22. With regard to the allocation of the burden of proof under Article 2.2, Mexico contends that a complaining party's burden is to simply "identify possible alternatives", and that the complaining party does not have the burden of presenting evidence and arguments sufficient to demonstrate that the alternative measure is less trade restrictive, makes an equivalent contribution to the relevant objective pursued and is reasonably available.[31] As explained by the Appellate Body, and as argued in this case by the United States in detail,[32] Japan believes that a complaining party bears the burden of presenting a *prima facie* case that the challenged measure is inconsistent with Article 2.2 by establishing that there is an alternative measure reasonably available and that this alternative measure is less trade restrictive and makes an equivalent contribution to the relevant objective pursued.

[28] First Written Submission of United States of America, para. 153.
[29] See e.g., Second Written Submission of Canada, para. 71.
[30] European Union Third-Party Written Submission, para. 110.
[31] Second Written Submission of the United Mexican States, paras. 114-119.
[32] Second Written Submission of the United States of America, paras. 114-119.

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ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE REPUBLIC OF KOREA*

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views to the Panel as a third party. The decision of this Panel will provide important guidelines to the WTO Members in making their policy decisions and formulating their respective government programs in a manner consistent with the relevant rules of the WTO.

2. While the parties to the dispute and third parties raise several important issues, Korea would like to briefly focus on certain systemic issues. First, Korea would like to share its views about what kind of legal standard must be established with respect to the Article 21.5 panel's terms of reference. Second, Korea would like to comment on whether the trace-back system suggested by the complaints can be a reasonably available alternative measure consistent with Article 2.2 of the TBT Agreement.

COMPLIANCE PANEL SHOULD BEAR IN MIND 'TRUE FINALITY' OF A DISPUTE IN DETERMINING ITS TERMS OF REFERENCE

3. To begin with, Korea observes that compliance panel's jurisdiction has become an important systemic issue in the recent Article 21.5 proceedings. As the number of compliance disputes increases,[1] the scope of compliance panel's terms of reference has also been in dispute as a major systemic issue.

4. Korea has maintained that a compliance panel must possess a relatively broad authority to identify measures taken to comply. The Appellate Body in several Article 21.5 disputes has ruled that measures taken to comply are not confined to the declared measures by the implementing Member.[2] The Appellate Body in *Mexico – Corn Syrup (Article 21.5)* has particularly ruled that panels have a duty to examine issues of a "fundamental nature," issues that go to the root of their jurisdiction on their own motion even if the parties to the dispute remain silent on those issues.[3]

5. Because the WTO jurisprudence recognizes a compliance panel's broad authority to identify measures to comply, Korea believes that certain guiding principle to determine whether a measure is within a compliance panel's jurisdiction would be necessary. As a guiding principle to determine compliance panel's jurisdiction, Korea submits that the concept of 'true finality' may assist a compliance panel in delineating its jurisdiction. As we understand, 'true finality' of a dispute could be achieved when a compliance panel resolves all the disagreements between the parties to the dispute with respect to measures taken to comply. As a practical matter, true finality of a dispute should envisage a situation where the exporters of the aggrieved party restore their competitiveness which they had enjoyed before the WTO inconsistent measures imposed by the Member concerned.

6. It should be noted, however, that the concept of 'true finality' should not be interpreted to include all the claims raised by the complaining party. As Korea has pointed out, if a compliance panel's terms of reference are overly broad, it may open a possibility for the parties to the dispute to re-litigate the issues already lost in the prior proceedings. Therefore, compliance panel must strike a balance between the broad authority and the concerns on re-litigation.

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* The Republic of Korea requested that its oral statement serve as the integrated executive summary.

[1] As of 16 February 2014, 48 complaints requesting Article 21.5 panel have been filed in the DSB since 1995. In the same period, 110 disputes have been appealed. About half of the DSB decisions have not been effectively resolved, resulting in compliance disputes. *See* the statistics in www.worldtradelaw.net. (last visited on 16 February 2014).

[2] *E.g.,* Appellate Body Reports, *US-Softwood Lumber IV (Article 21.5 – Canada)*; *US-Zeroing (Article 21.5 – EC)*.

[3] Appellate Body Report, *Mexico-Corn Syrup (Article 21.5)*, para. 36, quoted in *US-Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.35.

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7. In this respect, Korea would like to briefly comment on certain aspects of the principle of *res judicata*, although the principle is known to be inapplicable to international law. The principle of *res judicata* precludes parties from re-litigating claims that have already been finally resolved in a prior proceeding before a competent tribunal. Of course, the narrow scope of the WTO panel's terms of reference must be distinguished from the more flexible municipal court proceedings where the principle of *res judiciata* applies. Ordinarily, in the municipal court proceedings, each party can amend its complaint as necessary with permission by the court. As we know, this kind of flexibility is not allowed in the WTO dispute settlement procedures. Nonetheless, systemic interest in achieving finality of disputes still exists in the WTO dispute settlement procedures.

8. For example, the Panel in *India-Autos* examined certain aspect of *res judicata*. In that dispute, India argued that certain import licensing requirements that were the subject of the dispute had already been addressed by a prior WTO proceeding, and therefore should not be considered by the panel in the subsequent proceeding. Although the Panel did not directly touched upon the issue of *res judicata*, it appeared to take the position that *res judicata* would apply to the issues that were actually litigated and decided in the prior WTO dispute.[4]

PANEL SHOULD EXAMINE WHETHER THE POLICY OBJECTIVE OF THE TRACE-BACK SYSTEM WOULD BE DIFFERENT FROM THE POLICY OBJECTIVE THAT THE COOL REQUIREMENTS PURSUE

9. One of the issues in this compliance proceeding is whether trace-back system suggested by the complaints as a reasonably available alternative measure is congruent with the object and purpose under Article 2.2 of the TBT Agreement. It seems to be agreed among the parties to this dispute that the trace-back system will apply to both domestic and imported product in a non-discriminatory manner. However, the parties disagree on the question of whether the trace-back system requiring more burden on the farms and meat producers is permissible as a reasonably available alternative measure under Article 2.2 of the TBT Agreement.

10. To Korea's understanding, the ordinary meaning of trade-restrictiveness would be that the flow of goods and services between national borders is constrained. Considering the additional costs and administrative burden incurred by the trace-back system, one would tend to conclude that the alternative measure would constrain the flow of the goods in dispute. Therefore, without legitimate policy objective justifying the additional burden, the trace-back system would not seem to be a reasonably available alternative measure.

11. In this dispute, the objective of the COOL requirements is clear: that is, to provide consumers of certain designated products with information about country of origin in order to enhance the consumers' right to know. Clearly, the trace-back system seems to meet this policy objective. However, a question arises as to reasonableness of the measure. In other words, is the trace-back system reasonably available alternative measure to substitute for the current COOL requirement?

12. To Korea's understanding, there exist somewhat different policy objectives between the COOL requirements and the trace-back system. Normally, a trace-back system is known to be adopted to ensure animal health and food safety. That being said, the policy objective of the trace-back system would be surveillance rather than consumers' right to know. Therefore, this Panel should examine whether the degree of information required in the trace-back system is appropriate and necessary to fulfill the policy objective, contemplated in the COOL requirements. If the trade-back system incurring additional costs and administrative burden unnecessarily requires more information than the policy objective of the COOL requirements pursues, Korea considers that the trace-back system should not be regarded as a *reasonably* available alternative measure.

13. This concludes Korea's oral statement. Again, Korea appreciates this opportunity to present its view and would be happy to take questions you might have.

[4] Panel Report, *India-Measures Affecting the Automotive Sector*, paras. 7.62-66.

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ANNEX C-8

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NEW ZEALAND

I. INTRODUCTION

1. New Zealand's participation as a Third Party in this dispute reflects both its systemic legal issues arising from the amended country of origin labelling measure and its trade interest in the United States beef market.

II. THE DISPUTE SETTLEMENT UNDERSTANDING

2. New Zealand notes that the United States' amended Country of Origin Labeling Measure[1] (amended COOL measure) was subject to a six month "education and outreach" grace period in which it was legally in force, but was not fully enforced to allow retailers and suppliers transition to the new rule.[2] Article 21.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides that prompt compliance with the recommendations and rulings of the Dispute Settlement Body is essential in the effective resolution of disputes. If compliance were achieved once a Member formally changed the law on its books, even where the Member has stated its intention not to fully implement it until a later date, relief for Members suffering adverse effects from a non-compliant measure would be deferred until this later date. This would have systemic implications for the dispute settlement process. New Zealand approves of the approach taken in previous disputes where the appropriateness and length of a grace period was considered in a determination as to the "reasonable period of time" for compliance under Article 21.3(c) of the DSU.[3]

III. THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

A. ARTICLE 2.1: THE FRAMEWORK TO ASSESS LEGITIMATE REGULATORY DISTINCTIONS

3. The Appellate Body has stated that a technical regulation that detrimentally impacts on imported products compared to like domestic products will nevertheless be consistent with Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) if this impact stems from a legitimate regulatory distinction.[4] Jurisprudence further clarifies that a regulatory distinction that is not designed in an even-handed manner will not be legitimate.[5] A regulatory distinction will not be even-handed if it is designed or applied in a manner that "constitutes a means of arbitrary or unjustifiable discrimination".[6]

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[1] As set out in §1638 of the *Agricultural Marketing Act of 1946* (7 U.S.C. § 1638 (2012)) and the COOL regulations (i.e. *the Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng and Macadamia Nuts*, 74 Fed. Reg, 2658 (15 January 2009) as modified by *the Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng and Macadamia Nuts*, 78 Fed. Reg, 31,367 (24 May 2013).

[2] Mexico First Written Submission, 31 October 2013 (Mexico FWS), para. 51.

[3] See Award of the Arbitrator, Korea – Taxes on Alcoholic Beverages (Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes), WT/DS75/16 and WT/DS84/14, 4 June 1999, para. 47 where the arbitrator noted that a thirty day grace period was required for the enforcement of certain measures under Korean law and included this additional period after the promulgation of the amendments to the legislation as part of the reasonable period of time.

[4] Appellate Body Reports, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, para. 181 (*US – Clove Cigarettes*); *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* WT/DS381/AB/R, adopted 13 June 2012, para 215 (*US – Tuna II (Mexico)*); *United States – Certain Country of Origin Labelling (COOL) Requirements,* WT/DS384/AB/R /WT/DS386/AB/R, adopted 23 July 2012 (*US – COOL)*, para. 271.

[5] Appellate Body Reports, *US – Clove Cigarettes*, para. 182 and *US – COOL*, para. 271.

[6] Appellate Body Report, *US – COOL*, para. 271.

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4. The recently published panel report in *EC – Seal Products* may provide a useful framework for the Panel to consider in assessing the exceptions and flexibilities in the amended COOL measure.[7] The Panel's approach in *EC – Seal Products* involves consideration of three questions: First, is the regulatory distinction rationally connected to the objective of the overarching measure? Second, if not, is there any cause or rationale that can justify the distinction (i.e., "explain the existence of the distinction") despite the absence of the connection to the objective of the overarching measure, taking into account the particular circumstances of the instant dispute? Third, is the distinction "designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination" such that it lacks "even-handedness"?[8]

5. If this analysis concludes that individual regulatory distinctions are even-handed, New Zealand submits that a Panel should also step back to consider the measure as a whole in determining whether there is less favourable treatment. This additional step would prevent Members from expressly designing measures with even-handed regulatory distinctions that, when combined, nevertheless have an overall protectionist effect. While individual distinctions may be even-handed, the number and/or nature of the distinctions may still accord less favourable treatment to like imported products.

B. ARTICLE 2.2: DETERMINING WHETHER A MEASURE IS MORE TRADE-RESTRICTIVE THAN NECESSARY

(i) It is not necessary to add the relative importance of the common interests or values as a separate factor to the Appellate Body's test

6. The Appellate Body has set out a test for assessing whether a technical regulation is "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement, which involves consideration of three matters: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure.[9]

7. Mexico has suggested that "the relative importance of the common interests or values furthered by the challenged measure" should be added as an additional factor in the Article 2.2 necessity test.[10] While the importance of the common interests or values at stake is an important element under Article 2.2, this is already considered (albeit indirectly) in the assessment of the "nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the objective". To include the importance of the objective as a separate factor could cause confusion, and may give the importance of the objective (or the lack of importance) undue emphasis in the overall weighing and balancing process.

8. New Zealand would be concerned if this increased emphasis undermined the rights of WTO Members to decide which legitimate policy objectives they wish to pursue, and the levels at which they wish to pursue them.[11] Establishing the *relative* importance of the objective as a factor in its own right would lead panels to difficult assessments of the hierarchy of legitimate objectives. New Zealand considers that, beyond objectives such as the protection of human health that are universally recognised as being of utmost importance, different Members will place importance on different objectives based on current circumstances and their own subjective values and priorities, all of which may change over time. New Zealand is therefore wary of any attempts to categorise or rank the importance of legitimate objectives in advance, and in isolation from the measure and the Member under consideration.

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[7] Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R WT/DS401/R and Add. 1, circulated to WTO Members 25 November 2013 (appeal in progress), para. 7.259.

[8] Panel Report, *EC – Seal Products*, para. 7.259.

[9] Appellate Body Report, *US – Tuna II (Mexico),* para. 322.

[10] Mexico FWS, paras. 156 - 157.

[11] As recognised in Article 2.2 and the sixth recital to the preamble of the TBT Agreement.

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(ii) There must be a balancing and weighing in the consideration of alternative measures

9. The Appellate Body in *US – Tuna II (Mexico)* found that the text of Article 2.2 imports an element of "weighing and balancing" into the analysis of whether a technical regulation is more trade restrictive than necessary by requiring the risks non-fulfilment of the objective would create to be taken into account.[12] This process will generally involve a comparative analysis of the challenged measure against reasonably available alternatives.

10. This analysis requires the Panel to identify the legitimate objective of the challenged measure in order to assess the contribution it makes to that objective and to assess the risks that non-fulfilment of that objective would create. The proper identification of the legitimate objective is therefore fundamentally important to identify these comparison points to evaluate against proposed alternatives. A legitimate objective described in an artificially narrow manner may prevent the formulation of reasonably available alternatives.

11. The parties differ as to the comparative contribution that an alternative measure is required to make to the achievement of the legitimate objective. New Zealand's view is that the fact that an alternative measure makes a lesser contribution to the legitimate objective is a highly relevant, but not determinative, factor in this weighing and balancing process. The extent of this lesser contribution should be balanced against the risks that non-fulfilment of the objective would create and the trade-restrictiveness of the measure. For instance, an alternative measure that makes only a slightly lesser contribution to the legitimate objective, but is considerably less trade restrictive, *may* demonstrate that a challenged measure is more trade restrictive than necessary if the risks that non-fulfilment of the objective would create are not particularly grave. However, New Zealand expects that an alternative measure that makes a lesser contribution to the legitimate objective will only very rarely demonstrate an inconsistency with Article 2.2.

12. In regard to possible alternatives, New Zealand notes Mexico's and Canada's proposed first alternative measure that includes a mandatory COOL requirement based on substantial transformation, complemented by a voluntary COOL scheme that provides information on where the animal was born, raised and slaughtered.[13] New Zealand considers that voluntary COOL may be an alternative measure where there is no health or safety objective behind the regulation. As noted by Mexico[14] and Canada,[15] voluntary COOL can provide the same information to the consumer if there is consumer demand for such information. Voluntary COOL allows the design and operation of a labelling system to be developed in response to supply and demand needs. Well-designed voluntary COOL can make an equivalent (or even better) contribution to the objective of providing consumers with information as to origin than a mandatory COOL regime that is peppered with exceptions.

IV. THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

13. The complainants and respondent differ as to the correct interpretation of the term "treatment no less favourable" in Article III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) as compared to the interpretation of the same term in Article 2.1 of the TBT Agreement. The Appellate Body has found that Article III:4 of the GATT 1994 provides relevant context for interpreting the term "treatment no less favourable in Article 2.1 of the TBT Agreement,[16] given the provisions are "built around the same core terms, namely 'like products' and 'treatment no less favourable'".[17]

14. However, the legal standards for the national treatment obligations are not identical. Article III:4 of the GATT 1994 prohibits Members from modifying the conditions of competition in the marketplace to the detriment of the group of imported products vis-à-vis the group of

[12] Appellate Body Report, *US – Tuna II (Mexico)*, para. 321.

[13] Mexico FWS, paras. 182 – 191; Canada First Written Submission, 31 October 2013 (Canada FWS), paras. 156 – 163.

[14] Mexico FWS, para. 185.

[15] Canada FWS, para. 158.

[16] Appellate Body Reports, *US – Clove Cigarettes*, paras. 100 and 180; *US – Tuna II (Mexico)*, para. 214; *US – COOL*, para. 269.

[17] Appellate Body Report, *US – Clove Cigarettes*, para. 100.

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domestic products.[18] In contrast, as noted above at paragraph 3, the Appellate Body has consistently maintained that the "treatment no less favourable" requirement in Article 2.1 of the TBT Agreement does not prohibit "detrimental impact on imports that stems exclusively from a legitimate regulatory distinction".[19] This additional element in Article 2.1 reflects the context in which the term "treatment no less favourable" is used, particularly the second, fifth and sixth recitals of the preamble, the text of Article 2.2, the definition of "technical regulation",[20] and the lack of a general exceptions clause in the TBT Agreement.[21] The United States submits[22] that analysis under Article III:4 requires an assessment of whether distinctions can be explained by factors or circumstances unrelated to the origin of the imported product on the basis of the Appellate Body reports in *Dominican Republic – Import and Sale of Cigarettes*[23] and *EC – Asbestos.*[24] New Zealand notes that the Appellate Body in *US – Clove Cigarettes* specifically found that *Dominican Republic – Import and Sale of Cigarettes* is not authority for the proposition that panels should inquire further into whether the detrimental effect is unrelated to the foreign origin of the product in an Article III:4 analysis.[25]

15. The jurisprudence therefore provides that the analysis under Article III:4 of the GATT 1994 focuses on the modification of the conditions of competition in the marketplace.[26] However, New Zealand acknowledges the concern that this legal analysis could result in a technical regulation being found consistent with the national treatment obligation in Article 2.1 of the TBT Agreement (because the detrimental impact stems exclusively from a legitimate regulatory distinction) but nevertheless inconsistent with Article III:4 of the GATT 1994 because the reason for the distinction does not fall within the general exceptions in Article XX of the GATT 1994. New Zealand expresses some unease about this potential outcome, particularly as the TBT Agreement is the more specialised agreement dealing with technical regulations. That being the case, the WTO-consistency or otherwise of a technical regulation should primarily be determined by the Agreement negotiated specifically to discipline such measures. This issue is unlikely to be resolved as a matter of strict legal interpretation, and New Zealand supports the complainants' view that the scope and content of the obligations in Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement are distinct and that "treatment no less favourable" under Article III:4 focuses on the modification of the conditions of competition in the marketplace.[27]

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[18] Appellate Body Reports, *US – Clove Cigarettes*, para. 179; *US – Tuna II (Mexico)*, para 214 (citing 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 (*Korea – Various Measures on Beef)*, para. 137); *US – COOL*, para. 270.

[19] Appellate Body Reports, *US – Clove Cigarettes*, paras. 174 and 181; *US – COOL*, para. 271; *US – Tuna II (Mexico)*, para. 215.

[20] Appellate Body Reports, *US – Clove Cigarettes*, paras. 88-102 and 181-182; *US – Tuna II (Mexico)*, paras. 211-213; *US – COOL*, para. 268.

[21] Appellate Body Report, *US – Clove Cigarettes*, para. 101.

[22] United States First Written Submission, 26 November 2013, paras. 131 – 134.

[23] Appellate Body Report, Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/AB/R, adopted 19 May 2005.

[24] Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001.

[25] Appellate Body Report, *US – Clove Cigarettes*, footnote 372 at para. 180.

[26] Appellate Body Reports, *US – Clove Cigarettes*, para. 179; *US – Tuna II (Mexico)*, para. 214 (citing Appellate Body Reports, *Korea – Various Measures on Beef*, para. 137); *US – COOL*, para. 270.

[27] Appellate Body Reports, *US – Clove Cigarettes*, para. 179; *US – Tuna II (Mexico)*, para. 214 (citing Appellate Body Reports, *Korea – Various Measures on Beef*, para. 137); *US – COOL*, para. 270.

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